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CONFLICT MANAGEMENT

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MEDIATION AS A TOOL FOR SETTLING MASS TORT CLASS ACTIONS

Robert Gary

The mediation of mass tort class actions presents real opportunities to achieve settlement, while also presenting issues particular to an attorney's obligations to multiple plaintiffs in the class action context.

ECONOMIC ISSUES

The scope of this article is the mediation of mass tort claims. Addressing the issues of damages is critical to the settlement of any class action, and mediation provides the ideal mechanism in the mass tort area. Valuation of these claims, where the damages are indeterminate, must be approached very differently from a class case where the claims can be computed with precision by mathematical formula. A pension class action, for example, may hinge on the selection of interest rates when converting an annuity to a lump sum, or the effect of a lump-sum payment calculation in a cash balance plan. In such instances, the parties can determine the number of eligible class members

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DYNAMICS OF A GLOBAL CLASS ACTION SETTLEMENT: THE SULZER HIP IMPLANT CASES

Harvey Kaplan and Andrew Carpenter

On May 8, 2002, Judge Kathleen O'Malley of the United States District Court for the Northern District of Ohio certified a settlement class under Federal Rule of Evidence 23(b)(2) and granted final approval to a class settlement that provided over $1.03 billion to resolve the claims of the approximately 30,000 class members. The settlement class consisted of all persons who had been surgically implanted with a hip prosthesis (the Sulzer Inter-Op™ Acetabular Shell) or knee prosthesis (the Sulzer Natural Knee® II Tibial Baseplate) manufactured by Sulzer Orthopedics, Inc. ("SOI") from an "affected lot" and their derivative claimants.

The settlement has been as an effective, efficient resolution of the class claims. As of February 20, 2004, the Settlement Trust had received 4,772 claims for benefits for patients who had undergone revision surgery, 5,924 claims for benefits under the Extraordinary Injury Fund ("EIF"), and 3,450 claims for benefits by unrevised class members. While the Trust continues to process claims, approximately $710 million has been paid out to claimants. Over $30,232,300.00 in common benefit attorneys' fees have been approved by the Court. The settlement also served the interest of the defendant. Instead of having been forced into bankruptcy, SOI, subsequently re-named Centerpulse Orthopedics, Inc. ("COI"), has emerged from its litigation crisis and has been acquired by Zimmer Holdings, Inc. ("Zimmer"), a worldwide leader in the design, development, manufacture, and marketing of reconstructive orthopedic implants and trauma products. This Article describes how the parties achieved the settlement in the Sulzer class action.

A. The Parties & the Product. SOI was an Austin, Texas-based manufacturer of orthopedic devices, including knee, hip, and shoulder replacement systems. SOI's Inter-Op™ Acetabular Shell ("Inter-Op Shell") and

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Message From the Editor

This issue features three articles about the settlement of class actions. The number of claimants, varying circumstances, attorneys and jurisdictions involved in many mass tort matters present perhaps the greatest challenge for "conflict management". Our feature authors offer three different perspectives, providing lessons and examples for us all, regardless of the type of cases we may be handling. Harvey Kaplan describes how a defendant's early and thoughtful case assessment, key court rulings, astute case management and vigorous negotiations combined to produce a win-win resolution for over 30,000 plaintiff class members, and the defendant, in the Sulzer hip implant litigation. Bob Gary describes how a mediator can assist in resolving critical interlocking issues in class actions. And Deana Peck and Kathleen Biesterveld discuss the array of legal obstacles, and tools for overcoming them, in the multi-jurisdictional enforcement of class action settlements.

In addition to the feature articles, you'll also find news on changes in arbitrator ethics rules, case notes, and a new section, ADR Basics, which will provide key information for those new to dispute resolution processes. In this month's ADR Basics, ADR Committee Co-Chair Richard Kennedy addresses the bases for court review of arbitration awards under the Federal Arbitration Act.

Our next issue will focus on Conflict Management Systems, which are of particular interest to labor and employment lawyers, but which can be useful to clients regardless of the type of disputes that are most common in their organizations. Future issues will focus on other themes, as guided by Committee leadership and suggestions and submissions from you, our readers. . . .So let's hear from you!

Deborah A. Coleman, Editor in Chief

Message From the Chairs

As we approach the midpoint of this Bar year, we are extremely pleased at the state of the Committee. We have recently appointed new co-Chairs for subcommittees and have enlisted interested members to join the subcommittees, although additional members are always welcome. We co-sponsored three (3) Programs at the Section of Litigation Annual Meeting in Phoenix, Arizona this month.

A wide range of subjects falls within the scope of the Section's ADR Committee, including strategies for settling court litigation (featured in this issue), conflict management systems (to be featured in the summer issue, mediation, negotiation and arbitration. Each approach to dispute resolution has unique characteristics within a particular field of law, and hence we have subcommittees that are subject-specific, such as securities, as well as method specific, such as mediation. Consider what area is of greatest interest to you and join a subcommittee, offer program ideas for upcoming Section of Litigation Meetings, or submit an article for publication in *Conflict Management*.

Issues at the intersection of two areas are also of interest to us. We note that last year, a focus of court decisions was determining the boundary between the jurisdiction of the court and the charge of the arbitrator. The U.S. Supreme Court in *Bazzle* directed us to look to the arbitrator to make the class action arbitrability decision. Nevertheless, various Federal and State courts, ignoring the standard adopted by the U.S. Supreme Court in Bazzle, have proceeded to decide gateway issues on motions to compel, confirm or vacate without restraint. The focus of these Courts is the question of whether the arbitration agreement is unconscionable. It does appear, however, that the unconscionability question involves the interpretation of the underlying contract, which is exactly what the U.S. Supreme Court has now said is for the neutral to decide.

In this era, it seems that the only certainties are tension and change. As lawyers, our charge is to do our best to interpret these developments to our clients, and to assist them in achieving their goals in spite of new and changing obstacles.

E. Richard Kennedy
Paul A. Sandars, III

as well as the exact value of their claims. Armed with this data and assisted by a mediator, the parties then can arrive, through a traditional risk-benefit analysis, at a dollar value that is acceptable to plaintiff and defendant and is likely to be approved by the court at a fairness hearing.

A mass tort or environmental event such as an explosion, pipeline break or superfund site does not present such mathematically precise damage calculations. The number of class members only can be estimated, and the value of any one claim or a number of aggregate claims for personal injury, evacuation or property diminution is subjective. Nor can it be determined with precision how many of the unnamed class members will fit into various damage categories, even where categorization is a point on which the named litigants can agree.

Although parties negotiating any settlement conventionally regard the total value and the per client value of a settlement as the key issues, in class settlements, the protocols for administration of the settlement, as well as the identity of the administrator, may be as important to the actual recovery by class members as the aggregate dollar value. At the point of resolution of a gross settlement figure by mediation, neither the parties nor the mediator can know with certainty the number of claims that will be made, and who will qualify. Regardless of the total stated value of the settlement, the real cost to the defendant, and the actual recovery by the plaintiff class, will depend on details that are subject to negotiation—for example, the settlement claim criteria, which may limit realistic participation, or the claim form, whose complexity may deter claimants.

A class action mediation should not proceed with the expectation that all administrative issues will be resolved in the mediation in order to be deemed successful or to be able to move forward. Participants to a mediated resolution should recognize that, once the economic framework is established, counsel can resolve by themselves matters such as class notice, claims forms, and criteria for payment. Mediation sets the foundation for addressing these "administrative details" by facilitating agreement on the underlying economic issues.

TRUST AND TIMING

The potential for resolution of a class action by mediation begins the day that class counsel first interacts with defense counsel. As in any litigation, there will be discovery issues, as well as unique class issues such as the size and definition of the class. If, at the outset, the attorneys are able to build trust, rather than suspicion and distrust, an important foundation will have been set for a successful mediation. Beyond trust, the second most important factor in any successful mediation is timing. As a practical matter, mediation would generally not take place until the class is certified so that class members have had a chance to opt out and discovery is well under way, so that the parties can accurately assess liability, if not damages.

INHERENT PROBLEMS AND COST

Some of the dilemmas presented by class action mediation are obvious. For example, even if a mediator were able to resolve the dispute among the named litigants, neither side can be sure that the unnamed class members will be willing to participate or that the court will approve the proposed settlement, particularly since a mass tort class action frequently features multiple subjective damage components for a large and diverse group of potential plaintiffs represented by multiple class counsel. Less obvious are the problems surrounding the determination of attorney fees in class actions, which for the most part are awarded by the court rather than paid pursuant to client contract.

To address these issues effectively, the mediation of a class action may consume many more hours than the mediation of a traditional suit and may be more expensive to mediate, but is generally worth the expense. Participants generally know full well that trial of a class action presents difficulties that go beyond those of the submission of even a complex non-class matter to a jury, and can be enormously expensive for all the litigants. Establishing both the uniformity of damages within the class, and the variety of damages flowing from a common source, frequently involves computer modeling and expensive experts running into the hundreds of thousands of dollars. Thus, neither the number of mediation sessions, which may extend over several weeks or even months, nor the total cost expended on mediation, should be an impediment to pursuing mediation as an option, as long as settlement appears realistic and in the interests of all sides participating in good faith.

FAIRNESS HEARING

In a class action mediation, the parties must keep foremost in mind, throughout the negotiations, that it is not up to the parties alone to settle on their own terms. They can only fashion a settlement which is acceptable to those at the table and is designed to pass muster with the court at a fairness hearing. The unnamed class members, sometimes numbering in the thousands, by definition cannot participate in the mediation, and thus the plaintiff class speaks through class counsel. A court-supervised fiduciary relationship exists between the class and class counsel, who has no unilateral authority to settle on behalf of the class. Rather, the court must approve any settlement after notice provided to all of the class members as to the terms of the settlement agreement. In order to be approved as a binding agreement of the parties, the results of the mediation will be examined by the court for fairness at a hearing at which the class members, who have their own expectations of fairness, may appear and be heard. Therefore, the mediation should in many respects address the very issues which will be presented to the court at the fairness hearing, i.e., adequacy of the economic resolution for the class, attorney fees, and, if necessary, administrative details, causing the mediation to serve the dual purpose of settlement of the case and preparation for the fairness hearing.

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SELECTION OF THE MEDIATOR

Because of the uniqueness of the issues to class actions, the mediator must be someone who is intimately familiar with, and has had hands-on experience in, class action litigation. If the mediator focuses exclusively on the dollar value without a fundamental awareness of how other issues ultimately will affect the total final cash distribution, an apparently reasonable settlement may be headed for a lop-sided result. The mediator must understand several dynamics, including the interplay between the power of administrator over the implementation of the settlement, the language of the opt-out notice, and the format and complexity of the claim form, as well as the required showing at the fairness hearing. The imperative of the mediator's familiarity and facility with these issues may limit the field of potential mediators to those prepared to make the commitment to mastering the class issues, class action attorneys and judges experienced in class actions.

CASE STUDIES

The successful mediation of two complex mass tort class actions illustrates the potential effectiveness of mediation in class action litigation, despite an indeterminate number of class members and subjective and widely varying damages for classes numbering in the thousands.

White v. Aztec

The *White* case arose out of an explosion of a chemical facility in Elyria, Ohio. As a result of the explosion, approximately 9,000 people were evacuated from their homes, creating evacuation claims in addition to claims for property damage, property value diminution, a variety of physical symptoms and medical bills, and a potential punitive damage claim.

Extensive document production and discovery resulted in a reasonably clear picture of the causes of the explosion. Nevertheless, and not surprisingly, the parties had vastly different opinions regarding the effect of the explosion on the community. After extensive but unsuccessful face-to-face negotiations, by agreement of the parties the case was submitted to mediation with a former United States District Court judge. The stature, credibility and skill of the mediator are important elements to the success of any mediation, and class actions are no exception. The mediator in this instance brought to the table these necessary assets.

Prior to mediation, during almost a year of attorney-to-attorney negotiation, neither side was willing to commit to a specific dollar settlement without first reaching agreement on the methodology for distribution. Without the dollar amount agreed upon, neither side was willing to address the methodology for distribution. Only a third party could simultaneously shape these two interrelated elements, thereby obviating the necessity of plaintiff and defense counsel making face-to-face concessions to the detriment of one or the other as they worked through the myriad of details required to effectuate a class action settlement.

The defendants in *White* wanted to put the case behind them and settle for a fixed amount with all cash, expenses and attorney fees coming out of the settlement fund. The dilemma for class counsel was how to divide equitably a fixed sum among an unknown number of claimants who suffered a mixed bag of damages. Some individuals were evacuated but had no medical injuries; some had medical injuries but were renters, not owners, of real estate, and so forth.

The solution was reached in mediation. The defendants would pay a fixed amount, out of which would be paid all costs of administration, expenses, attorney fees and distribution to the class. Class members would receive a fixed amount for each damage category for which they qualified, including payments up to $65,000 for a severe injury, if corroborated in a specified manner.

Class counsel always fears that, after publicizing the terms of a settlement, the fund will run dry, or, because of the number of applicants, the actual payments will fall far short of the estimated compensation to each participant. If every class member sent in a valid claim, the settlement fund would be insufficient to pay all claim categories at a hundred cents on the dollar, and the claims would have to be reduced pro-rata across the board. While plaintiffs' counsel in *White* wanted a substantial dollar amount per category (i.e., evacuation, personal injury), with a capped settlement fund, they ran the risk that there would be insufficient funds at the end of the distribution process. The defendants were of the belief that, even if all claims by category were paid one hundred cents on the dollar, there would be large amounts of money left over. The mediator's solution was to convince the defendants to agree to both a generous payment per category and to a two stage payout, in order to avoid the danger of exhausting the fund. The claims for punitive damages, evacuation and pollution symptoms were set at a fixed amount for the initial payout. After the initial payout,

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when the total number of all claimants was known, eligible class members would receive up to an additional 200% for punitive damages and 100% for the other categories if sufficient funds were available after the expiration of the claims period. The defendants' concern about overpayment was resolved by the plaintiffs' agreement to return any portion of the funds not expended through the claims process. At the conclusion of the administration of the settlement, approximately a million dollars was available for refund to the defendants.

Lowe v. Sun Refining and Marketing Co.

In *Lowe*, through mediation, a similar class action reached a very different result. *Lowe* involved a spill from a pipeline break of hundreds of thousands of gallons of toluene, resulting in claims for evacuation, property damage, physical injury and punitive damages on behalf of a class of thirty thousand. After 14 years of vigorously contested litigation, three mediation sessions over a several month period yielded a financial resolution. Subsequent to the financial resolution, the administrative details consumed almost an additional year and were resolved through additional face-to-face discussions between counsel, without resort to further mediation except to resolve the attorney fee question.

Defendants in *Lowe* were convinced that individual class members would have little or no interest in submitting a claim after the passage of 14 years. As a result, the defendants were reluctant to settle on a lump-sum basis. The solution that arose from mediation was that all qualifying claims would be paid regardless of the number of claims filed. Damage categories were again enumerated with each class member submitting a claim form specifying which of the damage categories he or she fell into, but not to exceed a maximum dollar amount per class member. Depending on whether 300 or 30,000 of the class members submitted claims, the defendants' exposure could be modest or enormous. The defendants also agreed to separately pay attorney fees, expenses, and all costs of administration. Despite the passage of time there were 20 thousand claims submitted. As in any mediation, the motivation of the parties and the ability of the mediator to shape a creative solution around that motivation was the difference between success and failure.

> Neither side was willing to commit to a specific dollar settlement without first reaching agreement on the methodology for distribution. Without the dollar amount agreed upon, neither side was willing to address the methodology for distribution. Only a third party could simultaneously shape these two interrelated elements.

ATTORNEY FEES

The determination of attorney fees presents a unique problem in mass tort class action settlements. To avoid the potential for conflict, the class claim must be settled before there is any discussion about the magnitude of attorney's fees. Although any award of attorney fees must be approved by the court, plaintiffs' class counsel wants some assurance from the defendants that they will not object to the fees at the fairness hearing. The defendants have both a tactical and economic interest in early disclosure of class counsel's fee. If class counsel disclose their fee and the mediation is unsuccessful, then defense counsel can use it to portray class counsel as putting their own interests above that of the class. For this reason, seasoned class counsel prefer to withhold their fee request as long as possible. Of course, defense counsel will not settle the case without knowing the size and source of plaintiff counsel's fee, since the defendant in a class action settlement is, as a practical matter, ultimately the source of payment of class counsels' fees. Thus the fee is an integral part of any resolution by mediation.

In a mass tort case, there are a variety of ways to compensate class counsel. Class counsel can petition the court for a percentage of the fund created or request a lode star to be paid from the fund including a multiplier. Alternatively, defendants can agree to pay a fixed amount, separate and apart from the settlement fund. Regardless of the methodology of payment it must be approved by the court.

In *Lowe*, the importance of the resolution of class counsel's fee at the mediation cannot be overstated. The defendants had agreed to pay all claimants who qualified, but they refused to agree to any common fund fee, arguing that there was no predetermined and liquidated common fund amount from which a percentage could be computed. In fact, defense counsels' analysis was correct in that total payout could range from zero to $48,000,000, based on 30,000 potential claimants with claims up to $1,600.00 per claimant.

At the mediation, plaintiffs' counsel agreed to negotiate a settlement for the class independent of any agreement as to attorney fees. The parties then agreed to mediate the question of attorney fees independently of the settlement for the class, so long as defendants were willing to pay the attorney fees once determined, separate and apart from a common fund approach. Thus, each side was at risk in a disputed attorney fee application before the court. In the subsequent mediation, defendants agreed to a fixed amount of attorney fees to class counsel to be paid directly by the defendants, which sum was ultimately approved by the court.

In *White*, the solution was simple. A common fund of $21.5 million was created. The defendants agreed that they would not object to a fee request of up to one-third of the fund, and the court, after a thorough analysis, approved the one-third fee request at the fairness hearing.

In every settlement of a class action, the class is sent a notice advising them of the terms of the settlement and the fees requested by class counsel. Thus, the mediation does not operate to deny the rights of unnamed class

members to object to attorney fees. The settlement notice usually will set out class counsel's fee request and provide the class an opportunity to object to these fees at the fairness hearing.

EXPENSES

As with attorney fees, the defendants want all the expenses determined before they agree to settle. Again, *White* and *Lowe* demonstrated two solutions to this problem. In *White*, the expenses were submitted to the court for approval and were deducted from the common fund. In *Lowe*, the defendants agreed to pay the expenses without reducing the payment to the class, but they capped the expenses at $550,000. Same issue – two different solutions.

IMPLEMENTATION

Only after the parties in White and *Lowe* had set the range of their financial exposure were they able to begin to build the framework for implementation. It wasn't until the plaintiffs in both cases were satisfied with the total dollar value and/or payout structure that they were willing to concede on claim form language and issues related to the rules of administration. Conversely, only when the defendants believed the settlements were reasonable could they be more flexible on issues such as the time period for claim forms to be submitted and the criteria for review.

The mediations in these two cases demonstrate different mind sets. In *White* the defendant wanted his expenses fixed and after the signing of the settlement wanted to walk away without looking back. In *Lowe* the defendants were willing to gamble that very few class members would submit claims and the actual payout would be low. As a result, the *Lowe* defendants continued to be involved until the last class member claim was processed. Different solutions, but in each example, mediation brought about a settlement for the class and a determination of attorney fees and expenses, and set the stage for the parties to be able to build the structure necessary to carry out the settlement.

CONCLUSION

In both *White* and *Lowe*, the mediation resolved only the core economic issues. However, in both cases, the breaking of that logjam through mediation allowed the parties then to resolve the details that accompany the resolution of any class action. Even if the mediation does not or cannot settle all mechanical and ministerial questions, or even attorney fees, these matters can be determined by a follow-up mediation if they are not resolved through direct discussions between counsel.

In class action mediation, the parties need to recognize that the goal and the resolution may be very different than that of a traditional mediation. The hallmark of any class action settlement is flexibility, creativity, and the ability of both class counsel and defense counsel to work together. This is particularly important since, unlike the resolution of most litigation, a class action lives on long after final judgment or even the distribution of the funds to class members. A member of the class usually can appeal any award by the administrator to a special master, excess funds may need to be redistributed, missing class members located, or even motion practice regarding the procedures employed by the administrator to qualify claimants. The administration of a class action settlement can proceed for years. Because a mediated resolution involves parties who have succeeded in working together to solve problems, this model can be expected to continue during the course of the administration, distribution and final wrap-up stages of the settlement. Thus, class action mediation is a process that continues to generate benefits well beyond the hammering out of the terms of the settlement.

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Dynamics of a Global Class Action Settlement: The Sulzer Hip Implant Cases
Continued from page 1

Natural Knee II® Tibial Baseplate ("Tibial Baseplate") became the focus of the Sulzer class action litigation. The Inter-Op™ Shell is a socket-like device that is surgically inserted into the patient's acetabulum, which is part of the pelvis. The shell was designed to receive a separate ball-like device with a stem, which is inserted into the femur, or thigh bone. The two components thereby replace the articulating ball and socket structure of the hip joint. The Sulzer Natural Knee® Tibial Baseplate is a component used for complete knee replacement system. It consists of a device which is inserted into the tibia (or shin bone) designed to replicate the hinge structure of the knee joint.

A litigation crisis developed following initial reports that several patients who had received Inter-Ops™ shells had experienced a problem identified as aseptic loosening, *i.e.*, the loosening of the device from the joint in the absence of infection. Scientific evidence showed that aseptic loosening, in most cases, was caused by a failure of the patient's bone to integrate, or grow into, the porous coated surface of the implanted device. This problem was determined to be the result of some excessive residual material on the porous coating portion of the Inter-Op™ shell. In some instances, revision surgery was required; the original prosthesis was removed and another inserted.

While all surgical implants have a background failure rate, SOI immediately began investigating several possible mechanisms. SOI's investigation indicated that a change in its manufacturing processes that employed machining and cooling oils after the application of the porous coating to the Inter-Op™ shells (post-porous coating machine processing) was the likely cause of the premature aseptic loosenings.

By December, 2000, SOI was able to isolate the problem to certain lots. Not all implants in the affected lots failed to bond, but product failures were correlated with these "affected lots." By December 8, 2000, SOI had gathered sufficient information to initiate a voluntary recall of approximately 40,000 Inter-Op™ Shells. Approximately 24,000 of these implants from affected lots had already been implanted. To date, over 3,500 patients implanted with affected hip devices have undergone hip revision surgery.

Later, similar failures were reported in SOI's Natural Knee® II Tibial Baseplates. On May 17, 2001, SOI issued a Special Notification and Voluntary Exchange Program for all affected lots, but 1,343 knee implants from affected lots had been implanted before the Special Notification and Voluntary Exchange Program had been implemented. To date, over 600 patients implanted with affected knee devices have undergone knee revision surgery.

B. Litigation Surges. Within weeks of the Inter-Op™ Shell recall and shortly after the Natural Knee® Tibial Baseplate Voluntary Exchange Program, lawsuits were filed across the country. By September 16, 2001, more than 1,580 lawsuits, 1,360 in state courts, had been filed against SOI in many jurisdictions throughout the country based on failed Inter-Op™ Shells and Natural Knee® Tibial Baseplates. Several of these cases were filed as putative class actions, involving thousands of individual claims. As more products failed, the lawsuits continued. By April 19, 2002, approximately, 1,812 state court cases and 399 federal court cases were pending against SOI.

On August 30, 2001, a jury in Nueces County (Corpus Christi) Texas awarded four million dollars in actual damages and eleven million dollars in punitive damages for the consolidated claims of three elderly women who had undergone revision surgery in a case called Rupp v. Sulzer Orthopedics. The Rupp verdict made it clear that SOI could not afford to defend each of the cases pending against it. At this point, SOI made a critical decision to seek a global class action settlement. Defending and litigating every case would not only likely drive SOI into bankruptcy, but divert precious resources away from those in need of compensation. Bankruptcy and protracted litigation would also threaten to delay any recovery to the primarily elderly plaintiffs by subordinating their interests to those of secured creditors.

C. Consolidation & Certification. On June 20, 2001, the Judicial Panel on Multi-District Litigation consolidated and transferred all pending federal litigation relating to the Inter-Op™ Shell to the Judge Kathleen M. O'Malley in the United States District Court for the Northern District of Ohio. On August 15, 2002, SOI and plaintiff's interim lead class counsel moved for preliminary approval of class settlement and conditional certification of a Rule 23(b)(2) and 23(b)(3) class. On August 17, 2002, Judge O' Malley held a pretrial conference at which she established procedures for submission of objections to the motions for preliminary settlement approval and conditional class certification. Following a hearing on the pending motions for preliminary approval of class settlement and conditional class certification, Judge O'Malley issued a fifty-two page Memorandum and Order on August 31, 2001, conditionally certifying a settlement class consisting of "All citizens or residents of the United States who have had Affected Inter-Op acetabular shell hip implants placed in their bodies, together with their associated consortium claimants," and preliminarily approving the Class Settlement pursuant to Fed. R. Civ.P. 23(e). On October 19, 2001, Judge O'Malley conditionally certified an amended class that also included recipients of both the Inter-Op™ Shells and Natural Knee® Tibial Baseplates as well as their related derivative claimants.

D. The Class Settlement. At this stage, the Class Settlement had less than unanimous support. One of the more controversial aspects of the early versions of the Class Settlements were the "six year liens." These liens financed the proposed settlement fund, but also encumbered substantially all of Sulzer's assets, creating serious disincentives to opting out of the class settlement and pursuing independent litigation. The lien provision was eventually dropped during negotiations. Vigorous

While the multi-district litigation centralized all federal claims, Sulzer still faced nearly 2,000 state court claims, all of which were pushing individual discovery schedules and seeking to set early trial dates, primarily in California and Texas. By September 2001, it was no longer possible for Sulzer to defend itself in state court litigation, maintain the company's operations, and comply with the dictates of the MDL class litigation and discovery.

negotiations and discovery, particularly financial discovery, continued. On September 13, 2001, the District Court issued its Case Management Order defining the responsibility of various counsel, inviting the participation of state plaintiffs' counsel, refining the issues to be resolved in the MDL, and setting deadlines for cross-claims and counterclaims, plaintiffs' master discovery to defendants, defendants' discovery to class representatives, for court approval of preliminary and final class notice, and defining the parameters of class discovery.

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E. Injunction Against State Court Litigation. To stem the rising tide of state court litigation, SOI moved on September 17, 2001 for an order enjoining all related state court Inter-Op™ litigation. Judge O'Malley entered an Order the same day enjoining "any and all persons from commencing or continuing prosecution . . .of any claim or action or legal proceeding . . . in any federal, state, or territorial court . . . against the 'Sulzer Defendants' or their assets . . . related in any way to claims arising out of an alleged product defect in Sulzer Orthopedic, Inc.'s Inter-Op acetabular shell." The anti-litigation injunction proved to be an extremely controversial measure, and it soon became the focus of much collateral litigation. In retrospect, however, it provided the critical relief SOI needed to litigate and negotiate the class settlement. On October 12, 2001, SOI moved for and received a similar injunction enjoining all federal and state actions against SOI involving the Natural Knee® II Tibial Baseplate as well.

F. Evolution of the Settlement. During the Fall of 2001 and the Spring of 2002, SOI, class counsel, and state court plaintiffs' counsel continued to negotiate the terms of the Class Settlement. Judge O'Malley appointed key plaintiffs' counsel to the nine-member Special State Counsel Committee ("SSCC"), which was charged with assisting in and monitoring the discovery process. By including prominent plaintiffs' counsel on the SSCC, Judge O'Malley was able to gain valuable input and insight and garner support from former opponents of the class proceedings who had previously felt disenfranchised by the MDL proceedings.

As the terms of the eventual settlement evolved, the parties came to realize that the Class Settlement was in the best interest of their clients, a point that was not lost on Judge O'Malley at the final certification hearing. In her final certification Order, Judge O'Malley specifically noted how vigorous negotiations among experienced trial counsel had produced significant improvements to the class settlement, including:

- The total settlement value rose from approximately $630 million to $1.033 billion;
- The parties agreed to eliminate a controversial provision that would have imposed "six year liens" on all of SOI's assets in favor of the settlement class;
- Compensation for claimants who had undergone revision surgery rose from $37,500 in cash and $20,000 in stock to approximately $160,000, all of which was in cash;
- Guaranteed funding for the Extraordinary Injury Fund (see supra) rose from $30 million to $80 million;
- SOI's Swiss parent companies and their insurers agreed to substantially participate in the proposed Class Settlement, including a $50 million contribution from Sulzer AG;
- A large percentage of the funds paid by SOI into the settlement came from bank loans from convertible debt instruments rather than anticipated future earnings;
- The parties were able to develop and finalize the terms of the Guaranteed Payment Option (see supra); and
- The parties were able to develop and define "matrix factors" that defined what payment claimants were entitled to receive from the Extraordinary Injury Fund.

SOI contributed $725 million to the Class Settlement, thereby insuring that claimants would receive cash rather than any equity in the company. In addition, Sulzer Medica, a related entity, contributed its available insurance coverage totaling $218.5 million, including $178.5 million from the initial insurance policy, and $40 million from a secondary insurance policy created for the Class Settlement. In addition, Sulzer AG contributed $50 million in cash and 483,314 shares of stock to the settlement. The total value of the settlement was more than $1 billion, exclusive of interest.

Settlement funds were allocated for various purposes. Under the Unrevised Affected Product Recipient Fund, persons who had received an Inter-Op™ Shell or a Natural Knee® Tibial Baseplate from an affected lot that had not been removed were eligible to receive $1000 plus $250 for derivative claimants. Pursuant to the Affected Product Revision Surgery Fund, individuals who had an Inter-Op™

Shell or Natural Knee®Tibial Baseplate from an affected lot removed from their bodies were eligible to receive $160,000, plus attorneys' fees (plus $1,600 for derivative claimants). Revised patients could also elect the Guaranteed Payment Option, ("GPO") under which they could receive a portion of their settlement benefits immediately, regardless of whether the Class Settlement ever received final judicial approval or whether SOI elected to terminate the Class Settlement five days after expiration of the opt-out period. This allowed class members to obtain a definite payment quickly in exchange for waiving their right to opt out and to object to the Class Settlement. Class members who opted for the GPO received the same amount of total benefits as claimants who elected the standard claims option.

The Class Settlement also provided an Extraordinary Injury Fund, ("EIF"), which is composed of matrices designed to fairly compensate claimants for injuries beyond basic revision surgery. The EIF is composed of nine levels of compensation awards, the maximum of which provides for $800,000. The EIF gives added flexibility that applies to special situations. The Sulzer Class Settlement also provided for reasonable attorneys fees. The Trust pays a portion of the class member's attorney fees equal to 23% of the stated benefit for which they are eligible. The Class Settlement agreed to honor fee agreements entered into between class members and their counsel before February 2, 2002. If, however, a class member entered into a contingency fee agreement with his/her attorney, the contingency fee is to be applied against the benefits received by the class member under the Settlement Agreement.

Ultimately, the Sulzer Class Settlement offered an attractive alternative to costly and uncertain litigation. Sulzer (now Zimmer) continues in business, and the plaintiffs have been and continue to be compensated to the best of SOI's ability, with added compensation from other Sulzer entities. As the district court had concluded, the parties were able to shape a settlement that got the most people the most money the soonest. In retrospect, the Sulzer Class Settlement, the product of the hard work of many people, is a rare example of Rule 23(e) functioning as it was intended for the benefit of all parties.

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MULTI-JURISDICTIONAL ENFORCEMENT OF CLASS ACTION SETTLEMENTS

Deana S. Peck and Kathleen A. Biesterveld

I. Introduction

Late in 2002, the *In re Managed Care Litigation* presented a novel question: whether one federal district court could enjoin one of the parties before it from proceeding with a class settlement in another federal district court, where the plaintiff classes in the two actions were the same. *In re Managed Care Litigation*, 236 F.Supp. 1336 (S.D. Fla. 2002). In an admittedly novel deployment of the All Writs Act, 29 U.S.C. § 1651, Judge Federico Moreno entered the requested injunction prohibiting one of the eight managed care defendants before him in coordinated MDL proceedings from going it alone on a settlement elsewhere with different counsel proposing to represent the same plaintiff class. The move was notable for two reasons. First, it was one of the few known instances in which the All Writs Act has been used to allow one federal court to enjoin parties from taking action in another federal – as opposed to a state – court. Second, the injunction served to disrupt, rather than promote, a settlement – albeit, one that Judge Moreno described as the product of "underhanded maneuvers" that "snookered" both federal judges in an "obvious attempt to avoid [the MDL court's] jurisdiction." *Id.* at 1342.

While the question presented in the *In re Managed Care Litigation* is novel, the scenario in which it arose – overlapping and competing class litigation – is becoming increasingly commonplace. When a good faith class settlement has been reached and approved by the court as fair, reasonable and adequate, it should serve to cut off further litigation by non-opting out class members. If it does not, then the parties have not obtained the global peace for which they bargained. This article will explore the various legal strategies available to enforce a class action settlement when a non-named class member attempts to pursue a precluded suit in an alternative jurisdiction. Three general preclusive principles are initially considered – *res judicata*, release, and mootness. These theories may be implicated in any jurisdictional combination of overlapping litigation following a class action settlement.

The article then examines various approaches to preclusion in the inter-jurisdictional context. Diverse enforcement strategies come into play depending upon whether the settlement sought to be protected originated in state or federal court and whether the court in which it is being challenged is state or federal. Federalism dictates that inter-jurisdictional enforcement of class action settlements will implicate the competing interests of finality and forum sovereignty. Where a settlement judgment is later collaterally attacked or simply ignored in a subsequently filed suit in an alternative forum, issues of jurisdiction, comity and remedial powers are brought to bear. The

recognition of state and federal judgments in the intersystem context is primarily governed by federal law. Federal statutes and common law mandate that American courts, both federal and state, must acknowledge and enforce judgments made by other courts. Whether the non-named class member seeks to relitigate a state court settlement judgment in the federal system, or relitigate a federal judgment in a state system, determines which doctrines will apply.

The chart below organizes the topics discussed in this article based on the forum from which the settlement judgment originated in relation to the forum where the non-named class member has filed an overlapping suit. For the purposes of this article, the relative timing of the filings is irrelevant. Once a settlement judgment is entered, the issue becomes how to wield that judgment to preclude the other court from rendering a decision.

	Overlapping Suit Filed in State Court	**Overlapping Suit Filed in Federal Court**
State Settlement Judgment	• Res Judicata • Release • Mootness	• Res Judicata • Release • Mootness • Full Faith & Credit Act • Rules of Decision Act • Rooker-Feldman Doctrine • Younger Abstention
Federal Settlement Judgment	• Res Judicata • Release • Mootness • All Writs Act • Exceptions to the Anti-Injunction Act • Common Law Full Faith and Credit • Rule 23(d) Authority	• Res Judicata • Release • Mootness • All Writs Act

II. General Preclusion Arguments

The principles described in this section (*res judicata*, release, and mootness) apply regardless of whether the subsequent overlapping suit is filed in a state or federal forum, and regardless of whether the relitigation raises intersystem or federalism issues.

A. Res Judicata

Res judicata, or claim preclusion, is perhaps the most immediately evident doctrine used in enforcing prior class action settlements. Whenever multiple suits raise claims arising out of the same facts and circumstances and one results in a judgment of settlement, the preclusive effect of that judgment on subsequent suits is at issue. The doctrine of *res judicata* is intended to prevent the relitigation of claims finally resolved and bar plaintiffs from recovering twice for the same wrongful act. *Res judicata* requires (1) a prior judgment on the merits; (2) substantial identity of the parties; (3) same cause of action presented in both actions; and (4) a judgment rendered by a court of competent jurisdiction.

The settlement of a class action has been recognized as a final judgment and accorded *res judicata* preclusive effect, thereby barring the relitigation of claims settled. *See Providian Nat. Bank v. Pritchett*, 846 So.2d 1072 (Ala. 2002); *Martin v. Drummond Co.*, 663 So.2d 937, 947 (Ala. 1995); *Doiser v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295 (9th Cir. 1981). Under Rule 23 of the Federal Rules of Civil Procedure, every member of a class is bound by the judgment unless he opts out. However, preclusion in the class action context raises unique concerns such as protecting the due process rights of absent class members and determining whether absent class members should be allowed to litigate claims not raised in the original action. Specifically, before the bar of claim preclusion may be applied to the claim of an absent class member, it must be demonstrated that the invocation of the bar is consistent with due process. *Twigg v. Sears Roebuck & Co.*, 153 F.3d 1222, 1225 (11th Cir. 1998); *In re MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 635-36 (Del. 2001), *cert. denied*, 535 U.S. 1017 (2002), *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 388, 116 S.Ct. 873 (1996) (Ginsburg, J. concurring in part, dissenting in part) ("In the class action setting, adequate representation is among the due process ingredients that must be supplied if the judgment is to bind absent class members.") Thus, even if the elements of claim preclusion are present, the settlement judgment remains vulnerable to collateral attack based on due process concerns such as lack of adequate representation and notice. *Twigg, 153 F.3d* at 1229; *Silber v. Mahon*, 957 F.2d 697, 699-700 (9th Cir. 1992); *Gonzales v. Cassidy*, 474 F.2d 67, 74-75 (5th Cir. 1973).

It is important to underscore that it is the form of the judgment, and not the settlement agreement, that will ultimately define its preclusive effect. A class action settlement can be entered as a judgment only after a Rule 23(e) fairness hearing, designed to protect non-named class members. Courts will not give preclusive effect to a settlement agreement that was not subjected to Rule 23(e) scrutiny and never entered as a judgment. *Frank v. United Airlines*, 216 F.3d 845, 852 (9th Cir. 2000). Additionally, in order to maximize the likelihood that a settlement judgment will merit a finding of *res judicata*, it is important that the judgment explicitly define the scope of the release, including for example, the release of unasserted claims over which there may be exclusive federal jurisdiction. *Matsushita Elec. Indus.*

Co., Ltd. v. Epstein, 516 U.S. 367, 116 S.Ct. 873 (1996). In addition, preserving the preclusive effect of a settlement judgment warrants diligent efforts to ensure sufficient due process protections such as adequate representation, appropriate notice, opt-out provisions, and sufficient objection hearings.

As explored below, the preclusive effect of a class action settlement will vary depending upon whether the subsequent suit is brought in state or federal court. Generally, the state law of the prior state court decision will govern the preclusive effect whether the subsequent suit is filed in state or federal court. *See Charchenko v. City of Stillwater*, 47 F.3d 981, 984 (8th Cir. 1995). However, in federal question cases, the *res judicata* effects of a federal settlement judgment are controlled by federal law in subsequent federal litigation. Interjurisdictional preclusion is raised in cases where the initial and subsequent forums differ – in these cases, a standard *res judicata* argument may prove insufficient to preclude an absent class member from relitigating claims.

B. Release

Invariably, class action settlements include provisions releasing the defendants from further liability to the non-opting out class members and enjoining related suits by class members arising out of the same factual circumstances. As a matter of contract law, all claims within the scope of the release provision are extinguished. *Knuth v. Beneficial Washington, Inc.*, 107 Wash.App. 727, 731, 31 P.3d 694, 696 (2001) (prior class action settlement specifically released creditor from any claims that could have been brought by the class at that time). A class representative can enter into a settlement that bars future claims by class members even though the released claim was not presented and could not have been presented. *In re Baldwin-United Corp.*, 770 F.2d 328, 336 (2nd Cir. 1985); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992). However, absent class members may not be bound, under contract principles, to a release entered into by class representatives unless the settlement is accompanied by a corresponding preclusive judgment. *Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *reversed on other grounds*, 516 U.S. 367 (1996). Unlike preclusion which can prevent absent class members from bringing subsequent claims even if they rely on different legal theories, a class action settlement release can only release claims not pressed in the initial class action if they depend "upon the very same set of facts." *National Super Spuds Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 n. 7 (2nd Cir. 1981). Thus, the "key inquiry" is whether the factual predicate for the subsequent claims is identical to the factual predicate underlying the settlement agreement. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (2nd Cir. 1982).

C. Mootness

A case is moot if it has lost its character to present a live controversy. A live controversy is considered a threshold requirement for the maintenance of an action. Courts recognize that settlement is an event which can render a case moot. *See Allard v. DeLorean*, 884 F.2d 464, 466 (9th Cir. 1989). Therefore, mootness can be used to attack a subsequent overlapping action brought by an absent class member who did not opt out of a class settlement.

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III. Enforcing State Settlement Agreements In Federal Court

The following section explores strategies for enforcing prior state court class action settlement judgments against overlapping suits filed in federal courts – what we will call the "state/federal context." In this context, the preclusive effect afforded by the state rendering the settlement judgment can be raised as a bar pursuant to federal law codified in the Full Faith and Credit Act and the Rules of Decision Act. In addition, litigants can challenge the jurisdictional authority of the federal courts to entertain the subsequent suit based on federal common law doctrines such as *Rooker-Feldman* and *Younger* abstention.

A. Full Faith and Credit

The Full Faith and Credit Act, 28 U.S.C. § 1738, provides that the proceedings of any state court shall have the same full faith and credit in every other court within the United States. Only the statutory and common law applications of the Full Faith and Credit doctrine apply in the state/federal context. The constitutional Full Faith and Credit clause applies exclusively as between two states and does not control where the subsequent suit is filed in a federal court.

The Full Faith and Credit Act commands that federal courts must honor the *res judicata* effects of state court judgments and apply the same preclusive rules as would be accorded in the courts of the rendering state. This requires the federal court to accord no less and no greater preclusive effect than the state court would. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384, 105 S.Ct. 1327 (1985). Full faith and credit must be afforded state judgments regardless of the form of relief sought – damages or equitable relief. The doctrine also applies regardless of whether the underlying judgment construes state or federal law.

The Full Faith and Credit Act applies specifically to class action settlement judgments. *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 373-74, 116 S.Ct. 873, 877-78 (1996). In *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, the Supreme Court held that federal courts must accord full faith and credit to state court class action settlement judgments

regardless of whether the settlement released unasserted – indeed, unassertable – federal claims that are within the exclusive jurisdiction of the federal courts. 516 U.S. at 374, 116 S.Ct. at 878. Thus, even where claims are outside the subject matter jurisdiction of the settlement-rendering state court, full faith and credit still attaches to the judgment releasing such claims.

Since the Full Faith and Credit rule is statutory as applied to federal courts, other federal statutes may provide exceptions in particular contexts. Thus the preclusive effect of state settlement judgments that involve federal claims will depend, in part, on an examination of the jurisdictional grant of the federal statute to determine whether Congress intended to limit the reach of the Full Faith and Credit Act. *Id.* at 380, 116 S.Ct. at 881. However, such an "implied repeal" of the Full Faith and Credit Act is rarely recognized in federal statutes. *Id.* (§ 27 of the Securities Exchange Act, which grants exclusive federal jurisdiction over claims arising under the act, does not impliedly repeal the Full Faith and Credit Act).

B. Rules of Decision Act

The Rules of Decision Act, 28 U.S.C. § 1652, provides that the laws of the several states shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. Like the Full Faith and Credit Act, whenever there is a dispute as to whether state or federal law governs the preclusive effect of a prior state court adjudication, the Rules of Decision Act commands deference to the state law, unless there is a constitutional or statutory conflict with federal law. While the Rules of Decision Act is a source of authority guiding federal courts in the overlapping suit context, it is not cited or looked to nearly as often as the Full Faith and Credit Act.

C. *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine is a recognition of the principle that inferior federal courts lack the power to exercise appellate review over state court decisions. Only state appellate courts and the U.S. Supreme Court are empowered to render such review. The purpose of the *Rooker-Feldman* doctrine is to protect state judgments from collateral federal attack. *Doe & Associates Law Offices v. Napolitano*, 252 F.3d 1026, 1029 (9th Cir. 2001). An outgrowth of common law, the doctrine originated from two Supreme Court opinions: *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). In *Rooker*, the Supreme Court held that regardless of whether a state court decision was erroneous, only the Supreme Court has the power to reverse or modify that judgment because the jurisdiction of federal district courts is strictly original. 263 U.S. at 415-16, 44 S.Ct. at 150. Similarly, in *Feldman*, the court recognized that a federal district court has no authority to review final judgments of a state court in judicial proceedings. 460 U.S. at 476, 103 S.Ct. at 1311-12.

At its core, *Rooker-Feldman* is a jurisdictional bar that prevents federal district courts from reviewing, directly or indirectly, final state court adjudications. In *Feldman*, the Supreme Court based its determination that the federal court had no authority to review a final state court judgment on the fact that the federal claims were "inextricably intertwined" with the state judgment. *Rooker-Feldman* similarly precludes any federal action where the relief requested in federal court would effectively reverse the state decision or void its ruling. *Charchenko v. City of Stillwater*, 47 F.3d 981, 983 (8th Cir. 1995) ("A claim is inextricably intertwined if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it."); *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3rd Cir. 1996). For instance, if the injury alleged by the plaintiff arises from a prior state court judgment itself, then *Rooker-Feldman* forecloses the exercise of federal jurisdiction regardless of whether the underlying state court judgment is erroneous or even unconstitutional. *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510 (7th Cir. 1996). In addition, *Rooker-Feldman* would control despite the fact that the time for appealing the state court judgment in the proper forum has passed. *Id.*

In the class action context, *Rooker-Feldman* can be raised as a subject matter jurisdiction defect that requires federal courts to dismiss any overlapping suits that raise claims common to class action settlement judgments rendered in state courts. For instance, in *Kamilewicz v. Bank of Boston*, non-named class members, bound by a prior class action settlement agreement in state court, brought suit in federal court against the former state court defendants and plaintiffs' attorneys alleging violations of federal anti-racketeering law in connection with the settlement. *Id.*

In addition, the federal plaintiffs argued that the state settlement judgment was void based on a lack of personal jurisdiction and due process deficiencies in notice and representation. The seventh circuit held that the district court was barred, by the *Rooker-Feldman* doctrine, from exercising jurisdiction over plaintiff's federal action. Despite the federal plaintiffs' argument that they were not seeking to overturn or review the state judgment, the circuit court noted that, even though the federal case was "dressed up" as an independent claim for RICO and malpractice damages, it was nonetheless a collateral attack on the state court settlement judgment requiring consideration of issues "inextricably intertwined" with the state court adjudication. *Kamilewicz* demonstrates a willingness by the federal courts to apply the *Rooker-Feldman* jurisdictional bar even in cases where the state and federal cases are not exactly alike.

While the *Rooker-Feldman* doctrine shares some attributes of standard preclusion principles, it differs in several respects. Generally, the applicability of *Rooker-Feldman* will be decided before the court considers *res judicata*. Where the doctrine applies, lower federal courts have no power to address other affirmative defenses, including *res judicata*. Because *Rooker-Feldman* arises from interpretation of the federal subject matter jurisdiction statutes, it can be raised at any time, by either party, or by the court *sua sponte*. Unlike *res judicata*, a *Rooker-Feldman* argument cannot be waived. Further, *Rooker-Feldman* is

broader than claim or issue preclusion because it does not depend on a final judgment on the merits. *Rooker-Feldman* is also entirely federal and requires no reference to principles of state law, while *res judicata* requires the district court to consider the preclusive effect of the judgment in its originating state.

Additionally, most state settlement judgments will incorporate findings of fairness and due process compliance. Thus, while a standard *res judicata* argument would remain subject to a due process collateral attack, *Rooker-Feldman* would jurisdictionally preclude review even where the plaintiff challenges the state settlement judgment based on due process, unfairness, or malpractice. *Kamilewicz*, 92 F.3d at 510.

While *Rooker-Feldman* generally provides federal courts with a basis for refusing to entertain claims overlapping with prior state class action settlements, the doctrine does have some limitations. Similar to the Full Faith and Credit Act, exceptions to *Rooker-Feldman* are found where there is specific congressional authorization for collateral review of state court judgments. *Levin v. ARDC*, 74 F.3d 763, 766 (7th Cir. 1996) (finding habeas corpus under 28 U.S.C. § 2241 expressly allows for collateral review of state court judgments by inferior federal courts and is an exception to *Rooker-Feldman*).

Additionally, the *Rooker-Feldman* doctrine does not defeat subject matter jurisdiction as to non-parties even though the decision may involve matters that are inextricably intertwined with a state judgment. This limitation presents an interesting question in the class action context. Outside of that context, the Court has recognized that *Rooker-Feldman* is inapplicable to cases where the plaintiff was not a party to the underlying case because the plaintiff was not in any position to seek appellate review of the state court judgment. *Johnson v. De Grandy*, 512 U.S. 997, 1006, 114 S.Ct. 2647, 2654 (1994). But, would *Rooker-Feldman* apply to cases where an absent class member, who did not opt out of a state court settlement, seeks to file an overlapping federal suit? Indeed, there is judicial discord on the issue whether a non-named class member is considered a party for *Rooker-Feldman* purposes. *Snider v. City of Excelsior Springs, Mo.*, 984 F.Supp. 1251, 1254 (W.D. Mo. 1997), *aff'd*, 154 F.3d 809 (8th Cir. 1998) (holding that non-named class members were parties for *Rooker-Feldman* analysis); *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (non-named class members were held not to be parties for *Rooker-Feldman* analysis). However, in *Devlin v. Scardelletti*, 536 U.S. 1, 9, 122 S.Ct. 2005, 2010 (2002), the Supreme Court held that a non-named class member, who objected to a class action settlement, is considered a party for appeal purposes and can appeal the class action settlement without first intervening. Because the non-party exception to *Rooker-Feldman* is premised on the assumption that the non-party had no appellate privileges, it seems clear in the wake of *Devlin* that *Rooker-Feldman* would apply, at least to those non-named class members who timely objected to the class action settlement and preserved their ability to appeal. In fact, it is arguable that *Rooker-Feldman* should apply even in the absence of a timely objection by the would-be federal plaintiff because he at least had the opportunity to object and appeal in the state court action. In any event, it remains to be seen how *Devlin* will impact the *Rooker-Feldman* doctrine.

D. *Younger* Abstention

Federal district courts can also abstain from asserting jurisdiction over suits filed after an overlapping state class action settlement under *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Three requirements must be met for *Younger* abstention to be appropriate: (1) an ongoing state judicial proceeding in which the federal plaintiff is a party and with which the federal proceeding will interfere; (2) the state proceeding must implicate important state interests, and (3) the state proceedings must afford an adequate opportunity to raise constitutional claims. *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 843 (3rd Cir. 1996). *Younger* abstention is based on principles of comity and "a system in which there is sensitivity to the legitimate interests of both State and National Governments." *Younger*, 401 U.S. at 44. Justice Powell has recognized that *Younger* abstention is warranted by the broader interest of states "in administering certain aspects of their judicial system." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11, 107 S.Ct. 1519 (1987).

Notably, *Younger* abstention applies only where the state proceedings are ongoing. Hence, *Younger* abstention is not available once the highest court of the state has ruled. While abstention and *Rooker-Feldman* share common characteristics, abstention is available only where the federal court has jurisdiction, and thus, where *Rooker-Feldman* does *not* apply. In addition, while an application of *Rooker-Feldman* strips the court of its subject matter jurisdiction, under abstention, the federal court merely relinquishes its jurisdiction to the state court as a matter of comity.

IV. Enforcing Federal Settlement Agreements In State Court

The following section explores strategies for enforcing prior federal court class action settlements against overlapping suits filed in state courts—what we call the "federal/state context." Unlike the strategies raised above, the proper course of action in the federal/state context is to pursue immediately a federal injunction enjoining the state court proceedings. If the injunction avenue fails, other preclusion strategies based on common law are available. However, if the preclusion issue is raised first in state court, the state court ruling on preclusion would act to bar the litigants from seeking federal injunctive relief. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 524, 106 S.Ct. 768 (1986). This outcome is a product of the Full Faith and Credit Act. Once the state court adjudicates the preclusive effect of the prior federal judgment, the state court's determination itself is accorded preclusive effect and will foreclose the federal court from deciding the injunctive issue.

A. All Writs Act & Exceptions to the Anti-Injunction Act

The All Writs Act, 28 U.S.C. § 1651, gives federal courts the authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions." Often federal courts will expressly retain subject matter jurisdiction in order to oversee the enforcement of the class action settlement judgment, particularly in nationwide or global settlements. Thus, federal courts can enjoin state actions that overlap with federal settlement judgments, where necessary to protect the federal court's retained jurisdiction.

However, the authority vested by the All Writs Act is significantly limited by the Anti-Injunction Act, 28 U.S.C. § 2283. The Anti-Injunction Act generally prohibits federal courts from interfering with state court proceedings, unless the circumstances warrant an exception. Three exceptions to the Anti-Injunction Act are recognized: (1) where Congress has expressly authorized the injunction; (2) where necessary in aid of the federal court's jurisdiction; and (3) where necessary to protect or effectuate the federal court's judgments. *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 805 (9th Cir. 2002). The exceptions are narrowly construed and the decision to enjoin the state court, where an exception is found, is within the court's discretion. Notably, the Anti-Injunction Act does not preclude injunctions against the *institution* of state court proceedings, it only limits injunctions of suits already instituted. *In re Diet Drugs*, 282 F.3d 220, 233 n.10 (3rd Cir. 2002). In addition, a federal court's authority over complex nationwide class action settlements is recognized as justifying injunctions that may otherwise be prohibited under the Anti-Injunction Act. *Id.* at 235 (citing *Carlough v. Amchem Products, Inc.*, 10 F.3d 189, 202-04 (3rd Cir. 1993)).

In the class action context, federal injunctions enjoining state suits have been approved under the second and third exceptions to the Anti-Injunction Act. The "necessary in aid of jurisdiction" exception allows injunctive relief where necessary to prevent a state court from interfering with and impairing a federal court's flexibility and authority to decide the case. *In re Diet Drugs*, 282 F.3d at 235-36 (recognizing that district courts overseeing complex federal litigation are especially susceptible to disruption by related actions in state fora). This exception requires the court to determine whether the state proceeding would sufficiently impair or threaten the federal proceeding and to consider principles of comity and federalism.

The "necessary to protect or effectuate" exception, also known as the "relitigation" exception, applies before the state court has decided the preclusive effect of the federal judgment and permits the federal courts to bar "state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S.Ct. 1684 (1988). However, this exception can be used only where the state court has not finally ruled on the merits of the *res judicata* issue. Otherwise, once the state court has ruled that *res judicata* is inapplicable under that state's law, the Full Faith and Credit Act commands federal deference to that decision.

Injunctions may be issued against non-parties, including non-named class members, under the All Writs Act. *U.S. v. International Broth. of Teamsters*, 907 F.2d 277, 281 (2nd Cir. 1990). In addition, unlike *res judicata* and full faith and credit strategies, federal courts have the authority to enjoin state actions even where no final settlement judgment has yet been entered. The temporary approval of a nationwide settlement is sufficient to give the federal court authority to issue an injunction against state proceedings to ensure control over the integrity of the settlement approval process. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998).

Neither the Full Faith and Credit Act nor *Rooker-Feldman* will bar the federal court from issuing an anti-suit injunction because the overlapping state suit will not yet have resulted in a final adjudication. *In re Diet Drugs*, 282 F.3d at 240-41.

The Supreme Court has recently held that the All Writs Act cannot be used as a jurisdictional basis for removal. *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 123 S.Ct. 366 (2002). To remove the overlapping state case, the federal court must have a separate jurisdictional basis for removal, *e.g.*, diversity or federal question. However, the issue of removal does not affect the jurisdiction of the federal court to issue an anti-suit injunction because the federal court will most likely have retained exclusive jurisdiction as to the administration and enforcement of the federal class action settlement. Notwithstanding, if the federal court sought to dismiss the overlapping state case, in lieu of injunctive relief, the district court must have proper removal subject matter jurisdiction. *In re Prudential Ins. Co. Sales Practices Litig.*, 314 F.3d 99 (3d Cir. 2002).

B. Common Law Full Faith & Credit

While neither the statutory nor constitutional versions of the full faith and credit doctrine mandate deference to federal adjudications by the state courts, the common law application of the doctrine is widely recognized. The preclusive effect of federal judgments upon state courts is entirely premised on case law; however, it is still often referred to as full faith and credit. *Deposit Bank of Frankfort v. Board of Councilmen of Frankfort*, 191 U.S. 499, 520, 24 S.Ct. 154 (1903); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 784 n.13 (3rd Cir. 1994) ("state courts must give full faith and credit to federal court judgments."). To the extent that the state jurisdiction recognizes the application of full faith and credit to federal decisions, the analysis above is applicable.

C. Rule 23(d) Authority

Federal Rule of Civil Procedure 23(d) vests federal courts with the authority to protect the interests and rights of class members and to ensure control over the settlement approval process. *Hanlon*, 150 F.3d at 1025. Pursuant to Rule 23(d), a district court can "enter appropriate orders governing the conduct of counsel and parties." *Id.* (quoting *Gulf Oil Co. v.*

Bernard, 452 U.S. 89, 100, 101 S.Ct. 2193 (1981)). Accordingly, where justification otherwise exists for an injunction pursuant to the All Writs Act and exceptions to the Anti-Injunction Act, Rule 23(d) may be relied upon to bolster the argument.

V. Enforcing Federal Settlement Agreements in Federal Court

In addition to the general preclusive principles of *res judicata*, release and mootness, the decision in *In re Managed Care Litigation*, 236 F.Supp.2d 1336 (S.D. Fla. 2002), suggests that the All Writs Act, 28 U.S.C. § 1651, might offer another mechanism for enforcing a class settlement approved by one federal court in another federal court. While the All Writs Act was used in *In re Managed Care* to prevent a defendant in the MDL proceeding from moving forward with an overlapping class settlement in another federal court, there is nothing in the opinion that suggests that the Act could not be used conversely to enjoin settling parties from proceeding with litigation in a second federal court.

Typically, such a situation would not present itself because competing actions on the federal level are subject to coordination and consolidation by the Judicial Panel on Multidistrict Litigation under 28 U.S.C. § 1407. Moreover, if the situation did arise, it would arise because a *class member* who did not opt out of the federal class settlement started her own lawsuit in a second federal court. Principles of comity would likely dictate that the second federal court be allowed to rule on the matter under the general preclusion principles of *res judicata*, release and mootness. Nonetheless, it is at least arguable that an All Writs Act remedy would also be available to enforce the settlement. *Cf. In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003) (directing district court to enter order enjoining unnamed class members and their counsel from attempting to have nationwide classes certified in other courts on same claims for which nationwide class certification was overruled in prior Seventh Circuit decision).

VI. Conclusion

Almost always, the expectation and goal of class action settlements is to obtain global peace. If an absent class member, bound by a prior settlement judgment, could pursue further litigation simply by filing suit in another forum, that goal would be defeated. When the absent class member is given, but elects not to exercise, opt-out rights, his interest in prosecuting his claims outside the settlement must give way to the competing interests of finality, efficiency, and consistency. The diverse legal principles and doctrines summarized above are the means by which that balancing can be accomplished.

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ADR BASICS: JUDICIAL REVIEW OF ARBITRATION AWARDS UNDER THE FEDERAL ARBITRATION ACT

E. Richard Kennedy

In last month's issue, the Co-Chairs Message explored the ramifications of the Ninth Circuit's recent decision, *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F. 3d 987, holding that parties to an arbitration agreement may not draft arbitration clauses so as to expand the scope of judicial review of awards beyond the grounds specified in the Federal Arbitration Act (FAA) 9 U.S.C §§ 9-11 (2003). Given the difficulty now inherent in relying upon a contractual provision conferring upon the courts the duty of conducting an expanded judicial review of an arbitration award, this article explores the best grounds available under the FAA for seeking to vacate an arbitration award.

Judicial review of arbitration awards under the FAA is very limited. *Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 932 (11th Cir. 1990). The FAA does not permit review of erroneous findings of fact or misinterpretations of law. *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960). There are four statutory grounds for vacating an arbitration award. The federal courts have developed several additional non-statutory grounds.

Statutory Grounds for Vacatur.

The first statutory ground is "where the award was procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1). Obtaining vacatur on this ground is difficult. "The party asserting fraud must establish it by clear and convincing evidence . . . and must show that due diligence could not have resulted in discovery of the fraud prior to arbitration." *Foster v. Turley*, 808 F.2d 38, 42 (10th Cir. 1986).

The second ground for vacating an arbitration award is where "evident partiality or corruption" on the part of an arbitrator exists. 9 U.S.C. § 10(a)(2). For example, in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), the United States Supreme Court held that

an arbitrator's failure to disclose to a party his long financial relationship with the opposing party was "evident partiality" which justified setting aside the award.

Another court found "evident partiality" where the arbitrator inexplicably reduced the damages documented by one party by 95% percent. *Tinaway v. Merrill Lynch & Co.*, 658 F. Supp. 576 (S.D.N.Y. 1987). The district court could not infer any ground for the arbitrator's decision from either the award or the facts of the case, the court concluded that the reduction of the award by such a staggering amount, showed "evident partiality" on the part of the arbitrators.

A third statutory ground for vacatur exists where arbitrators are guilty of "misconduct in refusing to postpone the hearing . . . or in refusing to hear" relevant material evidence, or "any other misbehavior" prejudicing a party's rights. 9 U.S.C. § 10(a)(3). In *Allendale Nursing Home, Inc. v. Local 1116 Joint Board*, 377 F. Supp. 1208 (S.D.N.Y. 1974), an arbitrator refused to adjourn the proceeding after an employer's representative became ill during arbitration and had to be hospitalized. The arbitrator proceeded to a final award. Because of the importance of the presence of the employer's representative to the employer's case, the district court vacated the arbitration award and remanded the dispute.

A final statutory ground for vacatur exists where "the arbitrators exceeded their powers, or so imperfectly executed them" that a true award on the matter submitted "was not made." 9 U.S.C. § 10. In *NCR Corp. v. Sac-Co.*, 43 F.3d 1076 (6th Cir. 1995), a manufacturer brought an action against a non-servicing dealer seeking payment for monies due under a promissory note. In arbitration, the arbitrator awarded punitive damages, not only to the particular dealer asserting the counterclaim, but to dealers throughout the United States. The Sixth Circuit affirmed the vacatur of that award, finding that "the arbitrator exceeded his authority by resolving a dispute which may or may not have existed . . . and by determining the rights of individuals who were not parties to the arbitration proceedings." *Id.* at 1080.

Judicially Created Grounds for Review.

In addition to the statutory bases, judicial precedent establishes several non-statutory bases for vacatur. The three primary non-statutory bases permitting courts to vacate an arbitration award are where (1) an award violates public policy, (2) an award is arbitrary or capricious, or (3) an award manifestly disregards the law.

The first non-statutory basis for vacating an arbitration award is where the award violates public policy. It is well settled that the courts will not enforce arbitration agreements that are against public policy. For example, in *Delta Air Lines, Inc. v. Air Line Pilots Association International*, 861 F.2d 665 (11th Cir. 1988), an arbitration panel ordered reinstatement of a pilot who had been discharged after he had flown a passenger plane while intoxicated. The Eleventh Circuit stated, in no uncertain terms, that it would not enforce such a decision, since flying airplanes while intoxicated was illegal under Delta's policies.

The second non-statutory basis for vacating an arbitration award is that the award is arbitrary and capricious. An award is arbitrary and capricious only if a ground for the arbitrator's decision cannot be inferred from the facts of the case. *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992). *Ainsworth* was a suit brought by a customer against a securities broker. The arbitration panel found that the broker was negligent in handling the account of his customer. The relevant Florida statutes applicable in such situations "automatically trigger[] a damage award." *Id.* at 939. However, the arbitration panel stated: "Claimant sustained no damages; and therefore, we conclude that the Claimant is not entitled to recover damages." *Id.* at 941. The Eleventh Circuit held that because the arbitrators knew that the law required damages "their refusal to grant damages is clearly arbitrary." *Id.*

The third non-statutory basis for vacating arbitration awards occurs in situations where arbitrators show a "manifest disregard" of the law. The concept of vacating an arbitration award, emerged from *Wilko v. Swan*, 346 U.S. 427 (1953). The Court in *Wilko*, in explaining its rejection of arbitration of several securities claims, contrasted the limited bases for challenging an award with the right to appeal a court judgment. The Court stated that. "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review." *Id.* at 436-37.

Although the Supreme Court has never defined what is meant by "manifest disregard" of the law, numerous decisions provide general guidance. In essence, "manifest disregard" occurs where an arbitrator knew the governing law, but deliberately decided to ignore the law in rendering the award. Manifest disregard of the law "can be established only where a governing legal principle is well defined, explicit, and clearly applicable to the case, and where the arbitrator ignored it after it was brought to [his] attention in a way that assures that the arbitrator knew its controlling nature." *GMS Group v. Benderson*, 2003 WL 1792224, at *4 (2d Cir. 2003).

While the opportunities for review are limited, in appropriate situations, the court will act to review the arbitrator's decision and, if appropriate, set aside the award.

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General Choice-Of-Law Provision Requires Application of State Arbitration Law

The Second Circuit, addressing a "recurring and troubling theme in many commercial contracts," ruled that a general choice-of-law provision calls for application of both that state's substantive and arbitration-related laws and decisions. The parties in this case were based in Connecticut but the relevant contract applied the laws of the State of California. Appellee in this case moved to stay the arbitration proceeding based on a California statutory provision which permitted the stay of arbitration proceedings where, as here, a related action was pending in court involving one of the parties.

The Second Circuit concluded that the choice-of-law provision in the agreement evidenced an intent to incorporate California arbitration law into this proceeding.

Security Insurance Company of Hartford v. TIG Insurance Company, 360 F.3d 322 (2d Cir. 2004)

9th Circuit Enforces Condition of Employment Agreement to Arbitrate

In a rehearing en banc, a majority of the 9th Circuit overruled its prior decision in Duffield v Robertson Stephens & Co., 144 F.3d 1182, and joined with the other circuits in finding that a condition of employment agreement to arbitrate statutory disputes is enforceable.

Equal Employment Opportunity Commission v Luce, Forward Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003)

No Agreement to Arbitrate Found.

Employee filed suit and Employer moved compel arbitration pursuant to its Handbook policy. The trial court stayed the lawsuit and compelled arbitration premised on its finding that she had implicitly agreed to arbitrate. The District Court confirmed the arbitrator's award. Employee appealed, arguing that she had never agreed to arbitrate and the Sixth Circuit agreed. It found that she had not signed the arbitration agreement which was attached to the Employer's Handbook, she had explicitly told her supervisor that she would not agree to the arbitration policy and no materials from the Employer stated that by continuing to work she was implicitly agreeing to arbitrate.

Lee v Red Lobster Inns of America, Inc. 2004 WL 187564 (6th Cir. (Tenn.))

California Reverses Course to Follow Bazzle

California law provides for class-wide arbitrations in the absence of waiver. In a commercial case, the Second District Court of Appeal held that the previously employed approach of a court determining class action certification was improper under Bazzle and that the determination is now to be made by the arbitrator.

Garcia v Direct TV, et al., 115 Cal.App.4th 297 (2nd Dist. 2004)

Employer Control of Arbitrator Pool Unfair

Employee signed a mandatory pre-dispute arbitration agreement, the Termination Appeal Procedure (TAP) when she was hired. After she was terminated she initially sought arbitration and subsequently asked the court to find the TAP was unenforceable. The TAP provided that the arbitrator must be selected from a list, selected by the Employer, of at least five persons knowledgeable about labor and employment law. The Employer used the same list for all its employment disputes at the location. The 6th Circuit found this procedure posed such a seriously threat to the Employee's possibility of vindicating her rights that it was unenforceable. It remanded the matter to the District Court to consider if the offending provision was severable in the absence of a severability clause in the agreement.

McMullen v Meijer, Inc., 355 F.3d 485 (6th Cir. 2004)

Party's Constructive Knowledge of Possible Conflict Constitutes Waiver

A party-appointed arbitrator satisfied his burden of disclosure by disclosing the general nature and scope of his attorney-client relationship with one of the parties involved in the arbitration. The arbitrator here was nominated by the lessor in this real estate matter over a dispute for rent. The lessee sought to vacate the award following the arbitration based on a claim of partiality by the arbitrator appointed by the lessor. The lessee pointed to a particular document written by the arbitrator which related to his past dealings with respect to the property at issue.

The Court ruled that the lessee waived any complaint it may have with respect to the arbitrator's disclosure. The Court noted that the document at issue was in fact in the lessee's file prior to the arbitration and that the lessee's failure to raise an issue earlier constituted a waiver of its challenge.

Daiichi Hawaii Real Estate Corporation v. Lichter, 82 P.3d 411 (Haw. 2003), *reconsideration denied,* 83 P.3d 742 (Haw. 2004)

Authorization of Out of State Counsel to Appear in Arbitration is for Arbitrator to Decide

A customer brought an arbitration against an investment advisor. The customer lost, and sued to overturn the arbitrator's decision. Among her complaints was that the company's attorney was not licensed to practice law in that

state. The customer argued that the New York attorney handling the matter in Illinois was able to engage in tactics that an Illinois lawyer was forbidden to do based on the rules of ethics governing members of the Illinois bar. The Seventh Circuit rejected this argument.

The court noted that the applicable arbitration rules did not require that parties be represented by an attorney, "let alone a licensed one". The court distinguished a case in which a party might be represented by "a pit bull" to intimidate the arbitrator. The court reasoned that in that case the party would be employing undue means to intimidate the arbitrators. The court noted that the Federal Arbitration Act " fixes only the most distant of outer bounds" relating to proper arbitration procedure. The court concluded that the question of whether a lawyer needs to be licensed in the state in which the arbitration occurred was a question for the arbitrators, and not the court.

Sirotzky v. NYSE, 347 F.3d 985 (7th Cir. 2003)

Pre-Hearing Arbitration Discovery Authorized

The Supreme Court of Hawaii ruled that under Hawaiian arbitration law, which closely tracks the Federal Arbitration Act, an arbitrator is authorized to order pre-hearing discovery of documents in the possession of non-parties. The court noted that the documents sought were relevant to the merits of the case.

The Court noted that to deny an arbitrator the authority to compel such discovery would hinder the effectiveness of an arbitrator's handling of large and complex cases.

Glover vs. Derrick Concrete Cutting & Construction, 80 P.3d 1001 (Haw. 2003)

Arbitrator Need Not Hear All Evidence

The Fifth Circuit rejected a motion to reconsider an arbitrator's award based on the arbitrator's alleged failure to hear all of the evidence presented. The court concluded that while an arbitrator must give all parties an adequate opportunity to present evidence, "they need not hear all of the evidence tendered by the parties". Here, the court concluded that the arbitrator's award evidenced that he had heard and considered the relevant evidence and that the arbitrator's decision "not to credit that evidence is not reviewable".

Brooks v. Cintas Corp., 2004 WL 57704 (5th Cir. 1/2/04)

An "Interim Final" Award can be Confirmed

The District Court Ordered the parties submit a preliminary issue to the arbitrator who issued an "Interim Final Order" granting equitable relief while reserving any decision on the larger dispute between the parties to a later time or different finder of fact. The District Court confirmed the award and, on appeal, the 9th Circuit held that if only a discrete issue in a larger dispute is submitted to the arbitrator, the award on the submitted issue is "final" for purposes of confirmation. An award that is "tentative" or merely "interim" cannot be confirmed.

Venetian Casino Resort, L.L.C. v Lehrer McGovern Bovis, Inc. et al. 2004 WL 42384 (9th Cir. (Nev.))

Failure to Pay Arbitration Fees Returns Case to Court

Employee sued Employer pursuant to an agreement which contained an arbitration provision requiring Employer to pay all arbitration fees. Employer successfully moved to compel arbitration and stay the court action. However, Employer failed to make the required deposit of fee with the arbitration provider and the arbitrator found Employer in default. Employee returned to court and the default was confirmed. The District Court refused to return the matter to arbitration. The Employer now had the money to pay the arbitration fees and sought an order returning the matter to arbitration, which the District Court denied. Employer appealed arguing that §4 of the Federal Arbitration Act (FAA) required the court to send the matter back to arbitration. The 9th Circuit held that where a party was in default and could not stay the court action pursuant to §3, it had no right to have the matter sent back to arbitration pursuant to §4 of the FAA.

Sink v Aden Enterprises, Inc. 352 F.3d 1197 (9th Cir. 2003)

Amount of Award is Determinative of Federal Diversity Jurisdiction

Employee arbitrated an Americans with Disabilities Act (ADA) claim which resulted in no award of damages. Employee moved in federal District Court to vacate the Award. The District Court held that it was the amount of the Award and not the amount of claimed damages which must be considered for establishing diversity jurisdiction. As there was no damage award, there was no jurisdiction. The 9th Circuit affirmed.

Luong v Circuit City Stores, Inc. 356 F.3d 1188 (9th Cir. 2004)

ABA and AAA Adopt New Code of Ethics for Commercial Arbitrators

Deborah A. Coleman

The ABA and the AAA have announced the adoption of an updated Code of Ethics for Commercial Arbitrators, reflecting changes in arbitration practice since the Code was published in 1977. The updated Code was approved by the ABA's House of Delegates on February 9, 2004 at the Mid-year meeting, and by the Executive Committee of the Board of Directors of AAA. The 2004 Code applies to all AAA arbitrations, and in any other arbitration in which the Code has been adopted by the administrative entity or the parties as the rule of decision for arbitrator ethics. Although the basic structure of the 1977 Code remains intact, several changes reflect the maturing view of arbitrators as persons in the business of providing neutral adjudicative services.

The most significant innovation of the new Code is that it reverses the 1977 Code's presumption that party-appointed arbitrators were not neutral, and establishes a presumption of neutrality for all arbitrators, including party-appointed arbitrators. The new Code also requires every party-appointed arbitrator to ascertain and disclose to all, as soon as possible, whether that arbitrator's appointing party intends the arbitrator to serve as a neutral or not, taking into account the agreement of the parties, the applicable rules and the applicable law (Canon IX(C)(1)), as well as the views of the party appointing that arbitrator (Canon III(B)(4)). If the party-appointed arbitrators agree that they are not neutral, they may conduct themselves as provided in new Canon X, which contains express exemptions from some of the ethics rules for non-neutral party appointed arbitrators. If the party-appointed arbitrators disagree, the Code anticipates that their status will be determined by the parties, any administering institution or the arbitral panel, and enjoins the party-appointed arbitrators to conduct themselves as neutral until a contrary decision is made.

Little change has been made in the statement and explanation of an arbitrator's basic duties to serve impartially and independently, and to hear and decide cases competently and with the time and attention that the parties are entitled to expect. In at least three respects, however, the Code has been modified to emphasize the arbitrator's rights and obligations as a quasi-judicial officer, rather than merely a contractor of the parties.

First, the revised Code states that an arbitrator may ethically request expert testimony, if deemed necessary to decide the case. The 1977 Code stated only that it was not improper for an arbitrator to ask questions, call witnesses or request documents. Note that this rule states that it is not unethical for an arbitrator to request such evidence: it is not a rule of procedure—the parties may decline to provide the information or expert requested by the arbitrator—and it is not a rule of evidence—subject to the parties' agreement and the rules of the administrative entity, the arbitrator may draw whatever inference from non-production the law permits.

Second, the revised Code contemplates than an arbitrator may evaluate any agreement that the parties make as to procedures for the arbitration, and states that "an arbitrator has no ethical obligation to comply with any agreement, procedures or rules that are unlawful or that, in the arbitrator's judgment, would be inconsistent with the arbitrator's ethical obligations.

Third, the revised Code amplifies an arbitrator's obligation to uphold the integrity and fairness of the arbitration process by (1) stating that an arbitrator should not withdraw from or abandon an accepted appointment absent unanticipated circumstances that make it impracticable or impossible to continue to serve; and (2) by requiring that an arbitrator who does withdraw must take reasonable steps to protect the parties interests, including returning evidentiary materials.

Many of the changes in the Code of Ethics for commercial arbitrators reflect changes in the business of the practice of law. Thus, the obsolete ban on soliciting engagements as an arbitrator has been pre-empted by a requirement that advertising be accurate and unlikely to mislead, and the injunction to "scrupulously avoid bargaining" over fees has been jettisoned. Each arbitrator, including non-neutral arbitrators, is obligated to make full disclosure of any existing or past financial, business, professional or personal relationship that the arbitrator may have that may affect any party's perception of the arbitrator's impartiality, but as to relationships of household members or business colleagues, the arbitrator need only disclose those ascertainable "by reasonable efforts".

Those who wish to compare the old and new codes in more detail can retrieve the old Code in the archive section of the AAA website, www.adr.org, and the new code by pressing the hot link for it at www.abanet.org/dispute/webpolicy.html.

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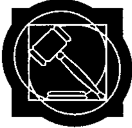

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