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# Recent Developments Regarding Enforceability of Binding Arbitration Agreements Under State and Federal Law

BY **Bill Hart**

The U. S. Supreme Court and the U. S. 9th Circuit Court of Appeals have again weighed in on the thorny issue of the enforceability of binding arbitration agreements. The following is a brief recap of those decisions and how they will impact the enforceability of arbitration agreements between parties well into the future. Owners and managers should pay particular attention to these decisions because they may have a direct impact on agreements that affect you that are currently in place or that you may enter into in the future.

The U. S. Supreme Court and the 9th Circuit Court of Appeal have generally found that the Federal Arbitration Act ("FAA") will preempt any State law in instances where State law would exclude the enforceability of binding arbitration agreements. A binding arbitration clause will generally be upheld unless the challenging party can prove that the arbitration clause was entered into under circumstances deemed objectively unconscionable or where its terms are materially unfair.

When seeking to enforce an arbitration provision in an existing agreement or when drafting an enforceable arbitration provision, one should look first to the FAA as a guide to determining the enforceability of arbitration. Provided the parties enter into an arbitration provision that comports with the FAA and does so absent material unfairness, fraud or duress, then it is likely that that arbitration provision will be enforced under the FAA, even if State law would deny the enforcement of arbitration agreement in the stated circumstances.

**Sonic-Calabasas A, Inc. v. Moreno (2013) 51 Cal.4th 659**

The California Supreme Court (just two months ago) held that where State law governing the enforceability of binding arbitration agreements conflicts with the FAA that the FAA, and therefore Federal law, will control. While State law may impose rules against "unconscionability" of arbitration agreements, a party challenging an arbitration clause must demonstrate that a binding arbitration clause is unconscionable as a matter of normal contract law. In a concurring opinion, it was observed that "courts are not free to alter terms to which the contracting parties agreed simply because they find the terms unreasonable or ill- advised". The unconscionability defense requires a much stronger showing of unfairness.

**Chavarria v. Ralphs Grocery Co. (9th Cir. 2013) 733 F.3d 916**

The 9th Circuit Court of Appeal has reaffirmed the right of a party to an arbitration agreement to challenge the enforceability of that agreement on grounds of unconscionability thereby voiding the enforceability of such an arbitration provision. The 9th Circuit found that the FAA did not preempt California State law allowing a party to challenge an arbitration clause on the grounds of unconscionability if that party could demonstrate that the arbitration clause was unconscionable as a matter of statewide contract law. In effect, the 9th Circuit allowed the party to challenge the arbitration provision that they originally entered into on the grounds that it was unconscionable and therefore revocable and unenforceable. In California, the trial court has the obligation in response to such a challenge to make a threshold determination as to whether or not a written arbitration provision is or is not unconscionable and, therefore, enforceable. In Chavarria, the trial court found that the Ralphs Grocery arbitration provision signed by their employee was unconscionable and therefore revocable. The employee then had the option of pursuing their claims in the State Court and avoiding binding arbitration altogether.

Note that Chavarria provides that an additional ground for unconscionability and invalidating an arbitration provision is where the arbitration procedure as set forth in the arbitration agreement is manifestly unfair on its face. The FAA does not seek to enforce arbitration provisions that are objectively unfair to one of the parties and, therefore, State law can be invoked to invalidate an arbitration provision but is procedurally or substantively unfair to one of the parties to that arbitration agreement.

**Ferguson v. Corinthian Colleges, Inc. (9th Cir. 2013) 733 F.3d 928**

The 9th Circuit Court of Appeal determined that the U. S. District Court at trial had failed to properly apply the FAA, which provided that the Federal Rules would preempt State Court law governing the application of binding arbitration to claims for "public injunctive relief" in a class action case.

The court found that, "The Federal Arbitration Act ('FAA') provides that agreements to arbitrate are valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. "

This is a policy that articulates the general Federal policy that favors written binding arbitration agreements. Generally, the FAA preempts contrary State law and will control the enforceability of arbitration agreements in spite of conflicting State law. The court found that any doubts concerning the scope of arbitrable issues should be resolved in favor of upholding arbitration. This court found that even in cases involving claims by class members in a class action, that all class members are bound by a written binding arbitration agreement.

**AT&T Mobility LLC v. Concepcion (2011) 131 S. Ct. 1740**

The U. S. Supreme Court here found that the FAA would support an arbitration agree-

ment and find it to be valid and enforceable with the exception of circumstances where the challenging party could establish "grounds as exist at law or in equity for the revocation of any contract".

Federal law favors the enforceability of arbitration agreements even where such an agreement is arguably in conflict with State law. The nation's highest Court found that a party to an arbitration agreement has the right to contest the enforceability of the terms of that contract on the same grounds as they would have the right to contest the enforceability of any other contract. However, simply because the contract provides for arbitration does not set a higher standard for determining that such a provision is enforceable. In those events, the FAA controls and will preempt State law.

**Conclusion**

The takeaway for owners and managers who may seek to draft or enforce binding arbitration provisions is that those arbitration provisions should initially comport with the Federal Arbitration Act. Every owner or manager who seeks to draft or enforce a binding arbitration provision in their agreements should consider specifically referencing the FAA and its enforcement rules so as to preclude the application of State law that could undermine the enforceability of such a provision.

Always remember that the procedures, terms and conditions of the arbitration provision should be reasonably fair to all parties to that arbitration agreement, avoiding unreasonable economic or procedural burdens on one party versus the other.

Finally, an arbitration provision must be free from circumstances that suggest that the arbitration provision was entered into via fraud, duress or material mistake of fact. While Federal law favors the enforcement of written binding arbitration agreements, such provisions will be enforceable by the trial court only in the absence of unconscionable circumstances resulting from procedural or objective unfairness.

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# Industry Mourns Loss of Edward Roemer

Edward D. Roemer, 85, of 2471 Roemer Rd., Ashville, NY died Wednesday Dec. 4, 2013 in his home. A resident of Chautauqua County since coming to the United States in 1956, he was born Oct. 13, 1928 in Feldorf, State of Transylvania, Romania, the son of Daniel and Sara Platz Roemer. He served in the German military during World War II.

He was the founder and president of R-CO Products Corp. where he had been actively working until his health began to decline recently. In earlier years he had been a cabinet maker and had built over sixty houses in the area.

An exceptionally hard worker, he was a perfectionist who valued old country skills and traditions. He loved animals of all kinds, was an avid bowler, and had sponsored many bowling teams over the years. He had been a member of the German Club.

Surviving are his wife, Erika M. Kessler Roemer, whom he married March 3, 1956; three children: Edward (Mary Lou Bean) Roemer, Jr. and Katy M. (Randall) Lord, both of Ashville, and Cynthia M. (Donald) Cantwell of East Meredith, N.Y.; five grandchildren: Karen Roemer of Jamestown, Sabrina and Benjamin (Jessica) Lord, both of Ashville, Jenna Cantwell of San Antonio, Tex., and Robert Cantwell of E. Meredith, N.Y.; four great grandchildren: Kloe Samick, Emma and Zofia Lord, and Connor Roemer. He was preceded in death by three brothers: Daniel, Stefan, and George Roemer; and by a sister, Sara Godschling.

The funeral was at Powers, Present & Sixbey Funeral Home. The Rev. Piotr Zaczynski, pastor of Sacred Heart Catholic Church officiated. Burial will be in Maple Grove Cemetery in Ashville. To send a message to the family or to light a candle in memory, visit www.presentsixbeyfuneral.com. The family suggests that memorials may be made to Hospice Chautauqua County, 20 W. Fairmount Ave., Lakewood, N.Y. 14750.