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ILLINOIS STATE BAR ASSOCIATION

TRIAL BRIEFS

The newsletter of the Illinois State Bar Association's Section on Civil Practice & Procedure

"Physician" nets reasonable rate of $66.95 per hour for deposition

By Kimberly A. Davis, Momkus McCluskey LLC, Lisle, IL

Pursuant to Illinois Supreme Court Rule 204(c), a party requesting a nonparty physician deposition shall pay a "reasonable fee to a physician for the time he or she will spend testifying at any such deposition."[1] In *Montes v. Mai,*[2] the First District Appellate Court faced the questions of whether a treating chiropractor is a "physician" under Supreme Court Rule 204(a), whether a monetary sanction against a noncompliant subpoena recipient was proper, and whether a discovery deposition fee of $66.95 per hour is reasonable for a treating chiropractor.

The underlying lawsuit arose out of a motor vehicle accident between the parties. Fernando Perez, a chiropractor, treated plaintiff following the accident. Defendant issued a subpoena to Perez for his discovery deposition. In response, Perez' office ("the clinic") sent a letter to defense counsel asserting that "Dr. Perez's fee for Depositions is $550 per hour and must be paid in advance with a two-hour minimum," and that Perez was not available on the date and time on the subpoena.[3] Defense counsel offered Perez $300 per hour, with no advance or minimum payment.

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Arbitration primer for civil trial attorneys©

By Mark Rouleau, Rockford, Illinois

In the last decade we have seen a large number of cases removed from the arena of the courts to arbitration forums. This has in large part occurred not as part of a negotiated process between contracting parties who have mutually decided that it is in their best interests to resolve their disputes in an arbitration forum instead of the courts, rather it has repeatedly occurred as a result of boilerplate that has been inserted into one-sided, take-it-or-leave-it contracts. These contracts involve many ordinary day-to-day type transactions.

Arbitration clauses have been used in lease contracts,[1] credit card contracts,[2] warranty contracts,[3] motor vehicle financing agreements,[4] home remodeling contracts,[5] mortgage loan agreements,[6] rebate offers,[7] satellite television service agreements,[8] video rental agreements,[9] real estate purchase agreements,[10] wireless telephone service agreements,[11] long-distance telephone service agreements,[12] employment contracts,[13] computer purchase agreements,[14] software license agreements,[15] and the list goes on and on. Any contractual transaction can be the subject of mandatory arbitration. It has become commonplace in consumer goods and service transactions to include mandatory arbitration clauses coupled with waivers of class action relief.

The Federal Arbitration Act

The Federal Arbitration Act (FAA) applies to contracts affecting interstate commerce.[16] "Congress enacted the FAA to replace judicial indisposition to arbitration with a 'national policy favor-

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"Physician" nets reasonable rate of $66.95 per hour for deposition

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Perez refused. Perez' role in the lawsuit was limited to that of a subpoena respondent.

Defendant moved for compliance with the subpoena, and the court conducted an *in camera* inspection of the clinic's financial records. The trial court ruled that an hourly fee of $66.95 was reasonable, with no minimum or advance payment. Perez refused to comply with the subpoena for his discovery deposition and requested leave to appeal pursuant to Illinois Supreme Court Rule 304(a) since the trial court's ruling of $66.95 per hour was "fundamentally unfair." The trial court denied Perez' request, and instead found him in contempt for refusing to honor the subpoena and fined him $50. Perez appealed the contempt order.[4]

On appeal, Perez argued that the hourly rate of $66.95 for his discovery deposition was unreasonable in light of the financial documentation provided to the Court. He further argued that the trial court erred in handing down the contempt order, since Perez claimed his non-compliance with the subpoena was made in good faith.

Initially, the appellate court analyzed whether a chiropractor is a "physician" pursuant to S.C.R. 204(c).[5] In addressing this question of first impression in Illinois, the court evaluated the plain meaning of the terms "physician" and "medicine," and considered an Illinois Supreme Court decision in *Vuagniaux v. Department of Professional Regulation*, which addressed the composition of a review board in a Medical Practice Act violation case. In *Vuagniaux*, the Illinois Supreme Court commented that, while once ostracized by certain members of the medical profession, chiropractors possess "the same professional stature as those holding degrees as doctors of medicine or doctors of osteopathy. All are regarded as physicians."[6] As such, chiropractors are physicians under S.C.R. 204(a), and are entitled to a reasonable fee to compensate them for their time testifying.

In reviewing the trial court's order that $66.95 per hour was a reasonable deposition fee, the appellate court recognized that S.C.R. 204 does not define the basis for determining reasonable fees and that the standard of review was abuse of discretion.[7] The financial records reviewed by the trial court included an analysis of patient services provided by the clinic during a six-month period, dates worked by Perez for that period, a copy of the clinic's corporate income tax return for 2007, and related documents. The record was devoid of Perez' W-2 for 2007 and the income of the clinic was larger than Perez' personal income. Perez argued that the $550 per hour fee was based upon his income. Defendant argued that Perez' income was $139,000 per year, or approximately $66 per hour when divided by 52 weeks and 40 hours per week.

The court passed on the opportunity to define a reasonableness formula. Instead, it noted that there exist a "myriad of ways" by which to calculate a fair and reasonable deposition fee for a physician and, when reviewed by this "admittedly deferential standard," the appellate court affirmed the trial court's determination of $66.95 per hour for Perez' time.

Perez further argued that the mandates of pre-payment and two-hour minimum were appropriate, and thus the trial court erred in excusing them. As discussed above, S.C.R. 204(c) states that a physician shall be paid a reasonable fee "for the time he or she will spend testifying at any such deposition."[8] The Committee Comments note that said fee "should be paid only after the doctor has testified, and it should not exceed an amount which reasonably reimburses the doctor for the time he or she actually spent testifying at deposition."[9] As such, the appellate court also affirmed the trial court's denial of the additional fees and terms as demanded by Perez.

Finally, the sanction order was vacated, since the appellate court found that Perez' refusal to comply with the subpoena was made in good faith and because the issue of whether a chiropractor was a physician under S.C.R. 204 was a novel one.

Those of us who regularly practice personal injury litigation face hourly rate charges from physicians reaching upwards of $1,500, along with further demands including advance payment, two-hour-minimum fees, extra money for patient file review time, and strict cancellation mandates. This author urges that treating physicians commanding such fees and "extras" be taken to task on these inappropriate charges. ■

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1. S.C.R. 204

2. 2010 WL 682445, Ill. App. 1st Dist (February 25, 2010) No. 1-28-2774.

3. *Montes* at *1.

4. A civil contempt order with a monetary penalty obviates the requirement of a special finding contained in Illinois Supreme Court Rule 304(a).

5. Interestingly, neither party raised this issue on appeal.

6. *Montes* at *3, citing *Vuagniaux v. Department of Professional Regulation*, 208 Ill. 2d 173, 197, 802 N.E.2d 1156 (Ill. 2003).

7. An abuse of discretion is found only where the reviewing court determines that no reasonable person would rule as the trial court did. *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 331, 887 N.E.2d 878 (1st Dist. 2008).

8. S.C.R. 204

9. *Montes* at *5, quoting 166 Ill. 2d R. 204(c).

Arbitration primer for civil trial attorneys©

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ing [it] and plac[ing] arbitration agreements on equal footing with all other contracts.'"[17]

To accomplish this purpose, the FAA states that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[18] Additionally, a court is required stay its suit or proceedings upon being satisfied that the issue before it is arbitrable under the agreement.[19] The court must enter an order directing the parties to proceed to arbitration in accordance with the terms of the agreement if there has been a "failure, neglect, or refusal" to comply with the arbitration agreement.[20] Furthermore, under the FAA a court may vacate an arbitration award only if (1) "procured by corruption, fraud, or undue means;" (2) "evident partiality" is present in one or more of the arbitrators; (3) "the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or (4) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[21] It should be noted that the Uniform Arbitration Act as adopted in Illinois adds an additional and fifth ground: "[t]here was no arbitration agreement and the issue was not adversely determined in proceedings [in the Circuit Court to compel or stay arbitration] and the party did not participate in the arbitration hearing without raising the objection."[22]

Correspondingly, an arbitration award may be modified only (1) where there is an "evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award"; (2) "[w]here the arbitrators have awarded upon a matter not submitted to them"; or (3) "the award is imperfect in [a] . . . form not affecting the merits,"[23] and then, the court may only modify or correct the award "so as to effect the intent thereof and promote justice between the parties."[24] The FAA limits the scope of judicial review to those specific categories of extreme arbitral conduct and does not "authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error."[25] The Court of Appeals for the Seventh Circuit has said that if the parties desire more scrutiny than the Federal Arbitration Act, 9 U.S.C. §§ 10-11 (1994), authorizes courts to apply, "they can contract for an appellate arbitration panel to review the arbitrator's award[;] they cannot contract for judicial review of that award."[26] The Court of Appeals for the Fifth Circuit made it clear that state standards of review only apply where the parties expressly state in their contract that such rules apply.[27] Illinois courts have taken a different view on this subject holding that a general choice of law provision requiring Illinois law to be applied to the contract is sufficient to invoke the Illinois Arbitration Act thereby supplanting the FAA.[28]

Under section 2 of the FAA, a written agreement to submit an issue to arbitration is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Where a contract affecting interstate commerce contains an arbitration provision and does not provide otherwise, the FAA requires the question of the contract's validity as a whole to be submitted to arbitration.[29] Under the FAA, issues relating only to the validity of the arbitration provision are generally subject to a judicial determination.[30] Where one party challenges the validity of the contract as a whole but does not expressly dispute the validity of an arbitration clause within it, that clause is severed and generally serves as clear, unmistakable evidence that the parties intended to arbitrate any dispute over the contract's validity.[31] Suits brought upon issues falling within section 2 must be stayed until after "arbitration has been had in accordance with the terms of the agreement."[32]

Abuses Attendant to Boilerplate Arbitration & Forum Selection Clauses

Given the power of the dominant parties to impose, in many of these contracts, arbitration in a forum of their choice, coupled with the extreme deference given to arbitration decisions, the circumstances lend themselves to abuse as can be seen by the recent allegations involving the National Arbitration Forum (NAF).[33] A press release regarding the recent case filed by the Minnesota Attorney General states:

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> The company tells consumers, the public, courts, and the government that it is independent and operates like an impartial court system. In fact, it has extensive ties to the collection industry--ties that it hides from the public.
>
> The lawsuit alleges that the National Arbitration Forum, while holding itself out as impartial, works behind the scenes-alongside creditors and against the interests of ordinary consumers to convince credit card companies and other creditors to insert arbitration provisions in their customer agreements and then appoint the Forum to decide the disputes. The lawsuit alleges that the Forum pays commissions to executives whose job it is to convince creditors to put mandatory arbitration clauses in their customer agreements. The suit alleges that the Forum does this to generate arbitration filings in the Forum and hence revenue for itself.[34]

On July 19, 2009, only several days after suit was filed by the State of Minnesota, the National Arbitration Forum (FORUM)[35] voluntarily ceased administering consumer arbitration disputes as part of a settlement agreement with the Minnesota Attorney General.[36] The Minnesota suit alleged that JP Morgan Chase, Citigroup, Bank of America, American Express and Discover Card used NAF.[37] In an interview with BusinessWeek, Swanson [Minnesota Attorney General] says that showing the alleged cross ownership between the collection law firms, the NAF, and Accretive gave her the leverage to force NAF out of consumer arbitration."[38] The American Arbitration Association has placed a moratorium on the administration of any new consumer debt collection arbitration programs where the claims are initiated by creditors until it has completed a review of its consumer due process protocols and made any necessary revisions.[39]

Arbitration clauses are frequently coupled with forum selection, choice of law, and waivers of rights to pursue actions as class actions. Where this happens in a consumer contract, the terms of resolving disputes have almost always been stacked in favor of the seller or service provider. By setting the forum in which the disputes are to take place while eliminating class relief, the drafter of the contract attempts to insulate himself from consumer lawsuits.[40] The overwhelming majority of such contracts are boilerplate prepared by the seller or service provider on a bulk basis over which there is no real opportunity to negotiate. Such contracts are "contracts of adhesion."[41] Venue and arbitration are frequently the subject of claims of unconscionability as well as clauses that expressly prohibit (waive) class action arbitration.

Clauses that establish venue for consumer suits in locales or venues other than that of the consumer are attempts to circumvent the Fair Debt Collection Practices Act,[42] the Federal Trade Commission Act,[43] Constitutional Due Process Clauses, and consumer expectations. Often times they are designed so as to preclude actions by consumers[44] by eliminating possible remedies[45]

Long ago the Federal Trade Commission found that the use of long arm jurisdiction to sue distant mail order customers on delinquent credit accounts violated public policy and was injurious to consumers and hence constituted an unfair trade practice, where frequently the suits involved relatively small amounts and the choice of retaining local counsel or traveling to the forum was virtually foreclosed by economic considerations. "There the Commission was persuaded by an analogy to the due-process clause that it was unfair for the firm to bring collection suits in a forum that was unreasonably difficult for the defendants to reach."[46] The American Arbitration Association has recognized this due process issue and has incorporated a rule in its Consumer Due Process Protocol ("Consumer Protocol") requiring the locale of any hearing to be held in a reasonably convenient location.[47] The AAA will not administer an arbitration that does not materially comply with the provisions of the Consumer Protocol.[48] The AAA reviews all arbitration clauses contained in consumer contracts to determine if they meet the AAA's requirements for due process.[49] The author knows of several cases in which the AAA has refused to arbitrate consumer claims where the clause fixes the loca-

tion of the arbitration in a distant forum. Under the Fair Debt Collection Practices Act, one federal court certified a class composed of defendants subject to distant forum abuse.[50]

[F]orum selection clauses are valid and should be given effect unless enforcement of the clause would be unreasonable.[51] Numerous cases have considered forum selection clauses valid in click-wrap and shrink-wrap contracts for software license purchase contracts.[52] Given the obvious problems that can arise due to the repeat business that many large sellers of goods and services can have with a specific forum or arbitrator, it is very important that the consumer carefully examine the possibility of challenging the forum selected by the company who drafted the boilerplate agreement.

Class Arbitration

Many consumer actions lend themselves to class action counterclaims due to the business practices, products or services of the party who prepared the boilerplate agreement requiring arbitration. In *Green Tree Financial Corp v. Bazzle*, 539 US 444, 123 S Ct 2402 (2003), the United States Supreme Court held that joinder of multiple parties in a single arbitration proceeding as a class is a decision an arbitrator—not the courts—should make when no provision expressly prohibits class action in arbitration.[53] The United States Supreme Court "granted *certiorari to determine whether this holding is consistent with the FAA*.[54] The Supreme Court held that limited "gateway" issues, e.g., whether the parties have an arbitration agreement or whether the agreement even applies, are for the courts. On the other hand, the question of whether class arbitration is permitted relates to "the kind of arbitration proceeding" the parties agreed to and is a matter of contract interpretation for the arbitrator.[55] Significantly, the Supreme Court ruled this latter question is "a matter of state law."[56]

Most importantly the Supreme Court's decision undercuts any notion that class-wide arbitration is inconsistent with and barred by the FAA unless explicitly allowed in the parties' agreement. For if class-wide arbitration were inconsistent and barred, it would not matter who decides the issue of contract construction. One would simply never get to that question. One must first conclude that the class-wide arbitration is permissible under the FAA before one gets to the questions of (a) whether the specific arbitration clause in issue permits it, and (b) who decides that issue as a matter of contract construction. In response to Green Tree, the American Arbitration Association prepared Supplementary Rules For Class Arbitration.[57]

In a case currently pending before the Supreme Court,[58] a case involving international maritime contracts calling for arbitration which were silent on the issue of whether class arbitration may proceed in a maritime contract, a panel of arbitrators, charged with deciding whether that silence permitted or precluded class arbitration, issued an award finding that the contracts permit class arbitration. Stolt-Nielsen filed a petition with the United States District Court seeking to vacate the award, which the District court granted finding that the award was made in manifest disregard of the law. The Appellate Court for the Second Circuit reversed the District Court reinstating and affirming the finding that the matter could go forward on a class-wide basis.[59] Oral Arguments took place on December 9, 2009, and a decision is expected this court term.

The Illinois Supreme Court has held that a clause prohibiting class action arbitration was unenforceable based on the cumulative effect of both procedural unconscionability and substantive unconscionability.[60] Our courts have held that an arbitrator must determine whether the arbitration clause permits class arbitration where the clause is otherwise silent on the subject.[61] In a second view of the same case the court held that where the arbitration clause was silent, neither expressly permitting nor expressly denying arbitration on a class-wide basis the clause is not unconscionable where the company, DirecTV, who drafted the contract pays all of the fees and costs of arbitration in the AAA.[62] The court ordered the case to proceed in arbitration on a class-wide basis.[63] If there is a severability clause in the contract and it bars the consumer from effectively pursuing a statutory right provided by the public policy[64] of the State of Illinois, such as the "Consumer Fraud and Deceptive Business Practices Act"[65] the court will likely sever the unconscionable provision barring class proceedings and order arbitration on a class-wide basis.[66] If the expenses of the class arbitration can be placed upon the company and not the consumers, there are many advantages to proceeding with class actions in arbitration. ■

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1. Residential lease; *Onni v. Apartment Inv. and Management Co.*, (Ill.App. 2 Dist. 2003) 801 N.E.2d 586, 344 Ill.App.3d 1099; commercial lease *Northeast Illinois Regional Commuter R.R. Corp. v. Chicago Union Station Co.*, 358 Ill.App.3d 985, 994-95, 832 N.E.2d 214 (2005)

2. *Rosen v. SCIL, LLC,* (Ill.App. 1 Dist. 2003) 799 N.E.2d 488, 343 Ill.App.3d 1075.

3. *Carr v. Gateway, Inc.*, (Ill.App. 5 Dist. 2009) 2009 WL 4263796.

4. *Ford Motor Credit Co. v. Cornfield*, (Ill.App. 2 Dist. 2009) 2009 WL 3791628.

5. *Artisan Design Build, Inc. v. Bilstrom*, (Ill.App. 2 Dist. 2009) 2009 WL 3052362.

6. *Keefe v. Allied Home Mortg. Corp.*, (Ill.App. 5 Dist. 2009) 912 N.E.2d 310, 393 Ill.App.3d 226.

7. *Wigginton v. Dell, Inc.*, (Ill.App. 5 Dist. 2008) 890 N.E.2d 541, 382 Ill.App.3d 1189.

8. *Bess v. DirecTV, Inc.*, (Ill.App. 5 Dist. 2008) 885 N.E.2d 488, 381 Ill.App.3d 229.

9. *Cohen v. Blockbuster Entertainment, Inc.*, (Ill. App. 1 Dist. 2007) 878 N.E.2d 132, 376 Ill.App.3d 588.

10. *Spencer v. Ryland Group, Inc.*, (Ill.App. 1 Dist. 2007) 865 N.E.2d 301, 372 Ill.App.3d 200.

11. *Kinkel v. Cingular Wireless LLC*, (Ill. 2006) 857 N.E.2d 250, 223 Ill.2d 1.

12. *Ragan v. AT & T Corp.*, (Ill.App. 5 Dist. 2005) 824 N.E.2d 1183, 355 Ill.App.3d 1143.

13. *Melena v. Anheuser-Busch, Inc.,* (Ill. 2006) 847 N.E.2d 99, 219 Ill.2d 135.

14. *Hubbert v. Dell Corp.,* (Ill.App. 5 Dist. 2005) 835 N.E.2d 113, 359 Ill.App.3d 976.

15. Frequently referred to as "click-wrap" agreements, which appear at the beginning of the installation of software and requires the user to consent to the terms before continuing. *Davidson & Assoc., Inc. v. Internet Gateway,* 334 F.Supp.2d 1164, 1176 (E.D.Mo.2004), Unlike shrinkwrap agreements which are included in the package with the purchased product and available to the purchaser only after opening the package. *Davidson & Assoc., Inc. v. Internet Gateway*, 334 F.Supp.2d 1164, 1176 (E.D.Mo.2004).

16. 9 U.S.C. § 1 (2000); *Allied-Bruce Terminix Co. v. Dobson,* 513 U.S. 265, 269, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

17. *L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396, 1402 (2008). quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)

18. 9 U.S.C. § 2

19. Id. § 3.

20. Id. § 4.

21. Id. § 10.

22. 710 ILCS 5/2

23. Id. § 11. See also 710 ILCS 5/13

24. Id. § 11.

25. *Hall St. Assocs.*, 128 S. Ct. at 1403–04. However see *Hawrelak v. Marine Bank, Springfield*, App. 4 Dist.2000, 249 Ill.Dec. 241, 316 Ill.App.3d 175, 735 N.E.2d 1066, appeal denied 252 Ill.Dec. 77, 192 Ill.2d 688, 742 N.E.2d 327, on remand 2001 WL 35947125.

26. *Chicago Typographical Union v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991).

27. *Action Industries v. U.S. Fidelity & Guar. Co.*, 358 F.3d 337 (5th Cir., 2004). One of the parties contended that parties' intent to replace the FAA's vacatur standard could be gleaned from the agreement's general choice-of-law provision, which provided that Tennessee law governed contractual execution and performance. The court disagreed citing to *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), where the Supreme Court held that a

contract's choice-of-law provision did not evince the parties' clear intent to opt out of the FAA default rules. The court stated: "In the wake of *Mastrobuono*, this Court has held that a choice-of-law provision is insufficient, by itself, to demonstrate the parties' clear intent to depart from the FAA's default rules.

28. *Tortoriello v. Gerald Nissan of North Aurora, Inc.,* (Ill.App. 2 Dist. 2008) 882 N.E.2d 157, 379 Ill. App.3d 214.

29. *Prima Paint Corp. v. Flood & Conklin Mfg.Co.,* 388 U.S. 395, 404, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)

30. *Ibid.*

31. See, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

32. 9 U.S.C. § 3 (2000).

33. <http://www.adrforum.com/>

34. Minnesota Attorney General, Press Release July 14, 2009, ATTORNEY GENERAL SWANSON SUES NATIONAL ARBITRATION COMPANY FOR DECEPTIVE PRACTICES -Minnesota Company Is Listed In Millions of Fine Print Consumer Contracts Nationwide.

35. The self-professed "largest U.S. administrator of consumer arbitrations" NAF Press Release July 19, 2009 <http://www.adrforum.com/newsroom.aspx?itemID=1528>

36. NAF Press Release July 10, 2009, National Arbitration Forum to Cease Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges <http://www.adrforum.com/newsroom.aspx?itemID=1528>

37. *BusinessWeek*, July 19, 2009, "Big Arbitration Firm Pulls Out of Credit Card Business," <http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html>

38. *Id.*

39. Testimony Of Richard W. Naimark, On behalf of the American Arbitration Association before the Domestic Policy Subcommittee Oversight and Government Reform Committee Wednesday, July 22, 2009, <http://www.adr.org/si.asp?id=5770>

40. See *Comb v. PayPal, Inc.* (N.D. Cal. 2002) 218 F.Supp 2d 1165, 1177.

41. Professor Corbin, in speaking of adhesion contracts, says:

> 'Adhesion contracts' include all 'form contracts' submitted by one party on the basis of this or nothing. Ehrenzweig (Ehrenzweig, "Adhesion Contracts in the Conflict of Laws, 53 Col.L.Rev. 1073 (1953) defines them as 'agreements in which one party's participation consists in his mere "adherence," unwilling and often unknowing, to a document drafted unilaterally and insisted upon by what is usually a powerful enterprise.' He includes the following classes: Insurance Policies; Commercial Loan Contracts; Transportation Contracts; Employment Contracts. *Corbin on Contracts,* § 1446.

Corbin on Contracts, § 559A through 559I (Kaufman supp., 1980) contains a rather extensive discussion of contracts of adhesion which is apt and instructive. A contract of adhesion is generally found under circumstances in which a party has, in effect, no choice but to accept the contract offered, often where the buyer does not have the opportunity to do comparative shopping or the organization offering the contract has little or no competition. See *Williams v. Illinois State Scholarship Comm'n*, 139 Ill.2d 24, 72, 563 N.E.2d 465, 487 (1990).

42. 15 U.S.C. section 1692i(a) states,

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or(B) in which such consumer resides at the commencement of the action.

43. 15 U.S.C. § 45

44. See *Comb v. PayPal, Inc.* (N.D. Cal. 2002) 218 F.Supp.2d 1165

45. For example, injunctive relief. *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 2006 WI 53 (Wis., 2006) but c.f. *Vascular and General Surgical Associates, Ltd. v. Loiterman,* App. 1 Dist.1992, 234 Ill.App.3d 1, 599 N.E.2d 1246, holding that arbitrator had authority to grant injunctive relief in connection with non-competition agreement between employer and former employer, where the agreement incorporated rules of the American Arbitration Association which state that arbitrators have the power to grant equitable relief and the agreement did not contain clear, express limitation needed to restrict arbitrator's authority.

46. FTC POLICY STATEMENT ON UNFAIRNESS Appended to International Harvester Co., 104 F.T.C. 949, 1070 (1984). See 15 U.S.C. § 45(n). Federal Trade Commission Washington, D.C. 20580 December 17, 1980 <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>

47. American Arbitration Association Consumer Due Process Protocols, <http://www.adr.org/sp.asp?id=22019#PRINCIPLE_7._REASONABLY_CONVENIENT_LOCATION>

48. Testimony Of Richard W. Naimark, On behalf of the American Arbitration Association before the Domestic Policy Subcommittee Oversight and Government Reform Committee Wednesday, July 22, 2009, <http://www.adr.org/si.asp?id=5770>

49. AAA Review of Consumer Clauses <http://www.adr.org/si.asp?id=5649>

50. *Zanni v. Lippold*, 119 F.R.D. 32 (C.D. Ill. 1988)

51. See *Liebrand v. Brinker Restaurant Corporation*, G039017 (Cal. App. 6/18/2008), However, if the "place and manner" restrictions of a forum selection provision are "unduly oppressive" (Bolter v. Superior Court (2001) 87 Cal.App.4th 900, 909-910) or have the effect of shielding the stronger party from liability (*Comb v. PayPal, Inc*. (N.D. Cal. 2002) 218 F.Supp.2d 1165, 1177 (Comb)), then the forum selection provision is unconscionable.

52. The majority approach recognizes that the contract is formed when the purchaser fails to return a product, under the presumption that the seller is master of the offer, and holds the purchaser bound by any terms included in the packaging of the product. *Ramette v. AT&T Corp*., 351 Ill.App.3d 73, 812 N.E.2d 504, 513 (2004); *Hill v. Gateway 2000, Inc*., 105 F.3d 1147, 1150 (7th Cir.1997), cert. denied, 522 U.S. 808, 118 S.Ct. 47, 139 L.Ed.2d 13 (1997); *ProCD, Incorporated v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir.1996); The minority approach looks to the conditions surrounding the order of the product; ascertains when the contract was formed; and then applies § 2-207 of the U.C.C. to determine if the terms included in the packaging are integrated into the contract. See, e.g., *Defontes v. Dell Computers Corp*., 2004 WL 253560, 6 (R.I.Super.2004); *Klocek v. Gateway, Inc*., 104 F.Supp.2d 1332, 1338-41 (D.Kan.2000).

Cases involving on-line click-wrap agreements or licensing agreements where it was clear that a party assented to the terms before continuing the purchase or installation of software. *Davidson & Associates, Inc. v. Internet Gateway*, 334 F.Supp.2d 1164, 1176 (E.D.Mo.2004) [Software end user license agreement was enforceable.]; *DeJohn v. The. TV Corp. Int'l,* 245 F.Supp.2d 913, 918 (N.D.Ill.2003) [Click-wrap agreement which user had to assent to terms before the product could be obtained upheld.]; *Hughes v. McMenamon*, 204 F.Supp.2d 178, 181 (D.Mass.2002) [Click-wrap agreement containing forum selection clause valid.].

53. *Green Tree*, 123 S.Ct at 2407

54. 539 U.S. at 447 (emphasis added)

55. Id. at 452.

56. Id. at 447.

57. <http://www.adr.org/sp.asp?id=21936>

58. *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp*. (08-1198)

59. Decision below <http://www.ca2.uscourts.gov/decisions/isysquery/e2c9cb76-e92d-467e-a197-dbb7973349be/3/doc/06-3474-cv_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/e2c9cb76-e92d-467e-a197-dbb7973349be/3/hilite/>

60. *Kinkel v. Cingular Wireless, LLC*, 223 Ill.2d 1, 306 Ill.Dec. 157, 857 N.E.2d 250 (2006); see also *Keefe v. Allied Home Mortg. Corp.*, (Ill.App. 5 Dist. 2009) 912 N.E.2d 310, 332 Ill.Dec. 124.

61. *Bess v. DirecTV, Inc*., 351 Ill.App.3d 1148, 1153-54, 815 N.E.2d 455, 459-60 (2004) (Bess I).

62. *Bess II (Bess v. DirecTV, Inc.*, (Ill.App. 5 Dist. 2008) 885 N.E.2d 488, 381 Ill.App.3d 229).

63. *Id.*

64. Courts around the nation are holding that "class certifications to enforce compliance with consumer protection laws are desirable and should be encouraged." See, e.g., *Ballard v. Equifax Check Servs, Inc.,* 186 F.R.D. 589, 600 (E.D. Cal. 1999); see also, e.g., *D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 458 (E.D.N.Y. 1996) Class actions are often the most suitable method for resolving suits to enforce compliance with consumer protection laws because the awards in an individual case are usually too small to encourage the lone consumer to file suit," *Zanni v. Lippold*, 119 F.R.D. 32, 36 (C.D. Ill. 1988).

65. 815 ILCS 505/1

66. *Bess v. Directv, Inc., (Bess II)* 885 N.E.2d 488, 381 Ill. App. 3d 229 (Ill. App., 2008); citing to *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 444, 126 S.Ct. 1204, 1208, 163 L.Ed.2d 1038, 1042 (2006); and *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967).

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