COMMENTARY

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Dispositive motions in arbitration: Strategies and best practices

BY HARSHITHA RAM

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Dispositive motions in Arbitration

A dispositive motion in litigation seeks to dispose of or resolve a claim or issue in the case without going to a full hearing. The moving party argues there are no disputed issues of material fact, and they are therefore entitled to a favorable ruling as a matter of law. A dispositive motion in arbitration is a request to an arbitrator to resolve a particular issue. It is similar to a motion for summary judgment in a federal court proceeding. Examples of dispositive motions include motions to dismiss, motions for summary judgment, and motions for directed verdicts. Some practitioners perceive dispositive motion practice in arbitration as a new challenge. In reality, dispositive motions have existed in arbitration for almost as long as arbitration itself.

Arbitrator's authority in dealing with dispositive motions

In general, arbitrators have the authority to decide dispositive motions, subject to the terms of the arbitration agreement and the rules governing the arbitration (collectively, the "Constraints"). For example, some arbitration agreements may require the arbitrator to apply the same rules of procedure and evidence that would apply in a court, which may include the ability to rule on dispositive motions. Other agreements may limit the arbitrator's authority to decide dispositive motions and require such motions to be decided by a court. Recently, arbitrators have witnessed an increase in requests for leave to file them as parties consider it more efficient, and more cost-effective.

When to request a dispositive motion in an arbitration

The timing for filing a dispositive motion in arbitration may depend on the specific rules of the arbitration forum or the Constraints. In general, a party may file a dispositive motion in arbitration any time after the completion of the initial pleadings and before the hearing on the merits. Since the exact timing may vary depending on the Constraints it's important to review them before filing a dispositive motion. It's also important to note that dispositive motions in arbitration may be more limited than in court, as arbitrators often have more discretion in determining the scope of the motion and the evidence they will consider. Therefore, it's important to carefully consider the strength of your case and the potential impact of a dispositive motion before filing.

An analysis of the advantages and the challenges of dispositive motions

1. Efficiency: Dispositive motions can save time and resources by resolving the dispute before a full hearing, thus avoiding the expense and delay of a lengthy arbitration evidentiary hearing.

2. Cost-effective: Since dispositive motions allow for quicker resolution of disputes, it can be more cost-effective for the parties involved. This is because they do not have to incur additional legal fees, expert witnesses, and other expenses related to the arbitration process.

3. Provide clarity: dispositive motions can provide clarity on key legal issues before a full hearing. This can help parties assess their case's strengths and make informed decisions about how to proceed, which witnesses to call, etc.

4. Helps manage expectations: dispositive motions can also help manage expectations by giving parties an early indication of the strength of their case. This can help them to realistically assess the potential outcomes of the arbitration.

5. Encourages settlement: The filing of a dispositive motion may encourage settlement discussions between parties by highlighting the strengths and weaknesses of each party's case and helping them come to a mutually acceptable resolution.

6. Limited Discovery: Unlike litigation, arbitration typically involves limited discovery, which can make it difficult for parties to gather sufficient evidence to support a dispositive motion. This can result in a party being unable to meet the burden of proof required to succeed in the motion.

7. Timing: Dispositive motions in arbitration must be filed early in the proceedings, often before a party can conduct any discovery. This can make it difficult for a party to fully develop its arguments and present all relevant evidence in support of the motion.

8. Lack of precedent: Unlike in litigation, there is often a lack of precedent in arbitration, particularly on dispositive motions. This can make it difficult for parties to predict how the arbitrator will rule on the motion and can create uncertainty around the outcome.

9. Limited review: In many cases, the arbitrator's decision on a dispositive motion is final and binding, with limited opportunities for appeal. This can make it difficult for a party to challenge an adverse ruling and may result in a final decision inconsistent with the law or the facts of the case.

10. Cost: Dispositive motions can be expensive to prepare and argue, particularly in cases requiring extensive briefing and expert testimony. This can make it difficult for parties with limited resources to pursue a dispositive motion, even where they believe it would be in their best interests to do so.

Practical tips for using dispositive motions in arbitration

1. Review applicable rules: Before filing a dispositive motion, review the arbitration rules to ensure they permit such motions. Some do not allow dispositive motions or have specific requirements for filing them.

2. Consider timing: Dispositive motions should be filed at an appropriate stage of the arbitration. Filing too early may be premature, while filing too late may disrupt the arbitration process.

3. Be strategic: Dispositive motions should be used strategically to resolve key issues in the case. Focus on the issues most important to your case which can be decided based on applicable law.

4. Support your motion with evidence: Provide evidence in support of your motion, such as affidavits, declarations, and expert reports. This will help demonstrate your motion has merit.

5. Consider the standard of review: The arbitrator will likely apply a deferential standard of review when considering a dispositive motion. Consider the standard of review when drafting your motion and provide a persuasive argument to convince the arbitrator.

6. Be prepared for opposition: The opposing party will have an opportunity to respond to your dispositive motion. Be prepared to address arguments or evidence they are likely to present.

7. Follow-up: If your motion is granted, follow up with the arbitrator to ensure that the ruling is implemented effectively.

Tips for arbitrators when dealing with dispositive motions

1. Familiarize yourself with the applicable law: Before ruling on a dispositive motion, it is important to have a clear understanding of the relevant legal principles and standards. This may require conducting legal research, reviewing relevant statutes, regulations, and case law, and consulting with legal experts if necessary.

2. Carefully review the pleadings and evidence: To properly evaluate a dispositive motion, you will need to review the pleadings and evidence submitted by both parties. This may involve examining written briefs, affidavits, witness statements, and other relevant documents.

3. Consider the standard of review: Depending on the specific motion being filed, you may need to apply a particular standard of review. For example, when evaluating a motion for summary judgment, the standard is typical whether there are any genuine issues of material fact that would require a trial.

4. Allow both parties to be heard: Before ruling on a dispositive motion, it is important to allow both parties to be heard. This may involve holding a hearing or allowing both sides to submit additional written arguments.

5. Issue a clear and well-reasoned decision: When ruling on a dispositive motion, it is important to issue a clear and well-reasoned decision which explains your reasoning and analysis. This can help ensure your decision is perceived as fair and just by both parties.

6. Consider the impact of your decision on the arbitration process: Ruling on a dispositive motion can have a significant impact on the arbitration process, so it is important to consider the potential consequences of your decision carefully. For example, granting a motion to dismiss may result in the case being terminated before a full hearing can be conducted.

Rules on dispositive motions by AAA

The American Arbitration Association (AAA) has several rules related to dispositive motions in arbitration proceedings, which are outlined in its Commercial Arbitration Rules and its Supplementary Rules for Class Arbitrations.

1. Timing of dispositive motions: Under the AAA rules, dispositive motions can be made at any time during the arbitration, but the parties must comply with any deadlines set by the arbitrator or the AAA.

2. Filing requirements: Dispositive motions must be submitted in writing to the AAA and the opposing party, along with any supporting documents or legal authorities. The AAA may also require the parties to file briefs or memoranda of law.

3. Grounds for dispositive motions: Dispositive motions may be made on any grounds that would justify the entry of judgment in a court of law, such as lack of jurisdiction, failure to state a claim or summary judgment.

4. Standard of review: The AAA rules provide that the arbitrator will determine the appropriate standard of review for dispositive motions, which may be de novo (the arbitrator will review the matter anew) or on a deferential standard (the arbitrator will defer to the parties' agreement or the underlying law).

5. Discovery: AAA rules allow for limited discovery related to dispositive motions, but the scope will depend on the arbitrator's discretion and the specific circumstances of the case.

6. Hearing: AAA rules provide the arbitrator may hold a hearing on dispositive motions if he or she deems it necessary but has the discretion to rule on the motion based solely on the parties' written submissions .

7. Effect of the ruling: If the arbitrator grants a dispositive motion, he or she may render an award dismissing some or all of the claims or may order the parties to proceed to a hearing on the remaining claims.

If a party is objecting to the arbitrator's authority to hear all or part of the dispute on a summary basis, they should file their objection early on at or before the start of the hearing and reiterate it in every pleading they file so that it is not deemed waived. Ultimately, dispositive motions can be granted by arbitrators so long as there is a fair opportunity for the parties to present their case and in strict compliance with a fundamentally fair and reasonable hearing, which typically serves as the touchstone for vacatur of an arbitral award. Furthermore, the decision to grant a dispositive motion as such will depend on the specific facts and circumstances of each case as such motion may vary depending on the jurisdiction and the rules of arbitration as well.

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COMMENTARY PAGE

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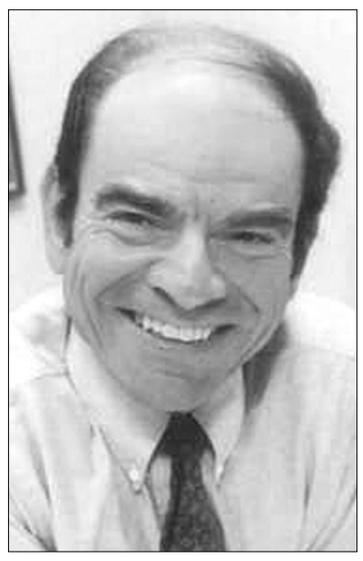
A justice's lapse in judgment casts a cloud over court

BY BERL FALBAUM



Berl Falbaum

Given the controversies in which they are engulfed, it is not unfair to conclude that U.S. Supreme Court Justice Clarence Thomas and Robert Hunter Biden, the son of the U.S. president, both Yale Law School graduates, failed courses in ethics.

Of course, they could have cheated and, given their ethical compromises, it is not unjust to consider that as well.

Both men are involved in questionable ethical behavior, and neither seems to understand what the big brouhaha is all about.

First, Thomas, a Supreme Court associate justice since 1991:

ProPublica, the online news service, reported that Thomas traveled on billionaire mega-donor Republican Harlan Crow's 162-foot yacht, vacationed at Crow's luxury resort, and flew on his plane around the world on trips worth hundreds of thousands of dollars. (As I was completing this column, ProPublica revealed that in 2014 Thomas and his family sold properties worth more than $130,000 to Crow, but the justice did not disclose the sale, a possible violation of federal law which requires disclosure of such transactions of more than $1,000).

In defending himself, Thomas said Crow and his wife, "are among our dearest friends, and we've been friends for over 25 years. As friends do, we joined them on a number of family trips during the more than a quarter of a century we have known them."

Thomas continued: "Early in my tenure at the court, I sought guidance from my colleagues and others in the judiciary, and was advised that this sort of personal hospitality from close personal friends, who did not have business before the court, was not reportable."

He added: "It is, of course, my intent to follow this guidance in the future."

That prompts the following responses: (1) He should seek more ethical colleagues; and (2) We are disturbed that he does not plan to change his behavior.

Now, Crow may not have had cases before the Supreme Court during Thomas's tenure—as Thomas makes clear—but the justice must be aware of Crow's political interests, and rulings opposed to those beliefs would most certainly impair their relationship. Would Crow invite the justice on a trip after he voted against a major policy backed by the billionaire?

Sure, Crow, a "mega-Republican donor" may really like his pal, but presumably he is also aware of the direct and indirect political influence he can have on the justice with his relationship—without saying a word. He is not a "mega-dummy."

To assure skeptics (like us), Crow is quoted in news articles, stating: "We have never asked about a pending or lower-court case, and Justice Thomas has never discussed one, and we have never sought to influence Justice Thomas on any legal or political issue."

The major principle involved here, that Thomas ignores, is that public officeholders must not only avoid direct conflicts of interest, but also the appearance of such conflicts. Thomas may consider that unjust, but that is the sacrifice politicians seeking public office must make to have the privilege—and it is a privilege—to serve the public interest.

What is particularly troubling is that while lower courts are bound by codes of conduct, the Supreme Court does not have one. Perhaps it's time to enact one since it's clear that justices like Thomas are taking advantage of the void, and the other eight members have been silent on the issue, apparently intent on letting the controversy die on its own.

Oh, and let's not forget another "minor" conflict involving Thomas's wife, Virginia "Ginni" Thomas, who worked actively, behind the scenes, to overturn the 2020 election.

Are we wrong and too cynical to suggest that Thomas should have recused himself from a case involving the release of White House records related to the January 6 insurrection?

Should we assume that since Mrs. Thomas did not have any cases before the court, Thomas was not guilty of any ethical violations?

We will go way, way out on a limb: Besides talking about what was for dinner, he and his wife might—just might—have talked about the election and other related Trump politics that Mrs. Thomas supports.

True, Mr. Justice, your wife did not have a case before the court, but nevertheless we just can't help envision a scene in which you commend her cooking and then add, inadvertently: "I (agree, don't agree) that the election was stolen."

Or we can envision—again, unfairly—that your wife tells you she was dusting in your office and has a suggestion for some language in a draft opinion she happened to see on your desk.

Since your colleagues have signed off on your behavior, you might ask Crow to invite them on your next trip.

We'll cover Hunter Biden in our next column. He is also guilty of ethical compromises even though he doesn't have a case before the Supreme Court.

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