NEUTRAL NOTES

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A WRITING IS A WRITING AND A SETTLEMENT IS A SETTLEMENT

In Partners Pharmacy Services, LLC v. Halbert, et al., the Presiding Chancery Judge in Union County rejected a claim that a settlement had been reached in mediation. The case arose based on defendants' motion to enforce a settlement which defendants asserted was reached before a retired judge as mediator. No formal written settlement agreement was prepared but defendants contended oral settlement was reached during the mediation and should be enforced by the court. Defendants relied upon a series of e-mails between counsel which they asserted laid out the terms of the settlement. Defendants contended the e-mails were outside the scope of confidentiality afforded to mediation since the mediation was complete. The question for the court was whether the post-mediation correspondence between counsel was confidential or outside the confidentiality attached to mediation and, therefore, subject to disclosure. The court stated that "[s]ettlements reached at a complementary dispute resolution session, such as mediation, must be reduced to writing expeditiously, but not necessarily at the mediation session."

Under the Uniform Mediation Act §6(a)(1), the only writing which establishes the existence of a settlement agreement is one that is signed by all of the parties. The Act also allows parties to refuse to disclose mediation communications.

Judge John Malone stated that "[i]n order to consider defendants' claim that the case is settled" would require the court to "review the e-mails presented … [and] additional documents would need to be reviewed." Based upon the innate confidentiality of mediation as well as the Uniform Mediation Act, the court concluded that "[s]uch review would improperly intrude into the mediation process."

Absent a waiver of confidentiality by the plaintiff – which was not given – the motion to enforce settlement was denied.

The court further noted that the mediator in this matter confirmed his understanding that a settlement was reached and, also, the fact that the court's decision "leaves defendants without a mechanism to enforce the settlement, if in fact a settlement was reached." The court finally concluded that the "expectation of confidentiality in the mediation process must be protected" and that right is sacrosanct.

Practice Tip: Having the parties do a term sheet signed by counsel and parties at the conclusion of the mediation probably would obviate such a result.

MEDIATION MUSINGS

Is there one correct way to handle a mediation? Not in my opinion.

Every mediation, in some measure, has to be handled based upon the topics, the issues, the parties, and the moment. Yes, of course, there is a general structure that should occur. I always explain the rules and the absolute confidentiality when I proceed. However, defining "success" is not always the same.

After one recent mediation I was asked "was the mediation successful?" Interestingly, it was in my mind. Not every case is ready for complete resolution of all issues at the same time. In that example, at an early state in litigation my goal before we even got started was to narrow the issues and parties. In some litigations, for a variety of reasons, it is simply not possible to settle a case right out of the box. Part of the role of the mediator is to recognize how to most effectively handle the process to accomplish results that help the parties.

On the other hand, there are some situations, particularly in court-ordered mediations, where either the parties or counsel have no interest in the process and will not invest (literally) in the process.

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DIFFERENT VIEWS ON ARBITRATION FROM THE APPELLATE DIVISION (NJ)

ARBITRATION COMPELLED EVEN AGAINST NON-SIGNATORIES TO THE AGREEMENT

In Hirsch, et al. v. Amper Financial Services, LLC, et al. v. Securities America, Inc., the Appellate Division affirmed a decision of the trial court to compel arbitration of all claims even though all of the parties were not signatories to the arbitration agreement. Plaintiffs' account agreements with their stockbroker Securities America, Inc. (SAI) mandated arbitration of any disputes between the parties. No agreement between plaintiffs and defendants Amper Financial Services (AFS) and EisnerAmper LLP mandated arbitration. The dispute arose out of plaintiffs' purchase of securitized notes issued by Medical Capital Companies which had been recommended by Mark Scudillo, a broker and registered financial represented with AFS. EisnerAmper and Scudillo each owned a 50% interest in AFS. SAI was the broker-dealer for each transaction.

The account application and customer agreement had a pre-arbitration agreement which specifically had a waiver of jury trial and committed the parties to "arbitration in accordance with the rules then prevailing of the New York Stock Exchange, Inc. or the NASD…." NASD has been replaced by FINRA.

On September 22, 2010, plaintiffs filed a FINRA arbitration claim against SAI and Scudillo concerning defaults on the notes. Two months later plaintiffs filed a complaint in the Law Division against EisnerAmper and AFS alleging breach of fiduciary duty, violation of the New Jersey Consumer Fraud Act, the New Jersey Uniform Securities Law, negligent misrepresentation, professional malpractice, breach of contract, and negligent supervision. The complaint did not name Scudillo or SAI as defendants.

SAI moved for an order compelling arbitration staying the action pending arbitration and consolidating the Law Division action with the pending arbitration proceeding.

The main argument relied upon was simply that no contract existed requiring the Hirsch plaintiffs to arbitrate with the Amper entities and, absent a contract requiring arbitration, arbitration could not proceed and should not be compelled.

The Court noted and recognized that as a general rule "only signatories to an arbitration agreement will be required to submit to arbitration." However, the Court stated further that "[t]hat rule is not inflexible, however, and is subject to traditional principles of contract and agency law."

Citing U.S. Supreme Court precedent, the Court further stated that traditional principles of state law allow a contract to be enforced by or against non-parties through assumption, piercing of the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel.

The Court said that New Jersey law recognized non-signatory standing to compel arbitration based upon the principle of equitable estoppel. The Court opined that equitable estoppel has been invoked under appropriate circumstances to

> force an objecting signatory to arbitrate the same claims against a non-signatory as alleged against the other party to the contract. But even where the inextricable connectivity was not considered itself dispositive of the issue, the combination of the requisite nexus of the claim to the contract together with the integral relationship between the non-signatory and the other contracting part was recognized as a sufficient basis to invoke estoppel. (Emphasis supplied.)

In this case, while there was no contractual provision between plaintiffs and defendants mandating arbitration, plaintiffs and SAI had agreed to arbitrate all claims concerning "any account, order, or transaction." The Court noted that plaintiffs' claims against defendants arose directly from the same accounts and transactions. Despite not naming Scudillo, he was an employee of defendant AFS and completed the transaction as a broker for SAI and he signed the agreement mandating arbitration.

The Court found that the "legal and factual issues concerning plaintiffs' transactions are intertwined and should be resolved in one proceeding."

The Appellate Panel concluded that the "entire controversy doctrine" supported its decision to have the matter litigated in one forum and that compelling arbitration of all claims in this case furthered the doctrine's goals of "fairness and judicial efficiency."

Thus, despite careful pleading, the Court found that it made more sense to litigate at one time in one forum rather than bifurcate the process even though some of the parties had not been individual and specific signatories to the arbitration agreement. The Court, of course, noted New Jersey's long-standing policy favoring arbitration as a speedy and efficient approach to dispute resolution. Although observing that "arbitration is a matter of contract," the Court ruled that a broader approach, based upon the facts in Hirsch, mandated such a finding.

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SOME DISPUTES ARE NOT SUBJECT TO ARBITRATION

A different panel of the Appellate Division ruled, in First Managed Care Option v. Ott, et al., that arbitration was not appropriate based upon the agreement between the parties. Premier Comp Solutions (PCS) had a participation agreement with First Managed Care Option (FMCO). The arbitration provision in the agreement required disputes between PCS and FMCO to be arbitrated. The Court concluded, however, that the dispute did not arise out of or relate to the agreement and, therefore, arbitration

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Mediation Musings

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Those circumstances are rarely models for success and should probably not even be in mediation in the first place.

There are a myriad of key issues and not necessarily one correct answer.

For example, there is discussion/ disagreement about settlement agreements - who is the scrivener; how much detail; and how are they executed.

Very simply, my position is I do not write settlement agreements but try to insist that the parties memorialize their agreements, either full or partial, in writing before they leave the mediation. There are too many cases suggesting that no "deal" has been made and litigation efforts to unravel them. Rather, my suggestion is that the parties reduce to writing the agreement that we have come to, usually in my presence, and sign off even on a sketchy term sheet. Other colleagues insist on a memorialization that they draft or dictate. I try to minimize my direct role in finalizing the settlement document.

I also suggest that the parties be present for finalization and give their assent, preferably in writing.

Terms of settlement:

I recently attended a very interesting conversation among mediators regarding the scope and contents of a settlement agreement. There was a lack of unanimity on the subject. Again, my practice is that the parties reach agreement on terms that are necessary to each and that I not dictate the terms. The different question is if the mediator is asked "are there any other material terms that you think are important?" After thirty years of practice I have some idea and might make suggestions individually to that query but only if asked directly.

Coming to terms:

Sometimes parties and/or counsel prefer the mediator to "call it." I am very reluctant to follow such a practice. Primarily, parties who have opted for mediation and not arbitration want to achieve a settlement. If the parties cannot achieve a settlement the matter may be appropriate for arbitration. However, the processes remain different. My goal during mediation is to help the parties achieve resolution. It is not to impose my decision. Offering suggestions, however, is a different part and tool of the process. Mediators should be creative in helping parties to craft solutions that work for all parties and take into account different concerns and constituencies. A checklist can be helpful for individual mediators to make sure that he or she has covered the subjects critical to the process. Since mediation needs to be facilitative, it is unlikely that a checklist can be fixed or immutable.

Some other quick observations:

With regard to court-ordered mediation (in New Jersey), most of the mediators are attorneys just like those representing parties. It is rare that a matter can be concluded utilizing the two "free" hours. Sometimes, counsel will advise, in advance, that they and/or clients have no interest in spending money on the process. While success is delimited in such a situation, my suggestion is for counsel to keep in mind that the mediators are also just trying to earn a living. Advising us one time is probably sufficient to convey that message.

Finally, my conclusion in general regarding mediation, litigation and all forms of dispute resolution is that courtesy and patience usually produce results. If parties and counsel let the process work, it usually does.

NY COURT RULES ARBITRATORS HAVE POWER TO INDEPENDENTLY SUBPOENA WITNESS TO TESTIFY

In In the Matter of Petry Holding, Inc. v. The Rural Medial Group, Inc., Justice Eileen Bransten of the Supreme Court, New York County, ruled in a matter of first impression under New York law that arbitrators have the power to independently subpoena witnesses to testify. The Court stated that this question had not arisen previously in New York presumably because arbitrators have subpoena power under multiple provisions of the CPLR and its predecessor. The Court also opined that the AAA rules exempt arbitrators from the rules of evidence that constrain judges and permit arbitrators to require the parties to produce evidence that the arbitrator may deem necessary to an understanding and determination of the dispute. The Court stated that

> Given that Rule 31(a) grants arbitrators the authority to independently demand the production of evidence not otherwise proffered by the parties, the most logical reading of Rule 31 (d) is that it permits arbitrators to independently subpoena witnesses, provided that the arbitrators are "authorized by law" to issue subpoenas. In New York, arbitrators are authorized to issue subpoenas under CPLR §7505.

The Court noted that the witness in question had been on the witness list of Rural but was not called. When the witness was not called, the chairman of the panel stated that the panel would like to hear his testimony. Rural then called him to testify and Rural conducted the direct examination of the witness. The arbitration panel also briefly questioned the witness. Rural argued that the arbitration panel exceeded its authority under the AAA rules when it called the witness to testify.

The Court further noted that Rural and not the arbitrators conducted the direct examination and Rural provided no facts to show the arbitrators conducted any improper investigations. Therefore, the motion to vacate the arbitration award was dismissed.

Practice Tip: Arbitrators generally have the power to issue subpoenas for the parties or on their own initiative.

Different Views On Arbitration From The Appellate Division (NJ)

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was not required.

FMCO provided medical claims management services to insurance companies and third-party administrators. PCS was one of FMCO's competitors. The agreement enumerated PCS' obligation to perform specific claims management services. In 2011 FMCO filed a complaint against defendants Ott, Bayview, and PCS alleging PCS' conduct in hiring Ott, who had worked for FMCO for twelve years, constituted tortious conduct. PCS filed a motion to compel arbitration and argued that pursuant to paragraph eight of the agreement, in which the parties agreed to arbitration in Pittsburgh, Pennsylvania any disputes arising out of or which are related to the agreement, arbitration was appropriate.

The Appellate Panel stated that the issue was whether PCS' alleged tortious conduct constituted a dispute arising out of or relating to the agreement. The Court concluded that the allegation that PCS engaged in tortious conduct by soliciting clients from FMCO did not arise out of or relate to the agreement. Therefore, the matter was not arbitrable whether Pennsylvania or New York law was applied. The Court found that "because the underlying negligence claims did not arise out of or relate to any of the provisions of the Agreement, PCS cannot use the Agreement to compel arbitration of those claims." Curiously, the Court mentioned that under New Jersey law "'[i]n the absence of a consensual understanding, neither party is entitled to force the other to arbitrate their dispute. Subsumed in this principle is the proposition that only those issues may be arbitrated which the parties have agreed shall be.'"

The court concluded that there was nothing in the agreement to indicate that FMCO intended to waive its right to sue on tortious grounds not appearing anywhere in the agreement's provisions.

The agreement related solely to routine duties and responsibilities to provide managed healthcare services. The gravamen of the dispute, however, had to do with Ott's change in employment and an allegation that PCS stole FMCO's confidential client and marketing information which was proprietary information obtained during her employment. FMCO did not allege that PCS breached its duties and responsibilities outlined in the agreement. Rather, it alleged tortious conduct.

In Hirsch and First Managed Care Option the Appellate Division has attempted to thread a needle between those circumstances in which arbitration in order to handle all claims is appropriate and other claims in which the matters alleged fall outside of the scope of the arbitration agreement. Another of the distinctions is that the matters to be arbitrated in Hirsch concern the exact same issues in the lawsuit.

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APPELLATE DIVISION PUNTS ON QUESTION OF DISCIPLINARY ARBITRATION FOR POLICE OFFICERS

In In the Matter of NJIT and FOP Lodge No. 93, a terminated police officer and FOP 93 appealed from a dismissal by New Jersey PERC for appointment of an arbitrator. PERC had decided that FOP 93 could arbitrate a disciplinary termination under N.J.S.A. 40A:14-209 (permitting police and fire in non-civil service jurisdictions to appeal non-criminal terminations to binding arbitration). After deciding that issue PERC stated that if a petition was filed within ten days of the decision it would permit the parties to argue whether the petition should be treated as timely. FOP and grievant Boyle missed the ten-day extended filing deadline and the reasons for untimeliness (attorney on vacation and other internal law firm issues) were rejected. The Court stated that it need not resolve NJIT's argument that N.J.S.A. 40A:14-209 did not apply to a police officer appointed under Title 18 since the matter was moot and had been rejected for failure to meet the filing deadline that PERC had extended. The Appellate Division upheld PERC's handling of the matter.

NEW YORK COURT OF APPEALS AGAIN CONFIRMS EMPLOYMENT AT WILL AND NARROWNESS OF EXCEPTIONS

In Sullivan v. Harnisch the New York Court of Appeals rejected an attempt to carve out a further exception to New York's well-defined policy of employment at will absent a violation of a constitutional requirement, statute, or contract. Recognizing that it had made an exception "only once" in 1992 in Weider v. Skala, the Court rejected a further modification of its long-held policy of employment at will. Sullivan had been, in part, a compliance officer in the securities industry. However, it was only one part of his job and the Court of Appeals declined to extent an exception to at will similar to the one it created for ethical obligations imposed upon members of the Bar (a lawyer and a law firm).

The Court declined comparisons and reaffirmed its strong position that employment at will is sacrosanct in New York. But, see, very strong dissent by Chief Judge Jonathan Lippman who would have created an exception, particularly "in the wake of the devastation caused by fraudulent financial schemes," e.g. Madoff and others.