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California Court Of Appeal Decides Against Arbitration Bylaw Amendment

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Much has been written of late about the enforceability of exclusive forum bylaws. What happens when the forum isn't a court, but an arbitration? Does it make any difference if the arbitration bylaw is adopted after a dispute has arisen? The Fourth District Court of Appeal tackled these questions in an opinion issued yesterday. Cobb v. Ironwood Country Club, Case No. G050446 (Jan. 28, 2015).

The case arose from Ironwood Country Club's attempt to enforce a bylaw amendment requiring arbitration. Importantly, Ironwood adopted amendment four months after the plaintiff, a former club member, had filed his complaint. After Superior Court Judge Harold W. Hopp denied Ironwood's motion, Ironwood appealed, arguing:

- its new arbitration provision was fully applicable to this previously filed lawsuit because the lawsuit concerned a dispute that was "ongoing" between the parties, and
- its right to amend its bylaws meant that any such amendment would be binding on both current and former members.

In an opinion authored by Justice William F. Rylaarsdam, the Court of Appeal agreed with Judge Hopp:

> When one party to a contract retains the unilateral right to amend the agreement governing the parties' relationship, its exercise of that right is constrained by the covenant of good faith and fair dealing which precludes amendments that operate retroactively to impair accrued rights. Plaintiffs certainly did not agree to any such illegal impairment in this case.
>
> And Ironwood's basic premise, which is that each member's agreement to the bylaw provision allowing for future amendments to its bylaws means those members are automatically bound by whatever amendments the Club makes in accordance with that provision – even after the members have resigned their membership – would doom the agreement as illusory if it were correct. Fortunately, it is not.

Justice Rylaarsdam also found fault with the unilateral nature of Ironwood's bylaw: "Such a one-sided provision, especially when coupled with the purported waiver of any award of 'punitive or consequential damages,' could be deemed unconscionable." (Armendariz v. v. Foundation Health Psychcare Services, Inc. 24 Cal.4th 83, 118 (2000).

Justice Rylaarsdam's statements regarding retroactivity have some obvious echoes to U.S. District Court Judge Richard Seaborg's opinion in Galaviz v. Berg:

> Here, in contrast, the venue provision was unilaterally adopted by the directors who are defendants in this action, after the majority of the purported wrongdoing is alleged to have occurred, and without the consent of existing shareholders who acquired their shares when no such bylaw was in effect. Under these circumstances, there is no basis for the Court to disregard the plaintiffs' choice of forum, which Oracle does not contend is otherwise improper on any grounds, or so inconvenient as to warrant a transfer to another federal court under 28 U.S.C. § 1404(a).

763 F. Supp. 2d 1170, 1174-1175 (N.D. Cal. 2011). On the other hand, Judge Rylaarsdam made no mention of recent decisions in Delaware and elsewhere upholding exclusive forum bylaws.

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