ALTERNATIVE RESOLUTIONS

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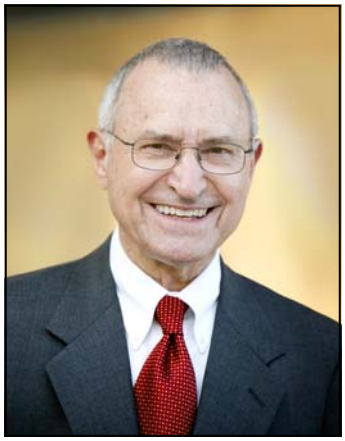
CHAIR'S CORNER
By John Allen Chalk, Sr., Chair, ADR Section



John Allen Chalk, Sr.

The 2009-10 State Bar ADR Section Year is off to a good start with lots of planned activities in addition to the continuing work on our section website, the new electronic newsletter, and our upcoming quarterly council meeting. Jenni Small, our section website's webmaster, is making updates to the website as quickly as we furnish her new information. Bill Lemons, San Antonio ADR professional and former Chair of the ADR Section, Course Director for our annual State Bar-sponsored CLE seminar, has already had a major planning meeting with his Seminar Planning Committee and State Bar staff. Plans are also almost complete for three Arbitration Roundtables scheduled for Fort Worth, Austin, and Houston during this bar year. The ADR Section Council will have its second quarterly meeting at Houston's Hobby Airport on Saturday, October 3, 2009. We have a great council with excellent working representatives of our ADR Section membership.

Mark Your Calendar - January 29, 2010

The Alternative Dispute Resolution Seminar 2010 sponsored jointly by the ADR Section and by the State Bar of Texas is scheduled for Friday, January 29, 2010, at the La Quinta Inn, San Antonio, Texas. The Seminar Planning Committee, led by Bill Lemons, is hard at work and should have the entire program in final form within the next few weeks. A number of veteran mediators, state and federal judges, Texas legislators, experienced negotiators, ADR scholars, and other dispute resolution professionals have been invited to participate in the event. The seminar is shaping up to be a fresh, re-invigorating, and challenging day for participants. Mark your calendar now and plan to be with us in San Antonio on January 29, 2010.

The Arbitration Roundtables
Fort Worth, Houston, and Austin

Following a well-received Arbitration Roundtable that occurred approximately three years ago in Fort Worth, the ADR Section Council approved three Arbitration Roundtables for Fort Worth, Houston, and Austin during the 2009-10 bar year. The first Arbitration Roundtable will occur on Saturday morning, November 7, 2009, in Fort Worth at the Tarrant County Bar Association Center, 1315 Calhoun Street, Fort Worth, Texas 76102-6504, www.tarrantbar.org. The Fort Worth Arbitration Roundtable will begin at 9:00 o'clock, a.m., on Saturday, November 7, 2009, and conclude at 1:30 p.m., local time. Currently, Cecilia Morgan, Melinda Jayson, Earl Hale, Robert Prather, James Juneau, Bill Lemons, Wayne Fagan, Michael Schless, and John Fleming are confirmed Discussion Leaders for the Fort Worth Roundtable.

The Austin Arbitration Roundtable will occur on Saturday, January 16, 2010, and is scheduled to take place at the State Bar headquarters at 1414 Colorado Street, Austin, Texas 78701. The Austin Roundtable will begin at 9:00 o'clock, a.m., and conclude at 1:30 p.m., local time. Currently, Kim Kovach, Michael Schless, John Fleming, John K. Boyce, III, Wayne Fagen, Melinda Jayson, and Bill Lemons are confirmed for the Austin Roundtable.

Inside This Issue:

The Houston Arbitration Roundtable will occur on Saturday, February 20, 2010, and is scheduled to take place at the South Texas College of Law, 1303 San Jacinto Street, Houston, Texas 77002, www.stcl.edu. The Roundtable will begin at 9:00 o'clock, a.m., and conclude at 1:30 p.m., local time. Currently, Lucretia Dillard, Alvin Zimmerman, Michael Wilk, John K. Boyce, III, Wayne Fagan, Bill Lemons, Michael Schless, and John Fleming are confirmed for the Houston Roundtable.

Each Arbitration Roundtable will follow the same format with "Discussion Leaders" presenting "Case Studies" that feature various situations arbitrators face. Each Discussion Leader will present one Case Study, suggest some resources for guidance in the situation presented, and engage all the Roundtable participants in a discussion of the Case Study presented. Each Case Study will get approximately twenty-five (25) minutes of presentation and discussion so that more cases can be considered. All Case Studies will carefully protect the confidentiality of participants in the arbitrations from which the Case Studies may be taken.

The Arbitration Roundtables are a great resource for experienced arbitrators who want more information about possible responses to the unique problems which arbitrators often face.

FROM THE EDITORS

By Stephen K. Huber and E. Wendy Trachte-Huber*

A fundamental principle of politics, law, and life is that one should *never* do anything for the first time. The Summer issue of Alternative Resolutions was our first: we learned a considerable amount in the process, although we wasted a fair number of hours. Now we undertake another first, because starting with this issue Alternatives Resolutions becomes an electronic journal. This approach will save money – no printing or postage – and allow for a more timely publication due to faster turnaround from the submission of articles to publication. That said, there will no doubt be some difficulties for some of you due to the change in format. Your editors, with considerable assistance from the State Bar staff, are doing our collective best to provide a seamless transition. If you have difficulty opening the version of Alternative Resolutions that arrives via e-mail, you can retrieve it from the ADR Section web page. Please let us know if you have problems. No doubt there will some initial difficulties, but these will be fixed in short order.

The "look" of the electronic edition will be different in some respects. Since filling pages is no longer a major consideration, articles will run from beginning to end, with no continuation on jump pages. Absent contrary feedback from readers, we plan to shift from endnotes to footnotes, so that readers can find citations at the end of each pages rather than having to scroll down to the end of an article. Authors are welcome to make use of citations in the text of articles. [Our editorial policy is to limit footnotes to citations – although, as with all rules, there will be exceptions – and to avoid multiple citations to a case or article.]

Readers should be able to print the entire journal and read it that way, or proceed through the electronic version on-line. The wonders of new information technology allow readers to select parts of published material for reading or manipulation, and we are confident that such features will be available to readers within a year – and perhaps faster. Suggestions are welcomed, because your editors are not technically talented, and sometimes need to rely on our teenage son.

With the concurrence of the Council of the ADR Section, the editors have established the following submission deadline and publication dates for Alternative Resolutions"

Issue	**Submission**	**Publication**
Summer	June 15	July 15
Fall	September 15	October 15
Winter	December 15	January 15
Spring	March 15	April 15

Leaving only one month between the submission deadline should be workable for your editors, particularly if some authors submit their material earlier. The specific dates were chosen because they work well with respect to the State Bar Convention. The April 15 issue is late enough to allow for a fairly complete listing of ADR Section activities at the Convention, while the July 15 issue will offer coverage of the Convention – including pictures.

This issue of Alternative Resolutions addresses several topics of interest to and importance for ADR practitioners. The United States Congress is giving serious consideration to enacting an Arbitration Fairness Act, with the purpose of reducing the preemptive impact of the Federal Arbitration Act on consumer transactions – and perhaps employment and franchise contracts as well. Richard Alderman and Ann Ryan Robertson present different perspectives on the issues associated with this proposed legislation. The legislative assault on arbitration appears to be expanding. On October 6. 2009 the United States Senate voted (by a 68-30 margin) to bar the Department of Defense from procuring goods and services from firms that require employees to arbitrate disputes. Because firms often prefer to use uniform contract provisions, the adoption of such a restriction could have ramifications far beyond the world of military procurement.

In addition to his From the Chair column, John Allen Chalk discusses an important Texas arbitration decision. Walter Wright profiles the 2009 Evans Award winner, Michael J. Kopp. Paul Keeper provides us with a delightful and thoughtful perspective on cross-cultural mediation. Larry Maxwell offers a careful examination of the Uniform Collaborative Law Act (UCLA) that has just been promulgate by the Uniform Law Commission, as well as a section-by-section summary of the UCLA's provisions. Kim Kovach is the guest author of From the Edge, addressing important issues of professional ethics. Look for Kay Elkins-Elliot's return in the next issue. Mary Thompson tells about interesting ADR web resources. Finally, your editors write about suits against arbitrators by the parties to an arbitration – and the converse situation, where parties or their lawyers sue the arbitrators.

Settlement and Recovery of Attorney's Fees by Prevailing Party

The remainder of this From the Editors column is devoted to an examination of two recent decisions by United States Courts of Appeal that examine issues surrounding the awarding of attorney's fees to a prevailing party in connection with settlement. The *Saint John's* decision by the Ninth Circuit addressed two important topics concerning the recovery of attorney's fees upon settlement of a law suit: the standard to qualify as a "prevailing" party, and whether the recovery of fees by a prevailing party is "appropriate."[1] [That standard is established by the Clean Water Act, but other statutes use similarly open-textured language.] The *Lohman* decision by the Third Circuit involved a dispute that did not settle prior to trial, and the recovery of the prevailing plaintiff was less than a pre-trial settlement offer.[2] This brought to the fore the question of whether, and if so to what extent, the district court could take account of pre-trial settlement negotiations for the purpose of determining the recoverable amount of attorney's fees.

A. Saint Johns Decision. Saint John's brought suit under the citizen-suit provisions of the Clean Water Act (CWA), asserting that Gem County violated the CWA by discharged pesticides into U.S. waters without a permit. The parties settled the suit, although Gem County had a potentially strong defense – it had applied to the EPA for a permit, whereupon the EPA replied that no permit was required. Rather than devoting more resources to litigation, Gem County agreed to alter its pesticide spraying practices. The district court ruled that Saint John's did not qualify as a prevailing plaintiff, and therefore did not consider an award of attorney's fees. The Ninth Circuit reversed, noting that the required modicum of success needed to qualify as a prevailing party is quite modest.[3] Although this ruling was sufficient to dispose of the case, the Ninth Circuit proceeded to set forth the appropriate standards for the awarding of awarding attorney's fees under the CWA.

The CWA instructs courts to award attorney's fees to a prevailing plaintiff when such an award is appropriate" – hardly a bright line rule. In response, the federal courts of appeals have promulgated several approaches to the appropriateness determination. The Ninth Circuit had four different legal standards to choose from:

1. "Wide discretion" – but nothing more specific;4
2. Recovery appropriate for all substantially prevailing plaintiffs;[5]
3. Recovery if suit has served the public interest or advanced statutory goals;[6] and
4. Recovery absent "good cause" for denying fees.[7]

Rather than accept any of these options, the Ninth Circuit adopted a fifth standard: the "special circumstances" test adopted by the Supreme Court for attorney's fees claims arising under Title II of the Civil Rights Act of 1964.[8] Recovery of attorney's fees by a prevailing plaintiff is appropriate absent special circumstances that would render such an award unjust. (The Ninth Circuit has applied this approach to other statutes that authorize the recovery of attorney's fees by a prevailing plaintiff.) The discretion to deny fees to a prevailing plaintiff is "narrow," and findings of special circumstances should be "extremely rare." In a statement apparently addressed to the facts of this case, the court specified that a good faith belief by a defendant that it was following the law does *not* qualify as a special circumstance.

Although the Ninth Circuit ruled that St. John's qualified as the prevailing party, the case was remanded to the district court for determination of the appropriate recovery of attorney's fees. That often contentious determination was the subject of an important recent decision by the Third Circuit.

B. Lohman Decision. In a wrongful discharge suit, Lohman was awarded damages of $12,000 – and therefore was the prevailing party. He sought attorney's fees and costs of $113,000, but the district court awarded only $30,000 in attorney's fees plus $4,200 in costs. A major reason for the reduced fee award was that Lohman had earlier rejected a settlement offer of $75,000. This approach raised the important question (for the first time in the Third Circuit) of what weight, if any, a trial court may give to settlement negotiations in awarding attorney's fees.

Rule 408 of the Federal Rules of Evidence prohibits the admission of "conduct or statements made in compromise negotiations," to prove liability, the amount of a disputed claim, or for purposes of impeachment. However, Rule 408 permits the introduction of such evidence when "offered for another purpose" – i.e., any purpose "other than liability for or invalidity of a claim or its amount. Reasonable fee determinations fit comfortably – but not inevitably – within the other purpose exception. Accordingly, the Third Circuit permitted consideration of the settlement offer in making the fee determination because account was taken of the offer only for the purpose of determining the appropriate award of attorney's fees.

The Third Circuit decision was premised on the district court finding that there was a clear offer by the defendant to settle the dispute by paying $75,000. This made the case different from instances where numbers are merely considered or discussed, without the negotiation reaching the specificity necessary to constitute an offer. Where a settlement amount is not reduced to writing, parties are likely to dispute whether there ever was an "offer" that was subject to "acceptance." [Welcome back to issues discussed in the first week of law school.]

The district court made a lodestar determination (reasonable rate times reasonable hours) of $63,000. Among the twelve factors

listed by the Supreme Court for use in making fee determinations, the most critical factor is the degree of success obtained. While fee awards are normally reviewed under an abuse of discretion standard, plenary review is the proper standard when, as in this instance, the fee determination raises a question of law.

While the district court took account of multiple factors in setting a reasonable award, the level of success clearly was a major factor. Indeed, if the engagement agreement between Lohman and his attorney called for a 40 percent contingent fee, the recoverable amount would be precisely $30,000. The role of the other factors is of little moment, because once the question of law was resolved in favor of permitting consideration of the settlement offer, the district court determination was bound to be upheld under the abuse of discretion standard. After all, the jury award of $12,000 was less than one-sixth of the amount for which the case could have been settled.

Lohman also argued that the failure by the employer to make an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure precluded the district court from considering the settlement negotiations in making the degree of success determination. While resort to Rule 68 was an available option for limiting subsequent costs (until 10 days before trial), its use is not required.

The Court of Appeals concluded its decision with a statement that should serve as both a caution and a source of comfort for district court judges.

> We think it important to note that we hold only that settlement negotiations *may* be relevant in measuring success, and, if so, are clearly only one factor to be considered in the award of fees. A court is also free to reject such evidence as not bearing on success when, for instance, negotiations occur at an early stage before discovery, or are otherwise not a fair measure of what a party is truly seeking in damages (emphasis in original).

The message for district court judges is that they are permitted but not required to take account of settlement negotiations in setting attorney's fees, but this cannot be the only factor considered. So long as a trial judge heeds this caution, the standard for review of the resulting fee determination will be "abuse of discretion" – and the fee award will almost always be upheld.

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[1] Saint John's Organic Farm v. Gem County Mosquito Abatement District, 574 F.2d 1050 (9th Cir. 2009).

[2] Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009)

[3] See *Farrar v. Hobby*, 506 U.S. 103 (1992) (nominal damages); *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989) (change in legal relationship between parties).

[4] *United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 283 (1st Cir.2000).

[5] *Penn. Envtl. Def. Found. v. Canon McMillan Sch. Dist.*, 152 F.3d 228, 231 (3d Cir.1998).

[6] *Chem. Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1279 (5th Cir.1989); *Stoddard v. W. Carolina Reg'l Sewer Auth.*, 784 F.2d 1200, 1209 (4th Cir.1986).

[7] *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 43 (11th Cir.1990).

[8] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

MICHAEL J. KOPP WAS THE 2009 RECIPIENT OF THE JUSTICE FRANK G. EVANS AWARD

At the ADR Section's 2009 annual meeting in Dallas, Michael J. Kopp received the Justice Frank G. Evans Award, which is presented annually to recognize a recipient's exceptional efforts in furthering the use or research of alternative dispute resolution (ADR) methods in Texas.

Kopp has been the Executive Director of the McLennan County Dispute Resolution Center in Waco since it began operation in April 1998. His outstanding record of service to the ADR profession includes a three-year term as a public (non-attorney) member of the ADR Section Council (2002-2005), and current terms on the Board of Directors of the Texas Association of Mediators (TAM) and the Directors' Council of the Texas Dispute Resolution Centers. He is also TAM's President-Elect.

A Credentialed Distinguished Mediator of the Texas Mediator Credentialing Association, Kopp mediates forty to fifty cases a year and has received basic mediation training, advanced divorce mediation training, advanced Child Protective Service training, and peer mediation training.

Kopp has served as an Adjunct Professor with Baylor University, teaching "*Negotiation and Conflict Resolution*" in the Hankamer School of Business. He also teaches a quarterly workshop for Habitat for Humanity for the benefit of Habitat clients and has taught Mediation and Conflict Resolution in Baylor University's Department of Continuing Education.

Over the past five years, Kopp has trained over two hundred students to serve as peer mediators for the West Independent School District, China Spring Independent School District, Valley Mills Independent School District, LaVega Independent School District and the Lake Waco Montessori School. He has also performed a number of conflict resolution trainings for school counselors, teachers, and administrators at Region 12 Education Center and Mental Health Mental Retardation staff personnel. Additionally, Kopp speaks frequently to schools, professional and business groups and civic organizations on ADR topics.

Justice Frank G. Evans, after whom the award was named, helped present the award to Kopp. After receiving the award, Kopp commented, "I am absolutely stunned to be named the 2009 recipient of the Justice Frank Evans Award. Thank you so very much. I know virtually all of the past recipients, either personally or by reputation, and I have never, even for a moment, considered myself to be in the same league, much less the same ballpark, with those individuals. This is a completely unexpected honor; and one that I will treasure for all of the remaining days that I have here in the earth."

The ADR Section proudly added the 2009 recipient's name to a distinguished list of prior recipients of the Justice Frank G. Evans Award: Honorable Frank G. Evans (1994); Professor Kimberlee Kovach (1995); Bill Low (1996); Honorable Nancy Atlas (1997); Professor Edward F. Sherman (1998); C. Bruce Stratton (1999); Suzanne Mann Duvall (2000); John Palmer (2001); Gary Condra (2002); Honorable John Coselli (2003); Professor Brian D. Shannon (2004); Maxel "Bud" Silverberg and Rena Silverberg (2005); Michael J. Schless (2006); Cindy Taylor Krier and Charles R. "Bob" Dunn (2007); and Robyn G. Pietsch and Professor Walter A. Wright (2008).

**Walter A. Wright* *is an Associate Professor in the Legal Studies Program of the Department of Political Science at Texas State University in San Marcos, Texas.*

Why We Really Need the Arbitration Fairness Act—It's All About Separation of Powers

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Introduction

Ask any American middle-school student to explain his or her system of government and you will quickly be told of "separation of powers"—the division between the legislative, judicial and executive branches of government—a system of "checks and balances."[1] We have long appreciated the way in which our founding fathers established an independent judiciary, and the important role courts play in the American system of law.[2]

At the highest level, American federal courts oversee the legislative and executive branch, ensuring compliance with constitutional principles. At the same time, state courts serve the perhaps even more significant role of providing remedies for those injured or wronged by others, often supplementing our justice system through the creation of common law rules and principles. It is the judicial system that protects the individual from the unreasonable exercise of legislative power, provides a forum for those who lack the ability to exercise significant influence over the legislative process, and provide a mechanism for an individual to seek redress from abuses in the marketplace. As Justice Marshall long ago recognized in *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the rights of every individual to claim the protection of the law, whenever he receives an injury."[3]

American consumers have benefited greatly from this Anglo-American legal culture. Our civil justice system has spawned judicial reform dealing with everything from a wide range of product safety issues,[4] to the establishment of premises liability and the creation of performance standards in landlord-tenant[5] and service contracts.[6] Courts have become increasingly receptive to claims of overreaching,[7] and have liberally construed our many consumer protection laws to provide increased protection from false, misleading and deceptive acts.[8] As the Supreme Court recently recognized, private civil lawsuits are often necessary to supplement statutory regulation, for example the FDA.

The FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times.[9]

The recent movement to impose binding pre-dispute mandatory arbitration[10] in an increasingly large number of consumer contracts, however, threatens to eliminate this "fundamental" branch of government from the consumer law arena, substituting a system of private, often secret, justice,[11] neither bound by precedent nor able to create it.[12] This article considers how consumers' rights are impacted by this privatization of the judicial system, which is rapidly resulting from widespread use of pre-dispute mandatory arbitration.[13] It suggests that as consumer access to the civil justice system and juries is reduced or eliminated, consumer protection similarly decreases.[14] The article concludes with a bit of optimism that the Arbitration Fairness Act, prohibiting pre-dispute binding arbitration, must be, and in fact may be, enacted by Congress.[15]

American Consumer Protection.

As a "movement," American consumer protection is relatively young. Consumerism began in earnest in the 1960's. Federal legislation,[16] such as the Truth in Lending Act,[17] attempted to level the playing field through meaningful disclosures and standardization. Numerous other state and federal laws were enacted to deal specifically with false, misleading and deceptive practices and warranties. For example, at the federal level the Magnuson-Moss Warranty Act[18] attempted to establish minimum warranty standards, while the states enacted lemon laws and deceptive trade practice acts of varying scope and applicability.[19] Even the Uniform "Commercial" Code provided some special protections for consumers, creating implied warranties, making it more difficult to limit damages, and easier to sue remote parties.[20]

Along with the enactment of new laws came a change in the manner in which consumer protection laws were enforced. Early in the 20th century, the enforcement of consumer protection measures generally was left to federal and state governments. It was soon recognized, however, that private litigation and private remedies were necessary to achieve effective reform. Writing almost 40 years ago, Professor William Lovett[21] correctly noted the importance of private enforcement:

Consumer protection has achieved dramatic new popularity within the last few years, and as a result, significant progress has been made in regulating product safety, enforcing disclosures to the public, and in making deceptive trade practices unlawful at the state and local—as well as federal—levels of government. But much less has been done to provide adequate private remedies in the law

against frauds or other deceptive trade practices which victimize consumers. There is still too little appreciation of the very healthy and complementary relationship that should exist between private and administrative remedies for deceptive trade practices, even though the potential for such complementary remedies is amply demonstrated in federal securities and antitrust law. What we need now in the deceptive trade practices area is comparable development of private remedies to match the recent growth of government investigation and prosecution efforts. *Without effective private remedies the widespread economic losses that result from these trade practices remain uncompensated and furthermore, private remedies are highly desirable for additional consumer bargaining power and more complete discipline against fraud in the marketplace.*[22]

Professor Lovett's desire for private remedies quickly came to fruition. Most consumer statutes provide for liberal remedies and possible treble damages in a sufficient amount to justify litigation, and perhaps more importantly, for the award of attorneys' fees for a successful consumer.[23] Private litigation of consumer disputes did not just supplement public enforcement, it effectively replaced it.

The Role of the Courts—Interpretation and Creation of Law.

1. Interpreting the Law.

As consumer litigation increased, courts found themselves dealing more and more with consumer issues. For example, all of the newly enacted laws had to be applied and interpreted--consumer legislation was not always the best example of judicial clarity and precision. Perhaps more importantly, the gaps left by the failure of the legislature to act, or the enactment of ambiguous legislation, provided an opportunity for courts to create common law doctrine. During the past four decades, American consumer law has been created, modified, reformed, and refined by the courts. Perhaps no other area of law better demonstrates the role of the courts in our civil justice system, and the relationship between its three branches of government.

A recent decision of the United States Supreme Court indicates how essential the courts are to implementing our consumer laws and maintaining their consistent application. In 1995, Congress amended section 1640(a)(2)(A) of the Truth-in-Lending Act, changing the remedy provisions for a violation of the Act.[24] Unfortunately, the language used by Congress was not the most precise, and courts gave differing interpretations to a significant issue—whether damages under this section were capped at $1,000.[25] In *Koons Buick GMC, Inc. v. Nigh*,[26] the United States Supreme Court was called on to resolve the controversy that had arisen, and provide an interpretation that would allow for consistent application of the law. The Supreme Court, with five separate opinions, held that the cap applied.[27] Without the ability of a court to review this statute, and render a decision that was binding on all other courts to consider the issue, lower courts would have continued a non-uniform application of the statute, and consumers and businesses would remain uncertain as to how to apply the law. As demonstrated by *Koons Buick*, the American system of binding precedent and *stare decisis* ensures that damages under the Truth-in-Lending Act will now be computed is a consistent manner. All courts must now abide by the meaning given section 1640(a)(2)(A) by the Supreme Court.

2. Creating Common Law.

In the our system of government, it also is not unusual for state courts to create legal rights. While the legislature enacts laws, courts "legislate" through their interpretation of legislation, as well as enactment of the "common law." Every first year student at an American Law School is taught that precedent and stare decisis are the foundations of the common law. Courts are bound by precedent and must follow decisions of higher courts, and all courts should give serious consideration to the rationale of others.[28] As Justice Stone noted almost seventy years ago, the common law's, [D]istinguishing characteristics are its development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all-pervading doctrine of supremacy of the law—that the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts.[29]

Through this process of judicial precedent, courts create and mold legal rights, co-existent with, and supplemental to, those created by statute.[30]

Although the current consumer protection movement is relatively young, American courts have attempted to deal with the problems presented by marketplace deception and product defects since the turn of the 20th century. Both tort and contract theories have been used as methods of providing consumer redress. The development of traditional contract and tort theories to deal with consumer issues demonstrates the application of our common law tradition. For example, contract law, primarily warranty, offered consumers a cause of action that was often easier to establish than tort, however, it required privity and was easily limited or disclaimed. Tort liability, on the other hand, was available without privity, but it was often more difficult to establish because of culpability requirements inherent in the concept of negligence or scienter requirements of fraud or misrepresentation. Gradually, both contract and tort requirements were judicially relaxed to permit liability for personal injury without regard to fault or privity, and provide a claim for false representations without regard to knowledge or intent.[31]

More recently, American courts have found less need for major doctrinal pronouncement, and a much greater demand for review of more specific scenarios. Decisions such as *Williams v. Walker-Thomas Furniture Co.*,[32] *Unico v. Owen*[33] and *Henningsen v. Bloomfield Motors, Inc.*,[34] refused to put form over substance and provided relief to consumers. Today, courts are often called on to deal with individual claims of overreaching, and must regularly deal with the application of traditional principles to newly developed technology, such as the internet.[35]

The courts also provide a significant "gap-filling" role, dealing with transactions that either slip through the cracks of legislation or simply were not dealt with. One of the most significant roles of the common law is maintaining consistency between similar rights in the absence of legislative action. For example, the Uniform Commercial Code comprehensively governs contracts for the sale of goods. Until the enactment of Article 2A, lease agreements were treated in a similar manner by common law analogy to Article 2.[36]

Today, Article 2 and 2A comprehensively regulate the creation of warranties, as well as disclaimers and damage limitations, in the sale or lease of goods. There is no similar statute, however, governing service contracts. Analogous law in the area of service contracts, therefore, is left to common law development by the courts.[37] The state of Texas provides a good example of how this area of law has been developed and demonstrates the importance of the courts to the creation of consumer rights.

Until 1987, the Texas Supreme Court had not recognized an implied warranty in a service contract. In *Melody Home Manufacturing Co. v. Barnes*,[38] the court noted that the United States had shifted from goods to a service oriented economy. Based on a "public policy mandate," the court imposed a warranty of good and workmanlike performance in any contract to repair or modify existing tangible goods or chattels. The court also defined the warranty as "the quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[39]

As with the development of any judicially created rule, *Melody Home* has been refined, modified, expanded and limited in the years since it was decided. The Texas Supreme Court has cited the opinion no less than a dozen times, initially broadening its scope and recently sharply limiting it. For example, after some question,[40] the Texas Supreme Court held the warranty does not apply to professionals,[41] and recently the court excluded certain "incidental services."[42] Meanwhile, more than 100 other Texas courts have cited *Melody Home* in their opinions. This is the life of the common law—a deliberate process of molding doctrine to the times. It is also a process that probably would not have occurred if the problem that gave rise to the decision in *Melody Home* arose today. *Melody Home* involved a manufactured home. The likelihood is that today, the contract in *Melody Home* would have contained a clause mandating arbitration—precluding a court from considering any of the legal issues involved.

Consumer Arbitration—Bye-Bye Courts

For some time now, arbitration has been heralded as a panacea for the ills of the American judicial system. It has been widely touted as a voluntary system of alternative dispute resolution, that is more efficient, less expensive, and more flexible than our clogged and congested courts. The use of an alternative forum[43] to hear consumer disputes would seem to be the best of both worlds; prompt resolution for consumers, and less expense for business.

Arbitration is generally viewed by the courts reviewing it as nothing more than a voluntary forum selection clause, simply moving a dispute to a more convenient, efficient, and less expensive forum. Recently, arbitration clauses have been embraced by American courts, particularly the Supreme Court, with open arms, uniformly adopting a pro-arbitration stance.[44] The support shown by the United States Supreme Court has been well documented,[45] and is demonstrated by the Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna*.[46]

Cardegna involved the question of whether an arbitration clause in an illegal and void payday loan agreement was enforceable against a consumer. The supreme court of Florida held that the arbitration clause was not enforceable, and the illegality of the contract was an issue for the courts. The United States Supreme Court disagreed. It noted three propositions for determining the validity of an arbitration clause:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.[47]

Applying these rules, the Court held that the issue of whether the contract was illegal was to be decided by the arbitrator, pursuant to the contract's arbitration provision. An arbitration clause, even if contained in an otherwise unenforceable contract, is none the less enforceable.

Consumer Arbitration—Substance Over Form

As noted above, the courts "strongly favor" arbitration clauses, even in consumer contracts, based on the notion that such clauses are valid contract provisions, knowingly and intentionally entered into, and that such clauses do not deny any substantive rights. In fact, however, consumer arbitration is not about an alternative forum for dispute resolution, it is about a modification of substantive rights. Consumer arbitration is often simply a way for a business to reduce the number of disputes, avoid the courts and juries, and achieve more favorable results. Arbitration is not about relocating or simplifying consumer dispute resolution; it is about eliminating consumer disputes and controlling their resolution.

For example, a recent article discussing damages for mental anguish in Alabama suggests that the current Alabama rule is an improper extension of the law, resulting in overly generous damage awards in cases involving the sale of automobiles and homes.[48] The authors provide strong support for the argument that the Alabama courts should review and modify this rule. The authors, how-

ever, may never see their article considered by the courts. The Alabama courts may never have the opportunity to modify the law in a way consistent with the premise of the article. Why? Because auto dealers and homebuilders have taken matters into their own hands and "opted out" of our civil justice system. They have found a way to avoid the laws of Alabama, and achieve the results they want. As the authors of the article note:

> The auto and home industries, fearing catastrophic verdicts before Alabama juries, now require customers, nearly across-the-board, to enter into pre-dispute binding arbitration agreements as a condition of doing business. These industries have effectively divorced themselves from the Alabama civil justice system in hopes of obtaining fairer and more just awards before arbitrators.[49]

As this excerpt indicates, American businesses dissatisfied with the civil justice system may privatize the dispute resolution process through arbitration, thereby controlling outcome as well as forum. The Alabama auto and homebuilding industries did not choose arbitration to promptly resolve disputes or provide consumers with an alternative forum. They imposed arbitration to avoid the legal rules of Alabama that would be applied by a court and jury.[50]

The use of arbitration to achieve substantive results different from what would be available in the courts not only circumvents our legal system, it also denies the courts the opportunity to review legal doctrine and make changes when appropriate.[51] The validity of arbitration clauses is based on the premise that they are a voluntarily chosen alternative forum of dispute resolution. In the consumer context, arbitration is anything but voluntary and it is becoming the norm, not an alternative. A recent study of commercial arbitration clauses supports the proposition that the widespread use of arbitration in consumer cases may in fact be based on something other than the efficiency benefits of an alternative forum:

> We present evidence that large corporate actors do not systematically embrace arbitration. International contracts include arbitration clauses more than domestic contracts, but also at a surprisingly low rate. Our results have implications for the justifications for the widespread use of arbitration clauses in consumer contracts. If the reasons that some have advanced to support the use of arbitration in the consumer context - that it is simpler and cheaper than litigation - are correct, it is surprising that public companies do not seek these advantages in disputes among themselves. In the simple economic view, our results suggest that corporate representatives believe that litigation can add value over arbitration.[52]

Consumer Arbitration Under Attack.

In response to this privatization of justice, arbitration in America, particularly pre-dispute consumer arbitration, has come under attack by consumer advocates and others who have found fault with both the manner in which arbitration is agreed to, the process itself, and the results of arbitration proceedings.[53] For example, the adhesive nature of the contracts upon which arbitration is based is often cited as a reason to not impose arbitration on the consumer.[54] Courts and commentators alike have also noted the often-excessive costs of arbitration, which may deny access to those unable to pay.[55] A recent dissenting opinion in a Florida arbitration decision summarizes the situation most consumers face:

> What we have begun to see is that virtually all consumer transactions, no matter the size or type, now contain an arbitration clause. And with every reinforcing decision, these clauses become ever more brazenly loaded to the detriment of the consumer -- who gets to be the arbitrator; when, where, how much it costs; what claims are excluded; what damages are excluded; what statutory remedies are excluded; what discovery is allowed; what notice provisions are required; what shortened statutes of limitation apply; what prerequisites even to the right to arbitrate are thrown up -- not to mention the fairness or accuracy of the decision itself. The drafters have every incentive to load these arbitration clauses with such onerous provisions in favor of the seller because the worst that ever happens, if the consumer has the resources to go to court, is that the offending provisions are severed. The state courts, demoralized by the United States Supreme Court's disapproval, have too often allowed these overreaching provisions to succeed. Most consumers can't read them, won't read them, don't understand them, don't understand their implication and can't afford counsel to help them out.[56]

An additional problem inherent in the widespread use of arbitration is the fact that an arbitration clause may preclude the use of the class actions device.[57] Although widely criticized, the class action device often proves a valuable tool for achieving consumer redress, and controlling the marketplace. In *Greentree Financial Corp. v. Bazzle*,[58] the Supreme Court recognized that an arbitration clause was not invalid when applied to a request for class action status and relief, and that arbitration could be conducted as a "class arbitration." The Court also held that the interpretation of an arbitration provision in an arbitration clause was to be decided by the arbitrator. Thus, whether the proceeding may be maintained as a class action, and the procedures employed to do so, are questions for the arbitrator. More significantly than what the court proclaimed, however, is what it did not discuss. The *Bazzle* Court did not resolve the question of whether an arbitration clause could prohibit class relief. In light of the deference shown to an arbitration clause and the weight given to the notion of freedom of contract when interpreting them, it appears that in light of *Bazzle*, a contractual prohibition on class action status may be enforceable.[59] It may be just a matter of time before "anti-class action clauses"[60] are included in all agreements, possibly eliminating the consumer class action.[61]

It may be argued, as it has been with arbitration in general, that all the Court did in *Bazzle* was shift the forum for class actions from the courts to arbitration. Even assuming the correctness of this statement, and that arbitration provisions are not drafted to preclude class action, the arbitration class action and arbitrations in general do not provide the same relief in terms of either procedure or

substance. Even in the event a class action arbitration is held, there may be no requirement that the process comply with the due process requirements imposed upon the courts.[62]

Finally, consumers forced to arbitrate are also subject to what is perceived as the unfair advantage for the repeat player. It has been argued that the repeat player,[63] such as the business that has thousands of arbitrations a year compared to the consumer who has just one, has an unfair advantage due to its greater familiarity with the process, as well as the process itself. In most arbitrations, either party as the right to "strike" an arbitrator. The repeat player, therefore, may be favored by the arbitrator because of the possible consequence of ruling against it. Arguably, the arbitrator, who could be precluded from hearing a large number of cases, will consciously or subconsciously favor the repeat player rather than risk offending him and be "blackballed" in the future.[64]

Due to the secret nature of most arbitrations and unavailability of public data, it is hard to verify or dispel the repeat player advantage. The *Christian Science Monitor*, however, recently evaluated available data from the National Arbitration Forum [NAF], one of the largest arbitration organizations.

A *Monitor* analysis of the last year of available data from NAF found that arbitrators awarded in favor of creditors and debt buyers in more than 96 percent of the cases. Such results may be similar to outcomes in court. It also found that the 10 most frequently used arbitrators – who decided almost 60 percent of the cases heard – decided in favor of the consumer only 1.6 percent of the time, while arbitrators who decided three or fewer cases decided for the consumer 38 percent of the time.[65]

The *Monitor* also found support for the notion that arbitrators who rule against business are "blackballed" and not selected again. "[T]wo former NAF arbitrators say banks took them off of cases after they issued rulings unfavorable to the institution."[66]

All of the above arguments against the use of arbitration clauses in consumer contracts are to some extent valid; some even compelling. Yet none of these arguments will be discussed here. Instead, the remainder of this article will focus on a different, and perhaps substantially more significant problem inherent in the widespread use of consumer arbitration—the elimination of a core component of the American justice system.

The Real Problem

As binding pre-dispute arbitration is increasingly used, and consumer access to the civil justice system is proportionately denied, consumer protection in the United States will be diminished as business structures a system of private dispute resolution that it finds acceptable.[67] Arbitration clauses and arbitration procedures will be designed to choose the system of arbitration that most favors business, and clauses will be drafted in a manner that precludes attack and limits redress, within the limits imposed by the courts.[68]
For example, language will be included to prevent the use of class actions, and costs will be structured to be sufficiently low enough to meet unconscionability and due process standards, yet sufficiently high enough to deter many valid consumer claims.

Under the current system, it appears inevitable that consumer arbitration will eventually replace litigation.[69] As consumer dispute resolution is fully privatized, the development and application of consumer law in America gradually will be skewed toward those who control the process. For example, in most arbitrations, arbitrators are selected through a process that enables either side to eliminate potential arbitrators. In commercial arbitrations, arbitrators must be concerned with fairness because either party may exercise its pre-emptive strike against that arbitrator in a future dispute. For example, an arbitrator who rules "unreasonably" in favor of one party or the other will soon be without work.[70] The fact that both sides to the dispute will have the right in the future to again select an arbitrator, helps ensure fairness. Common sense tells us that one of the reasons an arbitrator must be fair and impartial is that an arbitrator will not be inclined to rule in a manner one side finds offensive, and which may adversely affect his or her future selection.[71]

This concept works well in commercial arbitrations, but not in the consumer context. Unlike commercial arbitration, where each party has the same potential to be involved in future disputes and exercise equal influence over the selection process, in consumer arbitration one party is involved in multiple arbitrations, while the other is a one-shot player. For example, a bank or credit card company may be involved in thousands of arbitrations a year. The consumer is generally involved in one. Arbitrators, consciously or unconsciously, are probably aware of the fact that a few adverse decisions could preclude him or her from selection in the future. Consumers are not repeat players, and lack the ability to obtain information from others regarding arbitration decisions because such decisions generally are not published. A system of private justice will always favor those who control access and the purse strings.[72] As noted above, this is explicitly recognized in Alabama, where auto dealers and homebuilders have chosen to "opt-out" of the civil justice system to obtain the substantive benefits of arbitration.[73]

Precedent and Stare Decisis

Even assuming an arbitrator is committed to impartially following the law; he or she still cannot create or shape it. Therein lies perhaps the most serious problem with increased use of arbitration. The interpretation of statutes, the development of the common law, and the courts' ability to continually establish and refine legal rights depends upon litigants, cases, public written opinions, and appeals regarding questions of law.[74] Arbitration eliminates litigation, preventing our appellate courts from playing the role they were designed to play in our civil justice system.[75]

Unlike court opinions, most of which are published, most decisions of arbitrators are secret, and are often not even accompanied by

a written opinion. Even when published and made available to the public, the decision of one arbitrator or panel of arbitrators, is in no way binding on any other arbitrator or panel. In fact, arbitrators generally are not compelled to follow the law,[76] and their decisions are not appealable.[77] Arbitration precedent and stare decisis do not exist. Arbitrators can interpret the law, but the interpretation of one arbitrator is not binding upon another. Consequently, arbitration lacks the ability to formulate policy, impose consistency, or change existing law. Most would argue, and I concur, that this is the way it should be. Arbitrators are not elected judges; they do nothing more than decide the single dispute before them.[78] The problem, however, is that our beliefs regarding the value of arbitration are based on the underlying assumption that arbitration is an "alternate" method of dispute resolution. In other words, many disputes will remain within our civil justice system and our courts will continue to actively mold the common law. Consider the possible effects as this alternative system of justice becomes the norm.

Return to the development of the warranty of good and workmanlike performance in Texas, beginning with the Texas Supreme Court's decision in *Melody Home Manufacturing Co. v. Barnes.*[79] *Melody Home* involved a dispute over services performed on a manufactured home. The likelihood today is that the contract for the sale of that home would include an arbitration provision. The Barneses would be in arbitration, not court. The arbitrators would apply the law, not create it, and implied warranties in service contracts would not exist.

Arbitration precludes the courts from creating substantive rights through the common law. It also prevents the modification of existing rights. The common law allows the courts to create the law, and it also allows them to change it.[80] In theory, this consequence of precluding access to the courts favors neither side to a dispute. It is neither pro-consumer nor pro-business.

For example, in *Melody Home*,[81] the Texas Supreme Court created a very pro-consumer warranty, of apparently broad applicability. Recent decisions, however, have limited its scope and drawn into question its continued validity.[82] Because most consumer contracts now contain a mandatory arbitration clause, the case that gave rise to the opinion in *Melody Home* may never have arisen, or there might not have been subsequent decisions that limited it. In other words, arbitrators could find themselves applying law that a court, if given the opportunity, might modify, or even reverse. Arbitration has the potential to "freeze" the common law as it exists at the time universal arbitration is imposed, creating a "time warp" of consumer protection, unable to accommodate change.

But this analysis ignores an important fact: arbitration in consumer contracts is imposed almost as a matter of right by businesses. American consumers have no choice but to agree, businesses have the choice to leave out an arbitration provision whenever they wish to pursue litigation, or waive arbitration, and proceed to court. Through the sophisticated use and enforcement of mandatory arbitration provisions, business may engage in a form of selective creation of the common law. That is, selecting which disputes, if any, our courts will be allowed to deal with. In other words, consumer arbitration may stall the development of the common law, or even worse, it may allow business to control common law development to accommodate the needs of business.

Consumer Arbitration is Different

It is recognized that much of the above discussion applies to all forms of arbitration, not just consumer arbitration. For example, employment, securities or commercial arbitration also have the potential to preclude resort to the courts.[83] It is suggested, however, that consumer arbitration presents a unique situation that exacerbates the problems inherent in arbitration. What is special about consumer arbitration and why does it present problems different from those presented in other contexts, such as commercial agreements or employment contracts? First, arbitration is not used with the same frequency in non-consumer contexts. Commercial parties actually bargain for an arbitration provision, and many commercial contracts do not include such provisions. In the employment context, many employees do not work subject to a written arbitration provision.[84] Further, even a valid arbitration clause in an employment contract does not prevent litigation from being brought by a federal agency on behalf of the employee.[85] In the consumer context, however, there is in fact no bargain and arbitration provisions are becoming universal. For example, all of the major credit card companies, most banks, most home builders, and many service providers, including professional service providers, currently include an arbitration provision in their agreements.[86] As businesses realize the advantages of arbitration, more and more begin to include such provisions. Based solely on my personal experiences and anecdotal stories from friends and colleagues, it appears that today, most written consumer agreements contain an arbitration provision.

Second, commercial parties have the resources to influence legislators and government agencies to deal with problems through legislative or administrative rulings. For example, automobile dealers who found it unfair that they be forced to arbitrate recently successfully encouraged Congress to amend the Federal Arbitration Act to prevent automobile manufacturers from imposing arbitration on dealerships.[87] Similarly, employees have labor organizations, as well as federal regulatory agencies such as the EEOC, to represent their interests within legislative and regulatory communities. Consumers, on the other hand, have almost no effective lobbying group, and little in the way of support from agencies such as the FTC. Consumers have historically relied upon litigation and the courts to provide relief from false, misleading, deceptive and unconscionable practices.

Finally, consumer law is a newer body of law and consequently is undergoing more changes than might be seen in other areas. Until 40 years ago, there were few consumer statutes and *caveat emptor* reigned. Federal and state consumer law is still being actively interpreted by the courts and common law doctrines of fraud, deceit, misrepresentation and warranty continue to undergo substantial change.

In other words, although pre-dispute mandatory arbitration may present problems in the context of commercial or employment

agreements, consumer arbitration poses the greatest challenge to the our common law tradition. Consumers must rely more upon the courts to establish and refine rights. Yet at the same time, they are being precluded from the courts with greater frequency.

Conclusion

As discussed above, binding pre-dispute mandatory arbitration clauses are quickly becoming the norm in consumer contracts. Mandatory arbitration is imposed on consumers who lack the knowledge or bargaining power to knowingly agree to waive their right to use the courts, and in a manner that imposes significant increased costs and substantial deterioration of substantive rights. For these reasons alone, steps should be taken to slow down or stop the advance of pre-dispute mandatory arbitration clauses in consumer contracts. But as this article has pointed out, there is an additional and perhaps more compelling reason businesses should not be allowed to unilaterally preclude access to the courts.

Our civil justice system relies on courts and juries to regulate the marketplace. Unlike many other countries, private lawsuits are the means by which American consumers are compensated for damage caused by over-reaching, and most consumer protection laws have been enacted based on the premise that they will be enforced by private lawsuits in our courts.

The common law is the system that America has adopted and developed over the centuries for ensuring the law stays current with rapidly changing social and economic conditions. As Justice Harlan F. Stone noted, "If one were to attempt to write a history of the law in the United States, it would largely be an account of the means by which the common-law system has been able to make progress through a period of rapid social and economic change."[88] The American judiciary is much more than just a check on the legislative and executive branches of government. It is an independent branch of government, often looking out for the rights of those who lack the power or influence to receive the attention of our elected representatives. Our common law tradition is an essential part of the development and continuation of consumer protection;[89] arbitration destroys it.

Pre-dispute mandatory arbitration must not be allowed to preclude consumer access to the courts and circumvent the civil justice system. Courts must be able to decide issues of statutory interpretation, and precedent must be established to maintain consistency of results and provide certainty for the decision making process of parties who must predict the result of legal challenges. For example, it is extremely doubtful any of the legal issues surrounding the use of credit cards and credit card agreements will again see the light of a courtroom. Thus, questions such as the one recently addressed by the United States Supreme Court in *Koons Buick GMC, Inc. v. Nigh,*[90] will be left to individual arbitrators, who will be free to decide the case as they see fit, with no consistency of results, and no applicable standard the next time the same issue arises.

Although consumers have had some success challenging individual arbitration provisions, it is just a matter of time until business structures the "perfect" clause, immune from judicial attack.[91] As I have noted elsewhere,[92] the only way to prevent the continued growth of arbitration and the degeneration of consumers' rights, is through a change in federal law, namely amending the Federal Arbitration Act. Current law assumes the validity of arbitration provisions and makes it extremely difficult to avoid enforcement. Exceptions to the current law, designed to ensure arbitration agreements are voluntary and consumers are provided a meaningful choice, must be enacted. The simplest change is to preclude pre-dispute arbitration clauses in consumer contracts, while permitting parties to agree to arbitration after a dispute has arisen and other alternatives have been considered.[93] The law must ensure that consumers retain the right to resolve disputes through the civil justice system, and that the common law tradition continues to be a viable part of our system of justice. What are the chances that will soon happen?

On July 12, 2007, Senator Russell Feingold and Representative Hank Johnson introduced the Arbitration Fairness Act[94] in Congress. The Act was recently re-introduced as the Arbitration Fairness Act of 2009.[95] The Act prohibits the use of pre-dispute binding arbitration clauses in consumer and employment contracts.[96] If enacted, it will restore the consumers' right to sue and ensure that American courts continue to play a significant role in the development of consumer rights. Hopefully, Congress will see the wisdom in this bill and promptly enact it. My fear, however, is that the business lobby may be too strong for consumers to expect any prompt, favorable action.[97]

* Associate Dean for Academic Affairs, article appears as "*The Future of Consumer Law in the United States, So-long Consumer Protection,*" 257-285 THE YEARBOOK OF CONSUMER LAW 2009 (2009)

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[1] A popular children's book states:

> There are three branches of federal government, charged with different responsibilities. The legislative branch (the House of Representatives and the Senate) creates laws for the nation. The executive branch (headed by the president of the United States) executes, or carries out, the laws. The judicial branch (The Supreme Court and other lower courts) interprets the law and can overrule them.
>
> In addition to separating powers, the Constitution also provides for numerous ways in which these bodies of government overlap. This is so they can check up on one another in case one body does something that isn't good for the country.

[2] Mark Friedman, GOVERNMENT, at 12 (2005).
For example, two books on very different topics discussed our separation of powers and the importance of an independent judiciary. *See* Carl T. Bogus, WHY LAWSUITS ARE GOOD FOR AMERICA at 45 (2001) ("The division of powers among three branches of government is perhaps the most fundamental feature of American government. It is also the feature most distinctly American."), and DAVID MCCULLOUGH, JOHN ADAMS at 222 (2001) ("But it was through the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected, and for life, that Adams made one of his greatest contributions not only to Massachusetts but to the country, as time would tell.").

[3] 5. U.S. 137, 163 (1803). *See also* Thomas Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U.L.Rev. 1309 (2003), wherein he quotes Sir Edward Coke:

> Every subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporal, ... or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay…
>
> Justice must have three qualities; it must be ... free; for nothing is more odious than Justice let to sale; full, for justice ought not to limp, or be granted piece-meal; and speedily, for delay is a kind of denial; and then it is both justice and right *Id.* at 1321. (portions of quotation translated from Latin by Phillips).

[4] "The single greatest development of the common law during the twentieth century has been the creation of a new area of law known as products liability." Carl T. Bogus, WHY LAWSUITS ARE GOOD FOR AMERICA at 137 (2001). *See also* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1, 35 (2004) (While negligence cases are most numerous in tort law, the most significant area of development in neoclassical law was the law of products liability).

[5] For example, some courts have created an implied warranty of habitability in residential leases. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Pines v. Perssion , 14 Wis. 2d 590, 111 N.W.2d 409 (1961). Similar protections have also been provided to commercial tenants. *See* Davidow v. Inwood N. Prof'l Group, 747 S.W.2d 373 (Tex. 1988).

[6] *See, e.g.,* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987) (implied warranty of good and workmanlike performance in contract to repair or modify existing tangible goods or property). *See also* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (implied warranty of good and workmanlike performance and habitability in contract for construction of new home).

[7] Perhaps the most notable decision to consider overreaching in a consumer context is *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (applying unconscionability to a consumer contract).

[8] A recent book review comments upon the development of plaintiffs common law rights in tort:

> In 1969 Robert Keeton wrote that "the most striking impression that results from reading the weekly outpouring of torts opinions handed down by appellate courts across the nation for the decade commencing in 1958 is one of candid, openly acknowledged, abrupt change." Keeton observed that the state courts had, between 1958 and 1968, "candidly and explicitly" overruled precedents in a "wide range of problems in the law of torts," and he listed ninety overruling decisions on at least thirty-five topics, ranging from eliminating or limiting common law immunity doctrines, to expanding the right to recover for pure emotional distress, to expanding the doctrine of strict liability. As Gary Schwartz famously commented, until the early 1980s these changes were "almost all triumphs for plaintiffs; the collection of these cases could be referred to as "plaintiffs' greatest hits.'"

Anthony J. Sebok, *Dispatches From the Tort Wars,* 85 TEX. L. REV. 1465, 1110-11 (2007). (Reviewing WILLIAM HALTOM and MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS; HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES; and TOM BAKER, THE MEDICAL MALPRACTICE MYTH.)

[9] Wyeth v. Levine, 129 S. Ct. 1187, 1202 (2009).

[10] I have chosen to use the term "pre-dispute mandatory arbitration" to emphasize that the practice under consideration is the use of arbitration agreements contained in a contract entered into prior to the existence of a dispute. As others have recognized, pre-dispute arbitration itself is often referred to as "mandatory arbitration." *See, e.g.*, Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069 (1998). This essay uses the phrases "pre-dispute mandatory arbitration" and "mandatory arbitration" synonymously.

[11] In most cases, the decisions of arbitrators are private. In fact, it is not unusual for arbitrators to rule without any written opinion.

[12] The "threat" posed by the privatization of law may already be real. In a recent article discussing the effect of arbitration on the development of contract law, Professor Charles L. Knapp notes the diminishing number of decisions discussing contract issues. He notes, "Far and away the most pervasive contract-related issue litigated during this period [2002] has been this: Will the court enforce an arbitration contract in the parties' written agreement?" Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 763 (2002). *See also* Chris A. Carr and Michael R. Jenks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision*, 88 KY. L. J. 183 (1999).

[13] I recognize that others have discussed the effects of the privatization of law through arbitration agreements. *See, e.g.,* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 798 (2002), wherein the author concludes with a question and answer:

> Can powerful private interests with the ability to control most of the terms of most of the contracts they make, deprive large segments of American society of their access to the courts for which all of us pay, and to which all of us have historically had access? The answer, until now, sadly, to some of us—they apparently can. And do. And will.

See also Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999) (arbitration does not produce a uniform or consistent law). As will be discussed in this paper, however, I believe that the impact of arbitration on consumer law is of particular concern because of the increasingly widespread use of mandatory arbitration in consumer cases, and consumers' inability to meaningfully bargain for an alternative.

[14] Other authors have noted the broader impact arbitration may have upon our civil justice system. *See, e.g.*, Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U. SAN FRANCISCO L. REV. 17, 38 (2003) ("If our society is to eliminate the civil trial right we should do so in the open, following a full public discussion. It is wrong to allow companies to use mandatory arbitration clauses to surreptitiously eliminate this precious right.").

[15] The Arbitration Fairness Act prohibits the inclusion of pre-dispute arbitration clauses in consumer contracts, as well a certain other agreements where one side lacks sufficient bargaining power to negotiate terms. Congress has been considering prohibitions on pre-dispute consumer arbitration clauses for two years. The 2009 bill is the Arbitration Fairness Act of 2009, S. 931, H.R. 1020, 111th Cong. (2009). In 2008, the bill, which was not enacted, was Senate Bill: Arbitration Fairness Act, S. 1782, 110th Cong. (2007), House Bill: Arbitration Fairness Act, H.R. 3010, 110th Cong. (2007).

[16] Webster's dictionary defines consumerism as "a movement for the protection of the consumer against defective products, misleading advertising, etc." Limited consumer protection was present until the 1950s and early 1960s. In the 1950s, a significant breakthrough occurred with the establishment of the product-liability concept, whereby a plaintiff did not have to prove negligence but only had to prove that a defective product caused an injury. In his 1962 speech to Congress, President John F. Kennedy outlined four basic consumer rights, which later became known as the Consumer Bill of Rights. Later, in 1985, the United Nations endorsed Kennedy's Consumer Bill of Rights and expanded it to cover eight consumer rights. Consumer protection can only survive in highly industrialized countries because of the resources needed to finance consumer interests. Kennedy's Consumer Bill of Rights included the right to be informed, the right to safety, the right to choose, and the right to be heard." Answers.com, available at http://www.answers.com/topic/consumer-bill-of-rights?cat=biz-fin

[17] 15 U.S.C.A. §§1601—1667. Although there was some pre-1960s consumer protection legislation, it usually was directed primarily at attempts to increase competition or eliminate a very specific health or safety problem.

[18] Manguson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Title 1, §§101-112, 15 U.S.C.A. §§2301-11. *See generally*, CURTIS R. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON-MOSS WARRANTY ACT (2d ed 1987).

[19] For a list of all state deceptive trade practice legislation, and an excellent discussion of the subject, see UNFAIR AND DECEPTIVE ACTS AND PRACTICES 6th ed (2004 and supp.), published by the National Consumer Law Center. *See generally* RICHARD M. ALDERMAN AND DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW 2008 EDITION (2008).

[20] *See, e.g.*, sections 2-312, 2-316, 2-318 and 2-719 of the UCC.

[21] *See* William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 ADMIN. L. REV. 271 (1970).

[22] *Id.*at 271.

[23] For example, the Truth in Lending Act, a federal consumer credit law, provides that a successful consumer claimant shall be entitled to recover from the creditor "the costs of the action, together with a reasonable attorney's fee as determined by the court," as well as punitive damages between $100 and $1,000. TILA §130(a)(3); 15 U.S.C. §1640(a). The Texas Deceptive Trade Practices Act, a state consumer protection statute, allows for attorney's fees and punitive damages up to three times economic and mental anguish damages. TEX. BUS. & COM. CODE §17.50(a)(b). Most state consumer laws allow the recovery of reasonable attorneys' fees, *see generally* RICHARD M. ALDERMAN AND DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW 2008 EDITION (2008); UNFAIR AND DECEPTIVE ACTS AND PRACTICES 6th ed (2004 and supp.), published by the National Consumer Law Center.

[24] Truth in Lending Act Amendments of 1995, Pub L 104-29, § 6, 109 Stat 274.

[25] As the Supreme Court noted, "We granted certiorari, to resolve the division between the Fourth Circuit and the Seventh Circuit on the question whether the $100 floor and $1,000 ceiling apply to recoveries under §1640(a)(2)(A)(i)." Koons v. Buick GMC, Inc., 543 U.S. 50, 59 (2004).

[26] 543 U.S. 50 (2004).

[27] *Id.* at 64. The opinion was written by Justice Ginsburg, joined by Justices Rehnquist, Stevens, O'Connor, Kennedy, Souter, and Breyer. Concurring opinions were issued by Justice Stevens, joined by Justice Breyer; Justice Kennedy, joined by Chief Justice Rehnquist; and Justice Thomas. Justice Scalia dissented.

[28] The importance of *stare decisis* was recently recognized by the Supreme Court:

> Basic principles of *stare decisis*, however, require us to reject this argument. Any anomaly the old cases and *Irwin* together create is not critical; at most, it reflects a different judicial assumption about the comparative weight Congress would likely have attached to competing legitimate interests. Moreover, the earlier cases lead, at worst, to different inter-

pretations of different, but similarly worded, statutes; they do not produce "unworkable" law. Further, *stare decisis* in respect to statutory interpretation has "special force," for "Congress remains free to alter what we have done.". Additionally, Congress has long acquiesced in the interpretation we have given.

John R. Sand & Gravel Co. v. United States, 128 Sup. Ct. 750, 756 (2008) (citations deleted).

[29] Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 5 (1936).

[30] The need for a common law supplement to legislation has been described as follows:

> Our society has an enormous demand for legal rules that actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. The capacity of a legislature to generate legal rules is limited, and much of that capacity must be allocated to the production of rules concerning governmental matters, such as spending, taxes, and administration; rules that are regarded as beyond the courts' competence, such as the definition of crimes; and rules that are best administered by a bureaucratic machinery, such as the principles for setting the rates charged by regulated industries. Furthermore, our legislatures are normally not staffed in a manner that would enable them to perform comprehensively the function of establishing law to govern action in the private sector. Finally, in many areas the flexible form of a judicial rule is preferable to the canonical form of a legislative rule. Accordingly, it is socially desirable that the courts should act to enrich that supply of legal rules that govern . . . [business] conduct-not by taking on lawmaking as a free-standing function, but by attaching much greater emphasis to the establishment of legal rules than would be necessary if the courts' sole function was the resolution of disputes.

Carr and Jencks, *supra* note11 at 193. *See generally* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 SEATTLE U. L. REV. 1 (2004) (discussing changes and trends in the development of the common law).

[31] *See, e.g.*, McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (eliminating the requirement of privity); Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963) (imposing strict products liability). *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). *See also* Seavy, *Caveat Emptor as of 1960*, 38 TEX. L. REV. 439 (1960); Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?*, 1968 DUKE L.J. 831 (1968).

[32] 350 F.2d 445 (D.C. Cir. 1965).

[33] 50 N.J. 101, 232 A.2d 405 (1967).

[34] 32 N.J. 358, 161 A.2d 69 (1960).

[35] This is not to imply that recent decisions uniformly recognize the lack of bargaining in the typical consumer contract of adhesion. In fact, most courts use a traditional contract analysis to find assent and a valid contract. *See generally* Jean Braucher, *The Afterlife of Contract*, 90 NW. U. L. REV. 49 (1995).

[36] *See, e.g.*, KLPR TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315 (W.D. Ark. 1971) (express warranty in leased equipment); Sarafanti v. M.A. Hittner & Sons, 35 App. Div.2d 1004, 318 N.Y.S.2d 352 (1970) (implied warranty in lease of automobile). *See generally* Hawkland, *Impact of the Uniform Commercial Code on Equipment Leasing*, 1974 ILL. L. F. 446 (1972). *See also* Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar Alike*, 39 ALA. L. REV.575 (1988); Edwin E. Huddlesin, III, *Old Wine in New Bottles: UCC Article 2A—Leases*, 39 ALA. L. REV. 615 (1988).

[37] For a general discussion of the development of the law with respect to the sale of goods and service transactions, see Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231 (1996).

[38] 741 S.W.2d 349 (Tex. 1987).

[39] *Id.* at 354.

[40] In *Archibald v. Act III Arabians*, 755 S.W.2d 84 (Tex. 1988), the court suggested that the warranty could be applied to professional services.

[41] Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1998) (no implied warranty for professional services).

[42] Rocky Mountain Helicopter, Inc. v. Lubbock County. Hosp. Dist., 987 S.W.2d 50 (Tex. 1999) (no implied warranty for services incidental to helicopter maintenance).

[43] *See, e.g.*, Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.")

[44] The provisions of the FAA [Federal Arbitration Act] manifest a "liberal federal policy favoring arbitrations agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). This pro-arbitration stance of the Supreme Court began in earnest with the decision in Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). Subsequent Supreme Court cases all evidence a strong pro-arbitration position. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (FAA's employee exception should be narrowly construed); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (Possibility of excessive costs is insufficient to defeat arbitration clause); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (FAA preempts state statute restricting arbitration); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (courts should "rigorously enforce agree-

ments to arbitrate").

[45] "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). *See also* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (stressing that courts should "rigorously enforce agreements to arbitrate"); Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 643 (7th Cir. 1981) (describing the "established federal policy that, when constructing arbitration agreements, every doubt is to be resolved in favor of arbitration"); Wick v. Atl. Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979) (asserting that courts should stay proceedings pending arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue"); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 44 (3d Cir. 1978) (recognizing that even in international agreements, the federal courts continue to favor arbitration of disputes); Germany v. River Terminal Ry. Co., 477 F.2d 546, 547 (6th Cir. 1973) (acknowledging that using arbitration to resolve disputes, with consent of the parties, reduces "court congestion").

[46] 546 U.S. 440 (2006).

[47] *Id.* at 446.

[48] W. Scott Simpson, Stephen J. Ware, and Vickie M. Willard, *The Source of Alabama's Abundance of Arbitration Cases: Alabama's Bizarre Law of Damages for Mental Anguish*, 28 AM. J. TRIAL ADVOC. 135 (2004).

[49] *Id.* at 177. The authors also note that, "It is virtually impossible now for Alabama consumers to purchase a new automobile or home without first signing a pre-dispute arbitration agreement. *Id.* at 138.

[50] Although the auto and home industries have "divorced" themselves from the Alabama civil justice system, I assume that if the courts adopted a more pro-business stance these same industries would again "opt-in" to the civil justice system by removing their arbitration provisions. Because the decision of whether to include an arbitration provision rests exclusively with the business, business alone can determine when to arbitrate and when to allow a matter to proceed to court.

[51] As a general rule, a court may not review the decision of an arbitrator. A federal court may set aside an arbitration award under the FAA only upon a finding that certain statutory or judicial grounds are present." The Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 328 (6th Cir. 1998). Those statutory grounds are:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. It is extremely unusual for a court to find a basis upon which to set aside an arbitrator's decision.

Although some courts have also allowed review of an arbitrator's decision based on additional "non-statutory" grounds, such as manifest disregard of the law, that approach appears to no longer be proper. For example, in *Citigroup Global Mkts, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009), the U.S. Court of Appeals for the Fifth Circuit held manifest disregard is no longer a basis to vacate arbitration awards. The court noted that its ruling was demanded by the reasoning of the Supreme Court's decision in *Hall Street Associates v. Mattel*, 128 S. Ct. 1396 (2008). In *Citigroup*, the court stated:

> The question before us now is whether, under the FAA, manifest disregard of the law remains valid, as an independent ground for vacatur, after *Hall Street*. The answer seems clear. *Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a nonstatutory ground for vacatur. Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.

[52] Theodore Eisenberg and Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DEPAUL L. REV. 335, 373-74 (2007).

A recent article discusses arbitration, and compares it with an alternative, a contract to modify the rules of litigation. Henry S. Noyes, *If You (Re) Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration¹s Image*, 30 HARV. J.L. & PUB. POL. 579 (2007). As the article points out, contractual modification of the rules of litigation can offer the parties substantial procedural and cost benefits over the current alternative, arbitration. Parties do not, however, use such contractual agreements in consumer arbitration, and it is unlikely they will. As discussed above, this is because arbitration in consumer cases is not

used to provide a simpler, quicker, more efficient and less costly alternative to litigation. It is used to change the substantive results of the civil litigation system. As Professor Noyes points out, if business truly wanted a better alternative to our current litigation system, it could contractually modify the rules to effectuate cost and time reductions, while maintaining the traditional role of the courts.

[53] *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?* 21 J. CORP. L. 331 (1996); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection*, 78 MICH. B.J. 302 (1999); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5 (2004) David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived its Welcome?*, 40 ARIZ. L. REV. 1069 (1998); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997).

[54] One of the few challenges to arbitration provisions that has met with limited success is unconscionability. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (employer's "Dispute Resolution Agreement" is unconscionable and unenforceable); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997) (declining to enforce an employment arbitration agreement in the absence of consideration); Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (11th Cir. 1985) (holding that "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims" and, absent such an exchange, an arbitration provision in an employment agreement is invalid and unenforceable); Ting v. AT& T, 182 F. Supp.2d 902 (N.D. Cal. 2002) (agreement unconscionable where consumer had no meaningful choice); Kloss v. Edward D. Jones, 2002 Mt. 123, 54 P.3d 1 (Mont. 2002) (arbitration agreement in contract of adhesion not enforceable); Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000) (refusing to enforce an agreement to arbitrate employment disputes and finding the agreement unconscionable because it required arbitration for claims brought by employees but did not require arbitration of claims brought by the employer); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 158–59 (Cal. Ct. App. 1997) (declaring an arbitration clause in an employment agreement unenforceable, unconscionable, and against public policy because it was adhesive, the duty to arbitrate was unilateral, and the terms unfairly benefited the employer).

[55] The United States Supreme Court recently had an opportunity to rule on this point in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The court side-stepped the issues, however, noting that although "[i]t may well be that . . . large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights, ... [t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91. For cases that have considered the effect of excessive costs, see e.g., Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998); Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997); Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002); Armendariz v. Foundation Health Psychare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000).

Although most small claims courts provide a judge and jury for less than $100, the costs of arbitration far exceed this amount. A recent study by Public Citizen concludes that the costs of arbitration almost always exceed the costs of litigation. *The Costs of Arbitration, April 2002.* (The report's publication number is B9028. It is available from Public Citizen, www.citizen.org) For example, AAA cites $700 per day as the average arbitrator's fee in 1996. Kenneth May, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, 31 DAILY LAB. REP. (BNA) A-12 (Feb. 15, 1996). Judicial Arbitration and Mediation Services arbitrators charge an average of $400 per hour. *Reginald* Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. & EMP. L.J. 381, 410 n.189 (1996). Fees up to $600 per hour are not uncommon. *See* Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1; David Segal, *Have Name Recognition, Will Mediate Disputes*, WASH. POST, Dec. 16, 1996, WASH. BUS. at 5. The CPR Institute for Dispute Resolution estimates arbitrators' fees of $250-$350 per hour and 15-40 hours of arbitrator time in a typical employment case, for total arbitrators' fees of $3,750 to $14,000 in an "average" case. CPR INST. FOR DISPUTE RESOLUTION, EMPLOYMENT ADR: A DISPUTE RESOLUTION PROGRAM FOR CORPORATE EMPLOYERS I-13 (1995).

[56] Mercedes Homes, Inc. v. Colon, 966 So. 2d 10, 28-29 (Fla. Ct. App. 2007) (Griffin, dissenting).

[57] In Greentree Financial Corp. v. Bazzle, 399 U.S. 444 (2003), the Court recognized class arbitration, and held that the interpretation of an arbitration provision in an arbitration clause was to be decided by the arbitrator.

Courts to consider whether such clauses preclude a class action have reached differing results. For example, in *Discover Bank v. Superior Court of Los Angeles*, 36 Cal. 4th 148, 167, 113 P.3d 1100, 1110, 30 Cal. Rptr. 3d 76, 87 (2005) the California Supreme Court found a class action prohibition unconscionable and unenforceable, stating:

> We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

The Ninth Circuit reached a similar conclusion with respect to a cell phone contract. *See* Shroyer v. New Cingula Wireless Servs., 498 F.3d 976 (9th Cir. 2007) ("Applying that law to the class arbitration waiver at issue here, we conclude that under the test set forth in *Discover Bank v. Superior Court of Los Angeles*, 36 Cal. 4th 148 (Cal. 2005), the waiver is both procedurally and substantively unconscionable and, therefore, unenforceable.") *See also* Homa v. American Express Co., 558 F.3d 225 (3rd Cir. 2009) (class action waiver invalid); In re American Express Merchant's Litig., 554 F.3d 300 (2nd Cir. 2009) (class action waiver unenforceable). However, the Supreme Court of North Dakota, in *Strand v. U.S. Bank Nat'l Assoc*., 693 N.W.2d 918 (2005), recently upheld a class action prohibition, noting:

> Nor has Strand established that he will be left without an effective remedy if the "no class action" provision is enforced. The arbitration provision here requires that the arbitration take place in Strand's home jurisdiction and provides for advancement of fees and costs by the Bank. Furthermore, if Strand prevails in his claim against the Bank he will be entitled to an award of attorney fees…. under the facts of this case the arbitration provision between Strand and the Bank creates a chance that Strand can be made whole through individual arbitration. [t]he facts certified to us have failed to show that enforcement of the disputed contractual provision would leave Strand without an effective remedy. We therefore conclude Strand has failed to demonstrate that the "no class action" provision is substantively unconscionable. Because a showing of both procedural and substantive unconscionability is required to declare a contractual provision unconscionable and unenforceable, we conclude that, under the facts of this case, the "no class action" provision is not unconscionable.

Id. at 927. S*ee generally* Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But not all) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 BUS. LAW. 775 (2005).

[58] 539 U.S. 444 (2003).

[59] S*ee generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

[60] For example, many arbitration provisions contain clauses similar to this one:

> PLEASE READ THIS AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT. YOU WILL NOT BE ABLE TO BRING A CLASS ACTION OR OTHER REPRESENTATIVE ACTION IN COURT SUCH AS THAT IN THE FORM OF A PRIVATE ATTORNEY GENERAL ACTION, NOR WILL YOU BE ABLE TO BRING ANY CLAIM IN ARBITRATION AS A CLASS ACTION OR OTHER REPRESENTATIVE ACTION. YOU WILL NOT BE ABLE TO BE PART OF ANY CLASS ACTION OR OTHER REPRESENTATIVE ACTION BROUGHT BY ANYONE ELSE, OR BE REPRESENTED IN A CLASS ACTION OR OTHER REPRESENTATIVE ACTION.

American Express contract provision received by the Author.

[61] "Bazzle's twin holdings - and just as importantly, the manner in which arbitration administrators and courts have responded to them - make it possible for corporations to draft arbitration clauses so as to virtually guarantee that claims will not be arbitrated on a classwide basis." Note: *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV. 1715, 1721 (2005). Although some courts continue to uphold such clauses and prohibit class action arbitrations, the recent trend appears to be to invalidate limits on class action arbitrations. *Compare* Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007) (class action ban enforceable) *with* Dale v. Comcast, 498 F.3d 1216 (11th Cir. 2007) (ban on class arbitration is unenforceable). *See also*, Chalk v. T-Mobile USA, Inc., 560 F.3d 1087 (9th Cir. 2009) (class action waiver was unenforceable and not severable); Homa v. American Express Co., 558 F.3d 225 (3rd Cir. 2009) (class action waiver invalid); In re American Express Merchant's Litig., 554 F.3d 300 (2nd Cir. 2009) (class action waiver unenforceable); Pleasants v. Am. Express Co., 541 F.3d 853 (8th Cir. 2008) (class action waiver enforceable); Scott v. Cingular Wireless, 156 Wn.2d 1001, 135 P.3d 478 (Wash. 2007) (ban on class action arbitration unenforceable); Kinkel v. Cingular Wireless, 223 Ill. 2d 1; 857 N.E.2d 250 (2006) (class action ban is unconscionable).

[62] *See, e.g.*, Carole J. Buckner, *Due Process in Class Arbitration*, 58 FLA. L. REV. 185, 263 (2006) ("State action may require due process in some models of class arbitration, and perhaps would not require such protections under other models.")

[63] This theory is based on the seminal work by Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Galanter's thesis was rather simple: repeat-players with substantial assets can use the legal system to their advantage. This conclusion was based on his observations concerning the ability of the "Haves" as repeat-players to manipulate the legal system to optimize long-term results. Those with a greater stake in the outcome of future litigation will attempt to optimize long-term results. *See also* Susan S. Silbey, *Do The "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 799 (1999) ("Since its publication in 1974, Galanter's paper has been cited more often than any other piece of sociolegal scholarship, and it stands among the most well cited law review articles of all time." (citing Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 766 (1996), which ranks Galanter's article as thirteenth on the list of most cited law review articles).

Whether the "haves" come out ahead in consumer arbitration is virtually impossible to prove or disprove. In the consumer context, there is almost no data available. Even in the employment area, where the most data is available, it is hard to come to any meaningful conclusions. This is due, in part, to the fact that the most meaningful statistic would be one that compared not only arbitration numbers, but also similar cases in the courts. *See, e.g.*, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 n.17 (D.C. Cir. 1997) ("It is hard to know what to make of these studies without assessing the relative *merits* of the cases in the surveys."). It must

[72] A similar problem may exist with respect to financial contributions to the campaign of judges. Spending on judicial elections has been skyrocketing, and data suggests that the spending is often rewarded with favorable rulings. *See, e.g.*, Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html. Whether and to what extent contributions to judges affect their decisions is still an open question.

[73] *See* note 46 and 47 and accompanying text, *supra.*

[74] "As trials shrink as a presence within the legal world, they are displaced from the central role assigned them in the common law. [C]ommon law procedure has been defined by the presence of this discreet plenary event, to which all else was a prelude or epilog." Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459, 524 (2005).

[75] As one author discussing arbitration has stated, "A private civil justice system is evolving, one that is relatively unconstrained by law and relatively uninformed by systematic empirical research." Using what is described as "Dispute Resolution Darwinism," the author concludes that, "We may already be witnessing the first mass extinction as large institutional organisms move in to occupy entire habitats in the civil justice ecosystem." Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002).

[76] *See generally*, note 51 *supra.*

[77] As a general rule, decisions of arbitrators are not appealable. Under the Federal Arbitration Act (FAA), a court has very limited authority to vacate an arbitrator's award. Federal Arbitration Act, 9 U.S.C. § 10 (1994) (indicating that an arbitral award can be vacated only on narrow grounds including corruption, fraud, partiality, and misconduct). In most cases, the award may not be appealed based on the incorrect application of law or an improper factual finding. The review process was nicely explained in *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004) as follows:

> When reviewing an arbitral award, courts accord "an extraordinary level of deference" to the underlying award itself, because federal courts are not authorized to reconsider the merits of an arbitral award "even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." Indeed, an award must be confirmed even if a court is convinced the arbitrator committed a serious error, so "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority."

Id. at 798. *See also* Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724, 1728 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement."); Universidad Interamericana v. Dean Witter Reynolds, Inc., 208 F. Supp.2d 151 (D. Puerto Rico 2002) (courts do not sit to hear claims of factual or legal error by an arbitrator). For a general discussion of the grounds for vacating an arbitrator's award, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731 (1996).

[78] Not only are arbitrators without authority to develop the law, they also have little incentive to do so. Because their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public. *See generally* Moohr, *supra* note 12 at 436.

[79] 741 S.W.2d 349, discussed at note 36 and accompanying text.

[80] "There is another characteristic of litigation in the Anglo-American system, however, much less frequently manifested but perhaps of equal importance: the ability to *depart* from precedent." Knapp, *supra* note 12 at 785 (Emphasis in original).

[81] 741 S.W.2d 349 (Tex. 1987).

[82] *See, e.g.*, Rocky Mountain Helicopters, Inc. v. Lubbock County. Hosp. Dist., 987 S.W.2d 50 (Tex. 1998) (no implied warranty found).

[83] This fact has been noted and discussed elsewhere, *see generally* Knapp, *supra* note 12, Moohr, *supra* note 12, and Carr and Jencks, *supra* note 11.

[84] Section 2 of the FAA requires that the arbitration provision be contained in a written contract. It is also interesting to note that some have argued that employers are better off not including an arbitration provision. *See*, e.g., Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399,470 (2000) ("The increasing use of mandatory arbitration by some employers has constituted an ill-advised departure from the overwhelmingly successful experience of employers in the court system.").

[85] *See, e.g.*, Equal Employment Opportunity Comm'n. v. Waffle House, Inc., 534 U.S. 279, 122 S.Ct. 754 (2002) (An agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an ADA enforcement action.).

[86] *See, e.g.*, Johanna Harrington, Comment, *To Litigate or Arbitrate? No Matter—The Credit Card Industry is Deciding For You*, 2001 J. DISP. RESOL. 101.

be assumed, however, that if businesses are increasingly imposing mandatory arbitration provisions on consumers, they see some benefit in precluding resort to the courts.

[64] *See generally Id.*

[65] *Consumer Advocates Slam Credit-Card Arbitration*, July 16, 2007 available at http://www.csmonitor.com/2007/0716/p13s01-wmgn.htm

[66] *Id.* The *Christian Science Monitor* report is not alone in finding that consumers do not fare well in arbitration. In a recent study of nearly 34,000 arbitration cases conducted by the National Arbitration Forum in California, it was found that the business prevailed in over 94% of the cases. The study also found that arbitrators charge up to $10,000 a day and some make $1 million a year. The report, entitled, "*The Arbitration Trap: How Credit Card Companies Ensnare Consumers*," shows that "binding mandatory arbitration is a rigged game in which justice is dealt from a deck stacked against consumers." The complete 74 page study is available through Public Citizen at www.citizen.org.

[67] Because pre-dispute arbitration clauses are drafted by the business and presented to the consumer on a take it or leave it basis, the business has the ability to draft an arbitration clause in whatever manner is most beneficial to the business. For example, the business may select the arbitration forum, specify the time and location of the arbitration, designate what claims will or will not be subject to arbitration, whether class-action arbitrations will be permitted, and whether there will be a written opinion.

[68] One of the results of litigation against arbitration clauses is that even when consumers prevail, the result is often simply a stronger clause used in the future. Many pro-consumer opinions strike specific language and do so with such specificity that it enables the business to modify its arbitration clause in a manner that complies with the law.

[69] In fact, this is already happening. Many have noticed that jury trials are vanishing in the United States, and that this has been caused at least in part by the increased use of arbitration clauses. Much has been written recently about the privatization of justice and the vanishing jury trial. *See generally* THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS—REPORT OF THE 2003 FORUM FOR STATE APPELLATE COURT JUDGES (Pound Civil Justice Institute 2006) *See also 2004 ABA Annual Meeting--Program Materials Bench and Bar: The Vanishing Jury Trial (2004)*, available at http://www.abanet.org/abanet/litigation/mo/premium-lt/prog_materials/2004_abaannual/20.pdf (membership required); Glenn A. Ballard, Jr., *The State of Trial Work – 2007*, 44 HOUSTON LAWYER 6 (2007); Ileana Blanco and Tanya C. Edwards, *Arbitration v. Litigation Pros and Cons: What Business Lawyers Need To Know (Arbitration and the Vanishing Jury Trial)*, 69 TEX. BAR JOURNAL 858 (Oct. 2006); Scott Brister, *Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191 (2005); Dennis J. Drasco, *The American Jury Project and the Image of the Justice System*, 32 LITIGATION No. 2 at 1 (2005), *available at* http://www.abanet.org/litigation/journal/opening_statements/ 05winter_openingstatement.pdf; John Fleming, *Using Best Practices to Draft Arbitration Agreements (Arbitration and the Vanishing Jury Trial)*, 69 TEX. BAR JOURNAL 866, 868 (2006); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2005); Patrick E. Higginbotham, *Point-Counterpoint: Two Judges' Perspectives on Trial by Jury: Mahon Lecture*, 12 TEX. WESLEYAN L. REV. 501 (2006); Ed Kinkeade, *Point-Counterpoint: Two Judges' Perspectives on Trial by Jury: Introduction*, 12 TEX. WESLEYAN L. REV. 497 (2006); David T. López, *Arbitration and the Vanishing Jury Trial: Realizing the Promise of Employment Arbitration*, 69 TEX. BAR JOURNAL 862 (2006); Jason Mazzone, *Symposium: Justice Blackmun and Judicial Biography: A Conversation with Linda Greenhouse: The Justice and the Jury*, 72 BROOK. L. REV. 35 (2006); Tracy Walters McCormack, *Privatizing the Justice System*, 25 REV. LITIG. 735 (2006) (Symposium); Terry R. Means, *Point-Counterpoint: Two Judges' Perspectives on Trial By Jury: What's so Great About a Trial Anyway? A Reply to Judge Higginbotham's Eldon B. Mahon Lecture of October 27, 2004*, 12 TEX. WESLEYAN L. REV. 513 (2006); Kirk W. Schuler, *Note: ADR'S Biggest Compromise*, 54 DRAKE L. REV. 751 (2006); Task Force on the Vanishing Jury Trial, Boston Bar Association, *Jury Trial Trends in Massachusetts: The Need to Ensure Jury Trial Competency Among Practicing Attorneys as a Result of the Vanishing Jury Trial Phenomenon* (2006); Mark R. Trachtenberg and Christina F. Cozier, *Risky Business: Altering the Scope of Judicial Review of Arbitration Awards by Contract*, 69 TEX. BAR JOURNAL 868 (2006); Pamela Tynes, *Design Your Own Arbitration: Redesigning Arbitration to Fit Your Dispute? (Arbitration and the Vanishing Jury Trial)*, 69 TEX. BAR JOURNAL 872 (2006); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67 (2006).

[70] In the typical arbitration, the parties are presented with a list of arbitrators and are allowed to delete some or all members of the list. The arbitrators for that specific dispute are then selected from the remaining names. In other words, a party may not select the arbitrator but he may prevent someone from serving. If an arbitrator were viewed as unreasonable, he or she could effectively be out of work because neither side would want to run the risk of an unfair decision. An unfair or unreasonable commercial arbitrator would have his or her name deleted from the list of acceptable arbitrators.

[71] American arbitrators generally are well compensated, and many rely upon being selected as an arbitrator as their sole means of income. As discussed above, if an arbitrator were deemed to be "unfair" or "unfit" he or she would effectively lose all income because both sides to a dispute would "strike" him or her. In the context of consumer arbitration, however, an arbitrator viewed as unfair by the consumer loses little. The consumer is involved with one arbitration and is not a repeat-player. On the other hand, many businesses are involved in thousands of arbitrations a year. Being deemed unfair by business would preclude most future employment.

[87] The Motor Vehicle Franchise Fairness Act has been codified at 15 U.S.C. §1226 and reads as follows:

> § 1226. Motor vehicle franchise contract dispute resolution process
>
> (a) Election of arbitration.
>
> (1) Definitions. For purposes of this subsection--
>
> (A) the term "motor vehicle" has the meaning given such term in section 30102(6) of title 49 of the United States Code; and
>
> (B) the term "motor vehicle franchise contract" means a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles.
>
> (2) Consent required. Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.
>
> (3) Explanation required. Notwithstanding any other provision of law, whenever arbitration is elected to settle a dispute under a motor vehicle franchise contract, the arbitrator shall provide the parties to such contract with a written explanation of the factual and legal basis for the award. Interestingly, many of those same dealers who found it unfair that they should be forced by the manufacturer to arbitrate, often impose arbitration on their customers.

[88] Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 11 (1936).

[89] Our common law tradition, while not perfect, generally ensures that parties to a dispute can rely on the fact that similar cases will be dealt with in a similar manner. The consistency and predictability of the common law is lost in arbitration.

[90] 543 U.S. 50 (2004), discussed at note 24, and accompanying text.

[91] There is the additional problem of the cost and inefficiency of individual challenges to arbitration clauses. Because most of these attacks are based on unconscionability, they establish little if any precedent for other consumers. Judicial attacks against arbitration provisions are also extremely expensive and take a great deal of time.

[92] *See* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1264-67 (2001) (proposing amendments to the Federal Arbitration Act).

[93] For example, Congress has recognized the “unfairness” of arbitration clauses and prohibited the inclusion of pre-dispute arbitration clauses in contracts between automobile dealers and manufacturers. Motor Vehicle Franchise Contract Arbitration Fairness Act of 2002, 15 U.S.C. §1226. *See, e.g.*, Volkswagen of America, Inc. v. Sud’s of Peoria, Inc., 474 F.3d 966 (7th Cir. 2007).

[94] Arbitration Fairness Act, S. 1782, H.R. 3010, 110th Cong. (2007).

[95] The 2009 bill is the Arbitration Fairness Act of 2009, S. 931, H.R. 1020, 111th Cong. (2009).

[96] In a recent article, the authors recognize that employees face problems similar to consumers. The authors recommend enactment of the Arbitration Fairness Act.

> The Arbitration Fairness Act of 2007 is based on findings that the FAA was intended to resolve disputes of commercial entities with the same bargaining power and level of sophistication, and that the Supreme Court has extended the FAA to disputes between parties with limited bargaining power. Congress should make this legislation law and properly balance the policy goals of the FAA and Title VII. An emphasis on values other than efficiency and economy is needed…. It seems that the desire to embrace arbitration and the policy goals of FAA have overshadowed all other concerns. There needs to be a rebalancing of interests: efficiency and economy versus the protection of important substantive rights. Hopefully, this reform effort will be more successful than past endeavors.

Landry, Robert J., III and Benjamin Hardy. *Mandatory pre-employment arbitration agreements: the scattering, smothering and covering of employee rights*, 19 U. Fla. J.l. & Pub. Pol'y 479, 495 (2008).

[97] On December 12, 2007, I testified before the Senate Judiciary Committee in support of the Arbitration Fairness Act. My testimony, was based in large part on this article. *Testimony Before the United States Senate Committee on the Judiciary—Arbitration Fairness Act of 2007*, 11 J. CONSUMER AND COMM. L. 85 (2007). Reprinted in 14 THE CONSUMER ADVOCATE 9 (2008). A video of my testimony may be found at http://www.peopleslawyer.net/arbitration.html.

The Arbitration Fairness Act of 2009

By Ann Ryan Robertson*

I. The Tempest

An anti-arbitration storm is brewing in the United States. Bills have been introduced in the United States Congress and Senate to address concerns arising in consumer and employment arbitrations. Unfortunately, due to a number of weaknesses, including poor draftsmanship, the failure to appreciate the widespread acceptance of arbitration as a dispute resolution mechanism in commercial transactions, and the failure to acknowledge the important role arbitration holds in international trade, the bills have the potential for having unforeseen and, in some instances, far-reaching consequences. This article will examine two pending bills, the Arbitration Fairness Act of 2009, House Bill 1020 (the "House Bill") and the Arbitration Fairness Act of 2009, Senate Bill 931 (the "Senate Bill") and their potential impact on both domestic and international commercial arbitration.

The Federal Arbitration Act ("FAA"), enacted in 1925, was originally designed to allow merchants of relatively equal bargaining power to agree to arbitrate their disputes. With its adoption, Congress "declared a national policy favoring arbitration and withdrew the power of states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[1] Since the enactment of the FAA, United States courts have repeatedly emphasized the importance of arbitration to the conduct of commercial transactions, and upheld arbitration as an appropriate means of resolving a variety of disputes including claims arising under federal statutes.

Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Nothing, in the meantime, prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.[2]

In the latest example of the Supreme Court upholding an arbitration clause, the court ruled that a collective bargaining agreement that clearly and unmistakably required union members to arbitrate age discrimination claims was valid under federal law.[3]

Embracing United States courts' acceptance of arbitration, United States businesses have widely incorporated arbitration clauses in their domestic contracts, perhaps most notably in the consumer and employment context. Not surprisingly, international commercial arbitration remains companies' preferred dispute resolution mechanism for cross-border disputes because it offers many benefits including the ability to avoid national courts, to select a mutually agreed upon forum, to select the decision makers, and to enforce arbitral awards around the world pursuant to the New York Convention.[4]

Over the past few years, however, consumer advocacy groups have mounted campaigns against the perceived injustices of arbitration in the consumer and employment arenas. Stories abound of consumers being required to arbitrate in distant locales utilizing rules that favor business; of employees being required to agree to arbitration in order to obtain employment; of the imposition of short contractual statutes of limitation as a means of foreclosing claims. In 2007, in response to this hue and cry, the Arbitration Fairness Act of 2007 was introduced but ultimately died in committee. (Although a number of bills related to consumer and/or employment arbitration were introduced in earlier sessions, this was the first time such legislation was seriously pursued.)

A new wind is blowing in the United States. Both the executive and legislative branches of the United States government are controlled by the Democrats. This change in control coupled with the deepening global economic crisis and the concomitant derogation of corporate America portends the passage of an anti-arbitration bill in the near future. On February 12, 2009, Representative Hank Johnson, Jr, a Democratic Congressman from Georgia, introduced the House Bill which has the support of more than 60 Representatives.[5] Congressman Johnson described the House Bill as "not an anti-business bill, but a pro-consumer bill" designed to protect a citizen's right to jury trial by prohibiting the use of mandatory arbitration clauses in employment and consumer contracts. In announcing the introduction of the bill, Representative Johnson specifically identified contracts involving wireless telephone services, credit cards, elder care facilities, and home buying as the types of contracts that typically include mandatory arbitration provisions.

Interest in the United States in reforming consumer and employment arbitration is high. Fair Arbitration Now, a coalition of consumer and other groups lobbying for passage of an anti-arbitration bill, organized and celebrated "Arbitration Fairness Day" on April 29, 2009. That day, Senator Russell Feingold, a Democratic Senator from Wisconsin, together with seven co-sponsors, introduced the Senate Bill.[6] In introducing the Senate version of the Arbitration Fairness Act, Senator Feingold stated:

Americans are sick and tired of a system that so strongly favors big corporations over consumers and in this case robs them of their constitutional right to their day in court. Americans are often given no choice but to give up their rights if they want to sign credit card agreements, cell phone contracts, job applications or other basic contracts. It's time for Congress to side with consumers and employees and end this practice of forced arbitration, which stacks the deck against the people Congress is supposed to represent.

This statement represented real public concerns, not just political rhetoric. The category of consumer arbitration that raised the

greatest concern was debt collection actions.

On July 14, 2009, the Attorney General for the State of Minnesota filed a lawsuit against the National Arbitration Forum ("NAF"), the largest arbitration company in the country for consumer credit disputes, alleging that it misrepresented its independence and hid from consumers and the public its extensive ties to the collection industry. Among the allegations made were (1) that NAF deceptively represented to consumers and the public that it was independent and neutral, operated like an impartial court system and was not affiliated with any party or took sides between parties; (2) that NAF in soliciting creditors to use its arbitration services made representations that aligned the NAF against consumers; (3) that NAF has ties to the collection industry and (4) that NAF "deselected" arbitrators who ruled for the consumer or did not award the credit card company any attorneys fees.

Three days after the lawsuit was filed, NAF signed a consent judgment that barred NAF from the business of arbitrating credit card and other consumer disputes, and that required NAF to cease accepting any new consumer arbitrations or in any manner participating in the process of administering new consumer arbitrations. As a consequence, NAF will permanently cease to administer arbitrations involving consumer debt, including credit card, consumer loans, telecommunications, utilities, health care and consumer leases.[7]

In contrast to NAF, the American Arbitration Association ("AAA"), a not-for-profit entity that has been the leading arbitration organization in the country for many decades, did not administer significant numbers of consumer arbitrations. (The one major exception was a single high volume insurance claims program that ended in mid-2009.) In testimony before the Domestic Policy Subcommittee of the Oversight and Government Reform Committee, Senior Vice President Richard W. Naimark, presented the official position of the AAA: "It is the AAA's position that a series of important fairness and due process concerns must be addressed and resolved before we will proceed with the administration of any future debt collection arbitrations."[8] In the wake of these two events, Bank of America, the largest U.S. bank, announced that it would no longer enforce mandatory arbitration against individuals in new banking disputes involving credit cards, vehicular loans (including boats), and deposit accounts of individuals.[9]

Thus, the stage has been set for arbitration reform in the consumer and employment arenas. However laudable these objectives may be, the Arbitration Fairness Act, as currently drafted, unfortunately is likely to have unintended negative effects on domestic and international commercial arbitrations.

II. The House Bill

The House Bill proposes to amend Chapter 1 of the FAA, which presently applies to all domestic arbitration claims, with no distinction drawn between claims involving individuals and business-to-business disputes. It also does not distinguish between domestic arbitrations and international arbitrations sited in the United States. Any amendment to the FAA, therefore, has the capacity to affect international commercial arbitration.

A. The Proposed Amendments to the FAA

The core of the Arbitration Fairness Act involves changes to the scope of FAA, section 2 .

Section 2. Validity and Enforceability.

(a) A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable and enforceable to the same extent as contracts generally, except as otherwise provided in this title.

b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of –

(1) an employment, consumer, or franchise dispute; or
(2) a dispute arising under any statute intended to protect civil rights.

(c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

The House Bill is designed to take effect on the date of enactment and "shall apply with respect to any dispute or claim that arises on or after such date." Thus, it would declare invalid pre-dispute arbitration agreements entered into before the date of its enactment. As a consequence, the House Bill would potentially invalidate hundreds of thousands of commercial arbitration agreements.

B. Simple Language with Almost Unlimited Reach

A New York County Bar Association analysis of the Arbitration Fairness Act of 2007, which included identical language to the 2009 bill, concluded that the proposed changes to the FAA "could easily sweep in areas such as securities, antitrust, ERISA, Uniform Commercial Code law, bankruptcy law, certain bodies of admiralty and maritime law, governmental contracts, intellectual property and a host of others."[10]

The simplicity of the language is flawed in other respects. By referring to "consumer dispute" without including a dollar carve-out provision to place large consumer transactions outside of the purview of the House Bill, neither the pre-dispute arbitration agreement involving the purchase of a television set nor the pre-dispute arbitration agreement involving the purchase of a personal plane would be valid. The term "employment dispute" in the House bill suffers from the same problem. There are indeed instances when sophisticated parties with substantially equal bargaining power actively negotiate agreements containing arbitration clauses. The House Bill would declare these pre-dispute agreements invalid.

The exclusion of all franchise disputes is also a concern. The definition of "franchise" used in the House Bill follows the definition used by the Federal Trade Commission ("FTC"), but with certain differences. The FTC definition requires the payment of $500 or more to the franchisor within six months after the franchisee business opens. The FTC definition also exempts transactions between franchisors and sophisticated transferees. Unlike the FTC definition, the House Bill fails to specify a minimum fee that must be paid to qualify as a franchise and does not provide for any exemptions. Further compounding the problem, the House Bill expressly recognizes, without definition, that payment of an indirect franchise fee falls within the House Bill's ambit. The result is uncertainty regarding whether a business relationship is actually a franchise relationship within the meaning of the House Bill.

Moreover, by failing to differentiate between purely domestic franchises and multi-national franchises, United States franchisors will be placed in an untenable position. Should the current draft of the House Bill become law, the United States multi-national franchisor will have two alternatives, neither necessarily appealing: (1) choose a foreign law and venue to govern its arbitration agreement or (2) litigate disputes in domestic courts of varying quality and efficiency located across the globe.

The vagueness of the phrase "statute intended to protect civil rights" is equally troubling. Because the House Bill does not identify the "civil rights statutes," the creative litigant, fettered only by the limits of his counsel's imagination, could easily assert a violation of a civil rights statute and reap the perceived benefit of eliminating what would otherwise be an enforceable pre-dispute arbitration provision.

III. The Senate Bill

A. Addition of Chapter 4 to the FAA.

The Senate Bill attempts to address some of the concerns just discussed. Unlike the House Bill, which is an amendment to the FAA, the Senate Bill proposes to add a new Chapter 4 to the FAA.[11] This approach would undoubtedly alleviate some confusion and unnecessary litigation, and permit the development of a separate body of law regarding pre-dispute arbitration agreements in the consumer and employment arenas. Nevertheless, certain aspects on the proposed Chapter 4 are also unsettling.

B. Refined Definitions and Reach

The definition of "consumer dispute" is identical to the definition contained in the House Bill. The definition of "employment dispute" has been refined by specifically making reference to Section 3 of the Fair Labor Standards Act of 1938. Nevertheless the Senate Bill suffers from the same definitional shortcomings as the House Bill. In addition, to overriding the Supreme Court's recent decision in 14 Penn Plaza LLC v. Pyett, which upheld an arbitration clause in a collective bargaining agreement requiring union members to arbitrate discrimination claims, the Senate Bill also specifically provides:

COLLECTIVE BARGAINING AGREEMENTS – Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations, except that no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.

The definition of "franchise dispute" in the Senate Bill has been refined to mean "a dispute between a franchisee with a principal place of business in the United States and a franchisor."[12] While the addition of this phrase does narrow the scope of the Senate Bill's application, the refined definition still renders invalid a pre-dispute agreement to arbitrate between a United States franchisee and a foreign franchisor – and would undoubtedly discourage foreign investment in the United States.

The Senate Bill also provides a detailed definition of "civil rights dispute," clearly with the aim of curbing potential creative legal thinking.[13] Nevertheless, the Senate Bill would create an avenue for challenges to arbitration provisions by individuals based on claims arising under the constitutions of any of the 50 states.

Like the House Bill, the Senate Bill would become effective on the date of enactment and "shall apply to any dispute or claims that arises after that date." With a stroke of President Obama's pen, untold pre-dispute arbitration agreements would subsequently be invalid.

C. Amendment to Chapters 2 and 3 of the FAA

In 1970 the United States acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and Congress passed Chapter 2 of FAA in order to implement the convention. In 1990 the United States implemented the Inter-American Convention on International Commercial Arbitration ("Panama Convention") by enacting Chapter 3 of the FAA. Chapter 1 of the FAA specifically states that it applies only to the extent it is not in conflict with Chapters 2 and 3 of the

FAA. This legislative scheme acknowledges the international obligations of the United States

The Senate Bill proposes to amend Chapter 2 and Chapter 3 to provide that Chapters 2 and 3 apply "to the extent that this Chapter [2 or 3] is not in conflict with Chapter 4." These provisions allow the courts to reject the applicability of Chapters 2 and 3 based solely on a conflict with Chapter 4.

The United States entered a reservation to the New York Convention, which provides that the United States will apply the Convention "to differences arising out of relationships . . . that are considered commercial under the national law." Amendments to Chapter 2 and 3, therefore, are not necessary to protect the rights of consumers, employees and civil rights claimants, the stated objective of the anti-arbitration legislation. Unfortunately, the proposed amendments to Chapters 2 and 3 would add an unnecessary layer of ambiguity to the analysis of whether a claim is commercial, would damage perception regarding the United States' commitment to its international obligations, and would result in the enactment of a domestic law that would trump the United States' treaty obligations.

IV. Abrogation of Separability and Competence-Competence

The doctrine of separability is a basic tenet of arbitration, established over forty years ago by the United States Supreme Court in Prima Paint v. Flood & Conklin.[14] Pursuant to this doctrine, the agreement to arbitrate is separate or separable from the underlying contract containing the agreement. As a consequence, the invalidity of the underlying contract does not necessarily invalidate the agreement to arbitrate. The arbitration agreement, because it is effectively considered as a separate agreement, can be valid despite being contained in an invalid contract and importantly, the arbitrator retains jurisdiction to decide the validity of the underlying contract. Based on the doctrine of separability, if a party challenges the validity of the underlying contract, as opposed to the arbitration agreement itself, a court will refer the case to arbitration.

The doctrine of competence-competence permits an arbitrator to rule on challenges to his own authority. Stated differently, competence-competence determines how authority to decide issues is allocated between the court and the arbitrator. Under established United States' principles of competence-competence, if the challenge is not based on an objection to the validity or scope of the agreement to arbitrate, the arbitrator proceeds first in resolving the parties' dispute.

Although the application of competence-competence and separability can vary among jurisdictions, it is universally accepted that an arbitrator may proceed with arbitration notwithstanding a jurisdictional challenge. In keeping with this universally accepted principle, in the United States, a party may ask the court under the FAA to stay the arbitration, but in the absence of a court order staying the arbitration, the arbitrator has the authority to proceed.

A. The House Bill

The House Bill would undermine both of these two principles. The House Bill places the sole authority to determine the validity of arbitration agreement with a court, "irrespective of whether the party resisting arbitration challenges the arbitration specifically or in conjunction with other terms of the contract containing the agreement with the courts." The consequence is that an arbitrator would be required to stop a proceeding if a party alleged that a contract was invalid or unenforceable for any reason. Parties who had agreed to resolve their disputes outside of the court system would find themselves enmeshed in ancillary litigation with its attendant delays and costs. The autonomy of arbitration would be lost.

B. The Senate Bill

The Senate Bill limits the revocation of the competence-competence and separability principles to the classes of disputes set forth in Chapter 4, as opposed to all arbitrations. However, because of the proposed amendments to Chapters 2 and 3 of the FAA, the Senate Bill's reach may extend further than intended, calling into question the applicability of competence-competence and separability principles in certain cross-border disputes.

V. United States Treaty Obligations

The goal of the New York Convention was not only to foster the recognition and enforcement of commercial arbitration agreements in international contracts, but also "to unify the standards by which agreements to arbitrate are observed and arbitral awards enforced in the signatory countries."[15] The House and Senate Bills potentially place this goal at risk. For example, courts may deny enforcement of an arbitral award finding that the difference is not capable of settlement by arbitration under the law of that country" or against "public policy" under Article V §2 of the New York Convention. Courts might apply the new procedural rules on separability and competence to international awards under Section III of the Convention and refuse to enforce a foreign award. Although these are only possibilities, they nevertheless are valid concerns.

VI. The Legal Community Voices Its Concerns

The problems with the House Bill, both in drafting and application, have not gone unnoticed and unaddressed by the international legal community, and the international legal community was in large part responsible for the improved but nevertheless imperfect Senate Bill. In response to the House Bill, the Dispute Resolution Section of the New York State Bar Association prepared a posi-

tion paper urging Congress to carefully review the arbitration bills introduced in Congress to ensure that they do not interfere with general commercial arbitration, particularly international arbitration where arbitration is often the only realistic option for dispute resolution. Among the suggestions proffered by the Dispute Resolution Section of the New York State Bar Association to meet the specific concerns of the legislature were creation of a new Chapter 4 of the FAA, an amendment to another relevant statute, or an entirely separate statute. As explained above, the Senate bill adopted the suggestion of a new Chapter 4.

The Council of the Section of Dispute Resolution of the American Bar Association (ABA), apparently in an attempt to compromise between "warring factions" within its ranks, recommended a pre-dispute opt-out provision in favor of the consumer, employee or civil rights claimants, as well as fairness protections in all arbitrations covered by the House Bill. As stated by the Chair of that section:

The Council's objective was to find a solution to some of the concerns raised in the AFA in a manner that preserved voluntariness and fairness in arbitration, while maintaining an accessible and efficient forum for claimants.[16]

The rancor that ensued following this recommendation only serves to highlight that emotions regarding the need to reform consumer arbitration are running high. In May 2009, for undisclosed reasons but presumably in response to comments from its members, the Executive Committee of the Section of Dispute Resolution of the ABA recommended to the Council of the Section of Dispute Resolution that it not go forward with its opt-out recommendation.

The anti-arbitration storm will not abate anytime soon. The voluntary actions of the AAA and Bank of America, and the pursuit of NAF by the State of Minnesota, have further emboldened consumer interests in their call for arbitration reform. Consequently, the legal community must continue in its efforts to educate the legislature regarding the unintended effects that may be visited on domestic and international commercial arbitrations by the enactment of an Arbitration Fairness Act. If the legal community fails to educate Congress regarding these unintended effects, "the central purpose of the FAA . . . to ensure that private agreements to arbitrate be enforced according to their terms"[17] may well be "gone with the wind."

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[1] *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

[2] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 628 (1985).

[3] *14 Penn Plaza, LLC v. Pyett*, 556 U.S. ___, 129 S. Ct. 1456 (2009).

[4] International Arbitration: Corporate Attitudes and Practices 2008, p. 1.

[5] http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.1020. On March 16, 2009, the bill was referred to the Subcommittee on Commercial and Administrative Law.

[6] *http://www.govtrack.us/congress/billtext.xpd?bill=s111-931*.

[7] http://Kucinich.house.gov/UploadedFiles/BofA_letter_to_Kucinick_081309.pdf

[8] http://domesticpolicy.oversight.house.gov/documents/20090722112616.pdf

[9] http://Kucinich.house.gov/UploadedFiles/BofA_letter_to_Kucinick_081309.pdf

[10] Report of the Committee on the Federal Courts of the New York County Lawyers Association on the Arbitration Fairness Act of 2007, 249 F.R.D. 402 (Apr. 15, 2008).

[11] http://www.govtrack.us/congress/billtext.xpd?bill=s111-931.

[12] The Senate Bill defines "franchise dispute" as "a dispute between a franchisee with a principal place of business in the United States and a franchisor arising out of or relating to contract or agreement by which –

(A) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

(B) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

(C) the franchisee is required to pay, directly or indirectly, a franchise fee."

[13] The Senate Bill defines the term "civil rights dispute" as " a dispute--

(A) arising under–

(i) the Constitution of the United States or the constitution of a State; or

(ii) a Federal or State statute that prohibits discrimination on the basis of race, sex, disability, religion, national origin, or any invidious basis in education, employment, credit, housing, public accommodations and facilities, voting ... and

(B) in which at least one party alleging a violation of the Constitution of the United States, a State constitution, or a statute prohibiting discrimination is an individual."

[14] 388 U.S. 395 (1967); s*ee also, R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534, 539 (5th Cir.1992) ("If the fraud relates to the arbitration clause itself, the court should adjudicate the fraud claim. If it relates to the entire agreement, then the FAA requires that the fraud claim be decided by an arbitrator.").

[15] *Scherk v. Alberto-Culver*, 417 U.S. 506, 520 (1974).

[16] Memorandum from Lela P. Love, Chair, ABA Section of Dispute Resolution, to members of the ABA Section of Dispute Resolution, *Update on Arbitration Fairness Act Issues* (May 5, 2009) *available at* http://pubcit.typepad.com/files/drsectionstatement-1.pdf.

[17] *Mastribuiono v. Shearson Lehman Hutton*, 514 U.S. 42, 53-54 (1995).

The Uniform Collaborative Law Act: *It's Here*

By Lawrence R. Maxwell, Jr.*

The Uniform Collaborative Law Act ("Act") was unanimously approved by the Uniform Law Commission at its Annual Meeting in Santa Fe, New Mexico on July 15, 2009.[1] The Act will be available for consideration by state legislatures in mid-2010.

This article will provide a brief history of the Uniform Law Commission ("Commission")[2] give an overview of the collaborative law process, identify the reasons that the Commission deemed it appropriate to codify the process into a uniform law, take a peek into the drafting process to see what is included in the Act, what is not and why, take a walk through the Act highlighting its significant provisions, and discuss the road to enactment of the Act in Texas and nationwide.

Uniform Law Commission

The uniform law movement began in the late 19th century. With the rapid expansion of interstate commerce and travel, states began to recognize the legal tangles created by wide variations in state laws. In 1889, the American Bar Association decided at its 12th Annual Meeting to work for "uniformity of the laws" in the then forty-four states.

In 1892, seven states sent commissioners to the first meeting of the Conference of State Boards of Commissioners on Promoting Uniformity of Law in the United States which was held in Saratoga Springs, New York. By 1912, all of the then forty-eight states had joined the Commission. Today, the Uniform Law Commission includes Commissioners from every state and the District of Columbia, the Commonwealth of Puerto Rico and the U.S. Virgin Islands.

The purpose of the Uniform Law Commission is "to provide states with non-partisan, well conceived and well-drafted legislation that brings clarity and stability to critical areas of law." Now in its one-hundred and eighteenth year, the Commission has drafted more that 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable.

The Uniform Commercial Code, the signature product of the Commission working in conjunction with the American Law Institute, has recently been revised, updated and enacted in whole or in part in all jurisdictions. The Uniform Commercial Code is a prime example of how the work of the Commission has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.[3]

In 2006, with the use of the collaborative dispute resolution process becoming widespread throughout the country, the Commission identified a need for uniformity in the practice of collaborative law, recommended the development of a uniform collaborative law act and established a Drafting Committee ("Committee").[4]

Overview of Collaborative Law and the Need for Uniformity from State to State

Collaborative law is a part of the movement towards the delivery of "unbundled" legal representation. It separates, by agreement, representation in settlement-oriented processes from representation in adjudicatory processes. The organized bar has recognized unbundled legal services like collaborative law as useful options available to clients.[5]

Collaborative law is a dispute resolution process for parties represented by counsel. As is the case with mediation, collaborative law has its roots in the area of family law, and is expanding into many areas of civil law.[6] The process is a structured, voluntary, non-adversarial approach to resolving disputes wherein parties seek to negotiate a resolution of their matter without having a ruling imposed upon them by a court, arbitrator or other adjudicatory body.

The process is based upon cooperation between the parties, teamwork, full disclosure, honesty and integrity, respect and civility, and parity of costs. The collaborative process enables individuals, families, businesses and organizations to maintain control over their relationships with others by empowering them with the ability to resolve their disputes peaceably.

Prior to entering into the process, it is the practice of collaborative lawyers to provide prospective clients with sufficient information to enable them to make an informed decision as to the appropriateness of their matter for the process.
The collaborative process is initiated by the parties signing a participation agreement.[7] Research shows that most participation agreements will contain the core elements of the process: a stay of court proceedings while parties are in the collaborative process, confidentiality, a commitment to voluntary disclosure of relevant information and a requirement that attorneys withdraw in the event the process terminates without resolution. However, these fundamental provisions and other terms of the agreement vary widely from state to state.

In addition to Texas, two other states presently have collaborative law statutes in the area of family law, and bills are pending in

other states.[8] Collaborative Law participation agreements are crossing jurisdictional boundaries and there is no uniformity in the existing statues or in the pending legislation.

As more and more individuals and businesses in different states utilize the collaborative law process, it will become increasingly unclear which state law applies to transactions. Further, without uniformity in the collaborative process, parties in the process cannot be assured of the enforceability of participation agreements, the evidentiary privilege against disclosure, the stay of court proceedings or the confidentiality of communications in the process.

The Commission determined that uniformity would bring "clarity and stability" to the collaborative process, and set about the task of codifying the process. The stated purpose of the Uniform Collaborative Law Act (referred to herein as "Act") is "to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option for parties."

What is Included in the Act, What is Not, and Why

The Commissioners recognized the importance of preserving the autonomy of clients in the collaborative process and have attempted to provide such minimal regulation as is necessary to inform and protect prospective parties. The Commissioners further recognized the different models of Collaborative Law being practiced around the country, and the Act does not in any way regulate the detail regarding the practice of Collaborative Law. Indeed, there was an expressed interest in "stimulating diversity and experimentation in collaborative law."

The objectives of the Drafting Committee were to create a product that: (1) maintained the integrity of the collaborative dispute resolution process, (2) while providing as much flexibility as possible, (3) was user-friendly, and (4) was appropriate for enactment by the states.

The first meeting of the Drafting Committee was in February 2007, and a threshold question needed to be decided up front. Should the Act be confined only to divorce and family law matters, or should it be a broad act applicable to all areas of civil law? Proponents of a broad act asked why the benefits of the act should be limited only to persons seeking to resolve a family law matter in the process. Neither the Uniform Arbitration Act nor the Uniform Mediation Act forecloses parties in particular types of disputes from using those dispute resolution processes.

The query that ended the discussion was: How to define "divorce and family law matters?" The Committee wisely chose to avoid the daunting task of defining "divorce and family law matters" and voted unanimously to create a broad act that would apply to all areas of civil law.

The decision to create a broad act was a proper decision, but it did create additional challenges for the Drafting Committee. For example, should the act address tolling issues involving statutes of limitation? In view of the various statutes of limitations applying to a myriad of causes of action among the states, the Drafting Committee concluded that tolling issues, if they were to be addressed at all, should be dealt with by the individual states.

Should the act address in-house counsel serving as a collaborative lawyer for his or her employer? With the expansion of collaborative law beyond the family law arena, this issue has raised considerable discussion. A collaborative law purist believes that since a collaborative lawyer must withdraw and is disqualified from representing a client in an adversarial proceeding involving the subject matter of the collaborative process, under no circumstances can in-house lawyers serve as a collaborative lawyer for their employer.

However, some collaborative practitioners, realizing the probability that the use of the collaborative process will be greatly expanding with in-house lawyers serving as collaborative counsel for their employers, endorse the practice with full disclosure of the employment relationship, and if agreed to by all parties in the process.[9] Seeking to build as much flexibility as possible into the Act, the Drafting Committee left the question of in-house counsel serving as a collaborative lawyer to individual states in considering the Act.

Most members of the Drafting Committee have a family law background, and one of the most hotly debated issues was the question of whether the Act should address the issue of domestic violence, and if so in what manner. The final draft of the Act which was submitted to the Commission included such a provision which placed an affirmative duty on collaborative lawyers to discuss domestic violence with prospective clients.

On final reading before the entire Commission, several Commissioners expressed concern that this provision placed extra liability on lawyers, and a motion was made to delete the entire provision. The motion was defeated by a close vote. The Drafting Committee did address the concerns of the Commissioners and the provision was rewritten to apply a "reasonableness" standard in the assessment of whether there has been a history of coercive or violent relationships with a prospective party in the process.

Another contentious issue addressed by the Drafting Committee was whether the Act should create exceptions to the collaborative lawyer disqualification provisions for lawyers in legal aid clinics or lawyers in law firms representing low-income parties without fee, or lawyers representing government agencies. The Committee decided to retain the disqualification provision for collaborative lawyers representing parties without fee and lawyers representing government agencies. However, if agreed in advance by all parties, once the process terminates other lawyers in the law firm with which the collaborative lawyer is associated may represent such parties in an adjudicatory proceeding involving the subject matter of the collaborative process, provided that the collaborative law-

yer is appropriately "isolated" from participation in such adjudicatory proceeding.

A number of other issues were discussed by the Drafting Committee. For example, the Committee decided that it would not be appropriate to set standards to review settlement agreements created by parties in a voluntary process. Likewise, it was decided to leave conflict of laws issues to be determined by existing law.

Should the Act address multiparty disputes? If so, a number of questions would need to be resolved. For example, what provision should be made regarding terminating or continuing the process when a party, but not all parties, wishes to terminate the process? The Committee decided that issues raised in multiparty disputes should be dealt with by the parties in the participation agreement, and should not be included in the Act.

The issue as to whether the Act should establish training standards for lawyers practicing in the collaborative process was discussed. At present, collaborative law practice groups throughout the country establish their own qualification and training standards for membership, which can be quite extensive. In the interest of providing as much flexibility as possible, the Committee chose not to include any training requirement in the Act, anticipating that collaborative lawyers and affiliated professionals will continue to form and participate in voluntary associations and prescribe standards of practice and training for their members. Further, the Committee had separation of powers concerns, since there is no precedent for legislatures to set standards for which lawyers could or could not practice a particular form of dispute resolution.

A Walk Through the UCLA: *Significant Provisions*

By focusing on the key provisions of the Act, we see flexibility that has been built into the Act, and how the Act provides for the intersection of the collaborative process and the judicial process.[10]

The Drafting Committee sought to make the benefits of the collaborative process available not only for resolving "disputes," but also in a myriad of problem solving situations, which could include transactional work. The breadth and flexibility of the Act can be seen in several defined terms.

Definitions: *Section 2*

A number of terms which are defined in the Act give clarity to the purpose and scope of the Act.

The word "dispute" which had been in earlier drafts of the Act was changed to "*collaborative matter"* to describe what parties may attempt to resolve through the process. The broader term emphasizes that parties have greater autonomy in using the process and encourages broad and creative use of the process.

"Collaborative Law Participation Agreement" is defined simply as a written agreement by persons to participate in the collaborative law process.

"Collaborative law process" means a process in which parties represented by lawyers attempt to resolve a matter without the intervention of a tribunal, as evidenced by their signing of a participation agreement.

"Collaborative law communication" means a statement, whether written or oral, verbal or nonverbal, that occurs between the time the parties sign a participation agreement until the process is concluded, that is made for the purpose of conducting, participating in, continuing, or reconvening the process.

"Person" is broadly defined to include an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"Proceeding" is not limited to a judicial proceeding and a "Tribunal" may be a court, arbitrator, administrative agency or other body acting in an adjudicative capacity, or a legislative body conducting a hearing or similar process.

The definition of "law firm" is adapted from the definition of the term in the *ABA Model Rules of Professional Conduct* Rule 1.0 (c). It includes lawyers who practice law together in a

partnership or other type of professional entity, lawyers in a legal service organization, in-house lawyers or lawyers employed by or representing governmental agencies.

The definitions of "sign" and "record" adopt the standard language approved by the Commission, intended to conform uniform acts with the Uniform Electronic Transactions Act (which has been endorsed by the ABA House of Delegates and enacted in a majority of the states) and its federal counterpart, Electronic Signatures in Global and National Commerce Act (E-Sign).

The Participation Agreement: *Section 4*

A hallmark of the collaborative process is the commitment of parties and collaborative lawyers to abide by the terms of the participation agreement. The Act establishes minimum requirements for a participation agreement and allows for the creative design by collaborative lawyers and their clients of a process that is best suited for the clients' needs.
A participation agreement (a) must be in a record (a writing or in electronic form), (b) signed by the parties, (c) describe the nature

and scope of the matter, and (d) state the parties intention to attempt to resolve the matter in collaborative law.

In current practice, the signatories in most participation agreements are the parties and their lawyers. However, lawyers signing the agreement and thereby being in privity of contract with parties other their respective clients has raised ethical issues.

In establishing minimum requirements for a participation agreement, the Act addresses these ethical concerns. Rather than the collaborative lawyers being signatories to the agreement, the party signatories to the agreement must "identify the collaborative lawyer who represents each party in the process," and the agreement must "contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the process."

If parties and lawyers wish to sign the Agreement they can continue to do so, as the Act provides that "parties to a collaborative law participation agreement may agree to include additional provisions not inconsistent with the Act."

The requirement that parties specifically state their intention to attempt to resolve the matter in collaborative law is included in the Act to prevent collaborative-like settlement agreements to be accidentally covered under the Act, which would result in the disqualification of collaborative lawyers.

A Look at Places Where the Collaborative Process Intersects the Judicial Process

Section 3 emphasizes that collaborative law is a voluntary process and a party may not be ordered to participate in the process over that party's objection. ***Section 5*** specifies when and how the process begins and terminates. Any party may unilaterally terminate the process at any time, with or without reason or cause. However, since other events may trigger termination of the process, establishing a beginning and end of the process is particularly important for the application of the evidentiary privilege and/or disqualification provision by tribunals.

Section 6 creates a stay of proceedings once parties give file notice of a collaborative law proceeding. A tribunal may require status reports; however, the scope of information that can be requested is limited to insure confidentiality of the process**.** ***Section 7*** authorizes a tribunal to issue emergency orders to protect the health, safety, welfare or *interest* of a party; and permits the collaborative lawyer to appear before a tribunal regarding such emergency orders.[11] ***Section 8*** authorizes a tribunal to approve an agreement resulting from the collaborative process.

Section 17 creates a broad evidentiary privilege for parties' communications in the process, drawing on the purpose, rationale and tradition of the attorney-client privilege. In what appears to be a significant departure from current law, the Act also creates a privilege for a "non-party participant" for their communications in the process. Extending the privilege to non-parties, such as professional counselors, financial and other experts, seeks to facilitate the candid participation of experts and others who may have information and perspective that would facilitate resolution of the matter in the process. ***Section 18*** provides that the party and non-party privilege may be waived, if agreed to in writing by all parties.

Section 19 sets forth specific and exclusive exceptions to the broad grant of privilege provided for communications in the process. The exceptions are based on limited but vitally important values such as crime prevention, protecting against bodily injury and abuse, information available under Open Records Act and the right of someone to respond to accusations of professional misconduct. Also, parties may present evidence in a subsequent proceeding to determine whether the terms of a settlement agreement made in the process have been breached.

As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the Act contemplates that a tribunal will hold an *in camera* hearing to determine if the claim for exemption from privilege can be confidentially asserted or defended.

Section 20 deals with enforcement of a participation agreement that does not meet the minimum requirement of the Act in Section 4; and, situations where a lawyer has not complied with the disclosure requirements of Section 14, to determine the appropriateness of the process and obtained a prospective clients's informed consent. The Section provides that when the interests of justice so require, a tribunal may enforce a flawed agreement and apply the lawyer disqualification provisions and/or evidentiary privilege upon finding that (a) the parties intended to enter into a participation agreement and (b) they reasonably believed that they were participating in the collaborative process.

Lawyer Disqualification Provision: ***Sections 9, 10 and 11***

A fundamental defining characteristic of collaborative law is the requirement that collaborative lawyers must withdraw if the process terminates without resolution of the matter,
and they are disqualified from representing their clients in an adjudicatory proceeding relating to the matter which was the subject of the collaborative process.

Section 9 preserves this core element of the process and extends the disqualification requirement beyond the individual collaborative lawyer to lawyers in a law firm with which the collaborative lawyer is associated. Exceptions to the disqualification requirement permit collaborative lawyers to seek or defend emergency orders (Section 7), and to obtain approval of agreements resulting from the collaborative process (Section 8).
Sections 10 and 11 modify the "imputed disqualification" rule for lawyers in legal aid clinics, lawyers that represent low-income

clients without fee, and lawyers that represent government agencies.

Voluntary Disclosure of Relevant Information: *Section 12*

Voluntary disclosure of information is a hallmark of the collaborative process. A participation agreement typically requires timely, candid and informal disclosure of information substantially related to the collaborative matter.

This Section preserves the voluntary disclosure requirement, with a slight variation from the disclosure requirements in most participation agreements, which require such disclosure whether or not the information is requested. The Act requires the informal disclosure of information related to the collaborative matter *on the request of another party.* The Section requires prompt updating of previously disclosed information that has materially changed, and provides that parties are free to define the scope of disclosure in the process, so long as they do not violate any other law, such as an Open Records Act.

Standards of Professional Responsibility and Mandatory Reporting: *Section 13*

This Section reaffirms that the Act does not alter the standards of professional responsibility of lawyers and abuse reporting obligations of lawyers and all licensed professionals who participate in the collaborative law process.

Appropriateness of the Process and Informed Consent: *Section 14*

Much has been written, discussed and debated regarding the duty of collaborative lawyers to determine the appropriateness of a prospective client and the client=s matter for the collaborative process, and the necessity of obtaining a prospective client's informed consent to use collaborative law. This Section places specific obligations on a collaborative lawyer which must be fulfilled prior to the signing of a participation agreement.[13]

The ABA Model Rules - Terminology - Rule 1.0 [e] defines informed consent: "(It) denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of action."
Law review articles[14] and state ethics opinions have addressed the question of whether collaborative practice is consistent with the ABA Model Rules (and the various versions of those rules in the fifty states). In August 2007, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 07-477 squarely supporting the use of collaborative law participation agreements so long as clients are well informed about the process.[15]

The requirements in the Act are consistent with, and appear to go above and beyond, the requirements of Model Rules and ethical opinions.

Coercive and Violent Relationships: *Section 15*

The Act does not define "domestic violence" as that term is defined differently from state to state. To avoid the definition problem the Act uses the term "coercive and violent relationships" and requires only that a collaborative lawyer make a reasonable effort to screen prospective parties for a history of coercive or violent behavior, and throughout the process to continue to assess the situation. Screening protocols already exist which lawyers can use to satisfy the requirement of the Act. *See Commission on Domestic Violence, American Bar Association, Tools for Attorneys to Screen for Domestic Violence (2007).*[16]

Confidentiality: *Section 16*

Protection of confidentiality of communications is central to the process. Without assurances that communications in the process will not be used to their detriment later, the participants in the process will be reluctant to speak frankly, explore options for resolution or freely exchange information.

The broad evidentiary privilege prevents communications in the process from being admitted into evidence in legal proceedings, with certain exceptions. This Section provides that communications in the process are confidential *to the extent agreed by the parties,* thereby permitting parties in the process to agree on broader confidentiality such as non-disclosure of communications in the process to third parties outside of the process.

The Road to Enactment of the UCLA

The UCLA will be before the House of Delegates of the American Bar Association at its mid-year meeting in February 2010. The ABA Section of Dispute Resolution and other Sections and ABA entities have endorsed the Act. The only opposition within the ABA has come from the ABA Litigation Section. It is anticipated that the ABA House of Delegates will endorse the Act, as it has done with virtually all products of the Uniform Law Commission.[17] The Commission has established an Enactment Committee which is selecting key states to target for submitting the Act for consideration by their state legislatures.

Chances for Enactment in Texas

A collaborative law provision has been a part of the Texas Family Code since 2001.[18] Bills were filed in the 2005 and 2007 Sessions of the Texas Legislature to include a similar provision in the Texas Civil Practices and Remedies Code, thereby expanding the statutory benefits of the process to all areas of civil law. In the 2005 Session, the bill was unanimously passed in the Senate but died in conference committee with the House. In the 2007 Session the collaborative law bill did not make it out of the Senate Jurisprudence Committee.

In each Legislative Session the only opposition to the bills came from the Texas Association of Defense Counsel and the Texas Trial Lawyers Association. The many supporters of the collaborative process find it interesting that these strange bedfellows who usually cannot agree that the sun comes up in the east and sets in the west, have been able to ***collaborate*** in their opposition to collaborative law.

The Uniform Collaborative Law Act, which is a quality product of the venerable Uniform Law Commission now in its one-hundred and eighteenth year, will be before the Texas Legislature in 2011. Will the politically powerful and influential trial lawyer organizations choose to oppose enactment of the UCLA? The "Perfect Storm" may be brewing in Austin.

A Final Thought: *The Promise of the UCLA*

A recent book by Professor Julie Macfarlane based on extensive empirical research and subtitled "How Settlement is Transforming the Practice of Law" has been much discussed and widely received in ADR circles.[19] The preface points to "signs that the patience and deference of the consumers of legal services is beginning to fray around the edges" and has ignited a growing demand among clients of all types - individual and corporate - for their lawyers to serve as "conflict resolvers" rather than "warriors."

In *The New Lawyer,* Professor Macfarlane coined the phrase "conflict management advocates," referring to the new role for lawyers engaged in conflict management and dispute resolution. The task of lawyers practicing in this area should be to assist clients in meeting their goals and interests, resolving disputes ethically, with civility and professionalism, as quickly, economically and peacefully as possible.

The phrase "conflict management advocates" and the book's subtitle, *How Settlement is Transforming the Practice of Law*, bring to mind the 1976 Pound Conference convened by the American Bar Association to examine concerns about the efficiency and fairness of the court systems.

Following the Pound Conference, Derek Bok, the former Dean of Harvard Law School and former President of Harvard University, reflected on the significant events of the conference and opined:

> *"Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations towards collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not the leaders in marshaling cooperation and designing mechanisms that allow it to flourish, they will not be at the center of the most creative social experiments of our time."*

Collaborative law is indeed one of the "mechanisms" envisioned by Derek Bok. It offers parties a meaningful choice in the selection of methods for resolving disputes. The process can be tailored to the needs of the parties in the context of the unique characteristic of their dispute. The process encourages voluntary, early and peaceable settlement of disputes, thereby enabling parties to avoid the significant expense that, unfortunately, will be incurred in any adversarial process.
Collaborative law is a rapidly developing process for managing conflicts and resolving disputes outside of the courthouse, and its future growth and development has significant benefits for clients and the legal profession. The enactment of the UCLA will encourage and support the continued growth of the process.

Endnotes:

[1] The Uniform Collaborative Law Act (July 15, 2009).

[2] Early in its life the Commission adopted the name "National Conference of Commissioners on Uniform State Laws" (NCCUSL). In 2007, the Commissioners decided to shorten the name of the organization to the Uniform Law Commission (ULC). The Commission's website contains a detailed history of the Commission, how it is funded, its organizational structure and its procedures for selecting subjects and drafting uniform acts.

[3] The University of Pennsylvania Law School, in partnership with the Uniform Law Commission, maintains an extensive library of drafts of all uniform laws and final acts.

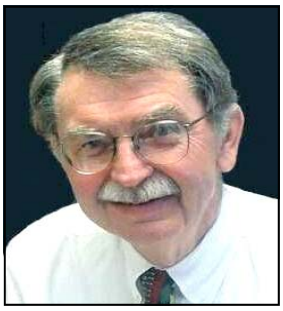
[4] The Drafting Committee includes eight Commissioners, four ABA Advisors and several Observers. The State of Texas has been well represented in the drafting process. Peter Munson of Sherman is a voting Commissioner and serves as Chair of the Drafting Committee; Harry Tindall of Houston, co-author of Sampson & Tindall's *Texas Family Code Annotated*, is a voting Commissioner; Norma Trusch of Houston, past president of the International Academy of Collaborative Professionals, serves as an Observer on behalf of the IACP; and Lawrence R. Maxwell, Jr. of Dallas, a founding director and president of the Global Collaborative Law Council, formerly Texas Collaborative Law Council, and co-chair of the ABA Section of Dispute Collaborative Law Committee, serves as the Section's Advisor.

[5] *ABA Model Rules of Professional Conduct* Rule 1.2 (c).
[6] The International Academy of Collaborative Professionals was established in 1999, as an organization of family collaborative lawyers. The organization has recently established a Civil Collaborative Committee and membership is expanding with members practicing in various areas of civil law. In 2004, The Texas Collaborative Law Council (now Global Collaborative Law Council) was established to promote the use of the collaborative process for resolving disputes in all areas of civil law. In 2007, the ABA Section of Dispute Resolution established a Collaborative Law Committee to educate ABA members and the public as to the benefits of the collaborative process.
[7] A Participation Agreement was developed by the Global Collaborative Law Council in 2004, and is being periodically revised.
[8] Texas, North Carolina and California statutes have enacted collaborative law statutes.
[9] The Protocols of Practice for Collaborative Lawyers developed by the Global Collaborative Law Council provide that in-house counsel may serve as a collaborative lawyer for their employers, with the informed consent of all parties in the collaborative process.
[10] The Collaborative Law Committee of the ABA Section of Dispute Resolution has prepared an Executive Summary of the Uniform Collaborative Law.
[11] The term "interests" could encompass financial or other interests. Although an unlikely possibility, collaborative lawyers would be permitted to seek an emergency order, such as a temporary restraining order to protect the status quo, while parties continue in the collaborative process. More likely, the process would be terminated.
[12] These exceptions to the imputed disqualification rule are supported by the ABA Model Rules of Professional Conduct (2002): Rule 6.5 regarding low-income parties, and Rule 1.11 regarding government lawyers.
[13] Section 14 of the Act reads as follows:

> Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:
>
> (1) discuss with the prospective party factors the prospective collaborative lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;
>
> (2) provide the party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and
>
> (3) advise the party that:
>
> (A) after signing an agreement:
>
> (i) if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates; and
>
> (ii) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not represent a party before a tribunal in such a proceeding except as authorized by Section 9(c), 10(b), or 11(b);
>
> (B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and
>
> (C) when the process concludes, the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Section 9(c), 10(b), or 11(b).

[14] The ABA Section of Dispute Resolution Collaborative Law Committee has prepared a Discussion Draft of Suggested Protocols to Obtain Clients' Informed Consent to Use a Collaborative Process (September, 2009). Scott R. Peppet, The Ethics of Collaborative Law, Vol. 2008 Journal of Dispute Resolution 131. Scott R. Peppet, The (New) Ethics of Collaborative Law, 14 Dispute Resolution Magazine 23-27, Winter (2008). John Lande and Forest S. Molsten, *Duties to Screen the Appropriateness of Collaborative Law and Obtain Clients= Informed Consent to Use Collaborative Law*, 25 Ohio State Journal on Dispute Resolution (forthcoming 2010).
[15] The ABA Section of Dispute Resolution Collaborative Law Committee has prepared a Summary of Ethical Rules Governing Collaborative Practice (2008) which analyzes all ethics opinions issued by states and the ABA Ethics Opinion.
[16] Tool for Attorneys to Screen for Domestic Violence, American Bar Association Commission on Domestic Violence (2007).
[17] Approval of the ABA House of Delegates, although not required, will be helpful as the Act is considered by state legislatures.
[18] Texas Family Code, Sec. 6.603 and Sec. 153.072. In the author=s opinion, the UCLA will be an improvement over the current Texas Family Code provisions in a number of respects, particularly in places where the collaborative process intersects the judicial process. A comparison of the provisions in the current Texas statute and the UCLA will be the subject of a future article.

[19] Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBS Press 2008).



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Executive Summary
Uniform Collaborative Law Act

By Lawrence R. Maxwell, Jr.*

The Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) has drafted more than 250 uniform laws on numerous subjects and in various fields of law where uniformity is desirable and practicable. The signature product of the Commission, the Uniform Commercial Code, is a prime example of how the work of the Uniform Law Commission has simplified the legal life of businesses and individuals by providing rules and procedures that are consistent from state to state.

The collaborative dispute resolution process (commonly known as "Collaborative Law") is a voluntary, non-adversarial dispute resolution process for parties represented by counsel. As is the case with mediation, collaborative law has its roots in the area of family law, and the process is rapidly expanding for resolving disputes in many areas of civil law. A number of states have enacted statutes of varying length and complexity that recognize collaborative law, and a number of courts have taken similar action through the enactment of court rules.

Collaborative Law agreements are crossing state lines as individuals and businesses are utilizing the collaborative process. As the use of the process continues to grow, the Uniform Collaborative Law Act (the "Act") will provide consistency from state to state regarding enforceability of collaborative law agreements, confidentiality of communications in the process, an automatic stay of court proceedings and the privilege against disclosure should the process not result in settlement.

Beginning in February, 2007 a Drafting Committee of the Uniform Law Commission has conducted a series of conferences for the purpose of drafting an act to codify collaborative law procedures into a uniform act. In July, 2009, meeting in its one hundred and eighteenth year, the Commission unanimously approved a Uniform Collaborative Law Act. This paper provides a section-by-section summary of the Act, as approved by the Commission.

Section 1 sets forth the title: Uniform Collaborative Law Act.

Section 2 sets forth definitions of terms used in the Act.

Section 3 makes the Act applicable to a collaborative law participation agreement signed after the effective date of the Act and emphasizes that a tribunal cannot order a party to participate in the collaborative law process over that party's objection.

Section 4 establishes minimum requirements for a collaborative law participation agreement, which is the agreement that parties sign to initiate the collaborative law process. The agreement must be in writing, state the parties intention to resolve the matter (issue for resolution) through collaborative law, contain a description of the matter and identify and confirm engagement of the collaborative lawyers. The Section further provides that the parties may include other provisions not inconsistent with the Act.

Section 5 specifies when and how the collaborative law process begins, and how the process is concluded or terminated. The process begins when parties sign a participation agreement, and any party may unilaterally terminate the process at any time without specifying a reason. The process is concluded by a negotiated, signed agreement resolving the matter, or a portion of the matter and the parties' agreement that the remaining portions of the matter will not be resolved in the process.

Several actions will terminate the process, such as a party giving notice that the process is terminated, beginning a proceeding, or filing of motions or pleadings, or requesting a hearing in an adjudicatory proceeding without the agreement of all parties, or the discharge or withdrawal of a collaborative lawyer. The Section further provides that under certain conditions the collaborative process may continue with a successor collaborative lawyer in the event of the withdrawal or discharge of a collaborative lawyer. The party's participation agreement may provide additional methods of terminating the process.

Section 6 creates a stay of proceedings before a tribunal (court, arbitrator, legislative body, administrative agency, or other body acting in an adjudicative capacity) once the parties file a notice of collaborative law with the tribunal. A tribunal may require status reports while the proceeding is stayed; however, the scope of the information that can be requested is limited to insure confidentiality of the collaborative law process.

Section 7 creates an exception to the stay of proceedings by authorizing a tribunal to issue emergency orders to protect the health,

safety, welfare or interests of a party or family or household member; or, to protect financial or other interests of a party in any critical area in any civil dispute.

Section 8 authorizes a tribunal to approve an agreement resulting from a collaborative law process.

Section 9 sets forth a core element and the fundamental defining characteristic of the collaborative law process. Should the collaborative law process terminate without the matter being settled, the collaborative lawyer and lawyers in a law firm with which the collaborative lawyer is associated, are disqualified from representing a party in a proceeding before a tribunal in the collaborative matter, except to seek or defend emergency orders ***(Section 7)*** or to approve an agreement resulting from the collaborative law process ***(Section 8).*** The disqualification requirement is further modified regarding collaborative lawyers representing low-income parties **(*Section 10*)** and governmental entities as parties **(*Section 11*)**.

Sections 10 creates an exception to the disqualification for lawyers representing low income parties in a legal aid office, law school clinic or a law firm providing free legal services to low income parties. If the process terminates without settlement, a lawyer in the organization or law firm with which the collaborative lawyer is associated may represent the low income party in an adjudicatory proceeding involving the matter in the collaborative law process, provided that the participation agreement so provides, and the representation is without fee, and the individual collaborative lawyer is appropriately isolated from any participation in the collaborative matter before a tribunal.

Section 11 creates a similar exception to the disqualification requirement for lawyers representing a party that is a government or governmental subdivision, agency or instrumentality.

Section 12 sets forth another core element of collaborative law. Parties in the process must, upon request of a party make timely, full, candid, and informal disclosure of information substantially related to the collaborative matter without formal discovery, and promptly update information that has materially changed. Parties are free to define the scope of disclosure in the collaborative process, so long as they do not violate another other law, such as an Open Records Act.

Section 13 acknowledges that standards of professional responsibility of lawyers and abuse reporting obligations of lawyers and all licensed professionals are not changed by their participation in the collaborative law process.

Section 14 deals with appropriateness of the collaborative law process. Prior to the parties signing a participation agreement, a collaborative lawyer is required to discuss with a prospective client factors which the collaborative lawyer reasonably believes relate to the appropriateness of the prospective client's matter for the collaborative process, and provide sufficient information for a prospective client to make an informed decision about the material benefits and risks of the process as compared to the material benefit and risks of other reasonably available processes, such as litigation, arbitration, mediation or expert evaluation. Further, a prospective party must be informed of the events that will terminate the process and the effect of the disqualification requirement.

Section 15 obligates a collaborative lawyer to make a reasonable effort to determine if a prospective client has a history of a coercive or violent relationship with another prospective party, and if such circumstances exist, establishes criteria for beginning and continuing the process and providing safeguards.

Section 16 provides that oral and written communications developed in the collaborative process are confidential to the extent agreed by the parties or as provided by state law, other than the Act.

Section 17 creates a broad privilege prohibiting disclosure of communications developed in the process in legal proceedings. The provisions are similar to the provisions in the Uniform Mediation Act and apply to party and non-party participants in the process.

Sections 18 and 19 provide for the possibility of waiver of privilege by all parties, and certain exceptions to the privilege based on important countervailing public policies such as preventing threats to commit bodily harm or a crime, abuse or neglect of a child or adult, or information available under an open records act, or to prove or disprove professional misconduct or malpractice. Parties may agree that all or part of the process is not privileged.

Section 20 deals with enforcement of an agreement made in a collaborative process that fails to meet the mandatory requirement for a participation agreement (Section 4), or a collaborative lawyer has not fully complied with the disclosure requirements (Section 14). When the interests of justice so require, a tribunal is given discretion to enforce an agreement resulting from a flawed agreement, if the tribunal finds that the parties intended to enter into a participation agreement, and reasonably believed that they were participating in the collaborative process.

Section 21 emphasizes the need to promote uniformity in applying and construing the Act among states that adopt it.
Section 22 provides that the Act may modify, limit or supersede certain provisions the Federal Electronic Signatures in Global and

National Commerce Act.

Section 23 is a severability clause.

Section 24 establishes an effective date for the Act.

The ABA Section of Dispute Resolution has endorsed the Uniform Collaborative Law Act and other Sections and entities of the ABA are encouraged to do so. The Act will be presented to the ABA House of Delegates at the February 2010 meeting, and should be available for consideration by state legislatures in mid-2010. ABA members and all collaborative practitioners are encouraged to contact their state delegates to the House of Delegates and encourage their support of the Uniform Collaborative Law Act.

Collaborative Law is a rapidly developing process for managing conflicts and resolving disputes outside of the courthouse. Voluntary early settlement increases party satisfaction, reduces unnecessary expenditure of personal and business resources for dispute resolution, and promotes a more civil society. The future growth and development of Collaborative Law has significant benefits for clients and the legal profession.

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SUING ARBITRATORS – AND VICE-VERSA: AN EXHUMATION AND REBURIAL

By Stephen K. Huber & Wendy Trachte-Huber

I. INTRODUCTION

Litigation brought by a participant in an arbitration proceeding against the arbitrator, or the organization that administered the arbitration, occurs infrequently – but it occurs often enough that there is a well developed body of law on this topic. On the other hand, a suit by an arbitrator against a party to an arbitration, and/or counsel for the party, is a "woman bites dog" situation – an event so rare as to be newsworthy. Most of this Article consists of a discussion of the only instance we know of where an arbitrator initiated such litigation. As a backdrop to this topic, we begin with a brief review of the law related to suits brought against an arbitrator (and/or an organization that provides arbitration services) by persons dissatisfied by the action (or inaction) of the arbitrator.

II. SUING ARBITRATORS

Arbitrators sometimes have their awards challenged, and upon occasion they are sued by dissatisfied parties. Arbitration awards only infrequently are altered, overturned, or returned to the arbitrator for further action. Suits brought against arbitrators (and organizations that provide arbitration services) almost universally fail, and subject the party bringing suit to the risk of sanctions. Still, a law suit brought by a dissatisfied party regarding an arbitrator's action (or inaction) is a recognized occupational hazard – a rare and unpleasant, but not unheard of, event.

Both the Federal Arbitration Act (FAA) and the 1955 Uniform Arbitration Act (UAA) – the version enacted in Texas – are silent on the topic of arbitral immunity. The 2000 version of the UAA addresses a variety of arbitration topics not covered by the FAA or the 1955 UAA, and the immunity of arbitrators and organizations that provide arbitration services is a prominent example. Section14 of the 2000 UAA provides that arbitrators and provider organizations are immune from civil (but not criminal) liability to the same extent as judges in the enacting state. Failure to make disclosures required by the UAA does not result in any loss of immunity, although it can provide the basis for vacatur of an arbitration award. Arbitrators are also immune from being required to testify in a law suit related to the arbitration proceeding.

To deter unmeritorious suits against arbitrators and provider organizations, section 14(e) directs courts to award arbitrators and providers "reasonable attorney's fees and other reasonable expenses of litigation" at both the trial and appellate levels. As the comments point out, virtually all such suits are "frivolous" due to the breadth of immunity. The provisions of the 2000 UAA accurately reflect the law in most if not all American jurisdictions, both state and federal.

All the federal courts of appeals that have ruled on arbitral immunity have accepted it for both arbitrators and provider organizations.[1] This principle is sufficiently well established in the Fifth Circuit that the last three cases on point were decided *per curiam*, and the last two were not deemed worthy of publication in the Federal Reporter.[2]

There is surprisingly little Texas state court authority on point, but the existing case law uniformly supports arbitral immunity.[3] The sole remedy for asserted wrongful arbitrator actions of commission or omission is through resort to a judicial challenge to the arbitration award, as authorized under state law.

Serious doubts have been expressed about the extraordinary breadth of immunity for arbitrators, and even more so for provider organizations. Professor Maureen Weston argues that qualified immunity should be the standard.[4] Neither the United States Supreme Court nor the Supreme Court of Texas has expressly sanctioned quasi-judicial immunity for arbitrators and administering organizations, so one might argue that the law on this topic is still open, but the immunity rule is deeply entrenched in federal and state law – and is virtually certain to stay that way.

III. SUIT BY AN ARBITRATOR AGAINST A PARTY AND/OR COUNSEL

The arbitrator who brought suit against the law firm that represented one of the parties in an arbitration before him, Edwin Naythons, is a distinguished retired federal Magistrate Judge. It is striking indeed that the first person to challenge quasi-judicial arbitral immunity is a former beneficiary of judicial immunity. Naythons' suit was summarily dismissed by a United States District Court sitting in Philadelphia, the very district where he had previously served as a magistrate judge.[5] Due to this circumstance, the case was heard by a New Jersey district judge. Naythons appealed this determination to the Third Circuit Court of Appeals, which upheld the district court decision in a brief opinion.[6]

Neither the district court nor the court of appeals decision was designated for publication. This approach strikes your authors as strange, even inappropriate, because the issues addressed are serious and there is little if any precedent on point. Accordingly, these decisions are worthy of wider notice. Perhaps the federal judges wanted to protect their former colleague from embarrassment, but

if a former federal judge can be so badly wrong about the applicable law then other arbitrators should be forewarned about going down this path.

A. The Underlying Litigation and Subsequent Arbitration

The underlying dispute that eventually came to arbitration was between two factions of a major Philadelphia church, with the dissidents led by Patterson challenging the incumbents led by Shelton. Each sought spiritual leadership of the church, and control of its financial assets (many millions of dollars). In mid-1995 Patterson brought suit in the state Court of Common Pleas seeking an accounting, and control of the Church Corporation. The dispute was still unresolved a decade later, although there had been a trial court and appellate decision in a related case.

In late 2005, Patterson and Shelton agreed to arbitrate all remaining issues. Like so much about this story, the number of arbitrators was unusual. Each party was to name three arbitrators, with Naythons serving as the seventh and neutral arbitrator. Outside of international public arbitration, such a large number of arbitrators is unheard of. The six arbitrators heard evidence and deliberated, but they could not resolve the dispute. Each of the six party-appointed arbitrators favored their appointing party, whereupon Naythons was left with the task of rendering the decision. In April 2006 Naythons issued an order that favored Patterson, ruling that Patterson was entitled to an accounting. While Patterson had alleged all manner of improprieties by Shelton, these claims could not be proven absent access to Church records.

Arbitrator Naythons had not yet issued a final decision on July 27, when he was informed of an anonymous threat on his life had been posted on an Internet site. When he met with the parties on August 3 to discuss the situation, Naythons was met by a request from Shelton (through counsel) to recuse himself. It appears from the transcript of the August 3 meeting that Naythons suspected that the threat on his life came from the Shelton faction, and he refused to recuse himself.

Shortly thereafter, Shelton (again through counsel) petitioned the Philadelphia Orphans Court, which has jurisdiction over not-for-profit corporations, seeking to have Naythons removed as the neutral arbitrator. Apart from the death threat, Shelton also claimed bias on the part of Naythons. In view of Naython's initial decision in favor of Patterson, it is apparent that Shelton had little to lose and much to gain by adopting this approach. As for counsel, it arguably would have constituted malpractice to fail to inform the client about the advantages of this course of action.

Naythons filed a "response" with the Orphans Court that opposed his recusal. Shelton argued that the court should reject this filing, because Naythons was not a party to the underlying suit and therefore was not a "party in interest." Rather, Naythons was participating in the arbitration in a quasi-judicial capacity. The Orphan's Court agreed, and struck Naythons' response from the record. Subsequently, the Orphans Court declined jurisdiction over the recusal request, in deference to the earlier and continuing proceeding in the Court of Common Pleas.

Meanwhile, Arbitrator Naythons proceeded with his work, and on October 3, 2006 he issued a final decision that favored Patterson. The opinion was dated July 25, 2006 – two days before Naythons learned of the death threat. The reason for the delay was that Naythons agreed not to issue a final opinion until the Orphan's Court decided on the motion to recuse. Whether Naythons completed his work shortly before the death threat or shortly thereafter was a disputed matter. As the suit brought by Naythons was disposed of by summary judgment, no findings of fact were made by the United States district court.

Patterson sought confirmation of the arbitration award in the Court of Common Pleas, while Shelton responded by filing a petition to vacate the award. Shortly thereafter, Shelton also renewed the motion to recuse Naythons. Presumably, the reason for renewing the recusal request was to offer the court an alternative route to deciding for Shelton without trying to fit the matter into one of the grounds for vacating an arbitration award. Leaving no stone unturned, Patterson also moved for confirmation of the award in federal court. This action was dismissed by the district court due to lack of diversity jurisdiction. Not content to stop there, Patterson appealed to the Third Circuit Court of Appeals, which affirmed the district court decison.[7]

At the state level, the Court of Common Pleas confirmed the arbitration award, However, the Superior Court reversed and vacated the final and intermediate awards issued by Naythons on the ground that he had exceeded the scope of his authority. A petition for discretionary review was denied by the Pennsylvania Supreme Court.[8] The underlying dispute, now approaching 15 years since the original filing, was returned to the Court of Common Pleas to determine whether Patterson was entitled to an accounting and other relief. The result of the arbitration was no decision, and so this modern day version of Jarndyce and Jarndyce may still be with us for years to come.[9]

B. Litigation Initiated by Arbitrator Naythons

With the arbitration proceeding at an end, Naythons brought suit against the Philadelphia law firm of Stradley, Ronon, Stevens & Young (hereafter, "Stradley") that represented the losing party in the arbitration (Shelton). While Shelton and Stradley ultimately succeeded in having the arbitration award vacated, that event occurred after the filing of Naythons's suit against Stradley. Naythons sued only the agent (Stradley), but not the principal (Shelton).

The basis for federal jurisdiction was diversity of citizenship; although Naythons was a retired Magistrate Judge in the Eastern District of Pennsylvania, he resided in New Jersey. As the Eastern District of Pennsylvania encompasses Philadelphia, the case was heard by Judge Rebee N. Bumb of the District of New Jersey. The district court granted summary judgment to Stradley, and the

Third Circuit in a short opinion affirmed the ruling of the trial court in all respects, albeit not the entire reasoning of the lower court.

The District Court disposed of the case by granting a Rule 12(b)(6) motion for failure to state a claim for which relied may be granted – we use the simpler term, summary judgment. To defeat such a motion, the plaintiff is required only to show that the factual allegations are "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true, (even if doubtful in fact)."[10] No one verbal formulation can capture all the nuances of summary judgment, but the central idea is that the plaintiff will not prevail even if he succeeds in proving the claims alleged. Naythons's claims failed to satisfy this fairly minimal standard.

C. Abuse of Process

The major claim raised by Naythons was for abuse of process.[11] Under Pennsylvania law, this cause of action consists of three elements:[12]

(1) invocation of legal process by defendant against plaintiff;

(2) mainly to accomplish a purpose for which the process was not designed; and

(3) the plaintiff suffered a legally recognized harm.

Normally only the second element is contested at the summary judgment phase – the legal process clearly has been invoked, and if doing so was wrongful harm almost certainly occurred. (The level of harm is likely to be vigorously contested at trial, but a simple assertion of harm normally is sufficient to avoid summary judgment.)

Stradley responded that Naythons failed to satisfy any of these requirements at even the modest level necessary to avoid summary judgment. The District Court addressed all three elements of the abuse of process claim, so we will do likewise.

1. Invocation of Legal Process

Stradley did invoke the legal process by seeking to vacate the arbitration award issued by Naythons, but that action was not taken *against* Naythons. Indeed, when Naythons sought to respond in the Orphans Court action that court struck his pleadings. (The court did subsequently determine that it should not have taken any action, due to the continuing jurisdiction of the Court of Common Pleas.) Although the action was not brought against Naythons *per se*, he responded that the action was aimed at him. There are a few exceptions to the "action against" standard, but they are narrow, and only one was from Pennsylvania: a parent was permitted to raise an abuse of process claim when the aim of the underlying action was to remove the parents from custody of their child for purposes of settling litigation.[13] That situation is not close to an action to vacate an arbitration award. Both in Naythons' brief and at oral argument, counsel conceded the absence of case law supporting an action by an arbitrator against an arbitration party or its counsel.

2. Perversion of Legal Process

At some point activities associated with disputing can become improper to the point of perverting the legal process. However, the scope of this approach has to be limited to the most extreme cases. A fundamental norm of successful societies is that people are generally prohibited from self-help remedies, and must instead make use of the legal regime provided by the State. This channeling function is important, and to say that people who invoke legal process are behaving in a selfish or even a foolish manner is simply a loaded way of saying that they are pursuing their self interest. There is a certain irony in Naythons' assertion that Stradley engaged in a war of attrition, to the point of subverting the legal process, because Naythons became enmeshed in a real legal war of attrition – the underlying church litigation that has gone on for fourteen years and still is not resolved.

The nature of activity that crosses the line from aggressive litigation tactics and multiple suits that amount to zealous advocacy, and abuse of process, can be defined only in general terms Under Pennsylvania law, "perversion of process" requires a showing that there was a:

> definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process; there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.[14]

An action to vacate an arbitration award is expressly permitted by state and federal legislation, and is a basic legal requirement that legitimates private arbitration. Judicial review, albeit limited, is what makes private arbitration an acceptable approach to dispute resolution. Complete contracting out of the societal legal system is no more permitted than contracting out of the antitrust laws or selecting involuntary servitude. It is truly difficult to imagine a situation where seeking vacatur of an arbitration award would constitute an abuse of legal process, particularly since both the FAA and UAA expressly make provision for such review. Motive has nothing to do with the matter, and civil law typically does not address that matter. As the party seeking vacatur is dissatisfied with the outcome of the arbitration process, there is an easy explanation in self-interest for seeking judicial review. Upon failing to prevail in the district court, there might be an argument that seeking appellate review constitutes an abuse of legal process, but such an appeal is expressly authorized by both the FAA and UAA. Anyway, here the party appealing from an adverse district court determination was Naythons, not a party to the arbitration (or its counsel).

Generalities aside, Naythons' claim was easily dismissed as lacking merit. The basis for the motion for Naythons to recuse himself was the death threat against him posted on an internet site. This development was beneficial to the Shelton group, which had fared badly in the arbitration, While a reasonable person might be suspicious about this development, there was no evidence that anyone associated with Shelton was responsible for the death threat. Anyway, Naythons refused to recuse himself, and the death threat was not the basis for the state court vacatur of the arbitration award.

3. Legally Cognizable Harm

Even though there was no basis for Naythons to prevail on his claim, the District Court went on to discuss potential theories of recovery, assuming *arguendeo* that recovery was authorized if proven. Naythons easily prevailed on the damages issue, although this is a classic example of winning a battle but losing the war. A claim for lost earnings would be permitted in all jurisdictions. As for reputational and emotional harm, if a jurisdiction permits recovery on these grounds in economic transactions then summary judgment should be easily avoided. Stradley argued that the damages claim was speculative; while that argument might prevail on the merits, it fails for purposes of summary judgment.

D. Wrongful Use of Civil Action: The Dragonetti Act

Naythons raised a separate state law cause of action under a Pennsylvania statute, the Dragonetti Act.[15] To prevail under this cause of action, a party must show that proceedings were instituted primarily for an improper purpose, without probable cause, and that the underlying proceeding was resolved in favor of the complainant. This claim failed for the same reasons as the abuse of process claim.

E. Court of Appeals Decision

The Third Circuit upheld the District Court decision without challenging the analysis of the lower court, but its concise opinion suggested a narrower basis for reaching the same result. Legal process was not used against Naythons, because he was the arbitrator and thus not a party to any judicial proceeding. In addition, judicial privilege makes communications in a judicial proceeding absolutely privileged – so they cannot provide the basis for civil liability. If there was a basis for sanctioning the conduct of Stradley, as Naythons alleged, that matter should be considered by the court reviewing the arbitration award, or a state bar grievance committee.

F. Defamation

We close with a word of caution: the doctrine discussed above governs communications made in the context of a judicial or arbitral proceeding. Communications with third parties, including the press, might provide the basis for a defamation action. Texas law appears to be more generous than Pennsylvania law to counsel who communicate with the press.[16] In an environment of casual resort to e-mail communications and a legal regime that allows for expansive discovery, a word to the wise should be sufficient.

IV. CONCLUSION

Is there any hope for an action by an arbitrator against a party to an arbitration and its attorney after the *Naythons* decision? One possibility is that another court would simply see the matter differently, and reach a different result. We regard that outcome as improbable. An arbitrator might bring suit against the client (principal) as well as the law firm (agent). Conceivably, this approach could drive a wedge between attorney and client. An attorney might claim that it advised the client not to proceed, but that the client insisted. Conversely, the client might claim that she wanted to drop a matter but its attorney insisted that a claim had merit.

The fact that the Common Pleas court vacated the award made by Naythons was not determinative, according to the U.S. District Court, but that outcome cannot be irrelevant. This suggests that where the underlying arbitration award was confirmed, the chance of an abuse of process suit at least stands a better chance of success. Suppose further that an appellate court stated that the asserted basis for vacatur was clearly without merit under the prior decisions in the jurisdiction, and the claim for abuse of process appears still better.

The Stradley firm was a relatively late arrival in the lengthy disputation between underlying dispute, and was not responsible for all of the blizzard of claims that Naythons claims amounted to an abuse of process. The Third Circuit noted that the lower court based its decision "in part, on the fact that Stradley was not the law firm that initially listed Naythons as a respondent in the state court petition at issue in this case."[17] Once more, different facts might could make for a more appealing claim.

Finally, one can easily imagine claims of harm more appealing than those raised by Naythons. He stepped into a high dollar war of attrition between bitterly divided factions at a major church that had been going on for over a decade, so Naythons could not reasonably be surprised that whatever decision he rendered would be subject to challenge. A court might find it easier to render a decision on behalf of a less prominent arbitrator (and former federal judge) in a less controverted dispute where the harm to the arbitrator was more palpable and less expected.

Are these just make-weight arguments that do little more than demonstrate the unlikelihood of an arbitrator prevailing in an abuse of process action against an arbitration party and/or its lawyer? Almost certainly yes, but maybe .....

The fact that arbitrator Naythons is a former federal judge makes it uncomfortably clear that if an arbitrator can sue a party (or its counsel) to an arbitration then the converse proposition – that an arbitration party should be permitted to sue the arbitrator – becomes more plausible, because what is sauce for the goose is sauce for the gander. The present state of the law is that neither type of action is permitted. To the extent that one limitation is relaxed, the arguments for relaxation of the other is strengthened. Neither of these eventualities are likely to occur – but stranger things have happened.

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[1] The leading federal cases are Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith, 477 F.3d 1155 (10th Cir. 2007); New England Cleaning Serv., Inc. v. Am. Arbitration Ass'n, 199 F.3d 542, 545 (1st Cir.1999); Olson v. Nat'l Ass'n of Securities Dealers, 85 F.3d 381 (8th Cir. 1996); Austern v. Chicago Board Options Exchange, Inc., 898 F.2d 882 (2d Cir. 1990); and Corey v. New York Stock Exchange, 691 F.2d 1205 (6th Cir. 1982).

[2] *Smith v. American Arbitration Ass'n Inc.*, 155 Fed.Appx 109 (5th Cir. 2006) (*per curiam*); Jason v. *American Arbitration Ass'n*, 62 Fed.Appx. 557 (5th Cir. 2003) (*per curiam*); *Hawkins v. Nat'l Ass'n of Securities Dealers, Inc*., 148 F.3d 330 (5th Cir. 1998) (*per curiam*).

[3] Pullara v. American Arbitration Ass'n, (191 S.W.3d 903 (Tex.App. Texarkana 2006); Yazdchi v. American Arbitration Ass'n, 2005 WL 375288 (Tex.App. Hous. (1 Dist.)); Blue Cross Blue Shield of Texas v. Juneau, 114 S.W.3d 126 (Tex.App. Austin 2003)

[4] Maureen A. Weston, Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitrtion, 88 Minn. L. Rev. 449 (2004).

[5] *Naythons v. Stradley, Ronan, Stevens & Young*, 2008 WL 1914750 (E.D.Pa.).

[6] *Naythons v. Stradley, Ronan, Stevens & Young*, 2009 WL 2329915 (3d Cir.).

[7] *Trustees of General Assembly of Church of Lord Jesus Christ of Apostolic Faith, Inc. v. Patterson*, 300 Fed.Appx. 170 (3d Cir. 2008). Shelton also raised collateral estoppel and res judicata arguments based on the state court vacatur of Naythons' decision, but neither the district court nor the court of appeals reached these arguments due to the absence of jurisdiction.

[8] *Patterson v. Shelton*, 963 A.2d 471 (Pa. 2008) (Table).

[9] Charles Dickens, BLEAK HOUSE (1854).

[10] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[11] For an example of a successful abuse of process claim against a law firm that represented an opposing party, see *Seltzer v. Morton*, 154 P.3d 561 (Mont. 2007) (7-0 decision).
The Montana Supreme Court upheld a trial court punitive damages award of $9.9 million – a sum reduced from the jury award of $20 million – against a prominent Los Angeles law firm.

[12] The District Court opinion is replete with citations to Pennsylvania law, but there is no need to repeat them here.

[13] *Cruz v. Princeton Insurnace Co.*, 925 A.2d 853 (Pa.Super. 2007). This matter also is on-going. After a visit to the Pennsylvania Supreme Court and remand, in the latest action the Superior Court remanded to the trial court for findings of fact regarding harm from misuse of process. *Cruz v. Princeton Insurance Co.*, 972 A.2d 14 (Pa.Super. 2009) (*en banc*).

[14] *Hart v. O'Malley*, 647 A.2d 542 , 552 (Pa.Super.1994).

[15] 42 Pa.C.S.A. § 8351

[16] See, Kathleen E. Weir, Zealous Representation: An Examination of Judicial Privilege, The First Amendment, and Attorneys' Statements to the Media, 25 Rev. Litig. 231 (2006) (focus on Texas cases). Compare, *Bochetto v. Gibson*, 2006 WL 2126296 (Pa.Com.Pl.).

[17] 2009 WL 2329915, at *2, n. 4.

Other Cultures, Other Values

By Paul Keeper*

Nearly every mediation involves a gap in values between the parties. What is the injury worth? How to decide to whom custody should be awarded? What future threat does this past behavior present? And, in many cases, the mediator must face the question of how to deal with basic values that the mediator does not share. In these cases, you ask, "How can I remain involved ethically as the mediator?"

A subclass of this type of case is the one that involves cultural differences. To mediate effectively, a mediator may need to act as translator between the parties. In some cases, the mediator may need the parties do the translating. Two examples explore this type of problem.

A. Tingli and Praheem Javish

With little opportunity for preparation, you agree to conduct a family mediation involving a Balomese couple, a young woman, Tingli, and her husband, Praheem Javish. Both are 21 years old, and students at the University. They have been married for about six months and have no children. Praheem is unrepresented, and Tingli's attorney is Ellen Morris, a family law specialist. Ms. Morris has been hired within the last few days by Tingli's uncle, Tondra Barsaloom, a Balomese diplomat in the United States. All four arrive in your office exactly twenty-four hours after you agree to act as the mediator.

1. Initial Joint Session

Praheem explains that Tingli's parents have recently learned of the marriage and disapprove strongly. He acknowledges that he is a member of a Balomese social order that is less esteemed than that of Tingli. Nonetheless, after meeting in the United States at the University, they courted according to Western social customs, fell in love, and married – something that would not have been permitted in their home country.

Until he received the divorce petition, Praheem knew of no problems with their marriage. But, Praheem explains, Tingli's uncle, Mr. Barsaloom, recently contacted them and demanded that they divorce. Praheem initially agreed only because Tingli was so distraught about her uncle's threats. Praheem explains that he has changed his mind and does not want a divorce. He loves Tingli and will not give up without a fight. He has no money to hire a lawyer, and he knows of no local attorneys who are familiar with his customs.

Tingli concurs with Praheem's recitation of the facts. She explains that she loves Praheem, but in deference to her uncle's and parents' demands, she thinks that divorce is the best route. She intends to return home someday. Their marriage would cause problems for her family. From the tone of Tingli's voice, you have doubts about the strength of her conclusions.

Mr. Barsaloom explains that the marriage was a mistake that must be quickly corrected. As the sole representative of the Barsaloom family in the United States, he has an obligation to her parents to see that his niece does not become irreversibly entangled with Praheem, someone of questionable reputation. Mr. Barsaloom tells everyone present that Praheem is a charlatan who intends to benefit from Tingli's family money. Mr. Barsaloom hints ominously that things will be "very bad" for Praheem if he does not accept a divorce.

2. Caucuses

Ms. Morris, whom you know to be an ethical and effective family lawyer, tells you privately that she knows nothing of Balomese ways. She explains that Mr. Barsaloom has agreed to pay triple her standard fee to expedite this matter. She tells you that she believes that Tingli is pregnant and has not told Praheem or Mr. Barsaloom. She also tells you that she believes that Mr. Barsaloom is a potentially dangerous man. Ms. Morris tells you that she intends to withdraw from this case once the mediation is concluded, whatever its outcome.

You hold a caucus with Tingli and Ms. Morris. Tingli admits to the two of you that she is pregnant. She tells you that she does not know what to do. She expresses her great love for Praheem and for her parents. She tells you that she wishes that her uncle and "all of this" would just go away.

You hold a caucus with Mr. Barsaloom. He tells you that he wants to meet with his niece and you without the presence of Ms. Morris. Ms. Morris and Tingli agree to this. Mr. Barsaloom explains to Tingli that he is the trustee of her late grandparents' estate. She is about to inherit a large sum of money, but only if he, Mr. Barsaloom, approves of the marriage. He does not. He wants Tingli to divorce Praheem and to return home to consult with her parents. He opens a briefcase and offers Tingli $20,000 in cash to do as he demands. He will offer Praheem $5,000 to sign the divorce papers. Mr. Barsaloom asks you to make his offers known to Ms. Morris and to Praheem.

3. In Your Office

You retreat to the privacy of your office to think about this dispute. You proceed to ask yourself a number of questions:

What are your obligations to Tingli? She has effective legal counsel, . . . or does she? If she doesn't, how does that change your role? And what about the $20,000 offer? How does that fit into the picture?

What are your obligations to Praheem? Although you know that he needs a lawyer, he is doing a pretty good job of standing his ground. However, you are worried about the size of the $5,000 offer and its potential effect on his decision-making. More importantly, Praheem knows nothing about his child. Finally, you are worried that Praheem may suffer harm if Mr. Barsaloom's demands are not met. But, you ask yourself, is it your job to worry about whether someone makes the "right" choice in a mediation?

What are your obligations, if any, to Mr. Barsaloom? Although he is not a party to the divorce litigation, he is certainly an active participant in the mediation. Does he have any place in the mediation process? If he does, don't you have an obligation to communicate his offers? And if he does not, what obligation do you have to the other parties to remove him from the process?

What are you obligations, if any, to the unborn child? You are reasonably sure that the presence of a child – even in utero – has some bearing on this process. Do you have some obligation to reveal this fact to Praheem?

What do you really understand about the motivations of these parties? You are not a cultural anthropologist. You have never been to their country or know their values. Or, are there supra-cultural values on which you can rely to mediate this dispute? What is the value of marriage, of caste, or of money in this culture? Must you learn more before you may mediate?

B. Joseph Trabulsi and the University

Mr. Trabulsi is a well-respected professor of public accountancy in Italy. He was invited to come to the United States to teach at the local University for one year with the option to renew the appointment for two more one-year periods. He accepts, finds another faculty member to teach his classes in Italy, signs a one-year lease at an expensive condo near the University, and moves to the United States.

Mr. Trabulsi and another professor, Dr. Helen Thomas, are assigned to jointly teach a graduate seminar. They meet each day before class. After discussing the syllabus, they briefly compare stories about Italy and travel. Two months into the semester, Mr. Trabulsi asks Dr. Thomas about her sex life. She is surprised and tries to change the subject. Mr. Trabulsi is undeterred and provides her with details about his sex life. He neither propositions her nor touches her. She is uncomfortable with his comments and mentions the event to a colleague. The colleague, in turn, informs the chair of the department.

A day later, Mr. Trabulsi is given notice of a hearing to reconsider his appointment. His teaching duties are suspended immediately. At a faculty hearing ten days later, he expresses his surprise, regret, and confusion at what has happened. The faculty committee recommends that his contract be terminated. The next day, he receives a notice of dismissal.

Mr. Trabulsi learns that he has the right to appeal. He files a written request. The president of the University calls you and asks if you would act as mediator before any appeal is considered. You agree.

1. Initial Joint Session

Mr. Trabulsi, the chair of the department, and an attorney from the University's human resources department arrive at your office. You ask Mr. Trabulsi to explain what has happened. He tells you the facts without embellishment. When he describes his conversation with Dr. Thomas, he explains:

> You know, where I come from, conversations among colleagues about a person's sex life are not unusual or offensive. It is part of life, like talking about food or travel. When I learned about the suspension, I called Dr. Thomas and apologized to her. She accepted my apology and told me that she never would have complained to the University. She regretted mentioning it at all. I've had to call my wife and explain that I may have lost my appointment. I have a lease on a condo and no job. I understand that I've offended someone, but I don't know where or how to undo it.

The University attorney explains that the University no longer has a zero-tolerance policy about offensive language. Instead, the University examines offensive language comments based on a set of written criteria. This case is a violation because Mr. Trabulsi's comments were: (1) an unsolicited request for personal information, (2) of a highly sensitive nature, (3) directed to a faculty member, (4) in a University building, and (5) made during work hours.

Mr. Trabulsi asks if he can ask a question, and you agree. He begins, While I respect your rules, can you understand how confusing this is to me? When I arrived at the department's office on my first day on campus, I was asked for proof of citizenship, my immigration papers, my marital status, my children's names, my criminal history, my educational background, letters of recommendation, and certified copies of my accountancy license. All of this was unsolicited by me, all of it was personal information of a highly sensitive nature, directed to a faculty member in a University building during work hours. How is what I did any different than what the University asked of me? Please tell me, who has been harmed and what is to be gained by this legal exercise?

2. Caucus With The University

In caucus, you ask the chair of the department and the lawyer to describe the interests of the University in this matter. The lawyer explains that the University cannot let the matter pass. The University has been sued in another case for disparate treatment in a similar situation. These are the rules and Mr. Trabulsi has violated them, however unwittingly. The University cannot afford to just drop the matter.

The chair of the department turns to the lawyer and says, "You know, Jack, there are two things that I've never been able to tolerate: lawyers and perverts. In this case, I guess that I've got to deal with both of them." He turns to you and says, "Tell Trabulsi if he'll agreed to resign, the department will not report this matter to his university in Italy or the Italian licensing authorities."

3. Caucus With Mr. Trabulsi

You give Mr. Trabulsi the offer. He shakes his head in disbelief. He explains that neither his university nor the Italian licensing authorities would care what an American university has done. He is willing to take sensitivity training classes or pay a small fine or a bribe, if that will satisfy the department chair. But, he would like to finish this one year appointment and then go home. Beyond that, he is very sorry for his actions and very sorry that he accepted an appointment at a university that is so frightened of its own faculty. He refuses to resign.

4. In Your Office

You retreat to the privacy of your office to think about this dispute. You proceed to ask yourself a number of questions:

What are the interests shared among these parties? Are there any?

What is the role of mediation, if any, in helping the parties understand each other's cultural values? Is that level of understanding critical to a resolution of this case? If you can help the parties find a solution with which they can live, have you discharged your duties?

Should you recommend that Mr. Trabulsi find an attorney to help him understand his rights and, perhaps, American legal values?

You are concerned because you cannot put to rest your fundamental agreement with Mr. Trabulsi's position in this case. Should you terminate the mediation?

**** Paul Keeper*** *is an administrative law judge, mediator, and arbitrator in Austin, Texas. He is a former officer of the ADR Section of the State Bar of Texas. The thoughts expressed in this essay are his alone, and do not represent those of the State Office of Administrative Hearings.*

REFLECTIONS FROM THE EDGE

By Kimberlee K. Kovach (Special Guest Author)*

This is the last in a series of three articles which examines six ethical problems that were originally posed for an ADR Symposium conducted by the Texas Wesleyan Law Review. An analysis of these ethical problems is made by our distinguished guest author, Kim Kovach. The Symposium can be accessed on line at www.law.txwes.edu [click the "Law Review"link, and then select the "ADR Symposium" link].

Overview

One of the principal difficulties with ethical situations that may arise in ADR processes is the lack of clear and definitive guidance. While ethical codes or standards exist for both arbitrators, and mediators, they tend to be too general to provide effective guidance to practitioners who represent clients in those proceedings. Questions also arise when lawyers serve as mediators and arbitrators. In some instances, the conduct of the lawyer representative, as permitted by the rules, directly conflicts with obligations of mediators.

While lawyers certainly have state mandates in the form of disciplinary rules, most derivatives of ABA Models, these rules or standards generally do not consider the lawyer's role to go beyond that of adversarial representation. In essence, the current ethical standards for lawyers as representatives for clients remain in the "one size, shape, and color fits all" approach. This is unworkable, particularly as the work of lawyers has evolved to encompass a variety of tasks and roles, many of which are not only dissimilar, but frankly contrary, to the adversarial paradigm. Finally, as is demonstrated in the following fact situations, many dilemmas arise for which no definitive or clear cut answer exists. As a consequence, even where specific guidance is provided to practitioners, whether in the role of representative or neutral, they will need to make case-by-case decisions.

Ethical Dilemma 5: The Costs of Home Improvement Work

There is a dispute between homeowners and their renovation contractor. The homeowners claim that the work was not completed within budget, that the work was performed in a shoddily manner, and that they will have to spend additional money to get the project completed. The contractor alleges that he found unanticipated foundation problems (water leak that undermined part of the foundation and driveway) and that the additional money expended was all spent on the repair of the foundation. He admits that he failed to get a signed change order from the homeowners. He disputes the claims about the poor quality of the work.

In the course of conversations with the homeowners, they report that they took out a home improvement loan with a local national bank. They also disclose that they agreed with the contractor that he would inflate his estimate by $3,000, about 15% of the loan, and the contractor provided them with two payments of $1,500 each out of his progress payments from the bank.

In a separate conversation, the contractor admits that the statements of the homeowners about the inflation of the estimates and the kickbacks are correct. He states he is aware that this is an "ethical" problem.

Both parties are pro se. They are scheduled for trial in two weeks before a judge who began his career in the United States Attorney's office.

What ethical issues are present for the mediator? What should the mediator do?

The concerns surround an allegation – and apparent admission – of fraud in obtaining the loan. In some cases, this could rise to the level of criminal conduct, depending of course, on state and federal statutes. Standards that address situations where the mediation is used to further a criminal activity would be relevant. Most recommend that the mediator terminate or postpone the mediation. Disclosure is not mandated, however, and it is unclear whether the mediator could later testify.

Since the bank is not a party to the mediation, the mediator has no duty or obligation to the bank. Even in the instance where the mediator is an attorney, nothing appears to surface that would obligate, legally or ethically, disclosure to the bank. On the other hand, whether a mediator feels a moral obligation to report such activity is likely a matter of personal choice. This "moral" obligation, however, must be balanced with the ethical, and perhaps even legal (e.g. contractual obligation) the mediator has to maintain the parties confidences.

In addition to the continuation and confidentiality concerns, another issue relates to impartiality and neutrality. One possible situation that could arise that would directly impact impartiality is if the Bank in question happens to be one where the mediator has an account. In such a situation, the mediator likely would be unable to continue as impartiality may be compromised as well as conflicts of interest arise. In addition, while the mediator may generally not approve of the inflated loan, as both parties are part of the fraudulent activity, it is likely that the mediator could remain impartial with regard to all participants. While the mediator may question any potential criminal activity, it appears that the deal was complete. The above-referenced exceptions pertain to the continua-

tion or furtherance of criminal activity.

Understanding, however, that the foundation of the relationship between the homeowners and contractor was based in part on fraud, the enforcement and durability of any agreement is called into question. The Model Standards, for example, consider the quality of the process as basic, and go further to urge the mediator to promote honesty. Yet, that is specifically among participants and the bank is not a participant.

In essence then, the mediator should not disclose what was learned in the mediation. Whether one would continue the mediation and craft an agreement is, of course, a matter of personal choice. None of the rules or standards provide clear guidance when, as it appears in this case, the malfeasance has been completed. From a practical standpoint, it also would seem that the parties would be inclined to resolve the matter short of trial and thus be focused on a very expedited resolution.

There is, however, one situation which could give rise to confidentiality issues. In the unlikely event that, should the matter not be resolved, during the course of the trial, the information is disclosed, and the court would request additional information. If, in some way the bank learns of the original fraud, then it is feasible that an additional legal action could be pursued by the bank against the parties. In this instance, being a "proceeding," the mediator runs the risk of inclusion in this subsequent proceeding. One other option, of course, is to play out this possibility for the parties in an effort to give understanding about the potential consequences, which may further settlement.

Essentially, the most practical solution appears to be to proceed with the mediation and refrain from making disclosures.

Ethical Dilemma 6: A Probate Predicament

You are mediating a probate matter. The daughter and only heir of the decedent is represented by counsel. The respondents are pro se. The respondents are two sisters of middle age and their mother. The mother appears in a wheel chair, but the complaining party's attorney claims that she only uses the wheelchair when she can obtain an advantage from it.

The following facts are elicited and, within limits, are not in dispute. In the last few years of his life, the decedent became associated with a particular Christian denomination. The three respondents, also members of that denomination, agreed to move into one wing of the large ranch style home of the decedent and live there in return for providing some domestic services such as routine cleaning and cooking. During decedent's gradual decline from congestive heart failure, they gradually took over his affairs, including managing his bank accounts and servicing his bakery route. After his death, they took over the bakery route and operated it until it was withdrawn by the bakery company. They then sold the bakery truck and emptied the bank account of the decedent. They have continued to live in the house, but have not paid taxes on it. The taxes have been paid by the estate. The daughter of the decedent wants the sisters and mother to leave the house so that she can repair and sell it. The house sits on 1.5 acres of land, is surrounded by quarter acre subdivisions, and is within the Barnett Shale.

During the decedent's final illness he provided the respondents with a durable power of attorney for healthcare, because he was concerned that his daughter might consent to medical procedures that were prohibited by his religion.

During discussion with the mediator, the two sisters state they have filed affidavits with the court. (Both are notaries and they notarized each other's affidavits.) Because these affidavits were not contradicted, the court must accept them and therefore they will be allowed to retain possession of the house. They prepared a special warranty deed that transferred the house from the decedent to their mother for services rendered, and appended the decedent's signature from the power of attorney for healthcare to the special warranty deed. A copy of the actual document filed in the deed records is presented, and the signature page of the decedent includes the last two paragraphs of the power of attorney. Once of the sisters notarized the document over a year after the decedent's death. The document was filed in the County Deed Records.

What issues are raised by the facts? What should the mediator do?

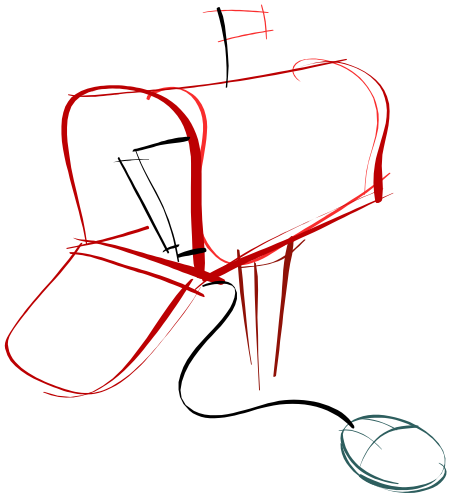
One of the more problematic issues for the mediator is maintenance of neutrality. A duty of neutrality and/or impartiality is contained in most, perhaps all, of the enacted ethical guidelines and standards. For example, the Texas Supreme Court Guidelines provide that a "mediator should be impartial toward all parties." This provision, however, is advisory due to use of the term "should." The Model Standards, however, go further and state that mediator should withdraw if he is unable to effectively conduct the mediation. A practical effect is that in actual practice it may be quite difficult for the mediator to remain neutral. In this instance, the mediator should question his ability to truly remain neutral.

Another concern for the mediator is the *pro se* parties. Certainly most mediators know that they cannot provide legal advice or information for the parties, (as the codes and standards for mediators often explicitly provide). Yet *pro se* parties commonly do not understand the prohibition. And if the mediator is a lawyer, and the other party is represented, then the unrepresented or *pro se* party may then feel that the mediator is biased – in this instance in favor of the daughter, as she is represented by counsel. Of course as the case appears to be in court, or heading there, it is the responsibility of the respondents to become familiar and knowledgeable about the essence of the law and procedure that impacts this matter. On the other hand, it is quite likely that at some point during the mediation, or at several points, that the *pro se* party will request information from the mediator.

Even more troublesome is the near unethical conduct that the respondents have engaged in with regard to the transfer of title and the like. Since the respondents have stated they are sure of what a court will do, and the daughter is requesting them to leave, an

easy and uncomplicated resolution does not seem apparent. So much of the discussion that the mediator would likely engage in with the parties could easily be perceived as legal or professional advice or information, thereby immediately raising not only ethical issues for the mediator but concerns of potential malpractice claims as well. In this instance, the mediator should decline to continue the mediation, relying, at least in part on Texas Guidelines 9 (Impartiality) and 13 (Termination), which provides that the mediator should terminate the process if it is apparent to the mediator that the matter "is inappropriate for mediation".

Kimberlee K. Kovach *has nearly thirty years experience in mediation as a leading teacher, trainer, scholar and practitioner. She is a Past Chair of both the ABA Section of Dispute Resolution and State Bar of Texas ADR Section and has taught a variety of ADR courses in legal education for over eighteen years. The author of text books, numerous law review articles, book chapters as well as short articles on a variety of ADR and related topics, she has lectured and trained extensively throughout the United States and abroad, and currently serves as the Director of the Frank Evans Center for Conflict Resolution as well as the Distinguished Lecturer in Dispute Resolution at South Texas College of Law.*



ADR ON THE WEB

By Mary Thompson*

Taking Another Look At The Joint Session

It has been over 20 years since the passage of the Texas ADR Act. The mediation field is now old enough to identify major trends and influences. In the 1980's the growth of court-related cases referred to mediation resulted in an increased use of the individual session or caucus. More recently, and partially in response to the emphasis on dialogue, narrative and transformation, the field is seeing renewed attention to face-to-face communication and joint sessions. Several interesting online articles reflect - and encourage - this trend.

Moving Mediation Back Toward Its Historic Roots – Suggested Changes

By Joseph McMahon

http://jpmcmahon.com/PDFfiles/McMahonColorado%20LawyerJune2008.pdf

In this article, published last year in the Colorado Bar Association Dispute Resolution Section newsletter, mediator and arbitrator Joseph McMahon examines the barriers to our field reaching its full potential. McMahon suggests that the commoditization of the ADR field has resulted in a law-centered approach to mediation, and in the acceptance by the legal profession of a very narrowly-defined, "low-functioning" approach to mediation.

McMahon contends that as ADR grew during the 1990's, it became a business that responded to market norms and began to lose sight of its founding principles. The earlier focus on face-to-face dialogue was replaced with processes and structures more familiar to lawyers: separation of parties, a focus on legal rights rather than interests, and the monetization of conflict.

One of the results has been the widespread use of individual sessions, at times at the complete exclusion of joint sessions. McMahon's article encourages mediators to resist being constrained by market expectations and to look for appropriate opportunities to encourage face-to-face dialogue between the parties. His article advocates for more conflict assessment before the mediation in order to match the process with the needs of the case. McMahon also reviews the key reasons dialogue is feared or resisted. He suggests that overreliance on the individual session avoids conflict, thereby discouraging the candid dialogue and engagement that can result in a more meaningful resolution.

In Praise of Joint Sessions

Geoff Sharp

http://www.mediate.com/GeoffSharp/docs/Geoff%20Sharp%20Full%20Paper.pdf

Sharp, based in New Zealand, is a mediator, barrister and author of the late, great blog, Mediator Blah Blah. In this article Sharp also reflects on the recent trend away from the joint session.

The article recounts a story of opposing counsel meeting during a mediation only by accident in the copy room while duplicating the final agreement. Sharp offers this scenario to illustrate the lengths to which today's attorneys - and mediators- will go to avoid face-to-face communication and negotiation.

Sharp describes a number of reasons the mediation field has moved away from use of the joint session: Attorneys and clients fear the uncertainty of the joint session. Emotional issues can surface which many attorneys feel are irrelevant to the dispute. The discussion may get out of control, escalating the dispute even further.

According to Sharp, individual sessions do have clear benefits: they provide the privacy to construct negotiating strategies, realistically value the case, and conduct candid discussions between the client and attorney.

But Sharp also urges us to consider the opportunities of the joint session: direct communication among the parties and attorneys, ability to directly persuade the other side, creation of common knowledge, transparency of the process and more efficient use of time. He proposes a mediation model that assumes use of joint session, but uses "selected caucusing" as needed. He provides a very practical example of a structure for a one-day commercial mediation.

Mediation Joint Sessions: Are You Missing the Boat?

Nancy Hudgins

http://www.mediate.com/articles/HudginsNbl20080818A.cfm

Finally, Nancy Hudgins, editor of the blog Civil Negotiation and Mediation, describes the six key persuasive negotiation strategies most effectively used by attorneys in the joint session: Appreciation, Affiliation, Storytelling, Respect, Likeability, and Outlistening. She concludes with an appeal to at-

torneys to engage in the joint session and not cede their power to the mediator conducting shuttle diplomacy:

> *"Admit it. Don't you cringe a little bit for the legal profession when you can see a lawyer for the other side sitting reading a newspaper during a caucus phase of a mediation? Wouldn't you at least want to keep your head in the game?"*

Each of these articles is well worth an in-depth look. All three authors agree that the individual session can be a useful tool in the mediation process. They also challenge us to be advocates for processes that promote effective communication, problem solving and negotiation.

Mary Thompson, *Corder/Thompson & Associates, is a mediator, facilitator and trainer in Austin. If you are interested in writing a review of an ADR-related web site for Alternative Resolutions, contact Mary at emmond@aol.com*

SUBMISSION DATES FOR UPCOMING ISSUES OF *ALTERNATIVE RESOLUTIONS*

Issue	Submission Date	Publication Date
Winter	December 15, 2009	January 15, 2010
Spring	March 15, 2010	April 15, 2010
Summer	June 15, 2010	July 15, 2010
Fall	September 15, 2010	October 15, 2010

SEND ARTICLES TO:

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100 Law Center
Houston, Texas 77204-6060,
Phone: 713.743.2066 FAX:713.743.2097 or rpietsch@central.uh.edu

CALENDAR OF EVENTS

Advanced Child Custody & SAPCR Family Mediation Training * Houston * October 9-11, 2009 * University of Houston Law Center—A.A. White Dispute Resolution Center * Contact Judy clark at 713.743.2066 or www.law.uh.edu/blakely/aawhite

Mediating the Debtor/Creditor Case * Dallas * October 13, 2009 * Contact Cris Gilbert at DMS at 214-754-0022 or visit www.dms-adr.org

Conflict Resolution October * Denton * October 15-18, 2009 ***** Texas Woman's University * For more information contact Stephen Pense, (940) 898-3466 or spense@twu.edu * Website: www.twu.edu/lifelong

Family Mediation Training * YO Ranch, Kerrville, TX * October 20-22, 2009 * Dispute Resolution Center of Lubbock County * For more information please contact Jessica Bruton or Crystal Stone at 866.329.3522 or 806.775.1720 Website: drc@co.lubbock.tx.us

Advanced Family Mediation Training * Houston * November 4-7, 2009 ***** *Worklife Institute* * 1900 St. James Place, Suite 880 * For more information call 713-266-2456, Elizabeth or Diana, or see www.worklifeinstitute.com calendar page.

Basic Mediation Training * Austin * November 11, 12, 13, 17, 18, 2009 * For more information visit www.corderthompson.com or call 512.458.4427

TMCA Symposium * Austin * November 14, 2009 * For more information visit www.txmca.org

OUT OF STATE

Association for Conflict Resolution (ACR) 9th Annual Conference * Atlanta, Georgia * October 7-10, 2009 For more information www.acrnet.org

International Commercial Arbitration Workshop * New Orleans, Louisiana * October 10-11, 2009 * The Chartered Institute of Arbitrators North American Branch and the US-Mexico Bar Association * For more information call 888-364-1200

ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

This is a personal challenge to all members of the ADR Section. Think of a colleague or associate who has shown interest in mediation or ADR and invite him or her to join the ADR Section of the State Bar of Texas. Photocopy the membership application below and mail or fax it to someone you believe will benefit from involvement in the ADR Section. He or she will appreciate your personal note and thoughtfulness.

BENEFITS OF MEMBERSHIP

✓ Section Newsletter, *Alternative Resolutions* is published several times each year. Regular features include discussions of ethical dilemmas in ADR, mediation and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around the State.

✓ Valuable information on the latest developments in ADR is provided to both ADR practitioners and those who represent clients in mediation and arbitration processes.

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I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2009 to June 2010. The membership includes subscription to *Alternative Resolutions*, the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

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ALTERNATIVE RESOLUTIONS

Publication Policies

Requirements for Articles

1. An author who wishes an article to appear in a specific issue of the newsletter should submit the article by the deadline set in the preceding issue of the newsletter.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. All quotations, titles, names, and dates should be double-checked for accuracy.
5. All citations should be prepared in accordance with the 18th Edition of *The Bluebook: A Uniform System of Citation*. Citations should appear in endnotes, not in the body of the article or footnotes.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. If possible, the writer should submit an article via e-mail attachment addressed to Stephen Huber at shuber@uh.edu or Robyn Pietsch at rpietsch@central.uh.edu. If the author does not have access to e-mail, the author may send a diskette containing the article to Robyn Pietsch, UH Law Center, 100 Law Center, Houston, TX 77204-6060
8. Each author should send his or her photo (in jpeg format) with the article.
9. The article may have been published previously or submitted to other publications, provided the author has the right to submit the article to *Alternative Resolutions* for publication.

Selection of Article

1. The newsletter editor reserves the right to accept or reject articles for publication.
2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format.
2. Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

ALTERNATIVE RESOLUTIONS

Policy for Listing of Training Programs

It is the policy of the ADR Section to post on its website and in its Alternative Resolution Newsletter, website, e-mail or other addresses or links to any ADR training that meets the following criteria:

1. That any training provider for which a website address or link is provided, display a statement on its website in the place where the training is described, and which the training provider must keep updated and current, that includes the following:

a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

2. That any training provider for which an e-mail or other link or address is provided at the ADR Section website, include in any response by the training provider to any inquiry to the provider's link or address concerning its ADR training a statement containing the information provided in paragraphs 1a, 1b, and 1c above.

The foregoing statement does not apply to any ADR training that has been approved by the State Bar of Texas for MCLE credit and listed at the State Bar's Website.

All e-mail or other addresses or links to ADR trainings are provided by the ADR training provider. The ADR Section has not reviewed and does not recommend or approve any of the linked trainings. The ADR Section does not certify or in any way represent that an ADR training for which a link is provided meets the standards or criteria represented by the ADR training provider. Those persons who use or rely of the standards, criteria, quality and qualifications represented by a training provider should confirm and verfy what is being represented. The ADR Section is only providing the links to ADR training in an effort to provide information to ADR Section members and the public."

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2009, Mediate With Us, Inc., SBOT MCLE Approved—40 Hours, 4 Ethics. Meets the Texas Mediation Trainers Roundtable and Texas Mediator Credentialing Association training requirements. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

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ALTERNATIVE DISPUTE RESOLUTION

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