LLB&L **Client Alert**

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Court Finds that Arbitrator is Not "Disinterested"

On January 21, 2010, a judge in the U.S. District Court for the Northern District of Illinois granted a preliminary injunction to stop a reinsurance arbitration from proceeding because one of the party-appointed arbitrators was not "disinterested" as required by the relevant arbitration clause. *Trustmark Insurance Co. v. John Hancock Life Insurance Co.*, No. 09 C 3959 (N.D. IL, Jan. 21, 2010). There was no allegation that the arbitrator had a financial interest in the outcome. Rather, Judge James Zagel found that the arbitrator's "interest" arose from the fact that he had served as a party-appointed arbitrator in a prior arbitration between the same parties; he had signed a Confidentiality Agreement in that first arbitration and the court found that he breached the Confidentiality Agreement while serving in the second arbitration.

Background

John Hancock Life Insurance Company ("Hancock") and Trustmark Insurance Company ("Trustmark") entered into certain contracts in 1997 under which Hancock ceded business to Trustmark. A dispute later developed as to whether the contracts also allowed Hancock to retrocede business to Trustmark.

An arbitration was initiated, a three-member panel was selected, and the panel members signed a Confidentiality Agreement at the commencement of the arbitration proceedings. Ultimately the arbitration panel submitted an award in 2004 in favor of Hancock by finding that retrocessional business was included in the contracts. Hancock then sought and obtained a court order confirming the award, and the Confidentiality Agreement, in the U.S. District Court for the Northern District of Illinois.

Hancock subsequently submitted another billing to Trustmark in connection with the 1997 contracts, another dispute developed, and Hancock again initiated arbitration. Since the issues were similar to the prior arbitration, Hancock appointed the same arbitrator that it used in the first arbitration. Trustmark opted to appoint a different arbitrator in the second arbitration, and the umpire was also new.

At the organizational meeting for the second arbitration, Trustmark raised the issue of whether Hancock's arbitrator — the sole "repeat" member of the panel — could effectively abide by the Confidentiality Agreement regarding the information that he had learned during the first arbitration. The arbitrator admitted that it would be hard for him to segregate the knowledge that he had acquired during the first arbitration, but he said that he would "scrupulously abide by confidentiality." Trustmark therefore did not raise a further objection, and the second arbitration commenced.

Hancock eventually proposed that it would be efficient and economical in the second arbitration to use the discovery materials from the first arbitration. Trustmark objected and Hancock's arbitrator did not recuse himself from considering this issue. Two members of the arbitration panel (including Hancock's arbitrator) then accepted Hancock's proposal. They also decided that they could proactively cure any potential breach of the prior Confidentiality Agreement by extending the terms of that agreement to govern the members of the second arbitration panel as well as the first.

Since the discovery materials and Confidentiality Agreement from the first arbitration were being made applicable to the second arbitration, Hancock next moved to preclude Trustmark from "relitigating" numerous issues that had gone Hancock's way in the first arbitration. The panel (including Hancock's arbitrator) ruled 2-1 in Hancock's favor on this issue-preclusion motion, and Trustmark therefore went to court.

Motion for Preliminary Injunction

Trustmark sought a Motion for Preliminary Injunction in the same U.S. District Court that had confirmed the earlier arbitration award and Confidentiality Agreement. Trustmark asserted that Hancock's arbitrator in the second arbitration had

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Court Finds that Arbitrator is Not "Disinterested" (cont'd.)

breached the Confidentiality Agreement which had been executed in the first arbitration and was later confirmed by the court. Trustmark charged that Hancock's arbitrator — having breached the Confidentiality Agreement — was no longer a "disinterested" panel member as required by the applicable arbitration clause in the contracts at issue.

Trustmark pointed out that court intervention was necessary because the Confidentiality Agreement did not include an arbitration clause and therefore an alleged breach was properly considered by a court rather than an arbitration panel.

Trustmark also proposed that the entire arbitration panel had been tainted by the breach and, consequently, the whole panel should be enjoined from proceeding.

The court found that the challenge raised by Trustmark properly belonged in court and was not premature; Trustmark did not have to await the completion of the second arbitration before seeking relief. This was because Trustmark was not basing its challenge on F.A.A. prohibitions against "evident partiality" by an arbitrator; instead, the issue was whether Hancock's arbitrator was "disinterested" as required by the arbitration clause in the contracts.

The court found that Hancock's arbitrator had not abided by the Confidentiality Agreement which he had signed in the first arbitration. For example, during one conference in the second arbitration Hancock made a reference to the first arbitration and its arbitrator supported Hancock by offering his recollections on that point. Trustmark objected to the arbitrator commenting upon the proceedings from the earlier arbitration, but he responded by saying that "I feel it is my duty to correct the record as best as I can in that regard." Using this example, the court concluded that Hancock's arbitrator had essentially become a "fact witness" and, therefore, he was no longer "disinterested."

The judge thus granted Trustmark's motion for a preliminary injunction, but only to the extent of prohibiting Hancock's arbitrator from remaining on the second arbitration panel. The court did not agree that the other two members of the panel needed to be replaced.

Commentary

It has not been unusual for some parties to reappoint arbitrators in subsequent arbitrations when the issues are similar and the arbitrator has already displayed a solid understanding of the disputed points. Yet, this practice is not without controversy and concern, particularly where the individual has been appointed by the same party and law firm many times.

The recent ruling in the U.S. District Court for the Northern District of Illinois offers some helpful guidance on what is required of a "disinterested" arbitrator, and in that way the court may have lent some support to those who have been troubled by episodes in which a certain arbitrator is routinely and repeatedly appointed by a party. In light of the reasoning of this court, such an arbitrator may not be "disinterested" if, as part of a subsequent arbitration, he comments upon what he learned in a prior arbitration protected by a Confidentiality Agreement.

About the Author

Robert E. Sweeney is a partner in the Chicago office of Locke Lord. His practice focuses on commercial disputes involving insurance and reinsurance contracts. He has counseled clients in the contract formation stage and the pre-dispute stage, but he has also served many times as trial attorney and arbitration attorney in various jurisdictions. His experience includes Life and Health matters as well as Property and Casualty.

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