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LITIGATION

Stormy Daniels Case Raises Interesting Issues Concerning Arbitration Law

BY DARYN RUSH AND TIMOTHY C. RUSSELL
Special to the Legal

There may be no legal matter currently capturing the public's attention more than the case of Stephanie Clifford (aka Stormy Daniels) and President Donald Trump. While most of the headlines focus on the allegations regarding their relationship, the case also raises a number of interesting issues concerning arbitration law. In addition to the key threshold question of whether the court or an arbitrator should resolve issues concerning the formation, validity and enforceability of the parties' 2016 "settlement agreement"—and, more specifically, the agreement's arbitration clause—the case also raises interesting issues about the right to discovery and a summary jury trial to determine whether an agreement to arbitrate has been formed; the enforceability of an agreement to arbitrate by a person who did not sign the agreement and claims not to have known of its existence; the enforceability of the arbitration clause by an entity to which the clause apparently was not intended to apply; and the availability of ex parte relief from an arbitrator.


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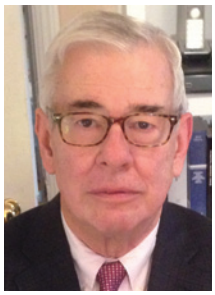
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DARYN RUSH, *partner at White and Williams, is chair of the firm's reinsurance group. He has been counseling the insurance industry for more than 20 years. Contact him at rushd@whiteandwilliams.com.*

TIMOTHY C. RUSSELL *is the principal of RussellADR, a dispute resolution firm headquartered in Bryn Mawr. He provides services as an arbitrator and mediator of complex business disputes and claims.*

Although most readers may be familiar with the basic facts of the case, a brief recap is provided here. The focus of the dispute is an agreement titled "Confidential Settlement Agreement and Mutual Release; Assignment of Copyright and Nondisparagement Agreement," commonly referred to in the press as the NDA. The NDA identifies three parties to the agreement by their pseudonyms: EC, LLC; David Dennison and Peggy Peterson. The preamble of the NDA references a separate side agreement, which provides the true identities of the parties, namely: Essential Consultants, Donald J. Trump and Stephanie Clifford, aka Stormy Daniels. EC's attorney, Michael Cohen, signed the NDA on EC's behalf on Oct. 28, 2016. Trump did not sign the NDA.

Under the NDA, EC agreed to pay Clifford $130,000 in exchange for her release of all claims against Trump, the transfer of certain information, images and text messages to Trump, and her agreement not to disclose certain confidential information. The NDA expressly provides Trump with certain remedies in the event of a breach by Clifford, including liquidated damages in the amount of $1 million for each breach, "it being understood that the liquidation damages calculation is on a per item basis." The NDA also allows Trump to seek immediate injunctive relief from a court or arbitrator on an ex parte basis without advance notice to Clifford.

Finally, the NDA contains a dispute resolution clause providing for arbitration before a sole neutral arbitrator selected by agreement of the parties or by one of two designated arbitration services. The clause applies to "any and all claims or controversies arising between DD [Trump] on the one hand, and PP [Clifford] on the other hand." EC is not mentioned, and the clause refers only to the mutual intention of DD and PP to arbitrate disputes between the two of them. The arbitration clause allows Trump to select the governing law (limited to California, Nevada or Arizona) but expressly affords the parties the right to conduct discovery in accordance with the California Rules of Civil Procedure. The clause also specifically authorizes the arbitrator to award certain forms of relief, including injunctive relief, liquidated damages, attorneys fees and costs, and punitive damages.

The absence of Trump's signature on the NDA and his public statement indicating that he was not aware of the agreement give some support to Clifford's claim that the NDA was never formed, at least as to Trump.

In January, the existence of the NDA was revealed in the news media, and, in February, Cohen made a public statement acknowledging the existence of the NDA and his role in facilitating the $130,000 payment to Clifford. A few days later, EC, without notice to Clifford, commenced an arbitration, in which Trump did not join as a party, and obtained a temporary restraining order prohibiting Clifford from violating the NDA. On March 6, Clifford filed a lawsuit in state court in California seeking declaratory relief confirming that she is not bound by the NDA. After EC removed the case to federal court and Clifford filed an amended complaint, EC moved to compel arbitration. Trump joined EC's motion to compel arbitration and "consented" to arbitration of the claims against him and EC, but he did not file his own motion or proclaim his own right to arbitrate under the NDA. Following the FBI's search of Cohen's office, home and hotel room, the defendants, on April 13, filed an ex parte application seeking to stay the litigation on the grounds that Cohen's Fifth Amendment rights could be adversely impacted if the case were to proceed. The case is pending before Judge S. James Otero, who was appointed to the bench in 2003 by President George W. Bush.

Should Otero deny the defendants' request for a stay, he will need at the outset to confront EC's motion to compel arbitration. That motion, and Clifford's opposition, raise a number of interesting issues concerning the formation, validity and enforceability of the arbitration provision in the NDA. The defendants assert that because the NDA was signed by Clifford and Cohen, on behalf of EC, and because EC issued and Clifford accepted the $130,000 payment, a valid and enforceable agreement exists. They argue that the absence of Trump's signature is irrelevant, particularly given that the preamble of the NDA identifies the parties as "EC. LLC and/or David Dennison, (DD), on the one part, and Peggy Peterson, (PP), on the other part." In addition, the defendants contend that under well-established federal law favoring arbitration, disputes concerning the validity of an agreement containing an arbitration provision must be decided by the arbitrators, not by a court, unless the other party challenges the validity of the arbitration provision itself. (See, e.g., *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 444 (2006) ("a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.").)

While Clifford does not assert that the arbitration provision standing alone is invalid, she claims that the rule set forth in *Buckeye* does not apply where a party challenges the formation and existence, rather than the validity, of the agreement. Here, Clifford argues that the NDA was never formed because it expressly requires the signatures of "all parties" and because Trump, who claims he was not aware of the NDA, could not have consented to the formation of the NDA or provided the consideration required of him under the agreement. Clifford also argues that EC has no standing to compel arbitration because the arbitration clause provides only for the arbitration of disputes between Clifford and Trump, not EC. Indeed, the arbitration clause does not reference EC at all. Interestingly, although Clifford asserted in her amended complaint that the NDA is unconscionable and void ab initio because it is illegal and violates public policy, she did

not make those arguments in her opposition to the defendants' motion to compel arbitration.

In addition to her opposition to the defendants' motion to compel arbitration, Clifford filed a motion for an expedited jury trial and limited discovery under Section 4 of the Federal Arbitration Act (FAA), which provides: "If the making of the arbitration agreement ... be in issue, the court shall proceed summarily to the trial thereof." Clifford argues that the U.S. Court of Appeals for the Ninth Circuit has interpreted this section of the FAA to apply not only to challenges to the formation of the arbitration clause itself but also to the making of the agreement containing the arbitration clause, as in *Sanford v. MemberWorks,* 483 F.3d 956, 962 (9th Cir. 2007). Because she disputes the formation of the NDA, Clifford contends that she is entitled to a jury trial to determine that dispute. Clifford also asks the court to allow limited discovery relevant to the issues concerning the formation of the NDA. Specifically, she requests, on an expedited basis, the depositions of Trump and Cohen (limited to two hours each) and permission to serve up to 10 targeted requests for production of documents. Clifford claims that discovery should proceed on an expedited basis because EC has already obtained a temporary restraining order purporting to prohibit Clifford from speaking about the NDA or her relationship with Trump.

While Clifford's argument that the threshold issue concerning formation of the NDA must be decided by the court and not the arbitrator is not without force, she may well face an uphill battle on that point. First, as the defendants emphasize, well-established federal law strongly favors arbitration, and gives courts very narrow discretion to deny arbitration motions, as in *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S.1, 24-25 (1983). The strength of federal law in favor of arbitration was no doubt a factor in EC's decision to remove the lawsuit to federal court. Second, given that Clifford signed the NDA, accepted the $130,000 payment and, for at least some period of time, apparently complied with her obligation not to disclose confidential information, she should expect her argument that the NDA was never formed to be met with a certain level of skepticism.

On the other hand, the facts of this case are very unique and may present enough doubt about the formation of the NDA that Judge Otero will decide to conduct a summary trial under Section 4 of the FAA. The absence of Trump's signature on the NDA and his public statement indicating that he was not aware of the agreement give some support to Clifford's claim that the NDA was never formed, at least as to Trump. The absence of any definitive declaration from Trump that he is a party to the agreement, or that he was even aware of it, just adds to the uncertainty. The court's interpretation of certain provisions in the NDA—including the use of "and/or" in the preamble and the various clauses cited by Clifford which purport to require the signatures of all parties—may prove to be dispositive. In addition, while Clifford does not argue that the arbitration clause is narrow and does not cover the subject matter of her lawsuit, she has disputed EC's standing to compel arbitration given that the arbitration clause only provides for the arbitration of disputes between Clifford and Trump. The defendants have not yet filed a reply brief and therefore have not directly addressed the standing issue. Their initial brief, however, asserts (without any cited authority) that the NDA "contains an agreement by EC and Clifford to arbitrate any dispute between PP [Clifford] and DD [Trump]."

(As of this writing, Cohen has filed a declaration advising the court that he will invoke the Fifth Amendment if his testimony is sought in the case due to the ongoing criminal investigation in which his records have been seized.) •