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Coming to New York?

An Unconscionable Mediation Agreement

By Paul Bennett Marrow

How can an agreement to mediate be unconscionable? That just doesn't sound right. What can be unfair about a private agreement requiring parties simply to discuss their dispute with a neutral? After all, mediation is a non-binding process and an agreement to mediate lacks any substantive force. And indeed there is nothing about requiring mediation that is *per se* unconscionable. In spite of that common-sense assumption, the draftsman should be wary of the terms and conditions *surrounding* the contractual obligation to engage in mediation. These can be onerous and some may even achieve what seems otherwise impossible and be found unconscionable.

This article explores some examples of terms and conditions that are problematic and then considers whether the regulatory provisions of the Uniform Mediation Act (UMA), currently under review by the Legislature in New York, will change anything.

Keep in mind that in New York mediation is by and large an unregulated process. While there are statutory programs that include procedures for mediation, these schemes are limited to specific types of disputes and have

no application whatsoever to private agreements calling for mediation. Sometimes the draftsman engages in overreaching when setting conditions and terms for mediation. Because of the lack of statutory regulation, control over the process is left to the courts. The judicial response is to evaluate these agreements through the filter of unconscionability. As we shall see, New York is attempting to enact a scheme to begin to regulate private contracts calling for mediation, but the proposal is insufficient to address the possibilities presented by *substantive* unconscionability.

First, a Case Finding Mediation Terms Unconscionable

Consider this fact pattern: Employer hires W as a waitress. After she begins working she is asked to sign an agreement that provides for mandatory mediation as a gateway to binding arbitration, and she does so. The agreement requires the employee to select a mediator from a list created by the employer. W isn't entitled to go elsewhere if she finds the list to be inadequate or inappropriate for any reason. The agreement also provides that

neither Employer nor W is entitled to have counsel present during the mediation and that the situs for the mediation is an office 200 miles away from the place of employment. W is dismissed after she becomes pregnant and refuses to wear a maternity uniform approved by Employer. Rather than follow the dictates of the agreement, W takes her case to the federal courts claiming that, in its entirety, the agreement is unconscionable.

This is what *Garrett v. Hooters-Toledo*¹ is about. It was decided by a federal court applying Ohio law. To date, it's the only reported case to suggest that an agreement to mediate can be tainted by unconscionability.

The *Garrett* court found this particular scheme for mandatory mediation to be unconscionable and unenforceable. The ruling emphasized the court's perception that the overall purpose of the scheme was to frustrate the employee by encouraging unwarranted acceptance of recommendations by the mediator before binding arbitration became necessary. In the words of the court, the agreement was *substantively* unconscionable because "the mediation requirement . . . as a whole [is] written to discourage potential claimants from pursuing their claims."² The court looked to the entirety of the impact of the clause and from that deduced the motivation of the employer.

A Careful Look at the *Garrett* Reasoning

The agreement specified that the mediators were to be selected from a list prepared exclusively by Hooters. Of course, Hooters had reason to provide names of people who were not necessarily impartial, and in fact, the *Garrett* court reached that conclusion: "The likelihood that a claimant would have any basis on which to choose a mediator who might be open to her contentions is slight, if nonexistent."³

In addition, the agreement provided that even though the site of employment was in Toledo, the mediation would be conducted in Louisville, Kentucky. *Garrett* claimed the costs associated with the travel and child care were prohibitive. The court agreed.

In the instant case, there appears to be little justification for the requirement that mediation . . . be conducted in [Louisville], Kentucky. If the term "the parties" were to be given a limited meaning, and include only the plaintiff and the defendants, no reason appears not to have the mediation conducted in Toledo.⁴

Finally, the agreement provided that at the mediation hearing neither side could be represented by counsel. The mutuality notwithstanding, the court still found this to be unconscionable, giving favor to the defendant. "Though defendants likewise forgo representation, an imbalance may arise if the participants include company representatives, such as human relations personnel, who have experience in dealing with claims of unfair or improper treatment."⁵

Unfortunately, the *Garrett* court made a subjective determination about fairness of the agreement and missed the real objective of the mediation procedure. The court was convinced that the mediation provisions in total were intended to discourage the claimant from pursuing her right to seek binding remediation. But, arguably, the court's position was mere speculation about the motivation of one of the parties. The prohibition involving the right to counsel at the mediation had objective consequences never considered by the court. Stripped of the right to a lawyer, the claimant could have

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made unwarranted and inappropriate disclosures that could then be used against her in the subsequent arbitration proceedings. This impropriety might well not be understood by an arbitrator or be deemed unimportant. The potential for unfairness by a binding determination is a concern that far outweighs speculation as to the motivation for a non-binding finding and should thus be the grounds for a finding of substantive unconscionability.⁶

Garrett, the View From New York

Garrett of course was decided in Ohio and under Ohio law. New York, like Ohio at the time *Garrett* was decided,⁷ has no statutory scheme regulating these agreements. At most, New York has a few statutory provisions calling for mediation under the terms of the enabling legislation, and none of these schemes attempts to address private agreements. In addition, there are no reported cases specifically dealing with circumstances like those discussed in *Garrett*. This doesn't mean that mediation agreements are beyond the reach of the law. It's only a matter of how and when.

The Uniform Mediation Act

The UMA is an attempt to regulate private agreements prescribing mediation. First approved and recommended by the National Conference on Uniform State Laws in 2001, it has been adopted by a handful of states. As of this writing New York is considering the UMA. On the assumption that it will be enacted in New York at some point in the near future, let's look at the UMA and see if it addresses the concerns raised in *Garrett*.

To start with, it is a mistake to assume that the UMA is far-reaching. Unfortunately, in its present form, it is shallow and leaves many issues for determination by the courts.⁸ More to the point, the UMA wasn't drafted with

unconscionability in mind. Indeed, in no place in the model act or in the accompanying commentary and notes is there any mention of unconscionability. So, it shouldn't be surprising that of all the terms and conditions discussed in *Garrett*, the UMA addresses only the right to an attorney.

This should be a warning to anyone drafting a mediation clause. Matters involving *substantive* unconscionability – *i.e.*, operation of a contract term on a party to the agreement – are for the most part left to the exclusive domain of the courts.⁹ The UMA has yet to be reviewed by the courts in any state other than New Jersey (none of those decisions touches on unconscionability), so the impact that it will have on other terms and conditions

select yet another name from the Hooters list. Thus the agreement defined a mediator as someone who was, no matter what, *potentially partial* and thus beyond the purpose of the waiver provided for in Section 9(g). This suggests that the entire agreement was also beyond the operation of the UMA.¹³ From this it is possible to conclude that the UMA might not apply because the mediators so designated either were not or may not have been holding themselves out as providing mediation services within the meaning of Section 3(a)(3).

Setting aside the issues of impartiality and meaningful choice, let's assume that the UMA would apply to the *Garrett* agreement. By its expressed terms the UMA would probably address only the issue of the right to

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provided for in contracts mandating mediation has yet to be determined. It is even possible that the UMA wasn't intended to apply at all to agreements such as the one described in *Garrett*.

Consider this line of reasoning: The UMA may not apply to mediation schemes that fall outside of the UMA's stated *scope*. That's not as preposterous as it may seem. The drafters of the UMA were clearly concerned about *scope*, as is evidenced by Section 3, entitled "Scope." Section 3 states that the UMA is triggered (made applicable) by only three specific conditions,¹⁰ suggesting that if a given agreement isn't within these triggering provisions, it isn't subject to the UMA.

The UMA applies to private agreements in which "[t]he mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation."¹¹ Suppose that the parties allow for a mediator who doesn't hold himself or herself out as a mediator? Arguably, that is what appears to have happened in *Garrett*. Remember, only Hooters had a say about whether or not people on its list were actually providing mediation services. Moreover, Section 9(g) of the UMA (it must be read in conjunction with Section 3, according to the Reporters Notes¹²) imposes on regulated mediators the requirement of impartiality *subject to waiver after disclosure*.

To be meaningful, a waiver must involve a choice between a mediator who is impartial and one who is not. That wasn't possible in *Garrett* because the agreement called for both parties to select a mediator from a list of candidates provided by Hooters. This restriction made waiver meaningless because the only other option was to

counsel. But even here, the UMA fails to address the full reach of the issues presented by *Garrett*.

Section 10 of the UMA grants any party the right to have counsel at mediation and anyone who waives that right before the mediation has the power of rescission.¹⁴ The commentary explains that this power was granted because of the possibility that "the party may not have understood the implication at that point in the process."¹⁵ Such an inability suggests the impossibility of a voluntary meeting of the minds, a hallmark of *procedural* unconscionability. Agreements tainted by procedural unconscionability are normally not voidable absent a showing of some substantive taint. The UMA serves to overcome this technicality by permitting rescission as of right for a waiver made prior to mediation.

But note that the UMA's right to rescission isn't absolute. Waivers given once mediation commences are enforceable and presumably conclusive, absent judicial intervention. The circumstances surrounding a waiver given during mediation may be problematic within the framework of unconscionability and thus appear to be open to judicial review because of the UMA's silence on the issue. For example, suppose one party induces the other to waive the right to counsel. Depending on the details, that might be grounds for a claim of unconscionable conduct, independent of any violation of the UMA.

Finally, nowhere in the UMA is there any provision addressing the effect of a requirement that mediation take place in an inconvenient location. This condition involves *substantive* unconscionability; as such it is beyond the scope of the UMA and remains an issue to be regulated by the courts.

Conclusion

From this discussion it is safe to conclude that the courts in New York will need to resolve the many issues raised by *Garrett* and the UMA. But in the meantime, the drafts-person must take note and proceed with caution. It is likely that if a term has been found unconscionable within the framework of arbitration, it will meet the same fate within the framework of mediation. So the first step would be to check to see whether courts have struck a clause being considered within the framework of arbitration.

Caution about how to proceed extends to the domain of the litigator. Because of the possibility that courts will find the UMA limited in scope, those seeking to challenge a particular agreement or term should plead in the alternative, *i.e.*, a claim arising under the UMA and a claim that the agreement or term is otherwise unconscionable. ■

1. 295 F. Supp. 2d 774 (N.D. Ohio 2003).
2. *Id.* at 783.
3. *Id.*
4. *Id.*
5. *Id.* at 782.
6. For more on *Garrett*, see Comment: *Unconscionable Mediation Clauses*, 10 Harv. Negot. L. Rev. 383 (2005).
7. Ohio recently adopted the Uniform Mediation Act. See Ohio Rev. Code §§ 2710.01-2710.10.
8. See Committee on Alternate Dispute Resolution, New York State Bar Association, *The Uniform Mediation Act and Mediation in New York*, at 24 (2002) ("Report"):

Significantly, New York lags behind other states that have years of experimentation with and development of mediation standards and statutes. Unlike some states, New York case law and statutory law related to mediation are just beginning to be developed. New York is only starting to define the parameters of acceptable mediation practice. It is unclear whether New York has enough experience with mediation across all areas and in all venues even to evaluate whether the UMA is beneficial for New York.

9. An example of an issue with substantive overtones is privilege. The Act makes provision for a privilege against disclosure. See UMA §§ 4-6. But even in these sections much is left undefined. "The UMA defines a privilege, but leaves the parameters of confidentiality generally to the parties." Report at 28.
10. UMA § 3(a) states:

Except as otherwise provided in subsection (b) or (c), this [Act] applies to a mediation in which:

- (1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;
- (2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or
- (3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person that holds itself out as providing mediation.

11. UMA § 3(a)(3) (emphasis added).
12. UMA, Reporters Notes, § 2(3) at 20.
13. This analysis is consistent with the commentary accompanying UMA § 3(a):

The third triggering mechanism, Section 3(a)(3), focuses on individuals and organizations that provide mediation services and provides

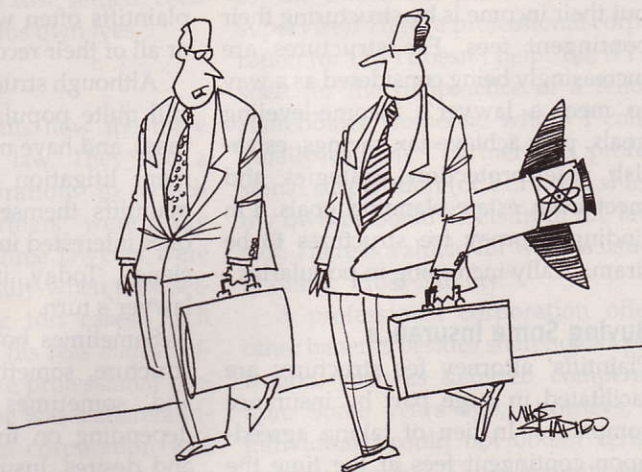
that the Act applies when the mediation is conducted by one who is held out as a mediator. For example, disputing neighbors who mediate with a volunteer at a community mediation center would be covered by the Act, since the center holds itself out as providing mediation services. Similarly, mediations conducted by a private mediator who advertises his or her services as a mediator would also be covered, since the private mediator holds himself or herself out to the public as a mediator. Because the mediator is publicly held out as a mediator, the parties may reasonably expect mediations they conduct to be conducted pursuant to relevant law, specifically the Act.

In connection with the provisions of UMA § 9:

"Impartiality" has been equated with "evenhandedness" in the Model Standards of Practice "approved by the American Bar Association, American Association of Arbitrators, and the Society of Professionals in Dispute Resolution (now Association for Conflict Resolution). The mediator's employment situation may present difficult issues regarding impartiality. A mediator who is employed by one of the parties is not typically viewed as impartial, especially if the person who mediates also represents a party. In the representation situation, the mediator's overriding responsibility is toward a single party. For example, the parties' legal counsel would not be an impartial mediator. Ombuds often are obligated by ethical standards to be impartial, although they are employed by one of the parties.

One may reasonably anticipate many situations in which parties are willing to waive a conflict of interest; indeed, depending upon the dispute, the very fact that a mediator is familiar to both parties may best qualify the mediator to mediate that dispute. That choice, however, properly belongs to the parties after informed consent, and in preserving this autonomy, this provision not only confirms the integrity of the individual mediator, but also supports the integrity of the mediation process by providing a visible, fundamental, and familiar safeguard of public protection.

14. "An attorney or other individual designated by a party may accompany the party to and participate in a mediation. A waiver of participation given before the mediation may be rescinded." UMA § 10.
15. UMA, Reporters Notes at 62.



"I was sure the nuclear defense was only a metaphor."