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ILLINOIS STATE BAR ASSOCIATION

IN THE ALTERNATIVE

The newsletter of the ISBA's Section on Alternative Dispute Resolution

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Chair's column

By Hon. Michael Jordan

I feel a great sense of pride and gratitude becoming the Chair of the Alternative Dispute Resolution Section for the year 2005-2006. I am particularly grateful to President Bob Downs for his appointment as well as Ole Pace III for his having moved me up to Vice Chair last year, and Allen Lavin for designating me Secretary the year before. I follow Bob Wells, and that is a daunting challenge since he demonstrated fantastic passion, energy, imagination, and ability well channeled into making the section progress on a fast-paced, multi-track course for the entire year in a manner that was inclusive for all and took into consideration the big picture yet never ignoring any of the details. He constantly displayed grace and finesse. Bob always reminded me to look to the prior leadership of the Section for guidance and to cultivate and awaken the energies of the newer members for the present and future. Bob had an agenda I share, to foster the growth and success of ADR, particularly mediation, in our state.

I look forward to working with all of the section council members and congratulate Steve Cohen for his promotion to Vice Chair of the Section Council. He has been greatly involved in all of our projects for the last several years and always adds a strong voice on the issues. As of the writing of this column, I am not aware of the identity of the new secretary. I have confidence that President Downs will make a wise choice. One of my first acts several months ago was to invite Professor Thomas Cavenagh to serve for at least another year as the editor of our newsletter. I am very grateful to Tom that he agreed to serve. The quality of his work is magnificent. I urge every reader of this newsletter to let their own instincts, interests, and passions move them to write articles for the newsletter several times this next year on pending or existing legislation, case law, or any ADR-related topics you think appropriate. I know we all want our newsletter to be the voice of the entire community. Don't let another day go by. Gather your thoughts and begin your article today. I look forward to seeing your article and learning from you.

We have many projects to address this year. We are the proactive force for education and training for mediation and arbitration services in Illinois for the users and for the providers. We intend to continue that tradition. We have also been an educational force in the community explaining how lawyers are service providers who help solve problems. Lawyers can help direct people to the best, fastest, and cheapest means for conflict resolution. We are keenly aware of the need to monitor legal trends and to encourage the passage of useful legislation or prevent the passage of burdensome, oppressive, or needless legislation.

The activities of our section council require the energies and efforts of all. I welcome one and all to attend our section council meetings, to speak up, to volunteer their ideas and to work to make the ideas become a living reality. While I am creating committees to process some of the activities of the Section Council, I hope everyone plays a role in all activities. Consider yourself the unofficial ex-officio vice chair of any committee you find interesting now or during the course of the year. I am keeping the structure used by Bob Wells and seek your active participation on as many committees as you are willing to serve. Publications will be chaired by the editor, Professor Cavenagh.

As the outgoing chair of our CLE Committee, I am pleased to announce that our section council is co-sponsoring the successful monthly educational program offered for lawyers, judges, and mediators participating in the court-annexed mediation program in Cook County. The program started this past April with programs scheduled through next year.

All seminars are held in Courtroom 2005 of the Richard J. Daley Center and run from 12:00 noon to 1:45 p.m., unless otherwise indicated. The seminars are generally held on the second Thursday of the month. Attendees are invited to bring their own lunch. Those attending are requested to call Judge Allen Goldberg's secretary, Mrs. Ferenzi at 312-603-6078, or Ms. Kim Atz, mediation administrator, at 312-793-0125. There is no admission charge but registration is requested.

The first program was held April 14, 2005 on Mediation Advocacy Skills

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Training with panel members Hon. Julia Nowicki, Hon. Roderick Heard, Mr. Robert Matlin, Hon. Thomas R. Rakowski, Hon. James E. Sullivan, and Hon. Bruno Tassone. The program covered a general description of mediation in the ADR context, preliminary pre-mediation considerations, and a question-and-answer period. The next program took place May 12, 2005—Mediation Advocacy Skills Training – 2nd Session with Hon. Jack Cooley, Mr. Frosty Pipal, Hon. Roderick Heard, Ms. Cherl Niro, Hon. James Sullivan, and Hon. Michael Jordan. The program included preparing the case for mediation, preparing the client for mediation, and a question-and-answer period. A June 9, 2005 program—Mediation Advocacy Skills Training – 3rd Session with Hon. Jack Cooley, Hon. Roderic Heard, Hon. Michael Jordan, Ms. Cheryl Niro, Mr. Faustin Pipal, and Hon. James Sullivan. The topics include effective advocacy in the mediation session, post-mediation advocacy, and a question-and-answer period.

After a break for the summer, the program will resume on September 8, 2005—Breaking the Impasse: Moving from stalemate to settlement in mediation with Hon. Mort Denlow, Mr. Stuart Widman, and Professor Tom Gibbons.

These programs are encouraged by Chief Judge of the Circuit Court of Cook County, Timothy C. Evans, under the auspices of Law Division Presiding Judge William D. Maddux, and with the supervision of Judge Allen Goldberg, responsible for the court-annexed mediation program in the Law Division. Judge Goldberg is an active and valued member of our section council.

Further information will be disseminated regarding the programs already planned for October, 2005 through the spring of 2006. Mediation has become a very successful aspect of our lives as lawyers everywhere and in the past year especially for cases in the Law Division in Cook County. Soon there will be an expansion of court-annexed mediation into the Chancery Division with rules now being drafted.

Editor's note

By Thomas Cavenagh

Introducing *In The Alternative's* New Student Editors

Each year, *In the Alternative* selects students with an interest in Alternative Dispute Resolution to serve as student editors. These students are chosen on the basis of academic excellence and interest in alternative methods of conflict resolution. This year's editors are Kristi Hornickel, Megan Kawa and Samia Zayed; all three are pre-law students.

Kristi is a third-year student at North Central College with a double major in Marketing and Entrepreneurship and Small Business Management and a minor in Professional Conflict Resolution. She is also involved in the American Marketing Association, Students In Free Enterprise, our College Scholars program, and the Student Government Association as a judicial panel Judge. She decided to enter the field of Conflict Resolution after taking an introductory course on mediation and writing a series of articles on Ombudsmanship, the first of which is included in this issue.

Megan is a sophomore from Omaha, Nebraska. She is currently in the process of creating an individualized major in "Social Change and Public Advocacy." She is also minoring in Professional Conflict Resolution. Megan is the Office Manager for Campus Safety and participates in the college Mock Trial program.

Samia a sophomore double majoring in International Business and Spanish with a minor in Professional Conflict resolution. She works for the campus Career Development Center as a student advisor and is the vice-president of the College Union Activities Board.

We welcome and are grateful for contributions to this newsletter from members of the section. *In The Alternative* serves as the communication vehicle for and between members of the Alternative Dispute Resolution Section, other practitioners and the legal profession at large. Unsolicited manuscripts of any length are very much welcomed. In addition, we are pleased to include descriptions of upcoming events related to ADR. Please submit articles and event information to: Thomas Cavenagh, Professor of Law and Conflict Resolution, North Central College, 30 North Brainard Street, Naperville, Illinois 60540, phone: 630\637-5157, facsimile: 630\637-5260, e-mail: tdcavenagh@noctrl.edu.

Ombudsmen: Part 1

By Kristi Hornickel, North Central College

After a rousing speech in Southern Illinois earlier this year by President Bush, most Americans were ready to jump on the Alternative Dispute Resolution bandwagon, on their way to less-crowded dockets and tort reform for all. Arising from this common perception of frivolous lawsuits and backstabbing lawyers, interest in ADR methods has increased significantly; it has also raised the profile of the Ombudsman. Similar to a mediator, Ombudsmen are individuals who are "authorized to receive complaints or questions confidentially about alleged acts, omissions, improprieties, and broader systemic problems…to address, investigate, or otherwise examine these issues independently and impartially."[1] This definition touches on the two most crucial components of Ombudsmanship: confidentiality and neutrality. It is these two underlying principles that make the Ombudsman not only a fascinating and complex position, but one that is currently facing legal barriers which threaten to impede expansion of the position. Over the next few issues, the Ombudsman will be explored in greater depth, including the controversy over the Ombudsman privilege and the detailed criteria set forth by the Ombudsman Association to ensure an Ombudsman's neutrality.

For years, organizations have taken a defensive approach to disputes: employing in-house lawyers, including arbitration clauses in agreements and, most recently, utilizing the practice of mediation to significantly reduce cost and exposure. However, more and more companies are beginning to realize that the use of such measures can be avoided altogether. The purpose of the Ombudsman, as stated by The Ombudsman Association, is "to provide a confidential, neutral, and informal process which facilitates fair and equitable resolutions to concerns that arise in the organization."[2] Conflicts can be resolved in the earliest stages by Ombuds. Acting within an organization, the Ombudsman allows employees an informal channel of conflict resolution. The position is not only intended for conflict, however, but also "serves as an information and communication resource, upward feedback channel, advisor, dispute resolution expert, and change agent"[3] in settings such as colleges and universities, government agencies, corporations, and hospitals. By offering individuals an alternative to lawsuits and mediation, the Ombudsman offers a confidential method of resolving disputes before they become a threat to the organization.

What makes this position so complex is the constant struggle to achieve neutrality. An Ombudsman must remain unbiased as he/she addresses issues that include the very organization by which they are employed. In order to achieve the impartiality needed to effectively resolve complaints, the position is granted a certain degree of independence within an organization. This independence is described by The American Bar Association in The Model Shield Law of Ombudsman. First, the position should have "an independent structure, function, and appearance."[4] To ensure this independence "no one should be able to control or limit the Ombudsman's duties after creation…eliminate the office or remove the ombudsman for retaliatory purposes."[5] In order to practice effectively, the Ombudsman must not feel coerced to rule in favor of the organization. Finally, "the Ombudsman is not responsible to [the] employer or creator."[6] Instead, the position functions outside the normal chain of command; reporting only to the head of the organization. Overall, it is necessary that the Ombudsman be free from the possibility of bias or even the appearance of bias so that both the organization and its employees are willing to utilize the vast array of helpful services he/she can employ.

In addition to neutrality, the Ombudsman's practice must be confidential. That is to say, that the source and content of communications with

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an Ombudsman must be kept secret by "providing anonymity" to the individual.[7] Without the reassurance that their identities will not be revealed, employees of an organization will be considerably less likely to use such an outlet to resolve sensitive issues such as sexual harassment or discrimination. Although the importance of this requirement seems necessary for an Ombudsman to function as intended, "no ombudsman privilege exists through the interpretation of federal evidence rules."[8] Without the protection of confidentiality, an Ombudsman is no different from other individuals who receive complaints within a working environment. If a privilege is not granted to the extent that "all communications, including all notes and written communication records pertinent to their role" are protected, the Ombudsman role will suffer measurably. We will consider caselaw on the matter of confidentiality in a future issue.

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1. ABA Model Shield Law Comm., Model Shield Law for Ombudsman, at <http://www.abanet.org/adminlaw/ombuds/modellaw.html>.

2. Larry B. Hill, Address at the Spring Meeting of the American Bar Association Section of Administrative Law and Regulatory Practice.

3. Id

4. ABA Model Shield Law Comm., Model Shield Law for Ombudsman, at <http://www.abanet.org/adminlaw/ombuds/modellaw.html>.

5. Id

6. Id

7. The Ombudsman Association Code of Ethics. <Http://www.ombuds-toa.org/code_of_ethics.htm>.

8. ABA Model Shield Law Comm., Model Shield Law for Ombudsman, at <http://www.abanet.org/adminlaw/ombuds/modellaw.html>.

Arbitration fees—Who pays?

By John Gilbert

One effective way to deal with the escalating cost of dispute resolution is to simply not pay the fees and costs involved. Lawyers are, unfortunately, all too familiar with this approach with respect to attorney fees, but what about the actual costs taxed by courts and service providers? Litigants who take this approach run into clerks who refuse to accept pleadings or court reporters that don't show up. Litigants are ultimately defaulted or severely prejudiced in the presentation of the case.

Arbitration, however, presents a very different scenario. Litigants who don't pay usually do not appear and participate and are also usually defaulted. However, what about the arbitration respondent who files an answer but refuses (or delays) the payment of the advanced assessment for arbitrator fees? These amounts can be substantial, especially where three panelists are involved, and the reasons for such conduct diverse. The respondent can be short of funds, can be standing on some principle, can be experiencing some administrative problem, or can simply be trying to delay the proceedings. The effect of non-payment by the respondent is dramatic—the proceedings usually come to a halt pending payment. Most claimants figure there is nothing they can do at this point.

Illinois law appears to support this as a tactic in some situations. In *Abels v. Safeway Insurance*, 283 Ill.App.3d 1, 669 N.E.2d 633, 218 Ill.Dec. 490 (1st Dist. 1996), app. denied 169 ILL.2d 563, the court ruled that a respondent could not be forced to pay the arbitrator fee in advance. Safeway appears to have been standing on principle because it named one arbitrator, but refused to pay the other "party" arbitrator and one-half of the fees for the third "neutral" arbitrator. The decision is certainly consistent with the idea that an injunction (mandatory in nature) is inappropriate where money "damages" are the issue, but what about other concepts, perhaps unique to the arbitration process? The court noted that the insurance contract itself did not contain a provision requiring the payment of fees, only that the dispute be arbitrated. The court also observed that section 10 of the Arbitration Act is not any help because it provides for the assessment of fees and costs after the hearing, unless otherwise provided for in the agreement:

> Under Illinois law, there is absolutely no requirement that an insurer agree in advance of arbitration to pay all arbitrator fees.

669 N.E.2d at 635. *Abels* may be a barrier, but it also contains several clues as to how a claimant might approach the problem.

Federal case law states where the rules of the administrating agency (like the AAA) are incorporated by reference into the arbitration agreement and those rules require the payment(s) to be made, they can be enforced. See for example, *Commonwealth Edison v. Gulf Oil*, 541 F.2d 1263 (7th Cir. 1976). The *Abels* court itself noted that the AAA Rules were stipulated in the insurance policy, but thought that they were not applicable because the parties had agreed to the appointment of a panel independently, thus avoiding resort to the AAA under the contract and the terms of the Insurance Code. Therefore, no discussion of whether or not those Rules would have required a different outcome. Unfortunately, there do not appear to be any other Illinois cases which discuss the subject in terms of general commercial or construction arbitration.

The court did discuss section 143a of the Insurance Code, which requires all policies to have an arbitration clause, and stipulates that the AAA be the agency of first resort if a voluntary agreement on the panel cannot be reached. That section contains the words "and be subject to its rules for the conduct of arbitration hearings...," 215 ILCS 5/143a(1), where resort

to the AAA is had. This leaves little or no doubt that, at least where the Insurance Code is involved, AAA Rules will govern if the AAA administers the case.

- **Clue #1** - If you have the opportunity, insert the usual provision incorporating agency rules into the agreement. If requested, also consider adding a provision specifically requiring the parties to pay required fees in advance. AAA Commercial Rule 52 is helpful because it gives the agency specific authority to require advance deposits.
- **Clue #2** - Don't shoot your client in the foot. Remember, your client pays half. Think about how many arbitrators you want in different situations (i.e., over/under $250,000 at issue) and whether or not you want a cap on fees and/or fee deposits. Or, select an agency that caps fees automatically. Remember also that arbitrators tend to estimate fees based on total time required to draft and reach a decision—and this includes resolving discovery disputes.
- **Clue #3** - If you have appropriate supporting contract language, go to the federal court, if you can. Remember, however, that resort to the federal court requires an independent basis for jurisdiction.

  However, as the Supreme Court has noted, the "save for such agreement" language of Section 4 [of the Uniform Arbitration Act] does not itself grant jurisdiction to federal courts…

  America's Moneyline v. Coleman, 360 F3d 782,784 (7th Cir. 2004). If you don't have diversity of citizenship and the requisite amount or some other basis for jurisdiction, forget it.
- **Clue #4** - Argue that *Abels* is distinguishable. *Abels* is an interpretation of the Insurance Code, but it is also a broad statement regarding a private insurance contract. Although the decision is consistent with equitable principles involving disputes over money, it is based on the assumption that the AAA Rules do not apply. Most of the time, some agency's rules do apply.
- **Clue #5** - Use the process. (A) Talk to your client in advance. We always seem to overlook this one. The contract may not have language which supports the imposition of fees in advance. If the client is aware that he or she may be required to pay all the fees up front, the possibility that this may be a more cost-effective approach than going to court will be a viable alternative strategy. Most agency rules and section 10 of the Arbitration Act allow the arbitrators to re-adjust the fees and the contract may require that the prevailing party get this relief. (B) Don't overlook talking to the case administrator about getting the panel to reduce the fee deposit if the other party is refusing to pay. (C) You might even argue that the respondent is actually in default.
- **Clue #6** - Use the federal case law. Most commercial and construction contracts make specific reference to agency rules. Most practitioners overlook this argument and the case law available from the federal courts. Illinois courts should allow the incorporation of agency rules by reference because to do so is consistent with traditional contract law and a basic objective of arbitration policy—to allow the parties to control the process by contract. See for example, *Edward Electric v. Automation, Inc.*, 229 Ill.App.3d 89, 593 N.E.2d 833, 840, 171 Ill. Dec. 13 (1st Dist. 1992), app. denied, 146 Ill.2d 625, where the court recognizes that the rules of evidence for the hearing are defined by the AAA Rules.

Florida: Pressure by Mediator can justify setting aside a settlement

By Samia Zayed, North Central College

A case brought to Florida's 4th district court of appeals should serve as a reminder to mediators that pressuring or coercing parties to settle is improper and settlements made under these conditions can be set aside. In *Vitakis-Valchine v. Valchine*, 793 So. 2d 1094, Kalliope and David Valchine used court-ordered mediation in an attempt to settle disputes that arose in the course of their divorce proceedings.

The mediation led to a 23-page settlement agreement that addressed all essential matters. A month later, Kalliope Vitakis-Valchine requested to that the agreement be set-aside, alleging that her husband, her husband's attorney, and the mediator had pressured her to settle. When the trial judge rejected her motion, Vitakis-Valchine appealed.

Although the court found that neither the husband nor the husband's attorney caused any duress, it determined that the alleged misconduct by the mediator was sufficient cause for the court to set aside the settlement. Vitakis-Valchine's alleged that the mediator threatened to report her to the judge for failing to agree to a reasonable settlement offer. She further claimed that the mediator advised her that even if she signed the agreement she could still protest unfavorable provisions at the final hearing. The court held that the mediator was acting as an agent of the court and if Vitakis-Valchine's claims were true, the mediator had abused his position. The case was remanded for further findings and the trial court must now decide if there is merit to Vitakis-Valchine's claims and, if so, must set aside the agreement.

Case summaries

By Kristi Hornickel, Megan Kawa & Samia Zayed, North Central College

Mediation: A case dismissed with prejudice for failure to mediate is not an abuse of discretion

***Office Environment Inc. v Lake States Ins. Co.* 2005 WL 2060996 Indiana Court of Appeals**

The Insured, Office Environment, Inc. filed a claim against the Insurer, Lake States Insurance, alleging failure to pay a claim. The local rule ordered the parties to participate in mediation 60 days before going to court, however, after three years and several attempts by the chosen mediator to hold the mediation, Insured refused to mediate resulting in the dismissing of the case with prejudice. Insured claimed there were appropriate reasons for the delay in mediation and therefore appealed the decision. The Indiana Court of Appeals affirmed the lower court's decision to dismiss the complaint, but would reverse it if the appellant could show an abuse of discretion; however, the Insured failed to do so. The Court indicated that dismissal of the complaint was appropriate because if Insured asked the court for permission, they could have been excused from mediation.

Arbitration: A union's delay in arbitration matters that caused a worker to miss a window of opportunity was not unfair representation in the light of the circumstances

***Fred Sanozky v. International Association of Machinists and Aerospace Workers* 2005 WL 1691595 New York Court of Appeals, 2nd Circuit**

Fred Sanozky' filed for arbitration with the International Association of Machinists and Aerospace Workers (IAMAW) after Trans World Airlines (TWA) terminated his employment. Shortly thereafter, TWA filed for bankruptcy putting Sanozky's arbitration claim to an end. American Airlines took control of TWA and IAMAW was able to bargain with American Airlines to keep TWA workers actively employed. Even though American Airlines had no interest in employee's facing termination charges, they agreed to 24 termination hearings. Under the Railway Labor Act, Sanozky brought suit against IAMAW for unfair representation. He claimed that IAMAW's delay caused him to miss a window of opportunity to acquire a timely arbitration. However, the court held that the actions of IAMAW were not unreasonable in the light of the circumstances. American Airlines was only willing to arbitrate some of the numerous termination hearings and IAMAW had a responsibility to represent numerous TWA employee terminations, all who are entitled to arbitration.

Arbitration: The right to arbitrate under an arbitration agreement is forfeited if the party fails to timely pursue an appeal of a denial to arbitrate

***Franceschi v. Hosp. Gen. San Carlos, Inc.* 2005 WL 2035260 U.S. Court of Appeals, 1st Circuit**

Dr. Porfirio Franceschi was employed as a radiologist by Hospital San Carlos in Puerto Rico. Franceschi sued his employer after the employer allegedly failed to pay him his contracted salary. The employment contract contained an arbitration clause for any disputes, requiring the two parties to attempt to arbitrate the claim, however, the attempts failed and Franceschi filed suit. Based on the existence of the arbitration provision, he submitted a motion for summary judgment. The court denied the summary judgment and the case was decided by a jury three years later. Both parties appealed the decision. The appellate court held that they would adopt three other circuits' holdings that a party's failure to timely appeal a denial of arbitration, if prejudicial to the opposing party, operated to the forfeit of the demanding party's right to arbitration. Because the hospital did not to anything for three years to pursue an interlocutory appeal for mandatory arbitration, it forfeited its right to arbitrate.

Full opinion at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=1st&navby=case&no=042104>.

Arbitration: An employee is not subject to arbitration where she never received the employee handbook stating the arbitration policy, even if she signed a form saying that she read the policy

***Quiles v. Financial Exchange Co.* 2005 WL 1562355 Pennsylvania Supreme Court**

All prospective employees of the employer were required to read the employee handbook, which contained an arbitration clause, and then sign a form stating that they had read the handbook. The form specifically stated that the employee was acknowledging having read the arbitration clause. The employee in question was found by the trial court to never have received the handbook, even though she had signed the form that said she had received it. The court also found that she was pressured into signing the form, and that she repeatedly asked to see the handbook, but never received one. The appellate court held that the employee could not be bound to arbitrate, in spite of a national policy in favor of arbitration.

Full opinion at: <http://www.aopc.org/OpPosting/Superior/out/a08021_05.pdf>.

Arbitration: Under Louisiana law, a contract to arbitrate may be formed without writing and still be enforceable

***Marino v. Dillard's, Inc.* 2005 WL 1439892 (5th Cir., June 21, 2005)**

Karen Marino sued Dillard's, Inc., her former employer, for unlawful termination and failure to accommodate her alleged disability under the Americans with Disabilities Act (ADA). While under employment with Dillard's, Marino received a pair of documents concerning an arbitration policy and an "Acknowledgement Form" which stated that "[e]mployees are deemed to have agreed to the provisions of the Rules [of Arbitration] by virtue of accepting employment with [Dillard's] and/or by continuing employment therewith." Below this statement and immediately above the signature line, the form states, "I acknowledge receipt of the agree-

ment to arbitrate certain claims and rules of arbitration." Marino signed the Acknowledgment Form and continued to work for Dillard's and some time thereafter, Dillard's terminated Marino and this suit was followed. Dillard's motioned to arbitration, but the trial court denied the motion, finding that Marino had not consented to arbitration. The appellate court applied Louisiana state law, which provided that a contract does not need to be in writing for there to be consent, therefore, the documents were explicit and Marino had consented to the policy. The decision was reversed and remanded.

Full opinion at: <http://caselaw.lp.findlaw.com/data2/circs/5th/0430911p.pdf>.

Arbitration: A grievance under an expired Collective Bargain Agreement must be asserted within a reasonable time after its discovery to preserve the action

R.J. Carman derailment Services v. International Union of Operating Engineers, Local 150 **No. 04-2482 U.S. Court of Appeals 7th Circuit**

After failing to establish a renewed collective bargaining agreement with International Union of Operating Engineers, R. J. Derailment Services, which specializes in emergency railroad services, closed its Gary, Indiana facility. More than 18 months later, the Union filed grievances against R.J. Corman for not complying with a wage provision in the collective bargaining agreement established in 1996. Although the events that triggered the grievances took place before the agreement expired, the courts ruled in favor of the Plaintiff, declaring that the Union failed to file the grievances within a timely manner after the agreement had expired. Upon appeal, the Seventh Circuit held that the Union failed to file the grievances in a reasonable time as defined by the language of the agreement between the two parties, which stated that a party demanding arbitration must do so within 45 days of discovery of the grievance. Since the International Union of Operating Engineers failed to abide by the terms, the Seventh Circuit Court of Appeals ruled that the arbitrability of a claim does not extend indefinitely and barred the Union from bringing the action.

Full opinion at: <http://caselaw.lp.findlaw.com/data2/circs/7th/042482p.pdf>.

Arbitration: A party does not automatically waive its right to arbitrate its contractual claims by filing a mechanic's lien

Newman v. Valleywood Association No. **2002-674-Appeal Supreme Court of Rhode Island**

The Newmans hired Valleywood Associates to build them a new home. Upon signing the written agreement, the Newmans agreed to an arbitration clause and provision for filing a mechanic's lien. A dispute arose between the parties when the Newmans became unsatisfied with the work Valleywood had performed. This was followed by the filing of a mechanics' lien by Valleywood and a breach of contract claim by the Newmans. Valleywood, then, moved to dismiss the claim brought by the Newmans based on the arbitration provision stated in the written agreement. The motion judge granted Valleywood's motion contingent upon the dropping of the mechanics' lien within two weeks. When the company did not comply, the motion judge denied the motion. Upon appeal, Valleywood argued that nothing, including the contract itself, barred it from pursuing arbitration on contract claims and filing a lien. The Newmans argued that Valleywood waived its right to arbitration by filing a lien and expressing a willingness to litigate first. With the conditional nature of the previous ruling in mind, the Supreme Court of Rhode Island analyzed the appeal "as though it was an order denying a motion to stay litigation." Ultimately, the court held that seeking arbitration and filing a mechanics' lien are not mutually exclusive and the act of filing a lien does not bar a party from arbitrating contractual claims in the same matter. Thus, the court reversed and remanded the case for further proceedings.

Full opinion at: <http://caselaw.lp.findlaw.com/data2/rhodeislandstatecases/2005/02-674.pdf>.

Arbitration: When a court ignores a choice of law provision in an arbitration agreement and the interested party fails to raise an objection, the appellate court has high discretion in deciding to hear the new issue even if the result is plain error

Wiser v. Wayne Farms **No. 04-2021 U.S. Court of Appeals 8th Circuit**

Ms. Wiser agreed to take care and harvest Wayne Farm's hens in exchange for compensation. When another individual wanted to lease Wiser's farm two years later while maintaining the contract with Wayne Farms, the parties agreed that the lease would remain in tact contingent upon improvements to the Wiser's farm. Ms. Wiser agreed with Wayne Farms that if the lessee failed to adequately comply with the agreement, she would recommence caring for the chickens. When the lessee did not comply adequately, Wayne Farms removed the chickens and did not let Ms. Wiser resume care for the birds. When the Wisers brought claims against Wayne Farms, the defendant moved the court to compel arbitration. However, the court denied the motion for arbitration based on Arizona law. Wayne Farms then proceeded to appeal, arguing that the arbitration invokes Georgia law. The Wisers declared that since the Defendant did not object to the use of Arizona law at trial, it was barred from its right to appeal on that basis. The Eighth Circuit Court of Appeals noted that the Defendant failed to bring up the choice of law issue before appeal and relied solely on Arizona law in the original memorandums to the District Court. Wayne Farms stated that even though it did not bring up the choice of law before appeal, the court should review the issue to prevent plain error. The court held that "although the issue of plain-error test in a civil context is unclear in the Eighth Circuit, the court has high discretion to determine what questions to hear on newly-raised issues and the effect of the mistake in this case is simply whether the case will go to federal court or arbitration." The Court of Appeals affirmed the District Court's decision.

Full opinion at: <http://caselaw.lp.findlaw.com/data2/circs/8th/042021p.pdf>.

Arbitration: The existence of a separate Internal Dispute Solution Program that could be altered without notice was insufficient to allow a trial court to find an arbitration agreement lacked consideration

Hill v. Peoplesoft USA, Inc. **No. 04-2187 United States Court of Appeals for the 4th Circuit**

Karen Hill accepted a job with PeopleSoft USA, Inc. which was offered

to her in the form of a letter. Included in the letter was a condition that stated Ms. Hill would need to sign a six page arbitration agreement stating that employees of Peoplesoft would have to "arbitrate all issues arising from employment with the company." Hill was also informed in the letter that by accepting employment, she would be subject to the Internal Dispute Solution Program. Unlike the arbitration agreement, Hill did not have to sign a form concerning her involvement in the program. In January of 2004, Hill brought a sexual discrimination suit against Peoplesoft in Federal District Court alleging sexual harassment, discrimination, and a hostile work environment. Peoplesoft then filed a motion to compel arbitration followed by a motion for summary judgment by Hill. The Trial Court reviewed the Internal Dispute Solution Program and found it to be without consideration as Peoplesoft reserved the right to alter the agreement without notice and denied the motion for arbitration. Upon appeal, the court disagreed with the ruling and stated that the Trial Court was "not allowed to look beyond the arbitration agreement to find consideration." Therefore, the appellate court held the arbitration clause to be valid and the case remanded for arbitration.

Full opinion at: <http://caselaw.lp.findlaw.com/data2/circs/4th/042187p.pdf>.

Arbitration: it is proper for an arbitrator, not a court, to decide the preclusive effect of a previous arbitration award on subsequent actions

***Yates Paving & Grading Co. v. Bryan County* A05A1246 Court of Appeals of Georgia, 1st Division**

Yates Paving & Grading Co. was hired by Bryan County to construct new public roads. When the County defaulted on the contract and hired another company to finish the work, Yates and Bryan County proceeded to arbitration where the arbitrator ruled in favor of the Plaintiff. Later on, Yates filed a demand for arbitration on a second, but similar issue. The County then filed an action arguing that res judicata barred Yates' claim. The Trial Court issued an order granting summary judgment, agreeing with Bryan County that res judicata precluded the subsequent action. Upon appeal, Yates argued that an arbitrator should decide the issue of res judicata as a matter of contract law as it was that the matter arose out of the contract established in arbitration. The Court of Appeals ruled in favor of the Plaintiff and the judgment was reversed.

Arbitration: Stating changes in dispute resolution policies to employees through e-mail is insufficient notice to create an enforceable arbitration clause

***Campbell v. General Dynamics Government Systems Corporation and Schnorbus* 2005 WL 1208136 (1st Cir. May 23, 2005)**

Campbell, a former employee of General Dynamics Government Systems filed a suit claiming he was discharged in violation of the Americans with Disabilities Act (ADA). The defendant moved to dismiss the claim and handle the matter through the policies outlined in an arbitration clause. However, the arbitration clause was not included in the new hire material Campbell was given when he began his position at General Dynamics. The company alerted employees of the arbitration clause through company e-mail. The e-mail detailed a four-step dispute resolution process that had been developed and the last step of the process was arbitration. No where in the e-mail was mention made of how the new policy would affect an employee's right to seek damages through a judicial process. In addition, the e-mail did not require employees to respond or acknowledge receipt of the message. Campbell filed suit after he was terminated for persistent absenteeism and tardiness. The suit began in a state court but was then removed to federal court at the request of General Dynamics. The defendant filed a motion to dismiss. Campbell argued that because the e-mail was not considered a writing it failed the "written provision" requirement of 9USC sec 2 and he therefore did not feel that the motion to dismiss was appropriate. He also claimed that the policy was unenforceable because the e-mail did not give sufficient notice of the change. The district court ruled that the e-mail notice was not sufficient enough to terminate a person's rights under ADA. Upon appeal, the court held that the motion to dismiss and compel arbitration could only succeed if the defendant could show that a valid contract to arbitrate existed. In this particular case, General Dynamics needed to show that Campbell had reasonable notice of waiver of judicial rights. The court did not find the e-mail to be sufficient for the following reasons: (1) It did not directly state that the policy change included an agreement that waived an employee the right to access a judicial forum and (2) The tone and phrasing found in the e-mail was insufficient. The court upheld the decision not to compel arbitration.

Arbitration: A "Relation back" clause in an insurance agreement was not enough to require a current claim under a current policy to be reverted back to a previous policy of mandatory arbitration

***BCS Insurance Co. v. Wellmark, INC* 2005 WL 1324846 (7th Cir. June 01, 2005)**

From 1994 through 1997 BCS Insurance Co. issued "errors-and-omissions" insurance to Wellmark, Inc. From 1994-1996 the policies contained a mandatory arbitration clause. The clause changed in 1997 to allow for optional arbitration at the request of the insured. When four class action lawsuits were filed against Wellmark for 1994, 1995, 1996, and 1997, Wellmark settled these suits and sought recovery from BCS. The parties attempted to resolve the issue through negotiation but when efforts failed Wellmark filed suit against BCS in federal court. Both parties agreed to arbitrate the 1994, 1995, and 1996 claims, but Wellmark demanded a trial for the 1997 claim. The 1997 policy's relation back clause stated that "same or interrelated wrongful acts are treated as a single claim deemed made at the time of the earliest claim." BSC reasoned that this meant that the court should compel arbitration since the 1997 claim is related to previous claims under the past policies. It was further argued that the current claims be treated as a single claim that relates back to earlier policy claim. This would make the current claim subject to mandatory arbitration. When the trial court refused to compel arbitration, BCS appealed. The appellate court held that the clear language of the arbitration clause meant that arbitration was possible, but not mandatory. Therefore, in respect to the 1997 claim, it could only occur at the option of the insured. The appellate court held that "what ever the effect the relation back clause might have on the existence of coverage, the

application of deductibles, and the limits of liability, it does not modify the arbitration clause." The remaining question to answer was whether the claims arose in 1997 and, as the court held that they did, the decision was affirmed.

Full Opinion at: <http://caselaw.lp.findlaw.com/data2/circs/7th/042575p.pdf>.

Arbitration: The terms of an unambiguous arbitration agreement cannot be rewritten by a court because to do so would violate §5 of the Federal Arbitration Act

***Mutual Marine Office, Inc. v. Insurance Corp. of Ireland*, 2005 WL 1398597(S. D.N.Y., June 13, 2005).**

In this case, the Plaintiff insurance company sought to enter into arbitration with the Defendant re-insurance company. In an agreement between the parties an arbitration clause provided that each party would pick their own arbitrator, and then the two arbitrators would agree upon a third arbitrator. The agreement contained mention as to what action would be taken if the arbitrators were unable to settle on a third arbitrator. The arbitrator selected by the U.S.-based Plaintiff provided a list of three U.S. arbitrators. The arbitrator selected by the Ireland-based Defendant provided a list of three U.K. arbitrators. Unable to reach an agreement, the Plaintiff sought to have the third arbitrator appointed from its list of U.S. arbitrators, and sought to have arbitration compelled. The Plaintiff acknowledged that the agreement did not provide for U.S.-based arbitrators, but took the position that such arbitrators were required because American contracts were involved that needed to be interpreted under American law. In its opinion, the court relied on section 5 of the FAA, which provides that where a method for selecting an arbitrator is agreed upon, then that method will be followed. The court concluded that the plain language of the agreement said nothing about having a U.S.-based arbitration panel and therefore, to compel such a conclusion would be to rewrite the terms of the agreement.

Arbitration: After considering the split opinion as to whether the FAA allows for a stay of litigation pending an appeal, the 10th Circuit, in agreement with the 11th and 7th circuits held that stays are appropriate

***McCauley v. Halliburton Energy Services, Inc.*, 2005 WL 1519129 (10th Cir, June 28, 2005)**

In this matter, McCauley brought a suit against his employer, Halliburton Energy Service, Inc (Halliburton), claiming he was injured while applying foam insulation to the exterior of a bulk tank owned by Halliburton. Due to both the injuries sustained, as well as Halliburton's decision to terminate him, Mr. McCauley filed claims for negligence, fraud and deceit, intentional infliction of emotional distress, and wrongful termination. Halliburton moved to dismiss the suit and instead compel arbitration. The motion was granted for all claims except those related to negligence and the loss of consortium claims brought by McCauley's family. It was ruled that these claims were not bound by the arbitration agreement as McCauley was working as a contractor at the time. Halliburton appealed and petitioned the appellate court for a stay pending the appeal. The appellate court noted that the Federal Arbitration Act grants a party the right to file an interlocutory appeal from the denial of a motion to compel arbitration. 9 U.S.C. § 16(a)(1)(C). However, it is not clear in the statute's language whether a motion to stay proceedings during an appeal should be granted. Both the 2nd and 9th Circuits have denied stays. In an opposing viewpoint, the 11th and 7th Circuits have held that the appeal triggers the general divestiture principle and, given that the appeal is not frivolous, warrants issuance of a stay. The court then agreed with the 11th and 7th Circuits that had adopted the non-frivolous appeals standard, staying the litigation pending appeal.

Full Opinion: <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=10th&navby=case&no=056011>.

Arbitration: Employer waived its right to arbitrate when it allowed several months to elapse while litigating extensively in the interim period

***Corbett v. DRH Cambridge Homes, Inc.*, 2005 WL 1838456 (N.D.Ill., July 26,2005).**

Corbett brought a Title VII sex discrimination suit against the DRH Cambridge Homes, Inc. In its answer to the suit, the defendant failed to utilize an arbitration agreement between the parties as an affirmative defense. The defendant eventually moved to compel arbitration after seven months had elapsed. During the seven month period both parties litigated the case extensively. The court denied the defendant's motion to compel listing several equitable considerations. First, discovery had compelled the plaintiff to produce documents that would not have been had arbitration been sought immediately. Second, in order to pursue her claim, the plaintiff had spent significant resources. The court concluded "the arbitrable nature of plaintiff's claims coupled with defendants' litigation-directed conduct favors inferring waiver."

ADR happenings

By Kristi Hornickel, Megan Kawa & Samia Zayed, North Central College

Wells Fargo to Forgo Mandatory Arbitration Clauses

Wells Fargo announced late in August that it will discontinue its use of mandatory arbitration clauses in real estate loans. The new policy will apply to Wells Fargo Financial, Wells Fargo & Company's consumer finance subsidiary, Wells Fargo Home Mortgage's nonprime retail lending business, Home Credit Solutions, and its third-party nonprime lending channel, Alternative Lending. The company has been targeted by consumer and civil rights groups in the past for its policy of mandatory arbitration. In a statement made by Wells Fargo, the com-

pany said that its policy changes are "part of our continuing commitment" to improve customer service.

California Moves to Protect Out-of-State Lawyers in Arbitration

The California Senate is expected to approve a bill that would authorize out-of-state attorneys to represent clients in arbitrations for an additional year. The law allowing out-of-state lawyers to represent clients in arbitrations in the state and provide local counsel for arbitrations in another state is set to expire at the end of 2005, but under an agreement reached in the Senate Judiciary Committee that authority will be extended until 2007. For this to occur, state lawmakers would need to first agree to put off developing a permanent solution to unauthorized practice of law issues until the next legislative session. The issue of unauthorized practice of law (UPL) in arbitration is a concern in the state because of the California Supreme Court's ruling in *Birbrower v. Superior Court* (17 Cal.4th 117, 1998), which held that out-of-state attorneys could be subject to UPL charges for certain representation of in-state clients, including representation in arbitration. The compromise, supported by the Securities Industry Association, is meant to "maintain the status-quo and prevent a rash of unauthorized practice of law charges," Baker said.

N.J. Supreme Court May Review Arbitration Clause Enforcement

The New Jersey Supreme Court is considering whether to hear a case that would clearly state the standards for determining unconscionability in arbitration agreements under state law. The court is also considering whether parts of an unenforceable clause may be removed and the remainder enforced. Specifically, the court is being asked whether or not it is unconscionable for an arbitration provision that establishes a carve out from the arbitration requirement for foreclosure actions. The case, *Delta Funding Corp. v. Alberta Harris* (Sup. Ct. No. 58437), arose in 2002 when Wells Fargo began foreclosure proceedings in N.J. state court against Harris. She responded by bringing Delta Funding, who sought to arbitrate the dispute, into the case as a third party defendant. When it returns from summer recess, the court will decide whether to hear the case.

Washington Voters to Determine Fate of Health Care ADR

In the general election ballot this fall, Washington state voters will decide whether or not mediation for all medical malpractice claims and new weight to arbitration agreements will be required. The ballot initiative I-330 is supported by the 9,000-member Doctors for Sensible Lawsuit Reform (DSLR) and received enough signatures for consideration in 2004. Under the ballot, voluntary arbitration agreements that contain specific language could not be considered excessive, a contract of adhesion, or otherwise inappropriate. A warning to patients about the loss of their right to jury or trial court by signing the contract would be required. Patients would also have to be warned that any issue of malpractice will be decided by an arbitrator. The competing I-336, supported by the Washington State Trial Lawyers Association, does not include any provision for the use of ADR processes to resolve medical malpractice claims.

No Need for release to obtain arbitration award

The U.S. Court of Appeals for the Third Circuit declared in its opinion in *Uprichard v. Pfizer, Inc*, (No. 04-2527) that a judge has only the authority to correct mistakes in a judgment to the degree of clerical error. Thus, they are prohibited from exceeding their power by requesting that a party sign a release agreement prior to receiving an arbitration award unless the conditions of enforcement are included in the earlier judgment. Furthermore, the court solidified the means through which to request a judgment be corrected to reflect an award of prejudgment interest is indeed Federal Rule of Civil Procedure 60 (a). Rule 60 (a) allows for correction of clerical mistakes in judgment, and errors resulting from oversight or omission at the discretion of the court or party request but does not involve the right of a party to collect on a judgment awarded by the court.

Supreme Court Agrees to Revisit Key Arbitration Doctrine

In June 2005, the Supreme Court decided that it would revisit the separability doctrine that divides jurisdiction over the review of contracts and arbitration agreements between arbitrators and the courts. The doctrine states that under the Federal Arbitration Act, claims of fraud in the inducement of a contract containing an arbitration clause are decided by arbitrators, while charges against the making of the arbitration agreement itself are reserved for courts. The doctrine has become a source of controversy amongst the lower state and federal courts who question whether or not arbitration clauses are more enforceable than any other clause contained in an invalid contract. The Florida Supreme Courts recent ruling in *Prima Painting Corp. v. Flood & Conklin Manufacturing Corp*. (388-U.S. 395) determined that courts must first determine if an alleged illegal contract is valid before an arbitration clause contained in that contract can be enforced. Although the ruling is an objection to the separability doctrine in that it allows courts to determine the validity of a contract with an arbitration clause as opposed to an arbitrator, enforcing a clause, regardless of its content, in an invalid contract "would seem to lead to an absurd result." Strictly enforcing the separability doctrine would suggest that arbitration clauses in an invalid contract be enforced. However, some courts have distinguished between contracts that are voidable, enforcing the arbitration provision and contracts that are void as a matter of public policy, refusing to enforce the arbitration provision. Once the Supreme Court comes to a conclusion on the matter, the issues of validity, jurisdiction, and implementation will be enforced regardless of the nature of the contract.

For copies of bills, amendments, veto messages and public acts, contact the ISBA Department of Legislative Affairs in Springfield

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