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Dispute Resolution Update

February, 2009

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- Recent Arbitration Case Decisions
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- Dispute Resolution News & initiatives

Dear Friends and Colleagues:

This edition of *Dispute Resolution Update* examines recent court decisions in Kansas and Missouri discussing the propriety of mandatory arbitration provisions in employment and consumer contracts.

This issue also features recent mediation decisions and dispute resolution news and initiatives gathered from around the country and around the world. The information has been summarized by Keith L. Seat, a respected mediator and Editor of the International Academy of Mediators newsletter.

We are pleased to announce that ADR, LLC partners, Larry Rute and Patrick Nichols were named to the 2008 list of *Super Lawyers* in Kansas and Missouri. We understand that no more than five percent of the lawyers in one state are named to the *Super Lawyers* list. The list is created using a selection process including a statewide survey of lawyers, independent evaluation of candidates by attorney-led private research staff, peer review of candidates by practice area, good standing, and disciplinary review.

The *Super Lawyers* list is designed to create a comprehensive compilation of outstanding lawyers to be used as a resource to assist attorneys and consumers in the search for quality legal counsel. Candidates for inclusion are assigned points considering factors such as pure comments, verdicts, settlements, transactions, clients, experience, honors, awards, professional activities, *pro bono* and community service and scholarship.



Larry R. Rute



Patrick R. Nichols



Distinguished Fellows
of the
International Academy of Mediators

2008-2009
Super Lawyers



District Court for the District of Kansas Approves Mandatory Arbitration Provision under Hallmark's Dispute Resolution Program.

In the August 2008 edition of *Dispute Resolution Update*, we reported that the Missouri Court of Appeals (Western District) had recently held in *Morrow v. Hallmark Cards, Inc.* No. WD 67440, that a mandatory arbitration provision under Hallmark's dispute resolution program was not supported under the facts of the case. The Court found that Hallmark had offered no legal consideration to its employees to give up their rights and access to the courts despite the employees' employment-at-will status. The Appellate Court also found that Hallmark's dispute resolution program violated "mutuality" provisions because Hallmark reserved the right, at its' sole discretion, to modify or revoke provisions of the program.

By contrast, the District Court for the District of Kansas handed down a decision in January 2009 upholding Hallmark's Kansas Dispute Resolution Program. The Court found the *Morrow* decision unpersuasive. The Court found that in *Morrow* the Missouri Court of Appeals analyzed the validity of Hallmark's original DRP and not the newly amended DRP. Under the amended DRP, respondent is mutually bound to the covered claims under the DRP and that any new modifications of the DRP did not apply to the pending claim. Further, under Kansas law, "an at-will-employee *does* work under an employment contract, by which, at its most basic level, the employee promises to do a certain job and the employer promises payment therefore; the failure to fulfill either promise constitutes a breach of contract. The issue becomes whether that contract contains a certain provision—governing termination, for example, or in this case, arbitration." The Court further found that based upon the record, the amended DRP is a valid, binding contract to arbitrate, which the parties intended to be bound by.

For more information, see *Kenney v. Hallmark Cards, Inc.*, No. 08-CV-2134-CM.

Missouri Supreme Court Delivers Blow to Arbitration Agreements in Nursing Home Contracts.

In a pair of decisions, the Missouri Supreme Court, for the first time, discussed enforceability of arbitration provisions in nursing home contracts.

In *Lawrence v. Beverly Manor*, a daughter signed an arbitration agreement in behalf of her mother who was moving in to Beverly Manor. The arbitration agreement specifically did not permit the woman's heirs, one of whom had signed the agreement pursuant to a Power of Attorney, from bringing a wrongful death action against the nursing home. The decedent's son claimed that his mother died as a result of injuries incurred when Beverly Manor employees dropped her. Beverly Manor filed a motion in the Circuit Court to compel arbitration. The Circuit Court overruled Beverly Manor's motion, reasoning that "the decedent's daughter was an agent for the purpose of securing residential treatment for the decedent during her lifetime [and] nothing in the arbitration agreement can be construed to extend to new and independent causes of action..." The Supreme Court affirmed the Circuit Court's judgment finding that the arbitration agreement did not bind Ms. Lawrence's heirs from bringing a court action for wrongful death. The High Court further found that because the wrongful death act creates a *new cause of action* where none existed at common law, it did not revive a cause of action belonging to the deceased.

In a concurring opinion by Special Judge Norton, he stated: "I would hold that provisions requiring a residence and nursing home to arbitrate any personal injury claims, in requiring them to waive their right to have any claims decided in a court of law, are unenforceable because they are procedurally and substantively unconscionable."

For more information see *Lawrence v. Beverly Manor*, No. SC 89291.

In a second nursing home wrongful death action, the Supreme Court found in *Ward v. National Health Care Corp., et al*, that the only relevant factual distinction between this case and *Lawrence* (above) was that, in this case, both the decedent and her daughter signed the arbitration agreement. In this case, the daughter signed as "legal representative" when she signed the admission forms, including the arbitration provision. The Supreme Court found that the daughter's signature on the agreement carries no legal binding weight regarding the arbitration of a wrongful death claim and that the arbitration agreement would not be binding on the decedent's children.

For more information see *Ward v. National Health Care Corporation, et al*, No. SC 89392.

(Continued)

8th Circuit Panel Finds that Employees' Supervisor May Rely on an Arbitration Agreement Signed by Employee.

A three-judge panel for the 8th Circuit Court of Appeals found in January 2009 that a former H&R Block supervisor facing an employment discrimination lawsuit has the right to arbitrate the claims filed against him. A former employee asserted claims of racial discrimination, harassment and retaliation against H&R Block and the supervisor. In their motion to compel arbitration, H&R Block and the supervisor relied upon an arbitration clause in a document signed by the employee, in which she "agree[d] to arbitrate any dispute, claim or controversy which may arise between the company and me, including any controversy arising out of my employment or termination of employment with the company, any claim of discrimination arising under Title VII, and any claim under "any other applicable federal or state law." Applying Missouri law, the District Court had concluded that a valid arbitration agreement existed between the employee and H&R Block. The District Court concluded, however, that based on Missouri law, the arbitration agreement was not enforceable by the supervisor. The 8th Circuit Panel concluded that the District Court erred in applying Missouri law to determine whether the supervisor could enforce the arbitration agreement. Citing the U.S. Supreme Court's 1983 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* decision, the Panel held that the Federal Arbitration Act governs the issue of arbitrability and is "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." The Court, therefore, reversed the District Court's denial of the motion to compel arbitration as to the employees' claims against the supervisor, and remanded the case to District Court with instructions.

Missouri Court of Appeals (Eastern District) Determines that Clause in Payday Loan Contract Preventing Class Action Lawsuits by Borrowers to be "Procedurally" and "Substantively" Unconscionable.

In *Woods v. QC Financial Services, Inc.*, the Missouri Court of Appeals (Eastern District) found a part of a mandatory arbitration clause in QC Financial Services, Inc.'s. loan contracts was both "procedurally" and "substantively" unconscionable. QC Financial is a subsidiary of publicly traded QC Holdings, Inc., and does business in Missouri as Quick Cash. Since 2002, Quick Cash has made loans to about 400,000 Missouri residents. Due to the arbitration clause in its loan contracts, however, Quick Cash had never been sued in Missouri until plaintiff filed her claim in mid-2007. Plaintiff maintained that Quick Cash had committed several violations of Missouri's statutes governing payday lenders, and seeking class certification on behalf of those similarly situated. Quick Cash sought dismissal of plaintiff's petition and asked the Trial Court to compel plaintiff to engage in individual arbitration as provided in the mandatory arbitration clause contained in the loan contract. Citing a 1999 decision by a Florida Appeals Court, the Missouri Court of Appeals said that QC, by denying plaintiff the right to class arbitration "has precluded the possibility that a group of its customers may join together to seek relief that would be impractical for any of them to obtain a loan..."

For more information, see *Woods v. QC Financial Services, Inc.*, No. Ed. 90949.

Editors Note:

We encourage readers to submit dispute resolution related case decisions for submission in future editions of *Dispute Resolution Update*. You are welcome to e-mail your case information to info@adrmediate.com. Thank you.

Mediation Confidentiality No Excuse for Court Not to Analyze Reasonableness of Class Action Settlement

A California appellate court concluded in [Kullar v. Foot Locker Retail, Inc.](#) that – without breaching mediation confidentiality – the trial court must look at underlying information about the claims and defenses to determine the reasonableness of a class action settlement reached in mediation. A \$2 million settlement of claims brought by employees against Foot Locker was challenged based on the lack of discovery about the magnitude of the issues being settled. The trial court believed that circumstantial evidence of reasonableness was adequate, in part due to the involvement of an experienced mediator. But the appellate court concluded that the lower court abused its discretion, explaining that the court needed to analyze the amounts in controversy and range of litigation outcomes, and could not rely on general statements that information on these issues was exchanged between competent counsel during mediation with the involvement of a neutral mediator. The appellate court noted that the underlying data should not be immune from discovery even if it was used in mediation, review of which may help the court determine if the class settlement was in the ballpark of reasonableness.

[Kullar v. Foot Locker Retail, Inc.](#), A119697 (Cal. App. 1st Dist., Nov. 7, 2008)

Colorado Supreme Court Clarifies State Mediation Statute

The Colorado Supreme Court considered a pair of appeals in [Yaekle v. Andrews](#) to clarify that the Colorado mediation statute sets forth the way settlement agreements reached in mediation may be enforced as court orders, but does not affect the common law of contract which determines whether a settlement agreement exists at all. Since the Colorado statute makes “mediation communications” confidential, any agreement must be demonstrated without impinging on the confidentiality of the mediation process. In one case the unsigned term sheet prepared by the mediator was not admissible to show an agreement, and partial performance of the purported agreement by one party did not help. In the other case, the parties conducted direct negotiations over the terms of the settlement agreement and were still exchanging drafts months after the mediation session. The court concluded that these exchanges were no longer mediation communications and could be used, along with statements made by counsel in open court, to determine that an agreement had been reached even though it had never been signed.

[Yaekle v. Andrews](#), Nos. 07SC420, 07SC874 (Colo., Oct. 20, 2008)

Court-Style Transcript Setting Forth Agreement Not Sufficient for Mediated Settlement

A split Colorado appellate court concluded in [GLN Compliance Group, Inc. v. Aviation Manual Solutions](#) that it could not enforce a mediated settlement agreement in the absence of a signed writing, even though the retired judge who acted as mediator called in a stenographer and set forth the settlement terms and obtained each party’s agreement “on the record,” even though defendants sent a settlement check to plaintiff who cashed it, and even though plaintiff’s counsel withdrew and testified that an agreement existed. The court further concluded that Colorado’s mediation confidentiality provisions may not be waived by implication. A vigorous dissent agreed with the trial court that the settlement agreement was clearly enforceable since it was “read in the presence of the senior judge [acting as mediator] and transcribed by a court reporter...’in open court.’”

[GLN Compliance Group, Inc. v. Aviation Manual Solutions](#), No. 07CA1563 (October 16, 2008)

Court Considers Parties’ Mediation Positions in Determining No Harm from Missing Insurer

A federal magistrate determined there was no harm to plaintiff and imposed no sanctions when defendant’s insurer failed to send a representative to mediation in violation of explicit court rules. In denying sanctions, the magistrate noted that other representatives attended the mediation for defendant and it made no difference that the insurer failed to attend because the parties were “light years” apart due to “plaintiff’s settlement position.” Summary judgment for defendant had been granted days before the mediation, but the magistrate required that the scheduled mediation proceed despite the parties’ desire to cancel.

[Hinkle Oil & Gas, Inc. v. Bowles Rice McDavid Graff & Love](#), No. 7:07cv487 (W.D. Va., Oct. 17, 2008)

Enforcement of Mediation Clause Doesn't Bar Future Litigation

The Utah Court of Appeals interpreted the mediation clause in the real estate purchase contract in [Miller Family Real Estate v. Hajizadeh](#) and concluded that it precludes litigation until mediation has been attempted, but that an initial failure to mediate would not prevent eventual litigation if mediation is tried unsuccessfully. Thus, the court affirmed the trial court's dismissal of litigation without prejudice. The appellate court did note that parties could agree to contractual terms that would create a condition precedent and prevent any litigation if dispute resolution processes were not carried out, but found that the real estate purchase contract in this case did not contain such terms.

[Miller Family Real Estate v. Hajizadeh](#), 2008 UT App 475 (Utah App., Dec. 26, 2008)

Unambiguous Confidentiality Agreement Merits Summary Judgment on Oral Settlement Claim

The Utah appellate court concluded in [Moss v. Parr Waddoups Brown Gee & Loveless](#) that the terms of a mediation confidentiality agreement were unambiguous and so required summary judgment in litigation seeking to enforce an alleged oral settlement agreement. While the confidentiality agreement was signed for mediation in one case, the parties also negotiated a second case during the mediation session, which plaintiffs argued was not covered by the confidentiality agreement. The appellate court found the broad language of the confidentiality clause to be unambiguous and reversed the district court's denial of summary judgment, without reaching the provisions for mediation confidentiality offered by state statutes. Negotiations in the second case involved an additional plaintiff contacted by telephone who did not sign the confidentiality agreement, but the appellate court concluded that her testimony about the defendants' alleged agreement to settle could not avoid the hearsay rule because the mediator was not an agent conveying a party-opponent's admission.

[Moss v. Parr Waddoups Brown Gee & Loveless](#), 2008 UT App 405 (Utah App., Nov. 6, 2008)

Watershed Mediation Still Succeeding After Ten Years

The successful resolution of an eight-month long mediation in 1998 has permitted ongoing constructive engagement between Minnesota land owners, watershed managers, and county, state and federal conservation agencies in dealing with continuing issues of flood protection, water quality and conservation. Ten years later, the Red River Watershed Management Board continues to use mediation processes. The initial mediation also created a working group which relies on an advisory committee that develops technical consensus to undergird the decision-making of the working group and the Board.

[Crookston Daily Times](#) (December 31, 2008)

West Virginia Bar Dismisses Judge's Unauthorized Practice of Law Complaints Against Mediator, Advocate

A West Virginia family law judge's complaints against a Virginia mediator and an anti-divorce activist were dismissed by a West Virginia Bar committee. The non-lawyer activist had written a letter to the editor offering "friendly advice" about divorce, with which the judge disagreed, that may have been the basis for the judge's complaint. The mediator is a former Virginia attorney who mediates in Virginia with West Virginia clients who come to him, noting that as a mediator he cannot give legal advice and they should seek legal advice from an attorney in their state. The mediator did not know any reason for the complaint, especially since the West Virginia Family Court has approved his clients' mediated agreements.

[WestVirginia Record](#) (November 14, 2008)

Class Action Discrimination Claims Against Dating Service Sent to Mediation

A California case alleging discrimination by the dating service eHarmony for refusing to extend its services to gay and lesbian customers was certified as a class action and sent to mediation. A similar case in New Jersey was just settled, with eHarmony agreeing to open a new website for gay customers, which the company asserts should resolve the California case as well.

[PC Magazine](#) (November 21, 2008)

International Trade Commission Begins Pilot Mediation Program

The U.S. International Trade Commission has launched a pilot mediation program for section 337 investigations, as an initial step towards a permanent mediation program. Participation by parties in the pilot program is voluntary. The program relies on pro bono mediators, most of whom also mediate in the U.S. Court of Appeals for the Federal Circuit. While mediation is confidential and the Commission investigative attorney will not participate or have knowledge of the mediation, the investigative attorney may review any settlement agreement that results from mediation in order to make a recommendation on whether the settlement is in the public interest.

[U.S. International Trade Commission Notice](#) 73 Fed. Reg. 65,615 (November 4, 2008); [Pilot Mediation Program Information](#)

IRS Expands Mediation Options with Post-Appeals Pilot Program

The Internal Revenue Service has begun a two-year test of a post-Appeals mediation program, along with an arbitration program. The programs are available in specified Appeals offices for Offer in Compromise and Trust Fund Recovery Penalty cases. Either the taxpayer or Appeals may request mediation. While the taxpayer may decline Appeals' request for mediation, Appeals must evaluate taxpayer requests according to established regulations.

IRS.gov (December 1, 2008)

EEOC Reports Jump in Filings, Slight Increase in Mediation

The U.S. Equal Employment Opportunity Commission reported a 15 percent increase in job bias charges last year, for a total of over 95,000 private sector filings in fiscal year 2008. Its National Mediation Program obtained nearly 9,000 resolutions in FY 2008, a 2% increase for the year. In addition to non-monetary relief, the EEOC recovered \$124 million for complainants through mediation. The mediation program maintains its very high user satisfaction rate of 96.5 percent. Employers continue to enter into Universal Agreements to Mediate with the EEOC, with the total rising by 14 percent during 2008, to 1,450. In its Federal Sector Mediation Program, the EEOC noted that parties in over 18,000 EEO cases participated in alternative dispute resolution, which was nearly half of all EEO cases in federal agencies.

[National Underwriter Property & Casualty](#) (December 8, 2008) (Subscription Required); [EEOC FY2008 Performance Report](#)

Delaware Joins EEOC's Universal Agreement to Mediate

Delaware is the second state to enter into a Universal Agreement to Mediate with the U.S. Equal Employment Opportunity Commission, following New Mexico in October. Based on Delaware's formal agreement to resolve disputes through mediation, all eligible discrimination charges filed with the EEOC naming Delaware as respondent will be sent to the EEOC's mediation unit.

[US State News](#) (November 19, 2008) (Subscription Required)

Update on State Programs for Mediation of Home Foreclosure Disputes

Connecticut's foreclosure mediations have saved the homes of about 360 homeowners in the past five months, but the mediation program is reaching less than 30 percent of those eligible. The governor has proposed making the mediation program mandatory for all homeowners facing foreclosure. Mediators in the program report that lenders were initially skeptical, but are now willing to participate and actively negotiate solutions. [Hartford Business](#) (December 8, 2008)

New Jersey has enacted foreclosure prevention legislation which allocates \$12 million for additional mediation and counseling through the Housing and Mortgage Finance Agency, and \$500,000 for state courts to provide mediation services to homeowners facing foreclosure. [Bizjournals.com](#) (December 1, 2008)

In order to implement the **New Jersey** Residential Foreclosure Mediation Program, the state Supreme Court has relaxed several court rules, including minimum requirements for mediators in the program. [New Jersey Law Journal](#) (November 24, 2008) (Subscription Required); [New Jersey Foreclosure Mediation Information and Forms](#)

Wisconsin is considering legislation that would require lenders to offer mediation to homeowners before proceeding with foreclosure. [Milwaukee Journal Sentinel](#) (December 12, 2008)

Legislation modeled on the 1986 Farmer-Lender Mediation Act is proposed in **Minnesota** to curb home foreclosures by giving homeowners the right to request mediation in an effort to renegotiate their mortgage terms with lenders.

[Bizjournals.com](#) (November 21, 2008)

Texas Considering New Mediation Program for Hurricane Claims

The Texas Department of Insurance is considering a mediation program to help resolve claims resulting from Hurricane Ike last September, which resulted in about \$10 billion in damages and more than 750,000 insurance claims. While about 60-80 percent of the claims have been settled, the Department of Insurance has received some 2,000 complaints and expects more. The Department is looking to hurricane mediation programs in other states as models and hopes to have a proposal ready for the state legislature in January.

[AM Best Newswire](#) (December 30, 2008) (Subscription Required)

Pennsylvania County Using Newly-Established Mediation Program for Property Reassessment Challenges

Luzerne County, Pennsylvania has implemented a mandatory mediation program for property owners who wish to challenge their property assessments following a formal appeal. The county is reassessing all property in the county for first time since 1965, so expects a large number of challenges, but is relying on the specialty courts director as the sole mediator. Over 850 mediations have already been filed, which may take the single mediator until June, and nearly 8,000 additional appeal board rulings have not yet been received by property owners. The first four settlements in the mediation program have been reached, with assessment reductions ranging from ten to twenty percent. If mediation is not successful, the challenge proceeds to a three-person arbitration panel, then to a special master, and finally to the county court.

[Times Leader](#) (November 7, 2008); [The Citizens' Voice](#) (November 14, 2008) (Subscription Required); [The Times Leader](#) (November 20, 2008) (Subscription Required); [The Times Leader](#) (December 11, 2008) (Subscription Required)

Nebraska Mediation Program Expands Information Provided

The Nebraska Department of Agriculture's Farm Mediation Service conducts monthly informational workshops on issues of farm finances, debt restructuring and other legal issues in an effort to help those it serves solve problems themselves. Recent workshops have focused on farmers' obligations under forward contracts for grain in light of uncertainties created by the bankruptcy of a major ethanol producer. The numbers attending the clinics has increased over the last five years, but the number of mediations in the program has not.

[Grand Island Independent](#) (December 30, 2008)

Mediation Successful in Providing Consumer Restitution

Missouri's attorney general recovered \$9.5 million for consumers through mediation in 2008, exceeding the previous mediation record, plus an additional \$6 million through civil and criminal litigation. The attorney general's office handled about 120,000 contacts from consumers during 2008, including over 40,000 formal complaints.

[US State News](#) (December 30, 2008) (Subscription Required)

"Street" Mediation Works to Curb Homicides

CeaseFire, an anti-violence program in Chicago, has been successfully using mediation to reduce homicides since 2000. When shootings occur, trained mediators reach out to try to break the cycle of violence and prevent retaliation. Many of the paid mediators were former gang members who have access to and credibility with current gang members. The Cease Fire program has expanded to 15 Chicago neighborhoods and five other Illinois cities, and has been replicated in Baltimore, Cincinnati and Newark, New Jersey. Kansas City, Missouri has been working to develop a similar anti-violence program with a mediation component to address increasing homicide rates, but daunting organizational and funding challenges have thus far hampered the pilot project.

[Pitch Weekly](#) (November 20, 2008); [CeaseFire Website](#)

China Continues to Ramp Up Mediation

Mediation of litigated cases continues to increase in China; last year, one-third of five million civil cases were resolved using non-mandatory mediation, often with assistant judges acting as mediators. The Supreme People's Court is pleased with the effectiveness of mediation and hopes to further increase the use of mediation in civil and family cases to deal with ever larger caseloads. Pilot projects using mandatory mediation began in June 2008 in seven Chinese provinces and large cities.

[China Daily](#) (November 21, 2008)

Other International Mediation Developments

Use of "planning mediators" is urged in **Malta** under the Development Planning Act, [Times of Malta](#) (December 7, 2008)

- **India** launches 17 mediation centers for the courts of Punjab and Haryana, [Express India](#) (November 9, 2008); [The Hindu](#) (November 8, 2008)
- Chief Justice of **India** announces that mediation training camps will be conducted in all high courts in India, [Express Buzz](#) (December 21, 2008)
- **Indian** government turns to UK mediators, who are training Indian lawyers to Western standards, [The Lawyer](#) (November 3, 2008)
- **Indian** television launches mediation/arbitration show in which actual civil disputes are resolved without actors or scripts, [OneIndia](#) (November 30, 2008)
- The third of four mediation centers planned for **Nepal** was launched with support from the U.S. Agency for International Development, [US Federal News](#) (December 19, 2008) (Subscription Required)
- Mediation of large medical disputes will be provided without charge by a mediation committee supported by the Tainjin city government in **China**, [China Business Newswire](#) (December 22, 2008) (Subscription Required)
- Implementation of civil justice reforms by **Hong Kong** is likely to greatly increase demand for mediation, [South China Morning Post](#) (November 15, 2008) (Subscription Required)
- **Malaysia** has trained 200 mediators and expects to train more in concerted effort to defuse racial conflict and tension, [The New Straits Time](#) (December 21, 2008)



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