

Supreme Court of the State of Washington

Opinion Information Sheet

Docket Number: 74156-5  
Title of Case: THERESE R ZUVER v. AIRTOUCH COMMUNICATIONS, INC.  
File Date: 12/23/2004  
Oral Argument Date: 06/08/2004

SOURCE OF APPEAL

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Appeal from Superior Court of King County  
Docket No: 02-2-16005-1  
Judgment or order under review  
Date filed: 06/03/2003  
Judge signing: Hon. Steven Scott

JUSTICES

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Zuver v. Airtouch Communications  
Concurrence/Dissent by Madsen, J.

No. 74156-5

MADSEN, J. (concurring/dissenting) -- The majority holds that the remedies limitation provision in the parties' arbitration agreement is substantively unconscionable because it "appears to heavily favor" employer Airtouch Communications, Inc. Majority at 27. The majority claims that it does not decide this issue based on lack of mutuality of obligations, but that is exactly what the majority does. Lack of mutual obligation,

however, is not a legitimate basis on which to invalidate the limitation. Moreover, the remedies limitation provision lacks the onesided harshness that is shocking to the conscience, and which characterizes substantively unconscionable contract terms. Accordingly, I do not agree with the majority's conclusion that the provision must be invalidated under the doctrine of unconscionability.

As a practical matter, the majority's invalidation of the remedies limitation provision has no present impact in this case because it applies only to common law claims brought by employee Therese Zuver against her employer. The only claim she has raised at this point is that Airtouch violated the Washington Law Against Discrimination. And, since the majority finds the provision severable, its invalidation does not render the remainder of the arbitration agreement unenforceable.<sup>1</sup>

Far more important than the effect of the majority's ruling in this particular case is the impact it will have in future cases. The majority's analysis opens the door to claims of unconscionability whenever only one party to an employment arbitration agreement is constrained under one term of the agreement. The end result of the majority's decision is the erosion of arbitration agreements in the employment context under the guise of applying state contract law pertaining to substantive unconscionability. The majority's analysis contravenes the spirit, if not the letter, of the Federal Arbitration Act (FAA), 9 U.S.C. sec.sec. 1-16, and United States Supreme Court decisions implementing the act in the employment setting.

#### ANALYSIS

The remedies limitation provision states that by signing the arbitration agreement, the party waives "the right to seek punitive damages on common law claims." Clerk's Papers (CP) at 36-37. The agreement further provides that the substantive law of Colorado applies to common law claims. Zuver argues that the remedies limitation provision lacks "a modicum of bilaterality" of remedies and is thus substantively unconscionable. Br. of Pet'r at 20-23. Zuver relies on *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 6 P.3d 669 (2000), for the proposition that a "lack of mutuality of remedies," i.e., "an inherent imbalance in the remedies available to the parties to the arbitration agreement" is "fundamentally unfair and unconscionable." Reply Br. of Pet'r at 17, 18. At heart, Zuver is arguing for mutuality of obligation, in particular, mutuality of available remedies.

As the majority correctly notes, this court has rejected the premise that there must be mutuality of obligations in a contract. Majority at 26. Indeed, the Restatement (Second) of Contracts sec. 79 (1981) states: "If the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'"<sup>2</sup> Accordingly, a majority of courts have rejected the premise that arbitration clauses must contain mutual obligations, provided that the underlying contract is supported by adequate consideration. See, e.g., *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 451-52 (2d Cir. 1995); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 179 81 (3d Cir. 1999); *Wilson Elec. Contractors, Inc. v. Minnotte Contracting Corp.*, 878 F.2d 167, 168-69 (6th Cir. 1989); *Young v. Jim Walter Homes, Inc.*, 110 F. Supp. 2d 1344, 1350 (M.D. Ala. 2000); *Pridgen v. Green Tree Fin. Servicing Corp.*, 88 F. Supp. 2d 655, 658-59 (S.D. Miss. 2000); *W.L. Jordan & Co. v. Blythe Indus., Inc.*, 702 F. Supp. 282, 284 (N.D. Ga. 1988); *Willis Flooring, Inc. v. Howard S. Lease Constr. Co. & Assocs.*, 656 P.2 1184, 1185 (Alaska 1983); *Ex parte Smith*, 736 So. 2d 604, 612-13 (Ala. 1999); *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 398, 498 S.E.2d 898 (Ct. App. 1998); *In re FirstMerit Bank, N.A.*, 52 S.W.3d 749 (Tex. 2001); *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 137, 538 N.Y.S.2d 513, 535 N.E.2d 643 (1989); see *Arthur M. Kaufman & Ross M. Babbitt, The Mutuality Doctrine in the Arbitration Agreements: The Elephant in the Room*, 22 *Franchise L.J.* 101, 102 (Fall 2002) ("the requirement of mutuality of obligation has been denounced as defunct by a majority of courts").<sup>3</sup>

The majority reasons, however, that Zuver does not just argue for mutuality of obligation, but instead argues that the remedies limitation provision "is so one-sided and harsh that it is substantively unconscionable." Majority at 27. Initially, a review of petitioner's briefs leaves me in doubt that Zuver's argument is as the majority states. In any event, the majority ultimately determines that the term is

substantively unconscionable because it is one-sided. The majority says that the only common law claim that employer Airtouch would ever be likely to bring against Zuver is for breach of a duty of nondisclosure of confidential information, and punitive or exemplary damages are available for that claim. Majority at 27.

Although couched in terms of unconscionability, the majority effectively reasons that the provision is invalid because the employee must forgo punitive or exemplary damages, while the employer does not forgo such damages in the only likely case where the employer might bring a common law claim. In other words, the clause is invalid for lack of reciprocal obligations, i.e., lack of mutuality of obligation.

Because mutuality of obligation is not required as a matter of state contract law, the absence of such mutuality is not a legitimate basis for invalidating an arbitration clause in this state. The FAA's purpose, the United States Supreme Court has said, is "to place arbitration agreements on the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). Arbitration agreements must be enforced "save upon such grounds as exist a law or in equity for the revocation of any contract." 9 U.S.C. sec. 2.4 Thus, since lack of mutuality of obligation is not a basis on which to invalidate contracts in Washington, it is not a basis on which an arbitration clause can be invalidated. And a claim of lack of mutual obligations, here, mutual remedies, should not be a basis for overturning an arbitration clause merely because it is recast as a claim of substantive unconscionability. In the end, the majority's analysis circumvents the FAA's requirement that arbitration agreements be assessed under the same state law principles applying to contracts generally.

By finding substantive unconscionability here, the majority's decision opens the gates to claims of unconscionability in employment arbitration agreements whenever a one-sided clause is alleged, regardless of the arbitration agreement as a whole and the employment contract as a whole. The United States Supreme Court has made it clear, however, that employment arbitration agreements are enforceable, except for those covering workers engaged in transportation. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001).

Perhaps more disturbing, the majority's conclusion is inconsistent with the doctrine of substantive unconscionability. This court has stated that substantive unconscionability requires a determination that the clause or term in the contract is "one-sided or overly harsh." *Schroeder v. Fageol Motors, Inc.*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975). This statement however, should not be invoked to impose a requirement of mutuality of obligation; mere one-sidedness of a term resulting from one party incurring an obligation where no reciprocal obligation is incurred by the other party should not be enough to conclude that a clause is substantively unconscionable. Other terms used to describe substantive unconscionability provide guidance. The term must be "overly harsh," or, as has also been stated, "`shocking to the conscience', `monstrously harsh', {or} `exceedingly calloused.'" *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995) (quoting *Montgomery Ward & Co. v. Annuity Bd. of S. Baptist Convention*, 16 Wn. App. 439, 444, 556 P.2d 552 (1976)).

This arbitration agreement prohibits recovery of punitive or exemplary damages for successful claims under Colorado's common law. While there are clearly common law claims that an employee might bring against an employer, where a Washington employee is concerned there are also numerous potential statutory claims that must be brought under Washington law and for which no punitive or exemplary damages are available. Comparing the employee's potential claims against Airtouch, including statutory claims, against the limited category of claims where Airtouch might recover punitive or exemplary damages under Colorado law common law, I cannot agree that the remedies limitation provision is overly harsh or shocking to the conscience.

Next, the majority correctly rejects Zuver's argument for a special standard applicable to employment arbitration agreements. Majority at 24 n.12 (rejecting apparent claim that a standard analogous to that for consumer transactions should apply); see Reply Br. of Pet'r at 1617. However, Zuver makes another argument that should also be rejected. She

suggests that the arbitration process will not provide her an appropriate forum allowing her to fully and effectively vindicate her rights because under the arbitration agreement she is precluded from an award of punitive or exemplary damages, and therefore the remedies limitation provision is substantively unconscionable. She cites *Gilmer*, and other similar cases. In *Gilmer*, the Court held that an age discrimination claim under the Age Discrimination in Employment Act, 29 U.S.C. sec. 621-634, was subject to compulsory arbitration pursuant to an agreement in a securities registration application. The Court observed, in a passage relied on by Zuver, that "`{b}y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)).

It is unnecessary to decide in this case whether an employee can ever waive statutory rights in an arbitration agreement because *Gilmer*'s discussion of statutory rights clearly does not support Zuver's argument. The arbitration clause waives only the right to punitive and exemplary damages in common law actions under Colorado law.

Zuver also relies on *State ex rel. Dunlap v. Burger*, 211 W. Va. 549, 562, 567 S.E.2d 265, cert. denied sub nom. *Friedman's, Inc. v. West Virginia ex rel. Dunlap*, 537 U.S. 1087 (2002), where the court said that a "no punitive damages" provisions deprived the plaintiff of the "right to invoke and employ an important remedy provided by law to punish and deter illegal, willful, and grossly negligent misconduct." *Dunlap*, 211 W. Va. At 562. The court held that "exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law relief and remedies" under state law existing for "the benefit and protection of the public are unconscionable." *Dunlap*, 211 W. Va. at 564.

Zuver fails to acknowledge, however, that in Washington an exculpatory clause is valid unless, among other things not relevant here, it violates public policy. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 492, 834 P.2d 6 (1992). A contract provision forgoing punitive damages is not against public policy in this state. See, e.g., *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891) (punitive damages not awardable in personal injury action); *Farrar v. Tribune Publ'g Co.*, 57 Wn.2d 549, 552 53, 358 P.2d 792 (1961) (defamation claim; exemplary damages unknown to Washington law); *Fisher Props., Inc. v. Arder-Mayfair, Inc.*, 106 Wn.2d 826, 852, 726 P.2d 8 (1986) (punitive damages are not awardable unless authorized by the legislature).

Further, the policy bases in the case that Zuver relies on, punishment and deterrence, *Dunlap*, 211 W. Va. at 562, do not support invalidation of the remedies limitation provision on grounds of substantive unconscionability under Washington law. In *Barr v. Interbay Citizens Bank of Tampa, Florida*, 96 Wn.2d 692, 635 P.2d 441, 649 P.2d 827 (1981), the plaintiff brought an action for conversion of an automobile, intentional infliction of emotional distress, and outrageous conduct, as a result of events that flowed from a bank's issuance of clear title to the prior owner of the automobile rather than to the purchaser. The plaintiff sought punitive damages under Florida law, where the vehicle was purchased and the bank was located. The trial court ruled that Washington, not Florida, law would apply to the claim for punitive damages.

This court affirmed. The court observed that Florida's interest in a punitive damage award is punishment of the defendant and deterrence to similar misconduct. *Barr*, 96 Wn.2d at 699. The court reasoned, however, that Florida's interest in allowing punitive damages to deter similar misconduct would not be furthered where the acts said to warrant punitive damages had not occurred in Florida, but instead had occurred in Washington and Nevada. *Id.* The court reiterated the rule that punitive damages are not allowed in Washington unless expressly authorized by the legislature. *Barr*, 96 Wn.2d at 699. Quoting *Spokane Truck & Dray Co.*, 2 Wash. at 5253, the court also explained that exclusive of punitive damages, the plaintiff "is made entirely whole" through full compensation for all injury done

and all losses sustained. Barr, 96 Wn.2d at 700.

As Barr demonstrates, Washington does not have the same interest that West Virginia has in punitive damage awards to punish and deter wrongdoing. Accordingly, Dunlap is unpersuasive. Moreover, as Barr also indicates, a similar interest Colorado may have in punishment and deterrence would not be furthered by invalidating this remedies limitation provision which applies to a Washington resident and events occurring in Washington.

It simply does not matter that the common law claims potentially affected by the remedies limitation provision would be brought under Colorado common law. The question that Zuver raises is whether under this state's contract law the remedies limitation provision is unconscionable because it insulates Airtouch from paying punitive damages on common law claims and is, therefore, against public policy. On this question, the reasoning of the West Virginia court that Zuver advances is not in accord with this state's law on exculpatory clauses or punitive damages.<sup>5</sup>

I dissent, in part, from the majority opinion because it invalidates the remedies limitation provision as substantively unconscionable.

1 The majority also invalidates the confidentiality provision of the arbitration agreement on unconscionability grounds.

2 The Restatement also addresses the doctrine of "mutuality of remedy," under which courts will not order an equitable remedy unless it is available to both, stating: "the law does not require that the parties have similar remedies in case of breach, and the fact that specific performance or an injunction is not available to one party is not a sufficient reason for refusing {to apply} it to the other party." Restatement (Second) of Contracts sec. 363, cmt. c (1981).

3 The term "mutuality of obligation" is to be distinguished from the requirement that the parties to a contract make mutual promises to each other, and the requirement that there be mutual assent to a contract. See Arthur M. Kaufman & Ross M. Babbitt, *The Mutuality Doctrine in the Arbitration Agreements: The Elephant in the Road*, 22 Franchise L.J. 101-102-03 (Fall 2002).

4 Although the United States Supreme Court has not addressed the issue whether a waiver of punitive damages in an employment arbitration agreement is enforceable, its cases indicate that generally such a waiver may be enforceable. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995) (applying principles of contract interpretation to decide whether an arbitration contract precluded an award of punitive damages and concluding it did not); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478-79, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) (observing that the FAA "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms" and noting that arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit"). The Eleventh Circuit has said that the FAA "would not override a clear provision in a contract prohibiting arbitrators from awarding punitive damages." *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1387 n.16 (11th Cir. 1988). And the Seventh Circuit has reasoned that "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern . . . their disputes" and "surely can stipulate that punitive damages will not be awarded". *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

5 Another case cited by Zuver, *Parrett v. City of Connersville, Indiana*, 737 F.2d 690 (7th Cir. 1984), does not involve the issue raised in this case -- whether an arbitration clause barring a party from punitive damages is substantively unconscionable -- but instead involved a due process challenge.