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ILLINOIS STATE BAR ASSOCIATION

In the Alternative

The newsletter of the Illinois State Bar Association's Section on Alternative Dispute Resolution

From the editor

By Thomas D. Cavenagh

Once again, we welcome our new student editors for this year's volume. This is a very talented group of student editors with whose work I think you will be very pleased. We are planning an ambitious year of six issues containing new columns and features to enhance the articles, case briefs and current events we have covered in the past. Please feel free to contact me if you have suggestions for or comments on the newsletter.

This year, all of our editors are first year editors. Kyler Juckins is a junior majoring in Political Science with a minor in Philosophy. After graduation, Kyler plans on attending law school. Abigail Van Hook is a junior majoring in Global Studies with minors in Conflict Resolution and Social Change and Advocacy. She is a member of the College Scholars program and plans to attend law school after graduation. Jerremy Wiker is majoring in English and Entrepreneurship. Jerremy plays baseball and belongs to two honors societies, Sigma Tau Delta and Chi Alpha Sigma. John McWard is a senior majoring in Political Science and Business Management and plans to attend law school in the fall of '14. John is involved in multiple organizations at North Central College including: The President of the College's Pre- Law Society, Member of the Blue Key Honor Society, Student Panel Member for the College's Student Conduct Hearing Committee, and a member of North Central's Men's Soccer team. Tom Finnegan is a senior majoring in Political Science, and plans on attending law school next fall. He is also involved in North Central College's Mock Trial Team, Pre-Law Society and Political Science Honors So-

Continued on page 2

Writing for the ISBA: MCLE credit and newsletter authors

According to Rule 795(d)(7) of the Supreme Court of Illinois' Minimum Continuing Legal Education Rules, authors who write "law-related articles in responsible legal journals or other legal sources" can get MCLE credit. The Rule states that "[a]n attorney may earn credit for writing law-related articles in responsible legal journals or other legal sources, published during the two-year reporting period, that deal primarily with matters related to the practice of law, professionalism, diversity issues, mental illness and addiction issues, civility, or ethical obligations of attorneys." The Court's MCLE Rules are available at <http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/ArtVII.htm#c>.

Can authors claim CLE credit for the time they spend writing and researching ISBA newsletter articles? The answer depends on whether (1) ISBA newsletters qualify as "responsible...legal sources" and (2) the article in question qualifies as a "law-related article" addressing one of the listed topics.

On the first issue, to the best of our knowledge, the ISBA newsletters are responsible legal sources. On the second issue, each author needs to review Rule 795(d)(7) and, considering the content of the article, determine whether the

Continued on page 2

INSIDE

***(Notice to librarians:** The following issues were published in Volume 19 of this newsletter during the fiscal year ending June 30, 2013: October, No. 1; November, No. 2; February, No. 3; May, No. 4).*

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From the editor

Continued from page 1

ciety. Jon Kingzette is a sophomore majoring in Political Science and minoring in Social Change as well as Spanish. He is involved in RotarACT and the Leadership, Ethics, and Values program at North Central College, where he is a Distinguished Leader and a board member for the student organization LEVerage. Brandon Sarkauskas is a junior majoring in Philosophy, with a concentration in Ethics. Brandon is a member of the College Scholars program, and is co-captain of the North Central College Mock Trial Team. Upon graduation Brandon intends to enroll in law school.

On another matter, please be aware that we are very grateful for contributions to this newsletter from members of the section. *In the Alternative* serves as the communication vehicle for and between members of the Alternative Dispute Resolution Section, other practitioners and the legal profession at large. Unsolicited manuscripts of any length are very much welcomed. In addition, we are pleased to include descriptions of upcoming events related to ADR.

Please submit articles and event information to your editor: Thomas Cavenagh, Professor of Law and Conflict Resolution, North Central College, 30 North Brainard Street, Naperville, Illinois 60540, phone: 630\637-5157, facsimile: 630\637-5295, e-mail: tdcavenagh@noctrl.edu. ■

Writing for the ISBA: MCLE credit and newsletter authors

Continued from page 1

article is a "law-related article" that "deal[s] primarily with matters related to the practice of law, professionalism, diversity issues, mental illness and addiction issues, civility, or ethical obligations of attorneys." For example, an article on a recent fundraiser or networking event would not qualify for MCLE credit. Likewise, a non-substantive news-type feature, such as an article reporting on another speaker's presentation or another attorney's accomplishments, would not qualify for MCLE credit.

If your article was published in an ISBA newsletter and you choose to claim hours you spent writing it toward your MCLE requirement, please keep the following elements of Rule 795(d)(7) in mind:

- Authors must keep contemporaneous records of the time they spend preparing an article.
- Authors can earn CLE credit for the actual number of hours spent researching and writing a qualifying article, but – quoting the court's Rule 795(d)(7)(iii) – "the maximum number of credits that may be earned during any two-year reporting period on a single publication is half the maximum CLE hours required for that reporting period." For the first two-year reporting period, the maximum for a single publication is 10 hours.
- Authors can only earn credits for the reporting period in which an article was published, regardless of when it was written.
- Republication of any article entitles to the author to no additional CLE credits unless he or she made substantial revisions or additions.

For more information, visit the MCLE Board's Web site at <http://www.mcleboard.org>. ■

First District finds waiver of right to force individual arbitration of class action claims

By John R. Schleppenbach

The United States Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion* was widely viewed as a significant development in arbitration law.[1] In that case, the court invalidated a California rule barring class-action waivers in arbitration agreements as inconsistent with the Federal Arbitration Act.[2] As a result, businesses could safely compel consumers to participate in arbitration of their individual claims as opposed to simply joining with thousands of others in a class action before a court.[3] Prior cases in California and some other states had often stricken these class-action waivers as unconscionable, highlighting their adhesive nature and their potential to prevent plaintiffs from seeking relief due to the high costs of individual litigation and the low damages generally involved.[4] Noting *Concepcion*'s apparent change to the law and the uphill battle a litigant might have faced in seeking to compel individual arbitration of a class action prior to that decision, a corporate litigant in the First District case of *Bovay v. Sears, Roebuck & Co.* recently argued that it had not waived its right to arbitrate by failing to assert it during approximately a decade of litigation.[5] The court rejected this contention, however, concluding that because the arbitration agreements were at least arguably enforceable at the time the lawsuits in question were initiated, the corporation's decision to litigate aggressively rather than assert a right to arbitration resulted in waiver.[6]

The *Bovay* matter consisted of several consolidated class actions brought by Sears credit card holders in 2001-2003 alleging that Sears had unlawfully disclosed their confidential data, including credit card numbers and account balances.[7] Each of the several Sears credit card agreements in effect during this period included an arbitration clause.[8] Despite this, however, Sears answered the plaintiffs' complaints and asserted affirmative defenses that did not include a claim that the suits were barred by the arbitration clauses.[9] Over the next several years, Sears filed motions to dismiss, opposed class certification, and participated in discovery, all without asserting a right to arbitration.[10] It was not until August 2011 that Sears moved to compel arbitration, arguing that the Supreme Court's then-recent decision in *Concepcion* had for the first time established that Sears had a right to compel arbitration of plaintiffs' individual claims and avoid class arbitration.[11] The plaintiffs responded that Sears had waived any right to arbitration by aggressively litigating for nearly a decade because it could not demonstrate that demanding arbitration would have been futile prior to *Concepcion*.[12] The trial court agreed with the plaintiffs and Sears appealed.[13]

The First District affirmed, starting from the proposition that although the FAA favors the enforcement of arbitration agreements, waiver of the right to arbitrate can be evidenced through a showing of (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.[14] As to the first element, Sears conceded that the plain language of the agreements gave it the right to demand arbitration, but it argued that it could not have successfully relied on those agreements to demand arbitration until after *Concepcion*.[15] The court rejected this argument, noting that the contracts were governed by Arizona law, which had not explicitly addressed the enforceability of class-action waivers at the time the lawsuits were initiated.[16] Although concurrent decisions in other states, including most notably California, had found such waivers enforceable, "[a]bsent controlling precedent foreclosing a right to arbitrate, a motion to compel arbitration will almost never be futile."[17] Indeed, Sears itself had successfully persuaded courts interpreting Arizona law in other jurisdictions to reject unconscionability arguments against the waivers around the same time these lawsuits had begun.[18] In light of this, Sears could not be heard to argue that it would have been futile to argue that it had a right to arbitrate.[19] The other two elements were even more straightforward; a decade of litigation was clearly inconsistent with the right to arbitrate and plaintiffs had been prejudiced by incurring substantial litigation expenses related to motion practice and discovery.[20] Thus, the court concluded

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that Sears had waived its right to arbitrate and that the trial court had therefore properly denied the motion to compel arbitration and stay the litigation.[21]

So although the Supreme Court's decision in *Concepcion* clarified that arbitration agreements with class-action waivers may be used to compel the individual arbitration of class action claims, Illinois litigants who have not previously asserted their right to arbitrate may find themselves unable to take advantage of this decision. Indeed, the First District's decision in *Bovay* should serve as a reminder to all litigants that the right to arbitration can only be preserved by asserting it, no matter how tenuous the claim of an entitlement to arbitration may seem to be. ■

John R. Schleppenbach is an Assistant Attorney General in the Criminal Appeals Division of the Illinois Attorney General's Office and a member of the ISBA's Alternative Dispute Resolution Section Council. Any opinions expressed in this article are solely Mr. Schleppenbach's and are not intended to reflect the views of the Illinois Attorney General's Office.

1. *See, e.g.,* Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 Or. L. Rev. 703 (2012); Jonathon L. Serafini, *The Deception of* Concepcion: *Saving Unconscionability After* AT&T Mobility LLC v. Concepcion, 48 Gonz. L. Rev. 187 (2012).
2. *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1753 (2011).
3. *See American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304, 2308 (2013).
4. *See, e.g. Discover Bank v. Superior Court,* 30 Cal. 4th 148, 160-61 (Cal. 2005), *abrogated by Concepcion,* 131 S. Ct. 1740; *Scott v. Cingular Wireless, Inc.,* 161 P.3d 1000, 1004 (Wash. 2007) (collecting cases).
5. 2013 IL App. (1st) 120789, ¶ 12.
6. *Id.* ¶ 39.
7. *Id.* ¶ 3.
8. *Id.* ¶¶ 4-6.
9. *Id.* ¶ 7.
10. *Id.* ¶¶ 8-11, 16.
11. *Id.* ¶ 12.
12. *Id.* ¶ 13.
13. *Id.* ¶¶ 16-17.
14. *Id.* ¶¶ 28, 30.
15. *Id.* ¶ 32.
16. *Id.* ¶¶ 43-45.
17. *Id.* ¶ 43.
18. *Id.* ¶¶ 46, 48, 53.
19. *Id.* ¶ 53.
20. *Id.* ¶¶ 59-64.
21. *Id.* ¶ 66.

ISBA—It's just the beginning

By Hon. Ann Breen-Greco

As part of the ISBA/Just The Beginning Foundation (JTBF) Law & Leadership Institute (LLI) at The John Marshall Law School in August 2013, ISBA members Sandra Crawford (Chicago Collaborative Law attorney) and Judge Ann Breen-Greco (Special Education Administrative Law Judge), current vice chair of the ISBA Alternative Dispute Resolution Section/council, were joined by Juliana Stratton, Executive Director, Cook County Judicial Advisory Council, to lead a discussion about alternative dispute resolution (ADR) with high school students ranging in grade levels from entering freshmen to graduating seniors about careers in the law. The students are generally invited to participate in this LLI program based on demonstrated leadership skills and come from many different schools around the City. Prior to the ADR discussion, the students were involved in a discussion on "Stand Your Ground" laws and the "Castle Doctrine."

After reviewing with the students the components of alternate dispute resolution model to traditional court process, including Restorative Justice and Peace Circles, Ms. Crawford, Ms. Stratton, and Judge Breen-Greco each led Peace Circles for the participating students to learn how to resolve conflicts in group settings. In one circle, the students initiated discussion on the Trayvon Martin case.

The Law & Leadership Institute (LLI) is a statewide initiative which assists students from backgrounds which are currently underrepresented in the legal profession to achieve academic success and aspire to a career in the law. Various opportunities exists around the state through the Just the Beginning Foundation (see, www.jbtf.org) for lawyers interested in getting involved to help the next generation decide if a career in law is a good fit. Information regarding how to donate time can be found on the JBTF site under "How to Get Involved." ■

National policy favoring class arbitration reaffirmed

By Mark Rouleau

In the intervening period since the Supreme Court decision in *Stolt-Nielsen S.A. v. Animal Feeds International,* 559 U.S. 662, 130 S. Ct. 1758 1767, 176 L. Ed. 2d 605, many courts and parties have been left wondering if arbitration on a class-wide basis could ever be sustained. Recently the Supreme Court answered this question preserving arbitration on a class basis.

In *Oxford Health Plans LLC v. Sutter*, 569 U.S. _____, 133 S. Ct. 2064, _____ L.Ed.2d _____ (2013), the United States Supreme Court "reaffirmed the national policy favoring arbitration in relation to class arbitration."[1] Upon consideration of the arbitration clause, the arbitrator decided that the contract, though silent as to the specific possibility of class arbitration, "on its face . . . expresse[d] the parties' intent that class arbitration can be maintained." Id. at ____, 133 S. Ct. at 2067.

"[T]he arbitrator focused on the text of the arbitration clause" (Slip op at 2) applying principles of contract interpretation "he concluded that 'on its face, the arbitration clause . . . expresses the parties' intent that class arbitration can be maintained.'" (Slip op at 2). The Supreme Court explained that in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* 559 U. S. 662 the parties "had entered into an unusual stipulation that they had never reached an agreement on class arbitration." (*Oxford Health Plans LLC, v. Sutter,* slip op at 6). The Court further quoting *Stolt-Nielsen* stated "("Th[e] stipulation left no room for an inquiry regarding the parties' intent"). Nor, we continued, did the panel attempt to ascertain whether federal or state law established a "default rule" to take effect absent an agreement." (slip op at 6).

In *Oxford Health Plans* the Court concluded:

> The contrast with this case is stark. In *Stolt-Nielsen*, the arbitrators did not construe the parties' contract, and did not identify any agreement authorizing class proceedings. So in setting aside the arbitrators' decision, we found not that they had misinterpreted the contract, but that they had abandoned their interpretive role. Here, the arbitrator did construe the contract (focusing, per usual, on its language), and did find an agreement to permit class arbitration. So to overturn his decision, we would have to rely on a finding that he misapprehended the parties' intent. But §10(a)(4) bars that course: It permits courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract, not when he performed that task poorly.

The Court found that because the parties "bargained for the arbitrator's construction of their agreement," the Court held that "an arbitral decision 'even arguably construing or applying the contract' must stand, regardless of a court's view of its (de)merits." Id. at ____, 133 S. Ct. at 2068 (quoting *Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist*. 17, 531 U.S. 57, 62, 121 S. Ct. 462, 466, 148 L. Ed. 2d 354 (2000)),. Thus, "the sole question" a court should ask under the exacting standards of § 10(a)(4) "is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Id. at ____, 133 S. Ct. at 2068. (See *S. Commc'n Servs., Inc. v. Thomas* (11th Cir., 2013) (confirming arbitrators award construing the arbitration clause to allow class arbitration and in certifying a class) see also *Wolf v. Sprenger* + *Lang*, PLLC (DC, 2013); *St. Mary's Med. Ctr. v. Int'l Union of Operating Eng'rs, Local 70* (D. Minn., 2013); and *White v. Valero Ref. New Orleans, LLC* (E.D. La., 2013)).

More broadly the recent decision in *Oxford Health Plans LLC v. Sutter*, expresses the very limited basis of judicial review of arbitration decisions under the Federal Arbitration Act, preventing the court from substituting its view of the proper interpretation of an arbitration agreement for that of the arbitrators. This case essentially holds that the parties by agreeing to arbitration the parties have bargained for an arbitrator's decision without regard to whether he "performed that task poorly" where the court should not act as a secondary or appellate review of the award. The Court emphatically found that under 9 USC §10(a)(4) a court has no business overruling an arbitrator because the court's interpretation of the contract is different from the arbitrators.

In light of the strong decisional authority upholding class action waivers in arbitration contracts (*AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 179 L. Ed. 2d 742 (U.S., 2011)) we should expect to see more class action waiver clauses in the standard boiler-plate contracts of adhesion used in many consumer transactions. ■

1. *S. Commc'n Servs., Inc. v. Thomas* (11th Cir., 2013)

The cost of arbitration

By Honorable Michael S. Jordan (Retired Judge), Mediation & Arbitration Services; Glenview, Illinois

Tenured teacher discharge grievances in Illinois are administered by the Illinois State Board of Education (ISBE) under the Illinois School Code that provides a panel of qualified hearing officers, (arbitrators), who are screened and sometimes trained but then selected by the parties, district by school district throughout the state with the respective unions or with private counsel. A court reporter is required and the transcripts, exhibits, and award are submitted to the ISBE as well as to the parties.

For cases brought before July 1, 2012, the ISBE paid the hearing officers for their time at sessions a daily fee or honorarium and an hourly fee for study. The amounts, ($37.50 per hour for study time), were well below the typical hearing officer's normal hourly rate as an arbitrator but the total amount budgeted and paid by the state each year for all such cases was costly, including the daily fee for actual arbitration sessions. As a result of budget cuts, due in great measure to the State of Illinois' near insolvency, the law administering these hearings was changed so that the fees and costs would no longer be born by the State. The parties would be equally responsible for the fees and costs of the arbitrator and the transcripts. Arbitrators and court reporters could charge their published rates as the market allowed. In most instances arbitrators are now charging the parties at rates many times greater than the State had been paying.

Neither the now unemployed discharged teacher nor the financially challenged school district facing tax caps on revenues, lower state subsidies, and taxpayers upset about costs are in a position to afford these new expenses. A large school district, like Chicago, could and does pre-select a limited number of arbitrators, (about 9), who agree to a rate established by the school district, but other districts are not in such a bargaining position not being able to assure an arbitrator of other work in exchange for a reduced rate. With the State Board of Education, pursuant to state law, requiring many elements of proof to establish due process and a basis to dismiss a tenured teacher, most discharge cases take several days to arbitrate.

After several days of hearings, parties being invoiced find a sense of financial realism and attempt settlement where possible. Sometimes a justly discharged teacher may be put back to work or an unjustly discharged teacher may remain discharged but with the costs, fees and other benefits provided by the school district. The result, unlike past experience, is that fewer cases will be going to hearing. In the long run, hearing officers with fewer cases will receive less revenue even with higher rates. A fully extended hearing to air all the issues will not be as common as it should be for all. Counsel may enter into stipulations to streamline cases that must be tried depriving the hearing officer of the full flavor of the case and its issues.

Had the decision to shift the fee payments from the State to the parties been based on social policy only, one could say this act was anti-labor or an effort to downsize government, but since it is more likely that the primary motive was fiscal - merely a means for cost savings for the State during hard financial times, we can only consider that someday the process might go back to the State of Illinois paying and paying at a more reasonable rate than it did before this change; but a sense of reality suggests that change in that regard is unlikely.

The excessive cost to fully try tenured teacher discharge cases is typical of many areas where arbitration is utilized. As more and more formality is exercised in the interests of due process, costs increase. At least, with tenured teacher discharge cases there is only one arbitrator. In many other venues, the rules require three arbitrators, where the costs may triple. Since there is no one entity setting the rules for every type of case being arbitrated, no simple solution is available. In fact, many arbitrators are hired on an ad hoc basis as disputes arise. In other circumstances, arbitrators are pre-selected for panels for disputes between parties as they arise. Parties may negotiate the rates down in return for repetitive business for the arbitrator with the same parties—typically an employer and a union. Where private counsel or advocates are used, such an arrangement is somewhat problematic. Parties then look to the published rate for the arbitrator.

Any experienced advocate or arbitrator knows that increasing costs are difficult to sell to the parties and the public so a challenge exists to think out of the box to manage the costs. No solutions are offered here, but solutions are invited for the many types of disputes ending up before a single arbitrator or a panel of arbitrators!

Disputes resolved by arbitration range from employment and labor disputes, uninsured and underinsured insurance disputes, commercial disputes, and securities disputes to name only a few. Some, like the discharge of tenured teachers are administered by state agencies, some like the discipline or discharge of railroad employees go through federal agencies, and others may be administered through private or public panels such as American Arbitration Association, FINRA, Federal Mediation and Conciliation Service, and the National Mediation Board. It might appear to be impossible to control costs administered or negotiated in so many ways, but the discussion should continue.

Before closing this subject here, it is noted that the professional arbitrator is entitled to just compensation for the time spent in assuring a fair hearing and a just result considering all the evidence and the body of law pertaining to the issues. The arbitrator needs all of the skills and abilities one would seek to have in a good judge together with an adherence to a high set of moral and ethical values. Also, one should not merely suggest that mediation—rather than arbitration—is the key to reduce costs since not every case is settled in mediation and not all public sector cases may be mediated for various public policy reasons. In spite of these significant considerations, we must address the rising costs of arbitration. ■

Case briefs

By Kyler Juckins, Jerremy Wiker, Brandon Sarkauskus, North Central College

Seventh Circuit issues decision regarding misbehavior during mediation

***Michael A. Benes, V. A.B. Data, Ltd.*, No. 13-1166 (Seventh Circuit, July 2013)**

Plaintiff Michael A. Benes filed suit against his employer A.B. Data Ltd., charging the firm with sex discrimination. Benes had been employed at A.D. Data Ltd., for four months at the time of the suit being filed. The EEOC arranged for a mediation to occur, in which after an initial group session, the parties separated and could respond to offers via a go-between. The respective parties (including attorneys and assistants) stay in their own rooms while the intermediary shuffles between rooms. Upon receiving a settlement proposal that he thought was too low, Mr. Benes stormed to the room that was being occupied by his employers representatives and said loudly: "You can take your proposal and shove it up your ass and fire me and I'll see you in court." A.B. Data accepted Benes's counterproposal and fired him an hour later. He replied with this suit under 42 U.S.C 2000e-3(a), the anti-retaliation provision of Title VII of the Civil Rights Act of 1964. Benes was the one who had dissolved the mediation session that was set for his original claim of sex discrimination. The judges in this case cannot see why misconduct during mediation must be consequence free. In no way was conduct like this accepted during Benes's employment at A.B. Data Ltd., nor was it accepted during mediation or court. The seventh circuit decided with the defendant. Title VII covers investigation and litigation in the same breath. 2000-3(a) does not create a privilege to misbehave in court, so the same goes for mediation in this case.

Pre-judgment interest on the non-contract damages portion of the arbitration award

***Zev Lagstein, M.D., V. Certain Underwriters at Lloyds of London, a foreign insurance entity*. No. 11-17369, 11-17460 (Ninth Circuit, August 2013)**

Dr. Zev Lagstein had become disabled after undergoing various different health reasons. Due to this Lagstein was unable to practice medicine any further. Lagstein then filed a claim under his disability insurance with Certain Underwriters at Lloyd's of London. Lloyds of London denied the claim after a two-year period, and Lagstein sued in the District Court for the District of Nevada. A motion of arbitration was granted to Lloyds of London, and from this Lagstein was awarded a total of 6 million dollars. Lloyds of London had the award dismissed. Lagstein appealed the dismissal to the Ninth Circuit, whom reversed and remanded with instructions to confirm the award. After confirming the award to Lagstein, he was denied his requested interest and attorney's fees. Lagstein appealed this, where Lloyds of London cross-appealed for a "return of overpayment to Dr. Lagstein." The Ninth Circuit found the Dr. Lagstein was entitled to post-award, pre-judgment interest citing a 1994 Nevada case *Mausbach v. Lemke*. The Nevada Supreme Court ruled that courts are permitted "to award post-award, pre-judgment interest on the non-contract damages portion of the arbitration award from the date of the awards through the date of the payment." Lagstein was entitled to collect, and the panel found the same conclusion. As to an alleged over payment, the panel found that the first arbitration award "provided for interest on the contract damages through the date of payment", and the later award had not changed that.

Appeal to overturn Arbitrators decision due to excessive authority and decertification of a union

***Lees Summit Medical Center v. Nurses United for Improved Patient Care*, CAN/NNOC No. 12-2229 (Eighth Circuit, February, 2013)**

Plaintiff Lee's Summit Medical Center terminated registered nurse Gwynn Pirnie after receiving a complaint from an emergency room patient. Pirnie's union (Nurses United for Improved Patient Care) filed a grievance on Pirnies behalf under the collective bargaining agreement the union shared with Lee's Summit. The union had stated the hospital has lacked "just cause" in the ruling of Pirnies termination. The two parties were unable to resolve the issue, so the union submitted issues for binding arbitration. Issue being whether Lee's Summit has just cause for termination. Nearly one year after Pirnies termination, and two weeks before the arbitration hearing, the National Labor Relations Board decertified the union after is disclaimed interest in Pirnies bargaining unit. The hearing continued as planned. After the arbitrator issued the final decision, finding that Lee's Summit lacked just cause to terminate and ordered Pirnie be reinstated with back pay from the date of termination. Lee's Summit filed a declaratory judgment action under Section 301(c) of the Labor Management Relations Act, 29 U.S.C. 185 (c), seeking to vacate the arbitration award. The arbitrator's decisions are virtually unreviewable, but in an action to vacate the award, Lee's Summit argues the arbitrator "exceeded his authority." Using an example from the case of *United Steelworkers v. Enterprise Wheel & Car Corp*., (1960) and *Van Waters & Rogers Inc., v. Int'l Bhd. Of Teamsters* (1995) an arbitrator may award reinstatement and back pay after the governing CBA expired, as long as the arbitrator applied the CBA and not just implying his own thoughts of justice. Furthermore, Lee's Summit argued that when the union became decertified, Pirnie lost all rights under the CBA, causing her to lose her reinstatement and back-pay that was awarded during arbitration. This was not the case. Lee's Summit provided no evidence that, following the CBA's expiration, the terms and conditions of employment were changed for an at will employee. The court finds that the arbitrator exercised correct authority. The judgment of the district court is affirmed.

Arbitration Forum Selection

***Green v. U.S. Cash Advance Illinois, LLC, and Title Loan Company both doing business as The Loan Machine*, No. 12 C 8079 United States Court of Appeal for the Seventh Circuit July 30, 2013**

Plaintiff Green sued under the Truth in Lending Act, §15 U.S.C. 1606, claiming that the defendant misstated Green's loan's annual percentage rate. As part of the loan agreement, the lender requested arbitration which referred to "binding arbitration by one arbitrator by and under the Code of Procedure of the National Arbitration Forum." The Forum has not accepted new consumer cases since 2009, while the arbitration agreement was signed in 2012. The defendant requested that the court appoint a new arbitrator, but

the court declined, stating that the agreement to the Forum was an integral portion of the agreement. The Seventh Circuit reversed, holding that the agreement was to use the Forum's Code of Procedure, and not the actual Forum itself.

Arbitration Jurisdiction

***CMH Homes, Inc.; Vanderbilt Mortgage & Finance, Inc., v. Thomas R. Goodner; Linda Goodner*, No. 12-3381 United States Court of Appeals for the Eighth Circuit September 5, 2013**

Plaintiffs filed a putative class action law suit against CMH Homes and Vanderbilt Mortgage and Finance, claiming that the companies violated Arkansas Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-101 et seq. and the Arkansas Unfair Practices Act, Ark. Code Ann. § 4-75-201 et seq. The companies filed a petition in district court, claiming that the plaintiffs' claims were subject to mandatory arbitration, due to a provision in the original purchase contract. The plaintiffs requested the court dismiss the petition due to a matter of subject jurisdiction. The district court granted the plaintiffs' motion to remand and dismissed the petition to compel arbitration, concluding that federal jurisdiction question did not exist and that the amount in controversy was short of the required minimum amount in controversy in order to exact jurisdiction. The court concluded that the district court correctly interpreted the precedent set by *Vaden,* and remanded for the district court to settle on an amount in controversy and determine jurisdiction on those grounds.

Sanctions in the Context of Arbitration

***Pius Awuah, et al., and all others similarly situated, v. Coverall North America, INC.*, No. 12-2495 United States Court of Appeals for the First Circuit August 30, 2013**

The plaintiff in the case is a franchisee of the defendant, the franchisor. After the plaintiff brought suit against the defendant, the district court certified a class which excluded those franchisees whose agreements with the defendant, franchisor, requires mandatory arbitration. The arbitrator imposed a stay of arbitration on a number of franchisees. However, the district court later concluded that the defendant had violated an order which required it to obtain judicial permission before making any motion to delay or prevent arbitration. The district court sanctioned the defendants by admitting the previously excluded franchisees to the class, which relieved them of their duty to arbitrate. The defendant then filed a motion to reconsider the sanction and to hold the franchisees' judicial proceedings pending arbitration. The First Circuit Court of Appeals reversed, holding that the district court's determination that defendant violated the order was an abuse of discretion; and therefore, there was no grounds for a sanction. The First Circuit Court of Appeals affirmed defendant's motion to stay arbitration should have been granted.

Enforcement of Arbitration Agreement

***Richard Grosvenor v. Qwest Corporation; Qwest Broadband Services, INC*, No. 12-1095 United States Court of Appeals Tenth Circuit August 14, 2013**

Defendant, Qwest Corporation, sought to appeal a district court order granting partial summary judgment. After plaintiff filed a putative class action law suit, defendant moved to compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq. The district court denied defendant's motion, and scheduled a trial to determine whether the parties had reached an agreement to arbitrate. After both parties moved for partial summary judgment, the district court granted both motions in a single order. The district court concluded that although the parties had entered an agreement, the agreement was illusory and unenforceable. Upon appeal to this Court, defendant argued that the Court had the jurisdiction to review the district court's order. The Court found that the defendant did not satisfy the FAA's criteria, by either staying arbitration and/or compelling arbitration; therefore the Court dismissed the defendant's appeal because of a lack of appellate jurisdiction. ■

Happenings

By Jon Kingzette, North Central College

Detroit and Its Creditors Taking the Mediation Route

On September 17th Federal Judge Gerald Rosen opened formal mediation between the city of Detroit and its creditors. As the city is trying to declare bankruptcy for its $18 billion debt through litigation, the case between Detroit and its creditors will be settled outside of the courts. Rosen stated that reaching a settlement would prevent years of litigation in courts, and implied mediation would save stress for both parties as well. Among the mediators trying to bring about this settlement are U.S. District Judge Victoria Roberts of Detroit, U.S. Bankruptcy Judge Elizabeth Perris of Oregon, U.S. District Judge Wiley Daniel of Denver, former U.S. Bankruptcy Judge David Coar of Illinois, and Eugene Driker, a Detroit-area attorney.

Occupational Safety and Health Review Commission Expanding ADR Program

In 1999, the Occupational and Health Review Commission began an ADR program at the trial level, called the Settlement Part program. This program combines both mandatory and voluntary procedures to encourage case settlement. In this program, the ADR process begins with a law judge acting as a settlement judge attempting to reach a settlement before litigation. If a settlement was not reached at this step, then an administrative law judge that did not act as settlement judge issues a decision on cases. These decisions may be appealed to Commissioners at the review level. Currently, there is no ADR program at this review level. However, after Indiana University conducted a study which deemed the Settlement Part program a success at the judges' level, the expansion of the ADR program at the review level is being strongly considered. The Commission is currently seeking public input to determine how the program should develop, and if it should at all.

Minneapolis Musicians Move Forward with Mediation

George J. Mitchell, an ex-senator from Maine, has acted as a mediator in a contract dispute between the Minnesota Orchestra players and management. September 15th was the deadline for the dispute, but by that date the players and management had still not come to an agreement, and a lockout is still in effect. However, both parties are willing to continue with negotiations, even after the deadline has passed. Players' spokesman Blois Olson stated that "the other side had returned to the mediation process" but there was still a "long way to go," before a deal could be reached. The players, in response to not being able to reach an agreement, have planned their own fall season of shows. Unfortunately, management cannot so easily recover from the failure of mediation. Osmo Vanska, the orchestra's music director, claimed that he would resign if a deal was not made by September 30th.

Conference to Explore Alternative Means of Solving Patent Disputes

On October 4th, there will be a symposium and CLE on resolving patent disputes. Contested patent cases now regularly exceed $10,000,000 in litigation costs. This conference is designed to help businesses find alternative means of settling disputes without turning to litigation. The conference also looks to explore how disputes can be transformed into cooperative business arrangements. University of Missouri's Center for the Study of Dispute Resolution will host the event. ■

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

November

Friday, 11/1/13- Teleseminar—UCC 9: Lien Foreclosure & Remedies. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 11/5/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Tuesday, 11/5/13- Teleseminar—Treatment of Trusts in Marital Separation. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 11/5/13- Live Webcast, ISBA Studio—Children and Trauma; A Guide for Attorneys. Presented by the ISBA Child Law Section. 11-12.

Tuesday, 11/5/13- Live Webcast, ISBA Studio—2013 Immigration Law Update-Changes which Affect Your Practice & Clients. Presented by the ISBA International & Immigration Law Section, ISBA Young Lawyers Division and the ISBA General Practice, Solo and Small Firm Section. 1:00-2:00.

Thursday, 11/7/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Thursday, 11/7/13- Teleseminar—Transfer, Sales & Use Taxes in M&A. Presented by the Illinois State Bar Association. 12-1.

Friday, 11/8/13- Chicago, ISBA Regional Office—Successfully Navigating Civil Litigation Evidence and Theory Involving Topics of Expert Testimony. Presented by the ISBA Civil Practice & Procedure Section. 8:50-4:00.

Tuesday, 11/12/13- Teleseminar—Estate Planning and IRAs. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/13/13- Live Webcast—Marketing and Networking Strategies. Presented by the ISBA Committee on Law Office Management and Economics. 2:30-3:30.

Thursday, 11/14/13- Chicago, ISBA Regional Office—SETTLE IT!- Resolving Financial Family Law Conundrums. Presented by the ISBA Family Law Section and the ISBA Alternative Dispute Resolution Committee. 8-5.

Thursday, 11/14/13- Springfield, INB Conference Center—Drug Case Issues and Specialty Courts. Presented by the ISBA Criminal Justice Section. 9-4.

Friday, 11/15/13- Chicago, ISBA Regional Office—Collection Issues You Don't Know About…But Should. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section. 9-4:30.

Monday, 11/18/13- Teleseminar—LIVE REPLAY: Ethics, Virtual Law (from 8/15/13). Presented by the Illinois State Bar Association. 12-1.

Tuesday, 11/19/13- Teleseminar—Estate Planning for the Elderly, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/20/13- Teleseminar—Estate Planning for the Elderly, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 11/20/13 – Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Friday, 11/22/13- Chicago, ISBA Regional Office—Drug Case Issues and Specialty Courts. Presented by the ISBA Criminal Justice Section. 9-4.

Monday, 11/25/13- Teleseminar—LIVE REPLAY: Corporate Governance for Nonprofits (from 7/11/13). Presented by the Illinois State Bar Association. 12-1.

Tuesday, 11/26/13- Teleseminar—Indemnification and Hold Harmless Provisions in Business Agreements. Presented by the Illinois State Bar Association. 12-1.

December

Tuesday, 12/3/13- Teleseminar—2013 Fiduciary Litigation Update. Presented by the Illinois State Bar Association. 12-1.

Thursday, 12/5/13- Teleseminar—Mergers and Buyouts of Closely Held Businesses, Part 1. Presented by the Illinois State Bar Association. 12-1.

Thursday, 12/5/13- Chicago, ISBA Regional Office—Civility in the Courtroom. Presented by the ISBA Bench and Bar Section. 1-5.

Friday, 12/6/13- Teleseminar—Mergers and Buyouts of Closely Held Businesses, Part 2. Presented by the Illinois State Bar Association. 12-1.

Friday, 12/6/13- Chicago, ISBA Regional Office—Medical Cannabis in Illinois. Presented by the ISBA Health Care Section. 9:30-11:30.

Friday, 12/6/13- Live Webcast—Medical Cannabis in Illinois. Presented by the ISBA Health Care Section. 9:30-11:30.

Tuesday, 12/10/13- Teleseminar—Multi-Family Development and Management Agreements. Presented by the Illinois State Bar Association. 12-1.

Thursday, 12/12/13- Chicago, Sheraton Hotel (Midyear)—Speaking to Win: Building Effective Communication Skills. Master Series presented by the ISBA. 8:30-11:45.

Thursday, 12/12/13- Chicago, Sheraton Hotel (Midyear)—Legal Writing in the Smartphone Age. Master Series presented by the ISBA. 1:00-4:15.

Tuesday, 12/17/13- Teleseminar—Joint Ventures in Business, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 12/18/13- Teleseminar—Joint Ventures in Business, Part 1. Presented by the Illinois State Bar Association. 12-1.

Thursday, 12/19/13- Teleseminar—Attorney Ethics and Alternative Fee Arrangements. Presented by the Illinois State Bar Association. 12-1.

Friday, 12/20/13- Teleseminar—Incentive Compensation in LLCs and Partnerships. Presented by the Illinois State Bar Association. 12-1. ■

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