

Arbitrating a Consumer Case through JAMS, Start to Finish

Joan Grafstein
Arbitrator and Mediator
JAMS, Atlanta, GA
www.jamsadr.com/grafstein/

2014 South Carolina Bar Convention
Consumer Law Section
January 23, 2014
Kiawah Island, SC

First, let's define a few terms. Arbitration as I will use it here means a process where a dispute is decided by a private arbitrator (or panel of arbitrators) rather than by a court (whether by a judge or a judge and jury) because the parties to that dispute have agreed¹ on arbitration rather than litigation. Many of you are familiar with JAMS, but just to be certain, JAMS is a provider of alternative dispute resolution (sometimes called "ADR" or "DR") services such as mediation (where the mediator encourages the parties to reach agreement but the mediator does not decide the dispute) and arbitration (where the arbitrator issues a binding decision called an "award"), and is the largest private provider of these services in the world. Arbitration providers² manage arbitration in accordance with their published rules, procedures, and policies, for a fee and payment of certain costs. Their services include administration by case managers, scheduling and

¹ There is a great deal of controversy in the consumer and employment fields about whether the consumer/employee has actually "agreed" to the arbitration provision, but that is beyond the scope of this paper which will just focus on the arbitration process.

² Another large provider of arbitration services is the American Arbitration Association, sometimes referred to as AAA.

coordination, providing facilities and technology for the arbitration hearing, and access to a panel of arbitrators.

JAMS has a special “minimum standards of procedural fairness” for consumer arbitrations.³ These minimum standards define a consumer as “an individual who seeks or acquires any goods or services, primarily for personal family or household purposes, including credit transactions associated with such purchases, or personal banking transactions” and the definition excludes commercial transactions between lenders and commercial borrowers or companies and commercial customers and exclude other financial services such as investment transactions, real estate transactions, or matters involving underinsured motorists.⁴

How does a consumer arbitration through JAMS begin?

Typically there is a provision, usually an “arbitration clause” in an agreement⁵ between the company and the consumer that provides for arbitration of disputes between them.

The wording of such clauses vary widely. The JAMS Standard Commercial Arbitration Clause, which may but is not required to be used, provides:

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (insert the desired place of arbitration, which in compliance

³ Actually these standards apply to consumer arbitrations “pursuant to *pre-dispute* clauses” but more about that later.

⁴ Also excluded from these specific minimum standards of procedural fairness are arbitration agreements that were *negotiated* by the individual consumer and the company.

⁵ See note 1 above.

with the Minimum Standards for Consumer Arbitrations must be “the hometown area of the consumer”), before (one) (three) arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules & Procedures (Comprehensive Arbitration Rules & Procedures). Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.

The arbitration clause may specify that the arbitration will be administered by JAMS or may list a number of providers that can be used with one party, for example the party initiating the arbitration, making the selection. Some clauses are silent about the provider and one or both parties may contact JAMS to administer the arbitration.

Once a party or parties contacts JAMS, the JAMS Case Manager will request that the party furnish a copy of the document containing the arbitration provision to determine if it falls within the “JAMS Policy on Consumer Arbitration Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness.”⁶ JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers only if the contract arbitration clause and specified applicable rules comply with the ten provisions of those standards. This Minimum Standards Policy clarifies that these standards are applicable “where a company systematically places an arbitration clause in its agreements with individual consumers and there is minimal, if any, negotiation between the parties as to the procedures or other terms of the arbitration clause.”

What do the JAMS Minimum Standards for Consumer Arbitrations require?

⁶ See www.jamsadr.com/rules-consumer-minimum-standards/

The Minimum Standards provide:

1. The arbitration agreement must be reciprocally binding on all parties such that: A) if a consumer is required to arbitrate his or her claims or all claims of a certain type, the company is so bound; and, B) no party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction.
2. The consumer must be given notice of the arbitration clause. Its existence, terms, conditions and implications must be clear.
3. Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the unavailable remedies in court.
4. The arbitrator(s) must be neutral and the consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s).
5. The consumer must have a right to an in-person hearing in his or her hometown area.
6. The clause or procedures must not discourage the use of counsel.
7. With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company including any remaining JAMS Case Management Fee and all professional fees for the arbitrator's services. When the company is the claiming party

initiating an arbitration against the consumer, the company will be required to pay all costs associated with the arbitration.

8. In California, the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail.

9. The arbitration provision must allow for the discovery or exchange of non-privileged information relevant to the dispute.

10. An Arbitrator's Award will consist of a written statement stating the disposition of each claim. The award will also provide a concise written statement of the essential findings and conclusions on which the award is based. (All emphases added.)

Once the Case Manager has determined that this Minimum Standards Policy applies, the parties will be notified that JAMS requires that the parties comply with the Minimum Standards in order to proceed. The Minimum Standards will be applicable notwithstanding any contrary provisions set forth in the parties' pre-dispute arbitration agreements, and the parties will be notified that their agreement to proceed constitutes their agreement to comply with the Minimum Standards.

There are also legal requirements that will apply such as those contained in the Federal Arbitration Act or FAA, 9 U.S.C. § 11, and the applicable state arbitration statute such as the South Carolina Uniform Arbitration Act, Code of Laws, Title 15, and cases decided under both statutes. It is interesting to note that the first Section of the South Carolina law provides, "Notice that a contract is subject to arbitration

pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.” Whether this provision may be pre-empted by federal law is beyond the scope of this paper.

In a very general sense, it could be said that the hierarchy of what trumps what in a consumer arbitration subject to the JAMS Minimum Standards is: first, the applicable law; second, the JAMS Minimum Standards; third, the specific provisions contained in the agreement of the parties; and fourth the applicable procedural Rules. Unless otherwise provided in the arbitration clause or agreement, the JAMS Streamlined Rules⁷ (which apply where no disputed claim or counterclaim exceeds \$250,000, not including interest or attorneys’ fees, unless other Rules are prescribed) will likely apply.⁸

What happens next?

Claims, Counterclaims, and Responses to Them

Generally a “claimant” initiates arbitration by serving a demand for arbitration on a “respondent.”⁹ JAMS has a demand form available if the claimant wants to use it. This form has includes:

- space for specifying information about the claimant and respondent and the attorney for each if applicable and known;

⁷ www.jamsadr.com/rules-streamlined-arbitration/

⁸ If any claim or counterclaim exceeds \$250,000 the JAMS Comprehensive Rules would apply.

⁹ “Claimant” and “respondent” are the terms used in arbitration, not “plaintiff” and “defendant.”

- space for filling in the “Nature of Dispute” with the option of attaching a more detailed statement of the claim or claims;
- a statement that the demand is pursuant to the arbitration agreement which the parties made, requires that the claimant identifies the location of the arbitration provision, and requires that the claimant attach two copies of the entire agreement containing the arbitration provision;
- a statement that “Claimant asserts the following claim and seeks the following relief” with instructions to include the amount in controversy, if applicable;
- information that respondent may file a response and counter-claim according to the applicable rules by sending the original to claimant at the address provided with two copies sent to JAMS;
- space for identifying the location for the hearing;
- an item about expedited rules which are usually not applicable in consumer cases; and
- a space for the claimant or the attorney for claimant to sign and date the form.
- Instructions follow about including a check payable to JAMS for the initial non-refundable deposit, which as noted in the Minimum Standards may not exceed \$250 when the consumer is the claimant and which must be paid by the company when the company is the claimant.¹⁰

¹⁰ It should be noted that Item 8 of the JAMS Minimum Standards provide that *in California* the arbitration provision may not require the consumer to pay fees and costs incurred by the company if the consumer does not prevail, thereby indicating that an arbitration provision may so provide in other states.

JAMS will commence the arbitration when its procedures are complied with. Rule 5 of the Streamlined Rules¹¹ provides that these procedural requirements for JAMS to commence the arbitration include:

- receipt by JAMS of a pre-dispute contractual provision requiring arbitration and specifying JAMS, or specifying JAMS Rules, or the parties' agreement to JAMS administration, or a court order compelling arbitration at JAMS or the like;
- receipt of payments required at that stage; and
- proof of service of the demand for arbitration on respondent.

Rule 7 sets forth the requirements for notice of claims, affirmative defenses, and counterclaims. Notice of a claim “shall include a short statement of its factual basis, and may consist of either a demand for arbitration or a copy of a complaint previously filed with a court” and is to be filed within seven calendar days after JAMS commences the arbitration. Counterclaims and affirmative defenses may be filed within seven calendar days of service of claims. This Rule also provides, “Each party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims” and these will not be considered by the Arbitrator absent such prior notice “unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice” or the parties agree it is appropriate to consider such notwithstanding the lack of prior notice. Responses to claims and counterclaims may be submitted within seven calendar days of receipt of the claim or counterclaim, but any claim or counterclaim to which no response has been served will be deemed denied.

¹¹ References to JAMS Rules shall be to the Streamlined Rules.

Counsel sometimes prefer to write demands as they would a complaint filed in court, but a short description is what the rules provide and may keep costs lower and provide more flexibility as the arbitration proceeds.

Arbitrator Selection and Replacement

The Minimum Standards require that the arbitrator be neutral and that the consumer have a reasonable opportunity to participate in the selection of the arbitrator, Item 4. JAMS Rule 12 provides that JAMS Streamlined Arbitrations are conducted by one neutral arbitrator. If the parties do not agree on an arbitrator and if their arbitration clause does not provide otherwise, the JAMS Case Manager will send the parties a list of at least three arbitrator candidates, along with a brief description of the background and experience of each. Within seven calendar days, or within a reasonable extension of time granted by JAMS, each party may strike one name and shall rank the remaining candidates and the remaining candidate with the highest composite ranking shall be the appointed arbitrator. If this process does not yield an arbitrator, JAMS shall designate the arbitrator. Within ten calendar days from appointment the selected arbitrator shall make any required disclosures and the obligation to make disclosures continues throughout the arbitration process.

If a party challenges the continued service of an arbitrator for cause at any time during the arbitration process, the challenge must be in writing and exchanged with opposing parties who may respond to it. JAMS shall make the final determination as to such

challenge. The challenge must be based on information that was not available to the parties at the time the arbitrator was selected and the determination by JAMS shall take into account the materiality of the facts and any prejudice to the parties and the decision of JAMS will be final.

Before the Evidentiary Hearing

After receiving the case materials from the Case Manager, the arbitrator selected will review the information to determine whether he or she must disclose any matters that might constitute either the appearance or actuality of a conflict of interest. Soon after appointment, the arbitrator generally schedules a preliminary conference with the parties which is often by telephone but may be in person.

The Minimum Standards require that the arbitration must allow for the discovery or exchange of non-privileged information relevant to the dispute. During the preliminary conference procedural matters may be addressed such as the exchange of all non-privileged documents and information relevant to the claim or dispute between the parties as required by Rule 13. This required exchange includes documents that a party relies on in support of its position or which a party intends to introduce at the arbitration, the names of all individuals with knowledge about the dispute or claim, and names of any experts who may be used. This obligation to exchange information, which is ongoing, is supposed to take the place of formal discovery, but Rule 13 also provides that if the parties have any dispute regarding discovery issues, they shall promptly notify JAMS so that a conference can be held with the arbitrator to decide the issues. These conferences

to resolve procedural disputes are often scheduled very quickly by telephone to keep the procedure moving on track. The streamlined rules not only do not contain discovery provisions, they also do not refer to motions, whether dispositive or other kinds of motions. This is partly because arbitration, especially streamlined arbitration, is supposed to be faster and less costly than litigation. It is often said that runaway discovery and elaborate motion practice are sources of much of the unnecessary cost and delay of litigation. Also, it is sometimes said that dispositive motions are less suitable in arbitration precisely because discovery is more limited or nonexistent in arbitration and because an arbitrator's decision, called an "award," is much more difficult to challenge than a court judgment.

Another important topic during the initial conference is to schedule the date, place, and duration of the hearing. Under the Minimum Standards the consumer has a right to an in-person hearing in his or her hometown area, Item 5. During the preliminary conference the arbitrator and the parties often also set the schedule for the parties to exchange witness and exhibit lists, and to file concise written statements of positions shortly before the hearing if the arbitrator wishes to receive these. Generally arbitrators will require that the hearing date(s) be set during the preliminary conference and will not later grant a continuance of the hearing date(s) absent a true emergency, again to keep the procedure faster (and cheaper) than litigation.

*The Hearing*¹²

¹² The evidentiary portion of the arbitration is called a "hearing" not a "trial."

Rule 17 provides the hearing rules but also allows the arbitrator to “vary these procedures if it is determined reasonable and appropriate to do so.” Witnesses testify under oath if either party requests or in the discretion of the arbitrator. An important provision is that “strict conformity to the rules of evidence is not required.” The arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as appropriate. The arbitrator “shall apply applicable law relating to privileges and work product.” Also, the parties will not offer as evidence, and the arbitrator shall neither admit nor consider prior settlements offers or statements or recommendations made by a mediator, except to the extent that applicable law permits the admission of such evidence. Finally, the arbitrator shall receive and consider deposition testimony provided that the other parties have had the opportunity to attend and cross-examine, and may consider affidavits but will give that evidence only such weight as the arbitrator deems appropriate.

The hearing or any portion of it may be conducted by telephone with the agreement of the parties or in the discretion of the arbitrator, but as noted above, under Item 5 of the Minimum Standards, the consumer has a right to an in-person hearing if the consumer wishes.

A party may arrange for a stenographic or other record to be made of the hearing and shall inform the other parties of this before the hearing. If all parties agree to share the cost of the stenographic record, it shall be made available to the arbitrator and may be used in the proceeding. If there is no agreement to share the cost of this record, it may

not be provided to the arbitrator and may not be used in the proceeding unless provided at no charge to the other party or on terms acceptable to the parties.

The arbitrator may hold the hearing in the absence of a party if that party has received notice of the hearing 30 days prior to the scheduled date and fails to attend. The arbitrator may not render an award solely on the basis of the default or absence of a party, but shall require any party seeking relief to submit such evidence as the arbitrator may require for the rendering of an award.

When the arbitrator determines that all relevant and material evidence and arguments have been presented and any interim or partial awards have been issued, the arbitrator shall declare the hearing closed. The arbitrator may defer the closing of the hearing to permit the parties to submit post-hearing briefs. Also, at any time before the award is issued, the arbitrator may re-open the hearing and the time for the award to be rendered shall be extended until the reopened hearing is declared closed.

*The Award*¹³

Rule 19 requires the arbitrator to render a final award or partial final award within 30 calendar days after the date the hearing is closed. This award may allocate arbitration fees and arbitrator compensation and expenses unless such an allocation is expressly prohibited by the parties' agreement, and may allocate attorneys fees and expenses and interest if provided by the agreement of the parties or allowed by applicable law. The

¹³ The decision in an arbitration is referred to as an "award" not a judgment. Thus a decision that the claim is denied and claimant shall take nothing is still called an "award."

award will consist of a written statement signed by the arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all parties agree otherwise, the award shall also contain a concise written statement of the reasons for the award.

After the award has been rendered, provided the parties have paid the fees as set forth in Rule 26, the award shall be issued by JAMS by serving copies on the parties. Service may be by U.S. mail and need not be sent certified or registered.

Within seven calendar days after service by JAMS, any party may file a request that the arbitrator correct “any computational, typographical or other similar error in an award,” or the arbitrator may *sua sponte* propose to correct such errors in an award. The arbitrator may make any necessary and appropriate correction to the award within 14 calendar days of receiving a request or 7 days of the arbitrator’s proposal to do so. Other than making corrections of these clerical types of errors in the time frames just described, the power of the arbitrator over the award ends when a final award is issued.

Pursuant to Rule 20, the award is considered final for purposes of judicial proceeding to enforce, modify, or vacate the award fourteen calendar days after service is deemed effective if no request for a correction is made or as of the effective date of service of a corrected Award, Rule 20 provides that proceedings to enforce, confirm, modify or vacate an award will be controlled by the FAA or applicable state law. Judgment upon the award may be entered in any court having jurisdiction thereof and the parties to an arbitration shall be deemed to have consented to this.

Practice Pointers

- To draft an arbitration provision for JAMS to administer an arbitration, parties should consider the clauses contained in the JAMS Clause Workbook at www.jamsadr.com/clauses/#Standard
- To prepare for an arbitration administered by JAMS between a company and a consumer, counsel and parties should carefully review the JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, www.jamsadr.com/rules-consumer-minimum-standards/ which must be followed if applicable, and JAMS Streamlined Arbitration Rules, www.jamsadr.com/rules-streamlined-arbitration/ which will likely be the applicable procedural rules.

A MEDIATOR'S VIEWPOINT: TIPS FOR ADVOCATES

By: Robert W. Hassold, Jr.

Although the public and your clients may refer to some of you as trial lawyers, advocates or litigators, in truth, you often feel like “fireman” is a more appropriate moniker given the pace of a litigation practice in today’s world.

Mediation affords you and your client an opportunity to resolve a case, but it is often one more deadline to meet in an already crammed schedule. However, since mediation is an extension of the negotiation process, the better prepared you are, the better the potential result for your client.

After mediating over 2000 disputes in a statewide mediation practice, I want to pass along some observations and tips to help you and your clients maximize the opportunity afforded by mediation.

PRE-MEDIATION CONSIDERATIONS

DO “SET THE TABLE” FOR MEANINGFUL NEGOTIATIONS:

- Understand your case backward and forward. If you don't, it will become readily apparent to your client and others at the mediation.

- Meet with your client prior to the mediation and:
 - Take time to understand your client's interests, i.e. their hopes, goals, fears and concerns, and explore their view of the opposing party's interests. Ideally, any resolution reached at mediation should attempt to meet the parties' interests. If you don't know what they are, it will be difficult for you to fashion a resolution that is satisfactory to your client.

 - Find out who “owns” the dispute within your client's family or organization – it may be someone behind the scene whose approval, input or presence will be required at the mediation. Their absence or lack of input may stifle negotiations.

- Explore all alternatives and options to resolve the dispute. Are there any options other than money or attractive alternatives using assets or situations outside those involved in the present dispute.

- Decide who will attend the mediation – you may want to bring a key witness or expert, particularly in disputes where little if any discovery has taken place.

- Make sure that one of the individuals who will attend the mediation has authority to settle the dispute. If not, make sure opposing counsel and the mediator consent to the situation. In the latter case, make sure that the decision maker can at least participate by phone and give them the heads up that the mediator will likely want to speak directly to them in your presence.

- Be realistic in your evaluation of the probable outcome of your client's case at trial or arbitration. Make sure that your client understands that the trial's outcome will be decided by a judge,

jury or arbitrator after they take into account all the facts, law and arguments presented by all the parties. Thus, the proper measuring stick for any negotiation is what a judge, jury or arbitrator is likely to decide, which may be different from the outcome or goals your client desires.

- Inform your client that mediation is a fluid process and that you may need to re-evaluate your case in light of what takes place at the mediation.
- Although the mediator will review the mediation process with your client, you should also review the process with them to:
 - (1) reduce their anxieties and fears, and (2) help prepare them to participate at the mediation in a meaningful manner.
- Provide opposing counsel information (documents, pictures, affidavits, deposition transcripts highlighted, etc.) well ahead of the mediation in order for them to better understand, evaluate and have

authority to settle the case. Remember that some parties have to have the case reviewed by a committee, board or other executive process well prior to the mediation. Receipt of last minute information or documentation may impede the resolution of the dispute.

- Provide the mediator, and if you think appropriate, opposing counsel, a brief pre-mediation statement setting forth: (a) the relevant facts, (b) the issues, (c) the parties' interests, (d) options available to resolve the dispute, and (e) the status of settlement negotiations.

- It is also helpful to speak directly to the mediator a few days before the mediation to make sure that the table has been set for meaningful negotiations to take place.

- Give the mediator a heads up to any unusual dynamics or personalities that might impact the negotiations. The parties' relationship may be so acrimonious, that the mediator may opt to forego a joint opening session and move straight into caucus sessions in order to shift the parties' focus from retaliation towards resolution.

DON'T MAKE THE FOLLOWING ASSUMPTIONS:

- That “off the record” settlement discussions with opposing counsel will remain off the record. These discussions typically are brought up during the mediation. Just as it is difficult to un-ring a bell, it is equally hard to forget what opposing counsel believed at one point to be a fair resolution of the case. Thus, plaintiff’s opening demand of \$1 million and defense counsel’s opening offer of \$5,000 are met with vitriolic responses when prior to the mediation all counsel believed a settlement in the \$100,000 range was in order.

- That opposing counsel and their client will be able to properly evaluate the dispute without the same information you have in your possession.

- That just because opposing counsel or their client are “good people”, that they are going to evaluate the dispute the same way you are.

- That the mediation session will last a predetermined amount of time.

MEDIATION CONSIDERATIONS

DO THE FOLLOWING:

- Prepare a short outline of your key points and analysis of the damages. Present this document to everyone at the mediation table before giving your presentation. A mediator is always looking for a good source document to frame the negotiations around.

- If you are representing a plaintiff, you should be able to clearly articulate you client's damages. Again, it is very helpful to a mediator to have a document analyzing the plaintiff's damages from a plaintiff's or defendant's viewpoint.

- If there is key case law or documents or testimony on point, have highlighted copies available for everyone. Remember the old saying, "seeing is believing". Don't underestimate the power of a visual presentation and the power of a party holding in their hands written documentation that undercuts their position.

- If you are trying to get money for your client, you and your client need to be civil and courteous. Very few people are willing to pay money to someone who has insulted them.

- Likewise, if your goal is to have your client pay no money, or as little as possible, you and your client still need to be civil and courteous so that your defenses and evaluation of the case appear reasonable.

- The opening session is a time to inform the other side of the reasonableness of your position and probable outcome of the dispute.

- The caucus session is a time to realistically evaluate your case with your client in light of information, new and old, discussed at the mediation.

- Get the mediator's feedback about the opposing party's mediation style, i.e. bottom line/quick death march (leapers) vs. cautious/slow death march (creepers). Generally, the creepers will dictate the pace, so you leapers need to be patient!

- Have key documents and witnesses at the mediation (or key witnesses at least available by speaker phone).
- Be honest with the mediator – a mediator can generally tell when you are not, so go ahead and maintain your credibility.
- Bounce negotiation strategy off the mediator.
- If consent has been provided to allow your decision maker to attend by phone, make sure that you can get hold of them at all times during the mediation - invariably, key decisions or negotiations take place during the lunch hour and after 5 p.m. Therefore, you should have their email address, work, cell and home phone numbers.
- Your offers, demands and messages should signal that you are there to resolve the dispute.
- Commit to work hard and stay until resolution occurs or until the mediator believes there is no hope of resolving the dispute that day.

DON'T THINK:

- That you can “wing it” and appear professional to your client and opposing counsel and their client.

- That you can leave key documents, pictures, depositions, etc. back at your office. Inevitably, the documents you left at the office become important.

- That opposing counsel and their client should see it your way after an hour.

- That your client will be happy with the outcome if you have given them false hopes or unrealistic expectations prior to the mediation.

- That it is hopeless after three rounds - give the mediator a chance.

And finally ...

Don't quit. Mediation is not for quitters!! As noted above, it is important to understand that mediation is a process that takes time and commitment by all involved. Although the mediation process affords an opportunity for parties to reach an amicable resolution, more times than not, resolution comes about through patience, perseverance and a strong work ethic from all involved. Good luck!!

Rob Hassold has a full time mediation and neutral practice and can be reached at 864.370.1070 or robhassold.mediation@gmail.com. Online calendar: <http://www.nadn.org/robert-hassold>

2013 FEDERAL ARBITRATION CASE LAW UPDATE

Marilyn E. Gartley
Anderson & Associates, P.A.
Marilyn@andersonlawfirm.net

I. BACKGROUND

The Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.* (“FAA”), reflects a liberal federal policy favoring arbitration agreements; underlying this policy is Congress’s view that arbitration constitutes a more efficient dispute resolution process than litigation. Adkins v. Labor Ready, Inc., 303 F.3d 496, 500 (4th Cir. 2002). The FAA requires that “an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.A. § 2. The United States Court of Appeals for the Fourth Circuit has elaborated that a litigant can compel arbitration under the FAA if he can demonstrate “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” Whiteside v. Teltech Corp., 940 F.2d 99, 102 (4th Cir. 1991). State contract formation law determines the validity of arbitration agreements. See e.g., Hill v. Peoplesoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005). The FAA “establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp. (Moses H. Cone), 460 U.S. 1, 24–25, 103 S. Ct. 927, 941, 74 L.Ed.2d 765 (1983). However, as the Supreme Court has recently noted, arbitration agreements “may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” AT & T Mobility LLC v. Concepcion (Concepcion), 131 S. Ct. 1740, 1746, 179 L.Ed.2d 742 (2011) (internal quotation marks omitted) (quoting Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 134 L.Ed.2d 902 (1996)).

Thus, Section 2 of the FAA has been described by the Supreme Court as requiring arbitration agreements to be interpreted through the prism of the following principles:

We have described [FAA § 2] as reflecting both a “liberal federal policy favoring arbitration,” [Moses H. Cone, 460 U.S. at 24, 103 S. Ct. at 941], and the “fundamental principle that arbitration is a matter of contract,” [Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2776, 177 L.Ed.2d 403 (2010)]. In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, [Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443, 126 S. Ct. 1204, 1207, 163 L.Ed.2d 1038 (2006)], and enforce them according to their terms, [Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S. Ct. 1248, 1255, 103 L.Ed.2d 488 (1989)].

Concepcion, 131 S. Ct. 1740, 1745–46. Indeed, it is generally settled law that mandatory predispute arbitration agreements will be enforced by courts despite being contained in contracts of adhesion, subject only to being voided on traditional contract grounds.¹ Added complexity emerges, however, when consumers (or, perhaps more accurately, their lawyers) decide to raise an arbitrable dispute as a class.²

¹ Joshua S. Lipshutz, Note, *The Court’s Implicit Roadmap: Chartering the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677, 1680–81 (April 2005).

² Id. at 1681.

Companies, which generally oppose class certification, argue that, by agreeing to resolve all disputes in arbitration, consumers have waived their right to proceed on a classwide basis just as they have waived other rights normally obtained under the rules of civil procedure, including the right to a jury trial, a presiding judge, and certain discovery proceedings.³ Other opponents of class actions in arbitration, including some consumer advocates, argue that the due process rights of absent class members, so delicately preserved by courts in class action litigation, are lost in arbitration.⁴ On the other hand, other consumer advocates, and consumers themselves, argue that if consumers are not allowed to proceed on a classwide basis, then the arbitration agreement has effectively stripped them of substantive rights because some claims are simply too small to be worth pursuing individually, even in arbitration.⁵

The scope of questions committed to arbitration is for the arbitrator to decide when the parties have agreed to submit those questions to the arbitrator; therefore, an arbitrator has the power and the responsibility to decide whether to maintain an action as a class-wide arbitration where the arbitration clause is silent. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 451–53, 123 S. Ct. 2402, 2407, 156 L.Ed.2d 414 (2003). However, it is important to emphasize that class arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them. Oxford Health Plans, LLC v. Sutter, 133 S. Ct. 2064, 186 L.Ed.2d 113 (June 10, 2013) (citing Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp. (Stolt-Nielsen), 559 U.S. 662, 684, 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010)).

Although where an arbitration clause in a contract precludes or waives the right of the parties to participate in any collective or class action, the issue arises whether such provision renders the agreement unconscionable or otherwise unenforceable.⁶ The Supreme Court has interpreted the policies underlying the FAA to be in conflict with class procedure and has therefore determined that the FAA expresses a clear federal policy in favor of enforcing class waivers contained in arbitration agreements. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750–52 (Apr. 27, 2011). In its 2013 term, the Supreme Court has provided guidance on the compatibility between class action lawsuits and mandatory arbitration agreements, which are explored below.

II. SUPREME COURT PRECEDENTS RENDERED IN 2013

(A.) AMERICAN EXPRESS CO. V. ITALIAN COLORS REST., 133 S. CT. 2304⁷ (JUNE 10, 2013)⁸

FACTS:

Respondent, Italian Colors Restaurant, was a merchant who accepted American Express cards. Italian Colors had an agreement with Petitioner, American Express, and a wholly owned subsidiary, that contained a clause requiring all disputes between parties be resolved by arbitration. The agreement contained a waiver to class arbitration.

Italian Colors brought class arbitration against American Express for violations of federal antitrust laws, the Sherman Act and Clayton Act. American Express moved to compel individual arbitration. In resisting the motion, an economist for Italian Colors estimated that the cost of an expert analysis necessary to prove the antitrust claims would possibly exceed \$1 million, while the maximum recovery for an individual plaintiff would be \$38,549. The district court granted the motion and dismissed

³ Id. (citing Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. Miami L. Rev. 831, 835 (2002)).

⁴ Id. (citing, Sternlight, *supra* note 3, at 53; Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. Rev. 949, 966–67 (2000); Daniel R. Waltcher, Note, *Classwide Arbitration and 10b-5 Claims in the Wake of Shearson/American Express, Inc. v. McMahon*, 74 Cornell L. Rev. 380, 399 (1989)).

⁵ Id. at 1681–82.

⁶ 4 Am. Jur. 2d Alternative Dispute Resolution § 40.

⁷ American Express Co. v. Italian Colors Rest. (American Express v. Colors), 133 S. Ct. 2304, 186 L.Ed.2d 417 (June 20, 2013).

⁸ Summary in part included in 17 J. Consumer & Com. L. 41 (Fall, 2013).

the lawsuits. The appellate court reversed and remanded. The United States Supreme Court granted certiorari.

HOLDING: Reversed.

REASONING:

The American Express Court held that the excessive costs of requiring members of the class to litigate their claims individually would not conflict with the policies of antitrust laws.⁹ The American Express Court reasoned that Congress had taken measures to facilitate the litigation of Antitrust claims, but it did not guarantee an affordable path to the resolution of every claim.¹⁰ In support, the American Express Court observed that the Sherman and Clayton Acts were enacted decades before Federal Rule of Civil Procedure 23 allowed class actions; Fed. R. Civ. P. 23 provides an exception to the usual rule that litigation is conducted by and on behalf of only the individual named parties only.¹¹ Therefore, the American Express Court concluded the antitrust laws do not evince an intention to preclude a waiver of class-action procedure.¹²

Further, the American Express Court continued that congressional approval of Fed. R. Civ. P. 23 does not establish an entitlement to class proceedings for the vindication of statutory rights.¹³ Thus, likening class-certification requirements to class waiver, the American Express Court found Fed. R. Civ. P. 23 did not create an entitlement to class actions. The American Express Court explained that class certifications have certain requirements, one being the class-notice requirement. The American Express Court explained that compliance with the class-notice requirement of Fed. R. Civ. P. 23 cannot be dispensed with, despite that compliance with the class-notice requirement by plaintiffs may result in “prohibitively high cost” that would “frustrate [plaintiff]’s attempt to vindicate the policies underlying the antitrust laws.”¹⁴ Though the class-notice requirement creates high costs, the American Express Court held that the class-notice requirement could not be dispensed with, even if it prevented the class action.

Lastly, the American Express Court rejected Italian Colors’s argument that an exception allowed courts to invalidate agreements that prevented “effective vindication” of a federal statutory right.¹⁵ Italian Colors argued that enforcing the waiver of class arbitration bars effective vindication because they have no economic incentive to pursue their antitrust claims individually in arbitration.¹⁶ The American Express Court explained that the “effective vindication” exception originated as dictum in Mitsubishi Motors, where the Supreme Court expressed a willingness to invalidate, on “public policy” grounds, arbitration agreements that “operat[e] . . . as a prospective waiver of a party’s *right to pursue* statutory remedies.”¹⁷ However, “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”¹⁸ The American Express Court explained this exception was intended to prevent “prospective waiver of a party’s right to pursue statutory remedies.”¹⁹ The American Express Court continued that it would cover a provision in an

⁹ American Express v. Colors, 133 S. Ct. 2309-10.

¹⁰ Id. at 2309.

¹¹ Id. at 2309 (citations omitted).

¹² Id.

¹³ Id.

¹⁴ Id. at 2310 (quoting Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 166–168, 175–176, 94 S. Ct. 2140, 40 L.Ed.2d 732 (1974)).

¹⁵ Id.

¹⁶ Id. at 2310.

¹⁷ Id. (emphasis added in American Express v. Colors) (quoting Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc. (Mitsubishi Motors), 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L.Ed.2d 444 (1985)).

¹⁸ Id. (internal citations and quotation marks omitted) (quoting Mitsubishi Motors, 473 U.S. at 637, 105 S. Ct. 3346).

¹⁹ Id. (internal citations and quotation marks omitted) (quoting Mitsubishi Motors, 473 U.S. at 637, n. 19, 105 S. Ct. 3346).

arbitration agreement forbidding the assertion of certain statutory rights, and it would perhaps cover filing and administrative fees that are so high as to make access to the forum impracticable.²⁰ However, the American Express Court found the exception inapplicable holding that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”²¹

IMPLICATIONS:

The holding in American Express v. Colors—that a class action waiver contained in an arbitration agreement was enforceable, even though the plaintiffs showed that the waiver effectively prevented them from bringing their federal antitrust claims because litigating the claims individually would be prohibitively expensive—is interpreted by commentators to evidence that the Supreme Court has continued its pattern of enforcing arbitration agreements according to their terms and virtually eliminated one of the last plausible judicial limits on the enforcement of class waivers in arbitration agreements.²² Commentators fear that the decision makes it likely that many federal statutes will no longer be enforced privately in certain contexts, further weakening a judicially created principle that was already difficult to apply.²³

(B) OXFORD HEALTH PLANS LLC V. SUTTER, 133 S. CT. 2064²⁴ (JUNE 10, 2013)²⁵

FACTS:

In Oxford Health, plaintiff-respondent, John Sutter, a pediatrician, filed suit against Oxford Health Plans, a health insurance company, in New Jersey state court on behalf of himself and a proposed class consisting of New Jersey physicians under contract with Oxford for breach of contract alleging Oxford had failed to make full and prompt payment to the doctors as required by the agreements and in violation of various state laws. In reliance on an arbitration clause included in the contracts at issue, Oxford successfully moved to compel arbitration.

Once in the arbitral forum, the parties agreed to submit to the arbitrator the question of whether their contract permitted class arbitration. The arbitrator ruled, looking at the contract's broad and inconclusive language, that the contract did permit class arbitration.

The contract's arbitration clause read as follows:

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

This clause, as the arbitrator interpreted it, required arbitration in “the same universal class of disputes” as would ordinarily be brought as “civil actions” in court. In other words, the “intent of the clause” was “to vest in the arbitration process everything that is prohibited from the court process.” Thus, because class action would plainly be one of the possible forms of civil action that could be brought in a

²⁰ Id. at 2310-11 (citations omitted).

²¹ Id. at 2311 (emphasis in original).

²² Harvard Law Review Ass'n, *Class Actions—Class Arbitration Waivers—American Express Co. v. Italian Colors Restaurant*, 127 Harv. L. Rev. 278, 278 (Nov. 2013).

²³ Id.

²⁴ Oxford Health Plans, LLC v. Sutter (Oxford Health), 133 S. Ct. 2064, 186 L.Ed.2d 113 (June 10, 2013).

²⁵ Summary in part included in Illana Haramati, Federal Bar Assoc., *The Future of Class Arbitration: Lessons from Oxford Health Plans LLC v. Sutter*, 60-Dec. Fed. Law. 73 (Dec. 2013).

court,” the arbitrator found that “on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained.”

Seeking to escape the arbitrator's ruling, Oxford filed a motion in federal district court arguing that the arbitrator had exceeded his powers under § 10(a)(4) of the FAA. Oxford argued the arbitrator badly misunderstood the contract's arbitration clause.²⁶ However, the district court denied the motion, and the Third Circuit affirmed.²⁷

While the arbitration proceeded, the Supreme Court decided Stolt-Nielsen. In the wake of Stolt-Nielsen, Oxford requested that the arbitrator reconsider his class arbitration decision. Upon reconsideration, however, the arbitrator found that Stolt-Nielsen did not affect his ruling.

Oxford again returned to federal court in an attempt to vacate the arbitrator's decision. The district court denied Oxford's motion, and the Third Circuit affirmed, holding that “the task of an arbitrator is to interpret and enforce a contract. When he makes a good faith attempt to do so, even serious errors of law or fact will not subject his award to vacatur” Thus, because the “the arbitrator endeavored to interpret the parties' agreement within the bounds of the law,” the Third Circuit found that the arbitrator had not run afoul of the FAA and declined to unseat the arbitrator's decision. The Supreme Court granted *certiorari*.

HOLDING: Affirmed

REASONING:

A unanimous Supreme Court refused to vacate the arbitrator's decision to permit class arbitration. Section 10(a)(4) of the FAA authorizes a federal court to set aside an arbitral award “where the arbitrator[] exceeded [his] powers.”

The Oxford Health Court first emphasized the standard of review of an arbitrator's decision: Only if “the arbitrator act[s] outside the scope of his contractually delegated authority”—issuing an award that “simply reflect[s] [his] own notions of [economic] justice” rather than “draw[ing] its essence from the contract”—may a court overturn his determination.²⁸ Therefore, despite that the Oxford Health Court clarified that nothing in its opinion should be taken to reflect any agreement with the arbitrator's contract interpretation or any quarrel with Oxford's contrary reading, the arbitrator's decision was determined to hold, however, good, bad, or ugly²⁹:

All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was “arguably construing” the contract—which this one was—a court may not correct his mistakes under § 10(a)(4). [Eastern Associated Coal], 531 U.S. at 62, 121 S. Ct. 462, 466–67] (internal quotation marks omitted). The potential for those mistakes is the price of agreeing to arbitration. As we have held before, we hold again: “It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation

²⁶ Oxford Health, 133 S. Ct. at 2070 (citing Pet'r Br. at 21–28).

²⁷ Oxford Health, 133 S. Ct. at 2067 (citing Sutter v. Oxford Health Plans, LLC, 05–CV–2198, 2005 WL 6795061 (D.N.J. Oct. 31, 2005), *aff'd*, 227 Fed. Appx. 135 (3d Cir. 2007)).

²⁸ Oxford Health, 133 S. Ct. at 2068 (internal citations and quotations omitted) (quoting Eastern Associated Coal Corp. v. Mine Workers (Eastern Associated Coal), 531 U.S. 57, 62, 121 S. Ct. 462, 466–67, 148 L.Ed.2d 354 (2000)).

²⁹ Oxford Health, 133 S. Ct. at 2070–71.

of the contract is different from his.” [United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599, 80 S. Ct. 1358, 1362 (1960).]³⁰

In its opinion, the Oxford Health Court took care to distinguish the case from Stolt-Nielsen. The Oxford Health opinion summarized the Supreme Court’s opinion in Stolt-Nielsen as holding the following: that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”³¹ The Oxford Health Court explained that the parties in Stolt-Nielsen, had stipulated that they had never reached an agreement on class arbitration. Thus, relying on § 10(a)(4), the Stolt-Nielsen Court vacated the arbitrators’ decision approving class proceedings because, in the absence of such an agreement, the arbitrators had “simply . . . imposed [their] own view of sound policy.”³² Thus, the Oxford Health Court repeatedly focused on the Oxford Health parties’ agreement to submit the question of class arbitration to the arbitrator, and the arbitrator’s interpretation of the contract in making the decision in contrast to the interpretation reached by the arbitrator.

IMPLICATIONS:

Commentators remark that Oxford Health leaves us no closer to understanding the contours of applying § 10(a)(4) of the FAA to class arbitration questions. Leaving how explicit the contract must be to support class arbitration unclear.³³

III. 2013 FOURTH CIRCUIT CASE LAW

The following is a list of decisions in the Fourth Circuit concerning arbitration, which will be discussed and supplemented further in the presentation:

1. Muriithi v. Shuttle Express, Inc., 712 F.3d 173 (4th Cir. April 1, 2013)
2. Noohi v. Toll Bros., Inc., 708 F.3d 599 (4th Cir. Feb. 26, 2013)
3. Morgan Keegan & Co. v. Silverman, 706 F.3d 562 (4th Cir. Feb. 4, 2013)
4. USB Fin. Servs., Inc. v. Carilion Clinic, 706 F.3d 319 (4th Cir. Jan. 23, 2013)
5. Rota-McLarty v. Stander Consumer USA, Inc., 700 F.3d 690 (4th Cir. Nov. 28, 2012)
6. Dewan v. Walia, No. 12-2175, 2013 WL 5781207 (4th Cir. Oct. 28, 2013) (unpublished table decision)
7. Great Am. Ins. Co. v. Hinkle Contracting Corp., No. 12-1014, 497 Fed. Appx. 348 (4th Cir. Nov. 28, 2012)
8. St. Denis v. Onemain Fin., Inc., Civ. Action No. 8:12-cv-01669, 2012 WL 6061022 (D.S.C. Dec. 6, 2012)
9. Ballew v. Cannon’s Funeral Home, Civ. Action No. 6:12-3473, 2013 WL 1566658 (March 12, 2013)
10. Caire v. Conifer Value Based Care, LLC, Civ. Action No. RDB-13-1216, 2013 WL 5973151 (D. Md. Nov. 8, 2013)
11. In re Titanium Dioxide Antitrust Litig., Civ. Action No. RDB-10-0318, 2013 WL 4516472 (D. Md. Aug. 26, 2013)

³⁰ Id.

³¹ Oxford Health, 133 S. Ct. at 2067 (internal citations and quotations omitted) (quoting Stolt-Nielsen, 559 U.S. at 684, 130 S. Ct. at 1755)

³² Id. (internal citations and quotations omitted) (quoting Stolt-Nielsen, 559 U.S. at 672, 130 S. Ct. 1767–68).

³³ Haramati, *supra* note 12, at 75.

2013 – Roundup – Arbitration Cases in S.C. State Courts

by:

Kirby Mitchell, Senior Litigation Attorney, South Carolina Legal Services

Henderson v. Summerville Ford-Mercury, Inc., 748 S.E.2d 221(S.C. 2013)

S.C. Supreme Court – September 11, 2013

Holding: Considering a matter of 1st impression, the S.C. Supreme Court determined that an unsuccessful party in an **arbitration** proceeding may not prevent the confirmation of an award by paying the award prior to the confirmation proceeding. Circuit Court’s ruling affirmed.

- (1) S.C. Supreme Court states § 9 of FAA (concerning confirmation of an **arbitration** award) is procedural in nature rather than substantive, and thus, § 9 applies only in federal court. The Circuit Court did not err in applying South Carolina UAA ‘s confirmation provision (§ 15-48-120) because the confirmation statute is procedural, not substantive. The FAA’s substantive provisions apply to **arbitration** in federal or state courts, but a state’s procedural rules apply in state court unless they conflict with or undermine the purpose of the FAA.
- (2) Considering arguments about whether the Federal Arbitration Act (FAA) or the South Carolina Uniform Arbitration Act (UAA) should apply here, the S.C. Supreme Court discusses and compares § 9 of the FAA and §15-48-120 of the UAA and the Court concludes that on the facts of this case the outcome would’ve been the same under either the FAA or the UAA, as both mandate confirmation unless grounds were established for vacating, modifying, or correcting the award, and such grounds were not asserted here.
- (3) Confirmation is not a separate judicial process; it is merely a continuation of the **arbitration** procedure. *Confirmation* of an award is a distinguishable issue from a defendant’s *payment* or satisfaction of an award. Both the UAA and the FAA use the words “shall” or “must” in directing that an award be confirmed upon application in the absence of a motion to vacate, modify, or correct the award, and such language is mandatory.

York and Cristy v. Dodgeland of Columbia, Inc. and Jim Hudson, et al., Appellate Case No. 2011-199006, Opinion No. 5169 (S.C. Ct. of App. 2013)

S.C. Court of Appeals – September 4, 2013

Holding: In a complicated case involving 3 vehicle purchases, 1 consumer loan, and 2 distinct sets of parties, as memorialized within 4 separate contracts, the S.C. Court of Appeals analyzed each dispute and held that each dispute was within the scope of at least one valid **arbitration** agreement. Thus, the S.C. Court of Appeals affirmed the Circuit Court’s dismissal of Appellants’ suit and compelled **arbitration** (Circuit Court’s ruling affirmed as modified).

- (1) Useful case to study to see a S.C. Court of Appeals panel’s analysis of the requisite elements of a valid **arbitration** agreement, starting with FAA discussion followed by detailed review of the parties’ **arbitration** agreements – S.C. Court of Appeals concluded these agreements were not ambiguous; agreements did not omit material and essential terms; agreements did not incorporate inconsistent or irreconcilable terms; etc.
- (2) Useful case to study for Court’s lengthy ‘2-pronged unconscionability analysis’ to see if here there was “the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” S.C. Court of Appeals did find one of the **arbitration** agreements (Cristy’s Buyers Order) to be unconscionable, and thus, invalid in its entirety.
- (3) All of these contested **arbitration** agreements purport to ban group or class action **arbitration**, and the S.C. Court of Appeals holds these provisions cannot be invalidated based upon public policy considerations embodied within state law. Rather, the **arbitration** clause[s] at issue here must be enforced according to [their] terms, which requires individual **arbitration** and forecloses class **arbitration**.

Crouch Constr. Co. v. Causey, 405 S.C. 155 (S.C. 2013)

S.C. Supreme Court – August 14, 2013

Holding: Circuit Court erred in vacating an **arbitration** award under § 15-48-130(a)(2) (concerning an arbitrator’s partiality) because the Circuit Court applied incorrect legal standard – the Circuit Court incorrectly applied an “appearance of partiality or bias” standard instead of § 15-48-130(a)(2)’s “evident partiality” standard, which requires a showing that a reasonable person would have concluded the arbitrator was partial to the other party. Circuit Court’s ruling reversed and remanded.

- (1) Circuit Court incorrectly held the relevant legal standard was not the language of the statute itself, but rather, is the standard set forth in the S.C. Code of Ethics for Arbitrators, which requires disclosure of any relationship that “might reasonably create an appearance of partiality or bias.” See *Code of Ethics for Arbitrators* Canon II A(2), App. A, SCADRR. S.C. Supreme Court concluded the Circuit Court improperly conflated a purported breach of the S.C. Code of Ethics for Arbitrators with a factual showing that justifies setting aside an **arbitration** award.
- (2) Appellant argued at S.C. Supreme Court that provisions of the Federal Arbitration Act (FAA) controlled rather than S.C.’s § 15-48-130, but S.C. Supreme Court limited its review to only the application of § 15-48-130 and concluded appellant’s argument re: applicability of the FAA was not preserved for appellate review (see the S.C. Supreme Court’ footnote 9).
- (3) A court should examine 4 factors to determine if a claimant has demonstrated evident partiality: (a) extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceedings; (b) directness of the relationship between arbitrator and the party he is alleged to favor; (c) connection of that relationship to the **arbitration**; and (d) proximity in time between the relationship and the **arbitration** proceeding.

Cape Romain Constrs., Inc. v. Wando E., LLC, 405 S.C. 115 (S.C. 2013)

S.C. Supreme Court – August 14, 2013

Holding: Where a subcontractor filed suit asserting a mechanics' lien claim against a property owner and a breach of contract claim against the general contractor, the Circuit Court erred in denying the owner's and general contractor's motion to compel **arbitration** on Circuit Court's basis there was insufficient impact of interstate commerce. This underlying transaction to construct a marina on a navigable river fell within purview of Congress's commerce power, as it extensively involved both the channels and instrumentalities of interstate commerce. Also, as the subcontractor's mechanics' lien claim arose directly from the contract with the general contractor, the claim was encompassed by contract's **arbitration** provision; therefore, under terms of the contract, the owner could be joined as a party to the **arbitration** proceedings. Circuit Court's ruling reversed and remanded.

- (1) S.C. Supreme Court states the proper analysis involves consideration of all 3 broad categories of activity within the purview of Congress's commerce power – use of the channels of interstate commerce; regulation of persons, things or instrumentalities in interstate commerce; and regulation of activities having a substantial relation to interstate commerce.
- (2) S.C. Supreme Court finds this **arbitration** pursuant to the FAA is proper because the underlying marina construction transaction falls within the purview of Congress's commerce power.
- (3) S.C. Supreme Court finds that because Wando E. is an entity who is "substantially involved in a common question of law or fact whose presence is required if complete relief is to be accorded in arbitration," then under the unambiguous terms of the contract between Barnes and Cape Romain, Wando E. may properly be joined as a party to the arbitration proceedings.

Carlson v. S.C. State Plastering, LLC, 404 S.C. 250 (S.C. Ct. of App. 2013)

S.C. Court of Appeals – June 12, 2013

Holding: Circuit Court erred in denying contractors' motion to compel **arbitration** because, although they did not file their motion until over two years after the filing of the complaint, they nevertheless, raised the issue of **arbitration** from the inception of the action and the delay in filing the motion was the result of the court's decision to first address another issue, not because of any dilatory actions by contractors. This **arbitration** clause was not unconscionable, and although the deed contained no **arbitration** clause, the doctrine of merger did not preclude **arbitration**. Further, the home buyers' tort claims fell within the scope of the **arbitration** clause. Circuit Court's ruling reversed.

- (1) The right to enforce an **arbitration** clause may be waived, but to do so a party must show prejudice through an undue burden caused by delay in demanding **arbitration**. Here, S.C. Court of Appeals found aside from the passage of time the Carlsons can point to no prejudice they will suffer as a result of being compelled to **arbitration**.
- (2) S.C. Court of Appeals distinguishes the facts here from what was presented in *Simpson v. MSA of Myrtle Beach*, 644 S.E.2d 668 (2007) in rejecting Carlsons' unconscionability arguments.
- (3) Citing the S.C. Supreme Court's recent decision in *Landers v. FDIC*, 402 S.C. 100 (S.C. 2013), the S.C. Ct. of App. finds the Carlsons' tort claims fall within the scope of the **arbitration** clause.

C-Sculptures, LLC v. Brown, 403 S.C. 35 (S.C. 2013)

S.C. Supreme Court – May 8, 2013

Holding: S.C. Supreme Court accepted cert and reversed the S.C. Court of Appeals and the Circuit Court judge and held that it was error for arbitrator to manifestly disregard the applicable law in declining to dismiss contractor's action. Here the property owners correctly argued the contractor did not have a valid license and was thus prohibited, pursuant to S.C. Code Ann. § 40-11-370(C) from bringing any action to enforce the contract. S.C. Court of Appeals and Circuit Court reversed.

- (1) S.C. Supreme Court states the plain language of § 40-11-370(C) is clear, defined, explicit, and unquestionably applicable, yet the arbitrator simply chose to ignore it.
- (2) Generally, an **arbitration** award is conclusive and courts will refuse to review the merits of an award, and an award will be vacated only under narrow, limited circumstances, *inter alia*, when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law. An arbitrator's 'manifest disregard of the law' as a basis for vacating an **arbitration** award occurs when the arbitrator knew of a governing legal principle yet refused to apply it.
- (3) Note: Justice Pleicones "reluctantly dissented," citing the very limited scope of the S.C. Supreme Court's review and the high burden of South Carolina's 'manifest disregard' standard.

Smith v. D.R. Horton, Inc., 403 S.C. 10 (S.C. Ct. of App. 2013)

S.C. Court of Appeals – April 17, 2013

Holding: Circuit Court did not err in concluding the **arbitration** provision was unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions, including a lack of mutuality of remedy, and a purported exemption of appellant from liability for \$ damages. Also, this **arbitration** clause was not severed from the numerous unconscionable provisions, particularly appellant’s attempt to waive any seller liability for \$ damages of any kind, including secondary, consequential, punitive, general, special, or indirect damages. Circuit Court’s ruling affirmed.

- (1) S.C. Court of Appeals relied on S.C. Supreme Court’s unconscionability analysis in *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 667 (2007), focusing on the lack of mutuality of remedy, which purported to exempt Horton from liability for \$ damages.
- (2) S.C. Court of Appeals concluded that, because they affirm the Circuit Court’s finding of unconscionability and find the **arbitration** provision should not be severed, they did not reach the issue of whether the FAA or S.C. UAA applies.
- (3) S.C. Court of Appeals recited the S.C. Supreme Court’s language from *Simpson* indicating “there is no specific set of factual circumstances establishing the line which must be crossed when evaluating an **arbitration** clause for unconscionability . . . instead, we emphasize the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions.”

Landers v. FDIC, 402 S.C. 100 (S.C. 2013)

S.C. Supreme Court – February 27, 2013

Holding: S.C. Supreme Court holds Circuit Court erred in finding employee’s claims for slander, intentional infliction of emotional distress, illegal proxy solicitation, and wrongful expulsion as director were not within the scope of the parties’ **arbitration** clause. Circuit Court’s ruling reversed.

- (1) Circuit Court found that only Landers’ breach of contract claim was subject to the **arbitration** provision, but S.C. Supreme Court found a clear nexus between all his claims and employment contract sufficient to establish a significant relationship to the employment agreement, and thus, all the claims are within the scope of the agreement’s broad **arbitration** provision.
- (2) S.C. Supreme Court admits the question of whether Landers’s corporate claims are within the scope of the arbitration clause is a closer question than the question re: his tort claims; however, in part because any doubt must be resolved in favor of **arbitration**, the S.C. Supreme Court finds these corporate claims must be arbitrated.
- (3) S.C. Supreme Court discusses federal arbitration jurisprudence – in particular courts’ usage of the terms “significant relationship” and/or “touch matters” – and concludes these terms were never intended to be separate and independent tests for analyzing the scope of a broad arbitration clause.

2013 State Court Arbitration Decisions: New Law and Some Application of Existing Law

Jack Pringle
Adams and Reese, LLP
Jack.pringle@arlaw.com
@jjpringle

I. Introduction

Each passing year brings more appellate court decisions, at the state and federal levels, addressing arbitration. 2013 was no exception. The South Carolina Supreme Court considered several issues of first impression, in the areas of arbitration award confirmation, “manifest disregard of the law,” and “evident partiality.” And our appellate courts took up questions about whether arbitration claims are subject to the Federal Arbitration Act (“FAA”), the “unconscionability” of an agreement to arbitrate, waiver of the right to arbitrate, and the scope of an agreement to arbitrate.

II. New Law

A. Confirmation of Arbitration Award

*Henderson v. Summerville Ford-Mercury*¹, Supreme Court, September 11, 2013

Takeway

Payment of an arbitration award does not prevent confirmation of the award.

Background

Purchaser and car Dealer arbitrated their SCUTPA and Dealers Act claims, and arbitrator found for Purchaser. Dealer did not move to vacate, modify or correct the award. Purchaser moved to confirm the arbitration award, and the circuit court granted the motion.

Analysis

The issue of first impression before the South Carolina Supreme Court was whether a party to an arbitration proceeding can prevent that award from being confirmed by paying the

¹ 405 S.C. 440

award prior to the confirmation proceeding. Justice Beatty, writing for the Court, ruled (succinctly): “The answer is no.”

Dealer argued that paying the award removed any “justiciable controversy” (based on the idea that the purpose of confirmation is to enter an enforceable judgment) and mooted the motion for confirmation. Purchaser responded that confirmation was mandated by S.C. Code Ann. Section 15-48-120 (found in the South Carolina Uniform Arbitration Act “UAA”), and necessary in order to conclude the action.

Justice Beatty agreed with the Circuit Court that Section 15-48-120 made confirmation mandatory (absent a claim that the award be vacated, modified or corrected):

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 15–48–130 [vacating award] and 15–48–140 [modification or correction of award].

Confirmation is a “ministerial recording of the result” (the award) in an arbitration proceeding. And because both the UAA and the FAA use the term “shall”, confirmation is mandatory.

Addressing Dealer’s mootness argument, Justice Beatty reasoned that “[c]onfirmation of an award is a distinguishable issue from a defendant’s *payment* or satisfaction of an award.” Accordingly, payment of an award is characterized as a “defense to any attempt to execute on a judgment,” and does not extinguish the right or obligation to confirm an award.

Note also the Court’s holding that because confirmation is a procedural matter, the UAA’s confirmation statute (Section 15-48-120) applies instead of the FAA’s confirmation provision (9 U.S.C. Section 9).

B. Manifest Disregard of the Law

***C-Sculptures, LLC v. Brown*², Supreme Court, May 8, 2013**

Takeway

This case marks the first instance in which a South Carolina appellate court has vacated an arbitration award pursuant to S.C. Code Ann. Section 15-48-130, based upon an arbitrator's "manifest disregard of the law."

Background

Contractor agreed to build a house for Buyers, at a contract price exceeding \$800,000. Contractor possessed a license that limited its construction projects to those that did not exceed \$100,000. Contractor filed an action in circuit court seeking to enforce a mechanic's lien, and Buyers compelled the matter to arbitration.

Although Buyers moved to dismiss the arbitration based on the fact that Contractor did not have a "valid license" and therefore could not bring an action to enforce the contract pursuant to S.C. Code Ann. Section 40-11-370(C), the arbitrator disagreed and found for Contractor on the merits of the case. Buyers challenged the award, alleging "manifest disregard of the law" on the part of the arbitrator. The trial court and the Court of Appeals ruled against the Buyers.

Analysis

In reversing the decisions of the trial court and Court of Appeals, Justice Kittredge described the standard as follows:

[F]or a court to vacate an arbitration award based upon an arbitrator's "manifest disregard for the law", the "governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable. Indeed, an arbitrator's manifest disregard for the law, as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it.

*Quoting Gissel v. Hart*³.

Contractor admitted that it did not have the license required to perform the project, and the Court concluded that the arbitrator ignored "governing law" (Section 40-11-370(C)) that was "well defined, explicit, and clearly applicable" in refusing to grant Buyers' motion to dismiss. In other words, because Section 40-11-370(C) plainly prevented Contractor from bringing a claim, the manifest disregard standard was met.

² 403 S.C. 53

³ 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

Justice Pleicones dissented, pointing out that the clarity of Section 40-11-370(C) was not the question before the Court. Instead, the “manifest disregard of law” analysis asks “whether the arbitrator *knowingly refused* to give the term its well-defined and explicit meaning.” (Emphasis added). While “valid license” in Section 40-11-370(C) may be unambiguous, that term had never been addressed before by the Court, and the cases referenced by the Majority did not address that provision. As a result, the meaning was not so “explicit” that the Court could conclude that the arbitrator “knowingly refused” to apply it.

Because manifest disregard of the law “presupposes something beyond a mere error in construing or applying the law,” *Trident Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985), under the Court’s “very limited scope of review” Justice Pleicones would have upheld the arbitrator’s award. In his view, showing that a party would have been successful on appeal is not enough to prevail in vacating an arbitration award under the “manifest disregard of law” standard.

Keep in mind that the manifest disregard standard is applied on a case-by-case basis.

C. Evident Partiality

***Crouch Construction v. Causey*⁴, Supreme Court, August 14, 2013**

Takeaway

This case involved the first consideration of the standard for “evident partiality” sufficient to vacate an arbitration award pursuant to S.C. Code Ann. Section 15-48-130(a)(2).

Background

A commercial dispute arose between a Contractor and the Owners of property related to the construction of a commercial building. The circuit court compelled arbitration based on an arbitration clause in the construction contract. The arbitrator determined that the Contractor was owed money under the construction contract.

Before an order confirming the arbitration award was entered, Owners learned that an engineer employed by the company that had done an engineering report in connection with the construction project had a brother who was a law partner of the arbitrator. Owners subsequently filed a motion to vacate the arbitration award, based in part on the allegation that the arbitrator’s “failure to disclose his law partner’s familial relationship” with the employee of the engineering firm constituted “evident partiality.”

The circuit court vacated the arbitration award, applying the standard in the South Carolina Code of Ethics for Arbitrators requiring disclosure of any relationship that “might

⁴ 405 S.C. 155

reasonably create an appearance of partiality or bias,” and concluding that the “arbitrator’s conduct demonstrated evident partiality in favor of” the Contractor.

Analysis

The South Carolina Supreme Court certified the case per Rule 204(b), SCACR, and proceeded to consider the legal standard for “evident partiality” as a question of law to be reviewed *de novo*.

With respect to the circuit court’s reliance on the S.C. Code of Ethics for Arbitrators, Justice Kittredge concluded that the issue of whether a failure to disclose a conflict of interest “is unethical is separate and distinct from the issue of whether an arbitration award must be vacated due to evident partiality.” As such, the Code of Ethics does not provide “the proper legal standard for evaluating a claim of “evident partiality.”

Because there is no South Carolina precedent addressing the “evident partiality” ground to vacate an award found in S.C. Code Ann. Section 15-48-130(a)(2), the Court decided to look to federal applications of “evident partiality” (as the language in FAA –Section 9 U.S.C. 10(a)(2)- is similar).

Following the lead of federal case law, the Court required “the party seeking vacatur to demonstrate that a reasonable person would have to conclude that an arbitrator was partial to the other party to the arbitration.” *ANR Coal Co. v. Cogentrix of North Carolina*⁵.

ANR Coal establishes a four-part test for evident partiality:

- 1) the extent and character of the personal interest, pecuniary or otherwise, of the arbitrator in the proceeding;
- 2) the directness of the relationship between the arbitrator and the party he is alleged to favor;
- 3) the connection of that relationship to the arbitration; and
- 4) the proximity in time between the relationship and the arbitration proceeding.

Owners did not demonstrate evident partiality according to this standard. First and foremost, the arbitrator was “unaware of the undisclosed relationship until several months after the arbitration award was made.” Nor was the engineering firm a party to the arbitration, and the arbitrator had no direct relationship with the employee of the engineering firm. Moreover, the employee of the engineering firm was not employed by the engineering firm during the time work was performed on the project.

The decision of the Court is best summed up by the following: “Evident partiality, as a statutory ground to vacate an arbitration award, requires a strong and objective showing of

⁵ 173 F.3d 493 (4th Cir. 1999).

probable arbitrator bias.” The circuit court’s use of the “appearance of bias” improperly shifted the burden of proof away from the party seeking to have the arbitration award set aside, and effectively required the Contractor to “disprove evident partiality.”

III. Application of Existing Law

A. Interstate Commerce

***Cape Romain Contractors, Inc. v. Wando E., LLC*⁶, Supreme Court, August 14, 2013**

Takeaway

The test for whether a contract concerns a “transaction involving interstate commerce” for purposes of arbitration under the FAA is not limited to a determination of whether the agreement “on its face” demonstrates that the parties contemplated an interstate transaction.

Background

A marina construction Contract between Contractor and Subcontractor provided for arbitration under the FAA. When the Subcontractor sought to foreclose on its mechanic’s lien, Owner and the Contractor moved to compel arbitration. Subcontractor opposed arbitration because 1) Owner was not a party to the Contract and could not compel arbitration; and 2) the arbitration clause was not enforceable under the FAA because the transaction did not impact interstate commerce.

The circuit court refused to compel arbitration because performance of the Contract didn’t involve an impact on interstate commerce sufficient to trigger application of the FAA. Moreover, the circuit court concluded that the Owner could not demonstrate a “special relationship” with one of the contracting parties sufficient to compel arbitration.

Analysis

Justice Kittredge disagreed. First, this particular marina construction transaction is subject to arbitration under the FAA because it falls within the reach of the three categories of the Commerce Clause: 1) use of the channels of interstate commerce; 2) regulation of persons, things, or instrumentalities in interstate commerce; and 3) regulation of things having a substantial relation to interstate commerce. *United States v. Lopez*⁷. The materials used to construct the dock were manufactured in Ohio, and the Contractor consulted with an out-of-state engineering and survey company in connection with the dock section installation. The construction site is on the Wando River (within a channel of interstate commerce), and the

⁶ 405 S.C. 115

⁷ 514 U.S. 549, 558–59, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995)

Contractor used barges and other instrumentalities of interstate commerce to transport materials and equipment used in connection with the project.

Accordingly, to the extent that *Timms v. Greene*⁸ required an arbitration agreement to demonstrate on its face that the parties contemplated an interstate transaction, this case overruled it.

The Court then quickly determined that the disputes between the parties should be compelled to arbitration, and that the Contract's plain language allowed the Owner to be joined as a party in the arbitration.

B. Unconscionability

1. *York v. Dodgeland of Columbia*⁹, Court of Appeals, September 4, 2013

Takeaway

An arbitration clause banning statutory remedies and allowing the stronger party judicial remedies that supersede consumer arbitration remedies is unconscionable, following the rule in *Simpson v. MSA of Myrtle Beach, Inc.*¹⁰ ("*Simpson*").

Also, under the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*¹¹ ("*Concepcion*"), the FAA preempts any state law provision invalidating class action waivers on public policy grounds.

Analysis

The factual and procedural history of this case is so tortured that describing it would take more pages than the entire presentation.

Unconscionability and Arbitration Agreements

The test for unconscionability has two parts: "In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*. "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Id.*

⁸ 310 S.C. 469, 427 S.E.2d 642 (1993).

⁹ 2013 WL 4734569.

¹⁰ 373 S.C. 14, 644 S.E.2d 663 (2007).

¹¹ — U.S. —, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

Suffice it is to say that an arbitration clause with one-sided and oppressive terms (like that considered by the S.C. Supreme Court in *Simpson*) is subject to being struck down as unconscionable. The language in one of the arbitration clauses in this case (“In no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages (or any other damages which are punitive in nature or effect) against either party.”) was identical to that considered in *Simpson*. In addition, another provision (also existing in the *Simpson* agreement) allowed the dealer to “retain repossession, foreclosure, and set-off rights, without regard to pending arbitration claims, while the claimant’s sole remedy was arbitration.”

With respect to class action waivers in arbitration clauses, recall that in 2010 the South Carolina Supreme Court invalidated a provision in an arbitration agreement requiring purchasers to waive their right to participate in a “class action or multi-plaintiff or claimant action in court or through arbitration.” According to the first *Herron v. Century BMW*¹² opinion, such a provision was inconsistent with the public policy of South Carolina as expressed in the Dealers Act and its specific provision allowing “group actions.”

Subsequently the United States Supreme Court vacated *Herron I* and remanded same to the S.C. Supreme Court to reconsider its invalidation of the provision banning class arbitration in light of *Concepcion*. *Concepcion* held that the FAA preempts state law when it “allows any party to a consumer contract to demand [classwide arbitration], notwithstanding the presence of a class arbitration waiver in an otherwise valid arbitration agreement.” 131 S.Ct. at 1750. On remand (*Herron II*¹³), the South Carolina Supreme Court determined that the issue of preemption was not preserved for review, and reinstated its original opinion.

So this *York* case represents the first time that the issue addressed by *Concepcion* has been presented to a South Carolina appellate court. Accordingly, the Court of Appeals determined that two arbitration agreement provisions prohibiting class arbitration and representative actions were valid and enforceable.

¹² 693 S.E.2d 394.

¹³ 719 S.E.2d 640 (2012).

2. *Smith v. D.R. Horton*¹⁴, Court of Appeals, April 17, 2013

This decision affirmed a circuit court determination that an arbitration clause in a purchase agreement was unenforceable because it was unconscionable.

Background

The Smiths filed a construction defect case against builder D.R. Horton ("Horton") in connection with a house they purchased from Horton. Horton moved to compel arbitration based upon an arbitration clause found in Section 14(g) of the purchase agreement. The arbitration clause was a subsection of the purchase agreement's Section 14 "Warranties and Dispute Resolution." The circuit court considered Section 14 "Warranties and Dispute Resolution" "as a whole," and denied Horton's motion to compel arbitration because certain provisions contained in Section 14 (not just in Section 14(g)) made the arbitration clause unconscionable.

Analysis

The Court of Appeals affirmed the circuit court's decision based upon "the supreme court's analysis in *Simpson*," and cited Section 14(c)'s disclaimer of certain warranties and Section 14(i)'s limitation of liability provisions as examples of "oppressive and one-sided provisions."

***Prima Paint*, a Court's Limited Role in Considering Unconscionability, and Severability**

Horton claimed that the rule of *Prima Paint Corp. v. Flood and Conklin Mfg. Co.*¹⁵, ("*Prima Paint*") prevented court consideration of other provisions in the purchase agreement outside the arbitration clause in making an unconscionability determination.

According to *Prima Paint*, the issue of contract validity (as opposed to the issue of the validity of an arbitration agreement found *within* that contract) is for the arbitrator, not the courts. *Prima Paint's* rationale is that the FAA applies *only* to those agreements to arbitrate between parties, and therefore a court is empowered *only* to hear a "discrete challenge" to the parties' arbitration agreement. Justice Black, dissenting in *Prima Paint*, characterized the Court's holding as "fantastic" and inconsistent with the language of § 2 of the FAA. The Court of Appeals, perhaps echoing Justice Black, has referred previously to the *Prima Paint* rule as a "surprising result," See *New Hope Missionary Baptist Church v. Paragon Builders*¹⁶ because the FAA empowers a court to hear an unconscionability challenge to an arbitration agreement that is *part* of a contract, but not the contract *itself*.

In considering the purchase agreement, the Court of Appeals acknowledged the application of *Prima Paint* in South Carolina: "[A]n arbitration clause is separable from the

¹⁴ 403 S.C. 10.

¹⁵ 388 U.S. 395, 87 S.Ct. 1801 (1967).

¹⁶ 379 S.C. 620 (2008).

contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.' *Munoz v. Green Tree Fin. Corp.*¹⁷ (citing *Prima Paint*).'" However, the Court of Appeals construed Horton's claim as seeking to *sever* the offending provisions from the purchase agreement and send the remainder of the purchase agreement to arbitration. Accordingly, because the *Simpson* court determined that severability was not an appropriate remedy, the Court of Appeals declined to do so also.

Of course, Horton undoubtedly sees "separability" and "severability" as two very different things. Likewise, echoing *Munoz*, a ruling on whether the FAA applied to the purchase agreement might have brought the issue of *separability* into sharper focus. However, the Court of Appeals did not address the issue of whether the FAA or the UAA applied to the purchase contract, based on its disposition of the case on unconscionability grounds.

3. *Gladden v. Palmetto Home Inspection Services*¹⁸, Supreme Court, March 27, 2013

This is not a case about arbitration. However, Justice Beattie's dissent offers a pretty good survey on the ways in which a limitation of liability provision in a contract can be unconscionable and violate public policy.

C. Waiver of the Right to Arbitrate

***Carlson v. S.C. State Plastering*¹⁹, Court of Appeals, June 12, 2013**

Takeaway

A party does not waive its right to arbitrate merely by engaging in litigation for over two years before seeking to compel arbitration.

Background

Homeowners entered into a purchase agreement with Developer to buy a Sun City house in Hilton Head. The purchase agreement had an arbitration clause. In September of 2008 Homeowners filed a lawsuit (one of 140 involving Sun City homes) alleging construction defects in the house's stucco siding. Developer's answer alleged 1) Homeowners' failure to comply with the Right to Cure Act; and 2) the claim was subject to arbitration.

After a number of intervening events, including motions to dismiss, stays, and extensions in this case and in related stucco cases, on February 14, 2011 Developer moved to compel

¹⁷ 343 S.C. 531 (2007).

¹⁸ 402 S.C. 140.

¹⁹ 404 S.C. 250.

arbitration. On October 20, 2011 the circuit court denied the motion and ruled that the Developer had waived the right to compel arbitration based on the delay in filing the motion.

Analysis

Judge Williams reversed the circuit court, citing the three factors used to determine whether a party has waived its right to compel arbitration: 1) whether a substantial amount of time transpired between the commencement of the action and the filing of the motion to compel arbitration; 2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and 3) whether the non-moving party was prejudiced (not merely inconvenienced) by the delay in seeking arbitration. *Davis v. KB Home of SC, Inc.*²⁰.

Although over two years elapsed between the commencement of the action and the filing of the motion to compel arbitration, that delay was due in large part to the circuit court's decision to address the Right to Cure Act issues first (and not due to any fault of the Developer). Addressing the second factor, no discovery of any type had taken place. Accordingly, the lack of activity in the case meant that the Homeowners could show no prejudice as a result of the delay.

D. Scope of the Arbitration Clause

***Landers v. FDIC*²¹, Supreme Court, February 27, 2013**

Takeaway

Tort claims that bear a "significant relationship" to an employment agreement fall within the scope of an agreement to arbitrate.

Background

Landers, a bank officer and director entered into a written employment agreement (containing an arbitration clause) with Bank. The arbitration clause provided that "Except matters contemplated by Section 17 below [Applicable Law and Choice of Forum], any controversy or claim arising out of relating to this contract, or the breach thereof, shall be settled by binding arbitration. . . ."

When the Bank's finances unraveled during the "recent unpleasantness," the Bank terminated Landers. As described in some detail in the case, Landers and various bank personnel were not on the best of terms prior to and following his departure.

Landers brought a lawsuit alleging 1) breach of contract/constructive termination; (2) slander/slander per se; (3) intentional infliction of emotional distress; (4) illegal proxy solicitation and (5) wrongful expulsion as a director. The circuit court granted the motion to

²⁰ 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011).

²¹ 402 S.C. 100.

compel arbitration of the breach of contract/constructive termination claim, but denied the motion with respect to the other causes of action, concluding that “there was not a significant relationship between the claims” and the employment agreement.

Analysis

Justice Kittredge reversed the decision of the circuit court, citing numerous federal court decisions. In particular, the opinion points out that Landers “has provided a clear nexus between the underlying factual allegations of each of his claims and his inability to perform the employment Agreement and the alleged breach thereof, such that all of his causes of action bear a significant relationship to the Agreement.” For example, Landers’ allegations of slander and intentional infliction of emotional distress “directly related to Landers’ ability to perform his duties with Bank.” In sum, “Landers has essentially pled himself into a corner with respect to each of his claims.”

To be sure, certain allegations of defamation, such as the statement that an individual is “the company drunk” (as cited in another case), might fall outside the coverage of an arbitration clause. However, the connection between the alleged defamatory statements and Landers’ performance of his job, in combination with the strong presumptions in favor of arbitration and reading an arbitration clause broadly, created the “significant relationship” necessary to compel arbitration.