Arizona Court Rules Arbitration Unconscionable

By Judge Bruce E. Meyerson (Ret.)[1]

Although the United States Supreme Court in *Green Tree Fin. Corp. – Alabama v. Randolph*,[2] held, in the context of a contract of adhesion, that the cost of arbitrating a federal statutory right may not be "prohibitively expensive" few courts have ruled an arbitration agreement unconscionable for this reason. The Arizona Court of Appeals in *Clark v. Renaissance West, LLC*[3] is one of the few courts to do so and apply this rule to the arbitration of a state statutory right.

Facts

After hip surgery, John Clark was admitted to a skilled nursing facility operated by Renaissance West, LLC ("Renaissance"). Several days after his admission he signed an all disputes arbitration agreement. After his discharge he filed a complaint against Renaissance for medical negligence and abuse and neglect of a vulnerable adult under Arizona's abuse and neglect statute.

After Renaissance moved to compel arbitration, the trial court held an evidentiary hearing at which testimony was presented that the fees to arbitrate the case would be

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[2] 531 U.S. 79 (2000).
[3] 2013 WL 3914416 (Ariz. Ct. App. July 30, 2013).

$22,800. Mr. Clark testified he was retired and lived on a fixed income and could not afford to arbitrate his case. The trial court denied the motion to compel arbitration concluding the agreement was substantively unconscionable. The court of appeals affirmed the ruling.

The Court's Ruling

Relying on *Green Tree* and the Arizona Court of Appeals decision in *Harrington v. Pulte Home Corp.*,[4] the court held that an "arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to "deny a potential litigant the opportunity to vindicate his or her rights."[5] The court set out the requirements that must be shown if a party opposing arbitration is to be successful. The party opposing arbitration must present evidence of (1) specific facts showing with reasonable certainty the likely cost of the arbitration; (2) an individualized showing as to why he or she would be financially unable to bear the; and (3) whether the arbitration agreement permits a party to waive or reduce the costs.[6]

At an evidentiary hearing Mr. Clark presented expert testimony that arbitration fees in the Phoenix area ranged from $300 to $475 per hour. The expert testified that, based on the facts and complexity of the case, it was likely the arbitration hearing would last at least five days. Because the arbitration agreement required three arbitrators, and further required both parties, regardless of who prevailed, to share the arbitration costs

[4] 119 P.3d 1044 (Ariz. Ct. App. 2005).
[5] *Clark*, 2013 WL 3914416, at *2.
[6] *Id*.

equally, the evidence supported Mr. Clark's assertion that his share of the arbitration fees would be approximately $22,800.

Mr. Clark testified he was retired and lived on a fixed income, and had no savings or stocks. His total monthly income was $4,630. Although Renaissance contended his annual income, estimated to be about $55,000, was sufficient to pay the $22,800, the trial court found to the contrary, and the appellate court ruled there was no clear abuse of discretion in such finding. The court also observed there was no provision in the parties' arbitration agreement to permit a waiver or reduction in Mr. Clark's fees.

In summary, the court found that the arbitration agreement "effectively precludes [Mr. Clark] from obtaining redress for any of his claims, and is therefore substantively unconscionable and unenforceable."[7]

Related Federal Court Developments

Earlier this year the United States Supreme Court had occasion to discuss the subject of vindication of statutory rights in arbitration. In *American Express Co. v. Italian Colors Restaurant*,[8] the Court enforced a class action waiver in a case involving Sherman Act claims brought by a group of merchants who accept American Express cards. The merchants contended the restriction on class arbitration in their agreements with American Express was unenforceable. The Court disagreed for two reasons. First, the Court looked at the Sherman Act and found nothing in the act or its legislative history indicating Congress intended to preclude a waiver of class action procedures.

[7] *Id*. at *4.
[8] 133 S.Ct. 2304 (2013).

The second reason the Court ruled against the merchants involved consideration of the same doctrine relied upon by the court in *Clark v. Renaissance West LLC.* The effective vindication of statutory rights doctrine was first mentioned by the Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[9] and again in *Gilmer v. Interstate/Johnson Lane Corp.*[10] The doctrine was applied to the cost of arbitration in *Green Tree Fin. Corp. - Alabama v. Randolph*.

In *American Express Co. v. Italian Colors Restaurant*, the Court seemingly narrowed the doctrine to situations which amounted to a "'prospective waiver' of a party's *right to pursue* statutory remedies." (emphasis in original).[11] In describing situations where the doctrine would remain valid, the Court held:

> That would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. *And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable.*[12]

(emphasis added). The Court does not seem to be giving a ringing endorsement to the idea that high arbitration costs will always render an arbitration agreement unenforceable.

Conclusion

Nevertheless, in Arizona we now have two decisions, *Harrington v. Pulte Home Corp.* and *Clark v. Renaissance West LLC*, that have applied the effective vindication of statutory rights doctrine to state statutory rights thereby ensuring that if there is to be

[9] 473 U.S. 614 (1985).
[10] 500 U.S. 20 (1991).
[11] 133 S.Ct. at 2311.
[12] *Id*. at 2310-11 (emphasis added).

arbitration, the cost of arbitration must not be unreasonably high. There are two obvious lessons from the decision in *Clark v. Renaissance West LLC* for those who wish to include arbitration in adhesion contracts. First, think carefully about the need for three arbitrators, and provide for three arbitrators only where it is foreseeable the dispute will be large enough to justify that added expense. Second, make provisions to permit the adjustment or even waiver or fees where the cost of arbitration may cause a severe financial hardship.