

ANTITRUST ACT RULING LIMITS ATTORNEY GENERAL'S AUTHORITY

Two key arbitration decisions set 'traps for the unwary'

BY JEFFREY J. WHITE

The lifeblood of any corporation is its proprietary documents, which often reflect the creativity, skill, and inventiveness of employees. As a result, the unwanted disclosure of such documents can be devastating, and thus, justify an extended legal battle.

In *Brown & Brown Inc. v. Blumenthal*, 297 Conn. 710 (2010), the Connecticut Supreme Court decided one such battle when it interpreted the Connecticut Antitrust Act to impose limits on the attorney general's authority to disclose a corporation's trade secrets and other valuable information during the course of an investigation. The impact of the *Brown* decision — both legally and politically — renders it the most significant business law decision issued by the Supreme Court in 2009-10.

In addition to *Brown*, the Supreme Court issued two important arbitration decisions, which set "traps for the unwary" for those handling arbitrations. As corporations continue to insert arbitration clauses in their commercial contracts, it is essential to understand that the contours of arbitration law differ from typical civil litigation.

Antitrust Act

Connecticut General Statutes § 35-42 authorizes the Office of the Attorney General to demand discovery before an action is even commenced, based merely on a suspicion that a corporation is engaging in antitrust activity. The legislature attempted to cushion this broad investigative power by preventing the public from gaining access to confidential information disclosed during these types of investigations.

In *Brown*, the Supreme Court decided the question of whether the attorney general could disclose *Brown & Brown Inc.*'s confidential information to other parties (such as actual and potential competitors) during the course of the antitrust investigation. Clearly, the stakes were high for the business community and the attorney general.

In an opinion written by Chief Justice Chase T. Rogers, the Supreme Court ruled in favor of the plaintiff on three distinct issues. First, as to the disclosure of confidential information to third parties during an investigation, the Court held that C.G.S. § 35-42's prohibition from disclosing such information to the "public" bars the attorney general from disclosing subpoenaed information and documents to third parties during interviews or depositions that are conducted to advance the antitrust investigation. Specifically, the Court noted that although the legislature "granted broad investigatory powers to [the attorney general] to pursue antitrust violators, [it] also intended to afford counterbalancing protections to investigatory targets in recognition of the potential sensitivity of internal business information and the fact that the [attorney general's] investigation need not be founded on any specified level of suspicion and, ultimately, might result in no allegations of wrongdoing."

Indeed, the Court soundly rejected the attorney general's argument that there would be little prejudice to disclosing documents to one's competitors (particularly, if they are involved in the conspiracy), by emphasizing that those parties targeted by the attorney general have not and may never be charged and therefore "it is wholly inappropriate to presume their guilt to justify fur-

ther expansion of the [attorney general's] already considerable statutorily granted investigatory powers."

Second, with respect to the disclosure of confidential information to other governmental entities, the Court interpreted C.G.S. § 35-42 as requiring the attorney general to obtain an agreement from those officials that they will keep the information confidential before any documents or information are shared. In doing so, the Court rejected the attorney general's argument that it would be unduly burdensome to place restrictions on disclosure to other governmental officials as that argument "is belied by the fact that many other states have similar prerequisites for interjurisdictional sharing of documents and information acquired in pre-litigation antitrust investigations."

Finally, the Court held that if confidential documents are filed with the Superior Court as part of some future legal action, they must be filed under seal with the court until a determination is made as to whether the documents should be disclosed.

Ultimately, the *Brown* decision reaffirms that the Office of the General Attorney continues to enjoy

broad authority to investigate antitrust violations. However, as *Brown* indicates, this authority is not limitless, which provides some degree of comfort to the business community.

Arbitration

In the past several years, the Supreme Court has issued several important arbitration decisions. This court year was no exception. For instance, in *Bacon Construction Co. Inc. v. Department of Public Works*, 294 Conn. 694 (2010), the Court found that the department had waived its right to seek judicial review of whether a dispute was subject to arbitration or barred by sovereign immunity.

In a nutshell, the department agreed to allow an arbitrator to decide the sovereign immunity issue, but later, when it lost, the department sought *de novo* judicial review. The Supreme Court determined that the department's submission of that issue to the arbitrator prevented the Court from exercising *de novo* review over the issue even though it is traditionally within the bailiwick of the judicial system. The Court repeatedly emphasized the department's willingness to allow the arbitrator to decide the sovereign immunity issue, and for that reason, the department was not entitled to get a second bite at the proverbial apple. Ultimately, while *Bacon* is fact-dependent, it again emphasizes that arbitration is not a prelude to expansive judicial review.

Indeed, the limited review afforded to arbitration awards was also at issue in *Comprehensive Orthopedics & Musculoskeletal Care LLC v. Axtmayer*, 293 Conn. 748 (2009). In a 4-3 decision, the majority held that an arbitrator did not exceed his authority when he declined to award attorney's fees and costs pursuant to the terms



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of an employment agreement.

The circumstances of the case are relatively straightforward. In *Axtmayer*, the underlying arbitration concerned whether a physician violated a restrictive covenant in an employment agreement. The arbitrator found that the covenant was violated, but held that the penalty for violating the agreement (i.e., the liquidated damages clause) was excessive. As a result, the arbitrator reformed the contract and slashed the penalty for a violation in half. The agreement also stated that attorney's fees and costs were to be awarded to the plaintiff if it was the "prevailing" party on its claims. The arbitrator declined to award fees and costs based upon his reformation of the agreement.

Although the arbitrator did not say so expressly, the majority found that the arbitrator had implicitly ruled that the plaintiff had not prevailed in the arbitration in light of the arbitrator's reformation of the employment agreement. The majority held that so long as the arbitrator rendered one of two awards (namely,

that: 1) the plaintiff prevailed and was entitled to fees or, 2) that it had not prevailed and was not entitled to fees) then the award conformed to the submission. In doing so, the majority relied on established case law that a court cannot correct legal errors, which in this case would be the arbitrator's interpretation of the term "prevailed." Not surprisingly, the dissent, authored by Justice Joette Katz, disagreed with this reasoning by arguing that the arbitrator exceeded his authority by ignoring the settled meaning of the term "prevailed."

Ultimately, the Court (albeit by a slight margin) issued another decision that underscores the narrow judicial review afforded to an arbitration award.

The 2009-10 Court year produced interesting decisions that will have a future effect on the business community. Time will tell whether the Court will continue to become entangled with the Office of the Attorney General or whether quieter days are ahead. ■

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as regulated by this statute. In this case, the city did not inform its employees that it had placed GPS tracking devices in city-owned cars. Based on evidence gathered from the GPS device, the plaintiffs were presumably subject to discipline for traveling to locations not required by their job assignments. The plaintiffs sued, claiming they were entitled to notice of monitoring and damages when the city failed to provide such notice. The Supreme Court rejected this claim explaining that only the commissioner of the state Department of Labor can bring such an action.

This ruling does not mean that employers should ignore the requirements of the statute. To the contrary, the commissioner can penalize an employer for violations, and an employee may use administrative remedies provided under their collective bargaining agreement. However, this does mean employees cannot personally initiate the action. Hopefully, the result is that frivolous actions are slightly less likely. However, to protect the business, employers should still post the required notices in their workplaces regarding their rights to electronically monitor employee's conduct.

Other New Haven Firefighters

While the country was concentrating on *Ricci v. DeStefano*, a case regarding discrimination in the New Haven Fire Department that received national media coverage, the Connecticut Supreme Court was considering another discrimination case involving different New Haven firefighters.

The case, *Broadnax v. City of New Haven*, was brought by several African-American firefighters who claimed the city's process of "underfilling" high-ranking positions had a discriminatory impact on African-American firefighters. Underfilling is when "the fire department promotes an individual to a particular position, and the city's budget has not allocated funds to pay the salary of that position." The solution is funds for a vacant higher ranking position are used to pay for the newly appointed lower ranking position. The plaintiffs desired to be promoted to chief. However, since so many lieutenant positions had been underfilled, there was no money left to pay for

new chiefs and the plaintiffs were therefore denied promotions. They argued that the process of underfilling disproportionately benefited non-African American firefighters, in violation of the equal protection clause of the Fourteenth Amendment.

The jury awarded the plaintiff's front pay and non-economic damages. However, the Supreme Court reversed finding no evidence that there was any discriminatory impact or intent on the part of the city and concluding no reasonable juror could find discrimination in violation of the Fourteenth Amendment.

Bargaining Agreements

In *Honulik v. Town of Greenwich* (argued in the 2008-09 term but officially released this past term), the plaintiff argued that under the collective bargaining agreement between the town of Greenwich and the Silver Shield Association, the highest scoring officer on the promotional exam was to be promoted to captain. The plaintiff scored the highest, but a lower scoring lieutenant was promoted. The town argued that the collective bargaining agreement did not cover the promotion to police chief, since the position was outside the bargaining unit.

The Court agreed with the town, stating that the promotion to police captain could not be a subject of bargaining or grievance between the union and the employer as the employee was promoted out of the bargaining unit. This is the same basic standard recognized at the federal level — if the issue is promotion out of the bargaining unit, the employee has no right to use the collective bargaining agreement to protest the promotion.

Conclusion

As the Connecticut Supreme Court begins their new term this month, employees and employers alike should remain aware of the Court's decisions. With the state's increase in wage and hour enforcement, its crackdown on worker misclassification, and an economy that remains weak, it is likely that the next Connecticut Supreme Court term will see more employment law cases. ■

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