No. 20-4

In The

Supreme Court of the United States

ROSANNE L. WOODROOF,

Petitioner,

v.

JOSEPH F. CUNNINGHAM;
CUNNINGHAM & ASSOCIATES, PLC,

Respondents.

On Petition For A Writ Of Certiorari
To The District Of Columbia Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question 1:

Is it a violation of the Federal Arbitration Act for a state court to dismiss an arbitration due to the resignation of an arbitrator so that a pending motion to invoke an FAA Section 5 replacement arbitrator can be denied or rendered "moot"?

Section 5 of the FAA requires the trial court to appoint an arbitrator if there is a lapse in the naming of an arbitrator "for any reason." This section creates a more efficient arbitration process by minimizing delays and mechanical breakdowns in replacing arbitrators who have died or resigned for any reason. However, it is subject to the parties' contract, which should be rigorously enforced according to its terms. (Section 2) Therein lies the tension between expeditious arbitrator replacement to continue the arbitration and terms which stipulate forums or arbitrators "integral" to the contract which may be unavailable, thus voiding the contract.

The circuits are split on favoring the intent to arbitrate over the integral term exception, which may void the contract where a specific arbitration forum or arbitrator deemed "integral" is not available. In this case, the DC Court of Appeals implicitly created another circuit split inconsistent with the goals of the FAA, dismissing Petitioner's arbitration contract and also her case where an arbitrator who was not integral to the contract resigned. This decision upends the

QUESTIONS PRESENTED—Continued

power and force of FAA Section 5, making arbitration contracts vulnerable to attack whenever an arbitrator dies or resigns.

Question 2:

Is it a violation of the Federal Arbitration Act for a state court to dismiss an arbitration to prevent a party from asserting the appropriate evident partiality and disclosure standard for her arbitration contract, rendering moot a motion to disqualify a corrupt arbitrator?

Section 10 of the FAA requires that an arbitration award be vacated "where there was evident partiality or corruption of the arbitrators." 9 U.S.C. Section 10(a)(2). This Court likewise instructs that arbitrators "not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another." Reference is also made to the "simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." *Commonwealth Coating Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968).

Here the DC Court of Appeals implicitly deepened the considerable split among circuits regarding the standard to be used for evident partiality and how related disclosures should be handled. Unlike other

QUESTIONS PRESENTED—Continued

appellate circuits, the Court of Appeals held that Petitioner could not object to Respondents' failure to disclose potential bias and conflict of interest even when it resulted in substantive changes to her arbitration contract and appeal rights.

Question 3:

Is it a violation of the Federal Arbitration Act for a state court to dismiss an arbitration because a party will not agree to the arbitration panel's substantive rewrite of the arbitration contract?

Section 10 of the FAA provides that a United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration where the arbitrators exceeded their powers. The analysis of what constitutes arbitrators exceeding their powers varies among circuits and courts.

The DC Court of Appeals readily endorsed the rewrite of Petitioner's arbitration contract by a newly assembled tripartite panel, an act frequently considered in excess of an arbitrator's authority. The appellate court dismissed Petitioner's case when she objected to the panel's rewrite in order to maintain the integrity of her arbitration and arbitration contract. No authority was cited in the court's unpublished opinion. A Petition for Rehearing seeking corrective action as well as a Motion to Publish seeking clarity for resultant new holdings were both summarily denied.

PARTIES TO THE PROCEEDING

Petitioner Rosanne L. Woodroof was the Plaintiff in the D.C. Superior Court proceedings and appellant in the D.C. Court of Appeals proceedings. Respondents Joseph F. Cunningham and Cunningham & Associates PLC were the defendants in the D.C. Court proceedings and appellees in the D.C. Court of Appeals proceedings.

RELATED CASES

Rosanne L. Woodroof v. Joseph F. Cunningham, *et al.*
DC Court of Appeals No. 18-CV-309
Petition for Rehearing, Rehearing *En Banc*.
Denied February 4, 2020
Memorandum Opinion and Judgment. Decision of Trial Court Affirmed. October 3, 2019

Rosanne L. Woodroof v. Joseph F. Cunningham *et al.*
DC Superior Court Case No. 2013 CA 006474
OMNIBUS ORDER. dismissal with prejudice.
December 12, 2018. (Following Oral Rulings February 16, 2018)

Rosanne L. Woodroof v. Joseph F. Cunningham, *et al.*
Rosanne L. Woodroof v. Cunningham & Associates, PLC
Cunningham & Associates, PLC v. Rosanne L. Woodroof
DC Court of Appeals
No. 14-CV-939, No. 14-CV-1426, No. 14-CV-1441
(14-CV-1426 and 14-CV-1441 denied)
14-CV-939: Decision of Lower Court Confirmed
October 13, 2016
Mandate Issued January 4, 2017

RELATED CASES—Continued

Cunningham & Associates, P.L.C. v.
Rosanne L. Woodroof
DC Superior Court Case No. 2012 CA 9591 F.
AMENDED ORDER December 22, 2014. (written)
(Following Oral Ruling May 29, 2014)
DC Trial Court granted Motion for Relief of Foreign Judgment because Arlington County Circuit Court (in Virginia) did not have subject matter jurisdiction over Cunningham's Claim because DC Bar Rule XIII required mandatory adjudication by the District of Columbia Attorney/client Arbitration Board as Woodroof (Defendant) timely requested in February 2011.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Rosanne L. Woodroof respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The District of Columbia Court of Appeals petition and amended petition for rehearing, denied. The District of Columbia Court of Appeals petition for rehearing en banc, denied. The District of Columbia Court of Appeals memorandum opinion and judgment, denied. The District of Columbia Superior Court OMNIBUS ORDER December 12, 2018 dismissed with prejudice. The District of Columbia Oral Rulings February 16, 2018.

JURISDICTION

The District of Columbia petition and amended petition for rehearing was denied February 4, 2020. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

9 U.S. Code § 2.

A written provision in any maritime transaction or a contract evidencing a transaction involving

commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch. 392, 61 Stat. 670.)

9 U.S. Code § 4.

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is

filed. If the making of the arbitration agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101-552, § 5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102-354, § 5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107-169, § 1, May 7, 2002, 116 Stat. 132.)

9 U.S. Code § 5.

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named

therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

(July 30, 1947, ch. 392, 61 Stat. 671.)

9 U.S. Code § 10.

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court

may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

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Article VI, section 2 of the U.S. Constitution

This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

STATEMENT OF THE CASE

Respondents used misrepresentations and material omissions to induce Petitioner into an engagement to recover substantial losses ($1.4M) related to catastrophic water damage to her downtown DC condominium. Petitioner had been displaced for two and one-half years during which she was forced to litigate to get the condominium to agree to repair the common element source of the leaks just to repair her uninhabitable unit where she planned to live into retirement. She had depleted virtually all of her considerable retirement savings trying to maintain ownership of what was once a highly desirable condo unit.

At the engagement meeting, Respondents were emphatic that the condo's insurance company would want to settle the case quite quickly and that there would be no discovery. Petitioner was particularly trusting of her lawyer and fiduciary because he was highly recommended by another lawyer and had great credentials and experience. Eager to get started toward settlement and recovery, she signed the engagement contract, including an arbitration agreement, the day she met Respondents. She read the arbitration agreement and thought it offered a "quid pro quo" in terms of arbitrating fees and malpractice. Respondents did not utter one word about the complicated ad hoc tripartite agreement Petitioner was signing or that Petitioner already had the right to arbitrate fees under the auspices of the DC Bar.

The case immediately experienced problems when Respondents missed the first important deadline in the case and almost missed the statute of limitations entirely. Later Petitioner would learn that Respondents spent about fifty percent of the year outside of Washington, DC on global personal travels and at their other three homes in California and Hawaii, all without much contact with the home office. Throughout this case, Respondents' personal travel was a priority and court dockets were constantly manipulated because of it, including inexplicable delays for no good reason. But the courts were tolerant with Respondents, who were highly successful in rearranging everyone's schedule to suit theirs.

Petitioner became distraught with the downward trajectory of what was once such a promising case, especially after the case was dismissed in September 2009, less than one year after Respondents had assured Petitioner of a quick settlement. Fees were skyrocketing. Petitioner, a financial compliance professional, could not hold debt and work in her profession, a fact she repeatedly told Respondents. She sought to have Respondents negotiate her out of the case, which was problematic as Respondents were battling to get the case back on the docket. But at a pivotal meeting in December 2009, just after Respondents managed to recover the case, Respondents had a plan to achieve success as they originally described. If Petitioner would just sign a "confessed judgment" for past and future legal fees, now spiraling to around $96,000 and beyond, Respondents would initiate discovery which

would encourage the condo to settle the cases "in about two months." Petitioner, tired of waiting to get her DC condo back, had closed on her Virginia home five days prior. Respondents did not offer Petitioner any advice or information about the "confessed judgment" she had signed, such as the fact it gave Respondents a security interest in both Petitioner's DC and Virginia properties, which Petitioner would never have knowingly done.

Massive discovery followed, where Petitioner was forced to produce around 20,000 documents along with hundreds of photos meticulously documenting her case. Equally massive were the fees. What was not forthcoming was any settlement to match the size of the fees incurred. After failing to mediate a successful settlement, in large part due to a non-neutral negotiator, Respondents issued a defamatory withdrawal notice to all parties. The derogatory withdrawal notice criticized Petitioner for owing so much in fees and not paying as promised. It destroyed what was left of the posture of the case. However, Petitioner was determined to recover some money for all of the time and effort she had spent, so proposed a settlement, despite the dismal negotiating position Respondents had created for her. She also had non-economic interests, such as the walkway the condo planned for around her unit, which promised to compromise the agreed upon water management solution she had litigated to win prior to hiring Respondents.

Petitioner engaged an attorney to induce Respondents to stay in the case long enough to at least try to negotiate some financial and other benefits for

Petitioner. The result was the $160,000 settlement, for which Respondents were paid $123,000 before immediately filing a fee lawsuit in Virginia for another $143,000 they claimed Petitioner owed. Petitioner immediately filed a Petition to the DC Bar for a Rule XIII fee arbitration, mandatory under the rules of the D.C. Bar. (Appendix F Petition App. 54) Respondents vigorously fought the DC Bar fee arbitration and managed to finagle an ex parte hearing on jurisdiction after promising Petitioner, hospitalized with a near fatal pneumonia, that they would notice her by email of their intent for a hearing on jurisdiction. Petitioner received no email or mail notification of the hearing, did not attend and Respondents easily "won" jurisdiction. Petitioner filed a motion for reconsideration requesting arbitration via the DC Bar's mandatory program or her arbitration contract. The motion was denied. Petitioner filed a Motion to Compel Arbitration based on malpractice (Appendix G Motion to Compel App. 102) as Respondents were engineering a default judgment. Petitioner battled the default judgment, and lost, in the Virginia Supreme Court. In December, 2012, Respondents sought to file their foreign default judgment in DC to seize Petitioner's assets in that jurisdiction. Petitioner assigned her malpractice attorney to the fee case in early 2013. After numerous delays requested by Respondents, that case was finally resolved in Petitioner's favor on May 29, 2014, except for the forced payout from the proceeds of Petitioner's condo sale, which Respondents falsely claimed was a voluntary "settlement." Both Petitioner and her attorney asserted to the trial court that they had no knowledge of and did not intend to execute a settlement. (This led to

the mutual filings of contempt decided with Petitioner's appeal, 14-CV-1426 and 14-CV-1441.)

During the foreign jurisdiction case, delayed multiple times by Respondents, Petitioner filed her fiduciary malpractice because of a looming statute of limitations deadline. Her malpractice attorney was assigned to the fee case, so Petitioner was forced to file her complaint Pro Se. Respondents immediately filed a motion for a more definite statement, with which Petitioner timely complied by filing the only amendment in this case she has been permitted by the court to file. Respondents then filed a motion to dismiss Petitioner's case *with prejudice.* As soon as Petitioner prevailed, Respondents brought in insurance counsel, demanded arbitration, filed Answers and claimed to have named an arbitrator.

Petitioner appealed Respondents demand for arbitration because she believed they had solidly waived and/or defaulted on their right to arbitrate anything after years of litigation against arbitration in any form. However, the court disagreed and ordered Petitioner into arbitration by a Mandate issued January 4, 2017. At the time, Petitioner was experiencing financial difficulty, fighting foreclosure on her home, so she filed a motion for prohibitive cost based on this Court's decision in *Green Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 522-523 (2000). The trial court denied her motion. Petitioner then tried to meet with Respondents to find out the name of their party arbitrator at that point, since the last she had heard was an email on July 14, 2014. She

also sought to work out the rules and administrative procedures required to arbitrate. But Respondents refused to speak with Petitioner about the arbitration or to name their current party arbitrator. Instead, Respondents filed a motion to dismiss the case 3 days later on April 14, 2017 based on two false premises—that Respondents had a party arbitrator in place waiting to arbitrate and that Petitioner had failed to obtain the proper stay for her arbitration.

At a Status Hearing on the April 14, 2017 dismissal motion (the 4th motion to dismiss in the case) the trial court refused to hear arguments. Instead of sorting out the arguments from both sides, the trial court angrily denounced Petitioner for owing all those fees in Virginia, fees his own ruling decided did not have jurisdiction because Respondents should have met their commitment to arbitrate under Rule XIII of the D.C. Bar. The court then launched into a tirade about how Petitioner had sued Respondents who had been nice to her and offered her a discount on fees! None of this was true and all would have been refuted by the docket available to the trial court for the prior case.

Add to this the fact that Mr. Cunningham had died on May 5, 2017, shortly after the motion to dismiss was filed. He was not, Petitioner would later learn, compliant with his own contract because he did not have a party arbitrator in place as asserted to the court in the motion filing or orally at the Status Conference by his defense counsel. The trial court was anxious to dismiss Petitioner's case, but stopped short to allow her 30 days to comply by hiring a party arbitrator just so she could

not win an appeal and come right back into his courtroom. But he spoke of leaving the motion open to renewal even if she complied. When Petitioner timely complied, the trial court did not vacate the motion to dismiss, he left it open for renewal whenever Respondents would cook up another complaint against Petitioner.

As soon as Petitioner named a party arbitrator, a neutral, as standards and the contract dictated, Respondents suddenly named their new party arbitrator, who Petitioner would soon learn was a non-neutral. However, Respondents made none of the required disclosures for a non-neutral. Petitioner also learned that the original party arbitrator had retired on January 10, 2017, prior to the motion to dismiss and months prior to the order the trial court was induced to issue to Petitioner under threat of having her case dismissed. Respondents continued to represent orally at the status hearing that they were in compliance, had a party arbitrator, etc., none of which appears to be true.

The two party arbitrators, with full time support from Petitioner, found a third neutral, but the neutral would not take the job. Under pressure to hire a Panel Chair, the arbitrators chose David Clark, Esquire. Mr. Clark was keenly interested in his compensation package based on the Appendix D Exhibits to the next Motion to Dismiss filed October 9, 2017. In fact, he used the panel to negotiate his pay rather than discuss it directly with the parties as the ABA Code of Ethics for Arbitrators in Commercial Disputes CANON VII requires. The panel also decided they needed to adopt

the highly unfavorable CANON X ethical framework from the ABA Code, a provision no neutral panel would ever have considered. The panel proposals were a great shock to Petitioner because she had not received the panel's confidential emails as did Respondents. She tried to agree with some provisions and challenge others, particularly disclosures which appeared totally deficient. However, the panel attempted to coerce Petitioner's acceptance of their proposals in their entirety and she was forced to withhold her consent for them. She was not contractually or legally required to accept any of the proposals.

The Panel Chair abruptly resigned. Petitioner went on a campaign to replace the resigned Panel Chair as soon as possible, but Respondents filed a motion to dismiss with prejudice and ceased to cooperate on any selection. Respondents declared arbitration impossible, stating that Petitioner had delayed the proceeding and thus waived her claims.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT CONCERNING UNAVAILABLE ARBITRATORS OR ARBITRATION FORUMS

In determining whether FAA Section 5 may be invoked to replace an arbitrator, the arbitration agreement will not fail unless the choice of forum is an integral part of the agreement to arbitrate, rather than

an "ancillary logistical concern." *Brown v. ITT Consumer Financial Corp.*, 211 F.3d at 1222 (11th Cir. 2000) A court must determine whether the forum choice is "integral," and "so central to the arbitration agreement that the unavailability of that arbitrator brings the agreement to an end." *Reddam v. KPMG L.L.P.*, 457 F.3d 1054 (9th Cir. 2006) Where the forum is not "integral," Section 5 applies and the court may name a replacement arbitrator.

Two 9th Circuit cases illustrate the "integral" test. In *Martinez*, 118 Cal. App. 4th at 121, the parties agreed to an AAA forum, but AAA refused to conduct the arbitration. This forum was an integral term of the contract which the courts must enforce just like any other contract term. Since AAA, the forum selected by the parties and "integral" to the contract declined to hear the case, the dispute was sent to court for adjudication. In another 9th Circuit case, an investor's arbitration contract specified NASD, so that term was "integral" to the contract. However, the brokerage house against which the investor planned to file a claim was no longer a member of NASD so a motion to compel arbitration could not be granted. In this case, the investor could have consented to renegotiate the contract with different terms, avoiding the forum problem, but did not. Thus, the investor's case returned to the court docket. *Provencio v. WMA Securities, Inc.* (2005) 125 Cal. App.4th 1028, 1032.

In re Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 561 (2d Cir. 1995) the parties specified the NYSE as an exclusive forum. When that chosen

forum would not hear the case, the parties could not switch to another forum using Section 5 to circumvent the parties' exclusive arbitral forum. However, other courts have determined the court should appoint an arbitrator via Section 5 when the exclusive forum or chosen arbitrator is not available. *Zachman v. Merrill Lynch, Pierce, Fenner Smith, Inc.*, 742 F.Supp. 1359, 1365 (N.D. Ill. 1990) In *Adler v. Dell Inc.*, Civ. 2009 WL 4580739 (E.D. Mich. Dec. 3, 2009), the court found that it was not clear that the term in dispute was as important as the arbitration agreement, therefore it was not integral to the parties' agreement, which was found enforceable.

In interpreting contracts to determine whether or not the terms are "integral," *Grant v. Magnolia Manor-Greenwood*, Supreme Court of South Carolina, 383 S.C. 125 (S.C. 2009) focused on the significance of the specific rules named in the agreement as an indicator that the rules were integral to the agreement to arbitrate. Contract interpretation in other cases noted mandatory, as opposed to permissive language further demonstrating the named arbitration provider is integral to the agreement to arbitrate. See, e.g., NMSA 1978, Section 12-2A-4(A) 197 ("Shall" and "must" express a duty, obligation, requirement or condition precedent." *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, 22, 146 N.M. 24, 206 P. 3d 135 "Shall" indicates that the provision is mandatory.")

Despite the fact that the Panel Chair in Petitioner's case had only worked a few hours and was not in any way "integral" to Petitioner's arbitration

contract, the trial court, affirmed by the DC Court of Appeals, used this resignation to improperly dismiss her case, rendering the Section 5 motion to replace the arbitrator "moot" and ending her arbitration and entire case. This was completely contrary to the purpose of the FAA, to enforce arbitration contracts according to their terms. It also sets up a dangerous precedent where parties can, as in Petitioner's case, manipulate a resignation to end the arbitration unfairly, contrary to the national policy favoring arbitration. The DC Court of Appeals contributed to the circuit split, devising its own unique brand that benefits no one, except, perhaps the party seeking to take advantage.

II. CERTIORARI IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT ON ARBITRATION STANDARDS FOR EVIDENT PARTIALITY AND RELATED DISCLOSURES

To promote the goal of integrity in the process and finality at its conclusion, the divergent standards for evident partiality and related disclosures need clarity and a more uniformed approach. The origin of the standards, *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 at 149, decided in 1968, serves as the foundation for the current framework.

An overview of diverse standards across circuits underscores the problem:

Second Circuit: The court adopted a reasonable person standard where the court would find "evident

partiality" where a "reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Morelite Constr. Corp.*, 748 F.2d at 84.

Fifth Circuit: "Nondisclosure by an arbitrator" would not lead to vacatur of an award "unless it creates a concrete, not speculative impression of bias." *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 283, 286 (5th Cir. 2007).

Fifth Circuit: Waiver of arbitrator disclosure when party moves to vacate award arguing arbitrator disclosures insufficient. The court concluded that the right to challenge should have been exercised during arbitral proceedings. The reasoning is to promote finality and a favorable federal policy toward arbitration. (*See Dealer Comput. v. Michael Motor Co.*, 485 F. App'x 724, 727 (5th Cir. 2012).

Sixth Circuit: To establish evident partiality, the challenging party must show that "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." *Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 328 (6th Cir. 1998) This standard requires showing greater than an appearance of bias, but less than actual bias: and to meet the standard a party "must establish specific facts that indicate improper motives on the part of the arbitrator." Id. At 329. Near the end of a 5 year arbitration, Defendants Nancy and David White hired the neutral arbitrator's law firm for substantial engagements, a fact disclosed to Plaintiff Thomas Kinkade Company. Defendants proceeded to receive many favorable

decisions from the neutral arbitrator. After an unusually favorable award, Plaintiff sought vacatur. The District Court vacated the award based on evident partiality. *Thomas Kinkade Company, fka Media Arts Group v. Nancy White, David White, Lighthouse Galleries, LLC*, 711 F.3d 719 (2013).

Seventh Circuit: *In Trustmark Ins. Co. v. John Hancock Life Ins. Co.*, 631 F.3d 869, 874 (7th Cir. 2011) This circuit found that an arbitrator should not be disqualified for having knowledge regarding previous arbitral proceedings between the same parties. This standard may be problematic where there are personal relationships without financial ties.

Ninth Circuit: Evident partiality can exist even when the arbitrator does not have actual knowledge. Constructive knowledge concept. Lawyer ran check and missed relevant information. Arbitrators are bound to disclose potential conflicts and must fail to investigate potential conflicts to reach evident partiality. Arbitrator's failure to inform the parties to the arbitration resulted in a reasonable impression of partiality. *Commonwealth Coatings*, 393 U.S. 145 at 150 (1968).

Eleventh Circuit: Applies "reasonable impression of bias." Lawyer must have actual knowledge of conflict for evident partiality. Court rejected that arbitrator had a duty to investigate the past contacts to avoid evident partiality. *See Gianelli Money Purchase Plan and Trust v. ADM Inv. Services, Inc.*, 146 F.3d 1309 (11th Cir. 1998).

III. CERTIORARI IS WARRANTED TO ENFORCE ARBITRATION AGREEMENTS ACCORDING TO THEIR WRITTEN TERMS NOT AS ARBITRATORS WANT TO REWRITE THEM

FAA Section 10 provides for vacatur where arbitrators exceed the scope of their authority. One of the ways in which arbitrators exceed their authority is by changing, adding, deleting and/or rewriting portions of the arbitration contract. This can significantly change the arbitration contract, deviating from the expectation of the bargain when signed.

Examples of caselaw where arbitrators have exceeded their authority by rewriting the contract:

PMA Capital Ins. Co. v. Platinum Underwriters Bermuda, Ltd., 400 Fed.Appx. 654, 656 (3d Cir. 2010) "The arbitrators in this case by . . . rewriting material terms of the contract they purported to implement, went beyond the scope of their authority."

Eastern Seaboard, 553 F.3d at 3. In the Court's view, the arbitrator exceeded his powers under the FAA by prospectively voiding the Guaranty while rewriting the terms of the NOA. First, there is evidence that the parties never intended to bestow this power upon the arbitrator.

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., U.S. 662, 671 (2020), that "the arbitrator . . . is not free to ignore or abandon the plain language of the parties' agreement . . . ," and that "an arbitrator exceeds his

powers . . . when he reforms material terms of a contract so the agreement conforms with his own sense of equity or justice."

Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC, 913 F.3d 1162, 1169 (9th Cir. 2019) "When an arbitrator disregards the plain text of a contract without legal justification simply to reach a result that he believes is just, we must intervene . . . We therefore affirm the district court's vacatur of the Award."

In the Second Circuit, a Respondent argued the award of Passaretta's deferred compensation should be vacated because the arbitration panel exceeded its authority when interpreting the employment agreement. The Court of Appeals has determined that "such an excess of power occurs only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *New York City Transit Authority v. Transport Workers' Union of America, Local 100, AFL-CIO*, 6 N.Y. 3d 332, 336 (2005). New York courts have found an arbitrator to be acting in excess of her power "if the arbitrator's interpretation of the contract essentially makes a new contract for the parties." *Soma Partners, LLC v. Northwest Biotherapeutics Inc.*, No. 111745/ 2005, slip op. 30372 (unpublished) (Sup. Ct. N.Y. Co. Dec. 30, 2005).

IV. COURT IS WRONG

Respondents filed a Motion to Dismiss on October 9, 2017, claiming that Petitioner had rendered arbitration "impossible" because she would not agree to rules proposed by the newly formed tripartite arbitration panel. Respondents also claimed that arbitration could not proceed because the neutral (Panel Chair) withdrew from the process when Petitioner would not agree to the rules and procedures, including the "fee security" for the Panel Chair. The motion falsely stated that Petitioner "refused to participate in paying any retainer to the neutral to secure his services."

Petitioner had no legal or contractual obligation to agree to the panel's proposals which exceeded their authority per FAA Section 10. Neither the D.C. Superior Court nor the D.C. Court of Appeals ever juxtaposed the panel's proposals with the Arbitration Agreement. Had the courts conducted even a cursory analysis of the terms of the arbitration contract, they would have understood that there was no merit whatsoever to Respondents' motion filed to get *out* of arbitration, *not* proceed in arbitration. The only party trying to proceed in arbitration is the one with the $1.25 million claim—Petitioner.

Respondents did not cite any authority or legal basis for their Motion to Dismiss other than the Arbitration Agreement's General Provisions on page 2 regarding "waiver" and bar if a claimant fails to pursue the arbitration claim in accordance with the

procedures prescribed here with reasonable diligence. (App. E Arbitration Agreement, p. 2).

The Federal Arbitration Act and decisions of this Court, as well as the DC Court of Appeals have a policy favoring arbitration. (*Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984). Both courts have also determined that whether or not a waiver has occurred is for an arbitrator to decide. *See Howsam v. Dean Witter Reynolds*, 537 U.S. 79, 84 (2002), *Moses H. Cone Mem'l Hosp. v. Mercury Constru. Corp.,* 460 U.S. 1, 25 (1983) both holding "the presumption is that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability." *Also, see Woodland Limited Partnership v. Wulff,* 868 A. 2d 860 (DCCA 2005). Further, as this Court stated in its *per curiam* opinion issued February 21, 2012, *Marmet Health Care Center, Inc. v. Brown*, No. 11-391, state courts are not free to reject this Court's interpretation of federal law, even if the state courts are unpersuaded by this Court's reasoning. Specifically, state and federal courts "must enforce the Federal Arbitration Act, 9 U.S.C. Section 1 et. seq., with respect to all arbitration agreements covered by that statute." *Marmet*, 132 S. Ct. at 1202.[1]

At the time Respondents' Motion to Dismiss was filed, Petitioner had already communicated with both party arbitrators and received their commitment to move forward with an arbitrator replacement. That

[1] Also see Article VI, Section 2 of the U.S. Constitution, stating that the Constitution and the Laws of the United States shall be the supreme law of the land, and the "Judges in every State shall be bound" by the "Laws of the United States."

replacement would be selected from the very same list of candidates used to pick the departed arbitrator only two months earlier. However, after the motion was filed, Respondents refused to cooperate with Petitioner on making an offer to the candidate selected, a retired D.C. Superior Court Judge.

On November 26, 2017, Petitioner filed a motion to invoke FAA Section 5 for a court-appointed replacement arbitrator and FAA Section 10 for disqualification of Respondents' undeclared, undisclosed non-neutral party arbitrator who was in violation of the parties' contract. Typically, notice of disclosure, bias, conflict of interest and/or evident partiality problems would have been directed to the arbitration panel. However, pending the formation of a new panel, Petitioner was obligated to note problems threatening the integrity of her arbitration and the finality and fairness of any resulting award or face potential waiver of evident partiality. (The Sixth Circuit held that "as a general rule, a grievant must object to an arbitrator's partiality at the arbitration hearing before such an objection will be considered by the federal courts.") *Apperson*, 879 F.2d at 1358-59" it is an accepted rule in arbitration cases" that courts will not hear a claim of bias that was not raised at the hearing in which the bias is alleged. *Delta Mine Holding Co. v. AFC Coal Props. Inc.*, 280 F.3d 815, 821 (8th Cir. 2001). *United Steelworkers of Am. Local 1913 v. Union R.R. Co.*, 648 F.2d 905, 914 (3d Cir. 1981) (finding failure to object fatal to a claim of bias "when the reasons supporting an objection are known beforehand").

Petitioner's motions invoking FAA Sections 5 and 10 were necessary to enforce her arbitration contract according to its terms. The D.C. Superior Court deliberately held both motions until the Status Hearing on February 16, 2018, with the clear intention to circumvent them by first dismissing Petitioner's case without regard for the FAA, then rendering the FAA motions to appoint and disqualify "moot."

At the Status Hearing, the trial court was fixated on the panel's proposal for a security deposit for the entire estimate of the Panel Chair's fees, ***a term that was not in the parties' contract***. Further, according to the ABA Code of Ethics for Arbitrators in Commercial Disputes Canon VII, the Panel Chair should have negotiated his payment package with the parties before joining the arbitration panel and never again addressed his own pay issues during the arbitration. The wisdom of this ethical provision is obvious. The Panel Chair disrupted the arbitration panel and used it to negotiate (and leverage) the terms of his compensation with the parties, tainting the proceeding. The OMNIBUS ORDER dated December 12, 2018 references Exhibit D where the deposit issue is discussed in an email. It neglects to reference the companion email, Exhibit E, where the panel actually proposed and attempted to coerce Petitioner to accept its rules, terms and conditions, none of which were anticipated by the parties' contract. The parties' contract was an ad hoc Arbitration Agreement with no rules, no express stipulation of non-neutral party arbitrators and a simple pro rata, shared expense formula for the Panel Chair,

not a requirement for an upfront security deposit for the entire proceeding.

In Appendix D, Petitioner sought to discuss the panel's proposals and resolve any differences, particularly her concerns over disclosures. However, the panel refused. Petitioner was forced to disagree with the proposals the panel attempted to coerce. (Appendix D, Exhibit E).

Petitioner had no legal or contractual obligation to accept any of the panel's proposals because they did not conform to the arbitration contract as written. Instead, the panel substantially rewrote the terms, conditions and introduced rules which disrupted the evident partiality standard and other rights that should have applied, substantially harming Petitioner's appeal rights.

The trial court, and the D.C. Court of Appeals in affirming, did not analyze the arbitration contract as written or consider the fact that Petitioner had no legal or contractual obligation to accept a rewrite of her contract by the arbitration panel. In so doing, the D.C. courts did not consider the parties' contract or the requirement of the Federal Arbitration Act that it be enforced according to its terms. The courts did not comply with the Federal Arbitration Act or relevant decisions of this Court, including support for the national policy favoring arbitration. Instead, the D.C. courts based their decisions on what Respondents told them to do and the "evidence" and statements they provided, which were not legally cognizable "evidence." In fact,

Respondents offered the courts misleading, even outright false statements in support of their motion to dismiss. And the courts "bought" all of it, dismissing Petitioner's arbitration without any basis in fact or law.

At the Status Hearing on February 16, 2018, Petitioner approached the bench with a document she had hoped to present. (Motion for Leave to Use Courtroom Technology). That document summarized:

> Why Defendants' Motion Should be Denied
>
> Why Plaintiff's Motion Should be Granted
>
> Why Defendants' Arbitrator Should be Disqualified
>
> Defendants' Misrepresentations and Default
>
> Defendants' Attempted Subversion of Fundamental Principles (Evident Partiality & Disclosure)

The trial court dismissed the document as "irrelevant," although it contained a summary of critical factors that the court needed to consider before making several important decisions in Petitioner's case. (It may also have been mischaracterized as a "frivolous" filing.) Petitioner never had the opportunity to argue the "frivolous filings" accusation in the unpublished appellate opinion as it was never discussed at the dismissal hearing. It was not a factor in the written dismissal Order of the court below. It appeared to have been cut and pasted from Respondents' filings.

At the Status Hearing, Petitioner managed to make important assertions concerning the parties' contract vis a vis the panel's proposals. But the trial court did not listen or act on Petitioner's assertions. Petitioner stated the following:

February 16, 2019 Transcript: Petitioner (Page 19):

"There was a huge problem that developed with the neutrals being neutral and non-neutral, and it turns out that not only was there the potential conflict from his relationship, which is a little bit more than his just being lawyers, who just happened to know each other, his whole interpretation of the agreement. But the (interpretation) of agreement conflicted absolutely with mine and conflicted with sound arbitration principles, that is the insertion of non-neutrals into the parties' agreement. The agreement does not state that.

(Transcript February 16, 2018, page 19) As I said with the AAA, Rule 18, which Courts generally highly respect, my signature has to go on to any non-neutral in a panel. A panel is supposed to be neutral. That's how the whole thing is supposed to operate. And AAA really, really has put their foot down and said, we are not doing any of these. He's setting up something that, in the industry, is highly disfavored because it's so partial and, you know. They absolutely don't do it. (Transcript February 16, 2018, page 20).

This is a very important point. I want a neutral, ethical, fair arbitration. And I was told by my arbitrator . . . and it sounded to me like the biggest objection that Mr. Clark had, he was uncomfortable deciding the

waiver forfeiture default decision." (Threshold decision on right to arbitrate. Mr. Clark was the Panel Chair) (Transcript February 16, 2018, pages 19-20).

Instead of considering Petitioner's arguments, which described serious contractual and evident partiality problems which threatened the integrity of the arbitration, as well as a threshold decision the Panel Chair may have expressed reluctance to arbitrate, the trial court quickly switched to Respondents. After Defendants and the Trial court denied there could possibly be any issues with the threshold decision or the arbitrators, Respondents stated what they really wanted and their arguments had nothing to do with "impossibility":

February 16, 2018 Transcript: Respondents: (Page 24):

With all due respect to Ms. Woodroof, I mean, she has the law completely upside down. Our motion to dismiss simply is plain and simple. Enough is enough is enough already. We do not have to go through this multiple times until Ms. Woodroof is satisfied that she has the panel that will do—that will do the arbitration the way she thinks an arbitration ought to be done.

These three arbitrators decided themselves what the rules were going to be. I didn't tell them. She didn't tell them. They decided, wrote to us and said these are going to be the rules. She wouldn't agree. That was the end of it. (Transcript February 16, 2018, page 24).

Judge, there's no justification to make us start this process all over again.

The Trial Court:

No, the Court agrees. And the Court grants the motion to dismiss that was filed on October 9, 2017.

What we have here is an effort to delay and obstruct the proceedings that would have brought this case to resolution . . . (Transcript February 16, 2018, page 24)

–end of transcript excerpts–

Based on the above scenario, no arbitration contract is safe. Any party subject to an arbitration agreement ought to be worried if Respondents can now announce to a court that they don't think they should have to agree with Petitioner about anything, or that the difficulty of getting Petitioner to agree to some arbitration issue, such as the complete restructuring of the contract, merits dismissal of not only the arbitration, but the entire case.

Since the D.C. Court of Appeals used the abuse of discretion standard, just as Respondents advised, rather than the applicable "de novo" standard Petitioner asserted, it never figured out the law, the facts or what the lower court got wrong.

When Petitioner submitted her Amended Petition for Rehearing/Hearing En Banc, challenging the accuracy of the facts presented as well as the complete lack of applicable law, the D.C. Court of Appeals simply denied her petition. See below Issues presented in

Petitioner's Amended Petition for Rehearing included the following:

> 9 U.S.C.S. Section 1 et seq.: Rules of fundamental importance include basic precept that arbitration matter of consent not coercion
>
> 9 U.S.C.S. Section 4: Primary purpose of FAA to ensure private agreements to arbitrate are enforced according to their terms
>
> 9 U.S.C.S. Section 5: Trial court *shall* replace arbitrator . . . enforce contract
>
> 9 U.S.C.S. Section 10: Re: arbitrator authority and how exceeded United States Supreme Court decisions in support of FAA:
>
> *Rent-A-Center, W. v. Jackson*, 561 U.S. 63, 67 (2010) "The FAA reflects the fundamental principle that arbitration is a matter of contract."

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1774-1775 (2010), citing *Volt*, 489 U.S. at 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 arbitration matter of consent not coercion, arbitrators and courts "*must give effect to the parties' contractual rights and expectations.*"

Petitioner submitted a Motion to Publish the unpublished appellate opinion with a detailed analysis of new holdings that would result from the appellate court's unpublished decision. Petitioner requested that the decision be published, but that request was denied.

There was no prejudice toward Respondents. Respondents misled the trial court at the June 30, 2017 hearing, asserting that they had a party arbitrator in place since 2014. This was false. The party arbitrator they named had retired months before they filed the April 14 Motion to Dismiss. Because the trial court would not allow any arguments at that hearing, it did not realize Respondents had induced it to issue an order to Petitioner when Respondents were themselves in default on the Arbitration Agreement.

Mr. Cunningham died four (4) months after the January 4, 2017 Mandate to arbitrate. He was not compliant with his own Arbitration Agreement at that time. Prior to the Mandate, the parties were in the appeals process. Before the appeals process the parties were in litigation on Mr. Cunningham's Motion to Dismiss Petitioner's fiduciary malpractice case filed in 2014 which was denied on May 29, 2014. Petitioner filed Motions to arbitrate both fees and malpractice in 2011, but Cunningham resisted and vigorously opposed arbitration—for years (Appendix G). This was the reason for the appeal. Petitioner had been in litigation with Respondent's for years in multiple courts when Respondents suddenly decided to arbitrate.

Please see Appendix F Petition for Rehearing and Motion to Publish for detailed responses to the DC Court of Appeals unpublished opinion. The court got it wrong. Petitioner was never obligated legally or contractually to agree to the arbitration panel proposals used to dismiss her case. Petitioner did not cause any substantive delay. Had the courts analyzed the panel's

proposals with the Arbitration Agreement, they would have seen that the proposals were improper and never should have been offered, let alone coerced. Petitioner vigorously pursued arbitration of her $1.25 million in claims. She had no reason to delay the resolution of her own claims.

V. THE QUESTIONS PRESENTED ARE OF ENORMOUS PRACTICAL IMPORTANCE

This case is of enormous importance to the lives and liberties of Americans. Each year, hundreds of thousands of disputes that would otherwise clog already overloaded court dockets are resolved through arbitration. The American Arbitration Association (AAA) alone is on track to administer approximately 300,000 cases in 2020. This does not include the surge of COVID cases already starting to impact the judicial system. Many of these litigants will be businesses new to the legal system, particularly small businesses already experiencing severe economic impacts on their existence, while others will be larger, more sophisticated veterans of the legal system. All need a robust arbitration industry which is faithful to its foundational principles and the law that governs the process, the Federal Arbitration Act (FAA).

Parties to arbitration consensually surrender many of the procedural rights that they would enjoy if they had chosen to litigate the dispute in court. In exchange, however, they gain several important, attractive advantages. *See Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682-84 (2010).

The decision of the DC Court of Appeals upsets this balance—a balance that makes arbitration a viable and often attractive alternative to litigation. It defeats the primary goal of finality by refusing to consider questions involving two of the four reasons for vacatur outlined by FAA Section 10: (2) where there was evident partiality or corruption in the arbitrator, or either of them; and (4) where the arbitrators exceeded their powers. The decision also strips arbitration of three of its core benefits: the right (i) to make an informed selection of the persons who will exercise nearly final authority to resolve the dispute; (ii) to agree upon efficient and effective procedures for the adjudication; and (iii) to control the costs of the process.

The current state of uncertainty generated by the circuit splits discussed above defeat the very purpose that the Court cited for limiting review of arbitration awards in the first place: "maintain[ing] arbitration's essential virtue of resolving disputes straightaway." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588, 128 S. Ct. 1396, 1405 (2008).

This Court has frequently recognized the "national policy favoring arbitration." *Id.* (citation omitted). Resolving the circuit splits discussed above will materially advance that policy, promote the use of arbitration, and reduce the workload on the already overloaded court dockets around the country.

Review is also urgently needed *now*, lest more parties conclude that the approach taken by the court

below—and the myriad approaches of the different circuits discussed above—make the risks of arbitration too great to accept. Moreover, unless this Court intervenes *now*, this uncertainty and undermining of the national policy favoring arbitration will continue to spread.

This case also illustrates the high impact stakes of the questions presented on individuals such as Petitioner. Respondents conducted an insidious campaign to deprive Petitioner of her right to arbitrate under the parties' contract in multiple courts over several years, then attempted a failed Motion to Dismiss with prejudice before deciding to invoke the mandatory arbitration contract they had previously opposed. Respondents have argued that the clause governing mandatory arbitration of Petitioner's fiduciary malpractice claim is absolute and ironclad, except, of course when Respondents chose to lodge a complicated, substantive Motion to Dismiss the case with prejudice before even demanding arbitration. Once in arbitration, Respondents, who had inflicted egregious economic and non-economic damage on Petitioner, sought to shield themselves from liability for their professional malfeasance by covertly appointing a biased arbitrator, against the parties' contractual provisions. When Petitioner raised good faith objections to the injection of evident partiality into her arbitration as well as other deviations from the terms of the parties' contract, improprieties she was obligated to note or potentially waive, Respondents filed a motion to dismiss with prejudice, accusing Petitioner of obstructing the

arbitration and rendering it impossible. Respondents convinced the court to improperly dismiss Petitioner's arbitration and refuse to grant Petitioner's request for an FAA Section 5 replacement arbitrator to continue the arbitration to resolve both parties' claims according to the terms of the parties' arbitration agreement.

Our law is not that unjust. It must protect the integrity of arbitration on which so many litigants, including Petitioner depend. The Review should be granted, and the DC Court of Appeals decision should be reversed.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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