docket no. 15-8

Supreme Court of the United States

APPLIED UNDERWRITERS, INC., et al.,

Petitioners,

v.

ARROW RECYCLING SOLUTIONS, INC., et al.,

Respondents.

On Petition for a Writ of Certiorari
to the California Court of Appeals, case no. B245379
[Los Angeles County Super. Ct., case no. BC484846]

Brief in Opposition to Petition For Writ Of Certiorari

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QUESTION PRESENTED FOR REVIEW

Petitioners have not presented an issue that warrants review by the U.S. Supreme Court.

PARTIES TO THE PROCEEDING

ARROW RECYCLING SOLUTIONS, INC.
-Plaintiff/Respondent

ARROW ENVIRONMENTAL SOLUTIONS, INC.
-Plaintiff/Respondent

APPLIED UNDERWRITERS, INC.
-Defendant/Appellant/Petitioner

APPLIED UNDERWRITERS CAPTIVE RISK ASSURANCE COMPANY, INC.
-Defendant/Appellant/Petitioner

CALIFORNIA INSURANCE COMPANY
-Defendant/Appellant/Petitioner

CORPORATE DISCLOSURE STATEMENT

Pursuant to U.S. Supreme Court Rule 29.6, Respondents Arrow Recycling Solutions, Inc. and Arrow Environmental Solutions, Inc. hereby state that they were organized under California law, and now exist in active standing. They do not have any parent corporation, nor is there any publicly held company that owns 10% or more of the corporate stock of either of them.

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CITATIONS OF THE UNOFFICIAL REPORTS

The April 1, 2015 Order of the California Supreme Court in case no. S224449, denying Petitioners' petition for review, is not certified for publication, and has not been reported. The text of the April 1, 2015 Order is accurately set forth in Appendix A of the Petition, and is unreported.

The January 8, 2015 Opinion of the California Court of Appeal for the Second District (Division Three) in case no. B245379, affirming the trial court's denial of arbitration and remanding for further proceedings on the merits, is not certified for publication. As such, it may not be "cited or relied on by a court or a party in any other action." See Rule 8.1115(a) of the California Rules of Court. The text of the January 8, 2015 Opinion is accurately set forth in Appendix B of the Petition. It is also available on Westlaw, and is red-flagged as an unpublished decision.

The Los Angeles County Superior Court's October 30, 2012 Order in case no. BC484846, denying Petitioners' motion to compel arbitration, is not certified for publication, and has not been reported. The text of the October 30, 2012 Order is accurately set forth in Appendix C of the Petition.

STATEMENT OF THE LACK OF BASIS FOR JURISDICTION

The trial court entered an order denying the motion by Petitioners Applied Underwriters, Inc. ("AUI"), Applied Underwriters Captive Risk

Assurance Company, Inc. ("AUCRAC") and California Insurance Company ("CIC") to compel arbitration; and such an order is appealable under California law. Cal. Code Civ. Proc. § 1294(a). On the other hand, while Petitioners timely appealed, their motion to compel arbitration had failed to raise any federal question. Further, Petitioners' opening brief filed with the Court of Appeal failed to raise any issue under federal law. For that reason, the Court of Appeal ruled that Petitioners "forfeited" its federal law arguments. Petition, p. 18a.

Pursuant to 28 U.S.C. § 1257(a), the United States Supreme Court only has jurisdiction over state court decisions where –

> "the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

In interpreting the statute which has become 28 U.S.C. § 1257(a), this Supreme Court has held that it "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In order to perfect jurisdiction in the U.S. Supreme Court, the petitioner must show that the "federal question" was "raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails." *Ibid.*

Raising the federal question "in the state court below" includes raising it at the trial court level in a timely manner. *Engle v. Isaac*, 456 U.S. 107, 124-129 (1982). Here, Petitioners failed to raise any federal issue at the trial court level in relation to their motion to compel arbitration. They also failed to include it in their appellants' opening brief. In the California courts, "any argument not shown to have been presented to the trial court is deemed waived. *Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1092-1093 (1995); *Karlsson v. Ford Motor Co.*, 140 Cal.App.4th 1202, 1236 (2006) [failure to mention the federal seat belt regulation at the trial court level deemed a waiver of the issue on appeal]. In addition, the failure to raise issues in the opening brief on appeal operates as a waiver. *Evans v. CenterStone Development Co.*, 134 Cal.App.4th 151, 165 (2005). These state rules are now binding, in that this Supreme Court has held,

> "A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power."

Williams v. Georgia, 349 U.S. 375, 382-383 (1955).

Application of these rules leads to the conclusion that Petitioners cannot assert that the federal statute cited in the Petition (9 U.S.C. § 2) gives rise to jurisdiction in this Supreme Court. It was not properly raised. Also, the California statute cited in the Petition (Cal. Code Civ. Proc. § 1281.2) is certainly not part of "the Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a). For these reasons alone, Petitioners have failed to

advance a basis for this Supreme Court to exercise jurisdiction, meaning the Petition must be denied.

FEDERAL STATUTORY PROVISION INVOLVED

There is no provision of the U.S. Constitution or any treaty at issue in the Petition.

As for statutory provisions, in the event this Supreme Court chooses to exercise jurisdiction over this case, the Petition only involves a provision of the Federal Arbitration Act, specifically 9 U.S.C. § 2, which states,

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

ARGUMENTS IN RESPONSE TO PETITION

I.

The Arbitration Clause in the Request to Bind Was Not Made Part of the Contract Between the Parties.

The trial court in the present case made a factual finding based on the evidence that the "arbitration clause" in the "Request to Bind" was not made part of the contract between the parties

because the "box" next to that clause in the pre-printed document provided by Petitioners was never checked or initialed by any representative of Respondents Arrow Recycling Solutions, Inc. and Arrow Environmental Solutions, Inc. That factual finding was affirmed by the Court of Appeal (Petition, pp. 13a-14a), and is now binding.

This Supreme Court has held that it will not "redetermine facts" that the trial court has found. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-359 (1962). Thus, Petitioners are not at liberty to ignore the trial court's finding and simply assume that there is an arbitration clause in the Request to Bind. Since the trial and appellate courts determined that there was no arbitration clause in the Request to Bind, that document is immaterial to any discussion of the Federal Arbitration Act. For these reasons, the Request to Bind cannot form the basis of any relevant question for this Supreme Court to answer.

II.

The Reinsurance Participation Agreement Does Not Mention the Federal Arbitration Act, Meaning There Is No Conflict of Law.

Petitioners also rely on the "Reinsurance Participation Agreement" ("RPA"). It was drafted by Petitioners, and indeed *copyrighted* by "Applied Underwriters, Inc." in 2008. (Appellants' Appendix, vol.1 ["AA1"], p.86) In the RPA, the Federal Arbitration Act is not mentioned at all. Instead, the RPA states that it is "*exclusively* governed by and construed in accordance with the laws of Nebraska."

(AA1, p.90 [¶ 16 – emphasis added]) (Applied Underwriters, Inc. was organized in, and has its headquarters in, Nebraska.) Therefore, Petitioners made a conscious choice, in preparing the language of their RPA that they copyrighted, to have the agreement is "exclusively governed by and construed in accordance with the laws of Nebraska." [1]

The U.S. Supreme Court has expressly held that the Federal Arbitration Act does not preempt state law where the parties have agreed that state law governs. *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 470 (1989). For this reason, Petitioners long ago contractually and voluntarily abandoned the federal law argument they are now attempting to raise. Since the only "law" appearing in the document is Nebraska law, there is no conflict of law, and there is certainly no conflict involving the Federal Arbitration Act.

In making their "conflict of law" argument, Petitioners rely heavily on this Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). Importantly, *Mastrobuono* cites *Volt* but does not overrule it, and does not limit it in any way. Also, *Mastrobuono* is distinguishable since the issue there was whether it was permissible for a New York arbitrator to award punitive damages while New York law arguably prohibited such arbitral awards. This Court's final holding was to reinstate the award because "the

[1] Even so, Petitioners' trial counsel is the one who initially chose to apply California law instead of Nebraska law in the motion to compel arbitration.

Court of Appeals misinterpreted the parties' agreement." *Mastrobuono*, 514 U.S. at 64. Thus, *Mastrobuono* is a contract interpretation case, and does not effectuate any change in how the FAA is to be administered, nor does it articulate any principle of law that the California Court of Appeal failed to apply. For this reason, *Mastrobuono* does not help Petitioners in their effort to present "an important federal question." U.S. Supreme Court Rule 10(b).

Further, unlike the *Mastrobuono* contract, the RPA stated that the arbitration award –

> "may be entered by any court of competent jurisdiction in Nebraska or application may be made in such court for judicial acceptance of the award and an order of enforcement as the law of Nebraska may require or allow."

AA1, p.89 [¶ 13(G)]. Compare to *Mastrobuono*, 514 U.S. at 58, fn. 2 [arbitration award may be "entered in any court having jurisdiction thereof"].

Therefore, unlike *Mastrobuono*, Petitioners expressly intended that the law of Nebraska apply to both procedural and substantive matters. For these reasons, *Volt* does not conflict with *Mastrobuono* as it relates to the instant facts, and does not warrant certiorari in the present case.

III.

Imburgia v. DIRECTV, Inc. is Distinguishable on its Facts, and Does Not Support "Grant and Hold" Treatment of the Petition.

Imburgia v. DIRECTV, Inc., 225 Cal.App.4th 338 (2014), *cert. granted*, involved a contract with an

arbitration clause stating that it "shall be governed by the Federal Arbitration Act." *Id.*, 225 Cal.App.4th at 342. Again, the RPA did not mention the Federal Arbitration Act; and the Request to Bind did not even have an applicable arbitration clause, meaning *Imburgia* is factually distinguishable. Moreover, while *Imburgia* is a published case, the Court of Appeal's opinion here is unpublished, meaning it cannot be cited and thus has no *stare decisis* effect. Cal. Rules of Court, Rule 8.1115(a).

This Supreme Court granted certiorari in *DIRECTV, Inc. v. Imburgia*, case no. 14-462, on the following issue:

> "Whether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act."

Imburgia, case no. 14-462 (March 23, 2015 Order).

Petitioners' "grant and hold" request clearly begs the question as to whether the RPA is "governed by the Federal Arbitration Act." In *Imburgia*, the contract expressly stated that it did. In the present case, Petitioners' contract expressly states that it is exclusively governed by Nebraska law – even as to certain procedural matters related to arbitration – and says nothing about federal law. Indeed, Petitioners' trial court counsel's decision not to assert federal law in the arbitration motion is consistent with the absence of any mention of federal law the RPA. Consequently, it does not appear that this Supreme Court's ultimate ruling in *Imburgia*

will have any dispositive effect on the arbitration issues in the present case.

CONCLUSION

For all of the above reasons, Respondents Arrow Recycling Solutions, Inc. and Arrow Environmental Solutions, Inc. request that the Supreme Court deny the petition for writ of certiorari. Respondents also ask that this Supreme Court not issue a "grant and hold" order.

Respectfully submitted,

Oct. 5, 2015

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