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5th Circuit: Request to arbitrate dispute over Enron insurance proceeds denied

By Bentley J. Tolk

Enron's fiduciary liability insurance policies do not require arbitration of a dispute solely among Jeffrey Skilling, the Estate of Kenneth Lay and other insureds over distribution of $85 million in insurance proceeds, the **5th U.S. Circuit Court of Appeals** ruled.

Lay and Skilling argued that Enron's fiduciary and employee benefit liability insurance policies required arbitration of a dispute among various insureds (but not including the insurers themselves) regarding the proper allocation of insurance proceeds that were tendered into court and conceded to be due by the insurers. In affirming a district court ruling denying Lay and Skilling's motion to compel arbitration, the appellate court held the dispute was only "among the insureds over the proper allocation" of insurance funds, and since the arbitration clause in the insurance policies "does not encompass such a dispute," arbitration was not required.

In 2001, certain former Enron employees brought an Employee Retirement Income Security Act class-action lawsuit against Enron and its board of directors (including Lay and Skilling), alleging breach of fiduciary duties in connection with Enron's collapse. Lay and Skilling, along with other insureds under Enron's fiduciary liability policy, submitted claims under that policy for coverage of their defense costs. After some of the defendants (not including Lay, Skilling or Enron) reached a proposed settlement requiring the insurers to pay the entire $85 million in policy limits to the plaintiffs, the insurers were granted permission to deposit the $85 million with the district court, which would determine the proper distribution of those proceeds.

Claiming entitlement to some of the policy proceeds for their defense costs and coverage of a potential judgment or settlement against them, Lay and Skilling asked the district court to require arbitration of the dispute over distribution of the $85 million. The district court denied Lay and Skilling's request, stating that the language of the insurance policies did not require arbitration of a dispute among insureds over policy proceeds.

On appeal, Lay and Skilling contended the language of the insurance policies' arbitration clause needed to be construed broadly to include disputes solely between insureds, because the clause states that it applies to "[a]ny controversy or dispute arising out of or relating to" the policies. In considering this argument, the appellate court noted that the policies' arbitration clause needed to be read in the context of other provisions in the policies and the arbitration clause. The appellate court ruled that these provisions are only logical in the case of a dispute between the insurers and one or more of the insureds, and not to a dispute solely between insureds.

While the appellate court ruled that the dispute over allocation of the $85 million in insurance proceeds arose out of the insurance policies at issue, the court also ruled that the dispute was "only among various insureds." In other words, by tendering the $85 million to the district court, the insurers had "effectively removed themselves from any dispute by conceding coverage up to the policy limits and remaining neutral as to the proper distribution of the funds." All that remained was a dispute among Lay, Skilling and certain other insureds over the proper allocation of policy proceeds.

Thus, the appellate court held that because the only present dispute was among insureds regarding the appropriate distribution of the $85 million in tendered insurance funds, and because the arbitration clause did not encompass such a dispute, Lay and Skilling's request to require arbitration had been properly denied.

Tittle v. Enron Corp., 5th Cir., No. 05-20380 (Sept. 1, 2006).

Professional Pointer: Although this case addresses an arbitration clause in an insurance policy, it highlights the challenges that arbitration clauses can pose in general. An arbitration clause should unambiguously set forth the specific types of disputes it is intended to govern. Further, in light of the types of arguments raised in this case, employers should consider whether an arbitration clause will actually make dispute resolution more expensive and less effective.

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Related resources:

Before Banking on Mandatory Arbitration, Consider the Interest, *Legal Report*, March-April 2002.

Ethics Toolkit.
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