



# THE MAYHEW-HITE REPORT

## ON DISPUTE RESOLUTION AND THE COURTS

*Created by the Arthur I. Vorys Institute on Dispute Resolution at the Moritz College of Law at The Ohio State University for Judges and Court Administrators and made possible by a deferred gift from Harold E. and Betty W. Hite in honor of Kimberly Hite Mayhew*

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## Does Bazzle Dazzle? Not Really.

by Professor Sarah Rudolph Cole

In the Supreme Court's major arbitration ruling of the 2002-03 term, the Court empowered arbitrators to determine whether ambiguous language contained in an arbitration clause prohibits or permits class action arbitration. *Bazzle v. Green Tree Financial Corp.*, 123 S.Ct. 2402 (2003). By so doing, the Court implicitly approved contractual provisions that prohibit class action arbitration. *Bazzle* is important for three reasons: [1] it may precipitate an increase in the drafting of arbitration clauses that prohibit class actions in arbitration; [2] it resolves, albeit implicitly, the question of whether or not prohibitions on class actions in arbitration are unconscionable; and [3] it will increase the use of arbitration clauses that either are silent with respect to class actions in court or explicitly prohibit class actions in court.

In *Bazzle*, the Court examined an arbitration clause which stated that disputes "shall be resolved ... by one arbitrator selected by us [Green Tree] with consent of you [Green Tree's customer]." Green Tree claimed that the provision prohibits class actions and that an arbitrator selected pursuant to the clause could arbitrate only the dispute between the named plaintiffs and Green Tree but was not authorized to hear the claims of other class members. The courts below disagreed, affirming the arbitrator's decision to administer and arbitrate a class action between Green Tree and its customers. The Supreme Court examined the rest of the contract to elucidate the parties' intent regarding class action arbitration. Emphasizing that the parties gave the arbitrator a broad grant of power through an arbitration clause that said, "[a]ll disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract," the

Court concluded that the parties intended that the arbitrator, not a judge, would determine whether the provision permitted or prohibited class action arbitration. Importantly, the Court also expressly concluded that the parties' dispute was not a dispute about the enforceability of the arbitration agreement. Instead, it was a dispute over "what kind of arbitration proceeding the parties agreed to."

Implications from *Bazzle*: The Court held that the question of whether the contracts prohibit class action arbitration is not a question about the validity of the arbitration agreement. Thus, the arbitrator, not the court, will determine the meaning of the arbitration provision. The economic self-interest of a particular arbitrator, when considered together with the presumption in favor of arbitration, suggests that an arbitrator, interpreting an ambiguous class action arbitration provision, will find that the provision permits class action arbitration. Following *Bazzle*, companies may draft provisions that prohibit the use of class action arbitration. While one might worry that an explicit provision prohibiting class action arbitration would be challenged as unconscionable, the Court's willingness to allow the arbitrator to decide whether or not the arbitration provision at issue prohibits class action arbitration implies that the Court would uphold a prohibition on class action arbitration. While the probable result of *Bazzle* is that companies will draft clauses that specifically prohibit class action arbitration, companies may hesitate out of concern that a class action arbitration prohibition will be treated as a prohibition on class actions in court as well. While the Court may treat the former as conscionable, the latter prohibition may be viewed as unconscionable and therefore unenforceable. In other words, if a

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We are pleased to bring you Volume 2, Issue 2 of *The Mayhew-Hite Report on Dispute Resolution and the Courts*. This is the last issue of the report that will be printed and mailed. We plan to continue dissemination of the Report via e-mail. If you are interested in receiving the Report by e-mail, please send us an e-mail with your name and e-mail address to: [vorysresearch@hotmail.com](mailto:vorysresearch@hotmail.com).  
*Thank you.*

## Does Bazzle Dazzle?

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company explicitly prohibits class action arbitration, but says nothing about class actions in court, a court might interpret that silence as a prohibition on class actions in court (which some courts have held to be unconscionable) or leave the issue for the arbitrator to decide. A court might also conclude that the parties' failure to draft a contract provision concerning class actions in court, while, at the same time, explicitly prohibiting class action arbitration, means that the silence should be interpreted to permit class actions in court. To avoid these issues, a company might consider permitting class actions in arbitration. If such clauses become common, courts may face difficulties as they struggle with the question of how involved they should be in a class action arbitration process.

## OSU's Moritz College of Law's Judges' Day to Feature One of Time Magazine's 2002 Persons of the Year

FBI Agent Colleen Rowley will be one of the featured speakers at OSU's Moritz College of Law's Third Annual Judges' Day to be held at the College on March 11, 2004. Her memo to FBI Director Mueller and two members of the Senate Committee on Intelligence about the Bureau's failure to seriously consider her office's pre 9/11 warnings about Zacarias Moussaoui launched a debate over how to reinvent the FBI. Since then, Rowley began lecturing nationwide on the topics of ethics. Her presentation will be "Balancing Civil Liberties with the Need for Effective Investigation." This year's Judges' Day theme is criminal law to coincide with the launch of the College's new peer-edited journal, *The Ohio State Journal of Criminal Law*. For more information, contact Pam Lombardi, Assistant Dean for Alumni Relations at lombardi.2@osu.edu.

# C O U N T Y profile

## Twelfth District Court of Appeals

Interviewed: Gregory Clark, Conference Attorney

### Type of Programs:

Appellate Mediation

### Year Program Started:

In response to a significant increase in the number of appeals in recent years, the court sought a way to reduce its caseload. Rather than hiring an additional appellate judge and support staff, the court decided to try mediation. The court selected mediation in part because it viewed mediation as a more cost-effective method for resolving disputes. The court hired Gregory Clark in September 1999 as its mediator. Mr. Clark went through extensive mediation training and observed other appellate mediation programs prior to mediating in the Twelfth District.

### Funding Source:

The court's general budget funds the mediation program.

### Mediators:

The court employs one mediator, Gregory Clark, who mediates disputes and, as time permits, performs other duties for the court.

### Facilities:

The mediation sessions are typically held at the Twelfth District Court of Appeals in Butler County in Middletown, Ohio. If scheduling the mediation sessions at the Twelfth District Court of Appeals poses a problem for the parties, however, the mediator will travel to a location more convenient for them, typically the Common Pleas Court building in the county where the parties are located.

### Process:

The court reviews civil appeals and original action cases (cases initially filed at the appellate level) on its docket to determine whether they would benefit from mediation. If the court determines that mediation is appropriate, it notifies the parties of the date, time and location of the mediation session. Parties may also ask the court to consider their case for mediation. If the parties request mediation, the court has the discretion to decide whether mediation would benefit the parties.

If the parties do not think that mediation is appropriate for their case, they may request that the court reconsider the use of mediation in their case. In limited circumstances, the court may return the case to the docket after finding that mediation would not benefit the parties.

If mediation is considered appropriate for the case, the court-employed mediator conducts the mediation session. Cases in mediation always remain "on the court's docket." Although a scheduling order remains in effect, if necessary, deadlines (i.e. due dates for the transcript or a brief) may be extended to a later date by entry of the court.

Both the parties and attorneys must be present for the mediation session. Clark finds that attorney and party participation during mediation sessions varies depending on the nature of the case. In a typical mediation session, the attorney presents a general overview of the case and party participation increases as the mediation session continues. If mediation proves unsuccessful, the case is returned to the court's docket for review. Pursuant to the Twelfth Appellate District Local Rule 21, mediation communications are confidential and may not be used in subsequent court proceedings.

### Strengths:

The Twelfth District Court of Appeals has successfully implemented its mediation program to facilitate the resolution of the continually increasing number of appeals that it faces. Of the 80-100 cases the court refers to mediation annually, approximately 60% settle through mediation. In addition, the mediation program has preserved judicial resources because its success has helped the court postpone hiring additional appellate judges and support staff.

### Contact:

For more information regarding the Twelfth District Court of Appeals Mediation Program, contact Gregory Clark, Conference Attorney, at 1-800-824-1883.

## Case Summary *Herrnreiter v. Chicago Housing Authority, 281 F.3d 634 (7th Cir. 2002).*

**Issues:** This case involves two issues: (1) whether a federal appellate court can enforce a mediated settlement agreement and (2) whether a party who requests that a court enforce a mediated settlement agreement waives its right to the confidentiality of the terms of that agreement.

**Rule:** According to the Seventh Circuit, pursuant to Federal Rule of Appellate Procedure 33, a federal court of appeals has the authority to implement a settlement reached while the case is on appeal. Because an appellate court does not have fact-finding authority, however, a settlement can only be implemented if the terms of the settlement are clear. In addition, the court held that when parties ask a court to interpret and enforce their agreement, the agreement enters the record of the case and becomes publicly available, unless it contains information of a confidential nature, such as trade secrets.

**Facts:** Following a grant of summary judgment in favor of the Chicago Housing Authority (CHA) in an employment discrimination claim, Herrnreiter appealed. While the appeal was pending, CHA and Herrnreiter attempted to resolve their differences through a settlement conference with one of the Seventh Circuit's settlement attorneys. The parties reached an oral agreement during their settlement conference. The parties failed, however, to agree about how the agreement would be finalized and what would remain confidential. Despite these disagreements, CHA asked the Seventh Circuit to implement its version of the agreement, which required the Court to keep the settlement amount confidential.

**Discussion:** The Seventh Circuit found that when a party asks the Court to enforce a settlement agreement, it waives any claim to confidentiality regarding the terms of the agreement. According to the

court, the substance of the agreement was the basis for the litigation and must therefore be recorded in the public record. In addition, the Court ruled that it could not enforce CHA's version of the agreement because there was no consensus among the parties as to the terms of the agreement. Enforcing such an agreement would require the Court to hear testimony from the parties and rule as to the substantive nature of the agreement. Because a court of appeals lacks fact-finding authority, it could not perform this function. Although the Court considered appointing a special master to take testimony and propose a solution, it ultimately found that doing so would prevent the parties from taking advantage of the cost savings associated with mediation. Consequently, CHA's motion was denied and the parties had the option of either continuing with the appeal or returning to state court in order to pursue enforcement of the settlement agreement.

## Article Summary *Appellate Mediation in the Third Circuit – A Model Program*

Joseph Torregrossa, Director of the Appellate Mediation Program for the United States Court of Appeals for the Third Circuit, examines appellate mediation in "Appellate Mediation in the Third Circuit – Program Operations: Nuts, Bolts, and Practice Tips." The article also contains a forward by Edward Becker, Chief Judge for the United States Court of Appeals for the Third Circuit. Judge Becker states that the Third Circuit established its mediation program over the objection that attempting to settle cases that had reached the appellate level could "deprive courts of their ability to expand the corpus of the law." Rejecting this objection, the Third Circuit developed a mediation program with the hope that it could duplicate the success of other federal appellate court programs through cost savings and reduction of the number of cases on the court's docket.

According to Torregrossa, the Third Circuit program has succeeded in attaining these goals through the implementation of a mandatory appellate mediation program. Mandatory appellate mediation, Torregrossa states, provides value to litigants in a variety of ways. First, mandated mediation provides an opportunity for parties to reach a settlement that their lawyers may have thought impossible. Torregrossa contends that many lawyers fail to pursue mediation voluntarily because they think that their case has no chance of settling. According to Torregrossa, however, many of these cases may actually settle at the appellate level. Thus, courts are wise to promote settlement by requiring participation in mandatory mediation programs. In addition, Torregrossa states that appellate mediation is beneficial because it provides parties who may have lost by motion in the dis-

trict court, the opportunity to present their side of the case. Mediation thus effectively provides them with their "day in court." Furthermore, Torregrossa contends that appellate mediation may help attorneys create the most effective appellate argument possible by engaging them in discussion of the legal issues that become more important at the appellate level.

The Third Circuit's program is unique because it employs both a full-time mediator and utilizes senior circuit judges and senior district judges as mediators. Another unique characteristic of the Third Circuit's program is that the Program Director may appoint counsel to represent pro se litigants on a pro bono basis during mediation. If mediation is unsuccessful, the party may choose to have the appointed counsel represent him on appeal. The Third Circuit Mediation Program conducts mediation in-person or by telephone confer-

ence, depending upon which method is more convenient for the litigants and their attorneys. To promote efficiency, the local appellate court rules require individuals with settlement authority to attend the mediation. To promote candid party participation, the rules require parties, counsel, and the mediator to keep mediation communications confidential.

According to Torregrossa, of the 5,932 cases in the Third Circuit that have been eligible for mediation since the program's inception, 2,284 (39%) were actually mediated (80% by the Program Director and 20% by senior judges), and 834 (37%) had settled as of December 31, 2001. In addition, 341 pro bono cases were eligible for mediation, 41 were actually mediated (12%), and 10 resulted in settlements (24%). As Torregrossa notes, although the percentage of pro bono cases settled was lower than the percentage settled in cases where the parties

were represented, the program nevertheless saved the Court time and provided a valuable service to pro se litigants.

To make the mediation process even more effective, Torregrossa suggests that in preparation for mediation, attorneys should determine who will represent the party. During mediation, attorneys and parties should avoid creating a hostile environment, treating the mediator as an adversary, or rushing the mediation process. Moreover, the parties and attorneys should prepare adequately for mediation, anticipate the other side's responses, and keep an open mind about settlement in an effort to make mediation the most effective and efficient process for both the court and the parties.

*Joseph A. Torregrossa, "Appellate Mediation in the Third Circuit – Program Operations: Nuts, Bolts and Practice Tips," can be found in 47 Vill. L. Rev. 1059 (2002).*

### **Mayhew-Hite Report on Dispute Resolution and the Courts**

#### **Editors:**

Sarah R. Cole and Natalie Hostacky. *The Mayhew-Hite Report* will be published in November and December 2003 by the Arthur I. Vorys Institute on Dispute Resolution at The Ohio State University Moritz College of Law. Future editions will be transmitted via e-mail.

Copies of articles profiled in this newsletter are available from the Moritz Law Library. There is no charge for excerpts up to ten pages. Please contact our Reference Department at (614) 292-9463 or lawlibref@osu.edu to place an order or for more information.

#### **Send comments to:**

Sarah R. Cole, The Ohio State University, Moritz College of Law  
55 West 12th Avenue, Columbus, Ohio 43210-1391  
Phone Number: (614) 688-4918  
E-mail: cole.228@osu.edu  
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## **Report on ABA Resolution on Mediation and the Unauthorized Practice of Law**

In February 2002, the ABA Section on Dispute Resolution issued a Resolution on Mediation and the Unauthorized Practice of Law. The Resolution offers guidance regarding whether mediation constitutes the practice of law. It addresses four topics: whether mediation is the practice of law, the effect of mediators' discussion of legal issues, the role of the mediator in drafting settlement agreements, and other mediators' responsibilities.

The ABA Resolution states emphatically that "mediation is not the practice of law." Moreover, mediator communications do not necessarily constitute legal advice even when the communications include discussion of legal issues. The Resolution also states that lawyer-mediators may participate in drafting settlement agreements, as long as they do not draft terms that exceed those the parties specified. The ABA further states that the mediator is not engaged in the practice of law when he adds terms to the agreement if:

(a) all parties are represented by counsel;

and

(b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.

The Resolution also addresses additional mediator obligations, establishing that the mediator must explain at the outset of mediation sessions that their function is not to represent the parties, but rather to "assist them in reaching a voluntary agreement." The mediator also must explain to the parties that: a settlement agreement can impact their rights, each party has the right to independent legal counsel during mediation, and if counsel cannot be present during mediation, each party should consult counsel prior to signing a mediated settlement agreement.

The Resolution also states that the ABA approach intends to avoid unauthorized

practice of law (UPL) issues for lawyer-mediators involved in multi-jurisdictional practice. If mediation is considered the practice of law, lawyer-mediators could face UPL issues when serving in a jurisdiction where they have not been admitted to the bar. The ABA's resolution that mediation is not the practice of law enables a lawyer-mediator to engage in mediation practice across state lines without risking UPL violations. If the Resolution is not widely adopted, however, lawyer-mediators will face different UPL rules in different jurisdictions and will have to adjust their behavior accordingly. Diverse UPL rules will tend to discourage lawyers from becoming mediators because they fear engaging in a UPL. If, by contrast, the Resolution is widely adopted, lawyer-mediators will be more likely to put their skills to use in the greatest number of jurisdictions possible because they will not fear violating a variety of different UPL rules.

*For the full text of the Resolution, visit [www.abanet.org/dispute/Resolution2002.pdf](http://www.abanet.org/dispute/Resolution2002.pdf)*