

CONSTRUCTION ADR MONITOR

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FORUM DISPUTE MANAGEMENT

Forum Dispute Management offers some of Southern California's most knowledgeable and talented construction panelists. Our highly experienced neutrals serve as mediators, arbitrators and special masters in a wide range of disputes involving general construction, construction defect, real estate and insurance coverage issues. To learn more about our elite panel or to schedule an ADR session, contact us at 213-487-8660.

Forum Dispute Management Adds Veteran California Construction Mediator and Arbitrator Michael J. Bayard to its Construction Panel

Forum Dispute Management (FORUM) has added accomplished California construction neutral Michael J. Bayard to its construction mediation roster. Mr. Bayard is experienced in all aspects of construction ADR and has been serving as a full-time neutral, resolving primarily construction-related disputes, since 2000.

Prior to launching his full-time ADR practice, Mr. Bayard was National Chair of the Construction Law Practice Groups at Sonnenschein Nath & Rosenthal and previously at Pillsbury Madison & Sutro. Mr. Bayard also serves as an Adjunct Professor in Construction Management in the Graduate Program in Real Estate Development at the University of Southern California.

Mr. Bayard has mediated over 100 significant construction cases. He has mediated nearly every type of construction dispute, including design and construction defects, extra work and delay claims, and complex insurance coverage disputes. Construction claim values have ranged between \$25,000 and \$25 million.

Private project mediations included office buildings, shopping centers, condominiums, single-family homes, hotels, and stadiums. Public projects included port improvements, airports, schools, infrastructure projects, military bases, and convention centers.

Mr. Bayard has developed a bit of a sub-specialty in the mediation of construction claims relating to luxury or what sometimes are called "museum" homes. He is currently serving as the mediator for claims regarding what is reputed to be one of the most expensive single-family residences in the United States.

He has mediated and arbitrated multi-party disputes involving as many as 25 parties. Additionally, he has particular expertise in insurance coverage issues related to design and construction defect claims, including allocation of defense costs and indemnity obligations among multiple insurance carriers.

Author of over 35 construction law and construction ADR publications, Mr. Bayard has also presented or served as the featured lecturer for numerous events organized by the American Bar Association and California State Bar, as well as major



MICHAEL J. BAYARD

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construction industry and ADR-related events. This year, Mr. Bayard will again be acting as host for the presentation of the Robert Flaig Award by the Los Angeles County Bar Association's Construction Law Subsection.

The FORUM is proud to add Michael J. Bayard to its talented roster of construction mediators. For more information about the FORUM's out-of-court dispute resolution offerings for construction disputes, visit www.adrforum.com and access the Construction focus area.

Did You Know?

Parties asserting unwarranted challenges to arbitration awards may be subject to court sanction under Rule 11 of the Federal Rules of Civil Procedure or similar state court rule. Courts review arbitration awards with great deference and increasingly frown upon unsupported arguments and accusations.

For example, in refusing to overturn an award in a securities arbitration case, an Alabama federal court taxed attorney fees and costs of over \$15,000 to the broker, concluding that the motion to vacate was "both frivolous and ha[d] no real legal basis" and that it "needlessly increased the cost of litigation." **Reuter v. Merrill Lynch**, 440 F.Supp.2d 1256 (N.D. Ala. 2006).

The Eleventh Circuit recently put parties on notice that "in order to... protect arbitration as a remedy we are ready, willing, and able to consider imposing sanctions in appropriate cases." **B.L. Harbert Int'l v. Hercules Steel Co.**, 441 F.3d 905, 914 (11th Cir. 2006).

California Arbitration Awards are Presumed Binding Unless Parties Specify Otherwise

Unless parties to an arbitration agreement specify that arbitration will not be binding, the arbitrator's award is binding on the parties, a California state court held.

In **Massa v. Ruskin**, No. A110704, 2006 WL 2474885 (Cal. App. Aug. 29, 2006), Ruskin hired general contractor Massa to build a home. Massa finished the home and Ruskin refused to pay part of the contract price.

"In the absence of a clear indication that the parties intend arbitration not to be binding, they will be bound by the arbitrator's decision."

—CALIFORNIA COURT OF APPEALS

The parties submitted their dispute to arbitration pursuant to an arbitration clause in their contract. The arbitrator issued an award in Massa's favor, and Ruskin argued that the parties had not agreed to *binding* arbitration; therefore, he was

not bound to pay the amount that the arbitrator awarded Massa.

The parties' agreement did not specify that arbitration was to be binding. However, the court held that the arbitration was binding because "in the absence of a clear indication that the parties intend arbitration not to be binding, they will be bound by the arbitrator's decision."

Therefore, even though the parties were not required by their contract to submit

their dispute to arbitration, since they decided to do so and never specifically stated that the arbitration would not be binding, the court confirmed the arbitrator's award.

Arbitration Agreement in Subcontract Requires Arbitration of Dispute Involving Master Contract

A subcontractor joined into a lawsuit as a third party defendant is entitled to invoke the arbitration clause in its subcontract, even when the main lawsuit involves a master contract that lacks an arbitration provision, according to a federal district court in Kentucky.

In **FMC Technologies, Inc. v. Sequoia Energy, L.L.C.**, No. CIV 05-376 DCR, 2006 WL 2540377 (E.D. Ky. Aug. 31, 2006), contractor FMC sued Sequoia for breach of a construction contract. Sequoia counterclaimed, alleging negligence and breach of implied warranty.

After receiving the counterclaim, FMC filed a third-party complaint against Pacific and Colony, two of its subcontractors. Pacific then moved to compel arbitration pursuant to the arbitration clause in its subcontract

with FMC. In opposing the motion to compel, FMC argued that the dispute arose under the master contract, not the subcontract.

The court disagreed. It found that the subcontract contained a broad arbitration agreement encompassing all disputes between FMC and Pacific relating to the subcontract. FMC's claim, the court held, was based on Pacific's performance of the subcontract and, in fact, specifically alleged a breach of the subcontract.

FMC also sought indemnification and contribution from Pacific as a result of Sequoia's alleged damages. Therefore, even though the underlying claim arose from the master contract between FMC and Sequoia, FMC's claim against Pacific arose from Pacific's subcontract, and the claims were arbitrable.

Broad Arbitration Clause Between General Contractor and Homeowner Encompasses Disputes Between Homeowner and Subcontractor

A New Jersey state court held that a broad arbitration agreement between a general contractor and a homeowner requires the homeowner to arbitrate disputes against subcontractors when the contract between the general contractor and subcontractor also contains a broad arbitration clause and the general contractor is an indispensable party to the action.

In *Bruno v. Mark McGrann Associates, Inc.*, No. L-2659-04, 2006 WL 3228596 (N.J. Super. Nov. 9, 2006), Bruno purchased a home from U.S. Homes, the general contractor. When Bruno became dissatisfied with the heating system, he brought suit against U.S. Homes.

The lawsuit against U.S. Homes was subsequently dismissed, and the parties were ordered to arbitrate pursuant to an arbitration clause in their contract. Bruno then brought a suit against two of the subcontractors that were involved with the design and installation of the heating system.

The subcontractors petitioned the court to compel arbitration. Although there was no contract—and hence no arbitration agreement—directly between Bruno and the subcontractors, the court compelled arbitration of the dispute.

The court noted that the arbitration clause in the Bruno/U.S. Homes contract was sufficiently broad to cover Bruno's complaints about the heating system, and the clause gave U.S. Homes

the option to include subcontractors as parties to arbitration.

Additionally, the contracts between U.S. Homes and the subcontractors also contained arbitration clauses that required arbitration of all disputes. As a result, arbitration was the only forum where all three parties could resolve their dispute. Because U.S. Homes was an indispensable party to the lawsuit, the court held that the dispute between Bruno and the subcontractors must be arbitrated.

Finally, the court noted that because Bruno's original complaint against McGrann contained the same factual allegations as the complaint against the subcontractors, Bruno was estopped from avoiding arbitration.

FAA Applies Where Party Conducts Some Business Affecting Interstate Commerce, Even if Disputed Transaction Does Not

Evidence that a party to a transaction does some business affecting interstate commerce—even if the transaction at issue does not affect interstate commerce—is adequate proof that the transaction “affects” interstate commerce for the FAA to apply, the Alabama Supreme Court held.

In *McKay Building Co., Inc. v. Juliano*, No. 1071720, 2006 WL 2037161 (Ala. July 21, 2006), Juliano contracted with McKay to make improvements on Juliano's home. The parties' contract included an arbitration clause; however, when a dispute arose, Juliano argued that the Federal Arbitration Act (“FAA”) was inapplicable because the parties' transaction did not involve interstate commerce.

The court noted that the party with the burden of proving that the transaction affects interstate commerce—and therefore that the FAA is applicable—does not need to show that the individual transaction in question substantially affects interstate commerce. *Huntsville Utilities v. Consolidated Construction Co.*, 876 S.2d 450, 454 (Ala. 2003).

McKay submitted affidavits stating that lumber and light fixtures used for the project at the Juliano's home came

from states other than Alabama; Juliano argued that this evidence was insufficient.

Noting that “[e]vidence that a party to a transaction does business outside of Alabama or that it regularly deals in interstate commerce is sufficient to demonstrate that the transaction involves interstate commerce,” the court ruled that McKay's evidence established that the business conducted transactions in interstate commerce. This evidence was sufficient for the FAA to apply, and the court compelled arbitration of the dispute.

While the court applied the FAA in this case, the decision is a reminder that parties wishing to have a uniform application of their arbitration agreements should make the application of the FAA an express provision of the contract. See *Rodriguez v. American Technologies, Inc.*, 39 Cal. Rptr. 3d 437 (Cal. Ct. App. 2006) (parties to an agreement can explicitly choose to have their agreement governed by the FAA rather than state law). Parties can avoid the risk that their disputes will be governed by a patchwork of state laws or a state arbitration statute they do not prefer by explicitly exercising this authority.

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Parties Cannot Avoid Arbitration by Adding Party

In *Dodds v. Pulte Home Corp.*, Nos. 3262 EDA 2005, 3263 EDA 2005, 2006 WL 2788670 (Pa. Super. Ct. Sept. 28, 2006), the Pennsylvania Superior Court ruled that Dodds, a home buyer, could not avoid arbitration with Pulte merely by adding non-signatories or allegations of fraud to his lawsuit.

Dodds' lawsuit arose from an alleged breach of a home construction contract that contained a broad arbitration clause providing for arbitration of "any controversy, claim or dispute." Dodds claimed that he should not have to arbitrate because his fraudulent inducement claim was outside the scope of the arbitration clause.

In addition, Dodds asserted claims against Pulte's parent corporation rather than the subsidiary entity that signed the arbitration agreement.

Based on those circumstances, the trial court denied Pulte's motion to compel arbitration.

On appeal, the court ordered that the claims be arbitrated. In reversing the trial court, the court cited earlier case law establishing that a party can not avoid arbitration through creative pleading.

Similarly, the Court would not permit Dodds to avoid arbitration by naming a non-signatory as a defendant. As in many jurisdictions, Pennsylvania holds that non-signatories who are third-party beneficiaries may invoke an arbitration clause if the contracting parties so intended.

Since Pulte's interests coincided with those of its subsidiary, the court blocked Dodds' attempt to circumvent the agreement by naming a non-signatory.

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