

Who's Covered By Your Arbitration Provision?

For Decades corporations have incorporated mandatory arbitration provisions into contracts in an effort to control litigation expense and uncertainty and to secure the adjudication of disputes in the forum of their choosing. Reliance on contractual arbitration provisions to obtain these outcomes in cases which involve claims directly against employees may be unwise as a result of a recent decision of the Rhode Island Superior Court. In *Estrella, et al., v. Janney Montgomery Scott LLC, et al.*, PC-2017-5227 (R.I. Super. Ct. May 1, 2018), the Court considered whether claims made against a corporate defendant and the corporate defendant's employee were subject to a mandatory arbitration provision. Finding Massachusetts law on this subject persuasive, the Court determined that while the arbitration provision in this case required the Court to order the plaintiff to arbitrate his claims against the corporate entity, the provision did not compel arbitration of the claims against the corporate employee.

In *Estrella*, the executor of an estate filed suit claiming improprieties surrounding the transfer of the decedent's assets into an investment account. The executor named as defendants both the investment company holding the assets and the investment advisor employee assigned to the decedent's account. Before the parties litigated the merits of the case, the investment company, on behalf of itself and its employee, moved to dismiss the complaint and to compel the executor's claims to arbitration pursuant to a mandatory arbitration agreement in the investment account agreement signed by the decedent.

While there was little doubt the arbitration provision at issue required arbitration of the claims against the investment company, the intrigue lay in how the Court would resolve the application of the arbitration provision to the investment company's employee. After multiple written submissions and oral argument, the Court issued a bench decision compelling the executor to arbitrate his claims against the investment company but, in a surprising twist, not the claims against the employee. Accordingly, despite identical facts and circumstances supporting the estate's case against each party, this ruling created parallel proceedings for adjudicating the estate's claims in two distinct forums: (1) against the investment advisor employee in the Superior Court action; and (2) against the investment company in arbitration.

In coming to this conclusion, the Court found the Massachusetts Appellate Court's decision in *Constantino v. Frechette*, 73 Mass. App. Ct. 352 (2008) analogous and persuasive. In *Frechette*, the administratrix of an estate sued a nursing home and three of its nurse employees for wrongful death and personal injury to the decedent. The nursing home moved to compel arbitration of the claims pursuant to an arbitration provision within the underlying contract between the decedent and the nursing home. The Massachusetts Superior Court found the contract and arbitration provision to be valid and enforceable, but only compelled arbitration as to the nursing home, not its employee nurses. *Frechette*, 73 Mass.App.Ct. at 353.

On appeal, the Massachusetts Appellate Court reviewed the matter *de novo* to determine "whether the nurses demonstrated either that they were parties to the contract or that they were otherwise entitled to invoke its arbitration provision." *Id.* at 355. The Appellate Court upheld the lower court decision that the nurses "were not named as parties [to the underlying contract with the nursing home], nor did they assume any obligations" thereunder. *Id.* It found that regardless of whether or not the nurses were agents acting on behalf of the nursing home, there was "no intention to protect the nurse employees . . . in the arbitration agreement"; therefore, "the nurses [were] not entitled to enforce the arbitration clause against the administratrix." *Id.* at 358-59.

The Rhode Island Superior Court in *Estrella* followed suit, finding that the investment company's account agreement did not bring its employees "within the ambit" of the arbitration provision. The Court cited with approval the *Frechette* decision's conclusion that "typically, agents do not obtain rights or responsibilities from contracts entered into by their principals, absent additional contractual terms such as third-party beneficiary provisions or indemnification clauses." *Id.* at 358. Therefore, if the investment company intended to protect its employees from having to defend claims in court, the investment company could have (and should have)

tailored the arbitration provision to expressly provide that the provision is intended to inure to the benefit of its employees. Because the investment company's arbitration provision did not so explicitly state, the Court concluded that the investment company employee could not compel the executor to arbitrate.

Undoubtedly most corporations intend their contractual arbitration provisions to apply to claims made against their employees when they are acting in their employment capacity and within the scope of their duties and responsibilities. This is for two reasons – one substantive, the other practical. Substantively, corporations can only act by and through their employees, and when a plaintiff claims error on the part of a corporation that claimed error necessarily must tie back to some act or omission by a person(s) within the company. Practically, a company's mandatory arbitration provision is intended to resolve claims in one, expedient forum, not litigate the same dispute in multiple and potentially prolonged proceedings.

Estrella may make it more difficult for defendant employees to claim the protections of their employer's contractual arbitration provisions absent an explicit statement in the contract extending the provision to employees. Although not binding precedent in Rhode Island, the *Estrella* decision was issued by Rhode Island's senior business calendar judge and may be persuasive to other judges considering the same issue.

Do your contracts contain arbitration provisions? If avoiding litigation in court and compelling all disputes to arbitration is important to you, check your contracts to make sure they cover everything, and everyone, you expect them to cover.

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