



Client Alert

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South Carolina Supreme Court to Decide Whether Pre-Dispute Arbitration Agreement Remains Enforceable Despite Refusal of Chosen Arbitrator to Administer the Arbitration

Federal and state policy favoring arbitration over litigation is well established. Most recently, the United States Supreme Court reiterated that the Federal Arbitration Act “establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution.” *Preston v. Ferrer*, 128 S. Ct. 978, 981 (2008). Section 4 of the Federal Arbitration Act (9 U.S.C. §§ 1-16, “FAA”) states that “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.” 9 U.S.C. § 4. Once a valid and enforceable arbitration agreement is found to exist, Section 4 of the FAA mandates that the matter be submitted to arbitration.

But what happens when the arbitral forum selected in the parties’ arbitration agreement refuses to hear the dispute? Section 5 of the FAA provides that if there is “a lapse in the naming of an arbitrator . . . then upon application of either party to the controversy the Court shall designate and appoint an arbitrator . . . who shall act under the same force and effect as if he . . . had been specifically named therein.” 9 U.S.C. § 5. However, some courts (primarily in cases involving an agreement to arbitrate a securities dispute before a Self Regulatory Organization, i.e., the NYSE, NASD, or AMEX) have held that the arbitral forum is so vital to the parties’ agreement to arbitration that the arbitration agreement cannot be enforced outside of the chosen forum without doing substantial injustice to the reasonable expectations of the parties in entering the arbitration agreement. *See, e.g., In Re Salomon*, 68 F.3d 554 (2d Cir. 1995); *Smith Barney v. Critical Health Systems in North Carolina, Inc.*, 212 F.3d 858, (4th Cir. 2000); and *Buice v. WMA Securities, Inc.*, 2008 WL 4613634 (S.C. Ct. App. 10/14/08).

The South Carolina Supreme Court has scheduled oral arguments in *Grant v. Magnolia Manor-Greenwood, Inc.*, and will soon decide the effect of an arbitration forum’s rule refusing to administer arbitration of healthcare disputes without a post-dispute arbitration agreement. In *Grant*, the parties (a health care facility and a patient) entered into a pre-dispute arbitration agreement selecting the American Health Lawyers Association (AHLA) as the forum for the arbitration of any disputes which may arise between the parties. At the

time the dispute between the parties arose, however, the AHLA had policy under which it would not accept consumer healthcare liability claims for arbitration without a post-dispute arbitration agreement. The patient filed a claim against the facility in court, and the facility sought to enforce the arbitration agreement by having a substitute arbitrator appointed pursuant to Section 5 of the FAA. The lower court denied the facility's motion to compel arbitration holding that the AHLA's refusal to arbitrate the dispute rendered the arbitration agreement unenforceable. The facility appealed, arguing that the arbitration agreement was not rendered unenforceable as a result of the AHLA's refusal to accept arbitration of the dispute and that the trial court erred by not appointing a substitute arbitrator as required by Section 5 of the FAA. The South Carolina Supreme Court will hear oral arguments in this matter on January 8, 2009.

Currently both the AHLA and the American Arbitration Association (AAA) refuse to arbitrate consumer healthcare disputes without a post-dispute agreement to arbitrate. Therefore, the decision in Grant has the potential to affect the enforceability of a large number of arbitration agreements. Regardless of the outcome of the Grant case, arbitration agreements should anticipate and address the possibility that the chosen forum may refuse to hear the dispute.

If you would like further information, please contact Jason Bring or Jerad Rissler.