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ALTERNATIVE DISPUTE RESOLUTION: IS ARBITRATION REALLY A BETTER ALTERNATIVE TO TRADITIONAL LITIGATION?

In today's economy, businesses, both small and large, are trying to find ways to minimize expenses. With the rising costs associated with traditional litigation, it is becoming more common for businesses to seek to avoid litigation by either negotiating a settlement pre-litigation or using alternative dispute resolution methods. One such alternative dispute resolution method that is becoming increasingly popular is arbitration.

The object of arbitration is to avoid the formalities, delays and expenses that are typically associated with traditional litigation, and to foster a final disposition of disputes in an easier, quicker and more economical manner. Often, however, arbitration does not produce a cost-effective alternative to traditional litigation.

In arbitration, each party presents their respective position in the dispute to a third person or panel who then makes a decision on how to resolve the dispute based on the merits of each party's position. The determination of the panel usually consists of a decision and an award. While both sides usually present legal arguments, arbitrators are not required to follow legal precedent. As a result, panel's frequently fashion equitable rulings and remedies. The arbitrator's decision is generally final and binding on the parties; and absent fraud there is little ability to appeal the final decision. *See* §§ 682.12-682.13, Fla. Stat. (The award must be confirmed unless there is bias or corruption in the making of the award, or some other manifest procedural impropriety such that the hearing was not a fair hearing). Such limitations in a party's ability to appeal can be good or bad, depending on the ruling. Regardless, by choosing to arbitrate instead of litigate; parties are clearly giving up a certain amount of predictability in exchange for finality.

Arbitrations are often governed by rules agreed upon by the parties during contract formation. Therefore, the parties have the flexibility to create their own rules. Often arbitration agreements place significant limitations on the amount and type of discovery that can be conducted during the arbitration. *See Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682 (Fla. 2d DCA 2009)("[A] party's ability to take depositions and to propound discovery requests is generally much more limited in arbitration than it is under the Florida or the federal civil rules."); *see also Rintin Corp., S.A. v. Domar, Ltd*., 374 F.Supp.2d 1165 (S.D.Fla. 2005)("[D]iscovery is not guaranteed in arbitration and arbitrators have broad discretion as to grant or deny the ability to obtain discovery."). Depositions and other forms of discovery generally make up the bulk of expenses associated with traditional litigation. Parties to an arbitration contract can agree to limit this expense. Such limitation, of course, is not without a price. Discovery can be very helpful in developing a case for trial or arbitration. Agreeing not to conduct depositions may save expenses and fees but harm a party's ability to prepare its case. Additionally, when the parties fail to address issues like discovery during contract formation, they leave room for arbitrations to become complicated and weighed down by procedural and ancillary disputes.

Arbitrations also have hidden costs. Unlike with traditional litigation, parties to arbitration must actually pay the arbitrators to decide their case. Additionally, arbitration associations often charge significant filing fees, which increase based upon the amount of money in controversy. For example, the American Arbitration Association's current standard filing fee for a $600,000 claim in a commercial case is $8,700, consisting of a $6,200 initial filing fee and a $2,500 administrative fee.

Accordingly, while arbitration can, in some instances, be a cost-effective alternative to traditional litigation, it may not be the panacea once thought. Parties choosing to include arbitration provisions in their contracts should carefully consider the benefits and risks associated with this type of alternative dispute resolution and take care to address important procedural issues during contract formation.

AMICUS CURIAE BRIEFS IN TEXAS STATE COURTS: AN INTRODUCTION

An amicus curiae, or "friend of the court," brief is filed in an appellate court for the purpose of aiding the court in ruling upon a case in which the amicus curiae has no direct interest.[1] The Texas Supreme Court has described the amicus curiae as follows:

> A true amicus curiae is without interest in the litigation in which he appears. He is a "bystander" whose mission is to aid the court and to act only for the personal benefit of the court. *Burger v. Burger,* 156 Tex. 584, 298 S.W.2d 119, 129 (1957).

Texas Rule of Appellate Procedure 11 permits an amicus curiae (often shortened to "amicus") brief to be submitted under generally the same rules that apply to briefs of parties. It is at the discretion of the court whether it will consider such a brief. However, amicus briefs are common in both the Texas Supreme Court and the lower appellate courts, and when they offer information helpful to the court they are looked on favorably.

Amicus briefs are generally filed in cases that will have a substantial impact on the law. They are often filed by special interest organizations or trade groups, parties in other similar cases, an agency or official of the government, or law professors or attorneys practicing in a specialized field of law. Certain organizations and interest groups have established programs that monitor cases nationwide to determine appropriate cases for filing such briefs. For example, the American Bar Association, the American Association of Trial Lawyers, the Product Liability Advisory Council, and the Defense Research Institute all have amicus programs. In fact, Phelps Dunbar was regional counsel for a nationwide amicus program formerly sponsored by London Underwriters.

Often, the parties in litigation will seek out amicus briefs from individuals or organizations that may support their positions in the litigation. Amicus curiae support may be particularly helpful when it is best for someone other than a party to address the broader policy issues at stake in a case. The amicus can also provide historical perspective, technical expertise or simply endorse the views of a party.

An amicus curiae brief that serves one of these proper functions is generally appreciated by the courts, and the Texas Supreme Court has often cited to such briefs in its opinions. For example, in the recent Texas Supreme Court opinion in *Lamar Homes, Inc. v. Mid-Continent Casualty Company*, 242 S.W.3d 1 (Tex. 2007), the court cited to an amicus brief to explain the different functions of an insurance policy and a surety bond. Similarly, in *Missouri Pac. R.R. v. Limmer,* 299 S.W.3d 78 (Tex. 2009), the court cited to the amicus brief of the Association of American Railroads for historical statistics regarding collisions and fatalities at railroad crossings.

The Texas Rules of Appellate Procedure set no deadline for filing an amicus curiae brief; however, clearly there are times when such a brief is opportune. For example, in the Texas Supreme Court the parties must petition to the court to consider the case, and a limited number of petitions are granted each year (typically, 10-12%). An amicus brief may be submitted shortly after the petition for review to support the petition and urge the court to consider the case. Amicus briefs are also submitted at or shortly after the time the parties file their briefs on the merits to support or otherwise address the issues raised in the parties' briefs.

On occasion, an amicus brief is filed after the court has issued an opinion to encourage the court to reconsider an issue that the amicus believes was wrongly decided. For example, in *Excess Underwriters v. Franks Casing Crew and Rental Tools, Inc*., 246 S.W.3d 42 (Tex. 2008), the Texas Supreme Court initially held in favor of the insurers to hold that insurers had an extra-contractual right to seek reimbursement from insured parties under certain circumstances. The opinion generated significant interest and commentary on both sides of the issue. Only one amicus curiae brief had been filed before the opinion was issued. After the opinion was issued, the insured asked the court to reconsider. Twelve more amici then appeared in the case, including at least nine corporate interests who favored the insureds. In its opinion on rehearing, the court reversed its decision, and in so doing cited to arguments made by the amici. This is a good example of a case in which the appearance of amici made a significant difference in the ultimate outcome of the case.

There is no doubt that a brief filed by an amicus curiae can have an influence in the Texas appellate courts. It demonstrates to the court that the issues in the case are of interest to a broad audience and may have an impact beyond the parties themselves. If the amicus brief is well-crafted, short and to the point, and offers a perspective different from that presented by the parties, it will be viewed favorably by the court and fulfill its intended purpose of aiding the court in its decision-making.

[1] This paper borrows from McDonald & Carlson, Texas Civil Practice, 2d ed. §§ 4.1-4.9; Reagon Simpson, "Amicus Briefs," HBA Appellate Section Luncheon, June 21, 2007; and Gregory Coleman, "Amicus Curiae Briefs," 17th Annual Advanced Civil Appellate Practice Course, 2003.

INSURER WINS JURY VERDICT IN HURRICANE KATRINA CASE

Prime Insurance Syndicate, Inc. was sued by Ronnie and Patricia Bryant in a valuation dispute over damage caused by Hurricane Katrina under a homeowners' policy. The Bryants originally filed suit for compensatory and bad faith punitive damages in late 2007, seeking over seven million dollars in total damages.

Prime originally distributed a check for dwelling and other structures recovery to the Bryants within 120 days of the storm. Payment was made on an actual cash value basis pursuant to the insurance policy. The Bryants originally contended that the funds were insufficient to repair the home but did not point out any basis for additional payment for several months. Prime eventually invoked the appraisal conditions of the policy and representatives of both sides appraised the loss. Nearly a year after the storm at the time of appraisal, the home and some contents had allegedly suffered additional damage from exposure to the elements. Prime paid the amount agreed upon by the appraisers plus additional amounts available under the policy. The Bryants accepted the additional payments and also filed suit against Prime and their mortgage holder in federal court.

Following extensive discovery and at least three court ordered settlement conferences, the district court granted summary judgment to Prime on the Bryants' claims for punitive damages, and the mortgage holder settled out of the case. However, the district court found that there were issues of fact for trial on the Bryants' entitlement to additional amounts under the policy. Furthermore, there was an issue of whether the Bryants could recover extra-contractual damages (such as damage to the home in excess of policy limits and attorneys' fees) as a result of Prime's asserted basis for paying less than policy limits and alleged delay in tendering payment and claims handling.

A six-day trial was held in early January 2010 before a jury comprised entirely of Mississippi Gulf Coast residents. Each of the jurors indicated on voir dire that they had made an insurance claim following Hurricane Katrina. Most felt like they had not been paid enough by their insurer. After less than 90 minutes of deliberation, the jury found that Prime had not breached the insurance policy in its handling and payments on the Bryants' claim. Most importantly, the lack of any contractual breach precluded any finding that the Bryants were entitled to any extra-contractual damages.

Prime Insurance was represented by Phelps Dunbar LLP's Rick Bass, Jim Wyly and Justin Matheny. Please contact rick.bass@phelps.com or jim.wyly@phelps.com for further information on this ruling.

FLORIDA'S "SIGNIFICANT ISSUE" TEST CANNOT BE MODIFIED BY CONTRACT

Can parties to a contract define who the "prevailing party" is based upon whether a party is awarded a certain percentage of its claim? According to Florida's Fourth District Court of Appeal, no.

By way of background, an "attorney's fees" or "prevailing party" clause contained in a contract requires the loser of a lawsuit, arbitration or similar claim to pay the winning party's legal fees and costs. In the absence of such a clause or statutory authority, each party typically bears its own legal fees and costs. In Florida, the test used to determine the prevailing party for purposes of recovering attorney's fees is known as the "significant issues" test. Under this test, the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party for attorney's fees.

In *Port-A-Weld, Inc., v. Padula & Wadsworth Construction, Inc.*, 984 So. 2d 564 (Fla. 4th DCA 2008) the subcontractor, Port-A-Weld, sued the general contractor, Padula, for monies due on a construction project. The general contractor counterclaimed for delay damages. The trial court entered judgment in favor of the subcontractor as to its claims and the general contractor's counterclaims. The contract between Port-A-Weld and Padula contained the following clause defining who was the prevailing party for purposes of awarding attorney's fees and costs:

> Subcontractor and Contractor agree that in the event arbitration proceedings or litigation is initiated by either party, the non prevailing party shall be liable for all arbitrator's fees and costs, attorney's fees and court costs incurred by the prevailing party at all levels of proceedings or negotiations. For the purposes of this Agreement, a party shall not be considered a 'prevailing party' if its recovery shall be less than 75% of its claim amount.

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FLORIDA'S "SIGNIFICANT ISSUE" TEST CANNOT BE MODIFIED BY CONTRACT *continued...*

Based upon this definition, the trial court initially found that the general contractor was entitled to its attorney's fees and costs as the prevailing party, because the subcontractor failed to recover monies in excess of a 75% threshold as stated in the contract. In a subsequent judgment, the trial court later denied both parties' claims for fees finding that "the issues raised on both sides are significant" and that "the attorney's fees for both sides are a wash." Thus, the court determined that they were both prevailing parties and denied each party's claim for attorney fees and costs. From there, the appeal was taken.

As a matter of first impression, the appellate court held that "the Florida Supreme Court's 'significant issue' test for prevailing party attorney's fees cannot be contractually modified." The appellate court held that the subcontractor was the prevailing party and was entitled to recover all of its attorney's fees and costs, notwithstanding the contract language.

The Port-A-Weld decision makes it clear that parties are not free to redefine the "prevailing party." While it is ordinary for a contract to specify that the prevailing party is entitled to attorney's fees in the event of a dispute, businesses and individuals alike must realize when drafting such language that neither party can by contract or otherwise by its actions change the "significant issues" test mandated by the Supreme Court of Florida.

FINANCIAL INSTITUTIONS MAY QUICKLY FORECLOSE ON DEFAULTED PROPERTY

Through its recent decision in *Mitchell v. Valteau*, the Louisiana Fourth Circuit Court of Appeal has reinforced a mortgage note holder's ability to quickly foreclose on property by holding that mortgage holders are not required to serve amended notices of seizure on borrowers who default on repayment agreements entered into following the initial service of notice of seizure. *Mitchell v. Valteau*, 09-1095 (La. App. 4 Cir. 1/27/10); __ So.3d __ (publication forthcoming).

In 2006, Dr. Pamela Mitchell defaulted on her mortgage payments, prompting the bank holding her mortgage note to commence an executory proceeding for the seizure and sale of her property. Dr. Mitchell was served personally with the notice of seizure, which informed Dr. Mitchell of the date of the scheduled auction for the sale of the property. Following service of the notice of seizure and sale, Dr. Mitchell entered into a repayment agreement with the holder of the mortgage note. After making only two payments, Dr. Mitchell defaulted on the repayment agreement. The note holder filed a supplemental and amended petition and caused an amended writ of seizure to be issued. The sheriff's office was unable to serve Dr. Mitchell with the amended notice of seizure. A curator was appointed and accepted service for Dr. Mitchell, and the property was sold at a sheriff's sale to a third party. Following the seizure and sale of her home, Dr. Mitchell filed suit for wrongful seizure damages against the Orleans Parish Civil Sheriff, the two banks who held the mortgage note for the property, and the purchaser of the property.[1] The district court granted the bank's motion for summary judgment, dismissing Dr. Mitchell's claims.

On appeal, Dr. Mitchell argued that service of the amended notice of seizure was required before her property could be seized and sold following her default on the repayment agreement.[2] In addressing this issue, the Fourth Circuit conducted an analysis of several codal and statutory provisions regarding executory process, along with case law from the Fifth Circuit Court of Appeal. Noting that the terms of the repayment agreement specifically stated that (1) the executory proceeding would be placed on hold while the repayment agreement was in place and would resume upon Dr. Mitchell's default on the repayment agreement and that (2) the initial notice of seizure served on Dr. Mitchell instructed her to monitor the executory proceeding because additional notice may not be given upon postponement of the scheduled sale date, the Fourth Circuit held that the note holder had no obligation to serve Dr. Mitchell with another notice of seizure following her default on the repayment agreement. The Fourth Circuit's ruling in *Mitchell* buttresses the rights of a mortgage note holder to proceed executorily against borrowers who default on mortgage payments.

[1] While Dr. Mitchell initially filed suit against these four defendants, she only proceeded against the two banks who held the mortgage note for her property.

[2] The Fourth Circuit also addressed and rejected Dr. Mitchell's argument that because the mortgage note was transferred from one bank to another after the filing of the executory proceeding, the holder of the note at the time of the seizure and sale was required to establish its right to enforce the note by authentic evidence.

E-DISCOVERY CONTINUES TO CHANGE THE APPROACH TO LITIGATION

The technological shift toward electronic files and data management has revolutionized the landscape of litigation and the nature of discovery, or as it is more appropriately called, electronic discovery ("e-discovery"). Discovery disputes now revolve around the contents of hard drives and servers, as opposed to filing cabinets and bankers boxes. Correspondingly, this shift has created new responsibilities for litigants to manage, preserve and collect their electronically stored information. The federal courts presented with e-discovery issues have progressively shaped and redefined these responsibilities for litigants, while no longer providing sympathy for the defense of ignorance.

Recently, a decision from U.S. District Court Judge Schira Scheindlin, known for a series of landmark decisions that defined the scope of e-discovery and the apportionment of the discovery costs, issued a stern warning to litigants. *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010). To ensure that there was no confusion about the direction of her remarks, Judge Scheindlin began her opinion by stating, "By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in the right places for those records, will inevitably result in the spoliation of evidence." At issue in the case was over $550 million in damages and the defendants accused the plaintiffs of spoliation of evidence. After a thorough review of the facts, Judge Scheindlin imposed monetary fines on thirteen (13) plaintiffs and, based on evidence of the plaintiff's gross negligence, granted defendants' request for an adverse inference that allowed the jury to presume that the missing documents were harmful to the plaintiffs' case. In the lengthy decision, Judge Scheindlin reiterated the duties of litigants and their lawyers, both in litigation and the everyday operation of their business.

As explained by Judge Scheindlin, businesses are responsible for the routine storage and preservation of their documents, both paper and electronic. If litigation commences, businesses and their attorneys have additional responsibilities, requiring more stringent preservation of documents and, given the circumstances, the collection, review, and production of documents. As an initial matter, businesses should know the life cycle of their electronic files, from creation to deletion, be able to identify the storage location(s) of their electronic files, and have a document retention policy established —and followed—for both electronic and paper files. Addressing these issue in advance of litigation will save businesses money in their daily operation and storage costs; and in the event of litigation, will also streamline the discovery process by allowing litigants and their lawyers the ability to more easily preserve and collect electronically stored information. During litigation, the failure to properly preserve, collect, or identify electronically stored information could result in sanctions ranging in severity from further discovery, cost-shifting, fines, special jury instructions (such as an adverse inference), preclusion of evidence, entry of default judgment or dismissal.

To warrant the more harsh sanctions, Judge Scheindlin explained that there would need to be evidence of gross negligence, which could result from: failure to identify key figures in the lawsuit and not properly preserve their records; failure of the business to stop any automatic deletion programs (such as automatic deletion of e-mails); and failure to supervise the collection and preparation of relevant documents. Although Judge Scheindlin referred to sanctionable instances of conduct during litigation, the potential for these sanctions can be greatly minimized if litigants take the proper precautions in advance of litigation to better understand and manage their electronic information. Judge Scheindlin concluded with a warning for future litigants: "Finally, I note the risk that sanctions motions, which are very, very time consuming, distracting, and expensive for the parties and the court, will be increasingly sought by litigants. . . . parties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions."

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