En Garde! Do You Have Dueling Arbitration Agreements?

February 28th, 2020 | and Patricia E.M. Covington

Sometimes I write articles, but sometimes the articles write themselves. This is an example of the latter.

A few weeks ago, a car dealer client called and asked whether she had a legal problem if she was using more than one version of an arbitration agreement in the forms that she presented to her car buyers. She had evidently done a review of her forms looking for this very problem, and, bingo, determined that she had a case of "dueling arbitration agreements."

Although there have been few reported court opinions dealing with this question, we have for years advised dealers to avoid this problem by reworking forms to align the arbitration language. This wasn't so much legal advice as common sense – why give a judge or jury the opportunity to declare that your arbitration agreements are unenforceable because you have used two (or more) of them in a transaction when, with a little bit of work, you can eliminate that risk?

As luck would have it, a New Jersey court addressed this issue in a recent case, and I was able to use the court's decision to drive the point home that dueling agreements are not a good idea. Here's what happened in the Garden State.

A car owner traded in his old car and leased a new one from a dealership. The car owner sued the dealership, alleging various state law claims arising from an undisclosed fee he was charged in connection with paying off the lien on the car he traded in.

The dealership moved to compel arbitration under an arbitration provision in the parties' lease agreement. The trial court granted the motion, but the Superior Court of New Jersey, Appellate Division, reversed, finding that the arbitration provision was vague and unenforceable.

The dealership then moved to compel arbitration under an arbitration provision in the parties' motor vehicle retail order. The trial court denied the motion, finding that the arbitration provisions in the lease agreement and the retail order conflicted with one another and were, therefore, unenforceable. The trial court added that the dealership waived its right to arbitrate under the arbitration provision in the retail order because it did not rely on that provision when it filed its first motion to compel arbitration.

The appellate court affirmed. First, the appellate court noted that it agreed with the trial court that the dealership waived its right to assert the retail order's arbitration provision by failing to invoke that provision in its first motion to compel arbitration and by waiting over a year to assert that provision, a delay that prejudiced the car owner.

The appellate court also agreed with the trial court that the conflicting terms in the two arbitration provisions, including terms addressing the ability to pursue claims in court, the venue of an arbitration proceeding, the scope of the claims covered, and whether the arbitrator or the court has the power to decide the validity and scope of waiver of class action rights, rendered each arbitration provision unenforceable.

If the forms you ask your customers to sign include multiple arbitration agreements or, for that matter, contain provisions that don't mesh well, maybe it's time for another call to your lawyer. As Benjamin Franklin said, "An ounce of prevention is worth a pound of cure."

Trout v. Winner Ford, 2019 N.J. Super. Unpub. LEXIS 2440 (N.J. Super. App. Div. December 3, 2019).