Ruling Creates Circuit Split Over FAA Appellate Jurisdiction

By Justin Kelly, ADRWorld.com

(2.20.2007) The U.S. Court of Appeals for the Second Circuit recently created a split in the circuits over appellate jurisdiction under the Federal Arbitration Act when it ruled that a non-signatory to a written arbitration agreement is authorized to seek an interlocutory appeal from the denial of a motion to compel arbitration against a signatory.

In its Feb. 13 opinion in Robert Ross and Randal Wachsmuth et al. v. American Express Co. (Nos. 06-4598-cv(L), 06-4759-cv(XAP)), the court rejected a narrow interpretation of interlocutory jurisdiction, holding a district court's decision that a signatory is equitably estopped from refusing to arbitrate claims against a non-signatory satisfies the writing requirement of the FAA, and a refusal to compel is immediately appealable.

The ruling runs counter to the rulings of the D.C. Circuit in DSMC Inc. v. Convera Corp. (349 F.3d 679, 2003) and the Tenth Circuit in In re Universal Service Fund Tel. Billing Practice Litigation (428 F.3d 940, 2005).

Both rulings held that interlocutory appeals can only be brought based on written agreements to arbitrate under the FAA and the common law doctrine of equitable estoppel does not satisfy the writing requirement of the FAA.

David White, an attorney with White & Associates in New York and an adjunct professor at Fordham Law School, said, "the assertion that arbitration is a creature of contract is a truism which none will dispute."

"In its Ross ruling, however, the Second Circuit has made an unwarranted leap of logic, which smacks of the same-overly broad construction which Chief Justice Roberts decried as author of the 2003 D.C. Circuit opinion in DSMC, Inc. v. Convera Corp," he said.

According to White, the plain language of Sections 3 and 4 of the FAA "mandates that arbitration is an available remedy only in those instances where the disputants execute a written agreement to be so bound."

"Expansion of appellate jurisdiction on grounds of equitable estoppel vitiates party autonomy and creates mischief in lower courts which seek precedential continuity," he suggested. "Ross creates a troubling circuit split which invites certiorari," he added.

University of Kansas School of Law Professor Christopher Drahozal remarked that "attempts to bind non-signatories to arbitration agreements are very common, as noted by the Second Circuit," but "attempts by non-signatories to force signatories to arbitrate with them are less common."

The FAA "does not require a signed agreement to arbitrate, merely a written one," he noted.

According to Drahozal, the key under Sections 2 through 4 of the FAA is whether the dispute "aris[es] out of such contract," according to Section 2, or "under a written agreement," to arbitrate, according to Sections 3 and 4.

"Interestingly, Section 16 of the FAA says nothing about an agreement at all, merely that a party may immediately appeal from 'an order ... denying a petition under section 4,'" he said. "Presumably the reference to Section 4 is where the need for a written agreement comes in," he suggested.

"As a result, it would seem to me that so long as the party is arguing that the non-signatory is bound to arbitrate under a written agreement, even if not signed, the trial court's denial should be appealable," he said.

"The D.C. Circuit opinion cited as a possible conflict was written by then-Judge now Chief Justice Roberts," he said, adding, that "would make things interesting should the case get to the Supreme Court."

The case arose from numerous class action complaints filed by customers against VISA, MasterCard, and their member banks alleging antitrust claims arising from a conspiracy to fix fees for foreign currency conversion. After the cases were consolidated, the district court ordered class members that had signed arbitration agreements to arbitrate their disputes with the defendants.

Subsequently, the class members also filed class action complaint against American Express, alleging the same antitrust claims. It also alleged that Amex conspired with the other defendants to impose arbitration on cardholders.

Amex moved to dismiss the complaint, and although it was not a signatory to any arbitration agreements, moved to compel arbitration based on equitable estoppel. The district court determined that the antitrust claims against Amex were "inextricably intertwined with the antitrust claims arising out of the cardholder agreements with the other defendants, which contained mandatory arbitration clauses. The court went on to hold that because the claims against Amex "derive from the very same agreements [the class members] endeavor to enforce," Amex could try to enforce the arbitration agreements based on the theory of equitable estoppel.

However, the district court refused to compel arbitration and instead ordered a jury trial to determine whether the arbitration agreements were enforceable because the complaint had challenged the validity of the arbitration agreement on antitrust grounds. Amex appealed the court's refusal to compel arbitration, relying on Section 16 of the FAA, which grants jurisdiction to appeals courts over interlocutory appeals from a refusal to stay an action pending arbitration under Section 3 and from a denial to compel under Section 4.

FAA Section 3 directs district courts, where there is a written arbitration agreement, to order arbitration once it is satisfied that the dispute is subject to the parties' agreement. Section 4 authorizes a party to a written arbitration agreement to petition a district court for an order compelling arbitration when the other party fails or refuses to arbitrate.

The plaintiffs argued that Section 16 does not apply to an obligation to arbitrate based on equitable estoppel. It applies only to interlocutory appeals involving a Section 4 failure to arbitrate under a written agreement.

However, the Second Circuit disagreed. The court noted that it has previously recognized that equitable estoppel can serve to authorize a non-signatory to enforce an arbitration agreement against a signatory.

According to the court, "the district court ruled that it would be inequitable for parties who have signed a written arbitration agreement . . . not to abide by that agreement with regard to a non-signatory to the agreement."

The Second Circuit held that this finding by the district court satisfied the writing requirement of the FAA and conferred jurisdiction on to hear the appeal under Section 16.

"To hold otherwise would depart from the language and policies of the FAA and quite possibly lead to perverse and unnecessary complexities in cases involving arbitration agreements," the court said.

Once a party is deemed bound by a written arbitration agreement based on equitable estoppel, that written agreement governs the procedures for implementing arbitration, said the court. "In every relevant sense, therefore, appellants are appealing from the refusal to compel arbitration under a written arbitration agreement," it added.

A contrary ruling would strip appellate courts of jurisdiction over interlocutory appeals where the availability of arbitration was based on equitable estoppel, and alter the overall application of the FAA to arbitrations based equitable estoppel, the court said.

"Finally, to hold the writing requirement unfulfilled would be contrary to the caselaw in this and several other circuits, where courts have frequently stayed proceedings and compelled arbitration under the FAA on equitable estoppel grounds," the court opined.