

## Judge vacates arbitrator's award in unusual ruling

Had 'exceeded his power'  
by declaring contract void

It's rare for an arbitrator's award to be overturned by a judge — so rare, in fact, that Peter L. Kennedy, who has been practicing construction law for 48 years, says he has never seen it happen.

But on July 10, the same day that Kennedy left Adler, Pollock & Sheehan, the firm he had been with for close to five decades, to join the newly renamed Ratcliffe, Harten, Burke & Galamaga, the Superior Court handed him just such a ruling.

Kennedy's client, the Rhode Island Board of Governors for Higher Education, was embroiled in a dispute with DePasquale Building and Realty Co. over the delayed construction of the Newport campus of the Community College of Rhode Island.

In 2007, an arbitrator awarded DePasquale more than \$3 million in damages despite finding no evidence of fraud, bad faith or intentional misconduct on the part of the Board of Governors. The arbitrator voided the contract between the two parties "as against public policy for lack of basic fairness" because it contained language that limited damages for DePasquale while ensuring them for the Board of Governors.

Upon reviewing the award, Judge Judith C. Savage ruled that the arbitrator had "exceeded his power by declaring the contract void against public policy — an issue not raised by the parties or subject to arbitration." She proceeded to vacate the damages award, saving Rhode Island taxpayers \$4 million with interest included, Kennedy told Lawyers Weekly reporter Julia Reischel in an interview about the case.

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**Q.** *How unusual is it for a judge to vacate an arbitrator's finding?*

**A.** It's very rare to get an arbitration award vacated, because the grounds for overturning an arbitration award are statutory, and there are very few of them. For 40 years, I really have been trying to vacate awards I haven't liked and have never been successful.

**Q.** *What was the main issue in the case?*

**A.** The issue here was that the arbitrator, without anyone asking him to do so, voided the construction agreement because it had a liquidated damages clause in it. The silly thing about that is there are probably about 100,000 contracts a year using the same liquidated damages clause, and they never get voided.

**Q.** *What was your argument in the case, and why did it succeed?*

**A.** There are statutory reasons for vacating an award, and over the last 20-some odd years another reason has crept in — that is, the manifest disregard for the law. I argued in this case ... if you disregard a contract term, that is considered to be disregarding the law. Interestingly, the [U.S.] Supreme Court came down with a decision last year in which it strongly implied that no longer would manifest disregard of the law be grounds for overturning an arbitration award.

**Q.** *Did the Supreme Court's position on the issue affect your argument?*



PETER L. KENNEDY

**'The arbitrator has got to hew the line and decide only what is put before the arbitrator'**

**A.** Well, it would if we were under the Federal Arbitration Act. But nobody argued that we were under the Federal Arbitration Act. So if I had to argue today, I would say that that ground is still available in Rhode Island. In this case, the judge said [that the arbitrator] exceeded his authority and then quoted another Rhode Island Supreme Court case saying that, by exceeding his authority, he manifestly disregarded the law. [The judge] didn't have to say that. Clearly, her reasoning was that he exceeded his powers. So that is one more expansion by the court of finding that an arbitrator would [exceed his powers by] manifestly disregarding the law.

**Q.** *Do you disagree with any parts of the decision?*

**A.** [The judge] did say if [the arbitrator] voided the contract, he wouldn't have authority to arbitrate because arbitration is a creature of contracts. And she's right, except that in Rhode Island, if you have a public works dispute, it has to be arbitrated whether there's an agreement to arbitrate or not. I had a case in 1972 or so in the Rhode Island Supreme Court where there was no arbitration provision in the public works contract. I argued that because of the Public Works [Act] that mandated an arbitration, even if there wasn't a provision, you still had to arbitrate. Because of the outcome of that case, the absence of a provision wouldn't have affected his ability to arbitrate in this case, because he would have to do so anyway because of the statute.

**Q.** Judge Savage found that the arbitrator's award yielded an "irrational result." Isn't irrationality like obscenity, in that "you know it when you see it?"

**A.** It's more than pornography, where you

know it when you see it. If the contract says everything is black and the arbitrator says everything is white, that's against the facts, not just "you know it when you see it."

**Q.** Do you agree that the arbitrator was irrational when he awarded \$3 million in damages against your client?

**A.** I agree that he exceeded his authority. This contract, with all its changes, has been in existence for 50 years. A 1947 case upheld the validity of liquidated damages. And for the arbitrator to say that the liquidated damages were incorrect as a matter of public policy was totally irrational. He's a friend of mine, too, and he's a construction lawyer himself.

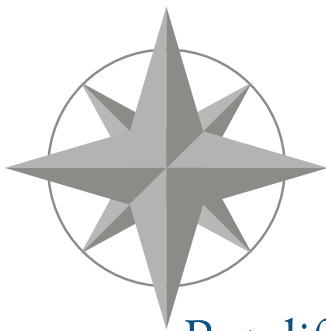
**Q.** What does this ruling mean for future arbitration issues? Will you change what you do in your arbitration practice because of it?

**A.** I think the most important thing that you can get out of this case is that, as an arbitrator or as a lawyer representing a client

before an arbitrator, the arbitrator has got to hew the line and decide only what is put before the arbitrator. It's not like the Superior Court or the District Court or the federal court where you can amend your pleadings after you put the evidence in. If you want [an arbitrator] to decide a particular issue, you have got to submit that issue to the arbitrator. You don't become a runaway arbitrator.

**Q.** Will this case prompt lawyers to re-write the boilerplate language in their contracts in the future?

**A.** They should. But it's always been pretty much the law in this state and in the county that you craft your demand for arbitration [with issues] that you want the arbitrator to decide. Alternative dispute resolution is really the thing of the future. I've found that no matter how big or how small the arbitrations are, the arbitrator always endeavors to do his best job. That includes the arbitrator in this case. He was just off the reservation. **RILW**



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