

STATE LAW AUTHORIZING CONFIDENTIAL ARBITRATION PROCEEDINGS VIOLATES FIRST AMENDMENT

On August 30, 2012, the United States District Court of Delaware handed down its decision in a lawsuit initiated by the Delaware Coalition for Open Government (DelCOG) against the Hon. Leo R. Strine, Jr. and the Court of Chancery. The plaintiffs in the case sought to challenge the confidential-dispute-resolution proceeding laws established by the State Legislature in April 2009 on the basis that they violated the First Amendment qualified right of public access to judicial proceedings. The controversial laws granted the Court of Chancery “the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute.” Even though arbitration is a very common dispute-resolution procedure and often conducted by former judges, the issue in the new Delaware laws was that *sitting* judges were performing the arbitrations.

The new confidential-dispute-resolution laws did not open such proceedings to everyone and were not available in every case. The laws required that the parties must consent either by arbitration agreement or stipulation in order to have the Court of Chancery arbitrate their dispute. Access was authorized only if at least one of the parties was a business entity and one a Delaware citizen; however, no party could be a consumer, meaning “an individual who purchases or leases merchandise primarily for personal, family, or household purposes.” 6 Del. C. § 2731(1). The guidelines did not require a monetary minimum amount in controversy if the damages sought were for equitable relief; however, if only monetary damages were sought, then the amount in controversy had to be over \$1 million. This was a significant change because before the Court of Chancery had limited jurisdiction to hear only equitable disputes. The new law now allowed the court to hear controversies involving monetary damages.

Many national corporations are based in Delaware, so the state courts are often the choice forum for many business disputes. The Delaware Legislature proposed the new laws as an attempt “to preserve Delaware’s pre-eminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters.” They were meant to keep the Court of Chancery “at the cutting-edge in dispute resolution.” Del. H.B. 49 syn., 145th Gen. Assem. (2009).

Attacking the arbitration laws, DelCOG argued that they denied the public its right of access to judicial proceedings granted by the First Amendment because the laws authorizing these arbitration proceedings were merely disguised litigation. They claimed that these arbitrations resembled bench trials in a civil suit in the following ways:

- the arbitrator is not privately retained by the parties, but rather a sitting judicial officer whose powers are granted by the state;
- the arbitrator functions similarly to a judge in a bench trial by analyzing evidence and hearing arguments;
- the costs and fees are paid to the court;
- the proceeding is conducted in a courthouse;
- the government pays the salary of the arbitrator and provides the resources needed in the courthouse; and

- the arbitrator's decision is legally binding without any further judicial confirmation. Finally, DelCOG argued that the importance of the public's right to access civil trials was necessary because it "enhances the quality and safeguards the integrity of the factfinding process" and "fosters an appearance of fairness, and heightens public respect for the judicial process." 457 U.S. 596, 606 (1982).

The defendants' position was that the First Amendment does not afford the public access to arbitration proceedings, and this has been true historically, both nationally and internationally. The defendants also pointed out that the confidential dispute-resolution proceeding benefitted Delaware business entities by providing local confidential arbitration for commercial disputes, without which such businesses might choose to operate outside of Delaware altogether. They also pointed out that the new arbitration procedures could reduce the delays and costs of litigation, which would increase the appeal of conducting business within the state.

Ultimately, the federal judge assigned to hear the case ruled in favor of DelCOG and struck down the new Delaware laws. Her reasoning was that the arbitration procedures essentially resembled a civil trial, which the Constitution requires to be open to the public under the First Amendment. When there are state-paid judges presiding over the dispute in state-supported facilities, the public must have access to the proceedings.

In regard to Louisiana, while this case might not have immediate impact, it will discourage the Louisiana Legislature from enacting any future laws authorizing sitting judges to arbitrate disputes. Even though the U.S. 5th Circuit Court of Appeals has not seen a case where the arbitration proceeding resembles a civil trial, it is highly likely that the courts will hesitate to forbid access to the media or the public. The First Amendment right of public access is an integral part of our judicial system, ensuring the fair administration of justice. After this case, we can expect that any legislative attempt to cut costs or increase the efficiency of litigation will not involve the authorization of confidential judicial arbitration.

Del. Coalition for Open Gov't v. Strine, ____ F.Supp.2d ____, 2012 WL 3744718 (D. Del. Aug. 30, 2012).

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