

*Alternative Dispute Resolution***Eleventh Circuit Criticizes Arbitration Award Appeals***Threatens to sanction future appellants*BY SEAN T. CARNATHAN
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Lawyers' ability to size up their chances on appeal took on greater importance following a recent decision by the U.S. Court of Appeals for the Eleventh Circuit. Weary of reviewing groundless appeals from arbitra-

tor's contentions and suggested the appellant lacked "an objectively reasonable belief it would prevail."

The appellate court's frustration with arbitration appeals is plain. "The Eleventh Circuit is making it very

obvious that when parties agree to a final and binding resolution of a dispute, that

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tion awards, the court declared that the appellant's position "did not come within shouting distance" of any basis to vacate the award, and threatened to sanction future appellants "who attempt to salvage arbitration losses

through litigation that has no sound basis in the law applicable to arbitration awards." *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*

The dispute arose from a steel manufacturing subcontract on a large construction project for the federal government. The appellant was the contractor on the project and alleged that the appellee failed to meet the deadlines set forth in the subcontract. The dispute centered on which of two project schedules applied to the subcontract.

After the arbitrator ruled in favor of the steel manufacturer, the contractor filed a motion to vacate in the U.S. District Court for the Northern District of Alabama, asserting that the arbitrator's decision constituted manifest disregard for the law. The contractor argued that the arbitrator's decision contradicted an express term of the contract and should be vacated under the "Montes exception" to the rule favoring affirmance of arbitration decisions, established by a previous Eleventh Circuit case. *Montes v. Shearson Lehman Bros., Inc.* The Eleventh Circuit rejected the contrac-

tor's contentions and suggested the appellant lacked "an objectively reasonable belief it would prevail."

is what it is, final and binding, and that's with very few exceptions," comments Susan Potter Norton, Coral Gables, FL, Co-Chair of the Section of Litigation's Alternative Dispute Resolution Committee.

On the other hand, the court's suggestion that the contractor should have predetermined the outcome on the merits and refrained from appealing is far from an obvious course. Just two weeks after *Harbert*, a divided panel of the U.S. Court of Appeals for the Fourth Circuit vacated an arbitration decision on a similar legal theory. The Fourth Circuit held that the arbitration decision "contradicted the plain and unambiguous terms" of the arbitration agreement in another case, by imposing a one-year statute of limitations. *Patten v. Signator Ins. Agency, Inc.*

The two circuit decisions address much different fact patterns, and there are no conflicts between the two. The similarity of the legal theories, however, calls into question the notion that the *Harbert* appellant had no "objectively reasonable belief" that it might succeed. Courts have long wrestled with the balance between discouraging frivolous litigation on the one hand, and encouraging creativity and zealous advocacy on the other. The *Harbert* decision brings this problem into sharp relief. □

Resources:

B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905 (11th Cir. 2006).

Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456 (11th Cir. 1997).

Patten v. Signator Ins. Agency, Inc., 441 F.3d 230 (4th Cir. 2006).