

## **Supreme Court of Virginia Affirms Order Refusing To Compel Arbitration**

Given the delays and costs imposed by litigation, many parties have insisted that clauses be inserted into contracts to require that disputes be arbitrated, rather than litigated in Court. For the most part, Courts are willing to enforce such agreements, and there is a public policy preference under Federal law and the laws of most states to require arbitration where the parties have signed an agreement requiring that disputes be arbitrated.

In a recent case decided by the Supreme Court of Virginia on June 7, 2002, however, the Supreme Court outlined an exception to the general trend of enforcing arbitration provisions. The case was Amchem Products, Inc., et al. v. Newport News Circuit Court Asbestos Cases, No. 012576.

The case arose from a massive lawsuit filed by 597 different plaintiffs against various asbestos manufacturers and distributors. The asbestos claims were resolved with the assistance of a third party called the "Center for Claims Resolution" (an organization created to evaluate, negotiate, litigate, and settle asbestos related personal injury cases against its members). In a "Master Settlement Agreement" signed in July 2000, the parties agreed to settle the asbestos claims. One provision of the Master Settlement Agreement required arbitration of disputes arising under the Agreement. The Center for Claims Resolution, which had helped negotiate the Master Settlement Agreement, was a party to the Master Settlement Agreement.

Separately, in October 2000, the Center for Claims Resolution issued a letter that amended, in part, the Master Settlement Agreement. It changed the terms of payments due to the original plaintiffs in the asbestos litigation, and permitted "a remedy in contract" for any failure to make payment as required.

Due to a failure of some of its members to make required payments to the organization, the Center for Claims Resolution failed to make payments to the plaintiffs as required. Plaintiffs filed a motion to enforce the Master Settlement Agreement, asking the Circuit Court of Newport News, Virginia to enter a judgment against the Center for Claims Resolution and its member companies for the required payments, plus interest and attorneys' fees.

The Center for Claims Resolution and its member companies moved to compel arbitration, under the arbitration provision in the original Master Settlement Agreement. The Circuit Court denied the motion to compel arbitration, and an interlocutory appeal was taken from that ruling.

The Supreme Court noted the strong public policy preference favoring arbitration, but affirmed the determination of the Circuit Court. Employing a standard contract interpretation analysis, the Supreme Court noted that although

the original Master Settlement Agreement contained an arbitration provision, the October 2000 modification allowed for “a remedy in contract” in the event of a failure to make payment. Since the modification did not restrict the “remedy in contract” to an arbitration proceeding, the Court held that the arbitration provision was deleted through the modification: “We must construe the words as written in the contract, and we will not make a new contract for the parties.”

It is not clear that, in entering into the October 2000 modification, the parties intended to eviscerate completely the arbitration provision. Nevertheless, that was the unambiguous result of the modification, and the Supreme Court followed traditional rules of contract interpretation in so holding.

Where the parties do not clearly and unambiguously provide for arbitration of disputes, notwithstanding the public policy preference for arbitration, courts are hesitant to step in and require arbitration. Amchem Products sends a clear warning of caution to those trying to require arbitration of disputes – the requirement can be modified if the parties are not careful.