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NEWSLETTER

Court Enjoins Arbitration by D&O Insurers Where ADR Provision Allows Insured to Elect ADR Process

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In an unpublished opinion, a Delaware trial court held that an insured's directors and officers liability policies allowed the insured to elect the form of ADR and therefore issued a preliminary injunction ordering a group of insurers to withdraw their demand for arbitration and submit themselves to mediation. *Qwest Communications Int'l Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, No. Civ. A. 20009, 2002 WL 31888303 (Del. Ch. Dec. 20, 2002).

Qwest Communications International, Inc. (Qwest) held various primary and excess directors and officers liability policies and a primary fiduciary liability policy that each contained a similar ADR provision. That ADR provision stated that all disputes concerning the policy shall be subject to ADR and that "[e]ither the Insurer or the Insureds may elect the type of ADR discussed below; provided, however, that the Insureds shall have the right to reject the Insurer's choice of ADR at any time prior to its commencement, in which case the Insured's choice of ADR shall control." The two types of ADR identified were non-binding mediation and binding arbitration.

The insurers decided to rescind the policies and filed a demand for arbitration with the American Arbitration Association. Qwest asked the insurers to withdraw their demand for arbitration and submit to mediation. When the insurers refused, Qwest filed suit, seeking to enjoin the arbitration. The court issued an injunction, holding that "[t]he ADR provision of the Policies plainly and unambiguously gives Qwest the right to reject the defendant carriers' choice of arbitration as their preferred form of ADR." The court rejected the insurers' argument that Qwest failed to reject the insurers' choice of dispute resolution process prior to "commencement" of the ADR, which the insurers argued was the filing of the demand for arbitration. The court reasoned that the insurers' interpretation of the policy would render the provision illusory, as the insured would never have the opportunity to elect the ADR process if the insurer filed its demand at the same time it notified its insured of its selection. While declining to determine what constitutes "commencement" of an ADR process under the policy provisions, the court concluded that the provision at least allows a reasonable opportunity for the insured to reject the process elected by the insurer. The court also found that the insured demonstrated irreparable harm if forced to participate in binding arbitration rather than non-binding mediation. Finding that the insured satisfied the requisite elements for a preliminary injunction, the court therefore entered an order

directing the insurers to dismiss the arbitration demand and submit themselves to mediation.

For more information, please contact one of WRF's Professional Liability Attorneys at 202.719.7130.