Circuit Court Judge Richard A. Posner Weighs in on Federal Policy in Favor of Arbitration

Introduction

Ronald v. Sprint Spectrum L.P., No. 14-3478, slip op. (7th Cir. May 11, 2015) (Posner, J.)

Ronald v. Sprint Spectrum L.P., No. 14-3478, slip op. (7th Cir. May 11, 2015) arose out of a class action lawsuit brought in the U.S. District Court for the Northern District of Illinois by a putative class of mobile phone customers?represented by Mr. and Ms. Andermann (the "Andermanns")?against Sprint, which sought damages for alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227.

Sprint moved to compel arbitration, but the district court denied its motion. Sprint appealed to the U.S. Court of Appeals for the Seventh Circuit as authorized by 9 U.S.C. § 16(a)(1)(B). The Seventh Circuit, in an opinion written by Circuit Judge Richard A. Posner, and joined in by Circuit Judge Diane S. Sykes and Chief District Court Judge Philip P. Simon of the Northern District of Indiana (sitting by designation), reversed and remanded with instructions to compel arbitration.

The Sprint Spectrum facts; the legal rules and principles that determined the outcome; and the outcome itself were not controversial. Had the court limited its task to applying the material facts to the applicable law, then the case likely would not have warranted a reported opinion.

But occasionally appellate judges, particularly ones as prominent, skilled and engaged as Judge Posner, will use a case like Sprint to make a point in passing that might influence other judges in the future and perhaps provide valuable information to attorneys and their clients. Judge Posner, with the apparent blessing of the other two judges, used the case to make a couple of points, one purely legal, the other bearing on both the law and, and at least to some extent, on matters pertinent to court administration.

The purely legal issue concerned the proper scope and practical significance of the federal policy in favor of arbitration, which a majority of the U.S. Supreme Court, Judge Posner and some other judges apparently believe lawyers and judges may misunderstand or misinterpret. In Sprint Spectrum Judge Posner, in dictum, raises the topic and shares some important insights about it.

The hybrid legal and judicial administration point concerned his view of the merits of the underlying Telephone Consumer Protection Act dispute. While the Court acknowledged that it was for the arbitrators to decide the merits, it nevertheless explained why it believed the claim would likely fail, whether in arbitration or in court.

Sprint Spectrum: Background

In 2000 the Andermanns entered into a two-year renewable mobile-phone service contract with U.S. Cellular, which was renewed continuously, and for the last time in 2012. The contract contained an arbitration agreement requiring arbitration of "any controversy or claim arising out of or relating to this agreement." The parties agreed that the obligation to arbitrate would "survive[] the termination of [the] [mobile phone] service agreement[,]" and that "U.S. Cellular may assign this Agreement without notice to" the customer.

In 2013 U.S. Cellular sold the contract to Sprint, and notified the Andermanns of the sale in a letter sent months later. The letter informed the Andermanns that their service would be terminated effective January 2014 because of a compatibility problem between the Andermann's mobile phone and the Sprint network. The letter explained that the Andermanns would have to obtain a new cell phone or find a new carrier, but "that Sprint was offering attractive substitutes for the terminated service," and, if interested, the customer should contact Sprint by telephone. See slip op. at 2.

In December Sprint phoned the Andermanns to remind them that their service was about to expire, and added that Sprint had "a great set of offers and devices available to fit [their] needs.'" Slip op. at 3. Sprint called each of three members of the Andermann family twice (a total of six calls), but by the time the calls were made, the Andermanns had obtained cell phone service from another carrier.

The Andermanns did not answer any of the six calls, except by commencing a class action lawsuit against Sprint, which contended that the unsolicited calls violated the Telephone Consumer Protection Act. Sprint moved to compel arbitration, contending that the dispute arose out of and related to the contract renewed in 2012. Even though that contract was between U.S. Cellular and the Andermanns, U.S. Cellular had, as permitted by the contract, assigned its rights to Sprint, who had now stepped into U.S. Cellular's shoes under the contract.

The Seventh Circuit's Decision

The district court denied Sprint's motion because its contract with the Andermanns had terminated prior to the allegedly offending telephone calls at issue in the lawsuit. The district court reasoned that the dispute did not arise out of or relate to the terminated agreement.

But the Court said "[a]ctually, there's an intimate relation" between the dispute and the contract. "The contract," said the Court, authorized an assignment, and because of the incompatibility of the assignor's (U.S. Cellular's) cellphones and the assignee's (Sprint's) mobile phone network, Sprint had had to terminate the U.S. Cellular customers, such as the Andermanns, whom it had acquired by virtue of the assignment. . . ." Slip op. 4. Sprint made the calls, and "offer[red] substitute service[]" "to prevent the loss of. . . customers because of the incompatibility. . . ." Slip op. at 4.

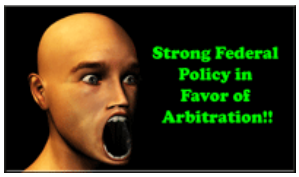
The Andermanns attempted to support their argument by offering an "untenable interpretation" of Smith v. Steinkamp, 318 F.3d 775, 777 (7th Cir. 2003). See Slip op. at 4. Steinkamp explained "'absurd results' would ensue if the arising from and relating to provisions contained in a payday loan agreement defining what disputes would have to arbitrated rather than litigated, were cut free from the loan and applied to a subsequent payday loan agreement that did not contain those provisions." Slip op. at 4-5 (quoting *Steinkamp*, 318 F.3d at 777).

The Andermanns argued that Steinkamp suggested that the same type of "absurd results" would ensue under the facts of this case. But *Steinkamp*, explained the Court, "is not this case[,]" which concerns a single contract containing an arbitration agreement, not two successive contracts, one with an arbitration agreement and one without an arbitration agreement. See slip op. at 5.

While the Andermanns received a mild (and perhaps well-deserved) rebuke, Sprint's argument prompted the verbal version of a roll of the eyes coupled with a quiet sigh?not so much because there was anything really wrong with the argument, but presumably because it overstated the importance of the federal policy in favor of arbitration. But that gave Judge Posner an opportunity to make a somewhat subtle, but important point.

The Court said "Sprint gilds the lily, however, in telling us that arbitration is a darling of federal policy, that there is a presumption in favor of it, that ambiguities in an arbitration clause should be resolved in favor of arbitration, and on and on in this vein." Slip op. at 5. "It's true," said the Court, "that such language (minus the "darling") appears in numerous cases." Slip op. at 5 (citations omitted): "But the purpose of that language is to make clear, as had seemed necessary because of judges' historical hostility to arbitration, that arbitration was no longer to be disfavored ? especially in labor cases, see, e.g., Granite Rock Co. v. International Brotherhood of Teamsters, 561 U.S. 287, 298--99 (2010), where arbitration is now thought a superior method of dispute resolution to litigation." Slip op. at 5.

Noting that "[t]he Federal Arbitration Act is inapplicable to labor disputes, . . . and merely makes clauses providing for the arbitration of disputes arising out of transactions involving interstate or foreign commerce. . . enforceable in federal and state courts[,]" the Court said it was "not clear that arbitration, which can be expensive because of the high fees charged by some arbitrators and which fails to create precedents to guide the resolution of future disputes, should [in commercial cases] be preferred to litigation." Slip op. at 5-6.



Under the Federal Arbitration Act, "[t]he issue is. . one of interpreting the [arbitration] clause to see whether it covers the dispute[,]. . [a]nd it's not clear why, so far as eliciting the meaning of a given arbitration clause is concerned, such a clause should be distinguished from any other clause in a contract." "The cases," explained the Court, "say that arbitration clauses are to be 'generously construed,' e.g., Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 625-26 (1985), but we take that to mean that judges should not allow any preference they might have for judicial resolution of a legal dispute to override the parties' dispute resolution preferences as embodied in an arbitration clause." Slip op. at 5-6.

The Court did not purport to suggest that its comments?as insightful as we think they are?were anything but dictum. "[T]his is an aside[,]" the Court said, because "with or without generous interpretation, Sprint is entitled to arbitrate." Slip op. at 6.

But the Court nevertheless embarked on what it also presumably considered to be an "aside," this time offering its thoughts concerning the merits of the suit, which it apparently thought were questionable. "It may seem odd," explained the Court, "that [Sprint] wants arbitration, or at least wants it badly enough to appeal the denial of its motion asking the district court to order arbitration, since it appears to have a very strong substantive defense to the suit ? a defense at least as likely to persuade a judge as an arbitrator." Slip op. at 6. Sprint presumably "want[ed] arbitration because the arbitration clause disallows class action arbitration[,] [and] [i]f the Andermanns' claims have to be arbitrated all by themselves, they probably won't be brought at all, because the Andermanns if they prevail will be entitled only to modest statutory damages." Slip op. at 6.

The Court observed that "in whatever form contested, the claims are unlikely to prevail." Slip op. at 6. The Andermann's argument that the calls were "unsolicited advertisements overlooks the fact that as U.S. Cellular's successor in providing mobile phone service to the Andermanns, Sprint had a relation to them that preexisted the calls." Slip op. at 6. In the circumstances, "it was natural for Sprint to assume that [the Andermanns] wanted to continue to have a mobile communications service and would therefore appreciate knowing that Sprint offered a substitute service. . . ." Slip op. at 6-7. Even if the Andermanns were not interested in alternative mobile-phone-service and mobile-phone-product options, it would be reasonable to "expect that. . . some other recipients of Sprint calls would want to know about Sprint's substitutes for U.S. Cellular service because they too would soon need to find a replacement for that service." Slip op. at 7.

"What[,]" asked the Court rhetorically, "would Sprint have done if forbidden to call the customers whom it had inherited from U.S. Cellular and now must terminate because of technical incompatibility? Post on highway billboards or subway advertisements the text of its calls to the customers it had acquired from U.S. Cellular?" Slip op. at 7.

The Court thought it "[m]ore likely" that the case was governed by "the exception in the Telephone Consumer Protection Act for telephone solicitations made 'to any person with whom the caller has an established business relationship." Slip op. at 7. (quoting 47 U.S.C. § 227(a)(4)(B) and citing CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 726-27 (7th Cir. 2011)). Given that its transaction with U.S. Cellular "established a business relationship" with the Andermanns "that Sprint would have disrupted had it told" them "only that that their service was going to be cut off, without adding its offer to substitute an equivalent service. So truncated a communication would gratuitously have deprived the Andermanns of what might have been an attractive opportunity for them . . . ." Slip op. at 7.

Having exposed what might well be a significant flaw in the Andermanns' claim, the Court backtracked a bit, explaining "[w]e don't want to step on the arbitrator's toes; the evidence presented and arguments made to him or her may cast the substantive issue in a different light. All we hold, therefore, is that Sprint's motion to order arbitration should have been granted." Slip op. at 7-8.

In addition to contending that the dispute did not fall within the scope of the arbitration agreement, the Andermanns argued that "the acual assignee was Sprint Solutions, Inc., rather than the defendant in this suit, Sprint Spectrum L.P.," and because Sprint Spectrum, an affliliate of Sprint Solutions, was not the assignee in the U.S. Cellular - Sprint transaction, it therefore could not enforce the arbitration agreement. The Court said that "argument has no merit[]" because, "for reasons the Andermanns have not shown to have any connection to the. . . dispute, Sprint Solutions was designated to be Sprint Spectrum's agent to hold the contracts assigned to Sprint by U.S. Cellular, including therefore the Andermanns' contract." Slip op. at 3.

A Few Parting Thoughts. . . .

Sprint Spectrum isn't likely to go down in history as a particularly significant Federal Arbitration Act decision, let alone a landmark one, but it, in combination with other bits of dictum appearing in other seemingly run-of-the-mill judicial opinions, might help to facilitate a paradigm shift in Federal Arbitration Act jurisprudence that has been in the works for some time, and which, on balance, should help promote arbitration as an alternative to judicial dispute resolution. The shift concerns the meaning and scope of the

federal policy in favor of arbitration. It suggests at least some degree of concern about the very hands-off attitude courts tend to take in Federal Arbitration Act enforcement proceedings (often in the name of that federal policy), and whether some courts may, at least to some degree, be (intentionally or unintentionally) marginalizing the important role they are supposed to play in ensuring that arbitration is a matter of consent, not coercion.

Sprint Spectrum is not the first time Judge Posner has suggested that the federal policy in favor of arbitration does not (or at least should not) reflect a federal policy decision that arbitration is a better way of resolving disputes than litigation. In *Roughneck Concrete Drilling & Sawing Co. v. Plumbers' Pension Fund, Local 130*, 640 F.3d 761, 765 (7th Cir. 2011), Judge Posner observed that "[t]he difference in [Illinois'] limitations periods [for enforcing as opposed to vacating an award] is an example of the law's bias in favor of arbitration, a bias that seems largely motivated by a desire to limit judicial workloads. Why otherwise prefer nonjudicial to judicial dispute-resolution processes?" Id. (citing and parenthetically quoting Gotham Holdings, LP v. Health Grades, Inc.], 580 F.3d 664, 666 (7th Cir. 2009) (Easterbrook, J.)). A few years before that Judge Posner's colleague, then Chief Circuit Judge Frank H. Easterbrook, in Gotham Holdings (cited and quoted in Roughneck Concrete), said "the Federal Arbitration Act eliminates hostility to private dispute resolution; it does not create a preference for that process . . . . People do not `violate' or `undermine' any federal policy if they litigate rather than arbitrate. Federal policy favors arbitration only in the sense that it favors contracts in general." 580 F.3d at 666.

The federal policy in favor of arbitration has, at least arguably, been interpreted to apply more expansively than the U.S. Supreme Court likely intended. As a result, even though the U.S. Supreme Court has said many times that arbitration is supposed to be a "matter of contract," or one of "consent not coercion," an overly expansive interpretation of the policy has, at least in some cases, arguably resulted in arbitration agreements being placed on a considerably more advantaged footing than ordinary contracts. As we read it, Judge Posner's comment in Roughneck raises the question whether this might have more to do with "limit[ing] judicial workloads" than a desire to enforce contracts as written and according to their terms.

The Supreme Court has explained?most recently and clearly in Granite Rock?that the federal policy in favor of arbitration, and the presumption in favor of arbitration that implements it, operate only as a way of resolving ambiguities in the scope provision of a concededly valid and existing arbitration agreement. See Granite Rock Co. v. International Brotherhood of Teamsters, 130 S.Ct. 2847, 2859 (2010) (Thomas, J.). In Granite Rock the Court explained that: (a) the "'policy' [in favor of arbitration] is merely an acknowledgement of the FAA's commitment to overrule" judicial hostility to arbitration and put arbitration agreements on "the same footing as other contracts"; and (b) the Court "never held" that the "policy overrides" the consent, not coercion principle, or "that courts may use policy considerations as a substitute for party agreement." 130 S. Ct. at 2859. "We have applied[,]" said the Court, "the presumption. . . in FAA and in labor cases[] only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute. . . ." Id.

While all courts give at least lip service to the Supreme Court's admonitions, some decisions?in contexts outside the interpretation of arbitration agreement scope provisions?arguably interpret or apply arbitration agreements as if they were "über-contracts" of sorts. Likewise, lawyers arguing for orders compelling arbitration, staying litigation or confirming arbitration awards quite often (intentionally or unintentionally) overstate the importance of the federal policy in favor of arbitration or advance it in contexts in which the Supreme Court has said it does not apply.

Judge Posner's in-passing comments about the policy in favor of arbitration seem to have been made in response to concerns like these, particularly, we suspect the tendency of attorneys to rely too heavily on that policy. We hope those comments do not fall on deaf ears.

As to his comments about the merits, they seem directed generally at litigants who interfere with the fair, effective and efficient administration of justice by asserting claims of questionable merit. This litigant had, in a sense, two strikes against it, because its claim on the merits was pretty questionable, and it should not have been asserted in court in the first instance. The claim on the merits and the opposition to arbitration were not frivolous (and thus deserving of sanctions), but they came close to being so. In the circumstances, their assertion in the federal courts needlessly strained judicial resources, particularly where, as here, the plaintiffs should have simply asserted them in arbitration.

As the Court acknowledged, the claims were likely brought in a class action suit because that may have been the only economically efficient way to assert those claims because of their small, individual dollar value. But that's a consequence of the Supreme Court's Federal Arbitration Act jurisprudence, and the nature of arbitration versus litigation.

Some might argue that the Seventh Circuit should have simply decided the case on the facts and law without the commentary. They might argue, for example, that Judge Posner and his colleagues on the panel are guilty of "judicial activism" or some other deadly judicial sin.

But that argument would miss the point. Neither Judge Posner nor any of the other judges on the Panel are guilty of anything of the sort. Judicial activism, in its derogatory sense, ordinarily describes situations where judges do not follow settled law in circumstances where there are no very compelling reasons for not following it, and substitute in its place their own notions of what the law should be, notions that are typically viewed as motivated principally by political considerations.

The judges here simply decided an uncontroversial case on the facts and law, including U.S. Supreme Court and Seventh Circuit Court of Appeals precedent. And in any event, even if Judge Posner's comments are viewed as something other than an aside, nothing about them is inconsistent with arbitration law or the Telephone Consumer Protection Act.

Judge Posner's side commentaries in this and other cases, are (like the rest of his work) clearly written and sometimes feature a bit of dry humor that can be refreshing, given the subject matter. He also has a remarkable of way of explaining in frank and readily understandable terms points of law and legal policy that are sometimes more obscurely referenced or are simply offered without much in the way of helpful explanation.

The common law develops incrementally through the process of judges deciding cases, and sometimes yesterday's dictum becomes tomorrow's holding, so to speak. And dicta, particularly that authored by highly-respected and accomplished jurists like Judge Posner, can be used, where appropriate, as persuasive authority by lawyers and judges to argue for, or justify, clarifying or extending the law.