

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2011

PHILADELPHIA, MONDAY, APRIL 18, 2011

VOL 243 • NO. 74 An **ALM** Publication

LITIGATION

Res Judicata, Collateral Estoppel and Arbitration

ADR

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Special to the Legal

Justice Potter Stewart explained res judicata [or claim preclusion] as “a final judgment on the merits of an action [that] precludes the parties or their privies from relitigating issues that were or could have been raised in that action”; and, with respect to collateral estoppel, [or issue preclusion], “once a court has decided an issue of fact or law necessary to the judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” (See *Alien v. McCurry*.)

Claims and issues resolved by arbitration are similarly entitled to both claim and issue preclusion. But often, because of the informality of arbitration proceedings and the entry of an award unaccompanied by a reasoned opinion, it is difficult to determine what claims or issues may have been resolved.

In particular, commercial litigation, involving a multitude of claims and parties, may result in uncertainty regarding the preclusive effect of arbitration awards. This was reflected recently in a March 23 opinion of the 1st U.S. Circuit Court of Appeals, *FleetBoston Financial Corp. v. Alt*.

According to the 1st Circuit’s opinion, Alt was part of a group of employees (collectively “Alt”) of RSI, an investment banking firm that was a wholly owned subsidiary of RSGI, itself a wholly owned subsidiary of Fleet. As Fleet was winding down the affairs of RSI, Alt filed numerous, varied claims in a New York Stock Exchange (NYSE) arbitration against RSI, RSGI and



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Fleet for breach of obligations arising out of the employment relationship. As a member of the NYSE, RSI was required to arbitrate these claims.

Thereafter, the 1st Circuit wrote, RSGI informed the Alt employees that by their actions they had forfeited the benefits of certain deferred compensation plans. Consequently, Alt added to the arbitration claims against all three defendants for the benefits of the deferred compensation plans. RSGI and Fleet did not answer these added claims, but sought dismissal by the arbitrators on the ground that they were not members of the NYSE.

In addition, RSI, RSGI and Fleet filed an action in the federal district court in Massachusetts against Alt seeking a stay of the arbitration as to RSGI and Fleet on similar grounds that they were not members of the NYSE and had never agreed to arbitration. The court declined to stay the arbitration; instead, it stayed the court proceedings pending final resolution of the NYSE arbitration. In light of this stay, the Alt employees filed a counterclaim with respect to the deferred compensation plans, to assure that if it were ultimately determined that the arbitrators lacked jurisdiction with respect to those plans, the statute of limitations would not have run.

After the request for the stay was declined,

all parties requested clarification from the court as to whether its order required RSGI and Fleet to arbitrate. The court responded that its order had not required RSGI or Fleet to arbitrate, and that it was of the view that this issue was properly left for the federal court for the Southern District of New York. Alt never sought such an order from the New York court.

After the arbitration commenced, RSGI continued to maintain that it could not be forced to arbitrate. Alt argued in opposition that the arbitrators had jurisdiction over RSGI. Alt further argued that the claim against RSGI also lay against its subsidiary, RSI, as the two companies were so interconnected that the actions of RSGI could be imputed to RSI. Consequently, the claims asserted by Alt with respect to the deferred compensation plans against both RSI and RSGI in the arbitration were identical to those asserted in the federal court counterclaim.

The arbitration panel issued a monetary award in favor of most of the Alt employees as a “full and final settlement of all claims between the parties,” the opinion said. The caption did not include RSGI. However, its award did not indicate which of Alt’s numerous claims were successful and which were not. Alt requested that the arbitration panel clarify that it had rendered the award against RSI alone and not against RSGI or with respect to the deferred compensation claims. Its objective, of course, was to assure that the deferred compensation claims had not been subsumed within the general monetary award and were still viable. The panel, however, refused to modify the award.

The parties then returned to the district court, with Alt seeking to pursue the deferred compensation counterclaims against

RSGI, asserting that they were unresolved by the arbitration panel. In response, RSGI moved for summary judgment on the ground that the arbitration award had resolved those very claims, which were now precluded. Before addressing these conflicting positions, however, the court confirmed the award; no party challenged the confirmation or requested a remand to the arbitrators for clarification as to whether the award extended to RSGI or the deferred compensation claims.

After the award was confirmed, the district court concluded that RSGI had been a party to the arbitration, and that the panel's award had resolved the deferred compensation claims so that they need not be addressed by the court. Alt appealed.

The appellate court concurred that the arbitral award encompassed the deferred compensation claims. In reaching this decision, the court recognized that the arbitrators had not specified the claims on which the award had been based and, more specifically, whether the amounts awarded included the compensations claims. Indeed, it noted that the monetary award may have reflected one of several conclusions by the panel:

- That the award included some amount for the deferred compensation claims.
- That the award did not resolve these claims because the arbitrators had determined that they could not be brought before the arbitrators.
- That the award included no payment for these claims because the defenses with respect to them were correct.
- That RSGI was, in fact, the alter ego of RSI, so any award or denial of this claim as to RSI also disposed of the claim against RSGI.

Moreover, even though there was no reasoned opinion from the arbitration panel clarifying these points, the totality of the circumstances reflected that the award did determine the deferred compensation claims and should be binding upon Alt for the following reasons:

- The arbitrators' award stated that they were resolving "all of the claims between the parties," and these claims had clearly been raised against all of the respondents, including RSGI.
- The arbitrators heard evidence with regard to these claims including testimony

from executives of Fleet, RSGI's parent company.

- Alt had argued to the arbitrators that RSGI need not be a formal party for these claims to be resolved because it could prevail on these claims against RSI as the alter ego of RSGI.

- The arbitrators' case summary unambiguously demonstrated that Alt's compensation claims were before the panel.

The court emphasized that Alt's argument that the arbitration panel lacked jurisdiction over RSGI was rejected because Alt had always insisted that RSGI should be considered a party, had named RSGI as a party and had claimed that RSGI was not prejudiced by being so included. Moreover, Alt had argued that RSI, which clearly was a proper party, was the alter ego and proxy for RSGI so that it acquiesced in the position that any finding against RSI also included RSGI.

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Inaction by Alt further supported a decision not to remand the matter to the arbitrators:

- Alt did not seek a remand by the court to the arbitrators before confirmation of the award.
- Alt failed to pursue remedies available under the FAA to cure what it was claiming were ambiguities in the award.

The court concluded, therefore, that claim preclusion applied because the party asserting the res judicata defense (RSGI) had established: "(1) a final judgment on the merits in an earlier suit, (2) sufficient

identity between the causes of action asserted in the earlier and later suits, and (3) sufficient identity between the parties in the two suits."

The court acknowledged that it is sometimes difficult to determine whether these factors have been satisfied following an arbitration award, but found no such difficulties here for the reasons stated above.

What is apparent, however, is that claim preclusion based upon an arbitral award may result, even in those situations where the basis for the award has not been explained. Arbitrators generally have no duty to set forth the reasons underlying their award and a failure to make detailed supporting findings does not render such a final settlement ambiguous as to the matters resolved.

Various lessons may be learned from this litigation. First, if you casually file a claim against a questionable party in an arbitration, you may unexpectedly find yourself precluded from proceeding against that party in court. Second, if you believe that the award of the panel is ambiguous, you should, in a timely manner, avail yourself of all procedural options to assure that there is no finding that you waived that contention.

And, perhaps most critically, if it is apparent that there may be uncertainty as to the parties who may be subject to the arbitration or the scope of the issues that may be arbitrated, a request should be made of the arbitrators, at the commencement of the arbitration, to provide a reasoned opinion with specific findings that would assist the parties in resolving later ambiguities with respect to the scope of the award.

Similar but perhaps more confusing issues are presented when dealing with collateral estoppel (issue preclusion) following arbitration. Those, regrettably, must remain for a future article. •