SIMPSON THACHER

REPORT FROM WASHINGTON

The Supreme Court Rules Against TV's "Judge Alex," Finding That an Agreement to Arbitrate Trumps State Administrative Process

February 29, 2008

TO VIEW THE SUPREME COURT'S DECISION IN *PRESTON V. FERRER* — S.CT. — NO. 06-1463 (2008), PLEASE CLICK HERE.

The *Report From Washington* is published by the Washington, DC office of Simpson Thacher & Bartlett LLP.

In an 8-to-1 ruling last Wednesday, the Supreme Court held that even claims under the exclusive jurisdiction of state administrative agencies can be arbitrated where the parties had entered into an arbitration agreement. The Court reversed a decision by the California Court of Appeals, which had found that the California Talent Agencies Act ("TAA") vests "exclusive jurisdiction" in the state's Labor Commissioner, an administrative officer, over a dispute between plaintiff Preston and Judge Alex Ferrer, star of Fox's reality courtroom show "Judge Alex." The Supreme Court held that, when parties agree to arbitrate all disputes stemming from a contract, the Federal Arbitration Act ("FAA") extinguishes state jurisdiction, in either a state court or administrative agency. The decision reaffirms the federal policy favoring private arbitration.

BACKGROUND

The Preston appeal arises from an arbitration proceeding that Arnold Preston commenced against Judge Alex, a former Florida superior court judge, alleging that Judge Alex failed to compensate Preston for services provided pursuant to a 2002 management contract. The contract, which contained a standard arbitration clause, awarded Preston a percentage of Judge Alex's earnings from his television show "Judge Alex." Judge Alex then filed a complaint in the Superior Court of Los Angeles County seeking a declaration that the dispute was not subject to arbitration and requesting injunctive relief to prevent Preston from proceeding with arbitration.

In his complaint, Judge Alex alleged that Preston acted as an unlicensed talent agent instead of a manager in

violation of the TAA, and thus the entire contract is invalid. The state law regulates the activities of a "talent agent" and assigns jurisdiction over disputes brought under the Act to the Labor Commissioner. As a general matter, under the law, a party who solicits employment for an artist is a "talent agent."

Accordingly, Judge Alex claimed that the Commissioner should determine the validity of the contract instead of the arbitrator because, he claimed, Preston acted as a "talent agent." Preston responded that the contract's validity should be determined by the arbitrator because the FAA provides that a written arbitration provision in any contract "evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The trial court granted Judge Alex's motion to enjoin Preston from preceding with arbitration, finding that, under the TAA, Preston must exhaust his administrative remedies before the Labor Commission.

The California Court of Appeals affirmed the trial court, finding that the Commissioner has exclusive jurisdiction over cases arising under the TAA. The court rejected Preston's argument that, pursuant to the Supreme Court's holding in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2005)—that arbitrators, not courts, should hear challenges to the validity of a contract containing an arbitration clause—the FAA preempts the California statute, requiring arbitration of Preston's claims under the original contract's arbitration clause. While the majority distinguished *Buckeye* on the grounds that it neither involved an administrative agency nor considered whether the FAA "preempts application of the exhaustion doctrine," a dissenting judge agreed with Preston that the FAA and *Buckeye* precluded the majority's decision.

After the Supreme Court of California denied review, the U.S. Supreme Court granted certiorari in September 2007. The U.S. Chamber of Commerce filed a brief amicus curiae in support of the Petitioner, arguing that the lower court's decision deprives Preston of the "full benefits of arbitration" and provides a blueprint for "eviscerating the FAA and Buckeye in other state courts."

The Supreme Court held oral arguments on January 15, 2008. The questioning focused heavily on the added expense and time in the dispute resolution procedure proffered by Judge Alex's counsel, where Preston would be able to get a court to enforce the arbitration clause only after exhausting the administrative review required under state law. To adopt such a position, as Justice Souter noted, would run counter to the rationale behind the FAA—to promote the expeditious and inexpensive resolution of disputes.

"Requiring initial reference of the parties' dispute to the Labor Commissioner would, at the least, hinder speedy resolution of the controversy."

JUSTICE GINSBURG

THE DECISION

In the Court's decision, written by Justice Ginsburg and joined by every other member of the Court except Justice

Thomas, the Court began by noting that an "easily stated question underlies this controversy." Judge Alex's entire defense to Preston's suit seeking recompense for his claimed representation of the plaintiff revolves around whether Preston was acting as an unlicensed "talent agent." Judge Alex claims Preston was. Preston says he was not. The question, then, is who decides whether Preston was or was not a talent agent.

Justice Ginsburg began by noting the strong "national policy favoring arbitration," codified in Section 2 of the FAA, which displaces conflicting state law. After discussing the Court's 2006 decision in *Buckeye*, which held that the FAA governs a contract if the parties agreed to arbitrate certain claims even when the validity of those claims would otherwise be determined in a state court, Justice Ginsburg wrote that *Buckeye* "largely, if not entirely, resolves the dispute before us."

At the Supreme Court, Judge Alex had argued that the TAA does not supplant arbitration, it merely delays it until the exhaustion of the administrative procedure. The Court rejected this claim. Not only had Judge Alex's counsel argued the opposite in the state court proceedings (that the TAA essentially precluded arbitration of the contract), but also, Justice Ginsburg wrote, holding in favor of Judge Alex would eviscerate the policy rationale behind arbitration—providing "streamlined proceedings and expeditious results" relative to a public forum.

The Court then addressed Judge Alex's argument that the Court's decisions in *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293-94 (2002), and *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), served to distinguish *Buckeye* from the present case. Both cases involved challenges to administrative proceedings conducted concurrent or subsequent to an underlying dispute subject to arbitration. The Court also found this argument unpersuasive. *Waffle House*, Justice Ginsburg wrote, simply stated that an agreement subject to arbitration does not stop the EEOC from filing a complaint in its own name. Likewise, *Gilmer* held that individuals who agreed to arbitrate do not abandon their right to file an EEOC complaint.

In both cases, Justice Ginsburg wrote, the EEOC was acting as an advocate, not as a tribunal or "impartial arbiter" of legal and factual disputes. Furthermore, Judge Alex was not losing any substantive statutory rights, created either by the state or the federal government. His agreement to arbitrate simply means that those claims must be decided in arbitration, not a court or administrative agency.

Finally, the Court distinguished *Volt Info. Sciences, Inc. v. Stanford Univ.*, 489 U.S. 468 (1989), which had permitted a court to delay arbitration pending the outcome of a court case involving a third-party from whom one of the arbitration participants sought indemnification. First, *Volt* involved a claim brought by a third-party not subject to the arbitration. And, second, in line with *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52

"We hold today that, when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA."

JUSTICE GINSBURG

(1995), when the parties have expressly incorporated privately formulated arbitration rules, as they did here, that trumps any "choice of law" provision in the contract that would apply special state rules to "limit the authority" of arbitrators.

Justice Thomas was the only member of the court who agreed with Judge Alex. In a one paragraph dissent, he stated that Judge Alex's claim should be addressed by the Labor Commissioner because the FAA does not apply to state courts, and therefore does not displace a state law's ability to delay arbitration until the conclusion of administrative proceedings.

IMPLICATIONS

The Court's decision is, as expected, a strong defense of the federal policy favoring arbitration. The decision clarifies the thorny status of *Volt*, which has been interpreted in various, arguably inconsistent, ways over the years. In *Volt*, unlike here, the related court case involved third-parties who would not be bound by the arbitration. Today's decision limits *Volt* to that particular (and relatively rare) situation, placing the question of arbitrability firmly in the hands of the arbitrator. The Court also expressly held that state law provisions placing "special" restrictions on the authority of arbitrators are preempted under the FAA in the presence of an agreement to arbitrate.

For further information about this decision, please feel free to contact members of the Firm's Litigation Department, including:

New York City:

Barry Ostrager
212-455-2655
bostrager@stblaw.com

John Kerr
212-455-2526
jkerr@stblaw.com

Mary Kay Vyskocil
212-455-3093
mvyskocil@stblaw.com

Mary Beth Forshaw
212-455-7039
mforshaw@stblaw.com

Andy Amer
212-455-2953
aamer@stblaw.com

Robert Smit
212-455-7325
rsmit@stblaw.com

George Wang
212-455-2228
gwang@stblaw.com

Washington DC:

Peter Thomas
202-220-7735
pthomas@stblaw.com

Peter Bresnan
202-220-7769
pbresnan@stblaw.com

Arman Oruc
202-220-7799
aoruc@stblaw.com

London:

Tyler Robinson
011-44-20-7275-6500 (x6118)
trobinson@stblaw.com

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017-3954
212-455-2000

Washington, D.C.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004
202-220-7700

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
310-407-7500

Palo Alto
2550 Hanover Street
Palo Alto, CA 94304
650-251-5000

EUROPE

London
Citypoint
One Ropemaker St.
London EC2Y 9HU England
+44-20-7275-6500

ASIA

Beijing
3119 China World Tower One
1 Jianguomenwai Avenue
Beijing 100004, China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road
Hong Kong
+852-2514-7600

Tokyo
Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037, Japan
+81-3-5562-6200

www.simpsonthacher.com