Highlights of Key State Court Cases of Interest

By Bryan C. Graff

Self-Insured Employers May Recoup Overpaid Benefits Resulting From Innocent Misrepresentations.

On September 16, 2016, the Washington Supreme Court held that under the Industrial Insurance Act, Title 51 RCW, the Department of Labor and Industries ("Department") (and a self-insured employer) may recoup previously overpaid benefits caused by clerical error, mistake of identity, innocent misrepresentation, "or any other circumstance of a similar nature," provided it requests the adjustment of benefits within one year of the date of the incorrect payment. *Birrueta v. Dep't of Labor & Indus.*, No. 92215-2 (Wash. Sept. 15, 2016) (*en banc*). In so doing, the court reversed a published opinion of the Court of Appeals, *Birrueta v. Dep't of Labor & Indus.*, 188 Wn. App. 831, 843, 355 P.3d 320 (2015), which had held that the Department was barred from recouping an overpayment following a final order.

The case involved an employee ("Birrueta") who suffered a workplace injury resulting in his total disability. An unknown person helped Birrueta complete a report of industrial injury and the report mistakenly stated that Birrueta was married. Birrueta signed the report, declaring the statements therein to be true, but he was in and out of consciousness at the time. Thereafter, the Department issued a compensation order providing that Birrueta was married and it became final in 2009 pursuant to RCW 51.52.050. Birrueta made no effort to correct the mistake until completing a questionnaire in 2011 that accurately reported his unmarried status. The Department thereafter issued orders assessing an overpayment and changing his marital status for compensation purposes.

Birrueta appealed to the Board of Industrial Insurance Appeals, which affirmed the Department's orders. On further appeal, however, the Superior Court reversed, concluding as a matter of law that the Department lacked authority to issue the recoupment order and could not change Birrueta's mistaken marital status. The Court of Appeals unanimously affirmed the Superior Court, holding "only nonfinal orders are subject to a claim that benefits were underpaid or overpaid as a result of clerical errors, mistake of identity, or innocent misrepresentation." *Birrueta*, 188 Wn. App. at 843.

The Supreme Court reversed. The Department, a self-insured employer, or an injured worker, may seek correction of erroneous payments based upon clerical errors, mistakes of identity, or innocent misrepresentations within one year of payment pursuant to RCW 51.32.240(1)(a). This is true regardless of whether an underlying compensation order is temporary, or final and binding. However, a final order will preclude an injured worker's right to seek adjustment of underpaid benefits, or the Department's (or a self-insured employer's) right to recoup overpaid benefits if the mistake is based upon an "adjudicator error," *i.e.*, an error in applying the law to the facts, insufficiency of evidence, or errors of law.

Do Not File Suit on a Rejected Creditor's Claim in a Probate Proceeding.

The Court of Appeals has clarified that a claimant's suit on a rejected creditor's claim must be brought as an ordinary civil action and should not be filed in a proceeding under the Trust and Estate Dispute Resolution Act ("TEDRA"). *Sloans v. Berry*, 189 Wn. App. 368, 375, 358 P.3d 426 (2015). A business or other claimant who has a claim rejected by the deceased's estate is not a proper "party" under TEDRA. "It is only after a judgment in a civil action establishes the amount of an allowed claim that the claim becomes subject to the rules of estate administration." *Id.* at 375.

In *Sloans*, the claimant alleged that the deceased breached real property maintenance obligations and failed to pay property taxes in breach of an agreement. She timely filed and served creditor's claims with the deceased's estate, but the estate rejected her claims. The claimant then filed (and later amended) a "Petition on Rejection of Creditor's Claims" against the estate's co-administrators under the probate cause number for the estate. The estate moved to dismiss the petition for lack of subject matter jurisdiction and failure to state a claim, arguing a judicial proceeding under TEDRA is an inappropriate vehicle for establishing a creditor's claim. *Id.* at 373. The Superior Court Commissioner agreed, dismissed the claimant's suit with prejudice, and ordered her to pay the estate's fees.

On appeal, the Court of Appeals agreed that the claimant was not a proper party to a judicial proceeding under TEDRA. While acknowledging that it is understandable why a claimant may prefer to proceed under TEDRA, with its provisions for mediation, arbitration, and resolving matters expeditiously, a claimant without a judgment does not fit within TEDRA's definition of a "party" (RCW 11.96A.030(5)). *Sloans*, 189 Wn. App. at 375. A claimant's suit on a rejected creditor's claim must, therefore, be brought as an ordinary civil action, governed by the civil rules, where the parties may have a right to a jury trial and are subject to a lengthy case schedule. *Id.* However, the Court of Appeals held that, in *Sloans*, the error was procedural, not jurisdictional, and harmless because the claimant filed her action in the Superior Court within the 30-day statute of limitations, paid the filing fee, and timely served the estate. *Id.* at 377-79. Accordingly, the Court of Appeals reversed the trial court's dismissal and remanded the case to the Superior Court to be treated as an ordinary civil action and placed on an appropriate civil calendar. *Id.* at 379.

All businesses, and particularly those who may find themselves more regularly dealing with a creditor's claim against a decedent's estate (*e.g.*, hospitals, long-term care facilities, and lending and financial institutions) should be cognizant of this procedural development and proceed accordingly.

Membership in a Voluntary Association May Give Rise to a Duty to Arbitrate.

Think you cannot be compelled to arbitration absent proof

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of your signature on a written arbitration agreement? Think again. Membership in a voluntary association whose bylaws contain a duty to arbitrate has the same effect as an executed arbitration agreement. *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 192 Wn. App. 465, 469, 369 P.3d 503 (2016).

In *Marcus & Millichap*, the parties were each members of the Commercial Broker's Association ("CBA"). CBA's bylaws contained an arbitration clause that provided that "[i]t is the duty of the members of this Association (and each so agrees) to submit all controversies involving commissions, between or among them to binding arbitration by the Association…." *Id.* at 470. CBA's bylaws further authorized its board of directors to amend the rules and procedures governing CBA arbitration. CBA did not maintain records dating back to the time that Marcus & Millichap applied for and became a member. Accordingly, no writing containing Marcus & Millichap's signature and manifesting its assent to the arbitration provision could be produced. The evidentiary record also did not establish what form of arbitration provision existed at the time Marcus & Millichap became a CBA member, but rather only the arbitration clause that existed at the time the underlying dispute arose. Accordingly, Marcus & Millichap asserted that it was under no duty to arbitrate. Marcus & Millichap filed suit seeking a declaratory judgment that no agreement to arbitrate existed and moved to stay an arbitration proceeding that Yates, Wood & MacDonald, Inc. ("Yates") had commenced against it. The trial court denied Marcus & Millichap's motion for a stay, granted Yates's motion to compel arbitration, and dismissed Marcus & Millichap's lawsuit.

The Court of Appeals affirmed, holding that "[u]nder Washington law, an express agreement to arbitrate is not required." *Id.* at 474. "Absent an express bilateral contract, voluntary membership in a professional organization establishes assent to an arbitration agreement contained in that organization's bylaws." *Id.* at 475. A signed arbitration agreement is not necessary. Moreover, insofar as CBA's bylaws explicitly authorized its board to amend the rules and procedures governing arbitration, it was not necessary to establish how the arbitration clause read at the time Marcus & Millichap became a member. Rather, Marcus & Millichap, a voluntary member of the association, was bound by the arbitration provision extant when the underlying dispute arose. *Id.* at 482. The Washington Supreme Court denied Marcus & Millichap's petition for review on August 3, 2016. *Marcus & Millichap Real Estate Inv. Servs. of Seattle, Inc. v. Yates, Wood & MacDonald, Inc.*, 185 Wn.2d 1041, 377 P.3d 764 (2016).

Those who do not wish to arbitrate disputes should carefully consider the articles, bylaws, and rules of any voluntary associations they have joined. Arbitration provisions contained therein are binding and may be amended over time.

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