Schlossberg | LLC

Report From Counsel

Insights and Developments in the Law **Winter 2013/2014**

Class Action Waivers—An Undervalued Business Tool

By Brianne M. Dobush, Esq.

Due to a recent U.S. Supreme Court Decision, the Massachusetts Supreme Judicial Court ("SJC") has reluctantly changed its position on the enforceability of class action waivers in arbitration agreements. Before the U.S. Supreme Court issued its decision in *American Express Co. v. Italian Colors Restaurant*, the SJC held in *Feeney v. Dell, Inc.* ("Feeney II") that, despite the strong federal policy of enforcing arbitration agreements under the Federal Arbitration Act ("FAA"), a class action waiver in an arbitration agreement could be invalidated by a court if a plaintiff demonstrated that he or she could not effectively pursue the claim in individual arbitration due to the low value of any individual recovery.

However, eight days later, the U.S. Supreme Court issued the *American Express* decision and specifically held that "the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." This statement caused the SJC to revisit its earlier decision in Feeney II, and in a rescript opinion ("Feeney III"), the SJC stated that they were bound to uphold the U.S. Supreme Court's decision as a "controlling statement of Federal law." Therefore, the SJC will no longer invalidate a class action waiver

Continued on page four.

Due to a recent U.S. Supreme Court Decision, the Massachusetts Supreme Judicial Court ("SJC") has reluctantly changed its position on the enforceability of class action waivers in arbitration agreements.

What Is a REIT?

If investing in real estate appeals to you but you are not so well-heeled that you can go shopping for investment properties like they were appliances, you may want to give some thought to investing in one or more real estate investment trusts (REIT). As you would with shares of common stocks, you can buy and sell different REITs, and having REITS in your portfolio of investments could be a good way to add some diversification. Another attraction for REITs is that you can invest in them with relatively small amounts of money, as compared with the sums required to buy the real estate itself.

There are two basic categories of REITs, although even within each category there are variables to consider. An equity REIT owns a mix of stocks and one or more pieces of property, often specializing in a particular type of real estate, such as shopping centers. As the name suggests, a mortgage REIT owns debt instruments, buying existing mortgages, collecting payments on them, then passing on the money to investors.

The fortunes of the two kinds of REITs rise and fall with the markets in different ways. Equity REITs prosper in a strong real estate market and when the values of stocks are on the rise. Shares in mortgage REITs, combining the features of real estate and bonds, tend to trade with the bond market, so that when interest rates rise, mortgage REIT shares generally fall along with bond values.

The federal tax code requires a REIT to pay investors at least 90% of its taxable income each year. This means that REITs pay little or no corporate income tax, thus improving on the tax treatment of dividends, which can be taxed twice, with both the company and the shareholders owing taxes on them.

The end result is that REITs potentially can have relatively high returns. Within the general category of REITs, there are significant differences in such features as levels of risk and the limitations on when an investor can sell his or her shares. As with any investment, you should collect and understand all information for any REITs being considered before investing.

Schlossberg | LLC
35 Braintree Hill Office Park, Suite 204 • Braintree, MA 02184 • (781) 848-5028
Fax: (781) 848-5096 • Website: www.sabusinesslaw.com • E-Mail: e-mail@sabusinesslaw.com

When Is an Employee a "Supervisor"?

Title VII of the Civil Rights Act of 1964 prohibits the creation of a harassing hostile work environment based on the prohibited forms of discrimination, such as discrimination based on sex or race. To hold the employer liable for the harassment, the plaintiff must show that the work environment was so pervaded by discrimination that the terms and conditions of employment were altered. Isolated or trivial occurrences are not likely to be sufficient.

Recently the Supreme Court clarified the issue of when a harassing fellow worker is a "supervisor" and not merely a coworker for purposes of making the employer entity liable for that harassment. In the case before the Court, the plaintiff was an African-American employee in a university's catering department. She alleged that a white employee to whom she had been assigned as an assistant harassed her by using racial epithets and relegating her to menial jobs because of her race.

The plaintiff argued that the harasser was the plaintiff's "supervisor" for Title VII purposes because the harasser had been given the ability to exercise significant direction over the plaintiff's work, a power that also enabled her to racially harass the plaintiff. In

Continued on page three.

Recently the Supreme Court clarified the issue of when a harassing fellow worker is a "supervisor" and not merely a coworker for purposes of making the employer entity liable for that harassment.

If the harassing employee is the victim's coworker, that is, someone no higher in the chain of command than the victim is, the employer is liable under Title VII only if it was negligent in controlling working conditions. However, if a supervisor's harassment of an employee culminates in a tangible employment action, such as a termination or a demotion, the employer is strictly liable under Title VII.

When, as is very often the case in harassment litigation, there has been no tangible employment action taken against an employee who is harassed by a supervisor, under prior U.S. Supreme Court precedents the employer may escape liability under Title VII by establishing a two-pronged affirmative defense. The employer must prove that (1) the employer exercised reasonable care to prevent and correct any harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided.

Deducting the Business Use of Your Home

The federal income tax deduction for the business use of a home has a good dollars-and-cents upside for those who qualify. Some detailed questions have to be answered correctly to get to that point, however. Not surprisingly, the IRS publication on the subject makes use of a complex flowchart filled with "yes or no" questions to guide taxpayers to a determination of their eligibility for the deduction.

Qualifying for the Deduction

To pass the threshold for use of the home business deduction, a taxpayer must satisfy the following two basic sets of requirements: The first set concerns the nature of the business activities, while the second set relates more to the place itself.

First, the use of the business part of the home must be exclusive (with exceptions to be discussed), regular, and for the business. Second, the business part of the home must be one of the following: the principal place of business—the place where the taxpayer meets or deals with patients, clients, or customers in the normal course of business—or a separate, detached structure used for business.

The exclusive use factor means that the area is used *only* for business, not for a mixture of business and personal uses. However, the exclusive use requirement does not have to be met when a part of the home is used for the storage of inventory or product samples or for a day-care facility. Be aware that not every activity that makes money for the taxpayer constitutes the use of the home for a trade or business: If you use a computer in your den for day-trading stocks or online gambling, do not count on taking the deduction.

As for what constitutes a "regular" use for business, that essentially means business conducted on a continuing basis, not occasionally. Even if a taxpayer has a place in the home used exclusively for business, the deduction is not available if the business activity is only sporadic.

As for the requirements relating to the place itself, the area in the home used for business is a "principal place of business" if it is used exclusively and regularly for the administrative or management activities of the business and there is no other fixed location where substantial activities of that kind are carried out. If some business is

Continued on page four.

Weather the Storm

Superstorm Sandy and, before that, Hurricane Katrina were just two of many dramatic reminders that millions of us are vulnerable to destructive storms that cause injuries, deaths, and property damage on a scale that is often hard to comprehend. But even a comparatively minor storm that doesn't dominate the headlines can wreak havoc with those unfortunate enough to be in its path. Here are some tips for preparing yourself and your family for dealing with a damaging storm and its aftermath.

Stock Up

The moment when you are in the crosshairs of an approaching storm is no time to be scurrying around town for necessities. While skies are still clear, here are some things you should do:

- Put together an emergency kit, with such items as a whistle, dust masks, flashlights (with batteries), drinking water, basic first aid items, and any needed medications;
- Fuel up your vehicles and a gas generator (and a chainsaw, if you have one);
- Recharge your cell phones;
- Keep at least a three-day supply of nonperishable foods;
- Make sure fire extinguishers have adequate pressure;
- Inform your local utility and fire department if someone in your home uses special medical equipment (your power could get restored sooner);
- Get a battery-powered or hand-cranked radio for getting information during a weather emergency; and
- Keep some cash on hand.

Batten Down the Hatches

To secure your property and valuables as best as time and other circumstances will allow, shut all windows, blinds, shades, and drapes and, over the longer run, consider installing impact-resistant windows or hurricane shutters. To keep them from becoming projectiles, move indoors all outdoor objects that are vulnerable to high winds. Park cars on the highest ground available, but not under trees, and move valuable personal property and important documents to higher floors if flooding is possible.

When the Storm Hits

During a severe storm, stay in a centrally located room in your house that doesn't have windows. If flooding or even significant wetness is an issue, don't use devices you need to plug in, and avoid using landline phones. Skip baths and showers until the storm has passed. Be on the lookout for downed power lines and live wires. And as you hunker down, be glad if you took steps to stock up and otherwise prepare for the storm.

The Aftermath

With luck, you and your family can come through a major storm relatively unscathed. But there are some adverse consequences of storms that are not as obvious as flattened or completely flooded homes but that will still need immediate attention. Check for mold in your home and remediate it as soon as possible, getting professional help if the mold is widespread. Run one or more dehumidifiers to dry out the house. If high water reached your furnace or boiler, before turning it back on have a professional check it out for water damage. Likewise, if at any point your vehicles looked like boats on a pond, get them inspected before you try to crank them up.

When the time comes to submit insurance claims for damage to your property, for availability and costs of your future coverage it makes sense to submit one larger claim rather than a series of smaller claims. Having photos of your property before and after storm damage can also facilitate a successful outcome for your insurance claims.

Employee or Supervisor

Continued from page two.

this argument the plaintiff had no less an ally than the Equal Employment Opportunity Commission, which had taken basically the same position in an enforcement guidance it had issued.

The Court rejected the plaintiff's claim, finding that for a harassing individual to be considered a "supervisor" under Title VII, with all that that means for employer liability, a more demanding and restrictive definition of "supervisor" was appropriate. Unlike the harasser in the case before it, whose powers over the plaintiff did not extend beyond generally directing her daily activities, a fellow employee will be considered a supervisor only when the employer has empowered that employee to effect a significant change in the victim's employment status.

To be a supervisor, the employee must be empowered to take tangible employment actions against the victim such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Business Use of Home

Continued from page two.

transacted at more than one location, determining whether the home location is the principal place of business requires consideration of the relative importance of the activities at each location.

If that does not provide an answer, the time spent at each site should be considered. Remember that the deduction is available if either the home is the place for meeting with patients, clients, or customers, or a separate structure on the premises is dedicated for business.

If the taxpayer is an employee using part of his or her home for business, the deduction is available if all the requirements described above are met, plus additional tests. The business use must be for the convenience of the employer (not just appropriate or helpful). If the taxpayer rents part of his or her home to his or her employer and uses the rented part in performing services for the employer as an employee, the deduction for the business use of the home is limited.

Mortgage interest, qualified mortgage insurance premiums, real estate taxes, and personal casualty losses for the rented part are deductible, subject to any limitations. However, the taxpayer cannot deduct otherwise allowable trade or business expenses, business casualty losses, or depreciation related to the use of the home in performing services for the employer.

What Is Deductible?

Deductible expenses for a business use of the home include items such as the business portion of real estate taxes, deductible mortgage interest, rent, casualty losses, utilities, insurance, depreciation, painting, and repairs. This is not likely to be an all-or-nothing proposition, though. Generally, an expense is fully deductible if it is direct, that is, incurred only for the business part of the home.

An indirect expense, incurred for running the home as a whole, is deductible based on the percentage of the home used for business. Any reasonable method for determining that percentage is acceptable, such as dividing the square feet used for business by the total square feet or dividing the number of rooms devoted to business by the total number of rooms. If an expense is unrelated to the business part of the home, it is not deductible at all.

If the taxpayer's gross income from the business use of the home is lower than the total business expenses, the deduction for certain expenses will be limited. But those expenses that cannot be deducted because of such a limitation can be carried forward for the next year's home business expenses.

A new development in 2013 was the IRS offering of a simplified option for figuring deductions for the business use of a home. Instead of involving the sometimes complex calculations generally required for taking the deduction, the new "safe harbor" method, starting with the 2013 return that most taxpayers will file in 2014, makes the calculation easier. It caps the deduction at $1,500 per year, based on $5 per square foot for up to 300 square feet of space.

Bear in mind, though, that the basic requirements for claiming the deduction still apply even if the safe harbor method is used. All in all, it would be prudent to consult your tax advisor as to whether the "old" or the "new" method of calculating the deduction is better in your particular circumstances.

Class Action Waivers

Continued from page one.

in an arbitration agreement due to a public policy exception addressing the financial impracticality of an individual pursuing a low value claim.

The Feeney III case was based in consumer law, but it is likely that the SJC will apply this reasoning to employment cases as well. Even if the SJC attempted to hold onto its public policy exception for low-valued claims in the employment context, it would be a rare occasion that such an exception would be applied, as employment cases tend to yield higher damages for plaintiffs than a consumer case due to state statutes permitting triple damages and attorneys' fees. Further, the SJC addressed class action waivers in arbitration agreements in the employment law context in *Machado v. System 4 LLC* and held that the class action waiver in that case was enforceable. However, the SJC did strike down a provision in the arbitration agreement waiving multiple damages, as it was contrary to mandatory provisions of the Massachusetts Wage Act.

The use of arbitration agreements in the employment law context can benefit employers, as arbitration usually leads to a quicker resolution of claims, allows the case to be kept out of the public eye, and typically involves less discovery, a costly factor in litigation. With the recent case law in Massachusetts, it is important to also include class action waivers in any arbitration clause or agreement. If an employer faces a class action lawsuit by its employees, any damages can quickly multiply. If you have more questions about the benefits of using arbitration agreements and class action waivers in the employment context, please contact us.