Neutral Notes

The Jacobs Center for Justice and Alternative Dispute Resolution™

December 2012

Volume I, Issue 10

U.S. SUPREME COURT OPINES AGAIN ON FEDERAL ARBITRATION ACT

The United States Supreme Court, in Nitro-Lift Technologies, L.L.C. v. Eddie Lee Howard, et al., rejected the analysis of the Oklahoma Supreme Court regarding the Federal Arbitration Act (FAA). The Supreme Court said that contrary to the finding of the Oklahoma high court, a discussion regarding the noncompetition agreements in two employment contracts should have been left to the arbitrator and not the courts.

Nitro-Lift Technologies had contracts with two of its former employees, Eddie Lee Howard and Shane D. Schneider. The contracts contained a confidentiality and noncompetition agreement with the following arbitration clause:

> Any dispute, difference or unresolved question between Nitro-Lift and the Employee (collectively the "Disputing Parties") shall be settled by arbitration by a single arbitrator mutually agreeable to the Disputing Parties in an arbitration proceeding conducted in Houston, Texas in accordance with the rules existing at the date hereof of the American Arbitration Association.

After working for Nitro-Lift on wells in Oklahoma, Texas, and Arkansas, Eddie Lee and Shane quit and began working for one of Nitro-Lift's competitors. Claiming a breach of the noncompetition agreements, Nitro-Lift served them with a demand for arbitration. Eddie Lee and Shane filed suit in the District Court of Johnston County, Oklahoma, asking the court to declare the noncompetition agreements null and void. The court dismissed the complaint and found valid arbitration clauses which required an arbitrator to settle the dispute.

On appeal, the Oklahoma Supreme Court held that despite U.S. Supreme Court cases in this area, "the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement." The Supreme Court, in a per curiam opinion, not only disagreed but made short shrift of the Oklahoma Court's analysis. For example, the Oklahoma Supreme Court declared that its decision rests on "adequate and independent state grounds." The U.S. Supreme Court said:

> If that were so, we would have no jurisdiction over this case…. It is not so however, because the court's reliance on Oklahoma law was not "independent" – it necessarily depended upon a rejection of the federal claim, which was both "properly presented to" and "addressed by" the state court.

The U.S. Supreme Court said that the Oklahoma Supreme Court's decision disregards U.S. Supreme Court precedents on the FAA. The Supreme Court opined as follows:

> … when parties commit to arbitrate contractual disputes, it is a mainstay of the Act's [FAA] substantive law that attacks on the validity of the contract, as distinct from attacks on the validity of the arbitration clause itself, are to be resolved "by the arbitrator in the first instance, not by a federal or state court."

The U.S. Supreme Court said that the Oklahoma Supreme Court "must abide by the FAA, which is 'the supreme Law of the Land.'"

The U.S. Supreme Court declared the Oklahoma decision as "expressing judicial hostility towards arbitration." In this case, the U.S.

Cont'd on pg. 5, column 1

Inside this issue:

- U.S. Supreme Court Opines Again On Federal — 1
- Despite The Supreme Court's Decision in Nitro-Lift - Not Every Case Should Be Arbitrated — 2
- Working For OTB A Bad Bet — 3
- Arbitration: Choice Of Forum Provision Rejected — 3
- Civil Service Act Applies To School District Employees — 4
- Some Issues That Could And Should Have Been Subjected To A Master Or Mediator — 4
- Contact Information — 5

The Jacobs Center for Justice and Alternative Dispute Resolution is dedicated to assisting individuals and companies in resolving problems and disputes of all types.

DESPITE THE SUPREME COURT'S DECISION IN NITRO-LIFT - NOT EVERY CASE SHOULD BE ARBITRATED

In Marjam Supply Co., Inc. v. Columbia Forest Products Corporation, et al., the Appellate Division, in New Jersey, rejected a motion to compel arbitration. The case involved conflicting claims regarding Marjam and its purchase of assets from Centre Lumber and Plywood, a building materials distributor. Marjam had acquired Centre's assets, including its vendor and customer lists, good will as a going concern, and inventory of specialty lumber and wood products, which included a substantial amount of Columbia's products. As part of Marjam's acquisition of Centre, Alan Foxman, Centre's Director of Purchasing, went over to Marjam. Curiously, four days after Centre was acquired by Marjam, Foxman quit and went to work for defendant LeNoble Lumber Co., a competitor within Marjam's newly-acquired market area.

The facts are a little muddled with regard to the status and interactions between Marjam and Columbia. For example, Columbia elevated Marjam to the level of a "Cornerstone Member" distributor and it was memorialized in a written document. To maintain that status, Marjam was required to purchase all of its domestic hardwood plywood from Columbia. The Enrollment Agreement governing this transaction was executed on May 26, 2011. Significantly, it did not contain a dispute resolution mechanism, an arbitration clause, or a choice of law provision.

Transactions between Columbia and Marjam followed a "predictable and routine procedure." Purchase orders were submitted which contained things like the goods' description, quantity, price, expected delivery date, and delivery location. Acknowledgement would be reviewed and forwarded regarding errors, omissions, or discrepancies. On page 2, or the reverse side, of Columbia's invoices, Columbia set forth its conditions of sale which involved a provision 17 stating that this was the "Complete Agreement" and on page 6, section 19, a provision that stated that:

> Any and all disputes arising under these Terms and Conditions or arising from any sale of goods by Seller to Buyer, or otherwise, shall be resolved by binding, mandatory arbitration under the authority of the American Arbitration Association…. Such arbitration proceeding shall be conducted in Portland, Oregon.

But, neither Marjam's purchase order nor Columbia's acknowledgement contained a dispute resolution mechanism, an arbitration clause, or a choice of law provision.

The parties engaged in a course of conduct for several months generating nine orders with nine invoices and only one invoice after Marjam reached Cornerstone Member status. On June 24, 2011, without any prior notice, warning, or explanation, Columbia terminated Marjam as its distributor effective immediately and appointed LeNoble in Marjam's place. This lawsuit followed shortly thereafter seeking equitable relief as well as damages. The court denied Columbia's motion to compel arbitration finding that the arbitration clause was the last clause in the Terms and written in exceedingly small print. The court also failed to see why that clause contained in the invoices constituted notice to arbitrate with Columbia when it entered into the Enrollment Agreement.

On appeal, Columbia asserted that the FAA applied to the present matter and the court should compel arbitration. The Appellate Division agreed that the FAA applied but rejected the argument regarding compelling arbitration. The court went though a lengthy analysis of motions to compel arbitration and said that a reviewing court should conduct a two-step inquiry into (1) whether a valid agreement to arbitrate exists; and (2) whether the particular dispute falls within the scope of that agreement.

The Appellate Division ruled that "the record convincingly reveals that Marjam never agreed to submit disputes relating to the Enrollment Agreement to arbitration." It noted that the scope of the Terms, including the arbitration clause, was "unambiguous." Columbia, nonetheless, argued that the Terms' arbitration clause was so broad and expansive that it would subsume the Enrollment Agreement.

The court did not agree. As a matter of fact, the Appellate Division ruled that the "factual connection between what the parties will litigate and those invoices … is illusory." The Appellate Court concluded that an expansive reading was appropriate and that there was an arbitration provision in the Enrollment Terms. However, this particular agreement was not controlled by the Enrollment Terms and, therefore, the motion to compel was rejected; arbitration was not appropriate on these facts. The court's conclusion is buttressed by its comment that "it is a far cry from liberally interpreting an arbitration provision to being satisfied that the factual matrix of the parties' dispute actually touches and concerns the Terms' arbitration clause found in the invoices."

My comment – enough said.

CONTACT US FOR ADR:

- Mediation
- Arbitration
- Fact-finding
- Workplace Investigation
- Policy analysis and development
- Discovery management

WORKING FOR OTB A BAD BET

In Roberts, et al. v. Paterson, et al., the New York Court of Appeals affirmed the denial of City obligations for pension and other benefits to former employees of the New York City Off-Track Betting Corporation ("NYC OTB" or the "Corporation"). NYC OTB was created in 1970 as a public benefit corporation to operate off-track pari-mutuel betting within New York City. It was governed by the Racing, Pari-Mutuel Wagering and Breeding Law and collected about $1 billion per year in wagers for at least four years ending June 30, 2008. After paying bettors and others, NYC OTB was left with insufficient funds to cover operating expenditures and accumulated debt. Some changes by the Legislature kept it alive a little longer but more akin to life support. NYC OTB continued to hemorrhage funds and filed for bankruptcy protection under Chapter 9. The New York State Senate declined to adopt legislation implementing a reorganization plan and NYC OTB shut down on December 7, 2010. By letter dated December 8, 2010, the City's Corporation Counsel informed NYC OTB that, in light of its decision to close, NYC OTB retirees would lose coverage under the City's health insurance and welfare benefit plans because NYC OTB was no longer able to reimburse the City as required by its enabling legislation.

District Council 37 brought suit against the State, the Governor, the Mayor, and the City to reinstate benefit payments. Despite an initial TRO, the N.Y. Supreme Court eventually ruled that none of the theories presented by District Council 37 required the City to accept liability for NYC OTB, the City, or the State for NYC OTB retiree health benefits.

NYC OTB was a public benefit corporation specifically established by the Legislature to operate pari-mutuel betting. The Appellate Division unanimously affirmed this decision and said the City and State were "precluded by New York Constitution" from bailing out the retirees' health insurance benefits.

The Court of Appeals agreed and said that as a public benefit corporation created by the State NYC OTB was "never a 'department or agency' of the City." The Court opined that public authorities are legal entities separate from the State and exist as their own political subdivisions. Despite the fact that NYC OTB employees participated in City authorized health insurance and welfare benefits plans, it was solely contingent upon the Corporation's reimbursement of the City on a dollar-for-dollar actual cost basis.

ANALYSIS AND COMMENTARY:

It almost seems that the Legislature contemplated this possibility. When it adopted the Act it added a new subdivision (1) to section 606 of the Racing, Pari-Mutuel Wagering and Breeding Law which provided that for the purposes of section 606, "all employees of the NYC OTB … shall remain employees of such corporation…." (Emphasis supplied.)

Very simply, the claims of the retirees for pension and other benefits were flat out rejected; NYC OTB was established as a standalone State authority; and as a political subdivision did not confer City employment status on its employees despite the fact that they participated in the City health insurance program. By amending section 606, the New York Legislature made clear at the outset that, at the end of the day, OTB would sink or swim on its own. Sadly, it turned out to be a bad bet for all.

Roger Jacobs recently negotiated protocols with the NJ Department of Corrections to permit Jewish prisoners to light candles on the Hanukah Menorah for the first time.
http://s.nj.com/osW7p4J
This historic development utilized his dispute resolution skills. If you require problem solving expertise call him at 973-226-0499.

ARBITRATION: CHOICE OF FORUM PROVISION REJECTED IN NJ

In Allied Professionals Insurance Company v. Jodar, et al., the Appellate Division in New Jersey affirmed a finding that a coverage dispute with regard to medical malpractice should be arbitrated but that the choice of forum provision for Orange County, California was rejected. The Appellate Division agreed with the analysis regarding the choice of forum.

Ilene Schneider and David Schneider were intervenors as plaintiffs in the underlying medical malpractice action against Jodar and Integral Acupuncture for services rendered to Ilene on April 11, 2008. Jodar tendered the Schneider's claim to Allied on October 6, 2008, after Ilene renewed her policy. Allied declined coverage asserting Jodar made a material representation when she omitted any reference to a potential cause of action on the April 17, 2008 policy renewal. On January 6, 2009, Allied canceled the policy.

The Schneiders filed their malpractice complaint against Jodar and Integral Acupuncture shortly after the cancellation. Jodar and Integral Acupuncture then filed a third-party complaint against Allied in the medical malpractice lawsuit, seeking to compel coverage. In turn, Allied filed a separate proceeding against Jodar and Integral Acupuncture, pursuant to Rule 4:67, demanding arbitration under the terms of the policy.

The trial judge found it to be a "hardship" on Jodar if she were required to arbitrate her claims in California because this case implicated the public policy of New Jersey. The appellate court agreed that forum selection clauses will be given effect unless they are unfair, unreasonable, or contrary to public policy. The lower court found it would be unfair to require Jodar to arbitrate in Orange County and the forum designation contrary to public policy. The appellate court noted that fair arbitration of the

Cont'd on pg. 5, column 2

NEW JERSEY SUPREME COURT RULES THAT CIVIL SERVICE ACT APPLIES TO SCHOOL DISTRICT EMPLOYEES

In Headen v. Jersey City Board of Education, the plaintiff was a ten-month employee in the Jersey City School District. As a food service worker she worked a full-day ten months per year based on the school calendar. She sought compensation for vacation time she claimed was due her under the Civil Service Act governing vacation leave for career service employees of political subdivisions.

Some basic facts:

School districts that adopt the Civil Service Act are political subdivisions for the purposes of the Act. In this case, Jersey City had done so.

The Supreme Court held that the Civil Service Act's paid vacation leave provisions apply to career service, non-teaching staff employees of school districts that have opted to be part of the civil service system, like Jersey City and including ten-month employees in the career service like plaintiff. However, this action was properly dismissed because a collectively negotiated agreement had already provided plaintiff with more than the minimum vacation leave to which she was entitled under the Act.

The Civil Service Act, N.J.S.A. 11A:6-3, had a vacation schedule for full-time political subdivision employees. The court held that the Civil Service Act, "once adopted by a local governmental entity, provides a comprehensive framework." Thus, unless an exclusion provided otherwise, "a school district opting to become a political subdivision subject to the Act cannot pick and choose among the Act's provisions for those it wishes to follow." Having made that ruling, the court looked at the vacation requirement and noted that 11A:6-3 sets the "minimum vacation leave." Utilizing this analysis, the Supreme Court concluded that plaintiff was entitled to ten-twelfths of the time allotted to a full-time employee of a political subdivision.

According to the Board's calculations plaintiff is entitled to ten days of paid vacation based on her three years of service at the time the complaint was filed. However, the collectively negotiated agreement (CNA) provided her with more than the minimum amount of statutory vacation. Thus, the Court concluded plaintiff had received all of the paid vacation leave "and more" that she was entitled to when she filed her complaint.

Practice Tip: The Supreme Court's ruling is significant particularly because it holds that the Civil Service Act's paid vacation leave provisions apply to career service non-teaching staff of school districts that have opted to be part of the civil service system. Unfortunately for plaintiff Headen, she had already gotten more time than the statute provided.

SOME ISSUES THAT COULD AND SHOULD HAVE BEEN SUBJECTED TO A MASTER OR MEDIATOR

In Flecker v. Statue Cruises, LLC, et al., the Appellate Division reviewed interesting claims regarding wage and hour issues and CEPA as well as class certification. For the purposes of *Neutral Notes* I will not deal with each of the issues other than to comment in conclusory fashion that utilization of a special master or mediator might facilitate the issues sent back on remand for further review and discovery.

The court ruled, based upon the pleadings, that defendants' motion to compel an independent medical examination (IME) should be granted. Plaintiff argued that nothing more than "garden variety" claims were presented and that an IME was unnecessary and inappropriately intrusive. The court stated, to the contrary, that the allegations of severe emotional stress with accompanying physical sequelae as a result of defendants' interrogatory responses that plaintiff suffered from sleeplessness, anxiety, increased stress, humiliation, loss of self-esteem, panic and stress, and an admitted pre-existing emotional distress, justified an examination. The court directed plaintiff to undergo an IME.

The allegations regarding wage and hour claims are also quite interesting. There is a basic preemption question with regard to the application of the Fair Labor Standards Act, a federal statute. The Court found that the record existing to date (on cross-motions for summary judgment) was insufficient to make a determination and that the factual basis needed to be further developed. The court cited cases in New York regarding FLSA and exemptions of seamen from overtime pay requirements but stated that no reported New Jersey decisions had addressed this precise issue to date.

SUGGESTION: in monitoring and following the remand of the wage and hour claim, utilization of a master or mediator might be helpful. Developing complicated facts and managing discovery can be facilitated with a special master to guide and push the process along.

The case appears to be very interesting based upon potential CEPA facts and the interaction of federal and state law regarding overtime and other issues. A decision on preemption will be a precedent in New Jersey. I will keep you posted.

U.S. Supreme Court Opines Again On Federal Arbitration Act *(Cont'd from pg. 1)*

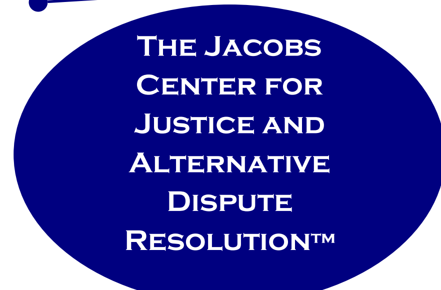
Supreme Court rejected the state court's opinion and said that where a specific statute conflicts with a general constitutional provision, the latter governs "[a]nd the same is true where a specific state statute conflicts with a general federal statute." In this case it is for the arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law.

Practice Tip: Another victory for arbitrators. The U.S. Supreme Court has made clear, again, that arbitration is preferred; that contracts that provide for arbitration should be enforced; and that reliance on the Federal Arbitration Act is preferred.

Arbitration: Choice of Forum Provision Rejected *(Cont'd from pg. 3)*

coverage question may require more than just Jodar's testimony and that other witnesses from New Jersey may be needed to present the claim in full. The court held that "[t]he public's interest is implicated when insured, attempting to enforce coverage, are required pursuant to boiler-plate forum language in their policies to arbitrate out-of-state even though the covered risks, potential witnesses, and other evidence are located in this state."

Practice Tips: Arbitration provisions should be drawn to reflect reality, not just convenience to the party holding the cards. In New Jersey, forum selection may be voided to assist New Jersey litigants when out of state forum selection is so grossly inconvenient that it violates public policy.



Roger B. Jacobs, Esq.
103 Eisenhower Pkwy, Suite 103
Roseland, NJ 07068
973-226-0499 Phone
973-226-0110 Fax
jacobsjustice@gmail.com E-mail

JACOBS CENTER UPDATE

2012 has been a very exciting year for us. Roger Jacobs is now on the panel of arbitrators at FINRA, FMCS, AAA, NJSBM, and NY PERB. He is also a mediator for FINRA, AAA, NJ Superior Courts, and the U.S. District Court in NJ. Cases have included multi-party commercial disputes in construction, intellectual property, discovery management in federal court and arbitration of labor and employment matters as well. Jacobs is regularly retained by parties to assist in ADR.