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Is a broad arbitration clause still effective after Granite Rock?

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Bringing up arbitration at a cocktail party is more likely to provoke yawns than excitement, even when one is in the company of fellow members of the bar. But as most every litigator is aware, arbitration issues have become nearly ubiquitous in litigating everything from commercial breach-of-contract disputes to employment-discrimination claims. In many cases, whether claims are subject to an arbitration agreement may be a "make or break" issue – one that can determine whether a lawsuit is worth bringing, whether or when a defendant should settle a case, or whether a particular defendant or cause of action should be included in a complaint.

The scope of an arbitration clause – *i.e.,* what claims fall within the language of the provision – frequently is the lynchpin issue in determining whether a party's claims are subject to mandatory arbitration. Those who undisputedly entered into an agreement to arbitrate have little hope of resisting arbitration unless they can argue successfully that their claims fall outside the scope of the particular arbitration agreement. Traditionally, however, those arguing that their claims are outside the scope of a valid and enforceable arbitration clause have faced an uphill battle with a limited likelihood of success. Courts have consistently held that the Federal Arbitration Act (or an equivalent state law, if the FAA does not apply[1]) manifests a presumption in favor of arbitration and that this presumption requires the scope of an arbitration clause to be broadly construed.[2] A recent United States Supreme Court case, *Granite Rock v. International Brotherhood of Teamsters*,[3] may at first blush call into question the continuing strength of this pro-arbitration presumption. A closer look at the case and a subsequent federal court of appeals opinion, however, reveals that the presumption in favor of arbitration is still intact.

Granite Rock v. International Brotherhood of Teamsters

Granite Rock is one of several cases decided by the United States Supreme Court in the last year that has the potential to affect practitioners facing any number of arbitration-related issues. In *Granite Rock*, which was decided in June 2010, the Court endeavored to clarify the proper framework for determining when particular disputes are subject to arbitration. While essentially synthesizing prior Supreme Court precedent, the *Granite Rock* Court did stake out some new ground by elucidating several broad principles concerning the interpretation and enforceability of arbitration provisions. First, the Court made it clear that the presumption in favor of arbitration has no applicability to the question of whether a contract containing an arbitration clause was ever formed in the first place. Because arbitration is "strictly a matter of consent," a court is required to address a party's argument that no agreement containing an arbitration provision was ever reached. Subsequent federal appellate decisions have confirmed this interpretation of *Granite Rock*.[4] Thus, *Granite Rock* establishes that the resolution of disputed questions as to whether such an agreement was reached is not subject to determination by an arbitrator, and instead is a matter to be determined by a court.

However, *Granite Rock* maintains that the presumption in favor of arbitration remains applicable to

determinations about *the scope* of a validly formed arbitration clause. To be sure, the Court appeared to downplay somewhat the strength and importance of the pro-arbitration presumption. It stated that it was "wrong to suggest that the presumption of arbitrability we sometimes apply takes courts outside our settled framework for deciding arbitrability."[5] It stated that the Court had never held that the pro-arbitration policy overrides the principle that arbitration is strictly a matter of consent, and that courts may not "use policy considerations as a substitute for party agreement."[6] Additionally, the Court noted that any pro-arbitration presumption is simply derived from the conclusion that a broadly worded arbitration clause reflects that the parties intended to arbitrate grievances between them.

Nonetheless, the Court ultimately appeared to endorse the continuing viability of this presumption whenever it is determined that the parties have agreed to an arbitration clause and that the clause is ambiguous as to whether it covers a particular dispute: "We have applied the presumption favoring arbitration, 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."[7]

But the Court's interpretation of the particular arbitration provision at issue – which required arbitration of any claims "arising under" the parties' agreement – does somewhat call into question the way the pro-arbitration presumption has been applied by lower federal courts. The Supreme Court held that the parties' dispute about *when* the agreement containing the arbitration clause was ratified was not itself arbitrable because it could not be said that a dispute about when an agreement came into existence "arises under" that agreement.[8] The Court mentioned that the "arising under" language was "relatively narrow," and it rejected the Ninth Circuit's reasoning that the clause was "susceptible of an interpretation" which would require the dispute to be arbitrated.[9]

Pre-Granite Rock law on the pro-arbitration presumption

Thus, in the wake of *Granite Rock*, one might reasonably ask whether the Court's decision will alter the long line of cases holding that a broad arbitration clause leads to a presumption that the parties agreed to arbitrate any disputes not clearly excluded from the terms of the agreement.

One such typical pre-*Granite Rock* case is *Kruse v. AFLAC International*, where the United States District Court for the Eastern District of Kentucky compelled the plaintiff, Kruse, to arbitrate her claims against AFLAC and other defendants.[10] (In full disclosure, one of the authors was counsel to AFLAC in that case.) Kruse – a former regional sales coordinator for AFLAC – alleged breach of contract, violations of state and federal statutes, and a litany of common law claims, including promissory estoppel, conversion, fraud, defamation, and tortious interference. Kruse argued, among other things, that her claims other than the breach of contract claim fell outside of the scope of the arbitration agreement she had signed. That agreement required Kruse and AFLAC to arbitrate "[a]ny dispute arising under this Agreement to the maximum extent allowed by applicable law." The court disagreed with Kruse and held that her claims were within the scope of this agreement. "The test to determine if a claim falls within the scope of an arbitration clause is to determine if the factual allegations 'touch matters' governed by the parties' Agreement, not what claims the Agreement specifically mentions as plaintiff contends." The court relied in part on prior Sixth Circuit cases holding that, where the parties agreed to arbitrate disputes "arising out of" the parties' contract, any claim between them should be arbitrated unless there is "clear intent to exclude a particular claim."[11]

Because all of Kruse's claims touched on her business relationship with AFLAC, and the agreement did not manifest any intent to exclude any of her claims from arbitration, the court found all of Kruse's claims to be arbitrable. The court specifically rejected Kruse's argument that claims were not arbitrable unless their subject matter was specifically made arbitrable by the contract. Although Kruse argued that the clause did not "govern disputes beyond violation of specific terms of the Agreement," the district court did not agree. Rather, it found that all of Kruse's claims were covered by the arbitration clause because the factual

allegations supporting the claims pertained to Kruse's contract with AFLAC in some way.

A post-Granite Rock decision

A review of a recent Sixth Circuit opinion suggests that, even after *Granite Rock*, decisions like *Kruse* will continue to be the norm whenever it is clear that the parties agreed to a broad arbitration provision. This opinion suggests that the judiciary does not believe *Granite Rock* altered the general rule that a broad arbitration provision is presumed to encompass any substantive disputes between the parties that are not expressly excluded from arbitration by their agreement.

In *Teamsters Local Union No. 89 v. Kroger*, 617 F.3d 889 (6th Cir. 2010), a case decided two months after *Granite Rock*, the Sixth Circuit reiterated its prior holdings to the effect that "where the agreement contains an arbitration clause, the court should apply a presumption of arbitrability, resolve any doubts in favor of arbitration, and should not deny an order to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[12] The Sixth Circuit panel in *Kroger* stated that the presumption in favor of arbitration is "particularly applicable" in cases involving broad arbitration clauses and that in such a case, "only an express provision excluding a particular grievance from arbitration or 'the most forceful evidence of a purpose to exclude the claim from arbitration'" can prevent a dispute from being arbitrated.[13] The court found that the arbitration provision before it – which required arbitration of "any grievance[,] dispute[,] or complaint over the interpretation or application of the contents of this Agreement" – was the type of broad arbitration clause that would trigger such a presumption. In so doing, the court cited to prior cases holding that agreements requiring arbitration of claims "arising under" and "related to" an agreement were broad arbitration agreements. It therefore rejected Kroger's argument that arbitration was inappropriate because the subcontracting dispute at issue was outside of the scope of the parties' arbitration clause. The court held that the parties' arbitration agreement was "susceptible to an interpretation" that would provide for arbitration of the dispute, the presumption in favor of arbitration controlled.[14]

The *Kroger* court did not reference or cite to *Granite Rock*, and it thus appeared to believe that *Granite Rock* did not require the Sixth Circuit to revisit its general rules that a broad arbitration clause triggers a presumption of arbitrability and that when parties have agreed to such a provision, a dispute between them is arbitrable absent clear evidence that the parties intended the particular dispute to be non-arbitrable. As described above, this "susceptible to an interpretation" standard was at least obliquely called into question by *Granite Rock*, but the Sixth Circuit in *Kroger* did not appear to believe that *Granite Rock* would require this standard to be revisited. Additionally, the Sixth Circuit cited favorably to prior holdings that "arising under" language was broad – even though the *Granite Rock* Court termed such language "relatively narrow."

A federal district court in Missouri recently reached a similar result while citing to *Granite Rock.* In *Utility Workers Union v. Missouri-American Water Co.*,[15] the district court upheld an arbitrator's determination that the parties' broadly phrased agreement to arbitrate encompassed a dispute over wage amount. The court observed that *Granite Rock* "clarified the framework regarding the application of 'the federal policy favoring arbitration.'"[16] Nevertheless, the Court favorably quoted prior decisions for the proposition that a broad arbitration clause triggers a presumption that a dispute between the parties is arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[17] Like the Sixth Circuit in *Kroger*, the district court did not appear to believe that *Granite Rock* altered the application of the presumption in favor of arbitrability in any significant way.

Ramifications

What does this mean for the interpretation of the scope of arbitration provisions after *Granite Rock*? In *Granite Rock*, the Supreme Court appeared expressly to hold that a presumption in favor of arbitration applies only when "a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand."[18] The *Granite Ro*ck decision emphasized that the Supreme Court "has never held that the presumption [in favor of arbitration] overrides the principle that a court may submit to

arbitration 'only those disputes . . . the parties have agreed to submit . . . ."[19] *Kroger* provides a clear indication that courts do not appear to believe that *Granite Rock*'s clarification of the law requires alteration of the rule that certain broadly phrased arbitration provisions trigger a presumption in favor of arbitrability.

Thus, provisions requiring arbitration of any dispute "arising out of" or "relating to" a contract that governs the relationship between parties will likely generally continue to be construed to encompass most any claim between the parties that "touches on" matters in the contract. Even though a party may be compelled to arbitrate "only those disputes" that the party has agreed to arbitrate, this does not mean that the arbitration agreement needs to enumerate particular types of disputes to make such disputes arbitrable. The holdings in cases such as *Kruse* – where the court held that arbitration is appropriate if the factual allegations underlying a claim "touch matters" governed by the agreement – therefore appear to remain sound even in light of *Granite R*ock.

Because *Granite Rock* is little over half-a-year old, it may be that future lower court decisions will begin to read the decision more broadly. But for now, it appears that prior decisions on the scope of a broad arbitration clause remain good law.

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(1) See, e.g., KRS 417.045 et seq. (the Kentucky Uniform Arbitration Act)
(2) See, e.g., Glazer v. Lehman Bros., Inc., 394 F.3d 444, 450 (6th Cir. 2005).
(3) 130 S. Ct. 2847 (2010).
(4) See, e.g., Janiga v. Questar Capital Corp., 615 F.3d 735, 741-42 (7th Cir. 2010) (holding that Granite Rock "eliminated all doubt" about whether a court is required to decide questions of whether an agreement to arbitrate was reached in the first place).
(5) Id. at 2859.
(6) Id.
(7) Id. at 2859-60.
(8) Id. at 2862.
(9) Id.
(10) 458 F. Supp. 2d 375 (E.D. Ky. 2006).
(11) Id. at 387 (citing Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co., 706 F.2d 155, 160 (6th Cir. 1983)).
(12) Id. at 904.
(13) Id. at 905.
(14) Id. at 909-11.
(15) 2010 U.S. Dist. LEXIS 111752; 189 L.R.R.M. 2718 (E.D.Mo. Oct. 22, 2010).
(16) Id. at *34.
(17) Id. (quoting United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)).
(18) Granite Rock, 130 S. Ct. at 2858-59.
(19) Id. at 2851.