

## AVOIDING JACKPOT JUSTICE

David L. Martin, Esq.  
601. 949.4901

Robert B. House, Esq.  
601. 949.4830

*"What I call the 'magic jurisdiction,'...[is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money...These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the cases, so it doesn't matter what the evidence or law is."*<sup>1</sup>

-Richard "Dickie" Scruggs  
Mississippi trial lawyer  
2002

Since 2002, Mississippi has made significant strides in the area of civil justice reform. Legislation that was passed in a special session and which generally went into effect on September 1, 2004, is considered to be one of the most comprehensive legal reform bills in the nation.<sup>2</sup> In addition, arbitration and mediation approaches may be used to avoid the "magic jurisdiction" and thereby possibly avoid losing a case when the evidence and law are on your side. In this article, we will review the legal background of arbitration provisions in insurance policies in Mississippi. Also, we will outline how to resolve insurance disputes through arbitration and mediation.

### *Background*

In 2002 in this Journal we reviewed the state of regulatory policy and judicial opinions concerning resolving insurance disputes in Mississippi through binding arbitration. At that time, it had been the policy of the Mississippi Department of Insurance, and Mississippi Commissioner of Insurance George Dale, not to approve policy forms, policy applications or other documents that provided for mandatory arbitration. Only recently had a policy providing for binding arbitration been knowingly approved and then only because the carrier, Primerica, allowed consumers to choose the same policy without the arbitration agreement for a higher premium. Also at that time, jury verdicts in Mississippi were among the highest in the nation. For example, one insurance company had been hit with a 30 million dollar punitive damages award for allegedly forcing plaintiffs to purchase high-risk insurance policies. The industry was looking for some measure of predictability in resolving disputes in Mississippi and naturally sought to utilize arbitration for this purpose.

In our earlier article, we analyzed the Fifth Circuit Court of Appeals decision in *American Heritage Life Insurance Co. v. Orr*.<sup>3</sup> There the Court held that the Commissioner has "no regulatory authority to disapprove mandatory arbitration clauses relating to insurance." Also, we discussed the Mississippi Supreme Court's general adherence to "the federal policy favoring arbitration."<sup>4</sup>

It was clear from the *American Heritage* decision that the provisions of the Federal Arbitration Act apply to arbitration provisions signed in conjunction with most insurance policies in Mississippi and that the Commissioner of Insurance did, in fact, have the authority to approve arbitration provisions contained in policies.<sup>5</sup> Less clear was the extent to which the Commissioner *must* allow arbitration of insurance disputes in light of the statement that "The record indicates that the Commissioner can permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit."<sup>6</sup> The Court's statement seemed to retain a degree of discretion with the Commissioner regarding arbitration clauses either contained in policies or in separate documents. One of the interpretations of the Court's opinion that we outlined was that any arbitration provision relating to an insurance policy could be subject

to something of a "fitness test" established by the Commissioner to determine whether the provision complies with applicable law, including whether or not the clause is unconscionable.

The Mississippi Department of Insurance followed this interpretation of the *American Heritage* decision and developed guidelines and requirements for approval of binding arbitration provisions in insurance policies. These guidelines address type size and print, signature requirements, reference to the rules that will govern any arbitration proceedings, and require the location of any arbitration proceedings to be in the insured's county of residence unless another location is mutually agreed upon. The guidelines also include forms that may be used to satisfy the disclosure requirements of the Department. Since the development of these guidelines many arbitration provisions in insurance policies have been approved by the Mississippi Commissioner of Insurance, but the question remained open as to how the Mississippi Supreme Court would view such provisions.

That question arguably was put to rest with the December 9, 2004 decision in *Gulf Insurance Co. v. Neel-Schaffer, Inc.*<sup>7</sup> In this case, the Court reversed a lower court order denying a motion to compel arbitration and upheld an arbitration provision in an employment practices liability insurance policy. One of the issues addressed by the Court was the validity of the arbitration agreement since it had been inadvertently approved by the Department at a time when mandatory arbitration provisions were against the Department's stated policy. The Court relied on *American Heritage* in upholding the agreement and stated in dicta that "It is unclear under what authority the MDI now believes it can impose restrictions beyond that which is provided by FAA and judicial precedent."

Furthermore, the arbitration provision in the Gulf policy prohibited the arbitration panel from awarding punitive or exemplary damages. In a further effort to strike down the arbitration provision the lower court found that the punitive damage provision of the arbitration agreement was ambiguous, and that the claim for punitive damages fell outside the scope of arbitration. The Mississippi Supreme Court flatly rejected the lower court's position and held that the arbitration provision was not ambiguous in its scope and was a valid remedy limitation.

In the final analysis, it seems relatively clear that Mississippi courts will uphold arbitration agreements in insurance policies and agreements. We now turn our attention to the types of disputes that are ripe for arbitration and mediation and how to do it.

#### *Types of Disputes to Arbitrate or Mediate*

What type of insurance disputes should be resolved through arbitration or mediation? The answer might be any and all of them, especially to avoid the potentially unpredictable results of a jury trial. Examples include: disputes between insurers and agents and brokers; disputes between insurers and their policyholders involving such issues as coverage, suitability, vanishing premium, premium increases and replacement issues; disputes with reinsurance and excess carriers; and even insurer disputes with regulators over premium rates, market conduct, and financial examination issues.

#### *How to Arbitrate*

The primary element in arbitration is the agreement to arbitrate. Parties can provide for the arbitration of future disputes by simply inserting a typical arbitration clause into their contracts which might read: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof." Arbitration agreements in policies that are filed with the Mississippi Department of Insurance should contain the items included in the Department's guidelines. Carriers will have to determine if they wish to challenge the Department on any of these specifics (for example: location of arbitration).

In theory, arbitration should be initiated by filing a demand for arbitration setting forth the information required by the arbitration organization and payment of the arbitration filing fee. In practice, the first step in initiating arbitration may very well be the filing with a court of a motion to compel arbitration. In any event, the statement of the dispute should be brief, include the amount claimed, if any, and relief sought.

Hopefully, the number of arbitrators will be stated in the arbitration agreement; if not, this will have to be determined in accordance with the governing rules. The arbitrator or arbitrators will be selected from rosters of neutrals maintained by the arbitration organization.

Once the arbitrators have been selected, the matter moves forward toward a hearing. During this time, the arbitrator should work to narrow the issues to be resolved, stipulate uncontested facts, and take any further action that will expedite the arbitration proceedings.

Arbitration hearings are a lot like court trials, except less formal (but maybe not less expensive). Arbitrators are not required to follow strict rules of evidence and in most instances will accept evidence that might not be allowed in a trial. Neither party has the burden of proof. Each party must convince the arbitrators of his position.

In the end, an award is made. The rules or the agreement under which the arbitration proceeding is conducted will govern items such as splits in the arbitration panel and whether a written opinion is required. Normally, written opinions are not required since the parties are looking to the arbitrator for a decision rather than an explanation.

Finally, the majority of arbitration awards result in voluntary compliance. If this is not the case, judgment in the award may be entered in a court having jurisdiction.

### *How to Mediate*

It is important for the parties to remember the availability of mediation even in situations where there exist an enforceable agreement to arbitrate. Mediation is simply a process in which the parties to a dispute set aside a specific time, usually a full day, to focus on settling a dispute with the aid of a trained neutral – a mediator. Unlike arbitration, the mediator does not decide the case. The goal of the mediator is to facilitate resolution of a dispute through a binding agreement reached by the parties to the dispute. We interviewed Tom Crockett, who many consider to be the preeminent mediator in Mississippi, for an inside look at the mediation process.<sup>8</sup> Mr. Crockett offered the following three point outline for handling mediations:

*The Opening or Joint Session.* Unless the parties are so hostile they cannot stand to be in the same room with each other, as happens occasionally, the mediation session starts with a joint session. At this time, the parties or their lawyers make opening statements, the object of which is to persuade the other side that they are correct. The mediator explains the procedure and his role. Frequently, the mediator will ask the parties to explain what their evidence will be and how they plan to prove the points they make. It is at this time that the mediator attempts to be sure that both sides have all of the information they need to enable them to make a decision on the important issues before them. Many discovery disputes are resolved at this time.

*The Caucus.* The caucuses are in effect confidential breakout meetings in which the parties go to separate rooms where several things happen. First, the parties will usually vent their emotions. This is a crucial step. Sometimes the greatest need of a party in a dispute is to have someone listen and understand their position. After the venting is over, the parties brainstorm and evaluate the different proposals. The first caucuses can last up to an hour, as each side goes through this process. Later in the day, the caucuses will get shorter as the parties will pretty well know what they will accept in the way of a settlement. This bottom line usually changes substantially during the mediation session.

*The Bargaining.* As the mediation gets to trading offers back and forth, Mr. Crockett says that he does not like to be a messenger. Instead, he will have the lawyers meet with him in a separate room away from their clients in order to get down to some hard bargaining. Sometimes, when it is appropriate, Mr. Crockett will have the parties meet without the lawyers. “In about 85% of the cases, a settlement is reached and the agreement signed by the end of the day,” Crockett said.

### *Conclusion*

After enactment of the 2004 civil justice reforms, Mississippi Governor Haley Barbour declared that “We have struck the balance of fairness in our civil justice system so that defendants and their insurers will have a level

playing field and not be subject to a litigation lottery.”<sup>9</sup> In fact, several insurers have cited Mississippi’s 2004 tort reform legislation as a contributing factor in their decisions to increase their business in Mississippi. Furthermore, recent judicial decisions seem to indicate the emergence of a more just civil litigation environment. Nevertheless, arbitration and mediation of insurance disputes continue as a viable alternative to potentially unpredictable jury trials.

---

<sup>1</sup>See *Judicial Hellholes 2004*, American Tort Reform Foundation (2004) citing Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in *INDUSTRY COMMENTARY* (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 (transcript of comments of Richard Scruggs).

<sup>2</sup> These reforms abolished joint and several liability, addressed venue and joinder abuse, placed limits on non-economic and punitive damages awards, provided greater protection for innocent sellers of products, and revised jury service procedures. H.B. 13, 2004 Leg., 2d Ex. Sess. (Miss. 2004).

<sup>3</sup> *American Heritage Life Insurance Co. v. Orr*, 294 F.3d 702, 709 (5<sup>th</sup> Cir. 2002).

<sup>4</sup> *East Ford, Inc. v. Taylor*, 2002 WL 1584301 (Miss. 2002), *Russell v. Performance Toyota, Inc.*, 2002 WL 31087644 (Miss. 2002).

<sup>5</sup> The Federal Arbitration Act provides, in pertinent part, that “A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C.A. § 2. In contrast to certain other states, Mississippi has only one statute specifically prohibiting arbitration clauses in *uninsured motorist* insurance policies. See Miss. Code Ann. § 83-11-109. No Mississippi statutes prohibit such clauses in *other types* of policies. Thus, the McCarran-Ferguson Act would not require reverse-preemption of the FAA in regard to most types of insurance policies issued within the state, so that any arbitration provisions relating to insurance disputes validly executed will be “valid, irrevocable, and enforceable” under the terms of the FAA, absent a finding of unconscionability by a court.

<sup>6</sup> *American Heritage* at 709. The court made this statement to refute the argument that the Commissioner had never approved insurance policies containing arbitration clauses. The October 2001 Primerica approval was evidence to the contrary.

<sup>7</sup> *Gulf Insurance Co. v. Neel-Schaffer, Inc.*, No. 2003CA-01367-SCT (Miss. 2004). This case arose out of a coverage dispute involving a \$215,000 payment to a female employee of Neel-Schaffer. The female employee discovered a camera mounted under her desk. A supervisor admitted mounting the camera but denied any improper motive. Following an internal investigation, Neel-Schaffer retained the supervisor, whereupon the female employee refused to work at Neel-Schaffer and claimed constructive discharge. Neel-Schaffer alleged that the settlement money was “compensatory damages” covered under the policy.

<sup>8</sup> Thomas W. Crockett is a shareholder in the law firm of Watkins Ludlam Winter & Stennis, P.A. Mr. Crockett is on the JAMS list of mediators and National Arbitration Forum list of arbitrators.

<sup>9</sup> Denise Bedell, *A Time for Change*, U. S. INSURER, Fall 2004, at 39, 41.