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MORE MEDIATION CONFIDENTIALITY HEADED FOR THE CALIFORNIA SUPREME COURT

A California state appeals court decision could lead to another state Supreme Court take on mediation confidentiality.

Fair v. Bakhtiari, 19 Cal.Rptr.3d 591, Docket No. A100240 (Cal. App. 1st App. Dist. Div. 2 Oct. 12, 2004) (available at www.courtinfo.ca.gov/opinions/documents/A100240A.PDF) appears to be a simple enforcement case, revolving around a writing made in a mediation.

The facts are equally simple: one side says the writing was a settlement agreement, the other says that the writing wasn't binding, merely setting out terms to be fleshed out later.

But the business divorce case calls into question, again, whether mediation efforts or products can be raised in court proceedings. The California Supreme Court looked at mediation evidence last summer in *Rojas v. Superior Court,* 15 Cal.Rptr.3d 643 (Calif. S.C. 2004), holding a hard line on discovery of mediation documents in subsequent litigation, and strongly backing nondisclosure. *Rojas* has divided the mediation community and could be a target of legislation next year. See articles at "A Straightforward *Rojas* Still Riles Some Practitioners," 22 *Alternatives* 127 (September 2004).

Fair relies on *Foxgate Homeowners Ass'n v. Bramalea California Inc.,* 26 Cal.4th 1 (Calif. S.C. 2001), another case that is seen as holding the limits on mediation-related discovery. But *Fair* focuses on a *Foxgate* exception—that disclosure of mediation communications is prohibited unless it fits under a statutory exception.

The agreement in *Fair*, according to the opinion by Presiding Justice J. Anthony Kline, who was joined by Associate Justices Paul R. Haerle and Ignazio J. Ruvolo, fits within that narrow exception. The 16-page opinion permits the plaintiff to take the writing to court and attempt to enforce an arbitration clause it contains. The arbitration provision was designed to iron out details that weren't covered by the rest of the "settlement terms document," as the agreement is called in the opinion.

The opinion outs the mediation by transcribing the settlement terms document's nine numbered provisions. The parties designated Jams Inc., a national ADR provider, to conduct the arbitration in the agreement, handwritten by plaintiff's counsel Gilbert R. Serota, a partner in the San Francisco law firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin.

Forcing arbitration is a way for the plaintiff to get a $5.4 million cash payment he was supposed to have received from his former business associate within 60 days of the March 21, 2002, settlement terms document's drafting. The adversaries, and others, were involved in defendant Burlingame, Calif.'s Stonesfair Financial Corp., which, along with several associated companies, manages apartment buildings.

Before the stark disagreement over the settlement terms document, the case was messier and nastier. One of the defendants is the plaintiff's former wife, who also is a Stonesfair principal. Besides the contract allegations, plaintiff R. Thomas Fair alleged assault and battery against defendant and former business associate Karl E. Bakhtiari, and alleged intentional infliction of emotional distress against Bakhtiari and his former spouse, Maryann Fair. The defendants accused Fair in a cross-complaint of, among other things, misappropriating trade secrets and property, and conversion.

Bakhtiari will ask the California Supreme Court to hear the case, according to his attorney, Arthur J. Shartsis, a name partner in San Francisco's Shartsis, Friese & Ginsburg. Referring to the arbitration clause, Shartsis says that the "inclusion of what we think is basically a forum selection clause does not meet the requirements set forth by the Supreme Court with regard to making mediations disclosable in subsequent proceedings."

The October appellate division decision focuses on two issues: whether the settlement terms document satisfies a statutory exception to mediation confidentiality and, if so, whether the settlement terms document constitutes a valid arbitration agreement. Shartsis says the decision incorrectly blends the issues.

The appeals panel quotes *Foxgate* in

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Cartoon by Leo Cullum

"There seems to be some discrepancy. In Martorelli v. Tyne *we billed $350 an hour but in* Bell v. Cosgrove *it was $500."*

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noting that California Evidence Code Section 1119 "unqualifiedly bars disclosure of communications made during mediation absent an express statutory exception." But the appellate decision applies Section 1123, which states "A written settlement agreement prepared in the course of, or pursuant to, a mediation, is not made inadmissible, or protected from disclosure, by provisions of this chapter [e.g., Section 1119] if the agreement is signed by the settling parties and . . . [t]he agreement provides that it is enforceable or binding or words to that effect."

Presiding Justice Kline writes, "While it is true that the settlement terms document does not contain the words 'enforceable' or 'binding' there is language in the document, i.e., 'words to that effect,' that makes plain the parties' intent to be bound." The opinion notes the reference to Jams' arbitration rules as evidence that the parties intended the agreement to be "enforceable or binding" as described in Section 1123.

Based on its terms, the signatures, and the parties' conduct, the panel found both the settlement agreement and the arbitration provision valid. "Use of the objective test for determining whether mutual consent existed shows that the parties intended to enter into a binding contract and that the settlement terms document contained a valid agreement to arbitrate disputes," Kline states.

The opinion rejects Bakhtiari's and the other defendants' contentions that circulating a formal settlement draft and disputing some terms demonstrates that essential elements were left for the future, and that the handwritten settlement terms document "was intended to be an agreement to agree, rather than an agreement."

The appeals panel reversed the trial court's determination that the statutory mediation confidentiality exception didn't apply, and held that the settlement terms document was admissible under Section 1123 and that it contained a valid agreement to arbitrate all disputes.

"We're very, very pleased," says plaintiff's attorney Sirota. "We expect to be awarded $5.4 million plus 10% interest from the date of the agreement, and have the arbitrator resolve any loose ends."

Sirota says that the *Fair* decision "really helps the process of mediation by assuring that when parties and their attorneys and the mediator agree on a settlement, it's enforceable. People don't want to do a mediation, and put all the time in, and then have the other party renegotiate."

He says the case "underscore[s] the need to be as clear as possible about the finality of an agreement that is reached at the end of mediation. . . . There are people out there who will shake hands and then try to renegotiate later."

Sirota says that mediators must be aware of local laws relating to settlements, and differences in laws in different states.

The *Fair* mediator, Eugene Lynch, agrees, but places the statutory burdens squarely on the shoulders of the parties' representatives. "It's up to the lawyer to make sure that any agreement they reach in any settlement . . . meets the standard in any state of a written agreement," says Lynch, who is a former Northern California federal and state court judge, and now is a Jams Inc. neutral in San Francisco.

The decision, Lynch says, is a "simple straightforward issue over whether the agreement satisfied the California statute [to] allow it to be introduced in evidence."

Lynch—who emphasizes emphatically that he is commenting solely on the appeals panel's view of the law, not his or the parties' mediation conduct—adds that the *Fair* situation is commonplace. "Most people reach a settlement agreement in mediation, or at lunch, or wherever. Then they disagree, [and it becomes] 'Who can go to court?' And that's how it is. I don't see it affecting mediation all."

Defense attorney Shartsis disagrees. "I think this has broad implications for contract law," he says, adding that mediation confidentiality "is a very important privilege. You have got to be really clear."

His client's petition to the California Supreme Court will argue that the agreement's finality was anything but clear. "[T]he parties created a 'settlement terms document,'" says Shartsis. "It wasn't called an agreement. It didn't say it was an agreement. It didn't say it was binding. And it didn't say it was enforceable."

He says the *Fair* effect will be to inhibit mediation exchanges. He says his clients often sign nonbinding letters of intent in the course of real estate transactions, and there was no reason for them to believe that the settlement terms document was anything other than a precursor to hammering out a real deal.

"The California Supreme Court has created very bright lines for the mediation process in order to encourage people to be as open and expansive as possible," Shartsis says.

He explains that the appellate panel's deference to arbitration contravenes the laws protecting mediation. "We say that even if you enter into an arbitration agreement in a mediation, unless you say it is admissible in court, it is unenforceable," Shartsis notes, adding that the court equated the presence of an arbitration provision with its ability to enforce the clause. "It is no different than a forum selection clause," he says.

The defense objective is that the Supreme Court reverses and reinstates the bar against disclosure of the already-public agreement terms, and then forces the plaintiff to litigate the case at a new trial.

From there, Shartsis says, "the case could go back to mediation."

The *Fair* appellate decision cited above vacates an earlier opinion, *Fair v. Bakhtiari*, 18 Cal.Rptr.3d 208, (Cal.App. 1 Dist. Aug. 31, 2004).

ARBITRATION ASSOCIATION EXAMINES, CELEBRATES THE FEDERAL ARBITRATION ACT

Kicking off a year-long commemoration of the Federal Arbitration Act's 80th anniversary, scholar and neutral John D. Feerick said that the statute has worked in all political and legal climates.

"It's an act for all seasons," declared Feerick in a speech before about 300 peo-

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ple at the Association of the Bar of the City of New York on Oct. 26.

The address—"Why a Federal Arbitration Act? Modern Arbitration at its Core"—was the first in a series of four lectures the American Arbitration Association is sponsoring "to celebrate this milestone and emphasize the importance of the legislation to the continued success of arbitration."

The nonprofit association, based in New York, is the nation's largest alternative dispute resolution provider. The city bar association, and its arbitration committee, were cosponsors of the first event in the series.

Feerick, a former dean and currently a professor at New York's Fordham University School of Law, focused on the historical basis of the statute, which is at 9 U.S.C. 1 et seq. He explained British common law precedents, and the lengthy U.S. legislative history leading up enactment.

President Calvin Coolidge signed the act into law in February 1925. The association was founded a year later.

The FAA "has been called venerable and colorful," said Feerick. "Some scholars have called it a monster in its interpretation by the [U.S.] Supreme Court."

But the Court, Feerick said later, has strongly supported the act. Citing recent Court opinions, he said, "It's even apparent that it is a 'young' statute, embodying and take shape as it moves along."

New York state's chief judge, Judith Kaye, introduced Feerick, noting that the state had an arbitration law that predated the FAA, and acted as a catalyst for national reform. The FAA, said Kaye, "is one of the pillars of modern-day conflict resolution."

After Feerick's keynote speech, event host William K. Slate II, the American Arbitration Association's president, said that the four commemorative speeches would be gathered in an association-published volume, and also posted on its Web site at www.adr.org.

Attendees at the inaugural event received a 319-page "commemorative booklet" containing the Federal Arbitration Act's text, and 35 articles from association publications giving a historical perspective on the act's operations.

The lecture series will include:

- Washington, D.C., on Feb. 10, 2005, titled, "The FAA—Going the Distance: Elements of Legislative Durability";
- Dublin, Ireland, on May 20, 2005, titled, "Global Implications of the FAA: The Role of Legislation in International Arbitration"; and
- Chicago, on Oct. 20, 2005, titled "Kissing Cousins?: The FAA and Modern Labor Arbitration."

* * *

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FOLLOW-UP: PRESIDENT SIGNS OFF ON A NEW ADMINISTRATIVE CONFERENCE

ACUS rises anew.

The Administrative Conference of the United States, a federal agency that was a favorite of the Washington legal community and was budgeted out of its 27-year existence by Congress in 1995, was resurrected Columbus Day weekend. President Bush signed the bill into law on Oct. 30, along with 40 other end-of-session measures.

A bill reauthorizing the conference was the subject of hearings last spring. Fans of the agency had worked behind the scenes for years, and lobbying over the past year intensified. But a spokeswoman for sponsor Rep. Chris Cannon, R., Utah, suggested that a new Congress next year would have to take up the reauthorization. See ADR Briefs, "Congress May Restore Bellwether ADR Agency," 22 *Alternatives* 137 (September 2004).

That background made the October reauthorization striking. The House unanimously passed the bill, H.R.4917, late in the evening on Friday, Oct. 8. The Senate followed with S.2979, also passed unanimously, near 11:00 p.m. on the federal holiday three days later, before adjourning until a November lame duck session.

People familiar with the bill credit a push by Cannon; the Senate sponsor is Cannon's home state colleague, fellow Republican Orrin Hatch. The bill also had bipartisan support. Hatch's sole co-sponsor is Democrat Patrick J. Leahy of Vermont, while Cannon is joined by 35 cosponsors across the political spectrum in the House version.

The key to the bipartisan support—and ultimately the president's signature—was the May and June hearings before the House Judiciary Committee's subcommittee on commercial and administrative law, which Cannon chairs. The hearings presented testimony by well-known Washingtonians declaring their support for the bill, led by U.S. Supreme Court associate justices Stephen G. Breyer and Antonin Scalia. See www.house.gov/judiciary/commercial.htm. "That just really shows the importance of the issue," says Cannon spokeswoman Meghan Riding, "and that the two sides have come together."

Both justices are former conference executives. See *Alternatives* article, Id.

The conference was a federal think tank that enlisted nongoverment experts to analyze the way the government operated. The focus was on improving efficiency in government by improving administrative procedures, an often arcane area addressed most frequently by agency officials, law professors, and inside-the-Beltway regulatory attorneys.

The conference, which had about 20 employees when it was cut as part of Congress's focus on government downsizing in the mid-1990s, often enlisted law professors to construct its reports. It was ahead of the private-sector curve on conflict resolution, recognizing its utility in the early 1980s. Conflict resolution processes were at the heart of the Administrative Dispute Resolution Act, and the Negotiated Rulemaking Act, two 1990 measures that the conference produced which became law.

The reauthorization bill is called the "Federal Regulatory Improvement Act of

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2004." The bill establishes the conference "(1) to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest; (2) to promote more effective public participation and efficiency in the rulemaking process; (3) to reduce unnecessary litigation in the regulatory process; (4) to improve the use of science in the regulatory process; and (5) to improve the effectiveness of laws applicable to the regulatory process."

Even while the president's signature was a virtual certainty given the Congressional votes, supporters in late October were still sweating the appropriations. The appropriations bill that would fund a new conference already had gone through the House in late October, but there was no allocation since President Bush had not yet signed into law the conference's return. The bill, says University of Missouri-Columbia School of Law Prof. Philip J. Harter, a former conference official, "could be the ultimate Pyrrhic victory."

Despite its focus on government procedure, supporters are unclear how the agency will be reestablished once the law is finalized. Cannon spokeswoman Riding says she isn't sure what happens next. "I'm puzzling that out myself," says Jeffrey Lubbers, a fellow in law and government at American University's Washington College of Law in Washington, and a longtime conference employee who had sought reestablishment.

In fact, the conference's history raises concerns. Congress enacted legislation creating a permanent conference in 1964—and then took four years to provide funding for it. The bill is specific about the allocations, authorizing $3 million for fiscal year 2005, $3.1 million for 2006, and $3.2 million for 2007.

President Lyndon Johnson appointed a conference chairman in 1967, which anticipated appropriations for the following year's budget. See Toni M. Fine, "A Legislative Analysis of the Demise of the Administrative Conference of the United States," 30 *Ariz. St. L.J.* 19 (1998).

If President Bush makes a late 2004 appointment, the new chairman would be unable to begin filling positions, or obtaining new office space, until money had been allocated.

Lubbers says that he expects the new agency's model to be the same as the old conference, noting that the bill's purpose language is close to the original mission.

Lubbers also says that it appears opposition has disappeared. In 1995, some administrative law judges had asked Congress to defund the conference, because it had issued a report asking for formal evaluations of judges' performances. "None of those ALJs opposing us are active," Lubbers says. "The current leadership of the ALJs is favorable."

John Vittone, who is chief administrative law judge of the U.S. Labor Department in Washington, says the conference's reestablishment is a good idea. "It's a good chance for practitioners inside and outside of government for having serious input into improving the administrative adjudication process," says Vittone, who did committee work for the conference.

Discounting the ALJ criticism, Vittone says, "I don't think ACUS back then was a perfect organization, nor do I think it is going to be a perfect organization in the future."

Ronald Bernoski, a Milwaukee-based administrative law judge in the U.S. Social Security Administration's Office of Hearings and Appeals, who currently is president of the Association of Administrative Law Judges, didn't return calls requesting comment.

Jeffrey Lubbers says the conference was missed by legislators, who continued to introduce bills instructing the conference to work. A 2001 bill focused on the conference's alternative dispute resolution expertise, enlisting the agency to help draft ADR mechanisms to help resolve healthcare liability claims. The effort died in committee.

The conference's future work, says Lubbers, could deal with the influence of information technology on the administrative process. He says that the tension between homeland security efforts, and openness, could provide fertile work ground for the new conference.

On the conflict resolution front, Lubbers cites the current work by the American Bar Association's Ad Hoc Committee on Federal Government ADR Confidentiality as the kind of subject that would make for a good conference investigatory subject, particularly with regard to Freedom of Information Act requests and contracting. One of the leaders of the ABA work is Charles Pou Jr., who was the conference's chairman for 17 years.

"There are lots of issues," says Lubbers. "Congress drafts a lot of legislation without paying enough attention to the nitty-gritty procedure questions that can either make or break substantive legislation."

University of Missouri-Columbia Prof. Harter, who worked with Rep. Cannon's office on the bill and who provided testimony to the House Judiciary subcommittee, agrees. He says electronic rulemaking has changed the volume and nature of comments for many agencies, and would make a good subject for conference study. "So much is going on with the role of the agencies and the Internet," he says, explaining that there could be improvements not only in commenting on proposed rules, but in gaining access to government services.

In the ADR area, Harter echoes his June 24 testimony, suggesting that the conference study ways to maximize the use of regulatory ombuds to include agency performance reviews. He says the process of negotiated rulemaking—Harter wrote the 1990 act while working for the agency—has been manipulated by agencies, and should be reexamined.

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