DISPUTE RESOLUTION

The Newsletter for Conflict Resolution Neutrals and Attorneys

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Note for February Issue. This issue is late because of the Editor-Writer's involvement in several pressing arbitration and mediation cases. Also, the material content is very brief, and, as usual, references are made to on-line sources for more information.

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Meeting Notes
TBA Dispute Resolution Section Executive Council
Tuesday, February 11, 2003 @ 8:30 a.m. Central

<u>Attending:</u>
Ken Jackson

Allen Blair
Judy Johnson
Lynn Pointer, TBA

- **The Uniform Arbitration Act -** Allen Blair will contact David Taylor to follow up on the study of the Uniform Arbitration Act.

- **CLE -** Lynn Pointer will contact Jan Walden to see if she has plans to put together a section DR forum this year.

- **Memphis Bar Info. –** Allen tells about the Memphis Bar's Conference in May in Destin. He and Hayden Lait are doing a "Mediation from A – Z" for that program.

- **CLE Question –** Allen asks if this section could do a statewide mediation program. Mediation is big in Memphis - the section's annual forum has been in Nashville in the last few years. Is this viable statewide?

- **TALS (Tennessee Alliance for Legal Services) Training –** Ken talks about the TALS training for Legal Aid staff and asks if anyone might be interested in helping with that statewide training on the basics of mediation (March - no exact dates yet). Travel would be reimbursed. Anyone who is willing to help should contact Ken.

- **Newsletter Articles Needed** – Ken asks for anyone having articles or information for the section's monthly newsletter to get them to him as soon as possible.

- **TBA Convention** - TBA Convention is set for June 11-14 in Memphis at the Peabody Hotel. There are no plans for a section CLE program at this time.

- **Expanding Mediation –** Ken discusses expanding mediation to other areas such as employment, environment, health care, etc. – other states are moving in this direction.

HIM PORTLAND, LLC v. DEVITO BUILDERS, INC.

Contract required request for mediation before arbitration, thus HIM PORTLAND could not compel arbitration under the FAA. U.S. Court of Appeals for the First Circuit. (No. 02-1955, 1/17/03). Full text:
http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=1st&navby=case&no=021955

Discover Bank v. Superior Court of Los Angeles County

A state court is pre-empted from striking class action waiver from an arbitration agreement governed by the FAA. California Court of Appeal, Second Appellate District. (No. B161305, 1/14/03). Full text: http://www.courtinfo.ca.gov/opinions/documents/B161305.PDF. Contrast *Szetela v. Discover Bank*, 97 Cal.App. 4th 1094 (2002). See also *Ellen Mandel v. Household Bank,*

National Association, California Court of Appeal, Fourth Appellate District. (No. G029531, 1/7/03) where the unconscionable provision re class actions was severed.

Morrison v. Circuit City and Shankle v. Pep Boys

These cases were consolidated for *en banc* review by the Sixth Circuit, Nos. 99-4099 and 99-5897, decided and filed 1-30-03, available at: http://pacer.ca6.uscourts.gov/cgi-bin/getopn.pl?OPINION=03a0033p.06. The Court dealt with the tests for cost-sharing by employees, and struck down a limitation of remedies provision, and stated that invalid provisions could be severed.

ACEQUIP LTD. v. American Engineering Corp.

The Second Circuit decided that a party resisting the appointment of an arbitrator does not have the right to a hearing to test the validity of the arbitration agreement. Full text at: http://www.tourolaw.edu/2ndCircuit/.
(No. 01-9166, decided 1-2-03).

Ting v. AT&T, Boomer v. AT&T

These two cases from the Seventh and Ninth Circuits reached different results on class action limitations in a Consumer Service Agreement. Ting, the 9th Circuit case (No. 02-15416, filed 2-11-03) is found at:
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/1CB92EF5AD825DA188256CCA0011916F/$file/0215416.pdf?openelement. Boomer, the 7th Circuit case (No. 02-2667, decided 10-3-02) is found at:
http://www.ca7.uscourts.gov/op3.fwx?submit1=showop&caseno=02-2667.PDF.

Goodman v. THF Construction

John B. Goodman Limited Partnership v. THF Construction, Inc., 2003 WL 329000 (11th Cir. Fla.) held that once the parties have agreed to arbitrate it is for the arbitrators, not a court, to determine the enforceability of the underlying contracts. Full text:
http://www.law.emory.edu/11circuit/feb2003/02-13435.opn.html

Waverlee Homes v. McMichael

Reasonable impression of arbitrator bias may be grounds for setting aside award. Waverlee Homes v. McMichael, Alabama S. Ct. 2003 (No. 1010966, 02/14/03). Full text:
http://www.wallacejordan.com/decisions/Opinions2003/1010966.htm

University Nursing Associates v. Phillips – Mediation of Malpractice

Another case – as the two above – reported by Willamette Law Online-Dispute Resolution is a mediation case involving a malpractice negligence claim against their attorney, Steve Torvik, who represented them in mediation. The attorney agreed to the mediator's appraisal of stock at $64,000, and the Diebolds settled their claim. An expert subsequently valued their stock at $500,000. The Diebolds were unsuccessful in setting aside their settlement agreement, and sued Torvik for damages. The court dismissed their claim on the grounds that mere dissatisfaction with a settlement will not support a malpractice negligence claim. University Nursing Associates, PLLC v. Phillips, 2003 WL 328034, (Miss. 2003.)

Dluhos v. Strasberg

Thanks to Louis Coffey of Philadelphia's Wolf, Block, Schorr and Solis-Cohen for this item. The Third Circuit ruled that an arbitration panel's decision in a dispute over the rights to an Internet domain name are not entitled to "extremely deferential" reviews in Federal courts because such proceedings do not fall under the FAA. Dluhos v. Strasberg, Third Circuit, (No. 01-3713, 2/20/03). Text at: http://caselaw.lp.findlaw.com/data2/circs/3rd/013713p.pdf. The District Court directed to review the award de novo under the Anticybersquatting Consumer Protection Act.

Sawtelle v. Waddell & Reed, Inc.

Coffey also brought to our attention a New York case throwing out a $25 Million punitive damages award – an award that was about 25 times the compensatory damages award – in an NASD arbitration involving an employment matter. Sawtelle v. Waddell & Reed, Inc., No. 2330, New York Appellate Division, 1st Department.

Florida Bar v. Rapoport

In Florida Bar v. Rapoport (no. SC01-73, 2/20/03), the Florida Supreme Court found that an attorney licensed in Washington, D. C. but not in Florida engaged in the unauthorized practice of law by representing parties in Florida in securities arbitration proceedings. Rapoport relied on the FAA as preemptive of state law in federal securities matters. Full text: http://caselaw.lp.findlaw.com/data2/floridastatecases/2_2003/sc01-73.pdf.

Parkway Dodge v. Hawkins

This is an Alabama Supreme Court case (No. 1010898, 2/7/03) compelling arbitration. Hawkins had bought a car from Parkway and bought a service contract from Chrysler Corporation and an insurance policy from Resource Life, both foreign corporations. Overturning the lower court, the Supreme Court held that those contracts constituted a substantial effect on interstate commerce so as to bring the FAA into play. Full text: http://www.wallacejordan.com/decisions/Opinions2003/1010898.htm.

Chester v. Doig

Supreme Court of Florida (No. SC01-348, 2/6/03), available at: http://www.flcourts.org/sct/sctdocs/ops/sc01-348.pdf. Arbitrators rightly found that Florida's Medical Malpractice Act did not specifically permit an offset from an arbitration award against a doctor by reason of plaintiff's prior settlement with hospital.

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