

## DISPUTE RESOLUTION

The Newsletter for Conflict Resolution Neutrals and Attorneys

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#### No Offsets to Back-Pay Award

International Chemical Workers Union v. Columbian Chemicals Co., 2003 WL 21088001 (5<sup>th</sup> Cir.(La.)). Full text:

<http://www.lb5.uscourts.gov/Opinions/Opinhome.cfm>. The failure of the Arbitrator to mention offsets in the award meant that no offset for employee's earnings after discharge before reinstatement.

## Mediation Confidentiality

In *Rojas v. Superior Court*, 102 Cal. App. 4<sup>th</sup> 1062 (2002), the Court of Appeals determined that the California mediation confidentiality statute, Cal. Evid. Code § 1119, does not apply to raw data or “non-derivative” evidence disclosed in a mediation and provides only a qualified protection for “amalgamated materials,” such as charts and diagrams prepared by an attorney and disclosed in a mediation. The Southern California Mediation Association (SCMA) submitted an *amicus* brief supporting the appellate decision to the California Supreme Court. While counter-intuitive to the idea of protecting confidentiality at all costs, SCMA makes the point in its press release that affording absolute confidentiality to all evidence belatedly claimed to have been “prepared for mediation” would destroy the integrity of mediation. If you are interested in reading more, go to <http://www.scmmediation.org/>

If you wish to read the court’s opinion, go to:  
<http://www.mediate.com/articles/rojas.cfm>.

## Florida Court Rejects a Parent’s Arbitration Agreement

For full text, see <http://www.4dca.org/opfrm.html>. When you get to that site, click on Opinions Released 4-23-03, and then click on *Shea v. Global Travel*, No. 4D02-910. A child, age 11, was killed while on safari with his mother. His mother had signed an arbitration agreement on behalf of her son. The court concluded in this case of first impression in Florida that a parent does not have the authority to bind a minor child to arbitrate potential personal injury claims. The court reviewed decisions of other states, and discerned “no common sense reason to depart from the public policy favoring the protection of children from waiver of their basic rights by a parent.”

## Circuit City Old vs. New Pre-Dispute Arbitration Agreements

The 9<sup>th</sup> Circuit on May 13, 2003 affirmed the trial court’s refusal to compel arbitration in a Circuit City case that used the old version of the company’s arbitration agreement in *Ingle v. Circuit City*. Full text is available at:

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/52C7E06D0044D65488256D24007F5BE8/\\$file/9956570.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/52C7E06D0044D65488256D24007F5BE8/$file/9956570.pdf?openelement). Contrast two other cases involving the new agreement:

*Circuit City Stores v. Ahmed* (U. S. C. A. 9<sup>th</sup> Cir., March 22, 2002) and *Circuit City Stores v. NAJD* (U. S. C. A. 9<sup>th</sup> Circuit, June 24, 2002) where arbitration orders were upheld. Those cases are available at

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/019BBCA995F557E988256B840002142A/\\$file/9855896.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/019BBCA995F557E988256B840002142A/$file/9855896.pdf?openelement) and

[http://www.ca9.uscourts.gov/ca9/newopinions.nsf/3F6DAB5B09C0FFCA88256BDF007864CA/\\$file/9956571.pdf?openelement](http://www.ca9.uscourts.gov/ca9/newopinions.nsf/3F6DAB5B09C0FFCA88256BDF007864CA/$file/9956571.pdf?openelement), respectively.

## Supreme Court Remands Alabama Case: FAA Applicable

The U. S. Supreme Court in *The Citizens Bank v. Alafabco*, No. 02-1295, dated June 2, 2003 ordered remand of a case the Alabama Supreme Court said had an insufficient nexus to interstate commerce to establish FAA coverage of the dispute. The Supreme Court in an unsigned order stated that the lower court's opinion rested on "an improperly cramped view of the Commerce clause. For full text, see:

<http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&navby=case&vol=000&invol=02-1295>.

#### California Arbitration for Non-Resident Attorneys

Carl Ingwolson directs our attention to California Code of Civil Procedure, § 1282.4 for the current, repeat current rules on representing a party in a California arbitration.

#### Mediation Confidentiality

In *Eisendrath v. Superior Court (Rogers)* (2003) \_\_\_ CA4th \_\_\_ [2d Dist, Div 4, May, 30, 2003], full text at: <http://www.courtinfo.ca.gov/opinions/documents/B164245.PDF>, the appellate court required an express waiver of mediation confidentiality, and the court ruled that the mediator could not be deposed in this domestic case.

#### Housh v. Dinovo Investments – Primer on Law of Arbitrability

Paul Lurie of Chicago's Schiff, Hardin & Waite recommends the following case as a good primer on the law of arbitrability:

<http://www.ksd.uscourts.gov/ors/opinions/022562KHV-16.pdf>.

#### Failure to Timely Notify AAA of Arbitration Demand Renders Architect's Decision Final and Binding

In the Idaho case of *Martel v. Bulotti*, available at: <http://www2.state.id.us/judicial/opinions/martel.pdf>, the Idaho Supreme Court rejected a claim by the builder that he had timely filed an arbitration demand when he sent it to the architect but not to the owner or the AAA as required by the arbitration provision of the contract.

#### ABA Connection June 18<sup>th</sup> on ADR Advocacy

For ABA members, call 1-800-285-2221 to register, or register on-line at [www.abanet.org/cle/connection.html](http://www.abanet.org/cle/connection.html), for this free program. The program is dial-in to an 877 number, at 1 p. m. Eastern, 12 p. m. Central. A nice way to learn while you take your lunch break. You get one hour of CLE at no charge. The ABA will give you a required PIN number to enter the program. You can read the article about the program in the June ABA Journal.

#### Interlocutory Order Not Appealable Under FAA

Jonesfilm v. Lions Gate Films, Inc., 2003 WL 21266466 (2nd Cir.(N.Y.)), brought to our attention by Willamette Law School's Dispute Resolution e-Zine. Full text at:

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/2nd/019437.html>. Case concerns film The First 9 \_ Weeks.

Sixth Circuit Vacates Arbitration Panel Award Directing Payment to a Third Party, But Rejects District Court's Order Directing Panel to Consider Offsets Not Within Panel's Jurisdiction

See Nationwide Mut. Ins. Co. v. Home Ins. Co., 2003 WL 21263845 (6<sup>th</sup> Cir.(Ohio)).

Full text at:

<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/6th/03a0172p.html>.

Malpractice Claim and Counterclaim for Breach of Contract Mediation Yielded Agreement. In Who's Favor?

A Kentucky appeals court *Feinberg v. Townsend*, 2003 WL 21204627 (Ky. App. 5/23/2003), available at:

[http://www.kycourts.net/Appeals/COA\\_Opinions.shtm](http://www.kycourts.net/Appeals/COA_Opinions.shtm)

(Use *Feinberg* as search term.) determined that the circuit court properly granted summary judgment as to whether the mediation proceeding was terminated in *Feinberg's* favor. *Townsend* sued *Feinberg* for legal malpractice. The case was referred to mediation where it was agreed that *Townsend* would dismiss his claims against *Feinberg* and *Feinberg* would receive 50 shares of *Riverboat Development, Inc.*, instead of the 240 shares agreed upon in the contract for legal representation. The circuit court held that *Feinberg* could not then bring suit for wrongful use of civil proceedings against *Townsend* and his counsel because he could not show that the underlying action was terminated in his favor. The appeals court affirmed, saying that a mediated settlement agreement was the product of mutual agreement, even though *Feinberg* got something out of the agreement.