

CAN THIRD PARTY DEFENDANTS COMPEL ARBITRATION OF CLAIMS?

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Court of Appeals Offers [Unofficial] Guidance in *Tobel, et al v AXA Equitable Life Insurance Co, et al, No. 298129 (Mich App, Slip Op 2/21/12)(Unpub)*

Plaintiffs in this case were several Trusts, their Grantors and Trustees who had purchased flexible premium variable life insurance policies from Defendant AXA, through and on the advice of their financial advisor at Defendant Baird & Co. under Baird Cash Account Agreements. Apparently, this investment did not provide Plaintiffs the benefits they had hoped, so they sued Defendants in a multi-count action, alleging various theories of fraud, securities violations, breach of fiduciary duty, negligence and breach of contract.

The Agreements, which had been entered into by the Grantors as individuals prior to establishment of the Trusts, expressly applied "...to any and all Baird accounts in which Client is the beneficial owner, including accounts opened prior to the date of execution of this Agreement and any Baird account opened after execution of this Agreement." They each contained an Arbitration provision that applied by its own terms to "...any controversy or claim or issue in any controversy arising from events that occurred prior, on, or subsequent to the execution of this Arbitration Agreement with respect to any and all Client Accounts...."

Defendants moved to compel Plaintiffs to submit their claims to arbitration, and Plaintiffs defended the motion by challenging the validity of the Arbitration Agreements, their applicability to the Trustees (Grantors' spouses) who were non-signatories to the Agreements, and AXA's ability to enforce the arbitration provision as a non-signatory third party. The lower court granted Defendants' motion and ordered the matter to arbitration; Plaintiffs appealed.

The Court of Appeals affirmed the lower court ruling on all three issues. Applying principles under both the Federal Arbitration Act, 9 USC 1 *et seq*, and Michigan law, it rejected Plaintiffs' claims the arbitration agreement was illusory due to Baird's reserved right to amend or modify it at any time, due to both stated restrictions on that right in the Agreement itself and the parties' actual performance under the Cash Account Agreements. With respect to the non-signatory Trustees, the Court of Appeals dismissed Plaintiffs' arguments based on both the Successors clause in the Agreements and its ruling that any party who sought the benefit of an agreement was estopped from disavowing its arbitration provision.

The Court of Appeals, however, saved its best and most useful analysis for the last issue, whether AXA was entitled to compel arbitration under Agreements to which it was not a party. Relying on the Sixth Circuit's opinion in *Javitch v First Union Securities, Inc*, 315 F3d 619 (6th Cir 2003), the Court of Appeals noted an agency relationship between parties may be a basis for *requiring* a non-signatory to participate in arbitration. It then went on to hoist Plaintiffs by their own petard, noting their Complaint was replete with references to and allegations of agency as between Baird and AXA. This, therefore, was sufficient to give AXA the right to compel.

The Court of Appeals went on to find the doctrine of "alternative estoppel" also permitted AXA to compel Plaintiffs to arbitrate under their Agreements with Baird. It found, relying again on federal judicial decisions, that Plaintiffs were estopped from disavowing the arbitration provision. See, *PRM Energy Sys, Inc v Primenergy, LLC*, 592 F3d 830, 834-35 (8th Cir 2010). The estoppel in the instant case flowed from both the Defendants' agency relationship in the underlying transactions and the fact Plaintiffs' claims against AXA were so intertwined or coordinated with those against Baird, it would be unfair or inappropriate to deprive AXA of the right to compel arbitration.

Finally, the Court of Appeals also noted the closely similar doctrine of "equitable estoppel" supported its ruling. It cited *Brown v Pacific Life Ins Co*, 462 F3d 384, 398-99 (5th Cir 2006) for the proposition a non-signatory may compel a signatory into arbitration when either:

...(1)...the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement is asserting its claims...; or (2) ... the signatory raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract.

Here, the Court of Appeals indicated the second prong of this test applied to estop Plaintiffs from disavowing the arbitration provision as to AXA.

Lessons for Practitioners: For those representing non-signatory third parties seeking to compel enforcement of an arbitration commitment made by other parties to a transaction, scrutiny should be directed at the existence of agency relationships with a signatory party, the other party's pleading allegations, the other party's reliance on its agreement with the signatory party in bringing its claims against the non-signatory, and the degree to which claims against both signatory and non-signatory are intertwined. For those representing parties wishing to avoid being compelled to arbitrate their claims, the lessons are even simpler: thorough forethought of your party's claim(s) before filing and due care in drafting your party's pleadings and other court submissions.



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