

THE ABSTRACT

WINTER 2001

AMERICAN COLLEGE OF MORTGAGE ATTORNEYS

Editor's Notes

This issue of The Abstract features two great articles, one by Harris Ominsky on the federal statute on electronic signatures and one by Jean L. Bertrand on using alternative dispute resolution as a component of settlements.

Mr. Ominsky practices in the Philadelphia, Pennsylvania office of Blank, Rome, Comisky & McCauley. His article was published in the July 26, 2000 issue of *The Legal Intelligencer* and is reprinted here with the permission of Mr. Ominsky and *The Legal Intelligencer*.

Ms. Bertrand is a Fellow of the College and practices in San Francisco with the firm of Morgenstein & Jubelirer. Her article was published in the October/November 2000 issue of *The San Francisco Lawyer* and is reprinted here with the permission of Ms. Bertrand and *The San Francisco Lawyer*.

President's Column

Alfred G. Adams

It is truly exciting to be the new president of the American College of Mortgage Attorneys. The role certainly represents the greatest honor which I have received in my legal career. I want to thank all of you for your confidence.

It has been most gratifying to receive the number of calls that I have received from members agreeing to serve the College in various capacities. I have attempted to add new faces to committees and leadership responsibilities. We are an organization composed of members with many talents and abilities. It is incumbent upon the College to access the personal resources that each of you possess.

The most significant event in the life of the College has been the selection and employment of a professional executive to handle the daily functions of the College. Kathy Sibley performed a valuable and unselfish service for ACMA for many years. Her love and devotion to the College carried us for many years. Words cannot adequately express our gratitude to Kathy for her hard work. However, the time has arrived for professional management.

ACMA has grown and the demands to provide up-to-date services to our Fellows require daily attention. We were fortunate through a complete search process to find Management Solutions Plus ("MgmtSol") located in Rockville, Maryland. We now have a contract with MgmtSol and are blessed to have Beverly ("Bev") Levy as our new Executive Director. It is not an exaggeration to say that Bev has hit the ground running. Her attention to detail and desire to assist has exceeded our initial expectations.

(FYI, so that I am not left behind I have raised my expectations level.) Please feel free to call and introduce yourself to Bev. ACMA business can now be accessed as shown in the accompanying box.

In future columns I shall keep the membership informed of our current initiatives and plans for each committee. In the meantime, we are in the final planning stages for our Board of Regents meeting in Asheville, North Carolina on May 3-5, 2001. All members are certainly invited to attend and learn more about the College. Since **I need to insure a total number of rooms by March 15**, please send Bev an e-mail if you want registration information and plan to attend the meeting. Asheville Airport does have jet service. After March 15, we will be required to release rooms. Asheville is a beautiful town and the meeting should be a great one. We hope to hear that you will attend.

ACMA Information

American College of Mortgage Attorneys
15245 Shady Grove Road, Suite 130
Rockville, Maryland 20850-3222
Telephone: (301) 990-9075
Fax: (301) 990-9771
E-mail: acma@mgmtsol.com

Beverly I. Levy, CEBS, CAE, SPHR
Executive Director

Contents

Representative Status	2	Recent Cases of Interest	5	Referral Program	10
Electronic Signatures	3	Using ADR	7	New Fellows	11

9 Representative Status of Secured Party Under Revised Article 9

The issue of identifying the representative status of a secured party in a financing statement was discussed in the last edition of *The Abstract*. One of the cases mentioned was *Chemical Bank v. Security Pacific National Bank*, 20 F.3d 375 (9th Cir. 1994). In that case, Security Pacific was acting as agent in a loan on behalf of itself and two other lenders. The financing statement that Security Pacific filed only named Security Pacific as the secured party and did not indicate that Security Pacific was acting in a representative capacity. When the debtor filed bankruptcy, the bankruptcy court held that Security Pacific was a secured creditor since it was named in the financing statement and that the other lenders were unsecured creditors because they were not named in the financing statement. The Ninth Circuit affirmed the bankruptcy court's decision.

Revised Article 9 provides in Section 9-502(a)(2) that a financing statement is sufficient if it provides the name of the secured party or a representative of the secured party. In an article entitled *The Filing System Under Revised Article 9*, 73 Am. Bankr. L.J. 61 (Winter 1999), Harry C. Sigman, a member of the Revised Article 9 drafting committee, discussed the effect of Section 9-502(a)(2) on the Security Pacific case.

"Thus, Revised Article 9 negates the holding of the bankruptcy court in *Chemical Bank v. Security Pacific National Bank*, 20 F.3d 375 (9th Cir. 1994), that a filing naming a bank as secured party but not identifying its representative capacity did not serve to perfect the security interests of two banks not named as secured parties for whom the named bank was acting. To illustrate the effect of Revised Article 9's rules: a security agreement might provide for a security interest in favor of six lending banks; the financing statement might name X, who was selected by the banks to function as their collateral agent; X may but need not be one of the six lenders, and the financing statement need not disclose that X is acting as an agent for the six lenders."

2000-2001 Officers

President

Alfred G. Adams

President Elect

J. Tim Konold

Secretary

Stephen A. Bromberg

Treasurer

Robert J. Pinstein

ACMA Information

American College of
Mortgage Attorneys

15245 Shady Grove Road
Suite 130

Rockville, Maryland 20850-3222

Telephone: (301) 990-9075

Fax: (301) 990-9771

E-mail: acma@mgmtsol.com

Beverly I. Levy, CEBS, CAE, SPHR
Executive Director

General

This Newsletter is a publication of the American College of Mortgage Attorneys for the benefit of the College's Fellows. Readers are welcomed and encouraged to send their corrections, comments, articles or news to the editor, Rod Clement, P. O. Drawer 119, Jackson, MS 39205, or rclement@brunini.com. Although an earnest effort has been made to ensure the accuracy of the matters contained herein, no representation or warranty is made that the contents are comprehensive or without error. Summaries of cases or statutes are intended only to bring current issues to the attention of the College's Fellows for their further study and are not intended to be and should not be relied upon by readers as authority for their own or their clients' legal matters; rather, readers should review the full text of the cases or statutes referred to herein before relying on these cases or statutes in their own matters or in advising clients. All commentary reflects only the opinion of the editor and does not represent a position of the American College of Mortgage Attorneys.

"OOPS! I Just Clicked My Life Away"

"A verbal agreement isn't worth the paper it's written on."

- Attributed to Samuel Goldwyn

In biblical times, man developed document seals to facilitate commercial transactions. In an illiterate world, these elaborately carved symbols could authorize the purchase or sale of land, and the oxen and slaves to till it.

Now in the year 2000, we're back to binding symbols again. Only now, these adopted symbols can be a mere electronic click or blip on a computer screen produced in split seconds. I'm referring to the Electronic Signatures in Global and National Commerce Act signed by President Clinton on June 30, 2000, and effective October 1, 2000.

This new Act will electrify the business world by overriding traditional concepts of "signatures" and contracts. Transactions "affecting interstate or foreign commerce" may not be denied enforceability merely because they are in electronic form, or because an electronic signature or electronic record was used in their formation. The Act facilitates the new way we all do business, and it will undoubtedly be the subject of litigation for many years to come. Businesspeople and lawyers should study it carefully.

The new Act is intended to establish uniformity throughout the states by preempting inconsistent state electronic regulatory

laws. States may implement such laws of their own, provided they are consistent with the Uniform Electronic Transaction Act, and any variations are consistent with the federal act.

Electronic Clicks and Symbols

The definition of "electronic signature" is broad.

"The term 'electronic signature' means an electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.

"The term 'electronic record' means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

"The term 'electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." (Section 106)

All of this tells us that parties with the requisite intent can now bind themselves by many means other than traditional signatures. Just type in your name and send it out by e-mail. You may also accept a contract by clicking a "yes," or an icon on your computer screen. You may even

do it with an electronic sound, such as a word or musical note.

This may sound rather shocking, but it may not go much further than many existing business and legal customs. Think of all the transactions that we now carry out in e-commerce merely by the click of a mouse. Look at other traditional contracts that are made every day without "signature." You use your Mac from remote resorts, merely by pushing buttons. You bind yourself every time you fill up with gas without saying a word. You make a contract at an auction merely by raising your hand in response to an auctioneer's announced price.

How far will this go? Will we now be seeing electronic mortgages and notes without, heaven forbid, any parchment - or even paper? Will 30-story buildings change hands, and deeds be recorded, by a blip on the screen? None of that may seem so revolutionary if one recalls that in feudal times land could be conveyed by "livery of seisin," which occurred by merely standing on the land and handing over some twigs to your successor.

continued on page 4

Scope of the New Act

The Act provides two major exceptions, and dozens of others that may not be quite as broad. Here are the major ones:

1. While it preempts any requirement by statute or law that contracts or other records be written, signed or in non-electronic form, it is not intended to affect any other requirements concerning contracts or records.
2. It does not require anyone to agree to use electronic records or electronic signatures (other than certain governmental records). So if you are not yet comfortable in cyberspace, you don't have to go there.

Here are some other exceptions and exclusions:

- consumer disclosures and consents,
- other legislation which requires verification or acknowledgment of receipt,
- certain oral communications,
- other laws requiring notices or records to be posted, displayed, or publicly affixed,
- wills or testamentary trusts,
- adoption, divorce or other matters of family law,
- the Uniform Commercial Code, other than Section 1-107 (waiver of a breach), and 1-206 (writing needed for sale of certain personal property), and Articles 2 and 2A (sales and leases of goods),
- court orders or notices, or official court documents (including briefs and pleadings), and
- notices of default, foreclosure, eviction or right to cure in connection with a primary residence.

For a comprehensive list of caveats and exceptions, there is no substitute for reading the new Act.

Watch Out!

In trying to "encourage" and "promote" electronic commerce, Congress has obviously made certain "trade-offs". Those include what some perceive as erosions of traditional safeguards against deception and fraud. Without paper contracts, witnesses and signatures in blue ink, dishonorable people will be tempted to deny that the typed signature or the clicked response was authorized.

Years after the event, when the contract is litigated, it may be difficult to prove whether an exchange of e-mail resulted in a meeting of the minds. If an "or" was changed electronically to an "and", who was responsible for that electronic change, and did it occur before participants affixed their symbolic signatures?

The Act anticipates some of these issues by requiring the electronic record or contract to be in a form "capable of being retained and accurately reproduced for later reference" by the participant. (Section 101(e)). Also, documents may be authenticated in a blink of the eye by security codes; and some companies are racing to develop and distribute better technology, which will authenticate transactions by personal identification of your voice, fingerprint or even your eyeball.

We now have digitizer pads you can attach to your computer. If these security devices are widely implemented, fraud may become even more difficult than with paper contracts signed in blue ink with witnesses.

Unfortunately, electronic signing sacrifices the "ceremonial psychology" of signing an important contract, deed or mortgage. That happens when people plan a meeting, sit around a table, sign documents and affix notary seals. While none of this may be necessary, you know an event is happening. You may be a little less charged up if you need only a click of an electronic mouse which resides in your den.

In the world of e-commerce, many casual communications take place. A re-

sponse may be "I like that proposal" or "Let's go with it." Will that bind you to an electronic contract with an electronic signature?

Lawyers will have to be particularly careful about how they respond to e-mail on behalf of their clients. Under the Act, "electronic agents" may bind their principals.

The Future

It is still not clear how the Act will affect other laws which are intended to impede fraud, such as the Uniform Written Obligations Act and Statutes of Frauds. Is an e-mail enough to pre-empt these other laws under the Electronic Signatures Act?

Also, the Act only applies to transactions "in or affecting" interstate or foreign commerce. Will a deed between two local residents who communicate on the Internet be such a transaction? And how will Records' Offices deal with electronic mortgages and deeds which participants deliver for recording?

The Act apparently gave Records' Offices some slack. Section 104 provides that the Act's requirements are trumped by the standards and formats of state agencies for "filing" of records. However, some commentators have raised a subtle issue of interpretation here. Records' Offices may still have to comply with the Act if "filing" does not include recording of documents.

Civilization has traveled a long circuit from ancient seals on parchment to icons on a screen, and the Electronic Signatures Act has now blessed the new ways we do deals. E-commerce sales exceeded an estimated \$60 billion in 1999, and it has been estimated that the reduction of paperwork from electronic contracts could save up to \$2000 on the cost of closing a home mortgage. Business people, consumers and their lawyers and other representatives had better be prepared to plug in and sign on.

Recent Cases of Interest

Implied Actual Notice of Mortgage ■ *Slachter v. Swanson*

2000 WL 1187811, 2000 Fla. LEXIS 1712 (Fla. Ct. App. 2000). Swanson purchased land from the Millmans in 1995. The title showed a mortgage to Slachter in 1984, a foreclosure action by Slachter in 1986 that was dismissed with prejudice, a 1990 judgment against Slachter for wrongful foreclosure, and an order of a trial court in 1992 discharging the Slachter mortgage. Swanson relied on the court's discharge of the mortgage, and affidavits from the Millmans that there were no liens or other proceedings which could give rise to a lien on the property, in purchasing the land without making any provision for the mortgage to Slachter. Unbeknownst to Swanson, Slachter had appealed the 1992 trial court order discharging the mortgage, and the appeals court had issued a judgment vacating the trial court's discharge of Slachter's mortgage

in 1993. Slachter did not file in the land records any notice of the appeal or the appeals court's 1993 order vacating the 1992 discharge of the mortgage. The Florida Supreme Court denied review of the appeals court's decision in 1995, six days before Swanson bought the land from the Millmans. The trial court did not vacate its judgment discharging the mortgage until 1997. Slachter filed a foreclosure action against Swanson in 1998. Swanson argued that he was a bona fide purchaser with no notice of the Slachter mortgage. The trial court granted summary judgment to Swanson. On appeal, the trial court's judgement was reversed. The appeals court held that the existence of the trial court's 1992 discharge of the mortgage gave Swanson implied actual notice of the possibility of an appeal and the duty to inquire about whether Slachter had ap-

pealed. This information was public record and easily available.

Note: The court quoted from the Florida Attorney's Title Fund, Inc., Notes: "The Fund does not authorize reliance on final decrees quieting title, foreclosing mortgages, etc., until the time for appeal has run, and if appealed, until the time for applying for a writ of certiorari to the Supreme Court of Florida has run."

Note: The court discussed the difference between three kinds of notice: actual notice, constructive notice and implied actual notice. The court stated that implied actual notice "arises when a subsequent purchaser has the means of knowledge and the duty to investigate but does not." In the editor's state, this is known as "inquiry notice."

Prepayments ■ *In Re Hidden Lake Limited Partnership*

247 B.R. 722, 2000 Bankr. LEXIS 446 (Bankr. S.D. Ohio 2000). Aetna loaned money secured by an apartment complex in Ohio. The borrower defaulted on its payments. Aetna accelerated the debt on December 18, 1997. The note provided that a prepayment charge was due upon voluntary or involuntary prepayment, including acceleration, but did not state that the date of acceleration would be deemed to be the date of the prepayment for the purpose of calculating the prepayment charge. Aetna used the first day of the next month after acceleration, January 1, 1998, as the date from which to calculate the prepayment charge. The amount of the charge was approximately 23% of the outstanding principal. The borrower filed bankruptcy under Chapter 11 on July 28, 1998. The borrower challenged the enforceability of the prepayment charge on the grounds that the charge was an unen-

forceable liquidated damages provision under 11 U.S.C. § 502(b)(1), and that it was a claim for unmatured interest barred by 11 U.S.C. § 502(b)(2). The bankruptcy court held that the prepayment charge was a valid liquidated damages clause under Ohio law and thus was not barred by § 502(b)(1), despite the fact that the court also found that the prepayment charge would seriously impair the borrower's ability to reorganize, that the prepayment charge had not been negotiated between the parties, and that Aetna may be overcompensated by the calculation. Relying on Ohio law, the court determined that the prepayment charge was enforceable because the parties were knowledgeable, had a reasonable chance to understand the agreement and were sufficiently sophisticated and experienced so as to be aware of the import of their agreement. While the note did not state

expressly when the prepayment charge would be due, Aetna's interpretation of when the charge was due was reasonable. The court also held that the prepayment charge was not a claim for unmatured interest because it arose prepetition and matured at the time the debt was accelerated.

Note: An attorney for Aetna in this case, Richard F. Casher, wrote an article entitled "Prepayment Premiums: Hidden Lake is a Gem", that is published in the November 2000 issue of the American Bankruptcy Institute Journal. In this article Casher elaborates on the significance of several aspects of this decision, including that the court approved a yield maintenance formula that relied on the "naked" (without any upward basis point adjustment) yield on U.S. Treasury obligations as the discount rate.

continued on page 6

Recent Cases of Interest

continued from page 5

Mortgage and Adverse Possession ■ *Ford Consumer Finance Co. v. Carlson & Breese, Inc.*

611 N.W. 2d 75, 2000 Minn. App. LEXIS 548 (Minn. Ct. App. 2000). In 1989 the Nelsons acquired title to certain property and executed a mortgage in favor of Ford. The Nelsons took possession of the property. A dispute arose between the Nelsons and Carlson over ownership of a small triangular portion of the land. In 1993 Carlson brought an action to quiet title to the land. The Nelsons were named as defendants but Ford was not named. Carlson obtained a default judgment against the Nelsons. In 1995 Ford foreclosed on its mortgage. In 1998 Ford filed an action to quiet its title to the triangle and then assigned its rights to Johnson in connection with a sale of the rest of the land to Johnson. Johnson argued that Ford's rights in the property were not cut off by the 1993 quiet title action

because Ford was not named in the action, and that by tacking on Ford's and the Nelsons' interest, she had title to the triangle by adverse possession. The trial court held that the 1993 quiet title action was not binding on Ford, but that Carlson was the owner of the land. The Court of Appeals affirmed, but on slightly different grounds. The Court of Appeals reasoned that Johnson could not tack the Nelsons' possession because the Nelsons' possession was cut off by the 1993 quiet title action. Even if Ford's interest was not cut off by the 1993 quiet title action, Ford's interest was not possessory until Ford foreclosed in 1995. So there was a gap in possession that prevented Johnson from tacking on previous ownerships for adverse possession, and

Johnson's adverse possession claim failed.

Note: The mortgage exception to the doctrine of merger provides that if the mortgagee obtains title to the land, merger between the mortgage estate and the fee estate will not take place if merger would manifestly be against the mortgaged interest, for example, if an intervening lien exists. An earlier Minnesota case had applied this exception to allow the mortgagee the benefit of an easement that otherwise would have been extinguished by merger. Johnson made the novel argument that the court should adopt a similar exception to the doctrine of adverse possession in order to protect the nonpossessory interest that Ford had in the land before its foreclosure. The court declined to do so.

Forged Request For Reconveyance ■ *Schiavon v. Arnaudo Brothers*

84 Cal. App. 4th 374, 100 Cal. Rptr. 2d 801, 2000 Cal. App. LEXIS 822 (Cal. App. 6th Dist. 2000). In March 1989, Perlitch borrowed money from Schiavon, which loan was secured by a deed of trust on land owned by Perlitch. In July 1989, a request for reconveyance, with a forged signature of Schiavon, was delivered to the trustee of the deed of trust, who executed and recorded the reconveyance. Perlitch then sold the property to Arnaudo. Perlitch filed

bankruptcy in 1991. Schiavon sought to cancel the reconveyance and reinstate the deed of trust. In California a bona fide purchaser for value takes title free and clear of any improperly reconveyed deed of trust so long as the reconveyance is voidable and not void. The trial court held that the reconveyance was voidable rather than void, and because Arnaudo was a bona fide purchaser, Arnaudo took title free and clear of Schiavon's deed of trust. The Court of

Appeals affirmed. While a forged instrument is void rather than voidable, in this case the signature of the trustee on the reconveyance was not forged. Rather the signature of the beneficiary on the request to the trustee for reconveyance was forged. The reconveyance itself was therefore not void but voidable, and Arnaudo, as a bona fide purchaser, was entitled to rely on the reconveyance and took free of Schiavon's deed of trust.

Construction Lender's Duty To Materialman ■ *Town & Country Homecenter, Inc. v. Woods*

725 N.E.2d 1006, 2000 Ind. App. LEXIS 444 (Ind. Ct. App. 2000). Fellows contracted with Woods for Woods to build a house. National City Bank ("NCB") made a loan to Fellows to pay for the construction of the house. Woods, the contractor, purchased materials for the house from Town & County Homecenter ("T & C"). Prior to disbursement of the loan proceeds, Fellows received a letter from T & C to the effect that T & C could perfect a lien against Fellows' property if it did not receive payment from Woods for its materials. Fellows asked his loan officer at NCB about the letter and the loan officer told him that this would be taken care of at closing. At closing the loan officer asked Woods if T & C had been paid. Woods admitted that he had not paid T & C but said that he intended to pay T & C out of the proceeds of closing. At the bank's request,

Woods executed an affidavit saying that there were no unpaid claims for materials. NCB then cut one check to Woods. Woods in fact did not pay T & C. T & C filed a mechanics lien against Fellows' home. The mechanics lien was dismissed because T & C failed to meet the requirements of the statute. T & C then brought an action against NCB claiming that NCB had a fiduciary duty to Fellows and T & C to exercise reasonable care to make sure that T & C was paid, and further claiming that NCB breached its duty by disbursing the loan proceeds to Woods with knowledge that T & C had not been paid. The trial court entered judgment in favor of NCB. The Court of Appeals affirmed. NCB had a duty to its mortgagee, Fellows, to make sure that T & C was paid, and breached that duty. Fellows was not harmed by this breach since T & C failed to perfect its mechanics

lien and eventually had to release its lien. But NCB, in its role as construction mortgagee, had no duty to protect a materialman such as T & C.

Note: The mortgagee won this case by a whisker. The appeals court consisted of a three-judge panel with one judge dissenting and another judge concurring only in the result. The dissenting judge thought that NCB had a duty to T & C under existing law. The concurring judge castigated the bank and railed against the inequities of the case. He pointed out that NCB could have issued the check payable to Woods and T & C, retained the amount necessary to pay T & C in escrow, or required Woods to obtain a release from T & C. In the end, however, the concurring judge concluded that under the present state of the law NCB owed no duty to T & C.



Using ADR As A Settlement Component

Thinking "Out of the Box"

Often both sides to litigation want to settle out-of-court but cannot agree on a dollar figure. Plaintiffs and their counsel may be visualizing a pot of gold and be blind to the substantial risks of trial, while defendants, especially corporate defendants, often lack the authority to cross certain monetary thresholds. Sometimes settlement cannot be achieved simply because of the numerous variables affecting the decision. But even the biggest blowhards of the plaintiffs' bar fear a defense verdict, especially if they first must incur the large out-of-pocket costs associated with a jury trial. And even the most inflexible corporate defendants fear the proverbial "big hit". Thus, even when the parties seem most polarized, they have something in common – a shared fear of the extreme result. This common fear can often be channeled to create common goals for settlement even if an agreed-upon dollar figure is unattainable.

At a minimum, all sides usually want to avoid the risks and costs of traditional jury

trial resolution. By crafting innovative settlement procedures, this common goal can be achieved and the risks and costs of a jury trial avoided.

Over the past decade, ADR (Alternative Dispute Resolution) has become commonly used to *facilitate* settlements; the difference I propose here is the use of ADR as a *component* of the settlement itself. Set forth below are five actual settlement approaches we have used, incorporating ADR methods into the settlement agreement in a variety of ways. I will explain each by reference to the common goal the parties shared, as the common goal illuminates the methodology chosen.

COMMON GOAL NO. 1

To Get Out of the Public Eye

An environmental contamination case was brought by property-owner plaintiffs against three defendants, accusing each of contributing contaminants to the soil and groundwater. The three defendants found it relatively easy to reach agreement with

plaintiffs as to the amount necessary to settle the plaintiffs' case, but could not agree on how to allocate that payment among themselves. Yet none of the defendants wanted to try the case publicly before a jury because, ultimately, local pollution authorities would be issuing clean-up orders and none of the defendants wished to display publicly all of the evidence which eventually could be used against them by the local authorities. In addition, the extent of the groundwater contamination was not yet completely known and the total cost of clean-up was highly speculative at the time the underlying landowners' declaratory relief action was scheduled for trial.

Because of their common desire to avoid a public trial, all defendants agreed to pay the requisite amount to the plaintiffs and transfer the defendants' allocation dispute to a private forum. Private binding arbitration was used to allocate the amount paid to plaintiffs, as well as additional amounts which would be expended in the future for clean-up costs. Because the full

continued on page 8

extent of required clean-up was not known at the time of settlement with plaintiffs, the defendants agreed to postpone arbitration for several years, meeting in mandatory mediation sessions regularly beforehand to exchange information about the developing extent of knowledge regarding the contamination.

The evidence to be submitted at arbitration was limited by agreement of the parties such that only expert reports and testimony were permitted. No evidence was allowed as to relative degrees of fault, only as to relative quantities of contributed contaminants. It was agreed there would be no discovery, other than exchange of the expert witness reports generated by each party.

Thus, in this circumstance, settlement occurred gradually. First, the property-owner plaintiffs were satisfied by way of traditional settlement. Then, several years later, the cross-complaints were resolved. Although (as is the case with nearly every settlement) no party was completely happy with the end result, and each had hoped to do better, because the common goals of postponing resolution until the facts developed and staying out of the public forum were achieved, all parties were content with the settlement process as a whole.

COMMON GOAL NO. 2

Third-Party Resolution

Plaintiff homeowners association sued the real estate developer and several subcontractors in a classic construction defect case, alleging multiple defects in the construction of their homes, from foundations to chimney caps and everything in between. Even after extensive discov-

ery and drawn-out settlement negotiations, settlement could not be achieved. While the plaintiffs and the developer were able to agree on the extent of the defects and the cost of repair in most of the categories of claims, there were five or six types of claims (e.g., concrete garage floors, grading and drainage) where there was complete and final disagreement.

The one thing all parties had in common in this circumstance was the need to have a third party, preferably a jury, resolve their dispute. Plaintiffs' counsel needed a jury



trial to satisfy some of his more outspoken homeowners; he knew if they were ever to compromise, it would only be after a jury had effectively told them to do so. Defendants needed a jury trial so that, if and when others presented similar claims in the future, it could not be said they voluntarily entered into a high-value settlement. Yet all parties realized a full-blown jury trial would be extraordinarily expensive and involve dozens of witnesses.

With the court's help, the parties agreed to participate in a non-binding mini-trial

using jurors drawn from the actual jury pool in the relevant county. Only the issues on which the parties were at odds were "tried", and the only subcontractors who participated were the ones involved in those areas. Key decision-makers for each party were required to be present throughout the mini-trial, because the verdict was to be followed immediately by additional settlement discussions.

Time limits were agreed upon, and strictly enforced such that the entire trial (from the beginning of jury selection until the conclusion of jury arguments) took only seven court days. It was agreed that no objections would be made or heard to the evidence presented during the mini-trial. However, because the advisory jury would produce a meaningful advisory verdict only if the evidence accurately reflected that which would be admissible in a full trial, only evidence which counsel honestly believed would be admissible at trial was presented. The parties also agreed the advisory mini-trial verdict would be considered confidential.

As all parties had hoped, the case settled shortly after the advisory jury rendered its verdict. The mini-trial process served as a "reality check" for plaintiff homeowners and allowed defendants who might face similar claims in the future to say "the jury made me pay it." All parties felt the process they had chosen worked well and served their needs.

In this circumstance, the judge assigned to try the case was very involved in crafting and presiding over the mini-trial. However, it would not be necessary to have such court involvement. (Indeed, it would be impossible to get such a high level of court participation in most jurisdictions.) Even without judicial help, litigants could stipulate to a private trial be-

fore one or more professional neutrals, or they could agree to use the services of marketing analysts to hire a jury panel with similar characteristics to the jury likely to be drawn from the particular venire in question.

COMMON GOAL NO. 3

To Prevent Disaster

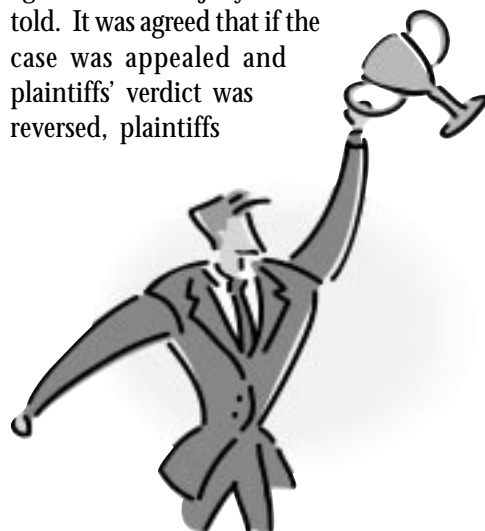
In this high-value personal injury case, plaintiffs' counsel was in a difficult spot. He had sued two defendants on behalf of a widow and three children but was not sure he could prove liability as to either of them. More disturbing than that, however, was the likelihood that even if liability was shown, only one or the other, but not both, of the defendants would be held responsible for the wrongful death of plaintiffs' decedent. Plaintiffs' counsel wanted to settle with one of the two defendants to guard against a complete loss and ensure financial security for his clients. He also wanted to proceed to verdict against one defendant to maximize the potential recovery. Yet he could not know which was the better candidate to take to trial.

Of the two defendants, one was particularly motivated to settle, for internal corporate reasons. Thus, two parties were strongly motivated to avoid complete disaster.

This situation lent itself very well to a variation on the "Mary Carter" theme. The settling defendant guaranteed plaintiffs' recovery up to a certain amount and the plaintiffs proceeded to verdict against the other defendant. The result of the actual trial before a real judge and jury would determine the amount paid by the settling defendant; the higher the verdict against the non-settling defendant, the lower the settling defendant's share. A maximum was set, thus ensuring that the defendant would not experience its version of disaster – a

run-away jury. No minimum was necessary because the plaintiffs' counsel knew that if the jury found liability, he would recover a large amount.

Plaintiffs agreed they would continue to prosecute the action against the non-settling defendant, and the agreement gave the settling defendant the right to veto any proposed settlement between plaintiffs and the remaining defendant. All parties appeared at trial and although the non-settling defendant and the judge knew of the agreement, the jury was not told. It was agreed that if the case was appealed and plaintiffs' verdict was reversed, plaintiffs



could then pursue both defendants as if no agreement had been reached – except that punitive damages were forever waived against the settling defendant.

In the end, the verdict against the non-settling defendant was so large the settling defendant paid nothing, and both parties were pleased with their settlement.

COMMON GOAL NO. 4

Bet Hedging

This situation was somewhat similar to the one just described in that they both involved high-value personal injury death cases. But here only one defendant remained at the time of trial and a "Mary

Carter" was therefore unavailable. As before, the defendant most feared a run-away jury and the plaintiff most feared a defense verdict. The parties' common desire to allay those fears made it possible for them to agree to bracket the risks. They agreed to try the case to verdict but, no matter what the result, the defendant would pay *at least* a certain minimum amount, and *at most* a certain maximum amount. If the actual verdict were in an amount between the minimum and the maximum, the actual verdict amount would be paid.

Plaintiffs agreed to waive punitive damages and both parties waived their right to appeal. The parties agreed that certain items of evidence would be withheld. They stipulated to certain jury instructions, and also agreed the transcripts would not be usable in any subsequent proceeding. The judge knew of the agreement, but the jury did not.

As it turned out, the jury's verdict was in an amount less than the minimum agreed payment. Out of all of the uses of alternative methods described in this article, this one was most disappointing to the parties. Plaintiff's counsel felt that his stipulations as to admissible evidence and jury instructions unduly affected his opportunity to win a large verdict. On the other hand, the defendant had to write a check for an amount greater than the verdict. Despite the parties' reactions to the result, they did accomplish their common goal and avoided disaster for either side.

COMMON GOAL NO. 5

Efficient Resolution of Numerous Claims

The most highly-publicized use of ADR as a component of settlement results from the global settlement of asbes-

continued on page 10

tos claims against Fibreboard Corporation in the matter of *Ahearn v. Fibreboard*, filed in the United States District Court for the Eastern District of Texas. The settlement class was overturned by the United States Supreme Court in *Ortiz v. Fibreboard Corporation*, 99 C.D.O.S. 4953 (June 23, 1999). During the five years the class action settlement was on appeal, claims against Fibreboard have been resolved through an ADR process known as "baseball arbitration."

Although our firm did not negotiate the class action settlement for Fibreboard (credit for that goes to Brobeck, Phleger & Harrison's Steven Snyder and William Levin), we have been active in arbitrating numerous claims since the settlement was reached.

The common problems faced by the parties in this circumstance was that everyone knew numerous claims would arise during the time the innovative settlement wound its way through the appellate courts. Many asbestos claimants are elderly or suffer terminal illnesses and all parties agreed it would be unfair to deprive them of a forum for years pending appellate resolution of the class action settlement. Thus, some methodology was needed to resolve claims during this interim period. All parties also agreed that efficiency was of utmost importance to resolve numerous claims without extraordinary costs.

A committee was formed to process claims pending appeal, composed of one representative each from (a) Fibreboard, (b) the plaintiffs' bar, and (c) Fibreboard's insurers. If the committee was unable to resolve a particular claim, claimants' counsel could demand arbitration. An arbitrator was promptly selected from a lengthy list of arbitrators nominated equally by plaintiffs' and Fibreboard's counsel. Both sides submitted their proffered evidence to each other and to the arbitrator, followed by simultaneous cross-

briefs. A hearing was held at which live testimony was possible, but not common. The arbitration almost never took more than one-half day. Following the hearing, the arbitrator awarded either the committee's offer to settle the claim or the claimant's demand. No middle number could be chosen. This feature kept either side from selecting an extreme settlement posture, and although both sides won some and lost some, no result was extraordinarily out-of-line. Overall the system worked well and accomplished the shared goal of efficiently resolving numerous claims during the interim period.

CONCLUSION

As the foregoing examples demonstrate, creative use of ADR as a component of settlement can bridge gaps previously believed to be uncrossable chasms:

- A cocky plaintiffs' lawyer can be brought back to reality by an advisory jury and mini-trial; the same process can work for a defendant with its head in the sand.
- An unruly co-defendant who refuses to participate in settlement discussions can be left high and dry with a Mary Carter settlement.
- Both sides can avoid disaster with a minimum/maximum agreement, even if they cannot agree on a specific result.
- When appropriate, all parties can avoid the public spectacle of a trial by resolving matters through private arbitration.

All sorts of combinations or variations of these techniques could be used, such as private binding mini-trials, Mary Carter arrangements with both a minimum and a maximum agreed-upon figure, or actual jury trials with stipulated facts or controlled evidence and no appeal. With a little imagination, ADR can be of great benefit to litigants not only to *facilitate* settlement, but as a *component* of settlement.

Referral Program

Stephen A. Bromberg

In order to encourage use of the ACMA Roster by ACMA Fellows to refer business to other Fellows, the referral incentive reward program previously adopted is being continued. Because of the quality of the Fellows and their firms, which was reviewed and confirmed at the time that each of the Fellows was elected to membership, the referral of business to them may be carried out with utmost confidence. In addition there will be a personal interest taken by the receiving attorney because of the ACMA personal relationships involved.

Referral should not only be of real estate mortgage transactions, but of all legal matters in which the receiving attorney or his firm have specialization as specifically set forth in the Roster.

This viable and expanding referral system continues to benefit all of the Fellows and create an additional dimension for the College. The system involves the mere reporting by the forwarding Fellow to Beverly Levy, our Executive Director, of the referral, giving only the date and names of the referring and receiving attorneys. This information can be communicated either by a short note or letter to Beverly Levy.

At the end of the month immediately preceding the annual meeting, the Executive Director will total the referrals made by each Fellow. The Fellow making the most referrals during the preceding year will receive recognition in the next ACMA newsletter, as well as at the next annual meeting in the form of free fees to the meeting. In the event of a tie, only the newsletter announcement will be made.

Please Actively Participate!

NEW FELLOWS

David M. Allen

Page, Mannino, Peresich & McDermott, P.L.L.C.
759 Vieux Marche Mall
Biloxi, Mississippi 39530
Phone: (228) 374-2100 Fax: (228) 432-5539
Email: dallen@pmp.org

Lee A. Chilcote

Arter & Hadden LLP
1100 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115
Phone: (216) 696-2297 Fax: (216) 696-2645
Email: lchilcot@arterhadden.com

Howard Donovan, III

Johnston & Conwell L.L.C.
800 Shades Creek Parkway, Suite 325
Birmingham, Alabama 35209-4510
Phone: (205) 414-1200 Fax: (205) 414-1205
Email: whd@johnstonconwell.com

Anne S. Ellefson

Haynsworth, Marion, McKay & Guerard, L.L.P.
75 Beattie Place, Eleventh Floor
Greenville, South Carolina 29602
Phone: (864) 240-3200 Fax: (864) 240-3300
Email: asellefson@hmmg.com

Morris A. Ellison

Buist, Moore, Smythe & McGee, P.A.
5 Exchange Street
Charleston, South Carolina 29402
Phone: (843) 722-3400 Fax: (843) 723-7398
Email: mellison@bmsmlaw.com

Albert J. Gladner

Flagstar Bank, FSB (Legal Department)
2600 Telegraph Road
Bloomfield Hills, Michigan 48302
Phone: (248) 338-6493 Fax: (248) 338-6493

Allan Goldberg

Arnstein & Lehr
120 South Riverside Plaza, #1200
Chicago, Illinois 60606-3913
Phone: (312) 876-7133 Fax: (312) 876-0288
Email: agoldberg@arnstein.com

Mary Kay Kennedy

Shartsis, Friese & Ginsburg LLP
One Maritime Plaza, Eighteenth Floor
San Francisco, California 94111
Phone: (415) 421-6500 Fax: (415) 421-2922
Email: mkk@sfglaw.com

Michael G. Kerman

Sutherland Asbill & Brennan LLP
999 Peachtree Street, N. E.
Atlanta, Georgia 30309-3996
Phone: (404) 853-8326 Fax: (404) 853-8806
Email: mgkerman@sablaw.com

Grace Nihei Kido

Cades Schutte Fleming & Wright
1000 Bishop Street, Suite 1000
Honolulu, Hawaii 96813-4298
Phone: (808) 521-9200 Fax: (808) 521-9210
Email: gkido@cades.com

Neal J. Kling

Sher Garner Cahill Richter Klein McAlister & Hilbert
909 Poydras Street, Twenty-Eighth Floor
New Orleans, Louisiana 70112-1033
Phone: (504) 299-2100 Fax: (504) 299-2300
Email: nkling@shergarner.com

Jack Marvin

Morrison & Hecker
600 Commerce Bank Center
150 North Main
Wichita, Kansas 67202-1320
Phone: (316) 265-8800 Fax: (316) 265-1349
Email: jcmarvin@moheck.com

Kathleen O. McKune

Stites & Harbison
400 W Market Street, Suite 1800
Louisville, Kentucky 40202-3352
Phone: (502) 681-0445 Fax: (502) 587-6391
Email: kmckune@stites.com

Bruce H. Newman

Arter & Hadden LLP
725 South Figueroa Street, Suite 3405
Los Angeles, California 90017-5418
Phone: (213) 430-3377 Fax: (213) 617-9255
Email: bnewman@arterhadden.co

Michael H. Rubin

McGlinchey Stafford
Ninth Floor, One American Plaza
Baton Rouge, Louisiana 70825
Phone: (225) 383-9000 Fax: (225) 343-3076
Email: mrubin@mcglinchey

Robert W. Sargeant

Underwriting Counsel
Stewart Title Insurance Company
700 5th Ave, Suite 5500
Seattle, Washington 98104
Phone: (206) 223-1505 Fax: (206) 269-4916
Email: rsargean@stewart.com

Robert R. Sexton

Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
Birmingham, Alabama 35203-2602
Phone: (205) 254-1000 Fax: (205) 254-1999

Vernon D. Singer

Millsap & Singer, P.C.
Suite 2300, 7777 Bonhomme Avenue
St. Louis, Missouri 63105
Phone: (314) 726-6545 Fax: (314) 726-6483
Email: vsinger@msfirm.com

William M. Warren

Forest City Enterprises, Inc.
Terminal Tower
50 Public Square, Suite 1100
Cleveland, Ohio 44113-2267
Phone: (216) 416-3275 Fax: (216) 263-6206
Email: william_warren@fceinc.com

Please notify Bev Levy of any changes or corrections.

ACMA

AMERICAN COLLEGE OF MORTGAGE ATTORNEYS

15245 SHADY GROVE ROAD
SUITE 130
ROCKVILLE, MD 20850-3222

Plan Now To
Attend

AMERICAN COLLEGE OF MORTGAGE ATTORNEYS

ANNUAL MEETING 2001

October 10 - 14, 2001
Nemacolin Woodlands Resort & Spa
Farmington, Pennsylvania