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THE "FLAVOR" OF ARBITRATION: DISCLOSURE AND CONFIDENTIALITY UNDER ADR AGREEMENTS

Given the Federal Circuit's nationwide jurisdiction, that court's recent decision on ADR agreements in *Kimberly-Clark v. First Quality Baby Products* will undoubtedly have far-reaching impact across the country, as the court compelled disclosure under a series of ADR agreements and refused to decide the issue of a federal mediation privilege. *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC.*, 447 Fed. Appx. 217 (Fed. Cir. 2011). Although the court marked its decision as non-precedential, the case provides valuable lessons for parties attempting to create ADR agreements.

Embroiled in patent infringement suits with a number of companies over baby diaper technology, Kimberly-Clark entered into a series of Dispute Resolution Agreements with those companies to settle their legal claims. In 2009 however, Kimberly-Clark filed suit against First Quality Baby Products, alleging that First Quality had infringed on Kimberly-Clark's patents relating back to its earlier patent infringement claims against Procter & Gambel.

Attempting to defend itself at trial, First Quality successfully compelled Kimberly-Clark to produce its Dispute Resolution Agreements with Procter & Gambel, as well as the underlying proceedings. *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC.*, No. 1:cv-09-1685, slip op. 14-15 (M.D. Pa. Nov. 3, 2010) (order compelling discovery). Kimberly-Clark opposed production and requested reconsideration of the order, claiming that the Agreements created a mediation process and that those materials were thus protected by a federal mediation privilege, which would prevent the disclosure of information associated with a mediated settlement process.

On reconsideration, the Pennsylvania court determined that "the Agreements created a 'quasi-judicial procedure' by which the parties 'obtained a decision from a panel of neutral arbitrators.'" *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC.*, No. 1:cv-09-1685, (M.D. Pa. July 5, 2011) (issue on reconsideration). Designated as part of an arbitration process, those materials would not be protected from discovery at trial under a mediation privilege. Kimberly-Clark appealed the reconsideration.

On appeal to the Federal Circuit, the court affirmed that the materials are not protected because the Agreements established an adversarial arbitration process, and not a mediation. In arriving at this conclusion, the court looked to the language of the agreements and the framework of the proceedings they established. In oral argument, the court commented the "the processes were adversarial in nature, so they just simply don't take the flavor of a mediation." Oral arg. at 2:32-2:40, *available at* http://www.cafc.uscourts.gov/. By creating an adversarial process in its Dispute Resolution Agreements, Kimberly-Clark engendered its own compelled disclosure.

Attorneys creating or entering into ADR agreements should be careful to avoid the pitfall of establishing an adversarial process as per *Kimberly-Clark*. Weighing heavily on the court's order compelling disclosure in *Kimberly-Clark* was the fact that the Agreements created detailed procedures which called for the implementation of the

Federal Rules of Civil Procedure, federal standards regarding the applicable burden of proof, and federal substantive patent law. Furthermore, the Agreements contained "loser pays" fee-shifting provisions, designated the panel as one of "arbitrators," and allowed for limited discovery, including the exchange of documents and the taking of depositions. Crucially, "[u]nder the Agreements, a panel of arbitrators would issue a 'clear and concise decision.'" Parties were to file briefs, present evidence, and argue their case before the panel, whose decision was susceptible to review by a secondary panel.

Having determined that the Agreements created an arbitration process, the court declined to determine whether it should recognize a federal mediation privilege. Though some federal district courts have recognized such a privilege, it is not recognized by any federal circuit courts. Years before *Kimberly-Clark*, the Fifth Circuit had likewise refused to consider the issue of adopting a federal mediation privilege. *See In Re: Grand Jury Proceedings Dated December 17, 1996*, 148 F.3d 487, (5th Cir. 1998); *see also* Hon. Sarah Vance and Charles Thensted, *Confidentiality of Mediation Proceedings*, 47 LA Bar Jnl. 98, 99 (1999). This leaves open the issue of how attorneys should attempt to protect confidentiality in ADR proceedings.

In practice, choice of law provisions in contracts or, more specifically, in ADR agreements, play a key role in protecting confidentiality. Ellen Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 Ohio St. J. on Disp. Resol. 239, 297-302 (2002). "In diversity cases, federal courts typically apply state law to govern the enforcement and interpretation of settlements." As state law varies in protecting mediation confidentiality, a federal court applying state law may recognize or destroy a mediation privilege depending on which state's law that court applies.

To protect confidentiality, lawyers entering into dispute resolution agreements may want to establish their choice of law in a jurisdiction that shields confidentiality in the mediation process. Having done so, litigants in district court may seek protection of information from the mediation process under a federal mediation privilege in order to prevent disclosure during discovery. This protection will afford litigants predictability in court and will enhance attorney confidences in maintaining confidentiality during and after the mediation process.

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