The Arbitration Newsletter

(Published by Whitaker Chalk Swindle & Schwartz PLLC)
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January, 2013

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.[1]

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THE CASE OF THE MISSING COMMA: ARBITRABILITY AND THE TRIAL COURT *IN RE READYONE INDUSTRIES, INC.* 2012 WL 6643568 (Tex.App. – El Paso Dec. 21, 2012)

In a yet to be released-for-publication mandamus opinion, the El Paso Court of Appeals reversed the 327th Judicial District Court's discovery order that Petitioner ReadyOne Industries, Inc. ("ReadyOne") produce information about its federal contracts that exceed $1 million and information about whether it "manufactures items commercial available off-the-shelf." This information is implicated by Section 8116 of the Department of Defense Appropriations Act of 2010 (the "Franken Amendment"), [2]which the injured employee in a non-subscriber claim asserted barred the arbitration of her non-subscriber negligence claim against her employer. The trial court delayed making a decision on ReadyOne's motion to compel arbitration pending ReadyOne's compliance with the trial court's discovery order.

For whatever reason not clear at this point,[3] the trial court considering the employer's motion to compel chose to determine arbitrability rather than allowing the arbitrator to make that decision. At the request of the employee and based on the employee's claim that the Franken Amendment barred arbitration of the employee's claim, the trial court ordered the discovery. ReadyOne requested and obtained mandamus relief from the El Paso Court of Appeals who ordered the trial court to vacate its discovery order.

The Court of Appeals ordered the relief based on its statutory construction of the Franken Amendment, employing the doctrine of *ejusdem generis*,[4] the maxim *noscitur a sociis*,[5] the last

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[1] Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader's independent legal counsel.

[2] Defense Appropriations Act, 2010 Pub. L. 111-118, Dec. 19, 2009, 123 Stat. 3409, §8116(a); 48 C.F.R. §22.702(a)(2)(i)-(ii).

[3] The briefing available at this time doesn't include the parties' arbitration agreement.

[4] "... when general words in a statute follow specific examples, the general words are to be restricted in their meaning to a sense analogous to the same kind or class as those expressly mention." 2012 WL 6643568, *2.

antecedent rule,[6] and the serial comma rule.[7] The Court's statutory construction concludes with the serial comma interpretation so that the Franken Amendment is construed by the Court to prohibit only two classes of arbitration claims for "any Federal contract for an amount in excess of $1,000,000 that is awarded more than 60 days after the effective of this Act": (1) "any claims under title VII of the Civil Rights Act of 1964 or [2] any tort related to or arising out of sexual assault or harassment ... ."[8] The "adjectival phrase" that immediately follows "sexual assault or harassment" and includes "or negligent hiring, supervision, or retention" does not create a third class of torts barred from arbitration. Based on the four statutory construction guidelines previously discussed in the opinion and applied to the Franken Amendment language, makes "or negligent hiring, supervision, or retention" additional examples of negligent claims that arise in the context of ""sexual assault or harassment" and, therefore, do not create a third class of claims barred from resolution by arbitration.[9]

Congress did not insert a comma between the two classes of torts described in the statute but did insert a comma immediately before "or negligent hiring, supervision, or retention," which the court chose to view as a "serial comma."[10] This put "negligent hiring, supervision, or retention" in the class of "sexual assault or harassment" and not a third, independent tort for which arbitration is barred in certain federal contracts by the Franken Amendment. This meant that the trial court's discovery order regarding Franken Amendment company information was "irrelevant ... unduly harassing and burdensome."[11] This constituted abuse of the trial court's discretion for which ReadyOne had "no adequate remedy by appeal."[12]

OBSERVATIONS

1. Haven't been able to locate the parties' arbitration agreement so cannot determine why this discovery request was not a matter for the arbitrator to decide.

2. Arbitration clause drafting should always clearly state who the parties want to make the arbitrability decisions – the trial court or the arbitrator.

3. Allowing the trial court to make arbitrability decisions exposes the parties to state court discovery and other rules of civil procedure that the parties thought they were eliminating by contract.

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[5] "...(associated words), when general and specific words are grouped together in a statute, the general words are limited by the specific and will be construed to embrace only objects similar in nature to those things identified by the specific words." 2012 WL 6643568, *2.

[6] "... a qualifying phrase in a statute must be confined to the words and phrases immediately preceding it to which it may, without impairing the meaning of the sentence, be applied." 2012 WL 6643568, *2.

[7] The only commas inserted by the U.S. Congress in the Franken Amendment's applicable language are immediately preceding "or negligent hiring, supervision, or retention." 2012 WL 6643568, *3.

[8] 2012 WL 6643568, *3.

[9] 2012 WL 6643568, *3.

[10] Citing the Oxford Style Manual. 2012 WL 6643568, *4.

[11] 2012 WL 6643568, *4.

[12] *Id.*

4. This appears to be the first case in the U.S. that interprets the Franken Amendment.[13] I have been unable to find another federal of state case interpreting this Franken Amendment language.

[13] "The narrow issue before this Court is one of first impression." 2012 WL 6643568, *1.