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Surprise! You Get to Arbitrate! Massachusetts Courts Continue to Permit Third Parties to Enforce Arbitration Agreements

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Two Massachusetts decisions—including one from the state's highest court—applied the same standard regarding enforcement of an agreement to arbitrate. In each case, plaintiffs signed arbitration agreements with another party. Others that were not a party to and did not therefore sign those agreements sought the protections of the arbitration provision, and the courts required the plaintiffs in both instances to arbitrate their claims even against the non-signatory defendants. We briefly discuss these cases and the takeaways below.

This all started back in 2007, in *Vassalluzzo v. Ernst & Young*, LLP, when Judge Ralph Gants (then a trial court judge) determined that a litigant can't have his cake and eat it too. Vassaluzzo sued E&Y for claims arising out of a contract and for claims independent from the contract. The contract contained an arbitration provision, requiring arbitration of all claims arising from the contract. Because Vassaluzzo brought claims separate from the contract, E&Y could not force Vassaluzzo arbitrate his claims. Judge Gants recognized in Vassaluzzo, however, that 1) if a plaintiff's claims arose entirely and solely from the contract—that is, if the contract did not exist, plaintiff would have no leg to stand on in bringing suit— and 2) that same contract contains an arbitration provision requiring arbitration of claims arising from the contract, plaintiff must settle his (entire) score in arbitration.

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Then, in April 2015, the Supreme Judicial Court applied this fairness principle in *Machado v. System4, LLC*. System4 did not sign the franchisee agreements that plaintiffs used in filing a class action suit against it. Those agreements, however, contained an arbitration provision requiring arbitration of claims arising from the contract. All of plaintiffs' claims arose from the contract. Fairness demanded that plaintiffs arbitrate even those claims brought against a defendant that was not a party to the arbitration agreement.

And just before the Machado decision, Judge Mitchell Kaplan of the Business Litigation Session applied the same rationale in *TIBCO Software, Inc. v. Zephyr Health, Inc. & Willoe* in the context of a non-compete case. There, TIBCO sued a former employee and his new employer after the former employee allegedly solicited TIBCO's employees. The employment agreement containing the non-solicitation provision also contained an arbitration provision. Seizing on that fact, the new employer told the court that TIBCO had to arbitrate even though the new employer wasn't a signatory to the agreement. Judge Kaplan agreed, citing to Machado and Vassaluzzo.

Takeaways

Employers, both signatories and non-signatories, can take several points away from these cases. In drafting employment agreements, employers should consider one-sided arbitration provisions, requiring arbitration of claims brought against them but not by them, or carve-outs if they foresee the need or advantage of seeking

immediate injunctive relief or litigating a claim arising from the contract. Conversely, employers roped into post-employment disputes between a new hire and his previous employer should look to the employment agreement for an arbitration provision it can use to its advantage. If the former employee's claims would not exist but for the contract, and that contract requires arbitration of claims arising from the contract, fairness allows the new employer to force the former one to arbitrate.