Labor & Employment Issues
In Focus
Pitta LLP
For Clients and Friends
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SCOTUS HOLDS "WHOLLY GROUNDLESS" EXCEPTION TO ARBITRABILITY WHOLLY GROUNDLESS

Continuing both lines of decisions supporting arbitration and strictly construing contracts, the U.S. Supreme Court unanimously held that, where a contract so provides, the question of arbitrability – whether a particular issue must be arbitrated - is for the arbitrator, even if the argument for arbitrability of a particular dispute appears "wholly groundless" to the court. *Henry Schein, Inc. v. Archer & White Sales, Inc*., U.S. No. 17-1272 (Jan. 9, 2019).

Archer & White sued Schein seeking monetary and injunctive relief for federal and state anti-trust violations. Schein moved to compel arbitration instead, citing the parties' contract providing for arbitration of "any dispute." Archer countered that the provision also expressly stated "except for actions seeking injunctive relief." But, responded Schein, the contract incorporated the American Arbitration Association's arbitration rules, and those rules empowered the arbitrator to decide whether an issue was arbitrable. Even so, the District Court and U.S. Court of Appeals for the Fifth Circuit denied arbitration because, given the express injunction exception, a decision for arbitration would be "wholly groundless," they explained.

Justice Brett Kavanaugh, writing for a unanimous Court, reversed and remanded. Initially, Justice Kavanaugh affirmed the general rule that so long as the delegation is "clear and unmistakable," a court may not decide an arbitrability question that the parties have delegated to an arbitrator. Next, he rejected the notion that since the Federal Arbitration Act ("FAA" or "Act") provided for post award judicial review of arbitrability, courts should likewise decide arbitrability pre-award, because "Congress designed the Act in a specific way, and it is not our proper role to redesign the statute." Similarly, Justice Kavanaugh rejected the purported cost-saving efficiencies of deciding arbitrability first because "the Act contains no 'wholly groundless' 'exception' and any efficiencies would be eclipsed in litigating the exception. Finally, Justice Kavanaugh found no danger of frivolous arbitrations since "arbitrators can efficiently dispose of frivolous cases." In short, the Supreme Court held:

> "We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties contract delegates the arbitrability question to an arbitrator, a court may not override the contract . . . That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless"

On its face, *Henry Schein* undoubtedly provides welcome support for labor arbitration and in particular those collective bargaining agreements stating that the arbitrator decides arbitrability. However, some questions for the court remain. First, the Supreme Court made clear that whether an agreement to arbitrate exists at all must be decided first by a court at the outset. Second, absent a verbatim delegation, courts can still determine an initial motion whether the contract delegates arbitrability questions to the arbitrator. Nevertheless, while

Henry Schein relies heavily on the FAA, whereas labor arbitration derives from Section 301 of the Labor Management Relations Act, its principle rejecting a "wholly groundless" exception easily transposes to labor, reaffirming arbitration as the primary forum for resolving all labor contract disputes, including arbitrability.

BUILDING TRADES MUST WRESTLE WITH HUDSON YARDS DEVELOPER IN STATE COURT BECAUSE TORT CLAIMS NOT PREEMPTED BY FEDERAL LAW

Hudson Yards, a multi-billion dollar construction project creating office and residential space on the west side of Manhattan, resulted in an equally massive labor dispute between the, Building and Construction Trades Council ("BCTC" or "Union") and developer Stephen Ross, Hudson Yards. Unsurprisingly, some aspects of the dispute have produced litigation. On January 15, 2019, Southern District of New York Judge Gregory Woods held that the project's construction manager could pursue state law tort claims against the Union in state court, over the Union's objections, because they are not preempted by federal law. *Hudson Yards Constr. LLC v. Bldg. & Constr. Trades Council of Greater New York & Vicinity*, 18-cv-2376 (S.D.N.Y. Jan. 15, 2019).

On January 16, 2013, the parties reached agreement on a project labor agreement ("PLA") for the first phase of the Hudson Yards project, permitting each of the approximately fifteen affiliated-member unions to be hired. Over time, the relationship soured and Hudson alleged breaches of the PLA. Hudson also refused to negotiate another PLA for additional work. Instead, Hudson allegedly sought to bid the project directly with individual contractors and their respective unions and trade councils. Plaintiff Hudson alleges that the Union subsequently engaged in: (1) tortious interference, by pressuring BCTC member unions to not individually negotiate with Plaintiff, and (2) defamation. Plaintiff brought its suit on March 8, 2018, in New York State Supreme Court, County of New York. The Union removed the case to federal court and Plaintiff filed a motion to remand to state court.

Judge Woods initially explained that the Union bore the burden of establishing that removal was proper. The Union alleged that this case presented a "federal question" under Section 301 of the Labor Management Relations Act ("LMRA"). LMRA 301 confers federal jurisdiction on suits for violation of contracts between employers and unions. Section 301 does not preempt state law when resolution of the state law claim does not require construing a labor agreement. On the contrary, if Section 301 preempted the state law claims, the Union could defend the action by arguing it did not violate the PLA. The Court, however, concluded that the tortious interference claim did not implicate any provision in the parties' 2013 PLA. Judge Woods similarly found no provision implicated by the defamation claim, noting that none of the allegedly defamatory statements even mentions the PLA. Moreover, the Court explained that malicious defamation, as pled by Plaintiff, is not preempted by Section 301 because the State's strong interest in protecting its residents overrides its interest in maintaining labor peace.

The Union also contended that LMRA Section 303 preempted Plaintiff's claims. Section 303 provides federal court jurisdiction for actions against unions for secondary activity in violation of the National Labor Relations Act ("NLRA"). The Court rejected the Union's preemption argument, finding that the Union failed to identify any neutral-secondary parties unconcerned with the outcome of the labor dispute. Judge Woods rejected the Union's "novel" argument that its own member unions were neutrals given the function and organization of the

BCTC. Finally, the Court offered a cap of dicta chiding the BCTC for historically contradictory positions with regard to its status as a labor organization under the LMRA.

The Court's decision means that the Union will now have to defend itself in state court under state law causes of action. While the Union may ultimately succeed, this loss diminishes its chance for a simpler resolution in a traditionally more favorable forum. Nevertheless, LMRA Section 301 remains a useful defense, when apposite, to state law claims against unions.

U.S. DEPARTMENT OF EDUCATION'S PROPOSED TITLE IX REGULATIONS SEEK TO PROTECT SEXUAL HARASSMENT COMPLAINANTS AND AT THE SAME TIME GIVE RESPONDENTS A FAIR PROCESS

On Nov. 16, 2018, the U.S. Education Department officially released proposed new rules on how to enforce Title IX, the federal statute that forbids sex and gender-based discrimination in public schools. The proposed regulations were open to public comment through Jan. 30, 2109. The rules replace those established under the Obama administration, which was viewed by many as being in favor of complainants, and by others as threatening to the due process rights of respondents accused of sexual misconduct.

The jurisdiction of Title IX will be limited to events that transpire on campus, or are properly described as school functions. In other words, the proposal would forbid schools from investigating most complaints of student-on-student harassment or rape that took place off campus, even if it had continuing effects on campus. The new rules also recognize differences between K-12 education and college: K-12 teachers, for instance, must initiate investigations if they become aware of sexual misconduct, whereas college professors do not have such an obligation - misconduct must generally be reported to the Title IX office for an investigation to be opened.

Below are a few ways the new rules will make changes on college campuses:

1) They define sexual misconduct more narrowly. Under the previous system, administrators were obliged to investigate any unwanted conduct of a sexual nature, which is a broad band of behavior. Some officials interpreted this to include routine speech that happened to involve gender or sex. But the new rules specify that Title IX is only infringed when conduct is severe, pervasive, and objectively offensive.

2) They mandate cross-examination. Previous guidance did not explicitly forbid cross-examination, but it heavily discouraged the practice due to concern that questioning an alleged sexual assault survivor would be re-traumatizing. The new rules state that neither the accuser nor the accused need to be physically present in the same room, but their attorneys—or support persons provided by the university—must be allowed to submit questions on their behalf for the other party to answer. There are some exceptions, such as, neither party may ask questions pertaining to their previous sexual history with other partners.

3) They allow colleges and universities to set their own evidentiary standards but require similar standards for non–Title IX adjudication. Currently, universities must adjudicate sexual misconduct under a preponderance-of-the-evidence standard: The accused is found guilty if there is 51 percent certainty that he or she is guilty. Under the proposed rules,

universities may use either this standard or the clear-and-convincing standard, which requires greater certainty. Also, the new rules stipulate that a university must use the same standard for Title IX as it does for other matters—even ones involving the faculty. If academic misconduct is adjudicated under a clear-and-convincing standard, sexual misconduct must be handled in such a manner as well.

Generally, the Department's proposed Title IX regulations narrow the circumstances under which schools would be required to investigate and adjudicate sexual harassment complaints, and, at the same time, impose more stringent procedural requirements.

TWO "MOTHER'S DAY" LAWS PASSED TO PROTECT NURSING MOTHERS IN THE WORKPLACE

Effective March 18, 2019, New York City employers must inform employees about the existence of a lactation room and the process for making lactation-related accommodation requests as well as ensure that their lactation rooms comply with the newly implemented standards. These new requirements are outlined in Intro 879-A and Intro 905-A, two bills that the New York City Council passed on October 17, 2018, which amend the New York City Human Rights Law.

Intro 879-A obligates employers to provide a lactation room, other than a restroom, in "reasonable proximity" to an employee's work area. This is consistent with section 206-c the New York State Labor Law and the guidelines released by the New York State Department of Labor to help employers interpret the State law, which requires that the lactation room be in "walking distance" to the employee's work area. Both laws require the lactation room contain a chair and a flat surface on which to place lactation devices. The amendment, however, now obligates employers to provide the following additional amenities, while the Labor Law simply "encouraged" employers to provide them:

1. A refrigerator suitable for breast milk storage and in reasonable proximity to the employees' work area;
2. An electrical outlet in the lactation room itself; and
3. Nearby access to running water.

Intro 905-A now requires employers to distribute a written lactation policy. The policy should advise employees about the existence and location of a lactation room and about the process for requesting lactation-related accommodations. Specifically, the policy must:

1. Specify how an employee may request a lactation room;
2. Specify the employer's obligation to respond to a request for a lactation room within five (5) business days;
3. Provide a procedure to use when two or more employees request the lactation room simultaneously, including contact information for any follow up required;

4. Specify that the employer shall provide reasonable break time for an employee to express breast milk, consistent with section 206-c of the State's Labor Law; and

5. State that if the request for a lactation room poses an undue hardship on the employer, the employer shall engage in a "cooperative dialogue" with a nursing mother to determine what alternate accommodation(s) may be available. Following such a dialogue employers must issue a written determination identifying any accommodation(s) granted or denied as required by another employee friendly bill passed by the New York City Council which went into effect City-wide on October 15, 2018,

To help employers comply with this requirement, Intro. 905-A directs the City Commission on Human Rights in collaboration with the Department of Health and Mental Hygiene to create and make publically available a model lactation accommodation policy.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

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