

## **New Jersey Law Journal October 21, 2002**

### **AAA's Impartiality Challenged by Lawyer Seeking Alternate Forum**

#### **Claims big-business bias based on fees paid for arbitration services**

10-21-2002

A lawyer for plaintiffs in commercial suits against a company claims that his clients should not be required to arbitrate through the American Arbitration Association, arguing that AAA's process is tainted by bias toward businesses that pay for its services.

On Oct. 10, Superior Court Judge Clarkson Fisher Jr. in Freehold granted an order to show cause for the plaintiffs, temporarily restraining the company from proceeding with AAA arbitrations. *Casey v. Snap-On Tools Co., C-309-02.*

The plaintiffs' lawyer, Gerald Marks, who heads a firm in Red Bank, wants Fisher to continue the restraints and to refer the seven matters for arbitration through the Superior Court or some other private arbitration forum that will be fairer for his clients.

The complaint charges that AAA has a conflict of interest because it has been paid millions of dollars in arbitrator and administrative fees as the exclusive provider of arbitration services for the defendant, Snap-On Tools of Kenosha, Wisc.

Although claimants are also assessed fees, the companies are repeat customers and therefore are a continuing source of revenue.

Supporting the complaint is a certification from Adam Bushman, who was a case administrator in AAA's Somerset office from 1989 to 1996. Bushman states that as a trainer for AAA, he suggested to corporate clients that they use arbitration clauses limiting the rights of claimants. Bushman states AAA also encouraged use of customized clauses, which it used as "a sales tool to help sell its services."

The complaint alleges that AAA acquiesced in unfair requirements imposed by Snap-On. The provisions at issue limit discovery, allow only one year to bring a claim, prohibit joinder of parties, bar punitive or exemplary damages and prohibit findings reached in one arbitration from being used in another.

The complaint also alleges that Snap-On uses the added expense of AAA arbitration to deter dealers from pursuing claims against the company. For example, plaintiff Steven Lutz, who has not yet had a hearing, has paid AAA \$3,500 and is being dunned another \$2,875 for hearing fees and pre-hearing motions, says Marks.

The suit also contests the impartiality of the arbitrators who serve as AAA's "neutrals," calling them "high priced business oriented lawyers, rather than other franchisees, employees or everyday business owners who . . . would . . . possess a more practical and complete business understanding of the difficulties facing sales persons" and charge less.

James Curtin, a Connecticut lawyer and a defendant in the suit, is allegedly the arbitrator for the disability discrimination claim brought by Lutz, a former Snap-On employee who worked out of the New Jersey branch office.

Lutz, a Connecticut resident, says he selected Curtin, who is not admitted in New Jersey, before learning from Marks that his rights were governed by the New Jersey Law Against Discrimination. The Lutz arbitration was supposed to start last week but was stayed by Fisher's order.

Curtin, who Marks says refuses to recuse himself, did not return a call seeking comment.

The other six claims involve charges that Snap-On recruits new dealers with false representations about profitability, assigns inadequate sales territories and imposes credit practices that boost its own revenue to the detriment of its dealers.

The alleged result is high dealer failure with 100 percent replacement of the force every five to seven years. The company benefits from the rapid turnover because new dealers must purchase fresh inventory, says the complaint.

Eric Chase, who represents auto dealers and other franchisees, says the Snap-On types of restrictions have become more common. Chase, a partner with Florham Park's Bressler Amery & Ross, agrees that the expense of arbitration can act as a deterrent, noting that it took him six months of litigation to get around an anti-joinder clause in an Ohio case on behalf of 49 franchisees that he eventually won.

Lutz may stand a better chance than his colleagues in avoiding arbitration, thanks to last year's decision in *Garfinkel v. Morristown Obstetrics & Gynecology Associates*, 168 N.J. 124. In that LAD case, the Court found that a waiver of statutory rights through an arbitration clause must be "clear and knowing."

Federal courts are more likely to enforce arbitration clauses under the Federal Arbitration Act, especially after the U.S. Supreme Court, in *Circuit City Stores Inc. v. Adams*, 121 S.Ct. 1302 (2001), narrowly construed the FAA's exemption provision as not applying to an employee claim.

Earlier this month, Congress passed the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, amending the FAA to allow auto dealers out of arbitration clauses by conditioning enforcement on written consent by both sides after the controversy arises. The bill is awaiting the president's signature.

Kersten Norlin, AAA's vice president of corporate communications, declines to comment, as does the attorney for Snap-On, Michael Bowen, a partner with Foley & Lardner in Milwaukee. Snap-On's local counsel, Michael Lampert of Saul Ewing in Princeton, declines to comment as well.