ALTERNATIVE RESOLUTIONS

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION

CHAIR'S CORNER
By Ronald Hornberger, Chair, ADR Section

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This iteration of the From the Chair column reports on the activities of my colleagues and friends on behalf of the [Alternative] Dispute Resolution Section of the State Bar of Texas.

A more appropriate title would be "With a Little Help From My Friends." [Actually, a lot of help from my friends and ADR colleagues, but the reference to the Beatles was too good to pass up.] Not only have our colleagues done wonderful work on behalf of the Section, they also provided me with the information that forms the basis for the material that follows.

Your ADR Section Council has been busy developing new content and a new layout and design for our website to help ADR practitioners and users. With the able guidance and leadership of our Chair Elect, Don Philbin, and Bre Binder of the State Bar, we are completely reworking the Section website to make it a fully functional, real-time resource for busy neutrals and their users. The site will not only provide information on Section activities, but gather in one place links to the relevant ADR statutes in Texas and other states, the general and specialized arbitration rules of the major providers, and even ADR clauses and forms. There will be information on ADR groups and training, academic publications and programs, blogs, book reviews, and FAQs on ADR.

Through this reinvigorated web site, we also will celebrate the recipients of our highest award, the Justice Frank G. Evans Award, and recognize the past chairs. The calendar maintained on the site will continue to keep members up-to-date not only on Section activities, but also available trainings. All of this will be presented in an eye-catching and easy to find and read format – whether you're sitting in front of a large computer screen in your office or trying to find a rule in the heat of a hearing on your mobile device.

We also are working on a special project to revitalize and renew the "ADR Handbook" once published by the Section, and long since sold out and out of print. Section Treasurer Linda Thomas and Kay Elliott, the co-editor of the last ADR Handbook, have been working hard on the ADR Handbook project that will gather information from more than forty authors who are experts in their respective fields.

The 2003 Handbook contained twenty- eight chapters covering a variety of topics: eight on ADR processes (mediation, mini-trial etc.); subject matter chapters on environmental, construction, criminal, employment, health care, and family dispute resolution; and the use of alternative dispute resolution in government settings, community dispute resolution centers, and in judicial settings.

The new Handbook will have thirty chapters and will reflect the evolution and institutionalization of dispute resolution in a complex, global environment. Although told from a Texas perspective, the new Handbook is designed to be useful for a legal practitioner in another state or another country.

Inside This Issue:

Chapter headings include the following: multi-cultural aspects of dispute resolution; restorative justice; civil collaborative law; mediation advocacy; corporate ADR; neuroscience and dispute resolution; dispute resolution in intellectual property cases; and international dispute resolution initiatives. The Handbook will be available from the internet, which enables dynamic updates to keep it current. Some text has been received for editing, and the book's publication date is expected to be in December, 2014.

Our hope with the ADR Handbook and the new website is to be a constant source of ADR content not only to our members, but to their users. We want to provide our members with great content, but we also strive to improve their practices by providing those who use their services with an easy ADR resource. I hope you will help us by perusing the site and sending content or design suggestions (and any corrections you might catch in the process!) to Linda and Don and their committees.

In a recent report from the Dispute Resolution Centers, Donna Phillips observed that about one-half of the DRCs do Child Protective Services (CPS) mediations. This particular area of the law must be understood to effectively represent a parent in a CPR mediation. The knowledge and experience of *ad litems* varies considerably. The agency does about 5,000 adoptions annually.

There is a need for standards and guidance due to the seriousness of the issues involved – a parent is at risk of losing custody of a child. There is a significant power inequality issue in that the parent's opponent is the State – with a strong advantage in terms of knowledge, wealth, and power. There is some discussion of raising this issue at the next session of the State Legislature.

Planning for the Section meeting at the State Bar convention in June is proceeding apace. As part of our effort to educate both ADR users and neutrals on other applications of our skills, the Section will present a two-hour CLE entitled, Settlement Counsel: Why, How and When?, during the State Bar Annual Meeting in Austin on June 26, 2014.

Well-known Austin plaintiff's attorney Bill Reid will share how using settlement counsel has improved his settlement outcomes. Chris Nolland, a Dallas attorney-mediator who often serves as settlement counsel, will give his perspective on the similarities between that role and mediating as well as how he markets those services. Former General Counsel and later President of Bearing Point, John DeGroote, will host the panel and tell how he effectively used settlement counsel to improve outcomes in the Bearing Point wind-up. Since lawyers of all walks attend the larger State Bar Annual Meeting, our hope is to draw ADR users – general counsel and litigators – to learn more about using settlement counsel. You will enjoy that opportunity to hear from users and further develop these ancillary ADR skills.

For pictures from our just completed Section CLE, courtesy of Alvin Zimmerman, please see pages 63 to 64.

In re Stephanie Lee Finally Decided

Alvin Zimmerman*

EXTRA! EXTRA! READ ALL ABOUT IT! The Texas Supreme Court has issued its opinion in the case of *In re Lee*, --- S.W.3d ----, 2013 WL 5382067 (Tex. 2013).

A couple of issues ago in this newsletter, I advised our members that this case had been decided by the appellate court and if their decision were allowed to stand, the well-engrained concept would be judicially undone that binding mediated settlement agreements are enforceable unless procured by fraud, duress, illegal activity is the subject matter or the settling parties are involved in child possession/custody case in which there has been family violence. If the lower court's decision were left to stand, it would have undermined the public policy favoring the binding effect, of mediated settlement agreements, as provided for in the Texas Family Code provision for mediated settlement agreements. I also cited reasons why I thought the mandamus should be granted, many of which were used in the Supreme Court's recent decision. I submit that the decision is well reasoned and should be carefully read by family lawyers to fully understand the gravamen of the decision.

In this case, the district court refused to enforce the mediated settlement when a divorced mother who had possession of her seven year old daughter, married a registered sex offender. The daughter lived in the house with him, even though he was prohibited by his probation terms from being around children. In the mediated settlement agreement, the mom and the biological father agreed that when the mom was with the child, her new husband would not be closer than 5 miles to the child – in other words the parties agreed that the new husband would not to be around the child when the child was with mom. There were no allegations of family violence nor was there any proof that mom's husband had ever violated the child in any manner. The Binding Mediated Settlement agreement entered by the parties satisfied all of the requirements of Section 153.0071 of the Texas Family Code.

In a split decision the Supreme Court finally issued the long awaited opinion reversing the trial court which set aside the mediated settlement and the appellate court affirming that action and granting the mandamus from the opinion of the 14th Court of Appeals in Houston, Texas. Justice Lehrman announced the Court's decision and delivered the opinion of the Court with respect to Parts I, II, II, V, and VII in which Justices Johnson, Willett, Guzman, and Box joined, and Justice Boyd delivered an opinion with respect to Parts IV and VI in which Justices Johnson, Willett, and Boyd joined; Justice Guzman filed a concurring opinion and Justice Green filed a dissenting opinion in which only Chief Justice Jefferson and Justices Hecht and Devine joined. The Parts of the Decision are:

Part I – Background

b. Part II – The Need for Mediation in High-Conflict Custody Disputes

c. Part III – Statutory Interpretation

(1) Standard of Review
(2) Section 153.0071
(3) The Parties' Arguments
(4) Analysis of Section 153.0071

d. Part IV – A Trial Court's Duty to Take Protective Action

e. Part V – The MSA in the Code (majority)

f. Part VI – Additional Response to the Dissent (majority)

g. Part VII – Conclusion

The Court actually held: "If a mediated settlement agreement meets [certain requirements], a party is entitled to judgment on the mediated settlement agreement notwithstanding . . . another rule of law."

TEX. FAM. CODE § 153.0071(e) (emphasis added). We are called upon today to determine whether a trial court abuses its discretion in refusing to enter judgment on a statutorily compliant mediated settlement agreement (MSA) based on an inquiry into whether the MSA was in a child's best interest. We hold that this language means what it says: a trial court may not deny a motion to enter judgment on a properly executed MSA on such grounds. Accordingly, we conditionally grant the writ of mandamus."

The Supreme Court, through Justice Lehrman's majority opinion, has now (perhaps temporarily) allayed the fears of practicing attorneys, especially family law attorneys, that mediated settlement agreements in which child possession/custody issues are involved can be set aside by the trial court by only using the best interest of the child standard. Rather, Texas courts must apply the Texas Family Code section 153.007 standard, which clearly articulates that best interest of the child standard can only be used when family violence has been shown -- which was not the fact situation in this case.

The majority further stated that it would be improper for a court to conduct an inquiry into the best interest of the child in contravention of the aforesaid Family Code section. To do so would frustrate the underlying policies of child custody mediated settlements which support their enforcement and the protection of the children. Section 153.007(e-1) does provide for the use of the best interest test, but not without a showing of family violence; otherwise the mediated settlement is binding and cannot be set aside merely because of a naked best interest of the child concern without coupling it to evidence of family violence. To do otherwise would create a new court mandated policy in contravention of the Legislature's clear intent set forth in the Family Code, rendering this provision of the Family Code superfluous. The Court went on to say that the specific language of Section 153.0071(c) (requiring family violence before best interest test is used) trumps Section 153.002's more general mandate (which generally addresses best interest) and cited Tex. Gov't Code § 311.026(b); *see also, Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 297 (Tex. 2011) which reiterated the rule that specific statutory provision (in this case 153.0071(c)) prevail over general mandates (153.002).

The Court concluded, "Section 153.0071(c) the public policy encouraging parents to peaceably resolve their child-related disputes through mediation by foreclosing a broad best interest inquiry with respect to entry of judgment on properly executed MSA's ensuring that the time and money spent on mediation will not have been wasted and that the benefits of successful mediation will be realized."

Reading the opinion we can now understand the delay in issuing it and the tensions that surely existed in reaching the majority. Justice Guzman, formerly a family district judge in Houston, in her concurring opinion suggests that such cases still provide judicial flexibility when there is a proper showing of endangerment to a child, which such evidence was lacking in this case.

The four members of the dissent stated that the best interest test should be available for the trial court to use in its discretion under Family Code Section 153.0071 and the Family Code as a whole. They went on to say that the distinction used in the majority which distinguished cases on the record that the mediated settlement was not in the best interest of the child, from the instant case which was a modification and the court said the facts indicated that the child could be endangered, was an impermissible distinction.

Query: With the divided Court in this opinion, does the opinion provide a safe harbor as many members of the bar had hoped for? What was being pressed was for an opinion that would bring certainty to child possession/custody cases that are resolved with a mediated settlement agreement. Although this opinion will be cited favorably for this proposition and there is very strong language that can be relied upon that such mediated settlements are binding and cannot be disturbed merely on the best interest of the child standard, the concurring and dissent will be cited and used for the opposite position for another day and another case. Stay tuned for the next one.

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Don Philbin, How Tomorrow's Lawyers Are Using Technology Now to Improve Outcomes, 31 Alternatives to High Cost Litig. 81 (2013) (Review of books by Richard Susskind)

Remember the runaway bestseller *Megatrends* in 1983? Author John Naisbitt captivated his audience by identifying 10 themes that would change the world. The relative accuracy of these predictions 30 years later is haunting. Here they are:

1. Shift from an industrial society to an information society.
2. Shift from high-touch human responses to newly automated responses.
3. Shift from a national economy to a global economy.
4. Shift by management from short-term planning to long-term perspectives.
5. Rapid decentralization of business, politics, and culture.
6. Shift from institutional help to self-help.
7. Shift from a representational democracy to a participatory democracy.
8. Shift from hierarchies to networks.
9. Shift from Northeast to Southwest and Florida.
10. Shift from binary choices--that is, either/or--to multiple options.

Richard Susskind is the John Naisbitt of legal megatrends. He's shaken us up for years with *The End of Lawyers?* (2008); *Transforming the Law* (2000); and *The Future of Law* (1996). Like Naisbitt, he won't be right on all of the particulars when we have the luxury of grading him 30 years down the road. But, some of his predictions are already upon us. Here are the three megatrends Susskind claims are combining to form a perfect storm in his latest book, *Tomorrows Lawyers,* which was published in March, 2013 by Oxford University Press USA:

1. The "more-for-less" challenge from clients.
2. Liberalization of who can provide legal services and information.
3. Information technology.

The specific path of this perfect storm, and its aftermath, are the subject of considerable debate. But, even its less controversial effects could bring profound change to dispute resolution methods. ADR will broaden, diversify, and develop as an essential lawyering skill. Like medicine, advanced decision aids will also help those well-trained practitioners guide their clients to better results.

'MORE-FOR-LESS'

General counsel have been under enormous pressure to reduce their legal spending for years. That trend accelerated during the financial downturn. Susskind reports that many general counsel have faced 30%-50% reductions in their legal budgets, while legal and compliance work has doubled in terms of legal spend. See Sue Reisinger, "LegalVIEW Data Shows Litigation Up, Legal Spend Down," *Corporate Counsel* (April 25, 2013) (available at http://bit.ly/16tXabq).

Since 200 corporations buy 80% of legal services, it doesn't take pressure from very many clients to put pressure on the industry. And GCs are working together through the Association of Corporate Counsel's Value Challenge (see www.acc.com/valuechallenge) and other forums.

They are also aided by predictive analytics crunching big data sets to forecast expected expenditures on a matter with various staffing options. TyMetrix

(see tymetrix.com), LexisNexis CounselLink Insight (www.lexisnexis.com/counsellink), and Mitratech (www.mitratech.com) already have commercialized that service and others will follow.

The more-for-less challenge not only applies to large companies with in-house legal teams, but also to small companies that have had difficulty hiring counsel and individuals who have seen public legal aid monies dry up. Susskind laments that only the very rich and the very poor have access to the legal system at a time when a record number of law graduates go without jobs.

LEGAL SERVICES' LIBERALIZATION

The liberalization of who can provide legal services and information to the underserved 90% of the population is a Susskind megatrend. His views are certainly colored by his jurisdiction, the United Kingdom. In England, "reserved" legal business--work only lawyers can do--is narrower than what constitutes the "unauthorized practice of law" in the U.S. U.K. non-lawyers can own and run legal businesses and make investments in law firms.

There already is a publicly traded law firm in Australia, which used capital from a financing round to buy a British personal injury firm. Other firms are expected to list their stocks in the United Kingdom soon. Susskind also sees the reentry of Big Four accounting firms more than a decade after 1,500-lawyer Andersen Legal went down in the unrelated Enron scandal.

While it's easy to dismiss this as a European phenomenon, the ABA Commission on Ethics 20/20 has been studying the definition of the practice of law and unbundling of legal services for a decade, and has made some relatively minor adjustments. Susskind is convinced that within 10 years, "after intense agonizing and various changes of direction, most major jurisdictions in the West ... will have liberalized in the manner of England."

We'll see. What we know now is that LegalZoom.com Inc., RocketLawyer Inc., AOL Inc.'s TechCrunch, and a variety of websites provide online forms that pro se litigants are already using in large numbers. Court help centers and walk-in clinics everywhere are filled.

During a Reinvent Law conference in Silicon Valley, attendees visited a ""law office" that looks more like an Apple store. Its owner revolutionized the trademark process for small businesses with Trademarkia.com and has broadened its focus with a rebrand to LegalForce. Forty-eight states also have adopted court-approved family-law forms for pro se litigants, and other specialties are in development. See Chief Justice Wallace B. Jefferson, State of the Judiciary presented to the 83rd Legislative Session, Austin, Texas, 9 (March 6, 2013) (available at http://bit.ly/ZdHswc). And Wevorce.com aims to streamline divorce in a collaborative law-meets-Silicon Valley way.

INFORMATION TECHNOLOGY

As with Naisbitt, Susskind sees a world in which IT transforms many industries. He claims that the legal profession will "increasingly find it impossible to avoid the technology tidal wave." Here again, Susskind may be in a bit of an echo chamber--his work over the past 30 years has been devoted to thinking and writing about technology and its impact on lawyers and courts.

But "Moore's Law" is still holding: The pace of change evident at LegalTech New York and Reinvent Law Silicon Valley is hard to overstate. In 1965, Gordon Moore, the founder of Intel, predicted that computers' processing power would double every two years. If it continues, the average desktop computer will have the processing power of the human brain by 2020 and of humanity combined by 2050.

Quantum computers that can run multiple calculations simultaneously, rather than one at a time in classical computers, are reaching commercialization. Gary Marcus, "A Quantum Leap in Computing?" *The New Yorker* (May 18, 2013) (available at http://nyr.kr/16KfOvX)). Google bought one in mid-May. Dylan Love, "Google Bought a Computer That Is 1,000 Times Faster than Yours and Will Use It to Study AI," *Business Insider* (May 16, 2013) (available at http://read.bi/1475NW3).

In their new book, "The New Digital Age: Reshaping the Future of People, Nations and Business," (2013), Google executives Eric Schmidt and Jared Cohen note, "The data revolution will bring untold benefits to the citizens of the future. They will have unprecedented insight into how other people think, behave and adhere to norms or deviate from them."

While lawyers have used computers and Boolean searches for years--think Google, LexisNexis, and Westlaw--Susskind sees artificial intelligence making way for learning systems like IBM's Watson, which beat the two best human contestants in a special *Jeopardy!*

LIMITS TO PRICE COMPETITION

The more-for-less challenge has been addressed with price reductions and alternative fee arrangements. Susskind's premise is that law firms and their clients cannot address "more-for-less" over the long -term with price cuts and alternative fee arrangements that repackage the estimated hourly expenditure. Those will work in the short-term, and if the legal market returns to 2006 levels, the Band-Aid worked.

But Susskind believes that 2006 was the high-water mark for law that won't come again after clients realize they can get "more-for-less" and alternatives become available. Others agree or back up the concepts: Steven Harper's book, "The Lawyer Bubble: A Profession in Crisis," (2013) paint a similar picture. But it is not uniform. For example, New York University law professor Richard A. Epstein critiques Harper's view in a recent review. "The Rule of Lawyers," *Wall Street Journal* (May 5, 2013) (available at http:// on.wsj.com/18JM8vm).

Susskind's bet is that at least one mega firm will break ranks and offer long-term solutions to more-for-less and that when they do, others will scramble to follow. Seyfarth Shaw massively invested in data and knowledge management to form Seyfarth *Lean* (see http://bit.ly/15c6EZg).

Prof. Dan Katz at Michigan State University College of Law in East Lansing, Mich., and co-founder of the Reinvent Law Laboratory (see www.reinventlaw.com), sees firms becoming two-tier organizations--a law firm owned by lawyers, and allied services organizations that provide software and other services that are funded from a larger capital pool. Collaboration software company Xerdict Group is a wholly-owned subsidiary of Sedgwick, a San Francisco-based international law firm. It could presumably raise outside capital from nonlawyers.

This author believes that "bet-the-company" litigation and megadeals will remain relatively conventional and price insensitive. But that population of cases is shrinking in the eyes of general counsel. When I started practicing, the percentage of cases that seemed price insensitive--"Get me out of this at any cost"--was reportedly around 25%. Now general counsel say the number is in the low single digits. So while litigation as a whole is up, the percentage of cases that are price insensitive has decreased significantly. The remaining cases and many transactions continue to face the more-for-less challenge.

UNBUNDLING LEGAL SERVICES

One way Susskind believes that law firms can meet the persistent more-for-less challenge is by unbundling the overall engagement to protect the legal expert's value-proposition, while sourcing other pieces to lower-cost providers.

This is already occurring. Document review already has been sent offshore or onshore to lower U.S. cost regions, and predictive coding aims to automate costly E-discovery. The U.S. Department of Justice just approved the use of predictive coding to review millions of electronic documents in the proposed Anheuser-Busch In Bev NV/ Grupo Modelo SAB merger. A handful of judges have approved such review in litigated cases, but Justice's approval may spur more wide-spread use. Joe Palazzolo, "Software: The Attorney Who Is Always on the Job," B1 *Wall Street Journal* (May 6, 2013) (available at http:// on.wsj.com/126T4Si).

Susskind breaks transactions and litigation down into their component parts (see boxes below). Of the Litigation Tasks, U.S. litigators responded that strat-

egy, tactics, and advocacy were the tasks that singularly require their expertise. Since the United Kingdom has long separated solicitors and barristers, U.K. litigators predictably responded with strategy and tactics. Susskind also took a hand at decomposing the tasks involved in most transactions.

NEGOTIATION CRITICAL

Negotiation is a critical task in both transactions and litigation, but not something the litigators Susskind surveyed identified as requiring their expertise. That aligns with settlement counsel literature suggesting it is prudent to do in litigation what we do as countries --separate the war and peacemaking functions. See, e.g., "Settlement Counsel: 10 Free Internet Resources," SettlementPerspectives.com (April 4, 2013) (direct link: http://bit.ly/ZeNsYz); Kathy A. Bryan, "Why Should Businesses Hire Settlement Counsel?" 2008 *J. Disp. Resol.* 195 (available at http://bit.ly/15QGY4v).

Keeping the generals singularly focused on beating the other side has key strategic benefits. But there is almost always another line open between the diplomats that does not oscillate with ebbs and flows of the war effort. Diplomats do not get involved in the war effort, but keep those channels open so the generals do not have to show weakness by stopping the battle to talk peace. Generals win or accept surrender.

Diplomats don't interfere with prosecution of the war, but are looking for alternatives that might satisfy the parties' interests. They are complementary, not competitive, and allow tight focus without compromising their position by momentarily changing rolls.

Of course, every effort is well coordinated and overseen by the head-of-state or client. Dallas-based author and consultant John DeGroote and others advocate that settlement counsel can be used to bring settlements about earlier and more efficiently. See DeGroote's Settlement Perspectives website at the link above. James McGuire notes that the types of questions are different when focusing on a future settlement than on preparing an autopsy of the past. See, e.g., James McGuire, "Why Litigators Should Use Settlement Counsel," 18 *Alternatives* 1 (June 2000).

HUMAN + MACHINE

Susskind is a legal technologist and when you're a hammer, everything is a nail. He makes sweeping projections about the disruptive effects of technology. I am also a fan of the benefits of technology, but see the two as much more complementary. I'm not naive enough to think there will not be dislocation for people and firms that do not adopt emerging technology. There will be. The printing press dislocated some scriveners. The industrial revolution reduced the prominence of horses. And undersea fiber optics and the Internet have been tough on call centers, bank tellers, and facilitated foreign document review. But no one will replace David Boies, Ted Olsen, or Ken Feinberg with a bot.

That's not to say they will not be greatly aided by learning systems that function as decision aids. Louis M. Solomon, Litigation Department co-chair at Cadwalader, Wickersham & Taft in New York, tries headline-grabbing cases and has the well-honed judgment that comes with that experience. Still, he is an early adopter of predictive analytics for negotiation and other advanced decision aides.

ONLINE DISPUTE RESOLUTION

Susskind lists several technologies he believes will have disruptive effects. (See the box below.)
Online dispute resolution, or ODR, is a perfect example of supplementary technology. PayPal, eBay, Amazon, TaoBao, and other E-commerce providers already handle more than 150 million disputes per year across jurisdictional lines, according to Modria's Colin Rule, who led PayPal's program for years and now offers similar services to a wide-range of online merchants.

Imagine what would happen if those disputes were dumped onto an already overworked and underfunded court system, even if the courts had jurisdiction over the E-merchant. California is darkening courts in response to its budget crisis. A well-respected federal judge with detailed knowledge of federal court finances explained the calamities that will befall that branch if the sequester and its effects aren't undone. And even without sequester, appropriators have not adequately funded our courts for some time and have

signaled more of the same in future budgets.

The American Arbitration Association, the CPR Institute, and other institutional providers of ADR services are building ODR options. [*Editor's note*: The CPR Institute, which co-publishes this newsletter, is working on a joint ODR venture for commercial mediation cases with the aforementioned modria.com.]

CyberSettle has been running a double-blind bidding system for small disputes since 1998, and recently morphed into settling claims between healthcare providers and their uninsured patients. Fair Outcomes Inc. of Boston offers fair-division options primarily through buy-sell facilitated trades. This industry will continue to develop rapidly, but not as a substitute for courts or litigators. It will serve unmet needs.

BIG DATA, PREDICTIVE ANALYTICS

Susskind is fascinated with big data and predictive analytics. According to Google Executive Chairman Eric Schmidt, we create more information every two days than we did from the dawn of civilization through 2003.

Cheap storage has made retention of that data possible. With it, Google can predict flu trends faster than the CDC based on user's searches for flu-related topics. President Obama last month issued an Executive Order noting that government weather data in the hands of entrepreneurs had created GPS technology, and requiring that the "default state of ... Government information resources shall be open and machine readable." Executive Order, "Making Open and Machine Readable the New Default for Government Information" (May 9, 2013) (available at http://1.usa.gov/1931KN6).

"Apollo 11 ran on approximately 74 kilobytes of memory and did 50 calculations per second," noted Ian Koenig of LexisNexis in a recent *ABA Journal* piece. Joe Dysart, "How lawyers are mining the information mother lode for pricing, practice tips and predictions," *ABA Journal* (May 2013) (available at http:// bit.ly/ZMwHmy). LexisNexis' system, now crunches between 5,000 and 10,000 calculations per second.

And these technologies are increasingly available to lawyers. Stanford Professor Mark Lemley believes analytics is the wave of the future. LexMachina's computers already crawl the entire federal court PACER docketing system daily looking for patent documents so practitioners can determine whether to try or settle their IP case. Lexis Advance MedMal Navigator offers similar predictions in medical-malpractice cases. The aforementioned TyMetrix draws on the billions of dollars in legal bills it has collected with permission through its sister bill review product to help project how much a matter will cost.

SkyAnalytics, of Andover, Mass., offers a macro view into the costs of legal services; Serengeti Law, a Thomson Reuters legal-matters management unit, offers a similar product. Not only are general counsel using the predictive power of such analytics to form budgets and choose outside counsel, law firms are using the data and analytics to gauge case strength and to get a read on what other firms are charging. The ability to learn in real time and gain insights from meaningful, predictive data is increasingly important to delivering new levels of value to clients.

And this author's Picture It Settled® is Moneyball for negotiation. The behavioral software has learned negotiating patterns from parties to thousands of litigated cases in a wide variety of jurisdictions and claim types. Picture It Settled® recently predicted the outcome of an IP dispute within 3.5% after just two rounds--and those predictions improved with additional offer data (17 total rounds). These projections look like "hurricane tracks" coming from each side to form a zone of potential agreement in the overlapping areas.

The predictions become actionable intelligence when parties calibrate their concession plans by dragging the target settlement dot to an advantageous, but probable, outcome. Using splines informed by settlement data, parties can then work toward settlement by making offers intended to induce cooperative reciprocation. By constantly input-

ting offer data and updating realistic targets in the game-like interface, users are able to increase their settlement rates by using a data-informed negotiation strategy. Picture It Settled® doesn't replace honed intuition; it puts a scope on the human controlled gun.

These are exciting times for legal technology. Increased computing power, cheap data storage, and rapid and ubiquitous communications have opened up new frontiers. Firms are mining their historical data and new data sets are being collected to aid decision-makers. Human judgment aided by advanced analytics is a powerful combination.

Don Philbin *is the Chair-Elect of the Dispute Resolution Section of the State Bar of Texas. He was named the 2014 "Lawyer of the Year" for Mediation in San Antonio by Best Lawyers®, was recognized as the 2011 Outstanding Lawyer in Mediation by the San Antonio Business Journal, and is one of seven Texas mediators listed in The International Who's Who of Commercial Mediation. Don is an elected fellow of the International Academy of Mediators, the American Academy of Civil Trial Mediators, and the Texas Academy of Distinguished Neutrals*.

Time to Dust Off Your Contractual Arbitration Boilerplate: New Commercial Arbitration Rules Released by AAA Merit a Closer Look

Emily E. Duke* & Luis G. Resendiz**

In recent years, parties to arbitration proceedings have complained that the process is costly and slow. Some commercial litigators advise companies to avoid arbitration provisions because the "advantages" of lower-cost, faster decisions have not been realized. In an attempt to make the arbitration process more efficient and cost-effective, the American Arbitration Association (AAA) released new commercial arbitration rules effective October 1, 2013.

The revised rules are worth a good look. According to the AAA, they are designed to arm arbitrators with more tools and authority to manage the arbitration process more effectively, and to resolve cases through mediation. Below, we explain some of the changes.

Amount in Controversy

For companies that wish to use arbitration for small disputes, the expedited rules have been revised to apply to cases up to $25,000 (the former rule was for cases up to $10,000). The default rule for such smaller disputes is that a sole arbitrator will decide a case based on documentary submissions only. Evidence will not be taken from witnesses unless the arbitrator feels that the witnesses are necessary.

On the flipside, large disputes "default" to requiring three arbitrators only if one of the asserted claims is at least $1 million. Otherwise, even if the sum of all the claims exceeds $1 million, only one arbitrator is required. In cases of financial hardship, the AAA retains discretion to require only one arbitrator even if the $1 million threshold is met.

Emergency Relief Just Got Easier

Many companies have drafted their contracts to allow the parties to go to court if they need emergency relief, such as a preliminary or interim injunction. The AAA Rules formerly only allowed arbitration of injunctive relief claims if both parties agreed to the use of optional emergency relief rules, or if the parties' contract specifically called for their application. Since the overwhelming majority of commercial contracts did not call out the emergency relief rules, a party seeking emergency relief was required to either ask their opponent to consent to the application of the rules or, if that was not feasible, bring their motion for emergency relief only to have the opposing party demand to have the motion heard in Court. Thus, a party seeking emergency relief could be significantly delayed in obtaining a hearing.

Now, the "optional" rules will automatically apply to contracts that require use of the AAA Commercial rules. However, the emergency relief rules are only automatic for contracts signed on or after October 1, 2013. Companies who want to preserve the right to go to court for emergency relief now need to look carefully at their arbitration provisions.

Discovery – Is It Out of Control?

Another major change is found in the case management rules. Under the prior regime, much case management was left to the arbitrator with little to no guidance from the AAA rules. As a result, parties were left to guess what approach any given arbitrator would take, particularly in cases with complex e-discovery issues or complex disputes. In some in-

stances, arbitration discovery looked fairly similar to discovery conducted under court rules.

The new Commercial rules stress the need for economy and speed, and give the arbitrator more authority to control the process to achieve those goals. The new AAA rules require a preliminary scheduling conference at which 29 suggested issues should be addressed. These range from discussion of whether dispositive motions, which are now expressly allowed by the AAA rules, would be helpful to narrowing the dispute, to discussion of e-discovery issues, to whether only automatic disclosures versus document requests will be allowed.

In an effort to address head-on the skyrocketing costs of producing certain electronically stored information, the new rules also encourage the arbitrator and parties to discuss searches and who should bear the cost for conducting them, taking into account the size of the dispute. Moreover, the rules expressly state that care should be taken to avoid simply importing court procedural rules into the arbitration process, as arbitration is supposed to be an *alternative* form of dispute resolution that is "less expensive and more expeditious" than court proceedings. (Rule P-1.)

Whether these changes result in more efficient and cost-effective arbitrations will ultimately rest with the arbitrators who are appointed, but the distinct "vibe" that the AAA has communicated is that arbitrators must make efforts to streamline the arbitration process and offer a mechanism that helps parties control costs (while being sensitive to the fact that parties must be able to adequately present their cases).

The Technology Age, At Last!

Other AAA rule changes simply reflect an acknowledgement of technology that is commonplace today. For example, the rules now provide for email notices – something that formerly required consent of all parties and the arbitrator. The rules also give the arbitrator express authority to allow witness testimony by video conference, internet, or other technologies that do not require in-person attendance.

Mediation

Another step to try to expedite the resolution of disputes is the inclusion of "mandatory" mediation for all cases where a claim or counterclaim exceeds $75,000. However, any party may opt out of mediation. The mediation will take place concurrently with the arbitration. The mediator will not serve as the arbitrator unless all parties agree otherwise. The mediation will be conducted under "the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties."

Many contracts that contemplate arbitration also require some type of preliminary mediation. It will be important when drafting these contracts to consider how those provisions will interplay with the new "mandatory" mediation, e.g. whether to accept the mandatory mediation as provided under the revised rules, whether to require mediation under the auspices of the AAA but under a different set of rules, or whether to completely opt out of the mandatory mediation and provide for a different mediation mechanism.

Enforcement Power & Sanctions

The new rules aim to give arbitrators more tools to enforce their decisions. Parties may request the arbitrator to order sanctions where a party fails to comply with its obligations under the rules or with an order of the arbitrator. An arbitrators can impose parameters for the exchange of information if the parties are unable to agree. Arbitrators may allocate costs of producing documentation. In case of willful non-compliance, arbitrators may exclude evidence and issue awards of costs.

Ability to Modify the Rules

Parties that agree to submit to the rules must remember that they may, by written agreement, vary the procedures under the rules. Counsel must be familiar with the rules and with the parties' objectives to be able to determine whether the rules should be tweaked to achieve such objectives. Things that readily come to mind are the rules for allocating costs, including arbitrators' and attorneys' fees and the appointment of one versus multiple arbitrators.

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The Value of Economic Analysis in Preparing for Mediation:

How Economic Analysis Can Help Redirect Attention from Party Positions to a More Objective Analysis Based on Component Variables

Donald R. Philbin, Jr.*

Why?" the child asks, negotiating a reprieve from eating green beans in favor of an early desert. "Because green beans are good for you," may have a hollow ring. "Because I said so" may work only to the extent of the power imbalance. Children want to know how their parents reach the conclusions that they serve up as positions. They probe for underlying rationales and interests.

Litigants have the same need to understand how their opponents reach conclusions. If 98% of filed cases will have negotiated outcomes, preparing to negotiate or mediate should focus more on underlying rationales than on positions, and for this the parties need a common vernacular through which to discuss the rationales that inform their positions.

This article discusses economic decision analysis as a tool to assist practitioners and their clients in preparing to negotiate or mediate. Of course, an economic analysis is only as good as the legal and factual analysis upon which it is built. It should show the legal remedies allowed by law and the facts supporting them. A sound economic analysis will get a party beyond the simple conclusion that it has a "good case" because there is some chance of a high or low award.

A litigant wants to understand how the adversary got to its "good case" conclusion and what "good case" means. Take this military example. An 80% chance of success in each of six crucial stages of a military operation does not make for good odds. Even though a president may be tempted to give the go-ahead if the generals report that the overall chances for the operation are good, the combined results are a surprisingly low 26%. Mathematically, the problem is represented as 0.80 to the sixth power or 0.80 x 0.80 x 0.80 x 0.80 x 0.80 x 0.80 = 0.26.

With the facts narrowed and the potential outcomes identified by legal analysis, it is possible to use economic analysis to graphically depict and value various scenarios in a litigated case. While we may not know with certainty what will happen in a specific trial, we do have an idea of the types of results that would flow from trying the same case 100 or 1,000 times. For example, we may get seven heads in 10 coin tosses--a high success rate. But that rate will be quite different (i.e., a "normal distribution") if you tossed the coin 100 times. Just ask anyone who has been to Las Vegas.

Stacking an economic analysis atop our legal analysis will also help us unravel the psychological biases that may skew our results. Anchoring, overconfidence, imperfect information, attribution errors, reactive devaluation, and other recognized biases account for noticeable differences in the answers different parties give to the same question. While we may not be able to completely "de-bias" the analysis, we can recognize that the same person will value the same object (house, car, etc.) differently depending on whether she is buying or selling.

Plaintiffs and defendants are no different. The legal system essentially forces defendants to write call options that are either in or out of the money depending on the final outcome. The challenge is to rationally derive that strike price in advance. So, we account for biases as we build tiered analyses.

Value of Economic Analysis

Intuition and experience can help lawyers and clients gauge the prospect of "winning" a lawsuit. Economic analysis takes this "gut" assessment to another level. It urges a systematic analysis of the different outcomes, from the lowest (zero) to the highest. Once these potential outcomes are determined, they can be depicted in decision trees that MBA students have used for years.

Potential outcomes are not much help until they are assigned a probability of actually occurring. For example, having a chance at winning a $12 million lottery pay off is nice, but it is more helpful to assess the probability of winning, which may be worse than getting hit by lightning. People are likely to have different views on the likelihood of particular outcomes. Those different assessments can be graphed out and rolled back mathematically to determine the impact they have on overall valuation. Some may dramatically affect the net expected value (NEV) while others will not.

After the potential outcomes are identified and the probabilities are assigned, we do some basic arithmetic to determine NEV for each outcome (the product of multiplying the outcome by its probability). Notice that in the process, we have animated what we mean by "probable," "reasonably possible," and "remote" in a way that makes sense to financial types and decision makers--whether or not they agree with the underlying assumptions. It is a clearer way of talking about a "good case" or a "bad case" because it focuses on a range of potential future outcomes, rather than just the historic events that underlie the suit.

The exercise also increases the confidence of the negotiator, who can now articulate how the "good case" conclusion was reached. That confidence tends to produce more favorable outcomes.

Using Decision Trees

Decision trees present alternatives in a graphic manner. They can help people make decisions under uncertain conditions by helping value the intangible in dollars. The more information that goes into the decision tree and the determination of probability, the greater the precision: but discovering that information comes with a price.

Here is a decision tree representing the issue of whether a small business owner should replace its aging computer system with a new one. In deciding whether to replace the current system, the buyer first must research different replacement cost options. It must also determine the price at which it will decide not to buy a new system and keep the current one – its "walk away" alternative. In this example, that figure is $56,000, but it's kept close to the vest during negotiations. The decision tree shows that the buyer identified three viable purchase options, all less than its walk-away number: buying from (1) a local dealer for $52,000, (2) a manufacturer's direct sales division for $50,000, or (3) an Internet-only seller for $48,999.

Armed with this information and its walk-away number, the buyer could decide to try to negotiate a lower price from the local dealer, from whom it might get some reciprocal business. It could choose to take the risk of buying from the Internet dealer, especially if the computer system comes with the same manufacturer's warranty. The buyer may feel more comfortable with the mid-priced system from the manufacturer's direct sales unit.

The same basic analysis applies to options in a litigated case. Parties to a dispute can decide to negotiate their own solution to a problem (with or without a mediator) or turn it over to someone else to impose a decision (as in arbitration or litigation). For each type of claim (e.g., breach of contract or warranty, misrepresentation, violation of consumer protection statutes, etc.), there are associated legal remedies (economic loss, treble or punitive damages, etc.), which provide the range of potential outcomes to the dispute. These outcomes can be depicted in a decision tree, just like the outcomes in the purchase decision.

But before getting to those remedies, to simplify, let's say the plaintiff has two options: to settle or litigate. This decision is completely within the parties' control and is represented in the decision trees as a square (called a "decision node"). However, the potential legal remedies that might result if the parties do not settle are represented by a circle (called a

"chance node"), since a jury, judge, or arbitrator would then determine the outcome for them.

In the following decision tree, let's assume that the computer system turns out to be defective and that it cannot be fixed under a written warranty. The small business owner in this example can mount a claim under the state consumer protection statute, which provides for treble damages, as well as a claim for breach of contract and for repair costs. For brevity, we will not get mired down in credits for a returned product, remedy elections, time value of money, etc. – though such assumptions could be progressively worked into the analysis in the context of a live mediation session.

Let's start by assuming four possible outcomes depicting high, medium, low and zero awards. The "bell curve" we hoped to forget from school provides an illustrative structure. It shows that if you had 100 trials of the same dispute, there will be high and low results, but the majority will probably lie somewhere in between.

There is usually some chance of no recovery (left). Better results, for example recovery of repair costs, or the purchase price, or even treble damages, are shown as the curve moves to the right along the horizontal axis. At some point, the probabilities start coming back down. The likelihood of treble damages is less than recovery of the purchase price, which may be less than the probability of repair costs. The outcomes with the highest probabilities form the top of the curve. Those that are possible, but less likely, form the sides that approach zero probability at the horizontal axis.

Of course, more data points will result in more definition, but our goal is to build a relatively simple model that provides a vehicle for evaluating and discussing plausible options while narrowing the open issues. Using this model can have a highly beneficial effect because it moves the parties away from heated discussions of past events, allowing them to make rational decisions based on the probability of various plausible future outcomes and the NEVs of each option.

In this example, the plaintiff will decide whether to take a chance on various legally available but uncertain outcomes at trial, or to negotiate a settlement. The defendant faces a similar decision. The value of the settlement offer is assumed to be $12,500 in this round.

The next step is to assign a value to each potential litigation outcome and the probability that each might occur. The parties' lawyers will have a good sense for these values as they shift into the role of investment banker during negotiations. But two investment bankers valuing the same intangible may reach different conclusions based on different biases. For example, sellers and plaintiffs routinely seek more than buyers and defendants are willing to pay – and if they switch roles, those views too will reverse.

Studies have been done of overconfidence. One showed that over 80% of entrepreneurs considered their chance of success as 70% or better, while 33% described it as "certain." That compares with an actual success rate of 33% for new firms (with success considered surviving for five years). Similarly couples about to be married tend to be overconfident that the marriage will last. They estimated their chances of later divorcing as modest, often zero, even though most know that the divorce rate is between 40-50%. Likewise, negotiators in baseball arbitration (in which the arbitrator selects the most reasonable offer) overestimated the chance that their offer would be chosen by 15%. Surveys find this "Lake Wobegon above-average" effect across all kinds of demographics – college professors, high school students, and truck and taxi drivers.

Let's assume that plaintiff's counsel has determined that the client is more likely to recover repair costs or the sales price than treble damages because a trebled recovery requires proof of malice, which might be difficult to establish in this case. Thus, the chance of recovering treble damages is assumed to be remote, possibly 1%. For illustration, the .01 estimate is placed just below the branch leading to the trebled outcome.

Let's also assume that plaintiff's counsel has determined that recovery of the purchase price has a greater probability of success, 19%, while recovery of repair costs is the most probable, estimated at 50%. Plaintiff's counsel also assumes that there is a 30% chance that it will lose at trial. These probabili-

ties are placed below the relevant tree branch. The probabilities must add up to 100%, and they do: (.01 + .19 + .50 + .30).

Next we need to determine the NEV of each branch of the litigation decision. We do this by multiplying the value of each potential outcome by its probability. Thus, we multiply .01 by $150,000, which equals $1,500, and do the same for the other outcomes. Then we add the products of each of these multiplications.

1% times $150,000 =	$ 1,500
19% times $50,000 =	$ 9,500
50% times $11,000 =	$ 5,500
30% times $0 =	$ 0
NEV for Litigation Branch =	$16,500

Because $16,500 exceeds the hypothetical $12,500 settlement offer, the plaintiff decides to litigate. But that assessment may change as different contingencies are considered.

Now assume that the defendant files a motion for summary judgment (MSJ), which its counsel assesses to have a 15% chance of being granted in the hypothetical jurisdiction. This means that there is an 85% chance that the motion will be denied. These assumptions are additional factors to consider when assessing the anticipated outcomes. The MSJ and its potential outcomes are added to the decision tree at the end of the litigate branch. Note that the potential trial outcomes now branch from a circle chance node on denial of the MSJ.

Adding this additional decision fork with its two possible outcomes and probabilities affects the NEV of the litigate branch. If summary judgment is granted to the defendant, the case goes away and the NEV of the litigation option is discounted to zero.

On the other hand, if summary judgment is denied, which has an 85% chance of occurring, the NEV of the litigate branch is only reduced by the 15% chance of the MSJ. So there remains an 85% chance that the plaintiff will get to take a swing at the trebled award and the other litigation options that fork from the denial of the MSJ. Thus, the NEV of all trial options ($16,500) is discounted by the good chance (85%) of overcoming a MSJ. This contingency, however, reduces the value of the litigate options to $14,025 (the product of $16,500 times .85). This is depicted in Figure 8.

Now, if we examine the discounted value of each litigate option, we find that the $150,000 trebled award (which is plaintiff's best-case scenario) is slightly less likely to occur because of the additional contingency. Instead of having a 1% chance of occurrence, it has a .085% chance of occurrence (0.01 times 0.85 = 0.0085). Recall that the NEV of the $150,000 award is $1,500 ($150,000 times the 1% (.01) probability of winning that award) pre-MSJ. To take into account the odds of summary judgment being denied (85%), we need to multiply $1,500 by .85. This gives us $1,275.

We do the same for the other litigate options to arrive at the weighted average (NEV). The plaintiff's worst-case scenario (zero recovery) is unchanged because any number multiplied by zero is zero. But the probability of getting zero is slightly less, reduced from 30% to 25.5% (.85 times 0.30) due to the summary judgment contingency. The plaintiff's chance of obtaining contract damages (.19 times .85) is discounted to 16% instead of 19%, which when multiplied by $50,000 results in an MSJ discounted award of $8,000 (down from $9,500). The plaintiff's chance of obtaining repair costs is discounted to 42.5% (.50 times .85). When .425 is multiplied by $11,000, the discounted result is $4,620.

Before discounting the potential litigation recoveries by the odds of a denied MSJ, the plaintiff had a 70% chance of recovering something more than zero (50% + 19% + 1% -- from figure 6). If we discount that aggregated percentage, it is reduced to 60% (.85 times .70) in figure 8 for the MSJ. Thus, the plaintiff could be said to have a “good chance” of winning something. But like the lottery, winning doesn't always mean a big win. Here plaintiff does not have a “good case” for a big win ($150,000), the amount we would all want to recover if playing the plaintiff's role.

Transaction Costs

Another important factor is missing from our analysis of possible outcomes. That is the impact of transaction costs on each scenario. Since the time it takes

to bring and defend claims, discover facts, file and defend motions and argue the case is expensive, we would do well to bake those costs into the analysis.

Let's assume that the plaintiff has negotiated a 25% contingency fee, which pays if the plaintiff wins the case. To take this into account, we need to reduce each potential litigate outcome by 25% (ignoring potential fee recoveries for now). Thus, winning $150,000 would cost $37,500, leaving a $112,500 net recovery; winning $50,000 would cost $12,500, leaving a $37,500 net recovery; winning $11,000 would cost $2,750, leaving a $8,250 net recovery. These outcome adjustments affect the NEV of the litigation option, as well as the discounted NEV, taking into account the MSJ. So instead of an NEV of $16,500, we get a NEV of $12,375, which is the sum of:

1% times $112,500 =	$ 1,125
19% times $37,500 =	$ 7,125
50% times $4,125 =	$ 4,125
30% times $0 =	$ 0
TOTAL =	$10,519

Then, instead of a discounted NEV of $14,025, we get a discounted NEV of $10,519, which is less than the anticipated settlement amount, calculated as follows: $12,375 times .85 = $10,518.75. This is depicted in figure 9 below.

The Defendant's Transaction Costs

Now we look through the other end of the telescope at the decision the defendant faces. Our defendant may not be able to negotiate a contingency fee, but let's assume that it can get a reduced fee due to other similar suits. So for purposes of this example we are going to assume that the defendant will incur conservative legal costs of $5,000 through summary judgment and another $5,000 if the case goes to trial.

The defendant's best-case scenario is winning the MSJ, in which case it will have only spent $5,000 in legal fees. Its worst-case scenario is losing the MSJ and the plaintiff winning treble damages. Its costs would then be $160,000 (i.e., $150,000 + $10,000, its own legal fees).

This does not fully account for the downside risk if the state deceptive practices statute allows a prevailing plaintiff to recover its attorney fees from the defendant. If the plaintiff's legal costs are shifted to the defendant, the litigate scenarios look like this.

Figure II. Defendant's Scenario with Plaintiff's Transaction Costs (bottom of page)

The worst case for the defendant is a treble damages award plus an award of the plaintiff's legal costs. To this must be added the defendant's own legal fees ($150,000 + $37,500 + $10,000 = $197,500). But the assumed probability that this scenario will occur at trial is 1% and the plaintiff must overcome the defendant's MSJ to get to trial. Following the path of the claim from left to right, the plaintiff has an 85% chance of overcoming the defendant's MSJ and a 1% chance of ringing the bell at trial thereafter. That's a .0085 chance of obtaining $197,500 or $1,678.75. But there are four different trial outcomes to the right of the MSJ branch. Therefore, we must factor each outcome by the same percentages and then sum them to reach NEV for the litigate alternative (including the MSJ and trial outcomes). $11,708.75 (.85 times .19 times $72,500), plus $10,093.75 (.85 times .50 times $23,750), plus $2,550 (.85 times .30 of $10,000, plus the $1,678.75 above equals $26,031.25 ($1,678.75 + $11,708.75 + $10,093.75 + $2,550.00). To the $26,031.25 we must add the 15% chance that the defendant wins its MSJ but still has to pay $5,000 in fees (.15 times $5,000 = $750). All in, the NEV equals $26,781 for the litigate branch with a summary judgment contingency. At that juncture, a defendant would presumably prefer to settle for $12,500 over the NEV of the litigate option ($26,781).

The plaintiff may not like the $10,519 NEV in figure 9 and the defendant may be equally unmoved by its $26,781 NEV in figure 11. But now they can argue about the component assumptions making up those numbers rather than arguing that my “good case” results in valuations at either end of the bell curve. The economic analysis exercise helps break down the broad conclusions we all tend to make. Not only does that begin to project valuations, it helps unravel the psychological biases we all bring to the process. It also gives us a way to disagree with the assumptions the other side is making without devolving to general assessments--“she's wrong, we'll get

$197,500." Without an objective assessment, we would all continue to jump from a "good case" assumption to the number we like the best ($150,000 or more for the plaintiff and $0 liability for the defendant).

Mediators Help Overcome Bias

Because we do not naturally question our own conclusions and we surely do not want our lawyer advocates to do it either, bringing in a neutral third-party mediator with knowledge of economic analysis can be very helpful. In private caucus, the mediator can help the parties unearth and discuss the assumptions embedded in their conclusory positions. Moreover, a neutral mediator's suggestions will be received quite differently than suggestions by their adversary--even if substantively the same. This is due to reactive devaluation bias.

A Cold War experiment quantified the magnitude of this type of bias. Soviet leader Mikhail Gorbachev made a proposal to reduce nuclear warheads by one-half, followed by further reductions over time. In the experiment the subjects were asked to react favorably or unfavorably to the proposal based on three assumptions: the proposal was made (1) by President Ronald Reagan, (2) by a group of unknown strategists, or (3) by Gorbachev himself. The surprise was not that the group reacted differently to the same proposal depending on its source, but the wide range of difference. When attributed to Reagan, 90% reacted favorably. That dropped marginally when attributed to the third-party (80%), and then by half (44%) when attributed to the Soviet leader.

Not surprisingly, proposed peace agreements between Israel and the Palestinians were also viewed differently depending on whether the proposal was said to have emanated from the Israeli government or the Palestinian Authority.

When economic analysis is used in mediation, the parties may agree on a range of potential outcomes and then discuss the probabilities--along with a cathartic discussion of past events--with the mediator in private caucus. For example, the mediator could reflect back to the plaintiff, "Let's assume Mr. X is Darth Vader and did try to ruin your business with faulty computers. How does that change your future options and potential outcomes?"

Whether an economic analysis is done before or during mediation, it lays a foundation for a constructive conversation, a means of keeping the discussion focused on probable or reasonably probable outcomes, as well as a common language to discuss those outcomes. It also helps the parties refine and discuss their expectations.

Instead of arguing that one side has a "good case" or a "bad case," the parties can visualize a possible range of outcomes. The parties may see that if they decide to litigate, the cumulative effect of their assumptions is NEV, rather than their preferred result. The exercise shows that a party can expect result A in an assumed percentage of total outcomes, and that the probability of result A, whether low or high is only one of several potential outcomes. Thus, the analysis recognizes the possibility that someone else may be right (even if those chances are low), and this has powerful psychological implications on decision making.

The variables in this analysis can easily be changed and other variables can be added, for example, present value (internal rate of return, adjusted for pre- and post-judgment interest), fee shifting, and business impact.

Taking attorney's fees and other transaction costs into account can illustrate how far apart the parties have to be in order to eliminate settlement, either through continued negotiation or mediation. Changing the assumptions and adding new variables helps the parties measure the impact of their biases. They can see whether reaching a settlement may make more or less sense under certain outcomes than it does under others. The process helps everyone more clearly understand what a "good case" or a "good chance" means in a common vernacular. That improves the process by defusing a fight and focusing on the assumptions that drive party aspirations and interest.

Conclusion

Decision makers are likely to make more rational decisions when they have the benefit of an economic analysis. They are less likely to make decisions

based on emotions and hard line positions. Economic analysis provides a basis for productive future-oriented negotiations, which can be facilitated by a mediator. Combined with other business evaluation tools, it can help parties make the best possible decisions as to how to resolve disputes with imperfect information.

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ETHICAL PUZZLER

By Suzanne M. Duvall*

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to214-368-7528.

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"It's not what you don't know that gets you in trouble, its what you think you know for sure, especially if it ain't so."

Mark Twain

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In this issue I asked prominent mediators to examine without breaching confidentiality, some of the mistakes hey have made and how those mistakes have helped them become more skilled at what they do. Here are their stories.

Al Ellis, (Dallas): As a part time mediator, or still spends most of his time being mediated upon, a mistake I often see is mediators treating each lawyer with similar cases the same. I think it is important for mediators to understand that similar facts and injuries should be evaluated differently for the experienced trial lawyer than the inexperienced high volume trial lawyer. Unfortunately, as a mediator, I've fallen into the same trap and must often remind myself to treat each case and each lawyer on their own merits.

Thomas (Tommy) J. Smith, (San Antonio): I am a strong advocate for the joint opening session in mediations. It gives the mediator the opportunity to set the stage for the whole day and it gives the lawyers an effective platform to present their position to the other parties. I have seen lawyers "win" their case at mediation with strong, effective opening statements. Only an unprepared, cowardly lawyer would suggest that no opening session was necessary. I have often used gentle persuasion to get recalcitrant lawyers to agree to my joint sessions. I have even occasionally used less than subtle persuasion to force these timid lawyers to do it my way.

Some time ago, I received a conference call from two lawyers needing an emergency mediation at my first available opening. We agreed on a session later that same week. One of the lawyers stated during the phone conference that no joint session would be necessary. I told him that I thought these sessions were important and we would discuss it further when they arrived later that week. At that appointed time, the lawyers and their clients arrived. The case involved three brothers in their 60s, arguing about their mother's very small estate. I put the brothers in separate rooms and met privately with the lawyers in my office. I argued for a joint session and both lawyers were adamant that one was neither necessary nor advisable ("These brothers hate each other and have not spoken in years"). I insisted and they resisted. They won and we had no joint session.

After several hours of mediation, we reached an impasse. We were so close, only a few thousand dollars a[art and I could tell that it wasn't the money, but family history that was keeping us apart. I took the lawyers back to my office and told them that if we could get the brothers together in the same room, I thought we could break the impasse. The lawyers very reluctantly agreed but refused to go in with them and insisted that I go in the brothers. I agreed, and the brothers and I all went into my large conference room, the one with a floor-to-ceiling window into the lobby of my office. I aksed them to sit down, but they all preferred to stand. I gave them an absolutely brilliant one minute talk about families, mothers, love and God. I told them I was going to leave them alone while I went to refill my coffee cup. I suggested that their deceased mother would want them to settle this case. I left and as I closed

the door behind me, I gave the lawyers sitting in my lobby a thumbs up signal. Approximately 5 seconds later after I closed the door behind me, I heard glass breaking. I rushed back in the room only to find two of the brothers on the floor wrestling like grade school children. The third brother was kicking one of his brothers. By the time I got them separated, at some risk to myself, they had broken a lamp, a large ceramic bowl, a picture on the wall and the telephone. I promptly led then out of the conference room to the lobby, where both lawyers, who had witnessed the entire episode without rising from their chairs, had expressions on their faces that could only be described as TOLD YOU SO." The case never settled.

Today I still favor joint opening sessions, but no longer think they are essential in all cases.

Bobby Mann, (Meridian): Suzanne there has been three problems: 1) Early on, I wanted so badly to settle cases that I not only presented the opposing party's offer and rationale supporting it but often actually became a devil's advocate in the discussion. This probably applied unnecessary and unwanted pressure on the parties. For years now I make certain that I am not applying pressure while discussing the other party's rationale for the settlement offer. I try to explain it and may ask questions about why it is wrong, but I never argue the point.

2) This has only happened once in an extremely emotional divorce mediation that had several offers which were continuously changing. We discussed a division of retirement benefits that was in my and one of the party's mind unresolved. There were many other moving parts that changed repeatedly, but the retirement benefits were never discussed again. After several hours of extensive negotiation, a settlement was reached and typed. Upon reading the first draft of the mediated settlement, one of the parties didn't remember the previous understanding of the retirement portion as the other party or me. This hit me in the face very late in the day and almost caused an impasse.

I now make sure that every time I carry an offer I discuss every single aspect of it each time and do not take for granted that certain aspects have been preciously resolved. This problem probably will only occur in family law mediations involving multiple issues but I can see the possibility in other cases.

3) Early on it was not unusual for me to go 16 hours in a mediation. I now will not go more than 10 hours because I do not want the parties to make decisions they will possibly later regret due to fatigue and or emotional frustration.

Elaine Block, (Houston): Here is my answer to your ethical puzzler: While I pride myself in having pretty good instincts about the people and issues involved in mediation, I have been wrong enough times to know that such judgments need to be kept in check. There have been times when the party who seems to be the most difficult turns out to the most reasonable. Conversely, the most charming party may turn out to be the least reliable. Sometimes, the attorney who seems to have the strongest legal arguments has not provided the full picture of the law.

These experiences have helped me not only be a better mediator but be aware in everyday life that withholding judgments is not only the right thing to do, but the smart thing to do.

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Comment: Cumulatively, the participants in this issue's Ethical Puzzler have conducted and/or participated in almost fourteen thousand mediations, making them the perfect candidates to discuss their mistakes and how those mistakes made them particularly skilled at what they do. Along the way, they have proven Twain's observation that *"It's not what you don't know that gets you in trouble, its what you think you know for sure, especially if it ain't so."*

Perhaps we would all do well to do suck introspection.

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SUBMISSION DATES FOR UPCOMING ISSUES OF
ALTERNATIVE RESOLUTIONS

Issue	**Submission Date**	**Publication Date**
Spring	March 15, 2014	April 15, 2014
Summer	June 15, 2013	July 15, 2014
Fall	September 15, 2014	October 15, 2014
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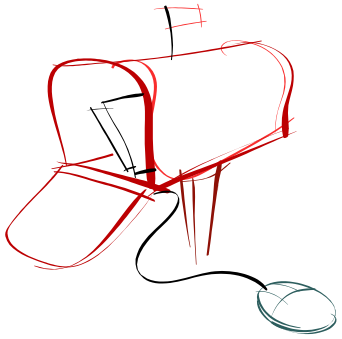

ADR ON THE WEB

Kluwer Mediation Blog
http://kluwermediationblog.com/

By Mary Thompson*

The Kluwer Mediation Blog is a publication of Kluwer Law International. One can search by category, contributor or date. The categories are extensive: Deal Mediation, International Courts, Mediation Advocacy, Confidentiality, etc.

The blog features approximately 30 contributors, many with an international perspective. The posts are kept current, which is refreshing in a blogosphere where the most recent posts for many sites are several years old. A sampling of posts from several categories demonstrates the diversity of articles:

Communication

In *Ramblings of a Neural Linguist: Dealing with Problems of Perception*, National University of Singapore law professor Joel Lee explores the dilemma of the "What Happened?" conversation in mediation. Lee proposes specific questioning techniques, to explore the parties' very subjective and differing perceptions of events related to the conflict. Drawing from the field of neuro-linguistic programming, the author describes how subjective perceptions serve as obstacles to agreement.

Link: http://kluwermediationblog.com/2012/08/26/what%e2%80%99s-in-a-frame-or-the-power-of-emotions-and-subliminal-messaging/

Decision Making

Nadja Alexander, from the International Institute for Conflict Engagement and Resolution posts *What's in a Frame? (or the Power of Emotions and Subliminal Messaging).* Alexander cites research that illustrates why parties in mediation value choice, easy comparisons, certainty and getting "free" concessions. Examples are provided of how mediators and parties can frame offers to take advantage of these dynamics of negotiation and decision making.

Link: http://kluwermediationblog.com/2012/08/26/what%e2%80%99s-in-a-frame-or-the-power-of-emotions-and-subliminal-messaging/

Negotiation

In *The Argument as a Persuasive Tool In Negotiation,* California attorney and mediator Jeffery Krivis describes three types of argument and the role of each in mediation. Krivis posits that there are three main models of argument: Arguments as War, Arguments as Proofs, and Arguments as Performances. Finding positive uses for each depends on how and where they are used in the justice system. Krivis offers strategies for the appropriate use of argument in mediation, focusing on arguments that permit forward movement without boxing in the other players.

Link: http://kluwermediationblog.com/2013/10/16/the-argument-as-a-persuasive-tool-in-negotiation/

This is a relatively new mediation resource; the blog posts begin in 2011. Kluwer Mediation Blog is a well-organized, comprehensive resource for mediators, arbitrators and ADR advocates. A link to a related blog, Kluwer Arbitration is also found on this site.

Link: http://kluwerarbitrationblog.com/

***Mary Thompson,** *Corder/ Thompson & Associates, is a mediator, facilitator and trainer in Austin.*

AGONISM, REVILING THE STREET, AND SONG LASHING

Kay Elkins Elliott*

Do you know that different cultures have quite different rituals for resolving conflict? The above terms, with which you may be unfamiliar, represent widely divergent social norms for the prevention or lessening of violence. Although we may not want to copy these forms, we can benefit by looking at their rituals, processes and success rates – much as an innovator might borrow ideas from several very different disciplines.

The evolution of any new idea, after all, is usually the result of searching for *adjacent possibles*: old ideas, combined with accidental discoveries, jiggered into new shapes. Before we look too closely at some specific multicultural conflict mechanisms, let us step away and look together at innovation itself. Where do good ideas come from?

Some environments squelch innovation while others nurture it. An obvious example of a nurturing environment is the Web, which is capable of the creation, diffusion, and adoption of good ideas. Our brains shape the environments we inhabit, and our environments shape us.

In his brilliant book, Where Good Ideas Come From: The Natural History of Innovation, Steven Johnson explains six recursive patterns in fertile environments that can, and often do, lead to new ideas. These patterns can be deliberately embraced and utilized by our extraordinary brains, leading to innovative thinking about conflict resolution. One of those patterns is the concept of adjacent possibles, mentioned above; another is the concept of *liquid networks.*

A good idea is not just a light-bulb or an epiphany; it is a constellation of thousands of neurons firing in sync together for the first time in the brain. It is a neural network with a distinct shape. Within your 100 billion-neuron-brain, intricate and elaborate connections form: each neuron being capable of connecting to at least a thousand other neurons distributed across your brain.

The average human brain (and most of you are above average!) holds 100 trillion neural connections! Our brains are the most complex networks on the planet. The Web, by contrast, has only 10 links for each of its approximately 40 billion pages – a far smaller number. These connections are more important, in terms of wisdom, than the total number of neurons in your brain. You can even lose some neurons through illness, abuse, trauma, or aging, and still be able to think and innovate, especially since the brain can replace some neurons through plasticity, but more importantly, because of the many neural connections that remain and will be formed throughout life.

Repetitive tasks are networks too, but are quite different from creative ideas. When a chimpanzee picks up a nearby stick for the first time to help capture ants within an ant hill, the behavior is not repetitive – the chimpanzee has made a tool. The stick is the adjacent possible, and the new behavior is an innovation. See, Kerry Patterson, et.al., *Al, Influencer: The Power to Change Anything* (2013). When other members of the same group of chimpanzees watch our inventor do this, parts of their brains activate and they copy the behavior. Other groups of chimpanzees, far from this innovative bunch, don't know about this innovation and continue to stick their short fingers into the ant hill.

We share 95 percent of our DNA with chimpanzees. When a group of diverse scientists secretly gathered at Los Alamos during World War II to collaborate on the creation of the atomic bomb, a powerful liquid network was established. Their *propinquity* enhanced their creativity, resulting in the innovations that historians believe was the decisive factor in our

winning and in the earlier cessation of armed warfare. The close physical proximity, the isolation and even secrecy about their mission and location, intensified their creativity and accelerated the pace of innovative thinking. Even with all the technology of the Los Alamos laboratories, it was the genius and interaction of the humans which proved the most productive tool for generating good ideas: a circle of humans at a table, talking.

Going back to the *adjacent possibles,* here is a chain of events that led to saving the lives of many babies born in developed and developing countries. A Parisian obstetrician named Stephane Tarnier, in the late 1870's, decided one day to take a walk in the Jardin des Plantes where the Paris Zoo was housed. He happened to see an exhibit of chicken incubators, which triggered the idea of creating a human incubator.

At the time, 66% of low-weight babies died soon after birth, but after collaborating with the zoo's poultry expert, an incubator was created that would quickly lower the infant mortality rate by half. That original incubator evolved into the sophisticated ones we now use in many hospitals around the world. However those require a certain level of contextual sophistication to operate properly over time.

When an MIT professor, Timothy Prestero, the founder of Design that Matters, realized in 2008 that most incubators donated to developing countries fail (estimates exceed 90%) within the first five years and are not repaired, he worked with a Boston doctor, Jonathan Rosen, to create incubators that would be cheaper, less complicated, and easier to repair. The NeoNurture was created from spare automobile parts that are in abundant supply in many developing countries. It can be repaired by locals who understand automobile repair, which many do. Many good ideas are like that sequence of events: a chicken hatchery, seen by a doctor in 1870, evolves into an incubator in the 21st century made from the spare parts of cars. Id., at 25-28.

This example actually illustrates the two patterns we are examining: adjacent possibles and liquid networks. Countless articles and books have explored the sociology and psychology of scientific discoveries and progress from a retrospective point. In the 1990's, a McGill University psychologist, Kevin Dunbar, took a different approach and filmed scientists working in four molecular biology laboratories. His approach was not retrospective: he captured their dialogues in the moment. He also conducted interviews with them, but they had to speak in the present tense, which he called *in media res*. The full, emotional, detailed thought processes they were experiencing are captured in those *in vivo* (i.e. in the wild) interviews. The exchanges were coded, which allowed the team to track the patterns of communication occurring in the laboratory interactions. He was able to demonstrate that most creative breakthroughs were the result of ordinary lab meetings where the scientists just talked about their work and asked each other questions. Id., at 59-61. Wouldn't it be fascinating to have films and *in media* res interviews of the scientists who worked at Los Alamos?

Now let's go back and look specifically at some dispute resolution mechanisms in other cultures by shining the light of these two patterns on them. What is *song lashing?* What is *reviling the street?* What is agonism?

In *The Argument Culture: Moving from Debate to Dialogue* (1998), Deborah Tannen sets forth a powerful argument that America has descended into unproductive and unscientific dispute resolution mechanisms, which she refers to by the global term *agonism.* Her complaints center on the unproductive and uncreative way Americans deal with conflict chiefly through litigation, social media and political factionalism. She believes that in the American argument culture, aggression has come to be valued for its own sake. She also points out that in all human relations people are required to find ways to get what they want without seeming to dominate others. Conflict, therefore, can often be resolved without confrontational tactics – but our culture values fighting for its own sake, lessening the opportunity to find more creative and more personally satisfying conflict approaches.

Many other cultures choose to manage conflict by ritualized behaviors that allow aggression to be expressed without escalating to violence. In one traditional Chinese village, Michael Bond and Wang

Sung-Hsing discovered a practice dating from 1900 that was still practiced in 1983 called "reviling the street". This is how they described it:

> The moment that a quarrel begins abusive words … are poured forth in a filthy stream to which nothing in the English language offers any parallel. … Women use even viler language than men, and continue it longer… The practice of "reviling the street" is often indulged in by women, who mount the flat roof of the house and shriek away for hours at a time… If the day is a hot one the reviler bawls as long as he (or she) has breath, then proceeds to refresh himself by a session of fanning, and afterwards returns to the attack with renewed fury.

Reading this reminded me of a story in which an aggrieved American wife would always retreat to a closet and engage in a stream of invective against her husband until she was calm, then would return to his presence, kiss him on the head, and go about her chores. Notice that in both situations the "victim" does not confront the perpetrator and can be heard by others in the community or the family. Both of these contextual facts contribute to giving the victim a way to express negative emotions without endangering anyone or causing major family or community disharmony.

How could this be used in mediation? I think it already is. The common practice of using a caucus session to encourage each side to vent, away from the other party, accomplishes much of the same objectives and is done in a safe, neutral place: the mediator's office. How does the Chinese practice compare to typical American litigation, media attacks and political mud-slinging? Could we offer more outlets for the aggrieved than the courtroom, the TV talk show (Firing Line), and the newspaper? Does mediation itself ameliorate some of the agonism of our culture and, if so, does that explain its popularity? What types of ritual vituperation might we add to our menu of choices in managing conflict?

A similar ritual, song-lashing, occurs in rural, traditional Nigerian villages. Teenage girls engage in creative streams of insults done in rhyme, proverbs or musical verses. The purpose is to heap insults on a listener, who is not named! Onlookers enjoy the ritual as a form of performance art and often the song lashers are given praise for their skill. Primarily this set of behaviors provides an outlet for the performer, does not specifically shame the target, and does not lead to physical aggression.

Great ideas come from looking at adjacent possibles and fertilizing innovative thought in liquid networks. To close, let me suggest all mediators do a little research on how other cultures solve the very human problems we all have: scarce resources, the need for public approval and support, the necessity for change yet the stress change causes, our frightening power to communicate and to kill, just to name a few. Mediators are expert influencers. What if we all spent more time identifying the vital behaviors that can transform conflict into peace? What if we all developed the personal, social and structural skills that science has shown can influence change in the direction of peace and harmony? Is that perhaps what being a mediator is really about? Let me know your ideas – we are a liquid network!

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FROM THE EDITORS

Stephen Huber* & E. Wendy Huber*

This introduction is followed by heavily edited versions of seven important judicial decisions from around the nation that are likely of interest to the readers of Alternative Resolutions. One if from the Supreme Court, four from federal courts of appeals, and two from state courts.

1. *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas*, --- S.Ct. ---- (2013); 2013 WL 6231157 (Unanimous Decision)

At issue is the procedure that is available to a civil defendant who seeks to enforce a forum-selection clause. The answer is by a motion by defendant to transfer under § 1404(a), and the district court "should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer."

2. *Delaware Coalition for Open Government, Inc. v. Strine*, --- F.3d ---- (3d Cir. 2013), 2013 WL 5737309.

The Delaware legislature enacted a State-Sponsored Arbitration Program that provided for Court of Chancery judges to act as arbitrators. As with private arbitration, the proceedings would be private. [The opinion provides a full explanation of the statutory scheme.] The Delaware Coalition argued that a court-conducted arbitration was subject to public access under the First Amendment, and the Third Circuit agreed.

3. *In re Wal-Mart Wage and Hour Employment Practices Litigation*, --- F.3d ---- (9th Cir. 2013); 2013 WL 6605350

This bit of disputation is but a small piece of major litigation regarding Wal-Mart's employment practices. Nevertheless, a central arbitration question is at stake: the enforcement of contractual provisions limiting judicial review of an arbitration award. The 9th Circuit ruled, in a matter of first impression, that parties cannot contract around § 10 of the FAA (grounds for vacating an arbitration award).

4. *D.R. Horton, Inc. v. N.L.R.B.*, --- F.3d ---- (5th Cir. 2013), 2013 WL 6231617

At issue here is the interaction of the Federal Arbitration Act and the National Labor Relations Act (NLRA). The Board ruled that conditioning employment on agreement to arbitrate all disputes (and no class or collective action permitted) constituted a violation of the NLRA. The Fifth Circuit reversed because the NLRB had failed to give proper weight to the FAA.

5. *Ross v. Waccamaw Community Hosp.*, --- S.E.2d ---- (S.C. 2013); 2013 WL 3200593

Ross is of interest because it explains the South Carolina mandatory pre-suit mediation process for medical malpractice claims The specific issue is the expiration of the pre-suit mediation period and the further jurisdiction of the court.

6. ***Bank of America, N.A. v. District of Columbia*, No. 10CV-78 (2013)**

This decision by a mid-level District of Columbia court demonstrates how a determined court can avoid enforcement of an arbitration agreement.

7. *Eller v. National Football League Players Ass'n*, 731 F.3d 752, (8th Cir. 2013)

Eller tells much about labor-management negotiations in professional football, and will be of particular interest to sports fans.

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Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for Western Dist. of Texas, --- S.Ct. ---- (2013); 2013 WL 6231157 (Unanimous Decision)

Justice ALITO delivered the opinion of the Court.

The question in this case concerns the procedure that is available for a defendant in a civil case who seeks to enforce a forum-selection clause. We reject petitioner's argument that such a clause may be enforced by a motion to dismiss under 28 U.S.C. § 1406(a) or Rule 12(b)(3) of the Federal Rules of Civil Procedure. Instead, a forum-selection clause may be enforced by a motion to transfer under § 1404(a), which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." When a defendant files such a motion, we conclude, a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer. In the present case, both the District Court and the Court of Appeals misunderstood the standards to be applied in adjudicating a § 1404(a) motion in a case involving a forum-selection clause, and we therefore reverse the decision below.

Petitioner Atlantic Marine Construction Co., a Virginia corporation with its principal place of business in Virginia, entered into a contract with the United States Army Corps of Engineers to construct a child-development center at Fort Hood in the Western District of Texas. Atlantic Marine then entered into a subcontract with respondent J–Crew Management, Inc., a Texas corporation, for work on the project. This subcontract included a forum-selection clause, which stated that all disputes between the parties "shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division."

When a dispute about payment under the subcontract arose, however, J–Crew sued Atlantic Marine in the Western District of Texas, invoking that court's diversity jurisdiction. Atlantic Marine moved to dismiss the suit, arguing that the forum-selection clause rendered venue in the Western District of Texas "wrong" under § 1406(a) and "improper" under Federal Rule of Civil Procedure 12(b)(3). In the alternative, Atlantic Marine moved to transfer the case to the Eastern District of Virginia under § 1404(a). J–Crew opposed these motions.

The District Court denied both motions. It first concluded that § 1404(a) is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum. The District Court then held that Atlantic Marine bore the burden of establishing that a transfer would be appropriate under § 1404(a) and that the court would "consider a nonexhaustive and nonexclusive list of public and private interest factors," of which the "forum-selection clause [was] only one such factor." Giving particular weight to its findings that "compulsory process will not be available for the majority of J–Crew's witnesses" and that there would be "significant expense for those willing witnesses," the District Court held that Atlantic Marine had failed to carry its burden of showing that transfer "would be in the interest of justice or increase the convenience to the parties and their witnesses."

Atlantic Marine petitioned the Court of Appeals for a writ of mandamus directing the District Court to dismiss the case under § 1406(a) or to transfer the case to the Eastern District of Virginia under § 1404 (a). The Court of Appeals denied Atlantic Marine's petition because Atlantic Marine had not established a "clear and indisputable" right to relief. See *Cheney v. United States Dist. Court for D. C.,* 542 U.S. 367,

381 (2004) (mandamus "petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable")). Relying on *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22 (1988), the Court of Appeals agreed with the District Court that § 1404(a) is the exclusive mechanism for enforcing a forum-selection clause that points to another federal forum when venue is otherwise proper in the district where the case was brought. The court stated, however, that if a forum-selection clause points to a nonfederal forum, dismissal under Rule 12(b)(3) would be the correct mechanism to enforce the clause because § 1404(a) by its terms does not permit transfer to any tribunal other than another federal court. The Court of Appeals then concluded that the District Court had not clearly abused its discretion in refusing to transfer the case after conducting the balance-of-interests analysis required by § 1404(a).

Atlantic Marine contends that a party may enforce a forum-selection clause by seeking dismissal of the suit under § 1406(a) and Rule 12(b)(3). We disagree. Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is "wrong" or "improper." Whether venue is "wrong" or "improper" depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause.

Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Rule 12(b)(3) states that a party may move to dismiss a case for "improper venue." These provisions therefore authorize dismissal only when venue is "wrong" or "improper" in the forum in which it was brought.

This question—whether venue is "wrong" or "improper"—is generally governed by 28 U.S.C. § 1391 That provision states that "[e]xcept as otherwise provided by *law* ... this section *shall* govern the venue of *all civil actions* brought in district courts of the United States" (emphasis added). It further provides that "[a] civil action may be brought in: (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action." § 1391(b).

When venue is challenged, the court must determine whether the case falls within one of the three categories set out in § 1391(b). If it does, venue is proper; if it does not, venue is improper, and the case must be dismissed or transferred under § 1406(a). Whether the parties entered into a contract containing a forum-selection clause has no bearing on whether a case falls into one of the categories of cases listed in § 1391(b). As a result, a case filed in a district that falls within § 1391 may not be dismissed under § 1406(a) or Rule 12(b)(3).

Petitioner's contrary view improperly conflates the special statutory term "venue" and the word "forum." It is certainly true that, in some contexts, the word "venue" is used synonymously with the term "forum," but § 1391 makes clear that venue in "all civil actions" must be determined in accordance with the criteria outlined in that section. That language cannot reasonably be read to allow judicial consideration of other, extrastatutory limitations on the forum in which a case may be brought.

The structure of the federal venue provisions confirms that they alone define whether venue exists in a given forum. In particular, the venue statutes reflect Congress' intent that venue should always lie in *some* federal court whenever federal courts have personal jurisdiction over the defendant. The first two paragraphs of § 1391(b) define the preferred judicial districts for venue in a typical case, but the third paragraph provides a fallback option: If no other venue is proper, then venue will lie in "*any judicial district* in which any defendant is subject to the court's personal jurisdiction" (emphasis added). The statute thereby ensures that so long as a federal court has personal jurisdiction over the defendant, venue will always lie somewhere. Yet petitioner's approach would mean that in some number of cases—those in which the

forum-selection clause points to a state or foreign court—venue would not lie in any federal district. That would not comport with the statute's design, which contemplates that venue will always exist in some federal court.

The conclusion that venue is proper so long as the requirements of § 1391(b) are met, irrespective of any forum-selection clause, also follows from our prior decisions construing the federal venue statutes. [Discussion of prior Supreme Court decisions omitted.]

Although a forum-selection clause does not render venue in a court "wrong" or "improper" within the meaning of § 1406(a) or Rule 12(b)(3), the clause may be enforced through a motion to transfer under § 1404(a). That provision states that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." Unlike § 1406(a), § 1404 (a) does not condition transfer on the initial forum's being "wrong." And it permits transfer to any district where venue is also proper (*i.e.,* "where [the case] might have been brought") or to any other district to which the parties have agreed by contract or stipulation.

Section 1404(a) therefore provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district. And for the reasons we address in Part III, *infra,* a proper application of § 1404(a) requires that a forum-selection clause be "given controlling weight in all but the most exceptional cases."

Atlantic Marine argues that § 1404(a) is not a suitable mechanism to enforce forum-selection clauses because that provision cannot provide for transfer when a forum-selection clause specifies a state or foreign tribunal, and we agree with Atlantic Marine that the Court of Appeals failed to provide a sound answer to this problem. The Court of Appeals opined that a forum-selection clause pointing to a nonfederal forum should be enforced through Rule 12(b)(3), which permits a party to move for dismissal of a case based on "improper venue." As Atlantic Marine persuasively argues, however, that conclusion cannot be reconciled with our construction of the term "improper venue" in § 1406 to refer only to a forum that does not satisfy federal venue laws. If venue is proper under federal venue rules, it does not matter for the purpose of Rule 12(b)(3) whether the forum-selection clause points to a federal or a nonfederal forum.

Instead, the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*. Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer. For the remaining set of cases calling for a nonfederal forum, § 1404(a) has no application, but the residual doctrine of *forum non conveniens* has continuing application in federal courts. And because both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum. …

Although the Court of Appeals correctly identified § 1404(a) as the appropriate provision to enforce the forum-selection clause in this case, the Court of Appeals erred in failing to make the adjustments required in a § 1404(a) analysis when the transfer motion is premised on a forum-selection clause. When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied. And no such exceptional factors appear to be present in this case.

In the typical case not involving a forum-selection clause, a district court considering a § 1404(a) motion (or a *forum non conveniens* motion) must evaluate both the convenience of the parties and various public-interest considerations. Ordinarily, the district court would weigh the relevant factors and decide whether, on balance, a transfer would serve "the convenience of parties and witnesses" and otherwise promote "the interest of justice." § 1404(a).

Factors relating to the parties' private interests include "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 241, n. 6 (1981). Public-interest factors may include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Ibid.* The Court must also give some weight to the plaintiffs' choice of forum. See *Norwood v. Kirkpatrick,* 349 U.S. 29, 32 (1995).

The calculus changes, however, when the parties' contract contains a valid forum-selection clause, which "represents the parties' agreement as to the most proper forum." The "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." For that reason, and because the overarching consideration under § 1404(a) is whether a transfer would promote "the interest of justice," a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases. The presence of a valid forum-selection clause requires district courts to adjust their usual § 1404(a) analysis in three ways.

First, the plaintiff's choice of forum merits no weight. Rather, as the party defying the forum-selection clause, the plaintiff bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted. Because plaintiffs are ordinarily allowed to select whatever forum they consider most advantageous (consistent with jurisdictional and venue limitations), we have termed their selection the "plaintiff's venue privilege." But when a plaintiff agrees by contract to bring suit only in a specified forum—presumably in exchange for other binding promises by the defendant—the plaintiff has effectively exercised its "venue privilege" before a dispute arises. Only that initial choice deserves deference, and the plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed.

Second, a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests. When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum. As we have explained in a different but instructive context, "[w]hatever inconvenience [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting." *The Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 17–18 (1972).

As a consequence, a district court may consider arguments about public-interest factors only. Because those factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases. Although it is conceivable in a particular case that the district court would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, such cases will not be common.

Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations. See *Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 241, n. 6 (1981) (listing a court's familiarity with the "law that must govern the action" as a potential factor). A federal court sitting in diversity ordinarily must follow the choice-of-law rules of the State in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 494–496 (1941). However, we previously identified an exception to that principle for § 1404(a) transfers, requiring that the state law applicable in the original court also apply in the transferee court. We deemed that exception necessary to prevent defendants, properly subjected to suit in the transferor State," from "invok[ing] § 1404(a) to gain the benefits of the laws of another jurisdiction. See *Ferens v. John Deere Co.,* 494 U.S. 516, 522 (1990) (extending the *Van Dusen* rule to § 1404(a) motions by plaintiffs).

The policies motivating our exception to the *Klaxon* rule for § 1404(a) transfers, however, do not support an extension to cases where a defendant's motion is premised on enforcement of a valid forum-selection clause. See *Ferens, supra,* at 523. To the contrary, those considerations lead us to reject the rule that the law of the court in which the plaintiff inappropriately filed suit should follow the case to the forum contractually selected by the parties. In *Van Dusen,* we were concerned that, through a § 1404(a) transfer, a defendant could "defeat the state-law advantages that might accrue from the exercise of [the plaintiff's] venue privilege." 376 U.S., at 635.

A plaintiff who files suit in violation of a forum-selection clause enjoys no such "privilege" with respect to its choice of forum, and therefore it is entitled to no concomitant "state-law advantages." Not only would it be inequitable to allow the plaintiff to fasten its choice of substantive law to the venue transfer, but it would also encourage gamesmanship. Because § 1404(a) should not create or multiply opportunities for forum shopping, we will not apply the *Van Dusen* rule when a transfer stems from enforcement of a forum-selection clause: The court in the contractually selected venue should not apply the law of the transferor venue to which the parties waived their right.

For the reasons detailed above, the same standards should apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums. We have noted in contexts unrelated to forum-selection clauses that a defendant "invoking *forum non conveniens* ordinarily bears a heavy burden in opposing the plaintiff's chosen forum." *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Co.,* 549 U.S. 422, 430 (2007). That is because of the harsh result of that doctrine: Unlike a § 1404 (a) motion, a successful motion under *forum non conveniens* requires dismissal of the case. *Norwood,* 349 U.S., at 32. That inconveniences plaintiffs in several respects and even "makes it possible for [plaintiffs] to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate." Such caution is not warranted, however, when the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid forum -selection clause. In such a case, dismissal would work no injustice on the plaintiff.

When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations. A forum-selection clause, after all, may have figured centrally in the parties' negotiations and may have affected how they set monetary and other contractual terms; it may, in fact, have been a critical factor in their agreement to do business together in the first place. In all but the most unusual cases, therefore, "the interest of justice" is served by holding parties to their bargain.

The District Court's application of § 1404(a) in this case did not comport with these principles. The District Court improperly placed the burden on Atlantic Marine to prove that transfer to the parties' contractually preselected forum was appropriate. As the party acting in violation of the forum-selection clause, J –Crew must bear the burden of showing that public-interest factors overwhelmingly disfavor a transfer.

The District Court also erred in giving weight to arguments about the parties' private interests, given that all private interests, as expressed in the forum-selection clause, weigh in favor of the transfer. The District Court stated that the private-interest factors "militate against a transfer to Virginia" because "compulsory process will not be available for the majority of J–Crew's witnesses" and there will be "significant expense for those willing witnesses." But when J–Crew entered into a contract to litigate all disputes in Virginia, it knew that a distant forum might hinder its ability to call certain witnesses and might impose other burdens on its litigation efforts. It nevertheless promised to resolve its disputes in Virginia, and the District Court should not have given any weight to J–Crew's current claims of inconvenience.

The District Court also held that the public-interest factors weighed in favor of keeping the case in Texas because Texas contract law is more familiar to federal judges in Texas than to their federal colleagues in Virginia. That ruling, however, rested in part on the District Court's belief that the federal court sitting in Virginia would have been required to apply Texas' choice-of-law rules, which in this case pointed to Texas contract law. But for the reasons we have explained, the transferee court would apply Virginia choice-of-law rules. It is true that even these Virginia

rules may point to the contract law of Texas, as the State in which the contract was formed. But at minimum, the fact that the Virginia court will not be required to apply Texas choice-of-law rules reduces whatever weight the District Court might have given to the public-interest factor that looks to the familiarity of the transferee court with the applicable law. And, in any event, federal judges routinely apply the law of a State other than the State in which they sit. We are not aware of any exceptionally arcane features of Texas contract law that are likely to defy comprehension by a federal judge sitting in Virginia.

Delaware Coalition for Open Government, Inc. v. Strine, --- F.3d ----, 2013 WL 5737309 (3d Cir. 2013)

SLOVITER, Circuit Judge.

This appeal requires us to decide whether the public has a right of access under the First Amendment to Delaware's state-sponsored arbitration program. Chancellor Strine and the judges of the Delaware Chancery Court ("Appellants"), who oversee the arbitrations, appeal a judgment on the pleadings entered in favor of the Delaware Coalition for Open Government (the "Coalition"). [In addition to the parties' briefs, three briefs on behalf of amicus curiae have also been filed. The Corporate Law Section of the Delaware State Bar Association and the Nasdaq OMX Group Inc. and NYSE Euronext filed briefs in support of the Appellants" position. The Reporters Committee for Freedom of the Press and several news organizations filed a brief in support of the Coalition's position.]

The District Court found that Delaware's proceedings were essentially civil trials that must be open to the public. *Delaware Coalition for Open Government v. Strine*, 894 F.Supp.2d 493 (D.Del. 2012). [Despite the "D.Del." citation, the case was assigned to Judge Mary McLaughlin of the Eastern District of Pennsylvania, because all of the United States District Judges in Delaware recused themselves.] Appellants dispute the similarities and argue that the First Amendment does not mandate a right of public access to Delaware's proceedings. [We affirm.]

In early 2009, in an effort to "preserve Delaware's preeminence in offering cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters," Delaware amended its code to grant the Court of Chancery "the power to arbitrate business disputes." As a result, the Court of Chancery created an arbitration process as an alternative to trial for certain kinds of disputes. As currently implemented, the proceeding is governed both by statute and by the Rules of the Delaware Court of Chancery.

Delaware's government-sponsored arbitrations are not open to all Delaware citizens. To qualify for arbitration, at least one party must be a "business entity formed or organized" under Delaware law, and neither party can be a "consumer." The statute is limited to monetary disputes that involve an amount-in-controversy of at least one million dollars.

Once qualified parties have consented "by agreement or by stipulation" to avail themselves of the proceeding, they can petition the Register in Chancery to start arbitration. The fee for filing is $12,000, and the arbitration costs $6,000 per day after the first day. After receiving a petition the Chancellor selects a Chancery Court judge to hear the arbitration. The arbitration begins approximately ninety days after the petition is filed, and, is conducted in a Delaware courthouse during normal business hours. Regular Court of Chancery Rules governing depositions and discovery apply to the proceeding, but the rules can be modified by consensual agreement of the parties.

The Chancery Court judge presiding over the proceeding "may grant any remedy or relief deemed just and equitable and within the scope of any applicable agreement of the parties." Once a decision is reached, a final judgment or decree is automatically entered. Both parties have a right to appeal the resulting "order of the Court of Chancery" to the Delaware Supreme Court, but that court reviews the arbitration using the deferential standard outlined in the Federal Arbitration Act. Arbitrations can therefore only be vacated in relatively rare circumstances.

Both the statute and rules governing Delaware's proceedings bar public access. Arbitration petitions are "considered confidential" and are not included "as part of the public docketing system." Attendance at the proceeding is limited to "parties and their representatives," and all "materials and communications"

produced during the arbitration are protected from disclosure in judicial or administrative proceedings. If one of the parties appeals to the Supreme Court of Delaware for enforcement, stay, or vacatur, the record of the proceedings must be filed with the Supreme Court in accordance with its Rules. "The petition and any supporting documents are considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal." The Delaware Supreme Court has yet to adopt rules that would govern the confidentiality of appeals from Delaware's arbitration program, and there is no record of a public appeal from an arbitration award.

The First Amendment, in conjunction with the Fourteenth, prohibits governments from abridging the freedom of speech, or of the press. This protection of speech includes a right of public access to trials, a right first elucidated by the Supreme Court in *Richmond Newspapers v. Virginia,* 448 U.S. 555 (1980). In that case the Court found that a Virginia trial court had violated the First Amendment by closing a criminal trial to the public. Chief Justice Burger's opinion for the plurality emphasized the important role public access plays in the administration of justice and concluded that "the explicit, guaranteed rights to speak and publish concerning what takes place at a trial would lose much meaning if access to observe the trial could ... be foreclosed arbitrarily." The Court has since found that the public also has a right of access to *voir dire* of jurors in criminal trials, and to certain preliminary criminal hearings.

We have found a right of public access to civil trials, as has every other federal court of appeals to consider the issue. In addition to finding a right of public access to civil trials, we have also found a First Amendment right of the public to attend meetings of Pennsylvania city planning commissions and post-trial juror examinations. We have declined, however, to extend the right to the proceedings of judicial disciplinary boards, the records of state environmental agencies, deportation hearings, or the voting process.

The Experience and Logic Test

A proceeding qualifies for the First Amendment right of public access when "there has been a tradition of accessibility" to that kind of proceeding, and when "access plays a significant positive role in the functioning of the particular process in question." *Press–Enterprise Co. v. Superior Court of Calif. for the Cnty. of Riverside,* 478 U.S. 1, 8 (1986). The examination of the history and functioning of a proceeding has come to be known as the "experience and logic" test. In order to qualify for public access, both experience and logic must counsel in favor of opening the proceeding to the public. Once a presumption of public access is established it may only be overridden by a compelling government interest.

A. Experience.

Under the experience prong of the experience and logic test, we consider whether the place and process have historically been open to the press and general public, because such a tradition of accessibility implies the favorable judgment of experience. In order to satisfy the experience test, the tradition of openness must be strong; however, a showing of openness at common law is not required. [Lengthy discussion of the history of civil trials and arbitration omitted.]

Taking the private nature of many arbitrations into account, the history of civil trials and arbitrations demonstrates a strong tradition of openness for proceedings like Delaware's government sponsored arbitrations. Proceedings in front of judges in courthouses have been presumptively open to the public for centuries. History teaches us not that all arbitrations must be closed, but that arbitrations with non-state action in private venues tend to be closed to the public.

Although Delaware's government-sponsored arbitrations share characteristics such as informality, flexibility, and limited review with private arbitrations, they differ fundamentally from other arbitrations because they are conducted before active judges in a courthouse, because they result in a binding order of the Chancery Court, and because they allow only a limited right of appeal. … Our experience inquiry therefore counsels in favor of granting public access to Delaware's proceeding because both the "place and process" of Delaware's proceeding have historically been open to the press and general public.

B. Logic.

Under the logic prong of the experience and logic test we examine whether access plays a significant positive role in the functioning of the particular process in question. We consider both the positive role that access plays, and also the extent to which openness impairs the public good. We have recognized that public access to judicial proceedings provides many benefits, including:

> [1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the proceeding;
>
> [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings;
>
> [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion;
>
> [4] serving as a check on corrupt practices by exposing the proceeding to public scrutiny;
>
> [5] enhancement of the performance of all involved; and
>
> [6] discouragement of fraud.

All of these benefits would accrue with the opening of Delaware's proceeding. Allowing public access to state-sponsored arbitrations would give stockholders and the public a better understanding of how Delaware resolves major business disputes. Opening the proceedings would also allay the public's concerns about a process only accessible to litigants in business disputes who are able to afford the expense of arbitration. In addition, public access would expose litigants, lawyers, and the Chancery Court judge alike to scrutiny from peers and the press. Finally, public access would discourage perjury and ensure that companies could not misrepresent their activities to competitors and the public.

The benefits of openness weigh strongly in favor of granting access to Delaware's arbitration proceedings. In comparison, the drawbacks of openness that Appellants cite are relatively slight.

First, Appellants contend that confidentiality is necessary to protect patented information, trade secrets, and other closely held information. This information, however, is already protected under Delaware Chancery Court Rule 5.1, which provides for the confidential filing of documents, including "trade secrets; sensitive proprietary information; [and] sensitive financial, business, or personnel information" when "the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause." These tailored protections are compatible with the First Amendment right of public access.

Second, Delaware argues that confidentiality is necessary to prevent the loss of prestige and goodwill that disputants would suffer in open proceedings. Although the loss of prestige and goodwill may be unpleasant for the parties involved, it would not hinder the functioning of the proceeding, nor impair the public good. As we have previously held, the exposure of parties to public scrutiny is one of the central benefits of public access.

The Appellants' third argument is that privacy encourages a less hostile, more conciliatory approach. This may sometimes be true, but even private binding arbitrations can be contentious. Moreover, informality, not privacy, appears to be the primary cause of the relative collegiality of arbitrations. We therefore do not find that a possible reduction in conciliation caused by public access should weigh heavily in our analysis.

Finally, Appellants argue that opening the proceeding would effectively end Delaware's arbitration program. This argument assumes that confidentiality is the sole advantage of Delaware's proceeding over regular Chancery Court proceedings. But if that were true—if Delaware's arbitration were just a secret civil trial—it would clearly contravene the First Amendment right of access. On the contrary: as the Appellants point out in the rest of their brief, there are other differences between Delaware's government-sponsored arbitration and regular Chancery Court proceedings. Arbitrations are entered into with the parties' consent, the parties have procedural flexibility, and the arbitrator's award is subject to more limited review. Thus, disputants might still opt for arbitration if they would like access to Chancery

Court judges in a proceeding that can be faster and more flexible than regular Chancery Court trials.

I agree with Judge Roth on the virtues of arbitration. I cannot help but question why the Delaware scheme limits those virtues to litigants whose disputes involve an amount in controversy of at least $1 million, and neither of whom is a consumer. One wonders why the numerous advantages set forth in Judge Roth's dissenting opinion (which apparently motivated the Delaware legislature) should not also be available to businesspersons with less than $1 million in dispute. I see no explanation in Judge Roth's dissent for the limitation to rich businesspersons.

In her dissent, Judge Roth states that she believes that I do not appreciate the difference between adjudication and arbitration, *i.e.,* "that a judge in a judicial proceeding derives her authority from the coercive power of the state, while a judge serving as an arbitrator derives her authority from the consent of the parties." Indeed I do. Delaware's proceedings are conducted by Chancery Court judges, in Chancery Court during ordinary court hours, and yield judgments that are enforceable in the same way as judgments resulting from ordinary Chancery Court proceedings.

Delaware's proceedings derive a great deal of legitimacy and authority from the state. They would be far less attractive without their association with the state. Therefore, the interests of the state and the public in openness must be given weight, not just the interests of rich businesspersons in confidentiality.

Because there has been a tradition of accessibility to proceedings like Delaware's government-sponsored arbitration, and because access plays an important role in such proceedings, we find that there is a First Amendment right of access to Delaware's government-sponsored arbitrations. We will therefore affirm the order of the District Court.

FUENTES, J., Concurring:

I write separately because, given that not all provisions of § 349 of the Delaware Code or the Chancery Court Rules relating to Judge-run arbitration proceedings are unconstitutional, I think it is necessary to be more specific than the District Court's order in pointing out those that are problematic and those that are not. …

The crux of today's holding is that the proceedings set up by § 349 violate the First Amendment because they are conducted outside the public view, not because of any problem otherwise inherent in a Judge-run arbitration scheme. Thus, Appellants are enjoined only from conducting arbitrations pursuant to § 349(b) of Title 10 of the Delaware Code or Rules 97(a)(4) and 98(b) of the Delaware Chancery Court. Nothing in today's decision should be construed to prevent sitting Judges of the Court of Chancery from engaging in arbitrations without those confidentiality provisions.

Appellants suggest that Judge-run arbitrations will not occur under § 349 unless they are conducted in private. This may be so, but neither Appellants nor the Delaware Legislature have presented us with an alternative confidential arbitration scheme sufficiently devoid of the air of official State-run proceeding that infects the system now before us, sufficient to pass constitutional muster. Nor have they otherwise suggested that we attempt to sever offending portions of the statute to construct such an alternative. Thus, we have no occasion to consider if different arbitration schemes pass constitutional muster, and we are left with no choice other than to sever the confidentiality provisions. … With this understanding of the scope of today's decision, I join in Judge Sloviter's opinion and concur in the judgment.

ROTH, Circuit Judge, Dissenting:

The use of arbitration as a method of resolving business and commercial disputes has been increasing both here and abroad. … There are a number of factors that have caused this growth in arbitration. One is the importance of resolving disputes expeditiously. Businesses in this country and abroad need to get commercial conflicts resolved as quickly as possible so that commercial relations are not disrupted.
Another factor in the growth of arbitration is the increase in commercial disputes between businesses located in different countries. In particular, non-U.S. companies, with no familiarity—or with too much

familiarity—with the American judicial system, may prefer arbitration with the rules set by the parties to lengthy and expensive court proceedings. In addition, arbitration permits the proceedings to be kept confidential, protecting trade secrets and sensitive financial information.

The State of Delaware has become interested in sponsoring arbitration as a part of its efforts to preserve its position as the leading state for incorporations in the U.S. One of the reasons that Delaware has maintained this position is the Delaware Court of Chancery, where the judges are experienced in corporate and business law and readily available to resolve this type of dispute.

Nevertheless, judicial proceedings in the Court of Chancery are more formal, time consuming and expensive than arbitration proceedings. For that reason, the Court of Chancery, as a formal adjudicator of disputes, may not be able to compete with the new arbitration systems being set up in other states and countries.

In order to prevent the diversion elsewhere of complex business and corporate cases, the Delaware Legislature in 2009 enacted legislation to create an arbitration system. The Legislature established the arbitral system in the Court of Chancery where the judges are the most experienced in corporate and business litigation. …

This Delaware arbitration system is offered to business entities (at least one of which must have been formed or organized under Delaware law; no party can be a consumer) to resolve expensive and complex disputes (for disputes involving solely monetary damages, the amount in controversy must be at least $1 million) with the consent of the parties. The arbitrators are judges of the Court of Chancery or others authorized under the Rules of the Court of Chancery. The proceedings are confidential. In my view, such a set-up creates a perfect model for commercial arbitration.

Judge Sloviter urges, however, that the Delaware system violates the First Amendment of the U.S. Constitution. In arriving at this conclusion, she classifies that "particular type of government proceeding," which would occur in the Delaware arbitration system, as one that has traditionally been open to the public. In my view, her analysis begs the question.

In this dissent, I will focus on the issue of confidentiality because that is the only area in which Judge Fuentes and I differ. An examination of confidentiality in arbitration should begin in colonial times. The tradition of arbitration in England and the American colonies reveals a focus on privacy. In the twentieth century, the modern arbitration bodies began to develop rules for arbitration proceedings that emphasize privacy and confidentiality. Today, the major national and international arbitral bodies continue to emphasize confidentiality. Their rules provide that arbitration proceedings are not open to the public unless the parties agree they will be. As a rule, arbitration has not "historically been open to the press and the general public.

With this history of arbitration in mind, looking at experience and logic, *see Press–Enterprise Co. v. Superior Court of Calif. for the Cnty. of Riverside,* 478 U.S. 1 (1986), I conclude that, historically, arbitration has been private and confidential. Logically, the resolution of complex business disputes, involving sensitive financial information, trade secrets, and technological developments, needs to be confidential so that the parties do not suffer the ill effects of this information being set out for the public—and especially competitors—to misappropriate. For these reasons, there is here no First Amendment right of public access.

In conclusion, then, it appears to me to be very clear that, when the State of Delaware decided to create its arbitration system, it was looking at traditional arbitration, in a confidential setting, before arbitrators experienced in business and corporate litigation. Delaware did not intend the arbitration system to supplant civil trials. Delaware did not intend to preclude the public from attending proceedings that historically have been open to the public. The new system was created to provide arbitration in Delaware to businesses that consented to arbitration—and that would go elsewhere if Delaware did not offer arbitration before experienced arbitrators in a confidential setting. … I respectfully dissent.

Note: Judge Roth practiced law in Delaware, and served as a United States District Judge in Delaware before being appointed to the Third Circuit. Judge Slovitor spent her legal career in Pennsylvania, which Judge Fuentes was a New Jersey practitioner and state judge.

In re Wal-Mart Wage and Hour Employment Practices Litigation, --- F.3d ---- (9th Cir. 2013); 2013 WL 6605350

Appellants Carolyn Burton [and others] (collectively, the Burton Group) appeal from the district court's confirmation of an arbitration award allocating attorneys' fees. The Burton Group contends that the district court erred in declining to vacate the arbitration award pursuant to § 10(a) of the Federal Arbitration Act (FAA). Appellee Robert Bonsignore counters that we lack jurisdiction to hear this appeal because the parties agreed to binding, non-appealable arbitration.

This appeal presents a question of first impression in this circuit: Is a non-appealability clause in an arbitration agreement that eliminates all federal court review of arbitration awards, including review under § 10 of the FAA, enforceable? We conclude that it is not. [The court then proceeded to the merits, and affirmed the district court.] Because the Burton Group did not seek review of the arbitration award under § 11 of the FAA, which allows a district court to modify or correct an arbitration award, we do not reach the question whether a party could waive review under its terms.

This appeal arises out of a protracted dispute over attorneys' fees awarded in the Wal–Mart wage and hour multidistrict litigation, MDL 1735. In December 2008, the parties to the Wal–Mart Litigation participated in a mediation with the Honorable Layn R. Phillips (retired). The parties agreed to a global settlement whereby Wal–Mart agreed to pay up to $85 million to settle all claims against it. The parties also agreed that any fee disputes among plaintiffs' counsel would be arbitrated by Phillips (the Arbitrator).

Plaintiffs' counsel quarreled concerning the proper allocation of the $28 million fee award, and were unable to resolve their dispute. Consequently, the fee dispute was submitted to "binding, non-appealable arbitration" before the Arbitrator, as provided in the Settlement Agreement. The arbitrator issued an award that was confirmed by the district court, and this appeal followed.

We ordinarily have jurisdiction pursuant to 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(1)(D) to review a district court order confirming an arbitration award. However, Bonsignore questions whether we have jurisdiction in the present action because § 22.9 of the Settlement Agreement contains a non-appealability clause. Specifically, § 22.9 provides, in relevant part:

> Class Counsel agree on behalf of themselves, their clients, and all Class Counsel to submit any disputes concerning fees (including, but not limited to, disputes concerning the fee allocation to any Class Counsel as recommended by Co–Lead Counsel, and disputes between Co–Lead Counsel regarding the determination of appropriate fee allocations) to binding, non-appealable arbitration to the Honorable Layn Phillips within fourteen (14) days of the fee allocations set forth by and/or recommended by Co–Lead Counsel.

Courts have construed non-appealability clauses like that in § 22 .9 in two different ways. First, as the district court concluded, the phrase "binding, non-appealable arbitration" may be understood to preclude only federal court review of the merits of the Arbitrator's decision, and not to eliminate the parties' right to appeal from the Arbitrator's decision under § 10 of the FAA, which provides grounds for the vacatur of an arbitration award. The district court's reasoning tracks that employed by some of our sister circuits, which have held that a contract provision stating that arbitration is non-appealable signifies that the parties only waive review of the merits of the arbitration. *See Southco, Inc. v. Reell Precision Mfg. Corp.,* 331 F. App'x 925, 927–28 (3d Cir.2009) (citing *Tabas v. Tabas,* 47 F.3d 1280, 1288 (3d Cir.1995) (en banc)); *Rollins, Inc. v. Black,* 167 F. App'x 798, 799 n. 1 (11th Cir.2006); *cf. Dean v. Sullivan,* 118 F.3d 1170, 1171 (7th Cir.1997).

A second possible construction of the "binding, non-appealable arbitration" clause is that the arbitration clause divests both the district court and our court of jurisdiction to review the Arbitrator's fee allocation on any ground, including those enumerated in § 10 of the FAA.[FN4] *See Hoeft v. MVL Grp., Inc.,* 343 F.3d 57, 63–64 (2d Cir.2003), *overruled on other grounds by Hall St. Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576 (2008). In *Hoeft,* the Second Circuit adopted this reading of a similar arbitration clause, which provided that in the event of a dispute, the parties were to:

> use their reasonable best efforts to resolve such dispute, and in the event that they are unable to do so such dispute shall be resolved by Steven Sherrill, whose decision in such matters shall be binding and conclusive upon each of the parties hereto and shall not be subject to any type of review or appeal whatsoever.

This arbitration clause here is different from the clause at issue in *MACTEC, Inc. v. Gorelick,* which stated in relevant part that "*judgment* upon the award rendered by the arbitrator shall be final and nonappealable ...." 427 F.3d 821, 827 (10th Cir.2005) (emphasis added). The Tenth Circuit held that the non-appealability clause in that case foreclosed only appellate review, and was enforceable because it preserved federal court review by the district court. *Id.* at 829–30. The clause at issue here, in contrast, arguably forecloses *all* federal court review. We express no opinion concerning whether a non-appealability clause that precludes only appellate review is enforceable. …

The arbitration clause is ambiguous. We need not resolve the question of which interpretation is correct if we conclude that the second possible construction is unenforceable because it eliminates judicial review under § 10 of the FAA.

The FAA provides for expedited judicial review of arbitration awards. However, federal court review of arbitration awards is almost entirely limited to the grounds enumerated in the FAA, under which a court may vacate, modify, or correct an arbitration award. The Supreme Court has already clarified that the statutory grounds for judicial review in the FAA are exclusive, and may not be supplemented by contract. *Hall St. Assocs.,* 552 U.S. at 578. But since Bonsignore's contention is that we lack jurisdiction to review the Arbitrator's award on any ground, we must also determine whether the statutory grounds for vacatur in the FAA may be waived or eliminated by contract.

Congress enacted the FAA to promulgate a "national policy favoring arbitration and to place arbitration agreements on equal footing with all other contracts." *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 443 (2006). Although parties may tailor certain aspects of arbitration through private contract, and "courts must ... enforce [such contracts] according to their terms," the Supreme Court has articulated limits on parties' freedom to modify judicial review of arbitration awards. *See Hall St. Assocs.,* 552 U.S. at 578 (holding that the statutory grounds for vacatur and modification of arbitration awards may not be supplemented by contract); *see also Kyocera Corp. v. Prudential–Bache Trade Servs., Inc.,* 341 F.3d 987, 1000 (9th Cir.2003) (en banc) ("Private parties' freedom to fashion their own arbitration process has no bearing whatsoever on their inability to amend the statutorily prescribed standards governing federal court review.").

In *Hall Street Associates,* for example, Hall Street argued that the arbitration clause in its contract, which expanded judicial review beyond what is provided for in the FAA, was enforceable because arbitration is a "creature of contract." *Hall St. Assocs.,* 552 U.S. at 585. The Supreme Court rejected this argument, concluding that Hall Street's arbitration clause was unenforceable because it was "at odds" with the "textual features" of the FAA, which provide that the grounds for judicial review in §§ 10 and 11 are exclusive. *Id.* at 586.

Just as the text of the FAA compels the conclusion that the grounds for vacatur of an arbitration award may not be supplemented, it also compels the conclusion that these grounds are not waivable, or subject to elimination by contract. A federal court "must" confirm an arbitration award unless, among other things, it is vacated under § 10. 9 U.S.C. § 9. This language "carries no hint of flexibility" and "does not sound remotely like a provision meant to tell a court what to do just in case the parties say

nothing else." By contrast, other provisions in the FAA expressly permit modification by contract. For example, § 5 provides rules for appointing an arbitrator that apply "if no method [is] provided [in the arbitration agreement]. If the text of the statute trumps a contractual arrangement to expand review beyond the statute, then it follows that the statute forecloses a contractual arrangement to eliminate review under its terms ….

Permitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress's attempt to ensure a minimum level of due process for parties to an arbitration. Through § 10 of the FAA, Congress attempted to preserve due process while still promoting the ultimate goal of speedy dispute resolution. *See Kyocera Corp.,* 341 F.3d at 998 ("The[ ] grounds [in § 10] afford an extremely limited review authority, a limitation that is designed to preserve due process but not to permit unnecessary public intrusion into private arbitration procedures."); *see also Hall St. Assocs.,* 552 U.S. at 588 ("[T]he three provisions, §§ 9–11, ... substantiat [e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."); *Hoeft,* 343 F.3d at 64 ("In enacting § 10(a), Congress impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct."). If parties could contract around this section of the FAA, the balance Congress intended would be disrupted, and parties would be left without any safeguards against arbitral abuse.

In *Aerojet–General Corp. v. American Arbitration Ass'n,* we noted in dicta, citing a district court decision from South Carolina, "that parties to an arbitration can agree to eliminate all court review of the proceedings ...." 478 F.2d 248, 251 (9th Cir.1973). That dicta is not controlling, and we do not elect to follow its reasoning. *See In re Magnacom Wireless, LLC,* 503 F.3d 984, 993–94 (9th Cir.2007) ("In our circuit, statements made in passing, without analysis, are not binding precedent."); *see also United States v. Johnson,* 256 F.3d 895, 915 (9th Cir.2001) (en banc) (Kozinski, J., concurring) ("Of course, not every statement of law in every opinion is binding on later panels. Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case.").

In light of the above, we hold that 9 U.S.C. § 10(a), the statutory grounds for vacatur in the FAA, may not be waived or eliminated by contract. AFFIRMED.

D.R. Horton, Inc. v. N.L.R.B. --- F.3d ---- (5th Cir. 2013); 2013 WL 6231617

LESLIE H. SOUTHWICK, Circuit Judge:

The National Labor Relations Board (NLRB) held that D.R. Horton, Inc., a home builder with operations in over twenty states, had violated the National Labor Relations Act (NLRA) by requiring its employees to sign an arbitration agreement that, among other things, prohibited an employee from pursuing claims in a collective or class action. On petition for review, we disagree and conclude that the Board's decision did not give proper weight to the Federal Arbitration Act. We uphold the Board, though, on requiring Horton to clarify with its employees that the arbitration agreement did not eliminate their rights to pursue claims of unfair labor practices with the Board.

In 2006, Horton began requiring all new and existing employees to sign, as a condition of employment, what it called a Mutual Arbitration Agreement. Three of its provisions are at issue in this appeal.

> First, the agreement provides that Horton and its employees "voluntarily waive all rights to trial in court before a judge or jury on all claims between them."
>
> Second, having waived their rights to a judicial proceeding, Horton and its employees agreed that "all disputes and claims" would "be determined exclusively by final and binding arbitration," including claims for "wages, benefits, or other compensation."
>
> Third, Horton and its employees agreed that "the arbitrator [would] not have the authority to consolidate the claims of other employees" and would "not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding."

These provisions meant that employees could not pursue class or collective claims in an arbitral or judicial forum. Instead, all employment-related disputes were to be resolved through individual arbitration.

Michael Cuda worked for Horton; he signed a Mutual Arbitration Agreement. In 2008, Cuda and a nationwide class of similarly situated superintendents sought to initiate arbitration of their claims that Horton had misclassified them as exempt from statutory overtime protections in violation of the Fair Labor Standards Act ("FLSA"). Horton responded that the arbitration agreement barred pursuit of collective claims. Cuda then filed an unfair labor practice charge, alleging that the class-action waiver violated the National Labor Relations Act ("NLRA").

[The NLRB] order upheld the ALJ's determination that the Mutual Arbitration Agreement violated Section 8(a)(1) because employees would reasonably interpret its language as precluding or restricting their right to file charges with the Board. The panel also determined, contrary to the ALJ's decision, that the agreement violated Section 8(a)(1) because it required employees to waive their right to maintain joint, class, or collective employment-related actions in any forum. The panel ordered Horton to rescind or revise the agreement to clarify that employees were not prohibited from filing charges with the Board, nor were they prohibited from resolving employment-related claims collectively or as a class. Horton filed a timely petition for review of the panel's decision, and the Board cross-applied for enforcement of the panel's order.

This court will uphold the Board's decision if it is reasonable and supported by substantial evidence on the record considered as a whole. Substantial evidence is such relevant evidence as a reasonable mind

would accept to support a conclusion. In light of the Board's expertise in labor law, we will defer to plausible inferences it draws from the evidence, even if we might reach a contrary result were we deciding the case *de novo.* This deference extends to both the Board's findings of facts and its application of the law. While the Board's legal conclusions are reviewed *de novo,* its interpretation of the NLRA will be upheld so long as it is rational and consistent with the Act. …

III. NLRA Sections 7 & 8(a)(1) and the Federal Arbitration Act

The Board concluded that Horton violated Sections 7 and 8(a)(1) of the NLRA by requiring its employees to sign the Mutual Arbitration Agreement, which "precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial." In reaching this conclusion, the Board first determined that the agreement interfered with the exercise of employees' substantive rights under Section 7 of the NLRA, which allows employees to act in concert with each other:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,* and shall also have the right to refrain from any or all of such activities ….

[Emphasis by court.] The Board deemed it well-settled that the NLRA protects the right of employees to improve their working conditions through administrative and judicial forums.

Taking this view of Section 7, the Board held that the NLRA protects the right of employees to "join together to pursue workplace grievances, including through litigation" and arbitration. The Board concluded that an "individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7 ... central to the [NLRA's] purposes." In the Board's opinion, by requiring employees to refrain from collective or class claims, the Mutual Arbitration Agreement infringed on the substantive rights protected by Section 7.

The other statutory component of the Board's analysis is Section 8(a)(1) of the NLRA. It defines unfair labor practices by an employer: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7] of this title ...." In light of the Board's interpretation of Section 7, it held that Horton had committed an unfair labor practice under Section 8 by requiring employees to agree not to act in concert in administrative and judicial proceedings.

Horton and several amici disagree with this interpretation of Section 7. According to Horton, the NLRA does not grant employees the substantive right to adjudicate claims collectively. Additionally, Horton argues that the Board's interpretation of Sections 7 and 8(a)(1) impermissibly conflicts with the FAA by prohibiting the enforcement of an arbitration agreement.

We give to the Board judicial deference when it interprets an ambiguous provision of a statute that it administers. The task of defining the scope of § 7 is for the Board to perform in the first instance as it considers the wide variety of cases that come before it. Where an issue implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference. "Deference to the Board 'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption ... of major policy decisions properly made by Congress. Particularly relevant to this dispute is that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.. "[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies

unrelated to the NLRA." *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137, 144 (2002).

Section 7 effectuated Congress's intent to equalize bargaining power between employees and employers by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment, and that there is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. On the other hand, no court decision prior to the Board's ruling under review today had held that the Section 7 right to engage in "concerted activities for the purpose of ... other mutual aid or protection" prohibited class action waivers in arbitration agreements.

Board precedent and some circuit courts have held that the provision protects collective-suit filings. "It is well settled that the filing of a civil action by employees is protected activity ... [and] by joining together to file the lawsuit [the employees] engaged in concerted activity." *127 Rest. Corp.,* 331 N.L.R.B. 269, 275–76 (2000). "[A] lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under Section 7" of the NLRA. *Brady v. Nat'l Football League,* 644 F.3d 661, 673 (8th Cir. 2011). An employee's participation in a collective-bargaining agreement's grievance procedure on behalf of himself and other employees is similarly protected..

These cases under the NLRA give some support to the Board's analysis that collective and class claims, whether in lawsuits or in arbitration, are protected by Section 7. To stop here, though, is to make the NLRA the only relevant authority. The Federal Arbitration Act ("FAA") has equal importance in our review. Case law under the FAA points us in a different direction than the course taken by the Board. As an initial matter, arbitration has been deemed not to deny a party any statutory right. *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 627 (1985). Courts repeatedly have rejected litigants' attempts to assert a statutory right that cannot be effectively vindicated through arbitration. To be clear, the Board did not say otherwise. It said the NLRA invalidates any bar to *class* arbitrations.

In every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA. *Walton v. Rose Mobile Homes LLC,* 298 F.3d 470, 474 (5th Cir. 2002) (citing cases); *see also CompuCredit v. Greenwood,* 132 S.Ct. 665, 673 (2012) (considering in the context of the Credit Repair Organization Act)).

Although the Board is correct that none of those cases considered a Section 7 right to pursue legal claims concertedly, they nevertheless emphasize the barrier any statute faces before it will displace the FAA. The Board presents no cases that have overcome that barrier, and our research reveals very limited exceptions. *See In re Nat'l Gypsum Co.,* 118 F.3d 1056, 1069 (5th Cir. 1997) (finding exception to mandatory arbitration necessary to preserve Bankruptcy Code's purpose of creating centralized and efficient bankruptcy court system); *Clary v. Helen of Troy, L.P.,* No. EP–11–CV–284–KC, 2011 WL 6960820, at *7 (W.D.Tex. Dec. 20, 2011) (finding inherent conflict between Jury Act and FAA).

The use of class action procedures, though, is not a substantive right. *See Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 612–13 (1997); *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."). This court similarly has characterized a class action as a procedural device. Thus, while a class action may lead to certain types of remedies or relief, a class action is not *itself* a remedy. The Board distinguished such case law on the basis that the NLRA is essentially *sui generis.* That act's fundamental precept is the right for employees to act collectively. Thus, Rule 23 is not the source of the right to the relevant collective actions. The NLRA is.

Even so, there are numerous decisions holding that there is no right to use class procedures under various employment-related statutory frameworks. For example, the Supreme Court has determined that there is no substantive right to class procedures under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), despite the statute providing for class procedures. *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 32 (1991). Similarly, numerous courts have held that there is no sub-

stantive right to proceed collectively under the FLSA, the statute under which Cuda originally brought suit. *Carter v. Countrywide Credit Indus., Inc.,* 362 F.3d 294, 298 (5th Cir.2004); *see also Adkins v. Labor Ready, Inc.,* 303 F.3d 496, 506 (4th Cir.2002); *Kuehner v. Dickinson & Co.,* 84 F.3d 316, 319–20 (9th Cir.1996).

The Board determined that invalidating restrictions on class or collective actions would not conflict with the FAA. The Board reached this conclusion by first observing that when private contracts interfere with the functions of the NLRA, the NLRA prevails. The Board then noted that the FAA was intended to prevent courts from treating arbitration agreements less favorably than other private contracts, but the FAA allows for the non-enforcement of arbitration agreements on any "grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It then reasoned that to find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law. The Board argues that any employee-employer contract prohibiting collective action fails under Section 7, and arbitration agreements are treated no worse and no better.

In so finding, the Board relied in part on its view that the policy behind the NLRA trumped the different policy considerations in the FAA that supported enforcement of arbitration agreements. The Board considered its holding to be a limited one, remarking that the only agreements affected by its decision were those between employers and employees. The Board recognized that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 684 (2010). Even so, the Board concluded that it was not requiring parties to engage in class arbitration: So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration, and employers remained free to insist that *arbitral* proceedings be conducted on an individual basis.

The Board explained its interpretation of the NLRA as appropriately weighing the public policy interests involved and, to the extent the NLRA and FAA might conflict, suitably accommodating those statutes' interests. Had it found the two enactments to conflict, the Board believed the FAA would have to yield for also being in conflict with the Norris–LaGuardia Act of 1932, which prohibits agreements that prevent aiding by lawful means a person participating in a lawsuit arising out of a labor dispute, and which was passed seven years after the FAA.

We now evaluate the Board's reasoning. We start with the requirement under the FAA that arbitration agreements must be enforced according to their terms. Two exceptions to this rule are at issue here: (1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's "saving clause; and (2) application of the FAA may be precluded by another statute's contrary congressional command.

The Board clearly relied on the FAA's saving clause. Less clear is whether the Board also asserted that a contrary congressional command is present. We consider each exception.

The first exception to enforcing arbitration agreements is set out in this language found in the FAA, which we will refer to as the "saving clause" (9 U.S.C. § 2).

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*

The Board found that the Mutual Arbitration Agreement violated the collective action provisions of the NLRA, making the saving clause applicable. A detailed analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause. A California statute prohibited class action waivers in arbitration agreements. *AT & T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1746 (2011). The Court considered whether the fact that California's prohibition on class-action waivers applied in both judicial and arbitral proceedings meant the prohibition fell within the FAA's saving clause.

The Court said the saving clause was inapplicable.

"The overarching purpose of the FAA ... is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings," and "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." The Court found numerous differences between class arbitration and traditional arbitration. These included that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Class arbitration also "*requires* procedural formality" because "if procedures are too informal, absent class members would not be bound by the arbitration." Finally, class arbitration "greatly increases risks to defendants" by removing "multilayered review," resulting in defendants, who might have been willing to accept such risks in individual arbitrations as the cost of doing business, being "pressured into settling questionable claims." Taken together, the effect of requiring the availability of class procedures was to give companies less incentive to resolve claims on an individual basis.

Like the statute in *Concepcion,* the Board's interpretation prohibits class-action waivers. While the Board's interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration. As the *Concepcion* Court remarked, "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis."

It is no defense to say there would not be any class arbitration because employees could only seek class relief in court. Regardless of whether employees resorted to class procedures in an arbitral or in a judicial forum, employers would be discouraged from using individual arbitration. Further, as *Concepcion* makes clear, certain procedures are a practical necessity in class arbitration. *Id.* at 1751 (listing adequate representation of absent class members, notice, opportunity to be heard, and right to opt-out). Those procedures are also part of class actions in court. As *Concepcion* held as to classwide arbitration, requiring the availability of class actions "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 1748. Requiring a class mechanism is an actual impediment to arbitration and violates the FAA. The saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement.

We examine next whether the NLRA contains a congressional command to override the FAA. The FAA establishes a liberal federal policy favoring arbitration agreements. The FAA's purpose is "o ensure the enforcement of arbitrations agreements according to their terms. That is the case even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command. *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220, 226 (1987). If such a command exists, it "will be discoverable in the text," the statute's "legislative history," or "an 'inherent conflict' between arbitration and the [statute's] underlying purposes. The relevant inquiry remains whether Congress precluded arbitration or other nonjudicial resolution of claims. *Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672, 679 (5th Cir.2006).

When considering whether a contrary congressional command is present, courts must remember that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. The party opposing arbitration bears the burden of showing whether a congressional command exists. Any doubts are resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24–25 (1983).

There is no argument that the NLRA's text contains explicit language of a congressional intent to override the FAA. Instead, it is the general thrust of the NLRA—how it operates, its goal of equalizing bargaining power—from which the command potentially is found. For example, one of the NLRA's purposes is to "protect the exercise by workers of full freedom of association ... for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151. Such

general language is an insufficient congressional command, as much more explicit language has been rejected in the past. Indeed, the text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing suits all have been found insufficient to infer a congressional command against application of the FAA. Even explicit procedures for collective actions will not override the FAA. The NLRA does not explicitly provide for such a collective action, much less the procedures such an action would employ. Thus, there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.

We next look for evidence in legislative history of a disavowal of arbitration. We find none. … Neither the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA. Therefore, the Mutual Arbitration Agreement should be enforced according to its terms unless a contrary congressional command can be inferred from an inherent conflict between the FAA and the NLRA's purpose. We do not find such a conflict.

First, courts repeatedly have understood the NLRA to permit and require arbitration. … As the Board itself acknowledged, "arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award." Having worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA.

Second, there are conceptual problems with finding the NLRA in conflict with the FAA. We know that the right to proceed collectively cannot protect vindication of employees' statutory rights under the ADEA or FLSA because a substantive right to proceed collectively has been foreclosed by prior decisions. The right to collective action also cannot be successfully defended on the policy ground that it provides employees with greater bargaining power. Mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context. The end result is that the Board's decision creates either a right that is hollow or one premised on an already-rejected justification.

We find no clear answer to the validity of the Board's use of the NLRA and FAA's respective enactment dates. Where statutes irreconcilably conflict, the statute later in time will prevail. The Board determined that the NLRA was the later statute. The FAA was enacted in 1925, then reenacted on July 30, 1947. The NLRA was enacted on July 5, 1935, and reenacted on June 23, 1947. The reenactments were part of a recodification of federal statutes that apparently made no substantive changes. An Act to codify and enact into positive law,

Of some importance is that the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice. We find limited force to the argument that there is an inherent conflict between the FAA and NLRA when the NLRA would have to be protecting a right of access to a procedure that did not exist when the NLRA was (re)enacted. The dates of enactment have no impact on our decision.

The NLRA should not be understood to contain a congressional command overriding application of the FAA. The burden is with the party opposing arbitration, and here the Board has not shown that the NLRA's language, legislative history, or purpose support finding the necessary congressional command. Because the Board's interpretation does not fall within the FAA's "saving clause," and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the Mutual Arbitration Agreement must be enforced according to its terms.

We do not deny the force of the Board's efforts to distinguish the NLRA from all other statutes that have been found to give way to requirements of arbitration. The issue here is narrow: do the rights of collective action embodied in this labor statute make it distinguishable from cases which hold that arbitration must be individual arbitration? We have explained the general reasoning that indicates the answer is "no." We add that we are loath to create a circuit split. Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable. *See* Richards v. Ernst & Young, LLP, —— F.3d —— (9th Cir. 2013), 2013 WL 4437601; *Sutherland v. Ernst & Young LLP,* 726

F.3d 290, 297–98 n. 8 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013).

A thorough explanation of the strongest arguments in favor of the Board's decision, which embraces the Board's distinctions from earlier Supreme Court pronouncements on arbitrations and adding some of its own, appears in a recent law review article. Charles A. Sullivan & Timothy P. Glynn, Horton *Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution,* 64 ALA. L.REV. 1013 (2013). We do not adopt its reasoning but note our consideration of its advocacy.

IV. Mutual Arbitration Agreement's Violation of NLRA Section 8(a)(1)

The Board's finding that the Mutual Arbitration Agreement could be misconstrued was reasonable and the need for Horton to take the ordered corrective action was valid.

GRAVES, Circuit Judge, concurring in part and dissenting in part.

I disagree with the majority's finding that the Board's interpretation of sections 7 & 8(a)(1) of the National Labor Relations Act (NLRA) conflict with the Federal Arbitration Act (FAA).

The Mutual Arbitration Agreement (MAA) precludes employees from filing joint, class or collective claims in any forum. I agree with the Board that the MAA interferes with the exercise of employees' substantive rights under Section 7 of the NLRA, which provides, in relevant part, that employees have the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...."

Further, as the Board specifically found, holding that the MAA violates the NLRA does not conflict with the FAA for several reasons:

> (1) the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts. To find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law.
>
> (2) the Supreme Court's jurisprudence under the FAA, permitting enforcement of agreements to arbitrate federal statutory claims, including employment claims, makes clear that the agreement may not require a party to forgo the substantive rights afforded by the statute. The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.
>
> (3) nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable. To the contrary, Section 2 of the FAA ... provides that arbitration agreements may be invalidated in whole or in part upon any 'grounds as exist at law or in equity for the revocation of any contract.
>
> (4) even if there were a direct conflict between the NLRA and the FAA, there are strong indications that the FAA would have to yield under the terms of the Norris–LaGuardia Act.

I also agree with the Board's holding that Horton violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial. The Board made it clear that it was not mandating class arbitration in order to protect employees' rights under the NLRA, but rather was holding that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, judicial and arbitral.

As acknowledged by the majority, we give the Board judicial deference in interpreting an ambiguous provision of a statute that it administers Further, as acknowledged by the majority, there is authority to support the Board's analysis. For the reasons set out herein, I would deny the petition for review and affirm the Board's decision *in toto*.

Ross v. Waccamaw Community Hosp., --- S.E.2d ----, 2013 WL 3200593 (S.C.)

Justice KITTREDGE.

Section 15–79–125 of the South Carolina Code requires a pre-suit mediation process for medical malpractice claims. The statute further requires that the pre-suit mediation conference be completed within a 120–day period, which may be extended for an additional 60–day period. This appeal presents the question of whether the failure to complete the mediation conference in a timely manner divests the trial court of subject matter jurisdiction and requires dismissal. We hold that the failure to complete the mediation conference in a timely manner does not divest the trial court of subject matter jurisdiction and dismissal is not mandated, … and remand for the pre-suit mediation process to be completed.

Section 15–79–125 requires a medical malpractice plaintiff to file and serve a Notice of Intent to File Suit before the plaintiff may initiate a civil action. The Notice of Intent must contain a statement of the facts upon which the plaintiff's claim is based, be accompanied by an affidavit of an expert witness identifying at least one negligent act or omission claimed to exist, and include the standard interrogatories required by the South Carolina Rules of Civil Procedure (SCRCP). Filing the Notice of Intent tolls the statute of limitations.

Following service of the Notice of Intent, the parties are required to participate in a mediation conference. Specifically, § 15–79–125(C) provides (emphasis by court):

> Within ninety days and *no later than one hundred twenty days* from the service of the Notice of Intent to File Suit, the parties *shall* participate in a mediation conference *unless an extension for no more than sixty days is granted by the court based upon a finding of good cause.*

Subsection (C) is silent as to the consequences of failing to timely comply with the mediation conference. Subsection (C) does, however, provide that the South Carolina Alternative Dispute Resolution Rules (SCADRR or alternative dispute resolution rules) govern the mediation process, unless the alternative dispute resolution rules are inconsistent with the statute. Regarding enforcement, § 15–79–125(D), explicitly recognizes the circuit court's authority to ensure parties comply with the statutory pre-suit mediation requirements. Only if the matter cannot be resolved through mediation may a plaintiff thereafter initiate a civil action by filing a summons and complaint.

[Patient Ross] served a Notice of Intent upon the Hospital, and mediation was scheduled within the 120-day period, but postponements by mutual consent (for the convenience of counsel) pushed the scheduled mediation date beyond that deadline. None of the parties sought an extension from the circuit court to enlarge the statutory time period, as provided by statute.

A few days prior to the scheduled mediation Hospital informed Ross that it would not participate in mediation as untimely. Specifically, Hospital contended that § 15–79–125 was jurisdictional and that, absent an judicial extension for good cause, the Notice of Intent automatically expired after 120 days and the circuit court no longer has jurisdiction to entertain the matter.

The trial court agreed with Hospital, whereupon this appeal to the South Carolina Supreme Court ensued. We … hold that the circuit court retained jurisdiction after the expiration of the 120–day mediation period. We further hold that … the trial court should have granted Appellant's motion to compel mediation.

Although § 15–79–125(C) provides that the mediation conference should occur within 120 days, the statute is silent as to the consequences of the parties' failure to do so within the prescribed timeframe. Significantly, the General Assembly expressly identified

the SCADRR as the governing procedural rules, which favor pretrial dispute resolution in lieu of litigation. *See, e.g.,* Rule 1, SCADRR ("These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply."). It is clear that the Legislature enacted _§ 15–79–125 to provide an informal and expedient method of culling prospective medical malpractice cases by fostering the settlement of potentially meritorious claims and discouraging the filing of frivolous claims.

To accept the view advanced by Respondents would lead to an absurd statutory construction. Specifically, Respondents would have this Court construe the statute as a trap for plaintiffs with potentially meritorious claims. Given the pressures of practicing law for even the moderately busy practitioner, completion of the mediation conference in a timely manner will not always be achievable. Respondents' interpretation is ripe for mischief, as defendants could easily thwart timely completion of the mediation conference, and then seek dismissal of the Notice of Intent and reinstatement of the statute of limitations. A mandated penalty of dismissal, as urged by Respondents, for lack of subject matter jurisdiction is fundamentally at odds with the language and purpose of § 15–79–125.

Thus, we hold that failing to comply with the 120–day statutory time period is a non-jurisdictional procedural defect. We further find that the circuit court retains discretion to permit the mediation process to continue beyond the 120–day time period and may consider principles of estoppel and waiver to excuse noncompliance. This is not to say the 120–day time period is meaningless. Indeed, it demonstrates the Legislature's desire that pre-suit mediation takes place expeditiously. And the failure to comply with the 120–day time period could result in dismissal (as the SCADRR provide), but as a function of the court's discretion based on the facts and circumstances, and not as a mandated one-size-fits-all result. …

When presented with a similar situation involving the failure to conduct a pre-suit mediation session within a 90–day statutory time period in a medical malpractice dispute, the Supreme Court of Wisconsin rejected the very argument advanced by Respondents. *Schulz v. Nienhuis,* 448 N.W.2d 655, 658-659 (1989). That court reasoned:

> If the legislature intended the result the defendants urge, it could have expressly stated that a claimant's failure to participate in a mediation session within the statutory mediation period results in dismissal. It did not do so. In the absence of express language, we are unwilling to read the harsh penalty of dismissal of the lawsuit into the mediation statute. The tenor of modern law is to avoid dismissal of cases on technical grounds and to allow adjudication on the merits.
>
> Moreover, strong practical reasons militate against reading the mediation statute as requiring dismissal of the lawsuit if a claimant does not participate in a mediation session within the statutory mediation period. A multitude of events could cause a mediation session to be delayed beyond the statutory period: illness or weather; fixing a date convenient for all parties; the need to appoint different mediators. The defendants' interpretation of [the mediation statute] would mean that a claimant, regardless of fault, would lose all legal redress because the mediation session did not occur within the 90–day period. This interpretation contradicts the legislature's expressed intent of providing an informal, inexpensive, and expedient mediation system.

We find the reasoning of the *Schulz* court is consistent with [prior South Carolina law]. Indeed, construing § 15–79–125 to require dismissal if the 120–day mediation period is not met would undermine the Legislature's manifest intent and South Carolina's strong public policy favoring alternative dispute resolution. Given the legislatively designed interrelationship between § ___15–79–125 and the SCADRR, we find that judicially engrafting a dismissal mandate into § 15–79–125 would lead to an absurd result not intended by the Legislature.

Bank of America, N.A. v. District of Columbia, No. 10CV-78 (2013)

Bank of America appeals from an order of the trial court denying the Bank's motion to compel arbitration under the Federal Arbitration Act (FAA) of the District of Columbia's claims for damages for losses incurred as the result of a protracted fraudulent scheme perpetrated by the District's employees and allegedly facilitated by Bank of America.

Bank of America argues that the trial court erred in its ruling because all of the District's claims are within the scope of a contractual agreement that requires arbitration in the state of North Carolina. The District's position is that there was no valid arbitration agreement, or alternatively, its claims do not fall within the scope of any agreement between the parties.

We affirm the decision of the trial court holding that the parties had no valid agreement to arbitrate their dispute in North Carolina or elsewhere and retaining jurisdiction of the District's claim under the Fraud Claims Act. We remand the case to the trial court for further proceedings consistent with this opinion as it relates to the remaining counts of the District's amended complaint.

At least since the 1990s, the District has maintained a Controlled Disbursement Account with Bank of America or its predecessors. At issue is the role of the Bank in improper disbursements from the District's account.

The trial court found that the parties' 2005 written contract governing dispute resolution and authority to modify the contract superseded "(1) any dispute resolution or forum selection clauses the Bank claims was previously agreed upon and (2) and any provision . . . which would allow other District officials to agree to arbitration in North Carolina (or elsewhere)."

Thus, the court could not find, as the Bank urged, that the 2006 Authorization and Agreement for Treasury Service signed by the Deputy CFO/ Treasurer was validly executed or that any signature cards signed after the 2005 contract bound the District to the forum selection provision in the 2008 Deposit Agreement. The trial court declined to dismiss the claim asserted under the False Claims Act, reasoning that the PPA, which is incorporated into the 2005 contract, makes the Superior Court the appropriate forum for claims under that Act. As an additional legal basis for concluding that the parties had no agreement to arbitrate in North Carolina, the trial court held that the PPA withheld from District officials the authority to agree to the arbitration and forum selection clauses in the documents relied upon by the Bank.

The Bank argues that the trial court erred in resolving the District's objections to the existence, scope or validity of the parties' arbitration agreement. It contends that, under applicable law, these issues are for the arbitrator; therefore, the trial court erred in denying its motion to compel arbitration. The District responds that its challenges to the arbitration clause itself and to the validity of the post-2005 contracts based on whether the person lacked authority to bind the District are properly resolved by the court.

We start with the basic principle that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes, but only those disputes, that the parties have agreed to submit to arbitration." Generally, in deciding whether the parties agreed to arbitration, the courts apply ordinary state-law contract principles. This general rule is subject to qualification when deciding whether the parties have agreed to have the arbitrator decide the question of arbitrability. With respect to this issue, the Supreme Court has admonished that courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.

The Bank asserts that the arbitration clause in the Treasury Booklet that incorporates by reference the AAA Commercial Arbitration Rules requires the parties to submit the arbitrability question itself to arbitration. Specifically, the Bank cites Rule R-7 that provides:

> (a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
>
> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

The Bank argues that incorporation of these rules into the contract show "clearly and unmistakably" that the parties intended for the arbitrator to decide the issue of arbitrability. In support of its position, the Bank relies primarily upon the Supreme Court's decision in Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010). This case does not support the Bank's position that the issue of arbitrability is for the arbitrator.

The issue in Rent-A-Center was whether under the FAA, a district court may decide a challenge to a contract as unconscionable where the agreement expressly delegated that authority to the arbitrator. Jackson had sued his former employer, Rent-A-Center, for discrimination, but as a condition of employment, he had signed an agreement that precluded him from pursuing his claims in court. The agreement gave the arbitrator the exclusive authority to resolve any dispute concerning the enforceability of the agreement. The Supreme Court reversed, held that, absent a specific challenge to the arbitration provision itself, the court must treat this delegation provision as valid under § 2 of the FAA and leave the challenge to the validity of the agreement as a whole to the arbitrator. Thus Rent-A-Center suggests a different outcome had petitioner preserved a specific challenge to the provision delegating arbitrability to the arbitrator.

Unlike petitioner in Rent-A-Center, the District directs one of its challenges to the validity of the arbitration clause itself. The District argues that it never entered an agreement to arbitrate any contract -related dispute because no authorized agent for the District had authority to sign such an agreement. In Rent-A-Center, supra, the Supreme Court stated that where a party challenges the agreement to arbitrate at issue under § 2 of the FAA, then the court must decide the issue.

Likewise, in the present case, it was for the court to determine whether the District, through authorized agents, ever agreed to be bound by the arbitration provision. Unless the District agreed to arbitration, it cannot be forced to have its dispute, including questions of arbitrability, heard in a private forum. Therefore, the trial court properly considered in the first instance the District's challenge to the arbitration provision under the circumstances presented here.

The Bank also argues that, insofar as the District's position is that the agreement containing the arbitration provision is superseded by subsequent agreements, its challenge is to the contract as a whole, and therefore, must be resolved by the arbitrator. It contends that to the extent that the trial court relied upon the merger clause in the 2005 contract to invalidate the 2000 Corporate Resolution authorizing various District employees to act on its behalf, "it impermissibly operates to invalidate the underlying Treasury Booklet and Deposit Agreement as a whole and, therefore, the issue of contract validity should have been submitted to arbitration." The District responds that because the validity of the post-2005 contracts that the Bank alleges the District entered turns on whether the person who signed lacked authority to bind the District, resolution by the court is appropriate.

For this argument, the Bank relies upon cases holding that challenges to the validity of the contract as a whole are for the arbitrator to decide. These include: Menna v. Plymouth Rock Assurance Corp., 987 A.2d 458, 465 n.30 (D.C. 2010) (noting that the

validity of the contract with an arbitration clause is for the arbitrator unless the challenge is directed specifically to the validity of the arbitration clause itself under the District's Revised Uniform Arbitration Act). The Bank contends that resisting arbitration on the ground that the agreement in which the arbitration provision is found is superseded by later agreements is tantamount to contesting the contract as whole, and thus, the principle from the cases it cites applies to require consideration by the arbitrator.

The District acknowledges the general principles extracted from these cases. However, it contends that where the issue turns on whether the person who signed the contract lacked authority to commit the principal, judicial review is appropriate, a point referenced in Buckeye, supra, which the District cites. In Buckeye, the Supreme Court considered whether a court or an arbitrator should decide the claim that the contract containing an arbitration provision was void because it violated state lending and consumer-protection laws. Buckeye, 546 U.S. at 442. Reversing the Florida Supreme Court, the Court held that this challenge to the validity of the contract as a whole was for the arbitrator. Id. at 446. While reaffirming this general principle and finding it to be applicable in Buckeye, the Supreme Court also stated that [o]ur opinion . . . does not speak to the issue decided in the cases . . . which hold that it is for the courts to decide whether the alleged obligor ever signed the contract, . . . [or] whether the signor lacked authority to commit the alleged principal, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (C.A. 3 2000); Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587 (C.A. 7 2001).

Buckeye, 546 U.S. at 444 n.1. This is the essence of the District's challenge here. It contends that it never agreed to arbitration because its 2005 contract did not provide for it and none of its employees were authorized to bind the District to arbitration. Thus, we conclude that the trial court was the proper forum in which to determine whether the District, through its duly authorized agent, ever agreed to arbitration.

The Bank argues that it had a contractual agreement with the District to arbitrate claims in North Carolina. It contends that officials in the Office of the Chief Financial Officer (OCFO) agreed to the terms set forth in its Treasury Services Booklet which included a provision for arbitrating disputes related to the Controlled Disbursement Account. On appeal, the District argues, as it did in the trial court, that there was no agreement to arbitrate contract or fraud claims because OCFO employees lacked actual authority to enter such agreements by reason of provisions in the PPA. [The trial court and appellate tribunal agreed; lengthy discussion of D.C. law omitted.]

The Bank argues that even if the PPA did apply to the OCFO, the FAA preempts state laws like the PPA. It contends that the FAA prohibits state law from interfering with the objectives of the FAA, and therefore, the District's argument that the PPA withheld authority from District officials to agree to arbitration must fail. Unquestionably, the FAA "establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution." Preston v. Ferrer, 552 U.S. 346, 349 (2008). The FAA provides for the application of federal substantive law regarding arbitration in both federal and state courts. Relying upon Preston, the Bank argues that the PPA's grant of exclusive jurisdiction of FCA claims to Superior Court and contract claims to the Contracting Officer and the CAB is superseded by the FAA. The District counters that Preston did not involve a statute that withheld authority from a government employee to agree to arbitrate, but rather one that bars enforcement of otherwise enforceable arbitration agreements. The District argues that the former is permissible, while the latter is not. The District has the better argument on this point. [Lengthy discussion omitted.]

For the foregoing reasons, we affirm the trial court's decision insofar as it holds that the parties had no agreement to arbitrate disputes in North Carolina. We remand the case to the trial court ….

The District of Columbia Courts, the judicial branch of the District of Columbia government, comprise the DC Court of Appeals, the highest court of the District; the Superior Court of the District of Columbia, a trial court with general jurisdiction over virtually all local legal matters; and the Court System, which provides administrative support functions for both Courts. District of Columbia courts

were created by Congress under Article I of the Constitution. The judges who serve on the courts are nominated by the President of the United States and confirmed by the US Senate for fixed terms.

Note: This opinion covers 73 pages (Times New Roman,12 point type)

Eller v. National Football League Players Ass'n, 731 F.3d 752, (8th Cir. 2013)

LOKEN, Circuit Judge.

In March 2011, members of the National Football League ("the NFL")—thirty-two professional football teams—commenced a lockout of players after bargaining to an impasse with the National Football League Players Association ("the NFLPA") over the terms of a new Collective Bargaining Agreement ("CBA"). In response, active NFL players filed a class action lawsuit in the District of Minnesota alleging violations of the federal antitrust laws and other claims (the "*Brady*" suit). Retired NFL players also sued the NFL and its teams, alleging antitrust violations (the "*Eller I* " suit). The district court consolidated the cases and ordered mediation. In August, active player representatives approved a tentative settlement of the *Brady* suit, the players redesignated the NFLPA as their collective bargaining agent, the NFL and the NFLPA signed a new CBA incorporating the settlement terms, the *Brady* plaintiffs dismissed their lawsuit, the lockout ended, and the 2011 NFL season commenced. The settlement as reflected in the new CBA included some $900 million in increased benefits for retired NFL players.

On September 13, 2011, Carl Eller and other retired NFL players filed this class action lawsuit (*Eller II*) against the NFLPA, its executive director, and certain *Brady* plaintiffs, asserting that defendants wrongfully barred retirees from the *Brady* plaintiffs' settlement negotiations, negotiated on retirees behalf without authority to do so, and ultimately agreed to a CBA with fewer benefits for retired players than they could have obtained for themselves. The district court granted defendants' motion to dismiss all claims. Plaintiffs appeal dismissal of their claims for intentional interference with prospective economic advantage. Reviewing the grant of defendants' motion to dismiss *de novo,* and accepting as true the facts alleged in the *Eller II* complaint, we affirm.

I.

For the last forty years, labor relations in the NFL have been affected by the players' use of federal antitrust lawsuits in the District of Minnesota to enhance their position in collective bargaining with the NFL's member teams under the federal labor laws. The Supreme Court has long recognized that "the congressional policy favoring collective bargaining ... requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." But in the NFL context, this court limited the exemption to labor agreements that concern mandatory subjects of collective bargaining and are "the product of bona fide arm's-length bargaining." *Mackey v. NFL,* 543 F.2d 606, 614 (8th Cir.1976). Operating under that rule, every time a CBA between the NFL and the NFLPA expired, the union or its player members filed a new antitrust suit alleging that the NFL's player restrictions were unreasonable restraints of trade. For a concise summary of this complex history, *see Brady v. NFL,* 644 F.3d 661, 663–68 (8th Cir.2011), reversing the district court order that preliminarily enjoined the lockout that led to the negotiations and settlement at issue on this appeal.

The rules of this collective bargaining game changed significantly when a nearly unanimous Supreme Court held, overruling *Mackey* and subsequent lower federal court decisions, that the nonstatutory labor/antitrust exemption applies "to an agreement among several employers bargaining together to implement after [bargaining to an] impasse the terms of their last best good-faith wage offer." *Brown v. Pro Football, Inc.,* 518 U.S. 231, 238, 116 S.Ct. 2116, 135 L.Ed.2d 521 (1996). But despite this clarification, the scope of the nonstatutory exemption remained unsettled, so antitrust lawsuits such as the *Brady* and *Eller I* suits continued to be part of the labor relations landscape when a CBA between the NFL's member teams and the NFLPA expired and bargain-

ing over a new CBA reached an impasse.

These historical realities are relevant to the issues raised by this appeal in two significant respects. First, the NFL in 2011 had a strong economic interest in avoiding *future* antitrust liability by resolving its labor relations impasse with the players through collective bargaining that resulted in an agreement protected by the nonstatutory exemption under the federal labor laws. Thus, as in prior years, the *Brady* lawsuit was settled and dismissed with a settlement that became the central part of a new CBA entered into after the NFLPA resumed its status as the players' certified collective bargaining representative. Second, the NFL's imperative need to resolve such disputes through collective bargaining put the retired players in a decidedly weaker position. Retirees are not "employees" within the meaning of the National Labor Relations Act. Therefore, they may not be joined with active players as members of the collective bargaining unit, and retiree benefits, while commonly bargained by labor unions representing current employees, are not mandatory subjects of collective bargaining.

II.

Plaintiffs' detailed *Eller II* complaint alleged the following: In May 2008, the NFL opted out of the final two years of its 2006 CBA with the NFLPA, scheduled to expire in March 2011. The parties bargained to an impasse on March 11, 2011. That day, the NFLPA renounced its status as the players' collective bargaining agent and amended its bylaws to prohibit collective bargaining with the NFL. Tom Brady and other active players filed the *Brady* class action lawsuit alleging antitrust violations by the NFL and its member teams. On March 12, the NFL commenced a lockout of the players. On March 28, Carl Eller and other retired players filed the separate *Eller I* lawsuit against the NFL, also alleging antitrust violations. The district court consolidated the two cases and ordered all parties to mediation before Chief Magistrate Judge Arthur Boylan in sessions that could be "joint or separate."

On April 4, two NFL owners sent a letter to retired players advising that the NFLPA had "walked away from" the NFL's March 11 proposal. Plaintiffs allege that the terms of that proposal, as described in the letter, included improved benefits for former players which "would have amounted to at least $1.5 billion being allocated to retirees over the ten-year duration of any new CBA." All parties then attended mediation sessions in April and May, with the *Eller I* plaintiffs being the sole representatives of retired players. In separate sessions with the NFL, counsel for the *Eller I* plaintiffs made several offers and demands, including one offer that 2.5% of all League revenues be set aside for retired players. The NFL did not accept the proposals, but stated that "key aspects ... appeared both worthwhile and achievable." After May 16, the NFL also held several sessions with the *Brady* plaintiffs that neither the *Eller I* plaintiffs nor their counsel were allowed to attend.

By June, plaintiffs alleged, it had become "public knowledge" that the NFL and the NFLPA were negotiating issues related to the retired players. On July 13, the *Eller I* plaintiffs moved to amend their complaint to add claims that the NFLPA, its executive director, and the named *Brady* plaintiffs were improperly negotiating on behalf of retired players. At the urging of counsel for the *Eller I* plaintiffs, Magistrate Judge Boylan requested that the *Eller I* plaintiffs be allowed to participate in the *Brady* plaintiffs' negotiations; the request was refused. On July 19, the NFL's counsel met with counsel for the *Eller I* plaintiffs and advised that the NFL and the *Brady* plaintiffs had reached an agreement. The *Eller I* plaintiffs asked if they could negotiate retiree issues with the NFL. The NFL declined but described benefit improvements for retirees that would be part of an agreement between the NFL and the *Brady* plaintiffs.

On July 25, the *Brady* plaintiffs and the NFL agreed to settle the *Brady* lawsuit contingent on the active players reconstituting the NFLPA as their collective bargaining agent and the NFLPA and the NFL entering into a new CBA by a specified date, with minimum terms set forth in the settlement agreement. Those terms included benefit improvements for retired players having an estimated value of $900 million over the ten-year duration of the CBA, most notably a "Legacy Fund" providing additional benefits to players whose last credited season was prior to 1993. The NFL on behalf of its member teams and the NFLPA on behalf of its member players signed the 2011 CBA on August 4, 2011. The CBA explic-

itly stated, "this release does not cover any claims of any retired player."

The *Eller I* plaintiffs voluntarily dismissed their suit against the NFL without prejudice before the district court ruled on their motion to amend. On September 13, 2011, twenty-eight retired players, including many members of the Pro Football Hall of Fame, filed this class action suit seeking declaratory relief and damages for intentional interference with prospective economic advantage and breach of fiduciary duty. They appeal only the dismissal of their claims under Minnesota law for intentional interference with prospective economic advantage.

III.

Minnesota courts have long-recognized the tort of intentional interference with prospective economic advantage. When the alleged interference is with prospective contractual relations, as in this case, the Supreme Court of Minnesota has adopted § 766B of the Restatement (Second) of Torts (1979):

One who intentionally and improperly interferes with another's prospective contractual relation ... is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relations, whether the interference consists of

> (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or
>
> (b) preventing the other from acquiring or continuing the prospective relation.

In applying this standard, Minnesota courts require that plaintiff prove a *reasonable* expectation of a prospective economic advantage or contractual relation.

Plaintiffs contend that defendants improperly interfered with their prospective economic advantage by locking them out of mediation negotiations with the NFL and then negotiating retired player benefits without authorization, resulting in fewer benefits for retired players than they could have obtained if allowed to negotiate with the NFL for themselves. The district court concluded that plaintiffs failed to state a plausible claim for relief because retired players "could not reasonably have expected to enter into a contract based on their own negotiating power as opposed to that of the active players," and because "no reasonable jury could find the purported interference here to be improper." We agree with both grounds of dismissal.

A. Reasonable Expectation

Plaintiffs' assertion of a reasonable expectation of prospective economic advantage from bargaining with the NFL on their own behalf is primarily based upon the April 2011 letter from two NFL owners to retired players stating that the NFLPA had walked away from the NFL's last offer that would have provided over $1.5 billion in additional benefits for retired players over ten years. They allege that, if the *Brady* plaintiffs and the NFLPA had not improperly negotiated a settlement and CBA providing only $900 million in additional benefits for retired players, retirees would have been able to negotiate an agreement with the NFL providing substantially greater benefits.

As explained in Part I of this opinion, the problems with this theory are (i) the NFL's desire to negotiate player benefits in a CBA protected by the nonstatutory labor antitrust exemption, and (ii) the retired players' lack of standing under the federal labor laws to negotiate a protected CBA on their own. The NFL's April 4 letter described an offer which, as interpreted by plaintiffs, included $1.5 billion in added benefits. But the offer was made to the NFLPA as collective bargaining agent for active players, not to plaintiffs. During mediation of the antitrust lawsuits ordered by the district court, the retired players made separate offers or demands. The NFL allegedly described these proposals as "worthwhile and achievable" but never made a counter-proposal directly to the *Eller I* plaintiffs.

Plaintiffs allege that counsel for the *Eller I* plaintiffs "repeatedly" told the NFL during the mediation sessions that "any settlement ... with former NFL players would occur through an independent organization devoted to the interests of such players that was separate from the NFLPA." But retired players are not members of a collective bargaining unit, and

therefore any separate settlement of this kind would not have resulted in a CBA protected by the nonstatutory labor exemption to the antitrust laws. Thus, on July 19, the NFL predictably refused to negotiate further with the *Eller I* plaintiffs after negotiating a tentative new CBA with the *Brady* plaintiffs that would include substantially increased benefits for retired players.

Given the undisputed history of labor relations and collective bargaining involving the NFL and its players, the factual allegations in plaintiffs lengthy complaint—which we accept as true—provide no plausible reason to believe that the NFL, having agreed with the active players to provide more than $900 million in increased contractual benefits for retired players in a new CBA, would be willing to separately negotiate even greater benefits directly with the retired player class, unless the *Eller I* class action claims posed a significant threat of even greater antitrust liability. The *Brady* plaintiffs' separate settlement with the NFL expressly provided that it did not release any claims by retired players in their pending separate antitrust lawsuit against the NFL. Thus, plaintiffs cannot plausibly claim intentional interference with a non-contractual prospective economic advantage from this lawsuit, which the *Eller I* plaintiffs voluntarily dismissed without prejudice.

Thus, even if the NFLPA and the defendant active players bargained on behalf of the retired players without proper authority to do so, as plaintiffs allege, the retired players had no *reasonable* expectation of a separate, prospective contractual relation with the NFL that would provide them greater player benefits than the NFL agreed to provide in the new CBA. A reasonable expectation requires something beyond a mere hope. Without question, plaintiffs had a reasonable expectation that the collective bargaining impasse and antitrust lawsuits would result in increased benefits for retired players. But no reasonable jury could find they had a reasonable expectation of a prospective separate contractual relation with the NFL that would provide more than the increased benefits provided in the 2011 CBA.

B. Improper Interference

Even if plaintiffs alleged a reasonable expectation of prospective contractual relations or economic advantage with the NFL, they failed to allege facts proving that defendants improperly or wrongfully interfered with these advantageous prospects. Plaintiffs allege that defendants impinged on the rights of retired players by improperly negotiating on their behalf and entering into an agreement with the NFL that "sacrificed the rights of retirees for the benefit of active players." As plaintiffs argued to the district court at the hearing on defendants' motion to dismiss:

Were the retirees harmed? Yes. Because they were negotiating for far more than what the shadow union accepted. Why? Because it reduced the amount that the League had to make available to the retirees and increased the amount that the players would take for themselves.

The first fatal flaw in this theory is plaintiffs' assumption that it is improper for current employees to bargain for increased benefits for retired former employees unless expressly authorized to do so by the retirees. To the contrary, though retired employees are not members of a collective bargaining unit under the federal labor laws, "bargaining over pensioners' rights has become an established industrial practice." Thus, the *Brady* plaintiffs did not interfere with retired players' prospective contractual relations by settling the *Brady* antitrust suit with a new CBA between the NFL and the NFLPA that included increased retiree benefits. Under the federal labor laws, the retired players *could not* negotiate their own CBA, so the 2011 CBA did not interfere with any prospective labor agreement. And the *Brady* settlement expressly provided that it did not affect the retirees' pending antitrust claims in *Eller I,* leaving retired players free to exploit whatever additional bargaining leverage that lawsuit provided.

The second fatal flaw in this theory is that Minnesota law has long recognized a "special privilege for competitors" set forth in § 768 of the Restatement (Second) or Torts. Under this "privilege," a competitor who intentionally causes a third person not to enter into a prospective contractual relation with the defendant's competitor does not *tortiously* interfere:

i. if the relation concerns a matter involved in the competition,

ii. the defendant "does not employ wrongful means" or unlawfully restrain trade, and

iii. "his purpose is at least in part to advance his interest in competing with the other."

"Wrongful means" as used in § 768 "refer to means which are intrinsically wrongful—that is, conduct which is itself capable of forming the basis for liability of the actor."

The competitor's privilege is plainly relevant to the complex relationships at issue in this case. On the one hand, active players represented by the *Brady* plaintiffs had a personal interest in negotiating increased benefits for retired players because all active players will one day retire (a particularly strong interest given the relatively short careers of most professional football players). On the other hand, the active and retired players were competitors for the share of professional football revenues that the NFL was willing to pay to its players.

Plaintiffs alleged that the active players excluded retired player representatives from settlement negotiations that included retiree benefits in order to get a larger share of the total player revenues for themselves. Plaintiffs further alleged they were told during the July 19 meeting with the NFL's counsel that the settlement agreement and 2011 CBA would include a Legacy Fund for players who retired before 1993—a fund that by definition would not benefit active players—that would receive one-half its funding from a salary cap on the active players, an obvious financial detriment to active players.

Under the competitor's privilege, these allegations that defendants engaged in collective bargaining under the federal labor laws to further their own economic interests, even at the expense of plaintiffs' economic interests, did not state a claim for tortious interference under Minnesota law. *See* Restatement (Second) of Torts § 767 cmt. f, § 768 cmt. b; *United Wild Rice,* 313 N.W.2d at 633; *accord Salomon v. Crown Life Ins. Co.,* 536 F.2d 1233, 1242 (8th Cir.) ("Justification for intentional interference ... can be provided through proof that the efforts were undertaken to protect a valid economic interest.") (applying the Restatement under Missouri law),

Finally, plaintiffs argued for the first time in their reply brief that defendants engaged in "illegal labor negotiations" because the NFLPA controlled and financed the *Brady* suit and collectively bargained on behalf of active and retired players when, as a decertified union, it had no authority to act as bargaining agent for members of the bargaining unit. This contention is squarely contrary to decisions by the District of Minnesota in prior litigation between the NFL and its players, decisions supported by the General Counsel of the National Labor Relations Board. *See White,* 822 F.Supp. at 1430–31 (D.Minn.1993) ("Where it was appropriate for the NFLPA to finance the prosecution of antitrust litigation challenging terms and conditions of employment, the court finds that the NFLPA's role as consultant to class counsel in settling the same litigation is also lawful and appropriate.").

In support, plaintiffs cite statements of general labor law principles regarding a union's authority to bargain collectively in *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers,* 434 U.S. 335, 344 (1978). But as that decision makes clear, those are issues within the exclusive purview of the NLRB. Thus, we reject plaintiffs' suggestion that courts may decide that a "decertified union engaging in collective bargaining under the guise of settlement negotiations ... constitute[s] improper conduct" under Restatement (Second) of Torts § 766B, cmt. d.

For these reasons, plaintiffs failed to plausibly allege facts establishing that they had a reasonable expectation that either prospective contractual relations or other economic advantage would result if they had been allowed to bargain independently with the NFL, or that defendants improperly interfered with any such expectation. Accordingly, the district court properly dismissed plaintiffs' claims of tortious interference under Minnesota law, and its judgment is affirmed.

BEAM, Circuit Judge, concurring.

I concur in the court's opinion, except for Part III.A., and in the judgment.

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Managing a Successful Arbitration * San Antonio * March 7, 2014 * *American Arbitration Association, College of Commercial Arbitrators and JAMS* * To register online go to www.aaau.org.

Family Mediation Training * Dallas * March 24-26, 2014 * *Professional Services & Education* * E-Mail: nkferrell@sbcglobal.net * Phone: 214-526-4525 * **www.conflicthappens.com**

Dispute Resolution Seminar—Technology in Conflict Resolution * Houston * April 11, 2014 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

Basic Mediation Training * Austin * May 14-16 continuing May 20-21, 2014 * *Austin Dispute Resolution Center* * (512) 471-0033 * **www.austindrc.org**

40-Hour Basic Mediation Training * Houston * June 6-8, continuing June 13-15, 2014 * *University of Houston Law Center—A.A. White Dispute Resolution Center* * Contact Judy Clark at 713.743.2066 * **www.law.uh.edu/blakely/aawhite**

40-Hour Basic Mediation Training * Dallas * June 16-19, 2014 * *Professional Services & Education* * E-Mail: nkferrell@sbcglobal.net * Phone: 214-526-4525 * **www.conflicthappens.com**

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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.

✓ **Continuing Legal Education** is provided at affordable basic, intermediate, and advanced levels through announced conferences, interactive seminars.

✓ **Truly interdisciplinary** in nature, the ADR Section is the only Section of the State Bar of Texas with non-attorney members.

✓ **Many benefits** are provided for the low cost of only $25.00 per year!

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
State Bar of Texas
ADR Section
P.O. Box 12487
Capitol Station
Austin, Texas 78711

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2013 to June 2014. 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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E-Mail Address:_____

2013-2014 Section Committee Choice_____

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ALTERNATIVE RESOLUTIONS
PUBLICATION POLICIES

Requirements for Articles

1. *Alternative Resolutions* is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.
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. Names, dates, quotations, and citations should be double-checked for accuracy.
5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. Check your mailing information, and change as appropriate.
8. The author should provide a brief professional biography and a photo (in jpeg format).
9. The article may have been published previously, provided that the author has the right to submit the article to Alternative Resolutions for publication.

Selection of Article

1. The 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, 2012, Mediate With Us, Inc., . Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

ALTERNATIVE DISPUTE RESOLUTION SECTION

http://www.texasadr.org