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Report From Counsel

Insights and Developments in the Law **Winter 2010/2011**

U.S. Supreme Court: Arbitration Is the New Employment Law

The employment law component of the docket during the most recent term of the U.S. Supreme Court was dominated by decisions on arbitration. Some of the cases have the potential to affect large numbers of employers and employees.

Allocation of Power

In the most significant of these decisions, the Court determined the allocation of decisionmaking powers under the Federal Arbitration Act (FAA), where an agreement to arbitrate includes an "agreement within the agreement," delegating to the arbitrator the power to determine the enforceability of the arbitration agreement.

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If a party specifically challenges the enforceability of that particular "delegation" agreement, the district court considers the challenge before ordering compliance with the agreement. However, if a party challenges the enforceability of the agreement as a whole, such as by a contention that it is unconscionable, as in the case before the Court, that challenge is for the arbitrator. In other words, in the latter situation, the courts must give effect to the agreement according to the terms agreed upon by the parties, by putting the matter before the arbitrator.

This is in keeping with the FAA's general rule that agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The Court also relied on its previous recognition that parties can agree to arbitrate "gateway" questions of "arbitrability," such as whether the parties have agreed to arbitrate in the first place, or whether their agreement covers a particular controversy.

Contract Formation

All was not lost for those predisposed to have courts, not arbitrators, decide as many employer-employee disputes as possible. In another case,

Continued on page four.

Taking Land for Economic Development

A city negotiated with property owners to acquire a strip of land and some temporary easements for the purpose of installing a deceleration lane for traffic that would access a new development. Included in that development was a building to be occupied by a well-known national retailer of consumer goods. After initial negotiations to acquire the real property failed, the city filed a petition in state court to condemn the property.

The owner of the property subject to being taken tried to capitalize on the fact that the state legislature had recently subjected the power of eminent domain to a new additional limitation. In 2006, after the U.S. Supreme Court had determined in a controversial ruling that the transfer of land to a third party for the purpose of furthering a city's economic development plan was a sufficiently public use to permit the constitutional exercise of eminent domain, the legislature passed a new law to prohibit the use of eminent domain "if the taking is primarily for an economic development purpose."

The property owner argued that the deceleration lane primarily served the economic development purpose of providing vehicles access to the nearby retailer. He reasoned further that the addition of the deceleration lane would ultimately cause the expansion of the city's property and sales tax bases by providing the retailer's customers easier access to the retailer's parking lot.

Continued on page four.

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Bank Accounts Are A-Changing

In the last year, new Federal Reserve Board rules have reined in the ability of banks and other financial institutions to impose charges and fees for some of their services. Issuers of credit cards generally cannot increase the interest rate on a card for one year after the account is opened. Consumers will no longer be charged a fee when a transaction causes an account to exceed its credit limit, unless the consumer has agreed in advance. For "subprime" cards, held by those with a limited or bad credit history, the total initial fees cannot exceed 25% of the card's initial credit limit, with the exception of fees for late payments, for exceeding the credit limit, or for returned payments due to insufficient funds.

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With these and other tightened regulations, it is predictable that financial institutions will gravitate toward other means of enhancing revenues through new or increased fees, and with new or more demanding requirements placed on consumers. In such a climate, consumers are well advised to brush up on some strategies for minimizing the financial hits from the institutions:

- If your bank decides to add or raise a minimum balance requirement for your account, consider whether you would do just as well with a "no frills" account that would have no such requirement, and likely no maintenance fee. The tradeoff may be a monthly limit on the number of checks that you can write, or on the number of ATM or debit-card transactions.
- The return from interest-bearing accounts today is barely an improvement on keeping your money under the mattress. It might be smarter to use a free account that pays no or very little interest, instead of an account that pays a slightly higher interest rate but also comes with a monthly fee. The monthly fee could well be greater than the meager return on the interest-bearing account.
- It is not exactly riveting reading material for most people, but make yourself promptly check your accounts online or check your paper account statements for errors, or for fees or account changes you may not have been expecting. In the same vein, monitoring the activity on your debit or ATM card will help you promptly report a problem if the card is lost or stolen, thereby limiting your liability.
- Many banks offer a free "alert service," meaning that the bank will send you an e-mail or text message notifying you when there has been a significant transaction on your account or if your balance drops be-

Continued on page three.

Season Tickets Cannot Be Seized

When a taxpayer failed to pay his federal income taxes, the IRS issued a levy against him. Among his possessions was a block of 16 season tickets for a professional sports team. He also had paid a deposit per seat as a "personal seat license," on top of the cost each year for the season tickets themselves.

The IRS wanted to seize and sell the season ticket renewal right, treating it as a form of "property or rights to property" under federal law. The sports team objected but did say that if it received a levy it would pay out the taxpayer's deposit for the personal seat licenses. The team's policy provided that the right to renew season tickets was not transferable and that if a ticket holder did not renew, the tickets would pass to the next person on a very long waiting list of people seeking season tickets.

In issuing an Advisory Opinion in favor of the sports team's position, the IRS found no precedents on the precise issue, but it borrowed from bankruptcy cases in which the bankruptcy trustee sold the taxpayer's season ticket renewals as property of the estate. In that context, the decisive factor was the team's policy—if the team treated a right to renew as transferable, it was "property," but if, as in the case at hand, it did not allow transfers, the right to renew was not a property right that could be sold.

As a result, the IRS could not touch the taxpayer's right to renew his tickets to satisfy the taxes owed, but it could go after the personal seat licenses for which the taxpayer had paid a deposit. A tax lien would attach to them, putting the IRS into the taxpayer's shoes and allowing the IRS to terminate the season tickets and receive a refund of the personal seat licenses deposit. The people next in line on the waiting list were no doubt very pleased.

Junk Fax Exemptions

A self-styled "business-to-business media company" that publishes trade magazines and sponsors industry-specific trade shows sent a fax advertising a trade show to a civil engineering and design firm. That simple act prompted a federal lawsuit by the fax recipient. As the court put it, in this case, as in most other junk fax cases, the facts were "not especially juicy." The same design firm had apparently adopted a combative policy regarding unsolicited communications of this kind. According to the court, the firm had filed over 100 similar suits under the federal Telephone Consumer Protection Act (TCPA).

The design firm was among the more than five million subscribers to the media company's publications. Over a 10-year period, it had subscribed to three of the media company's publications. For each subscription, the design firm's president and sole shareholder filled out the subscription card. On at least two of the subscription cards, he provided the design firm's fax number as part of the required contact information.

The single fax that set the lawsuit in motion had been sent to the attention of the design firm's president, using the fax number he had provided in his subscription requests. In addition to information about the trade show, the fax included a notice inviting the recipient to write "remove" on the face of the advertisement and fax it back to a toll-free number if he believed that he had received the fax in error or if he wished to unsubscribe. Instead of accepting that invitation, the design firm filed a class-action lawsuit.

The media company was able to fend off the lawsuit by establishing the "established business relationship" (EBR) defense. In 2005—after the media company had sent the fax, but before the design firm had filed suit—Congress passed the Junk Fax Prevention Act (JFPA), which amended the TCPA to exempt from the ban on unsolicited fax advertisements any faxes sent from a sender with an established business relationship with the recipient.

Although the pre-JFPA version of the TCPA applied in this case, even at that earlier time the business relationship exemption appeared in FCC reports and orders implementing the TCPA. An FCC 1992 Report and Order stated that a "facsimile transmission from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient."

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The plaintiff design firm tried without success to persuade the court that the EBR defense, as laid out in FCC edicts, was meant to apply only to communications with residential, not commercial, customers. It pointed to an FCC order using language to that effect, but that order was limited to telephone solicitations directed at residences and was geared toward preventing people from being peppered with annoying solicitation calls in their homes. The provisions that were specific to faxed advertisements did not confine the EBR defense to residential customers, and it was therefore available in the case of the fax to the design firm.

The relationship between the recipient design firm, as subscriber, and the media company, as publisher, fell well within the scope of the EBR defense under the TCPA. Their relationship came under the broad definition used in the Act—a prior existing relationship formed by voluntary two-way communications, which relationship had not previously been terminated by either party.

Bank Accounts

Continued from page two.

low a certain threshold. Such a "heads up" could allow you to shift funds among your accounts to avoid overdrawing an account.

- If overdrawing an account is a recurring event, consider changing from overdraft coverage to cheaper alternatives, such as linking a savings account to a checking account, arranging for an overdraft line of credit, or, for a short-term shortage of cash, applying for a small loan.
- ATM fees may not be crippling, but they can add up. Try to stick mainly with your own institution's ATMs, where there generally is no charge. If your bank allows getting some cash back on a debit-card transaction at no charge, that is an alternative to an ATM for getting small amounts of cash.

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.

Arbitration

Continued from page one.

an employer sued an international union and a local union, alleging that the local's strike breached a no-strike clause in a collective bargaining agreement (CBA). The employer also alleged that the international union had engaged in tortious interference with a contract by promoting the strike and that both defendants were liable for claims under the federal Labor Management Relations Act.

Resolution of the claims against the unions was affected by a dispute over the ratification date of the CBA, which contained an arbitration clause. The Court ruled that the dispute was a matter to be resolved by the federal district court, rather than by an arbitrator. The argument over the formation or existence date fell outside the scope of the arbitration clause, which was limited to claims "arising under" the CBA. The Court applied the prevailing general rule that where the matter at issue concerns contract formation, such a dispute is generally for the courts to decide. In addition, a court may order arbitration of a particular dispute only where the court is satisfied, as it was not in the case before the Court, that the parties had agreed to arbitrate that dispute.

Class-Action Arbitration

In another case, the Court was concerned with when parties can be made to submit to arbitration for an entire class of claims, and its answer was, in short, not unless they clearly consent to it. There are fundamental differences between the more typical bilateral arbitration and class-action arbitration. In the latter case, an arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to one agreement but, instead, resolves many disputes between hundreds or perhaps even thousands of parties.

The presumption of privacy and confidentiality that applies in many bilateral arbitrations does not apply in class arbitrations, thus potentially frustrating the parties' assumptions when they first agreed to arbitrate. The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement but adjudicates the rights of absent parties as well.

The commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited. In a case involving antitrust allegations against shipping companies by some of their customers, these differences between bilateral arbitration and class-action arbitration were too great for arbitrators to presume that the parties' mere silence on the issue of class-action arbitration constituted consent to resolve their disputes in class-action proceedings.

Eminent Domain

Continued from page one.

A state appellate court upheld the taking. Although the collateral consequences of the addition of a deceleration lane might include some enhancement to economic development, the primary purpose of the new lane clearly was the same as for any other road project— simply to promote traffic safety and the efficient flow of traffic on the city's streets. The court acknowledged that many permissible uses of eminent domain provide collateral benefits to private industry. When land is acquired by eminent domain for a public building, such as a school, nearby convenience stores or restaurants may also benefit. Using eminent domain to install utilities likewise can be beneficial to surrounding businesses. There are countless other instances where the exercise of eminent domain indirectly enhances economic development, but such situations do not come within the newly enacted prohibitions on the use of condemnation by the government, because such takings do not have as their primary purpose the stimulation of economic development.

Four reasons offered by the court for upholding the condemnation provide some criteria for gauging whether any other such challenges by property owners have a chance of succeeding on a similar theory: First, the city did not take the property primarily for the "use" of a commercial enterprise in any traditional sense. The city will be the owner of title to the land, and the primary users will be members of the public at large.

Second, the city's acquisition of the real property did not serve the primary purpose of increasing tax revenue because the actual land acquired will not contain any entity that will generate sales or property taxes.

Third, the city's acquisition of the land was not primarily serving the purpose of increasing employment. Construction of the deceleration lane will require the temporary use of labor, but the purpose of a deceleration lane is unrelated to the creation of additional jobs, as opposed to traffic control.

Finally, the use of the property cannot be construed as primarily related to general economic conditions, because there was no evidence that this affected the city's determination to exercise its eminent domain powers. The decision-making body, the city's engineering department, acquired the property at issue to allow traffic to proceed in an orderly and efficient fashion and to limit the potential collisions as a result of cars decelerating on the right-of-way. There also was no evidence that the nearby retailer in some way used economic pressure to convince the city to install the deceleration lane.