

**ARBITRATION LAW UPDATE:
RECENT MATTERS OF INTEREST AND IMPORTANCE
MISSOURI BAR ADR COMMITTEE
SPRING 2007**

Per the request of the ADR Committee, as the Chair of the Arbitration Subcommittee, I submit the following report for consideration at the Spring 2007 Conference:

1. Recent Developments : Eighth Circuit and Missouri Appellate Courts

A. Introduction

Recent decisions from the Eighth Circuit Court of Appeals and Missouri's various appellate courts continue to examine on a frequent basis many aspects of mediation and arbitration and by doing so offer expanded coverage over the rapidly growing volume of case law that exists on ADR.

B. Mediation

Koehler v. Brody, 207 WL 895864 (8th Cir. Mo.), decided March 27, 2007. This is a complicated class action lawsuit involving a dispute resulting from the merger of NationsBank and BankAmerica into Bank of America. The facts are lengthy and interesting but are not shared at length here to facilitate more quickly getting to the point regarding mediation. After three years in discovery, the parties entered into voluntary mediation in January 2002 in New York under the direction of a former federal district court judge. Koehler, and some of the other lead plaintiffs, were present at the negotiations but left after two days. The mediation continued the next day and counsel representing the parties reached an agreement. The agreement was memorialized in a memorandum of understanding that the cases would settle for a cash payment by the defendants of \$490,000,000 and that \$333,000,000 of that amount would be allocated to the two NationsBank classes who had filed the class-action lawsuit.

Thereafter, Judge Nangle in St. Louis held a series of hearings to determine the reasonableness of the proposed settlement. Koehler and a couple others retained separate counsel to contest the settlement. They filed objections arguing to the district court that the settlement amount was too low and was disproportionately distributed among the shareholder classes. They also challenged the settlement on the ground that the lead plaintiffs had not been present the last day of mediation because they had been led to believe that the mediation was over and the

case would only settle for an amount exceeding \$600,000,000, payable in stock. Koehler alleged that his attorneys had misled him and made false representations to the Court in violation of securities acts and other ethical duties.

The district court found the settlement to be reasonable and the Eighth Circuit affirmed.

More than two years after this judgment, Koehler filed new lawsuits against counsel representing his class as well as various law firms representing the class complaining that the settlement was too low and should not have been paid in stock. The Eighth Circuit noted that in “addition to allegations identical to objections he had already raised before the class action settlement was approved, Koehler alleges newly discovered facts to support his claims.” He alleged that the class action counsel engaged in secret negotiations previously and that another class member and he were “intentionally excluded from the December 2003 mediation,” as well as other allegations about misrepresentations to the district court regarding their presence at the mediation.

After considering all the facts, the Eighth Circuit affirmed the district court’s decision to dismiss these claims. The case is of interest because of its interconnection with the mediation proceedings and allegations that were made about conduct of counsel at and after these mediation proceedings. It raises to those who mediate cases the thorny question of what involvement a mediator should have in trying to avoid situations of this sort, given the magnitude of the money in dispute.

Clelland v. Cunningham Sandblasting and Painting, Inc., 2007 WL 1223453 (W.D. Mo.), decided April 25, 2007. This was a case that the parties reported to federal court was settled on February 8, 2007. The mediator indicated that the parties were to exchange checks and sign a release by the next day. A month and a half later, defendant filed a motion to dismiss plaintiff’s petition with prejudice, indicating that plaintiff came to counsel for defendant’s law firm, signed a full and absolute release and turned over the checks. Defendant’s counsel alleges that at the signing of the release and exchange of checks, he forgot to get plaintiff’s signature on a voluntary dismissal.

As of the date of filing of the motion, plaintiff had failed to sign the dismissal papers. Thereafter, defendant filed the pending motion to dismiss with prejudice since the checks were exchanged and the release had been signed.

The plaintiff filed a pro se brief on this matter containing items that the Court described as being not relevant to the instant legal

matters in dispute. The court ordered plaintiff to provide answers to two questions, namely: (1) did defendant's counsel turn over the checks to plaintiff; and (2) did plaintiff sign the release?

Plaintiff never responded to the Court's requests and never answered the questions. The court issued an order that failure to do so would result in the case being dismissed. Accordingly, the Court dismissed the case with prejudice.

McClaskey v. LaPlata R-II School District, 2006 WL 3803686 (E.D. Mo.), decided November 7, 2006. This detailed case represents one of the best examples of the process of mediation from start to finish. It is unusual to see documented through a federal court the process of court-ordered mediation. It is a must-read for anybody interested in or involved in the process of mediation.

American Equity Mortgage, Inc. v. First Option Mortgage, LLC, 2006 WL 3032417 (E.D. Mo.), decided October 23, 2006. In this case, the Federal District Court for the Eastern District of Missouri decided that American Equity was not likely to succeed on the merits of its claim for tortious interference against a competitor, First Option, when various employees of American Equity who were under contract went to work for First Option. The Court concluded that there was an insufficient threat of irreparable harm. The Court noted, however, that it kept open the possibility to change its mind once additional evidence was presented during the trial on the merits.

At the end of the decision, Judge Catherine Perry stated as follows:

By separate order I refer this case to mediation. The parties have conducted extensive discovery already, and they certainly know enough of the evidence to engage in meaningful settlement discussions. If the mediation fails I expect the case to be ready for trial on the merits relatively quickly, so I will set a scheduling conference to be held shortly after the deadline for completing mediation.

This case is of interest because it appeared to be contentious, involved allegations over numerous employees who left one place of work to go to another, and involved high profile parties; namely, American Equity Mortgage and First Option Mortgage. The Court set a tone, I believe, by its order that this matter would be sent to mediation and that if mediation failed, the Court was already applying immediate pressure that a trial would soon follow. Thus, this case seems to reinforce the continuing support that federal courts have for the mediation process

and their willingness to use it as an effective tool to achieve dispute resolution short of the ultimate trial on the merits.

C. Arbitration

Power of Attorney

In *Tallmadge v. Beverly Enterprises-Missouri, Inc.*, 202 S.W.3d 47 (Mo. App. E.D.), decided September 26, the Eastern District of Missouri held that a patient who had been admitted to a health care facility and thereafter sustained personal injuries was not subject to arbitration when her attorney in fact signed admission papers on her behalf agreeing to arbitration of various disputes, including those involving the personal injury that she thereafter sustained. The appellate court, in reversing the trial court, focused on the fact that a few months later, after admission, the patient signed a durable power of attorney appointing the person in question as her attorney in fact with full power to carry out various acts. That was at a point in time, however, a few months after she had already been admitted and after this person who obtained her authority as her attorney in fact had executed an admission process form agreeing to arbitration. The Court concluded that: “The power of attorney executed by Carolyn [the patient] after the arbitration agreement fails to provide authority for the execution of the arbitration agreement on Carolyn’s behalf.”

Non-Signatory to Arbitration Agreement

In *Nichelson v. Soeder, III*, 2006 WL 3079109 (E.D. Mo.), decided October 27, 2006, the Eastern District of Missouri provided some extremely helpful analysis of when a non-signatory to an arbitration agreement can nevertheless be bound. It concluded that, consistent with prior authority from the Third Circuit Court of Appeals, an arbitration agreement can include those to be bound by the dispute who are agents of the signatory parties. It further found that a non-signatory can enforce an arbitration clause against a signatory to the agreement in several circumstances, including: (1) where there is a relationship sufficiently close between the non-signatory and the signatory and only by permitting the non-signatory to invoke arbitration “evisceration of the underlying arbitration agreement between the signatories can be avoided”; and (2) when the signatory relies on the terms of the written agreement contained in the arbitration clause in asserting its claims against the non-signatory.

This case also involved allegations of waiver of the arbitration provision and the Court reinforced the continuing importance to show prejudice to advance successfully a claim of waiver of an arbitration

provision. The Court concluded that prejudice was not shown and therefore the arbitration provision had not been waived. In addition, the Eastern District held that “courts find waiver only where the same legal and factual matters are at issue.”

In *Senda v. Xspedius Communications, LLC*, 2007 WL 781786 (E.D. Mo.), decided March 13, 2007, the district court determined that a court can compel arbitration concerning an agreement without an arbitration clause if that agreement cross-references an agreement with a broad arbitration clause. Also, a court can compel parties to an agreement with a broad arbitration clause to arbitrate an issue concerning whether a letter sent between the parties amended the agreement. “Extrapolated one step further, the court can even compel the parties to arbitrate the question of whether a controversy relates to an agreement with a broad arbitration clause.” Applying these general principles, the Court recited the law in the Eighth Circuit that a non-signatory can enforce an arbitration clause against a signatory to the agreement when the signatory to the written agreement that contains the arbitration clause must rely on the terms of that written agreement in asserting its own claims. Thus, the Court concluded that plaintiff’s claims against the non-signatory defendants rely on and arise out of the employment agreement which contains an arbitration clause. Accordingly, the non-signatories were bound to arbitrate.

Extended Arbitration and Complicated Arbitration Order

The world of arbitration has extended far from its original concept and roots of simplicity and speed. Like litigation, there are now various matters resolved through arbitration that have consumed considerable time and involved enormous complexity. Does this give rise to a truly parallel system of justice? If so, is this indeed consistent with the original mandate that ADR would be cost-effective and more timely than traditional litigation? A case in point is *DTV Network Systems, Inc. v. Skywalker Communications*, 2006 WL 2987040 (E.D. Mo.), decided October 17, 2006. In this case, the Eastern District considered an arbitration that lasted more than three years. It had a number of interesting findings, including:

- Reinforcement of the concept that under the Eighth Circuit law in addition to the mandate set out by the Federal Arbitration Act, the only two additional grounds upon which an arbitration award can be overturned are (1) completely irrational and (2) manifest disregard of the law;
- An arbitration award must be confirmed even if the Court is convinced that the arbitrator committed a serious error, so

“long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority”;

- The procedure at the arbitration is within the parlance and providence of the arbitrator;
- This parlance can include an arbitrator’s decision to elect during the proceeding to allow a “surprise rebuttal expert report” and to exclude “pivotal impeachment evidence”;
- The limitations set upon this Court—the Eighth Circuit—in reviewing an arbitrator’s award are strict. The parties should be aware that they get what they bargained for and that arbitration is far different from adjudication.

And finally, in *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 2006 WL 3103677, decided September 14, the Eastern District discussed an arbitrator’s report that consisted of 2,075 pages. Yes, 2,075 pages. This alone speaks volumes as to how far arbitration has come and how close in some ways it seems to be to traditional litigation.

Unconscionable Arbitration Provision

Dierhoff v. General Growth Properties, Inc., 2006 WL 3210502 (W.D. Mo.), decided November 6, 2006. This case involved a dispute whether Dierhoff as an individual consumer could be compelled to arbitrate her dispute on an individual basis as opposed to litigating it on a class-action basis. She refused to arbitrate her claim. This nationwide lawsuit brought by Dierhoff involved charges of \$2.00 per month as a service fee on mall gift cards. The provider of the card, American Express, received approximately \$7,000,000 in revenue since the program’s inception. The program contained information stating, among other things, that there was a binding arbitration provision and a waiver of rights to participate in a class action lawsuit against the provider.

Plaintiff challenged this program on a number of fronts, including that she never signed the agreement and thus was not bound to it. Initially, the Court had to determine whether there was an agreement between plaintiff and the provider to arbitrate her disputes. The court concluded that arbitration seemed to be appropriate and enforceable, and then turned to what it considered the more important question to be: namely, whether plaintiff must arbitrate her claims. “This issue still remains as to whether the provision is enforceable.” Plaintiff argued the provision was not enforceable because it was unconscionable.

Applying a couple cases as precedent, the Court concluded that the agreement forces consumers to individually arbitrate claims that only amount to a few dollars. At the same time, the provider received in excess of \$7,000,000 in fees from this program.

Accordingly, the Court concluded that the FAA and the policy favoring arbitration of claims does not give a party carte blanche to eliminate the ability of consumers to challenge provisions of an unconscionable contract. Moreover, the Court, citing a previous case, held: “Standing alone, a public policy favoring arbitration is not enough to extend the application to an arbitration clause far beyond its intended scope.” The court found the arbitration clause to be unconscionable and concluded that the case would not go to arbitration but would continue instead as a class action in court.

Equal Employment Opportunity Commission v. Woodmen of the World Life Insurance Society, 479 F.3d 561 (8th Cir. 2007). This was an EEOC action against an employer. The employer then filed a motion to compel the employee to arbitrate her claims, which the federal district court initially granted. The issue before the Eighth Circuit was whether the district court properly excused the employee from arbitrating her individual discrimination claims and allowed her to proceed in the EEOC’s enforcement action as an intervener. The district court granted her requested relief for three reasons: (1) because she could not afford arbitration; (2) because forcing her to arbitrate would interfere with the EEOC’s ability to pursue its interests on behalf of the public; and (3) because she had filed for bankruptcy protection, listing the lawsuit in her bankruptcy schedules. She contended that once the EEOC had filed its enforcement action, she lost any right to litigate her individual claims other than as an intervener in the EEOC action. Accordingly, she argued that there was nothing left to arbitrate.

The Eighth Circuit noted that it reviews de novo a district court’s denial of the employer’s motion to compel arbitration. The arbitration provision in question provided that the parties share the costs of arbitration. The employee introduced evidence in the district court about the costs associated with the private arbitrator chosen to conduct the arbitration proceeding and about her own impending bankruptcy. The district court determined that the “spiraling costs” along with the employee’s financial situation relieved her of the obligation to continue in arbitration. The Eighth Circuit concluded: “Considering the circumstances that existed at the time the two arbitration agreements were entered, we conclude that neither arbitration agreement is unconscionable under Nebraska law.” The Court noted that the arbitration agreement contained a severability clause, such that the fee-splitting provision can be severed from the remainder of the arbitration

agreement and can be enforced. The Eighth Circuit rejected the employee's other claims as well, reversed the district court's judgment denying the motion to compel arbitration and remanded the case for an order compelling arbitration.

Arbitrator's Award

Communication Workers of America, AFL-CIO v. Southwestern Bell Telephone Company, 206 WL 3408409 (W.D. Mo.), decided November 27, 2006. In this case, the parties disputed an arbitrator's award. The case presents an interesting discussion of the interplay between the parties, an arbitrator's award and continued jurisdiction by the arbitrator to consider not only matters raised in that award, but other matters going forward. The court concluded that since the arbitrator left open an issue presented to him, the ultimate procedural question seems to be whether this issue should be resolved by a new grievance in arbitration or by the original arbitrator. The court concluded that the arbitrator's award did not clearly allow for determination whether the arbitrator was granting or denying the relief sought by the plaintiff in the lawsuit.

Thus, the Court stated that the arbitrator's award is similar to a contract in that it is the expression of the parties' will. The court further stated that it is also clear that an arbitrator's award must be definite and capable of enforcement. "Here, there is a dispute of fact that should have been resolved by the arbitrator."

Accordingly, the Court remanded the case back to the original arbitrator with directions that he resolve the disputed issues and determine whether the claimants were entitled to other positions.

Plaintiff Alleged it Could Not Proceed with Arbitration Because Too Expensive

Owner-Operator Independent Drivers Association v. United Van Workers, 2007 WL 1223463 (E.D. Mo.), decided April 24, 2007. Plaintiff filed a motion to voluntarily dismiss with prejudice its claims in federal district court. The federal court initially granted the motion, but upon defendant's strenuous objection to this ruling, the Court reconsidered its order. The plaintiffs were a member of a class action that alleged their leases with defendant violated the truth in leasing regulations. Defendant initially filed a motion to dismiss and then a motion to stay and requested that the Court refer the matter to arbitration. The court granted this motion and required plaintiff to arbitrate his claims. Four months later, when plaintiff had not initiated any arbitration proceeding, the Court lifted the stay. Thereafter, defendant filed a motion for partial summary judgment, which the Court granted.

Thereafter, the plaintiff filed a motion for voluntary dismissal with prejudice. Plaintiffs alleged they wanted to dismiss their claims because the Court's previous ruling had "effectively terminated" their claims. Plaintiffs further claimed that they wanted to dismiss their action because they could not afford the arbitration costs.

In an unusual ruling, the Court, after considering the factors whether to grant a voluntary dismissal, denied plaintiff's request for a voluntary dismissal with prejudice. It determined, among other items, that defendant had put considerable effort and expense into defending the lawsuit.

Challenge to Arbitration Award

Parks v. MBNA America Bank, 204 S.W.3d 305 (W.D. 2006). This case involved an attack on a settlement agreement between credit card holders and issuers of three credit card accounts. The card holders filed a petition to vacate the arbitration awards as to two of the accounts. The defendant filed a countermotion seeking to confirm the awards. The court stated that the party challenging the awards had the burden of demonstrating that the awards were not valid. While the petition alleged all four of the statutory grounds for vacating an award, "No evidence was adduced to support those allegations. Conclusory allegations are insufficient to establish the invalidity of an award." Further, the Court noted that the plaintiffs did not bring forth any evidence to support that any grounds existed to overturn the arbitration award. Accordingly, the Court affirmed the trial court's decision to confirm the arbitration awards.

Arbitrator Partiality

Freeman Contracting Company, Inc. v. Williamsburg Village Condominium Association, 206 S.W.3d 398 (Mo. Ct. E.D. 2006), decided November 21, 2006. In this short opinion, the appellate court considered whether the trial court erred by confirming an arbitration award that allegedly did not contain sufficient notice of the requirement to arbitrate and where the arbitrator was allegedly partial in that the contract required use of an arbitration service owned by the arbitrator or his family member. Defendant conceded that he did not raise these issues in the arbitration proceeding or in the trial court. The court concluded on this basis alone it could not review the disputed items. But it went on to note, considering a claim that the arbitrator exceeded his authority by awarding damages not based on the proper measure of damage, that such a review really involves a question whether the arbitrator incorrectly resolved damages. "The party challenging an arbitration

award is not entitled to have a reconsideration of the merits of the dispute.” Accordingly, and not surprisingly, the appellate court affirmed the trial court’s decision.

Staying a Case for Arbitration, Not Dismissing It

JBS Farms, Inc. v. Firemen’s Fund Agribusiness, Inc., 205 S.W.3d 910 (Mo. App. S.D. 2006), decided November 28, 2006. The case is noteworthy because it reaffirms that arbitration clauses are construed in favor of arbitration. “Absent positive assurance the dispute is outside the arbitration clause, arbitration should be ordered.” The court further noted that it is “compelled to resolve all such disputes in favor of arbitration.”

The court stated that it was persuaded that because the matter was subject to arbitration, plaintiff’s actions should be stayed, not dismissed. “Courts consistently have so held.” Ironically, many state courts in Missouri in the last several years have dismissed cases once they found them to be subject to arbitration. This case reaffirms that dismissal is not appropriate but rather there should be a stay of the action, so that after the arbitration proceeding is concluded, the parties may return to that court for any further action, principally including the enforcement of the arbitration award.

Verbal Notice of Intent to Arbitrate

Haberberger, Inc. v. Teamsters Local 682, 2007 WL 29669 (E.D. Mo.), decided January 3, 2007. This case is of note because there was an oral, not written request to arbitrate. The contract clearly required a written request to arbitrate. The arbitrator found that even though only oral notice was provided, it did not preclude the claimant from the ability to arbitrate and did not preclude the arbitrator from jurisdiction. The arbitration provision in question stated: “If the grievance has not been settled as a result of the foregoing, the union or the company may submit it to arbitration by notifying the other in writing within ten (10) days after the company’s decision [at the second stage of internal review].” The arbitrator concluded that the word “may” was permissive rather than mandatory and thus it did not absolutely require the demand be made in writing and did not absolutely require that it be made within ten days. The court agreed and thus granted defendant’s motion for summary judgment that asked the trial court to enforce the arbitrator’s award.

Review of an Arbitrator’s Decision

Carlisle Power Transmission Products, Inc. v. United Steel Workers of America and Local No. 662, 2007 WL 120669 (W.D. Mo.), decided January 11, 2007. The case is noteworthy because of its reemphasis that judicial review of an arbitrator's decision is extremely limited. "If the arbitrator is arguably construing or applying the collective bargaining agreement, a court may not set aside or amend the decision even if the Court would have reached a "different decision or is firmly convinced an error was made." To repeat, "or is firmly convinced that an error was made."

The Court Decides if the Parties Have a Valid Arbitration Agreement

International Brotherhood of Electrical Workers, Local Union No. 124 v. Smart Cabling Solutions, Inc., 476 F.3d 527 (8th Cir. 2007). This case reinforced the law that whether the parties have a valid arbitration agreement that binds them is a substantive decision. As a substantive decision, it is up to the Court to make this determination, not the arbitrator. By contrast, jurisdictional challenges of a procedural nature are submitted to arbitrators. Examples are whether the notice to arbitrate was timely filed or whether negotiations were sufficiently deadlocked that it triggered a contractual provision requiring arbitration.

Untimely Request to Arbitrate

An untimely request to arbitrate can preclude a party from arbitration and allow a judgment in a court of law to stand, according to the Missouri Court of Appeals, Eastern Division, in *Sitelines, LLC v. Pentstar Corp.*, No. ED 88579, decided February 6, 2007. The dispute involved a contractor who brought a breach of contract action against its subcontractor after the subcontractor allegedly abandoned the project without notice. This left substantial portions of the work uncompleted. The contractor filed a petition in circuit court and sought damages for breach of contract. The defendant subcontractor failed to respond to written document requests and failed to respond to plaintiff's request for admissions.

Accordingly, plaintiff contractor filed a motion for summary judgment. The defendant subcontractor never filed a response. The summary judgment motion was set for hearing and when both parties appeared in court on the date of the hearing, the hearing was reset for another date about a month later. On the afternoon before the hearing, defendant's attorney telefaxed a motion to dismiss or in the alternative, to compel arbitration pursuant to the arbitration clause in the agreement. Defendant's attorney also telefaxed at the same time a notice

to hear the arbitration motion the next day at the same time as the hearing on plaintiff's motion for summary judgment.

At the hearing, the Court granted plaintiff's motion for summary judgment and awarded plaintiff \$280,074.76 in damages and \$7,920.00 in attorney's fees. By separate order, the Court denied defendant subcontractor's motion to dismiss or to compel arbitration. Defendant appealed that decision.

The appellate court decided that because the motion to dismiss or compel arbitration violated Missouri's Rule 44.01(d) which requires at least five days' notice, the trial court properly denied the motion. In fact, the appeals' court went on to state that had the trial court granted the motion and enforced the request for arbitration, the trial court would have committed error. Further, the Court concluded: "We are aware that the trial court's order has the effect of precluding defendant from ever asserting a right to arbitrate the dispute, because a judgment on the merits of this dispute was entered on the same day. However, this situation was created by defendant."

Construction claims typically involve both allegations of breach of contract and tort claims. Inevitably, a dispute arises regarding the breadth of an arbitration provision. The most-recent case to address this issue is *Amega Mobile Home Sales, Inc. v. Southern Energy Homes, Inc.*, 186 S.W.3d 793 (Mo. App. WD 2006). The dispute was between purchasers of a mobile home and the manufacturer/installer of the mobile home. The home was covered by a one-year limited warranty stating that the home was free from any serious structural defects in material and workmanship, assuming reasonable maintenance and servicing of the home by its owner. The homeowners filed a lawsuit in circuit court alleging in Count I breach of contract, stating that the home was in a dangerous and defective condition and was not habitable due to the presence of excessive levels of formaldehyde gas within the home. Count II of the petition pled a product liability claim against the manufacturer, alleging that the home was in a defective and dangerous condition due to its manufacture and design.

The defendants alleged that there was a binding arbitration provision contained in the warranty which provided:

All disputes between us ... resulting from or arising out of the design, manufacture, warranty, or repair of the manufactured home, (including but not limited to: the terms of the warranty, the terms of this arbitration agreement, and all clauses herein contained, their breadth and scope, and any term of any agreement contemporaneously entered into

by the parties concerning any goods or services manufactured or provided by Southern Energy Homes, Inc.; the condition of the manufactured home; the conformity of the manufactured home to federal building standards; the representations, promises, undertakings, warranties or covenants made by Southern Energy Homes, Inc., (if any); or otherwise dealing with the manufactured home); will be submitted to BINDING ARBITRATION, pursuant to the provisions of 9 U.S.C. section 1, et. seq. and according to the commercial Rules of the American Arbitration Association then existing in Addison, Alabama, where Southern Energy Homes, Inc. maintains its principal place of business. ... *THIS ARBITRATION SHALL BE IN LIEU OF ANY CIVIL ACTION IN ANY COURT, AND IN LIEU OF ANY TRIAL BY JURY.*

The defendants contended that given this provision, plaintiff's action was subject to arbitration. The sale contract between the buyer and seller, however, did not contain any provision relating to arbitration. The majority of the Court's opinion related to whether the tort claim of product liability was barred by the arbitration provision contained within the one-year warranty. The appellate court, affirming the trial court's decision, concluded that the cause of action was independent of and different from a warranty claim and thus was not limited to the arbitration provision contained therein. The Court further concluded:

At the very least, for a tort claim to be subject to arbitration under a broad arbitration clause, it must raise some issue the resolution of which requires reference to or construction of some portion of the parties' contract. Where, however, a tort claim is independent of the contract terms and does not require reference to the underlying contract, arbitration is not compelled.

Id. at 798.

One-Sided Arbitration Provision is Unconscionable

The question of unconscionability was decided recently by the Missouri Supreme Court in *Vincent v. Schneider*, 194 S.W.3d 853 (2006). Plaintiffs were purchasers of single-family homes from defendant McBride & Son Homes, Inc. Written contracts were exchanged for each home that was purchased and they contained a preprinted provision that provided McBride the unilateral right to require any claim by the homeowner arising out of the contract or the home to be decided by binding arbitration. Specifically, the contract provision read as follows:

4. It is agreed between the parties that Seller's liability to Purchaser for damages of any breach of this contract (including, without limitation, defects in construction items warranted hereunder or breach of Seller's warranties) shall be *856 limited to the reasonable cost of repair or replacement of any defective items of labor or material. In the event of any claim by Purchaser against seller arising out of this Contract or the Residence, Seller, at its option, may either:

(a) By written notice to Purchaser, repurchase the Residence ...; or

(b) By written notice to Purchaser, submit the resolution and determination of such claim by Purchaser against Seller to binding arbitration pursuant to the provisions of the Missouri Uniform Arbitration Act, Mo.Rev.Stat. Ch. 435 (1986), as amended, and/or the Federal Arbitration Act, Title 9 U.S.C. §§ 1 et seq., as amended. The arbitrator shall be selected by the President of the Homebuilders Association of Greater St. Louis. The arbitration shall take place and such dates as directed by the arbitrator. The decision of the arbitrator shall be binding on both parties and enforceable in a court of competent jurisdiction. Purchaser shall be liable to Seller for all court, arbitration and attorney's fees and costs incurred by Seller in enforcing this provision.

Plaintiffs discovered problems with their homes and filed a lawsuit against McBride alleging violations of the Missouri Merchandising Practices Act, fraudulent misrepresentation, breach of the implied warranty of habitability, and breach of fiduciary duty. McBride sought to enforce the arbitration provision and asserted that the contract required payment of all of McBride's costs to enforce the agreement to arbitrate. The appellate court concluded that there was not sufficient information for it to determine based upon the record presented whether the arbitration provision in the contract was a contract of adhesion. The Court determined that a pre-printed contract by itself is not proof of a contract of adhesion. If this were the case, the majority of the contracts in this country which are based upon preprinted forms would automatically be invalid.

The appellate court determined, however, that the provision that allowed McBride to select the arbitrator was unconscionable. Section 435.360 R.S.Mo. provides that if the selected arbitrator cannot serve for any reason, then the Court shall appoint an arbitrator. Accordingly, Missouri law provided a cure for this particular provision, even though it was unconscionable.

The Court further found to be unconscionable the requirement in the arbitration provision that seller's attorney fees and costs must be paid by the purchaser of the home. "The sentence dealing with fees and costs is strangely worded," according to the Court. *Id.* at 860. Accordingly, the Court concluded:

"It is unconscionable to have a provision in an arbitration clause that puts all fees for arbitration on the consumer. This is particularly true when the cost-shifting terms could work to grant one party immunity from legitimate claims on the contract. At the time this contract was created, the arbitration provision that shifts all arbitration fees to Relators [the homeowners] was unconscionable and unenforceable.

Id. at 860-61.

Selection of an Arbitrator

Selection of an arbitrator was decided recently in *Jackson County v. McClain Enterprises, Inc.*, 190 S.W.3d 633 (Mo. App. WD 2006). Jackson County brought a lawsuit against an excavating company for trespass and conversion, alleging that the company entered upon county property that was a park and removed approximately 73,000 cubic yards of soil by digging a pit approximately 2 acres in size. The soil was used as fill dirt in a housing development owned by McClain, the defendant. Counsel for Jackson County then sent a letter to defendants offering to submit the dispute to arbitration and articulating in separate numbered paragraphs various items as to how the arbitration would proceed. Counsel premised the letter with an introductory statement that it was offering to enter into an agreement to submit the dispute to binding arbitration "before retired Circuit Judge John Moran." Counsel for defendants accepted the offer, but then counsel for both parties learned that Judge Moran would not hear the arbitration case. Jackson County then asserted that because participation by Judge Moran as the arbitrator was an essential term of the contract and since he was not available to serve, the contract was unenforceable.

The excavating defendant filed a motion to compel arbitration which the trial court overruled. The appellate court determined that the terms of the agreement to arbitrate were ambiguous enough that evidence should have been presented to the trial court to ascertain the parties' intentions and for the trial court to resolve the ambiguity. Accordingly, the appellate court remanded the case to the trial court for hearing on the motion to compel and further instructed the trial court to determine whether Judge Moran's service as an arbitrator was an

essential term to the contract. If it was, the contract was unenforceable. By contrast, should the trial court determine that Judge Moran's service as an arbitrator was not an essential term, then the arbitration provision was enforceable and the matter would proceed to arbitration with the appointment of an arbitrator by the Court.

Bifurcated Award

Crawford Group, Inc. v. Holekamp, 2007 WL 844819 (E.D. Mo. 2007), decided March 19, 2007. In this case, the Eastern District decided in a matter of first impression that an interim award of an arbitrator can be treated as a final award as to those matters that "finally determine the substantive issues on the merits." The Court emphasized, however, that the parties had agreed to a bifurcated arbitration process in which the arbitrators were going to be making certain decisions which they put into an interim award and then ultimately other decisions later. Based on this, the Court concluded that the arbitrators intended the interim award to be final as to the substantive issues addressed in that award. The case is a good study on the importance of correctly wording both interim and final awards. The problem becomes when an interim award is really meant to be a final award but is not treated as such and certain time limitations, including days to challenge the award, may or may not come into play under various rules. In this particular case, it was being administered by the American Arbitration Association, which has strict deadlines for post-award motions and reconsiderations.

Does the Denial of a Motion to Arbitrate That is Appealed to the Eighth Circuit Remove the Federal District Court from Jurisdiction to Proceed with the Case While it is On Appeal?

The answer was decided in *Express Scripts, Inc. v. Aegon Direct Marketing Services, Inc.*, 2007 WL 1040938 (E.D. Mo.), decided April 3, 2007. The parties had agreed that the Eighth Circuit has not definitively ruled on whether an appeal of a denial of a motion to stay pending arbitration divests the district court of jurisdiction. The majority of the other circuit courts of appeal that have considered this issue, however, have ruled that a notice of appeal under §16 of the Federal Arbitration Act divests the district court of jurisdiction to proceed with the case while it is on appeal. The Court decided that it agrees with the reasoning of the Seventh and Eleventh Circuits and concludes the better rule is that a notice of appeal under §16 divests the district court of jurisdiction during the period of the appeal.

Refusal to Vacate, Modify or Correct an Arbitration Award

Hudson v. ConAgra Poultry Company, 2007 WL 984106 (C.A. 8th), decided April 4, 2007. In this case, the Hudsons argued that the district court should have granted their motion to vacate, modify or correct the decision of the arbitration panel. Specifically, they argued that the arbitration panel misapplied the law in dismissing their tort claims on the basis of *res judicata*. The Court recited the now well-known standard that a district court is bound to give “an extraordinary level of deference” to the underlying arbitration award. There was a second arbitration and the second arbitration panel accepted ConAgra’s motion to dismiss on the basis of *res judicata* barring the Hudsons’ subsequent tort claims. Thus, there was no evidence actually presented at the second arbitration by way of a traditional hearing. The Court concluded that it would make little sense for the arbitration panel to hear such evidence if they had already determined that such claims were barred by *res judicata*. This case reinforces the power of an arbitrator to decide substantive matters by way of a motion, in this instance a motion to dismiss, without fear that by precluding the party from presenting evidence that action may be successfully attacked in the court system.

In *Twin Cities Galleries, LLC v. Media Arts Group, Inc.*, 476 F.3d 598 (8th Cir. 2007), an art distributor sought confirmation of an arbitration award against an art gallery owner. The gallery owner moved to vacate the award. His challenge was that the arbitration award violated Minnesota’s fundamental public policy of protecting its franchisees. In essence, they were contending there was a subtle difference between California and Minnesota law and that the arbitrators applied the wrong law. The Eighth Circuit disagreed with this position and stated that upon closer examination the Minnesota decisions apply an objective standard comparable to California’s standard in determining whether a minimum purchase commitment is an indirect franchise fee. Thus, the Court concluded that the Minnesota law does not differ materially from that required under California law and therefore the arbitration decision should not have been overturned. The Eighth Circuit reversed the trial court’s decision to the contrary. In doing this, the Eighth Circuit reemphasized its important role of oversight and deference to decisions being made by arbitrators. The reasoning for the decision, however, is interesting in that the Court made an analysis of which state law should apply in determining whether the arbitrators’ decision was proper.

2. Recent Developments: United States Supreme Court

The United States Supreme Court in a recent case decided that a challenge to the validity of the contract as a whole, whether brought in state or federal court, must be referred to arbitration for decision. The case is *Buckeye Check Cashing, Inc. v. Cardegna*, 126 S. Ct. 1204 (2006),

decided February 21. The case involved Cardegna, who brought a class action claiming that Buckeye had charged usurious interest rates in connection with various check cashing loans, allegedly in violation of Illinois consumer fraud laws. Buckeye moved to compel arbitration and Cardegna responded that the contract as a whole was illegal and therefore void, which in turn would void the arbitration provision contained within it.

The Florida Supreme Court ruled in favor of Cardegna, finding that the contract as a whole not only was void, but also in fact might be criminal in nature.

The Supreme Court of the United States reversed the Florida Supreme Court's decision and held that Cardegna's attack on the contract "must go to the arbitrator" for decision. This underscores with emphasis the tremendous deference that the U.S. Supreme Court is giving to arbitrators to decide a wide range of issues involving the validity of the contract as a whole and all its contents.

In reaching this result, the Supreme Court reaffirmed principles previously established in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), including that an arbitration provision is distinct and separate from the rest of the contract, that it is for an arbitrator to consider a challenge to the validity of the contract as a whole, and finally that federal arbitration law on a substantive level applies in both state and federal courts.

The result also supports a continuation of a recent Supreme Court trend expanding and endorsing arbitrator authority in matters of contract interpretation and enforcement, with the notable recent previous case on this point being *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003). In this case, the Supreme Court in 2003 had held that arbitrators rather than courts had the power to determine and apply various contract damage clauses.

It also extends the previous decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), wherein the Court held that matters of contract interpretation are for arbitrators, not the federal courts, to decide.

In addition to this recent U.S. Supreme Court case, a compilation of other recent cases from the United States Supreme Court, the Eighth Circuit Court of Appeals, and the appellate courts in Missouri is attached to this report in an article entitled: *The Current Law on ADR*. This article appeared in the Winter 2006 edition of the *The St. Louis Bar Journal* and

is being reprinted herein by its author, the undersigned Chair of this Arbitration Subcommittee.

Respectfully submitted,

James R. Keller
Herzog Crebs LLP
Chair of the Arbitration Subcommittee
of the ADR Committee of The Missouri Bar
515 N. 6th Street, Suite 2400
St. Louis, MO 63101
314.231.6700
314.231.4656 (fax)
jrk@herzogcrebs.com

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The Current Law on ADR

by James R. Keller

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Introduction

This Article presents the current law on arbitration and mediation based upon rulings from the Courts that most directly affect mediators, arbitrators and trial attorneys who practice ADR in the State of Missouri. The focus is on recent opinions from the United States Supreme Court, the Eighth Circuit Court of Appeals and Missouri's appellate courts. Virtually all case law concerns arbitration rather than mediation.

The United States Supreme Court continues to support, even encourage arbitration. During one recent oral argument, the high court quizzed counsel on the parties' willingness to resolve their disputes through arbitration.¹ The Supreme Court then expressed "hope" in its written opinion that the parties would agree to binding arbitration for all remaining issues.

In Missouri, many of the state's premier courtroom trial attorneys recently turned to binding arbitration to resolve their disputes over their attorney fees to be paid for tobacco litigation.² The arbitrator award was \$111,250,000, a result meriting attention from even the most skeptical as to whether "big awards" are possible in arbitration.

I. The Agreement to Arbitrate

It is axiomatic that binding arbitration requires a written agreement to arbitrate. Absent such an agreement, disputes are resolved in a court of law or equity. The courts liberally construe an arbitration agreement and resolve all doubts in favor of arbitration.³ A motion compelling arbitration will be granted unless it may be said with "positive assurance" that the arbitration provision is not susceptible of an interpretation that covers the asserted dispute.⁴

A letter from counsel responding to a request for arbitration that stated that arbitration was a "workable process for resolving this dispute" and then requested a discussion of the ground rules for arbitration was sufficiently binding to create an agreement to arbitrate.⁵ An arbitration provision survives an employee's termination even after the other provisions in the employment agreement no longer apply.⁶

Typically, broadly worded arbitration provisions will cover all anticipated disputes and are enforced by the Courts to address a myriad of claims. An example is an arbitration clause that applies to “all disputes, controversies or differences arising out of or in connection with this agreement or the making thereof.”⁷ Another broadly worded provision calls for arbitration of all disputes “arising hereunder.”⁸

If an arbitration provision is broad, the Court analyzes whether the dispute relates to the subject matter of the agreement and if so, the Court will send the case to arbitration.⁹ By contrast, courts will not compel arbitration where an arbitration provision is narrow and does not cover the claim in dispute. If the clause is narrow, the Court determines “whether the dispute involves an agreement collateral to the agreement contained in the arbitration clause.”¹⁰ For example, a letter of understanding that is separate from the main contract and its arbitration provision does not bind the parties to arbitration absent incorporation by reference.¹¹

Similarly, if the dispute involves a narrow arbitration provision and the claims do not raise any issue requiring reference to or construction of the agreement containing the arbitration provision, then the dispute is not subject to binding arbitration.¹² The arbitration provision in a collective bargaining agreement that provided for arbitration of any matter that relates to an interpretation of the agreement did not cover a former employee’s allegations that a resignation was due to some irrational behavior caused by an unspecified illness.¹³ Tort claims often involve issues where the resolution does not require reference to or construction of the agreement containing the arbitration provision, and thus they generally are not covered under a narrow provision.¹⁴

Courts are reluctant to enforce an arbitration provision that provides that one side can invoke arbitration but the other side does not have that option.¹⁵ Lack of mutuality can expose the clause to a finding of unconscionability. Courts also will deny a motion to compel arbitration where the amount in dispute is below the threshold amount specified to arbitrate.¹⁶

A frequent challenge is that the arbitration provision does not allow the arbitrator the authority to award all relief that could be available in a court of law. Issues relating to any potential limitation on recovery go to the merits of the dispute rather than whether the arbitration provision is enforceable. Decisions on the merits are for the arbitrator, not the Court.¹⁷

An arbitration clause only produces binding arbitration if it so states.¹⁸ Parties also need to specifically incorporate (rather than merely

reference) another contract containing an arbitration clause if they intend the arbitration clause to apply to their contract.¹⁹

A. Court Jurisdiction

The courts routinely exercise their jurisdiction to decide the “gateway question” of arbitrability; namely, whether the parties have entered into a valid and binding agreement to arbitrate.²⁰ The court’s role in deciding this issue is limited, however.²¹ If the Court decides in favor of arbitration, the matter then proceeds in arbitration without further court involvement.

Consequently, an arbitrator (not the Court) will decide the legality and enforceability of an arbitration agreement that prohibits punitive and exemplary damages in a case where claimant has requested treble damages under RICO.²² The Supreme Court defers to the expertise of arbitrators even over its own federal judges to resolve issues on statute of limitations, notice, laches, estoppel and other conditions precedent to an obligation to arbitrate.²³ Also, questions regarding the unconscionability of an arbitration provision typically rest with the arbitrator, not the Court.²⁴ There are times, however—see II. A. Venue, for example—when the Court will rule on whether an arbitration provision is unconscionable.

Challenges to the jurisdiction of an arbitrator are either (1) procedural, (2) substantive jurisdictional or (3) relate to the merits of the arbitrator’s decision.²⁵ Courts decline to address issues regarding procedural arbitrability. Substantive jurisdictional challenges involve the gateway question whether the parties agreed to arbitrate. The courts have jurisdiction to decide this issue. By contrast, the Courts “refuse” to exercise jurisdiction to review and reconsider on the merits an arbitrator’s award.²⁶

A dispute whether an employee complied with pre-arbitration provisions in a grievance procedure as a prerequisite to pursuing arbitration is a matter of procedure for the arbitrator, not the Court, to decide.²⁷ The courts repose great confidence in an arbitrator to decide a wide range of issues, including federal statutory claims.²⁸ While an occasional judge may still bristle at the concept that arbitrators have broad decision-making authority, the appellate courts have cast those judges as reflecting “an outmoded judicial hostility to arbitration that the Supreme Court has consistently rejected.”²⁹

Missouri’s courts are not available to review a dispute on a matter that is being arbitrated outside the State of Missouri, provided the arbitration agreement specifies arbitration in a state other than

Missouri.³⁰ This requires parties to be careful in considering the location for the arbitration hearing for only those hearings that take place within the State of Missouri will allow enforcement or redress in Missouri.³¹

B. Non-Signators to the Arbitration Agreement

Generally, a non-signator to a contract containing an arbitration provision is not bound to arbitrate. There are exceptions, however, as noted recently by both Missouri's appellate courts and the Eighth Circuit Court of Appeals. For example, a non-signatory party to an arbitration agreement can be bound to the arbitration provision if he or she is an agent of one of the signing parties or is a third-party beneficiary of the contract.³² A third-party beneficiary to a contract is someone who did not expressly execute the agreement but benefits from one or more of its terms.³³

A non-signatory can enforce an arbitration clause against a signatory when (1) the relationship between them is sufficiently close that only by permitting the non-signatory to invoke arbitration may evisceration of the underlying arbitration agreement between the signatories be avoided, or (2) the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the non-signatory.³⁴ The test for determining whether a non-signator can enforce a signator into arbitration is different from the test for determining whether a signator can force a non-signator into arbitration.³⁵

C. Waiver of Arbitration

One or more parties to an arbitration agreement can waive the right to arbitrate. Waiver occurs when the party (1) knew of an existing right to arbitrate; (2) acted inconsistently with that right; and (3) prejudiced the other party by his or her inconsistent acts.³⁶ The courts often focus on the prejudice component in determining whether a waiver exists.³⁷ Seven-³⁸ and nine-month periods³⁹ between filing a lawsuit and then filing a motion to compel arbitration are not necessarily of sufficient duration, absent other factors, to constitute a waiver.

II. Factors Affecting Arbitration

Both arbitrators and the Courts face a number of unique issues presented by virtue of arbitration. Among other items in recent years, the Courts have considered:

A. Venue

Arbitration provisions frequently specify where the arbitration will occur. The court may strike a venue provision if the location places an undue burden on a party, particularly if the agreement is between a business and a consumer.⁴⁰ A Missouri appellate court struck down the venue portion of an arbitration provision requiring the purchaser of an automobile in Missouri to arbitrate the dispute in Arkansas, finding it to be a contract of adhesion and unconscionable.⁴¹

B. Punitive Damages

Arbitrators decide issues concerning punitive damages including whether an agreement prohibiting the award of punitive damages is unenforceable.⁴² The Eighth Circuit affirmed an arbitrator's award of \$6,000,000 in punitive damages even though the actual damages were only \$1,000 in statutory damages, \$1,000 in actual damages, \$22,780 in attorney fees, and \$9,300 for the cost of the arbitration.⁴³ Missouri's Western District upheld an arbitrator's award of punitive damages of \$50,000 in addition to \$50,000 in actual damages relative to a construction dispute over a house.⁴⁴

C. Attorney Fees

The Eighth Circuit recently upheld an arbitrator's award of attorney fees based upon breach of contract in the amount of \$215,480.82 for fees paid to a major law firm for services prior to the breach and an additional \$359,861.55 for fees paid to that same firm for services after the breach.⁴⁵ As the Eighth Circuit noted, "the district court erred in substituting its remedial judgment for that of the arbitrator."⁴⁶

The Eighth Circuit also upheld a district court's decision to confirm an arbitrator's award denying attorney fees. The arbitrator found the dealership agreement to be a contract of adhesion and unconscionable as regards the provision that provided that the prevailing party could recover all costs and attorneys' fees.⁴⁷ Kawasaki, even though victorious in arbitration, could not recover costs and attorney fees of \$1.7 million.

In the only reported decision from the Eighth Circuit overturning an arbitrator's award based upon manifest disregard of the law,⁴⁸ the Eighth Circuit affirmed a district court's decision to vacate an arbitrator award of attorney fees because the panel expressly recognized that the law did not support such a recovery but awarded the attorney fees anyway. Manifest disregard of the law does exist where an arbitration panel cites relevant law, but then proceeds to ignore it.⁴⁹ This rarely happens.

An arbitrator's award of attorney fees also may be vacated when the fees related to litigation previously decided by a Missouri court rather than to attorney fees generated in the arbitration itself.⁵⁰

D. Arbitrator Fees

The courts examine carefully how an arbitration provision addresses the payment of an arbitrator's fees and on occasion courts will strike such a provision. Recently, the Eighth Circuit decided that a pension plan that required that arbitrator fees be split equally between the parties was not in accord with ERISA's statutory framework and discouraged the pursuit of many legitimate claims by those who cannot afford such costs.⁵¹

E. Class Action

The United States Supreme Court recently decided that an arbitrator can decide whether to certify a proceeding for class arbitration.⁵² This affords an arbitrator considerable authority and responsibility in determining what previously was thought to be within the exclusive parlance of the Courts.

F. Replacing an Arbitrator

On occasion, an arbitrator must be replaced due to illness, conflict or other unavailability. The Eighth Circuit, departing from several other federal circuits, has concluded that where the arbitration provision is silent about what to do in this instance, the Court shall designate a replacement arbitrator.⁵³ Some other federal circuit courts have taken a different approach and concluded that if an arbitrator needs to be replaced, the entire panel must be replaced and the arbitration start anew.⁵⁴

G. Delegation of an Arbitrator's Authority

While the parties may agree to arbitrate virtually any dispute, there are certain matters that cannot be delegated to an arbitrator. One example is a labor agreement involving a public entity. Per Missouri law, wages and hours for public employment in Missouri must be established by statute or ordinance and cannot be the subject of bargaining or arbitration.⁵⁵

H. No Private Cause of Action Against Arbitration Tribunal

Disputes in arbitration occasionally prompt a party to file a collateral lawsuit naming the arbitration tribunal as a defendant. Consistently, courts around the country have taken the position that

arbitration tribunals are immune from such lawsuits, at least to the extent covered by the administrative actions that they perform.⁵⁶ Missouri's appellate courts have not yet expressly ruled on this issue.

I. Discovery in Arbitration

The courts allow arbitrators sole discretion to interpret an arbitration provision and determine what discovery will be permitted in advance of the arbitration hearing.⁵⁷ Thus, an arbitrator will decide discovery issues such as whether and the number of depositions that parties may take and such decision will not be reviewed by a court.⁵⁸ Discovery requests within an arbitration proceeding can supersede an individual employee's privacy interests and require that information contained on his computer be part of the documents to be produced to the opposing party.⁵⁹

III. Litigating the Award

A. Applicable Law (Federal or State)

The Federal Arbitration Act (FAA) controls all arbitrations that involve interstate commerce, which the Courts have broadly construed to include a wide range of activities.⁶⁰ When both the FAA and Missouri's Arbitration Act are applicable, the Courts will apply the FAA. A court is not bound, however, by the procedural provisions of the FAA and can apply Missouri's procedures to the extent they do not defeat the rights granted by Congress through the FAA.⁶¹ The FAA, while expansively applied, does not provide an independent jurisdictional basis for filing a suit in federal court.⁶²

B. Enforcing and Upholding the Award

Both the FAA and Missouri's Arbitration Act set forth the precise and limited grounds when an arbitrator's award can be challenged in court and vacated.⁶³ In addition to the statutorily prescribed reasons, the federal courts have grafted by case law two additional grounds when an award can be vacated. The grounds are an award that is "completely irrational" or "evidences a manifest disregard for the law."⁶⁴ Otherwise, the Courts will confirm an arbitrator's award even when the arbitrator committed serious error provided the arbitrator arguably construed or applied the contract or acted within the scope of his or her authority.⁶⁵ Given the limited grounds to challenge an award, a court's scope of review is "among the narrowest known to the law."⁶⁶

Consequently, the Courts have considered in the past several years vast challenges to an arbitrator's award.⁶⁷ Yet, an arbitrator's award virtually never is overturned.⁶⁸ The courts' enormous deference to an

arbitrator's decision is part of the process and "exactly what" the parties agreed to by electing to arbitrate.⁶⁹

C. Standard of Review for the Appellate Court

An appellate court's review of a matter of arbitrability is *de novo*.⁷⁰ The courts apply the usual rules of contract interpretation. But, given an arbitrator's expertise and the process of arbitration itself, the Courts extend "an extraordinary level of deference" to an arbitrator's decision.⁷¹

D. *Res Judicata*

An arbitrator's findings can provide the defense of *res judicata* in a subsequent lawsuit.⁷² This requires a careful and somewhat unusual preservation of the record at the arbitration stage. Arbitrations typically are informal, do not include a court reporter, embrace relaxed rules of evidence and a limited record on exhibits and other evidentiary matters, none of which bodes well for making the kind of record necessary to establish a defense of *res judicata*.

E. Collateral Estoppel

An arbitration award also serves as a final judgment for collateral estoppel purposes.⁷³ This can prevent a party from later advancing related allegations and causes of action in a court of law. For example, a former employee may be collaterally estopped from litigating claims against a union for alleged breach of the duty of fair representation by failing to take his termination grievance to arbitration, where that employee's underlying claim against his employer was barred by *res judicata*.⁷⁴ An arbitrator may also be required to give a related "judgment" collateral estoppel effect.⁷⁵ And, findings in an arbitration proceeding may be presented to a jury in a subsequent lawsuit and collaterally estop a party from disputing those findings.⁷⁶

IV. Mediation

Everyone involved in lawsuits in federal court now knows that court-ordered mediation sessions must be conducted in good faith involving counsel and representatives who have serious and real authority to settle.⁷⁷ Recently, a lawyer's misconduct in a state-court mediation session contributed to a three-year suspension from the practice of law for that attorney.⁷⁸ He had directed profanities at opposing counsel and the party during mediation.

The courts continue to encourage the use of mediation to settle cases. In one recent case, the final settlement agreement proposed additional provisions not in the handwritten agreement that was

executed at the end of the mediation. The additional items included a provision on confidentiality, release of liability, disclaimer of fault, non-disparagement, and reinstatement or reemployment. While one of the parties balked at these new terms, the Court upheld the final version of the settlement agreement, finding that it was not materially different from the one agreed to during mediation.⁷⁹

The assessment and payment of the mediator's fees and his or her related costs often fuel heated disputes about who will pay for them, particularly in domestic relations cases. Missouri statutory law provides that the Court may assess mediation costs against any party as part of the Court costs.⁸⁰

Mediation is not a license for attorneys to marshal whatever manpower they desire and then expect to be reimbursed once they become the prevailing party. Attorney fees can be recovered for the time spent in mediation. However, a court will review carefully a prevailing party's attorney fees and related costs, including those expended in a mediation.⁸¹ One court recently found the use of three attorneys by one party at a mediation to be unreasonable and thus disallowed part of the attorney fees, even though that party prevailed in the lawsuit.⁸²

¹ *Kansas v. Colorado*, 543 U.S. 86 (2004).

² *Neel v. Strong*, 114 S.W.3d 272 (Mo. Ct. App. 2003).

³ *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir. 2001).

⁴ *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960).

⁵ *Asia Pacific Indust. Corp. v. Rainforest Café, Inc.*, 380 F.3d 383, 386 (8th Cir. 2004).

⁶ *Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943 (8th Cir. 2001).

⁷ *Medcam, Inc. v. MCNC*, 414 F.3d 972 (8th Cir. 2005).

⁸ *CD Partners, LLC v. Grizzle*, 424 F.3d 795 (8th Cir. 2005).

⁹ *United Steel Workers of America AFL-CIO-CLC v. Duluth Clinic, Ltd.*, 413 F.3d 786 (8th Cir. 2005).

¹⁰ *Fleet Tire Service of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997).

¹¹ *Id.*

¹² *Northwest Chrysler-Plymouth, Inc. v. Damler Chrysler Corp.*, 168 S.W.3d 693 (Mo. Ct. App. 2005).

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- ¹³ *Bakery, Confectionary, Tobacco Workers and Grain Millers, Local 100G v. Penford Products Co.*, 2004 WL 1811898 (8th Cir.).
- ¹⁴ *Id.*
- ¹⁵ *Wiser v. Wayne Farms*, 411 F.3d 923 (8th Cir. 2005).
- ¹⁶ *G&S Masonry, Inc. v. MJC Constructors, Inc.*, 167 S.W.3d 813 (Mo. Ct. App. 2005).
- ¹⁷ *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002).
- ¹⁸ *In re Arbitration Between Dow Corning Corp. v. Safety National Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003).
- ¹⁹ *Dunn Indus. Group, Inc. v. City of Sugar Creek and Lafarge Corp.*, 112 S.W.3d 421 (Mo. 2003).
- ²⁰ *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003).
- ²¹ *Id.*
- ²² *Howsam v. Dean Witter Reynolds, Inc.* 537 U.S. 79 (2002).
- ²³ *Id.*
- ²⁴ *Madol v. Dan Nelson Automotive Group*, 372 F.3d 997 (8th Cir. 2004).
- ²⁵ *International Brotherhood of Elec. Workers, Local Union No. 454 v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004).
- ²⁶ *Id.*
- ²⁷ *International Assoc. of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Shopman's Local 493 v. EFCO Corp. and Construction Products, Inc.*, 359 F.3d 954 (8th Cir. 2004).
- ²⁸ *Bailey v. Ameriquest Mortg. Co.*, 346 F.3d 821 (8th Cir. 2003).
- ²⁹ *Id.*
- ³⁰ *Government e-Management Solutions, Inc. v. American Arbitration Assoc., Inc.*, 142 S.W.3d 857 (Mo. Ct. App. 2004).
- ³¹ *See Teltech, Inc. v. Teltech Communications, Inc.*, 115 S.W.3d 441 (Mo. Ct. App. 2003).
- ³² *Greenpoint Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868 (Mo. Ct. App. 2004).
- ³³ *Azbill v. UMB Scout Brokerage Services, Inc.*, 129 S.W.3d 480 (Mo. Ct. App. 2004).
- ³⁴ *CD Partners, LLC v. Grizzle*, 424 F.3d 795 (8th Cir. 2005).
- ³⁵ *Id.*
- ³⁶ *Kelly v. Golden*, 352 F.3d 344 (8th Cir. 2003).
- ³⁷ *Triarch Industries, Inc. v. Crabtree d/b/a Crabtree Painting, Inc.*, 2004 WL 941218 (Mo. Ct. App.).
- ³⁸ *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182 (Mo. Ct. App. 1999).
- ³⁹ *Nettleton v. Edward D. Jones & Co.*, 904 S.W.2d 409, 410-11 (Mo. Ct. App. 1995).
- ⁴⁰ *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo. Ct. App. 2003).
- ⁴¹ *Id.*
- ⁴² *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003).
- ⁴³ *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004).
- ⁴⁴ *Groceman v. Pulte Homes Corp.*, 53 S.W.2d 599 (Mo. Ct. App. 2001).
- ⁴⁵ *St. John's Mercy Medical Center v. Delfino, M.D.*, 414 F.3d 882 (8th Cir. 2005).
- ⁴⁶ *Id.* at 885.

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- ⁴⁷ *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721 (8th Cir. 2003).
- ⁴⁸ *Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060 (8th Cir. 2003).
- ⁴⁹ *St. John's Mercy Medical Center v. Delfino, M.D.*, 414 F.3d 882 (8th Cir. 2005).
- ⁵⁰ *Strain-Japan R-16 Sch. Dist. v. Landmark Systems*, 51 S.W.3d 916 (Mo. Ct. App. 2001).
- ⁵¹ *Bond v. Twin Cities Carpenters Pension Fund*, 307 F.3d 704 (8th Cir. 2002).
- ⁵² *Green Tree Financial Corp.—Alabama v. Randolph*, 531 U.S. 79, 90-92 (2000).
- ⁵³ *National American Insurance Co. v. Transamerica Occidental Life Ins.*, 328 F.3d 462 (8th Cir. 2003).
- ⁵⁴ *Id.*
- ⁵⁵ *International Brotherhood of Elec. Workers, Local Union Number 545 v. Hope Elec. Corp.*, 380 F.3d 1084 (8th Cir. 2004).
- ⁵⁶ *MM & S Financial, Inc. v. National Assoc. of Securities Dealers, Inc.*, 364 F.3d 908 (8th Cir. 2004).
- ⁵⁷ *United Paperworkers Inter., Inc., Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).
- ⁵⁸ *CPI/Kupper Parker Communications, Inc. v. HGL/L*, 51 S.W.3d 881 (Mo. Ct. App. 2001).
- ⁵⁹ *Biby v. Board of Regents of the University of Nebraska at Lincoln*, 419 F.3d 845 (8th Cir. 2005).
- ⁶⁰ *The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).
- ⁶¹ *Clayco Const. Co., Inc. v. THF Carondelet Dev., L.L.C.*, 105 S.W.3d 518 (Mo. Ct. App. 2003).
- ⁶² *Pinnavaia v. National Arbitration Forum, Inc.*, 122 Fed. Appx. 862 (8th Cir. 2004). See *Whitney v. Alltel Communications, Inc.*, 2005 WL 1544777 (Mo. Ct. App.) and *Netco, Inc. v. Dunn*, 2005 WL 858031 (Mo. Ct. App.).
- ⁶³ Title 9, U.S. Code §§1-15; Chapter 435, Mo. Rev. Stat. (2000).
- ⁶⁴ *McGrann v. First Albany Corp.*, 424 F.3d 743 (8th Cir. 2005).
- ⁶⁵ *Id.*
- ⁶⁶ *Finley Lines Joint Protective Bd. Unit 200, Brotherhood of Railway Carmen Division, Transportation Communications International Union v. Norfolk Southern Railway Company*, 312 F.3d 943 (8th Cir. 2002).
- ⁶⁷ See *McGrann v. First Albany Corp.*, 424 F.3d 743 (8th Cir. 2005); *The Electrolux Home Products v. The United Automobile Aerospace and Agricultural Implement Workers of America*, 416 F.3d 848 (8th Cir. 2005); *Manion v. Nagin*, 392 F.3d 294, 298 (8th Cir. 2004); *Lincoln National Life Ins. Co. v. Payne*, 374 F.3d 672 (8th Cir. 2004); *United Steelworkers of America, AFL-CIO, Local 9452 v. MacSteel, Arkansas Div. of Quanex Corp.*, 68 Fed. Appx. 750 (8th Cir. 2003); *MidAmerican Energy Co. v. International Brotherhood of Elec. Workers Local 499*, 345 F.3d 616 (8th Cir. 2003); *In re Arbitration Between Dow Corning Corp. v. Safety National Cas. Corp.*, 335 F.3d 742 (8th Cir. 2003); *Finley Lines Joint Protective Bd. Unit 200, Brotherhood of Railway Carmen Division, Transportation Communications International Union v. Norfolk Southern Railway Co.*, 312 F.3d 943 (8th Cir. 2002); *Brotherhood of Maintenance of Way Employees and Wabash Federation v. Terminal Railroad Assoc. of St. Louis*, 307 F.3d 737 (8th Cir. 2002); *Maxwell-Gabel Contracting Co., Inc. v. City of Milan*, 147 S.W.3d 93 (Mo. Ct. App. 2004); and *Decker v. Kamil*, 100 S.W.3d 115 (Mo. Ct. App. 2003).
- ⁶⁸ *Id.*
- ⁶⁹ *The Electrolux Home Products v. The United Auto. Aerospace and Agricultural Implement Workers of America*, 416 F.3d 848 (8th Cir. 2005).
- ⁷⁰ *Dunn Indus. Group, Inc. v. City of Sugar Creek and Lafarge Corp.*, 112 S.W.3d 421 (Mo. 2003).
- ⁷¹ *The Electrolux Home Products v. The United Auto. Aerospace and Agricultural Implement Workers of America*, 416 F.3d 848 (8th Cir. 2005).

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- ⁷² *Kitsmiller Const. Co., Inc. v. Wynn Const., Inc.*, 126 S.W.3d 795 (Mo. Ct. App. 2004).
- ⁷³ *Manion v. Nagin*, 394 F.3d 1062 (8th Cir. 2005).
- ⁷⁴ *Banks v. International Union Electronic, Elec., Technical, Salaried and Machine Workers*, 390 F.3d 1049, 1054 (8th Cir. 2004).
- ⁷⁵ *Cornerstone Propane, L.P. v. Precision Investments, L.L.C.*, 126 S.W.3d 419 (Mo. Ct. App. 2004).
- ⁷⁶ *Jackson v. Flint Ink North American Corp.*, 370 F.3d 791 (8th Cir. 2004).
- ⁷⁷ *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001).
- ⁷⁸ *In re: Disciplinary Matter of Fletcher*, 424 F.3d 783 (8th Cir. 2005).
- ⁷⁹ *Nwachukwu v. St. Louis University*, 114 Fed. Appx. 264 (8th Cir. 2004).
- ⁸⁰ §487.100, Mo. Rev. Stat.; *Blackburn v. Mackey*, 131 S.W.3d 392 (Mo. Ct. App. 2004).
- ⁸¹ *Williams v. ConAgra Poultry Co.*, 113 Fed. Appx. 725, 729 (8th Cir. 2004).
- ⁸² *Id.*