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Recommended Citation

Mahe, Miranda, "Summary of Attorney Gen. v. Dist. Ct. (Philip Morris), 125 Nev. Adv. Op. No. 5" (2009).
Nevada Supreme Court Summaries. 381.
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Attorney Gen. v. Dist. Ct. (Philip Morris), 125 Nev. Adv. Op. No. 5 (Jan. 29, 2009)¹

CONTRACT LAW – COMPELLING ARBITRATION

Summary

Petition for writ of mandamus challenging order granting motion to compel arbitration on the basis that the contract's arbitration clause does not include issues of enforcing qualifying statutes within its scope and another part of the contract allows state courts to hear certain breaches of contract.

Disposition/Outcome

Petition for writ of mandamus challenging order granting motion to compel arbitration denied because enforcement of qualifying statutes is within the scope of the arbitration clause and, therefore, does not fall under the court's jurisdiction.

Factual and Procedural History

In 1998, Nevada entered into a Master Settlement Agreement (MSA) with tobacco companies forcing tobacco companies to make an annual payment to the state in exchange for the state's agreement to not pursue litigation against them for smoking-related health-care costs.² Under the MSA, the state would then have to enact and enforce a qualifying statute requiring tobacco companies selling products within the state to either join the MSA or make payments into a state escrow account. Therefore, under the MSA, if a state does not enforce its qualifying statute and an independent auditor determines the MSA is at least partially responsible for one of the MSA companies' decrease in profits, a MSA company can decrease its annual payment to a state.

In 2006, the MSA tobacco companies alleged that Nevada did not enforce its qualifying statute in 2003 and therefore the MSA tobacco companies lost profits during that year to non-MSA tobacco companies. The MSA tobacco companies then withheld millions of dollars from their 2006 annual payment to Nevada. The state of Nevada filed a complaint asking the district court to determine that the state had enforced its qualifying statute and, therefore, the MSA companies must pay the full 2006 payment. The MSA companies answered the complaint with a motion to compel arbitration which the district court awarded under the terms of the MSA.

Discussion

A writ of mandamus is an extraordinary remedy to protect petitioners when they will not have access to an appeal and when there is a clear abuse of discretion or when a tribunal is not correctly applying the law.³

¹ By Miranda Mahe.

² Nevada joined 45 other states in agreeing to the MSA.

³ *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-604, 637 P.2d 534, 536 (1981); *Puolos v. Dist. Ct.*, 98 Nev. 453, 455, 652 P.2d 1117, 1178 (1982); *Pan v. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004).

Compelling Arbitration under the MSA

Whether a contract compels arbitration is a question of contract interpretation but Nevada's public policy is to encourage arbitration.⁴ The MSA's arbitration clause listed controversies arising out of the payment adjustment based on a state's enforcement of its qualifying statute, among other things. The State argues that the arbitration clause only applies to controversies arising out of payment adjustments and does not apply to whether or not the state has enforced its qualifying statute. However because the arbitration clause does not limit what type of claims are available for arbitration and the clause itself makes a reference to the enforcement of qualifying statutes, the court held that the state did not overcome the presumption in favor of arbitration. Additionally, many jurisdictions have also held that under the MSA whether a state has enforced its qualifying statute, is available for arbitration.⁵

MSA Provision Giving State Courts Jurisdiction

The state argues that the MSA allows state courts to hear disputes arising under the MSA. However, the provision of the MSA that allows this, excludes disputes that would fall under the arbitration clause and excludes disputes concerning the payment adjustment caused by enforcement of the state's qualifying statute. Therefore, the MSA ensures that when payments are adjusted based on more than one state's failure to enforce a qualifying statute, the MSA tobacco companies will not have to defend lawsuits in each state they adjust their payment to because these adjustments will often be nationwide. Thus, enforcement of the qualifying statute does not fall under the state court's jurisdiction.

Conclusion

The court denied the writ of mandamus holding that a claim arising out of a payment decrease based on the lack of enforcement of a qualifying statute shall go to arbitration instead of through the state courts. The MSA's arbitration clause is not limited and alludes to qualifying statute enforcement controversies. Additionally, the MSA provision granting state courts jurisdiction over certain controversies exclude a controversy over a payment decrease based on the lack of enforcement of a qualifying statute. Therefore, under the MSA, the controversy shall go to arbitration.

⁴ *Clark Co. Pub. Employees v. Pearson*, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990); *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990).

⁵ *People v. Lorillard Tobacco Co.*, 865 N.E.2d 546, 554 (Ill. App. Ct. 2007); *State v. Lorillard Tobacco Co.*, _So.2d_, 2008 WL 821054 at *5 (Ala. 2008); *State v. Phillip Morris, Inc.*, 905 A.2d 42, 51 (Conn. 2006); *State, ex rel. Carter v. Phillip Morris, Inc.*, 879 N.E.2d 1212, 1216 (Ind. Ct. App. 2008); *Ieyoub v. Phillip Morris, USA, Inc.*, 982 So. 2d 296, 300 (La. Ct. App. 2008); *State v. Phillip Morris*, 944 A.2d 1167, 1182 (Md. Ct. Spec. App. 2008); *State ex rel., Bruning v. R.J. Reynolds*, 746 N.W.2d 672, 680 (Neb. 2008); *State v. Phillip Morris USA, Inc.*, 927 A.2d 503, 509 (N.H. 2007); *State ex rel. N.M. Att. Gen.*, 194 P.3d 749, 754 (N.M. Ct. App. 2008); *State v. Philip Morris Inc.*, 813 N.Y.S.2d 71, 76 (App. Div. 2006); *State v. Philip Morris USA, Inc.*, 666 S.E.2d 783, 792-93 (N.C. Ct. App. 2008); *State v. Philip Morris, Inc.*, No. 06AP-1012, 2008 WL 2854536, at *10 (Ohio Ct. App., July 24, 2008); *State v. Philip Morris USA Inc.*, 945 A.2d 887, 892 (Vt. 2008).