

NEUTRAL NOTES

THE JACOBS CENTER FOR
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ARBITRATOR IMPARTIALITY

The New York Court of Appeals recently addressed the subject of arbitrator neutrality in *U.S. Electronics, Inc. v. Sirius Satellite Radio, Inc.* U.S. Electronics (USE) sought to vacate a unanimous arbitration award in favor of Sirius Satellite Radio (Sirius). There had been a breach of contract dispute. USE had a non-exclusive agreement with Sirius to distribute radio receivers. USE claimed that William Sessions, the chairman of the arbitration panel and former Director of the FBI, failed to disclose relationships of interest that affected the impartiality and propriety of the arbitration process. They argued that he specifically failed to disclose that his son, Congressman Peter Sessions, had publicly advocated a merger between Sirius and XM Radio and that his son was a close political ally of Rep. Darrell Issa, the founder and

director of Directed Electronics (DE), a competitor of USE in radio receiver distribution.

The court adopted the Second Circuit formulation of reasonable person standard of review. The court found that the Appellate Division had erred by imposing upon USE a burden of proving by clear and convincing evidence that any impropriety or misconduct of the arbitrator prejudiced its rights. New York's high court said that "[n]o such standard can be gleaned from federal precedent." However, the Court of Appeals found that there was no basis to vacate the arbitration award.

The high court concluded that USE's claims of bias were "premised on attenuated matters and relationships" and not sufficient. The court reasoned that the purported connection between Chairman Sessions and Congressman Issa, through his

son's political relationship, was "too tenuous to impute partiality or bias to the chairman." The court noted, however, that it would have been a different case if USE could allude to a personal or business relationship between Chairman Sessions and Congressman Issa or if his son had had a prominent role at Sirius or Issa's company. Therefore, absent such a showing the allegations without more were nothing more than "speculation of bias."

TIP: In other words, mere supposition will not be sufficient to set aside an arbitration award, particularly where it is based upon adding relationships together without more to conclude that there was a direct relationship and knowledge and participation in the actions alleged.

INSIDE THIS ISSUE:

Arbitrator Impartiality	1
Enforceable Arbitration Agreements	2
Settlements	3
Arbitration of FMLA Claims	3
Contact Information	4

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ENFORCEABLE ARBITRATION AGREEMENTS

A panel of the Appellate Division in New Jersey grappled with the enforceability of an arbitration provision in Hard Grove Café and Bonilla v. Domestic Linen Supply Co., Inc., et al. The Court remanded the question of unconscionability of the arbitration clause for further review.

Hard Grove is a café in Jersey City. Alexandra Bonilla is an employee of Hard Grove. Domestic Linen is a linen supplier. An individual co-defendant was Richard Then, a district sales manager of Domestic Linen who dealt with Bonilla. The issues in dispute involved a form contract signed by Then and Bonilla at the Café. The remaining question involved whether the terms were understood by the parties when they signed the agreement, not really whether the terms say what they purportedly say.

The contract was a three-page form contact which obligated Hard Grove to rent a variety of items from Domestic Linens with a minimum weekly delivery charge of \$146.10. Significantly, the agreement also stated that Hard Grove warranted that its representative had read the entire contract, front and back, and received a copy and that the signatory was authorized to sign.

The contract also contained an arbitration clause which was as follows:

In the event of any controversy or claim in excess of \$10,000.00 arising out of or relating to this agreement, including but not limited to questions regarding the authority of the persons who have executed this agreement, the question, controversy or dispute shall be submitted to and settled by arbitration to be held in the city closest to the city in which the branch office of the Company which serves the Customer is located. Said arbitration shall be held in accordance with the then prevailing commercial arbitration rules of the American Arbitration Association except any rules which require the parties to use the American Arbitra-

tion Association as their sole Arbitration Administrator. Judgment upon and award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The filing party may use either court or arbitration where the claim is less than \$10,000.00. Venue for any court proceeding shall be in the county of the company's branch office servicing the Customer. The judge or arbitrator shall include as part of the award all costs including reasonable attorney fees and arbitration fees of the non-breaching party where it is determined that one of the parties has breached the agreement. [Emphasis supplied.]

Despite the language of the contract which required Hard Grove to obtain certain supplies only from Domestic Linen, Hard Grove continued to use a different vendor and did not pay the amounts billed under the contract. As a result, a demand was sent from counsel for Domestic Linen for monies allegedly due under the agreement. Hard Grove took the position that the contract was unenforceable for a variety of reasons including that Bonilla lacked the authority to bind the company; Bonilla's native language was Spanish and she was fraudulently induced to sign the agreement; it was a contract of adhesion; and there was no meeting of minds for Hard Grove to waive its right to litigate.

Bonilla did not dispute that she signed the agreement but instead that she was told it was not a contract and contained no commitments. She stated that she also advised Then that the café was already renting uniforms from another vendor. No agreement was left at the premises.

The procedural record in this case is quite interesting. I will attempt to short circuit it for our discussion. Hard Grove moved for a declaratory judgment regarding the enforceability and unconscionability of the arbitration provisions. Ultimately, the Appellate Court con-

cluded that there were essentially two ways to proceed. The parties could agree to have the facts established in front of an arbitrator or in court. If the facts were established by an arbitrator then the arbitrator's ruling would be subject to court review in the course of the review of arbitration decisions under the federal arbitration act.

In the procedural tangle, the Court found that the trial court properly applied the governing principles of the Arbitration Act in section 6 with respect to plaintiffs' specific contentions that the contract was fraudulently induced and that Bonilla lacked authority to bind Hard Grove to it. Pursuant to subsection (b) of N.J.S.A. 2A:23B-6, the court correctly determined, at least as a threshold matter, that an agreement between Hard Grove and Domestic Linen existed and that the amount in controversy was met, subjecting the agreement to arbitration.

The Court noted that plaintiffs' claim of unconscionability had two aspects - procedural and substantive - and held that a contract provision that is procedurally and substantively unconscionable can be set aside. The Court found that plaintiff correctly noted that under applicable case law assertions of unconscionability of an arbitration provision are customarily decided by the courts and not the arbitrator. The Appellate Court found, however, that the difficulty arose here because the factual underpinnings of unconscionability are intertwined with the material facts of plaintiffs' separate claims of fraud and lack of agency. In any event, those facts needed to be established either in court or at an arbitral forum. Thus, the Court reasoned that the parties should have essentially selected where to proceed for the fact development. If the parties chose to have the factual issues decided by the court, then the arbitration was bypassed. Conversely, if they elected to have the factual issues developed before the arbitrator, the court record would be closed subject to ulti-

Cont'd on pg. 4

SETTLEMENTS

Some guidance from the Appellate Division in an opinion also including Judges Ariel Rodriguez and Sabatino who also heard the Hard Grove matter. In Colonial Surety Company v. Jason D. Cooper, the question before the Court was whether or not the parties had reached a settlement. There was an exchange of letters between counsel who settled the claims for \$10,000.00. The underlying claims had to do with Jason Cooper's services as a bond salesman and alleged breaches of an employment agreement with restrictions.

On August 12, 2010 defense counsel sent plaintiff's attorney a letter offering to pay \$7,000.00 to settle.

On August 17, 2010 plaintiff responded that settlement at \$10,000.00 would be acceptable. No release was mentioned.

On August 18, 2010 defense counsel replied that he would settle for \$10,000.00 and would prepare a release for plaintiff to sign. Counsel also stated that he assumed plaintiff's attorney would withdraw his motion to reconsider prior court orders.

On August 19, 2010 defense counsel sent plaintiff's attorney a release for plaintiff to sign. Upon receipt, plaintiff's attorney injected a new term of reciprocal releases.

On August 23, 2010 plaintiff's attorney said plaintiff would require a release as well and he would advise the court of the settlement.

On August 24, 2010 plaintiff's attorney sent defense counsel a blank release for signature and sent a letter to the court advising of a settlement.

On September 9, 2010 defense counsel tendered a \$10,000.00 settlement check which plaintiff's attorney returned, unendorsed, on September 14, 2010 because it lacked a signed release.

Since the parties reached impasse, plaintiff's attorney wrote to the court to reinstate his motion. The court refused and stated that as far as the court was concerned the matter was closed. The trial judge heard oral argument and refused to reopen the matter, finding that the August 24, 2010 letter from

plaintiff's attorney to the court was a conclusive indication of settlement. This decision was put into an order dated November 12, 2010.

The Appellate Court rejected the contention that a settlement had been reached. The Court noted that "a settlement is not enforceable until the parties have agreed on all essential terms.... Releases or other closing 'contingencies' are essential terms that must be approved by both parties." Thus, the settlement was contingent on attaining a mutual agreement for the exchange of releases. Since the parties failed to do so, there was no enforceable settlement. Because "there was no ultimate offer and full acceptance... there was no ultimate meeting of the minds and no enforceable settlement" the Court ruled.

The Court noted that, at oral argument, defense counsel represented that while the appeal was pending defendant changed his mind and signed a release. However, there was no motion to dismiss the appeal as moot and, based upon the response of plaintiff's attorney at oral argument, "plaintiff, having expended the costs of pursuing the appeal, is unwilling to agree to an unconditional dismissal of the appeal."

Some obvious points and tips from Colonial Surety: If the parties have reached settlement with the utilization of a neutral, the neutral should insure that the parties have reduced all of the terms of the settlement to writing and had sign-off by the parties in the presence of the neutral. Failure to at least initial a summary form of agreement may result in disagreements like Colonial Surety. All of the material terms of a settlement must be agreed upon between the parties in order to have a settlement. While the sum in dispute in Colonial Surety Company was not great, the costs and protraction of the litigation certainly could have been avoided.

ARBITRATION OF FMLA CLAIMS

In yet another decision from the New Jersey Appellate Division, there was an argument over the efficacy of arbitrating claims under the Family and Medical Leave Act, 29 U.S.C. §2601 (FMLA). In Flores-Galan v. J.P. Morgan Chase & Co., et al., the case had its origins when defendants filed a motion to dismiss plaintiff's complaint in court in favor of binding arbitration. Plaintiff filed a complaint against her then employer, Washington Mutual Bank, and its corporate successor J.P. Morgan Chase, and individual supervisors alleging violation of the Leave Act while she was pregnant. Plaintiff was unaware of her FMLA rights when she initially resigned her position. Shortly after sending in her resignation she learned she could apply for leave under FMLA. Defendants did not let her return to work and refused to rehire her allegedly because she asserted her rights under FMLA or they knew she was pregnant and suffering from a related disabling condition.

Defendants moved to dismiss and asserted the matter was covered under the Federal Arbitration Act by the arbitration provision which she has signed.

I, Jazmin C. Flores-Galan, in consideration of my employment with Washington Mutual, Inc. or any of its affiliates or subsidiaries ("Washington Mutual") agree with Washington Mutual as follows:

2. Washington Mutual and I understand that by entering into this Agreement, each of us is waiving any right we may have to file a lawsuit or other civil action or proceeding relating to my employment with Washington Mutual, and waiving any right we may have to resolve employment disputes through trial by jury.

3. This Agreement is intended to cover all civil claims that involve or relate in any way to my employment (or termination of employment) with Washington Mutual, including, but not limited to, claims of employment discrimination

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Enforceable Arbitration Agreements (Cont'd from pg. 1)

mate judicial review based on the limited grounds available under the Arbitration Act or by law. Finally, the Court ruled that if the parties could not decide on their own on a unitary forum to develop the factual issues, then the court shall first adjudicate the factual issues limited to the alleged unconscionability of the arbitration clause. If the court found the clause unconscionable, and thus unenforceable, the remaining issues would be litigated in court. But, on the other hand, if the court concluded the arbitration clause is not unconscionable, the matter shall proceed to arbitration where the arbitrator would resolve the claims of fraud in the inducement, lack of agency, and the merits of the claims if necessary.

Hard Grove Café is a muddle. It provides a helpful analysis by the Appellate Court of the pitfalls of proceeding and, of course, some basic lessons for companies signing agreements to arbitrate. Read them first!

Arbitration of FMLA Claims (Cont'd from pg. 3)

or...with Washington Mutual. The only exceptions to this are Claims for benefits under a plan that is governed by ERISA, Claims for unemployment and workers compensation benefits, Claims for injunctive relief to enforce rights to trade secrets, or agreements not to compete or solicit customers or employees.

17. Because of Washington Mutual's business, this Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § et seq ("FAA"). ...

About two weeks after defendants filed their motion to compel arbitration, and one day after the last motion brief was filed, plaintiffs filed an amended complaint which tracked very closely the initial complaint asserting failure to rehire and disability discrimination under the Law Against Discrimination and pregnancy discrimination. Based upon the premise of the retaliation claim, plaintiffs argued that they were free from the arbitration requirement.

The trial judge found the arbitration agreement comprehensive to cover plaintiff's FMLA and LAD claims - regardless of the theories pled, her complaint was factually based upon the same events during her employment. He concluded that the reprisal and refusal to rehire claims were inextricably intertwined with the other claims and that all should be arbitrated together. The judge also rejected plaintiff's argument that either FMLA itself or the Department of Labor's regulations prohibited agreements to arbitrate.

On review, the Appellate Court started with the strong federal policy in favor of arbitration. The Court rejected plaintiff's argument that her LAD claims were not covered by the arbitration agreement because they arose after her termination. The Court concluded the facts pled in both the original and amended complaints "demonstrate that her LAD claims were related to her employment and were inextricably intertwined with her FMLA claims."

The Court characterized the amended complaint as a "eleventh hour attempt to circumvent the arbitra-

tion clause." The court also rejected the argument that FMLA prohibits arbitration agreements as well as the argument regarding the Department of Labor position. Plaintiff relied upon a footnote in an amicus brief that the Department of Labor filed several years ago, arguing that FMLA prohibited employers from requiring employees to waive their rights to file suit. The Court rejected plaintiff's argument and said neither the Act nor the regulations support plaintiff's argument, quoting section 2615 of the act in its entirety.

The Court concluded that the statute and the regulations together prohibit employers from attempting to deprive employees of substantive rights and interfering with ongoing proceedings filed to enforce those rights. But, the provisions do not prohibit agreements to submit FMLA claims to arbitration, relying upon the Supreme Court's decision in 14 Penn Plaza LLC v. Pyett. The Court said that the footnote meant that "while an employee may accept a payment for the release of a claim based on an employer's past act, the employee cannot waive rights against an employer's future illegal acts, such as a future refusal to allow the employee to take FMLA leave or a future reprisal for taking such leave." Making short shrift of the plaintiff's other arguments, the Court said "plaintiff's additional argument lack sufficient merit to warrant discussion in a written opinion."

Of significance is the Court's finding that FMLA claims are subject to arbitration and agreements to arbitrate all claims, including leave claims under FMLA, will be enforced.