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To: All who are curious about yesterday's arbitration experiment

Much relieved that today is the day after, I am pleased to provide this summary of the results of yesterday's arbitration experiment.

A total of 31 arbitral decisions were rendered. Delishco was found liable to Bagger in 22 of those decisions, and not liable in 9 decisions. It should be noted however, that within the 22 liability findings, 2 awarded no damages other than costs and/or attorneys' fees.

As all participants now know, the arbitrators were divided into solo or three member panels. Also, some arbitrators' packets included a memo revealing the parties' agreement to a "high-low" bracket. Under this agreement, even if the arbitrator found no liability or extremely low damages, Bagger would receive the low bracket amount; if the arbitrator's award was very high, Delishco would have to pay no more than high bracket amount. 14 solo or arbitrator panels received this memo; 17 did not.

Regarding the likelihood of a liability vs. no liability finding

My hypothesis was that arbitrators who HAD received the bracket memo would be more likely to find no liability than others, and that solo arbitrators would be more likely to find no liability than panels.

On the question of the impact of bracket information: Of the 14 arbitral decision makers (solo or panel) who knew of a bracket, 9 found liability (64.93%) and 5 found no liability (35.07%). Of the 17 arbitral decision makers (solo or panel) without any bracket information, 13 found liability (76.47%) and 4 found no liability (23.53%).   I could claim support for my hypothesis, but really, the overall numbers are too small for any strong statistical conclusion. (At least it doesn't cut the other way.)

It may be worth noting that the statistical case become stronger if the decisions that found liability but awarded $0 damages other than fees or costs are treated as if "no liability". Both of the $0 damages decisions were by arbitrators with the bracket information. Thus, of 14 arbitral decision makers who knew of a bracket agreement, 7 (50%) found no liability or awarded $0 damages (other than costs and/or fees), compared to 23.53% of those unaware of a bracket. This tends to support the hypothesis that *knowing of a bracket agreement* makes a decision maker more likely to find "no liability" or award minimal damages. Still, these numbers are small. More data is required for any real conclusions.

On the question of the impact of three member panels vs. solo arbitrators on the likelihood of liability: Of the 16 three member panel decisions, 5 found no liability. And of the 15 solo arbitrators, 4 found no liability. (That is virtually no difference. We had an odd number; that last one had to go one way or the other.) My hypothesis was that three member panels would be more likely to find liability, as an initial division on the panel as to liability would lead to a liability finding but a compromise on the amount. The numbers provide no support for this hypothesis.

Regarding damages

It was my hypothesis that solo arbitrators were more likely to reach extreme results, high end or low end, than three member panels. The theory was that a three member panel would engage in compromise among extreme views. I also anticipated that arbitrators who knew of brackets would be more likely to have extreme awards. The theory was that knowing of the brackets "frees" an arbitrator to award what he or she "really" thinks, without pressure to be more temperate.

At the very end of yesterday's session we put up a quick chart that reflected "averages" among the arbitrator categories. Having now looked at the numbers more carefully, the averages seem less useful, as they were dramatically affected by a few extremes. Here are the raw dollar value of the various awards, divided by category (arranged lowest to highest $ value):

3 member panel With bracket info	Solo With bracket info	3 member panel No bracket info	Solo No bracket info
$0 (+ atty's fees)	$0 (+fees +costs)	$1,000,000	$3,500,000
$1,500,000	$1,000,000	$1,500,000	$3,500,000
$1,500,000	$3,500,000	$1,500,000	$3,500,000
$3,500,000	$7,000,000	$3,500,000	$3,500,000
$4,500,000		$3,500,000	$3,500,000
		$7,000,000	$3,500,000
			$130,000,000

Clearly, our most extreme award occurred with a solo arbitrator, who indicated during the session that it was intentional. A review of that award form suggests some confusion regarding a claimed guarantee of $50 million in profits, rather than 50 million bags and $5 million in profits. Even if one were to redo the math, this award would come in at $13 million – the highest in the group.

Having said that, I don't see the basis for proving or disproving any hypothesis regarding the impact of brackets or of panels vs. solo arbitrators based upon these numbers alone.

A most compelling conclusion that we CAN draw is that arbitration results are unpredictable! A room of 63 people, grouped into 31 decision making units, all watched *the arbitration proceeding in the same case, and reviewed the same stipulations and exhibits*. Some found liability, some did not. Those who did find liability awarded a wide range of damages including: $0 with fees and/or costs only, to $1 million, $1.5 million, 3.5million, 4.5 million, $7million and $13 million (at least).

Please accept my deepest appreciation for your willingness to participate. Once again, we are honored and humbled by your support for this educational enterprise, for our students, and for the College of Law.

Marjorie