Contracts Tea no. 14 (August-October 2012)

NATIONAL

Can we form an association of similarly situated people as a way to defeat an arbitration provision?

Under an arbitration perspective, *EA Independent Franchisee Association v. Edible Arrangements International*[1] is an interesting case because it gives leeway to a quite clever device: forming an association of similarly situated people to sue in court when single members could not because of a binding arbitration provision, provided that the association only seeks a purely declaratory ruling and not an award of damages.

Here Edible Arrangements' franchisees formed an association ("*EA Independent Franchisee Association* ") to sue their franchisor for alleged unlawful practices. The franchise contracts contained a binding arbitration provision and the franchisees could not have sued as such.[2]

Relying on Bldg. & Constr. Trades Council, 448 F.3d at 150 ("[W]here the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members, the [associational standing] test may be satisfied), and on *Penn. Psychiatric Soc'y v. Green Spring Health Serv., Inc.*, 280 F.3d 278, 286-87 (3d Cir. 2002), the federal court is satisfied that the association had standing. Indeed, when plaintiffs ask for a declaratory relief and not for concrete damages, the presence of the single members is not necessary.

Obviously even if the association wins on point of unlawfulness of the franchisor's practice, franchisor will not be prevented from seeking to compel individual arbitration as to the damage aspects of the claims. Considering that and considering also that the court reserved the right to rule again on standing -- the decision has been criticized as "not sound judicial policy because, unlike the case on which it relies [*Penn. Psychiatric Soc'y*], here there is no doubt that the substantive claims for damages are arbitrable" therefore the decision would simply kick the ball further and would not solve the issue.[3]

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[1] USDC (D-Connecticut, July 19, 2011) 2011 WL2938077.

[2] The court did not need to decide whether the association was bound or not by the agreement because the defendants conceded that it was not. This was probably a tactical mistake because we do not know what the court would have decided, had for example defendants objected that the association is the alter ego of the members, which would be conceivable.

[3] Scott C. Kern and Allan P. Hillman, Inedible Arrangements: Can Arbitration Clauses and Franchisee Associations

However, not in every situation damages are an issue for plaintiff. Plaintiff might be satisfied with a declaratory relief sometimes: for example when plaintiff want merely to make the point that a certain practice is unlawful and defendant must discontinue it. In addition, once plaintiffs obtain a court ruling on the merit of their case then they have an authoritative decision to present to the arbitrators when they ask for damages.

SOUTH CAROLINA

Diminution in value resulting from partial failure of title is solved as an issue of contract interpretation.

On September 12, 2012 the S.C. Supreme Court, answering a certified question[4] from the U.S. District Court for South Carolina, decided the issue of whether diminution of value resulting from partial failure of title[5] should be measured as of the date of purchase of the property or as of the date of discovery of title defect. *Joetta P. Whitlock v. Stewart Title Guaranty Co.*, No. 27169.

The Court decided the case as a pure contract interpretation case without taking position on which would be the best rule: whether the date the property was purchased, the date the title defect was created, or the date the defect was first discovered.[6] The Court noted that "where the insurance contract unambiguously identifies a date for measuring the diminution in value of the insured property or otherwise unambiguously provides for the method of valuation as a result of the title defect, such date or method is controlling." But

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Co-Exist?, Vol. 15, No. 1, available at http://www.americanbar.org/publications/franchise_lawyer/2012/winter_2012/inedible_arrangements_can_arbitration_clauses_franchisee_associations_coexist.html

[4] This was exactly the certified question:

> In the case of a partial failure of title which is covered by an owner's title insurance policy, where the title defect cannot be removed, should the actual loss suffered by the insured as a result of that partial failure of title be measured by the diminution in value of the insured property as a result of the title defect as of the date of the purchase of the insured property, or as of the date of the discovery of the title defect?

[5] In this particular case, in which the plaintiff learned of the existence of a spoilage easement (preventing her from obtaining a building permit) after the purchase, given the ambiguity of the policy, the damage should be measured at the date of purchase of the property.

[6] "While we are aware of differing approaches to the certified question we are guided by the contract principle that parties may contract as they see fit, provided the contract terms do not offend public policy."

not surprising, the Court also held that

> Where, as here, the insurance contract does not unambiguously identify a date for measuring the diminution in value of the insured property or otherwise unambiguously provide for the method of valuation as a result of the title defect,[7] such ambiguity requires a construction allowing for the measure of damages most favorable to the insured.

Once the court chooses to tackle the certified question as an issue of contract interpretation, the result logically follows. Indeed, it perfectly fits into consistent case law on policy interpretation: "ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer." *USAA Prop. & Cas. Ins. Co. v. Clegg*, at 655, 661 S.E.2d at 797.

Non signatories who received direct benefit from an agreement are estopped from denying the enforceability of arbitration clause there contained. Also, if plaintiff relies on a contract to establish defendant's liability, plaintiff is estopped from alleging that defendant cannot compel the arbitration clause there contained.

On October 3, 2012, the S.C. Court of Appeals reversed the circuit court, finding it erred in denying the motion to compel arbitration. *Pearson v. Hilton Head Hospital*, No. 5036.

In 2006 Hilton Head Hospital and some connected entities ("Hospital") and LocumTenens.com, LLC ("Locum"), an online medical professional placement corporation, entered into a contract pursuant to which Locum would place temporary physicians at the Hospital to work as independent contractors. In 2007, Locum entered into a contract with Dr. Pearson to place him at the Hospital as an anesthesiologist for forty days.

Both the Hospital-Locum contract and the Locum-Pearson contract contained the following arbitration clause:

> Any controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement or the relationship between the parties hereto shall be resolved by binding arbitration in accordance with the Commercial Arbitration Rules for the American Arbitration Association . . .

When on August 28, 2007, the Hospital and Locums fired Dr. Pearson, he filed a complaint against them requesting relief under the SC Payment of Wages Act and alleging several causes of actions. Both the Hospital and Locum filed a motion to compel arbitration. The circuit court granted Locum's motion, but not the Hospital's because Dr. Pearson had not

[7] The policy here spoke only of "actual loss".

signed an arbitration agreement with the Hospital. The Hospital appealed contending that arbitration should have been compelled because

> Dr. Pearson's claims fall within the arbitration agreement he signed with Locum; (2) federal law recognizes the right to compel non-signatories to arbitrate and for non-signatories to compel signatories to arbitrate; (3) Dr. Pearson is relying on the terms in the 4 agreement between Locum and the Hospital and Dr. Pearson sought to benefit from it; and (4) the Hospital is a third-party beneficiary to Dr. Pearson and Locum's contract.

The Court of Appeals agreed with the Hospital.

After finding that the Federal Arbitration Act applied, the Court of Appeals relied on several cases to support the proposition that Dr. Pearson was bound to arbitrate also with the Hospital. In particular, the Court of Appeals relied heavily on federal cases[8] and in particular on the Fourth Circuit's *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416 (4th Cir. 2000), which held:

> While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision. … Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause.

Int'l Paper Co. also held that "well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties". In *Int'l Paper* a parent company, under a theory of equitable estoppel, was bound to arbitrate even though it was not a party to the agreement because its subsidiary was.

More generally the Court of Appeals noted how the Second Circuit in *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995)) elaborated 5 theories under which a nonsignatory can be bound by arbitration, i.e. 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.

Here, Dr. Pearson was bound to arbitrate both with Locum and the Hospital based

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[8] The US Supreme Court clarified that only the validity of an arbitration is governed by state law (Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983); here there is no issue of validity: therefore federal law applies to the issue of whether a nonsignatory is bound by a contract.

on an equitable estoppel. Specifically, even if he was not a signatory of the contract containing the arbitration clause, he enjoyed "direct benefit" from it.

The Court of Appeals found fertile ground for this in *Int's Paper*, where the Fourth Circuit held that "to allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act." And also: "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause."

Same concept of "direct benefit" is the core of other cases relied on by the Court of Appeals: (1) *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) holding that "generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract";[9] (2) *Ellen v. A.C. Schultes of Maryland, Inc.*, 615 S.E.2d 729, 733 (N.C. Ct. App. 2005) finding that the doctrine of equitable estoppel could not be used to force plaintiffs to arbitrate "because plaintiffs [were] not seeking a direct benefit from [the provisions of the agreement]; (3) *Tencara Shipyard S.P.*A., 170 F.3d at 353, holding nonsignatory was estopped from denying applicability of arbitration clause when nonsignatory received "direct benefits" from contract including lowered insurance rates and the ability to sail under the French flag)); (4) *Jackson v. Iris.com* 524 F. Supp. 2d 742, 750 (E.D.Va. 2007) (holding that when a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a 'direct benefit' from a contract containing an arbitration clause).

The Court of Appeals also referred to precedents for the proposition that an equitable estoppel is justified also when plaintiff wants to hold someone accountable based

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[9] The Court of Appeals cited to *DuPont de Nemours,* also for the distinction between the third party beneficiary theory and this equitable estoppel theory.

> The two theories of liability are … distinct. Under the third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot this Court examines under equitable estoppel is much later in time than the snapshot for third party beneficiary analysis. … [There are cases in which] a signatory was bound to arbitrate claims brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations. . .

on a contract containing an arbitration clause which defendant has not signed. It is so in *Goer v. Jasco Indus.*, Inc., 395 F. Supp. 2d 308, 314 n.9 (D.S.C. 2005):

> First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. ... Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.

This is also the case of Dr. Pearson.

In sum, the Court of Appeals found that Dr. Pearson must be compelled to arbitrate even if Dr. Pearson had not signed the Hospital-Locum agreement and the Hospital had not signed the Pearson-Locum agreement. Indeed, since both contracts contained an arbitration clause, arbitration is warranted under either of two perspectives: based on first contract, because Dr. Pearson received a benefit from it (and therefore is estopped from denying the arbitration clause herein contained) and based on the second contract, because Dr. Person must rely on that to hold the Hospital accountable:

> [L]ooking at Dr. Pearson as a nonsignatory in the contract between Locum and the Hospital, he received a benefit due to the contract, in that he was able to work at the Hospital and receive payment for his work. ... Accordingly, Dr. Pearson benefitted from that contract and should not be able to disclaim the arbitration agreement contained in it.
> Additionally, looking at the Hospital as a nonsignatory in the contract between Dr. Pearson and Locum, Dr. Pearson has to rely on his contract or the Hospital's to have a breach of contract action against the Hospital. Because both of those contracts have arbitration clauses, he should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions. ...

When a lawyer works in SC on out-of-state cases, the FAA applies to the arbitration clause inserted in employment agreement.

On October 24, 2012, the S.C. Court of Appeals, in a dispute over an employment contract with a mandatory arbitration clause, reversed the trial court's denial of the motion to compel arbitration. *Lucey v. Meyer*, No. 4960.

Amy Meyer is a lawyer licensed to practice law only in SC. After having worked for the Solicitor's office, in January 2006, she was hired as an associate attorney by Justin O'Toole Lucey, P.A. ("Firm"). In June of 2006, Meyer and Firm executed an employment agreement ("2006 Agreement") in South Carolina. The 2006 Agreement conspicuously contained the following arbitration clause:

> Any disputes arising in any way related to the matters set forth herein will be submitted to confidential, binding arbitration under expedited and abbreviated procedures, with the parties being the only witnesses called in person. If we are unable to agree on an arbitrator, I will choose one, you will choose one, and the two will choose a third.

Firm alleged that Meyer dealt with many interstate cases and indeed that she handled most of the firm's out-of-state work. On July 22, 2009, Meyer's employment was terminated. In July of 2009, Meyer began making demands for several bonuses that she alleged were owed to her under one of the out-of-state cases on which she worked. Firm filed an arbitration proceeding on October 22 2009. Meyer did not respond and sent a draft complaint to Firm. To prevent the filing of this complaint, Firm filed a complaint, a motion for a temporary restraining order and preliminary injunction, and a motion to compel arbitration. After a hearing on December 9, 2009, the trial court denied the motion to compel arbitration.[10] On appeal Firm argued that the trial court erred in finding that the employment contract did not involve interstate commerce because "interstate commerce" must be broadly construed for FAA purposes. Specifically, since the cases on which Meyer worked required out-of-state travels, then "the contract involved interstate commerce." The Court of Appeals agreed:

> the words 'involving commerce' [in Section 9 of FAA][11] have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce' - words ... of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.

"[I]n all cases, determination of whether a transaction involves interstate commerce depends on the facts of the case (*Thornton v. Trident Med. Ctr., L.L.C.*, 592 S.E.2d 50, 52 (Ct. App. 2003). The Court of Appeals cited several SC precedents as basis to determine if Meyer's contract "involve[d] commerce." Specifically, the Court found *Thornton* as dispositive. James Thornton entered into a recruiting agreement with Trident Medical

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[10] The trial court found that

> (1) the arbitration clause did not meet the requirements of SCUAA; (2) the employment contract did not involve commerce within the meaning of the FAA; (3) the arbitration clause at issue was further void on equitable grounds; and (4) there were differences in compelling arbitration in real estate development and construction cases under the FAA and compelling arbitration for personal service contracts.

[11] 9 U.S.C. § 2 (2009)

> A written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Center and an arbitration clause was included in the contract. The agreement required Thornton to relocate his medical practice from Michigan to Charleston, SC.

> In finding the contract involved interstate commerce such that the FAA applied, … [t]his court found the recruiting agreement was primarily to induce Thornton to move from Michigan to South Carolina. Additionally, the agreement included reimbursement for Thornton's relocation expenses and prevented Thornton from practicing in any other state other than South Carolina for four years. Thus, the contract was denominated as and was intended as a recruiting agreement to induce Thornton's move across state lines. Internal citations omitted.

The court also relied on *Towles v. United Healthcare Corp.,* 524 S.E.2d 839 (Ct. App. 1999). Here United Healthcare Corporation, a national company headquartered in Minnesota hired Towles as a medical director in South Carolina and required him to sign a Code of Conduct and Employment Handbook, containing an arbitration clause. Since Towles' responsibilities included helping to establish medical policy, overseeing activities in other states and participating in telephone conferences with out-of-state personnel, the court found those activities provided "sufficient evidence of interstate commerce to invoke the FAA."[12]

In this case, "using the Towles court's analysis, this court holds the employment contract involves interstate commerce" and that FAA apply. Indeed, held the court that

> Even though Firm is not a national employer as United was, Firm handles business with many out of-state clients, similar to United. … It is critical that this is not a situation where Meyer simply worked in South Carolina on cases that involved out-of-state clients and businesses. Here, Meyer was employed to work on specific cases, which were identified in the contract, that [Firm] allege[s] involved interstate commerce. … [For sure Meyer worked] … the Ocean Club case, a case which involved significant out-of-state work. … Meyer travelled extensively to conduct her legal work and billed hours for her out-of-state work and travel. …

It is worth remembering why in so many cases parties fight hard to have the FAA applied: the requirements for validity of an arbitration clause under SCUAA are stricter than those under FAA. A clause that could not pass the muster for SCUAA's purposes

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[12] On converse the trial court had relied on Timms v. Greene, 427 S.E.2d 642 (1993) in which the SC had found that the contract was between a nursing home and one of its residents (which includes an arbitration clause) did not involve interstate commerce. Because even if the nursing home engaged in interstate commerce because of several factors, these factors did not relate enough to the relationship between the nursing home and the resident. For the trial court, Meyer was "an attorney is providing legal services for a South Carolina law firm doing business in South Carolina."

might be perfectly enforceable under FAA. It is worth remembering what the SCUAA's requirements for validity are:

> SECTION 15-48-10. Validity of arbitration agreement …
> (a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. *Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.* Emphasis added.

FAA, however, does not require a notice on the first page. So, in SC if you forget the notice, you *can* litigate the matter and argue that FAA applies (and not SCUAA) so making your arbitration clause effective notwithstanding the missing notice. However, simple piece of advice: be careful and don't forget the notice. How easy is that?

New York

Parties may be bound in the absence of a fully executed contract where their actions display intent to proceed with the transaction, even where the initial written agreement expressly requires a fully executed contract.

In *PMJ Capital Corp. v. PAF Capital, LLC* (98 A.D.3d 429) the First Department was faced (and decided 3-2) with the seemingly simple issue of whether or not a contract to purchase two mortgage loans was formed.

The facts of *PMJ* are fairly straightforward. Plaintiff submitted a bid to Defendant for the purchase of two mortgage loans. The bid form expressly provided that no contractual obligations would result unless and until a lender-prepared sale agreement was executed and delivered by both parties. Defendant notified Plaintiff that its bid had been accepted, Defendant prepared a sale agreement, and a series of negotiations ensued regarding the terms of the sale agreement.

At the conclusion of the negotiation process, Defendant's attorney notified Plaintiff's attorney that the revision process was complete Plaintiff was to execute three originals of the sale agreement and deliver them to Defendant for countersignature, and that Plaintiff should wire a $220,000 down payment to Defendant. Plaintiff complied with Defendant's instructions. In addition, Plaintiff's President emailed a signed copy of the

sale agreement to Defendant's President who replied "Terrific. Thanks! I will counter sign upon receipt. Here's to a smooth and successful completion of this transaction."

Defendant never countersigned the sale agreement. Approximately two weeks after Plaintiff delivered the signed sale agreement and wired the funds, Defendant informed Plaintiff that it would not be proceeding with the transaction. In fact, Defendant had sold the mortgage loans to a third-party.

Plaintiff sued seeking specific performance, damages, and attorney's fees based on breach of contract and Defendant sought dismissal relying on the language in the bid form requiring execution and delivery of the sale agreement by both parties which had not occurred. The court outlined the relevant law:

> In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the *objective manifestations of the intent of the parties as gathered by their expressed words and deeds … In doing so, disproportionate emphasis is not to be put on any single act, phrase or other expression, but, instead, on the totality of all of these*, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain. [Emphasis added]

The court found determinative that the parties agreed upon all terms of the sale agreement, Defendant stated that it would execute the document, Plaintiff complied with all of Defendant's instructions, and Defendant retained the down payment for over two weeks. If Defendant did not intend to be bound by the sale agreement, noted the court, Defendant would have had no reason to keep the down payment. Defendant failed, in the court's view, to give reasonable signals that it would be bound only by a written agreement. Under the circumstances of the case, despite the lack of a fully executed contract, the court concluded that triable issues of fact existed as to whether a contract had been formed. The dissent in *PMJ* focused on the fact that the parties agreed at the outset (i.e., in the bid form) that a fully executed sale agreement was required and that all negotiations proceeded upon this foundation.

In my opinion, this issue resembles the no oral modification clause where usually courts decide that notwithstanding the clause, a modification can be enforced either by waiver or estoppel. This analogy supports the majority opinion.

While multiple documents (taken together) can constitute a "note or memorandum in writing" for purposes of the statute of frauds, the clear language of the statute requires the name of the parties; this requirement cannot yield for common industry practice.

The rigidity of the statute of frauds in the face of industry practice was

highlighted in *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*. The Second Department adhered to the black letter law as this applied to an absentee bid at an auction. The statute of frauds in New York is codified as follows:

> General Obligations Law § 5-701
>
> a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent . . .
>
> 6. Notwithstanding section 2-201 of the uniform commercial code, if the goods be sold at public auction, and the auctioneer at the time of the sale, enters in a sale book, a memorandum specifying the nature and price of the property sold, the terms of the sale, *the name of the purchaser*, and *the name of the person on whose account the sale was made*, such memorandum is equivalent in effect to a note of the contract or sale, subscribed by the party to be charged therewith. [Emphasis added]

Plaintiff (an auction house) held an auction and Defendant submitted an absentee bid for certain antiques (he bid by telephone but also completed the requisite absentee bid form containing Defendant's name, telephone numbers, address, email address, and credit card number). Plaintiff assigned Defendant bidder number 305. The auction commenced and Plaintiff completed one of its standard clerking sheets which described the antiques, noted that "consignor number 428" was the consignor of the items, and that bidder number 305 successfully bid for the item for a price of $400,000. Defendant never paid for or took receipt of the antiques and Plaintiff lodged a breach of contract suit.

Defendant argued, tracking the statutory language above, that the clerking sheet did not satisfy the statute of frauds because it failed to specify the name of the purchaser and the name of the person on whose account the sale was made.

The court outlined that the statute of frauds "does not require the memorandum to be in one document. It may be pieced together out of separate writings, connected with one another." Further, the court added, signed and unsigned writings can be pieced together where they refer to the same subject matter or transaction and the evidence supports that the party to be charged (Defendant/purchaser in this case) consented to the content of the unsigned portions of the memorandum.

Plaintiff was able to clear the first hurdle regarding the existence of the name of the purchaser. Even if the clerking sheet did not contain the name of Defendant, the absentee form contained it, among other detailed information. Because the absentee form was required for the bid to be executed, the court concluded that it was properly considered along with the clerking sheet. However, Plaintiff was unable to establish that the memorandum contained the name of the person on whose account the sale was made.

Plaintiff failed to produce evidence identifying consignor number 428 by name and instead argued that the common practice of auction houses is not to reveal the names of consignors. This practice, according to Plaintiff, would render the name of the seller requirement unnecessary. The court rejected this argument based on the plain language of the statute. Further, the court opined that, to the extent a change in the law was warranted for alignment with industry practice, such a change was for the legislature to make and not the courts.

I have two minds on this issue. On one hand, the statute seems to be clear in requiring the name of both parties *("name of the purchaser*, and *the name of the person on whose account the sale was made")*, on the other hand the purpose of the writing requirement is clearly to ensure that the document rests on a real transaction. Under this perspective, a number identifying the consignor should be enough.

For further information, contact info@nathancrystal.com