The State Bar of California

COMMITTEE OF BAR EXAMINERS
OFFICE OF ADMISSIONS

CALIFORNIA BAR EXAMINATION
PERFORMANCE TEST AND SELECTED ANSWERS
February 2020

This publication contains the performance test from the February 2020 California Bar Examination and two selected answers.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

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PERFORMANCE TEST INSTRUCTIONS AND FILE

WESTERN INSURANCE COMPANY v. SECURETRADE, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictional State of Columbia, one of the United States.

3. You will have two sets of materials with which to work: a File and a Library.

4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.

5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.

6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

7. This performance test is designed to be completed in 90 minutes. Although there are no parameters on how to apportion that 90 minutes, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response. Since the time allotted for this session of the examination includes two essay questions in addition to this performance test, time management is essential.

8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

RAND SPIVEY LLP
202 First Street
Northport, Columbia

MEMORANDUM

To: Applicant
From: Jessie Parker
Date: February 25, 2020
Re: Western Insurance Company v. SecureTrade, Inc.

We represent both Western Insurance Company (Western) and Assurance North America Brokers and Administrators, Inc. (Assurance) in two actions against a company named SecureTrade, Inc. (SecureTrade). The two actions arise from two transactions. The material facts are set forth in our complaint in the Western-SecureTrade action.

SecureTrade sells consumers extended warranties for various products. SecureTrade has to have an insurance policy to back up these warranties to cover claims by consumers. To obtain the required insurance policy and to provide for review of consumer claims prior to approval or rejection, SecureTrade entered into a contract with Assurance (the Brokerage & Administration Agreement). The Brokerage & Administration Agreement contains an arbitration clause. Assurance in turn procured the required insurance policy (the Insurance Policy) for SecureTrade from Western, which is an insurance company affiliated with Assurance. SecureTrade entered into the Insurance Policy with Western. The Insurance Policy does *not* contain an arbitration clause.

In its action against SecureTrade, Assurance claims that SecureTrade breached the Brokerage & Administration Agreement. Invoking the arbitration clause in the Brokerage & Administration Agreement, SecureTrade successfully moved to submit the breach of contract claim to arbitration–the Assurance-SecureTrade arbitration.

In its separate action against SecureTrade, Western claims that SecureTrade committed fraud with regard to the Insurance Policy.

Counsel for SecureTrade sent me a letter requesting that Western voluntarily submit its fraud claim to arbitration as part of the Assurance-SecureTrade arbitration in order to avoid wasting time and money on a motion to compel arbitration that he asserts the Superior Court would "doubtless" grant.

Please draft a letter for my signature in response, stating that Western will not voluntarily submit its fraud claim to arbitration and explaining why any motion by SecureTrade to compel arbitration would be denied and why counsel's contrary argument is unsound.

ALLEN & PROCTOR LLP
Three Emerson Center
Northport, Columbia

February 20, 2020

Jessie Parker
Rand Spivey LLP
202 First Street
Northport, Columbia

Re: *Western Insurance Company v. SecureTrade, Inc.*

Dear Ms. Parker:

On behalf of SecureTrade, Inc. (SecureTrade), we hereby request that Western Insurance Company (Western) voluntarily submit its fraud claim in the above-referenced action to arbitration as part of an arbitration that was initiated by Western's affiliate, Assurance North America Brokers and Administrators, Inc. (Assurance), and is currently pending before the Columbia Arbitration Board in *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.*

As you are aware, relying on an arbitration clause in a so-called Brokerage & Administration Agreement to which SecureTrade and Assurance were parties, SecureTrade requested Assurance to voluntarily submit a breach of contract claim it had brought in *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.* to arbitration before the Columbia Arbitration Board. Assurance refused. Because of Assurance's refusal, SecureTrade was forced to waste time and money to move the Superior Court—successfully—to compel Assurance to arbitrate.

We make our request that Western voluntarily submit its fraud claim to arbitration to avoid the waste of time and money that would be incurred if SecureTrade were again forced to move to compel arbitration. To expend time and money on such a motion would be needlessly wasteful. That is because the Superior Court would doubtless grant the motion.

The Columbia Arbitration Act reflects a strong policy in favor of compelling arbitration. *Tuscany Builders v. Norman Properties* (Colum. Supreme Ct. (2011)).

The Columbia Arbitration Act's strong policy operates to compel arbitration whenever an action is intertwined with an arbitration and whenever a party to an action has a preexisting relationship with a party to an arbitration. *Tuscany Builders.* So it is here: Western and Assurance are affiliates and as such have a preexisting relationship; the Brokerage & Administration Agreement Assurance entered into with SecureTrade and the Insurance Policy Western issued to SecureTrade are intertwined.

In any event, the Columbia Arbitration Act's strong policy operates to compel arbitration whenever a party in an action seeks or obtains a direct benefit from a signatory to a contract containing an arbitration clause. *Tuscany Builders*. So it is here: Western obtained a direct benefit from SecureTrade, a signatory to the Brokerage & Administration Agreement, which contains an arbitration clause, by obtaining a premium from SecureTrade for the Insurance Policy.

Please respond, in writing, by March 2, 2020, and inform us whether Western will voluntarily submit its fraud claim to arbitration. If Western declines to do so, please state its reasons so that we may inform the court when we file a motion to compel.

Very truly yours,

ALLEN & PROCTOR LLP
Martin Chan

_____
Martin Chan

Jessie Parker
RAND SPIVEY LLP
202 First Street
Northport, Columbia

Attorneys for Plaintiff
Western Insurance Company

SUPERIOR COURT OF THE STATE OF COLUMBIA

COUNTY OF SPRINGFIELD

WESTERN INSURANCE COMPANY, Plaintiff, v. SECURETRADE, INC., Defendant.	Case No.: 170717 **COMPLAINT FOR FRAUD**

By this Complaint, Plaintiff Western Insurance Company (Western) brings this action against Defendant SecureTrade, Inc. (SecureTrade), and alleges as follows:

THE PARTIES

1. Western is a Columbia corporation with its principal place of business at 59 Maiden Lane, Northport, Columbia.

2. SecureTrade is a Columbia corporation with its principal place of business at 360 Third Street, Northport, Columbia.

JURISDICTION AND VENUE

3. Jurisdiction in this Court is proper under section 410 of the Columbia Code of Civil Procedure because SecureTrade maintains its principal place of business in the State of Columbia and the County of Springfield and does business there.

4. Venue in this Court is proper under section 395(a) of the Columbia Code of Civil Procedure because SecureTrade maintains its principal place of business in the State of Columbia and the County of Springfield and does business there.

GENERAL ALLEGATIONS

5. SecureTrade sells consumers extended warranties, which provide repair and replacement coverage for a variety of consumer products.

6. The extended warranties are contracts between SecureTrade and individual consumers. They are not insurance policies.

7. In general terms, an extended warranty provides a consumer with additional protection for certain forms of product failure or damage in addition to the standard warranty provided for by the manufacturer of the product.

8. SecureTrade is required to carry insurance from an insurer to back up its extended warranties.

9. Western and SecureTrade were parties to a Contractual Liability Insurance Policy (Insurance Policy). The Insurance Policy is a commercial insurance product that covers the contractual obligations of the insured–in this case SecureTrade–to consumers on extended warranties. SecureTrade paid a premium to Western for the Insurance Policy and Western issued the Insurance Policy to SecureTrade. Western and SecureTrade are the sole signatories to the Insurance Policy. The Insurance Policy does not contain an arbitration clause.

10. Assurance North America Brokers and Administrators, Inc. (Assurance) is an affiliate of Western. Assurance procured the Insurance Policy for SecureTrade pursuant to a contract referred to as a "Brokerage & Administration Agreement." Assurance and SecureTrade are the sole signatories to the Brokerage & Administration Agreement. The Brokerage & Administration Agreement contains an arbitration clause.

11. Subsequently, Assurance brought an action against SecureTrade in the Springfield County Superior Court, entitled *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.*, which raised a single claim for breach of the Brokerage & Administration Agreement. Under the Brokerage & Administration Agreement, SecureTrade engaged Assurance not only to obtain the Insurance Policy, but also to review consumer claims prior to approval or rejection. Under the Brokerage & Administration Agreement, SecureTrade obligated itself to provide Assurance with timely and accurate reports to enable it to approve all consumer claims that were

supported and to reject all consumer claims that were not supported. SecureTrade, however, failed to provide Assurance with timely or accurate reports.

12. Invoking the Brokerage & Administration Agreement's arbitration clause, SecureTrade successfully moved to compel Assurance to submit its claim to arbitration before the Columbia Arbitration Board under the Columbia Arbitration Act. Thereupon, Assurance initiated an arbitration before the Columbia Arbitration Board, similarly entitled *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.* The arbitration remains pending.

13. SecureTrade sold millions of extended warranties to consumers directly. The Insurance Policy insured SecureTrade's contractual obligations on these extended warranties.

14. Under certain conditions stated in the Insurance Policy, the extended warranties provide consumers with the right to seek reimbursement directly from Western. Among other things, the conditions impose claims-handling obligations on SecureTrade, requiring it to reasonably determine whether any consumer has presented a valid claim for product failure or damage and to certify in good faith whether Western is responsible for satisfying any such claim.

15. Over time, SecureTrade purportedly complied with its claims-handling obligations under the Insurance Policy, and so represented to Western, intending to induce its reliance. SecureTrade purportedly reasonably determined that more than 17,000 consumers had presented valid claims for product failure or damage totaling more than $36 million, and so represented to Western, intending to induce its reliance. And SecureTrade purportedly certified in good faith that Western was responsible for satisfying the claims, and so represented to Western, intending to induce its reliance. Having reasonably relied on SecureTrade's representations, Western satisfied all of these claims in timely fashion and in full.

16. In fact, however, SecureTrade did not comply with its claims-handling obligations under the Insurance Policy. Nor did SecureTrade reasonably determine that any of the more than 17,000 consumers had presented valid claims for product failure or damage totaling even a penny of the $36 million. Neither did SecureTrade certify in good faith that Western was responsible for satisfying any of the claims. In doing all of these things, SecureTrade acted fraudulently.

CLAIM

(Fraud)

17. Western incorporates by reference the allegations contained in the foregoing paragraphs.

18. SecureTrade represented to Western that SecureTrade: (1) complied with its claims-handling obligations under the Insurance Policy; (2) reasonably determined that more than 17,000 consumers had presented valid claims for product failure or damage

totaling more than $36 million; and (3) certified in good faith that Western was responsible for satisfying the claims.

19. SecureTrade's representations, however, were false.

20. SecureTrade knew that its representations were false when it made them.

21. SecureTrade intended that Western rely on its representations.

22. Western reasonably relied on SecureTrade's representations.

23. As a result, Western was harmed, in an amount equal to at least $36 million.

PRAYER FOR RELIEF

WHEREFORE, Western prays for the following relief:

A. An order requiring SecureTrade to pay damages, in an amount to be determined at trial but at least $36 million, to compensate Western for its damages incurred as a result of SecureTrade's acts of fraud;

B. An order requiring SecureTrade to pay punitive damages to Western as a result of SecureTrade's acts of fraud;

C. An order requiring SecureTrade to pay prejudgment and post-judgment interest on all sums that it is ordered to pay to Western;

D. The costs of bringing this action; and

E. Such other and further relief as the Court may deem just and proper.

DATED: February 14, 2020 RAND SPIVEY LLP

Jessie Parker

By: _____

Jessie Parker
Attorneys for Plaintiff
Western Insurance Company

PERFORMANCE TEST LIBARAY

WESTERN INSURANCE COMPANY v. SECURETRADE, INC.

LIBRARY

Tuscany Builders v. Norman Properties

Columbia Supreme Court (2011) .....

WESTERN INSURANCE COMPANY v. SECURETRADE, INC.

LIBRARY

Tuscany Builders v. Norman Properties

Columbia Supreme Court (2011) .....

Tuscany Builders, et al. v. Norman Properties, et al.

Columbia Supreme Court (2011)

In this matter, we consider the trial court's denial of a motion to compel arbitration pursuant to an arbitration clause in a real estate purchase and sale contract—the Purchase and Sale Contract—and the Court of Appeal's affirmance of the denial. Both the trial court and the Court of Appeal concluded that the arbitration clause could not be invoked by a nonsignatory to the Purchase and Sale Contract. In so concluding, both erred.

This is a complex residential real estate development project gone almost-inconceivably wrong. Suffice it to say that a group of plaintiffs, including buyers, sellers, and government agencies, sued another group of defendants, including other buyers, sellers, and government agencies, when the development project collapsed. Although the plaintiffs' complaint raises sixteen disparate claims, it essentially prays for relief, including damages, for breach of the Purchase and Sale Contract. The defendants filed a motion to compel the plaintiffs to arbitrate their claims under the Columbia Arbitration Act pursuant to the arbitration clause of the Purchase and Sale Contract. The plaintiffs opposed the motion, noting that none of the defendants was a signatory to the Purchase and Sale Contract, and that, although some of the plaintiffs were signatories, others were not. The trial court denied the motion, and the Court of Appeal affirmed.

We granted review in this matter to answer two related questions of first impression in Columbia. First, may a party who is *not* a signatory to a contract with an arbitration clause compel a party who *is* a signatory to arbitrate under the Columbia Arbitration Act via the doctrine of equitable estoppel? Second, may a party who is *not* a signatory to a contract with an arbitration clause compel another party who is *not* a signatory to arbitrate under the Columbia Arbitration Act via the doctrine of equitable estoppel? As we shall explain, the answer to both questions is: Yes.

While the Columbia Arbitration Act reflects a strong policy in favor of arbitration, generally speaking, arbitration is nevertheless a matter of contract and a party cannot be compelled to arbitrate any dispute that he or she has not agreed to arbitrate.

As for the first question, we observe that sister-state courts have not been hesitant to allow a party who is *not* a signatory to a contract with an arbitration clause to compel a party who *is* a signatory to arbitrate under the doctrine of equitable estoppel. The doctrine rests on the premise that a signatory should not be permitted to avoid arbitrating claims of the very type that he or she agreed to arbitrate simply because a nonsignatory seeks to arbitrate such claims. These courts have therefore concluded that a nonsignatory may compel a signatory to arbitrate when the claims the nonsignatory is seeking to arbitrate are intertwined with the contract containing the arbitration clause. We agree with the reasoning of these courts and with their result. Thus, we conclude that a nonsignatory may compel a signatory to arbitrate under the Columbia Arbitration Act via equitable estoppel when the signatory raises claims against the nonsignatory that are intertwined with the contract containing the arbitration clause, *i.e.*, dependent on rights or duties under the contract.

It follows that, under the facts, even though they are not signatories to the Purchase and Sale Contract with its arbitration clause, the defendants may nevertheless compel the signatory plaintiffs to arbitrate the claims they raise in their complaint. The signatory plaintiffs expressly allege that the defendants "breached the Purchase and Sale Contract," that the "breach" subjected them to "injury," and that the "injury" entitles them to "damages." The signatory plaintiffs' claims are therefore intertwined with the Purchase and Sale Contract because they are dependent on rights granted to the signatory plaintiffs.

As for the second question, we observe that, in contrast, sister-state courts have indeed been hesitant to allow a party who is *not* a signatory to a contract with an arbitration clause to compel another party who is *not* a signatory to arbitrate under the doctrine of equitable estoppel. It is foreseeable and therefore reasonable that a party who has chosen to become a signatory to a contract with an arbitration clause might be compelled to arbitrate not only with other signatories but also with nonsignatories. But it is not at all foreseeable or reasonable that a party who has *not* chosen to become a signatory to any contract with an arbitration clause might be compelled to arbitrate with anyone. These courts have therefore concluded that a nonsignatory may compel another nonsignatory to arbitrate only when the other nonsignatory has sought or obtained a direct benefit from the contract containing the arbitration clause—that is to say, only when the nonsignatory attempts to recover, or actually recovers, for breach of the contract as, for example, a third-party beneficiary. In so concluding, these courts have extended the settled rule that a *signatory* may compel a *nonsignatory* to arbitrate only when the *nonsignatory* has sought or obtained such a direct benefit from the contract containing the arbitration clause. On this point too, we agree with the reasoning of these courts and with their result. Thus, we conclude that a nonsignatory may compel another nonsignatory to arbitrate under the Columbia Arbitration Act via equitable estoppel, but only when the nonsignatory has sought or obtained such a direct benefit from the contract containing the arbitration clause.

We recognize that some sister-state courts have stated in dictum that a party who is not a signatory to a contract containing an arbitration clause may be said to seek or obtain a direct benefit from the contract if he or she alleges a preexisting relationship with one of the signatories. In this case, however, we need not and do not determine whether this dictum is sound. In any event, we believe that whether a nonsignatory has sought or determined a direct benefit from the contract should turn ultimately on what the nonsignatory *has done*, *i.e.*, effectively suing on the contract, rather than on what the nonsignatory *may be*, *i.e.*, factually or legally related to one of the signatories.

It follows that, under the facts, even though they are not signatories to the Purchase and Sale Contract with its arbitration clause, the defendants may nevertheless compel the nonsignatory plaintiffs to arbitrate the claims they raise in their complaint. The nonsignatory plaintiffs' claims are obscure and convoluted. As a result, we are not quite sure on what basis the nonsignatory plaintiffs are attempting to recover for breach of the Purchase and Sale Contract. But we are quite sure that the nonsignatory plaintiffs are attempting to do so. Like the signatory plaintiffs, the nonsignatory plaintiffs expressly allege that the defendants "breached the Purchase and Sale Contract," that the "breach" subjected them to "injury," and that the "injury" entitled them to "damages."

For these reasons, we reverse the judgment of the Court of Appeal and remand the matter to that court to remand it, in turn, to the trial court to grant the motion to compel arbitration.

PT: SELECTED ANSWER 1

Randy Spivey LLP
202 First Street
Northport, Columbia

February 25, 2020

Martin Chan
Allen & Proctor LLP
Three Emerson Center
Northport, Columbia

Re: *Western Insurance Company v. SecureTrade, Inc.*

Dear Mr. Chan:

On behalf of Western Insurance Company (Western), we are in receipt of your letter, dated February 20, 2020, sent on behalf of SecureTrade, Inc. (SecureTrade). We hereby respectfully advise you that Western will not voluntarily submit its fraud claim in the above-referenced action to arbitration as part of an arbitration that was initiated by Assurance North America Brokers and Administrators, Inc. (Assurance), which is currently pending before the Columbia Arbitration Board in *Assurance North America Brokers and Administrators, Inc. v. SecureTrade, Inc.*

Introduction

As you are aware, the facts of this case are as set forth in the complaint. Western is party to the Insurance Policy, to which only Western and SecureTrade are signatories. Western seeks damages on a fraud theory under the Insurance Policy. Assurance is party to an agreement with SecureTrade that contains an arbitration clause, and Assurance has instituted an action against SecureTrade for breach of contract, which is currently pending in arbitration. SecureTrade seeks to compel Western to participate in the arbitration, and SecureTrade claims that the court would "doubtless grant" a motion to compel arbitration in this matter. For the reasons set forth below, we strongly disagree with the characterization in your letter of February 20, 2020, and we welcome arguments before the court with respect to the motion to compel. In short, any motion by SecureTrade to compel arbitration would be denied, and the contrary arguments put forth by SecureTrade (and summarized below) are unsound.

Statutory Framework and Applicable Case Law–The Columbia Arbitration Act and *Tuscany*

The Columbia Arbitration Act (CAA) reflects a strong policy in favor of arbitration; however, arbitration is a matter of contract (*Tuscany Builders, et al. v. Normal Properties, et al.*, Columbia Supreme Court (2011)). As such, a party "cannot be compelled to arbitrate any dispute that he or she has not agreed to arbitrate" (*Id.*). The Columbia Supreme Court has

analyzed the issue of equitable estoppel in the context of compelling arbitration under two circumstances: (a) a nonsignatory party to a contract with an arbitration clause compelling arbitration with respect to a party who is a signatory to such contract and (b) a nonsignatory to a contract with an arbitration clause compelling arbitration with respect to a party who is not a signatory to such contract (*Tuscany*).

Here, as stated above, SecureTrade seeks to compel Western to participate in the pending arbitration with Assurance. However, the Insurance Policy does not contain an arbitration clause, and arbitration is a matter of contract. A court is therefore likely to take the view, despite the strong policy in favor of arbitration, that a presumption exists in the instant case militating against compelled arbitration -- a presumption that SecureTrade would struggle to overcome. Even still, we approach the issues raised in your letter of February 20, 2020 and the applicable law as though such a presumption does not exist, and the result at which we arrive is the same: a court will deny the motion to compel.

NonSignatory Compelling Signatory - Intertwined Claims

Equitable estoppel generally rests on the premise that a signatory should not be permitted to avoid arbitrating claims of a type that he or she agreed to arbitrate simply due to the fact that a nonsignatory seeks to arbitrate the claims (*Tuscany*). As set forth in *Tuscany* and in accord with sister-state courts, a nonsignatory may compel a signatory to arbitrate under the CAA via equitable estoppel when the signatory raises claims that are intertwined with the contract containing the arbitration clause and are thus dependent on rights or duties under the contract. In *Tuscany*, defendants who were not signatories to a land sale contract sought to compel plaintiffs who were signatories to arbitrate the breach of contract claims raised in the complaint. The Court held that the signatory plaintiffs' claims were "intertwined" with the contract because they were claims for breach of the contract and therefore dependent on rights granted to the signatory plaintiffs.

In the instant case, the facts could not be more different. Here, SecureTrade is signatory to a contract with Assurance that contains an arbitration clause and is seeking to compel arbitration from Western, a nonsignatory. Western is not claiming any rights under the contract between SecureTrade and Assurance. Quite the contrary, Western's claim is based on fraudulent conduct by SecureTrade arising out of the Insurance Policy–namely, SecureTrade did not comply with its claims-handling obligations under the Insurance Policy, nor did it reasonably determine the validity of any of the more than 17,000 consumer claims or even one cent of the $36 million in claimed damage. SecureTrade sold millions of extended warranties to consumers directly, and the purpose of the Insurance Policy was to insure SecureTrade's contractual obligations on such extended warranties. The claim arises from SecureTrade's fraud under the Insurance Policy, not the agreement with Assurance.

SecureTrade appears to argue that the action is intertwined with the existing arbitration because the agreement with Assurance and the Insurance Policy are intertwined. However, this ignores the case law on point. The reference to "intertwined" relates to the claims and not the contracts. We also understand that SecureTrade will argue that under the agreement with Assurance, SecureTrade obligated itself to provide timely and accurate reports to enable it to approve all consumer claims that were supported and to reject all consumer claims that were not supported. As such, SecureTrade will contend that the

claims Western asserts arise from the contract with Assurance. However, the Western's claims are independent and not intertwined with those under the Assurance agreement. Specifically, Western raises claims for fraud. Its representations and certifications are at issue, not simply the single claim for breach by Assurance.

As such, even if a court were to view the opposite positioning of the parties in a favorable manner (and twist the jurisprudence beyond measure to compel a nonsignatory to arbitrate under these facts), SecureTrade would be unable to persuasively argue that Western's claims of fraud on the Insurance Policy are "intertwined" with SecureTrade's agreement with Assurance, which revolves around the provision of timely and accurate reports.

NonSignatory Compelling Signatory - Direct Benefit

As set forth in *Tuscany* and again in accord with sister-state courts, a nonsignatory may compel another nonsignatory to arbitrate under the CAA via equitable estoppel only if the nonsignatory has sought or obtained a direct benefit from the contract containing the arbitration clause (i.e., only when the nonsignatory attempts to recover, or actually recovers, for breach of the contract with the clause). The courts are generally hesitant to permit a nonsignatory to a contract with an arbitration clause to compel another party who is not a signatory to arbitrate under the doctrine of equitable estoppel (*Tuscany*). The underlying rationale here is that it is not at all foreseeable or reasonable for a party who has not chosen to become a signatory to any contract with an arbitration clause to be compelled to arbitrate with anyone.

Here, Western seeks to recover damages for fraud under its existing agreement with SecureTrade (the Insurance Policy). It is not alleging breach of the underlying agreement between SecureTrade and Assurance, nor is it seeking to recover for a claim under such agreement. As such, a direct benefit from the contract containing the arbitration clause is conspicuously absent. It strains credulity that SecureTrade would twist the facts of *Tuscany* to allege that Western should be compelled to arbitrate a claim under *Tuscany* when Western neither seeks nor received a direct benefit under the contract with the arbitration clause.

SecureTrade appears to argue that Western obtained a direct benefit from SecureTrade by virtue of obtaining a premium from SecureTrade under the Insurance Policy. However, again, SecureTrade misapplies the applicable law. Under *Tuscany*, the direct benefit must arise from the contract with the arbitration clause, not from the party seeking to compel arbitration. Indeed, for the sake of argument, even if both parties were party to a contract with an arbitration clause, the provision by one party of a direct benefit to the other party that is wholly outside the scope of the contract should not give rise to arbitration requirements on issues beyond the scope of the contract. So too, the direct benefit at issue would need to arise from the contract with the arbitration clause in order to trigger a requirement to arbitrate.

In addition, SecureTrade's arguments under *Tuscany* fall flat for lack of analogous facts. The Court's analysis in *Tuscany* with respect to direct benefits regarded a nonsignatory compelling a nonsignatory. Here, by stark contrast, SecureTrade is party to the applicable contract with an arbitration clause.

Preexisting Relationship

The *Tuscany* court observed sister-state courts' dictum that if a nonsignatory to a contract with an arbitration clause can allege a preexisting relationship with a party to a contract with an arbitration clause, the nonsignatory can be said to have sought or obtained a direct benefit. While not controlling under Columbia law, the *Tuscany* court indicated that whether a nonsignatory can be deemed to have sought or obtained a direct benefit should turn on what the nonsignatory has done (i.e., effectively suing on the contract) rather than what such party may be (factually or legally related to the signatories).

This analysis is persuasive and right on point, although not for the reasons that SecureTrade alleges. Here, Western and Assurance are affiliated entities and thus could be deemed to be affiliated entities. However, their affiliated nature does not end the inquiry and thereby determine that a direct benefit has been conferred or is being sought by virtue of such relationship. To the contrary, the *Tuscany* court's break from sister-state courts on this issue suggest that Western's actions and posture is determinative. Accordingly, Western's affiliation with Assurance is irrelevant with respect to the matter at hand, and its claim for fraud stands apart from Assurance's damages claim and Assurance's underlying contract with SecureTrade.

Conclusion

Western's claim is independent from and thus not intertwined with Assurance's claim. Western's position is as a nonsignatory to a contract containing an arbitration clause, who has not sought or derived a direct benefit from such contract. Further, the particular preexisting relationship between Western and Assurance will not be considered by the courts under the dicta in *Tuscany*.

Very Truly Yours,

Rand Spivey LLP

_____

Jessie Parker

PT: SELECTED ANSWER 2

Rand Spivey LLP
202 First Street
Northport, Columbia

February 25, 2020

Martin Chan
Allen & Proctor LLP
Three Emerson Center
Northport, Columbia

Re: *Western Insurance Company v. SecureTrade, Inc.*

Dear Mr. Chan,

This letter is in response to your correspondence, dated February 20, 2020 regarding the above-captioned matter. As you know, this firm represents both Western Insurance Company (WIC) and Assurance North America Brokers and Administrators, Inc. (Assurance) in entirely separate claims against your client, SecureTrade, Inc. (STI). For the reasons discussed below, Western will not submit its fraud claim against SecureTrade to arbitration voluntarily, and the Superior Court will deny your motion to compel arbitration.

Arbitration is a matter of contract

While it is true that the Columbia Arbitration Act (CAA) reflects a strong policy in favor of arbitration, this does not override the more general contractual principle that "a party cannot be compelled to arbitrate any dispute that he or she has not agreed to arbitrate." *Tuscany.* This overarching principle of the right to free contract is a bedrock one, and more important and pertinent to this matter than the public policy of CAA, which is inapplicable here. The Parties here, STI and WIC, freely entered into a contract containing no arbitration clause: that certain Contractual Liability Insurance Policy. It would be neither reasonable, nor foreseeable therefore, to subject WIC to arbitration in this matter. To find otherwise would overcome the intent of the parties, and Columbia's core contracting principles.

It was not foreseeable that STI could bind WIC to arbitration

In general, equitable estoppel exists where it is foreseeable, and therefore reasonable to bind a party to arbitration even where in certain cases, that party is not a signatory to the agreement creating the arbitration clause. *Tuscany*. Critically, this principle relies on the idea that where a party enters into a contract that contains an arbitration clause, and a claim emerges out of, or intertwined with, that clause, then that party may be made to arbitrate. In other cases, where a party is not party to an arbitration clause, but directly benefits from it, they also should be able to foresee being compelled to adhere to that clause.

That is not the case in this matter. Of course, there is no agreement between STI and WIC requiring arbitration. Moreover, it was not foreseeable that STI would use its agreement with Assurance to try to bind WIC to arbitration because, as discussed further below, that agreement contains entirely different rights and obligations than the agreement between STI and WIC, and STI neither relied upon, nor directly benefitted from that agreement between STI and Assurance.

WIC is not a signatory to the BAA and not bound by its arbitration clause

It is true that a signatory may be compelled by a nonsignatory to arbitrate under the CAA where its claims are intertwined with those of the signatory. *Tuscany*. However, that standard clearly requires the party being compelled to have signed on to the instrument giving rise to the Arbitration Clause. *See id.* In *Tuscany*, the Court examined when a nonsignatory party could force a party signed to an agreement with an arbitration clause. The opposite is the case here, where a signatory is attempting to bind a nonsignatory party. Here, WIC is not a party to the BAA, nor any instrument containing an arbitration clause. WIC is not a signatory. As such, the court's rules regarding intertwined claims are inapplicable here.

Instead, only where, as a nonsignatory, WIC has obtained a direct benefit from the BAA can it be bound by the arbitration clause. Whether or not its claims are intertwined with those of the BAA is irrelevant, because, in stark contrast to *Tuscany*, it is not a signatory. Thus any such argument relying on this branch of equitable estoppel doctrine will fail.

Regardless, for reasons discussed below, even if WIC were a signatory, it could not be bound because its rights are not dependent on, or intertwined with, those of Assurance, as discussed in the following section.

WIC's rights are not dependent on rights granted to Assurance

Even if WIC were a signatory to the BAA, contrary to what you assert, WIC's rights are not dependent on any rights granted to Assurance, nor are they intertwined. In *Tuscany*, the rights of all plaintiffs and defendants were intertwined in one agreement: The Purchase and Sale Contract. In this matter, by contrast, each plaintiff, Assurance and WIC, respectively, has a separate agreement and entirely separate cause of action against STI. In order for STI to bind WIC as a nonsignatory, they must show that its claims are dependent on the rights granted to Assurance in the agreement between Assurance and STI. *See Tuscany*. This is simply not the case here.

Assurance provides brokerage and administration services to WIC under the Brokerage and Administration Agreement ("BAA"). WIC provides insurance services to STI under the Insurance Policy. WIC here, is asserting that STI fraudulently violated its agreement with WIC. As discussed further below, this claim does not rest on the BAA in any way. This is stark contrast to the situation in *Tuscany*, where the Court held that two parties were intertwined because the breach, injury, and damages, all arising from the same instrument, made the parties intertwined. In this case, neither the breach, injury, or damages relates to the BAA. Nor is the BAA as an instrument, at issue or necessary to the claim or defense. While the BAA is discussed

in the complaint in order to provide context, it is not the core part of the claim.

In addition, a major portion of the services provided by Assurance to STI, had nothing to do with WIC. Assurance provides brokerage services, but also provides services to review consumer claims prior to approval or rejection for STI. *See* Complaint, para. 11. These services are provided entirely separately from the brokerage services that Assurance provides in relation to STI. While it is true that STI did fail to provide reports Assurance with timely or accurate reports (Id.), WIC's claims do not hinge on this issue. Instead, STI's claims rest of the fraudulent misrepresentations made by WIC directly to WIC which resulted in STI paying out $36 million in fraudulent claims. *See Complaint, para.* 15-23.

Importantly, in no way do WIC's claims under the Insurance Policy depend on the rights and duties for brokerage services created under the BAA. STI breached the Insurance Policy by making false claims to WIC. This did not depend on a breach of the BAA- none was required. No injury arose out of the BAA, nor did any damages. Thus, unlike the parties in *Tuscany*, WIC's claims are not dependent on, or intertwined with the BAA.

Instead, because WIC's claims against STI rest on the insurance policy between WIC and STI, and the misrepresentations made from WIC directly to STI, they are not dependent on Assurance's claims or rights. Therefore, STI may not argue the claims are intertwined and may not seek equitable estoppel on this basis.

WIC did not directly benefit from STI's agreement with Assurance

In order for one nonsignatory party to bind another nonsignatory party to an arbitration clause under an equitable estoppel theory, the moving party must show that the other party either sought or obtained a direct legal benefit from the contract containing the arbitration clause. *Tuscany.* Here, your client STI is seeking to bind WIC to an arbitration clause under the BAA, a contract between STI and Assurance, based on an alleged benefit conferred from STI to WIC. WIC is not party to the BAA. Courts are hesitant to apply arbitration clauses to nonsignatory parties because it is not at all foreseeable or reasonable that a party who has *not* chosen to become a signatory to any contract with an arbitration clause might be compelled to arbitrate with anyone." *Tuscany*. So it is the case here, where it was not foreseeable for STI to attempt to bind WIC based on STI's agreement with Assurance.

The only exception to this general rule occurs where the third party obtains a direct benefit from such an agreement, as a third-party beneficiary. *Tuscany*. However, STI has failed to show that WIC has directly benefitted from the BAA with respect to STI. While it is true that Assurance acted as a broker under the BAA in facilitating the relationship between WIC and STI, any such benefits from that agreement are not direct, but rather, quite indirect. Assurance acted as a facilitator, but conferred no direct benefits to WIC whatsoever. All benefits that WIC received, arose directly out of the Insurance Agreement.

Contractually, the benefit conferred from STI to WIC was a premium. The premium was paid based on the Insurance Policy, not the BAA. The BAA did not require STI to engage with WIC, nor did it compel STI to pay its premium. In contrast to the court's consideration in *Tuscany*,

were WIC a third party beneficiary of the BAA and STI's obligation to pay its premium contained in that agreement, then there is no doubt that WIC would have directly benefitted from that agreement. However that is not the case here. Those obligations, and those benefits to WIC, arose out of the Insurance Policy exclusively. An Insurance Policy that, once again, contains no arbitration clause.

For this reason as well, the Superior Court will not find that the doctrine of equitable estoppel applies here.

WIC and Assurance's relationship did not create a direct benefit under the BAA

Contrary to the assertion in your letter, whether a nonsignatory has sought or determined a direct benefit from the contract depends on what the nonsignatory has done, not on what the factual or legal relationship to a signatory party. *Tuscany. C*ritically, Tuscany distinguished Columbia law from nonbinding dictum cited in your letter that comes from sister states holding that preexisting relationships with a signatory constitutes a direct benefit from a contract. Instead, Columbia courts will look to the actions of the parties, such as filing suit, not their relationships, to determine if a direct benefit exists.

While it is true that Assurance and WIC are affiliates, that affiliate relationship in and of itself, does not render WIC a beneficiary of STI and Assurance's agreement. As the Supreme Court held in *Tuscany*, such a relationship in and of itself is not sufficient to show a benefit to a nonsignatory party. Instead, the Superior Court will look to see whether WIC has sought or obtained any benefit under that agreement. In particular, whether a direct benefit exists will turn on whether the party has sued under the contract. However, as discussed in the prior section, WIC has not done anything to create a direct benefit. Critically, WIC did not sue under the BAA. It sued under the Insurance Policy exclusively.

WIC can rely solely on the insurance policy between itself and STI to prove its claims, and did not file an action under the BAA. Thus the affiliate relationship with not suffice to show a direct benefit to WIC under the BAA, and this theory for equitable estoppel will also be denied.

SecureTrade's Motion to Compel Arbitration Will be Denied

For all of the above reasons, SecureTrade's motion to compel arbitration in this matter will be denied as there is no legal basis for equitable estoppel. We will be opposing your motion to compel arbitration, and urge you to reconsider your stance here before the parties are forced to waste time and money litigating this issue in the Superior Court.

Sincerely,

Jessie Parker
On Behalf of Western Insurance Company