ARBITRATION AND MEDIATION: THE PARALLEL LEGAL UNIVERSE

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TABLE OF CONTENTS

The Presenters .................................................................................................................. i

Arbitration and Mediation: The Parallel Legal Universe ........................................... 1

Mediation..................................................................................................................... 1

Arbitration.................................................................................................................. 2

Attachment............................................................................................................... 7
LINDA M. HOPGOOD is a 1979 summa cum laude graduate of Western Kentucky University and a 1982 graduate of the University of Kentucky College of Law. She began her practice in Paducah and returned to the Lexington area in 1984. Since that time, she has concentrated her practice in the areas of personal injury, products liability, medical malpractice, mediation and arbitration. In 1992, she became one of the first mediators and arbitrators in the Commonwealth of Kentucky. Ms. Hopgood has been an AV rated trial lawyer in Martindale-Hubbell for the past fifteen years. She was selected as a Super Lawyer in 2013; admitted to the Bar Register of Preeminent Women Lawyers for 2014; and was elected as a Top Lawyer in Kentucky for 2013-2014 in the area of Alternate Dispute Resolution Law. She was also selected as a Fellow of the Litigation Counsel of America. Ms. Hopgood serves on the Board of the Fayette County Bar Association and the Board of Trustees for Baptist Health Lexington. She served as the Chair of the Kentucky Bar Association's House of Delegates, as well as its Board of Governors. In addition, she is a past Trustee of The Lexington School. Ms. Hopgood is a frequent lecturer at the University of Kentucky College of Law in the area of alternate dispute resolutions.
JUSTICE MARY C. NOBLE was elected to the Supreme Court in 2006 from the Fifth Supreme Court District, after serving fifteen years as a Fayette Circuit Court judge. She was re-elected to the Supreme Court unopposed in 2008. In 2010, Chief Justice John Minton appointed her Deputy Chief Justice. In 2011, she became the first woman to preside at the Kentucky Supreme Court in a case in which the Chief Justice was recused. Deputy Chief Justice Noble obtained her undergraduate degree and her Master’s degree from Austin Peay State University. She began her professional career by teaching English at Montgomery Central High School in Tennessee. After obtaining her Master’s degree, she served as a guidance counselor at Columbia Military Academy and later as a Psychology instructor at Columbia State Community College in Columbia, Tennessee. She returned to Kentucky to attend the University of Kentucky College of Law in 1979, and graduated in December, 1981. Deputy Chief Justice Noble began her legal practice at the law firm of Bryan and Fogle in Mt. Sterling. In 1983, she began a general litigation practice in Lexington and also served as Domestic Relations Commissioner for Fayette Circuit Court for two years until her election to the circuit bench in 1991. She served as Chief Judge of the Fayette Circuit Court and the region, the first woman to serve in such capacity in the over 200 year history of Fayette Circuit Court. In 1996, Deputy Chief Justice Noble, Chief Justice Minton and District Judge Henry Webber established the Court of Justice Drug Court program. She presided as a Drug Court judge for ten years. She has also served on the Board of the National Association of Drug Court Professionals, is a member of the organization’s Hall of Fame, and has been invited to speak about Drug Court-related topics throughout the country. Deputy Chief Justice Noble chairs the Family Court Rules Committee, and led efforts to draft the first statewide Family Court Rules of Practice and Procedure. She previously chaired the Civil Rules Committee.
I. MEDIATION

A. Voluntary Process

B. Goals of Mediation

C. Provides an Evaluative Process for all Parties and Decision Makers
   1. Evaluation of litigation risks;
   2. Evaluation of litigation costs;
   3. Economic position of parties.

D. Pre-Mediation Agreements between all Individuals Participating in the Mediation (provide examples)
   1. Setting out the terms and conditions of confidentiality of the process is the primary goal of the pre-mediation agreement.
   2. Everyone must sign including all non-parties who choose to attend and participate in the mediation.

E. Setting the Stage for a Successful Mediation Happens before the Mediation Begins and How to Properly Set the Stage

F. Mediation Submissions
   1. Confidentiality of the pre-mediation submissions;
   2. Need to be addressed in the pre-mediation agreement.

G. Offers and Counteroffers and/or Failure to Make Offers and/or Counteroffers
   1. Is it permissible for a party to attend a court ordered mediation and refuse to make a settlement demand and/or refuse to make a settlement offer?
2. When does a party have a right to refuse to make offers or demands?

H. Does the Mediator Have the Right to End the Mediation and if so When?

I. Protecting the End Game: Good Faith vs. Bad Faith and Admissibility of the Mediation Process into the Underlying Court Case


2. Solution to good faith? Self-interest.

3. Good faith versus self-interest in more complex cases.

4. Should good faith provisions be inserted into mediation agreement?

J. Is the Mediation Process Broken?

K. Is the Mediation Process Worth Preserving?

L. What the Courts Can Do to Protect the Mediation Process and Insure the Parties Participate Professionally and in "Good Faith"

M. Recent Developments in the Courts Concerning Confidentiality and Mediation Process

1. Model Rules of Mediation;

2. Mediation reports submitted to the court;

3. Admissibility of events and/or conversations occurring during the mediation;

4. Ability of the mediator to testify in court concerning the events and/or conversation occurring during the mediation.

II. ARBITRATION

A. What It Is and Isn't: It's NOT Mediation

1. It is fact-finding, law-applying and award-making by someone other than a judge or jury.
2. Two legislative acts apply.
   a. Federal Arbitration Act (FAA): 9 USCA §§1-16 (1925) (ninety years old!). Covers ONLY maritime transactions and commerce.
   c. Both require a written agreement.
   d. Kentucky act is broader than the FAA.
   e. When a Kentucky transaction involves "commerce," then the FAA is supreme IF the commerce is "commerce among the several states" (interstate commerce) or with foreign nations.
   f. Neither act covers employment contracts.
   g. Kentucky act does not cover consumer insurance contracts.
   h. Kentucky act DOES cover arbitration agreements between insurers.

B. So What's the Big Deal?
   1. Fundamental constitutional rights are being contracted away.
      a. Access to the courts;
      b. Trial by jury;
      c. Right to participate in a class action.
   2. There is evidence that parties to an arbitration agreement don't really understand this: Is there a meeting of the minds?
C. So What Does a Kentucky Lawyer Do about Arbitration Agreements? As always, It Depends on Perspective

1. In general, there are three preliminary issues.
   a. Choice of law: Does the issue in dispute arise out of interstate commerce or maritime issues? If so, the FAA applies. As to all other kinds of contracts, KUAA applies.
   b. Formation: Is there a valid arbitration agreement? If so, the case must proceed through arbitration.
   c. If raised in a court case, there is no interlocutory appeal unless the court denies arbitration, but there is a direct appeal from the court ordering a case to mediation after a finding that there is a valid arbitration agreement.

2. Defense attorney: May advise clients to put arbitration clauses in all their contracts to avoid court cases, jury trials.

3. Plaintiff's attorney: May have to become skilled in the law relating to formation of contracts in order to advise a client about which avenues for redress are open to the client.

4. Both defense and plaintiff's counsel must be aware that, under federal law, contracts cannot be voided just because there is an arbitration provision that takes the case out of the courts.

D. The Case Law

1. Federal.
2. Kentucky.


b. **Ernst & Young, LLP v. Clark**, 323 S.W.3d 682 (Ky. 2010).


h. **Linden v. Griffin**, 436 S.W.3d 521 (Ky. 2014).
"WHIMSY LITTLE CONTRACTS" WITH UNEXPECTED CONSEQUENCES: AN EMPIRICAL ANALYSIS OF CONSUMER UNDERSTANDING OF ARBITRATION AGREEMENTS

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Abstract

Arbitration clauses have become ubiquitous in consumer contracts. These arbitration clauses require consumers to waive the constitutional right to a civil jury, access to court, and, increasingly, the procedural remedy of class representation. Because those rights cannot be divested without consent, the validity of arbitration agreements rests on the premise of consent. Consumers who do not want to arbitrate or waive their class rights can simply decline to purchase the products or services covered by an arbitration agreement. But the premise of consent is undermined if consumers do not understand the effect on their procedural rights of clicking a box or accepting a product.

This article reports on an empirical study exploring the extent to which consumers are aware of and understand the effect of arbitration clauses in consumer contracts. We conducted an online survey of the 668 consumers, approximately reflecting the population of adult Americans with respect to race/ethnicity, level of education, amount of family income, and age. Respondents were
shown a typical credit card contract with an arbitration clause containing a class action waiver and printed in bold and with portions in italics and ALLCAPS. Respondents were then asked questions about the sample contract as well as about a hypothetical contract containing what was described as a "properly-worded" arbitration clause. Finally respondents were asked about their own experiences with actual customer contracts.

The survey results suggest a profound lack of understanding about the existence and effect of arbitration agreements among consumers. While 43 percent of the respondents recognized that the sample contract included an arbitration clause, 61 percent of those believed that consumers would, nevertheless, have a right to have a court decide a dispute too large for a small claims court. Less than 9 percent realized both that the contract had an arbitration clause and that it would prevent consumers from proceeding in court. With respect to the class waiver, four times as many respondents thought the contract did not block them from participating in a class action as realized that it did, even though the class action waiver was printed twice in bold in the sample contract, including one time in italics and ALLCAPS. Overall, of the more than 5,000 answers we recorded to questions offering right and wrong answers, only a quarter were correct.

Turning to respondents' own lives, the survey asked if they had ever entered into contracts with arbitration clauses. Of the 303 respondents who claimed never to have done so and who also answered a question asking whether they had accounts with certain companies that include arbitration clauses in their contracts, 264, or 87 percent, did indeed have at least one account subject to an arbitration clause.

These and other findings reported in this Article should cause concern among judges and policy-makers considering mandatory pre-dispute consumer arbitration agreement our results suggest that many citizens assume that they have a right to judicial process that they cannot lose as a result of their acquiescence in a form consumer contract. They believe that this right to judicial process will outweigh what one respondent referred to as a "whimsy little contract." Our results suggest further that citizens are giving up these rights unknowingly, either because they do not realize they have entered into an arbitration agreement or because they do not understand the legal consequences of doing so. Given the degree of misunderstanding the results demonstrate, we question whether meaningful consent is possible in the consumer arbitration context.
I. INTRODUCTION

The default mechanism for resolving civil disputes in the United States is the court system. The Federal Constitution and the constitutions of all fifty states and the District of Columbia guarantee a right to a jury trial in civil cases. Through news stories about lawsuits and TV dramas about courtroom lawyers, popular culture conveys the message that people with grievances – legitimate or otherwise – can and do pursue those grievances through litigation in the court system. But parties to civil disputes have the option of waiving their rights to adjudicative process by agreeing to have an arbitrator decide their disputes. Under the Federal Arbitration Act, parties can agree by contract to arbitrate disputes before those disputes arise, and courts must enforce those agreements even if one of the parties wishes to proceed in court.¹

Many companies include arbitration clauses in their consumer contracts. Consumers who agree to these contracts waive their rights to proceed in court, to a jury trial, and to appeal. Often, these arbitration agreements also provide that the parties waive their right to participate in class actions, either in court or in arbitration. The contracts themselves can be quite lengthy.

The legal regime supporting arbitration – and justifying the waiver of constitutionally-protected procedural rights implicit in it – rests on the principle of consent. Parties to an arbitration agreement are held to their bargain because they have consented to forego the procedural rights they ….
