

## BUSINESS LITIGATION

MARCH 2021

### IN THIS ISSUE

*The Vermont Supreme Court recently issued an important ruling enforcing arbitration, where the court discussed the interplay between the broadly-construed Federal Arbitration Act and the more-restrictive Vermont Arbitration Act.*

## Vermont Supreme Court Issues Important Decision on the Enforceability of Arbitration Clauses in Consumer Agreements and the Standards for Vacating Arbitration Decisions

### ABOUT THE AUTHOR



**Walter Judge** represents businesses in the state and federal courts of Vermont, Massachusetts, and Maine in commercial matters (contract disputes, unfair competition, etc.), intellectual property litigation (enforcement of copyright, trademark, and trade secret rights) and in products liability and personal injury defense. He defends retail establishments, premises owners, trucking companies, institutions, and individuals against negligence and personal injury claims. In 2019 Walter obtained a \$3.6 million jury verdict in federal court on behalf of an aviation company against a competitor. He is a member of IADC and other defense organizations. He can be reached at [wjudge@drm.com](mailto:wjudge@drm.com).

### ABOUT THE COMMITTEE

The Business Litigation Committee consists of members involved in business and commercial litigation including business torts, contract and other commercial disputes, e-commerce, antitrust issues, trade secrets and intellectual property, unfair competition and business defamation and disparagement. The Business Litigation Committee helps connect members involved in these areas around the world through networking and referral opportunities; developing and keeping current in the substantive, strategic and procedural aspects of business litigation; and affords members an international forum for sharing current developments and strategies with colleagues. Among the committee's planned activities are newsletters, publications, sponsorship of internal CLEs, and Webinars. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org).



**Kyle Miller**  
**Vice Chair of Publications**  
**Butler Snow LLP**  
[Kyle.miller@butlersnow.com](mailto:Kyle.miller@butlersnow.com)

*The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.*

The Court Affirmed A Lower Court's Enforcement Of The Arbitration Clause, Requiring The Consumers To Arbitrate Their Claims Against A Home Inspection Company, And Also Affirmed The Lower Court's Refusal To Vacate The Arbitrator's Decision Dismissing The Consumers' Claims, Based On Clear Disclaimers In The Inspection Contract Masseau, et al. v. Luck, et al., 2021 VT 9 (Feb. 19, 2021)

[www.vermontjudiciary.org/sites/default/files/documents/op20-131.pdf](http://www.vermontjudiciary.org/sites/default/files/documents/op20-131.pdf)

The case was a breach of contract, etc., case involving new homeowners against a home inspection company that was part of a national home inspection franchise company. The couple who bought the home that the company had inspected for them sued the company for not disclosing the possible presence of asbestos in the home, which the couple later discovered when they decided to remodel the kitchen and ripped out the ceiling. The company moved to dismiss on substantive grounds under Rule 12(b)(6), citing the multiple disclaimers in the inspection contract. Alternatively, the company moved to enforce the arbitration clause in the contract. Plaintiffs opposed on both grounds.

The trial court did not dismiss but ordered arbitration. Plaintiffs objected to arbitration on the grounds that the contract's arbitration clause did not contain the separate Acknowledge of Arbitration language required by Vermont statute for

Vermont contracts. 12 V.S.A. § 5652(b). <https://legislature.vermont.gov/statutes/section/12/192/05652>.

The court rejected their objection on the grounds that the contract was one "in interstate commerce" and therefore the Vermont statute did not apply. In addition, the plaintiffs objected because the arbitration service that was specified in the contract was no longer in business. But the court found that that provision could be severed and ordered the parties to agree on an arbitrator of their own choosing.

The parties agreed on a Vermont arbitrator. The company requested that, as a preliminary matter and before convening for an evidentiary hearing with the arbitrator, the arbitrator should decide whether the case should be dismissed for the reasons the company had argued in the motion to dismiss it had filed with the court. Plaintiffs did not object to that procedure.

The arbitrator considered the company's motion to dismiss and the plaintiffs' opposition thereto and issued a decision dismissing the plaintiffs' complaint on the grounds (as the company had argued in its motion) that the inspection contract clearly excluded the obligation to look for and report on non-visible environmental issues, such as asbestos.

Plaintiffs moved to vacate the arbitrator's decision but a subsequent judge in the trial court affirmed it.

The homeowners appealed to the Vermont Supreme Court. [Note, the plaintiffs had also sued the homesellers for not disclosing the possible presence of asbestos in the home. The appeal against the inspection company proceeded after the plaintiffs' resolved and dismissed their claims against the homesellers.]

The issues on appeal were: (a) the enforceability of the arbitration clause, and (b) the validity of the arbitrator's substantive decision that the plaintiffs had no claim under the contract.

**The Vermont Supreme Court Affirms The Enforcement Of The Arbitration Clause Against The Consumers, Rejecting The Argument That The Clause Was Unenforceable Because It Did Not Contain The Vermont-Specific "Acknowledgement of Arbitration" Language.**

First, the Vermont Supreme Court affirmed the trial court's decision that the company's home inspection contract was a contract in interstate commerce. The contract expressly called for arbitration but did not include the special arbitration notice required for Vermont contracts. Plaintiffs argued to the Supreme Court (as they had to the trial court) that the Vermont notice was required because the contract was not a contract in interstate commerce but was a local home inspection contract pertaining to a home in Vermont. The Supreme Court

rejected that argument, citing federal court cases, including two U.S. Supreme Court cases, giving broad effect to the Commerce Clause at it applies to arbitration agreements. In both U.S. Supreme Court cases, the transaction at issue occurred within a single state, but the Court determined that the companies involved in the contracts, and the transactions at issue, "involved interstate commerce," and that therefore the Federal Arbitration Act applied and the arbitration clauses in both cases were enforceable. Applying the reasoning of those cases, the Vermont Supreme Court observed that the home inspection company was part of a national franchise and used a national form of contract. In addition, inspections are a regular part of home purchase transactions and therefore affect the national residential real estate market. The Vermont Supreme Court concluded that federal interstate commerce law applied, preempting the Vermont Arbitration Act, and that therefore the trial court had properly required the homeowners to arbitrate their claim against the inspection company pursuant to the clause in the contract.

As a separate matter, the Court then also concluded that the trial court had been well within its discretion to sever out the part of the arbitration clause that required the consumers to arbitrate with a particular organization that was no longer in business and order the parties to choose an arbitrator.

**The Vermont Supreme Court Affirms The Arbitrator’s Decision Dismissing The Consumers’ Claims Against The Inspection Company, Rejecting The Argument That The Arbitrator’s Decision Showed “Manifest Disregard Of The Law.”**

Next, the Vermont Supreme Court rejected plaintiffs’ argument that the arbitrator exceeded his authority in dismissing their complaint. Plaintiffs argued that the arbitrator engaged in “manifest disregard of the law” in dismissing their claims against the company as unavailing under the Rule 12(b)(6) standard because of the disclaimers in the contract. Importantly, the Court held that even if, *arguendo*, the arbitrator committed “legal error” by dismissing the plaintiffs’ claims, “legal error” is not grounds for vacating an arbitration decision under the Federal Arbitration Act. The Court recapitulated the many cases that hold that a court can vacate an arbitration decision only where misconduct or an egregious mistake occurred. (The Court discussed whether “manifest disregard of the law” is even a basis for vacating an arbitration decision, but concluded that it did not matter, because under any circumstances ordinary legal errors are not a basis for doing so.)

Thus, the Supreme Court affirmed the trial court’s refusal to vacate the arbitration decision in the inspection company’s favor. This is an important decision in Vermont law. There are few Vermont decisions on arbitration clauses, and even fewer discussing the interplay between the broadly-construed Federal Arbitration Act

and the more-restrictive Vermont Arbitration Act. The Court never engaged in any discussion of whether an arbitration clause involving consumer contracts, such as the one at issue here, is unfair or unconscionable. Second, there are few Vermont decisions discussing the standards for vacating an arbitrator’s decision.

## Past Committee Newsletters

Visit the Committee's newsletter archive online at [www.iadclaw.org](http://www.iadclaw.org) to read other articles published by the Committee. Prior articles include:

FEBRUARY 2021

[Supreme Court of Canada Expands Duty of Honest](#)

[Contractual Performance](#)

Steven Rosenhek and David Ziegler

OCTOBER 2020

[Vermont Court Rules That Commercial Landlord Cannot be Liable for Injury to Retail Tenant's Invitee Involving Tenant's Operations on Premises](#)

Walter Judge

SEPTEMBER 2020

[Getting the 'Drift': Maryland Adopts Daubert Standard](#)

Andrew Gendron and Emily Kelley

JULY 2020

[Potential Investment Litigation and Arbitration Trends Arising out of the COVID-19 Financial Crisis: Two Products that will Likely be the Subject of Claims](#)

John Beach, Jack Pringle, and Lyndey Bryant

JUNE 2020

[Potential Investment Litigation and Arbitration Trends Arising out of the Coronavirus Financial Crisis: The Effect of Some Recent Legal Holdings](#)

John Beach, Jack Pringle and Lyndey R.Z. Bryant

APRIL 2020

[Vermont Supreme Court Recognizes Exception to the Economic Loss Rule](#)

Walter Judge

MARCH 2020

[A SLAPP in the Face to Free Speech? A Nationwide Overview of SLAPPs and Anti-SLAPP Laws](#)

Marcellus D. Chamberlain and Kyle V. Viller

FEBRUARY 2020

[SCOTUS: No "Discovery Rule" Tolling for FDCPA One-Year Limitations Period; Circuit Split Resolved in \*Rotkiske v. Klemm\*](#)

John Dollarhide and Phillip Sykes

OCTOBER 2019

[The Growing Consensus on the Propriety of "Snap" Removals – Looking at the Effect of \*Encompass Ins. Co. v. Stone Mansion Rest. Inc.\* After One Year](#)

Kyle Miller

AUGUST 2018

[Check Those "Choice of Law" Provisions!](#)

Val H. Stieglitz and Bruce Wallace

JULY 2018

[Hole-in-One Leads to GC's Deposition. Here's How.](#)

Todd Presnell