

# **“Recent Developments in Alternative Dispute Resolution”**

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**by**

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## **Summary**

**This seminar examines the continuing explosion of case law on arbitration and mediation from the Supreme Court of the United States, the Eighth Circuit Court of Appeals, and Missouri’s appellate courts. The vast majority of the cases are from the year 2002 to present. They generally are listed within each topic group from newest to oldest. There are exceptions, however. While the courts continue to favor arbitration, there are rare instances noted herein where the court found that an arbitrator overstepped his or her authority.**

## **Topics:**

- 1. Arbitration Remains Fashionable**
- 2. Large Arbitration Award**
- 3. Applicable Law (the Federal Arbitration Act or State Law)**
- 4. The Agreement to Arbitrate**
- 5. Standard of Review by the Appellate Court**
- 6. Jurisdiction (Courts and the Arbitration Tribunal)**
- 7. Venue**
- 8. Waiver of Arbitration**
- 9. Punitive Damages**
- 10. Attorney and Arbitrator Fees**
- 11. Enforcing, Upholding and Vacating Arbitration Awards**

12. Class Action Lawsuits and Arbitration
13. Replacing an Arbitrator
14. Unlawful Delegation to an Arbitrator
15. *Res Judicata*, Collateral Estoppel and Evidence in Subsequent Proceeding
16. Mediation
17. No Private Cause of Action against Arbitration Tribunal
18. Non-Signatory to the Arbitration Agreement

#### 1. Arbitration Remains Fashionable

U.S. Supreme Court: In a very recent court case, *Kansas v. Colorado*, 125 S. Ct. 526 (2004), decided December 7, the Supreme Court considered a long-running water dispute between Colorado and Kansas. Specifically on appeal, the Court was asked to consider among other items a request by Kansas to the Special Master for the case to recommend that the Supreme Court appoint a River Master with authority to decide various technical disputes between the parties. The Supreme Court concluded that the need for a River Master was diminished by the fact that the parties might find it “possible to resolve future technical disputes through arbitration.” The Court went on to note that the Interstate Compact provided a mechanism for arbitration. Further, in oral argument, counsel for both Kansas and Colorado expressed a willingness to consider arbitration. “These comments suggest that neither party opposes arbitration, and indeed the Colorado would accept it. Nor have the parties expressed any opposition to the use of other less formal means to resolve disputes, such as joint consultation with experts, negotiation and informal mediation....The Special Master recommended both binding arbitration and these other less formal methods as alternatives, while opposing appointment of a River Master in observing that such an appointment would ‘simply’ make it ‘easier to continue this litigation.’” *Id.* at 534.

The Supreme Court accepted the Special Master’s recommendations. Further, “the Special Master also recommended that experts for the two parties confer...and he expressed the hope that expert discussion, negotiation, and if necessary binding arbitration, would lead to resolution of any remaining disputes...We express that hope as well.” *Id.* at 540.

## 2. Large Arbitration Award

**Missouri Appellate Court:** Some arbitration awards are becoming sizable. The myth that only juries and some judges will award sizable compensation is just that, a myth. A dramatic, recent example is *Neel v. Strong*, 114 S.W.3d 272 (Mo. App. E.D. 2003). This is the tobacco litigation. The State of Missouri, the tobacco companies and the lawyers agreed that the fees of the counsel for Missouri would be paid by the tobacco companies and that the amount of the fees would be set by binding arbitration. Arbitration set the attorney fees at \$111,250,000.00, payable over 25 years. That comes to \$4,450,000 per year.

## 3. Applicable Law (the Federal Arbitration Act or State Law)

**U.S. Supreme Court:** The Federal Arbitration Act (FAA), Title 9, U.S. Code, §§ 1-15, controls arbitrations that involve interstate commerce. Otherwise, state law controls. The United States Supreme Court recently added even more reach to the already lengthy arms of the FAA. In *The Citizens Bank v. Alafabco, Inc.*, 123 S. Ct. 2037 (2003), the high court decided recently to reinforce a very broad definition of what activity constitutes interstate commerce in connection with an arbitration.

The Court held that the FAA covers a transaction of debt restructuring that occurred within the State of Alabama, in part because the general practice of the bank in question otherwise “involved” interstate commerce in a substantial way. The Supreme Court rejected the argument that a transaction between citizens of the same state could not involve interstate commerce.

The Court found compelling that Alafabco engaged in business in other states using loans from The Citizens Bank, and that the debt was secured by all of Alafabco’s inventory including goods assembled from out-of-state parts, and that commercial lending has a broad impact on the national economy. In reaching this result, the Supreme Court granted a petition for writ of certiorari and reversed the Supreme Court of Alabama.

**Missouri Appellate Court:** The Eastern District of Missouri recently gave some further direction on how it harmonizes arbitrations when both the FAA and Missouri’s Arbitration Act could apply to the dispute. In *Clayco Const. Co., Inc. v. THF Carondelet Dev., L.L.C.*, 105 S.W.3d 518 (Mo. App. E.D. 2003), the Court noted that the parties agreed that the FAA was applicable.

“We are bound to apply federal law and may not apply substantive or procedural state law which is in derogation of federal law.” The Court further noted, however, that it is “not bound by the procedural provisions of the FAA, provided that Missouri’s procedures do not defeat the rights granted by Congress.”

#### 4. The Agreement to Arbitrate

**The Eighth Circuit:** The Eighth Circuit recently concluded that a letter from counsel responding to a request for an arbitration that stated that this was a “workable process for resolving this dispute” and further requested a discussion of “the ground rules for arbitration” was sufficiently binding to create an agreement to arbitrate. The case is *Asia Pacific Industrial Corp. v. Rainforest Café, Inc.*, 380 F.3d 383, 386 (8<sup>th</sup> Cir. 2004). Rainforest had contacted Asia Pacific Industrial Corporation to find a suitable franchisee to open Rainforest restaurants in Asia. After finding a suitable person and Rainforest having opened restaurants in Asia, Rainforest granted Ashok Kothari, who acted on behalf of Asia Pacific Industrial Corporation, stock in the franchisee restaurants. A dispute arose when Kothari claimed that Rainforest had agreed to pay an additional one million dollars for finding the franchisee. Rainforest responded that there was no agreement and that a stock grant already received was sufficient compensation.

Kothari and Asia Pacific brought an action for breach of oral contract in federal court. They then moved, pursuant to 9 U.S.C. §§ 1-16 (2000), Federal Arbitration Act, for a stay of the federal proceedings and a request to compel arbitration. The federal district court granted the motion, and after the arbitrator awarded Kothari \$200,000.00, the district court then confirmed the award. On appeal, Rainforest argued that the district court erred in concluding that the parties had entered into an arbitration agreement merely through their written letter communications.

The Eighth Circuit noted that it applies ordinary state law contract principles in deciding whether parties have agreed to arbitrate a particular matter, “giving healthy regard for the federal policy favoring arbitration”. *Id* at 385. The Eighth Circuit, reviewing the matter *de novo*, concluded that an early letter in June, 2000 was enough to create a binding agreement to arbitrate when the letter contained the following:

Lyle [Berman] asked me to review this file and to respond to your request for an arbitration. We believe that an arbitration in Minneapolis would be a workable process for resolving this dispute and as such have turned it over to our counsel,

William Pentelovitch...Please provide me with the name and number of your counsel so we can discuss the ground rules for arbitration. I believe it is in all of our interests to keep expenses to a minimum.

*Id* at 386. The Eighth Circuit concluded: “In our mind, any reasonable person reading the June, 2000 letter in context would conclude Rainforest and Mr. Kothari had agreed to arbitration and it only remained for the lawyers to sort out the details.” *Id*. The Eighth Circuit rejected an argument that a subsequent letter changing one of the parties to the agreement from Kothari to Asia Pacific Industrial Corporation showed there was no agreement. This was “at most a request to modify the contract” as the previous letter clearly indicated that the parties “were already bound by the arbitration agreement.” *Id* at 386-87.

Recently, many litigants have been attacking arbitration agreements by arguing that they do not allow the arbitrator to award all relief that could be available in a court of law, and thus the agreement is not enforceable. “Whether the Agreement validly limits the arbitrator’s remedies for an AFPA violation does not affect the validity of the agreement to arbitrate. Rather, issues of remedy go to the merits of the dispute and are for the arbitrator to resolve in the first instance.” *Arkcon Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002).

This decision reaffirms that the courts have been resolving doubts about arbitration in favor of arbitration, even when the agreement may attempt to limit statutory rights to certain claims. *Id.* at 538. The federal courts continue to voice confidence in arbitrator decisions and to offer solid recognition for the authority of arbitrators to adjudicate disputes.

In 2001, the Eighth Circuit decided, contrary to precedent from other jurisdictions, in two different cases that a court’s role in the arbitration process is limited to determining whether a valid agreement to arbitrate exists. Once this is resolved, the arbitrators will decide “all other issues” including matters that typically fall within the court’s purview, such as whether the parties’ agreement, which excludes recovery of punitive damages, violates public policy and is unenforceable.

The cases are *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083 (8<sup>th</sup> Cir. 2001) and *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8<sup>th</sup> Cir. 2001).

- “At this juncture, our jurisdiction extends only to determine whether a valid agreement to arbitrate exists,

not to determine whether public policy conflicts with the remedies provided in the arbitration clause.” *Werries* at 1086.

- “Our role in determining whether a court should compel arbitration is limited. We must determine simply whether the parties have entered a valid agreement to arbitrate and, if so, whether the existing dispute falls under the coverage of the agreement...Once we conclude that the parties have reached such an agreement, the FAA compels judicial enforcement of the arbitration agreement.” *Gannon* at 680.

The Eighth Circuit also decided that an arbitration agreement is important enough that it remains viable and enforceable after an employee no longer works for the employer and their agreement has terminated. The case is *Lyster v. Ryan’s Family Steak Houses*, 239 F.3d 943 (8<sup>th</sup> Cir. 2001).

In this case, the agreement provided that all potential claims that an employee may have against his or her employer, which otherwise could have been pursued in state or federal court, had to be arbitrated. The court broadly construed this arbitration agreement to allow arbitration even when the employee did not follow the requirements for claim submission with the Equal Employment Opportunity Commission (EEOC) or the Missouri Commission on Human Rights (MCHR). The failure to follow these requirements may have provided strong legal defenses in a court of law, but they carried no weight in deciding whether the dispute was subject to arbitration. Consequently, any further arguments along these lines would have to be presented to and decided by the arbitrator.

In *In re Arbitration Between Dow Corning Corp. v. Safety National Casualty Corp.*, 335 F.3d 742 (8<sup>th</sup> Cir. 2003), the Eighth Circuit held that when the arbitration agreement does not expressly state in some manner that the award shall be “final and binding” or incorporate by reference the “rules of the American Arbitration Association or a similar arbitral body,” then the arbitration is not binding and litigation after the award can take place. The court could not locate any federal case “in which an arbitration agreement entirely silent on this question was construed as providing for binding arbitration.” *Id.* at 746.

Missouri Appellate Court: While courts will broadly construe what matters are subject to arbitration, if a particular dispute falls outside of or is excluded from the agreement to arbitrate, a court will not hesitate to conclude that such a dispute is not subject to arbitration. A recent

example is *Bakery, Confectionary, Tobacco Workers and Grain Millers, Local 100G v. Penford Products Co.*, 2004 WL 1811898 (8<sup>th</sup> Cir. (Iowa)). In this case, a union argued that its collective bargaining agreement with Penford required arbitration of a grievance filed on behalf of a member that Penford refused to allow to return to work after she had resigned. Two months after her resignation, she claimed that her resignation was due to some irrational behavior caused by an unspecified illness. The Eighth Circuit concluded in support of the federal district court's ruling that the grievance did not present an arbitrable dispute. In particular, the Eighth Circuit found that the collective bargaining agreement provided for arbitration of any matter that "relates to the interpretation or application of the provisions of the [collective bargaining agreement]." The court determined that the Union's primary grievance relating to an employee's competence to offer a resignation "does not plausibly involve interpretation or application of the provisions of the [collective bargaining agreement]." *Id* at \*1.

Nowhere has arbitration been under more attack recently than by parties who assert that they did not execute an agreement to arbitrate and thus they cannot be forced against their will into this forum for dispute resolution when they prefer traditional litigation. Construction projects, in particular, seem to involve this issue since there are so many parties necessary to begin and complete the job and thus there are many layers of agreements. This leads to the practice of referring to other contracts, both to save time in repeating obligations and to make certain that multiple parties have the same obligations.

When a contract refers to another contract, and the referenced contract contains an arbitration provision, it is quite possible that the parties have agreed to binding arbitration even though it was not specifically discussed in the body of the main contract between the two parties.

In *Dunn Industrial Group, Inc. v. City of Sugar Creek and Lafarge Corp.*, 112 S.W.3d 421 (Mo. 2003), the Missouri Supreme Court concluded that a mere reference to another contract that contained a binding agreement to arbitrate was not enough, however, especially since the party resisting arbitration had been consistently resolute in its opposition throughout the process of litigation and arbitration. Instead, there must be a specific incorporation by reference to the contract in question.

Of further note, the Supreme Court of Missouri also stated: "in a majority of state courts, including Missouri, due to the strong federal policy in favor of arbitration, arbitration agreements are enforced against guarantors or sureties where the arbitration agreement is incorporated by reference into the guaranty or performance bond." *Id.* at 435.

*Dunn* also discussed the two kinds of arbitration provisions: those that are broad and require arbitration of everything and those that are narrow and limit arbitration to certain, predetermined issues. The court decided that the contract provision requiring arbitration of “any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Rules of the American Arbitration Association” included claims for extra work, changes in the scope of work and mechanic’s lien claims. *Id.* at 428.

#### 5. Standard of Review by the Appellate Court

Missouri Supreme Court: In *Dunn Industrial Group, Inc. v. City of Sugar Creek, Mo.*, 112 S.W.3d 421 (Mo. 2003), the Missouri Supreme Court stated that an “appellate court’s review of the arbitrability of a dispute is *de novo*.” *Id.* at 428, citing *Fru-Con Constr. Co. v. Southwestern Redevelopment Corp.*, 908 S.W.2d 741, 743-44 (Mo. App. E.D. 1995). It also applies the usual rules of contract interpretation.

#### 6. Jurisdiction (Courts and the Arbitration Tribunal)

U.S. Supreme Court: In *Pacificare Health Systems, Inc. v. Jeffrey Book*, 123 S. Ct. 1531 (2003), the Supreme Court reaffirmed that courts can decide in the first instance any “gateway” question of arbitrability. The Court has decided, however, to place a “limited scope” on the phrase ‘question of arbitrability.’ *Id.* at 1536.

Accordingly, the Supreme Court has limited judicial inquiry about whether the parties are subject to arbitration to narrow circumstances “where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate,” quoting from *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) (Slip op. at 4).

Applying this test, the Supreme Court deferred to an arbitrator the decision whether arbitration agreements were legal and enforceable that prohibited punitive and exemplary damages when the claimant’s claim included treble damages under RICO. “Given our presumption in favor of arbitration...we think the preliminary question whether the remedial limitations at issue here prohibit an award of RICO treble damages is not

a question of arbitrability.” *Id.* at 1536. Thus, the arbitrator will decide this issue.

In *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002), the U.S. Supreme Court held that the timeliness of an arbitration was subject to decision by an arbitrator rather than a court, thereby reversing the Tenth Circuit. The case focused on a rule of the National Association of Securities Dealers (NASD), which provided that no dispute “shall be eligible for submission to arbitration ... where six (6) years have elapsed from the occurrence or event giving rise to the ...dispute.”

The court stated that the question whether the parties have submitted a particular dispute to arbitration, the “question of arbitrability,” is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise. This is the “gateway question.”

The time-limit rule, the Court concluded, is not a question of arbitrability, but rather it is a prerequisite such as notice, laches, estoppel and other conditions precedent to an obligation to arbitrate, and as such, it is a matter for the arbitrator to decide. “Moreover, the NASD arbitrators, comparatively more expert about their meaning of their own rule, are comparatively better able to interpret and to apply it.” *Id.* at 592.

In other words, the Supreme Court has deferred to the expertise of arbitrators, over its own lower-court judges, to resolve the dispute. Consequently, “parties to an arbitration contract would normally expect a forum-based decision maker to decide forum-specific procedural gateway matters.” *Id.* at 593.

**Eighth Circuit:** In *Pinnavaia v. National Arbitration Forum, Inc.*, 2004 WL 2805798 (8<sup>th</sup> Cir. 2004), the Eighth Circuit in a case of first impression held: “In keeping with the other circuits that have addressed the issue, we hold that 9 U.S.C. §10 does not provide an independent jurisdictional basis for filing suit in federal court.” Therefore, there must be independent federal jurisdiction to bring a cause of action in federal court, typically requiring either federal question jurisdiction or citizenship diversity. Without one of these, a district court lacks subject matter jurisdiction.

In a very recent case, the Eighth Circuit offered a lengthy analysis of the circumstances when a court or an arbitrator will decide various disputes regarding arbitration. The case is *International Brotherhood of Electrical Workers, Local Union Number 545 v. Hope Electrical Corp.*, 380 F.3d 1084 (8<sup>th</sup> Cir. 2004). The underlying dispute involved a company and a union. Their disputes included an allegation that the

Union abused the blocking charge policy as a “union tactic” to delay a board-monitored de-certification vote.

Hope Electrical asserted before the federal district court and on appeal a variety of points in opposition to Local 545’s motion for summary judgment and in support of its own motions, including a motion to vacate the arbitration award. The arguments included that the district court did not have jurisdiction to enforce the arbitration award because the Federal Arbitration Act governs labor contracts and whether the arbitration tribunal (Council Industrial Relations) had jurisdiction to consider the arbitration.

The Eighth Circuit’s discussion of the three types of challenges to an arbitrator’s authority is most noteworthy. The challenges are jurisdictional challenges of a procedural nature, jurisdictional challenges of a substantive nature, and challenges that relate to the merits of the arbitrator’s decision. *Id.* at 1098.

The court concluded that jurisdictional challenges of a procedural nature relate to whether the party who seeks arbitration and the arbitrators themselves abide by the procedural safeguards set forth in the collective bargaining agreement and in the rules of the arbitral body. As to these disputes, the Eighth Circuit stated: “We refuse to address issues of procedural arbitability even in the context of a motion to compel, and, instead, defer to the authority of the arbitrators to decide such issues.” *Id.* at 1099.

Substantive jurisdictional challenges revolve around whether the underlying agreement itself was sufficient to authorize arbitration. The court itself will consider these challenges. They relate to such items as whether the parties actually entered into the agreement to arbitrate.

By contrast, challenges to the actual decisions made by an arbitrator are typically not entertained by a court. “We refuse to enforce arbitration awards only where the awards do not draw their essence from the parties’ underlying agreements, and ‘in determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed with all doubts resolved in favor of the arbitrator’s award.’” *Id.* at 1100. The court went on to explain that this “highly deferential level of review places the merits of arbitable issues squarely in the province of the arbitrators themselves and reflects a congressional desire to promote efficient resolution of industrial disputes.” *Id.* at 1101.

The court also addressed circumstances and ways that a party can preserve its objection to rulings of an arbitrator, including whether an arbitrator has jurisdiction to consider a particular dispute. The court’s

analysis is helpful and should serve as a reference in future disputes on this subject. The Eighth Circuit stated that the party that opposed an arbitration could 1) object to the arbitrator's authority, refuse to argue the arbitrability issue, and proceed to the merits of the agreement; 2) seek declaratory injunctive relief from a court prior to commencement of arbitration; or 3) notify the arbitrators of a refusal to arbitrate altogether. *Id.* at 1101. Of great significance, the court held as follows:

Where, as in the present case, the underlying agreement does not grant arbitrators the authority to decide jurisdictional issues, it would be a harsh result to hold jurisdictional challenges waived by a failure to present the jurisdictional issue to the arbitrators. At least in this case, with no contract language expressly granting arbitrators the authority to decide substantive jurisdictional challenges, then, presentation and preservation of the issue before the courts is sufficient because only the courts are empowered to decide the issue of arbitrability under the circumstances.

*Id.* at 1103. The court went on to caution, however, that it “remains risky and ill-advised to fail to register an objection to arbitration at every possible stage, fail to seek declaratory or injunctive relief, or fail to participate in arguments on the merits of the grievance. An appearance before an arbitration panel for the limited purpose of contesting jurisdiction or to participate on the merits while preserving an objection to jurisdiction, does not confer jurisdiction.” *Id.* The court went on to state that this position related not only to matters of labor arbitration, but also arbitration under the Federal Arbitration Act.

The Eighth Circuit upheld the district court's decision to enforce the arbitration award.

In *Madol v. Dan Nelson Automotive Group*, 372 F.3d 997 (8<sup>th</sup> Cir. 2004), the Eighth Circuit reversed a district court's order allowing for more discovery in a dispute about whether the parties were subject to arbitration. One of the parties had argued the arbitration agreement was unconscionable. Initially, the matter had been resolved by a magistrate judge who determined that the parties had entered into a valid agreement to arbitrate and thus granted a motion to compel arbitration and a stay of the court proceedings.

The dispute then went to the federal district court level where the parties disagreed over the standard of review that a federal district court has in reviewing a magistrate judge's order and whether the district court had

authority to allow discovery and receive further evidence based on its perception that the record had been insufficiently developed. The Eighth Circuit held: “whatever type of review the district court was supposed to conduct, it erred in setting aside the magistrate judge’s order so that it should receive further evidence because the applicable legal principles require that the dispute be submitted to arbitration forthwith.” *Id* at 999-1000. The Eighth Circuit further held that arguments about unconscionability should be presented to the arbitrator, not the court, once the court makes a determination that there is a valid arbitration agreement.

By contrast, the Eighth Circuit in *Faber v. Menard, Inc.* 367 F.3d 1048 (8<sup>th</sup> Cir. 2004) considered considerable evidence and argument on whether an arbitration agreement providing that the employer and the employee each bear their own costs and attorney fees in arbitration was unconscionable under Iowa law. The Eighth Circuit reversed the federal district court’s decision denying the employer’s motion to compel arbitration. The Eighth Circuit remanded the case to the district court to determine whether the agreement requiring a splitting of fees unconscionably prevented the employees’ arbitral forum. “If found to be unconscionable, the offending clause should be severed and arbitration compelled.” *Id* at 1055.

In *International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Shopman’s Local 493 v. EFCO Corp. and Construction Products, Inc.*, 359 F.3d 954 (8<sup>th</sup> Cir. 2004), the court considered a motion to compel arbitration. The Eighth Circuit had to decide whether a court or an arbitrator should decide the importance of one party’s failure to adhere to the procedural steps that were set forth in the parties’ collective bargaining agreement as a prerequisite to arbitration. The district court determined that this was a matter for the court to decide. On appeal, the Eighth Circuit disagreed and reversed, finding that an alleged failure to comply with per-arbitration steps in a grievance procedure, was a matter of procedure for an arbitrator, not a court, to decide. *Id* at 957. The court ruled that the collective bargaining agreement in question did not limit in its procedural steps the subject matter that was to be submitted to arbitration. Accordingly, the collective bargaining agreement clearly embraced for arbitration any grievance or dispute. The Eighth Circuit thus found: “It is clear that any disputes that has gone through the grievance procedure may be before an arbitrator by a disinterested party, if the proper steps are followed: *Id* at 957.

In *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821 (8<sup>th</sup> Cir. 2003), the Eighth Circuit reinforced its earlier decisions that there is only a narrow exception to the general rule that agreements to arbitrate federal

statutory claims are enforceable. That narrow exception is when the agreement to arbitrate resulted from some sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract.

The trial court had applied a broader standard in deciding that the parties did not have to arbitrate. The Eighth Circuit responded: “In our view, the court’s analysis reflects an outmoded judicial hostility to arbitration that the Supreme Court has consistently rejected in construing the FAA.” *Id.* at 823. “[T]he Court has evidenced its confidence that arbitrators are perfectly capable of protecting statutory rights when the parties have conferred the authority to decide statutory claims.” *Id.*

Further, the court held: “When an agreement to arbitrate encompasses statutory claims, the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply.” *Id.* at 824.

Sometimes there are simultaneous lawsuits and arbitrations involving the same parties. *Taylor v. Southwestern Bell Telephone Co.*, 251 F.3d 735 (8<sup>th</sup> Cir. 2001), involved a court lawsuit over an employee’s termination allegedly due to discrimination. Her union had filed a grievance procedure on her behalf and later a demand for arbitration. The Eighth Circuit noted that an arbitrator’s inquiry could extend beyond that of a court or jury in a discrimination action, to include issues such as whether the employee’s punishment was disproportionate. Depending on the circumstances and the scope of the arbitration agreement, both actions could be underway at the same time.

In *ProTech Industries, Inc. v. URS Corp.*, 377 F.3d 868 (8<sup>th</sup> Cir. 2004), the Eighth Circuit considered a district court’s decision to compel arbitration when ProTech argued three points: 1) URS waived its right to compel arbitration; 2) URS’ demand for arbitration was insufficient; and 3) the arbitration provision was unconscionable because ProTech cannot now afford arbitration. In deciding these issues, the Eighth Circuit noted that it must first determine whether the contentions are “gateway” matters to be decided by courts rather than arbitrators, citing, for example, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003). Gateway matters, such as whether the parties had a valid arbitration agreement, are matters to be decided by a court, rather than the arbitrator.

The Eighth Circuit further noted a number of cases which have established as precedent that prerequisites such as time limits, notice, laches, estoppel and other conditions proceeding to an obligation to

arbitrate are to be decided by arbitrators. *Id.* at 872-73. Accordingly, the Eighth Circuit concluded that “questions of whether waiver occurred and whether demand was sufficient and timely under the agreement, involved issues of procedural arbitrability, matters presumptively for the arbitrator, not for the judge.” *Id.* Thus, ProTech’s allegations of waiver and insufficient demand fall within that class of Gateway procedural disputes that do not present “questions of arbitrability” and therefore are issues to be resolved by an arbitrator.

As for the argument regarding the cost of arbitration, the court concluded that the parties were sophisticated business entities who were able to negotiate a \$471,000 government construction contract. Therefore, the arbitration provision was not unconscionable “at the time the parties made the contract.” *Id.* at 873.

#### Missouri Appellate Court:

**2004 Cases:** The Eastern District recently concluded that the Missouri courts are not available to review a dispute on a matter that is being arbitrated outside the state of Missouri, provided that the arbitration agreement specifies arbitration in a state other than Missouri. The case is *Government e-Management Solutions, Inc. v. American Arbitration Association, Inc.*, 2004 WL 1554453 (Mo. App. E.D.). A party aggrieved by the decision of an arbitration panel on a matter pending in arbitration in California filed a declaratory judgment action in Missouri against the American Arbitration Association as the sole defendant. The trial court determined that the arbitration panel had exceeded its jurisdiction by deciding that it had jurisdiction to consider whether the aggrieved party (Government e-Management Solutions) could be made a party to the arbitration proceeding when it was not a signator to the arbitration agreement.

The American Arbitration Association argued a number of points on appeal, including immunity and the absence of an indispensable party. The Eastern District, before reaching a decision on the merits, *sua sponte* considered whether it had jurisdiction and whether the trial court had jurisdiction to review any action being taken by an arbitration panel in California. Recognizing that Missouri has adopted the Uniform Arbitration Act, the appellate court decided that §435.430 did not vest in the state of Missouri any jurisdiction because this statutory section states in part that the agreement to arbitrate must provide “for arbitration in this state” and that this then “confers jurisdiction on the court to enforce the agreement...” *Id.* at \*3. The court further concluded: “The contract provisions setting out the place of arbitration control jurisdiction, even when the suit is brought by a non-party to that contract who challenges the validity of the arbitration clause and

whether it is binding on it.” *Id* at \*3. Since the arbitration agreement in this case called for a hearing in Los Angeles, California, “Missouri courts lack jurisdiction to determine if GEMS is subject to the arbitration proceeding pending in California or would be bound by an award.” *Id* at \*4.

**2003 Cases:** Previously, the Western District also concluded that Missouri courts do not have jurisdiction to compel or stay an arbitration that is pending outside Missouri under the Uniform Arbitration Act or Missouri’s Arbitration Act, §435.430 R.S.Mo. 2000. *Teltech, Inc. v. Teltech Communications, Inc.*, 115 S.W.3d 441 (Mo. App. W.D. 2003). By contrast, the court noted that the Revised Uniform Arbitration Act—not yet adopted in Missouri—provides that jurisdiction to enforce an agreement to arbitrate does not turn on the location of the arbitration. Instead, jurisdiction is based on standard concepts of personal and subject matter jurisdiction.

In *Deiab v. Shaw*, 138 S.W.3d 741 (Mo. App. E.D. 2003), the Eastern District held that before a party can appeal a trial court’s decision to compel arbitration and stay further court proceedings there must be nothing else pending in the trial court. In this case the parties had filed a lawsuit and a counterclaim that were stayed. Since these stayed actions were still pending with the court, there was no final, appealable order on the arbitration issue.

**2002 Cases:** Typically, after someone files a petition, if there is a written agreement to arbitrate, the defendant moves the court to stay the lawsuit and requests an order compelling arbitration. Before a court can grant a motion to compel arbitration, the court must first decide whether the agreement containing the arbitration provision is valid and legally binding. *Estate of Burford by Pam Bruse v. Edward D. Jones & Co.*, 83 S.W.3d. 589 (Mo. App. W.D. 2002). Only then does the arbitrator have jurisdiction.

In *Edward D. Jones*, the court determined that co-conservators did not have authority to enter into an account agreement on behalf of the estate without prior court approval and therefore the agreement was void. The language of the arbitration clause was “wholly irrelevant” if the party never entered into the contract as a whole or agreed to be bound by arbitration.

The court rejected the argument that the validity of the account agreement was an issue to be decided by the arbitration tribunal and not the court. “Missouri courts have held that under either the Missouri Arbitration Act or the Federal Arbitration Act ‘before a court may grant a

party's motion to compel arbitration, it must decide whether the agreement containing the arbitration is valid and legally binding." *Id.*

In *Estate of James Athon and Joe Athon v. Conseco Finance Servicing Corp. and Ronsee*, 88 S.W.3d 26 (Mo. App. W.D. 2002) the Western District reversed a trial court's order denying a motion to compel arbitration. The estate had sued Conseco alleging that it wrongfully trespassed onto the estate's property and repossessed a mobile home.

The appellate court found that the claims in dispute, including those in tort, were subject to an arbitration agreement. The agreement had provided in part: "All disputes, claims or controversies arising from or relating to this Contract or the parties thereto shall be resolved by binding arbitration by one arbitrator selected by you with my consent."

The court stated that the Federal Arbitration Act (FAA), 9 U.S.C. § 2 (1999), applied to the case because the contract between the parties involved interstate commerce. Further, the claims of respondeat superior, conversion, trespass, interference with expectancy of inheritance and unlawful repossession of personal property all involved issues whose resolution "requires reference to or construction of some part of the Contract." For arbitration not to apply, the tort claim had to be independent of the contract terms and not require reference to the underlying contract.

2001 Cases: In *Workman v. Orkin Exterminating Co.*, 66 S.W.3d 743 (Mo. App. S.D. 2001), the Southern District reversed a trial court's order denying without explanation a motion to compel arbitration. The appellate court applied the FAA since employees for Orkin had to cross state lines and the material Orkin used came from another state.

Plaintiffs sued for actual and punitive damages, alleging that Orkin failed to treat as outlined in their agreement and that it did not prevent termite problems. Orkin moved for arbitration. The appellate court agreed with Orkin that the FAA mandated enforcement of the arbitration agreement. The court rejected plaintiffs' argument that since the treatment "had not been performed" the arbitration agreement had no effect, stating that the record on appeal did not contain any evidence concerning Orkin's performance.

In *Metro Demolition v. H.B.D. Contracting*, 37 S.W.3d 843 (Mo. App. E.D. 2001), the appellate court agreed that a trial court correctly denied a motion to stay litigation pending arbitration with regard to one particular subcontract. The subcontract incorporated by reference the provisions of a prime contract between the owner and the contractor that

included binding arbitration. The problem was that the prime contract was not in existence at the time of the incorporation and thus the incorporation was not valid. The court set out the elements to consider in deciding whether an arbitration agreement warrants an order staying litigation. They are:

- (1) whether the parties agreed to arbitrate;
- (2) the scope of the agreement;
- (3) if federal statutory claims are asserted, whether Congress intended those claims to be arbitrable; and
- (4) if the court concludes that some but not all claims are arbitrable, whether to stay the balance of the proceeding pending arbitration.

*Id.* at 846.

## 7. Venue

Missouri Appellate Court: In a recent case, the Eastern District decided that a contract requiring the purchaser of an automobile in Missouri to arbitrate disputes over car repairs pursuant to AAA's Commercial Arbitration Rules in Baxter County, Arkansas, was a contract of adhesion. *Swain v. Auto Services, Inc.*, 128 S.W.3d 103 (Mo. App. E.D. 2003). The plaintiff had purchased through the automobile dealer a vehicle service plan from Auto Services, an Arkansas corporation. The venue provision in the agreement stood apart from the rest of the arbitration agreement and thus the court decided it would undermine the liberal federal policy favoring arbitration agreements to invalidate the entire agreement.

Therefore, the only part of the agreement found to be unconscionable was the venue requirement calling for Arkansas. But the court offered additional comment worth noting: "On remand, the court may consider whether the existence of large arbitration costs—half of which Swain must pay under the 'fee-sharing' provision in this arbitration clause—effectively precludes Swain from pursuing his claims and renders the agreement to arbitrate invalid under *Green Tree Financial Corporation—Alabama v. Randolph*, 531 U.S. 79, 90-92." *Id.* at 109. The appellate court declined to decide this issue in part because the parties had not yet had the opportunity to conduct discovery to determine "whether the costs of arbitration are, in fact, prohibitively expensive in this case—especially in light of our holding that the arbitration need not occur in Arkansas." *Id.* at 109.

The plaintiff also contended that the arbitration clause was unconscionable because it limited remedies that would otherwise be

available under Missouri's Merchandising Practices Act and the federal Magnuson-Moss Warranty Act. The court noted that some "federal circuit courts have held that whether remedial limits in an arbitration clause are invalid or unconscionable is a question for the arbitrator, while others have found that a court may determine the enforceability of an arbitration clause with remedial limitations." *Id.* at 109. The appellate court further observed that the U.S. Supreme Court recently had this issue before it in *PacifiCare, supra* but the court did not reach any conclusion. Accordingly, following the U.S. Supreme Court's lead, the Eastern District concluded that it did not have to decide which was the better approach, "because the remedial restrictions here—like the venue provision—are severable from the rest of the arbitration clause." *Id.*

## 8. Waiver of Arbitration

**Eighth Circuit:** The Eighth Circuit in *National American Insurance Co. v. Transamerica Occidental Life Ins.*, 324 F.3d 462 (8<sup>th</sup> Cir. 2003), held that it is for the arbitrator or panel of arbitrators, not the court, to determine if a party to the arbitration has waived its right to proceed in arbitration. The Court relied on a recent decision from the United States Supreme Court, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), wherein the Court stated: "the presumption is that the arbitrator should decide 'allegations of waiver, delay, or a like defense to arbitrability.'"

In *Kelly v. Golden*, 352 F.3d 344 (8<sup>th</sup> Cir. 2003), the Eighth Circuit found waiver of a party's right to arbitration when that party initiated a lawsuit and failed to object or move to compel arbitration throughout a year of court proceedings. "He vigorously pursued discovery and did not raise an arbitration claim until after the district court had ruled against him on all of his motions on the merits of the case." *Id.* at 350.

The court cited the elements of waiver as: the party (1) knew of an existing right to arbitration; (2) acted inconsistently with that right; and (3) prejudiced the other party by these inconsistent acts. "Golden was prejudiced by Kelly's delay in seeking arbitration. He incurred expense and experienced substantial delay as a result of the extensive litigation and would be required to extensively duplicate his efforts if he were now required to participate in arbitration." *Id.* at 349.

**Missouri Appellate Court:** Recently, the Western District offered a rather extensive analysis of the circumstances when a party has waived its right to arbitrate. The case is *Triarch Industries, Inc. v. Crabtree d/b/a Crabtree Painting, Inc.*, 2004 WL 941218 (Mo. App. W.D.). The trial court had denied appellant's motion to compel arbitration on the

basis that the appellant had waived its right to arbitrate. The court initially noted that waiver of a right to arbitrate requires that the party (1) had knowledge of the existing right to arbitrate (2) acted inconsistently with that right and (3) prejudice the party opposing arbitration. *Id.* at \*3. The court noted that there is a strong presumption against waiver and that any “doubt as to whether a party has waived arbitration is to be resolved in favor of arbitration.” *Id.*

In this case, appellant filed a lawsuit and nine months later filed a motion to compel arbitration. The court likened this to similar periods of time found not to be a waiver in *Nettleton v. Edward D. Jones & Co.*, 904 S.W.2d 409, 410-11 (Mo. App. E.D. 1995) (a nine-month period between filing the lawsuit and filing the motion for arbitration) and *Mueller v. Hopkins & Howard, P.C.*, 5 S.W.3d 182, (Mo. App. E.D. 1999) (a seven-month period between petition filing and motion to arbitrate). The Western District focused on the prejudice component of waiver, noting that the bulk of the court activity consisted of pre-trial discovery initiated by the respondent. It also noted of significance that appellant’s motion to compel arbitration was filed after respondent filed its counterclaim. “While our research has not uncovered any Missouri cases which address the impact of a counterclaim on the issue of a plaintiff’s waiver of a right to arbitrate, federal case law has held that such an event can significantly alter the nature of the litigation so as to rejuvenate a plaintiff’s right to demand arbitration.” *Id.* at \*4.

The Western District also considered whether the arbitration provision which essentially allowed appellant to invoke arbitration or a court action, was one sided and thus, not mutual and therefore unenforceable. The court rejected this argument although the dissent found it to be persuasive. The majority noted that there was no case law to support a proposition that a contractual provision authorizing arbitration at the sole option of one of the parties violates the law or is against public policy. Nor was there any law cited that such a provision violates the doctrine of mutuality of obligation. *Id.* at \*5. Applying the legal standard that the party arguing for waiver bears the burden of demonstrating that he was prejudiced by the other party’s actions. Accordingly, the Western District concluded that the trial court erred in denying appellant’s motion to compel arbitration.

The Western District has decided, in a case of first impression, that there was a waiver of the right to arbitrate when the plaintiff filed in a court of law a petition for injunctive relief seeking replevin and then engaged in significant trial-oriented activity. The case is *Getz v. Recycling, Inc.*, 71 S.W.3d 224 (Mo. App. W.D. 2002). Since waiver cases are fact intensive, the following facts are necessary to understand the court’s decision.

Plaintiff, a recycling company, had leased, pursuant to a written contract, a piece of equipment to business owners who owned a rock crushing business. The business owners complained that the equipment was useless for its intended use and thus they only paid rent for one month. Getz sued in equity for replevin and an injunction, and sought declaratory relief and damages for breach of contract. Getz also sought a temporary restraining order (TRO) after the business owners refused to return or surrender the piece of equipment. The business owners counter sued.

The court set a hearing on the TRO and entered a show-cause order on why the court should not order an injunction and replevin. The parties resolved this dispute by agreeing to the return of the equipment and the posting of a replevin bond of \$45,000 pending resolution of the underlying lawsuit. Counsel also discussed the arbitration agreement and they decided that rather than enforcing its terms, they would stipulate to the return of the equipment and the bond.

A month later, plaintiff filed an application to stay the court proceedings and to move the dispute to arbitration pursuant to the arbitration agreement. Defendants did not timely respond to the motion, so the court treated it as being unopposed and granted the request.

The court transferred the case to a new judge who granted defendants' motion to set aside the earlier order. This judge scheduled the case for trial and Getz appealed.

The appellate court concluded that the arbitration agreement covered the claim and counterclaim, including defendants' allegations of negligent misrepresentation and misrepresentation. The agreement had provided: "In the event of any dispute as to the terms and/or conditions as set forth in the agreement, arbitration is to be conducted under the rules of the American Arbitration Association in Phoenix, Arizona at a time and location to be specified by GETZ RECYCLE, INC. or its authorized representative."

To find waiver, the court noted, requires a finding of prejudice and the burden of showing prejudice is on the party seeking waiver. The problem is whether a party whose arbitration agreement is silent on injunctive relief can seek a TRO in a court and then arbitrate the substance of the claim.

The court found that a four-month delay between filing the lawsuit and the application to stay the proceeding pending arbitration was not substantial, citing as support *McIntosh v. Tenet Health Sys. Hosps., Inc./Lutheran Med. Ctr.*, 48 S.W.3d 85, 89 (Mo. App. E.D. 2001). In

*McIntosh*, there was no waiver where the period of time before seeking arbitration was less than a year after filing the lawsuit and the substantial discovery already conducted could be used in the arbitration.

Other events, however, more clearly pointed to waiver, according to the court. First, there was the TRO activity, and then Getz's counsel led defendants to believe that it would not invoke the arbitration clause. While the court noted that "bad faith" is not an element to a finding of prejudice, this conduct may have influenced the outcome.

The court thus concluded that Getz's actions deprived the defendants of the main goals of arbitration, namely "speedy and low-cost dispute resolution." *Id.* at 231. The court further found that plaintiff "misused the court process." *Id.*

Given the substantial amount of trial activity, there was prejudice and given that the arbitration agreement did not allow for injunctive relief, the appellate court decided there was a waiver of plaintiff's right to arbitrate.

## 9. Punitive Damages

U.S. Supreme Court: In a remarkable showing of judicial restraint, the United States Supreme Court decided recently to defer to the arbitrator a decision whether the arbitration agreement's language prohibited an award of punitive damages and thus was unenforceable. The case is *Pacificare Health Systems, Inc. v. Jeffrey Book*, 123 S. Ct. 1531 (2003).

The Supreme Court had been asked to decide whether the claimants in the underlying arbitration could be compelled to arbitrate claims arising under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, "notwithstanding the fact that the parties' arbitration agreements may be construed to limit the arbitrator's authority to award damages under that statute."

Claimants argued that if the agreements precluded an award that otherwise could be recovered in a court of law, the agreements were unenforceable because they could not obtain "meaningful relief" for their statutory claims in an arbitration forum.

There were four arbitration agreements in question, two of which prohibited any award of punitive damages, one prohibited an award of exemplary damages, and one prohibited an award of extra contractual damages of any kind, including punitive and exemplary. Part of the debate was over whether RICO's potential for treble damages was like

punitive damages or was a form of remedial damage. Rather than sort out in a court of law this critical question, the Supreme Court held:

In short, since we do not know how the arbitrator will construe the remedial limitations, the questions whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance are unusually abstract. As in *Vimar*, the proper course is to compel arbitration.

*Id.* at 1536. In reaching this result, the Supreme Court reversed the Eleventh Circuit.

**Eighth Circuit:** The Eighth Circuit recently reversed a federal district court's decision and allowed an arbitrator's award of six million dollars in punitive damages to stand. The case is *Stark v. Sandberg, Phoenix & Von Gontard, P.C., Greenberg, EMC Mortgage Corp., and SpvG Trustee*, 381 F.3d 793 (8<sup>th</sup> Cir. 2004). This opinion provides a broad, sweeping summary of the powers of an arbitrator and fully supports in the end an arbitrator's decision to award six million dollars in punitive damages when 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.

The case involved a husband and wife who borrowed \$56,900.00 against their home to secure a loan to assist in a failing business. The Starks' (the husband and wife) business failed, prompting a petition for bankruptcy protection. The Starks' lender sold the note which was in default to EMC Mortgage Corporation who sought debt collection actions under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§1692-1692o. The Starks vacated their home and moved into an apartment. The motion of EMC to lift the bankruptcy automatic stay was granted and it proceeded with foreclosure.

Throughout the foreclosure and bankruptcy proceedings, the Starks were represented by counsel, who notified EMC's attorney of his representation and that it would extend beyond the bankruptcy proceedings. The Starks' attorney informed EMC's attorney that EMC should not contact them directly. According to the court, however, the Starks testified EMC contacted them by mail, telephone and in person at least ten times after being advised they were represented by counsel.

At one point, EMC's agent, without the Starks' consent, forcibly entered the home and posted a sign in the front window stating, among other

things, that the property had been secured and winterized and was not for sale or rent.

The arbitrator found that EMC violated the FDCPA and awarded the Starks the money set forth above. In addition, the arbitrator found EMC's forcible entry into the premises "reprehensible and outrageous and in total disregard of plaintiffs' legal rights" and accordingly awarded six million dollars in punitive damages against EMC.

The federal district court vacated the award of punitive damages, holding the agreement was unambiguous and not susceptible to the arbitrator's interpretation. No other aspect of the arbitrator's award was challenged in either the district court or on appeal. The Eighth Circuit noted that the plain language of the arbitration agreement stated that the "borrower and lender expressly waive any right to claim [punitive damages] to the fullest extent permitted by law." The court determined that this was a limited waiver of punitive damages and that such damages were only waived if the governing law in the State of Missouri permitted such a waiver. The Eighth Circuit then concluded that Missouri did not allow such a waiver because you can "never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest." Interestingly, the court noted that the Federal Arbitration Act allows parties to incorporate terms into arbitration agreements that are contrary to state law. "Thus, had the parties to this agreement intended its interpretation to be governed solely by the FAA, the punitive damages waiver might have barred any such award."

The Eighth Circuit also considered an argument that the award of punitive damages was excessive, in light of recent cases, including the Supreme Court case of *BMW of N. Am, Inc. v. Gore*, 517 U.S. 559, 572-74 (1996) (describing a 500:1 ratio of punitive to compensatory damages as "breathtaking" and suspicious). The court noted that this case came out after the arbitrator's decision, that no party had squarely presented to the arbitrator other related cases on this point, and that there was no or insufficient evidence that the arbitrator clearly understood the law and then chose to disregard it.

By contrast, the Eighth Circuit seemed to favorably embrace the arbitrator's conclusion to support the award of punitive damages that it represented merely one tenth of one percent of shareholder equity. The case is peppered with interesting summaries from other cases to support the broad sweeping powers of an arbitrator, including for example, that arbitration is not a perfect system of justice, nor is it designed to be.

Missouri Appellate Court: For years, Missouri litigators considered arbitration to be an unlikely forum for the award of punitive damages, at least until the decision in *Groceman v. Pulte Homes Corp.*, 53 S.W.2d 599 (Mo. App. W.D. 2001). The Western District upheld an arbitrator's award of punitive damages, despite facts that many would argue did not seem to support such a result.

The case involved a contract dispute (with fraud allegations) over the construction of a house, alleged to have several structural defects, including roof deflection, inadequate rafters, and ceiling cracks. On its face, this case hardly seemed to be the kind that would muster any serious concern that punitive damages were a realistic possibility, especially since it was in arbitration. The arbitrator—appointed by the court—awarded \$50,000 in actual damages and another \$50,000 in punitive damages against the contractor.

Probably few arbitrators will consider *Pulte Homes* to be a catalyst to start awarding punitive damages. Its importance is that if punitive damages are appropriate, the arbitrator now has court support for his or her decision and absent a showing that the arbitrator “manifestly disregarded the law,” the courts will uphold the decision.

In addition, there is the decision in *Hoskins v. Business Men's Assurance*, 79 S.W.3d 901 (Mo. 2002). The Supreme Court of Missouri upheld the constitutionality of Sec. 537.675 R.S.Mo. (2000), dealing with the state's lien of 50 percent on any final judgment for punitive damages. While the case did not involve arbitration, it is noteworthy because the statute in question includes this provision: “Cases resolved by arbitration, mediation or compromise settlement prior to a punitive damage final judgment are exempt from the provisions of this section.”

This, coupled with the decision in *Pulte Homes*, may convince many, who previously shied away from arbitration because of a perception that punitive damages would not be awarded by an arbitrator or affirmed by a court, to reconsider the merits of arbitration in Missouri.

## 10. Attorney and Arbitrator Fees

A. Attorney Fees: Attorney fees can be awarded if covered in the agreement between the parties (in either the arbitration provision or some other part of the agreement); if allowed by common law or statute; or according to the Rules of the American Arbitration Association if all the parties to the arbitration request such relief from the panel. See Rule 45 Commercial Dispute Resolution Procedures and Rule 46 Construction Industry Dispute Resolution Procedures.

**Eighth Circuit:** In *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721 (8<sup>th</sup> Cir 2003), the Eighth Circuit upheld a district court's decision to confirm an arbitrator's award that found a Kawasaki dealership agreement to be a contract of adhesion and unconscionable in providing that the prevailing party—in this case Kawasaki—could recover all costs and attorneys' fees. This decision meant that Kawasaki, even though it won in arbitration, could not recover costs and attorney fees of \$1.7 million.

The Eighth Circuit noted that two other circuits agree with its decision that it is for the arbitrator to consider challenges to attorney-fee provisions or other limits on remedies in the arbitration provisions. *Id.* at 726.

In *Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060 (8<sup>th</sup> Cir. 2003), the Eighth Circuit affirmed a decision of the district court to vacate an award of attorney fees because the panel recognized the law did not support such a recovery and the panel awarded the attorney fees anyway. See the next section for a more detailed discussion of this case.

**Missouri Appellate Court:** In a case of first impression, the Eastern District vacated an arbitrator's award of attorney fees where the fees related to litigation previously decided by the Missouri courts (rather than attorney fees due to the arbitration itself). The case is *Strain-Japan R-16 Sch. v. Landmark Systems*, 51 S.W.3d 916 (Mo. App. E.D. 2001).

The case involved a dispute over construction of an addition to a school. The School District withheld \$72,000 plus from final payment to the contractor claiming defective work by the general contractor Landmark Systems, Inc.

Landmark filed a demand for arbitration with the American Arbitration Association. The District filed a petition in circuit court requesting a stay of the arbitration and argued that the agreement was unenforceable. The court granted a Temporary Restraining Order, then dissolved the TRO and declared the contract to be enforceable.

Landmark amended its demand for arbitration to include a request for attorney fees incurred in the court action but not the arbitration. The arbitrator awarded to Landmark without explanation the remaining contract price minus costs to repair certain items, interest, and \$41,530 in attorney fees.

The appellate court applied the Federal Arbitration Act (FAA) to decide whether the arbitrator correctly awarded the attorney fees. The FAA's grounds for vacating an award include an arbitrator exceeding his or her powers.

Given this standard, the appellate court concluded that the arbitrator did exceed his powers under 9 U.S.C. § 10(a)(4) by awarding the attorney fees since they related to litigation other than the arbitration before him. "There was no express or written provision in the contract allowing for attorney's fees from a prior litigation to be recovered." *Id.* at 923.

**B. Arbitrator Fees:** In the recent case of *Bond v. Twin Cities Carpenters Pension Fund*, 307 F.3d 704 (8<sup>th</sup> Cir. 2002) 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 and regulatory framework.

The plan required binding arbitration and the payment of a split-fee initially of the arbitrator's fee to be adjusted, if at all, upon the final determination by the arbitrator. It is this fee splitting that turned the Eighth Circuit to reverse the district court and decide that this "arrangement" was not "reasonable" within the meaning of federal statutory law. The court found that such arrangements discourage the pursuit of "many legitimate claims by those who cannot afford such costs."

## 11. Enforcing, Upholding and Vacating Arbitrator Awards

**The Eighth Circuit:** In *Teamsters Local Union 682 v. KCI Construction Co., Inc.*, 2004 WL 2049214 (8<sup>th</sup> Cir. (Mo.)), the Eighth Circuit determined that if a section of a labor agreement was not a valid work preservation clause and did not fit within the sub-contractor industry proviso, then it was an unlawful hot cargo agreement. If this were the case, then an arbitration award that enforced this section may not be valid. Determination of this would require additional evidence at the federal district court level. Therefore, an arbitration award that is based upon an invalid and unlawful agreement is not enforceable.

In *Lincoln National Life Insurance Co. v. Payne*, 374 F.3d 672 (8<sup>th</sup> Cir. 2004), the Eighth Circuit concluded that there was insufficient record to determine that the arbitrators had manifestly disregarded the law and thus there was no compelling legal basis to overturn the arbitration panel's award. Interestingly, however, the district court remanded the case to the arbitrators asking that they clarify their award and stating that such clarification was necessary in order for the court to exercise its reviewing power properly. The district court stated that such

a remand was “necessary and appropriate...for the limited review allowed by the Federal Arbitration Act and the extra-statutory grounds recognized in the Eighth Circuit.” *Id.* at 675. The arbitrators declined to follow the direction perhaps according to the Eighth Circuit, believing that they are powerless to amend or clarify an award. The plaintiffs argued that this action should have led the district court to vacate the award, but since the district court, even without receiving any clarification, went ahead and ruled on the award, the Eighth Circuit determined that the district court had the information it needed to rule on the award.

In *MidAmerican Energy Co. v. International Brotherhood of Elec. Workers Local 499*, 345 F.3d 616 (8<sup>th</sup> Cir. 2003), the Eighth Circuit noted that while judicial review of arbitration awards is limited, awards will be vacated upon a showing that the award contravenes an “explicit public policy” or was procured by fraud. The court did not find that the award in question (which included a reinstatement to work of a terminated employee) violated any express public policy on the safety for the liquid natural gas industry.

The court did find, however, that evidence uncovered after the arbitration suggested that the employee may have lied about his reason for leaving work on the night in question. An anonymous caller tipped the employer off to someone who later testified in deposition that the employee was having an extramarital affair with her and was with her on the night in question. Since the arbitrator’s award expressly relied on the employee’s honesty, and since this new evidence cast doubt on this subject, the Eighth Circuit decided that the case needed to return to the district court for further proceedings. “[I]f fraud is proven, the entirety of Turner’s involvement in the arbitration process would be shown to be a sham” and thus the court concluded, “the alleged fraud is material to the case at hand.” *Id.* at 623.

In *Schoch v. InfoUSA, Inc.*, 341 F.3d 785 (8<sup>th</sup> Cir. 2003), the Eighth Circuit declined once again to decide whether the parties to an arbitration agreement can expand the scope of judicial review of an award beyond the parameters set out in the FAA and federal case law. The court decided that the parties’ agreement did not expressly contain a requirement for “heightened judicial scrutiny” and thus the court was not going to decide the issue.

The court further noted that the circuits are split on this issue and “[o]ur court has specifically reserved resolving this issue until the circumstances require it.” *Id.* at 789. The court also discussed the two, “extremely narrow” judicially created reasons to overturn an award. They are: (1) the award is “completely irrational,” meaning it fails to draw

its essence from the agreement, and (2) the award evidences a “manifest disregard of the law.” The court found neither to exist in the present case.

An excellent recent discussion about the standard for appellate review of lower court decisions on arbitration awards can be found in *Gas Aggregation Services, Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060 (8<sup>th</sup> Cir. 2003). “We review a district court’s decision to vacate an arbitration award *de novo*.” *Id.* at 1063.

The Eighth Circuit reiterated that the FAA requires that an arbitration award be upheld unless it is obtained by corruption, fraud, or undue means; or where there is evident partiality or corruption in the arbitrators; or where the arbitrators exceeded their powers. *Id.* at 1065 and see 9 U.S.C. § 10(a)(1)-(2). In addition, the Eighth Circuit has held that besides these statutorily pronounced reasons an arbitration award will be vacated only where it is “completely irrational or evidences a manifest disregard for the law.” *Id.* at 1065, citing *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461 (8<sup>th</sup> Cir. 2001).

Applying these standards, the Eighth Circuit in *Gas Aggregation* affirmed the part of a district’s decision to vacate a panel’s award of attorney fees. The Court determined that by the panel’s written decision it recognized the law in Minnesota to be that the Consumer Fraud Act did not allow the award of attorney fees in disputes between businesses. Yet the panel went ahead and awarded attorney fees. “This ruling ignores the relevant law. Where an arbitration panel cites relevant law, then proceeds to ignore it, it is said to evidence a manifest disregard for the law.” *Id.* at 1069.

In *Finley Lines Joint Protective Board Unit 200, Brotherhood of Railway Carmen Division, Transportation Communications International Union v. Norfolk Southern Railway Company*, 312 F.3d 943 (8<sup>th</sup> Cir. 2002), the Eighth Circuit reaffirmed that judicial review of an arbitration award is very limited, and review of the decision of a public arbitration board under the Railway Labor Act “is among the narrowest known to the law.” *Id.* at 946. The dispute was over the exclusion of a polygraph test when the collective bargaining agreement required that the arbitrator “receive all evidence.”

Another recent case to confirm that an award can be overturned if it is either “completely irrational or manifests a disregard for the law” is *Manion v. Nagin*, 392 F.3d 294, 298 (8<sup>th</sup> Cir. 2004). The Court, citing *Hoffman*, stated: “An arbitration decision may only be said to be irrational where it fails to draw its essence from the agreement, and an arbitration decision only manifests disregard for the law where the

arbitrators clearly identify the applicable, governing law and then proceed to ignore it.” Applying this standard, the Court in *Manion* rejected an argument to overturn an award where the arbitrator allegedly failed to abide by the parties’ choice of the AAA’s Employment Rules and therefore he exceeded his powers and rendered a completely irrational decision. Instead, the Eighth Circuit determined that the arbitration award reflected a careful consideration of the employment contract and the arbitrator’s conclusion that Manion’s termination was justified by at least three instances of malfeasance is amply supported by evidence submitted to the arbitrator, and “we will not disturb it on appeal.” *Id.* at 299.

The court stated that “Arbitrators have broad procedural discretion.” In fact, arbitrators may even look to outside sources, including prior unrelated awards, “without straying beyond their jurisdiction to interpret and apply the collective bargaining agreement.” *Id.* at 947. Accordingly, the “manner in which the Board resolves evidentiary disputers ‘does not fall within any of the narrow jurisdictional grounds for review under 45 U.S.C. § 153 First (q).”

Parties who disregard arbitrator awards may want to reconsider their thinking. The Eighth Circuit has made clear that arbitrator awards and orders, once confirmed by the District Court, are not subject to trifling or disregard without incurring a substantial consequence, including contempt of court. The case is *International Brotherhood of Electrical Workers, Local Union No. 545 v. Hope Electrical Corp.*, 293 F.3d 409 (8th Cir. 2002).

A corporation had failed to comply with two arbitration awards. The union asked the District Court to enforce the awards, which it did, and when the corporation did not comply with the court’s orders, the union sought an order of contempt. Considerable procedural maneuvering and additional motion activity followed.

In the end the Eighth Circuit upheld the district court’s contempt order using an abuse of discretion standard for review. “As a general matter, when a litigant refuses to respect the authority of the court, it is not an abuse of discretion for the court to hold the litigant in contempt and impose a sanction to coerce compliance.” *Id.* at 418.

In another recent case, *United Steelworkers of America, AFL-CIO, Local 9452 v. MacSteel, Arkansas Division of Quantex Corp.*, 68 Fed. Appx. 750 (8<sup>th</sup> Cir. 2003), a party challenged the arbitrator’s award as exceeding his authority when the arbitrator allegedly ruled on matters not before him, including a ruling on whether employees could take their lunch period in increments.

The Eighth Circuit upheld the award, noting that if “the arbitrator is arguably construing or applying an agreement, we cannot overturn the arbitrator’s decision even if we are convinced that the arbitrator committed serious error.” The court will “vacate an arbitration award only if, for example, the award exceeds the arbitrator’s power or if the award fails to draw its essence from the agreement.” The Court upheld the arbitrator’s award.

In *In re Arbitration Between Dow Corning Corp. v. Safety National Casualty Corp.*, 335 F.3d 742 (8<sup>th</sup> Cir. 2003), the Eighth Circuit rejected arguments that an award should be overturned due to certain nondisclosures by one of the arbitrators, some ex parte contacts with counsel and limiting cross examination of one party’s expert. The court provided some broad, helpful comments on these issues:

**Nondisclosure:** “When the parties agree to arbitration before disinterested persons who have experience in a specialized business or type of problem, the relatively small number of qualified arbitrators may make it common, if not inevitable, that parties will nominate the same arbitrators repeatedly.” *Id.* at 750. “At the outset of the arbitration process, arbitrators must disclose “a substantial interest in a firm which has done more than trivial business with a party.” *Id.*

**Ex Parte Contacts:** “[T]he ex parte contacts, even if arguably improper, simply do not demonstrate evident partiality. Umpire Lyon had an ‘administrative’ reason for contacting counsel (to discuss scheduling) and a basis for deciding that he needed to contact them one at a time.” *Id.* at 751.

**Limiting Cross Examination:** “Arbitrators have broad discretion to limit the cross-examination of witnesses at arbitration hearings.” *Id.* at 752. There is no showing that this procedural ruling demonstrated the arbitrator’s “evident partiality” within the meaning of § 10(a)(2) of the FAA.

In *Smart v. Sunshine Potato Flakes*, 307 F.3d 684 (8<sup>th</sup> Cir. 2002) the Eighth Circuit considered a complicated set of procedural facts involving actions pending in state and federal court. Initially, the plaintiff had filed a diversity action in federal district court in North Dakota, but it was stayed pending arbitration. The arbitrator entered an award in favor of defendant Sunshine for \$688,530.00 after the hearing on the arbitration in New Mexico. Plaintiff Smart then filed an action in state court in North Dakota to vacate the award pursuant to North Dakota’s version of the Uniform Arbitration Act.

Sunshine filed an improper motion to remove that action to federal district court since Sunshine failed to allege diversity jurisdiction. Sunshine then moved the federal district court to lift the stay from the original action and confirm the arbitration award. After more motions and skirmishes by the litigants, the Eighth Circuit ruled finally that the federal district court properly granted Sunshine's motion to confirm the arbitration award. Ultimately, Sunshine successfully chose the third option.

Further, the court concluded that the doctrines of preclusion, estoppel, and election of remedies do not bar a party from "sequentially pursuing alternative venues that may be available." *Id.* at 686. "Rather, the statutory time limits on filing lawsuits, seeking judicial review of arbitration awards, and exercising one's right of removal protect the courts and litigants from an excessively protracted search for alternative venues." *Id.*

Finally, the court reaffirmed its own power when others suggest that a federal court should defer to another action pending in state court. "[W]hen the issue is whether a federal court should defer to a pending suit in state court, as in this case, the order in which jurisdiction was obtained, while still a relevant factor in applying the abstention doctrine, is far less apt to be determinative because of the federal court's 'virtually unflagging obligation' to exercise its jurisdiction." *Id.* at 687.

In *Brotherhood of Maintenance of Way Employees and Wabash Federation v. Terminal Railroad Association of St. Louis*, 307 F.3d 737 (8<sup>th</sup> Cir. 2002), the Eighth Circuit reversed a district court's decision to grant summary judgment in favor of the railroad and reinstated the arbitration award for the union. The central issue was whether the arbitration panel exceeded its jurisdiction, as set out in the parties' agreement, by allowing the union to submit written arguments when the arbitration agreement had provided that the parties would present the file to the panel "with no alterations of any kind."

The Eighth Circuit noted, "our review of the arbitration award itself is among the narrowest known to the law." *Id.* at 739. The court stated that an award should be set aside or vacated if the arbitrator ignores the plain language of the agreement or exceeds his or her jurisdiction. The court then decided that the arbitration agreement was ambiguous on this point and thus the arbitrator's decision is "procedural." *Id.* at 740. "An arbitrator's procedural determinations should be set aside by a court when the arbitrator is guilty of misconduct or bad faith." *Id.*

In *Motion Control Corp. v. Sick*, 354 F.3d 702 (8<sup>th</sup> Cir. 2003), the Eighth Circuit recently held that an action filed in state court to confirm

or challenge an arbitration award cannot be removed to federal court, based on diversity of citizenship, if any of the defendants is a citizen of the state where the action is pending. There is no ancillary jurisdiction over the action merely because the federal court has another lawsuit pending before it by the same parties to the arbitration.

Missouri Appellate Court: The Eastern District recently decided that an appeal was premature from a trial court's order vacating an arbitration award where the trial court directed a re-hearing in arbitration. The court concluded that the arbitration process had not been completed, had not disposed of all parties and issues, and therefore was not ripe for appeal. The case is *Crack Team USA, Inc. v. American Arbitration Association and AMG Franchises, Inc.*, 128 S.W.3d 580 (Mo. App. E.D. 2004).

The Eastern District also decided that §435.440.1(5) of the Revised Statutes of Missouri implicitly bars appeals from orders that direct a rehearing.

In *Maxwell-Gabel Contracting Co., Inc. v. City of Milan*, 2004 WL 2381122 (Mo. App. WD 2004), the Western District Court of Appeals for Missouri upheld the trial court's decision to uphold the award of an arbitration panel despite an allegation that the panel's award of pre and post-hearing interest exhibited a manifest disregard of the law. Among other points, the Court noted that under Missouri law, manifest disregard of the law is not a basis to overturn an arbitration award. The Court further noted that through judicial decisions an attack of an award pursuant to the Federal Arbitration Act can include where the arbitration panel manifestly disregarded the law. "Applying this federal exception is severely limited, however, and an arbitration award will be vacated on this ground only if the complaining party establishes that the arbitrator understood and correctly stated the law, but ignored it....an award may not be set aside simply because the arbitrator erred in interpreting the law or in determining the facts."

In *Deiab v. Shaw*, 138 S.W.3d 741 (Mo. App. E.D. 2003), the Eastern District held that §435.440 of the Revised Statutes of Missouri does not allow an appeal from an order compelling arbitration. Likewise, the Federal Arbitration Act also does not allow such an appeal. The appellate court addressed situations where the only claim pending before the trial court was a request to stay arbitration and in such an instance, a denial of such a request was immediately appealable.

A good general discussion of the mechanic's of attacking an award by motion and appeal can be found in *Doyle v. Thomas*, 109 S.W.3d 215 (Mo. App. E.D. 2003). The decision also discusses the correlation

between Missouri's Arbitration Act and the FAA. The holding in the case, however, is not particularly noteworthy.

In *Lantz Welch v. Grant Davis, et al.*, 114 S.W.3d 285 (Mo. App. W.D. 2003), the Western District stated that its review of a circuit court's decision to confirm an arbitration award is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. Banc 1976). Thus, the appellate court will affirm unless it is not supported by substantial evidence, or it is against the weight of the evidence, or it erroneously declares or applies the law.

The Court further noted that even if the arbitrators had considered evidence that should not have been admitted in deciding the submitted issue, it is "of no consequence." "This is an issue of legal error, and the courts will not consider claims of legal error in arbitration proceedings."

In *Decker v. Kamil*, 100 S.W.3d 115 (Mo. App. E.D. 2003), the Eastern District noted that the "scope of judicial review of an arbitration award 'is among the narrowest known to the law.'" *Id.* at 117. "A party challenging an arbitration award is not entitled to reconsideration of the merits of the case and bears the burden of proving the invalidity of the award." *Id.*

Thus, the appellate court upheld a trial court's decision to affirm an arbitration award. The party challenging the award had not shown that there was an evident miscalculation of figures or an evident mistake in any description referenced in the award, such that the award violated § 435.410(1) R.S.Mo.

Of note to all neutrals is how the arbitrator handled a request from the trial court as to whether he had considered one of the party's cash contributions to the corporation, and if not, to correct the award accordingly. The arbitrator responded by writing there was no miscalculation as he had considered the "alleged" cash advances. This was an astute way to handle the court's request.

## 12. Class Action Lawsuits and Arbitration

U.S. Supreme Court: Arbitrators now can decide whether to certify a proceeding for class arbitration, given the recent decision in *Green Tree Financial Corp. v. Lynn W. Bazzle*, 123 S. Ct. 2402 (2003). Under the terms of the arbitration agreement, the parties agreed to submit to the arbitrator "all disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract." *Id.* at 14.

The Supreme Court found that this meant that the arbitrator, not the court, would decide whether the agreement forbids class certification. The question did not fall within the narrow scope of a gateway issue that courts will resolve, for it “concerns neither the validity of the arbitration clause nor its application to the underlying dispute between the parties.” *Id.* at 15-16.

Rather, it “concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.” *Id.* at 16.

Eighth Circuit: In *Dominium Austin Partners v. Emerson*, 248 F.3d 720 (8<sup>th</sup> Cir. 2001), the question was whether the trial court erred in denying a request of plaintiffs to arbitrate their disputes as a class. The underlying dispute involved limited partners and other partnership entities that had invested in low-income housing. The Eighth Circuit agreed with the trial court that the claims would be sent to arbitration as individual claims and not as a class action. Since the arbitration agreements were silent on class actions, the court concluded that the district court was without power to consolidate the arbitration proceedings.

The court also decided to send to the arbitrator for his or her consideration arguments that one of the parties was fraudulently induced to adopt the entire package of amendments to the agreement and arguments that the arbitration agreements had been waived because of a tardy submission of the demand for arbitration.

The recent decision from the Supreme Court should affect how this decision will be applied and enforced in the future.

### 13. Replacing an Arbitrator

Replacing an arbitrator is an infrequent but extremely troublesome problem, given that some arbitrations take months to a year or more from selection of the arbitrators to the final award after the hearing. During this time a host of events, such as sickness, job relocation, family responsibilities and conflicts, may necessitate the replacement of one of the three arbitrators on the panel.

The FAA provides in § 5 that the agreement controls this situation, but where the agreement is silent, then the court shall designate a replacement arbitrator. Recently, the Eighth Circuit in *National American Insurance Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (2003), followed this procedure. In doing so, the Court expressly distinguished and refused to follow cases from other federal circuits that have created a “general rule” that “where one member of a

three-person arbitration panel dies before the rendering of an award and the arbitration agreement does not anticipate that circumstance, the arbitration must commence anew with a full panel.”

#### 14. Unlawful Delegation to an Arbitrator

Missouri Appellate Court: “Allowing disputes over wages to go to the arbitrator results in a delegation of legislative authority, and as such it cannot be allowed.” *International Brotherhood of Elec. Workers, Local Union No. 53 v. City Power & Light Dept., City of Independence*, 129 S.W.3d 384 (Mo. App. W.D. 2003). The union had filed an action seeking to compel arbitration of a dispute arising under a labor agreement between the union and the City. Wages and hours for public employment in Missouri must be fixed by statute or ordinance and cannot be the subject of bargaining.

#### 15. *Res Judicata*, Collateral Estoppel and Evidence in Subsequent Proceeding

*Res Judicata*. In the case of *Kitsmiller Construction Co., Inc. v. Wynn Construction, Inc.*, 126 S.W.3d 795 (Mo. App. S.D. 2004), the Southern District considered whether the filing of a motion for summary judgment claiming that an arbitration hearing established the affirmative defense of *res judicata* would preclude a finding to the contrary. The case is interesting in that it included several references to transcripts and exhibits from the arbitration hearing, something that is not altogether common in an arbitration proceeding. Nevertheless, the arbitration record, expectedly, was still fragmented and challenged the appellate court to understand exactly what had occurred in arbitration. The case emphasizes, among other things, the importance of creating a record at the arbitration hearing stage if the ultimate purpose is to use the arbitrator’s findings for subsequent legal purposes. For example, the court noted:

“Exhibit 9 purports to be an index of the transcript; however, it contains sixty fragments of fact and/or conclusions of law which are supposedly supported by citations to the arbitration transcript. It appears the citations to the transcript are intended to prove that the facts and/or conclusions of law have already been litigated and thus, that the doctrine of *res judicata* applies. We cannot discern a method to the order of exhibit 9, nor are the elements of the defense of *res judicata* readily apparent. We are given no guidance to understand exhibit 9.” *Id.* at 797.

The court further noted that the transcript did not “grace us with a transcript of the arbitration hearing; thus, we have no way of

ascertaining whether or how the transcript cites relate to the sentence fragments.” *Id.* at 797.

**Collateral Estoppel. Eighth Circuit:** In *Manion v. Nagin*, 2005 W.L. 66346 (8<sup>th</sup> Cir. 2005), the Eighth Circuit held that an arbitration award counts as a final judgment for collateral estoppel purposes. This can act to prevent a party subject to a binding award in arbitration from later making related allegations and causes of action in a court of law.

Another recent case to apply and enforce the doctrine of collateral estoppel is *Banks v. International Union Electronic, Electrical, Technical, Salaried and Machine Workers*, 390 F.3d 1049, 1054 (8<sup>th</sup> Cir. 2005). In this case, the Eighth Circuit held that a former employee was collaterally estopped from litigating claims against a union for alleged breach of 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*.

**Missouri Appellate Court:** In *Cornerstone Propane, L.P. v. Precision Investments, L.L.C.*, 126 S.W.3d 419 (Mo. App. S.D. 2004), the Southern District considered an appeal from a judgment that vacated an arbitration award because the arbitrator was alleged to have engaged in manifest disregard of the law by failing to give collateral estoppel effect to a judgment from a related case. The trial court had determined that the arbitrator was required to give a related “judgment” collateral estoppel effect. Therefore, the trial court remanded the cause to the American Arbitration Association with directions that it determine liability in light of the judgment in the companion case and to compute actual and punitive damages.

On appeal from the trial court’s decision, the Southern District determined that the only basis to overturn the arbitrator’s award would be that he exceeded his powers. “Neither a mistake of law nor a mistake of fact provides sufficient reason to vacate an arbitration award.” *Id.* at 424. The court further noted that under Missouri law, manifest disregard for the law is not a statutory basis for vacating an arbitration award, but it is a basis under federal common law.

The appellate court did not have to determine whether the Federal Arbitration Act and therefore the federal standard of manifest disregard of the law was applicable, because it determined that of the four factors necessary to establish collateral estoppel, the first was missing. The factors are: 1) Whether the issue decided in the prior adjudication was identical with the issue presented in the current action; 2) whether the prior adjudication resulted in a judgment on the merits; 3) whether the party against whom collateral estoppel is asserted was a party or in

privity with a party to the prior adjudication; and 4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. The appellate court determined that the issue or issues presented in the related case were different from the issue in arbitration and therefore collateral estoppel was not appropriate.

**Evidence and Subsequent Proceeding.** In *Jackson v. Flint, Inc. North American Corp.*, 370 F.3d 791 (8<sup>th</sup> Cir. 2004), the Eighth Circuit provided language strongly suggesting that the findings in an arbitration proceeding may be presented to a jury in a subsequent lawsuit. The Eighth Circuit stated:

Mr. Jackson grieved his third firing, and he was represented by his union in an arbitration hearing. The arbitrator's findings, while by no means binding on a jury, provide persuasive evidence in the form of a neutral party's observations regarding Mr. Jackson's work performance and the appropriateness of Flint, Inc.'s disciplinary responses.

*Id.* at 797. Thus, it appears that an arbitration may provide evidence to be used by one party or another in a subsequent legal proceeding and while it does not necessarily have binding effect, it may be relevant evidence regarding certain issues that otherwise are in dispute.

## 16. Mediation

**Mediation Fees.** §487.100 of the Revised Statutes of Missouri states:

In any family court case the judge or commissioner may, on the judge's or commissioner's own motion, or, at the request of a party, order or recommend mediation, counseling or a home study. The costs of such mediation, counseling or home study may be assessed against any party at any time and may be taxed as court costs paid by the party against whom costs are taxed or may be paid from the family services and justice fund established pursuant to section 487.170. The party's ability to pay shall be a consideration when such costs are assessed.

In *Blackburn v. Mackey*, 131 S.W.3d 392 (Mo. App. W.D. 2004) the Western District considered a father's challenge to the assessment of

mediation costs against him. The mother contended that the court's order that the father pay the mediation costs was well within the court's power and discretion. Both parties conceded in the litigation that they had not reached any agreement as to how mediation fees should be allocated. The court was informed about the mediation proceedings and even though they were not included in any stipulations by the parties as to the assessment of overall fees, the information was available to the court. The Western District noted: "Under section 487.100, mediation costs may be assessed against any party as court costs." The appellate court concluded:

The court did not err in assessing the mediation against Father. The order was supported by the evidence, was not against the weight of the evidence and was well within the court's power and discretion.

*Id.* at 399.

**Attorney Fees at Mediation.** In *Williams v. Conagra Poultry Co.*, 113 Fed. Appx. 725, 729 (8<sup>th</sup> Cir. 2004), the Eighth Circuit considered a dispute over the amount of charges by attorneys and a paralegal who attended a mediation. Williams had filed a motion seeking the recovery of attorney's fees and costs, seeking recovery of them as the prevailing party who is entitled to "a reasonable attorney's fee" pursuant to 42 U.S.C. §§1983, 1988. Conagra challenged the charges expended by three attorneys at the mediation. The Eighth Circuit concluded "we think it was reasonable for two attorneys, at most, to attend the mediation" and therefore the Court only allowed the recovery of the fees for two of the attorneys. The Eighth Circuit also denied the reimbursement of the Williamses' expenses for travel to the mediation. "We have not located nor has Mr. Williams cited us to any authority for ordering one party to reimburse another for his or her own travel expenses." *Id.* at 728. The Court also deducted certain other charges that were not fully supported such as an unexplained air travel expense.

**Settlement Agreement.** In *Nwachukwu v. St. Louis University*, 114 Fed. Appx. 264 (8<sup>th</sup> Cir. 2004), the Eighth Circuit considered the challenge to the enforceability of a settlement agreement where the final settlement agreement prepared by counsel for the parties was allegedly materially different from the handwritten agreement executed at the end of the mediation. The complaining party argued that she did not agree to the new terms. The Eighth Circuit determined that it could not find clear error in the trial court's determination that the final settlement agreement was not materially different from the handwritten agreement that she had signed. "The final agreement gave Nwachukwu the same

benefits as the handwritten agreement, and both agreements provided that she would resign and execute a release of all claims, even though the final agreement contained more expansive or additional clauses related to confidentiality, release of liability, disclaimer of fault, nondisparagement, and reinstatement or reemployment.”

#### 17. No Private Cause of Action against Arbitration Tribunal

Eighth Circuit. In *MM & S Financial, Inc. v. National Association of Securities Dealers, Inc.*, 364 F.3d 908 (8<sup>th</sup> Cir. 2004), the Eighth Circuit held that a securities firm that was a member of a national securities association could not bring an action against the association and its dispute resolution subsidiary to prohibit their proceedings because no private cause of action for breach of contract existed. The precise issue was whether MM & S had a right of action against the National Association of Securities Dealers, Inc. (NASD) based on an allegation that the NASD defendants violated one of its own rules. The Eighth Circuit concluded that the Securities Exchange Act of 1934, 15 U.S.C. Section 78s(g)(1) does not create a private right of action against the NASD for violating its own rules. Otherwise, the court concluded, “allowing MM & S to assert a private breach of contract claim would vitiate Congress’ intent not to allow private rights of action against self-regulatory organizations for violating NASD’s own rules.” *Id* at 912.

#### 18. Non-Signatory to the Arbitration Agreement

In *Green Point Credit, L.L.C. v. Reynolds*, 151 S.W.3d 868 (Mo. App. S.D. 2005), the Southern District Court of Appeals for Missouri upheld the trial court’s decision that a non-signator was not a party to the arbitration agreement and therefore could not be bound to arbitrate. The Court noted that a non-signatory party to an arbitration agreement can be bound by the agreement if he or she is an agent of one of the signing parties or is a third-party beneficiary of the contract. In determining whether a party was a third-party beneficiary to the contract, “the question of intent is paramount...[and] is to be gleaned from the four corners of the contract.” The Court went on to conclude that the contract expressed no intent to benefit Ms. Nations individually or as a member of an identifiable class. “The record does not support a claim that the parties contracted other than for themselves without regard to others.” Thus, Ms. Nations was not bound to arbitrate.

By contrast, third-party beneficiary to a contract, one who did not expressly execute the agreement, is still bound by its terms, including a binding provision for arbitration. That was the conclusion in *Azbill v.*

*UMB Scout Brokerage Services, Inc.*, 129 S.W.3d 480 (Mo. App. W.D. 2004). The court initially noted that whether a dispute is covered by an arbitration clause is a matter of law and that the appellate court's review of such a dispute will be *de novo*. *Id* at 483. Azbill claimed that since she was a third-party beneficiary of an IRA contract, she could enjoy the benefits of the contract, but was not subject to arbitration. As the court concluded: "She cannot base here status to sue on the contract, then attempt to avoid the arbitability requirement contained in the contract." *Id*.

In addition, the court also concluded that Azbill's breach of contract claim was covered by the arbitration provision. Further, "[w]hen a tort claim arises directly out of a dispute regarding the terms of the parties' contract, it too must be resolved through arbitration...The arbitration clause covers all of Azbill's claims, and she must pursue her action through arbitration." *Id*. As a result, the appellate court reversed the trial court's decision not to compel arbitration as well as the trial court's decision on the merits and directed the trial court to enter an order compelling the parties to proceed with arbitration.

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