NEW YORK COURT OF APPEALS ROUNDUP

COST-SHARING IN ARBITRATION AGREEMENTS, ASSUMPTION OF RISK, SPECIAL EDUCATION

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This month we discuss a decision in which the Court of Appeals provided some guidance on how courts should address a situation in which one party may not be able to afford the costs of arbitration, yet the governing arbitration agreement calls for cost-sharing. We also discuss two decisions involving school districts. In an action arising out of a child's injury at school, the Court addressed whether application of the doctrine of assumption of risk should be restricted to the context of athletic and recreational activities, an issue over which departments of the Appellate Division have been divided. And in an action arising out of a child's entitlement to special services, the Court addressed when a school district must pick up the costs of services for a child enrolled in a nonpublic school.

We note that last month, the Court accepted a question certified to it by the Delaware Supreme Court in *Teachers' Retirement System of Louisiana v. PricewaterhouseCoopers, LLP*. The certification procedure allows the Court to accept questions pertaining to an unsettled area of New York law from the U.S. Supreme Court, a federal Circuit Court of Appeals, or the highest court of another state. Although the Court rule implementing the procedure became effective in 1986, *Teachers' Retirement System* constitutes the first time that the Court has accepted a question from another state court.

Right to Arbitrate

In *Brady v. Williams Capital Group, L.P.*, the Court addressed the issue of whether petitioner Lorraine C. Brady adequately showed that an arbitration agreement's provision for equal sharing of arbitration costs effectively precluded her from arbitrating her grievance against her former employer. Because neither lower court had made any findings concerning Ms. Brady's current financial ability to bear an equal share of the costs, the Court, in its opinion by Judge Theodore T. Jones for a unanimous Court, remitted the matter to the Supreme Court for a hearing to determine that issue.

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For five years prior to her termination, Ms. Brady had been employed to sell fixed income securities by Williams Capital Group, L.P., an investment bank and broker-dealer. Ms. Brady signed the employee manual that Williams required all of its employees to sign as a condition of continued employment. The manual included an agreement under which all employees agreed to arbitrate any dispute with Williams under the procedures of the American Arbitration Association (AAA) and to "equally share" the fees and costs of the arbitrator. During her employment, Ms. Brady earned between $100,000 and $405,000 annually.

In 2005, Ms. Brady filed a demand for arbitration with the AAA, seeking money damages against Williams and claiming that her termination was based upon race and/or sex discrimination in violation of Title VII of the federal Civil Rights Act of 1964, Article XV of the New York State Executive Law, and Title 8 of the New York City Civil Rights Law. Soon after Ms. Brady filed her demand, the AAA notified the parties that the dispute would be governed by the AAA's National Rules for the Resolution of Employment Disputes ("National Rules"), which provided, inter alia, that in the event of an inconsistency between those rules and an arbitration agreement, the appointed arbitrator would apply the National Rules. Several years earlier, the AAA had amended its rules to require employers to pay all arbitration costs, including the arbitrator's compensation (the "employer-pays" rule).

In 2006, after the AAA invoiced Williams for the full advance payment for the arbitrator's compensation in accordance with the "employer-pays" rule, Williams, relying on the "equal share" provision of the arbitration agreement, refused to pay. Even after the AAA advised Williams that Ms. Brady's position that the "employer pays" was correct, Williams still refused to pay. Ultimately, the AAA cancelled the arbitration. Ms. Brady then commenced an Article 78 proceeding, seeking to compel either Williams to pay the arbitrator's costs or the AAA to enter a default judgment against Williams for failing to do so.

The Supreme Court dismissed the petition, holding that the "equal share" provision of the arbitration agreement controlled. Additionally, the Supreme Court noted that $21,500 (one-half of the arbitrator's compensation) was not prohibitively expensive in light of Ms. Brady's earnings during her five years at Williams. In a 3-2 decision, the Appellate Division, First Department, reversed. Focusing on Ms. Brady's 18 months of unemployment before she commenced the Article 78 proceeding, the Appellate Division directed Williams to pay the arbitration fees in full, subject to reallocation by the arbitrator. Williams appealed as of right.

The Court of Appeals affirmed the Appellate Division's order as modified by its opinion. In doing so, it concluded and instructed the Supreme Court upon remittitur as follows:

a. The lower courts were correct that the terms of the parties' arbitration agreement, rather than the AAA's National Rules, controlled.

b. Both lower courts erred as a matter of law by not looking at Ms. Brady's current financial situation in determining her ability to pay the arbitration costs.

c. Taking guidance from several federal cases, and in particular *Bradford v. Rockwell Semiconductor Systems Inc.*, 238 F.3d 549 (4th Cir. 2001), courts should analyze a litigant's financial ability to pay on a case-by-case basis to determine whether a cost-sharing provision should be declared unenforceable as a matter of public policy. Courts should "at minimum" consider: (i) whether the litigant can pay the arbitration fees and costs; (ii) what the cost differential between litigation and arbitration would be; and (iii) whether the cost differential is so substantial as to deter the litigant from pursuing arbitration.

In adopting a case-by-case analysis, the Court noted the "strong State policy favoring arbitration agreements and the equally strong policy requiring the invalidation of such agreements when they contain terms that could preclude a litigant from vindicating his/her statutory rights in the arbitral forum." The Court gave no answer as to whether, should the Supreme Court find the "equal share" provision unenforceable, it should sever the provision and enforce the balance of the agreement, or give Ms. Brady the option either to accept the "equal share" provision and arbitrate or to bring a lawsuit in court.

Assumption of Risk

In *Trupia v. Lake George Central School District*, an 11-year old boy and his parents sued the child's school district, claiming negligent supervision. The child had ridden and then fallen off a stairway banister at school, sustaining serious injury. Following discovery and the filing of a Note of Issue, the district moved in the Supreme Court to amend its answer to assert the affirmative defense of assumption of risk, i.e., that the child had been injured in the course of "horseplay" and had assumed the risk of injury by engaging in such activity.

The trial court granted the motion, but the Appellate Division, Third Department, unanimously reversed. It then granted the plaintiffs leave to appeal on a certified question regarding the applicability of the assumption of risk doctrine, presumably by reason of contrary authority in the Second and Fourth departments that permitted a broader use of the doctrine in negligence actions in order to nullify a defendant's duty.

The Court affirmed the Third Department's denial of the district's motion to amend its answer. While all judges of the Court concurred in the affirmance, Judge Robert S. Smith authored a separate opinion concurring in the result only, in which Judges Susan Phillips Read and Eugene F. Pigott Jr. joined.

Judge Smith found this "an extremely easy case" to decide because one could not conclude that the child had "assumed the risk" that his teachers would fail to supervise him. His opinion acknowledged that Chief Judge Jonathan Lippman's opinion for the four-judge majority fully recognized this point. According to the concurrence, however, the majority—by way of what Judge Smith deemed to be dictum—concluded that the defense of assumption of risk was largely limited to "athletic and recreative activities." Judge Smith questioned why sliding down a banister could be found to be less "recreative" than skiing or sliding down a bobsled run.

The majority explained that, on a theoretical level, the assumption of risk doctrine may be conceptually compatible with the doctrine of comparative fault and the requirement of liability apportionment, which was enacted into law by CPLR §1411 following the Court's decision in *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143 (1972). Comparative fault compares the culpable conduct of the claimant with the conduct of those allegedly responsible for the damages caused and reduces the liability of defendants accordingly, whereas assumption of risk can negate the existence of the requisite duty where the injured party fully appreciates the known risk. Chief Judge Lippman's opinion recognized, however, that the two doctrines "cannot[] sit comfortably [together]" and that the retention of the assumption of risk defense is justified only by the social value of "athletic and recreative activities."

The case raises the possibility of future challenges that the doctrine of assumption of risk is vestigial in nature and does not serve any purpose where the finder of fact is otherwise empowered by statute to fix comparative fault in "any" action (CPLR §1411), including finding the injured party 100 percent at fault.

Nonpublic School Students

When is a public school district required to provide a special needs student enrolled in a nonpublic school with an individual classroom aide as part of an Individualized Education Program (IEP)? When the educational needs of the child so require, the Court ruled in *Board of Education of Bay Shore Union Free School District v. Thomas K*.

The respondent child was a student at St. Patrick's School, a private school located within the Bay Shore school district. He was diagnosed with Attention Deficit Hyperactivity Disorder and classified as "other health impaired." The IEP established by the district's Special Education Committee recommended that the child be provided with, inter alia, an individual classroom aide for three hours per day. The dispute between the parties concerned whether the aide should provide services to the child at his nonpublic school or at a Bay Shore public school.

After the school district refused to provide the aide at the child's school, his parents commenced administrative proceedings on his behalf. The Impartial Hearing Officer ruled in favor of the child, as did the State Review Officer on the school district's appeal, and the federal district court in an action for administrative review commenced by the school district. In each instance, the district's argument that a classroom aide did not constitute a "service" for purposes of the New York Education Law was rejected. The federal trial court also ruled, however, that the federal Individuals with Disabilities Education Act (IDEA) did not require Bay Shore to provide services at a nonpublic school. The U.S. Court of Appeals for the Second Circuit agreed with the lower court's ruling on the IDEA, and therefore vacated the District Court's order for lack of subject matter jurisdiction.

A state court proceeding pursuant to Education Law §4404(3)(b) ensued. Both the Supreme Court and the Appellate Division, Second Department, held that the district must provide the child with an aide at his nonpublic school. The Court of Appeals agreed, in a unanimous opinion by Chief Judge Jonathan Lippman.

School-aged children with disabilities are entitled to "a free appropriate public education" under the IDEA and "suitable educational opportunities" based upon their individual needs under §4402(2)(a) of New York's Education Law. Further, the "dual enrollment statute," Education Law §3602-c, commands that special education programs be provided to children in public and nonpublic schools on an "equitable basis."

The Court stated that the dual enrollment statute does not require a school district to provide each nonpublic school student with services at his or her school. The Court emphasized that the critical issue is the particular child's educational needs. Here, both administrative tribunals had found that the services of an individual aide in the child's nonpublic school classroom were necessary for his free and appropriate education. If the district were permitted to provide an individual aide in its own schools only, as a practical matter the child would have to withdraw from the school his parents had selected in order to receive the necessary services. The Court, like the administrative tribunals and lower courts before it, was not going to require the child to choose between receiving the services he needed at a new school and remaining at his nonpublic school.