

## Recent Development Notes<sup>1</sup>

### *Teidel v. Northwestern Michigan College*

In *Teidel v. Northwestern Michigan College*, 865 F.2d 88 (6th Cir. 1988), the Sixth Circuit Court of Appeals held that a district court may not enforce its pretrial mediation plan by forcing the losing party to pay the prevailing party's actual attorneys' fees pursuant solely to a local district rule.

This case was originally filed as a product liability action arising from the crash of a private airplane. The plaintiff was a student in the defendant university's flight program. The crash of the airplane resulted in the instructor's death and serious injury to the plaintiff. The case was filed in the District Court for the Western District of Michigan, which submitted the matter to mediation pursuant to Local Rule 42. The hour-long mediation hearing consisted of a thirty minute presentation by both sides, after which the panel rendered a unanimous "no cause" of action in favor of the defendant. The plaintiff continued to insist upon a jury trial and a jury ultimately returned a verdict for the defendant also. After the trial, the defendant submitted a bill for, among other things, its attorneys' fees and asked that it be levied against the plaintiff pursuant to Federal Rule of Civil Procedure 54(d), 28 U.S.C. 1920 and Local Rule 42. The district court held a hearing on this motion and ruled in favor of the defendant, prompting the plaintiff to appeal.

The Sixth Circuit held that while 28 U.S.C. 2071 empowers the Supreme Court and all courts established by Congress to prescribe rules for conducting their business, Federal Rule of Civil Procedure 83 requires that district court rules be consistent with the federal scheme. The court then focused on the case of *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *Alyeska Pipe Line* stated that the general rule in federal courts, called the "American rule," is that absent express statutory language or an enforceable contract, litigants pay their own attorney's fees. The Supreme Court therefore, held that federal courts are not free to fashion new rules and remedies regarding attorneys' fees, and, in the absence of a few limited exceptions, federal courts may not award attorneys' fees. The Sixth Circuit in *Teidel* held that, as seen in this light, a local rule which purports to authorize a district court to award attorneys' fees as part of a pretrial mediation scheme is contrary

---

1. These Notes represent a partial list of those developments which the Editors feel are particularly important to the dispute resolution field. The Editors hope that this new addition is useful to practitioners and academicians alike.

to the federal scheme as interpreted by the Supreme Court in *Alyeska Pipe Line* and reversed the previous award.

John W. Hopper

*Barnett v. Sea Land Service, Inc.*

In *Barnett v. Sea Land Service, Inc.*, 875 F.2d 741 (9th Cir. 1989), the Ninth Circuit Court of Appeals held that a district court can properly exclude a mediator's testimony about settlement when no written settlement agreement exists.

The case arose when James Barnett was injured while employed on board defendant Sea Land Services' vessel. After Barnett sued Sea Land Service in federal court, the district judge assigned the lawsuit to mediation pursuant to Western District of Washington Local Rule 39.1. Although no settlement was signed, the defendant believed that a settlement had been reached during mediation. The plaintiff argued that no settlement had been reached. At trial the defendant wanted to introduce testimony from the mediator that a settlement had occurred. The trial judge excluded the testimony on the ground that the local rule required mediation settlements to be in writing.

On appeal, the Ninth Circuit affirmed the district courts' interpretation of the local rule and held that the district court properly barred evidence regarding the mediation proceedings. The court analyzed the local rule which provides:

Proceedings Privileged. All proceedings of the mediation conference, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and not reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest: *No party shall be bound by anything done or said at the conference unless a settlement is reached*, in which event the agreement upon a settlement shall be reduced to writing and shall be binding upon all parties to that agreement.

*Id.* at 743-44.(emphasis added)

The court agreed with the plaintiff's argument that "since no written settlement was consummated, none exists" under the local rule. *Id.* at 744. By holding that a settlement in mediation is not binding until reduced to writing, the court excluded evidence of the existence of an oral settlement.

This case highlights the importance of reducing a mediation agreement to a writing so that such settlements may be admitted in any future court proceedings.

Julie Ellen Squire

*Delmay v. Paine Webber*

The case of *Delmay v. Paine Webber*, 872 F.2d 356 (11th Cir. 1989) involved a breach of contract by a customer (Delmay) against a securities broker (Paine Webber) in the Northern District Court of Georgia. The broker requested a stay of the action in favor of arbitration. The district court denied the request and found for the consumer. The broker appealed, but the 11th Circuit dismissed the appeal for lack of jurisdiction. The broker then filed a petition for reconsideration, which the 11th Circuit granted.

The central issue in the case is whether an Act of Congress can be applied retrospectively to a pending case. The Judicial Improvements and Access to Justice Act ("the Act") was enacted on November 19, 1988, while the case was pending. The Act permits an appeal to be taken "from an order refusing a stay of any action under section 3 of this title." The 11th Circuit's previous ruling denied the broker's request to stay judicial proceedings under section 3 of the Act. The broker argued that because the case was pending when the Act was signed into law, the 11th Circuit should vacate its prior ruling, retrospectively apply the Act, and grant a rehearing on its appeal. Delmay countered that any retrospective application of the Act would compel her [into a situation in which she would be forced to arbitrate.]

In making its decision, the 11th Circuit concentrated heavily on the general concerns of improving judicial efficiency by using alternative forms of dispute resolution. The court stated that "the jurisdictional issue implicates broad national concerns in the proper functioning of the judicial process and in the pursuit of alternative dispute resolution techniques." The court also pointed out that the section of the Act in question does not force anyone into arbitration, unless the parties previously agreed to arbitrate. The court mentioned that any retrospective application may affect the procedure of the case as to timing, but no substantive right to a jury trial would be affected. The court also emphasized the legislative history in passing the Act. A House Report indicated that the purpose of the Act was to facilitate arbitration by allowing interlocutory appeal to a federal appellate court when the trial court denied that the dispute could be resolved through arbitration, even though the trial court found an arbitration agreement to exist. In passing the Act, Congress was responding to the needs of the Judicial system by emphasizing the importance of alternative forms of dispute resolution. The court also remarked that Congress' intent was curative in nature and acknowledged that courts generally permit retrospective application of curative statutes.

The 11th Circuit held that the newly enacted legislation should be retrospectively applied to the case at hand. The Court reinstated the broker's appeal and vacated its prior decision.

*Dimitrios S. Pousoulides*

*Block v. T.G. & Y. Stores*

In *Block v. T. G. & Y. Stores*, No. 87-0490-CV-W-9 (W.D. Mo. Feb. 22, 1989), the United States District Court for the Western District of Missouri held that a court can enter judgment upon an arbitrator's award against a party who fails to participate meaningfully in the arbitration process.

The case was originally assigned to compulsory, nonbinding arbitration under Local Rule 30. During prehearing discovery, defendant McCrory Corp. partially responded to Block's discovery requests and failed to file a number of prehearing documents. At the hearing, McCrory's attorney made no presentation to the arbitrators, ostensibly as a self-imposed sanction for his client's failure to respond to Block's discovery requests. The arbitrators awarded Block almost \$184,600, plus interest, against McCrory Corp. and McCrory filed a demand for trial de novo.

In a decision clearly upholding the goals of the local arbitration program, the court struck McCrory's demand for trial de novo and entered judgment against McCrory for the amount of the arbitration award. The court quoted with approval the local rule providing for entry of judgment based on the arbitrator's award as a sanction for not meaningfully participating in the arbitration process and noted that

[w]ithout an enforceable requirement that litigants participate meaningfully in the arbitration process, the goals of the arbitration program are threatened. If litigants could do as McCrory did here and escape a sanction, the arbitrators would not be deciding contested issues. Essentially, arbitration would be a default proceeding, a meaningless proceeding preparatory to a district court trial. Without meaningful participation by all litigants, the arbitrators' award would have no credibility as an objective resolution of disputed issues and the parties would not be encouraged to resolve their disputes based on what is revealed about the strengths and weaknesses of their positions.

This decision indicates that courts will enforce local rules permitting rather heavy sanctions against parties who do not take the arbitration process seriously, despite the nonbinding nature of the arbitration.

*David S. Bence*

*Lawrence v. Walzer & Gabrielson*

In *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6 (Cal.App. 2 Dist. 1989), the California Court of Appeal for the Second District held

## RECENT DEVELOPMENT NOTES

that a provision in an attorney retainer agreement by which the client agreed to arbitrate any dispute “regarding fees, costs or any other aspect of our attorney-client relationship” did not sufficiently apprise the client that any legal malpractice claim would be required to be arbitrated, and thus the client was not bound to arbitrate her legal malpractice claim.

Plaintiff retained defendant attorneys to represent her in the dissolution of her marriage. Plaintiff signed a three-page retainer agreement consisting of thirteen paragraphs, nine of which dealt with financial matters. Paragraph 11 stated, “In the event of a dispute between us regarding fees, costs or any other aspect of our attorney-client relationship, the dispute shall be resolved by binding arbitration.” This agreement was not the product of negotiation.

Plaintiff subsequently filed a complaint against defendants alleging legal malpractice and willful breach of fiduciary duty. Defendants then filed a petition to compel arbitration of plaintiff’s claims. Plaintiff objected, stating that she did not understand that by signing the retainer she was agreeing to submit any future malpractice claims to arbitration. The trial court believed plaintiff’s contention and denied the petition to compel arbitration.

In affirming the trial court’s order, the court of appeal first noted that there is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate. The court then examined the arbitration clause in the retainer agreement and found that the plaintiff had not agreed to binding arbitration of either of her two claims.

The court rejected defendants’ argument that the phrase “any other aspect of our attorney-client relationship” in the arbitration clause compelled arbitration of a malpractice claim. The court applied the rule of construction known as *ejusdem generis*, which states that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable to only persons or things of the same general nature or class as those enumerated. Because in this case the phrase “any other aspect of our attorney-client relationship” preceded examples of disputes regarding fees and costs, the rule mandated that the phrase applied only to disputes over financial matters similar to fees and costs. Thus, plaintiff’s malpractice and breach of fiduciary duty claims were not covered by the arbitration clause and plaintiff could not be compelled to arbitrate.

This case demonstrates that courts will scrutinize arbitration agreements between attorneys and their clients very closely. It shows that a party wishing to bind another to an agreement to arbitrate future dis-

putes, such as malpractice claims, must take care to word the agreement to specifically provide which types of disputes are to be arbitrated.

*Melissa Stull*