West Virginia no longer an anti-arbitration jurisdiction, attorney/blogger says

LEGAL NEWSLINE STAFF WRITER • | SEPTEMBER 2, 2014 | 12:05 PM

CHARLESTON, W.Va. (Legal Newsline) – In the past year, the West Virginia Supreme Court has issued three decisions that signify a potential shift in the state's stance toward arbitration agreements.

Two of the cases – *New v. GameStop* and *Toney v. EQT* – involved arbitration of employment disputes. The other case – *Ocwen Loan Serv. v. Webster* – involved arbitration in connection with a residential mortgage loan. In all three, the state Supreme Court ruled against the plaintiff and in favor of enforcing arbitration agreements.

Liz Kramer, a partner with Stinson Leonard Street and the founder of the Arbitration Nation blog, contended that West Virginia was once among the most anti-arbitration states in the nation. However, she says, that began to change in 2012, after the U.S. Supreme Court reversed the West Virginia Supreme Court's decision in *Brown v. Genesis Healthcare Corp*.

The state Supreme Court found that pre-dispute arbitration agreements that apply to personal injury or wrongful death claims against nursing homes were unconscionable, and therefore, unenforceable under state law. The state Supreme Court also held that the Federal Arbitration Act did not preempt state law.

According to the U.S. Supreme Court's reversal of that decision: "State and federal courts must enforce the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq., with respect to all arbitration agreements covered by that statute. Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law implementing that basic principle."

"The U.S. Supreme Court has really been narrowing the basis that state courts can use to invalidate arbitration agreements," Kramer said. "That's what you saw happening here."

Kramer explained that courts typically consider three factors related to arbitration agreements: Whether parties actually formed an agreement, whether the agreement was valid or enforceable, and whether the agreement was waived.

In the past, she said, courts saw a lot of action over that second factor – whether the arbitration agreement was valid or enforceable. Many plaintiffs argued in state courts that the disputed agreements were unconscionable or even illegal.

Kramer pointed out that the U.S. Supreme Court voided those arguments in the past two years, holding that the Federal Arbitration Act trumps state law and that most arbitration agreements should be found valid and enforceable.

"The three [recent] cases show how federal case law has really hamstrung the state courts," Kramer said. "We know the West Virginia Supreme Court does not like sending people to arbitration because we read the Genesis Healthcare case from 2012.

"But in these three cases, it is saying that given the state of federal law here, we have no choice. These people are all going to have to comply with their arbitration agreement, because federal law is controlling and we really don't have a lot of room to maneuver."

In the first case, *New v. GameStop*, the state Supreme Court ruled on Nov. 6 that a plaintiff agreed to arbitration when she received an employment handbook and rules outlining an internal dispute resolution program and then signed an acknowledgement form.

The state Supreme Court held that the arbitration agreement was procedurally conscionable and enforceable because the plaintiff failed to show that she didn't understand the clear terms of the arbitration agreement or the acknowledgement form.

The state Supreme Court also held that the arbitration agreement was substantively conscionable and enforceable, since GameStop was required to give employees 30 days' notice before modifying or discontinuing the internal dispute resolution program.

Joseph Price, an attorney with Robinson & McElwee, represented GameStop in the case. He contends that the decision shows a continued willingness by the state Supreme Court to uphold arbitration provisions in West Virginia employment agreements.

"In the decision, our Supreme Court has outlined the analysis of arbitration agreements where one of the parties to the contract claims the agreement is 'procedurally' or 'substantively' unconscionable," he said.

"It has applied essentially the same analysis to agreements to arbitrate contained in employment contracts as it previously applied in cases where the agreement to arbitrate arose in different contexts."

Just seven days after the *New v. GameStop* decision, the West Virginia Supreme Court also ruled in favor of enforcing the arbitration agreement in *Ocwen Loan Serv. v. Webster*.

In this case, the state Supreme Court reversed a lower court ruling that deemed the arbitration agreement unenforceable under a Dodd-Frank Act provision that prevents using arbitration in residential mortgage loans. Instead, the high court said the Dodd-Frank Act, which was enacted in 2010, would not retroactively apply to an agreement signed in 2006.

The state Supreme Court found the arbitration agreement procedurally conscionable since clear language informed plaintiffs that the agreement was voluntary, and that even if they refused to sign, the lender would not refuse to complete the loan transaction.

The state Supreme Court additionally found the arbitration agreement substantively conscionable, despite plaintiffs' arguments that it contained a class action waiver, restricted attorneys' fees, lacked mutuality and limited discovery.

In the third and most recent case, *Toney v. EQT*, the West Virginia Supreme Court upheld EQT Corp.'s alternative dispute resolution program, which offered employees participation in a short-term incentive plan if they signed an arbitration agreement.

In its June decision, the state Supreme Court found that the arbitration agreement was enforceable because EQT and the plaintiff both agreed to submit their respective employment disputes to arbitration. The court also found that the short-term incentive program was not illusory since employees who signed the agreement –including the plaintiff – received, and could continue to receive, bonuses.

Additionally, the state Supreme Court held that the arbitration agreement was conscionable, since the plaintiff had a college education, held a responsible position with the company and received the opportunity to ask questions about the agreement.

Kevin Carr, an attorney with Spilman Thomas & Battle, represented EQT in the case. He agreed that the state Supreme Court's decision helped answer key questions about arbitration agreements in West Virginia.

"The Supreme Court has done a good job, not only in our case, but in prior cases, at looking at issues like unconscionability to give clients a roadmap of what type of procedural fairness pieces and components to agreements need to be in place, and what type of substantive components need to be in place," he said.

Carr adds that these decisions and their guidelines for arbitration agreements will benefit both plaintiffs and companies in West Virginia.

"For plaintiffs in a case, their lawyer wants the ability to tell them what to expect," he said. "When companies are coming in to do business in West Virginia, my firm and I also want to tell them what to expect.

"In my world, predictability is a good thing, and surprise and unpredictability are bad for business."

Web URL: http://washingtonexaminer.com/article/feed/2161418