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New York Law Journal

Outside Counsel

Arbitrators Less Prone to Grant Dispositive Motions Than Courts

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June 26, 2009

For over two decades, grants of dispositive motions in courts and in arbitrations have been moving in two very different directions.

In 1986, the U.S. Supreme Court issued a trilogy of now-famous decisions—Matsushita Electric Industrial Company v. Zenith Radio Corporation,1 Anderson v. Liberty Lobby Inc.,2 and Celotex Corporation v. Catrett3—that led federal courts to begin to view summary judgment as an important way to dispose of cases before trial. Empirical studies have also shown that the percentage of federal cases resolved by summary judgment has increased over time.4

In addition, two years ago, in Bell Atlantic Corporation v. Twombly,5 the Court introduced a new standard for when courts should grant a motion to dismiss a complaint, which makes it easier for defendants to win the motion. Fifty years early, in Conley v. Gibson,6 the Court had stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."7 Yet in Twombly, the Court held that "this famous observation has earned its retirement"8 and plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face."9

Moreover, just this term, the Supreme Court strongly reaffirmed Twombly in Ashcroft v. Iqbal and stated that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."10 The Court also made it clear that this holding applies to all civil actions.11

In contrast, arbitrators are generally much more reluctant than courts to grant dispositive motions—whether they are motions to dismiss a complaint or arbitration demand, or motions for summary judgment. Indeed, the rules of most major arbitration providers are silent about whether an arbitrator may entertain dispositive motions.12

While courts have held that arbitrators have the inherent power to grant dispositive motions, the lack of explicit rules on the issue reflects the hesitance that most arbitrators feel in granting dispositive motions without a fact hearing. Indeed, at the beginning of 2009, the Financial Industry Regulatory Authority (FINRA), the largest non-governmental regulator for securities firms, announced new rules "narrowing

significantly" the grounds for granting motions to dismiss in its arbitrations.13 These rules do not distinguish between "motions to dismiss complaints" and "summary judgment motions," but apply to any pre-hearing motion to dispose of the case.

Under the new rules, a FINRA arbitration panel can only grant a motion to dismiss for one or more of these three reasons: (1) the parties have a written settlement; (2) the complaint involves a "factual impossibility"—for example, the claimant sued the wrong company or person; or (3) the six-year eligibility rule for claims has expired.14 The new rule also requires that the arbitrators conduct an in-person or telephonic prehearing conference on the motion, and that a decision to grant the dispositive motion be unanimous. The panel also is required to issue a written explanation of a decision to grant dismissal. Finally, a losing movant is responsible for the forum fees for the review of the motion, and if the panel finds that a motion under this rule was frivolous, it must award reasonable costs and attorney's fees to any party that opposed the motion.

While the FINRA rule has struck some attorneys who are not familiar with arbitrations as severe, those with experience litigating claims at FINRA—and, more generally, in arbitration—have recognized that "the rule change may just institutionalize an already accepted practice."15 After the rule was finalized, FINRA Dispute Resolution President Linda Fienberg issued the following statement: "Although arbitrators rarely grant such motions, it is costly and time-consuming for parties to defend motions to dismiss."16

According to the College of Commercial Arbitrators, a national professional association of individuals who primarily conduct arbitrations of business-related disputes, "Commercial arbitration generally reflects a strong proclivity to avoid court-like motion practice to refine pleadings or to dismiss a matter for failure to state a claim properly."17 Moreover, the odds that an arbitrator will grant a summary judgment motion are only slightly higher than the odds he or she will grant a motion to dismiss.

Why are dispositive motions being treated so differently by arbitrators, as compared to judges? There are at least three institutional reasons, which also highlight some of the advantages of arbitration.

Review of Decisions

First, while every litigant is entitled to appeal the grant of a dispositive motion in federal or state court, a final decision in arbitration is subject to far less review. Moreover, appellate court review of such a grant is de novo, with the allegations or evidence, as the case may be, read in the light most favorable to the plaintiff. In addition, to the extent that the trial court has interpreted the law, the reviewing court is free to interpret and apply the law differently.

In contrast, the grounds for a court's vacating an arbitrator's award are very narrow—even when the award is based upon the grant of a motion to dismiss that was made prior to discovery and resolved without a hearing. Generally speaking, a court will not vacate an arbitrator's award unless it finds the result to be completely irrational or to demonstrate a manifest disregard for the law, or unless there is evidence of affirmative misconduct in the arbitral process such as corruption or fraud or evident partiality on the part of the arbitrator.18

Moreover, over the last two decades, various decisions by the U.S. Supreme Court have made arbitration proceedings harder to review. While both the federal and state courts have recognized the possibility of vacatur if there was "manifest disregard of the law" by the arbitrators, that somewhat broader standard of review is not nationally applicable and has been questioned. In addition, just last term the U.S. Supreme Court held in Hall Street Associates, LLC v. Mattel Inc.19 that parties cannot agree to expand the grounds for vacatur under the Federal Arbitration Act.

The arbitration agreement in that case stated that a district court asked to enter judgment on any award "shall vacate, modify, or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."20 The Supreme Court held that the "statutory grounds for prompt vacatur and modification" referenced above could not "be supplemented by contract."21

Arbitrators are thus well aware of the finality of their decisions and the narrow standard of review that courts apply. This awareness, in turn, partly explains why arbitrators are more reluctant than a court typically would be to grant a motion to dismiss.22 In addition, it is also worth noting that arbitrators are sensitive to the fact that one of the grounds for vacatur under the Federal Arbitration Act is the arbitrator's refusing to hear evidence that is pertinent and material to the controversy at issue. Sensitivity to this ground for vacatur frequently leads arbitrators to admit even arguably duplicative or irrelevant evidence at a hearing, and causes them to be all the more concerned about deciding a case without any kind of evidentiary hearing.

Discovery and Caseloads

The second difference between courts and arbitrators that explains why courts are more likely to grant motions to dismiss is a differing level of concern about discovery. In the U.S. Supreme Court's recent decision in Twombly, for instance, "the Court placed heavy emphasis on the 'sprawling, costly, and hugely time-consuming' discovery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, and expressed concern that such discovery 'will push cost-conscious defendants to settle even anemic cases.'"23

Discovery is much more limited in arbitrations and, thus, a denial of a motion to dismiss is less likely to result in such extensive discovery. As the Supreme Court stated in Gilmer v. Interstate/Johnson Lane Corporation, when a party objected to

the fact that "the discovery allowed in arbitration is more limited than in the federal courts," the reason for the difference is that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.'"24

Finally, some commentators and judges have noted that the pressure of the increasing caseload that federal and state courts have seen over the last two decades makes the courts more tempted to dispose of cases on a motion, instead of after a trial on the merits. As Judge Richard A. Posner, of the U.S. Court of Appeals for the Seventh Circuit, stated in one opinion, "The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal circuits. But it must be resisted unless and until Rule 56 is modified."25

In other words, according to Judge Posner and others, courts have increased the use of summary judgment in order to decrease the number of cases pending on their dockets. Ironically, although FINRA is currently facing growing caseloads as a result of the current market crisis, it has reacted in precisely the opposite way—by constricting, not expanding, the use of dispositive motions. Indeed, some arbitrators now require that a party seeking to file a dispositive motion describe the grounds for the motion—either orally or in a letter—before it is filed as a way of winnowing out those that have little likelihood of being granted.

Implications

What does this reluctance to grant a dispositive motion mean for the lawyer who is involved in arbitration? The short answer is that the attorney should give serious thought before filing a motion to dismiss or a motion for summary judgment, since doing so can impose a significant cost on the client without advancing the litigation—particularly now in the FINRA context, but also in other arbitration fora. Moreover, to the extent that a litigator wants to use a motion as a way to "educate the arbitrator" regarding his or her case before the hearing, an alternative method—such as a pre-hearing brief—may be far preferable.

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Endnotes:

1. 475 U.S. 574 (1986).

2. 477 U.S. 242 (1986).

3. 477 U.S. 317 (1986).

4. E.g., Stephen Burbank, "Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?" 1 J. Empirical Legal Stud. 591, 617-18 (2004) (percentage of cases in federal courts terminated by summary judgment increased from about 1.8 percent in 1960 to 7.7 percent in 2000).

5. 550 U.S. 544 (2007).

6. 355 U.S. 41 (1957).

7. Id. at 45-46.

8. 550 U.S. at 563.

9. Id. at 570.

10. No. 07-1015, 2009 WL 1361536, at *13 (U.S. May 18, 2009).

11. See id. at *16.

12. Section 15 of the Revised Uniform Arbitration Act does address summary dispositions as do the rules of JAMS.

13. FINRA, SEC Approves FINRA Rule to Drastically Limit Motions to Dismiss in Arbitration, Jan. 8, 2009, available at http://www.finra.org/Newsroom/NewsReleases/2009/P117686 (last retrieved on April 23, 2009).

14. Exchange Act Release No. 59189 (Dec. 31, 2008), 74 Fed. Reg. 731 (Jan. 7, 2009) (File No. SR-FINRA-2007-021).

15. Gina Passarella, "Mixed Feelings Over SEC Rule Change for Arbitrations: New Rule Promises to Slash Number of Motions to Dismiss," The Legal Intelligencer, Jan. 21, 2009, at 1.

16. News Release, Fin. Indus. Regulatory Auth., SEC Approves FINRA Rule to Drastically Limit Motions to Dismiss in Arbitration: Abusive Motions to Dismiss Cases Will Face Stringent Sanctions (Jan. 8, 2009), available at http://www.finra.org/Newsroom/NewsReleases/ 2009/P117686.

17. Guide to Best Practices in Commercial Arbitration at 106 (Curtis E. von Kann et al., eds. 2006).

18. 9 U.S.C. §10(a) and N.Y. CPLR §7511(b) are the statutes under federal and New York law that control when a court may vacate an arbitrator's award. Most federal courts now use "manifest disregard" as shorthand that refers to 9 U.S.C. §10(a)(4). See generally Citigroup Global Markets Inc. v. Bacon, 562 F.3d 349, 355-58 (5th Cir. 2009).

19. 128 S. Ct. 1396, 1403 (2008). However, the Supreme Court left open the possibility that the parties could agree to different standards of review under state law. Id. at 1407.

20. Id. at 1400-01.

21. Id. at 1400.

22. "Only one case has been found in which a court vacated an award granting a dispositive motion." Alfred G. Ferris & W. Lee Biddle, "The Use of Dispositive Motions," 62 Disp. Resol. J. 17, 22 (2007) (citing Prudential Sec. v. Dalton, 929 F.Supp. 1411, 1418 (N.D. Okla. 1996)).

23. Iqbal v. Hasty, 490 F.3d 143, 156-57 (2d Cir. 2007) (quoting Twombly, supra); see also Note, "Pleading Standards," 121 Harv. L. Rev. 305, 309-12 (2007) (discussing the U.S. Supreme Court's concern over discovery in Twombly).

24. 500 U.S. 20, 31 (1991) (citations omitted).

25. Wallace v. SMC Pneumatics Inc., 103 F.3d 1394, 1397 (7th Cir. 1997); Mark W. Bennett, "Judges' Views on Vanishing Civil Trials," 88 Judicature 306, 307 (2005).