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Recent Eighth Circuit Decision Provides Guidance on the Enforceability of Arbitration Agreements

The United States Court of Appeals for the Eighth Circuit recently issued a decision on the enforceability of an arbitration agreement. In *Plummer v. McSweeney*, No. 18-3059 (8th Cir. Oct. 23, 2019), the defendants argued the district court erred in holding an arbitration agreement within the parties' attorney-client retainer agreement was unenforceable. Although this decision is outside the employment context, it is still noteworthy for employers because of the court's analysis of the parties' arbitration agreement.

By way of background, the plaintiff had sued her attorneys and their law firm, alleging they had improperly solicited her to have surgery to remove a transvaginal mesh implant. The defendants sought to compel arbitration pursuant to the mandatory arbitration provision contained in the retainer agreement. The district court refused to compel arbitration, and the defendants appealed to the Eighth Circuit.

The Eighth Circuit began its analysis by determining whether the arbitration provision was unconscionable. The plaintiff argued the arbitration requirement was substantively unconscionable because it required her to pay a portion of the arbitration costs. The defendants, however, had offered to pay the plaintiff's arbitration costs, which, according to the court, effectively "cured any substantive unconscionability that the agreement may have contained."

The court further held the arbitration agreement was not procedurally unconscionable because the plaintiff did not lack a "meaningful choice." In so holding, the court noted the plaintiff had adequate time to consider the contract, and the contract expressly informed the plaintiff that she had the "Freedom to Contract" and that she could "bargain for and negotiate any of the terms of this Agreement or . . . consult with or retain any attorneys of [her] choice." The court also rejected the plaintiff's argument that she did not read the agreement, relying on the well-established legal principle that one cannot escape being bound by a contract on account of not reading it.

On alternative grounds, the plaintiff also claimed her attorneys violated their ethical duties by not explaining the arbitration provision to her, thereby rendering the arbitration agreement unenforceable. The court rejected this claim as well. The Eighth Circuit thus reversed and remanded the case to the district court with instructions to enforce the arbitration agreement and compel arbitration.

As mentioned above, although this case evaluated an arbitration agreement outside the employment context, it nevertheless provides general guidance to employers on important considerations that could affect the enforceability of arbitration agreements with employees. For example, this decision highlights the importance of considering how arbitration costs will be allocated, providing adequate time for an individual to review the arbitration agreement and providing notice of the individual's freedom to contract.

If you have questions related to your arbitration agreement, please contact your Kutak Rock attorney or any of the attorneys in the [Employment Law Group](#), and we would be happy to discuss this with you.

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