## August, 2015

# I. EMPLOYMENT LAW

### Plaintiffs' Assent to Company Arbitration Policy By Continuing to Be Employed

In *Jaworski v. Ernst & Young US LLP*, ___ N.J. Super. ___, 2015 N.J. Super. LEXIS 120 (July 23, 2015), three Ernst & Young employees sued for age discrimination under the New Jersey Law Against Discrimination. Ernst & Young filed a motion to dismiss and compel arbitration, which was granted by the trial court. The employees appealed.

In 2002, Ernst & Young adopted its "Common Ground Program." As part of the program, employment disputes were to be first handled through mediation and then, if that was not successful, through arbitration. The program barred employees from filing lawsuits. The program was amended several times in the following years. In these amendments the employees were not asked to affirmatively indicate their assent. Rather, the policy stated that by continuing employment, each employee understood and assented to the policy.

On appeal, plaintiffs challenged the enforceability of the mandatory arbitration policy on constitutional, statutory and common law grounds. The court was faced with the issue of whether, if the policy states assent is given by continued employment, remaining employed with the company indicates that the employee affirmatively has agreed to arbitrate his claims pursuant to the changed policy.

The Appellate Division reviewed well-established case law that provided that signed assent is required for the enforcement of an arbitration agreement. The panel held that the case did not control because there the employee was expected to sign in order to indicate agreement. In this matter, the employer did not seek a signature, but rather provided that the mere continuation of employment meant that the employee, read, understood and agreed with the policy, even if the employee did not actually read or understand the policy. As such, the court held that all of the plaintiffs had assented to the arbitration policy by continuing to be employed.

Plaintiffs made several other arguments: (1) the Program constituted an illusory agreement because Ernst & Young retained the right to unilaterally modify its terms; (2) plaintiffs never agreed to arbitrate claims relating to the termination of their employment; (3) the Program is not a valid waiver of plaintiffs' constitutional and statutory rights to a jury trial; and (4) the Program is unconscionable since it imposes substantial forum costs on plaintiffs they would not incur if proceeding in a court of law. The court rejected each of these arguments.

The court concluded that Ernst & Young's ADR policy was valid and enforceable as to plaintiffs, and held the trial court properly dismissed the complaint in favor of mandatory arbitration.

# II. INSURANCE LAW

### Statute of Limitations for Declaratory Judgment Action Begins to Accrue When the Insurer Becomes Aware that It May Not Have a Duty to Defend and Indemnify

In *Selective Way Ins. v. Hospitality Group, Inc.*, 2015 Pa. Super. LEXIS 398 (Pa. Super. Ct. July 7, 2015), seventeen-year-old Sean Nemcheck was killed in a car accident where he was driving his motor vehicle under the influence of alcohol. The accident occurred after Sean consumed alcohol that he allegedly obtained from the Ramada Inn during his sixteen-hour shift at the hotel.

On August 1, 2007, Terri Nemcheck filed the underlying negligence action. Selective provided a defense subject to a reservation of rights. In its reservation of rights letter dated July 31, 2007, Selective advised Hospitality Group that it was unsure whether it had a duty to defend and/or indemnify Hospitality Group in the underlying action and that coverage counsel would review the complaint and pertinent case law.

In June 2012, Selective filed a complaint seeking declaratory judgment that it had no duty to indemnify or defend Hospitality Group. Terri Nemcheck and Hospitality Group argued the four-year statute of limitations barred Selective's claim. The trial court held the statute of limitations began to run when Selective became aware of the allegations in the Nemcheck action nearly five years before the declaratory judgment was filed. Therefore, the trial court held that the declaratory judgment action was untimely.

Selective appealed the case, but later settled with Hospitality Group before the oral argument took place. The Superior Court chose to hear the appeal, however, deciding it presented an exception to the mootness doctrine.

An en banc Superior Court panel set forth the law as to when the 4 year statute of limitations on insurance declaratory judgment actions begins to run. The court provided that the basic principle is that "the statute of limitations for a declaratory judgment action brought by an insurance company regarding its duty to defend and indemnify begins to run when a cause of action for a declaratory judgment accrues." The Court specified:

> This requires a determination of when the insurance company had a sufficient factual basis to present the averments in its complaint for declaratory judgment that the insurance policy at issue does not provide coverage for the claims made in the third party's action. It is possible for the insurance company to possess sufficient information at the time it receives a complaint [against the insured] to cause the statute of limitations to begin to run; or that may not occur until the case develops and the claim is winnowed down to a recovery the insurance company believes is not covered by the policy of insurance. This requires the trial court to determine when the insurance company had a sufficient factual basis to support its contentions (as set forth in its complaint for declaratory judgment) that it has no duty to defend or indemnify the insured.

The court did not remand the case for the trial court to make the necessary factual determination of when Selective had a sufficient factual basis to trigger the running of the statute of limitations because the case was technically moot.

## Pennsylvania Supreme Court Rules that Insurer's Consent to Settle Not Required if Insurer Is Defending Under Reservation of Rights

In *Babcock & Wilcox Co. v. Am. Nuclear Insurers*, 2015 Pa. LEXIS 1551 (Pa. July 21, 2015), American Nuclear Insurers provided coverage at the Apollo and Parks nuclear fuel processing facilities initially owned by Babcock and Wilcox at the time of the suit. Five individuals and three class representatives filed suit alleging bodily injury and property damage as a result of exposure to radioactive emissions. It later grew to a class of over 500 plaintiffs. The defendants denied the allegations of liability and damages.

A "test" case of eight plaintiffs went to a verdict of $33.7 MIL against Babcock and Wilcox and its predecessor, Atlantic Richfield Company (ARCO) (Insureds), plus $2.8 million against only Babcock and Wilcox. A new trial was granted based on evidentiary issues.

While the underlying tort action was pending in federal court, disputes arose between insureds and their insurers, Appellees American Nuclear Insurers and Mutual Atomic Energy Liability Underwriters. At the outset of the litigation, the insurer acknowledged that it would defend insureds but contested whether the policy covered aspects of the claims, and thus defended subject to a reservation of rights.

Separately, American Nuclear filed a declaratory judgment action to determine whether American Nuclear was required to provide ARCO with separate counsel and alleging bad faith and breach of contract against Babcock and Wilcox. Babcock and Wilcox counter-sued for bad faith and similar declaratory relief.

During the course of the litigation, the insurer refused consent to any settlement offers presented to it due to its conclusion that the case had a strong likelihood of a defense verdict given the lack of medical and scientific support for plaintiffs' claims and decisions by the federal trial court regarding procedural and evidentiary issues in the pending retrial, which insurer viewed as highly favorable to the insureds' ultimate outcome. Nevertheless, after presenting the settlement offers to the insurer and being denied consent, insureds, ARCO and B&W, settled with the class action plaintiffs for a total of $80 million, which was substantially less than the $320 million of potential coverage.

Insureds then sought reimbursement of the settlement amount from insurer in the Allegheny County Court of Common Pleas. American Nuclear countered that reimbursement was not permissible because the insurance contract contained a standard consent to settlement clause, also referred to as a cooperation clause, requiring insureds to cooperate with insurer and to obtain insurer's consent to settle. The trial court agreed with American Nuclear, but the Pennsylvania Superior Court reversed the trial court.

On appeal, the Pennsylvania Supreme Court was faced with an issue of first impression regarding whether an insured forfeits insurance coverage by settling a tort claim without the consent of its insurer, when the insurer defends the insured subject to a reservation of rights, asserting that the claims may not be covered by the policy.

The Pennsylvania Supreme Court held that when an insurer is defending its insured in a liability claim subject to a reservation of rights because coverage is in doubt, the insured may settle the claim without the insurer’s consent, and recover the settlement amount from the insurer as long as coverage is found to exist and the settlement is fair and reasonable and made without collusion. The Pennsylvania Supreme Court rejected the insurer’s argument for applying Pennsylvania’s long-standing Cowden bad faith standard, under which the insurer would be required to pay the settlement only if the insurer acted in bad faith in refusing to settle. The Pennsylvania Supreme Court also rejected the Superior Court’s decision in Babcock & Wilcox, 76 A.3d 1 (Pa. Super. 2013), to adopt Florida’s “Insured’s Choice Test,” under which an insured can elect to reject a defense offered subject to reservation of rights, defend the case at its own expense, and then, if coverage exists, recover the amount of a judgment or any fair, reasonable and non-collusive settlement.

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