Adding Clarity in the Third Circuit

It is your New Jersey and Third Circuit reporter with two precedential Third Circuit cases from March that, I think, add a bit of clarity to the standards for finding an arbitrable contract.

In the first, *Aliments Krispy Kernels, Inc. v. Nichols Farms*, __ F.3d __, 2017 U.S. App. LEXIS 4991 (3d Cir. Mar. 21, 2017), the court confirmed the demise of part of a 36-year-old Circuit precedent, *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co*., 636 F.2d 51, 54 (3d Cir. 1980), which had required that the proponent of arbitration must show "an express, unequivocal agreement to that effect." After the Supreme Court held that ordinary contract and agency principles must be applied when determining the existence of an arbitration contract, *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), the *Par-Knit* language has led to confusion regarding the proper standard. Thus, *Aliments* held that the above *Par-Knit* words are incompatible with ordinary contract principles and should be relegated to the ash-heap of history (my words). As the Circuit explained, the judicial understanding of the FAA has changed in the intervening 36 years.

For those interested in the intersection of the UCC and the FAA, *Aliments* also addressed the requirements of UCC 2-201. Section 1 requires a signature of the party to be charged to make the writing enforceable. But Section 2 excuses the signature requirement where the contracting parties are merchants – and a proper confirmation is received without timely objection. Given the multiple documents and disputes regarding their receipt and response in the case before it, the Circuit found there were multiple issues of material fact and therefore reversed the trial court's denial of a motion to confirm the award obtained (and the cross-motion to vacate) and remanded to sort it all out.

The second case, *James v. Global Tel*Link Corp.*, __ F.3d __, 2017 WL 1160893 (3d Cir. Mar. 29, 2017), affirmed without oral argument the District Court's order declining to require arbitration as to most plaintiffs in a proposed class action concerning pricing for inmate telephone services. As such, the opinion would not at first seem all that noteworthy. What warrants attention is the clarity and brevity of the legal reasoning. In sharp contrast to so many opinions that start with lip service to the importance of arbitration, all in many paragraphs with

multiple cites, *James* gets right to the point: “The question presented is whether Appellees agreed to be bound by the terms of use contained on GTL’s website, even though they never visited it.” Appellees’ transaction with Global took place entirely over the phone and thus, as the Court stated: “they neither received GTL’s terms of use, nor were they informed that merely using GTL’s telephone service would constitute assent to those terms.” In contrast, the one named class member who completed the transaction on the web was ordered to arbitration (and did not appeal).

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