B. Arbitral Immunity: The Extension of Judicial Immunity?

1. Arbitrators

Some commentators advocate extending immunity to arbitrators because of the quasi-judicial nature of the actions they perform and the need to protect the independence of those acts. In essence, rather than focusing upon the terms of an arbitrator's appointment to establish the scope of liability, the limitation of liability is justified because of an arbitrator's status and functional similarity to judges. Particularly within common law jurisdictions, courts appear willing to extend immunity to arbitrators when they are acting in a quasi-judicial capacity since arbitrators are in much the same position as judges, in that they carry out more or less the same functions. As with the Administrative Law Judges who gained immunity in Butz, individuals trying to make principled decisions should be immune from suit because of the "special nature of their responsibilities." In the United States, when arbitrators assume responsibilities that are functionally comparable to those of judges, they receive immunity. As one respected commentator explained, functional similarity to a judge depends upon "(i) whether a dispute exists, (ii) whether there is an ultimate determination of liability, and (iii) whether the decision-maker conducts a hearing and takes evidence from the parties, as would a judge."

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115 See, e.g., DOMKE, supra note 1, at § 23.01.
116 When deciding whether to extend quasi-judicial immunity, one important prerequisite is whether the individual truly acts with a judicial function. See City of Durham v. Reidsville Eng’g Co., 120 S.E.2d 564 (N.C. 1961) (extending immunity to engineers); Blecick v. School Dist. No. 18, 406 P.2d 750 (Ariz. Ct. App. 1965) (extending immunity to architects); Wagshal v. Foster, 28 F.3d 1249, 1252 (D.C. Cir. 1994) (extending immunity to mediator and case evaluator acting in court-related program); see also Tindell v. Rogosheske, 428 N.W.2d 386, 387 (Minn. 1988) (extending quasi-judicial immunity to guardians ad litem); cf. Craviolini v. Scholer & Fuller Assoc. Architects, 357 P.2d 611 (Ariz. 1960) (failing to extend immunity to architects who were not acting in an arbitral capacity); Gammel v. Ernst & Ernst, 72 N.W.2d 364 (Minn. 1955) (determining that certified accountants were not entitled to immunity where they were not acting in a quasi-judicial, decision-making capacity).

Butz v. Economou, 438 U.S. 478,511 (1978). Employees of administrative agencies who work as judges (ALJs) are immune from liability because they perform quasi-judicial functions. See id. at 511, 513-14. Unlike arbitrators, however, ALJs are subject to de novo review for questions of law, and questions of fact are reviewed under the substantial evidence test. See Universal Camera v. NLRB, 340 U.S.474,491 (1951) and Brickner v. FDIC, 747 F.2d 1198, n.4 (8th Cir. 1984). Ultimately, ALJs are subject to greater scrutiny and have a more involved appellate review.

See Hausmaninger, supra note 8, at 16 and Corey v. New York Stock Exch., 691 F.2d 1205, 1209 (6th Cir. 1982). As the Corey court clearly articulated, arbitrators are judges chosen by the parties to decide matters submitted to them; and by this private agreement, the parties invoke the arbitrators' independent judgment and discretion as a decision-maker. See Corey at 1209.

Referring Principles:

XIII.2.7 - Immunity of arbitrator