

When Non-Signatories Compel Arbitration, Relationships Matter

By Gilda R. Turitz

Who gets to come to the arbitration party? Generally, only parties to the arbitration agreement can compel other signatories to arbitrate, based on the well-established premise that such agreement, by which a party gives up its right of access to the courts, is a matter of consent, not coercion. Several cases in 2011 addressed whether non-signatories can force an adversary to arbitrate where that adversary is a party to an arbitration agreement with a third person who may or may not be directly involved in the dispute. The relationship among these parties is a key factor in determining the outcome of a non-signatory's motion to compel arbitration. Principal among the factors considered in the recent cases here are corporate party relationships, the existence or lack of a claimed agency relationship, and whether another business relationship or allegations of acting in concert supported compelling arbitration. Courts have also relied on estoppel principles to allow a non-signatory to compel arbitration. The estoppel inquiry looks at the relationships of the pleaded claims and the parties and the intertwining of issues to be resolved in the contracting parties' claims and the claims involving the non-signatory.

Agency and Contractual Relationships

Agency allegations have been the basis of many a non-signatory's motion to compel arbitration,

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but the courts closely scrutinize whether there is a true agency relationship before granting such motions. The courts have allowed non-signatories who are truly agents of the signatory principal to compel arbitration against the adverse party if the latter's claims against the non-signatories also are within the scope of the asserted claims. The courts reject motions to compel non-signatories who claim to be but are not actually agents.

An agency relationship (established by the relevant contractual language) of a real estate broker to its principal, the seller, was the basis for the Mississippi Supreme Court upholding the right of a non-signatory agent to compel arbitration, notwithstanding waiver of arbitration by its signatory principal. In [*Lemon Drop Properties, LLC v. Pass Marianne, LLC*](#), 2011 WL 5027140 (Miss. Oct. 20, 2011), the seller, defendant Pass Marianne, LLC, had contracted with a developer to construct new condominiums. Alfonso Realty, Inc., was Pass's agent for the condominium sales. Pass's pre-construction sale contract with the plaintiff buyer had an arbitration clause. It also included provisions that, on certain transactions, Alfonso represented Pass and was the agent of Pass as the seller and not the buyer's agent, and, further, that when Alfonso presented the project to a potential buyer and obtained the contract, it was acting in its capacity as seller and not as a licensed real estate broker.

After the plaintiff sued Pass and the developer for construction defects, it sought to amend its complaint to add Alfonso as a defendant. Alfonso, which was not a signatory to the plaintiff's sales contract with Pass, timely moved to compel arbitration. The court held that Pass's waiver of its right to compel arbitration was not imputed to its agent, Alfonso, and that, consistent with applicable state law, Alfonso had the right to compel arbitration based on the sales contract. The court focused on the relationships involved, citing cases that held that a non-signatory should have standing to compel arbitration where it is in an agency relationship and is sued in its capacity or for its behavior as agent that gave rise to the claims. The court also reviewed the relationship of the claims against Alfonso with the scope of claims covered by the arbitration provision.

Court scrutiny of agency allegations and parties' relationships is highlighted by the contrast between the agency finding in *Lemon Drop* and the rejection in recent court decisions of the agency contention of collection agencies that are not parties to the arbitration agreements signed by the creditors on whose behalf they seek to collect. In [*Lucy v. Bay Area Credit Svc LLC*](#), 792 F. Supp. 2d 320 (D. Conn. 2011), the plaintiff, a wireless service customer of AT&T, sued the collection agency for multiple violations of the [*Fair Debt Collection Practices Act*](#), 15 U.S.C. § 1692, and state law violations. The collection agency was not a signatory to the plaintiff's contract with AT&T, which contained an arbitration clause that included AT&T's subsidiaries, affiliates, agents, employees, predecessors, and successors. The collection agency's agreement with AT&T expressly warranted that it was "an independent business" and would perform its obligations under that agreement as an independent contractor and not as an agent or employee of AT&T. Based on the language of these agreements, the court found "untenable" the collection agency's argument that it was AT&T's agent entitled to invoke the arbitration clause.

In another Fair Debt Collection Practices Act case, *Butto v. Collecto Inc.*, 2011 WL 3557310 (E.D.N.Y. Aug. 15, 2011), the plaintiffs, customers of Verizon and AT&T, which had standing collection agreements with Collecto, sued Collecto for statutory violations. The plaintiffs' contracts with Verizon and AT&T contained arbitration clauses. The AT&T agreement defined those in whose favor it ran in language identical to that in the *Lucy* case. The court, as in *Lucy*, rejected, for lack of any evidence, an agency or corporate relationship as a basis to allow Collecto to compel arbitration against the customers. The *Butto* court found persuasive the independent contractor recitals and express disclaimers of an agency relationship in the companies' agreements with Collecto. The *Butto* court also rejected Collecto's contention that it could prove a sufficiently close non-corporate relationship with the creditor to enforce an arbitration agreement, based on Second Circuit authority. *Denney v. BDO Seidman, LLP*, 412 F.3d 58 (2d Cir. 2005)) (when the plaintiff alleges that two persons without a corporate relationship acted in concert, the requisite close relationship for a non-signatory to enforce an arbitration agreement may be satisfied).

Estoppel

Recent district court decisions have also recognized equitable estoppel as a basis to allow non-signatories to compel arbitration and have not permitted a party to claim the benefits of a contract while simultaneously attempting to avoid that contract's burdens, including an arbitration clause. This principle formed the basis of the district court's decision compelling arbitration in *In re Apple & AT&TM Antitrust Litigation*, 2011 WL 6018401 (N.D. Cal. Dec. 1, 2011). In that case, which involved claims by the plaintiffs of subversion by the defendants of their contractual rights concerning iPhone voice and data service, the court recognized a two-part test for the equitable estoppel doctrine to support a non-signatory's right to compel a signatory to arbitrate its claim against it. First, equitable estoppel applies when the signatory to an agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory. Second, the doctrine is appropriate when the issues the non-signatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. Applying that test, the district court found that the plaintiffs had alleged a relationship between the two defendants—one signatory to an arbitration agreement with the plaintiffs and one not—and had further alleged that the defendants had jointly subverted the plaintiffs' rights under their contracts for iPhone voice and data service. Accordingly, the court found that the plaintiffs were equitably estopped from refusing to arbitrate against the non-signatory defendant and compelled arbitration.

In a factual context involving investment advice, the district court in *Robinson v. Isaacs*, 2011 WL 4862420 (S.D. Cal. Oct. 12, 2011), similarly recognized that courts have used equitable estoppel to bind signatories when there is a close relationship between the entities involved as well as the alleged wrongs to the non-signatory's obligations and duties in the contract, and the claims were intimately grounded and intertwined with the underlying contract obligations. In *Robinson*, the plaintiff signed several account applications with Geneos Wealth Management, Inc., and an advisory services contract with the individual investment advisory representative—

all of which contained similar arbitration agreements. The plaintiff ultimately sued Geneos and a related company, Nexus Wealth Management, Inc., with which there was no arbitration agreement, and the Geneos investment advisory representative (who also was Nexus's CEO), for negligence and breach of fiduciary duty in handling his investments. Nexus sought to compel arbitration based on the plaintiff's arbitration agreements with the other parties. The court found that the plaintiff's allegations against Nexus and its CEO went "hand in hand" and that none of the claims against Nexus were independent of the claims against the CEO. Accordingly, the *Robinson* court held that the close relationship between the parties involved and recognized equitable principles allowed Nexus to enforce the arbitration agreement even though it was not a party to it. The court's rationale was that the plaintiff could not "have it both ways" by filing claims against Nexus on the basis of an agreement with an arbitration clause and simultaneously denying Nexus the ability to enforce that clause of the agreement.

The lack of perceived unfairness to the non-signatory compelled an opposite result in *Lucy* (discussed above). The *Lucy* court rejected equitable estoppel as an alternative basis to compel arbitration when the collection agency argued that because of the relationships among the parties, it would be unfair for the plaintiff to claim that her agreement to arbitrate ran only to her fellow signatory, AT&T. The court found no contractual relationship among the parties creating such unfairness, considering that the collection agreement declaring the agency's relationship independent from AT&T was signed three weeks before the plaintiff's contract with AT&T. Therefore, there was no basis to estop the plaintiff and compel her to arbitrate against the collection agency.

Conclusion

As non-signatories seek to join in an arbitration, courts will increasingly scrutinize the allegations of the complaint with respect to alleged agency and the parties' contractual and extra-contractual relationships. Estoppel may provide a compelling basis for allowing a non-signatory to arbitrate, especially when the adversary relies on the same contract containing the arbitration clause as a basis for claims against the non-signatory.

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