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Recent Developments: The Uniform Arbitration Act

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STUDENT PROJECT

Recent Developments: The Uniform Arbitration Act*

I. INTRODUCTION

This Article is an overview of recent court decisions that interpret state versions of the Uniform Arbitration Act (“U.A.A.”).¹ Arbitration statutes patterned after the U.A.A. have been adopted by thirty-four states and the District of Columbia.² The goal of this project is to promote uniformity in the interpretation of the U.A.A. by articulating the underlying policies and rationales of recent court decisions interpreting the U.A.A.³

II. SECTION 1: VALIDITY OF ARBITRATION AGREEMENTS

Section 1 of the U.A.A. states:

[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].⁴

Courts are called upon repeatedly to analyze and apply numerous sections of the U.A.A. However, before a court can consider any of the various issues raised by the U.A.A., it must determine if a valid agreement to arbitrate has been entered into by the parties. Questions surrounding the validity of an agreement range from deciding whether technical requirements have been met to determining the scope of the agreement to arbitrate. Section 1 of the U.A.A. deals with these questions.

* This project was prepared by Journal of Dispute Resolution Candidates under the direction of Associate Editor in Chief Benjamin K. Byrd and Member Daniel S. Cohen.

1. UNIF. ARBITRATION ACT §§ 1-25, 7 U.L.A. 1 (1997) [hereinafter “U.A.A.”].

2. Jurisdictions that have adopted arbitration statutes based on the U.A.A. include: Alaska, Arizona, Arkansas, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Wyoming.

3. This Article surveys cases decided between January 1, 1998 and December 31, 1998.

4. U.A.A. § 1.

A. Prerequisites

Before a court can analyze an arbitration agreement to determine its scope, the court must determine if certain prerequisites have been met, to ascertain if a valid agreement exists at all. In *Messer v. Messer*,⁵ the South Carolina Court of Appeals dealt with an arbitration provision that appeared in a separation agreement.⁶ Under the South Carolina U.A.A., a contract containing an arbitration clause must have a notice on the front page stating that the contract contains an arbitration provision.⁷ The separation agreement in question had no such notice.⁸ However, a family court adopted the separation agreement in a divorce decree.⁹ The ex-husband argued that the arbitration provision was valid, in spite of the missing notice requirement, because the family court had adopted the agreement.¹⁰ The South Carolina Court of Appeals disagreed, holding that because the provision was originally part of a contract, the notice requirement applied, regardless of the contract's adoption into the divorce decree.¹¹ Therefore, the arbitration provision was invalid for failure to meet South Carolina's U.A.A. notice requirement.¹²

Another prerequisite that may need to be established is the fulfillment of any conditions precedent. In *L & L Kempwood Ass'n v. Omega Builders, Inc.*,¹³ the Texas court held that it was proper for the trial court to determine if all conditions precedent had been met to determine if the arbitration agreement was valid.¹⁴ The appellate court reasoned that this determination logically belonged to the courts instead of an arbitrator because the question of whether or not all conditions precedent have been met will determine the validity or invalidity of the arbitration agreement.¹⁵ If the conditions precedent question went before an arbitrator, and it determined the conditions had not been met, the arbitrator would be making a determination concerning parties over which it had no binding authority, because the arbitration agreement would be invalid.¹⁶ The court further stated that, in the interests of efficiency,¹⁷ a court should make a determination regarding the fulfillment of the conditions precedent when it has the case before it, rather than sending the issue to the arbitrator who may send the case back to the court if he finds that all the conditions have not been met.¹⁸

The presence of mutual consent between the parties is another prerequisite to a valid arbitration agreement. The Eighth Circuit addressed the question of the need

5. 509 S.E.2d 486 (S.C. Ct. App. 1998).

6. *Id.* at 487.

7. *Id.* This notice requirement is not found in the model version of the U.A.A. U.A.A. § 1.

8. 509 S.E.2d at 488.

9. *Id.* at 486.

10. *Id.* at 487.

11. *Id.*

12. *Id.* at 488.

13. 972 S.W.2d 819 (Tex. App. 1998).

14. *Id.* at 823.

15. *Id.* at 825.

16. *Id.*

17. The court noted that efficiency of cost and time is often cited as the most valuable aspect of arbitration. *Id.*

18. *Id.*

for mutual consideration for an arbitration provision found in a franchise agreement in *Barker v. Golf U.S.A., Inc.*¹⁹ Applying Oklahoma law, the Eighth Circuit held that there is no requirement that there be independent consideration for the arbitration clause in a contract.²⁰ The court relied on Oklahoma precedent holding that arbitration clauses are not separable from the rest of the contract.²¹ Therefore, the court reasoned, mutual obligation between the parties need only exist for the contract as a whole, and no independent consideration for the arbitration clause was required.²²

B. Who Can Be Bound by an Arbitration Agreement?

Many cases involve the ability of a party to agree to arbitration on behalf of other parties. In *Jenkins v. Percival*,²³ the Utah Supreme Court analyzed the authority of an insurance claims adjuster to bind his employer to an arbitration agreement.²⁴ After discussing the general role of an insurance adjuster, the court held that the adjuster did have the authority to bind his employer to an arbitration agreement. The court also discussed if an insured can be bound by an arbitration agreement between the insurance company and a claimant that alleges damages due to the insured.²⁵ The supreme court reasoned that an insured could be bound by an arbitration agreement only to the limits of the insured's policy.²⁶ The Utah Supreme Court held that an arbitration agreement could not bind the insured beyond the policy limits without his express agreement.²⁷ To allow the insurance company to unilaterally bind the insured beyond his policy limits would be to deny him his "substantial right" to seek relief from the judicial system.²⁸ The court did state, however, that the insured could waive this right if such waiver was "voluntary, intelligent, and knowing."²⁹

In *Tipton County Department of Public Instruction v. Delashmit Electric Co.*,³⁰ a Tennessee Appellate Court held that the Tipton County Board of Education ("Board") had the authority to bind itself to arbitration.³¹ Furthermore, the court held that a third party surety could effectively stand in the shoes of a principal who was a party to an arbitration agreement, and enforce the arbitration provisions.³² In *Tipton*, the Board entered into a contract with Delashmit Electric Company ("Delashmit") to have Delashmit perform electrical work on a new school building.³³

19. 154 F.3d 788 (8th Cir. 1998).

20. *Id.* at 792.

21. *Id.* (citing *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996)).

22. *Id.* at 791-92.

23. 962 P.2d 796 (Utah 1998).

24. *Id.*

25. *Id.* at 799.

26. *Id.*

27. *Id.*

28. *Id.* (citing *Bracken v. Dahle*, 251 P. 16, 20 (Utah 1926)).

29. *Id.* at 799.

30. No. 02A01-9704, 1998 WL 158774 (Tenn. Ct. App. Apr. 7, 1998).

31. *Id.* at *3.

32. *Id.*

33. *Id.* at *1.

Delashmit gave the Board a performance bond, issued by Frontier Insurance Company ("Frontier"), promising that, should Delashmit fail to finish the work contracted for, Frontier would complete the job itself, or pay to have another company do it.³⁴ Even though Frontier was not a signatory to the original contract between the Board and Delashmit, the court ruled that, as a surety, Frontier could enforce the arbitration provisions in the contract.³⁵

In *D. Wilson Construction Co. v. Cris Equipment Co., Inc.*,³⁶ the Texas Court of Appeals held that the Texas General Arbitration Act ("T.G.A.A.") is not limited solely to disputes between nonprofit organizations, but applies to any parties who have a written agreement to arbitrate.³⁷ The court reached this conclusion in spite of some statutory language that indicated a requirement that the parties be non-profit organizations.³⁸ The Texas court relied primarily on the only prior case it could find analyzing the T.G.A.A.,³⁹ in which the Texarkana Court of Appeals found that, through the T.G.A.A., Texas had adopted the U.A.A., which does not limit its application to non-profit organizations.⁴⁰

Occasionally an arbitration clause will be held invalid as against public policy. A trial *de novo* clause in an arbitration agreement was struck down as against Colorado public policy in *Huizar v. Allstate Insurance Co.*⁴¹ The dispute in *Huizar* arose from an automobile accident in which the plaintiff was a passenger.⁴² The driver of the vehicle the plaintiff was in was uninsured, so the plaintiff sought recovery for her injuries from her own insurance. Her insurance contract contained an arbitration provision that allowed both the insurer and insured to invoke arbitration in the event of a dispute.⁴³ However, the agreement also contained a provision allowing either party to have a trial *de novo* on the issues arising from the dispute when the arbitration award exceeds \$25,000.⁴⁴ The Colorado Supreme Court held this provision invalid due to the disparity in bargaining power in insurance contract situations, as well as the effect the clause has of essentially rendering the arbitration meaningless when the award exceeds the limit set out in the policy.⁴⁵

As with other contracts, courts assume that when a party signs a contract that includes an arbitration agreement, the party has read and understands the provisions of the contract, and will be bound by it.⁴⁶ In *Johnson v. Lynn Hickey Dodge, Inc.*, a party to an arbitration agreement located in a contract for the sale of an automobile claimed that he was not given information about arbitration prior to signing the

34. *Id.*

35. *Id.* at *4.

36. 988 S.W.2d 388 (Tex. App. 1999).

37. *Id.* at 393.

38. "This chapter applies only to the arbitration of a controversy between members of an association or corporation that is: . . . (2) incorporated under the Texas Non-Profit Corporation Act . . ." TEX. CIV. PRAC. & REM. CODE ANN. § 173.002 (West 1998).

39. *D. Wilson Constr. Co.*, 988 S.W.2d at 394. The Texas Court of Appeals in Texarkana dealt with the same issue two years earlier in *Holk v. Biard*, 920 S.W.2d 803, 807 (Tex. App. 1996).

40. *D. Wilson Constr. Co.*, 988 S.W.2d at 394 (citing *Holt*, 920 S.W.2d at 807).

41. 952 P.2d 342 (Colo. 1998).

42. *Id.* at 343.

43. *Id.*

44. *Id.* at 344.

45. *Id.* at 342-50.

46. No. 97-6410, 1998 WL 826829, at *3 (10th Cir. Dec. 1, 1998).

agreement and, therefore, the agreement was invalid.⁴⁷ The Tenth Circuit Court of Appeals held that when a party signs an agreement that includes an arbitration provision, a presumption is raised that the party has read and understands the agreement and the party cannot claim thereafter that the arbitration clause was not explained to him, and is bound by the agreement.⁴⁸

While some jurisdictions require the trial court to make an initial determination regarding the validity or invalidity of an arbitration agreement,⁴⁹ the Supreme Judicial Court of Maine withheld any determination regarding an arbitration agreement, where the factual issues fell within the purview of the Federal Energy Regulatory Commission ("FERC"). In *Ashburnham Municipal Light Plant v. Maine Yankee Atomic Power Co.*,⁵⁰ a dispute arose between the secondary purchasers of a power plant, and its primary owners.⁵¹ Because disputes in the regulated power industry are at least under the primary, if not exclusive, jurisdiction of FERC the court held that it could exercise its equitable powers to postpone any judicial determination in the case until FERC had ruled on the case.⁵² If FERC either concluded it did not have jurisdiction, or failed to exercise it, the parties would be allowed to return to the judicial system.⁵³

C. *Is it an Arbitration Agreement?*

In some situations, courts must determine if the agreement before them is actually an agreement to arbitrate at all. In *Minot Town & Country v. Fireman's Fund Insurance Co.*,⁵⁴ the Supreme Court of North Dakota analyzed an insurance contract to determine if a provision providing for an appraisal qualified as an agreement to arbitrate.⁵⁵ The insurance provision set up a procedure to resolve disputes regarding the amount of damage suffered by the insured.⁵⁶ Each party was to select an appraiser to determine the amount of damage.⁵⁷ The two appraisers were also required to select a third party "umpire."⁵⁸ After the appraisers made and signed their assessment of damage, the insured moved for a judgment to vacate the "arbitration" award, which was denied.⁵⁹ On appeal, the North Dakota Supreme Court determined that the appraisal provision did not constitute an agreement to arbitrate.⁶⁰ The supreme court noted general differences between an arbitration

47. *Id.* at *2.

48. *Id.* at *3.

49. *Burke v. Wilkins*, 507 S.E.2d 913 (N.C. Ct. App. 1998) (finding that the trial court's failure to summarily determine the validity of the arbitration agreement was reversible error when the issue was raised by the parties).

50. 721 A.2d 651 (Me. 1998).

51. *Id.* at 652-53.

52. *Id.* at 655.

53. *Id.* at 654.

54. 587 N.W.2d 189 (N.D. 1998).

55. *Id.*

56. *Id.* at 190.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 191.

procedure and an appraisal.⁶¹ Specifically, arbitrations usually decide the entire dispute, while appraisals deal solely with the amount of damage suffered.⁶² In the instant case, the supreme court pointed out that the insurer reserved the right to deny coverage, suggesting the appraisal was merely a determination of damage, and not a binding decision regarding liability.⁶³ Therefore, the court held that the U.A.A. did not apply to the provision.⁶⁴

The court, in *PHC, Inc. v. North Carolina Farm Bureau Mutual Insurance Co.*,⁶⁵ faced a similar appraisal procedure and reached the same result.⁶⁶ The *PHC* court focused on the lack of any mention of arbitrators or the U.A.A. in the agreement and, like the court in *Minot Town & Country*, the North Carolina Court of Appeals noted the reservation by the insurance company of the right to deny the claim after the procedure is complete.⁶⁷ Based on this evidence, the court determined that the agreement was merely for an appraisal of damage, and not an agreement to arbitrate.⁶⁸

D. Does the U.A.A. Apply?

Even once it is determined that a valid arbitration agreement exists, questions may still remain regarding whether or not the U.A.A. applies to the particular agreement. In particular, the Federal Arbitration Act ("F.A.A.")⁶⁹ provides for a federal body of substantive law dealing with arbitration agreements.⁷⁰ The F.A.A. does not, however, provide its own subject matter jurisdiction.⁷¹ Instead, the F.A.A. is applied to cases dealing with arbitration that have already established federal subject matter jurisdiction through diversity or federal question.⁷² If these requirements are met, the court will apply the F.A.A. to the dispute regarding arbitration.⁷³

The parties may, however, prevent the application of the F.A.A. by specifying in the arbitration agreement that the U.A.A. applies to arbitration issues. In *UHC Management Co., Inc. v. Computer Sciences Corp.*,⁷⁴ the Eighth Circuit declined an invitation to apply the Minnesota Uniform Arbitration Act in lieu of the F.A.A.⁷⁵

61. *Id.*

62. *Id.*

63. *Id.* at 191.

64. *Id.* at 190.

65. 501 S.E.2d 701 (N.C. Ct. App. 1998).

66. *Id.*

67. *Id.* at 703.

68. *Id.*

69. 9 U.S.C. § 4 (1954).

70. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.32 (1983).

71. *Id.*

72. *Id.*

73. For cases involving the use of the F.A.A. in lieu of state Uniform Arbitration Acts, see *Harper v. United Healthcare Corp.*, No. 97-C-4497, 1998 WL 673822 (N.D. Ill. Sept. 23, 1998); *M.C. Constr. Corp. v. Gray Co.*, 17 F. Supp.2d 541 (W.D. Va. 1998). In *Harper*, the district court noted that if the F.A.A. did not apply, the Illinois U.A.A. might still apply to a proceeding to compel arbitration. *Harper*, 1998 WL 673822, at *3 n.3.

74. 148 F.3d 992 (8th Cir. 1998).

75. *Id.* at 997.

However, the court stated that it would construe an arbitration agreement to require application of the U.A.A. if the parties made their intent to do so "abundantly clear."⁷⁶ The Eighth Circuit pointed out that the agreement in *UHC* made no reference to Minnesota's Uniform Arbitration Act and, in fact, provided that Minnesota law would yield whenever preempted by federal law.⁷⁷ Based on these facts, the court refused to preempt the F.A.A. in favor of Minnesota's U.A.A.⁷⁸

Not only can the F.A.A. preempt the U.A.A., but the parties to an arbitration agreement can also institute the American Arbitration Association ("AAA") rules in place of the U.A.A. In *Ratchye v. Lucas*,⁷⁹ the Supreme Court of Montana held that a provision in an arbitration agreement providing that the Commercial Arbitration Rules of the American Arbitration Association would be honored, despite a notice on the front page of the agreement referring to Montana's U.A.A.⁸⁰ The supreme court stated that the notice provision was designed merely to tell the parties that the agreement contained an arbitration clause, and was not meant to impose the Montana U.A.A. on the parties.⁸¹ The court held that the provision in the agreement expressly providing for the use of the AAA rules in any arbitration proceeding was clear and explicit, and could not be rendered void by applying the Montana U.A.A.⁸²

III. SECTION 2: MOTION TO COMPEL OR STAY ARBITRATION

Section 2 of the U.A.A. provides that when a valid arbitration agreement is found to exist between two parties and this agreement covers the dispute in question, then a court must compel arbitration.⁸³ If there is a dispute concerning the existence of such an agreement, the court "shall proceed summarily to the determination of the issue."⁸⁴ In such circumstances, when the agreement to arbitrate is in question, the court may stay the arbitration proceeding.⁸⁵

A. Existence of a Valid Arbitration Agreement

In *Jenkins v. Percival*,⁸⁶ Jenkins made a motion to compel arbitration against tort-feasor Gerald C. Percival ("Percival") and his insurance company, USF&G ("USF&G").⁸⁷ Jenkins asserted that during phone conversations between her counsel

76. *Id.*

77. *Id.*

78. *Id.*

79. 957 P.2d 1128 (Mont. 1998).

80. *Id.* at 1134.

81. *Id.* The Montana statute requiring the notice provision was repealed in 1997. *Id.*

82. The respondents in this case also argued that the Montana U.A.A. was more efficient and less expensive than the AAA rules. The Montana Supreme Court stated that the relative efficiency of the different rules was irrelevant, since the agreement explicitly stated which arbitration guidelines to follow. *Id.*

83. U.A.A. § 2.

84. *Id.*

85. *Id.*

86. 962 P.2d 796 (Utah 1998).

87. *Id.* at 797.

and the adjuster for USF&G an alleged agreement to arbitrate was established.⁸⁸ As the parties approached the agreed date of arbitration, however, USF&G's adjuster revoked his offer to arbitrate.⁸⁹ The Third District Court of Salt Lake County denied Jenkins' motion to compel arbitration on the basis that there was not a valid written arbitration agreement.⁹⁰ On appeal, the Supreme Court of Utah held that "until an agreement to arbitrate is reduced to writing, it is invalid, unenforceable and revocable."⁹¹

In *Burke v. Wilkins*,⁹² joint venturers entered into several agreements, each containing a provision that called for arbitration in the case of disputes.⁹³ Burke filed a judicial action alleging "fraud, unfair and deceptive trade practices, and breach of contract" against Wilkins.⁹⁴ Pursuant to their arbitration agreement, Wilkins moved to stay the judicial proceeding and compel arbitration.⁹⁵ Burke challenged the motion to compel arbitration claiming that Wilkins' fraudulent actions rendered the parties' contracts and, therefore, their arbitration agreements, void.⁹⁶ The Superior Court of Wake County denied the Wilkins' motion to compel arbitration without first deciding if a valid arbitration agreement existed.⁹⁷ On appeal, the Court of Appeals of North Carolina reversed and remanded to the superior court, holding that when the existence of the agreement is disputed the court must "summarily determine whether, as a matter of law, a valid arbitration agreement exists," before making a ruling on a motion to compel arbitration.⁹⁸

In *AJM Packaging Corp. v. Crossland Construction Co., Inc.*,⁹⁹ AJM Packaging Corporation ("AJM") brought a breach of contract and warranty action against Crossland Construction Company ("Crossland").¹⁰⁰ Following Crossland's motion to compel arbitration, a hearing was held at the trial court level to determine if a valid agreement to arbitrate existed.¹⁰¹ Finding no such agreement, the Circuit Court of Jasper County denied Crossland's motion to compel arbitration and Crossland appealed.¹⁰² The Missouri Court of Appeals held that although policies favor the enforcement of arbitration, parties are only compelled to arbitrate when they in fact have bargained for this arrangement.¹⁰³ The court of appeals stated that AJM did not

88. *Id.*

89. *Id.* at 798.

90. *Id.* Although the supreme court found that written correspondence between parties may qualify as an agreement to arbitrate, the court failed to find evidence of a "meeting of the minds" between Jenkins and USF&G contained within their written correspondence. *Id.* at 800.

91. *Id.* The Supreme Court of Utah, however, reversed and remanded this case to the trial court on an alternative theory of contract enforcement outside the scope of the Utah Arbitration Act. Based on an equitable theory of part performance, the trial court was instructed to determine whether an oral agreement existed and whether either party had partially performed. *Id.* at 801.

92. 507 S.E.2d 913 (N.C. Ct. App. 1998).

93. *Id.* at 913.

94. *Id.* at 914.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 914 (citing *Routh v. Snap-On Tools Corp.*, 400 S.E.2d 755, 757 (N.C. Ct. App. 1991)).

99. 962 S.W.2d 906 (Mo. Ct. App. 1998).

100. *Id.* at 907.

101. *Id.* at 907, 909.

102. *Id.* at 907.

103. *Id.* at 911.

correctly establish the existence of such an agreement, and thus the motion to compel arbitration was denied.¹⁰⁴

In *Bradford v. Denny's Inc.*,¹⁰⁵ Cheryl Bradford ("Bradford") brought a personal injury suit against Denny's Inc. ("Denny's") after eating food that contained a staple.¹⁰⁶ Bradford, however, voluntarily dismissed her suit against Denny's after entering into an agreement to proceed with binding arbitration.¹⁰⁷ Following arbitration, Denny's, claiming it had not been aware of the arbitration agreement until the day before arbitration, disputed the validity of the arbitration agreement.¹⁰⁸ Although Denny's did not raise an objection to the arbitration or raise the issue of the validity of the agreement during or prior to the arbitration, it refused to pay the arbitrator's award.¹⁰⁹ Bradford moved for summary judgement and sought confirmation of the arbitrator's award.¹¹⁰ Denny's responded with a motion to vacate the award claiming that it did not enter into the arbitration agreement, hence the agreement was not valid and the award was not enforceable.¹¹¹ Although Denny's was not a signatory on the agreement to arbitrate, the Northern District of Illinois held that Denny's was bound by the acts of its lawyer under the doctrine of apparent authority and that Denny's failure to object to the arbitration ratified Eckardt's signature of the agreement.¹¹² The court stated that because Denny's was held to the action of its lawyer, the agreement to arbitrate was valid and the arbitrator's award should be confirmed.¹¹³

In *Comverse Network Systems, Inc. v. Computel Computadores e Telecomunicacoes, S.A.*,¹¹⁴ Comverse Network Systems, Inc. ("Comverse") and Computel Computadores e Telecomunicacoes ("Computel") disputed the forum in which to compel arbitration.¹¹⁵ Computel and Comverse (known as BTI when the facts arose) entered into a "Master Distribution Agreement" ("MDA").¹¹⁶ The MDA

104. *Id.* at 910. The court also commented that even if AJM had established the existence of the provision containing the agreement to arbitrate, the rules of contract interpretation would prevent them from upholding AJM's motion to compel arbitration. *Id.* at 911-12. The court stated that an arbitration agreement, like a contract, must be construed as a whole such that none of the terms are rendered meaningless. *Id.* at 912. The court concluded that the contract entered into between AJM and Crossland contained sections that expressly called for the adjudication of disputes and thus would have superseded the provision containing the arbitration agreement. *Id.* at 911-12.

105. *Bradford v. Denny's Inc.*, No. 97 C 1531, 1998 WL 312009 (N.D. Ill. June 4, 1998).

106. *Id.* at *1.

107. *Id.* Although Denny's itself was not a signatory to the agreement, Denny's counsel did sign the arbitration agreement. *Id.*

108. *Id.*

109. *Id.* at *2.

110. *Id.*

111. *Id.*

112. *Id.* at *4-5. The court found that Eckardt was in fact Denny's legal counsel in the matter, that Bradford reasonably believed that Eckardt had the authority to enter into a binding agreement, and that Bradford, through her voluntary dismissal of the case, relied to her detriment on Eckardt's authority. *Id.* at *4. As well, Denny's failed to establish evidence to rebut the presumption that a lawyer has authority to act for her client and that Denny's is responsible for the actions of its own counsel. *Id.* The court noted, however, that Denny's does have a potential cause of action against Eckardt. *Id.* at *5.

113. *Id.* at *6.

114. No. CIV. A. 98-1155, 1998 WL 448910 (Mass. Super. Ct. July 13, 1998).

115. *Id.* at *3.

116. *Id.* at *1.

regulated the distribution, maintenance and warranty of BTI's communications products by Computel in Brazil.¹¹⁷ The MDA also provided for arbitration before the American Arbitration Association ("AAA") of disputes arising out of the agreement.¹¹⁸ After several years of successful business relations, Computel and BTI became partners in a joint venture and entered into the "Joint Venture Agreement" ("JVA").¹¹⁹ The JVA provided for submission of disputes before the International Chamber of Commerce ("ICC").¹²⁰

Two years later, BTI made arrangements for a merger with another company, Comverse, that would violate the provisions of the JVA entered into with Computel.¹²¹ Without disclosing the intended merger with Comverse, BTI induced Computel to dissolve their joint venture.¹²² Computel and BTI signed the Purchase and Sale Agreement ("PSA"), thus dissolving their joint venture and re-assigning their "rights and duties" to the previously entered into MDA.¹²³ The PSA, however, did not explicitly provide for arbitration of disputes.¹²⁴

Computel then brought a breach of warranty and contract action against the now merged BTI and Comverse (renamed Comverse).¹²⁵ Computel alleged that because it was fraudulently induced to sign the PSA, the JVA should still govern their relationship with Comverse.¹²⁶ Thus, their dispute should be placed before the ICC.¹²⁷ The Superior Court of Massachusetts concluded that because they had preliminarily decided that the JVA had been terminated and because Computel's claims related to the MDA, the MDA would govern.¹²⁸ Thus, pursuant to the MDA, the parties' disputes were compelled to arbitration.¹²⁹

B. Parties Rights Pursuant to a Valid Arbitration Agreement

As illustrated in *Denny's*, the validity of an agreement may hinge on who has the authority to enter into such an agreement.¹³⁰ In *Jenkins v. Percival*,¹³¹ an alleged oral agreement to arbitrate was entered into by Jenkins and an insurance adjuster for USF&G.¹³² USF&G asserted that the agreement to arbitrate was invalid because its adjuster lacked the authority to bind USF&G to an arbitration agreement.¹³³ The

117. *Id.* at *2.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at *3.

126. *Id.*

127. *Id.*

128. *Id.* at *3-4.

129. *Id.* For these same reasons, Computel's claim filed against Comverse in Brazil was also compelled to arbitration before the AAA. *Id.* at *5.

130. See *supra* Part III.A.

131. 962 P.2d 796 (Utah 1998). See *supra* Part III.A for a brief discussion of validity of an oral agreement to arbitrate.

132. *Jenkins*, 962 P.2d at 797.

133. *Id.* at 798.

Supreme Court of Utah held that an insurance company's adjuster, given the power to enter into settlement discussions and decisions, has the authority to bind the insurance company to arbitration agreements.¹³⁴ This authority, however, is limited in that the adjuster can not expose the insured to liability that exceeds the limits of the insurance policy.¹³⁵

In addition to disputes concerning who is bound by a valid arbitration agreement, parties also disagree as to who may enforce the arbitration agreement. In *Goldstein v. Depository Trust Co.*,¹³⁶ Goldstein represented plaintiffs in a class action suit against Depository Trust Company ("DTC") alleging negligence and breach of fiduciary duty.¹³⁷ DTC compelled arbitration of the class action proceeding based on an arbitration agreement entered into by Goldstein and his individual broker, Prudential Bache Securities.¹³⁸ On appeal, the Superior Court of Pennsylvania noted that the class action suit was based on the alleged fraudulent actions of DTC specifically.¹³⁹ The stockholders' claim did not implicate their individual banks or brokers through which they made the transaction.¹⁴⁰ Therefore, the agreement entered into by Goldstein and Prudential-Bache was not relevant to the claim against DTC.¹⁴¹ As well, the court noted that DTC was not a party to the arbitration agreement and therefore may not rely on the agreement to compel arbitration.¹⁴²

In *Township of Sugarloaf v. Bowling*,¹⁴³ Bowling, a former part-time police officer, was employed by the Township of Sugarloaf ("Sugarloaf") "on a probationary basis."¹⁴⁴ Bowling sought arbitration following notice that Sugarloaf would not be hiring him as a full-time police officer.¹⁴⁵ Bowling made his motion to compel arbitration pursuant to the collective bargaining agreement governing the relationship between Sugarloaf and the police department.¹⁴⁶ Although Bowling was informed he was not covered by the collective bargaining agreement as a part-time employee, Bowling maintained his action.¹⁴⁷ Sugarloaf then filed a complaint for

134. *Id.* at 798-99.

135. *Id.* at 799. The court also noted that an individual may independently agree to waive "his or her right of access to the courts." *Id.*

136. 717 A.2d 1063 (Pa. Super. Ct. 1998).

137. *Id.* at 1063-64.

138. *Id.* at 1066.

139. *Id.*

140. *Id.*

141. *Id.* at 1067. The court remarked that DTC also failed to produce a signed copy of the alleged arbitration agreement between Goldstein and Prudential-Bache. The court noted that even if DTC were able to compel arbitration pursuant to this particular arbitration agreement, failure to produce a signed copy of the agreement made it impossible for DTC to establish the existence of a valid agreement and that the claim fell within the scope of the agreement. Hence, the motion to compel arbitration would be denied. *Id.*

142. *Id.* DTC relied on F.A.A. cases that did allow individuals who were not party to an arbitration agreement to enforce the agreement. This court, however, was not bound by the aforementioned cases and was able to factually distinguish DTC from these cases. *Id.*

143. 722 A.2d 246 (Pa. Commw. Ct. 1998), *appeal granted*, No. 0092 M.D. Alloc. Dkt. 1999, 1999 WL 556823 (Pa. July 28, 1999).

144. *Id.* at 247.

145. *Id.*

146. *Id.*

147. *Id.*

injunctive relief and/or a stay of arbitration in the Common Pleas Court of Lazerence County, and sought a determination on the question of whether Bowling was entitled to arbitrate the matter of his dismissal.¹⁴⁸

The court of common pleas, referring to the Uniform Arbitration Act, granted Sugarloaf's injunction, stating that Bowling's probationary status removed him from coverage of the collective bargaining agreement.¹⁴⁹ Bowling appealed the order contending the collective bargaining agreement specifically called for arbitration of employment matters and was therefore in conflict with the U.A.A.¹⁵⁰ In instances in which the U.A.A. is in conflict with the collective bargaining agreement, the court previously held that "the arbitrator has sole jurisdiction in the first instance to decide whether an issue is arbitrable."¹⁵¹ Therefore, Bowling asserted that an arbitrator should decide the arbitrability of his claim.¹⁵²

On appeal, the Commonwealth Court of Pennsylvania held that before deciding whether arbitration is required it must establish that Bowling was covered by the collective bargaining agreement; if he was not covered by the agreement, due to his probationary status, then the court would, in fact, have jurisdiction to stay the arbitration.¹⁵³ If however, Bowling was covered by the collective bargaining agreement, although in conflict with the authority of the U.A.A., the issue would proceed to arbitration.¹⁵⁴ The court ultimately remanded the issue to the court of common pleas for further consideration.¹⁵⁵

C. Does the Dispute Fall Within the Scope of the Arbitration Agreement?

In *Brennan v. King*,¹⁵⁶ Brennan, a university professor, brought charges of discrimination and breach of contract against his employer university following denial of tenure.¹⁵⁷ The United States District Court for the District of Massachusetts refused to hear Brennan's allegation stating that he failed to follow the appropriate grievance procedures, specifically arbitration, before seeking judicial remedies.¹⁵⁸ Brennan appealed contending that the district court erred in finding that the university's appeal procedure required him to arbitrate his dispute.¹⁵⁹ The court evaluated whether Brennan was required to arbitrate his dispute under the

148. *Id.*

149. *Id.*

150. *Id.* at 248.

151. *Id.* (citing *Chester Upland Sch. Dist. v. McLaughlin*, 655 A.2d 621 (Pa. Commw. Ct. 1995), *aff'd*, 675 A.2d 1211 (Pa. 1996)).

152. *Id.*

153. *Id.* at 249.

154. *Id.*

155. *Id.* The Commonwealth court, based on logic rather than presented evidence, did determine that a "probationary officer is not subject to the protections of a collective bargaining agreement." *Id.* Given the length of Bowling's probationary employment, however, this is an issue for the court to decide. *Id.*

156. 139 F.3d 258 (1st Cir. 1998).

157. *Id.* at 259.

158. *Id.*

159. *Id.* at 258-60.

university's established grievance system using both the F.A.A. and the U.A.A.¹⁶⁰ Under the U.A.A., using rules of contract interpretation, a presumption of arbitrability may be overcome "by a showing that the particular dispute at issue is not subject to arbitration by the terms of the agreement."¹⁶¹ The court found that the university procedures for arbitration of a claim involving discrimination did not require arbitration.¹⁶²

First, only procedural aspects of a complaint were subject to binding arbitration.¹⁶³ Second, if one were to submit a grievance to arbitration, the arbitrator's decision would only be binding to the extent that the university president would take it into consideration.¹⁶⁴ Finally, the court found that arbitration is an employee's right, rather than an obligation.¹⁶⁵ Although the court indicated that it would resolve doubts in favor of arbitration, the evidence presented in this case was strong enough to overcome the presumption of arbitrability.¹⁶⁶

In *Ottman v. Fadden*,¹⁶⁷ Ottman brought a defamation and libel claim against Fadden, his former employer.¹⁶⁸ The allegation stemmed from an interoffice memorandum sent by Fadden following Ottman's voluntary resignation from Hanover.¹⁶⁹ Fadden compelled arbitration pursuant to the provision contained in Ottman's securities industry registration contract.¹⁷⁰ The provision provided for the arbitration of disputes "arising out of the employment or termination of employment."¹⁷¹ Ottman claimed that because the defamatory information had little relationship to his employment, it did not fall under the scope of the arbitration agreement.¹⁷² The District Court of Hennepin County found that the alleged defamatory claims were sufficiently connected to Ottman's employment and therefore granted Fadden's motion to compel arbitration.¹⁷³ Ottman appealed the district court's decision.¹⁷⁴ The Court of Appeals of Minnesota reminded the parties that although there is a policy favoring enforcement of arbitration and that interpretive doubts would be resolved in favor of arbitration, parties were only bound to arbitrate that to which they contractually agreed.¹⁷⁵ Given that the memorandum in question contained information concerning Ottman's resignation, customers, and

160. *Id.* at 264-67.

161. *Id.* at 267.

162. *Id.* at 266.

163. *Id.* at 265.

164. *Id.* at 265-66.

165. *Id.* at 266.

166. *Id.* at 267. See also *Grohn v. Sisters of Charity Serv. of Colo.*, 960 P.2d 722 (Colo. Ct. App. 1998) (interpreting the scope of an employer's agreement to arbitrate within the guidelines of the F.A.A.).

167. 575 N.W.2d 593 (Minn. Ct. App. 1998).

168. *Id.* at 594.

169. *Id.*

170. *Id.* at 595.

171. *Id.*

172. *Id.*

173. *Id.* at 594.

174. *Id.*

175. *Id.* at 595.

accounts, the court of appeals determined that the dispute fell under the scope of the agreement to arbitrate.¹⁷⁶

After finding a valid arbitration agreement and that the dispute is covered by the agreement, the court may not always choose to compel arbitration. In *Ashburnham Municipal Light Plant v. Maine Yankee Atomic Power Co.*,¹⁷⁷ the Superior Court of Maine denied Ashburnham's motion to compel arbitration, without prejudice.¹⁷⁸ The court held that the Federal Energy Regulatory Commission ("FERC") needs to first decide if it has jurisdiction over the dispute.¹⁷⁹ Ashburnham appealed, claiming that once a court has determined that a valid agreement to arbitrate exists, it must compel arbitration.¹⁸⁰ On appeal, the court concluded that given the unique factual situation, it would behoove the court to first let FERC determine the matter of jurisdiction and then,¹⁸¹ if necessary, the court would address the issue of arbitrability.¹⁸² The court noted that deference to an administrative agency was appropriate in situations where it may have exclusive or primary jurisdiction.¹⁸³

In *Board of Managers of the Courtyards at the Woodlands Condominium Ass'n v. IKO Chicago, Inc.*,¹⁸⁴ the Board of Managers of the Courtyards at the Woodlands Condominium Association ("Woodland") brought a claim against Zale Groves, Inc., Zale Group, Inc., Zale Enterprise, Inc., and Zale Construction Company (collectively "Zale") alleging a defect in the construction work completed by Zale for Woodland.¹⁸⁵ Zale, in turn, filed a third-party action against Johnston Associates ("Johnston") for the "architectural and design services," which it did on the allegedly faulty roofs.¹⁸⁶ Zale and Johnston's contract for the Woodland's roofing project contained an arbitration clause.¹⁸⁷ Pursuant to the agreement, Johnston moved to compel arbitration and stay the third-party claim.¹⁸⁸ The trial court found a valid arbitration agreement, but denied Johnston's motion to compel based on the fact the Johnston was so "interconnected" with the litigation.¹⁸⁹ The appellate court affirmed the trial court.¹⁹⁰ The Supreme Court of Illinois reversed.¹⁹¹ Although there is a general policy favoring the enforcement of arbitration agreements, both the trial and

176. *Id.* at 596.

177. 721 A.2d 651 (Me. 1998).

178. *Id.* at 652. Denial of the motion to compel arbitration without prejudice has the effect of staying the arbitration. *Id.* at 654.

179. *Id.* at 652. The court noted that FERC may have primary or exclusive jurisdiction of this matter as the facts centered on a utility purchase. *Id.* at 654. "FERC has exclusive jurisdiction over the reasonableness of interstate whole sale rates for electricity." *Id.* (citing 16 U.S.C. § 824(a) (1983)).

180. *Id.* at 652.

181. *Id.* at 655.

182. *Id.* at 654. "State courts are completely preempted from acting within areas of FERC's exclusive jurisdiction." *Id.*

183. *Id.* See also *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240 (Mont. 1998).

184. 697 N.E.2d 727 (Ill. 1998).

185. *Id.* at 728.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 728.

191. *Id.*

appellate courts relied on the exception to this rule created by *J.F. Inc. v. Vicik*.¹⁹² Johnston appealed to the Supreme Court of Illinois asserting that the *Vicik* exception had been criticized and that the policy behind *Vicik* was not strong enough to supercede the general policy favoring enforcement of arbitration agreements.¹⁹³

Although the supreme court recognized “policies supporting joinder and the resolution of multiparty conflicts in a single forum,” it overruled *Vicik* and held that once a valid arbitration agreement has been established, the arbitration agreement should be enforced.¹⁹⁴ The supreme court found that the parties bargained for the right to arbitrate their disputes and that to deny a motion to compel in multi-party litigation would render entrance into arbitration agreements meaningless.¹⁹⁵

D. Motion to Stay Arbitration

In *O'Brien v. Hanover Insurance Co.*,¹⁹⁶ O'Brien, former president of Hanover Insurance Company (“Hanover”), entered into a dispute concerning violation of his severance agreement with Hanover.¹⁹⁷ The arbitration provision in the severance agreement compelled the parties to arbitrate their dispute.¹⁹⁸ Shortly thereafter, Hanover filed charges against O'Brien.¹⁹⁹ Following the initiation of the judicial action, the arbitration panel stayed further arbitration proceedings until the potential for conflict with the Superior Court of Massachusetts was no longer at issue.²⁰⁰ After completion of the litigation, the parties resumed their discussion of arbitration.²⁰¹ Pursuant to the agreements reached during these discussion, O'Brien filed for a stay of arbitration and Hanover appealed.²⁰² On appeal, the supreme court stated that, “we [the court] have not determined whether a court may stay arbitration on the ground that a previous court decision on an issue bars subsequent arbitration of that issue.”²⁰³

192. 426 N.E.2d 257 (Ill. App. Ct. 1981).

Accordingly, the *Vicik* court specified that arbitration may be enjoined in multiparty litigation under “strictly limited circumstances”: “Where an arbitration agreement involves some, but not all, of the parties to multiparty litigation, the policy favoring arbitration must be weighed against the policies favoring joinder of claims. Where arbitration would increase rather than decrease delay, complexity and costs, it should not receive favored treatment.”

Woodlands Condominium Ass'n, 697 N.E.2d at 730.

193. *Woodlands Condominium Ass'n*, 697 N.E.2d at 729.

194. *Id.* at 730-31.

195. *Id.* at 731-32.

196. 692 N.E.2d 39 (Mass. 1998).

197. *Id.* at 40.

198. *Id.* at 41.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 42.

203. *Id.* at 43. The supreme court also found that the court, rather than the arbitrator, is the appropriate body to decide when a waiver has occurred. The question of waiver, like the question of validity and enforceability, must be determined summarily rather than waiting for a final judgment in pending litigation. *Id.* at 42-44.

IV. SECTION 3: APPOINTMENT OF ARBITRATORS BY THE COURT

In *State ex rel. Telecom Management, Inc. v. O'Mally*,²⁰⁴ the Western District of the Missouri Court of Appeals held that section 3 of the Missouri U.A.A. applies when the arbitration agreement has no provision for selecting replacement arbitrators.²⁰⁵ Even though the agreement in this case provided a method for selecting the arbitrators, the appellants claimed that the arbitrators were biased and, therefore, could not perform their duties.²⁰⁶ The appellants reasoned, section 3 should kick in, allowing the court to select new arbitrators. However, the Western District noted that courts should refrain from interfering in the arbitration process prior to an award unless it is an extreme case.²⁰⁷ Finding no facts suggesting bias in the case, the court held that the replacement of arbitrators for bias could not be addressed until an award was presented to the court.²⁰⁸

V. SECTION 7: WITNESSES, SUBPOENAS, DEPOSITIONS

Section 7 of the U.A.A. outlines the general discovery powers of an arbitrator.²⁰⁹ In *Palmer v. Duke Power Co.*,²¹⁰ the defendant in an arbitration proceeding sought to have the judgment vacated because the arbitrator refused to enforce the defendant's request for certain medical documents belonging to the plaintiff.²¹¹ The North Carolina Court of Appeals noted that section 7 provides the arbitrator with wide discretion regarding the manner in which the arbitrator conducts discovery.²¹² Therefore, the court found no abuse of discretion on the part of the arbitrator, and denied the defendant's motion to vacate.²¹³

In *UE Local 893/Iowa United Professionals v. Schmitz*,²¹⁴ the Iowa Supreme Court held that section 7 does not make a distinction between public and private sector arbitrations.²¹⁵ The case involved a collective bargaining agreement between the State of Iowa and UE Local 893 ("Union"). Union requested the arbitrator to issue a subpoena *duces tecum* to two department employees for the State of Iowa.²¹⁶ Iowa resisted the subpoenas, claiming the arbitrator had no authority over public sector parties.²¹⁷ The district court agreed, but was reversed by the Iowa Supreme Court. The Iowa Supreme Court held that because no distinction between private

204. 965 S.W.2d 215 (Mo. Ct. App. 1998).

205. *Id.* at 220.

206. *Id.*

207. *Id.*

208. *Id.*

209. U.A.A. § 7.

210. 499 S.E.2d 801 (N.C. Ct. App. 1998).

211. *Id.* at 803.

212. *Id.* at 804 (citing *Prime S. Homes, Inc. v. Byrd*, 401 S.E.2d 822 (N.C. Ct. App. 1991)).

213. *Id.* at 806.

214. 576 N.W.2d 357 (Iowa 1998).

215. *Id.* at 362.

216. *Id.* at 358-59.

217. *Id.*

and public parties existed in section 7, arbitrators of public sector disputes have the authority to issue subpoenas.²¹⁸

VI. SECTION 10: FEES AND EXPENSES OF ARBITRATION

Absent a contrary provision in an arbitration agreement, section 10 provides that all fees and expenses incurred through the process of arbitration (except attorneys' fees), shall be administered to the parties through the arbitrator's award.²¹⁹ Because section 10 addresses attorneys' fees, the Maryland Court of Appeals held in *Blitz v. Beth Isaac Adas Israel Congregation*,²²⁰ that language found in section 14 of the U.A.A. referring to "costs and disbursements" did not pertain to the award of attorney's fees.²²¹

While section 10 places authority to disburse arbitration fees in the arbitrator, the parties can agree to allow a trial court to essentially act as the arbitrator regarding this issue.²²² In *Dansereau v. Ulmer*,²²³ the Alaska Supreme Court held that the standard of appellate review of an award administered by a trial judge acting as an arbitrator will not be same as that which is applied to arbitration awards under the U.A.A.²²⁴ The court did suggest, however, that with "thorough briefing and careful consideration," the court might apply the U.A.A. standard, but the present case did not warrant this standard.²²⁵

VII. SECTION 11: CONFIRMATION OF AN AWARD

Section 11 of the U.A.A. governs confirmation of an arbitrator's award and speaks to the limited role of judicial review.²²⁶ Section 11 states that "the court shall confirm an award" unless the timely application by a party has brought about "the vacation, modification or correction of an award."²²⁷ Given the guidelines established in section 11, courts discussion of whether to confirm an award often focus on whether grounds to proceed under section 12 (vacation) or section 13

218. *Id.* However, in *Michigan State Employees Ass'n v. Michigan Liquor Control Commission*, 591 N.W.2d 42 (Mich. Ct. App. 1998), the court held that a collective bargaining agreement that provided for the arbitration to be dictated by the rules of the AAA preempted section 7 of the U.A.A. Therefore, the arbitrator did not possess the legal authority to issue subpoenas under the agreement. *Id.* at 43-44.

219. U.A.A. § 10.

220. 720 A.2d 912 (Md. 1998).

221. *Id.* at 915.

222. 955 P.2d 916. (Ark. 1998).

223. *Id.*

224. *Id.* at 918 n.2.

225. *Id.*

226. U.A.A. § 11.

227. *Id.*

(modification or correction) are met.²²⁸ Other cases, however, focus on the procedural aspects of a motion to confirm an arbitration award.

In *Kutch v. State Farm Mutual Automobile Insurance Co.*,²²⁹ Kutch and State Farm Mutual Automobile Insurance Company ("State Farm") disputed the amount of damages owed to Kutch following an automobile accident with an uninsured motorist.²³⁰ Kutch's uninsured motorist policy had a limit of \$100,000.²³¹ After submission of the dispute to arbitration, the arbitrator awarded Kutch \$176,800.²³² During the arbitration, neither party mentioned the policy limit or offered a copy of the insurance policy explaining the \$100,000 limit.²³³ Approximately one month after issuance of the award, Kutch's attorney sent State Farm a letter offering to lower the amount due to \$100,000 (plus interest) if the demand was paid within seven days.²³⁴

One month later, State Farm executed a check, but in accordance with the time constraint demand letter sent, Kutch refused to acknowledge the check and sought confirmation of the entire amount awarded by the arbitrator.²³⁵ State Farm asserted the uninsured motorist policy limit as a defense to payment of the arbitrator's award.²³⁶ The Denver District Court confirmed the arbitrator's amount even though it went beyond the policy limit because State Farm failed to vacate or modify the award within the ninety-day time limit.²³⁷ The court of appeals reversed the trial court's holding that the policy limit defense did not need to be raised during a motion to vacate, modify or correct the award, because it was not presented or required to be presented during the original arbitration. Thus, the policy limit defense could now be raised.²³⁸

The Supreme Court of Colorado granted certiorari to consider the limits on judicial confirmation of an arbitrator's award.²³⁹ The supreme court found that because the Uniform Arbitration Act provided an explicit and thorough set of procedures for the appeal of an arbitrator's award, State Farm should have utilized these opportunities within the time limit provided.²⁴⁰ Because State Farm failed to challenge the award in the manner provided in the U.A.A., it was time-barred from

228. See *New England Utils. v. Hydro-Quebec*, 10 F. Supp.2d 53 (D. Mass. 1998); *Reading v. Wheelabrator Water Tech., Inc.*, No. CIV.A. 97-7799, 1998 WL 151022 (E.D. Penn. Mar. 31, 1998); *Maiocco v. Greenway Capital Corp.*, No. CIV.A. 97-MC-0053, 1998 WL 48557 (E.D. Pa. Feb. 2, 1998); *E.I. Du Pont De Nemours & Co. v. Custom Blending Int'l Inc.*, No. C.A. 16295-NC, 1998 WL 842289 (Del. Ch. Nov. 24, 1998); *Sun Co., Inc. v. Pennsylvania Turnpike Comm'n*, 708 A.2d 875 (Pa. Commw. Ct. 1998).

229. 960 P.2d 93 (Colo. 1998) (en banc).

230. *Id.* at 95.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 95-96.

238. *Id.* at 96.

239. *Id.*

240. *Id.* at 97.

raising the limit of Kutch's uninsured motored policy as a defense.²⁴¹ The Supreme Court of Colorado remarked that "[w]hile preventing State Farm from raising the policy limit defense may seem inequitable on the facts of this case, the result we reach is necessary in order to preserve the integrity of the U.A.A.'s statutory framework."²⁴²

In *Fisher v. National General Insurance Co.*,²⁴³ the Superior Court of Navajo County found that a request for confirmation of arbitrator's award was untimely.²⁴⁴ Although no explicit time limit is set by the U.A.A. for confirmation of an award, the trial court created a time limit of not more than ninety days.²⁴⁵ The Court of Appeals of Arizona, however, applying principles of statutory interpretation, reversed the trial court's decision holding that because there are other specific timelines set in the U.A.A., the drafters must have intended this particular provision not to have a deadline.²⁴⁶ Therefore, the request to confirm, although made in excess of ninety days, was timely.²⁴⁷

In *McKibben v. Grigg*,²⁴⁸ a dispute concerning the terms of a partnership agreement led the parties to voluntary arbitration.²⁴⁹ Displeased with the arbitrator's result, McKibben made a motion to vacate the arbitrator's award and Grigg responded with a motion to confirm the award.²⁵⁰ The North Dakota Court of Appeals acknowledged that judicial review of an arbitrator's award is limited.²⁵¹ The court noted that it does not have the discretion to vacate or refuse to confirm an award simply because it would not, or could not, have granted relief similar to that chosen by the arbitrator.²⁵² Because there was no basis offered to vacate or modify the arbitrator's award, the court of appeals confirmed the amount.²⁵³ The court concluded that once an agreement was made to submit to arbitration, that measure would be binding and, absent some reason to do otherwise, a court will confirm an arbitrator's award.²⁵⁴

241. *Id.* State Farm argued that the policy limit defense did not fit within the requirements for modification, vacation or correction of an award, and thus could not raise the defense. Although the Court of Appeals of Colorado agreed with their rationale, the Supreme Court of Colorado found that the policy limit defense could have been used in a motion to modify or vacate the award. *Id.* at 98.

242. *Id.* at 99.

243. 965 P.2d 100 (Ariz. Ct. App. 1998).

244. *Id.* at 102.

245. *Id.*

246. *Id.* at 103.

247. *Id.*

248. 582 N.W.2d 669 (N.D. Ct. App. 1998).

249. *Id.* at 671.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 674.

254. *Id.* at 671.

VIII. SECTION 12: VACATING AN AWARD

The party challenging an arbitration award has the burden of showing grounds to vacate the decision.²⁵⁵ The allegations must be among those contained in the statute to vacate an award.²⁵⁶ Many states require a showing of fraudulent, irregular, or partial conduct on the part of arbitrators to vacate a statutory arbitration award.²⁵⁷

*A. Procurement of Award by Corruption,
Fraud or Other Undue Means*

In *Wojdak v. Greater Philadelphia Cablevision, Inc.*,²⁵⁸ the Pennsylvania Supreme Court reversed the decision of the lower court and ruled that the U.A.A. definition of "undue means" included an arbitrator engaging in ex parte communications with third parties.²⁵⁹ A partnership agreement between the limited and general partners of Cablevision required the purchasing of certain interests by the general partners, the price being set by agreement of the parties, or otherwise by the fair market value of the interest.²⁶⁰ In accordance with the agreement, an appraiser would first consult the general partners to determine the purchase price.²⁶¹ If an agreement is not reached, the appraiser obtains from both the limited and general partners a price for which they would be willing to sell and purchase, respectively, and makes a final determination.²⁶²

Without the knowledge or participation of the parties, the appraiser consulted an outside source in evaluating the interest of the partnership for sale.²⁶³ The Pennsylvania Supreme Court ruled that consulting a source outside those agreed upon by the parties deprived the limited partners of the right to challenge the assumptions and opinions of those upon whom the arbitrator relied.²⁶⁴ Because such activity is considered "undue means," the court vacated the award.²⁶⁵ It should be noted, however, that the court recognized the "undue means" standard to be a high threshold, requiring an arbitrator's decision to be "obtained in some manner which was unfair and beyond the normal process contemplated by the arbitration act."²⁶⁶

255. *Fisher v. National Gen. Ins. Co.*, 965 P.2d 100, 103 (Ariz. Ct. App. 1998).

256. *Id.* (denying motion to vacate where party failed to demonstrate any of the statutory factors and in addition, did not even argue them). See U.A.A. § 12.

257. See *Sun Co., Inc. v. Pennsylvania Turnpike Comm'n*, 708 A.2d 875 (Pa. Commw. Ct. 1998) (stating that because award may not be vacated based on errors of law allegedly committed by the arbitration panel, the admission of parol evidence to interpret a contract will not be second guessed).

258. 707 A.2d 214 (Pa. 1998).

259. *Id.* at 223.

260. *Id.* at 215.

261. *Id.*

262. *Id.*

263. *Id.* at 217.

264. *Id.* at 223.

265. *Id.*

266. *Id.* at 221 (quoting *Seither & Cherry Co. v. Illinois Bank Bldg. Corp.*, 419 N.E.2d 940, 945 (Ill. App. Ct. 1981)).

B. Arbitrator Partiality, Misconduct and Bias

In *Edward D. Jones & Co. v. Schwartz*,²⁶⁷ the defendant stock broker (“Schwartz”) entered into an oral agreement with the plaintiff employer (“Jones”) which stated that no other broker would have the rights to solicit clients within a certain geographic proximity to the defendant.²⁶⁸ Sometime later, Jones told Schwartz of their intention to station another broker in a nearby town, in violation of the oral agreement.²⁶⁹ Schwartz decided to resign from his employment.²⁷⁰ In turn, Jones commenced an action against Schwartz, seeking a restraining order to keep him from using company trade secrets and soliciting sales from any of Jones’ customers.²⁷¹ In response to this suit, Schwartz commenced an action against Jones alleging that they interfered with his contract to work for the plaintiff and damaged his reputation in the community.²⁷²

An arbitration panel found in favor of Schwartz.²⁷³ Following this decision, Jones filed an application to vacate the award on the grounds that the arbitrators exceeded their powers, that the award was in manifest disregard of the law, and that the panel was tainted with bias towards Jones.²⁷⁴ The court held that arbitrators exceed their powers only when they decide a matter beyond the scope of the arbitration agreement or rule on an issue that was clearly not submitted to them.²⁷⁵ Since the award here pertained to the employment agreement between the parties, the arbitrators acted appropriately.²⁷⁶ The court stated that bias or interest by arbitrators must be “direct, definite and capable of demonstration, rather than remote, uncertain or speculative,” in order to vacate an award.²⁷⁷ The court also found that Missouri’s version of the Uniform Arbitration Act did not authorize vacating an award because it was in manifest disregard of the law.²⁷⁸ Finally, the court found that an arbitrator was not biased against Jones even though the arbitrator’s spouse was a broker employed by a competitor of Jones.²⁷⁹ The fact that the arbitrator disclosed this conflict to Jones, and that there was no evidence displaying a lack of partiality in the arbitrator’s questioning made such a bias claim futile.²⁸⁰

In *Maiocco v. Greenway Capital Corp.*,²⁸¹ plaintiffs (“Maiocco”), who were two clients of the defendant investment company (“Greenway”), alleged that a stock broker employed by Greenway had engaged in speculative trading on their

267. 969 S.W.2d 788 (Mo. Ct. App. 1998).

268. *Id.* at 791.

269. *Id.*

270. *Id.*

271. *Id.* at 791-92.

272. *Id.* at 792.

273. *Id.* at 792-93.

274. *Id.* at 794-95.

275. *Id.* at 794.

276. *Id.*

277. *Id.* at 796 (quoting *National Ave. Bldg. Co. v. Stewart*, 910 S.W.2d 334, 343 (Mo. Ct. App. 1995)).

278. *Id.* at 794-95.

279. *Id.* at 795-96.

280. *Id.* at 796.

281. No. CIV.A. 97-MC-0053, 1998 WL 48557 (E.D. Pa. Feb. 2, 1998).

accounts.²⁸² The "Brokers Agreement" between the parties provided for arbitration before the National Association of Securities Dealers ("NASD") of all disputes related to securities transactions.²⁸³ Greenway claimed that they had nothing to do with the stock broker's transactions on the Maiocco's accounts, and that the plaintiffs executed a power of attorney in favor of the stock broker, thus releasing the defendant from any responsibility.²⁸⁴ The NASD ruled in favor of the Maioccos and Greenway filed a petition to vacate the award.²⁸⁵ The Maioccos made a motion to confirm the award and the Pennsylvania District Court sought to combine the issues.²⁸⁶

Greenway argued that the arbitrators engaged in misconduct during the proceedings, leading to an unjust reward.²⁸⁷ Specifically, defendant alleged improper refusal to postpone the hearing based on their need to call a key rebuttal witness and failure to stop the hearing when defendant's counsel requested a short break.²⁸⁸ Also, Greenway asserted that the arbitrators improperly refused to hear certain evidence and prevented defendant from cross-examining a witness.²⁸⁹

The Pennsylvania District Court first focused on the choice of law provision in the Brokers Agreement, which required following the Massachusetts Uniform Arbitration Act.²⁹⁰ However, the time limitations specified in the Act were considered procedural at the time the Brokers Agreement was drafted and, under the *Erie* doctrine,²⁹¹ must yield to the procedural rules under federal arbitration statutes.²⁹² Thus, a party had ninety days to file a motion to vacate after the award was delivered.²⁹³

The court found a reasonable basis in the arbitrator's decision to refuse to postpone the hearing in that Greenway failed to notify the panel of its desire to call a rebuttal witness until the last day of the hearing.²⁹⁴ Such short notice interfered with the set schedule of the arbitration and the award could not be vacated because of Greenway's poor judgement.²⁹⁵ The court also found the panel's refusal to grant unscheduled breaks during the arbitration was not an abuse of discretion and did not create any prejudice.²⁹⁶

In refusing to hear evidence, the court reiterated the rule that every failure to receive relevant evidence does not give rise to misconduct on the level of vacating an award.²⁹⁷ The arbitrators were found to agree on admissibility when part of the

282. *Id.* at *1.

283. *Id.*

284. *Id.*

285. *Id.* at *1-2.

286. *Id.* at *2.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at *4. See MASS. GEN. LAWS ch. 251, § 12 (1972).

291. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

292. *Maiocco*, 1998 WL 48557, at *5. See U.A.A. § 12.

293. U.A.A. § 12.

294. *Maiocco*, 1998 WL 48557, at *6.

295. *Id.*

296. *Id.* at *7.

297. *Id.*

panel silently assented to the evidence.²⁹⁸ Greenway also claimed that a witness' telephone testimony prevented proper cross-examination of the witness, but the court ruled that defendants could have faxed questions to the witness and the arbitrators had the ability to assess credibility of testimony over the phone.²⁹⁹

Finally, the court stated that the panel had the right to ask questions during defense council's closing argument and that arbitrators were not required to read any written submissions by the parties.³⁰⁰ These actions by the panel did not warrant a finding of misconduct that would justify vacating an award.³⁰¹

C. Arbitrator Exceeding the Scope of Authority

Courts will often look to whether an arbitration award draws its essence from the contract it is interpreting in deciding whether arbitrators exceeded their powers.³⁰² In *City of Philadelphia v. Fraternal Order of Police, Lodge No. 5*, the city entered into a collective bargaining agreement ("CBA") with the police force regarding their employment.³⁰³ Specifically, members of the Philadelphia Sheriff's Department were to be paid overtime for any weekends they worked for the city.³⁰⁴ The terms of the agreement were followed for months until the city unilaterally decided to stop paying the officers overtime pay.³⁰⁵ After the workers filed a grievance, an arbitrator ruled that the city violated specific terms of the CBA and was required to both cease from denying the officers overtime pay and compensate them for lost back pay.³⁰⁶

In reviewing the action, the court looked to the "essence test" to determine whether the arbitrator's decision "could rationally be derived from the [CBA]."³⁰⁷ Such an interpretation of the CBA by the arbitrator cannot be manifestly unreasonable or "exhibit an infidelity to the agreement."³⁰⁸ The court held that the arbitrator's decision was reasonable because the CBA explicitly called for overtime pay under these conditions, and the city did in fact comply with the requirements before amending the agreement without the permission of the police department.³⁰⁹ The court acknowledged that the Pennsylvania Supreme Court had granted arbitrators broad discretion in creating remedies.³¹⁰ Therefore, the court ruled that it had no authority to vacate the honest judgement of the arbitrator in that respect.³¹¹

298. *Id.* at *8.

299. *Id.*

300. *Id.* at *10. See *Advest, Inc. v. McCarthy*, 914 F.2d 6, 11 n.8 (1st Cir. 1990).

301. *Maiocco*, 1998 WL 48557, at *10.

302. *City of Philadelphia v. Fraternal Order of Police, Lodge No. 5*, 720 A.2d 811, 814 (Pa. Commw. Ct. 1998).

303. *Id.* at 813.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.* at 814.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

In *Jupiter Aluminum Corp. v. Home Insurance Co.*,³¹² the plaintiff asked for vacation of an arbitration award interpreting an insurance policy because they did not understand that such a determination would be binding.³¹³ This issue arose after both parties agreed to participate in proceedings where they would submit appraisal reports to an umpire who would determine the proper insurance coverage owed by the defendant.³¹⁴ However, the court did not reach the merits of plaintiff's motion to vacate as defendants were given leave to file a counterclaim.³¹⁵

An arbitrator is "bound to follow the guidelines set forth in the four corners" of a contract to arbitrate in order to avoid exceeding their scope of authority.³¹⁶ In *Michigan State Employees Ass'n v. Michigan Liquor Control Commission*,³¹⁷ the court held that arbitrators exceeded their powers under the parties' CBA by issuing subpoenas without any legal authorization.³¹⁸ The court noted that although the American Arbitration Association ("AAA") rules provide for subpoena power for arbitrators, such power must be "authorized by law."³¹⁹ In this case, the parties contract language did not give the arbitrator the power to issue subpoenas without court authorization.³²⁰ Furthermore, even though the F.A.A. and Michigan statutes may provide subpoena authority in some arbitration proceedings, "they do not provide that authority for [CBA] arbitration."³²¹

In *Father & Sons, Inc. v. Taylor*,³²² the defendants ("Taylors") entered into a construction contract with the plaintiffs ("F&S") to build a room addition onto the Taylors' home.³²³ The contract contained an arbitration provision.³²⁴ F&S failed to complete their work in accordance with the contract and the parties decided to draft a second contract, leading to this dispute.³²⁵ F&S subsequently filed separate complaints in three different courts, alleging the Taylors had not paid the balance due under the new contract.³²⁶ F&S then voluntarily dismissed the complaint filed in the first court and filed an amended complaint in the second court.³²⁷ The Taylors responded with a counterclaim revolving around F&S's failure to complete the contract as required.³²⁸ The court dismissed F&S's complaint and F&S moved to compel arbitration of the Taylors' counterclaim and other pending matters.³²⁹

312. 181 F.R.D. 605 (N.D. Ill. 1998).

313. *Id.* at 606.

314. *Id.* at 607.

315. *Id.* at 609.

316. *Beattie v. Autostyle Plastics, Inc.*, 552 N.W.2d 181, 183 (Mich. Ct. App. 1996).

317. 591 N.W.2d 42 (Mich. Ct. App. 1998).

318. *Id.* at 43.

319. *Id.*

320. *Id.*

321. *Id.* See MICH. COMP. LAWS § 423.1 (1995); MICH. COMP. LAWS § 600.5001 (1987); U.A.A. § 1.

322. 703 N.E.2d 532 (Ill. App. Ct. 1998).

323. *Id.* at 533.

324. *Id.* at 533-34.

325. *Id.*

326. *Id.*

327. *Id.* at 534.

328. *Id.*

329. *Id.*

During arbitration of the pending matters, the arbitrator refused to hear arguments related to either F&S's dismissed complaint or claims of attorney misconduct during discovery.³³⁰ The arbitrator ruled in favor of the Taylors and also made special findings that F&S materially breached the contract and that F&S was involved in deceptive practices in violation of the Consumer Fraud Act ("CFA").³³¹ F&S argued that the award should be vacated in that the arbitrator exceeded his powers by ruling that F&S had violated the CFA.³³² Particularly, F&S asserted that awarding attorney fees to the Taylors, barring crucial testimony, and removing liens held by F&S demonstrated evidence of the arbitrator exceeding his powers.³³³

The court focused on the fact that the award was based on issues that were properly submitted to the arbitrator and that it contained an honest decision by the arbitrator after a full and fair hearing of the parties.³³⁴ As such, the court would not set aside the award for error either in law or fact.³³⁵ The court also found credible evidence that F&S was involved in deceptive practices, thus justifying the arbitrator's finding of a violation of the CFA and the award of attorney fees.³³⁶ In addition, the court ruled that the barring of testimony of an employee of F&S by the arbitrator did not infringe on F&S's right to hear relevant evidence, in that, the employee was allowed to testify at one of the hearings.³³⁷ Finally, the court approved the removal of liens by the arbitrator because the subcontractors hired by F&S could assert their own legal interest on the Taylors' property.³³⁸

In *Klatz v. Western States Insurance Co.*,³³⁹ the plaintiff claimed uninsured motorist benefits under his insurance policy.³⁴⁰ A trial was first held on whether plaintiff's car had made contact with another vehicle; a requirement for being compensated under his insurance policy.³⁴¹ After the court ruled that plaintiff proved contact, the court then required arbitration of the claim.³⁴²

Despite the trial court's finding, the arbitrators ruled in favor of the defendant and awarded plaintiff nothing under his policy.³⁴³ The plaintiff filed an objection to the decision on the grounds that the arbitrators ignored the rules of evidence by failing to give sufficient weight to the trial court's findings, despite the fact that defendant offered no evidence to rebut the claims.³⁴⁴ The court found that the arbitrators exceeded their authority by disregarding the only evidence presented on the issue of liability and vacated the award.³⁴⁵

330. *Id.* at 533-34.

331. *Id.* at 534-35.

332. *Id.* at 535.

333. *Id.* at 535-38.

334. *Id.* at 536.

335. *Id.*

336. *Id.* at 536-37.

337. *Id.* at 538.

338. *Id.* at 538-39.

339. 701 N.E.2d 1135 (Ill. App. Ct. 1998).

340. *Id.* at 1136.

341. *Id.* at 1137.

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

The Illinois Appellate Court emphasized the court's duty to construe "an arbitration award so as to uphold its validity."³⁴⁶ The court also emphasized that the arbitration award in this case did not give the appearance of an "arbitrary and capricious" decision by the panel.³⁴⁷ Therefore, the court held that the trial court wrongly vacated the arbitration award because the judges were not free to substitute their own judgement for that of the arbitrators.³⁴⁸ The award itself gave no information about what the arbitrators considered in their decision, and absent such a record, the court must assume no error occurred.³⁴⁹ The court ruled that the trial court's vacation was improper, and reversed its decision.³⁵⁰

In *Westridge Investment Group, L.P. v. McAtee*,³⁵¹ plaintiffs, Westridge Investment Group, L.P. ("Westridge"), a real estate limited partnership, and Ferguson, general partner of the partnership, attempted to vacate an arbitration award finding the general partner liable on a promissory note.³⁵² Westridge had plans to develop a retirement community and defendant ("McAtee") offered to purchase an interest in the Westridge partnership and loan it \$25,000.³⁵³ Ferguson accepted the offer on behalf of Westridge and executed a promissory note to McAtee for the loan amount, although McAtee received a copy of the Limited Partnership Agreement sometime later.³⁵⁴

A clause in the partnership agreement allowed McAtee to pursue arbitration after he received no interest payments on the note.³⁵⁵ Ferguson made no objection to the proceedings on whether he was personally liable for the payments.³⁵⁶ After the arbitrator ruled in favor of McAtee, Ferguson filed a motion to vacate the award claiming the arbitrator exceeded his authority under the Missouri section of the U.A.A.³⁵⁷ by not complying with the provisions of the partnership agreement.³⁵⁸

The Missouri Court of Appeals focused on the policy reasons of why arbitration awards should be upheld stating that "every reasonable intentment is given in favor of an arbitration award."³⁵⁹ The plaintiffs claimed that the promissory note was a capital contribution, thus not entitling defendant to any return, and that a general partner had no liability for the partnership's actions.³⁶⁰ The court dismissed these arguments, holding that the arbitrator had the power to resolve liability on the promissory note because it was an issue connected with the Limited Partnership Agreement.³⁶¹ The court stated that it would not set aside an arbitration award

346. *Id.* at 1138 (citing *Edward Elec. Co. v. Automation, Inc.*, 593 N.E.2d 833, 837 (Ill. App. Ct. 1992)).

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. 968 S.W.2d 243 (Mo. Ct. App. 1998).

352. *Id.* at 244.

353. *Id.*

354. *Id.*

355. *Id.* at 244-45.

356. *Id.* at 245.

357. MO. REV. STAT. § 435.405 (1998).

358. *Westridge*, 968 S.W.2d at 245.

359. *Id.* (citing *Estate of Sandefur v. Greenway*, 898 S.W.2d 667, 669 (Mo. Ct. App. 1995)).

360. *Id.*

361. *Id.* at 246.

merely because it would have taken a different action.³⁶² Furthermore, plaintiffs' argument is in reality not that the arbitrators "exceeded their powers," but that the arbitrator's interpretation and application of provisions in the partnership agreement is incorrect.³⁶³ Therefore, the trial court properly denied the motion to vacate.³⁶⁴

In *McKibben v. Grigg*,³⁶⁵ a dispute between the parties over a buy-out provision in their partnership agreement resulted in an award that plaintiffs moved to vacate, which the trial court denied.³⁶⁶ In deciding the parameters of judicial review, the court examined the conflict between provisions of the North Dakota statutes and the Uniform Arbitration Act.³⁶⁷ Although procedural regulation of arbitration agreements was governed by North Dakota statutes at the time the parties created a contract to arbitrate, the adoption of the U.A.A. by the state effectively repealed those statutes pertaining to contractual arbitration.³⁶⁸ The court surmised that the state legislature would not intend to impair the obligation of the parties' contract, and decided to use the common law rules as modified by the North Dakota statutes in deciding procedural issues.³⁶⁹

The court of appeals first noted that even though an arbitration award may grant relief that courts cannot grant, such a circumstance is not grounds for vacating an award.³⁷⁰ Plaintiffs also claimed that the arbitration panel displayed partiality and exceeded their powers in ruling on matters not submitted to them.³⁷¹ The court found no evidence of partiality and ruled that the arbitrators were proper in considering all possible remedies because the parties submitted their entire contract for resolution.³⁷² Since the arbitrators acted within their powers, the court found no reason to vacate the award.³⁷³

D. Refusal to Postpone Hearing or Hear Relevant Evidence

In *E.I. Du Pont De Nemours & Co. v. Custom Blending International, Inc.*,³⁷⁴ the defendants ("CBI") sought to vacate an award in favor of plaintiffs ("Du Pont") for breaching a settlement agreement.³⁷⁵ The parties had entered into an agreement in which CBI would manufacture and distribute a tire service product containing a Du Pont Kevlar product.³⁷⁶ Shortly thereafter, a third party, Parsons, sued Du Pont over alleged statements made by Du Pont that Parsons was falsely representing

362. *Id.*

363. *Id.*

364. *Id.*

365. 582 N.W.2d 669 (N.D. Ct. App. 1998).

366. *Id.* at 670-71.

367. *Id.* at 671. See N.D. CENT. CODE § 32-29.20 (1999).

368. *McKibben*, 582 N.W.2d at 671-72. See 1987 N.D. LAWS ch. 408, § 23.

369. *McKibben*, 582 N.W.2d at 672.

370. *Id.* at 670-71. See N.D. CENT. CODE § 32-29.2-12(1) (1999).

371. *McKibben*, 582 N.W.2d at 673.

372. *Id.* at 673-74.

373. *Id.* at 674.

374. No. C.A. 16295-NC, 1998 WL 842289 (Del. Ch. Nov. 24, 1998).

375. *Id.* at *1.

376. *Id.*

products it sold as Kevlar.³⁷⁷ Evidence was presented by Parsons that demonstrated that it obtained its Kevlar products from CBI.³⁷⁸ Because of a dispute between Du Pont and CBI over their settlement agreement, including the alleged improper sale of Kevlar products by CBI to Parsons, Du Pont demanded indemnification from CBI over the dispute with Parsons.³⁷⁹

An arbitration proceeding was then commenced pursuant to the parties' settlement agreement, and an initial determination was made in favor of Du Pont.³⁸⁰ CBI originally argued that they would not comply with this determination, but over a month after the arbitration they asked the arbitrators to delay their ruling following additional discovery in the Parsons litigation.³⁸¹ CBI alleged that such discovery would show that they were under duress when the settlement agreement was signed with DuPont.³⁸²

The court emphasized the wide discretion given to arbitrators, and stated that review of an award is "narrowly circumscribed" and awards will be upheld if "any grounds for the award can be inferred from the record."³⁸³ In rejecting the duress claim, the court noted that CBI participated in the arbitration hearing without objection and that the threat of litigation by Du Pont, assuming the claim was in good faith, could not constitute duress.³⁸⁴ CBI was also unsuccessful in proving that the arbitrators disregarded the applicable law because the court found that the arbitrators could distinguish this factual situation from other similar cases.³⁸⁵ Moreover, there was no direct evidence presented that the arbitrators knew the law, but chose to ignore it.³⁸⁶ The court also found the arbitrators were justified in refusing to postpone proceedings.³⁸⁷ The court reached this conclusion by considering the dispute resolution clause of the settlement agreement which required a hearing within thirty days, and the fact that CBI made the postponement request well after the hearing and initial determination.³⁸⁸ Finally, the court ruled that the question was a closer call regarding the interpretation of some of the terms of the settlement agreement regarding CBI's duty to defend Du Pont.³⁸⁹ However, since the parties had to return to arbitration regarding the ongoing Parson's litigation, the court refused to vacate the award.³⁹⁰

377. *Id.*

378. *Id.* at *1-2.

379. *Id.* at *2.

380. *Id.*

381. *Id.* at *3.

382. *Id.*

383. *Id.* at *4 (citing *Audio Jam, Inc. v. Fazelli*, C.A. No. 14368, 1997 WL 153814, at *3 (Del. Ch. Mar. 20, 1997) (mem.)).

384. *Id.*

385. *Id.* at *5-6.

386. *Id.*

387. *Id.* at *7-8.

388. *Id.*

389. *Id.* at *8-9.

390. *Id.*

E. Non-Final Award Grounds to Vacate an Award

A court reviewing an arbitration award should usually either enforce or vacate the award, but where appropriate, may remand to the arbitrator for further findings.³⁹¹ In *GES Exposition Services, Inc. v. Bates*,³⁹² the defendants sued for denial of employment in retaliation for exercising rights under the Illinois Workers' Compensation Act.³⁹³ A settlement agreement was reached between the parties which provided that the arbitration procedure would be the exclusive means by which they would resolve disputes concerning certain rights.³⁹⁴ After the arbitrator found for the defendants, the plaintiffs sought to vacate the award on the grounds that the arbitrator exceeded his authority.³⁹⁵

The court denied the motion to vacate, finding that the award was not a final one in which the court could render a judgment and, in fact, stated that the award envisioned further action by the parties and the arbitrator.³⁹⁶ Because the parties would be required to negotiate further and the arbitrator retained some form of jurisdiction over the dispute, the court concluded that the arbitrator did not intend the award to be final.³⁹⁷ The court found that the "question of remedies requires more than mere ministerial action on the part of the arbitrator or the court."³⁹⁸

F. The Exclusivity of Statutory Grounds to Vacate an Award

In *Minot School Committee v. Minot Education Ass'n*,³⁹⁹ the plaintiff ("Committee") appeals from a decision of the Maine Labor Relations Board ("Board") in favor of the defendant teachers union's complaint of prohibited practice.⁴⁰⁰ The main argument forwarded by the Committee is that the Board exceeded its statutory authority to fashion remedies using the arbitration process.⁴⁰¹ Maine statutes provide that public employees engaged in collective bargaining may agree to binding arbitration to settle their claims,⁴⁰² but vacation of such decisions can only be done by the superior court and not the Labor Relations Board.⁴⁰³ The general grant of authority to the Board to settle controversies does not include the power to vacate an arbitration decision in contravention of Maine statutes.⁴⁰⁴ The

391. *Young Radiator Co. v. International Union, UAW*, 734 F.2d 321, 326 (7th Cir. 1984).

392. No. 97 C 3716, 1998 WL 142456 (N.D. Ill. Mar. 20, 1998).

393. *Id.* at *1.

394. *Id.*

395. *Id.* at *3.

396. *Id.* at *4-7.

397. *Id.*

398. *Id.* at *7.

399. 717 A.2d 372 (Me. 1998).

400. *Id.* at 374.

401. *Id.*

402. *Id.* See ME. REV. STAT. ANN. tit. 26, §§ 961-974 (West 1998).

403. *Minot Sch. Comm.*, 717 A.2d at 378. In fact, vacation by the superior court can only be accomplished in limited circumstances, those of the U.A.A. See ME. REV. STAT. ANN. tit. 14, §§ 5927-5949 (West 1980).

404. *Minot Sch. Comm.*, 717 A.2d at 378. See ME. REV. STAT. ANN. tit. 26, § 972 (West 1998).

court vacated the order of the Labor Relations Board that vacated the decision of the Maine Board of Arbitration and Conciliation.⁴⁰⁵

G. Time Limit Bar to Vacating an Award

When a party seeks to raise a defense to the enforcement of an arbitration award, the failure to make a timely request to vacate the award will bar such a defense.⁴⁰⁶ In *Maltz v. Smith Barney, Inc.*, plaintiffs claimed that they filed a timely motion to modify or vacate an arbitration award by resubmitting their motion within one year of its dismissal on procedural grounds.⁴⁰⁷ The court held that the proper statutory provision to apply was the Massachusetts' version of the U.A.A., which provides a thirty-day time limit from delivery of an arbitration award to file a motion to vacate.⁴⁰⁸ The court rejected plaintiff's alternative assertion that any time limit to filing a motion should begin running from the denial of their request for further modification.⁴⁰⁹

In *Kutch v. State Farm Mutual Automobile Insurance Co.*,⁴¹⁰ the plaintiff ("Kutch") was a passenger injured in an auto accident in which the driver of the car he was riding in carried State Farm uninsured motorist coverage.⁴¹¹ Kutch was entitled to recover from the defendants ("State Farm") under the insurance policy.⁴¹² However, the parties could not agree on the amount Kutch would recover for his damages, so the matter was arbitrated.⁴¹³ After Kutch was awarded an amount greater than State Farm's coverage under the policy, State Farm refused to pay any amount over the policy limit.⁴¹⁴

Because the defendants failed to apply for an order to vacate the award within ninety days, as required by Colorado law, the trial court confirmed the award.⁴¹⁵ The court of appeals reversed, ruling that the policy limit was not submitted to the arbitration panel and thus did not have to be raised in a motion to vacate, allowing State Farm to use the policy limit as a defense to confirmation of the award.⁴¹⁶

The Colorado Supreme Court held that under the Uniform Arbitration Act, the failure by State Farm to timely appeal for vacation of an arbitration award "prevents it from raising the contractual policy limits as a defense . . . after the expiration of the statutory time limit" of ninety days.⁴¹⁷ The court explained that State Farm could have sought to vacate the award on the grounds of "arbitrators exceeding their powers" because Kutch's award exceeded the policy limits.⁴¹⁸ The court surmised

405. *Minot Sch. Comm.*, 717 A.2d at 379.

406. *Maltz v. Smith Barney, Inc.*, 694 N.E.2d 840 (Mass. 1998).

407. *Id.* at 841-42. See MASS. GEN. LAWS ch. 260, § 32 (1992).

408. *Maltz*, 694 N.E.2d at 842. See MASS. GEN. LAWS ch. 260, §§ 12-13 (1988).

409. *Maltz*, 694 N.E.2d at 842 n.8.

410. 960 P.2d 93 (Colo. 1998) (en banc).

411. *Id.* at 95.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.* at 95-96.

416. *Id.* at 96.

417. *Id.* at 97.

418. *Id.* at 98.

that the award may have gone beyond the matters submitted for the arbitrators to resolve, voiding the award for lack of jurisdiction.⁴¹⁹ However, the failure of State Farm to timely make this argument prevents it from being preserved for review by the court.⁴²⁰ The court likened the defendants' position to "that of a litigant who has failed to file a timely appeal of the final judgement of a trial court."⁴²¹

In *Illinois Department of Central Management Services v. American Federation of State, County and Municipal Employees*,⁴²² a mental health technician employed by the plaintiffs ("CMS") and a member of the defendant union ("AFSCME") was discharged from his job for using abusive and inappropriate language towards other staff members.⁴²³ The AFSCME filed a grievance on behalf of the technician and an arbitrator sustained it because of the plaintiff's failure to abide by discipline procedures in the parties' collective bargaining agreement.⁴²⁴ CMS filed an application to vacate the award ninety-one days after receiving the award, and claimed that the award was against public policy and that the arbitrator exceeded his authority.⁴²⁵ The trial court then granted the defendants motion to dismiss the application based on the time limit required by the Illinois Public Labor Relations Act.⁴²⁶

The issue reached the Illinois Supreme Court, which refused to review the motion to vacate because the award had not been confirmed by the circuit court.⁴²⁷ The court held that an application to vacate is not the final step in a U.A.A. proceeding, and that the award must be confirmed to avoid possible modification or correction of the award.⁴²⁸ Thus, appellate review by the court of appeals was improper.⁴²⁹ On remand, the trial court confirmed the award, and an appeal followed.

The appellate court focused on two provisions of the Illinois act.⁴³⁰ The first required an application to vacate be filed within ninety days of delivery of the award to the applicant,⁴³¹ while another stated that no provision of the act regarding vacating an award shall apply to an award that is related to a collective bargaining agreement.⁴³² The court examined how other courts in Illinois have interpreted these two provisions and concluded that section 8 of the Labor Relations Act was controlling, stating that arbitration provisions of CBA's "shall be subject to" the Act.⁴³³ Furthermore, the court found that section 8 of the Act overruled the clause

419. *Id.*

420. *Id.*

421. *Id.* at 99.

422. 699 N.E.2d 594 (Ill. App. Ct. 1998).

423. *Id.* at 595.

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.* at 594.

428. *Id.*

429. *Id.*

430. *Id.* at 595.

431. 6 ILL. COMP. STAT. 315/12(b) (West 1993).

432. *Illinois Dept. of Central Management Servs.*, 699 N.E.2d at 595-96. See 710 ILL. COMP. STAT. 5/12(e) (West 1993).

433. *Illinois Dept. of Central Management Servs.*, 699 N.E.2d at 597 (citing 5 ILL. COMP. STAT. 315/8 (West 1994)).

in section 12(e), as it applied to the facts presented in this case.⁴³⁴ The court found this to be the most equitable result, instead of the 12(e) provision controlling which would have given a party five years to move to vacate an award.⁴³⁵ Thus, the plaintiff's failure to move to vacate within ninety days of receiving a copy of the award barred them from challenging it.⁴³⁶

H. No Arbitration Agreement and Issue Not Adversely Determined

In *Bradford v. Denny's Inc.*, the plaintiff was injured at the defendant's restaurant and suggested to defendant's counsel that the dispute be arbitrated.⁴³⁷ A letter confirming the agreement to arbitrate was sent by defendant's counsel to other parties representing defendants on certain disputed claims.⁴³⁸ After the arbitrator found for plaintiff, defendants objected to the award stating that they first learned of the arbitration only one day before it was commenced, and since they never entered into a contract agreeing to binding arbitration, the award was void and unenforceable.⁴³⁹

Under Illinois law, a party's attorney is the agent for the party.⁴⁴⁰ Since the attorney's authority to act for the client can be actual or apparent, the "principal will be bound [by authority actually granted to agent and] by the authority which [the principal] appears to give."⁴⁴¹

The court found for Bradford ruling Denny's lawyer had apparent authority to enter into the arbitration agreement.⁴⁴² Denny's had agreed to the lawyer's representation in this dispute and Bradford relied to her detriment on the defendant's attorney's apparent authority.⁴⁴³ Thus, the court refused to vacate the award.⁴⁴⁴

In *Smith v. Smith*, a special *in camera* proceeding by the trial court pronounced the parties divorced and partitioned their property.⁴⁴⁵ The plaintiff argued that the findings of the court were similar to an arbitration proceeding, and thus may only be vacated under the circumstances that fall under the U.A.A.⁴⁴⁶ The Tennessee Appellate Court disagreed, citing factors such as the lack of a written agreement to arbitrate, and the attorneys' failure to clearly indicate what form of ADR the parties agreed to participate in. Accordingly, the court found that the U.A.A. vacation

434. *Id.*

435. *Id.* at 597-98.

436. *Id.* at 598. See also 710 ILL. COMP. STAT. 5/12(b), 13(a) (West 1999); *Chicago Southshore & South Bend R.R. v. Northern Ind. Commuter Transp. Dist.*, 703 N.E.2d 7 (Ill. 1998) (denying the defendant's motion to vacate or modify an arbitration award because it was not filed within 90 days after delivery of the award as required by the U.A.A.).

437. No. 97 C 1531, 1998 WL 312009, at *1 (N.D. Ill. June 4, 1998).

438. *Id.*

439. *Id.* at *1-2.

440. *In re Estate of Maslowski*, 561 N.E.2d 1183, 1186 (Ill. App. Ct. 1990).

441. *Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 795 (Ill. 1993).

442. *Denny's*, 1998 WL 312009, at *4.

443. *Id.*

444. *Id.* at *5.

445. 989 S.W.2d 346, 347 (Tenn. Ct. App. 1998).

446. *Id.* at 347-48. See also *Hayden v. Allstate Ins. Co.*, 5 F. Supp.2d 649 (N.D. Ind. 1998) (claiming that de novo clause in contract defeats public policy of the Indiana U.A.A. rejected because contract at issue does not require binding arbitration).

requirements were not at issue.⁴⁴⁷ The court went on to modify the trial court's proceeding to ensure the parties were properly divorced.⁴⁴⁸

IX. SECTION 13: MODIFICATION OR CORRECTION OF AWARD

Under the U.A.A., a court reviewing an arbitration award should confirm the award unless certain conditions call for modification or correction of the award.⁴⁴⁹ Under section 13, these conditions are:

(1) [t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) [t]he arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) [t]he award is imperfect in a matter of form, not affecting the merits of the controversy.⁴⁵⁰

Section 13 also provides that an application to modify or correct an award may be joined in the alternative with an application to vacate the award.⁴⁵¹

With varied success, parties have used section 13 to petition courts to modify their arbitration awards to force the losing party to pay interest on the award from the date of its entry to the date of its payment.⁴⁵² In *Duffy v. Cook*, the court held that where the arbitration award itself did not include a provision for interest on the award, the court would not extend the award to include interest.⁴⁵³ The *Duffy* plaintiff and defendant entered into an agreement to arbitrate a dispute regarding personal injuries sustained by the plaintiff as a result of the defendant's negligence.⁴⁵⁴ An arbitration panel entered a \$425,000 award in favor of the plaintiff on February 12, 1998.⁴⁵⁵ On or about March 18, 1998, the defendant's insurance company tendered a check to the plaintiff for the full amount of the award.⁴⁵⁶ Plaintiff moved for an order requiring the defendant to pay interest on the \$425,000 at the legal rate from February 12, 1998 through March 16, 1998.⁴⁵⁷

The plaintiff based his argument on a previous Delaware Superior Court decision, *Continental Insurance Co. v. Rizzi*.⁴⁵⁸ In *Continental Insurance*, the court modified an arbitration award to grant the plaintiff interest from the time the award

447. *Smith*, 989 S.W.2d at 348.

448. *Id.* at 349.

449. U.A.A. § 13(b).

450. U.A.A. § 13(a).

451. U.A.A. § 13(c).

452. *Duffy v. Cook*, No. 16307-NC, 1998 WL 914267, at *1 (Del. Ch. Dec. 22, 1998); *Scott v. Erie Ins. Group*, 706 A.2d 357, 359 (Pa. Super. Ct. 1998).

453. *Duffy*, 1998 WL 914267, at *2.

454. *Id.* at *1.

455. *Id.*

456. *Id.*

457. *Id.*

458. Civ. A. No. 91C-04-191, 1992 WL 20022 (Del. Super. Ct. Jan. 17, 1992).

was made through the date that it was paid.⁴⁵⁹ The defendant in *Duffy* denied that *Continental Insurance* was applicable and requested that the court establish a grace period following the entry of the award in plaintiff's favor.⁴⁶⁰ The defendant conceded that it would then be responsible for any interest that the court found to accrue after the grace period had run.⁴⁶¹

The *Duffy* court agreed with the defendant that *Continental Insurance* was not applicable to the case at hand.⁴⁶² The court found that where *Continental Insurance* involved a "plenary action involving disputed issues of contract law," the case before the court was governed by the Delaware Uniform Arbitration Act ("D.U.A.A.").⁴⁶³ The *Duffy* court reasoned that the *Continental Insurance* court allowed interest because it "was satisfied that once the arbitrator's award was entered, the enforcement became a contract dispute and . . . [the court was] empowered to order prejudgment interest."⁴⁶⁴

Analysis under the D.U.A.A. would lead the *Duffy* court to a different finding. The court cited its previous decision in *Church Home Foundation, Inc. v. Victorine & Samuel Homsey, Inc.*⁴⁶⁵ for authority regarding the D.U.A.A. and interest modifications to arbitration awards.⁴⁶⁶ *Church Home Foundation* held that the request for interest should have gone before the arbitrator and that the court's limited scope of review caused "[reluctance] to order prejudgment interest on an award which does not grant or include such interest."⁴⁶⁷

Following *Church Home Foundation*, the *Duffy* court refused to grant interest that would amount to "a judgment requiring payment of interest for a few weeks on a sum already voluntarily paid."⁴⁶⁸ While the court recognized the policy reasons for requiring a losing party to pay interest on an arbitration award from the time of entry to a fixed point afterward, the court reasoned that such a judgment should be made either by the parties in the arbitration agreement, by the Delaware General Assembly or through an amendment to the D.U.A.A.⁴⁶⁹ A court should only make such a modification if "the agreement to arbitrate is entered into as part of a court sponsored alternative dispute resolution mechanism, by rule of that court."⁴⁷⁰

In *Scott v. Erie Insurance Group*, the Pennsylvania legislature had resolved a similar issue.⁴⁷¹ The *Scott* court referred to Pennsylvania Code, which states: "[e]xcept as otherwise provided by another statute, a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or

459. *Duffy*, 1998 WL 914267, at *1.

460. *Id.*

461. *Id.*

462. *Id.* at 2.

463. *Id.* See DEL. CODE ANN. tit. 10. §§ 5701-5725 (1998).

464. *Duffy*, 1998 WL 914267, at *2.

465. Civ. A. 6513, 1983 WL 3093 (Del. Ch. Aug. 29, 1983).

466. *Duffy*, 1998 WL 914267, at *2.

467. *Id.* (citing *Church Home Found.*, 1983 WL 3093, at *3).

468. *Id.* at *3.

469. *Id.*

470. *Id.*

471. 706 A.2d 357, 359-60 (Pa. Super. Ct. 1998).

award.⁴⁷² Under this authority, the plaintiff requested that the court modify the arbitration award to include judgment interest from the date the award was entered.⁴⁷³ In this case, the court ruled that the losing party would be required to pay the interest.⁴⁷⁴

In *Rus v. Family Land, Inc.*,⁴⁷⁵ plaintiffs, the decedent's wife and the administrator of the decedent's estate, asked the trial court to correct or modify an arbitration award that had been reduced based upon the decedent's comparative fault.⁴⁷⁶ The decedent drowned in a swimming pool owned by Family Land, Inc.⁴⁷⁷ The decedent's estate, the decedent's wife, Family Land, and Family Land's insurer, St. Paul Insurance Co., entered into a binding arbitration agreement.⁴⁷⁸ The arbitrator awarded \$405,000 to plaintiffs for negligent infliction of emotional distress.⁴⁷⁹ The decedent was found to be fifty percent comparatively at fault, and plaintiffs' award was accordingly reduced by the percentage of fault attributed to her late husband.⁴⁸⁰

The parties' arbitration agreement contained the following provisions:

The arbitrator shall decide the issues of liability, personal injury damages, and all applicable law. After the decision is rendered, the matter is resolved, any award arising from this agreement shall operate as a bar and complete defense to any action or proceeding in any court or tribunal that may arise from the same incident upon which the arbitration hearing is based.⁴⁸¹

Plaintiffs nevertheless argued that their award should not be reduced, contending that the reduction was an "evident error of law appearing on the face of the arbitration award" that should be corrected.⁴⁸² In response, Family Land argued that "the finality of the arbitration award precluded plaintiffs from seeking reconsideration."⁴⁸³

Illinois standards for the modification or correction of an arbitration award mirror the U.A.A.⁴⁸⁴ The district court noted its limitations in undertaking review of arbitration awards.⁴⁸⁵ Particularly, the court noted how narrow the consideration

472. *Id.* (citing 42 PA. CODE § 8101 (1995)).

473. *Id.*

474. *Id.*

475. 29 F. Supp.2d 475 (N.D. Ill. 1998).

476. *Id.* at 475.

477. *Id.*

478. *Id.* at 476.

479. *Id.*

480. *Id.*

481. *Id.*

482. *Id.* at 477.

483. *Id.*

484. 10 ILL. COMP. STAT. 5/13 (West 1998).

485. *Rus*, 29 F. Supp.2d at 477. "Judicial review of binding arbitration awards is quite limited and whenever possible, an arbitration award should be construed so as to uphold its validity." *Id.* at 477-78 (citing *Lemna v. Harry F. Shea & Co.*, 628 N.E.2d 577, 580 (Ill. App. Ct. 1993)). "Absent an express statement to the contrary in an arbitration agreement, arbitrators are 'their own judges as to what the law was.'" *Id.* at 478 (citing *Perkins Restaurants Operating Co. v. Van Den Bergh Foods Co.*, 657 N.E.2d 1085, 1088 (Ill. App. Ct. 1992)). "Gross errors of judgment in law or a gross mistake of fact will not

is in regards to claimed errors of law. Under *Board of Education of Chicago v. Chicago Teachers Union, Local No. 1*,⁴⁸⁶ the court had previously held that “[o]nly where it appears on the face of the award (and not in the arbitrator’s opinion) that the arbitrator was so mistaken as to the law that, if apprised of the mistake, the award would be different may a court review the legal reasoning used to reach the decision.”⁴⁸⁷

Based upon the foregoing, the court determined that while the face of the award indicated that plaintiffs’ award for negligent infliction of emotional distress had been reduced by fifty percent, the award did not identify who was at fault.⁴⁸⁸ Yet, even under the assumption that the fifty percent reduction was based entirely on the husband’s negligence, plaintiffs would still not be entitled to relief.⁴⁸⁹ Under Wisconsin law, where the non-negligent spouse’s claim is derivative of the negligent spouse, that negligence is attributable to both spouses.⁴⁹⁰ However, the district court noted that Wisconsin law is not settled on the issue of imputing negligence to a non-negligent party.⁴⁹¹ Therefore, the court found that “since either result was ‘reasonably possible’ in light of the existing precedents, no basis [existed] for overturning the arbitrator’s decision,” and the award would not be modified.⁴⁹²

X. SECTION 16: APPLICATIONS TO COURT

Section 16 of the U.A.A. provides for applications by motion to the courts to review arbitration awards.⁴⁹³ Under the section, the making of an agreement to arbitrate within a state “confers jurisdiction on the [circuit] court [of that state] to enforce the agreement under this Act and to enter judgement on an award thereunder.”⁴⁹⁴ Furthermore, arbitration awards rendered in a particular district give courts in that jurisdiction the authority to confirm the award.⁴⁹⁵

In *SBC Interactive, Inc. v. Corporate Media Partners*,⁴⁹⁶ the parties disputed the rights of one party to withdraw from their Partnership Agreement.⁴⁹⁷ The arbitration provision of their agreement stated that “the arbitration hearing shall be held in New York City or elsewhere as mutually agreed” and further provided for non-exclusive

vitate an arbitration award unless the mistakes or errors are apparent on the face of the award. Even an arbitrator’s gross abuse of discretion is not grounds for modifying an arbitration award under section 13.” *Id.* (citing *Perkins Restaurants*, 657 N.E.2d at 1088).

486. 427 N.E.2d 1199, 1202 (Ill. 1981).

487. *Rus*, 29 F. Supp.2d at 478 (citing *Board of Educ. of Chicago*, 427 N.E.2d at 1202).

488. *Id.*

489. *Id.* The “choice of law” provision in the arbitration agreement indicated that the substantive law governing liability and damages would be that of Wisconsin. *Id.* at 476.

490. *Id.*

491. *Id.* at 479.

492. *Id.*

493. U.A.A. § 16.

494. *Chicago Southshore & South Bend R.R. v. Northern Ind. Commuter Transp. Dist.*, 703 N.E.2d 7, 9 (Ill. 1998). See 710 ILL. COMP. STAT. 5/16 (West 1999).

495. *Maiocco v. Greenway Capital Corp.*, No. CIV.A. 97-MC-0053, 1998 WL 48557, at *2 (E.D. Pa. Feb. 2, 1998).

496. No. 16397, 1998 WL 749446 (Del. Ch. Oct. 7, 1998).

497. *Id.* at *1.

jurisdiction in the state and federal courts located in Wilmington, Delaware for any enforcement, modification, or vacation of any arbitration award.⁴⁹⁸ After an arbitration took place in New York City, plaintiffs filed a motion in the Delaware Court of Chancery to vacate the award.⁴⁹⁹ The defendant filed a motion to dismiss stating that the Delaware courts lacked subject matter jurisdiction.⁵⁰⁰

The court of chancery stated that the Uniform Arbitration Act alone does not create exclusive federal question jurisdiction, and that state courts may have concurrent jurisdiction under the U.A.A. under certain conditions.⁵⁰¹ In addition, section 9 of the U.A.A. granting exclusive jurisdiction to the federal district court where the arbitration took place was found not to apply since the parties specified "any court having jurisdiction thereof" in their agreement.⁵⁰² The court ultimately decided it had subject matter jurisdiction based on the inherited right to enforce and vacate arbitration awards from the English Court of Chancery, which the Delaware court split from in the eighteenth century.⁵⁰³ The court recognized that the English Court enforced and vacated awards arising out of arbitration agreements that existed in eighteenth century England.⁵⁰⁴

In *City of Philadelphia v. AFSCME, District Council 47*,⁵⁰⁵ an arbitration award was granted in favor of a city employee seeking promotion.⁵⁰⁶ The employee had been denied a promotion by the plaintiff ("City") and the defendant union ("AFSCME") represented her in filing a grievance against the City.⁵⁰⁷ Plaintiff claimed that the merits of the non-promotion were not reviewable, and the arbitrator could not decide the controversy between the parties.⁵⁰⁸ The court disagreed with the claim of the City, and stated that the arbitrator had jurisdiction to review the collective bargaining agreement between the City and its employees.⁵⁰⁹

Recognizing that the "essence test" required that deference be given to the arbitrator's interpretation of the CBA if it can rationally be derived from the agreement, the court accordingly found that the arbitrator had authority to award relief.⁵¹⁰

498. *Id.*

499. *Id.*

500. *Id.*

501. *Id.* at *2.

502. *Id.* at *2-3. See 9 U.S.C. § 9 (1994).

503. *SBC Interactive*, 1998 WL 749446, at *4.

504. *Id.*

505. 708 A.2d 886 (Pa. Commw. Ct. 1998).

506. *Id.* at 887.

507. *Id.*

508. *Id.*

509. *Id.* at 888.

510. *Id.*

XI. SECTION 17: COURT, JURISDICTION

Section 17 of the U.A.A. speaks to a court's jurisdiction to enforce an arbitration agreement and enter judgment on an arbitration award.⁵¹¹ The U.A.A. defines "court" as "any court of competent jurisdiction in this State."⁵¹²

In *Keystone, Inc. v. Triad Systems Corp.*,⁵¹³ the parties entered into a contract for the sale of a computer system that called for the parties to arbitrate any contract disputes in California.⁵¹⁴ Keystone, a Montana corporation, moved to compel arbitration in Montana.⁵¹⁵ Keystone's motion to compel relied on Montana code, which had been found by Montana courts to invalidate forum selection clauses that forced Montana residents to litigate in other states.⁵¹⁶ While section 28-2-708⁵¹⁷ had been applied to litigation, the court found that another statute, section 27-5-323,⁵¹⁸ gave the same consideration to Montana residents in arbitration agreements. Section 27-5-323 provides in relevant part: "[n]o agreement concerning venue involving a resident of this state is valid unless the agreement requires that the arbitration occur within the state of Montana. This requirement may only be waived upon the advice of counsel as evidenced by the counsel's signature thereto."⁵¹⁹ Because there was no indication that Keystone waived its right to have the dispute arbitrated in Montana upon the advice of counsel, the court held that any arbitration agreement calling for a Montana resident to arbitrate outside of Montana was void under Montana law.⁵²⁰

Triad argued, and the lower court agreed, that the Montana statute was preempted by the F.A.A. and the arbitration should be held in California. The Montana Supreme Court looked to *Doctor's Associates, Inc. v. Casarotto*⁵²¹ to clarify the preemptive effect of the F.A.A.⁵²² The *Keystone* court found that the holding in *Casarotto* "stands for the proposition that a state law may not 'place arbitration clauses on unequal footing' from general contract provisions."⁵²³ Since sections 28-2-708 and 27-5-323 invalidated forum selection clauses in both contracts and in arbitration agreements, the *Keystone* court found that there was no conflict with the F.A.A.⁵²⁴ Further, the court found that since Montana law did not invalidate the parties' agreement to arbitrate, but instead limited the enforceability of the agreement only as to its forum selection, Montana law did not conflict with the

511. U.A.A. § 17.

512. *Id.*

513. *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240 (Mont. 1998).

514. *Id.* at 1242.

515. *Id.*

516. *Id.* at 1243 (citing MONT. CODE ANN. § 28-2-708 (1997)). This section of the Montana Code provides that "[e]very stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void." MONT. CODE ANN. § 28-2-708 (1997).

517. MONT. CODE ANN. § 28-2-708 (1997).

518. MONT. CODE ANN. § 27-5-323 (1997).

519. *Keystone*, 971 P.2d at 1244 (citing MONT. CODE ANN. § 27-5-323 (1997)).

520. *Id.*

521. 517 U.S. 681, 686-87 (1974).

522. *Keystone*, 971 P.2d at 1245.

523. *Id.* at 1246.

524. *Id.*

general purpose of the F.A.A.⁵²⁵ As a result, the court reversed the lower court's ruling and granted Keystone's motion to compel the arbitration in Montana.⁵²⁶

In *Frizzell Construction Co., Inc. v. Gatlinburg, L.L.C.*,⁵²⁷ the Tennessee Court of Appeals found that the question of whether or not a contract existed between the parties was a question of law for the court to decide prior to determining whether or not the F.A.A. applied to the arbitration called for in the contract.⁵²⁸ The dispute between the parties arose from a contract for the construction of a hotel.⁵²⁹ Frizzell filed a complaint in the chancery court to enforce a mechanic's lien and for breach of contract, claiming that Gatlinburg failed to pay the amount due on the construction contract.⁵³⁰ Gatlinburg denied that it owed Frizzell and filed a counterclaim.⁵³¹ Frizzell then filed a motion to stay the court proceedings pending arbitration to resolve the contract provision.⁵³² In its opposition to the motion to stay court proceedings, Gatlinburg amended its counterclaim and alleged that Frizzell fraudulently induced it to enter into the contract.⁵³³

Upon the motion to stay proceedings, the trial court retained jurisdiction to hear the claim of fraudulent inducement, and Frizzell appealed that judgment.⁵³⁴ The appellate court cited *City of Blaine v. John Coleman Hayes & Associates*⁵³⁵ as authority that the court should not order the issue of fraudulent inducement into arbitration.⁵³⁶ The court followed *Blaine's* reasoning and found that where there was fraudulent inducement, there was no contract and, hence, no issue to submit to arbitration.⁵³⁷ Therefore, the lower court's retention of jurisdiction on the issue of fraudulent inducement was proper.⁵³⁸

In *O'Brien v. Hanover Insurance Co.*,⁵³⁹ the Massachusetts Supreme Court considered whether the superior court or an arbitration panel had the jurisdiction to decide issues of waiver and preclusion.⁵⁴⁰ *O'Brien* involved an arbitration to determine whether O'Brien had violated a non-solicitation clause in his severance agreement with Hanover Insurance Company.⁵⁴¹ The court concluded that it was proper for the arbitration panel to refer the issue of waiver to the court for decision because "[w]hether a party has waived arbitration is a question of arbitrability for the court to determine."⁵⁴² The court resolved the question of whether or not it had jurisdiction to hear the preclusion issue based upon the parties' agreement to put the

525. *Id.*

526. *Id.*

527. No. 03A01-9805-CH-00161, 1998 WL 761840 (Tenn. Ct. App. Nov. 2, 1998).

528. *Id.* at *1.

529. *Id.*

530. *Id.*

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.*

535. 818 S.W.2d 33 (Tenn. Ct. App. 1991).

536. *Frizzell*, 1998 WL 761840, at *2.

537. *Id.*

538. *Id.* at *3.

539. 692 N.E.2d 39 (Mass. 1998).

540. *Id.* at 42-43.

541. *Id.* at 40.

542. *Id.* at 43 (citing *Martin v. Norwood*, 478 N.E.2d 955, 958 (Mass. 1985)).

issue before the court to decide.⁵⁴³ The court found that since parties were allowed to agree to rescind an arbitration agreement, it must follow that parties could rescind the agreement as to a particular subject as with issue preclusion.⁵⁴⁴ The court recognized that it did not determine whether issue preclusion should be resolved by the courts as a general matter, because this case did not require the court to answer that question.⁵⁴⁵

*State ex rel. Telecom Management, Inc. v. O'Mally*⁵⁴⁶ involved the court's jurisdiction to order a change of arbitrators before an arbitration hearing had been held or an award had been entered.⁵⁴⁷ The initial dispute arose over commissions owed to Telecom Management, Inc. ("TMI") by Matrix Communications Corporation ("Matrix") pursuant to a contract between the parties.⁵⁴⁸ Pursuant to the contract, TMI demanded arbitration with the American Arbitration Association ("AAA").⁵⁴⁹ A panel was chosen in November of 1995, and a hearing on the matter was scheduled for October 21, 1996.⁵⁵⁰ On October 2, 1996, Matrix filed a letter of protest with the AAA and requested a new panel.⁵⁵¹ Matrix contended that the AAA had prejudged the matter and wrongfully ordered Matrix to provide confidential information.⁵⁵² The AAA denied the request and ordered discovery.⁵⁵³ Matrix and Matrix's attorney made at least two other requests to the AAA that they appoint a new panel, specifically stating that an arbitrator on the panel was biased against Matrix's attorney.⁵⁵⁴ In response to having heard that Matrix intended to file suit against the arbitrators and the AAA, the AAA wrote a letter to Matrix's attorney which stated that, as a general rule, the AAA did not appear in litigation relating to an arbitration, and that it was not proper for the AAA to be named as a party if the matter proceeded before the court.⁵⁵⁵ The letter further stated that "[the AAA would] of course abide by an order of the court regarding the continued service of the arbitrators."⁵⁵⁶

On March 28, Matrix filed a petition in the circuit court in prohibition and mandamus against the AAA requesting that the AAA dismiss the panel.⁵⁵⁷ TMI and the individual arbitrators were not named as parties in the action.⁵⁵⁸ The court found that the arbitration panel "had been arbitrary and biased against Matrix and declared

543. *Id.*

544. *Id.*

545. *Id.*

546. 965 S.W.2d 215 (Mo. Ct. App. 1998).

547. *Id.* at 215.

548. *Id.* at 216.

549. *Id.* The contract between the parties contained in relevant part: "If the parties are unable to resolve any controversy or claim or dispute arising out of or relating to this Agreement, the dispute shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association . . ." *Id.*

550. *Id.* at 217.

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*

557. *Id.*

558. *Id.*

the arbitrators should be recused and all documents and orders and other papers in the arbitration proceedings should be sealed and not relied upon in any manner.”⁵⁵⁹ Matrix’s attorney presented a copy of the order to the AAA.⁵⁶⁰ TMI was never served with a copy of Matrix’s petition or the circuit court’s order.⁵⁶¹ The AAA and TMI filed a motion to dismiss for lack of jurisdiction.⁵⁶² That motion was denied.⁵⁶³ TMI then filed a writ to prohibit enforcement of the order asserting the court’s lack of jurisdiction to recuse the arbitrators, or to have recused the arbitrators in an ex parte order of which TMI had no notice.⁵⁶⁴

In *Telecom*, the court found “scant court authority for court intervention into an arbitration proceeding prior to [the entry of] award.”⁵⁶⁵ As such, the court found that under Missouri’s Uniform Arbitration Act, “the party claiming an unfair arbitrator has to wait until an arbitration award is presented to be given judgment status to present [a bias or prejudice] claim.”⁵⁶⁶ Further, the court held that even if there had been authority to intervene prior to the entry of the award, TMI was a party to the pending arbitration and had not been notified of the petition or court order filed by Matrix.⁵⁶⁷ As such, the order could not be upheld.⁵⁶⁸

In *SBC Interactive, Inc. v. Corporate Media Partners*,⁵⁶⁹ the Delaware court examined whether or not it had subject matter jurisdiction under the F.A.A. to consider a motion to vacate an arbitration award given by a New York arbitration panel.⁵⁷⁰ The parties had agreed to arbitrate their dispute in New York, but also to “submit to the enforcement, modification or vacating of any award to the non-exclusive jurisdiction of the state and federal courts located in Wilmington, Delaware.”⁵⁷¹ The court found that previous holdings had established that it had subject matter jurisdiction to hear the motion.⁵⁷² Although previous cases did not “identify the source of the subject matter jurisdiction,” the court nevertheless found that it was bound by this earlier precedent.⁵⁷³ The court then sought to “independently find and articulate the source of this state court subject matter jurisdiction.”⁵⁷⁴ In doing so, the court recognized that precedent had provided that the court’s subject matter jurisdiction could not arise from the F.A.A., the parties’ arbitration agreement, or the Delaware Uniform Arbitration Act.⁵⁷⁵ Instead, because the court adopted the inherent equity jurisdiction of the High Court of Chancery of

559. *Id.* at 218.

560. *Id.*

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.* at 220.

566. *Id.*

567. *Id.*

568. *Id.*

569. No. 16397, 1998 WL 749446, at *1 (Del. Ch. Oct. 7, 1998).

570. *Id.*

571. *Id.*

572. See *Moss v. Prudential-Bache Sec., Inc.*, 581 A.2d 1138, 1140 (Del. 1990).

573. *SBC Interactive*, 1998 WL 749446, at *2.

574. *Id.*

575. *Id.* at *3.

Great Britain, it had subject matter jurisdiction “over the enforcement, modification or vacating of an arbitration award rendered under the F.A.A.”⁵⁷⁶

XII. SECTION 18: VENUE

Section 18 of the U.A.A. directs the venue in which an arbitration hearing must be held. Section 18 reads:

[a]n initial application shall be made to the court of the [county] in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the [county] where the adverse party resides or has a place of business or, if he has no residence or place of business in this State, to the court of any [county]. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.⁵⁷⁷

In *Coady v. Ashcraft & Gerel*,⁵⁷⁸ the United States District Court for the District of Massachusetts received a motion to transfer venue to the United States District Court for the District of Columbia from the defendant law firm.⁵⁷⁹ The dispute in *Coady* arose out of an employment contract that included a provision to arbitrate any ambiguities or questions of interpretation.⁵⁸⁰ The case, originally filed in state court, was removed to federal court.⁵⁸¹ Finding that there was an independent basis for federal jurisdiction, the court held that the Federal Arbitration Act applied.⁵⁸² The court proceeded to examine the motion for transfer of venue under the F.A.A. and determined that applications for arbitration were like any other federal civil case and were subject to transfer “to any other district or division where [they] might [be] brought.”⁵⁸³ The court isolated the venue issue as: “whether transferring this case to the United States District Court for the District of Columbia, where Ashcraft and Gerel filed its complaint for declaratory judgment and damages prior to the filing of this action, would further the interests of justice.”⁵⁸⁴

As with any civil case, the moving party for a transfer of venue must overcome the strong presumption in favor of the plaintiff’s forum.⁵⁸⁵ A district court’s review of a motion to transfer venue involves considering “the convenience of the parties and witnesses, the order in which the jurisdiction was obtained by the district court,

576. *Id.* at *1.

577. U.A.A. § 18.

578. 996 F. Supp. 95 (D. Mass. 1998).

579. *Id.* at 98.

580. *Id.*

581. *Id.* at 99.

582. *Id.* at 99-100.

583. *Id.* (citing 28 U.S.C. § 1404(a) (1994)).

584. *Id.*

585. *Id.*

the availability of documents and the possibilities of consolidation.⁵⁸⁶ The court must also consider “the nexus between the operative facts and the respective forums, trial efficiency, and the forum’s familiarity with governing law.”⁵⁸⁷

In making its decision, the court considered the defendant’s contentions regarding convenience of the parties, witnesses, and availability of documents.⁵⁸⁸ The court said that under each of these factors, the “differences between Boston and Washington are negligible and cannot weigh heavily in the balance.”⁵⁸⁹ The court also criticized the parties’ “jockeying for homecourt advantage” and characterized some of the parties’ arguments as “machinations [that brought] little credit to the legal profession.”⁵⁹⁰ The court focused its ruling and its refusal to transfer venue on the issue of trial efficiency.⁵⁹¹

The court reasoned that the transfer of a dispute to the forum with the most available judicial resources was a preferable means of providing the parties involved with speedy, efficient and just resolution of their case.⁵⁹² The distribution of resources among the federal courts is far from equal, according to the *Coady* court.⁵⁹³ The court cited Chief Justice Rehnquist who had stated that with almost one in ten offices in the federal judiciary vacant and with thirty-two percent of these vacancies in existence for eighteen months or longer, these conditions were “judicial emergencies.”⁵⁹⁴ These vacancies “contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed.”⁵⁹⁵

The *Coady* court found that the case before it was “a perfect example of the practical consequences of the Chief Justice’s concern. While the District of Massachusetts presently enjoys its full compliment of district judges and magistrate judges, the United States District Court for the District of Columbia is in a state of ‘judicial emergency.’”⁵⁹⁶ Judges should hesitate to transfer cases into these overloaded courts, according to *Coady*, and judges serving overloaded courts should not hesitate to transfer cases out.⁵⁹⁷ According to the *Coady* court, the judicial emergency suffered in the District of Columbia and at least ten other jurisdictions

586. *Id.* (citing *Cianbro Corp. v. Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987)).

587. *Id.* at 100-01.

588. *Id.* at 101 n.7.

589. *Id.* at 101.

590. *Id.* In footnote eight, the court discussed Ashcraft and Gerel’s argument that the application to arbitrate should be dismissed pursuant to the “first-to-file” rule. The court found that Ashcraft and Gerel did first file a complaint and the actions were identical in terms of parties and issues. The court went on to hold, however, that concerns involving duplicative litigation and waste of judicial resources were not present where one of the issues was an arbitration. The court distinguished the arbitration issue on the grounds that it could be resolved swiftly, it could be inserted ahead of litigation, and the F.A.A. commands the staying of any suit or proceeding dealing with any issue subject to arbitration in order to avoid duplication. *Id.* at 101 n.8.

591. *Id.* at 101-06.

592. *Id.* at 103.

593. *Id.*

594. *Id.* (citing HON. WILLIAM H. REHNQUIST, UNITED STATES SUPREME COURT, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7-9 (1998)).

595. *Id.*

596. *Id.* at 104.

597. *Id.* at 106.

reduces the chance that citizens of these jurisdictions will have access to federal courts equal to "that enjoyed by those areas of the country where adequate judicial resources have been secured by the people's elected representatives."⁵⁹⁸

XIII. SECTION 19: APPEALS

Section 19 of the U.A.A. lists the judgment and orders relating to arbitration that may be appealed.⁵⁹⁹ Under section 19, the following decisions or rulings may be appealed: (a) an order denying an application to compel arbitration, (b) an order granting an application to stay arbitration, (c) an order confirming or denying confirmation of an award, (d) an order modifying or correcting an award, (e) an order vacating an award without directing a rehearing, or (f) a judgment or decree entered pursuant to the provisions of the U.A.A.⁶⁰⁰ Section 19(b) provides that appeals from these judgments and orders "shall be taken in the manner and to the same extent as from orders or judgments in a civil action."⁶⁰¹

In *Weston Securities Corp. v. Aykanian*,⁶⁰² customers brought an action against a securities dealer and sought arbitration with the National Association of Securities Dealers ("NASD").⁶⁰³ The director of the NASD referred the case to arbitration and the dealer brought an action to enjoin the customers from continuing with the arbitration.⁶⁰⁴ The dealer claimed the customers' claims were not arbitrable under the NASD code or that they were barred by a six-year rule on filing.⁶⁰⁵ The trial court entered a preliminary injunction enjoining the customers from continuing the arbitration and ordered the parties to submit motions for summary judgment.⁶⁰⁶ The trial court entered summary judgment in favor of the customers and compelled the dealer to proceed with the arbitration.⁶⁰⁷ The dealer subsequently appealed the order.⁶⁰⁸ The dealer also filed a motion before a single justice of the Massachusetts Court of Appeals to stay arbitration pending the appeal.⁶⁰⁹ Both appeals were denied.⁶¹⁰

598. *Id.* The *Coady* court found that a state of "judicial emergency" exists in Alabama, California, Hawaii, Illinois, New York, Ohio, Oregon, Pennsylvania, Puerto Rico, Texas and the District of Columbia. Searching for an explanation, the *Coady* court held that "[i]t is interesting to note that the burden of inadequate judicial resources appears to fall disproportionately on our largest and most populous states. Perhaps this reflects the fact that these states enjoy less relative influence in the Senate, where every state is represented equally." *Id.* at 106 n.11.

599. U.A.A. § 19.

600. U.A.A. § 19(a).

601. U.A.A. § 19(b).

602. 703 N.E.2d 1185 (Mass. App. Ct. 1998).

603. *Id.* at 1187.

604. *Id.*

605. *Id.*

606. *Id.*

607. *Id.*

608. *Id.*

609. *Id.*

610. *Id.*

Unlike the U.A.A. or the F.A.A., the Massachusetts Uniform Arbitration Act ("M.U.A.A.") does not permit an appeal from an order compelling arbitration.⁶¹¹ As such, the question for the court was whether or not the F.A.A. preempted the M.U.A.A.⁶¹² The court held that the F.A.A. does preempt State law, but only to the extent that it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁶¹³

An Oregon Court of Appeals decision on point was persuasive to the Massachusetts Court of Appeals.⁶¹⁴ The Oregon court explained that the "object that Congress sought to achieve is simply that the aggrieved party have a right to appeal at some time."⁶¹⁵ Considering this, the Massachusetts court held that since the dealer could assert his rights in opposition to a confirmation of an award in the customers' favor and he could appeal an unfavorable award under the M.U.A.A., his rights were fully preserved.⁶¹⁶ Therefore, the court dismissed the appeal.⁶¹⁷

In *Thunderstik Lodge, Inc. v. Reuer*,⁶¹⁸ the plaintiff/lessor brought a forced entry and detainer suit against the defendant which was compelled into arbitration by an order of the circuit court.⁶¹⁹ The arbitrator determined that the right of re-entry did not vest in the lessor and found for the lessee.⁶²⁰ In ruling for the lessee, the court found that the lessee did not breach the "legal purpose" provision of the lease in the lessee's violation of the Migratory Bird Treaty Act.⁶²¹ The circuit court confirmed the arbitration award.⁶²² On appeal, the lessor raised the issue "whether a lease provision calling for arbitration of differences, limits the lessor to that remedy, or may the lessor instead use forcible entry and detainer relief."⁶²³

The Supreme Court of South Dakota held that the contract between the parties required the parties to arbitrate their dispute.⁶²⁴ South Dakota adopts the U.A.A. and under its influence,⁶²⁵ the *Thunderstik Lodge* court found, "[i]f any party to an agreement providing for arbitration had any doubt whether the case should be resolved by traditional judicial means or by arbitration, arbitration will control."⁶²⁶

611. *Id.* at 1187-88. "[S]ection 18, by failing to enumerate orders compelling arbitration as occasions for the exercise of the right of appeal, precludes an appeal from such an order." *Id.* at 1188 (citing *Old Rochester Reg'l Teacher's Club v. Old Rochester Reg'l Sch. Dist.*, 463 N.E.2d 581 (Mass. App. Ct. 1984)).

612. *Id.* at 1189.

613. *Id.* (citing *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

614. *See Marr v. Smith Barney, Harris Upham & Co., Inc.*, 842 P.2d 801 (Or. Ct. App. 1992).

615. *Id.* at 804.

616. *Weston Sec. Corp.*, 703 N.E.2d at 1189.

617. *Id.*

618. 585 N.W.2d 819 (Dakota 1998).

619. *Id.* at 820.

620. *Id.* at 821.

621. *Id.*

622. *Id.*

623. *Id.* at 822.

624. *Id.* at 823.

625. *See* S.D. CODIFIED LAWS § 21-25A-1 (Michie 1998). "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.*

626. *Thunderstik Lodge*, 585 N.W.2d at 822.

Where the lessor did not plead fraud, misrepresentation or wrongful act in the contract, the court presumed that the lessor knew of, and intended to be bound by, the contract's arbitration clause.⁶²⁷ The court thereby affirmed the circuit court's confirmation of the arbitration award.⁶²⁸

In *Fraternal Order of Police, White Rose Lodge No. 15 v. City of York*,⁶²⁹ the City of York ("York") appealed a York County Court of Common Pleas dismissal of York's exceptions to an arbitration award.⁶³⁰ The trial court ruled that "the exceptions were an appeal from a final decision of a common law arbitration, ruled that it did not have jurisdiction to hear the appeal because the appeal was untimely filed, and dismissed the appeal by granting the Fraternal Order of Police's ("FOP") petition to quash the exceptions."⁶³¹ On appeal, York presented the following issues:

whether the trial court properly dismissed the city's [York's] exceptions to the arbitration award as an untimely filed appeal; whether the arbitration award was an advisory opinion preventing it from having a final and binding status from which an appeal could be taken; and whether the trial court retained original jurisdiction and supervisory control over the arbitration such that the trial court's review of the arbitration award did not constitute an appeal.⁶³²

On the first issue, whether the trial court erred in dismissing York's petition requesting review of the arbitration award as untimely filed, York argued that the trial court's reference of the case to arbitration was a means to assist the trial court in resolving the case and as such, there was no time limit imposed on the petition.⁶³³ Further, York claimed that the arbitrator did not address the issues in the dispute, the award could not be final and binding, and the FOP was required to move the court for an order confirming the award before it was final.⁶³⁴ The appellate court found no support for this argument.⁶³⁵ Finding that York voluntarily entered the arbitration, the court stated that the trial court lacked "jurisdiction to entertain an appeal to review the merits of the award more than thirty days beyond its issuance or delivery."⁶³⁶

The FOP argued that York waived the issue of whether the arbitration award was advisory because York did not raise the issue before the trial court.⁶³⁷ The appellate court agreed and found that York had neglected to raise the issue in the lower court.⁶³⁸

627. *Id.* at 823.

628. *Id.*

629. 708 A.2d 855 (Pa. Commw. Ct. 1998).

630. *Id.* at 855.

631. *Id.* at 857.

632. *Id.*

633. *Id.*

634. *Id.* at 859.

635. *Id.* at 860.

636. *Id.*

637. *Id.* at 855.

638. *Id.*

The court found that although York argued that the arbitrator failed to resolve the issues in arbitration, York had “previously taken the position that the trial court was not the appropriate original forum for the [issues in dispute].”⁶³⁹ In light of this position, York voluntarily submitted to arbitration.⁶⁴⁰ Accordingly, under Pennsylvania law, the court found that any petition for a review of an arbitrator’s award “shall be deemed an appeal from a government agency for purposes . . . (relating to limitation of time).”⁶⁴¹ Therefore, the appellate court held that the review of the arbitrator’s award before the trial court was appropriately considered an appeal.⁶⁴²

In *Goldstein v. Depository Trust Co.*,⁶⁴³ share owners brought a class action lawsuit against Depository Trust Company (“DTC”), a securities depository, for breach of fiduciary duty and negligence.⁶⁴⁴ DTC filed a motion to compel arbitration and stay proceedings.⁶⁴⁵ Seven years later, after an unexplained lack of docket activity, the trial court denied DTC’s motion to compel.⁶⁴⁶ DTC appealed that order.⁶⁴⁷ The class action argued that the trial court’s order was not final and appealable and that the superior court should dismiss the appeal as interlocutory.⁶⁴⁸ In *Goldstein*, the superior court held that Pennsylvania appellate procedure provided that “an interlocutory appeal may be taken as of right from any order which is made appealable by statute.”⁶⁴⁹ Given that the Pennsylvania version of the Uniform Arbitration Act provides that a court order denying an application to compel arbitration may be appealed, the superior court found that the order denying DTC’s petition to compel arbitration had been made appealable by statute and was properly before the court.⁶⁵⁰

*Transit Casualty Co. in Receivership v. Certain Underwriters at Lloyd’s of London*⁶⁵¹ involved an appeal from an order denying a petition to compel arbitration.⁶⁵² The plaintiff brought the action in court against the defendant insurers to recover for refusal to pay.⁶⁵³ Pursuant to arbitration clauses in the insurance contracts between the parties, the defendant insurer filed a motion to compel the matter to arbitration and the motion was denied.⁶⁵⁴ The defendant appealed this denial.⁶⁵⁵ In response to defendant’s appeal, the plaintiff filed a motion to dismiss, claiming that the trial court’s order was not appealable because it did not dispose of all of the parties in the action since a named defendant, C.J. Warrilow, an

639. *Id.* at 859.

640. *Id.*

641. *Id.* at 860. See 42 PA. CONS. STAT. § 933(b) (1998).

642. *White Rose Lodge*, 708 A.2d at 860.

643. 717 A.2d 1063 (Pa. Super. Ct. 1998).

644. *Id.* at 1064.

645. *Id.* at 1065.

646. *Id.*

647. *Id.*

648. *Id.*

649. *Id.* (citing 42 PA. R.A.P. 311(a)(8)).

650. *Id.*

651. 963 S.W.2d 392 (Mo. Ct. App. 1998).

652. *Id.* at 392.

653. *Id.*

654. *Id.*

655. *Id.*

underwriter at Lloyd's of London, did not join in the motion to compel arbitration.⁶⁵⁶ The Missouri Court of Appeals found that Warrilow had been a party to the motion to compel arbitration, notwithstanding the fact that he had not been mentioned in the case caption.⁶⁵⁷ Furthermore, the court found that the order was appealable because Missouri's version of the Uniform Arbitration Act⁶⁵⁸ takes "precedence over general statutes relating to appeals . . . because it deals specifically with the question of an appeal from an order denying an application to compel arbitration."⁶⁵⁹ As such, the order denying the defendant's petition to compel arbitration was appealable.⁶⁶⁰

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656. *Id.* at 395.

657. *Id.*

658. MO. REV. STAT. §§ 435.350-435.470 (1994 & Supp. 1998).

659. *Transit Cas. Co.*, 963 S.W.2d at 395-96.

660. *Id.* at 396.