

Resolving Disputes Outside of Court

The Year in ADR Case Law

By Curtis Brown

Experienced lawyers are very likely to be regularly involved with some form of alternative dispute resolution (ADR) either by serving as a mediator or arbitrator or by representing parties in mediation or arbitration. And this is increasingly the case given the unmistakable growth in ADR usage. A search of the Westlaw® database of state and federal cases reveals 4,918 judicial opinions mentioning the word “arbitration” and 2,293 mentioning “mediation” in 2006. A search of cases decided in 1976 reveals 1,026 opinions mentioning arbitration and just 158 mentioning mediation. ADR is becoming more and more an accepted reality for lawyers and the parties they represent.

One byproduct of this growth is that it has become very difficult for ADR neutrals and lawyers to keep up with rapidly developing ADR case law. For example, my organization endeavors to track down, read, and summarize every state and federal appellate court decision that decides a significant legal issue related to some area of ADR. In 2006 alone we summarized more than 850 such cases. (Our *Law and Policy Update* weekly e-mail is available via cost-free subscription at www.adrforum.com.)

The overarching lesson learned from

reviewing all of these cases is that ADR processes are largely progressing smoothly and as expected. Courts are enforcing valid agreements to arbitrate and mediate, appropriately respecting mediation confidentiality, and routinely confirming arbitration awards into enforceable judgments. In short, the state of ADR in America is healthy and strong.

This article summarizes some of the most significant mediation and arbitration decisions from 2006 with an eye toward finding opinions that are likely to be of interest to lawyers who serve as ADR neutrals or who regularly practice in the mediation or arbitration contexts. Our hope is to encourage lawyers to continue to look for opportunities to resolve disputes outside of a courtroom or, potentially, to expand their practices by serving as an arbitrator or mediator.

Arbitration

When Can an Arbitration Agreement Be Challenged in Court?

Whether brought in federal or state court, a challenge to the validity of a contract as a whole, rather than just the arbitration clause, must be heard by the arbitrator, the Supreme Court has held.

Brown is vice president of the National Arbitration Forum (FORUM), where he directs development of FORUM's institutional dispute resolution programs and ADR service offerings. He can be reached by e-mail at cbrown@adrforum.com.

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Unless the challenge is to the arbitration clause itself, the validity of a contract is for the arbitrator to decide.

In *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (U.S. 2006), Cardegna brought a putative class action against Buckeye Check Cashing, alleging that Buckeye charged usurious interest rates in connection with check cashing loans, and that Buckeye's loan agreements violated several Florida lending and consumer protection laws.

Buckeye moved to compel arbitration based upon the arbitration clause contained in the loan agreement. Cardegna argued that the entire contract was void for illegality, and that the arbitration clause was therefore also void.

The Florida Supreme Court sided with Cardegna, holding that enforcing agreements to arbitrate in a contract challenged as unlawful "could breathe life into a contract that not only violates state law, but also is criminal in nature."

On grant of certiorari, the Supreme Court reversed, holding that Cardegna's challenge to the contract "must go to the arbitrator." In its opinion, the Court reaffirmed that an arbitration provision is severable from the rest of the contract. Unless the challenge is to the arbitration clause itself, the validity of a contract is for the arbitrator to decide. And finally, substantive federal arbitration law applies in both state and federal courts.

The Court found that the lower court improperly relied on the distinction between void and voidable contracts. Under Florida law, parts of a contract cannot be severed from a void contract. But the Supreme Court found that Florida state law is irrelevant. In so holding, the Supreme Court relied on the established body of federal substantive law relating to arbitration that is applicable to both federal and state courts. It is this federal law that preempts state law from governing arbitrations.

Justice Scalia explained why the Court could not agree with Cardegna:

It is true, as respondents assert, that the [proposed] rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable.

The Court clearly resolved this tension in favor of arbitration, finding that whether the challenge is brought in state or federal court, the challenge to a contract's validity must go to the arbitrator. The *Buckeye* decision continues the precedent established in other recent Supreme Court decisions that extended the authority to arbitrators to decide disputed issues.

May an Arbitrator Order a Preliminary Injunction?

Consistent with other circuits that have considered the issue, the Fourth Circuit has determined that courts can confirm time-sensitive arbitration awards, such as temporary injunctions, before the arbitration is complete.

In *Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 Fed. Appx. 39 (4th Cir. 2006), Datapath was a subcontractor of Arrowhead Global Solutions (AGS), a satellite receiver supplier. Datapath sued AGS for breach of contract when AGS gave some satellite work to another company.

Pursuant to an arbitration clause in the subcontract agreement, the dispute went to arbitration. The arbitrator enjoined AGS from sharing Datapath's proprietary information with the other company. Before the arbitrator had rendered an award on the merits, Datapath moved to have the District Court confirm this temporary injunction.

The District Court confirmed the interim award, and AGS appealed, arguing that the court could not confirm the equitable relief because the award was not final.

On appeal, the Fourth Circuit noted that the Federal Arbitration Act compels courts to confirm arbitration awards except under limited circumstances, and that nothing in the Act mandates that an award be final before it can be confirmed. In order for arbitrators to have the power to issue temporary equitable relief, the court explained, district courts must have the power to confirm and enforce that relief.

Otherwise, the arbitrator's order would not have teeth. Waiting until a decision on the merits to confirm time-sensitive relief could render the relief meaningless, said the court. The court stated that this

approach “makes sense,” and cited with approval similar holdings from the Sixth, Seventh, and Ninth Circuits, the other circuits that have considered this issue.

Frivolous Arbitration Appeals Can Lead to Sanctions

Desirous to ensure that parties in arbitration get the benefits of a faster and less expensive procedure than litigation, the 11th Circuit issued a stern warning that it is “ready, willing, and able to consider imposing sanctions” on those considering appealing arbitration decisions without a strong justification under the manifest disregard of law standard.

The parties in *B.L. Harbert Int’l, LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006) became involved in litigation over the length of time it took Hercules, a construction subcontractor, to finish its work for Harbert. The parties arbitrated the dispute, and the arbitrator determined that Hercules performed its work in a timely manner, and awarded Hercules monetary relief.

Harbert appealed, asserting that the arbitrator manifestly disregarded the law. The Circuit Court provided a quick review of the facts and found “no evidence that the arbitrator manifestly disregarded the law.” Clearly angered by the appeal, the court continued, stating, “the only manifest disregard of the law evident in this case is Harbert’s refusal to accept the law of this circuit which narrowly circumscribes judicial review of arbitration awards.”

The court continued:

If we permit parties who lose in arbitration to freely relitigate their cases in court, arbitration will do nothing to reduce congestion in the judicial system; dispute resolution will be slower instead of faster; and reaching a final decision will cost more instead of less. This case is a good example of the poor loser problem and it provides us with an opportunity to discuss a potential solution.

The court, expressing its frustration at so many frivolous arbitration appeals, particularly those relying (without justification) on manifest disregard of the law as the basis of appeal, also issued a

reminder that it had previously provided clear guidance to parties on whether they would meet that standard. Harbert’s case, the court explained, was “not within shouting distance of the [manifest disregard] exception.”

The “potential solution” would sanction parties on the losing end of arbitration who bring baseless litigation over arbitration awards. Harbert was spared sanctions in the case because “it did not have the benefit of the notice and warning this opinion provides.”

The court’s opinion follows the proarbitration policy contained in the Federal Arbitration Act (FAA). The opinion’s threat of sanctions for baseless appeals is also an explicit warning for “even the least astute reader” to consider appeals of arbitration decisions more carefully in the future.

This opinion, on the other hand, ought not to deter losing parties from bringing a meritorious appeal.

When Is an Unsigned Arbitration Agreement Enforceable?

The Eighth Circuit Court of Appeals enforced an agreement to arbitrate in an employment dispute where an employee refused to sign an acknowledgment form. The court found that she accepted the agreement through her continued employment.

In *Berkley v. Dillard’s, Inc.*, 450 F.3d 775 (8th Cir. 2006), Berkley filed complaints with the EEOC and the Missouri Commission on Human Rights (MCHR), alleging racial harassment by her coworkers at Dillard’s. Less than a month later, Dillard’s implemented an arbitration program by providing its employees with two documents, one of which advised employees that by “accepting or continuing employment with Dillard’s, you have agreed to accept the Program known as the Agreement to Arbitrate Certain Claims.”

A few days later, Dillard’s asked its employees to sign an acknowledgment form that stated: “Employees are deemed to have agreed to the provisions of the Rules by virtue of accepting employment with the Company and/or continuing employment therewith.” When Berkley refused to sign the form, Dillard’s advised her that refusing to sign would not affect the applicability of the arbitration agree-

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ment because it automatically applied to all employees who continued their employment.

Berkley sued Dillard's after receiving notice of her right to sue from the EEOC and the MCHR. The lower court granted Dillard's motion to compel arbitration.

On appeal, Berkley argued that she rejected the arbitration agreement by refusing to sign the acknowledgment form. Unpersuaded, the court held that Berkley accepted the arbitration agreement by her continued employment because the acknowledgment form stated that "employees 'are deemed to have agreed to the provisions of the Rules by virtue of accepting employment with the Company and/or continuing employment therewith.'"

Mediation

When Is a Mediated Settlement Agreement Admissible?

In construing a statutory exception to mediation confidentiality, the California Supreme Court held that a memorandum detailing the terms of a mediated settlement agreement did not fall within the exception because the inclusion of an arbitration provision did not satisfy the requirement that the settlement agreement include words of binding effect. As the court explained, the exception requires a direct expression of binding intent.

In *Fair v. Bakhtiari*, No. S129220, 2006 WL 3630768 (Cal. Dec. 14, 2006), Fair sued Bakhtiari and several others, alleging that they cheated him in their business dealings. The parties attended a two-day mediation session that culminated in a handwritten memorandum briefly detailing the terms of a settlement agreement. One of the settlement terms was a provision for arbitration stating: "Any and all disputes subject to JAMS arbitration rules."

Following mediation, the parties advised the court that the case had been settled. However, the parties were unable to finalize the settlement, prompting Fair to file a motion to compel arbitration.

Fair's motion to compel was based on the arbitration provision in the memorandum detailing the settlement agreement. In opposing the motion, Bakhtiari and his codefendants argued that the memo-

randum was inadmissible as confidential communications made in the course of mediation.

Fair countered by arguing that the memorandum was admissible under California Evidence Code section 1123(b), which exempts from mediation confidentiality a written settlement agreement "that provides that it is enforceable or binding or words to that effect." According to Fair's argument, the arbitration provision constituted "words to that effect."

The trial court ruled that the memorandum did not satisfy these requirements of the section and was therefore inadmissible. The court of appeals reversed, reasoning that the arbitration provision could only mean the parties intended the memorandum detailing the settlement agreement to be "enforceable or binding."

The California Supreme Court reviewed the matter and held that the memorandum was not admissible. Specifically, the court held that "to satisfy the 'words to that effect' provision of section 1123(b), a writing must directly express the parties' agreement to be bound by the document they sign."

As the court observed, the scope of the section 1123(b) exception is unique to California. Under section 6(a)(1) of the Uniform Mediation Act, mediation confidentiality does not apply to a settlement agreement signed by all parties. The memorandum would have been admissible under that standard since it was signed by all the parties.

Will Courts Enforce a Contractual Promise to Mediate?

A Kansas appellate court dismissed a case against a real estate agent because the clients who sued him had contractually agreed to mediate their claims yet failed to do so before filing the suit.

In *Crandall v. Grbic*, 138 P.3d 365 (Kan. Ct. App. 2006), real estate agent Grbic helped the Crandalls buy a home. The purchase agreement required that any dispute arising from the agreement "be submitted to mediation." After the Crandalls discovered roof leaks and pet urine in the home, they sued Grbic. Grbic filed a motion for summary judgment on the grounds that the Crandalls had not pursued mediation. The trial court granted Grbic's motion and the Crandalls

appealed.

On appeal, the court considered the fact that *after* Grbic filed his summary judgment motion the Crandalls did attempt to mediate the dispute. The court concluded that it would be unreasonable to allow them to avoid summary judgment because Grbic had spent time and money defending the suit. The purchase agreement required the Crandalls to pursue mediation *before* filing a complaint, the court concluded. For this reason, the

court affirmed the lower court's decision granting summary judgment to Grbic.

Though mediation itself is nonbinding, parties can obligate themselves to participate in the mediation process. Many courts already require some form of mediation or arbitration in the early stages of a case, but parties can also build this requirement into their agreements to avoid spending exorbitant amounts of time and money in litigation. ■