NEUTRAL NOTES

THE JACOBS CENTER FOR JUSTICE AND ALTERNATIVE DISPUTE RESOLUTION™

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ARBITRATION CHUTZPAH

The New York Court of Appeals, in N.J.R. Assoc. v. Tausend, affirmed a lower court opinion essentially holding that participation in arbitration precluded parties from subsequent court actions seeking to stay counterclaims relating to that arbitration.

The case is primarily based upon a family dispute over money. The court characterized its issue as determining the appropriate forum to resolve a statute of limitations challenge to counterclaims interposed in an arbitration proceeding – either the arbitrator or a court. The court said based on the facts presented the "timeliness question is to be decided by the arbitrator."

The basic facts: Ronald Tausend and his two children, Nicole and Jeffrey Tausend, were the beneficiaries of a trust established by Ronald's mother. Ronald was entitled to most of the trust income during his lifetime with the balance of income reserved for his children (Nicole and Jeffrey). They were to begin receiving principal at the age of 25 and, upon their father's death, the remaining principal by distribution. The trust owned two buildings in New York City referred to as the "East End properties." In 1985, Ronald Tausend formed N.J.R. Associates partnership (NJR) to acquire the East End properties. He held a 60% share and Jeffrey and Nicole each held a 20% share. The partnership agreement included an arbitration clause as well as a New York choice of law provision.

The dispute arose after the sale of the two properties. Despite an appraisal value of $1.8 million, the figure did not include the value of air rights because the appraiser felt it had no intrinsic worth. NJR subsequently purchased the

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MEDIATION: ARE WRITTEN AGREEMENTS REQUIRED?

The Appellate Division, in New Jersey, expressed an opinion regarding mediation, mediators, and written agreements in Rutigliano v. Rutigliano. The Court stated that despite the absence of a written agreement, it would enforce the "settlement" for a number of reasons. After the parties reached an agreement in a conference room, the mediator (in court-ordered mediation) reviewed the terms with all parties present and assenting. Apparently, plaintiff was not able to remain so the agreement was never memorialized in a writing. **[First mistake.]**

The mediator submitted the Completion of Mediation Form to the court stating that the parties had reached a settlement. **[Second mistake.]**

An exchange began almost immediately between counsel trying to fine-tune the terms of the deal. Without memorializing the terms, and without negotiating the terms, counsel for defendant filed a motion to enforce the settlement. At the trial court level, the judge found that the confidentiality of the mediation had been waived and would permit counsel to testify as to the terms. **[Third mistake.]**

The parties had a 6-1/2 hour mediation session. After the session concluded, the mediator advised the court that a settlement had been reached. During Judge Craig Wellerson's examination regarding inquiry by the mediation

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Arbitration Chutzpah

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properties from the trust for $1.9 million and sold the air rights for one of the buildings for $1.75 million. Two decades later it sold its remaining interest for $10.25 million. Both children received distributions and a final distribution in 2005 to Jeffrey and Nicole. In 2008, Nicole's financial advisor asked for information regarding the East End properties and she ultimately commenced a CPLR article 78 proceeding against NJR and her father to obtain access to the partnership documents and an accounting of its finances. In response, NJR issued a demand for arbitration causing Nicole to file a petition to stay arbitration. The Supreme Court denied the stay and ordered the parties to arbitration which was affirmed by the Appellate Division. Nicole appeared in the arbitration and asserted several counterclaims which led to NJR's commencement of a separate court proceeding seeking to stay arbitration of the counterclaims on the basis of expiration of statute of limitations. Nicole asserted that the timeliness challenge should be presented to the arbitrator. The Appellate Division ruled that CPLR §7503(2) precluded the partnership from obtaining a stay because it had initiated and participated in the arbitration. The Court of Appeals agreed.

NJR argued that it was not prohibited from seeking a stay because its decision to arbitrate did not waive its right to challenge the timeliness of the counterclaims in court. Nicole argued to the contrary that the initiator of arbitration is statutorily barred from requesting judicial review of a counterclaim and must submit all matters to the arbitrator. Alternatively, she argued that the language of the choice of law clause in the partnership agreement was insufficient to invoke the New York rule that a statutory timeliness issue may be subject to judicial determination and that an arbitrator was required under federal law.

The court stated that under the Federal Arbitration Act (FAA) resolution of a statute of limitations defense is "presumptively reserved to the arbitrator, not a court. New York law, in contrast, allows the threshold issue of timeliness to be asserted in court."

The court ruled that it "is unnecessary for us to decide whether the contract at issue is subject to the FAA or New York law because under either analysis, the proper forum is arbitration." The court stated that "[s]ince the agreement fails to unequivocally invoke the New York standard, the timeliness question must be resolved by an arbitrator under FAA principles."

The court reasoned that:

> NJR not only initiated arbitration, it also successfully defended against Nicole's petition to stay arbitration in court, received an application to compel arbitration in connection with Nicole's counterclaims and sought a court order to prevent the counterclaims from being considered by the arbitrator. In our view, this was enough to constitute "participation" within the meaning of CPLR 7503(b). It is also inconsistent for NJR to assert that Nicole's counterclaims are not arbitrable a party cannot compel arbitration of its own causes of action, prevent its adversary from obtaining judicial relief and then ask a court to block the adversary's counterclaims from being arbitrated by raising a statute of limitations defense…."

In sum, the court stated that "since NJR initiated and participated in the arbitration of issues stemming from the dispute, its timeliness challenge to the counterclaims must be decided by an arbitrator."

In other words, it was some degree of chutzpah for NJR to begin the arbitration process; participate in it; and then, when Nicole raised a counterclaim, to suggest that those issues should not be heard by the same arbitrator.

Interestingly, Judge Robert Smith concurred but found it necessary to decide the contract issue and concluded that the FAA would govern.

He took a different tack and said that it was true that NJR participated in, and

> indeed initiated, its own arbitration against Nicole Tausend. It did not, however, participate in the arbitration of Nicole's counterclaims. On the contrary, it made a timely application to prevent those claims from being arbitrated. I see no reason why a party against whom an arbitration counterclaim is brought should be denied the right to seek relief in court that it would have if the counterclaim were an independent arbitration proceeding. Thus, NJR should not be held to have "participated in the arbitration" within the meaning of CPLR 7503(b).

The Judge concluded that the "FAA governs if the contract containing the arbitration clause the NJR partnership agreement is 'a contract evidencing a transaction involving commerce' within the meaning of the FAA…." The Judge even made a jocular reference to Obamacare when he said "[w]hatever might be said about the power of Congress to require the purchase of health insurance or broccoli, I see no basis under the current state of the law for an argument that the transaction in this case was beyond Congress' reach."

Practice Tip: Once you commence and participate in an arbitration, at least in New York, you should anticipate that all issues emanating from or relating to that proceeding will be considered by the arbitrator.

HELP PETS DISPLACED BY SANDY!

If you or anyone you know are able to foster a displaced pet, or if you are in need of temporary foster for your pet due to the storm, please visit this web site for help and full information:

www.fosterasandypet.org

Foster a Sandy Pet is a direct matching social network to connect pet families in need with potential foster caregivers.

Mediation: Are Written Agreements Required?

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regarding finality, the judge stated that defendant testified "yes" that "it was okay for him to report the fact of the settlement to the court…." Plaintiff did not object to the disclosure. The judge ruled that the absence of a writing was not a "fatal law."

What's wrong with this picture?

At the end of every mediation the mediator should be clear with counsel and parties that the matter has either been settled or not settled or, alternatively, settled in part. If a settlement has been reached over any parts of the litigation, that settlement should be reduced to writing even if it is written on a napkin. The writing must be signed and acknowledged by counsel at a minimum. **My suggestion is that a writing occur in every case.**

The mediation privilege may be waived by the parties. No express form of waiver is required. Despite plaintiff's argument that he had not assented to a settlement, the court stated that he "overlooks the fact that both he and defendant authorized the mediator to contact the court to advise that the matter had been concluded with a settlement." The court further ruled that waiver of the privilege had occurred:

> …both parties waived the mediation privilege prior to the plenary hearing when they each consented to permit the mediator to notify the court the case had been settled. Because each disclosed there was a settlement, there was no bar to either party disclosing the terms of that settlement or, if necessary, going to court to enforce that settlement.

Mediators must be very clear before signing off on the case.

Regarding the need for a writing, the court held that "so long as settlement terms are clear, a writing is not required to settle a litigated matter." Plaintiff had objected to settlement based upon the absence of a writing but the court noted that "Plaintiff had the opportunity to obtain a writing setting forth the settlement terms, but he left his attorney's office to attend to a personal matter."

If the matter has been resolved and the parties have assented to that resolution, by all means, advise the court the matter has been settled. If there is any doubt, either wait for clarification from the parties or state that the matter has not been resolved.

LOST PAY ISSUES AFTER SANDY

There are two types of benefits those affected by the storm may qualify for – regular unemployment insurance (UI) or DUA. Regular UI provides temporary partial wage replacement to individuals who are separated from employment and meet certain requirements. DUA provides similar assistance to those *who are not eligible* for regular UI and who did not receive full wages during the disaster.

There is no set amount of days a person has to be out of work as a result of the storm to trigger regular UI eligibility; there are some requirements for DUA. The person must be out of work for at least a week.

Individuals that believe they are eligible for benefits should first file an unemployment claim at www.njuifile.net.

The federal government has extended its **deadline to February 4, 2013 for DUA applications in all 21 counties.** In order to be eligible for DUA, a person must first be deemed ineligible by the NJ Department of Labor for regular UI.

The February 4 deadline extended the December 3 deadline that was previously in effect for DUA claims in Atlantic, Bergen, Cape May, Essex, Hudson, Middlesex, Monmouth, Ocean, Somerset, and Union Counties.

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MEDIATION MUSINGS

Happy Holidays!

The holidays are a great time for families to get together with friends, neighbors, and extended families. They are also a time of great stress and tension, whether it is over family issues, rivalries, jealousies, the menu, recipes, or simply the tension of all sitting together.

Keeping peace in family disputes is really no different than most other settings. Obviously, long-standing hurt feelings may be involved.

People come to the literal table with pent up anger, historical feuds, expectations, and perhaps just memories of how it used to be. Does that translate? Well, not exactly in the workplace but not so far off. Not exactly in a commercial dispute.

Most commercial disputes at the end of the day are about money. While family disputes are also often about money (see the discussion in *Arbitration Chutzpah* involving N.J.R. Assoc. v Tausend which demonstrates that point), seasonal family interaction presents all the power dynamics of collective bargaining and therapy at the same time. Parents and children, and perhaps in-laws, are testing those dynamics. Who is in charge? Does it matter?

What is everyone's desired result? Frankly, in all disputes if we can ascertain the desired result in advance, we may have a shot at attempting to actually resolve the dispute. If it is just old hurt feelings that would be compounded by sitting at the table together, that sounds like a need for therapy rather than just a cathartic event.

How does mediation get involved? Well, this year we had a discussion about turkey. Although we have a smaller group than usual, everyone has an opinion and there will be a turkey. Does the inclusion of turkey mollify all positions? No, not really. It is simply a compromise that was easy to make so that most participants would be pleased.

What about the participants? Often there is a discussion about who is to be included, who is to be excluded, and who has no interest in being included or excluded.

Sometimes, these answers are self-executed.

A similar exercise could be discussed on menus or the workplace but the technique is the same.

My bigger concern and message has to do with the interpersonal dynamics that affect every relationship and are more pronounced in family relationships. Sensitivity to other thoughts or positions is something we may not realize we ignore or may not even want to deal with during holidays. Understanding that there are historical perceptions of what it used to be and accepting the ongoing changes of evolving families is often difficult for the most senior at the table. The same is generally true at work and often results in age-related issues.

Good mediation skills should attempt to understand everyone's thoughts, feelings, and positions and to include everyone in the decision making. While "too many cooks" is obviously not constructive, harmony can often be enhanced by participation and understanding.

So did I really have a holiday message or just a mediation suggestion? Just like the menu, that answer is for you to decide.

Enjoy the holiday season with your loved ones.