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TOPIC: Third Circuit Denies Coventry Motion to Compel Arbitration in Life Settlement Case Alleging Fraud and Bid-Rigging

CITES: *Griswold v. Coventry First LLC* (3rd Cir Ct. App Aug. 11, 2014); *People v Coventry First LLC*, 52 AD3d 345 (2009); *Coventry First LLC v. State of Florida*, No. 1D09-5783 (2010).

SUMMARY: This case was an appeal to the Third Circuit by Coventry First LLC, a life settlement company, from a decision of the United States District Court for the Eastern District of Pennsylvania. Lincoln T. Griswold purchased an $8.4 million life insurance policy on his life that was sold after two years to Coventry First LLC. The sales price is alleged to have included undisclosed commissions to the broker which Coventry is said to have paid in exchange for the broker's agreement not to offer the policy to other potential buyers. Griswold sued for damages. Coventry moved to dismiss the case for lack of standing or, in the alternative, to compel arbitration.

FACTS: In January of 2006, Griswold purchased an $8.4 million life insurance policy on his life. He then created an Irrevocable Life Insurance Trust ("ILIT") that named Wells Fargo Bank as trustee. Griswold also created the Griswold LLP, which was named as the sole beneficiary of the ILIT. Griswold was a 99% owner of the partnership and his son was a 1% owner. Premiums on the policy were made through a premium financing arrangement with "Bedrock Financing." Terms of the financing arrangement are not discussed in the court's opinion. The life insurance policy was then transferred to the ILIT.

That same month, the ILIT appointed Mid-Atlantic Financial as its exclusive agent to "identify, select and appoint" a life-settlement broker who would help the ILIT sell the life insurance policy. Mid-Atlantic selected Kevin McGarrey, the agent who had previously assisted Griswold in procuring the policy, to be the settlement broker. It was agreed that McGarrey would be paid $84,000 for acting as settlement broker. In March

of 2008, two years and two months after the policy was issued, McGarrey contacted Coventry and let them know that the policy was available for purchase.

Griswold alleged that Coventry "rigged the bidding process" by having McGarrey sign a written producer agreement promising to refrain from seeking any further bids and to report any competing offers and their terms to Coventry. In exchange for McGarrey's agreement, Coventry allegedly "allowed McGarrey to 'self-determine' his commission." Griswold alleged that McGarrey agreed not to pursue other offers for the policy in exchange for a commission of $145,000, which was $61,000 *more* than the commission he agreed to when he was appointed as agent. Coventry offered $1,675,000 for the policy, which amounted to $1,530,000 for the policy and $145,000 for McGarrey's commission. The ILIT sold its policy to Coventry without having received a competing offer.

The written purchase agreement contained the following arbitration clause:

> All disputes and controversies of every kind and nature between the Parties arising out of or in connection with this Agreement including, but not limited to, its existence, construction, validity, interpretation or meaning, performance, non-performance, enforcement, operation, breach, continuance, or termination thereof shall be submitted and settled by arbitration in accordance with the rules of the American Arbitration Association.

Once Coventry acquired the policy, the ILIT dissolved and the trustee, Wells Fargo, transferred the proceeds to the Griswold LLP (the sole beneficiary). Later that year, the partners of the Griswold LLP filed a "Cancelation of Limited Liability Partnership Election" in Georgia state court in accordance with the partnership agreement.

In September of 2010, after learning of Coventry's alleged fraud, Griswold brought this action (in his individual capacity and as the former majority partner of Griswold LLP) and on behalf of a class of persons who had sold their life insurance policies to Coventry. Griswold alleged that Coventry's collusion with McGarrey to conceal his self-determined commissions and to rig the bidding process constituted common law fraud, fraudulent concealment, conversion, aiding and abetting the breach of a fiduciary duty, unjust enrichment, and also violated state life settlement acts, the Sherman Anti-Trust Act, and the Racketeer Influenced Corrupt Organizations Act ("RICO").

Because the class action sought over $5 million in damages, Coventry removed the case to the United States District Court for Eastern Pennsylvania. In recognition that Griswold had not signed the purchase agreement, Coventry filed a motion to dismiss for lack of standing or, in the alternative, to compel arbitration pursuant to the purchase agreement.

The District Court denied Coventry's motion to dismiss because Griswold had a proprietary interest as a partner of the Griswold LLP. The court also dismissed Coventry's alternative motion to compel arbitration—holding that the arbitration clause was "unenforceable as to Plaintiffs who are non-signatories."

The Court of Appeals examined the District Court's decision not to compel arbitration. It noted that the standard for compelling arbitration is the same as the standard for granting summary judgment—meaning that the opposing party is given the benefit of all reasonable doubts and inferences that may arise. The Court of Appeals ruled that because Griswold was not a party to the purchase agreement that contained the arbitration clause, the court could not mandate arbitration.

In refusing to mandate arbitration, the Court of Appeals took a lengthy look at the doctrine of "equitable estoppel" which had been raised by Coventry. This doctrine can require that a non-signatory party be bound by an arbitration clause when that non-signatory party has "reaped the benefits of a contract containing an arbitration clause." Specifically, the court noted that equitable estoppel may apply under one of two theories. First, "courts have held non-signatories to an arbitration clause when the non-signatory knowingly exploits the agreement containing the arbitration clause despite having never signed the agreement." Second, "courts have bound a signatory to arbitrate with a non-signatory at the non-signatory's insistence because of 'the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intimately founded in and intertwined with the underlying contract obligations."

In this case, the court refused to find for Coventry under the first equitable estoppel theory because Griswold did not allege breach of the purchase agreement. Rather, he alleges fraud antecedent to the purchase agreement due to its claim that McGarrey colluded with Coventry. The second theory was found to be inapplicable because the case involves a signatory (Coventry) attempting to bind a non-signatory (Griswold) to the arbitration clause, rather than the inverse.

The decision did not discuss the merits of the alleged violations of RICO or the Sherman Anti-Trust Act.

RELEVANCE. This case has general relevance to the law regarding arbitration clauses. Arbitration clauses are a popular way in which parties seek to limit their litigation risk. Arbitration proceedings are generally considered a more predictable and less costly means of settling disputes than litigation. For this reason, they have become very common in all types of contracts both inside and outside of the financial services sector.

More specifically, this case is likely significant for Coventry and, possibly, the life settlement industry in the entirety. Assuming (the opinion does not say so) that this arbitration provision was regularly contained in Coventry's settlement purchase agreements, it could open the door for additional insureds (similarly situated as Griswold) to bring litigation against Coventry.

Griswold is not the first to accuse Coventry of bid-rigging and non-disclosure of commissions. Similar conduct was charged in a much publicized 2006 action brought by former New York Attorney General Eliot Spitzer. After the Spitzer action, the State of Florida brought a similar suit which was settled. Griswold's success in avoiding arbitration and, seemingly, gaining access to

court, could encourage others to bring similar actions against Coventry.

The decision also appears relevant in that the class action question was merely disposed of based on procedure. The decision did not rule out the possibility of a future case based on similar allegations attaining class action status.

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