CARLTON FIELDS

A Court May Not, under the Guise of Adjudicating a Breach of Contract Dispute, Stay an Arbitration Which Is in Process Based upon Complaints as to How the Arbitration Is Being Conducted

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Doing So Would Effectively Vary the Judicial Review Provisions of the Federal Arbitration Act
Savers Property and Casualty Insurance Company v. National Union Fire Insurance Company, __ F.3d __, 2014 WL 1378134 (6th Cir. April 9, 2014) **Case at a Glance**
A district court enjoined an ongoing arbitration after the issuance of a preliminary award which only partially resolved the issues submitted to arbitration, on the basis that the process followed by two of the three members of the arbitral panel amounted to a breach of the contractually agreed upon arbitration process. The United States Court of Appeals, Sixth Circuit, reversed, finding that it was improper for the court to inject itself into the arbitration proceeding before the entry of a final award.
Summary of Discussion
National Union Fire Insurance Company (reinsured) and three reinsurers (collectively referred to as Meadowbrook) entered into an arbitration of disputes concerning alleged overbilling under certain reinsurance agreements. The agreements provided for a tripartite arbitral panel, with each party selecting one arbitrator and the two party-selected arbitrators selecting a third panel member (an umpire). If the party-selected arbitrators could not agree on an umpire, the contracts provided that each party would propose three persons for the umpire position, that each party could strike two names from the list presented by the other party, and that the umpire would be chosen by lot from the remaining two names. The parties agreed to supplement this process by asking each proposed

umpire candidate to respond to a questionnaire seeking disclosures which would inform the selection process, a common agreement in reinsurance arbitrations. When the two party-selected arbitrators could not agree upon an umpire, the agreed upon process was followed by the parties. In his response to the umpire questionnaire, one of the three persons proposed by National Union, who ultimately was selected as umpire by lot, disclosed that he was a personal friend of National Union's party-selected arbitrator, yet his name was not stricken from consideration by Meadowbrook. The panel, after a hearing, entered a unanimous "Final Interim Award" resolving all liability in favor of National Union, and requiring the payment by Meadowbrook of over $1.9 million. The panel reserved jurisdiction to consider further damage submissions by the parties. Although ex party contacts between the arbitrators and counsel were prohibited for a period prior to the hearing, National Union resumed ex party contacts with its party-selected arbitrator at this point in the proceedings. Meadowbrook contended that such contacts were inappropriate, and a violation of the agreed-upon arbitration rules. Meadowbrook was ordered to make an additional submission to the panel to facilitate the panel's final calculation of the amount that it owed to National Union. With Meadowbrook's party-selected arbitrator on vacation, the remaining two panel members struck Meadowbrook's submission as "insufficient." Meadowbrook sought clarification through an emergency motion. National Union's party-selected arbitrator and the umpire entered an order clarifying the requirements for Meadowbrook's submission and extended the deadline for making the submission. Meadowbrook's party-selected arbitrator returned from vacation, and Meadowbrook moved for reconsideration of the prior orders, and for a stay of the arbitration. Meadowbrook contended that by acting while the third arbitrator was unavailable on vacation the umpire had displayed evident partiality and the two panel members had disenfranchised Meadowbrook's party-selected arbitrator and had exceeded their authority. Those motions were denied by the panel in a 2-1 ruling, with Meadowbrook's party-selected arbitrator in the minority. National Union then responded to Meadowbrook's revision submission, seeking a final award in excess of $25 million. Meadowbrook then decided that a different course of action was warranted, and filed suit in state court seeking an injunction against the continuation of the arbitration on the same grounds it had put forth in its motion for reconsideration in the arbitration, i.e., improper ex parte communication with an arbitrator, bias and actions in excess of the authority of the arbitrators. Meadowbrook contended that the actions of the majority of the panel amounted to a breach of contract—the contract being the agreement to arbitrate and the agreed upon arbitral rules. National Union removed the case to federal court. The district court granted Meadowbrook an injunction, enjoining the panel from entering any further orders without the permission of the court. The Sixth Circuit reversed, finding that under the Federal Arbitration Act ("FAA"), Meadowbrook's remedy was to make its challenges in the context of a motion to vacate the final award ultimately entered by the panel. The court of appeal found that the basic structure of the FAA was to provide only two points for judicial intervention in arbitrations: (1) at the beginning of the process if the validity of the contract containing the agreement to arbitrate is challenged under § 2 of the FAA; and (2) after a final award is entered in the context of motions to confirm, modify or vacate the final award under section 10 of the FAA. The court cited substantial authority for this view of the FAA. Although not advanced

by Meadowbrook, the district court had based the injunction in part on what the court of appeals termed a “strained reading” of Meadowbrook’s pleadings and section 2 of the FAA, which the court of appeals characterized as providing for the revocation of an agreement to arbitrate based upon traditional contract defenses only at the beginning of the arbitral process. Since Meadowbrook had never challenged the validity of the agreement to arbitrate, the court of appeals found this provision of the FAA to be inapplicable. The court of appeals held that § 2 of the FAA was not intended to displace the restrictions found in section 10 of the FAA with respect to the judicial review of non-final arbitral awards. The Court of Appeals ordered the dismissal of the case without prejudice, but noted that this disposition did not leave Meadowbrook without a remedy. Rather, it merely postponed Meadowbrook’s opportunity for judicial review, consistent with the provisions of the FAA, until after the panel had entered a final arbitral award. *Reprinted with permission of Thomson Reuters, Inc. All rights reserved.*

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