Connecticut Law Tribune
SEPTEMBER 15, 2008
VOL. 34, NO. 37 • $10.00
An incisivemedia publication
CTLAWTRIBUNE.COM

SHAPING THE NATURE OF ARBITRATION CASES

Court clarifies standards on time limits, vacating of awards

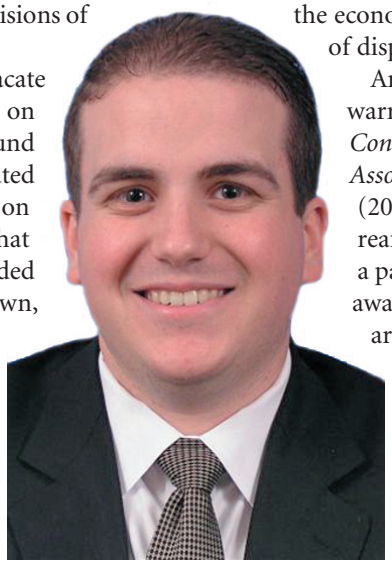
By JEFFREY J. WHITE

As in past years, the Connecticut Supreme Court decided a slew of cases that directly or indirectly affect the business community. Often, attention is paid to the so-called "hot button" cases, such as when the court creates new business torts, expands or restricts the rights of class action plaintiffs, or imposes personal liability on corporate officers. Just as important, however, are the opinions that influence the basic choices made by business leaders each day, such as: (1) Do I litigate or arbitrate?; and (2) Should I expend the resources to obtain a prejudgment remedy prior to trial in order to secure assets? The Supreme Court issued decisions in 2007-08 that will have a lasting impact on both of these questions.

Arbitration Applications

In *Town of Bloomfield v. United Electrical*, 285 Conn. 278 (2008), the court held that the 30-day limitations period for filing an application to vacate an arbitration award extends to *all* applications — regardless of whether they are based upon grounds enumerated in the Connecticut arbitration statutes (see General Statutes § 52-418(a)) or simply at common law.

The case arose out of the termination of a police officer by the Town of Bloomfield after the officer allegedly fabricated witness statements and later lied during a subsequent internal affairs inquiry. The officer's union representative demanded arbitration in order to challenge the termination. Although the arbitration panel agreed that the officer's conduct justified immediate termination, it reduced the penalty to a suspension in light of the prior disciplinary decisions of the town.



The town moved to vacate the panel's award based on the common law ground that the award violated public policy, and also, on the statutory ground, that the panel had exceeded its powers. The town, however, failed to file its application within 30 days of receiving notice of the award as required by General Statutes § 52-420(b). This failure to file timely created the question of whether the court had jurisdiction to review the award in the first place.

Although the trial court held that it lacked subject matter jurisdiction to consider the town's statutory claim, it concluded that the town's claim that the award violated public policy was a separate "common law action" that was not governed by the arbitration statutes. The Supreme Court reversed. It found that the 30-day limitations period set forth in General Statutes § 52-420(b) applies broadly to *all* applications to vacate — regardless of the particular grounds relied on. Significantly, the court commented that its seminal decision of *Garrity v. McCaskey*, 223 Conn. 1 (1992), which established that a public policy violation is a separate common law ground for vacatur, "does not stand for the proposition that a separate body of procedural law" must apply to such claims. In the court's view, to find otherwise would undermine the goal of facilitating the economical and rapid resolution of disputes.

Another arbitration case that warrants attention is *State v. Connecticut State Employees Association*, 287 Conn. 258 (2008), in which the court reaffirmed how difficult it is for a party to vacate an arbitration award on the ground that the arbitrator's decision was in "manifest disregard of the law." Although most of the opinion involves circumstances that are not particularly relevant to the business community (as it pertains to the termination of a state corrections officer), the court's analysis of the arbitrator's actions are significant. The court held that, at best, the state had shown that the arbitrator had misapplied Supreme Court law regarding the vacatur of arbitration awards on public policy grounds. Nevertheless, the court held that the misapplication of law does not support vacatur as it does not "demonstrate the arbitrator's egregious or patently irrational rejection of clearly controlling legal principles." Therefore, the standard for vacating an arbitration award remains extraordinarily high. See *Economos v.*

Jeffrey J. White is an associate in the Hartford, Connecticut office of Robinson & Cole LLP. He is a member of the firm's Trial and Appellate Group where he focuses his practice on appellate advocacy and complex business litigation.

Liljedahl Bros. Inc., 279 Conn. 300, 307 n.8 (2006) (noting that the court has yet to conclude that an arbitrator manifestly disregarded the law).

Prejudgment Remedies

The costs of obtaining a prejudgment remedy can be exorbitant, almost invariably requiring a mini-trial before the case is even off the ground. In *TES Franchising LLC v. Feldman*, 286 Conn. 132 (2008), the court reversed a trial court decision that granted a prejudgment remedy for attorneys' fees that the plaintiff corporation claimed it would recover at trial.

Following the execution of a settlement agreement by the plaintiff franchisor and defendant franchisee, the defendant allegedly made disparaging remarks about the plaintiff to as many as 30 state agencies. Not surprisingly, the settlement agreement prohibited such remarks and contained a liquidated damages clause and allowed for attorneys' fees for each violation.

The problem for the plaintiff franchisor was that the attorneys' fees provision in the settlement agreement only applied if the dispute was resolved through arbitration. Therefore, the Supreme Court held that the plaintiff had not proven, by probable cause, that it would prevail on its claim for attorneys' fees at trial.

More significant, however, to all corporations, is that the court cast doubt on whether any party could secure assets for attorneys' fees prior to trial. The court commented that such fees may always be unduly speculative or premature at the prejudgment remedy stage. Therefore, the court sent a clear signal that it may be impossible for a party to secure assets in advance of trial from a breaching party for the fees required to litigate the action.

For those businesses that desire to pursue vexatious litigation actions, careful attention should be paid to *Bernhard-Thomas Building Systems Inc. v. Duncan*, 286 Conn. 548 (2008), which held that the pursuit of a prejudgment remedy did not constitute the "prosecution of a civil action." Therefore, even if a party's application for a prejudgment remedy is ultimately meritless, such conduct does not expose that party to an action for vexatious litigation unless a civil action is subsequently initiated and prosecuted.

The 2007-08 term of the Supreme Court was not dominated by show-stopping decisions for the business community. Yet, the decisions made will influence the fundamental litigation decisions of business leaders for years to come. ■

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