

2015

State Legislative Update

Morgan L. Maples

Timothy McAleenan

Julia Neidhardt

Spring E. Taylor

Follow this and additional works at: <https://scholarship.law.missouri.edu/jdr>



Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Morgan L. Maples, Timothy McAleenan, Julia Neidhardt, and Spring E. Taylor, *State Legislative Update*, 2015 J. Disp. Resol. (2015)

Available at: <https://scholarship.law.missouri.edu/jdr/vol2015/iss2/6>

This Legislation is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Journal of Dispute Resolution by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

STATE LEGISLATIVE UPDATE*

*Morgan L. Maples
Timothy McAleenan
Julia E. Neidhardt
Spring E. Taylor*

I. STATE LEGISLATIVE FOCUS

A. Generally Revise Investigation, Licensing, Cert. Of Health Care Facilities

Bill Number:	Montana House Bill 576.
Summary:	Gives nursing homes a process to contest deficiency citations made in error.
Status:	Scheduled for second reading on Senate floor on April 15, 2015.

1. Introduction

Effective July 1, 1995, as part of the nursing facility enforcement regulations, the Centers for Medicare & Medicaid Services required states to provide nursing facilities with the opportunity for informal dispute resolution reviews. This dispute resolution system was set up in order to avoid the potentially prolonged resolution process associated with more formal appeals.¹ These regulations do not prevent a nursing facility from pursuing a formal appeal of the disputed deficiency, but the regulations do give an expedited alternative to the formal process.²

Montana was one of the first 14 states to have a specific state informal dispute resolution process information available to the public. Montana has since updated this process through legislation defining in greater detail both what informal dispute resolution is, and how this process will be implemented in the deficiency citation³ and survey appeals process.⁴ This process is vital to Montana's health care facility systems due to the fact that since January 1, 2015 there have

*The State Legislative Update is an annual article appearing in the fall edition of the Journal of Dispute Resolution and is compiled and written by Journal members. It is designed to provide readers with a listing of pertinent legislation affecting Alternative Dispute Resolution ("ADR"). The Update also provides a more detailed look at certain bills because of their importance and/or novelty within the ADR field. If you have comments or suggestions about this feature, please feel free to e-mail the Journal of Dispute Resolution Editorial Board at JDR@missouri.edu.

1. Inspector General, *Informal Dispute Resolution for Nursing Facilities*, DEP'T HEALTH & HUM. SERVICES, 1 (March 2005) <http://oig.hhs.gov/oei/reports/oei-06-02-00750.pdf>.

2. *Id.* at 2.

3. Citation and survey appeals are currently heard in front of a formal administrative state committee. H.B. 576, 64th Gen. Assemb., Reg. Sess. (Mont. 2015).

4. *Id.*

been 84 reported citations with 2,062 deficiencies in nursing homes throughout the state of Montana.⁵ These citations range in severity from level “A” (least serious) to level “L” (most serious).⁶ Of Montana’s nursing home citations, the majority of the violations occur in the “D” to “F” range.⁷ Health care facilities need a way to contest an unfair citation because citations can lead to steep fines, employee suspensions and revocation of a facility’s license.⁸

2. Montana House Bill 576

Republican House Representative Art Wittich introduced House Bill No. 576 on February 19, 2015.⁹ The bill passed the Human Services Committee on February 19, 2015, following revisions.¹⁰ It then went to the Appropriations Committee and passed on March 27, 2015 before being sent to the Senate’s Committee for Public Health, Welfare and Safety; the bill currently resides in this committee awaiting its second reading.¹¹ The purpose of Bill 576 is to give nursing homes and other long-term care facilities a forum in which to appeal survey findings and deficiency citations the facility believes were made in error.¹²

Bill 576 would allow nursing homes to attempt to resolve the dispute through an informal dispute resolution process that provides the facility with an objective review of the deficiency and thus a fair determination of whether or not a citation was issued in error or misjudgment of true facts.¹³ This informal dispute resolution system would help facilities avoid unnecessary sanctions and diminish the need for costly formal administrative hearings with the state.¹⁴ The process would require an individual who is independent of the citation or survey to evaluate the findings of the surveyors.¹⁵ The independent mediator is required to provide a written determination of the outcome within 60 days from the date that the dispute is submitted.¹⁶ “Submitted,” for purposes of House Bill No. 576, means that the provider and any other party to the dispute have “provided their final position

5. *Nursing Home Inspect*, PRO PUBLICA: JOURNALISM IN THE PUB. INT., http://projects.propublica.org/nursing-homes/findings/search?order=date&page=1&search=&sort_mode=desc&ss=ALL&state=MT&utf8=%E2%9C%93 (last visited August 4, 2015) (number of citations last reviewed on November 19, 2015, and the website reflected Montana’s inspection reports through June 10, 2015).

6. *Id.*

7. *Id.* A “D” level citation means that there was “[n]o actual harm, but potential for more than minimal harm that doesn’t pose immediate jeopardy. Deficiency is isolated.” *Id.* (hovering over the category in the severity range column reveals the category information). An “E” level citation means that there was “[n]o actual harm, but potential for more than minimal harm that doesn’t pose immediate jeopardy” but is “[d]eveloping a pattern.” *Id.* (hovering over the category in the severity range column reveals the category information). An “F” level citation means that there was “[n]o actual harm, but potential for more than minimal harm that doesn’t pose immediate jeopardy. Deficiency is widespread.” *Id.* (hovering over the category in the severity range column reveals the category information).

8. PATRICIA W. IYER, *NURSING HOME LITIGATION: INVESTIGATION AND CASE PREPARATION* 335 (2d ed. 2006).

9. See H.R. 576, 64th Gen. Assemb., Reg. Sess. (Mont. 2015).

10. *Id.*

11. *Id.*

12. *Id.* at § 30(b).

13. *Id.*

14. *Id.*

15. H.R. 576.

16. *Id.*

statements or arguments to the individual conducting the dispute resolution process, along with any supporting documents, within the time established by the individual.¹⁷

The rest of House Bill No. 576 was written to include sections regarding the lawful licensing and certification of health care facilities within Montana.¹⁸ The bill defines what institutions are regarded as tax-exempt and how facilities go about reporting their enrollment and occupancy, among other necessary regulations regarding the acquiring and maintaining of health care facility licenses and how to maintain accreditation.¹⁹ Bill No. 576 broadly covers many different healthcare facilities including, but not limited to, nursing homes, psychiatric hospitals and rehabilitation centers.²⁰ The bill also refers to time deadlines for the filing and appeal of certification processes.²¹

3. *Support and Opposition*

The bill quickly made its way through the Montana House of Representatives and the Senate without much opposition. Bill No. 576 was amended twice in the House, but otherwise passed through by a majority.²² This overwhelming support may be due to a surge in alternative dispute resolution systems within the administrative law realm. Arbitration and mediation are a quicker, and often cheaper, alternative to going through the tedious process of a formal hearing. Minnesota lawmakers recognize the need for an outlet to lighten the load on formal administrators and their committees, and a way to keep health care facilities open or without fines if the sanction seems to be unfair or wrong. Because this section of Bill No. 576 reduces administrative costs to the government and the facilities themselves, it appeals to both parties and has evinced a successful trail through the state legislature.

Opposition to this bill can be found in the form of legislators who believe institutions are going to want a formal administrative process to feel their complaints are being heard. Informal dispute resolution would not be binding on either party and thus could still be taken to the formal administrator, thereby racking up more costs than if the hearing would go through the formal hearing route in the first place. However, it seems this opposition is limited.

4. *Conclusion*

While House Bill No. 576 has not passed the Senate, and has yet to be signed into law. The future of Montana's health care facilities' dispute resolution system is still up in the air. Unfortunately, the bill is stalled in its second floor reading, but it has a promising future considering the rate at which it traveled through the House of Representatives. Alternative methods of dispute resolution seem to be the newest national legal trend in health care facilities' market, and systems like

17. *Id.*

18. *Id.*

19. *Id.* at § 2 & 9.

20. *Id.*

21. H.R. 576.

22. *Id.*

the one discussed in this bill are proving to be an effective way to handle complaints between two parties.

B. Health Security Act

Bill Number:	New Mexico Senate Bill 152
Summary:	Sets up a dispute resolution system for health care provider disputes
Status:	Without Recommendation Committee Report Adopted - Senate Judiciary Committee Action Postponed Indefinitely on January 24, 2015

1. Introduction

While many federal and state governments have health care commissions set up to regulate and improve the quality of our nation's health care, New Mexico is one of the few states that does not.²³ The purpose of a health care commission is to oversee and plan for health system needs, promote informed decision-making and increase accountability within the health care system.²⁴ Increasing accountability often requires a system where complaints or grievances may be addressed through an impartial system in order for those complainants to receive expeditious resolution.²⁵ By creating a new health care commission, New Mexico is attempting to circumvent a retroactive amendment to any new legislation by including a dispute resolution provision in the same bill that defines the role of the newly created commission.²⁶

2. The Bill

Democratic Senator Howie Morales introduced Bill No. 152 on January 9, 2015.²⁷ After introduction, Bill No. 152 was sent to the Senate Public Affairs

23. Federal organizations like the National Commission on Correctional Health Care and the Joint Commission, along with state organizations like the Maryland Health Care Commission and the Alaska Health Care Commission are all set up to oversee different segments of the country's health care system. See e.g., *Alaska Department of Health and Social Services*, ALASKA HEALTH CARE COMMISSION, <http://dhss.alaska.gov/ahcc/Pages/default.aspx> (last visited August 5, 2015); THE JOINT COMMISSION, <http://www.jointcommission.org/> (last visited August 5, 2015); *Department of Health and Mental Hygiene*, MD. HEALTH CARE COMMISSION, <http://mhcc.maryland.gov/> (last visited August 5, 2015); NAT'L COMMISSION ON CORRECTIONAL HEALTH CARE, <http://www.ncchc.org/> (last visited August 5, 2015).

24. See e.g., *Welcome to the Maryland Health Care Commission*, MD. HEALTH CARE COMMISSION, <http://mhcc.maryland.gov/> (last visited August 5, 2015).

25. See generally *Public Hearings*, COMMISSION ON HEALTH CARE FACILITIES IN THE 21ST CENTURY, <http://www.nyhealthcarecommission.org/hearings/index.htm> (last visited August 5, 2015). New York holds public hearings and releases "nonbinding recommendations" in cases regarding health care facility practices. *Id.*

26. S. 152, 52nd Leg., 1st Reg. Sess. (N.M. 2015).

27. *Id.*

Committee, Senate Judiciary Committee, and the Senate Finance Committee for further review.²⁸ On January 24, 2015, the Senate Judiciary Committee's report was adopted without recommendation; the action of the bill was postponed indefinitely.²⁹ The purpose of Bill No. 152 is to introduce a dispute resolution system that would be part of any contract with a health care provider, or health facility. It would permit the facility to dispute a denial or partial payment for services rendered to a beneficiary or to dispute the existence of adequate cause to terminate the provider's participation in the plan when a termination is made for cause.³⁰ The bill also promulgates a system in which a health care provider may file a grievance relating to the administration of the health care plan.³¹

Beyond § 29, Bill No. 152 has many provisions that create a health care commission system for New Mexico.³² §§ 1-16 define the health care commission's purpose, give guidelines on how to elect members, and give the commission the authority to rule over New Mexico's health care system.³³ The commission's authority is pursuant to the Health Security Act, and while it maintains authority, Bill No. 152 delegates some of that authority to a chief executive officer who would oversee the commission's objectives and actions.³⁴ The general duties of the commission are also described in Bill No. 152.³⁵ The commission would design the health security plan conforming with the Health Security Act, provide a program to educate the public, health care providers and health facilities about the health security plan, and research ways to implement cost-effective methods of providing quality health care to all beneficiaries, among other duties.³⁶

3. Support and Opposition

The bill had a quick, short run through the New Mexico Senate before the Senate Judiciary Committee postponed it indefinitely. This may be because of the economic impact this bill would have had on the state of New Mexico. According to the Fiscal Impact Report for Bill No. 152, \$250,000 would have to be allotted for initial startup costs.³⁷ Then, through the implementation of its Medicaid system, it would require additional funding on an unknown basis for the remainder of its commission authority.³⁸ The opposition also addressed their concerns involving the commission being able to secure the necessary federal waivers.³⁹ There were additional concerns that Bill No. 152 might conflict with the federal Patient Protection and Affordable Care Act (PPACA) of 2010.⁴⁰ Much of the language included in SB 152 is similar to that of the PPACA and is unclear on how Com-

28. *Id.*

29. *Id.*

30. *Id.* at § 29(C)(1)-(2).

31. *Id.* at § 29(D)(1)-(2). This includes, but is not limited to, the quality of and access to health care services and the choice of health care providers and health facilities under the plan. *Id.*

32. See S. 152.

33. *Id.* at §§ 1-16.

34. *Id.* at § 12.

35. *Id.* at § 11.

36. *Id.* at § 11(D)-(G).

37. LEGIS. FINANCE COMM., FISCAL IMPACT REP. 52ND LEG., 1 (N.M. 2015).

38. *Id.* at 3.

39. *Id.*

40. *Id.*

prehensive Statewide Health Care would be enacted.⁴¹ The opposition was further concerned that the commission’s issuance of “health resource certificates” could be in conflict with the Department of Health’s obligation to license and oversee health facilities.⁴²

4. Conclusion

It is unclear whether Bill No. 152 will continue on through the Senate, but currently, it has been stalled indefinitely. If passed, this Bill could be a step in the right direction for alternative dispute resolution within the health care realm in New Mexico. Health care facilities need an informal process to contest citations and problems that occur through the normal course of business, and since the opposition to Bill No. 152 seems to not have any inhibitions about this particular part of the Bill, it is likely a dispute resolution process could become a part of New Mexico’s health care system’s near future.

C. States Pave the Way for More Arbitration in Construction Claims

Bill Numbers:	Colorado Senate Bill 177; Connecticut House Bill 5263
Summary:	Providing arbitration methods in the context of the construction industry
Status:	2015 Colo. S. 177 in committee and vote postponed; 2014 Conn. H.R. 5263 enacted

I. Introduction

Due to its unique complexity involving the time, climate, manner and location of disputes, the construction industry has long sought to exit the court system, and instead operate under the realm of arbitration. The oft-cited complaint is that judges do not fully understand the sophistication inherent in the construction process, and it is necessary for industry experts to settle disputes.⁴³ The construction industry has suggested that arbitration clauses provide clarity of expectations beforehand, and enable construction companies to engage in projects that they would otherwise avoid without the certainty of risk allocations guaranteed by those arbitration clauses.⁴⁴

The state legislatures have been willing to embrace alternative dispute resolution for claims involving disputes between two or more construction companies, but have been less enthusiastic about embracing alternative dispute resolution

41. *Id.*

42. *Id.*

43. Donald R. Philbin Jr., et al., *Alternative Dispute Resolution: Litigating Arbitration Slows as Mediation Becomes More Popular*, 43 TEX. TECH L. REV. 757, 760, 762, 765 (2011).

44. Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (Or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 451-52 (2010).

(arbitration in particular) where consumers are concerned.⁴⁵ Usually, state legislatures want to provide some protection for consumers before increasing the authority of construction companies to use arbitration as the main mechanism for resolving disputes.⁴⁶ A look at recent movements in Colorado and Connecticut demonstrates how state legislatures have been responding to the industry's push for expansion of arbitration powers.

II. Background: The Rise of Arbitration for Construction Industry Disputes

By the 1990s, it became clear that the construction industry had a litigation problem.⁴⁷ The desire to speed up the process led construction industry leaders to seek arbitration clause expansion so that construction could begin even before project designs were complete.⁴⁸ State courts had a general wariness to expand arbitration clauses to the construction industry, out of a fear that the largest construction companies would take full advantage of their outsized bargaining power by shifting all risk to the parties with less bargaining power.⁴⁹

Some leaders in the industry wanted to create alternatives to litigation and became advocates for the principle of allocating risk to the party that is in the greatest position to control that risk.⁵⁰ By setting an industry standard that allocated arbitration risks fairly, construction industry members could create their own arbitration forums that recognized the uniqueness of every construction project in terms of location, cultural values, necessary labor and time necessary to complete complex projects.⁵¹

A move toward creating a fair distribution of responsibilities in the risk clauses reinforced the view that the construction industry “found it inefficient, costly and time-consuming to educate juries and judges in the intricacies of the various relationships and requirements involved in a construction project.”⁵² This desire to have construction industry arbitrators, who would have knowledge of the industry's expectations, settle disputes acted as strong incentive for members to bargain in good faith on risk allocation to avoid the alternative of going to court.

A New Jersey Supreme Court holding in *Perini Corp. v. Greate Bay Hotel & Casino, Inc.*⁵³ was the first significant move at the state level to treat arbitration results with finality even when the fairness of the process was hotly contested.⁵⁴ The New Jersey arbitration statute, like the arbitration statutes of many states, grants courts the authority to overrule arbitration settlements in the event that the result was “procured by corruption” or in instances “where the arbitrators exceeded their powers.”⁵⁵ This possibility of additional litigation after the arbitration

45. *Id.* at 468.

46. *Id.* at 464-65.

47. *Id.* at 464.

48. Allen L. Overcash, *Fast Tracking Construction Arbitrations*, COLO. LAW. (2011).

49. Richard H. Steen & Robert J. MacPherson, *The Construction Industry: Forging a Path for ADR*, 155-SEP N.J. LAW 19 (1993).

50. *Id.* at 23-24.

51. Richard H. Steen, *The Construction Industry: Forging a Path for ADR*, N.J. LAW. (1993).

52. *Id.*

53. *Perini Corp. v. Greate Baye Hotel & Casino, Inc.*, 610 A.2d 364 (N.J. 1992).

54. Steen, *supra* note 9, at 19-20.

55. *Id.*

award has created the concern that construction companies may be less likely to arbitrate disputes due to the reduced finality of the process.⁵⁶

Perini is significant because it addressed the question of whether an arbitration panel's ruling could be overturned due to a mistaken determination of law. The companies in the construction industry feared that courts with little knowledge of the industry could undo the arbitration results reached by industry experts who understood the complexity of construction-related disputes.⁵⁷ The *Perini* court held that arbitration results would not be invalidated unless the court found a "gross, unmistakable error of law."⁵⁸ This ruling set an important precedent for the finality of arbitration claims, giving construction companies increased certainty that the contract terms including right-to-arbitrate clauses would be enforced from start to finish.

Despite the industry victory in *Perini*, construction companies continued to show restraint by drawing up contracts advocating negotiation and other, softer forms of alternative dispute resolution before finally reaching arbitration.⁵⁹ For instance, the project architect would offer a nonbinding resolution at the first sign of any dispute involving construction companies.⁶⁰ This gave disputing construction parties an opportunity to settle disagreements before the arbitration stage, using low-cost, informal methods that required the consent of both parties in order to have a binding effect.

III. *The Benefits of Arbitration in Construction Cases*

The right to have your "day in court" is a cherished American principle and because of this, state legislatures are generally wary to wade into the waters of expanding arbitration powers originally created under the Federal Arbitration Act of 1925. In recent years, however, construction industry experts have questioned whether judges possess the necessary sophistication required to settle product dispute claims involving complex machinery.⁶¹

In addition to the quality of the decision-maker, there are also financial reasons for why arbitration is experiencing increased popularity in the construction sector.⁶² If a dispute involves two construction companies, the arbitration fees associated will be much lower than the cost of hiring a legal team to take the dispute to court.⁶³ Also, construction companies are generally fearful of setting a precedent in litigation, and strongly prefer arbitration settlements due to their non-precedential status.⁶⁴

56. *Id.*

57. Thomas H. Oehmke, *Construction Dispute Resolution Arbitration and Beyond*, 100 AM. JUR. TRIALS 45 § 1 (2006).

58. *Perini Corp.*, 610 A.2d at 366.

59. See ROBERT L. DUNN, RECOVERY OF DAMAGES FOR LOST PROFITS, § 1.19 at 64 (4th ed. 1992).

60. *Id.*

61. *Id.*

62. WILLIAM B. FOXHALL, PROFESSIONAL CONSTRUCTION MANAGEMENT AND PROJECT ADMINISTRATION (2d ed. 1976).

63. *Id.*

64. *Id.*

In disputes involving construction companies and consumers, each side has an incentive for arbitration.⁶⁵ The consumer benefits from a quicker judgment process and may receive a faster payout from an arbitrator as compared to a judge.⁶⁶ On the other hand, the construction company appreciates the privacy of the arbitration process, as an arbitration claim will not generate headline news about construction defects like a public court dispute might.⁶⁷

Additionally, those supporting traditional contract theory have argued that the freedom to bargain is a necessary component of maximizing efficiencies and providing clarity to the expectations of each party in a dispute.⁶⁸ When a construction company has the authority to define liability in the construction contract, it may take on projects that it otherwise would not have pursued without having clearly defined the risks beforehand.⁶⁹ The other contracting party has an opportunity to read the contract, and may determine whether the arbitration terms are acceptable before signing.⁷⁰ Since there is diversity in the construction industry's use and scope of arbitration clauses, it does not raise the same anti-competitive concerns that have dogged the credit card industry since the 1980s.⁷¹

The benefits of construction arbitration echo throughout the industry. Oftentimes, construction disputes involve controversies over contractual privity as the parties fight over whether the general contractor is liable for the action of a particular subcontractor.⁷² A contract including an arbitration clause is able to clearly articulate the responsibilities and risks of each sub-contracting party, and can provide clarity on where risk resides in the construction process. An arbitration clause gives the parties an opportunity to discuss whether the general contractor will assume joint liability for the actions of its subcontractors, or whether the subcontractors will be entirely responsible for liability that flows from their own craftsmanship.⁷³ The increased allowance of arbitration clauses at the state level can add certainty to these liability disputes that can often turn highly contested and controversial.

It is important that state court courts continue expanding the ability of construction companies to include arbitration language in their contracts that will be enforceable. Legislation that clearly articulates what may and may not be included in arbitration provisions provides certainty before the fact, whereas the judicial process does not provide any certainty until after the matter is adjudicated. The biggest source of disputes in construction claims involves scope of liability and whether joint liability exists. These controversies can be diminished through arbitration clauses that clearly define the responsibilities in writing ahead of time, and

65. COLLEGE OF COMMERCIAL ARBITRATORS, THE COLLEGE OF COMMERCIAL ARBITRATORS GUIDE TO BEST PRACTICES IN COMMERCIAL ARBITRATION 74-75 (2d ed. 2010).

66. Thomas J. Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 WAKE FOREST L. REV. 65, 75 (1996).

67. *Id.*

68. See generally Thomas Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988) (analyzing the clarity and cost efficiencies of the arbitration process for construction-related claims compared to the higher cost and delay of court).

69. *Id.*

70. *Id.*

71. *Id.*

72. See generally Frank Carr, *The Untapped Potential of ADR in the Construction Industry*, 42 FED. LAW. 32 (1995) (analyzing the value of industry experts serving as arbitrators to provide clarity and consistency of interpretation in a way that a judge may not).

73. *Id.*

then put any eventual disputes into the hands of an arbitrator who is familiar with the construction industry norms.⁷⁴

IV. The Legislative Response

Colorado is currently considering the prospect of increasing the authority of arbitrators in the context of construction-related disputes. On February 10, 2015, Republican Senator Mark Scheffel introduced Senate Bill 177 to his fellow members of the Colorado State Senate.⁷⁵ The bill aims to add clarity to the arbitration process for defective products in the construction industry. It purports to do so by stating that all court-modified amendments or removals of arbitration clauses must still require construction defect claims to be settled in arbitration if the original contract included such language in its governing documents.⁷⁶

The purpose of this bill is to create a clearly articulated process for settling construction defect claims, and the passage of this bill will provide statutory certainty on the process leading up to arbitration.⁷⁷ This bill mandates mediation “before a neutral third party mutually selected by the parties . . . as a condition precedent to any construction defect claim.”⁷⁸ If the parties cannot agree on a mediator, then they may contract to a process for selecting a neutral mediator or petition the district court for the selection of a mediator.⁷⁹

If this does not lead to a consensual outcome, the parties would then proceed to arbitration as stipulated in the contract.⁸⁰ The bill also provides instruction on what to do if a party takes a construction defect claim to court, even when the contract includes an arbitration provision.⁸¹ Even if the court chooses to modify some of the contract’s language, this bill calls for construction defect disputes to be settled in arbitration regardless of the court’s other modifications to the contract.⁸²

Title 13 of the Colorado Revised Statutes governs any possible changes involving dispute resolution requirements in the construction industry.⁸³ Senate Bill 177 would amend Title 13 to require mediation by a neutral party before initiating arbitration proceedings, even if the contract does not call for mediation.⁸⁴ The bill would also provide a guarantee that construction defect claims ultimately be settled through arbitration even if a party attempted to take the matter to a judicial court first.⁸⁵

On February 10th, the date of introduction, the bill was assigned to the Business, Labor, and Technology Committee of the Senate.⁸⁶ It was read three times

74. *Id.*

75. S. 177, 2015 Leg., Reg. Sess. (Colo. 2015).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. S. 177.

82. *Id.*

83. Uniform Arbitration Act, COLO REV. STAT. §§ 13-22-201 to 13-22-230 (2015).

84. S. 177.

85. *Id.* (status provided by LEXIS bill tracking).

86. *Id.* (status provided by LEXIS bill tracking).

between March 18th and April 14th, and received no amendments.⁸⁷ On April 22nd, 2015, the bill was introduced to the House and assigned to the State, Veteran, and Military Affairs Committee, where a vote has since been postponed.⁸⁸ Occasionally a bill sits through a few legislative sessions before becoming new law, and this Colorado bill may require a legislative session or two before there is a full vote. Also, not all alternative dispute resolution in the construction industry is focused on the relationship between one construction company and another.

On February 19th, 2014, House Representative Frank Nicastro introduced House Bill 5263 before the Joint Committee on General Law.⁸⁹ The bill seeks to create an avenue for consumers to receive compensation from a general construction company fund to remedy issues resulting from new home construction.⁹⁰

Colorado House Bill 5263 calls for a New Home Construction Guaranty Fund that could immediately pay consumers for claims associated with new home construction up to two years after the final construction work is completed.⁹¹ Most importantly, the discretion to distribute these funds would be at the hands of a court-appointed commissioner rather than an arbitrator.⁹² The language in this bill indicates there is still a belief that arbitration hearings contain an anti-consumer element, and the creation of this commissioner-led fund would enable consumers to quickly receive compensation from an authority outside the influence of construction companies.

The first public hearing for this bill was held on February 21st, 2014.⁹³ The bill passed the Senate with no dissenting votes, and was quickly approved through the house as part of routine scheduling.⁹⁴ The Governor signed the bill on June 6th, 2014, and took effect at the end of the quarter.⁹⁵ This bill may have represented a minor setback for the construction industry's desire to handle all disputes through arbitrators of its own choosing. However the creation of a commissioner does indicate that disputes will continue to be settled out of court, and the New Home Construction Guaranty Fund acts as the tradeoff consumers receive in exchange for waiving away their "day in court rights" by agreeing to arbitration clauses at the outset of the contract.

V. Conclusion

Courts have long been concerned about bargaining power disparities between disputing parties. This concern seems to be on the mind of legislatures as well when it comes to distributing authority through arbitration. The construction industry has been successful in persuading state courts that the sophistication of the disputes between industry players is enough to justify general deference toward the judgments of industry experts in arbitration proceedings. There is more hesitation where consumers are concerned, but the creation of separate funds with

87. *Id.* (status provided by LEXIS bill tracking).

88. *Id.* (status provided by LEXIS bill tracking).

89. H.R. 5263, 2014 Leg., Reg. Sess. (Conn. 2014) (status provided by LEXIS bill tracking).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (status provided by LEXIS bill tracking).

94. *Id.* (status provided by LEXIS bill tracking).

95. H.R. 5263 (status provided by LEXIS bill tracking).

appointed commissioners distributing justice, just like House Bill 5263 established by the Connecticut state legislature, provide an example of how states might get creative in balancing the bargaining power disparities in the field of arbitration.

D. Mediated Mortgages; How Mandatory Mediation Bills Are Affecting the Foreclosure Crisis.

Bill Numbers: Massachusetts House Bill 888,⁹⁶ Mississippi House Bill 792,⁹⁷ Missouri House Bill 1211.⁹⁸

Summary: These bills implement mandatory mediation programs to enable communication between lenders and borrowers with the goal of preventing foreclosure where possible.

Status: As of December 3, 2015, the Massachusetts House Bill had been sent to the to the Joint Committee on Financial Services; the Mississippi House Bill died in committee, and the Missouri bill was referred to House Committee on Banking.

I. Introduction

The collapse of the housing bubble in the early 2000s resulted in foreclosure of approximately five million homes.⁹⁹ “From 2001 to 2007, national U.S. mortgage debt almost doubled, and the amount of mortgage debt per household rose more than 63%”¹⁰⁰ After slowly increasing in value for decades, prices for homes plummeted causing a financial crisis coinciding with the 2008 recession.¹⁰¹ This crisis had multiple bases including risky lending practices, excessive borrowing by households and government policy encouraging greater loans to lower-income consumers.¹⁰² By June 2008, more than one million homes were in fore-

96. H.R. 888, 189th Leg., Reg. Sess. (Mass. 2015).

97. H.R. 777, 129th Leg., Reg. Sess. (Miss. 2014).

98. H.R. 1211, 98th Leg., Reg. Sess. (Mo. 2014).

99. David Dayen, *You Thought the Mortgage Crisis Was Over? It’s About to Flare Up Again*, NEW REPUBLIC (Aug. 24, 2014) <http://www.newrepublic.com/article/119187/mortgage-foreclosures-2015-why-crisis-will-flare-again>.

100. Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, WASHINGTON, D. C.: GOV’T PRINTING OFF. (Jan. 2011) <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/content-detail.html>.

101. Justin Lahart, *Egg Cracks Differ In Housing, Finance Shells*, WALL STREET J. (Dec. 24, 2007) <http://www.wsj.com/articles/SB119845906460548071>.

102. Financial Crisis Inquiry Commission, *supra* note 5. The U.S. Financial Crisis Inquiry Commission concluded “the crisis was . . . caused by: Widespread failures in financial regulation, including the Federal Reserve’s failure to stem the tide of toxic mortgages; Dramatic breakdowns in corporate governance including too many financial firms acting recklessly and taking on too much risk; An explo-

closure,¹⁰³ and this rate continued to rise alarmingly until 2010.¹⁰⁴ Mortgage fraud and predatory lending were among the top concerns for economists and lawmakers.¹⁰⁵

In response to these concerns, state legislatures brought greater regulation and judicial oversight to the foreclosure process.¹⁰⁶ By mid-2014, 31 states, as well as the District of Columbia, introduced legislation concerning foreclosures; to date such bills have been enacted in over 20 states.¹⁰⁷ The foreclosure rate has slowed since 2010, but today remains high at 1.2 percent.¹⁰⁸ To date, nearly one million properties in the United States are currently in some stage of foreclosure.¹⁰⁹ In order to keep foreclosure rates low, multiple states have established mediation programs, mandatory or permissive, for borrowers and lenders to use prior to commencing foreclosure procedures.

The Journal of Dispute Resolution studied the effectiveness of such legislation in a 2012 article, *Fighting Foreclosures with Mediation: A Look at Laws Calling for Mediation Between Borrowers and Lenders Before Lenders Can Foreclose*, that asserted the most effective bills (1) made mediation mandatory, (2) required lenders to provide an agent with actual authority to renegotiate a loan and (3) required lenders to provide more detailed disclosures concerning the mortgage in default.¹¹⁰ This article will evaluate the extrapolations of three years ago and analyze whether mediation has helped relieve the foreclosure crises by examining the above listed bills.

II. Have Mediation Programs Helped Lower the Foreclosure Rate?

Today, the foreclosure rate is at 1.2 percent, the lowest rate since January 2008.¹¹¹ Last year 1.4 million foreclosures were filed compared with 2.9 million in 2010, the peak of the foreclosure crisis.¹¹² However, analysts advise caution for the coming year when debt relief programs will expire and homeowners with reset

sive mix of excessive borrowing and risk by households...; Key policy makers ill prepared for the crisis...; and systemic breaches in accountability and ethics at all levels." *Id.*

103. Chris Isidore, *Homes in Foreclosure Top 1 Million*, CNN MONEY (June 5, 2008) <http://money.cnn.com/2008/06/05/news/economy/foreclosure/?postversion=2008060514>.

104. Alex Veiga, *Home Foreclosures on Track to End 2013 at 6-Year Low*, DAILY FIN. (Aug. 15, 2013) <http://www.dailyfinance.com/2013/08/15/home-foreclosures-fall-end-year-6-year-low/>.

105. Financial Crisis Inquiry Commission, *supra* note 5.

106. Heather Morton, *Foreclosures 2014 Legislation*, NAT'L CONF. ST. LEGISLATURES (July 25, 2014) <http://www.ncsl.org/research/financial-services-and-commerce/foreclosures-2014-legislation.aspx>.

107. *Id.*

108. *National Foreclosure Report*, CORELOGIC 2, 4 (June 2015) <http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-june-2015.pdf>.

109. *Foreclosure Rates for the U.S.*, REALTYTRAC <http://www.realtytrac.com/statsandtrends/foreclosuretrends> (last visited Dec. 3, 2015).

110. Lacy Cansler et al., *State Legislative Update: Fighting Foreclosures with Mediation: A Look at Laws Calling for Mediation Between Borrowers and Lenders Before Lenders Can Foreclose: Illinois H.B. 5759, Maryland H.B. 1374, Missouri S.B. 670, Mississippi H.B. 1275*, 2012 J. DISP. RESOL. 507, 507.

111. *National Foreclosure Report*, *supra* note 13, at 4.

112. Dayen, *supra* note 4.

home equity loans will begin repaying at higher monthly rates.¹¹³ This could potentially cause millions of people to be at risk of defaulting on their loans.¹¹⁴

Heather Scheiwe Kulp¹¹⁵ and Jennifer Shack¹¹⁶ studied the effectiveness of alternative dispute resolution programs used to address the foreclosure crisis in the United States.¹¹⁷ In an article for the Symposium Issue: *Lessons Learned From the Mortgage Foreclosure Crisis*, the authors collected what data was available on the efficiency of mediation foreclosure programs and from it, distilled best practices.¹¹⁸ Unfortunately, “the states for which data is publicly available represent less than half of all states with operational dispute resolution programs.”¹¹⁹ Therefore, a call to action for more data and transparency is needed. Their research indicates, “though there are certainly programs that are achieving their goals, few programs have sufficiently evidenced goal achievement to recommend any one model.”¹²⁰ It also appears that mandatory mediation may not be the most effective program.¹²¹

Despite the need for more research, many states are continuing to establish mediation programs for home foreclosures. While not all bills mandate mediation for foreclosures to proceed, many lay out greater disclosure requirements for lenders to the mediator, and most require lenders provide agents with actual authority to participate. The overall decrease in foreclosures over the past five years is at least in part due to the increase of mediation programs with greater teeth.¹²²

III. State Legislation 2015

To date, 26 states and the District of Columbia have established mediation programs for foreclosures.¹²³ Some are mandatory, while others are simply available alternatives to the parties. The additional time the latest proposed mediation bills add to the foreclosure process varies from 35¹²⁴ to 120¹²⁵ days. States are

113. *Id.*

114. *Id.*

115. Clinical Fellow, Negotiation and Mediation Clinical Program, Harvard Law School; J.D., Northwestern University School of Law. See *Heather Scheiwe Kulp*, HARVARD L. SCH., https://blogs.law.harvard.edu/hnmcp/hnmcp/faculty_staff/heather-kulp/ (last visited Nov. 11, 2015).

116. Director of Research, Resolution Systems Institute. Ms. Shack has written extensively on evaluating ADR programs and overseen the development of systems to monitor and evaluate mediation programs throughout Illinois. See *Jennifer Shack*, RESOL. SYSTEMS INST., <http://www.aboutrsi.org/staff.php?ID=9>, (last visited Nov. 11, 2015).

117. *Heather Scheiwe Kulp & Jennifer Shack, A (Mortgage) Crisis in Communication: Foreclosure Dispute Resolution as Effective Response?*, 66 ARK. L. REV. 185, 185 (2013).

118. *Id.* at 191.

119. *Id.* at 192.

120. *Id.* at 193.

121. *Id.* at 210. “In a 2010 report, the Center for American Progress...recommended that all foreclosure dispute resolution programs be mandatory...though programs that automatically assign borrowers to dispute resolution processes result in a greater percentage of all borrowers participating in dispute resolution, the percentage of those participating who reach agreement in opt-out programs versus opt-in programs is not necessarily higher.” *Id.*

122. *Id.*

123. *Foreclosure Mediation Programs by State*, NAT’L CONSUMER L. CTR., <http://www.nclc.org/issues/foreclosure-mediation-programs-by-state.html> (last visited Nov. 11, 2015).

124. H.R. 1211, 98th Leg., Reg. Sess. (Mo. 2014).

125. H.R. 888, 189th Leg., Reg. Sess. (Mass. 2015).

experimenting with requirements as they learn what strikes the ideal balance between public interest and economic efficiency.

In 2011, the federal government introduced legislation that would have established a mandatory mediation process for servicers of residential mortgages and borrowers,¹²⁶ and the U.S. Department of Justice Access to Justice Initiative convened a workshop to explore best practices for research and evaluation of foreclosure mediation programs.¹²⁷

The following bills were all introduced in 2015 and tried to establish a mediation program for parties going through foreclosures.

A. Massachusetts House Bill 888

Representative Mary Keefe introduced House Bill 888 on March 11, 2015. The Joint Committee on Financial Services then heard the bill on June 30, 2015.¹²⁸ The purpose of this bill is to require creditors to mediate in good faith with homeowners to identify alternative resolutions before commencing foreclosures.¹²⁹ The bill creates the Massachusetts Foreclosure Mediation Program administered by a Mediation Program Manager from a neutral, non-profit organization or law firm.¹³⁰ The act requires the mediation to conclude no more than 120 days after the borrower chooses to participate, but foreclosure may proceed if a borrower chooses not to participate.¹³¹ Under the effects of the law, if a borrower elects to participate in the program,¹³² foreclosure will not proceed until a mediator certifies the creditor “engaged in mediation in good faith, made all reasonable efforts to find an alternative to foreclosure, and any agreement is in full compliance with all state and federal guidelines.”¹³³

The bill incorporates all three of the suggestions laid out in *Fighting Foreclosures with Mediation*: the program is mandatory, the lenders must produce a representative “who shall provide proof of the authority to negotiate an alternative to foreclosure,” and the lenders are required to make extensive disclosures to the mediator.¹³⁴ These disclosures include, “proof of ownership, a written net present value analysis including inputs and their basis, an accounting and history of the outstanding balance on the debt, documents evidencing any loss mitigation re-

126. Mandatory Foreclosure Mediation Act, H.R. 3595, 112th Cong. (2011).

127. *Foreclosure Mediation: Emerging Research and Evaluation Practices*, U.S. DEP’T JUST. (March 7, 2011) <http://www.justice.gov/sites/default/files/atj/legacy/2012/01/05/foreclosure-mediation.pdf>.

128. H.B. 888, 189th Gen. Court, Reg. Sess. (Mass. 2015) (tracking of the bill indicates that it is eligible for executive session).

129. *Id.*

130. “[E]xperienced in the mediation of the foreclosure process, familiar with all programs available to help homeowners avoid foreclosure, and knowledgeable of the mortgage foreclosure laws of the Commonwealth of Massachusetts.” *Id.* These organizations or law firms must be selected by the Attorney General. *Id.*

131. *Id.*

132. Must elect by returning request to participate within 30 days of mailing by creditor. *Id.*

133. *Id.*

134. H.B. 888, 189th Gen. Court, Reg. Sess. (Mass. 2015) “[I]ncluding, but not limited to, (i) reinstatement of the loan, (ii) a modified mortgage loan, (iii) a reduction in principal, (iv) a reduction in interest rate, (v) an increase in the amortization period of the mortgage loan or (vi) a shortsale or deed in lieu[.]” *Id.* at (d).

strictions and the creditor's anticipated net recovery following foreclosure."¹³⁵ The bill additionally requires borrowers to provide documentation to the creditor and the mediator, including, "current income, expenses, assets and debts and proof of income and releases standardly required by the affordable home ownership program or similar federal program."¹³⁶

B. Mississippi House Bill 777

Representative David Myers originally introduced the Mississippi House Bill 777 in the 2012 legislative session.¹³⁷ The act would have established the Mississippi Residential Mortgage Foreclosure Mediation Program (RMFM Program).¹³⁸ It was reintroduced in the 2013¹³⁹ and 2014¹⁴⁰ legislative sessions by Representative Myers, and the 2015 legislation¹⁴¹ died in the Banking and Financial Services Committee on February 3, 2015.¹⁴² Bill 777 is very detailed and explains exactly what is required for the mediation notice, disclosures, fees and schedule.¹⁴³

The mediation cannot be scheduled until the borrower has met with a foreclosure counselor and provided his or her financial disclosures to the plaintiff.¹⁴⁴ After the mediation is scheduled, the program manager must file a notice of the mediation session with the clerk of the court and serve it on all parties.¹⁴⁵ In attendance at the mediation must be "a plaintiff's representative designated in the most recently filed RMFM Program Form; plaintiff's counsel; the borrower; and the borrower's counsel of record, if any."¹⁴⁶ Additionally, the disclosures required for both lender and borrower must be detailed.¹⁴⁷ The RMFM program would have required mediation between the borrowers and lenders prior to residential homes entering foreclosure, but the bill strongly encouraged parties to use any form of alternative dispute resolution and considered parties that participated in substantially similar programs to be in compliance with the bill.¹⁴⁸

135. *Id.* The statute also requires the creditor to bring any additional documents "supporting the net present value analysis to the mediation session." *Id.*

136. *Id.*

137. H.R. 1275, 2012 Leg. Reg. Sess. (Miss. 2012) House Bill 1275 reported in the 2012 Journal of Dispute Resolution article died in committee. *Id.* (review of LEXIS bill tracking). The 2012 version required the parties attend at least one mediation session before the lender filed for default judgment. This bill was killed before the end of the 2012 legislative session. See *House Bill 1275*, MISS. LEGISLATURE (March 6, 2012) <http://billstatus.ls.state.ms.us/2012/pdf/history/HB/HB1275.xml>.

138. *Id.*

139. H.R. 687, 2013 Leg., Reg. Sess. (Miss. 2013) (bill tracking states that the bill died in committee on February 5, 2013).

140. H.R. 792, 2014 Leg., Reg. Sess. (Miss. 2014) (bill tracking states that the bill died in committee on February 4, 2014).

141. H.R. 777, 2015 Leg., Reg. Sess. (Miss. 2015) (status provided by LEXIS bill tracking tool).

142. *Id.*

143. *Id.* "No earlier than sixty (60) days and no later than one hundred twenty (120) days after suit is filed, the program manager shall schedule a mediation session...for a date and time convenient to the plaintiff's representative, the borrower, and counsel for the plaintiff and the borrower, using a mediator on the List of Court Annexed Mediation Program Mediators who have been specially trained to mediate residential mortgage foreclosure disputes." *Id.*

144. *Id.* "Mediation must be scheduled later than 30 days after the plaintiff receives the borrower's financial disclosures."

145. *Id.*

146. *Id.*

147. H.R. 777.

148. *Id.*

C. Missouri House Bill 1211

Re-Introduced in March 2015, by Representative Jeanne Kirkton, Missouri House Bill 1211 establishes the Mortgage Foreclosure Mediation Code.¹⁴⁹ The code would make it mandatory for lenders to mail a notice of foreclosure along with a notice of right to request mediation before a foreclosure on a residential property may commence.¹⁵⁰ According to Representative Kirkton, “[T]his legislation is to curtail the rapid jump to foreclosure and to give people a chance to work out plans that are a win/win for the homeowner and lender. It’s really not in anyone’s best interest to foreclose if other options exist.”¹⁵¹

In the past year, approximately 12,000 Missouri homes completed foreclosure.¹⁵² This bill would help slow the rate of foreclosures and save some homeowners from losing their homes.¹⁵³ Unfortunately, the bill has not made progress through the legislature,¹⁵⁴ but Representative Kirkton intends to reintroduce it in January 2016.¹⁵⁵ Senator Rob Schaaf introduced the same bill in the Missouri Senate, and it also did not make progress.¹⁵⁶

The most recent version of the bill requires lenders to pay an upfront mediation fee of \$125 and allows the office of administration to contract with any person or entity to serve as a mediation coordinator on behalf of the state.¹⁵⁷ This mediation coordinator has 15 days to make and document at least two attempts to contact the homeowner and inform him or her of his or her right to request mediation (and further explain the mediation process).¹⁵⁸ A homeowner has 20 days from the date lender mailed notices to send back a request for mediation, such a request continues the foreclosure sale for at least 42 days.¹⁵⁹

The homeowner may waive his or her right to mediation, either in a writing delivered to the mediation coordinator or by failing to request mediation within 35 days.¹⁶⁰ If a homeowner requests mediation within 35 days after the letter was sent, he or she must also complete a financial statement, request for mortgage assistance form, provide a written opinion of the condition of the property and a written statement of any offers homeowner has made to the lender in an effort to resolve the default on the loan.¹⁶¹ If the homeowner fails to comply with the above requirements then the lender may obtain a certificate of compliance from the mediation coordinator and proceed with the foreclosure.¹⁶²

149. H.R. 1211, 98th Leg., Reg. Sess. (Mo. 2014).

150. *Id.*

151. E-mail from Representative Jeanne Kirkton, to author (Aug. 11, 2015) (on file with author).

152. *National Foreclosure Report*, CORELOGIC 9 (June 2015) <http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-june-2015.pdf>.

153. H.R. 1211, 98th Leg., Reg. Sess. (Mo. 2014).

154. The last action was to send the bill to the House Committee on Banking, May 15, 2015. *Id.* (status provided by LEXIS bill tracking tool).

155. E-mail from Representative Jeanne Kirkton, to author (Aug. 11, 2015) (on file with author).

156. S. 429, 98th Leg., Reg. Sess. (Mo. 2015).

157. H.R. 1211 at § 443.404(1).

158. *Id.* § 443.404(3).

159. *Id.* § 443.404(2).

160. *Id.* § 443.404.4, 443.405.4.

161. *Id.* § 443.405-4 (1)-(4).

162. *Id.* § 443.405.4.

If the homeowner chooses to exercise his or her right to mediation and provides all the necessary documentation the burden shifts to the lender.¹⁶³ The lender must provide an appraisal, a proposal to resolve the foreclosure, written reasons used to determine the eligibility of a homeowner for staying in the home, an estimated short-sale value of the property, and a statement of all offers the lender has made to resolve the default on the mortgage.¹⁶⁴ The lender must also provide the contact information for the person who will be attending the mediation as the lender's agent.¹⁶⁵ And finally, the bill requires this representative have the full authority to agree to a settlement, modify the loan, or dismiss the claim.¹⁶⁶ House Bill No. 1211 adds an additional incentive for lenders to reach a settlement agreement prior to mediation; the \$125 mediation fee will be refunded to the lender if they provide the mediation coordinator with a copy of a written settlement agreement signed by both parties at least two days prior to the first mediation conference.¹⁶⁷

In order to obtain a certificate of compliance in the event the mediation fails to lead to an agreement, the lender must have complied with all the statute's other requirements.¹⁶⁸ These include sending the homeowner a notice of foreclosure accompanied by a notice of the right to request mediation, paying the \$125 fee, providing all required disclosures, and providing a participant with the authority to negotiate, review and modify the homeowner's specific loan.¹⁶⁹

This bill would help lower the foreclosure rates in Missouri, which are currently around 1,000 homes per month. It is in the people's best interest for the legislature to make House Bill 1211 a priority.

VI. Conclusion

Thus far 14 states and the District of Columbia have implemented mediation programs for foreclosures by statute with varying success rates. Mediation won't save a default mortgage where the borrower has no money to pay back the loan. The purpose of many judicially run mediation programs goes back to correcting bad lending practices by banks.¹⁷⁰ Not everyone is for the use of mediation to solve the mortgage crisis; banks and other lending institutions have lobbied legislatures to not enact statutes requiring mediation or in some cases to enact legislation preventing courts from ordering mediation.¹⁷¹ According to lenders, mediation prolongs the foreclosure process and is economically inefficient. Additionally, some economists believe the housing crises is far from over. They predict

163. H.R. 1211 at § 443.405.5.

164. *Id.* at §§ 443.405.5(1)-(4).

165. *Id.* at § 443.405.5(5).

166. *Id.* at § 443.405.8(1).

167. *Id.* at § 443.405.11.

168. *Id.* at § 443.405.13.

169. H.R. 1211 at § 443.405.13.

170. See generally Christine Des Garenes, *Mandatory mediation on tap for foreclosure process*, THE NEWS-GAZETTE (Oct. 10, 2008) <http://www.news-gazette.com/news/local/2014-08-10/mandatory-mediation-tap-foreclosure-process.html>.

171. *Banks clash with homeowner advocates over foreclosure mediation*, WORCHESTER BUSINESS JOURNAL (Feb. 3, 2014) <http://www.wbjournal.com/article/20140203/PRINTEDITION/301319982/banks-clash-with-homeowner-advocates-over-foreclosure-mediation>.

foreclosure rates will rise again in the near future, potentially overwhelming courts once more.¹⁷² In conclusion, foreclosure rates across the nation are still high, potentially on the rise, and mediation has been shown as an effective, long-term solution at reducing these rates and allowing more people to stay in their homes.

E. The Revised Uniform Arbitration Act Is Gaining Ground

Bill Numbers:	Massachusetts House Bill 37; Pennsylvania House Bill 34; West Virginia House Bill 37
Summary:	The Massachusetts, Pennsylvania, and West Virginia bills update each state's statutory arbitration process.
Status:	Massachusetts H.B. was filed as House Docket 37 on March 10, 2015; Pennsylvania H.B. 34 passed the House and was sent to the Senate Judiciary Committee on April 17, 2015; West Virginia H.B. 37 was approved by the Governor on March 31, 2015.

1. Introduction

In the 2015 legislative session, three states recognized a need to update their statutory arbitration provisions – Massachusetts, Pennsylvania, and West Virginia.¹⁷³ Enacted in 2000, the Revised Uniform Arbitration Act (RUAA) was a significant modernization of the statutory arbitration process. In the 2015 legislative session, West Virginia¹⁷⁴ enacted its version of the RUAA, and bills to do the same in Massachusetts¹⁷⁵ and Pennsylvania¹⁷⁶ are still pending.

2. History of the UAA and RUAA

The Uniform Arbitration Act (UAA) was written in 1955 with the goal of ensuring the enforceability of arbitration agreements by providing a procedural framework for arbitration.¹⁷⁷ The UAA successfully established the right to preemptively agree to arbitrate disputes and the procedural process by which to

172. Dayen, *supra* note 4.

173. Arbitration Act (2000), UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000)) (last visited August 9, 2015).

174. Act of May 4, 2015, Act No. 8, 2015 W.V. Sess. Law S.B. 37.

175. H.R. 37, 189th Gen. Court, Reg. Sess. (Ma. 2015).

176. H.R. 34, 199th Gen. Assembly, Reg. Sess. (Penn. 2015).

177. Timothy J. Heinsz, *Symposium: The Revised Uniform Arbitration Act: Modernization, Revising, and Clarifying Arbitration Law*, 2001 J. DISP. RESOL. 1, 1.

arbitrate.¹⁷⁸ The UAA had nearly universal adoption.¹⁷⁹ The growth of arbitration as a method of dispute resolution surged after the 1950s. Recognizing a need to update the UAA, the Uniform Law Commission (ULC) decided to draft a revised version of the UAA.¹⁸⁰

The RUAA was passed by the ULC in 2000.¹⁸¹ Since its adoption, 19 jurisdictions have adopted a version of the RUAA.¹⁸² The RUAA addresses the needs and concerns of modern arbitration practice.¹⁸³ For example, it addresses the use of electronic communication in arbitration proceedings.¹⁸⁴ It also ensures that when a state enacts a version of the RUAA, it will not be preempted by the Federal Arbitration Act (FAA).¹⁸⁵ Among other topics addressed for the first time in the RUAA, it expressly establishes its own procedures as the default rules for statutory arbitration, allows for the consolidation of arbitration proceedings when the parties or transactions are the same,¹⁸⁶ and grants civil immunity to arbitrators which is similar to the immunity that is enjoyed by judges.¹⁸⁷ Overall, the RUAA is a significant modernization of the statutory arbitration dispute resolution arena.¹⁸⁸ With the 2015 addition of West Virginia, 19 states have updated their statutory arbitration acts to reflect the RUAA.¹⁸⁹

A. Massachusetts

The ULC is the sponsor of the bill in the Massachusetts legislature seeking to update the Commonwealth's arbitration process and procedures. The mission of the ULC is to "promote the principle of uniformity" across the states.¹⁹⁰ Consequently, Massachusetts has not customized its proposed version of the RUAA; it is essentially identical to the ULC's version. There are differences in the Uniform version and the Massachusetts's versions of the RUAA. The first difference is where the RUAA says "this State," the Massachusetts version says "this Com-

178. *Arbitration Act (2000) Summary*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration%20Act%20\(2000\)&_sm_au_=iVV551nvNZZkHHW0](http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration%20Act%20(2000)&_sm_au_=iVV551nvNZZkHHW0) (last visited August 9, 2015).

179. *Arbitration Act (2000)*, *supra* note 1 (forty-nine jurisdictions have adopted the UAA).

180. Heinsz, *supra* note 5, at 2.

181. *Id.*

182. *Arbitration Act (2000)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20\(2000\)](http://www.uniformlaws.org/Act.aspx?title=Arbitration%20Act%20(2000)) (last visited Nov. 15, 2015).

183. *See Arbitration Act (2000) Summary*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration%20Act%20\(2000\)&_sm_au_=iVV551nvNZZkHHW0](http://www.uniformlaws.org/ActSummary.aspx?title=Arbitration%20Act%20(2000)&_sm_au_=iVV551nvNZZkHHW0) (last visited Oct. 28, 2015).

184. Heinsz, *supra* note 5, at 2.

185. *Arbitration Act (2000) Summary*, *supra* note 11; *see also* Heinsz, *supra* note 5 at 5 (noting that the RUAA drafting committee "worked diligently to write provisions consistent" with the Supreme Courts view of FAA preemption).

186. Francis J. Pavetti, *The Revised Uniform Arbitration Act*, UNIFORM L. COMMISSION http://www.uniformlaws.org/Shared/Docs/RUAA%20Briefing%20Sheet_v2_030508.pdf (last visited Sept. 30, 2015).

187. *Arbitration Act (2000) Summary*, *supra* note 11.

188. *See* Heinsz, *supra* note 5 (for an overview and summary of the RUAA).

189. *Arbitration Act (2000)*, *supra* note 10.

190. *About the ULC*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited Aug. 9, 2015).

monwealth.”¹⁹¹ Second, where the RUAA refers to the arbitrator’s ability “to act,” the Massachusetts version references the arbitrator’s ability “to chapter.”¹⁹² Third, there is a scrivener’s error in Section 20(d)(1) of Massachusetts version, because there is no Section 4(a)(1); instead, the reference should be to Section 24(a)(1).¹⁹³ While the references to Massachusetts as a Commonwealth are appropriate, the other differences are scrivener’s errors that need to be corrected before the bill is finalized and enacted. The proposed effective date is July 1, 2016. Currently, the bill has been filed on the House docket.¹⁹⁴

B. Pennsylvania

Representative Glen Grell recognized that it is time to update Pennsylvania’s Arbitration Act.¹⁹⁵ He proposed a bill that would bring the state’s statutory arbitration in line with the RUAA.¹⁹⁶ After Representative Grell introduced the bill in February 2015, the House passed an amended version of the bill on April 15, 2015, and the bill was sent to the Senate’s Judiciary Committee.¹⁹⁷

An organizational change made by the Pennsylvania House was the addition of headers before each subsection of the statute.¹⁹⁸ The Pennsylvania House version also included a provision stating this statute is to be applied consistently to collective bargaining agreements between employers and employees.¹⁹⁹ A key change made by the House is that a motion to vacate the arbitration award must be filed within 30 days, not 90 days.²⁰⁰ Furthermore, the change to statutory arbitra-

191. See generally, H.R. 37, 189th Gen. Court, Reg. Sess. (Ma. 2015). Massachusetts has called itself a Commonwealth since 1780. State Library of Massachusetts, *Why is Massachusetts a Commonwealth?*, COMMONWEALTH OF MASS., <http://www.mass.gov/anf/research-and-tech/legal-and-legislative-resources/why-is-massachusetts-a-commonwealth.html> (last visited Sept. 20 2015).

192. When reviewing Massachusetts’s RUAA, this reference “to chapter” appears to be a scrivener’s error because the verb “to chapter” means to divide into chapters which is not synonymous with “to act” but must be used with an object. Compare Chapter, DICTIONARY.COM, <http://dictionary.reference.com/browse/chapter> (last visited, Sept. 30, 2015) (noting that the verb “to chapter” needs to be used with an object and means to divide into chapters like a book) with Act, DICTIONARY.COM, <http://dictionary.reference.com/browse/act?s=t> (last visited on Sept. 30, 2015) (stating that the verb to act means, among other things, “to reach, make, or issue a decision in some matter”). The bill uses “to chapter” four times in the text of the proposed bill. Upon continued analysis, the author believes that likely the bill’s sponsor copied the RUAA and using a word replace function, changed the RUAA’s use of the word “Act” to “chapter” because the Massachusetts statutes are organized in chapters and are not called “Acts.” As a result, this replace function not only changed the noun “act” to “chapter,” but also erroneously changed the verb “act” to “chapter.”

193. Compare H.R. 37, 189th Gen. Court, Reg. Sess. § 20(d)(1) (Ma. 2015) with REVISED UNIF. ARBITRATION ACT § 20(d)(1).

194. H.R. 37, 189th Gen. Court, Reg. Sess. (Ma. 2015).

195. Representative Glenn Grell, *House Co-Sponsorship Memorandum*, PA. HOUSE OF REPRESENTATIVES (Dec. 17, 2014), <http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20150&coSponsorId=15984>. Grell was joined in the bill’s sponsorship by Representatives Bryan Cutler, Ron Marsico, Garth Everett, R. Lee James, Donna Oberlander, Mark K. Keller, Scott Petri, and Dan Moul. *Id.*

196. *Id.*

197. H.R. 37, 189th Gen. Court, Reg. Sess. (Ma. 2015).

198. For example, RUAA Section 2 is entitled “Notice,” but the subsections under the title do not have a title. But the Pennsylvania version, in addition to entitling the section “Notice,” it added sub-headers to the subsections – “Giving Notice,” “Having Notice,” and “Receiving Notice.”

199. H.R. 34, 199th Gen. Assembly, Reg. Sess. § 7321.4(D) (Penn. 2015).

200. *Id.* at § 7321.24(a)(6)(B).

tion in the proposed bill impacts the existing procedures regarding common law arbitration.²⁰¹

When a similar bill to overhaul the state's statutory arbitration was proposed in 2013, public support for the bill was split. On one hand, the Pennsylvania Bar Association supported the bill under the premise that it would create a single body of arbitration procedure.²⁰² However, the Pennsylvania Association for Justice opposed the bill because the provisions limit rights of appeal and require the losing side to pay for the arbitration.²⁰³

The proposed effective date is January 1, 2016.²⁰⁴ This date will likely change unless the legislature passes this bill soon.

C. West Virginia

One of the first pieces of legislation introduced in the 2015 session was a bill to adopt the RUAA in West Virginia by Senator Palumbo.²⁰⁵ The chairman of the Judicial Committee, Senator Palumbo, stressed the need for West Virginia to update its statutory arbitration provisions. West Virginia's original statutory arbitration act was put on the books in 1926, and the last significant change occurred in 1931. Governor Earl Ray Tomblin signed West Virginia's version of the RUAA into law on March 31, 2015.

The version of the RUAA enacted in West Virginia is, overall, similar to the ULC's version, but it contains some unique provisions. West Virginia included a purpose statement in its version of the RUAA, which states that arbitration is a cost effective way to resolve disputes, there is a long established federal policy favoring arbitration, and that arbitration provides similar protections as civil litigation does.²⁰⁶ The section regarding applicability of the West Virginia statute is more robust than the RUAA.²⁰⁷ West Virginia chose to add a proviso in the section on the validity of the arbitration agreement that states the enforceability of the arbitration agreement is to be determined by the court.²⁰⁸ The statute requires that the arbitrator make a record of the findings of fact and conclusions of law, which is unique to West Virginia when compared to the RUAA.²⁰⁹ The new statutory arbitration process does not apply to "arbitration conducted or administered by a self-regulatory organization."²¹⁰ Additionally, West Virginia requires that the arbitrator's award address the fees that are to be split among the parties.²¹¹ The statute provides for a default venue if the parties have no domicile in the state.²¹²

201. *Id.* at § 7342.

202. Amaris Elliott-Engel, Pa Arbitration Bill Opposed by Trial Lawyers, PITTSBURG POST-GAZETTE (Mar. 18, 2013) <http://www.post-gazette.com/business/legal/2013/03/18/Pa-arbitration-bill-opposed-by-trial-lawyers/stories/201303180136>.

203. *Id.*

204. H.R. 34, 199th Gen. Assembly, Reg. Sess., § 7342.6 (Penn. 2015).

205. Act of May 4, 2015, Act No. 8, 2015 W.V. Sess. Law S.B. 37 codified at W. VA. CODE R. §§ 55-10-1 to 55-10-33 (2015).

206. Act of May 4, 2015, Act No. 8, § 55-10-2, 2015 W.V. Sess. Law S.B. 37.

207. *Id.* at § 55-10-5.

208. *Id.* at § 55-10-8(c).

209. *Id.* at § 55-10-21(a).

210. *Id.* at § 55-10-21(c).

211. *Id.* at § 55-10-23(d).

212. Act of May 4, 2015, Act No. 8, § 55-10-29, 2015 W.V. Sess. Law S.B. 37 (the default jurisdiction is the circuit court of Kanawha County, West Virginia).

It also provides a savings clause, stating that the act does not apply to actions commenced prior to the act taking effect.²¹³ West Virginia's version of the RUAA was effective July 1, 2015.

3. *Conclusion*

Uniform laws are only as effective as their uniform adoption. The more states that adopt the 15-year-old RUAA, the more influence it will have on statutory arbitration. Massachusetts and Pennsylvania legislators are in the process of reviewing their statutory arbitration provisions to match the RUAA. West Virginia's adoption of the RUAA has increased the application of the uniform act.²¹⁴ As more states review and update their statutory arbitration acts, the RUAA is expected to eventually have the same national adoption as the original UAA.

213. *Id.* at § 55-10-33.

214. West Virginia's enactment of the RUAA is the nineteenth state to do so since it was adopted in 2000. *See Arbitration Act (2000)*, *supra* note 10.

II. HIGHLIGHTS

A. Alabama House Bill 137²¹⁵

This Amendment to the Alabama Homeowners' Association Act was introduced by Representative McCutcheon.²¹⁶ It was read for the first time on January 14, 2014, passed the House on March 20, 2014, and was referred to the Senate Committee on the Judiciary on April 1, 2014.²¹⁷ The purpose of the bill is to grant the Homeowner's Commission the authority to develop a dispute resolution program in order to settle disputes between associations and land owners.²¹⁸ This bill would authorize a homeowners' association to either initiate a lawsuit in circuit court to recover assessed charges, or to obtain injunctive or other relief, for violations of the declaration or association rules, or to pursue arbitration or other means of alternative dispute resolution where authorized by the declaration or bylaws.²¹⁹ The commission may charge a fee for participation in the alternative dispute resolution program, as determined by the commission.²²⁰ Any fee collected shall be deposited in the State Treasury to the credit of the Real Estate Commission Revenue Fund, and shall be disbursed by the State on order of the executive director in concert with the commission.²²¹ The bill is awaiting a vote in the Judiciary after return from the Senate Committee. This process typically takes 12 to 16 months.²²²

B. Hawaii House Bill 492²²³

This bill, introduced by Representative Taykayama, is titled "[a]n Act Relating to the Judiciary" that describes the circumstances in which a judge may proscribe mediation before adjudicating.²²⁴ The bill was introduced on January 26, 2015.²²⁵ It was referred to the Senate Judiciary on March 12, 2015, amended on March 27, 2015 and referred to the Senate Ways and Means Committee on the same date.²²⁶ The bill purports to add mediation and arbitration to the list of dispute resolution administered by the judiciary.²²⁷ The judiciary, through the center for alternative dispute resolution, contracts for mediation services with various community mediation centers throughout the various counties.²²⁸ This Act represents a new development because it makes the judiciary responsible for the costs of alternative dispute resolution rather than the disputing parties, and this should

215. H.R. 137, 2014 Leg., Reg. Sess. (Ala. 2014) (status provided by LEXIS Bill Tracking report).

216. *Id.* (status provided by LEXIS bill tracking).

217. *Id.* (status provided by LEXIS bill tracking).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. H.R. 492, 2015 Leg., 28th Sess. (Haw. 2015) (status provided by LEXIS bill tracking).

224. *Id.*

225. *Id.* (status provided by LEXIS bill tracking).

226. *Id.* (status provided by LEXIS bill tracking).

227. *Id.*

228. *Id.*

incentivize parties to pursue mediation.²²⁹ This bill is currently awaiting a vote after it receives improvements from the Senate Ways and Means Committee.²³⁰

C. Louisiana Senate Bill 79²³¹

Senator Allain introduced this bill on April 13, 2015, on the recommendation of the Louisiana State Law Institute.²³² Bill 79 passed in the Senate on April 28, 2015, and was sent to the House Committee on Civil Law and Procedure, and then was referred to the Legislative Bureau.²³³ The House adopted both the Bureau and Committee's amendments on May 28, 2015; the bill subsequently passed in both the House and the Senate.²³⁴ Bill 79 was signed into law by the Governor of Louisiana on July 1, 2015, and was designated as Act No. 448.²³⁵ The intended purpose of this bill is to provide alternative dispute resolution in lawsuits involving the remediation of oilfield, exploration and production sites.²³⁶ The bill authorizes the court to compel nonbinding mediation and provides for payments, conditions and other requirements.²³⁷

Under current law, claims involving environmental damage are stayed for 30 days after notice is issued to the Commissioner of Conservation and the Attorney General, and return receipt of notice is filed with the court.²³⁸ The proposed law requires that within 60 days of the end of stay required by present law, "the parties must meet and confer to assess the dispute, narrow the issues, and reach agreements useful or convenient for the litigation of the action."²³⁹ The proposed law also provides that on any party's motion filed subsequent to the close of all discovery, or 550 days after commencement of the action, whichever occurs first, the court will enter an order compelling the parties to enter into nonbinding mediation.²⁴⁰

D. Massachusetts House Bill 888²⁴¹

Representative Keefe introduced this bill on January 20, 2015.²⁴² Bill 888 was sent to the Joint Committee on Financial Services²⁴³ and scheduled for hearing

229. *See id.*

230. H.R. 492 (status provided by LEXIS bill tracking).

231. S. 79, 2015, 44th Leg., Reg. Sess. (La. 2015).

232. *Id.*

233. *SB 79*, LA. ST. LEGISLATURE (Aug. 1, 2015), <http://www.legis.la.gov/legis/BillInfo.aspx?s=15rs&b=SB79&sbi=y>.

234. *Id.*

235. *Id.*

236. S. 79.

237. *Id.*

238. LA. REV. STAT. § 30:29 (2015). In 2011, H.B. 563, a bill concerning how to settle environmental damage claims related to oilfields, was rejected by the House Natural Resources Committee for giving primary jurisdiction to the Louisiana Department of Natural Resources instead of the courts. The bill's sponsor, Rep. Page Cortez, "emphasized the testimony of DNR officials who said that of 248 suits filed since...[2006], only two fields are completely clean, while only 65 or so have even completed environmental testing to gauge damage." *See* Bill Barrow, *Oilfield Remediation Measure Defeated in Louisiana House Committee*, THE TIMES-PICAYUNE (May 18, 2011), http://www.nola.com/politics/index.ssf/2011/05/oilfield_remediation_measure_d.html.

239. S. 79.

240. *Id.*

241. H.R. 888, 189th Leg., Reg. Sess. (Mass. 2015).

242. *Id.*

June 30, 2015.²⁴⁴ The purpose of the bill is to require banks or creditors to mediate in good faith with homeowners in order to identify alternative resolutions before commencing a foreclosure.²⁴⁵ The bill creates a Massachusetts Foreclosure Mediation Program administered by a “Mediation Program Manager” who is to be designated from a neutral, non-profit organization or law firm “experienced in the mediation of the foreclosure process, familiar with all programs available to help homeowners avoid foreclosure, and knowledgeable of the mortgage foreclosure laws of the Commonwealth of Massachusetts.”²⁴⁶ The bill requires the mediation to conclude no more than 120 days after the borrower chooses to participate.²⁴⁷ However, foreclosure may proceed under this new law if a borrower chooses not to participate in mediation.²⁴⁸ One of the effects of this proposed law is that if a borrower elects to participate in the program, foreclosure will not proceed or be initiated until a mediator certifies that the creditor has participated in the Mediation Program.²⁴⁹ Qualifying participation means the parties engaged in good faith, made reasonable efforts to avoid foreclosure, and any final agreement complies with state and federal law.²⁵⁰

*E. Montana House Bill 576*²⁵¹

Representative Art Wittich introduced this bill on February 9, 2015.²⁵² Bill 576 passed the Human Services Committee on February 19, 2015, following revisions.²⁵³ It then went to the Appropriations Committee and passed on March 27, 2015 before being sent to the Senate’s Committee for Public Health, Welfare and Safety; the bill currently resides in this committee waiting for its second reading.²⁵⁴ The purpose of Bill 576 is to give nursing homes, and other long-term care facilities, a forum in which they may voice their grievances with survey findings and deficiency citations that they believe to have been made in error.²⁵⁵ Bill 576 would allow nursing homes to resolve the dispute through an informal dispute resolution process that would provide the facility with an objective review of the deficiency. The arbitrator would then determine whether or not a citation was issued in error or whether there was a misjudgment of true facts.²⁵⁶ This informal dispute resolution system would help facilities avoid unnecessary sanctions and diminish the need for costly formal administrative hearings with the State.²⁵⁷

The bill was able to travel swiftly through the House of Representatives and is now currently waiting in the Senate for further readings and revisions.²⁵⁸ No

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* These organizations or law firms must be selected by the Attorney General.

247. H.R. 888

248. *Id.*

249. *Id.*

250. *Id.*

251. H.R. 576, 64th Gen. Assemb., Reg. Sess. (Mont. 2015).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at § 30(b).

256. *Id.*

257. H.R. 576.

258. *Id.*

vote is currently scheduled at this time.²⁵⁹ Due to the progress the bill has made, it will likely pass in the Senate, but until further action is taken, it is unclear whether the bill will become Montana law.²⁶⁰

F. *New Mexico Senate Bill 152.*²⁶¹

Senator Howie C. Morales introduced this bill on January 9, 2015.²⁶² After introduction, Bill 152 was sent to the Senate Public Affairs Committee, Senate Judiciary Committee, and the Senate Finance Committee for further review.²⁶³ On January 24, 2015, the Senate Judiciary Committee's report was adopted without recommendation; the action of the bill was postponed indefinitely.²⁶⁴ The purpose of Bill 152 was to introduce a dispute resolution system that would be part of any contract with a health care provider or a health facility to permit the facility to dispute a denial or partial payment for services rendered to a beneficiary.²⁶⁵ It also allows for disputing the existence of adequate cause to terminate the provider's participation in the plan when a termination is made for cause.²⁶⁶ The bill also promulgates a system in which a health care provider may file a grievance relating to the administration of the health care plan.²⁶⁷

The bill is currently residing in the Senate and has yet to be read on the House floor.²⁶⁸ The bill has neither passed nor failed either house at this time.²⁶⁹

G. *South Carolina House Bill 4001*²⁷⁰

South Carolina's law regarding the use of arbitration in family law disputes needs some updates. In South Carolina, family law practitioners do not have clear guidance from the courts whether arbitration of custody and visitation agreements is binding.²⁷¹ Representative Mike Pitts is sponsoring a bill that would overhaul how issues related to the dissolution of marriage are resolved.²⁷² Pitts has been trying since 2012 to make similar changes in South Carolina.²⁷³ He introduced Bill 4001 on April 16, 2015.²⁷⁴ This bill would create the South Carolina Family

259. *Id.*

260. *Id.*

261. S. 152, 52nd Legis., 1st Reg. Sess. (N.M. 2015).

262. *Id.* (provided in LEXIS bill tracking report).

263. *Id.* (provided in LEXIS bill tracking report).

264. *Id.* (provided in LEXIS bill tracking report).

265. *Id.*

266. *Id.* at § 29(C)(1)-(2).

267. S. 152 at § 29(D)(1)-(2). This includes, but is not limited to, the quality of and access to health care services and the choice of health care providers and health facilities under the plan. *Id.*

268. *Id.*

269. *Id.*

270. H.R. 4001, 121st Gen. Assemb., 1st Reg. Sess. (S.C. 2015).

271. Gregory S. Forman, *Frequently Asked Questions: What is Arbitration?* GREGORY S. FORMAN, P.C., <http://www.gregoryforman.com/faqs/what-is-mediation-and-arbitration/> (last visited Nov. 11, 2015).

272. H.R. 4001, 121st Gen. Assemb., 1st Reg. Sess. (S.C. 2015) (status provided by LEXIS bill tracking).

273. Rick Brundrett, *S.C. House Bill Proposes Major Child Custody Law Changes*, THE NERVE (Feb. 6, 2012, 6:00 AM), <http://thenerve.org/news/2012/02/06/bill-custody/> (discussing bill introduced by Mike Pitts in 2012 that would create an arbitration system for family disputes).

274. H.R. 4001, 121st Gen. Assemb., 1st Reg. Sess. (S.C. 2015).

Law Arbitration Act,²⁷⁵ and it proposes a process and provides the authority to resolve issues such as custody, visitation, child support, spousal support, and tax implications through arbitration.²⁷⁶ At this stage in the legislative process, there are still lingering questions because, for example, the bill defines both appealable arbitration and binding arbitration, yet neither of these terms are used throughout the bill.²⁷⁷ If passed, South Carolina's Family Court will be able to utilize arbitration to expedite the resolution of these key family law issues. At this time, the bill is with the Judiciary Committee.

H. South Dakota Senate Bill 3²⁷⁸

"Where should the drainage water go?" Disputes over this very question have been plaguing South Dakota for years.²⁷⁹ Now, South Dakotans have the option to resolve water drainage disputes through mediation. Sponsored by Senator Vehle, this new law passed quickly through the legislature.²⁸⁰ The law authorizes the Department of Agriculture (Agriculture) to establish rules regarding the mediation process of drainage water disputes.²⁸¹ The water drainage mediation process would be an extension of the existing agriculture mediation program.²⁸² The drainage dispute process provides that an aggrieved landowner may petition Agriculture for mediation services, then Agriculture will send a mediation notice to the affected parties and will make the public aware via newspaper publication.²⁸³ The law allows parties that may also be interested in the resolution to intervene.²⁸⁴ Agriculture has proposed some rules regarding the fees associated with using the medication services. For example, one of the proposed rules says that to use the mediation process, the petitioner must pay \$200, the respondent must pay \$200, and then the parties must split the mediator's \$200 hourly rate.²⁸⁵ Once the rules and regulations are finalized, landowners in South Dakota will have access to a program that will give them the tools to resolve water drainage issue out of court.

275. *Id.*

276. *Id.* at § 20-9-10(B) (listing of the issues that arbitration is prohibited from resolving).

277. *Id.* at § 20-9-20(1)-(2).

278. An Act to provide mediation of certain drainage disputes, 2015 S.D. Laws ch. 226.

279. David J. Ganje, *Surface Water Drainage Issues – Water Drainage in South Dakota*, GANJE LAW OFFICES, <http://www.lexenergy.net/surface-water-drainage-issues-water-drainage-in-south-dakota/> (last visited August 31, 2015) (stating that in 1985 South Dakota deregulated water drainage to the county level which has created a hodgepodge of authority when issues come up).

280. The bill was introduced on January 13th, 2015, and signed by governor Dennis Daugaard on March 20th, 2015. S. 3, 90th Leg. Assemb., Reg. Sess. (S.D. 2015) (status provided by LEXIS bill tracking).

281. An Act to provide mediation of certain drainage disputes, 2015 S.D. Laws ch. 226.

282. Bob Mercer, *Drainage mediation could cost each landowner \$200 per hour*, THE DAILY REPUBLIC (July 12, 2015 at 6:32pm) <http://www.mitchellrepublic.com/news/state/3784506-drainage-mediation-could-cost-each-landowner-200-hour>.

283. An Act to provide mediation of certain drainage disputes, 2015 S.D. Laws ch. 226.

284. *Id.* at § 9.

285. Bob Mercer, *Drainage mediation could cost each landowner \$200 per hour*, THE DAILY REPUBLIC (July 12, 2015 at 6:32pm) <http://www.mitchellrepublic.com/news/state/3784506-drainage-mediation-could-cost-each-landowner-200-hour>.

III. CATALOG OF STATE LEGISLATION

ALABAMA

Bills Enacted: None.

Bills Pending: 2014 H.B. 137 (mandates that homeowner's association create alternative dispute resolution between association and homeowners); 2014 H.B. 155 (states that the Public Service Commission no longer has jurisdiction over customer complaints regarding telephone service).

ALASKA

Bills Enacted: None.

Bills Pending: 2011 S.B. 116 (establishes an alternative dispute resolution officer for worker's compensation claims).

ARIZONA

Bills Enacted: None.

Bills Pending: 4014 H.B. 2556 (creates alternative dispute resolution process for condo contract disagreements); 2015 H.B. 2578 (creates alternative dispute resolution for inadequate home repairs).

ARKANSAS

Bills Enacted: None.

Bills Pending: 2013 H.B. 1205 (provides that if an employee requests mediation, the Arkansas Alternative Dispute Resolution Commission shall select an appropriate mediator from a roster maintained by the commission); 2015 H.B. 488 (establishes that all alternative dispute resolution involving construction disputes must take place in another state).

CALIFORNIA

Bills Enacted: None.

Bills Pending: 2015 A.B. 1185 (states that alternative dispute resolution will factor into the calculation of safety records); 2015 S.B. 290 (establishes that owner may pursue alternative dispute resolution to avoid foreclosure).

COLORADO

Bills Enacted: None.

Bills Pending: 2015 S.B. 177 (schedules alternative dispute resolution process to settle construction defect claims); 2015 H.B. 1015 (provides that alternative dispute resolution practitioners may not participate in any other member state).

CONNECTICUT

Bills Enacted: None.

Bills Pending: 2015 S.B. 1005 (creates alternative dispute resolution process for settling trust and estate claims); 2015 H.B. 6774 (creates alternative dispute resolution process to define rights under existing statute).

DELAWARE

Bills Enacted: None.

Bills Pending: 2015 S.B. 63 (provides that mandatory, non-binding mediation shall become the statutory definition of alternative dispute resolution).

FLORIDA

Bills Enacted: None.

Bills Pending: 2015 H.B. 165 (mandates that neutral evaluation supersedes alternative dispute resolution); 2015 H.B. 643 (provides that alternative dispute resolution means voluntary mediation or mandatory non-binding arbitration).

GEORGIA

Bills Enacted: 2015 H.B. 512 (establishes alternative dispute resolution process for hospital disputes).

Bills Pending: None.

HAWAII

Bills Enacted: None.

Bills Pending: 2015 H.B. 492 (establishes alternative dispute resolution centers to avoid litigation).

IDAHO

Bills Enacted: 2015 S.B. 1027 (provides that judges may not engage in alternative dispute resolution).

Bills Pending: None.

ILLINOIS

Bills Enacted: 2014 H.B. 5485 (amends the Public Labor Relations Act; in cases involving a security employee, peace officer, fire fighter, and fire department or fire district paramedic, it limits arbitration decisions to wages, hours, and conditions of employment).

Bills Pending: 2015 S.B. 1246 (amends the Public Labor Relations Act to preserve the analysis applied by arbitrators when ruling on proposals to modify firefighter Manning language in a bargaining agreement); 2015 S.B. 843 (makes changes relating to taxes, benefits, and clarifies that certain articles are prohibited subjects of bargaining and are not subject to arbitration); 2015 H.B. 890 (amends the Insurance Code that makes a technical change in a section concerning arbitration of medical malpractice disputes); 2015 H.B. 1380 (amends the Public Labor Relations Act to make any party, to a collective bargaining agreement, who fails to timely comply with an arbitration award, liable for court costs and attorneys fees, unless mutually agreed otherwise); 2015 H.B. 4009 (amends the Public Labor Relations Act for security employee, peace officer, and fire fighter disputes before an arbitrator; instead of choosing a member of the delegation panel ten days after making a request for arbitration, the parties shall instead select a location for the arbitration hearing); 2015 H.B. 2453 (amends the Public Labor Relations Act; arbitration panels hearing security employee, peace officer, firefighter, and paramedic disputes must not take into consideration the ability of a unit of government to raise taxes or impose new taxes when determining the financial ability of that unit of government to pay the costs associated with those employees' wages and other conditions of employment).

INDIANA

Bills Enacted: 2015 H.B. 1483 (adds "school psychologist" to the definition of "teacher" for the purposes of teacher preparation and licensing; requires an election for a student to have legal settlement in the school corporation whose attendance area contains the residence of the student's mother or father to be made on a yearly basis and apply throughout the school year unless the student's parent no longer resides within the attendance area of the school corporation; provides that fact finding initiated by the Indiana education employment relations board (IEERB) may not last more than 30 days, the board must rule on an appeal within 60 days, and this fact finding process may not exceed 30 days); 2015 H.B. 1304 (permits state prosecutor to require accused to participate in dispute resolution either under IC 34-57-3 or a program established by the prosecuting attorney); 2015 H.B. 1286 (amends the Indiana Code concerning property).

Bills Pending: None.

IOWA

Bills Enacted: 2015 H.F. 515 (creates an act relating to the use of the district management levy and includes applicability provisions).

Bills Pending: 2015 S.F. 419 (creates act relating to strikes and disputes arising in public employment and reduces the statutory time periods for various steps in dispute resolution processes for public employees to five days); 2015 H.S.B. 142 (establishes an act relating to a broker's lien, and allows for parties to agree to alternative dispute resolution); 2015 H.S.B. 79 (modifies the factors an arbitrator must consider in the arbitration of a public employee collective bargaining agreement); 2015 H.F. 549 (regulates arbitration procedures for a dispute involving employees of a public school district or education agency; defines the timeline for the arbitrator to render a decision, and states "the arbitrator's award with respect to each such item shall not be restricted to the final offers on each impasse item submitted by the parties to the arbitrator."); 2015 S.S.B. 1113 (provides an interpreter if a person is Limited English Proficient (LEP) and a court has ordered to the, participate in either mediation or a predisposition parenting program in a domestic relations case).

KANSAS

Bills Enacted: 2015 H.B. 2170 (provides that a parent may file a complaint through the local dispute resolution process if they believe emergency safety interventions have been used in violation of this act).

Bills Pending: 2015 H.B. 2326 (makes matters relating to the duration of the school term not subject to professional negotiations act).

KENTUCKY

Bills Enacted: 2015 H.B. 330 (provides for both mediation and binding dispute resolution for disputes involving schools and children of military families among member states; strives to remove barriers to educational success imposed on children of military families because of frequent moves and deployment of their parents); 2014 H.B. 78 (states disputes concerning the interpretation of a trust or its administration should be resolved by mediation, arbitration or other alternative dispute resolution procedures); 2015 H.B. 8 (provides that a court must not require mediation, conciliation or counseling prior to or as a condition of issuing an order of protection); 2015 H.B. 152 (sets out Telecommunications Commission's authority to arbitrate and enforce interconnection agreements); 2015 S.B. 186 (provides mediation of disputes relating to oil and gas production and reclamation is to be through the Department of Natural Resources).

Bills Pending: 2014 S.B. 54 (requires the Cabinet for Health and Family Services and Office of Inspector General to establish an informal dispute resolution program with at least two separate levels of review through which a child-care provider may dispute licensure deficiencies); 2015 H.B. 469 (establishes the Kentucky Citizens' Commission on Judicial and Legislative Compensation, which requires the Commission to consider the value of arbitration and mediation services); 2015 H.B. 500 (requires administrative orders, arbitration and mediation awards to be considered as court orders in regards to the Kentucky Teacher's Re-

tirement System); 2015 H.B. 480 (sets out mediation regulations for resolving disputes involving recreational power sport vehicle franchises); 2015 H.B. 398 (includes new requirement that all such claims against a health care provider, other than claims validly agreed for submission to binding arbitration, shall be reviewed by a medical review panel).

LOUISIANA

Bills Enacted: None.

Bills Pending: 2015 S.B. 79 (provides for alternative dispute resolution for disputes relating to remediation of oilfield sites and exploration and production sites); 2015 S.B. 163 (relates to Medicaid managed care; provides for definitions and requires the creation of a dispute resolution process); 2015 S.B. 195 (creates an Insurance Mediation Program); 2014 S.B. 382 (provides that the reasonable charges shall not exceed the median rate negotiated with health care providers); 2015 H.C.R. 69 (urges and requests the International Alliance of Theatrical State Employees Local 478 to allow Baton Rouge, Louisiana to become a production center in its upcoming negotiations with the Alliance of Motion Picture and Television Producers).

MAINE

Bills Enacted: 2015 L.D. 580 (permits an authorized employee of a financial institution or credit union instead of an attorney to attend a foreclosure mediation on behalf of the financial institution or credit union, and allows a defendant to affirmatively decline attending the mediation).

Bills Pending: 2015 S.P. 63 (includes a provision that prevents retaliation against employees for participating in investigations and proceedings including arbitration and mediation); 2015 S.P. 309 (requires parenting plans to be timely filed and allows for alternative dispute resolution through counseling, mediation, or arbitration); 2015 S.P. 124 (allows for alternative dispute resolution between property owners and state regulations; under the provisions of the bill, prior to filing an action, the property owner must pursue relief under a land use mediation program); 2015 H.P. 742 (requires the notification to a parent of a child with a disability informing them of their right to be a member of the child's individualized education program team must include notice that the parent has 14 days to object to a proposal and that the parent or school administrative unit may request alternative dispute resolution); 2015 H.P. 639 (makes changes in the foreclosure mediation process providing that, if courts have previously sanctioned the conduct of a mortgage servicer in a foreclosure process, the courts are authorized to directly sanction the mortgage servicer if the mortgage servicer's conduct evidences a failure to mediate in good faith); 2015 S.P. 449 (requires parties to a water level dispute to attempt to resolve the matter through mediation before the department); 2015 S.P. 265 (provides Maine consumers with an opportunity to avoid home mortgage foreclosure by participating in mediation at an early stage of default before foreclosure has commenced); 2015 H.P. 224 (provides for constitutional

enforcement of arbitration agreements); 2015 S.P. 350 (provides that the use of private contractors by a public employer to perform services for the public employer is not subject to negotiation in collective bargaining); 2015 H.P. 753 (amends law to redefine “claim” to include lawsuit or arbitration proceeding and “collection action” means a lawsuit or arbitration proceeding initiated to collect a debt from a consumer).

MARYLAND

Bills Enacted: None.

Bills Pending: 2015 H.B. 738 (amends to allow “certain provisions of law relating to dispute resolution by the Maryland State Board of Contract Appeals [to] apply in certain protests concerning procurement contracts for architectural or engineering services”); 2012 H.B. 1172 (establishes procedures for arbitration of collective bargaining disputes involving the exclusive representative of sworn law enforcement officers in the Charles County Sheriff’s Office); 2015 H.B. 829 (provides that Council of Unit Owners of a condominium has a right to be involved in alternative dispute resolution and certain alternative dispute resolution programs are unenforceable without being first adopted by Counsel of Unit Owners); 2015 H.B. 388 (establishes the Justice Reinvestment Coordinating Council in the Governor’s Office of Crime Control and Prevention; relates to advocating for victims of crime, mediation for restorative justice, and strategies to reduce recidivism); 2015 H.B. 791 (prohibits the filing of a specified petition for expungement until community conferencing, community mediation, or specified other agreements are completed under specified circumstances; prohibits expungement under specified circumstances); 2015 H.B. 1060 (requires specified parents and school personnel to be offered an opportunity to resolve a disagreement in a meeting with an independent facilitator before a mediation or due process hearing).

MASSACHUSETTS

Bills Enacted: None.

Bills Pending: 2015 S. 341 (promotes alternative dispute resolution for students); 2015 H. 2237 (allows for collective bargaining dispute resolution procedures); 2015 H. 2340 (sets out alternative dispute resolution for state police officers); 2015 H. 310 (discusses dispute resolution processes within the Bureau of Special Education Appeals); 2014 S. 2318 (implements a manufactured housing commission and the Manufactured Housing Trust Fund and states the fund must be utilized to support a dispute resolution program); 2015 H. 888 (requires banks to mediate in good faith with homeowners and identify alternative resolutions prior to starting foreclosures); 2015 H. 38 (makes certain aspects of mediation uniform); H. 1516 (provides that a special commission will investigate the viability of establishing and implementing a foreclosure mediation program); 2013 H. 947 (establishes a foreclosure mediation program with the University of Massachusetts at Boston and the Office of Public Collaboration to offer alternative to foreclosures); 2015 H. 781 (sets out arbitration with insurance companies for

property damage to motor vehicles); 2015 H. 1230 (discusses the payment of interest after arbitration); 2015 H. 1473 (permits private arbitration for all parties involved in residential contracting); 2015 H. 1692 (discusses binding arbitration for collective bargaining proceedings of public employees); 2015 H. 2305 (allows for binding arbitration for fire fighters and police officers); H. 2314 (discusses interest arbitration for state police collective bargaining disputes); 2015 H. 1376 (discusses binding arbitration); 2015 H. 37 (revises the Uniform Arbitration Act for commercial disputes).

MICHIGAN

Bills Enacted: 2014 H.B. 5576 (requires compulsory arbitration of labor disputes in municipal police and fire departments; sets out procedures, authority, penalties and enforcements); 2014 H.B. 6074 (sets out mediation of grievances in strikes by public employees; excludes public university athletes from definition of public employee).

Bills Pending: 2013 S.B. 530 (modifies powers and duties of Office of Child Support and provides for alternative dispute resolution plans in cases of domestic violence, child abuse or neglect); 2015 H.B. 4476 (limits mediation for certain domestic relations actions).

MINNESOTA

Bills Enacted: 2015 S.F. 1191 (amends family law provisions regarding mediation, maintenance, child support, judgments, and awards).

Bills Pending: 2014 H.F. 3236 (provides for duties of the Commissioner in relation to mediation services); 2014 S.F. 2779 (establishes mortgage foreclosure mediation); 2015 H.F. 1959 (requires alternative dispute resolution in certain cases involving real property); 2015 S.F. 253 (creates an Interstate Commission to provide for an interstate medical licensure compact project; which shall propose new laws and enact rules for both mediation and binding dispute resolution programs).

MISSISSIPPI

Bills Enacted: 2015 H.B. 825 (amends §25-9-129 of Mississippi Code to authorize the Personal Service Contract Review Board to allow agencies to seek arbitration if they disagree with a denial of their contract by the Board); 2014 H.B. 742 (creates the Recreational Vehicle Franchise Law which sets out mediation procedures).

Bills Pending: 2015 H.B. 445 (requires any employer or person affected by the operation of the Mississippi Workers' Compensation Assigned Risk Plan to exhaust all administrative dispute resolution remedies before commencing a civil action against any servicing carrier); 2015 H.B. 1231 (provides arbitration clauses in certain contracts shall be nonbinding); 2014 H.B. 792 (creates the Mississippi

residential mortgage foreclosure mediation program which provides for mediation between the borrowers and lenders before foreclosure).

MISSOURI

Bills Enacted: None.

Bills Pending: 2013 H.B. 1135 (makes provisions in a trust instrument that require mediation or arbitration enforceable, except for provisions relating to the validity of the trust); 2014 H.B. 46 (mandates the State Board of Mediation conduct an election certifying the exclusive bargaining representatives of a collective bargaining unit for certain public employees); 2015 H.B. 1211 (establishes the Mortgage Foreclosure Mediation Code); 2013 S.B. 619 (creates the Civil Liberties Defense Act; mandates that any court, arbitration, tribunal, or administrative agency ruling shall be unenforceable if based on a foreign law that does not grant the parties the same rights as the parties have under the federal and state constitutions); 2015 S.B. 928 (changes the Uniform Arbitration Act regarding agreements between employers and at-will employees); 2015 S.B. 381 (discusses arbitration in negligence actions against the Department of Transportation); 2015 S.B. 412 (modifies laws regarding arbitration agreements between employers and at-will employees); 2014 H.B. 193 (amends chapter 334, RSMo, by adding new sections relating to emergency medical services personnel including that the commission shall create a rule providing for both mediation and binding dispute resolution); 2015 H.B. 512 (amends chapter 436, RSMo, by adding new sections relating to the civil litigation funding act; redefines “legal claim” to include “any alternative dispute resolution proceeding”).

MONTANA

Bills Enacted: None.

Bills Pending: 2015 H.B. 576 (gives nursing homes a process to contest deficiency citations made in error).

NEBRASKA

Bills Enacted: None.

Bills Pending: 2015 L.B. 209 (requires political subdivisions of the state to enter into mandatory mediation before litigation in dispute).

NEVADA

Bills Enacted: None.

Bills Pending: 2015 S.B. 321 (authorizes a mortgagor who holds a deed of trust to initiate mediation with the mortgagee under certain circumstances).

NEW HAMPSHIRE

Bills Enacted: None.

Bills Pending: 2015 H.B. 570 (creates a condo dispute resolution board).

NEW JERSEY

Bills Enacted: None.

Bills Pending: 2014 A.B. 4435 (establishes that a person who is denied access to government records can file a complaint that is referred to mediation to be resolved).

NEW MEXICO

Bills Enacted: None.

Bills Pending: 2015 S.B. 152 (sets up a dispute resolution system for health care provider disputes).

NEW YORK

Bills Enacted: None.

Bills Pending: 2015 S.B. 4026 (defines scope, privilege, waiver, confidentiality, etc. over mediators and mediations in general).

NORTH CAROLINA

Bills Enacted: None.

Bills Pending: 2015 H.B. 799 (creates an arbitration process on appeals from the historic preservation commission).

NORTH DAKOTA

Bills Enacted: None.

Bills Pending: 2015 S.B. 2292 (repeals an arbitration option afforded to tax commissioners).

OHIO

Bills Enacted: None.

Bills Pending: 2015 H.B. 206 (sets up a dispute resolution process for workers' compensation claims).

OKLAHOMA

Bills Enacted: None.

Bills Pending: 2015 S.B. 766 (forbids sitting judges from acting as arbitrators or mediators).

OREGON

Bills Enacted: None.

Bills Pending: 2015 H.B. 2509 (requires the agricultural department to provide mediation services if the claim for dispute is reasonable).

PENNSYLVANIA

Bills Enacted: 2015 H.B. 34 (amends Pennsylvania's Uniform Arbitration Act to bring it in line with the RUAA).

Bills Pending: 2015 H.B. 126 (amends Public School Code of 1949 and significantly outlines the duties of the Bureau of Mediation and the Pennsylvania Labor Relations Board); 2015 S.B. 211 (amends the Policemen and Firemen Collective Bargaining Act providing for board of arbitration and its authority); 2015 H.B. 879 (repeals mediation programs).

RHODE ISLAND

Bills Enacted: 2015 H.B. 5429 (creates an arbitration process to address certain condominium disputes); 2015 S.B. 581 (creates additional protection to mortgagees granted under Servicemember's Civil Relief Act and clarifies that the mediation law applies prospectively); 2015 H.B. 6264 (substitutes "voidable" for "void" when the mortgagee does not comply with the mediation requirements).

Bills Pending: 2015 H.B. 5350 (provides for expanding compulsory binding arbitration issues for municipal employees); 2015 S.B. 531 (extends the application of any existing collective bargaining agreements for police and fire, including arbitration arrangements); 2015 H.B. 5617 (creates additional protection to mortgagees granted under Servicemember's Civil Relief Act and clarifies that the mediation law applies prospectively).

SOUTH CAROLINA

Bills Enacted: 2015 H. 4001 (allows for arbitration as a method to settle divorce and separation issues).

Bills Pending: 2015 S. 871 (impacts automobile insurance that prevents insurers from making arbitration mandatory under the uninsured motorist coverage);

2014 S. 53 (requires mandatory mediation for cases with the amount in controversy equal to or greater than \$5,000).

SOUTH DAKOTA

Bills Enacted: 2015 H.B. 1051 (includes modifications to the arbitration of claim regarding trusts); 2015 S.B. 3 (establishes the authority for the mediation of drainage disputes).

Bills Pending: None.

TENNESSEE

Bills Enacted: None.

Bills Pending: 2015 H.B. 1161 (permits a litigation financier to use arbitration which in effect is a waiver of the consumer's right to a jury trial); 2015 S.B. 997 (permits a litigation financier to use arbitration which essentially waives a consumer's right to a jury trial).

TEXAS

Bills Enacted: 2015 H.B. 1455 (addresses condominium associations using arbitration for claims related to defect or design); 2015 S.B. 849 (provides the process for appealing appraisal review board decisions through binding arbitration); 2015 S.B. 481 (addresses the use of mediation regarding billing issues with a facility-based physician).

Bills Pending: 2015 H.B. 3867 (provides the process for appealing appraisal review board decisions through binding arbitration); 2015 S.B. 834 (addresses condominium associations using arbitration for claims related to defect or design); 2014 H.B. 210 (modifies the victim-offender mediation services); 2014 H.B. 319 (provides for the creation, operation, and financial support of victim-offender mediation programs); 2015 H.B. 3013 (addresses mediation and settlement of specific disputes regarding ad valorem taxation); 2015 H.B. 3133 (addresses the use of mediation regarding billing issues with a facility-based physician); 2015 S.B. 948 (relates to mediation as an alternative dispute resolution process).

UTAH

Bills Enacted: 2014 H.B. 46 (creates process for arbitration of preconstruction and construction liens); 2015 S.B. 173 (creates arbitration process of disputes relating to the Environmental Quality Code); 2015 H.B. 189 (addresses mediation of child welfare matters).

Bills Pending: None.

VERMONT

Bills Enacted: None.

Bills Pending: 2015 S. 72 (addresses binding arbitration as a grievance procedure for state employees under a collective bargaining agreement); 2015 H. 76 (establishes mandatory binding arbitration under teachers' and administrators' contracts); 2015 H. 174 (provides binding arbitration for state employees); 2015 H. 214 (addresses arbitration of uncontested motor vehicle issues); 2015 S. 74 (provides binding arbitration for teachers, administrators, and municipal employees); 2015 S. 111 (addresses required mandatory binding arbitration for teachers' and school administrators' contracts); 2015 H. 474 (relates to mandatory mediation in divorce proceedings); 2015 H. 487 (addresses mediation in medical malpractice claims for plans under the State Exchange); 2015 S. 92 (establishes mediation in medical malpractice actions).

VIRGINIA

Bills Enacted: None.

Bills Pending: None.

WASHINGTON

Bills Enacted: None.

Bills Pending: 2015 S.B. 5805 (creates a volunteer conflict resolution and mediation program for neighborhood groups and schools, and creates a mediation training program for students); 2015 H.B. 1840 (addresses conflict resolution courses in schools); 2015 S.B. 5227 (creates policies and procedures for the management of international commercial arbitration agreements); 2015 H.B. 1070 (establishes the International Commercial Arbitration Act); 2015 H.B. 1122 (addresses the use of arbitration for dispatch operators of public employers); 2015 H.B. 1230 (permits the ordering of interest arbitration); 2015 H.B. 1601 (exempts arbitration from venue concerns in public work contracts); 2015 S.B. 5885 (provides safety enhancements for Western state hospital and eastern state hospital through binding interest arbitration); 2015 S.B. 6016 (mandates interest arbitration by statute).

WEST VIRGINIA

Bills Enacted: None.

Bills Pending: 2015 S.B. 37 (creates the Revised Uniform Arbitration Act); 2015 S.B. 372 (establishes mediation as an option for civil action).

No. 2]

State Legislative Update

381

WISCONSIN

Bills Enacted: None.

Bills Pending: None.

WYOMING

Bills Enacted: None.

Bills Pending: 2015 H.B. 107 (creates mediation and binding dispute resolution as an option under the Interstate Medical Licensure Compact,); 2015 S.F. 123 (creates nonbinding arbitration for firefighters).