

## Recent Case Law Relevant to Mediators as of May 2008

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### Mediation

#### FAA Does Not Apply to Mediation Agreements

If a party refuses to abide by an ADR agreement requiring the parties to submit a dispute to mediation, the aggrieved party cannot invoke the Federal Arbitration Act (FAA) as a means of enforcing the obligation to mediate, according to the Eleventh Circuit Court of Appeals. As the Court explained, mediation does not constitute arbitration under the FAA because there is no adjudication by an independent third party.

In *Advanced Bodycare Solutions, LLC v. Thione International, Inc.*, No. 07-12309, 2008 WL 1775001 (11th Cir. Apr. 21, 2008), Advanced Bodycare Solutions (ABS) and Thione International (Thione) entered into a licensing agreement making ABS the exclusive distributor of Thione nutritional supplements and testing kits. The licensing agreement contained an ADR provision requiring the parties to submit any unresolved disputes to either non-binding arbitration or mediation.

The testing kits supplied by Thione were allegedly defective, and as a result, ABS sued Thione for breach of contract. In response, Thione filed a motion to stay the suit pending arbitration pursuant to Section 3 of the FAA. The district court denied the motion.

On appeal, the issue before the Court was whether the ADR provision of the licensing agreement, which required either mediation or non-binding arbitration, constitutes an arbitration agreement within the meaning of the FAA. In analyzing this issue, the Court cited existing precedent in concluding that the FAA applies only to "classic arbitration," which may be identified by the following "common incidents": (1) an independent adjudicator, (2) who applies substantive legal standards, (3) considers evidence and arguments, and (4) renders a decision establishing the rights and duties of the parties.

In applying this standard, the Court focused exclusively on mediation, rather than non-binding arbitration, because the ADR provision gave the claimant a choice between the two. The Court found that mediation does not constitute arbitration under the FAA because mediation produces no award, does not involve adjudication, and does not necessarily resolve a dispute. In reaching this finding, the Court explained that forcing an unwilling party into mediation does not advance the purpose of the FAA because it "may well *increase* the time and treasure spent in litigation."

Having determined that mediation does not constitute arbitration under the FAA, the Court held that a party may not invoke the FAA as a means of enforcing a contractual obligation to mediate. Accordingly, the Court affirmed the lower court order denying the motion for a stay.

The Court's decision, while helping to clarify the fundamental distinction between arbitration and mediation, leaves the more difficult question unanswered. Does the

FAA apply to an agreement to submit disputes to non-binding arbitration? The Supreme Court's recent decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008) implies that the answer is no since a non-binding arbitration agreement necessarily supplements the statutory grounds for vacating an arbitration award.

### **California Appellate Court Holds That Settlement Agreement Requires Party's Signature**

Reversing a trial court's entry of judgment based upon a settlement agreement entered into at mediation, a California appellate court held that, for a settlement agreement entered into during mediation to be valid, the parties themselves must sign the settlement agreement rather than their attorneys.

In *Blix Street Records, Inc. v. Gelbard*, No. B196648, 2008 WL 331384 (Cal. Ct. App. Feb. 7, 2008), Eva Cassidy sang and wrote songs until her death in 1996. Her parents inherited the rights to Eva's work and entered into an exclusive licensing agreement with Blix Street. A dispute arose concerning royalties from a film the Cassidys planned to produce about their daughter's life. In 2004, Blix Street sued the Cassidys and the Cassidys countersued.

After jury selection had begun, the parties participated in a day-long mediation. All but two of the parties were present at the mediation. However, the absent parties had their attorneys, whom they had authorized to act on their behalf, attend the mediation. The parties reached a settlement agreement at the mediation, which they presented to the judge. The attorneys for the parties informed the judge on the record that they had settled the case. However, despite his attorney signing on his behalf, one of the parties absent from the mediation had not signed the agreement and refused to release a claim until he received compensation.

The Cassidys moved the court for entry of judgment based on the settlement agreement. Blix Street opposed the motion, arguing that no settlement existed because one party had not signed the settlement agreement, though his attorney had signed the agreement. The trial court granted the motion and Blix Street appealed.

Reversing the trial court, the Court held that the Settlement Agreement was unenforceable because it lacked the necessary signatures. Section 664.6 of the California Code of Procedure states: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of a court...for settlement of the case...the court, upon motion, may enter judgment pursuant to the terms of the settlement." California courts have held consistently that "signed by the parties," means the litigants themselves have signed, rather than someone else on their behalf.

Here, the Court found that several parties did not originally sign the settlement agreement. Further, even the party seeking to enforce the settlement agreement conceded that one party had qualms about signing the settlement agreement. Moreover, the document itself did not even contain a section for the various parties to sign. Finally, the Court rejected the argument that an attorney can sign a mediation agreement because section 664.6 requires the parties themselves to sign a settlement agreement, rather than an attorney or proxy.

