

## Artex granted motion to dismiss class action lawsuit

Artex Risk Solutions and other captive insurance providers have secured a victory in a class action lawsuit at the US District Court for the District of Arizona—Phoenix Division.

A group of defendants, including Artex, Arthur J. Gallagher & Co, TSA Holdings and Tribeca Strategic Advisors, were accused of a widespread captive insurance “conspiracy”.

Plaintiffs Dimitri Shivkov et al contended that the companies’ had devised a conspiracy to promote and sell tax-advantaged captive strategies that were viewed as illegal, according to the Internal Revenue Service (IRS), which disallowed the offered tax benefits.

Shivkov and others who entered into captive agreements with the named defendants brought several claims, including breach of fiduciary duty, negligent misrepresentation, disgorgement, and civil conspiracy.

However, all agreements signed by the plaintiffs included an ‘Arbitration Clause’ stipulating that any dispute between the relevant parties that could not be resolved through Arizona mediation would be arbitrated by the American Arbitration Association.

Furthermore, the agreements also included a ‘Limitation of Liability’, which details that “Artex shall have no liability to [the plaintiffs] for any losses, claims, demands, damages, liabilities, costs or expenses arising from [...] this agreement”.

Therefore, Artex argued that the claims should be arbitrated individually under this clause; because all claims in this lawsuit are barred by the Arbitration Clause, individual arbitration would inevitably lead to a dismissal of the action.

Shivkov argued against individual arbitration on the basis that the clause was unenforceable because: Artex breached their fiduciary duty; the Arbitration Clause is both “substantively and procedurally unconscionable”; the terms of the clause are beyond reasonable expectations’ and the clause was terminated along with the agreements.

Senior US district judge Stephen McNamee delivered the court order to grant Artex’s renewed joint motion to compel individual arbitrations, thus dismissing the action in its entirety as all claims in the suit are barred by the aforementioned Arbitration Clause.

A statement from Artex Risk Solutions stated: “On 5 August, the judge in the Shivkov putative class action lawsuit issued an order for individual arbitration. This is the most recent ruling in the lawsuit related to our 831(b) captive business.”

“We have disclosed the ongoing IRS audit and related customer litigation involving our 831(b) captive management business in our SEC filings and to our clients.”

“As stated in December when the original filing was made, we believe it has no merit and will deal with it accordingly. Gallagher and Artex have successfully defended individual claims involving similar allegations.”

“831(b) captives are important insurance vehicles that have been part of the Internal Revenue’s code for decades. Gallagher and Artex have diligently and consistently striven to comply with the legal requirements in forming and managing captive insurance companies.”

Michael Low, partner of Kutak Rock, who represents one of the defendant actuarial

firms in this case, said that it’s “important” there will not be a class action.

He explained: “It substantially limits the possible exposure to the individual plaintiff’s claim against each defendant.”

The importance of the ruling, according to Low, is enforcing the arbitration provisions in the agreements between Artex/Tribeca and the plaintiffs.

He commented: “[Enforcing arbitration] benefits captive insurers, both 831(a) and 831(b), by reemphasising the primacy of arbitration over class action litigation when arbitration clauses are part of underlying agreements.”

When discussing the outcome of future 831(b) captive court cases, Low suggested that it will depend on the facts as alleged. However, emphasises that the arbitration clause in the agreements, consistent with the Federal Arbitration Act, “trumped the effort to create a class action, thus limiting the potential exposure for each defendant”.

He explained that previous decisions in favour of the IRS were “individual rulings based on the facts relevant to each individual 831(b) captive subject to IRS proceedings”.

Low said: “The IRS has not held that every 831(b) captive insurer engages in inappropriate tax avoidance strategies.”

He concluded: “The court’s ruling is important beyond the captive area by re-emphasising the primacy of arbitration as a proper dispute resolution mechanism when parties agree to arbitrate in their agreements.” ■