

Arbitration Clauses: To Infinity and Beyond

Chief Judge Ann Bailey Smith

“Our courts have their faults as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.”

From “To Kill a Mockingbird”
by Harper Lee

Who doesn't love going to Disney World, frequently referred to as “the happiest place on earth”? Okay, there may be some of you who are not Disney fans... It's too hot in Orlando, the lines are too long, it's too expensive. I love Disney World and, with the exception of the Outer Banks, I do find it to be one of the happiest places on earth. Last summer I went with two of my grandchildren, both 5 years old at the time, and it was nothing short of magical seeing Disney World through their eyes. Hopefully I've caught your attention and drawn you in, because what this article is re-

ally about is... Arbitration. There is a Disney element to this, but I thought if I started the article writing about arbitration, then you would quickly be flipping to the next page of *Bar Briefs*.

Arbitration is a method for dispute resolution which does not involve a judge or a jury but is agreed to by the parties to a contract where a neutral third party hears the evidence and decides the case. Arbitration can be binding on the parties where they agree to accept the arbitrator's decision as final, or arbitration can be non-binding which means that if one of the parties is dissatisfied then the case can proceed in court.

My contact as a circuit court judge with arbitration typically comes in the form of a motion to stay proceedings and compel arbitration filed by a nursing home in response to a complaint filed by the resident or the administrator of the resident's estate for negligence. KRS 417.050 provides that a written agreement to submit any controversy to arbitration “is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.” Moreover, “[t]o create a valid, enforceable contract, there

must be a voluntary, complete assent by the parties having capacity to contract.” *Conners v. Eble*, 269 S.W. 2d 716, 717 (Ky. 1954). In the nursing home cases, the issue to be decided by the court is whether the resident had the mental capacity to enter into the Alternate Dispute Resolution Agreement, which is usually included in the documents the resident is presented with and asked to execute at the time of admission.

So, this brings us back to Disney. You may have read or heard about the arbitration issue involving Disney. A woman and her husband were dining at a restaurant in Disney Springs in 2023 when she had a severe allergic reaction to the food she was eating and died. Her husband filed a wrongful death lawsuit against Disney claiming that the restaurant had been made aware of her dairy and nut allergies yet did not take proper precautions in preparing her meal. Disney responded by saying that there was a binding arbitration clause between Disney and the husband because he had signed up for a free trial of Disney+ in 2019 which contained such a clause. It has been reported that the husband did not continue with Disney+ beyond the free trial period. Disney further argues that the arbitration

clause was also included when the husband bought tickets for the theme park, although Disney park tickets are not needed to enter Disney Springs. The husband's attorney calls Disney's argument for arbitration of the wrongful death suit preposterous.

Disney is not the only company that is seeking to expand the reach of an arbitration clause when it is facing a lawsuit by a customer. Walmart and Airbnb are increasingly seeking to forego litigation in a court of law in favor of arbitration. In order to use these companies' services, customers must agree to terms of use which incorporate arbitration agreements. Those arbitration agreements, the companies argue, cover affiliates of the company and extend to any complaint regardless of whether it's related to the original transaction that prompted the arbitration agreement. This has come to be known as “the infinite arbitration clause” by those who oppose this wide-ranging interpretation.

An example of this involves a family falsely accused of shoplifting at a Walmart store in Roanoke, Virginia. After the family of four had paid for their purchases and were

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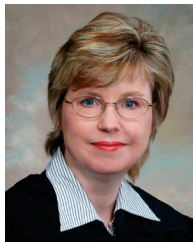
attempting to exit the store, a Walmart employee yelled out for them to stop, calling them thieves. The family approached the employee and offered to show her their digital receipt for their purchases. She wouldn't look at the receipt and persisted in her accusations which caused other customers to stare at the family causing embarrassment. The family called the police stating that they were being detained at the store. As the police arrived, a manager approached the commotion. When he saw which employee was making the accusations, he told the family that he believed them and he didn't even need to see their receipt.

The family filed a complaint alleging violation of the Civil Rights Act of 1964; that the Walmart employee had defamed the family; and that they were falsely imprisoned by the Walmart employee. Walmart responded with a motion to compel arbitration based on a binding arbitration agreement between Walmart and the mom of the family because she had signed an agreement to work as a shopper/driver on the Spark driver app. Plaintiffs did not dispute the existence of the arbitration agreement but argued that it had no relation to their claims in this lawsuit. The trial judge sustained the motion to compel arbitration finding that it applied to any and all disputes involving Walmart and the Plaintiff mom regardless of whether there was a nexus between the dispute and her work as an independent contractor. The judge clarified that

it was of no consequence to the arbitration issue whether the mom was shopping in her role as an independent contractor or whether she was simply just shopping for her family; either way, her claims and the claims she brought on behalf of her minor children were subject to arbitration. This decision cited the United States Supreme Court's case of *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), where the Court reaffirmed that arbitration agreements are to be enforced according to their terms, and ambiguities about the scope of an arbitration agreement are to be resolved in favor of arbitration.

Now, back to Disney. In late August, Disney reversed course and withdrew its motion to compel arbitration so that the wrongful death lawsuit will proceed in court, stating that in this circumstance a sensitive approach is warranted to expedite resolution for the family. The happiest place on earth may have been concerned about the backlash it received from its decision to push arbitration. We will have to wait for another day to see whether the United States Supreme Court will put its imprimatur on an expansive interpretation of arbitration clauses.

Chief Judge Ann Bailey Smith presides in Division 13 of Jefferson Circuit Court. ■



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