

**ARBITRATION SUBCOMMITTEE REPORT
FALL 2009 CONFERENCE**

Informative Website. I have found to be an extremely informative website the University of Missouri's School of Law web communication which can be accessed at <http://law.missouri.edu/csdr/news/>. Any specific information can be sent to Laura Coleman at colemanl@missouri.edu. I attach the most recent update information from the School of Law as a point of reference as to the kind of information it provides.

Brief Report on Some Recent Appellate Decisions within the Last Two Months.

**RECENT REPORTED DECISIONS FROM THE EIGHTH CIRCUIT AND
MISSOURI APPELLATE COURTS**

Appellate Jurisdiction

As a matter of first impression, the Eighth Circuit ruled that it had jurisdiction over an appeal from the denial of a motion to compel arbitration issued by the United States District for the Eastern District of Missouri. The underlying dispute involved a vendor agreement and allegations of patent and trade dress infringement as well as alleged violations of Missouri's unfair competition laws. The dispute over appellate jurisdiction revolved around whether the Federal Circuit has exclusive jurisdiction over appeals of this matter, as there is a split among the circuits. The Eighth Circuit ruled that the Federal Circuit does not have exclusive jurisdiction and since the underlying matter was pending in the Eastern District of Missouri, an appeal to the Eighth Circuit was proper. *Industrial Wire Products, Inc. v. Costco Wholesale Corporation*, 576 F. 3d 516 (8th Cir. 2009).

Enforceability of an Arbitration Provision on a Non-Signator is Governed by State Rather than Federal Law

The Eighth Circuit recently reinforced that a dispute in Mississippi over whether an arbitration provision applies to a non-signator is to be determined under Mississippi contract law. In this case, the party asserting binding arbitration—Donaldson—did not assert that it believed or relied on any representation about arbitration, and did not change its position to its detriment in reliance on a representation. Further, the court noted: "It does not appear that Donaldson even knew about the arbitration agreement between Burroughs and Western Star until this litigation began." *Donaldson Company, Inc. v. Burroughs Diesel, Inc.*, 581 F.3d 726, 736 (8th Cir. 2009). Accordingly, the Eighth Circuit reversed a trial court order compelling arbitration and

remanded the case for further proceedings. This is a rare departure from most appellate cases that typically uphold a trial court's decision to compel arbitration.

Credit Card Arbitration Provision not Unconscionable

A credit card holder filed a class action lawsuit in state court against a bank alleging violations of Missouri's Merchandising Practices Act. After removal, the bank moved to stay and compel arbitration pursuant to the credit card agreement. The trial court found the arbitration provision to be unconscionable because it contained a class-action waiver and it provided that both parties would bear their own costs, except an arbitrator could shift costs regardless of which party prevails. The Eighth Circuit reversed, concluding that the agreement was not unconscionable under Missouri law. *Cicle v. Chase Bank USA*, 583 F.3d 549 (8th Cir. 2009).

Orders Compelling Arbitration and Staying Arbitration are not Appealable

Plaintiff claimed that the circuit court erred in failing to rule on her application to prohibit defendant's unilateral choice of NAF for arbitration, a forum that the plaintiff contended is notorious for its bias against consumers. The Eighth Circuit concluded this really was an attack on an order compelling arbitration, and as such is not appealable. *Robinson v. Advance Loans II, L.L.C.*, 290 S.W.3d 751 (Mo. Ct. App. 2009). This case offers an excellent discussion of the procedural landmines that a litigant must navigate through in order to have a chance of correctly posturing a trial court's decision as being immediately appealable on the issue of arbitrability.

Review of Arbitrator Award

Courts remain reluctant to overturn an arbitration award or send it back for additional proceedings. The Eighth Circuit recently stated that it agrees with the Seventh Circuit that when reviewing an arbitration award, the appellate court should use the remand procedures sparingly in labor arbitration cases "given the interest in prompt and final arbitration." *Turner v. United Steelworkers of America, Local 812*, 581 F.3d 672, 677 (8th Cir. 2009). Accordingly, the Eighth Circuit concluded that when an arbitrator labeled a union "responsible for the back pay from January 21, 2005 through and including September 9, 2005" the arbitrator did not intend to award back pay directly against the union for that period. Thus, the Eighth Circuit concluded that while claimant was entitled to a judgment affirming the award, the district court judgment awarding damages plus interest had to be reversed.

Personal Injury Arbitration Award

Christopher Spielvogel and his wife Diana were riding a motorcycle on Highway 169 at the Broadway Bridge Complex in Kansas City in 2001 when their motorcycle collided with the center median. Both were ejected from the motorcycle. Diana died from her injuries and Christopher was seriously injured. Christopher and his children sued the Missouri Highway and Transportation Commission (“MHTA”) and the City of Kansas City for personal injury and wrongful death. Upon Spielvogels’ request, the court ordered an arbitration hearing on the claims against MHTA. The arbitrators determined that MHTA was responsible for the property on which the accident occurred and that MHTA had waived its right to sovereign immunity based upon the exception in the law if there are dangerous conditions on the property. The arbitrators awarded Christopher damages of \$861,000 on his personal injury claim subject to a 30% reduction for comparative fault. The arbitrators also awarded the Spielvogels \$2,250,000 in damages on their claim for the wrongful death of Diana Spielvogel. This is yet another case where an arbitration panel awarded significant damages for personal injuries and wrongful death in an arbitration proceeding, not a court of law. *Spielvogel v. City of Kansas City*, 2009 WL 3425636 (Mo. App. W.D.). This opinion was submitted on October 27, 2009.

Arbitrator Impartiality

In a high profile case involving suspended professional football players who allegedly tested positive for banned substances, the Eighth Circuit affirmed an arbitration award over a claim of arbitrator partiality. The Eighth Circuit concluded that the parties to an arbitration choose their method of dispute resolution and that they can ask no more impartiality than inheres in the method they have chosen. Thus, the players’ union waived any objection to an arbitrator’s evident partiality within the meaning of the Federal Arbitration Act where such objection was based on communications by the arbitrator on litigation threats to the professional football league. The waiver occurred because the players’ union failed to object to the fact that the arbitrator was the general counsel for the league while serving as an arbitrator. The court concluded that the union could not reasonably claim to be surprised that any communications occurred given the arbitrator’s position as general counsel for the league. *Williams v. National Football League*, 582 F.3d 863 (8th Cir. 2009).

Application of Arbitration Clause

The United States District Court for the Western District of Missouri very recently enforced an arbitration clause that stated the parties agree to arbitrate “any legal dispute relating to this Agreement and/or any claim related to this Agreement, or breach thereof, . . . [shall be] submitted in arbitration.” *Walsh v. American Multi-Cinema, Inc.*, 2009 WL 3617689*2 (W.D. Mo.). The court,

accordingly, concluded that claims for promissory estoppel, negligent misrepresentation/inducement, equitable estoppel and rescission of contract “fall comfortably within the scope of the arbitration clause.” *Id.* Plaintiff claimed he entered into the agreement due to defendant’s misrepresentations. The court decided this did not render the arbitration clause unenforceable. “In order for the Court to find the arbitration clause unenforceable, there must be an allegation that the party was fraudulently induced to include the arbitration clause itself in the contract.” *Id.*

Fraud Claim Subject to Arbitration

The Western District very recently concluded that fraud claims are subject an arbitration provision which required that the parties settle “any and all claims . . . by binding arbitration.” *Grossman v. Thoroughbred Ford, Inc.*, 2009 WL 3486011 (Mo. App. W.D.). This case was handed down on October 30, 2009.

Severing Part of an Arbitration Provision

The Western District very recently concluded that an arbitration agreement that immunized Honda from consumer claims relating to a charge of \$199.95 for a document preparation fee is “substantively unconscionable.” *Ruhl v. Lee’s Summit Honda*, 2009 WL 3571309 (Mo. App. W.D.). This case was decided on November 3, 2009. The contract also contained a class waiver provision and a provision stating that if any provision is found to be unenforceable for any reason, the remainder of the agreement shall be enforceable. Accordingly, the court decided the class waiver provision was not essential to the enforcement of the arbitration agreement and therefore was severable. The appellate court reversed the trial court and remanded the case to the trial court to enforce the arbitration agreement absent the class waiver provision.

Exhaustion of Administrative Remedies

If a claim is subject to arbitration but the claim is not brought in arbitration, it cannot later be raised in a court of law. *Hudson v. Butterball, LLC*, 2009 WL 3486780 (Mo. App. W.D.), decided October 14. Accordingly, Hudson’s common law claims failed because she failed to exhaust administrative remedies under the grievance and arbitration provisions in her agreement.

Respectfully submitted,

James R. Keller
Herzog Crebs LLP
Chair of the Arbitration Subcommittee
of the ADR Committee of The Missouri Bar
100 North Broadway, 14th Floor
St. Louis, MO 63102
314.231.6700
314.231.4656 (fax)
jrk@herzogcrebs.com

November 2009