

Case Digests

Arbitration Agreement—Modification of Statutory Review

In *Hall Street Assocs, LLC v Mattel, Inc*, _US_, 128 S Ct 1396 (2008), the parties entered into an arbitration agreement to decide an indemnification dispute between a landlord and tenant over environmental violations. The agreement provided that:

[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.

The issue before the court was whether the parties may supplement the statutory grounds under the Federal Arbitration Act (FAA), 9 USC 1 et seq., for prompt vacatur and modification.

The Act provides mechanisms for enforcing arbitration awards: a judicial decree confirming an award, an order vacating it, or an order modifying or correcting it. 9 USC 9-11. An application for any of these orders gets expedited treatment as a motion, eliminating a separate contract action that would usually be necessary to enforce or modify an arbitral award in court. 9 USC 6. Under the terms of 9 USC 9, a court "must" confirm an arbitration award "unless" it is vacated, modified, or corrected "as prescribed" in 9 USC 10 and 11. 9 USC 10 lists grounds for vacating an award, while 9 USC 11 designates those for modifying or correcting one. Resolving a split between the federal circuit courts as to whether the statutory grounds to confirm, modify, or vacate an award are subject to contractual expansion, the court held that the statutory grounds are exclusive. In holding that §§ 10 and 11 provide the exclusive means for statutory review, the court did not purport to state that this excludes more searching review based on authority outside the FAA. For example, the parties may contemplate enforcement under state statutory or common law, where judicial review of different scope is possible; thus, this decision was limited to the scope of the expeditious judicial review under 9 USC 9, 10, and 11.

Employment Law—Retaliation Claim under 42 USC 1981

In *CBOCS West, Inc v Humphries*, _US_, 128 S Ct 1951 (2008), a former assistant manager of a restaurant alleged that he was dismissed because of racial bias and because he had complained to managers that a fellow assistant manager had dismissed another black employee for race-based reasons. The question before the United States Supreme Court was whether 42 USC 1981, a post-Civil War civil rights statute that protects the right to "make and enforce contracts," encompasses retaliation claims. Finding ample authority in a long line of related cases to support its view, the court

ruled that 42 USC 1981 includes protection against retaliation.

Professional Service Corporation Act—Standing to Contest Validity of Entity's Formation

In *Miller v Allstate Ins Co*, Nos 134393, 134406, 2008 Mich LEXIS 1385 (July 2, 2008), an insurer alleged that a corporation that provided physical therapy services was unlawfully incorporated under the Michigan Business Corporation Act and that it was required to incorporate under the Professional Service Corporation Act (PSCA). The court of appeals had ruled that such a provider was required to incorporate under the PSCA but that the provider was entitled to payment because treatment was rendered by licensed physical therapists, and the corporate defect had nothing to do with that treatment. 275 Mich App 649, 739 NW2d 675 (2007).

The Michigan Supreme Court ruled that, under MCL 450.1221, only the attorney general may bring a challenge to an entity's corporate status. Thus, the insurer lacked standing to challenge the incorporation of the entity in this case, and the supreme court affirmed the court of appeals' decision on alternative grounds.

Contracts—Forum-Selection Provision

In *Robert A Hansen Family Trust v FGH Indus, LLC*, No 276372, 276452, 2008 Mich App LEXIS 1336 (2008), the action arose from a dispute over an investment that the plaintiff made in a business venture under an LLC operating agreement. A September 2003 operating agreement contained a Michigan choice-of-law provision and an Arizona forum-selection provision, while an amended December 2003 operating agreement had Delaware choice-of-law and forum-selection provisions. The defendants moved for summary disposition and sanctions, asserting that the December 2003 agreement was the operative agreement between the parties, and arguing further that, in either case, the court of a state other than Michigan—either Arizona or Delaware—was selected by the parties as the exclusive forum for the adjudication of all claims or disputes arising out of or relating to the operating agreement, thus requiring that the trial court dismiss the plaintiff's complaint. The plaintiff opposed the defendants' motion, asserting that the defendants waived their claim that Michigan was an improper forum for this action by failing to contest the court's personal jurisdiction over them in their first responsive pleading. The plaintiff also argued that the September operating agreement constituted the agreement between the parties and that the forum-selection clause was unenforceable under MCL 600.745(3). The plaintiff contested the defendants' request for sanctions on the basis that this action was properly filed in Michigan.

The trial court concluded that because neither agreement permitted a Michigan forum, the question of which agreement was operative was not material to the issue of whether the parties had an enforceable agreement to adjudicate their disputes exclusively in a forum other than

Michigan so as to require dismissal of the plaintiff's action. The trial court granted the defendants' summary disposition on all of the plaintiff's claims, on the basis that "they are not properly brought in Michigan." However, finding that the record before it suggested that the plaintiff "believed that it had an arguable case for jurisdiction of its claims in Michigan," the trial court denied the defendants' request for sanctions.

The court of appeals stated that enforcement of contractual forum-selection clauses is premised on the parties' freedom to contract and does not divest Michigan courts of personal jurisdiction over the parties. However, the parties' contractual agreement to forego Michigan as a forum for adjudication leaves Michigan courts incapable of granting relief on claims based on the contract. Regardless which of the two agreements was determined to be the operative agreement between the parties, neither provided for a Michigan forum for resolution of this case. The court of appeals also found no clear error in the trial court's conclusion that the plaintiff's filing of its complaint in Michigan was not patently frivolous because there was no evidence in the record to establish that the plaintiff filed its complaint in Michigan for improper purposes.

Contracts—No Privity Requirement for Rescission

In *Davis v Forest River, Inc*, 278 Mich App 76, 748 NW2d 887, *appeal granted*, 2008 Mich LEXIS 1191 (2008), the plaintiff purchased a new recreational vehicle (RV) but experienced numerous problems with the purchase. The plaintiff later concluded that the dealer should take the RV back and repay the purchase price. The plaintiff filed suit, alleging eight counts, including breach of express and implied warranties under the UCC and the Magnuson-Moss Warranty Act (MMWA). The jury found that the plaintiff was entitled to revoke acceptance of the RV in this case.

The court of appeals initially found that neither the state's lemon law nor the UCC was relevant to this case. Instead, the court stated that the critical issue was whether a purchaser who is not in contractual privity with a manufacturer may obtain the common-law remedy of rescission. The court found that privity has long been eliminated in Michigan as a prerequisite to purchasers' bringing suit against manufacturers, and the Legislature's adoption of the UCC did not abolish rescission except where the parties actually do have a contract with each other. The court stated that in this case, the plaintiff proceeded under theories of revocation of acceptance and rescission and was clearly entitled to the verdict of rescission awarded by the trier of fact. The supreme court granted leave to appeal, asking the parties to address the following issues: (1) whether the MMWA provides for a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract; (2) whether Michigan law provides a cause of action for breach of warranty and a remedy of rescission where the plaintiff and the defendant are not in privity of contract;

(3) whether the economic loss doctrine and the UCC apply to the plaintiff consumer's claims for breach of warranty; (4) whether, if the UCC applies, revocation of acceptance, MCL 440.2608, is available in the absence of privity, and whether the revocation-of-acceptance provisions of the UCC supplanted any former common-law action for rescission; and (5) whether, if the plaintiff is confined to the UCC, either privity or third-party beneficiary status was required for an action for breach of warranty.

Third-Party Beneficiary—Repair Contract with Subcontractor

In *Vanerian v Charles L Pugh Co, Inc*, No 276568, 2008 Mich App LEXIS 1333 (July 1, 2008), the plaintiff's basement was damaged by flooding, and she hired a contractor to repair the basement floor. The contractor suggested that if the plaintiff already had a flooring contractor, she should use that person to make the repairs. The plaintiff had dealt previously with a subcontractor and contacted it to make the repairs. The contractor and flooring subcontractor later agreed to replace the plaintiff's floor, titling the plaintiff's name and residence as the name of the job. A later flood again damaged the floor, and plaintiff sued the contractor and subcontractor, alleging that she was the third-party beneficiary of their repair contract.

Viewing the contract objectively, the court of appeals stated that the subcontractor undertook a promise directly for the plaintiff's benefit, and the plaintiff was expressly referred to in the contract. Thus, the plaintiff was not an incidental beneficiary since the whole and singular purpose of the contract was to secure repairs to the flooring in the plaintiff's basement. The court distinguished earlier authority in arguably similar circumstances, relying in particular on the express reference to the plaintiff by name and the plain language of Michigan's third-party beneficiary statute, MCL 600.1405, which does not create any situational distinctions such as those involving contractors and subcontractors.

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