

“ADR: Neutrals now have unprecedented power”

a presentation on Recent Developments in Missouri ADR; What People Need to Know, hosted by the American Arbitration Association on March 1, 2002

by

James R. Keller

Who has the “Final Word”?

**The President of the U.S.
A U.S. Supreme Court Justice
A U.S. District Court Judge
A State Court Judge
A Mediator
An Arbitrator
Your Mother
Your Spouse**

How Much Power Does a Neutral Have?

The Eighth Circuit has now made clear that a court’s role from the time an arbitration is filed until the final award by the arbitrator is “limited to determining whether the matter is arbitrable.” *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001). The arbitrator will decide *all other* matters.

The Eighth Circuit will not even get involved to decide whether public policy conflicts with a provision in the arbitration agreement that precludes an award of punitive damages. Plaintiff/Claimant had alleged RICO violations that under federal law, in a traditional court of law, could include an award of punitive damages. Even further, the Eighth Circuit stated: “we leave to the arbitrators what effect, if any, to give to the damage limitation language if indeed damages are awarded by them for any claims.” *Id.* at 1086-87.

The case is especially noteworthy because the Eighth Circuit, in making law in this Circuit, decided not to follow contrary precedent from the Ninth and Eleventh Circuits.

Two months later the Eighth Circuit reached the same result in a different case. “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 v. Circuit City Stores, Inc.*, 262 F.3d 677, 680 (8th Cir. 2001), decided August 17.

At stake is a balance between the laws applicable to contract interpretation that courts must follow and the rights of parties to enter into arbitration agreements as they please (or at least as one of the parties had drafted the agreement). Right now, the Eighth Circuit seems resolute in its approach, even if the picture is not that universally clear amongst courts around the country. “In an evolving climate such as this, if we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts....” *Id.* at 682.