Providers Immune from Liability for Acting in Their Official Capacities

By Gerald M. Levine, Esq.

There have lately been a number of decisions around the country with rulings on immunity for arbitrators and providers acting within their official capacities, and it is not be amiss to take a quick tour of the claims and judicial responses to them. A good place to begin is *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) in which the U.S. Supreme Court citing *Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996) agreed that "[b]ecause an arbitrator's role is functionally equivalent to a judge's role, courts of appeals have uniformly extended judicial and quasi-judicial immunity to arbitrators."

This ruling has been extended to providers, most recently *Owens v. Am. Arbitration Ass'n, Inc*., Civ. No. 15-3320 (D. Minn., December 9, 2015), although the tour also includes two lawsuits against the Forum, formerly known as the National Arbitration Forum (NAF), one in which it was accused of not acting in any official capacity, *In re Nat'l Arbitration Forum Trade Practices Litig*., 704 F. Supp. 2d 832, 836 (D. Minn. 2010) ("The allegations Plaintiffs make are not procedural irregularities or even violations of the organizations' own rules. Rather, they are systemic, pervasive, and far-reaching allegations of bias and corruption, rendering every single arbitration performed by NAF suspect. At this stage of the litigation, NAF cannot claim arbitral immunity); and one in which the court held that NAF acted in its official capacity, *Virtualpoint, Inc. v. Poarch Band of Creek Indians and National Arbitration Forum, Inc*., CV 15-02025 (CD CA, Southern Division June 6, 2016). Denial of NAF's motion to dismiss in the earlier action was the end of the case.

In *Owens*, plaintiff "rais[ed] claims for breach of contract, unjust enrichment, tortious interference with contract, and tortious interference with prospective economic advantage." Plaintiff took issue with the AAA's "refusal to disqualify [an] arbitrator" and the question was whether doing so was within or outside of its official capacity. The court held that it was acting within its official capacity:

> The cases are clear that an organization that sponsors arbitration is immune from liability for acts it takes "within the scope of the arbitral process." [*Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996)]. Indeed, one court of appeals specifically stated that a sponsoring organization's "refusal to disqualify [an] arbitrator . . . falls within the scope of [arbitral] immunity." Jason v. Am. Arbitration Ass'n, 62 F. App'x 557 (table), 2003 WL 1202934, at *1 (5th Cir. Mar. 7, 2003).

The court distinguished the case before it from *In re NAF* (discussed below) in which the decision "rested on the allegation that the 'arbitrations' performed by NAF related to consumer

debt 'were not arbitrations at all,' but that the NAF would regularly defer to credit-card companies as to the appropriate decision in a given case, rather than having arbitrators make that decision."

In Re NAF is particularly noteworthy in that it represents a rare rebuke against a provider. In 2010 a putative class of individuals holding consumer debt sued NAF, asserting "systemic, pervasive, and far-reaching allegations of bias and corruption" that rendered "every single arbitration performed by NAF suspect." NAF moved to dismiss on the grounds of immunity, but the court denied the motion and ultimately held it liable on grounds of "systemic, pervasive, and far reaching allegations of bias and corruption."

Fast forward to the new action against NAF, *Virtualpoint, Inc. v. Poarch Band of Creek Indians and National Arbitration Forum, Inc*., CV 15-02025 (CD CA, Southern Division June 6, 2016). In this case plaintiff citing *In Re NAF* sought to hold the provider liable for common law fraud. However, the facts in the new case are entirely different from the earlier one. Virtualpoint is a domain name reseller who was the losing party in an administrative proceeding conducted under the Uniform Domain Name Dispute Resolution Policy. It has a statutory right to challenge the award transferring the domain name to the trademark owner, Poarch Band of Creek Indians under the Anticybersquatting Consumer Protection Act. That part of the action is still pending.

Referring to the circumstances in the earlier case, the court noted that the

> doctrine [of immunity] exists to protect decision makers "from undue influence" and that plaintiffs were in fact alleging that all of NAF's arbitrations were corrupted by the sort of undue influence arbitral immunity is designed to prevent, so the application of immunity would have been improper.

Significantly, the *Virtualpoint* court also concluded that the *In Re NAF* court "stressed the narrowness of its ruling ... by acknowledging the "undeniably broad" scope of arbitral immunity and noting that the claims before [it] would have been barred had they alleged only "procedural irregularities or even violations of [the NAF's] own rules." Moreover,

> Virtualpoint has produced no examples of courts denying arbitral immunity based on allegations analogous to the ones it advances here, and the Court therefore concludes that its claims against NAF are clearly barred by the doctrine of arbitral immunity.

There has also been an equal amount of attention paid to arbitrator immunity, essentially with the same result. For a finding of personal liability there has to be a "clear absence of all jurisdiction." That is an extremely high bar; it cannot be cleared with formulaic allegations and no proof. We get a taste of this in numerous decisions in both State and Federal courts. In New York one very recent action, *Pinkesz Mut. Holdings, LLC v. Pinkesz*, 2016 NY Slip Op 4034 (2nd Dept. May 25, 2016) and another from a couple of years ago, *Siskin v. Cassar*, 122 A.D.3d 714

(2nd Dept. 2014) illustrate just how high the bar is to defeat immunity.

In *Pinkesz Mut. Holdings* the arbitral award (actually, an amended award) was vacated on the grounds that the Panel lacked authority to amend its prior award. The court held that "immunity also applies to acts taken in excess of authority." Importantly, "the plaintiffs failed to allege how any of the acts of the rabbinical court defendants were undertaken in the clear absence of all jurisdiction." While the fact pattern in *Siskin* was somewhat different, the court reached the same conclusion in dismissing the action against the arbitrator and provider (American Arbitration Association), essentially on the ground that plaintiff's failed to allege predicate facts sufficient to reach the higher bar that there was an "absence of all jurisdiction," therefore there was an absolute bar to the action.