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WELCOME

Welcome to the first issue of the NAF *Judicial ADR Monitor*. The *Monitor* is designed to provide you with reliable information on the latest legal and practical developments in the various fields of alternative dispute resolution (ADR). Each issue will contain important case law, statutory law, and regulatory updates and analysis of legal trends and key legal issues related to ADR.

E-mail and Web Arbitration Agreements Can Be Enforceable

Several recent court decisions have addressed the issue of whether properly drafted and formatted e-mails and Web documents can create legally binding dispute resolution agreements.

E-mail

In ***Campbell v. General Dynamics Government Systems Corp.,*** 407 F.3d 546 (1st Cir. 2005), Campbell sued for wrongful termination and General Dynamics moved to compel arbitration under a policy distributed via company e-mail.

Campbell argued the e-mail did not satisfy the Federal Arbitration Act's "written provision" requirement and did not provide adequate notice of a binding agreement to arbitrate. The court rebuffed his first argument but agreed he never assented to the new policy.

Under the E-Sign Act, 15 U.S.C. § 7001(a), e-mail satisfies statutory writing requirements. But this e-mail merely announced the policy and linked to its terms without requiring Campbell's assent.

Regardless, the court noted that assent could have easily been obtained by clearly stating continued employment was conditioned upon acceptance or by requiring a reply e-mail to acknowledge receipt and acceptance.

Web

The plaintiffs in ***Hubbert v. Dell Corp.,*** No. 5-03-0643 (Ill. App. 2005) ordered personal computers online and later filed consumer protection claims. Dell moved to compel arbitration asserting the arbitration clause included in the online "Terms and Conditions" was part of the contracts.

The court reasoned that hyperlinks to the Terms and Conditions were present throughout "the five-step process for ordering" and that the opportunity to click on the link was "similar to turning the page of a written paper contract."

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Because several Web pages stated that "[a]ll sales are subject to Dell's Term[s] and Conditions," the court sent the parties to arbitration.

In contrast, in ***Martin v. Snapple Beverage Corp.,*** No. B174847 (Ca. Super. Ct. 2005), consumers attempting to redeem bottle caps for merchandise on Snapple's website sued, claiming almost all of the items were sold out. Snapple moved to compel arbitration based on terms found on the website.

The court held that, because consumers could not assent by clicking the "I agree" button until the sale process was nearly complete, the arbitration terms did not bind those who complained about item unavailability but did not order any items.

Finally, ***Carfagno v. Ace, Ltd.,*** No. 04-6184 (D. N.J. 2005) involved an online Employee Guide requiring arbitration. The Guide's introduction hyperlinked to a "Receipt and Agreement" form to be printed and signed by employees.

The court refused to compel arbitration because the form did not itself mention arbitration and employees had to scroll through the Employee Guide to find the terms. However, the court advised, "[h]ad ACE … included language on the 'Receipt and Agreement' form that made employees aware that by signing they were waiving their right to sue, this case could have a different outcome."

Best Practices in Online ADR Agreements

E-MAIL

- Clearly communicate that the e-mail is a contract, arbitration is mandatory, and parties waive the right to sue in court.
- State that any hyperlinked terms are binding.
- It is best to require an affirmative act to confirm acceptance (e.g., a reply e-mail or signed form).
- With electronic assent, terms should be visible without scrolling.
- Backing up e-mail notice with a paper signature aids court review.
- State law requirements may differ, so consultation with local counsel is advised.

WEB

"BROWSE-WRAP" AGREEMENTS

An ABA Joint Working Group published recommendations to ensure that users "validly and reliably" assent to "browse-wrap" website terms (no button click required). The advice is based on case law and focus on four elements:

- Adequate notice of the proposed terms
- A meaningful opportunity to review the terms
- Adequate notice that taking a specified action manifests assent to the terms
- The user takes the action specified in the latter notice

See Christina L. Kunz, et. al., Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements, 59 Bus. Law. 279 (2003).

"CLICK-THROUGH" AGREEMENTS

The same group published 15 strategies "for avoiding disputes on the validity of the mutual assent process" in "click-through" agreements (button click required). The strategies are based on case law and break into six categories:

- Opportunity to review terms
- Display of terms
- Rejection of terms and its consequences
- Assent to terms
- Opportunity to correct errors
- Keeping records to prove assent

See Christina L. Kunz, et. al., Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent, 57 Bus. Law. 401 (2001).

SPOTLIGHT

NAF's Support of the Legal Community in 2005

The National Arbitration Forum regularly sponsors bar association sections and other legal organizations in order to continue to heighten awareness about arbitration and mediation. Highlighted 2005 sponsorships include:

- Featured sponsorship of the American Trial Lawyers Association 2005 Winter Convention in Palm Springs, California, January 29-February 2.
- Sponsorship of the 7th Annual Spring Conference of the ABA Dispute Resolution Section, April 14-16 in Los Angeles.
- Two-year sponsorship of the ABA Tort Trial and Insurance Practice Section (TIPS), commencing with the TIPS Spring Meeting in New Orleans, April 27-May 1.
- Two-year sponsorship of the ABA General Practice, Solo, and Small Firm Section, kicked off at the GP Solo Spring Meeting in Miami, May 18-22.
- Sponsorship of the National Conference of Minority Professionals in ADR's 2nd National Conference May 19-21 in Columbus, Ohio.
- Sponsorship of the ABA Section of Litigation's Annual Meeting in Chicago, August 4-9, 2005.
- Sponsorship of the California Dispute Resolution Council's 12th Annual ADR Policy Conference scheduled for October 14 in San Francisco.
- The ABA Law Student Division and NAF are jointly sponsoring the inaugural law student Arbitration Competition. The National Finals will be held in St. Paul, Minnesota, November 18-20.

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Predispute Jury Trial Waivers, Bad: Predispute Arbitration Agreement, Good

The California Supreme Court ruled predispute jury trial waivers unenforceable, but distinguished predispute arbitration agreements, finding they were supported by "a strong state policy favoring arbitration."

In ***Grafton Partners L.P. v. Superior Court of Alameda County,*** 36 Cal.4th 944 (Cal. 2005), Grafton and PriceWaterhouseCoopers (PWC) agreed that all disputes would be decided by a bench trial and later waived the right to a jury. Grafton argued against enforcing the waiver, noting that a predispute jury waiver was not one of California's six statutory waiver methods.

The Supreme Court agreed, finding that a civil jury trial waiver "is permitted only as prescribed by statute." Construing California Code of Civil Procedure Section 631(d)(2), the Court determined that "written consent" to waive a jury was only effective if obtained after litigation had commenced.

The Court emphatically distinguished arbitration agreements, reasoning that—unlike jury trial waivers—"predispute arbitration agreements are specifically authorized by statute." Fundamentally, arbitration agreements are "distinguishable from waivers of the right to a jury trial in that they represent an agreement to avoid the judicial forum altogether."

> *"[A]rbitration ... conserves judicial resources far more than the selection of a court trial over a jury trial."*
>
> —CALIFORNIA SUPREME COURT

In other words, the right to a jury trial only arises once claims are submitted to a court of law, and not to an alternative forum such as arbitration. Arbitration's efficiency explains this disparate legislative treatment:

"[A]rbitration…conserves judicial resources far more than the selection of a court trial over a jury trial. It therefore is rational for the Legislature to promote the use of arbitration…by permitting predispute agreements, while not according the same advantage to jury trial waivers."

Because it was unanimously decided on state constitutional grounds, ***Grafton Partners*** is very likely the last word on jury trial waivers in California.

Would You Like Arbitration With That?

In ***James v. McDonald's Corp.,*** 417 F.3d 672 (7th Cir. 2005), a dispute arose over McDonald's "Who Wants to be a Millionaire" game. McDonald's rejected James' purported million-dollar winning ticket. Meanwhile, eight people managing the contest were arrested for allegedly stealing winning game cards.

James sued for fraud, alleging McDonald's knew of the thefts and knew the odds of winning were smaller than represented. McDonald's motion to compel arbitration based on the game's official rules was granted.

James moved for reconsideration arguing that: 1) no valid arbitration agreement was formed, 2) she could not afford the arbitration costs, and 3) the contract was induced by fraud. The Seventh Circuit dismissed each of her arguments.

James argued she could not be expected to read every food container to discover she was entering a contract. Because the game rules were made available and James assented by submitting her ticket, the court enforced the agreement: "[a] contract need not be read to be effective; people who accept take the risk that the unread terms may in retrospect prove unwelcome." ***Hill v. Gateway 2000, Inc.,*** 105 F.3d 1147, 1148 (7th Cir. 1997).

Regarding costs, James' showing was deficient in three respects: 1) she never requested an arbitration fee-waiver, 2) provided no evidence relating arbitration costs to her financial situation, and 3) did not show the "comparative expense of litigating her claims."

Finally, because James' fraud in the inducement argument concerned the entire game and not the arbitration terms in particular, the court found the issue was reserved for the arbitrator to decide. ***Prima Paint Corp. v. Flood & Conklin Mfg. Co.,*** 388 U.S. 395, 406 (1967).

Despite its unusual facts, ***James*** shows how courts deal with common objections to arbitration clause enforcement.

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D.C. Circuit Validates Employment Arbitration

Statutory employment claims are arbitrable unless the claimant makes a strong showing that arbitration actually prejudices the claim, according to the D.C. Circuit Court of Appeals.

In ***Booker v. Robert Half Int'l,*** 413 F.3d 77 (D.C. Cir. 2005), Booker sued under the D.C. Human Rights Act and Robert Half sought arbitration. Booker argued he could not vindicate his claim because discovery was limited and punitive damages were unavailable. The court compelled arbitration and struck the punitive damages ban.

Federal statutory claims are arbitrable so long as the claimant "effectively may vindicate" those claims in arbitration. See ***Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,*** 473 U.S. 614, 637 (1985). Booker argued expedited discovery in arbitration might be inadequate.

The court rejected this as speculation, noting the arbitration rules left discovery to the arbitrator's discretion. Conjecture that "the arbitrator might provide inadequate discovery" was "plainly insufficient to render the agreement to arbitrate unenforceable."

Booker confirms that statutory claims are generally arbitrable. A party desiring to litigate must make a strong affirmative showing that arbitration actually prejudices the claim.

Booker also illustrates that a court may blue-pencil an arbitration provision but also honor the intent of the parties to arbitrate their dispute.

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