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ILLINOIS STATE BAR ASSOCIATION

Federal Civil Practice

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

High court allows class arbitration award to stand

By Michael R. Lied, Howard & Howard Attorneys PLLC, Peoria

In a recent decision, the U.S. Supreme Court upheld an arbitrator who determined that a contract between the parties authorized class arbitration. The case turned on the parties' agreement to allow the arbitrator to make that decision and the longstanding judicial deference to arbitration awards.

John Sutter entered into a contract with Oxford Health Plans, a health insurance company. Sutter agreed to provide medical care to members of Oxford's network. Several years later, Sutter sued against Oxford in New Jersey Superior Court on behalf of himself and a proposed class of other New Jersey physicians under contract with Oxford.

Oxford moved to compel arbitration of Sutter's claims, relying on the following clause in the contract:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.

The state court granted Oxford's motion. The parties agreed that the arbitrator should decide

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Judicial profile: John J. Tharp, Jr.

By Kate Kelly

Over the past several years, the Federal Civil Practice Committee has profiled new judges so that our members can become familiar with them. This issue, we are pleased to introduce you to Judge John J. Tharp, Jr.

Judge Tharp has been on the bench for almost a year, after being nominated on November 10, 2011 ("the Marine Corps Birthday," he notes) and confirmed by the Senate in May of 2012. His nomination by President Obama was his second nomination; he was also nominated by President Bush in July 2008, but the nomination was not acted upon by the Senate before the November election that year. Judge Tharp graduated from Duke University in 1982, where he proudly served in Naval ROTC. After graduation, Judge Tharp served in the United States Marine Corps for five years, reaching the rank of Captain. He received his law degree magna cum laude from Northwestern University School of Law in 1990.

After law school, Judge Tharp served as a law clerk to Judge Joel Flaum of the U.S. Court of Appeals for the Seventh Circuit. Judge Tharp then worked for Kirkland and Ellis for a few months before joining the United States Attorney's Office for the Northern District of Illinois. He served as an Assistant United States Attorney from 1992 to 1997, when he joined Mayer Brown.

While at Mayer Brown, he handled both civil and criminal matters, and he was co-chair of the Securities Litigation and Enforcement Practice. He was a partner at Mayer Brown until his appointment last year to the bench.

Judge Tharp handled a wide variety of cases in private practice, but has encountered many

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whether their contract authorized class arbitration, and he determined that it did.

The arbitrator reasoned that the clause required arbitration of "the same universal class of disputes" that it barred the parties from bringing "as civil actions" in court. The intent of the clause was to vest in the arbitration process everything that was prohibited from going to court.

Oxford then filed a motion in federal court to vacate the arbitrator's decision on the ground that he had exceeded his powers under §10(a)(4) of the Federal Arbitration Act ("FAA"). The district court denied the motion, and the Court of Appeals for the Third Circuit affirmed.

The Supreme Court held in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010) that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Importantly, the parties in *Stolt-Nielsen* had stipulated that they had never reached such an agreement on class arbitration. The Supreme Court therefore vacated the arbitrators' decision approving class proceedings because, in the absence of such an agreement, the arbitrators had simply imposed their own view of sound policy.

Oxford asked the arbitrator to reconsider his decision on class arbitration in light of *Stolt-Nielsen*. The arbitrator issued a new opinion holding that *Stolt-Nielsen* had no effect on the case because the agreement did authorize class arbitration.

Oxford returned to federal court a second time, again seeking to vacate the arbitrator's decision under the FAA. The district court again denied the motion, and the Third Circuit affirmed. The case then went before the Supreme Court.

Under the FAA, courts may vacate an arbitrator's decision only in very unusual circumstances. Oxford sought review of the award under § 10(a)(4) of the FAA, which authorizes a federal court to set aside an arbitral award where the arbitrator exceeded his powers.

Because the parties bargained for the arbitrator's construction of their agreement, however, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its merits.

The sole question for the Supreme Court was whether the arbitrator even arguably interpreted the parties' contract, not whether he got its meaning right.

The Supreme Court pointed out that the case would be different if Oxford had argued below that the availability of class arbitration is a "question of arbitrability." Those questions—which include certain "gateway" matters, such as whether parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy—are presumptively for courts to decide.

Oxford chose arbitration, and it had to live with that choice. The arbitrator provided an interpretation of the contract resolving that disputed issue. Because he did, he did not exceed his powers. Oxford was not entitled to relief. *Oxford Health Plans LLC v. Sutter*, ___ U.S. ____, 2013 WL 22459522 (2013).

It is worth pointing out that there is some judicial distaste for parties who choose arbitration and then seek court review after they receive an unfavorable decision. As a recent example, *see Johnson Controls, Inc. v. Edman Controls, Inc.*, 712 F.3d 1021 (7th Cir. 2013) ("We note, however, that challenges to commercial arbitration awards bear a high risk of sanctions. *See Flexible Manufacturing [v. Super Prods. Corp.,* 86 F.3d 96 (7th Cir. 1996)] (imposing sanctions)).

Predictably, disputes over arbitration agreements and awards will continue. However, *Oxford Health Plans* gives the parties an opportunity to carefully draft arbitration agreements to prevent class arbitration. ■

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Judicial profile: John J. Tharp, Jr.

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new areas of the law since taking the bench. Employment, ERISA, and § 1983 actions make up a big portion of his new caseload.

Of Judge Tharp's caseload of over 375 cases, about one-half were inherited by way of random reassignment from other judges and the remainder have come to him by way of random assignment of new cases. The most difficult challenge, he says, is "keeping up!" With two new cases a day on average being assigned to his docket, he feels "like a hamster on a wheel; you have to keep running or fall off." To juggle it all, Judge Tharp has three hard-working and efficient law clerks, one a "career clerk," and two who will serve one-year terms.

So far, Judge Tharp has handled some of his settlement conferences, but he prefers to refer parties to the Magistrate Judges when they seek a settlement conference. He does not typically refer discovery supervision to Magistrate Judges, but if he refers a case for a settlement conference, he is likely also to refer discovery scheduling and supervision so that the Magistrate Judge has the flexibility to address discovery issues that may be affecting the parties' ability to settle the case.

Having presided over a few jury trials, Judge Tharp has not yet allowed jurors to ask questions, nor have litigants agreed to cameras in the courtroom. He borrowed from Judge Amy St. Eve's pretrial order ("stole it," he laughs) and thus does not follow the standard pretrial order. The judge has not yet had a case with significant e-discovery issues, but his practice as an attorney was steeped in e-discovery, so he is familiar with those issues.

Asked for hints from the other side of the bench, Judge Tharp noted that some attorneys don't see the forest for the trees; they tend to over-try cases by dwelling on minutia. He suggests "taking a step or two back; focus on the big points." He also finds that some attorneys miss court deadlines and ask for relief only *after* the deadline has passed; he does not subscribe to the "better to ask forgiveness than permission" school of litigating. He says it is not fair to the court, the other side, or to clients when parties ignore deadlines. He readily acknowledges the legitimate need for extensions sometimes, but *post hoc* relief is frowned upon in federal court.

Most revealing about Judge Tharp's judicial philosophy is his answer to a question posed during his nomination: What is the most important attribute of a judge, and do you possess it? He responded: "I would cite integrity as the most important attribute of a judge because it is a quality that encompasses many characteristics that a judge should possess, such as honesty, impartiality, humility and respect for the rule of law."

From attorneys, he expects professionalism. While he believes a judge should be respectful and even-tempered, a judge must call attention if there is an abuse of the process, a client, or an opposing party.

We welcome Judge Tharp to the bench and appreciate his time. ■

Chief Judge James F. Holderman's final "State of the Court" address

By Hon. James F. Holderman

On Wednesday, May 15, 2013, I presented my seventh and final "State of the Court" address. My seven-year term as chief judge of the United States District Court for the Northern District of Illinois expires July 1, 2013. Judge Ruben Castillo will take over as the court's chief judge on that date. By statute, no chief district judge's term can be extended or renewed if another judge is eligible to take on the responsibility. I reported, as I have for each of the last six years, that the state of the court remains "Good," at least through September 30, 2013, the end of the government's fiscal year, but that proposed further budget cuts and diminished funding may require a decrease in services in the future. In a nutshell, filings are up and funding is down.

Civil filings increased for the fifth straight year in 2012, finishing the year at 10,859. This is the highest total of civil case filings in 25 years, and is up 43% since 2006, when I became the chief judge. Among the categories of civil cases that saw the highest increase were those filed by pro se litigants, which were up 18.8% in 2012 (1101 cases) over 2011 (927 cases), and up 362.6% since 2006, when there were only 236 pro se civil cases filed. On the criminal side, the number of felony defendants indicted rose 4.3% in 2012 (940) over the 2011 (901) totals. This was, however, still below the 2010 total of 1,006.

Jury trials topped out in 2011 at 177 civil and criminal jury trials. In 2012 there were 168 jury trials in the district, nine fewer than 2011. Yet, the combined 2011 and 2012 annual jury trial totals represent the largest number of jury trials in any two-year period as far back as records have been kept on this point in the court's history. In 2011, there were 212 total trials, 159 civil trials and 53 criminal trials, including bench trials. The total trials in 2012, including those to the bench, were 194, which were comprised of 120 civil trials and 74 criminal trials.

Patent case filings continued to rise in 2012 (247) over 2011 (239), as I had predicted at my address in May of 2012. This trend began when the district's Local Patent Rules went into effect in 2009. That year only 143 new patent cases were filed in the district.

Our district court continues to remain in the top 10 percent of federal district courts in efficiency with a median time to disposition of 6.5 months for civil cases. Our court also ranks second in the nation in the number of multi-district litigation cases being handled by our judges, with a total of 1,350 currently pending.

Previously contemplated furloughs of court staff and closures of the court have been avoided by the court not filling staff vacancies that have occurred. The Clerk's Office is now functioning with 67% of its allocated staff. Probation Department personnel, however, may have to each take up to three days of unpaid furloughs before the end of this fiscal year because of deficiencies in funding provided to that court unit.

New U.S. District Judges John Z. Lee and John J. Tharp, Jr., joined the court in 2012 and U.S. District Judge Thomas Durkin in January 2013. Eastern Division Magistrate Judges Mary Rowland and Daniel Martin were both sworn in on October 1, 2012, following the retirements of Magistrate Judges Nan Nolan and Morton Denlow on September 30, 2012. In the Western Division, Magistrate Judge Iain Johnston joined the court on May 4, 2013, after recalled Magistrate Judge P. Michael Mahoney's retirement. I appreciate the efforts and thank the two Magistrate Judge Merit Selection Panels we empanelled this year. Chicago Bar Association President Aurora Abella-Austriaco chaired the Panel in the Eastern Division and Chief Judge Val Gunnarsson of the 15th Judicial Circuit in Carroll County chaired the Panel in the Western Division. Both panels did excellent work. Additional judicial changes in the Western Division included Bankruptcy Judge Thomas Lynch replacing retiring Bankruptcy Judge Manuel Barbosa on January 1, 2013.

The Northern District of Illinois had three district judge vacancies at the beginning of 2012 and four vacancies at the beginning of 2013. As of the date I delivered the State of the Court address, May 15, 2013, there were three vacancies, all in the Eastern Division. I appreciate the cooperative efforts of Senators Dick Durbin and Mark Kirk to fill this court's vacancies as promptly as politically possible. President Obama, on April 30, 2013, nominated two Chicago attorneys, Sara Ellis of Schiff Hardin and Andrea Wood of the SEC, for two of the three vacancies.

I thank all of the judges, court staff, and members of the bar for their support during my term as chief judge, which spanned from July 1, 2006 through June 30, 2013. During that time a total of eight district judges, more than a third of the current active district judges, joined the court. Also during my time as chief judge, a total of six new magistrate judges, which is more than one-half of our court's active magistrate judges, came on board. I look forward to the bright future of the court because of the excellent new judges who have joined an already outstanding group of jurists.

Having known Judge Ruben Castillo for many years, back to when he was an assistant U.S. attorney, I know he will be an outstanding leader and an outstanding chief judge. The court is in good hands as we face the challenges ahead. ■

Upcoming CLE programs

To register, go to www.isba.org/cle or call the ISBA registrar at 800-252-8908 or 217-525-1760.

July

Tuesday, 7/2/13- Teleseminar—Portability of the Estate Tax Exemption: Planning Compliance and Drafting Issues. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/9/13- Teleseminar—Real Estate Management Agreements. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/9/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST.

Thursday, 7/11/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST.

Thursday, 7/11/13- Teleseminar—Corporate Governance for Nonprofits. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/16/13- Teleseminar—Health Care Issues in Estate Planning. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 7/17/13- Webinar (MCLE Credit Uncertain)—Business Building Strategies for Lawyers: Using Technology, Finding Clients, Getting Referrals. Presented by the Illinois State Bar Association and The Rainmaker Institute. 12-1.

Thursday, 7/18/13- Teleseminar—Managing Employee Leave. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/23/13- Teleseminar—Private Placements for Closely Held Businesses, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 7/24/13 – Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 3:00 – 4:00 p.m. CST.

Wednesday, 7/24/13- Teleseminar—Private Placements for Closely Held Businesses, Part 2. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 7/30/13- Teleseminar—Attorney Ethics in Real Estate Practice. Presented by the Illinois State Bar Association. 12-1.

August

Tuesday, 8/6/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Tuesday, 8/6/13- Teleseminar—UCC Article 9 Update. Presented by the Illinois State Bar Association. 12-1.

Thursday, 8/8/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Tuesday, 8/13/13- Teleseminar—Asset Protection in Estate Planning. Presented by the Illinois State Bar Association. 12-1.

Thursday, 8/15/13- Teleseminar—Ethics, Virtual Law Offices and Multi-Jurisdictional Practice. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/20/13- Teleseminar—Understanding the Law of Debt Collection for Businesses, Part 1. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/21/13- Teleseminar—Understanding the Law of Debt Collection for Businesses, Part 2. Presented by the Illinois State Bar Association. 12-1.

Wednesday, 8/21/13 – Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Thursday, 8/22/13- Teleseminar—Outsourcing Agreements: Structuring and Drafting Issues. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 8/27/13- Teleseminar—Buying/ Selling LLC and Partnership Interests. Presented by the Illinois State Bar Association. 12-1.

Thursday, 8/29/13- Teleseminar—Mixed Use Developments in Real Estate: Planning and Drafting Issues. Presented by the Illinois State Bar Association. 12-1.

September

Thursday, 9/5/13- Teleseminar—Generation Skipping Transfer Tax Planning. Presented by the Illinois State Bar Association. 12-1.

Monday, 9/9/13- Chicago, ISBA Chicago Regional Office—ISBA Basic Skills Live for Newly Admitted Attorneys. Complimentary program presented by the Illinois State Bar Association. 8:55-5:00.

Tuesday, 9/10/13- Teleseminar—Choice of entity for Real Estate. Presented by the Illinois State Bar Association. 12-1.

Tuesday, 9/10/13 – Webinar—Intro to Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Thursday, 9/12/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 10:00 – 11:00 a.m. CST.

Thursday, 9/12/13- Teleseminar—UCC 9: Fixtures, Liens, Foreclosures and Remedies. Presented by the Illinois State Bar Association. 12-1.

Thursday, 9/12/13- Chicago, ISBA Regional Office—Trial Practice Series: The Trial of a Retaliation Case. Presented by the ISBA Labor and Employment Section. 8:55-4:15.

Monday, 9/16-Friday, 9/20/13 - Chicago, ISBA Regional Office—40 Hour Mediation/Arbitration Training. Presented by the Illinois State Bar Association. 8:30-5:45 daily. ■

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