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Reference to American Arbitration Association Rules in Home Warranty Contract Makes Arbitration Decision Binding

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whether the regulation directly advanced the government's interest. The lower court did not have the benefit of a recent Supreme Court case that provides the framework for determining whether a regulation directly advances the government's interest. The Tenth Circuit stated that on remand, the district court must determine whether the government demonstrated a connection between its means, regulating alcohol content advertising, and its interest, preventing strength wars.

Finally, the appellate court stated that if the district court determined that the government's interest in preventing strength wars was directly advanced by the regulation, then it must determine whether the regulation was more extensive than necessary to serve this interest. Previously, the district court concluded that the government could have chosen a much less restrictive alternative, and therefore, the regulation did not satisfy the final element of the *Central Hudson* test. The appellate court maintained, however, that the district court misinterpreted the analysis of this final element by using an incorrect standard. The appellate court stated that the correct question was whether the regulation was proportionate to the interest being protected; the lower court should have measured the public's interest in disclosure against the government's interest in preventing strength wars to determine whether the regulation was overbroad. Therefore, the Tenth Circuit remanded the case to the district court for a redetermination of these last two factors.

Barbara L. Gallagher

Reference To American Arbitration Association Rules In Home Warranty Contract Makes Arbitration Decision Binding

In *Rainwater v. National Home Insurance Co.*, 944 F.2d 190 (4th

Cir. 1991), the United States Court of Appeals for the Fourth Circuit held that an arbitration section of a home warranty contract provided for final and binding arbitration since it was written pursuant to American Arbitration Association ("Association") rules.

Background

When purchasing his home, Charles Philip Rainwater ("Rainwater") bought a Home Buyers Warranty Contract with National Home Insurance Company ("National") as the underwriter. Included in the warranty's coverage were certain structural defects that must first occur after the warranty was purchased. Another section of the warranty provided for arbitration of disputes over National's coverage decisions. The warranty stated that the Association would conduct any arbitration proceedings according to the Association's rules. Also, the disputing parties' participation in arbitration was required before either party could sue.

Within one year of buying his house, Rainwater found a crack in the foundation and filed a claim under the warranty. National denied coverage, deciding that the foundation crack first occurred prior to Rainwater's purchase of the warranty. In response, Rainwater requested arbitration as provided for in the warranty contract.

After deciding that the foundation crack had first occurred during the warranty period and that it was a qualified structural defect under the warranty, the arbitrator ordered National to repair the foundation within sixty days. Following Association rules, National appealed the award. The arbitrator's decision was upheld.

National then sued in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that it was not bound by the arbitration decision. The district court dismissed National's suit, confirmed the arbitration award, and in addition, awarded Rainwater \$206,500 for reasonable costs of repair. National appealed to the United States Court of Appeals for the Fourth Circuit.

Fourth Circuit's Decision

The Fourth Circuit first recognized the longstanding federal policy of resolving any doubts concerning the scope of arbitrable issues in favor of arbitration. The court also noted a presumption that parties who agree to arbitration intend it to be binding. This policy of favoring arbitration exists, the court stated, because arbitration is an efficient and inexpensive dispute resolution process that does not take up valuable court time.

In light of this policy, the Fourth Circuit addressed whether Rainwater and National had agreed that the arbitration decision would be binding or whether it would merely serve as a condition precedent to bringing litigation. This issue was important because the court's jurisdiction to confirm the arbitration award stemmed from the parties' agreement that the award was final.

Rainwater argued that the award was final because the arbitration provision of the warranty contract stated that Association rules would apply to the arbitration process. Rule 26(c) of the Association regulations provides that unless otherwise provided by law or the applicable document, the parties involved shall be deemed to have agreed that any court having jurisdiction may enter judgment confirming the arbitration award. Rainwater contended that by adopting Association rules, National agreed that a court could confirm the arbitration award and thus impliedly agreed that the award was final.

The Fourth Circuit agreed, stating that other courts, including the Seventh and Tenth circuits, had found that if an arbitration agreement referred to Association rules and regulations the arbitration was binding. The Fourth Circuit found that the lack of explicit agreement to be bound by arbitration was inconsequential because reference to Association rules, which do provide for such a binding effect, implied such agreement.

National argued that the court first must determine if the warranty's arbitration provision stipulat-

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ed that arbitration would be final or binding. Only then could the court rely on Association rules that allow for entry of a confirmation judgment. National contended that although Association rules make an arbitration award confirmable, they cannot, by themselves, make the award final.

The appellate court rejected National's position and stated that it would not require the presence of magic words such as final or binding before enforcing arbitration awards. The Fourth Circuit pointed out that courts generally look for a reference to Association rules to determine finality and only when such guideposts are absent, rely upon the presence of words like final and binding.

National also argued that the warranty contract expressly rebutted the Association Rule 26(c) presumption of consent to entry of confirmation judgment. According to National, the warranty contract's stipulation that the arbitration process was a prerequisite to litigation was evidence that the parties anticipated the possibility of future litigation. Therefore, the arbitration decision was not binding.

The Fourth Circuit disagreed, finding that the language of this contract provision was probably left over from the days when courts were hostile to arbitration clauses. Drafters of arbitration agreements, therefore, used this language to insure that parties completed the arbitration process before suing in federal court. The Fourth Circuit found that, in the warranty contract in dispute, this language applied only to a court's ability to enter a confirmation judgment or a litigant's ability to use a final arbitration award as part of some larger litigation.

Lastly, the Fourth Circuit affirmed the lower court's award of damages to Rainwater for the cost of repairing the foundation.

Monica A. Murray

Consumers Injured By Meat Processor's False Advertising Receive Class Action Certification Under Lanham Act

In *Maguire v. Sandy Mac, Inc.*, 138 F.R.D. 444 (D.N.J. 1991), the United States District Court for the District of New Jersey certified a consumer class action under the Lanham Act for injuries caused by false advertising but denied similar class certification under the New Jersey Racketeering Act, the federal Racketeering Influenced Corrupt Organizations statute, the New Jersey Consumer Fraud Act, and common law fraud.

Background

Sandy Mac, Inc. ("Sandy Mac"), a federally inspected meat plant that is no longer in business, formally processed ham products for resale through distributors and wholesalers nationwide. From 1975 to 1987, Sandy Mac sold ham products that it fraudulently represented as meeting the United States Department of Agriculture standards. Sandy Mac's ham products failed to meet U.S.D.A standards because the amount of water added to the ham exceeded both the amount represented on the label and that which was permitted by law. In 1989, Sandy Mac plead guilty to criminal charges arising out of its fraudulent conduct.

In 1990, Zane Maguire ("Maguire"), a restaurant owner who purchased ham products from Sandy Mac during the relevant time period, sued Sandy Mac on behalf of a group of ham product purchasers. Maguire asserted claims against Sandy Mac under the Lanham Act, 15 U.S.C. 1125(a); the New Jersey Racketeering Act, N.J. Stat. Ann. 2C:41-4 (West 1982); the federal Racketeering Influenced Corrupt Organizations statute, 18 U.S.C. 1964(c); the New Jersey Consumer Fraud Act, N.J. Stat. Ann. 56:8-1 - 56:8-4 (West 1989); and common law fraud.

The proposed class of ham product purchasers was divided into

two subclasses. The first subclass consisted of all persons who purchased Sandy Mac's ham products, removed the packaging supplied by Sandy Mac, and thereafter resold the ham in a modified condition. Included within the first subclass were all deli and restaurant owners and large purchasers that sold the ham products over the counter. The second subclass consisted of all ultimate consumers of Sandy Mac's ham products who purchased the products on a cost-per-pound basis for home consumption.

Consumers of restaurant or deli sandwiches who purchased the product for immediate consumption were not included in either subclass.

Consumer Standing Under the Lanham Act

Before the district court reached the issue of class certification, it decided whether the consumers actually had standing to bring a Lanham action. The first issue relevant to standing was if the Lanham Act created a right of action for people who were not competitors.

The Lanham Act, 15 U.S.C. 1125(a)(2), provides that, "any person who, on or in any connection with any goods...or any container for goods, uses in commerce any . . . false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities . . . of his or her goods shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such an act." Sandy Mac argued that consumers could not sue under the Lanham Act because the Act only created a right of action for competitors.

The federal courts disagree about whether the Lanham Act provides protection to consumers. The United States Court of Appeals for the Third Circuit, which controls in this case, has held that the Lanham Act should be broadly construed to provide a remedy for non-competitors. Thus, the district court held that consumers have a right to relief under the Lanham Act.

The second issue the court ex-