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ADR Case Update 2018 - 20

Federal Circuit Courts

- **AWARD OF MEDIATION FEES REVERSED**

Design Basics LLC v. Forrester Wehrle Homes, et al.
2018 WL 4705873
United States District Court, N.D. Ohio, Western Division
October 2, 2018

Design Basics, the creator and owner of architectural designs for homes, sued Forrester Wehrle et al., alleging that they used DB's designs without permission. The case proceeded to mediation with a retired judge. The judge conveyed to the United States District Court, N.D. Ohio, Western Division, that mediation would not be successful because defendant Cincinnati Insurance did not have full authority to settle, in violation of Local Rule 16.6(f). The Court ordered Cincinnati to show cause why it should not pay all of the fees and costs associated with the mediation. Cincinnati responded to the order, DB responded, and Cincinnati replied.

Based on the information gathered, the Court ordered that the previous show cause order be withdrawn and DB's request for reimbursement of fees denied. The mediator understood full authority to mean that the party had complete discretion – to exercise independently during the mediation – to spend as much or take as little to best represent the party's interests. Given that Cincinnati's understanding was different, it had no meaningful notice of the risk it assumed in showing up without authority to settle. "Cincinnati, under all the circumstances, could not reasonably anticipate that its actions would expose it to the sanction and expense the show cause order posed."

Massachusetts

- **AWARD NOT CONTRARY TO PUBLIC POLICY**

City of Pittsfield v. Local 447
2018 WL 4762406
Supreme Judicial Court of Massachusetts
October 3, 2018

Pittsfield police officer Dale Eason was terminated from his position on grounds of conduct unbecoming an officer, untruthfulness, and falsifying records. The action resulted from Eason's report that he removed a larceny suspect from the cruiser "for her safety" – when the city alleged that he really did so to photograph the suspect. Local 447 filed a grievance pursuant to a collective bargaining agreement (CBA) between the union and the city, and the parties submitted the issue to an arbitrator. While the arbitrator found Eason's explanation that he moved the suspect "for her safety" to be untrue, intentionally misleading, and cause for discipline, he determined it was less than intentionally false and not serious enough to justify termination. The city commenced an action to vacate, arguing that the award was contrary to public policy. The court confirmed the award and the city appealed.

The Supreme Judicial Court of Massachusetts affirmed. In the collective bargaining context, an arbitration award carries a presumption of propriety because it is the arbitrator's judgment, not necessarily an "objectively correct answer," for which the parties have bargained. The Court thus will uphold a decision even when it is "wrong on the facts or the law, and whether it is wise or foolish, clear or ambiguous." The Court has drawn the "public policy exception quite narrowly so as not to encourage arbitration and yet devise ways to undermine an arbitrator's authority." The city asserted that this award violated the public policy supporting termination of officers for lying. The Court acknowledged that were it to conduct a *de novo* review, it would not draw the same "elusive" distinction - between intentionally misleading and intentionally false – as the arbitrator. Still, the Court was obligated to credit the arbitrator's conclusion that Eason's characterization of his action was no more than misleading.

Georgia

- **AMBIGUITY OF ARBITRATION CLAUSE RESULTS IN TRIAL**

Salinas, et al., v. Atlanta Gas Light Company
2018 WL 4763925
Court of Appeals of Georgia
October 3, 2018

Salinas contracted with Georgia Natural Gas for natural gas service. Included in the terms of service was a dispute resolution clause, providing that disputes between the owner and GNG (including officers, directors, employees, members, affiliates, agents) would be resolved by binding arbitration. Salinas sued GNG and the Atlanta Gas Light Company for shutting off gas to the properties without notice, causing significant damage. GNG and AGLC's motion to compel arbitration was granted and Salinas dismissed his action without prejudice and filed for arbitration. GNG moved for summary judgment, contending that under the terms of service, it was not responsible for AGLC's conduct. The arbitrator granted the motion, finding that AGLC and GNG were separate entities with separate functions. Salinas filed notice to withdraw his arbitration demand and asked the trial court for a trial by jury, TRO and preliminary injunction to prevent the arbitrator from taking further action. The court found that GNG and AGLC were affiliates and ordered the matter back to mandatory arbitration. Salinas appealed.

The Court of Appeals of Georgia reversed. The arbitration clause was ambiguous as to whether AGLC was an affiliate under the terms of service, and thus, had to be construed in favor of the property owners as not including utility service. AGLC countered that Salinas waived his right to litigate with AGLC by participating in arbitration for many months, almost to the date of the final hearing. The Court found no facts showing that Salinas waived his right: Salinas was required to arbitrate a claim of joint and several liability until GNG sought and obtained a dismissal in the arbitration. Salinas did not waive the right to litigate by walking away from arbitration proceedings.

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