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Arbitration Provision Which Completely Prohibited Any Discovery Enforced By North Carolina Business Court

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I don't draft arbitration provisions in agreements, but if I did I would not draft one like the one in ***Taggart v. Physicians Pharmacy Alliance, Inc*.** Not because it turned out to be unenforceable, but because it was found to be enforceable. What?

Judge McGuire granted a Motion to Compel Arbitration in that case in an (unpublished) Order last week.

The arbitration provision said that:

> [i]]t is the desire and intent of the Parties that such arbitration be held **without any discovery, deposition or motion practice**, that the arbitrator receive evidence solely through the written submissions and not hold an evidentiary hearing, and that the arbitrator has no ability to extend dates or apply rules that conflict with these provisions.

Order ¶2 (emphasis added).

So the Plaintiff will have to go into this arbitration with absolutely no discovery, and with no way for the arbitrator to assess the credibility of witnesses (since there will be no depositions and all the evidence will be presented in writing).

Although I have arbitrated cases where the arbitration provision made no mention of discovery (and most often I got none), my preference for an arbitration clause which specifies that limited discovery will be allowed to the parties.

What About Discovery In Arbitration?

It's tempting to say that arbitration -- often billed as being quicker and less expensive than in-court litigation --- shouldn't include any discovery, but as a practical matter, it often does. The Rules of the American Arbitration Association specifically permit discovery. The Procedures for Large, Complex

Commercial Disputes give the arbitrator the "[b]road authority to order and control the exchange of information, including depositions."

But it's not particularly clear whether the AAA Rules apply anyway. The arbitration provision calls for the arbitrator to be selected via AAA procedures, but does not make any mention or incorporation of the AAA Rules.

And regardless of whether the AAA Rules apply, these parties chose, in a most emphatic way, to prohibit any discovery whatsoever.

The AAA Rules probably don't apply, but if they did, Rule 22 provides for a "pre--hearing exchange and production of information." Maybe there's an argument that an "exchange and production of information" doesn't fall into the category of the prohibited "discovery."

Was This Arbitration Provision Enforceable?

Plaintiff said that the ban on discovery and the lack of any ability to have the arbitrator to consider a motion made the arbitration "unfair and substantively unconscionable." Order ¶16.

That might have been a successful argument if the parties to the agreement had been of "greatly unequal bargaining power." But under Delaware law (which governed the Agreement), great deference is accorded to "the voluntary agreements of sophisticated parties." Op. ¶15 (*quoting NACCO Indus., Inc. v. Applica Inc*., 997 A.3d 813, 840 (Del. Ch. 2011),

Judge McGuire concluded that:

> although arbitration procedures might not be as extensive as [those available in courts], by agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." An agreement between two corporate parties to decrease expected litigation costs is not unconscionable, particularly when both sides must adhere to the same prohibitions.

Order ¶19 (*quoting Tierra Right of Way Servs. v. Abengoa Solar Inc*., 2011 U.S. Dist.. LEXIS *15-16 (D. Ariz.. 2011).

Notwithstanding the ruling forcing him to arbitrate without any discovery at all, it is hard to feel sorry for Mr. Taggart. The arbitration was required under the terms of a Stock Purchase Agreement by which the Plaintiff sold his company for $52.5 million dollars. Plaintiff was represented in that transaction by one of the largest law firms in the United States.

The issue in arbitration will be whether Mr. Taggart is bound to indemnify the buyer of his company for a $5 million settlement paid after the sale as the result of an investigation by the U.S. Department of Justice of the company