

Michigan and Indiana Courts Continue to Address Arbitration Issues

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In two recent cases, Michigan and Indiana courts issued decisions addressing the arbitrability of claims, and in another case the Supreme Court of Michigan held that a construction lien claimant prevailing in arbitration can recover attorneys' fees under the Construction Lien Act.

In *Altobelli v. Hartman*, - N.W.2d - , 2016 WL 3247615 (Mich. June 13, 2016), the court was called upon to decide the scope of a mandatory arbitration provision in a law firm's Operating Agreement, which refers to members of the firm as "Principals." The arbitration provision applied to:

Any dispute, controversy or claim (hereinafter "Dispute") between the Firm or the Partnership and any current or former Principal or Principals of the Firm or current or former partner or partners of the Partnership (collectively referred to as the "Parties") of any kind or nature whatsoever (including, without limitation, any dispute[,] controversy or claim regarding step placement, or compensation, or the payment or non-payment of any bonus, the amount or change in amount of any bonus).

A Dispute was to be "solely and conclusively resolved" by mediation and arbitration under American Arbitration Association Rules.

The plaintiff requested a seven to twelve month leave of absence from the Firm to pursue a football coaching opportunity. Disagreements arose as to whether this opportunity could be pursued consistent with plaintiff's obligations to the Firm, and how plaintiff's share of income from the Firm would be affected. Ultimately the Firm took the position that plaintiff had voluntarily withdrawn from the Firm, while plaintiff contended he was improperly terminated.

After mediation failed, plaintiff filed an arbitration demand asserting multiple claims. While arbitrator selection was in process, plaintiff filed suit against seven individual Principals of the Firm and five managing directors, asserting claims substantially similar to those asserted in arbitration, but "repackaged" under different legal theories. The defendants moved to compel arbitration, and plaintiff moved for partial summary disposition. The trial court denied the motion to compel, and

granted partial summary judgment to the effect that plaintiff did not voluntarily withdraw from the Firm and had instead been improperly terminated. The Michigan Court of Appeals affirmed the denial of the motion to compel but reversed the grant of partial summary disposition. As to the arbitration issues, the Court of Appeals concluded that the arbitration provision required arbitration of disputes between a Principal and the Firm.

The Supreme Court of Michigan reversed, after analyzing two aspects of the arbitration provision. First, the court determined that the phrase, “between the Firm...and ...[a] former Principal” includes the individually named defendants. Under agency principles, as a limited liability company the Firm could act only through its managers. The court cited to cases from other jurisdictions which have similarly applied agency principles when interpreting an arbitration clause. Second, the court determined that the subject matter of plaintiff’s claims fell within the scope of the arbitration provision. Indeed, the dispute was “entrenched” within the scope of the provision because plaintiff’s allegations “inextricably tie defendants’ actions as agents of the Firm to the deprivation of plaintiff’s rights under the Operating Agreement.” Accordingly, the court held that the lower courts should not have addressed the merits of the motion for partial summary disposition, and that all claims at issue must be arbitrated.

Maynard v, Golden Living, - N.E.3d - , 2016 WL 3941015 (Ind. Ct. App. July 21, 2016) arose from a lawsuit filed by Maynard, the personal representative of an estate, alleging negligence and breach of contract in connection with the care of a resident (the decedent) at a nursing facility. At the time of admission the resident signed an Admission Agreement and a separate dispute resolution agreement, which stated that it was not a condition of admission or continued residence in the facility. This second agreement stated that, “The parties agree that any disputes covered by this Agreement that may arise between them shall be resolved exclusively by an ADR process that shall include mediation and, where mediation is not successful, binding arbitration.” The agreement further acknowledged that the transaction affected interstate commerce, and conspicuously – in bold capital letters – emphasized that the parties were giving up their rights to have disputes resolved in court by a judge or jury.

After suit was filed, Golden Living moved to dismiss and to compel arbitration. Maynard responded by asserting that Golden Living had failed to meet its burden of proving the existence of an enforceable arbitration agreement. The trial court deferred its ruling until Golden Living deposed its former marketing director, who testified that the resident signed both the Admission Agreement and arbitration agreement, though not at the same time and, in the case of the arbitration agreement, not in her presence. Although the trial court found it incredulous that Golden Living kept only the signature pages on file rather than the complete agreements, the court found sufficient evidence of an enforceable arbitration agreement.

An interlocutory appeal followed, and the Court of Appeals affirmed. The court agreed that, although the evidence reflected a blank arbitration agreement and a signature page signed by the resident, there was sufficient extrinsic evidence to support the trial court’s findings. The court also rejected a contention that the arbitration agreement was voidable, either under a theory of fraudulent inducement or that the resident was not competent when he signed the agreement.

Turning back to Michigan, *Ronnisch Construction Group, Inc. v. Lofts on the Nine, LLC*, - N.W.2d - , 2016 WL 4005654 (Mich. July 26, 2016) addressed the interplay between arbitration and litigation in the context of a lien foreclosure claim. The case arose from a contract to construct loft-style condominiums. The owner paid the contractor \$5.5 million toward the contract price of approximately \$6.1 million. The contractor recorded a lien and then filed a foreclosure action based on theories of

breach of contract and unjust enrichment. The case was stayed because the contract required arbitration. The arbitrator awarded the contractor approximately 70 percent of the damages sought, after reducing the lien claim by the amount of the owner's recoupment claim. The arbitrator specifically declined to address the contractor's claim for attorneys' fee under the construction lien statute, expressly reserving the issue for the court.

The owner paid the award plus accrued interest. The contractor then moved to lift the stay in court, to confirm the arbitration award, and recover attorneys' fees of over \$300,000. The owner argued that no fees should be awarded because it had already paid the arbitration award, and that resolution of the breach of contract claim rendered the foreclosure action moot. The trial denied the motion. The Michigan Court of Appeals reversed as to the denial of an award of fees. The Supreme Court of Michigan affirmed the Court of Appeals.

Michigan's Construction Lien Act provides that a court "may allow reasonable attorneys' fees to a lien claimant who is a prevailing party." Use of the word "may" shows that such an award is permissive, not mandatory. The Lien Act is remedial in nature and should be liberally construed. Here, the contractor was a lien claimant which sought a foreclosure remedy, and was the prevailing party because the arbitrator conclusively determined the contractor's claims in its favor. The fact that no foreclosure judgment or judgment confirming the arbitration award was entered was not determinative of the fee issue. The contractor sought foreclosure relief in addition to asserting a breach of contract claim. The contractor prevailed, and it would be contrary to the Lien Act to deny fees just because the arbitration award was paid.

The *Altobelli* and *Maynard* cases underscore the importance of drafting arbitration provisions which encompass disputes which are likely to arise between the contracting parties. *Ronnisch* is instructive because it shows that arbitration can be the first in a two-step process by which a claimant obtains relief.

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