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In this week's SWALU, we report on an Alabama Court of Civil Appeals case emphasizing that a party seeking to compel arbitration must present evidence to show an effect on interstate commerce. In addition, we report on an Eleventh Circuit Court of Appeals case which addresses the rights of property owners to a nonexclusive right-of-way, as well as the ability to amend restrictive covenants under Alabama law.

Accent Realty, Inc., d/b/a Century 21 Steele & Associates v. Snopl, ___ So. 2d ____ (Ala. Civ. App. 2009) (Party seeking to compel arbitration must prove effect on interstate commerce.) The Alabama Court of Civil Appeals emphasized that a party seeking to compel arbitration must not only prove the existence of a contract containing an arbitration clause, but must also show that the contemplated transaction affects interstate commerce. In Accent Realty, Inc. v. Snopl, Accent Realty appealed from an order entered in Madison County Circuit Court compelling arbitration. In 2006, Snopl entered into an exclusive buyer agency agreement with Accent in order to participate in a bus tour of a large number of real estate properties. The contract contained an arbitration clause and required Snopl to use Accent exclusively to purchase any properties during a three month period. Accent sued Snopl in 2007, alleging that he had breached the contract by purchasing properties through another real estate firm during the three month period covered by the contract. Snopl answered the complaint and counterclaimed, demanding a jury trial. He later moved the court to stay the proceedings and compel arbitration. The trial court granted the motion, and Accent appealed, arguing, *inter alia*, that Snopl had failed to submit sufficient evidence to show that the contract involved interstate commerce.

The Alabama Court of Civil appeals agreed with Accent and reversed the order. Although the court acknowledged that arguments in Snopl's appellate brief, if true, would have tended to show that the contract involved interstate commerce, it clarified that arguments of counsel are not evidence. Because Snopl did not offer the necessary evidence (that the contract involved interstate commerce) by affidavit or otherwise, and instead merely offered the contract itself with the bare assertion that it affected interstate commerce, he did not meet his burden of proof. Thus, the Court reversed the order compelling arbitration, and remanded to the lower court.

Callahan v. Point Clear Holdings, Inc., ___ F.3d ____ (11th Cir. 2009) (Nonexclusive street easement in restrictive covenants may be used in any way that does not conflict with the "purpose and character" of the easement; unilateral amendment of restrictive covenants subject to reasonableness standard.) Applying Alabama law, the Eleventh Circuit held in Callahan v. Point Clear Holdings, Inc. that the successor-in-interest to the developer to the rights of a nonexclusive street easement shared with lot owners of a subdivision, had the right to use or grant rights of use to the street in connection with property outside the subdivision. In addition, the Court held that notwithstanding a provision in the restrictive covenants granting the lot owners the right to amend the restrictions, their attempted amendment was invalid as unreasonably burdening the property of an owner who did not agree to the amendment.

A dispute arose between lot owners in the Lakewood Club Estates subdivision and the owner of the adjacent Grand Hotel resort property in Point Clear, Alabama, regarding the use of a street known as "Pine Grove Drive" within the subdivision. The original developer of the Grand Hotel and the subdivision had filed a set of restrictive covenants which provided, *inter alia*, that the street easements in the platted subdivision were designated as "private easements for streets" and were for the use and benefit of the lot owners and the developer, including guests, invitees and employees of the lot owners or the developer. In addition, the developer reserved in the restrictive covenants the right to "at any time dedicate said streets to the public." The restrictions also contained a provision which permitted automatic renewal of the covenants "unless by a vote of a majority of the then owners of the lots it is agreed to change said covenants in whole or in part." Point Clear Holdings ("PCH"), the successor in interest to the original developer, became involved in a development project near the subdivision, and planned to grant a right-of-way over Pine Grove Drive to the new development. The lot owners objected and enacted an amendment to the restrictive covenants severely limiting PCH's future use of the street, which would allow only bona fide employees of PCH to use Pine Grove Drive, and did not maintain PCH's ability to dedicate the drive to the public. The lot owners then filed a declaratory judgment action seeking a declaration that PCH had only limited use rights in Pine Grove Drive and that it could not use the drive in connection with any other development. PCH counterclaimed, alleging that the lot owners' amendment was invalid. The district court granted partial summary judgment in favor of the lot owners, but denied the same to PCH on its claims. The Eleventh Circuit here reversed both, and further vacated the district court's findings of fact.

First, the Court determined that the language in the restrictive covenants describing the street easements as "private easements for streets" created only a nonexclusive right-of-way by which the lot owners could access their lots, and not a "private street" as the lot owners had urged. Under Alabama law an easement may be used in any way that does not conflict with the purpose and character of the easement. Thus, PCH's proposed dedication and use of Pine Grove Drive in connection with the new development would not conflict with the "purpose and character" of the easement as a nonexclusive right-of-way. The Court further observed that "[i]n order to conflict with a nonexclusive right-of-way, the traffic created by PCH would have to impede the lot owners' ability to access their lots via Pine Grove Drive" and a mere increase in traffic would not create such inaccessibility. Thus, the Court reversed and remanded the district court's grant of summary judgment to the lot owners.

Next, the Court addressed the lot owners' attempted amendment to the restrictive covenants. Noting that restrictive covenants "are to be construed strictly and against restraints on the free use of land," and that the original covenants were silent as to the process for amending the covenants to impose additional restraints on the property now owned by PCH, the Court concluded that the amendment enacted by the lot owners was invalid as it created further burdens on PCH's property without PCH's consent. The Court further observed that even where developers reserve the right to unilaterally amend restrictive covenants, under Alabama law, exercise of such right must be "reasonable, with due regard for the property rights and investments of the persons who relied upon the residential covenants which were in full force at the time of their purchase." The Court applied those same principles to the present case, and determined that the attempted amendment was unreasonable and thus invalid. Accordingly, the Court reversed and remanded the district court's denial of summary judgment to PCH.



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