Journal of Dispute Resolution

Volume 2002 | Issue 2 Article 9

2002

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Recommended Citation

Jamie Hansen, Daniel L. Massey, Dustin C. Read, and Natalie A. Voris, *Recent Developments: The Uniform Arbitration Act*, 2002 J. Disp. Resol. (2002)
Available at: https://scholarship.law.missouri.edu/jdr/vol2002/iss2/9

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STUDENT PROJECT

Recent Developments: The Uniform Arbitration Act

I. SECTION 1: VALIDITY OF ARBITRATION AGREEMENTS

Many states have adopted the Uniform Arbitration Act[1] and retain a strong preference for resolving disputes through arbitration. As a result of this strong preference, doubts regarding arbitration agreements are generally resolved in favor of arbitration. However, favoritism toward arbitration is sometimes curbed by the fact that most courts hold that an agreement to arbitrate is a contract and subject to the same limitations and privileges imposed on other agreements. This pattern of courts applying contract law to arbitration agreements is consistent with Section 1 of the UAA, which states that an arbitration agreement is valid, enforceable, and irrevocable so long as it does not violate the laws of contract.[2]

A. Scope of the Arbitration Agreement

In *Breaker v. Corrosion Control Corp.*,[3] the Colorado Court of Appeals decided several issues relating to the validity of an arbitration clause contained in a purchase agreement.[4] The plaintiff was the primary stockholder of Elizamy, a business that designed, manufactured, and distributed flanges and other gaskets.[5] Elizamy and the plaintiff entered into a purchase agreement with the defendants pursuant to which Elizamy agreed to transfer all of its assets to defendants.[6] The purchase agreement contained an arbitration clause,[7] and obligated defendants to enter into an employment agreement with the plaintiff.[8] After the purchase agreement was executed, the plaintiff and defendants entered into an employment agreement that did not contain an express provision for arbitration.[9] Rather, it provided that all

1. U.A.A.
2. U.A.A. § 1 (1997).
3. *Breaker v. Corrosion Control Corp.*, 23 P.3d 1278 (Colo. App. 2001).
4. *Id.* at 1281-82.
5. *Id.* at 1281.
6. *Id.* The plaintiff was made a party to the agreement to reflect that he had personally made certain representations and warranties to the defendant and to bind him to certain obligations respecting future receipt by Elizamy or by him of capital stock in defendants. *Id.*
7. The arbitration clause provided that "[a]ny controversy or claim arising out of or relating to this Agreement, or breach thereof, shall be settled by arbitration." *Id.* In addition, the purchase agreement did not include any express agreement not to disclose information respecting Elizamy's or defendants' business to other parties. *Id.*
8. *Id.* The employment agreement was substantially in the same form as a document attached to the purchase agreement. *Id.* Unlike the purchase agreement, the employment agreement expressly stated that information relative to business or affairs of the defendant were not to be disclosed. *Id.*
9. *Id.*

claims "arising out of, in connection with, or by reason" of the employment agreement were to be governed by Colorado law and resolved in court.[10] In addition, the employment agreement contained a provision stating that the terms constituted a complete agreement between the parties and superseded all other agreements between the parties.[11] Two years later, the defendants, plaintiff, and Elizamy entered into an additional agreement that made no express reference to arbitration, instead stating that "exclusive jurisdiction and venue for any action brought under this agreement would be the District Court of Denver County, Colorado."[12]

The plaintiff brought this action alleging the employment agreement was breached because the defendants failed to pay him royalties due.[13] In his complaint, the plaintiff placed no reliance on the purchase agreement, and mentioned it only with respect to the employment agreement as a condition of the sale of Elizamy's assets.[14] Likewise, the defendants did not rely upon any provision of the purchase agreement in their initial responsive pleading and later counterclaims.[15]

Subsequent to defendants filing additional counterclaims, the plaintiff and counterclaim defendants sought to arbitrate the claims arising under and related to the purchase agreement.[16] The trial court denied the plaintiff's request, holding that the arbitration provision was broad enough to cover any claims arising under the employment agreement, but that the plaintiff had waived his right to arbitrate by failing to raise the issue sooner.[17] The plaintiff argued that the arbitration provisions of the purchase agreement did not extend to issues implicating only the employment agreement.[18] The plaintiff based his argument on the fact that the parties in their initial pleadings implicated no factual or legal issues that arose under the purchase agreement, and that the court erred in determining that the plaintiff waived his right to demand arbitration for those issues pertaining to the purchase agreement.[19]

In determining whether the plaintiff waived his right to arbitrate, the court had to determine whether the arbitration clause in the purchase agreement extended to disputes arising out of the employment agreement.[20] The determination was necessary because the parties' initial claims, counterclaims, discovery, and the activities that resulted in waiver implicated only issues involving the employment

10. *Id.*

11. *Id.*

12. *Id.* Under this new agreement, defendant consented to plaintiff's employment by another party; plaintiff's nondisclosure obligation created by the employment agreement was reaffirmed; and Elizamy and plaintiff waived their rights under the purchase agreement to receive shares of defendant's stock. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 1282. Defendant filed a counterclaim asserting that the plaintiff violated the original employment agreement and the later agreement by disclosing confidential information to a third party, and that the plaintiff had improperly interfered with an advantageous business relationship that defendant had developed with the same third party. *Id.*

16. *Id.* This demand for arbitration did not pertain to claims arising out of or related to the employment agreement. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

agreement.[21] In reaching its conclusion, the court recognized the strong public policy for arbitration, but refused to ignore the fact that arbitration agreements are subject to contract law.[22] Contract law dictates that the parties' reasonable expectations must determine an arbitration obligation's reach.[23] In the instant case, the parties' reasonable expectation was evidenced by the following: (1) the employment agreement made no reference to arbitration, and the purchase agreement mandated arbitration for actions arising out of this agreement; (2) the employment agreement did not incorporate any terms of the purchase agreement but instead, indicated that it was the "complete agreement"; (3) the subjects covered by the agreements were different; and (4) the fact that the parties could have expressed the two agreements under a single contract but opted not to.[24] In addition, the court stated that the parties' intention was confirmed by their actions in the litigation.[25]

Accordingly, the court held that a "claim or counterclaim that implicates only the employment agreement is not arbitrable and that plaintiff's participation in litigation of such claims could not, as a matter or law, constitute a knowing waiver of his right to require arbitration of other claims that arise out of or relate to the purchase agreement."[26]

The court then had to determine which counterclaims implicated the rights and obligations under the purchase agreement, and concluded that all claims that did implicate such rights and obligations were arbitrable.[27] The defendants argued that the intertwining doctrine prevents arbitration.[28] The court disagreed, and found that because the intertwining doctrine is to be applied only if there are common issues between arbitrable and nonarbitrable claims, the doctrine did not apply to this case because there were no such common issues.[29]

In *Sullivan v. Sears Authorized Termite and Pest Control, Inc.*,[30] the Florida Court of Appeals considered whether tort claims that are unrelated to the performance of a contract fell within the scope of the arbitration clause contained in

21. *Id.* at 1283.
22. *Id.*
23. *Id.*
24. *Id.* at 1283-84.
25. *Id.* at 1284. The court is pointing to the fact that during the initial pleadings, neither party mentioned or relied on the purchase agreement. It was not until the additional parties and counterclaims were introduced, did the plaintiff attempt to assert his right to arbitrate the claims stemming from the purchase agreement. *Id.*
26. *Id.*
27. *Id.* at 1284-85. The defendants claimed that (1) plaintiff and Elizamy made misrepresentations and fraudulent disclosure of patent rights transferred to defendant, (2) that plaintiff and Elizamy disclosed confidential information to third parties, (3) plaintiff had tortuously interfered with various third parties. *Id.*
28. *Id.* The intertwining doctrine, it is argued, states that even if some counterclaims are arbitrable and the right to arbitrate has not been waived, because they are joined with claims that are related but not arbitrable, none of the claims are arbitrable. The plaintiffs argued that the agreement is governed by the Federal Arbitration Act ("F.A.A.") because it deals with a transaction in interstate commerce, and the F.A.A. precludes application of the intertwining doctrine to deny enforcement of a contractual right to arbitrate. The defendants argues that F.A.A. does not govern the contract because of the specific reference to the U.A.A.. *Id.*
29. *Id.* at 1286.
30. 780 S.2d 996 (Fla. Dist. App. 2001), *rev'd*, 816 S.2d 603 (Fla. 2002).

the contract.[31] Sears and Sullivan executed a Pest Control Agreement in which Sears agreed to provide exterminating services for various pests, including spiders.[32] The agreement contained an arbitration provision.[33] After Sears treated Sullivan's residence, Sullivan was bitten by a spider.[34] Consequently, Sullivan sued, arguing that the arbitration provision did not preclude her action because the agreement was silent as to the parties' intent to arbitrate personal injury or tort claims.[35] The court turned to *Seiferts v. U.S. Home Corp.*,[36] where the Florida Supreme Court held that actions sounding in tort were not within the scope of the arbitration agreements because the claims were unrelated to the performance of the contract.[37] In the present case, the *Sullivan* court used the same reasoning in holding that Sullivan's action did not fall within the scope of the arbitration clause of the agreement.[38] The Florida District Court of Appeals found that: (1) the claim was predicated upon a tort theory; (2) the dispute was not significantly related to the contract since none of plaintiff's allegations referred to or mentioned the sales agreement; and (3) there was nothing in the Pest Control Agreement to indicate that either party intended to include tort claims within the scope of the agreement.[39]

In *D&E Constr. Co., Inc. v. Robert J. Denley Co., Inc.*,[40] D&E Construction submitted for arbitration a contractual payment dispute with Denley arising out of a contract to build a subdivision.[41] The arbitrators found in favor of D&E Construction and awarded attorney's fees.[42] The Tennessee Supreme Court upheld the trial court's verdict, holding that arbitrators exceed their authority by awarding attorney's fees upon matters not within the scope of the contract's arbitration provision.[43] The scope of the arbitrator's authority is thus determined by the terms of the agreement between the parties, which includes the agreement of the parties to arbitrate the dispute.[44]

The court agreed with D&E Construction that the language of the agreement gave the arbitrator broad authority, but that authority related to deciding any claim covered by the contract.[45] The *D&E Construction* court also applied the canon of

31. *Id.* at 998.
32. *Id.* at 997.
33. *Id.* The arbitration provision requires arbitration of claims "arising out of or relating to the interpretation, performance or breach of any provision of this agreement." *Id.*
34. *Id.*
35. *Id.* at 998. Sullivan sued Sears for negligence, breach of implied warranty of fitness for a particular purpose, breach of implied warranty of merchantability, negligent misrepresentation, and fraud in the inducement. To buttress her argument, Sullivan contends that because Sears drafted the agreement, it should be construed against Sears. *Id.* at 997-98.
36. 750 S.2d 633 (Fla. 1999).
37. *Sullivan*, 780 S.2d at 1000-01.
38. *Id.* at 1001.
39. *Id.*
40. 38 S.W.3d 513 (Tenn. 2001).
41. *Id.* at 514.
42. *Id.* Although neither party requested attorney's fees in their written submissions for relief, it is undisputed that D&E Construction orally notified Denley prior to arbitration that it would be seeking attorney's fees. *Id.* at 515.
43. *Id.* at 514-15.
44. *Id.* at 518.
45. *Id.* at 519.

"expressio unius est exclusio alterius"[46] in determining that if the parties intended to include attorney's fees within the scope of the arbitration clause, they would have done so as they did with the indemnification clause in the contract.[47] Furthermore, the court reasoned that the broad nature of the arbitration provision was limited by applicable Tennessee law, as evidenced by the inclusion of a choice-of-law provision.[48] Accordingly, the court held that the arbitrator exceeded his authority in awarding attorney's fees, and vacating the attorney's fee award did not vacate the entire arbitration award.[49]

B. Allegations of Fraud in the Inducement

There currently is a split among courts whether an arbitration agreement is nonexistent if the contract containing the arbitration agreement was fraudulently induced, even if the arbitration agreement itself was not. The majority view is outlined in *Burden v. Check Into Cash of Kentucky*.[50] In *Burden,* the plaintiffs entered into a "check cashing agreement" that contained an arbitration clause[51] with the defendants.[52] The "check cashing agreement" provided that the defendants would provide the plaintiffs with cash in exchange for a check in the same amount plus a "finance charge."[53] The agreement also provided that the defendants would hold the check for two weeks, which was the normal payment due date.[54] If after two weeks the borrower lacked sufficient funds to cover the check, the defendants would allow the borrower to "roll-over" the debt.[55]

The plaintiffs brought an action alleging that the defendants loaned money at usurious interest rates to hundreds of Kentucky residents.[56] The defendants responded by filing a motion with the trial court under the Federal Arbitration Act

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46. This canon reads literally "the expression of one thing is the exclusion of another of the same kind." *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 520-21.

50. 267 F.3d 483 (6th Cir. 2001).

51. The arbitration clause stated that "[t]o pursue any claim, demand, dispute, or cause of action (a "claim") arising under this Agreement or the transaction in connection with which this Agreement has been executed, the claimant must submit to the other party in writing an explanation of the claim." If the party does not respond within ten days, then the claimant may decide whether to have the claim resolved in court or by an arbitrator. If the party does respond within ten days, then it must be decided by an arbitrator. *Id.* at 487.

52. *Id.* at 486.

53. *Id.* For example, the defendants would provide the borrower with $200 in cash in exchange for a check in the amount of $238, the $38 would be the "finance charge." The "check cashing agreement" indicated that the "finance charge" was a service fee and not interest. *Id.*

54. *Id.*

55. *Id.* at 486. "Rolling-over" one's debt means that the borrower has to pay an additional "service fee," receives a replacement check in the same amount as the original check, and is required to pay the loan back within the normal two week period. Theses terms result in annual percentage rates of over five-hundred percent. *Id.*

56. *Id.* Kentucky law provides that check cashing companies that charge a "service fee" for accepting and deferring deposit on checks pursuant to agreements constitute interest subject to its usury laws. *Id.* (citing Ky. Rev. Stat. § 368 *et seq.* (2001))

("FAA")[57] to compel arbitration of the claims brought by the plaintiffs, which was subsequently denied.[58] It is from that order that the defendants brought this appeal.[59] The plaintiffs contend that their initial "check cashing agreement" did not contain an arbitration clause, and they were not made aware of the added arbitration clause until it was attached to the defendant's motion to compel arbitration.[60]

The United States Court of Appeals for the Sixth Circuit adopted the majority rule articulated by the United States Supreme Court in *Prima Paint v. Flood & Conklin Mfg. Co.*,[61] which held that a court may adjudicate claims of fraud in the inducement only if the claim of fraud concerns the inducement of the arbitration clause itself, and not the inducement of the contract generally.[62] For a complaint of fraud in the inducement to survive the *Prima Paint* rule, the complaint must contain a well-founded claim of fraud in the inducement of the arbitration clause standing apart from the whole agreement, that would provide grounds for the revocation of the agreement to arbitrate.[63] Because parties to a contract are presumed to know its contents, the plaintiffs' contention that they were unaware of the arbitration clause did not persuade the court to find any fraud in the inducement.[64]

In the alternative, plaintiffs attacked the enforceability of the arbitration clause itself, arguing that as unsophisticated consumers of limited education and means, the arbitration agreement should not be enforced.[65] Subsequently, the court remanded the plaintiffs' allegations that the arbitration agreements, separate from the loan agreement, were not enforceable against them on the "grounds as exist at law or in equity for revocation of any contract."[66]

The minority view on fraud in the inducement as applied to arbitration clauses is outlined in *Marks v. Bean*.[67] The Markses sold their home to the Beans pursuant to a contract that contained an arbitration provision.[68] However, after the Beans took

57. 9 U.S.C. § 1 *et seq.* (2001).

58. *Burden*, 267 F.3d at 486.

59. *Id.*

60. *Id.* at 487.

61. 388 U.S. 395 (1967). Applying *Prima Paint*, the *Burden* court made a distinction between contracts executed fraudulently as being void and contracts induced fraudulently as voidable. *Burden*, 267 F.3d at 488-489. In *C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 912 F.2d 1563 (6th Cir. 1990), the court discounted that distinction and characterized the central issue as whether the claim of fraud relates to the making of the arbitration agreement. *Burden*, 267 F.3d at 489 (citing *C.B.S. Employees*, 912 F.2d at 1566).

62. *Burden*, 267 F.3d at 488. In *Prima Paint*, the court found that the arbitration clauses were "separable" from the contracts in which they were included, and that "broad arbitration clause will be held to encompass arbitration of the claim that the contract itself was induced from fraud." *Id.* (quoting *Prima Paint*, 388 U.S. at 402).

63. *Burden*, 267 F.3d at 491. In addition, the court discussed the decision in *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136 (9th Cir. 1991), which is the case that the district court relied on in denying defendants' motion to compel arbitration. *Burden*, 267 F.3d at 491. However, the court found that *Three Valleys'* line of reasoning was not applicable to the present case because Burden challenged the substance, rather than the existence, of the loan agreements. *Id.* at 490.

64. *Id.* at 491-92.

65. *Id.* at 492. Specifically, the plaintiffs argued that arbitration would impose burdensome costs, deny statutory rights, and constitute an uninformed waiver of jury trial. *Id.*

66. *Id.*

67. 57 S.W.3d 303 (Ky. App. 2001).

68. *Id.* at 304. The contract contained a disclosure form that stated that there were no "defects or problems, current or past, to the structure [of the home] or exterior veneer." *Id.*

possession, they discovered serious problems with the brick veneer and filed suit against the Markses alleging that they were fraudulently induced to enter into the contract.[69] The Markses responded by moving to compel arbitration, which the trial court denied.[70] The Beans successfully offered two theories challenging the validity of the arbitration clause: (1) the merger doctrine,[71] and (2) that the arbitration clause was not enforceable pursuant to Ky. Rev. Stat. § 417.050.[72]

Although the majority of jurisdictions follow the separability doctrine, which invalidates arbitration clauses only when allegations of fraud are specific to the arbitration clause,[73] the *Marks* court was persuaded by the minority view.[74] The Kentucky Court of Appeals stated that the separability doctrine disproportionately elevated the policy favoring arbitration over the strong public policy against fraud.[75] Furthermore, the court deferred to the legislature's intent that innocent parties should not be forced to comply with arbitration provisions in contracts tainted with fraud.[76] Accordingly, the Kentucky Court of Appeals held that the arbitration clause was precluded by the public policy exception that protects parties from fraudulent inducement even if the fraud only went to the underlying contract.[77]

Courts have also addressed the issue of fraud in the inducement as it applies to confidential relationships. In *Paone v. Dean Witter Reynolds, Inc.*,[78] Paone, whose mother had died and left him an inheritance, went to Dean Witter to invest the money and signed several agreements, some of which contained agreements to arbitrate any disputes arising out of the relationship.[79] After Dean Witter fraudulently handled his funds, Paone filed a complaint against Dean Witter.[80] Dean Witter responded by moving to compel arbitration pursuant to the arbitration clause contained in the Active Assets Account Agreement and the Calls and Options Agreement.[81] The trial court denied Dean Witter's demand for arbitration, holding that Paone did not sign the Active Assets Account Agreement containing the arbitration clause, and that the Calls and Option Agreement did not contain an arbitration provision.[82] Moreover, the trial court concluded that both agreements were unenforceable because they were induced by fraud.[83]

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69. *Id.*
70. *Id.*
71. *Id.* at 305. The plaintiffs successfully argued that the merger doctrine invalidated the arbitration clause because the clause did not survive the closing since it was not contained in the deed of conveyance. *Id.*
72. *Id.* Ky. Rev. Stat. § 417.050 (2001) is a section of the Kentucky Uniform Arbitration Act. *Id.* at 304.
73. *Burden*, 267 F.3d 483.
74. *Marks*, 57 S.W.3d at 306-07.
75. *Id.* at 307.
76. *Id.*
77. *Id.* at 308. In addition, the Markses argued that under the court's interpretation of K.U.A.A., Ky. Rev. Stat. § 417.050 as enacted in Kentucky, the Beans would not be entitled to litigate their fraud claim since they had not sought recission of the contract. However, the court disagreed and found that the statute allowed the allegation of the existence of grounds for revocation to suffice. *Id.* at 307.
78. 789 A.2d 221 (Pa. Super. 2001).
79. *Id.* at 223.
80. *Id.*
81. *Id.* at 223-24.
82. *Id.* at 224.
83. *Id.*

On appeal, the Kentucky Court of Appeals determined that the Calls and Option Agreement did contain an arbitration clause.[84] Dean Witter argued that the attack on the validity of the contract for fraud did not invalidate the arbitration clause.[85] The arbitration clause, Dean Witter argued, was only invalid if the fraud went specifically to the arbitration provision.[86] Paone responded to Dean Witter's argument by asserting that a fiduciary duty arose out of the investment relationship which made the contract and the arbitration clause voidable.[87] The *Paone* court held that in determining the validity of an arbitration agreement contained in a contract that was a product of a confidential relationship, the trial court must determine: (1) whether a confidential relationship existed; (2) whether the proponent of the arbitration provision met its burden of showing the provision was fair under the circumstances; and (3) that the provision was not a result of a violation of the trust reposed in the confidential relationship.[88]

C. The Interplay Between Arbitration Clauses and the Magnuson-Moss Act

The Magnuson-Moss Warranty Act[89] applies to warranties contained in consumer products and services contracts.[90] "The Act provides that a consumer who is damaged by the failure of a warrantor to comply with the obligations imposed by the [warrantor] . . . may bring suit for damages and other relief."[91] Although the Act does not specifically prohibit arbitration, some courts have reached the conclusion that consumers always retain the right to access to courts.[92]

In *Philyaw v. Platinum Enterprises, Inc.*,[93] the court came to the same conclusion when it was asked to address the issue of whether the Magnuson-Moss Act precluded arbitration pursuant to the parties' written warranty agreement containing an arbitration clause.[94] The plaintiffs purchased a used vehicle from the defendants, and in connection with the sales transaction, a vehicle service contract was issued.[95] The plaintiffs subsequently experienced problems with their vehicle and Platinum's repair efforts were inadequate to cure the defects.[96] Thereafter, the plaintiffs filed an action alleging "that [Platinum] breached the warranties [contained] in the vehicle service contract and violated the Magnuson-Moss Warranty Act."[97] In response, defendants filed a motion to compel arbitration, which

84. *Id.* at 225.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 227.
89. 15 U.S.C. §2301 *et seq.* (2000).
90. *Philyaw v. Platinum Enterprises, Inc.*, 2001 WL 112107 at *2 (Va. Cir. Jan. 9, 2001).
91. *Id.* (internal quotations omitted).
92. *Id.*
93. *Id.*
94. *Id.* at *1.
95. *Id.*
96. *Id.*
97. *Id.* at **1-2.

the court denied.[98] The court agreed with the plaintiffs that the Magnuson-Moss Act precluded agreements to arbitrate.[99]

D. Arbitration Agreements and Forum Selection Clauses

In *Internet East, Inc. v. Duro Commun., Inc.*,[100] the North Carolina Court of Appeals decided whether a forum selection clause contained in a license agreement invalidated an arbitration provision found in the same agreement.[101] The plaintiffs "entered into a pre-incorporation agreement [where] they agreed to form . . . 'Internet East, Inc.'"[102] As part of setting up the company, the plaintiffs executed a license agreement with Internet of Greenville, Inc., that contained an arbitration clause and a forum selection clause.[103] The defendants, "an internet subscriber and network access business, acquired the assets of Internet of Greenville, Inc. and assumed the assignment of the license agreement."[104] Prior to acquiring Internet of Greenville, defendants purchased CoastalNet, another internet subscriber company.[105]

Plaintiffs filed suit against defendants arguing that when defendants acquired CoastalNet, it became a competitor of Internet East, Inc., thereby violating the ban against competition contained in the license agreement inherited from the Internet of Greenville transaction.[106] The defendants filed a motion to compel arbitration, which the trial court denied because the forum selection clause nullified the arbitration provision.[107] As a result, the court found that the license agreement did not contain a valid arbitration agreement.[108] On appeal, the North Carolina Court of Appeals held that the trial court erred in allowing the plaintiffs' motion to stay arbitration, incorrectly reading the arbitration clause in the license agreement as permissive and non-mandatory.[109]

Arbitration agreements are subject to the laws of contract, and for that reason "[w]here the terms of a contractual agreement are clear and unambiguous, the courts cannot rewrite the plain meaning of the contract."[110] In this case, the arbitration

98. *Id.* at *1.
99. *Id.* at *2.
100. 553 S.E.2d 84 (N.C. App. 2001).
101. *Id.* at 87.
102. *Id.* at 85.
103. *Id.* According to the license agreement, plaintiffs licenced from Internet of Greenville, Inc. "the entire right, title, and interest in and to the trade name and other related proprietary marks..." In addition, the license agreement stated that plaintiffs wished to obtain a license from Internet of Greenville for the purpose of operating an Internet access, electronic mail, and personal web page services business within a defined and limited territory. *Id.*
104. *Id.* at 86.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* The trial court concluded that the language of the arbitration and forum clauses were in conflict and that the language of the arbitration agreement which read, "'[u]nless the parties shall agree otherwise' demonstrates the parties' intent to render the otherwise mandatory language of [the arbitration clause in] the license agreement permissive and non-mandatory." *Id.*
109. *Id.* at 86-87.
110. *Id.* at 87 (quoting *Montgomery v. Montgomery*, 429 SE.2d 438. 441 (N.C. App. 1993).

agreement's plain meaning was that all claims were to be arbitrated unless there was an agreement to the contrary. The court determined agreements stating that matters "shall" be arbitrated should be interpreted as making arbitration mandatory, except when the parties have agreed otherwise.[111]

In addition, the court did not find persuasive the plaintiffs' contention that the parties had agreed to the jurisdiction of the state courts by including a forum selection clause in the agreement.[112] The court found that the "more logical course of reasoning [was] that the parties intended for both the forum selection [and arbitration clauses] to be given effect" since the two provisions were located "on the same page and within the same Article" of the agreement.[113] In addition, the court concluded it "unlikely that [the parties] would have included a superfluous arbitration [clause] . . . to be given no effect."[114]

After determining that the arbitration clause was mandatory, the court had to decide whether the forum selection clause and arbitration clause were in conflict.[115] In holding that the two provisions were consistent, the court was persuaded by contract law and "North Carolina's strong public policy favoring the settlement of disputes by arbitration."[116] Contract law states that "both provisions must be given effect if this can be done by a fair or reasonable interpretation."[117] The court determined that "[t]he forum selection clause should be . . . triggered only when a court is needed to intervene for those judicial matters [arising] from arbitration and when the parties have agreed to take a particular dispute to court instead of resolving it by arbitration."[118]

This conclusion that the forum selection and arbitration clause could be read consistently is further evidenced by the fact that the agreement named certain occasions where the parties could resort to courts, which would require the parties to choose a particular forum.[119] Thus, the court concluded "that the forum selection clause and the arbitration provision [did] not conflict under a reasonable interpretation of the license agreement."[120]

E. Requiring Mutuality of Obligations

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 89.
117. *Id.* at 88. According to contract law, "each and every part of the contract must be given effect if this can be done by any fair or reasonable interpretation; and it is only after subjecting the instrument to this controlling principle of construction that a subsequent clause may be rejected as repugnant and irreconcilable." *Id.* at 87 (quoting *Davis v. Frazier*, 64 S.E. 200, 201-02 (N.C. 1909).
118. *Id.* at 88. The arbitration process does not operate completely free of involvement of the courts. According to North Carolina's Uniform Arbitration Act, an arbitration provision may be used to limit, but not exclude, judicial intervention in their disputes. *Id.* at 87 (citing *Henderson v. Herman*, 49 S.E.2d 739 (N.C. App. 1991)). Thus, the forum selection clause would be triggered when a court is asked to enforce and enter judgment on an arbitration award. *Id.* at 88.
119. *Id.* at 88.
120. *Id.* at 89.

In *E-Z Cash Advance, Inc. v. Harris*,[121] the Arkansas Supreme Court considered the validity of an arbitration agreement lacking in mutual obligations.[122] In *E-Z Cash*, Harris signed an "Arkansas Deferred Presentment Agreement" pursuant to a "payday loan" from E-Z Cash that contained an arbitration provision.[123] After Harris encountered difficulties repaying the interest due on her loan, she filed suit alleging that E-Z Cash charged interest exceeding the maximum allowable rate.[124] E-Z Cash moved to compel arbitration, but was denied by the trial court, which held that the contract was one-sided and that void contracts cannot be arbitrated.[125]

In determining the validity of the arbitration agreement, the Arkansas Supreme Court relied on *Showmethemoney Check Cashers, Inc. v. Williams*,[126] and held that an arbitration agreement was unenforceable when not supported by mutual obligations.[127] Under Arkansas law, mutuality requires that the terms of the agreement impose real liabilities on both parties. Thus, "[t]here is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system."[128] Because Harris was the only party that promised to forego her rights to seek redress in the judicial system, the court held that the arbitration agreement lacked the element of mutuality and was not a valid and enforceable agreement.[129]

F. The Doctrine of Unconscionability

In *Conseco Finance Servicing Corp. v. Wilder*,[130] plaintiffs purchased a mobile home and financed the balance of their purchase through defendants, pursuant to a sales contract and security agreement containing an arbitration provision.[131] The plaintiffs stopped making payments on their home after defendants failed to make

121. 60 S.W.3d 436 (Ark. 2001).

122. *Id.* at 442.

123. *Id.* at 437-38. In a "payday loan" transaction, a consumer gives E-Z Cash a check in exchange for cash and E-Z Cash agrees to hold the check until the consumer's next payday. *Id.* at 439. The agreement stated that there was a check cashing fee of $40, a $10 deferred presentment fee, a $50 finance charge, and annual percentage rate of 372.4 percent. *Id.* at 438.

124. *Id.* at 438. Specifically, Harris argued that the service charge amounts to interest that make the annual interest rates from 300 to 720 percent. *Id.*

125. *Id.* at 442.

126. 27 S.W.3d 361 (Ark. 2000). *Showmethemoney* held that the essential elements of a contract include: (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligation. *Id.* at 366. In *Showmethemoney*, the court held that the fact that the cashier had the right to seek redress in a court of law while the customer was limited strictly to arbitration demonstrated a lack of mutuality. *Id.*

127. *E-Z Cash*, 60 S.W.3d at 439. The U.A.A. applied in this case because in *Volt. Info. Sciences, Inc. v. Board of Trustees of Leland Standford Junior Univ.*, 109 S.Ct. 1248 (1989), the United States Supreme Court held that application of the F.A.A may be avoided where the parties agreed to arbitrate in accordance with state law. *Id.*

128. *Id.* at 441.

129. *Id.* at 442.

130. 47 S.W.3d 335 (Ky. App. 2001).

131. *Id.* at 337. The arbitration provision at issue was located at the bottom of the second page of the three-page contract. The plaintiffs initialed the bottom of each page where a bold warning to read the agreement appeared. *Id.* at 338. The contract also included the names of the companies involved, information regarding the mobile home, the duty to make timely payments, and the duty to keep the home insured. *Id.*

repairs necessary to cure manufacturer and installation defects on the new home.[132] As a result, defendants brought suit under the contract, and repossessed the mobile home.[133] The plaintiffs then brought an action against defendants, seeking to have the contract rescinded, and the defendants responded by moving to compel arbitration pursuant to the parties' contract.[134] The defendants appealed the trial court's conclusion that the arbitration clause in the contract was unconscionable, arguing that the trial court's holding interfered with their rights under the Uniform Arbitration Act.[135]

The Kentucky Court of Appeals determined that the plaintiffs' claim against the defendants was related to the contract and thus fell within the scope of the arbitration agreement.[136] After determining the plaintiffs' claim was subject to arbitration, the *Conseco* court had to determine whether the agreement was unconscionable.[137]

The doctrine of unconscionability represents a narrow exception to the general rule that absent fraud in the inducement, contracts are enforced according to their terms so long as the parties have an opportunity to read it.[138] In *Conseco*, the Kentucky Court of Appeals concluded that even if the parties' contract was properly characterized as an adhesive one, the arbitration provision was not abusive or unfair.[139] The clause was not concealed or disguised in form, and its terms were clearly stated to provide notice.[140] In addition, the court was not persuaded that mandatory arbitration prejudiced the plaintiffs' claims and did not afford them an adequate opportunity to vindicate their substantive claim.[141] Accordingly, the court held that the trial court erred in denying defendants' motion to compel arbitration.[142]

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132. *Id.* at 337.

133. *Id.* at 337-38.

134. *Id.* at 338. Plaintiff alleges that defendant breached warranties arising from duties under the contract and duties imposed by the Consumer Protection Act. *Id.*

135. *Id.* at 338. More specifically, defendants argued that the U.A.A. favors arbitration and ensures that arbitration agreements are enforced according to the standards applied to other contracts. *Id.* at 339. In *Conseco*, neither party disputed that the contract fell within the U.A.A.. *Id.* at 340. The trial court's only concern was that there was an abuse of the defendants' superior bargaining position, which could have resulted in plaintiffs' relinquishing their right to a jury trial. *Id.* at 341.

136. *Id.* at 340. The plaintiffs argued that the Consumer Protection Act creates an overriding exception to the arbitration act. *Id.* The court determined that the plaintiffs had not met the burden placed on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. *Id.* at 340-41.

137. *Id.* at 341.

138. *Id.* The unconscionability doctrine is to police one-sided, oppressive, and unfairly surprising contracts, and not to police bad-bargains. *Id.*

139. *Id.* at 343. The plaintiffs' set forth a line of cases finding that similar arbitration agreements were unconscionable based on the ground that the right to insist upon arbitration was unfairly one-sided. *Id.* at 342.

140. *Id.* at 343.

141. *Id.* at 344. The court argued that under the U.A.A. "such a presumption was not a proper basis for refusing enforcement of an arbitration clause." *Id.*

142. *Id.* at 345. The court briefly addressed plaintiffs' claim that the defendants waived their right to arbitrate in their prosecution of its repossession action in court. *Id.* at 344-45. The court held that it did not constitute a waiver because there was "no indication . . . that its litigation of that matter was for the purpose of gaining or had the effect of conferring any tactical advantage with respect to the [plaintiffs'] subsequent complaint." *Id.*

In *Philyaw*, the Kentucky Court of Appeals also concluded that the particular arbitration clause was not enforceable "because it [was] patently unconscionable."[143] The Philayaw court stated that "[u]nconscionability is concerned with the . . . fairness of the terms of [an] agreement in relation to [the surrounding] circumstances . . . . [A]n agreement is unconscionable if no person in his senses would make it on the one hand and no fair and honest person would accept it on the other."[144]

In *Philyaw*, the arbitration clause at issue provided that any dispute or disagreement would be submitted to binding arbitration.[145] In addition, the clause required that the arbitration proceedings take place in Los Angeles, California, and that discovery be governed by the California Code of Civil Procedure.[146] Furthermore, the clause provided that each party must bear the cost of their own attorney's fees, witness expenses, and pay one-half of the costs and fees relating to the arbitration.[147]

The court considered the fact that the plaintiffs could not be expected to pay all the expenses and set aside the time to travel to Los Angeles as required by the clause.[148] In addition, the court addressed the fact that the agreement was presented to the plaintiffs, the weaker party, who had no bargaining power.[149] Therefore, the plaintiffs had no choice about the terms even if they understood the ramifications of the arbitration clause.[150] Accordingly, the court held that arbitration clause was not enforceable.[151]

II. SECTION 2: PROCEEDINGS TO COMPEL OR STAY ARBITRATION

After determining that an arbitration agreement exists, courts are faced with defining the scope of the agreement, whether the parties waived the right to arbitrate, and if the agreement is replaced by subsequent agreements. Courts must balance these decisions against a backdrop of strong public policy toward settling disputes outside of court. Section Two provides guidelines for courts in granting motions to compel or stay arbitration.[152] If a party to an arbitration challenges the existence of a valid agreement to arbitrate, the validity of the arbitration agreement must be determined before proceeding.[153] A court may then stay arbitration proceedings upon a showing that no arbitration agreement exists.[154]

A. Waiving the Right to Arbitration

143. *Philylaw*, 2001 WL 112107 at *2.
144. *Id.* at *3.
145. *Id.* at *1.
146. *Id.* at *2.
147. *Id.*
148. *Id.* at *3.
149. *Id.*
150. *Id.*
151. *Id.*
152. U.A.A. § 2
153. *Id.* at § 2(e).
154. *Id.* at § 2(b).

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In *Schroeder Murchie Laya Assoc., Ltd. v. 1000 West Lofts, LLC*,[155] Schroeder Murchie Laya Associates, Ltd. ("SML") brought an action against 1000 West Lofts, LLC ("1000 West") seeking payment for work performed.[156] 1000 West filed a motion to compel arbitration pursuant to an arbitration clause contained in the contract.[157] The trial court granted and entered an order dismissing without prejudice, but allowed for reinstatement if within ninety days an arbitration had not been filed.[158] After ninety days, neither party had filed a demand for arbitration, and the trial court reinstated the case.[159] 1000 West filed its answer, affirmative defenses, and counterclaims.[160] In response, SML moved to compel arbitration and stay proceedings.[161] 1000 West opposed the motion and asserted that SML had waived its contractual right to arbitrate when it initiated the original action.[162] The trial court agreed with 1000 West and denied SML's motion to compel arbitration, and SML appealed.[163]

It is well-settled that a contractual right to arbitrate can be waived like any other contractual right.[164] In determining whether a party has waived its right to arbitrate, the crucial inquiry is whether the party has acted inconsistently with its right to arbitrate.[165] A "party's conduct amounts to waiver when the party admits an arbitration agreement exists, yet submits issues that are arbitrable under the contract to a court for a decision."[166] SML did not act consistently with those of a party whose intent was to retain the right to arbitrate.[167] SML engaged in discovery at the trial court level, opposed 1000 West's earlier attempts to compel arbitration, failed to file for arbitration when the case was previously dismissed on 1000 West's motions, and then moved to reinstate the case in the circuit court.[168] Accordingly, the Illinois Court of Appeals held that SML waived its right to arbitrate all claims contained in their complaint and those claims closely related to those claims covered in the complaint.[169]

B. The Existence of Agreements to Arbitrate

In *Qestec, Inc. v. Krummenacker*,[170] the court determined whether prior agreements without arbitration clauses were replaced by new agreements with

155. 746 N.E.2d 294 (Ill. App. 2001).
156. *Id.* at 295.
157. *Id.*
158. *Id.*
159. *Schroeder Murchie Laya Assoc., Ltd.*, 746 N.E.2d 294, 295 (Ill. App. 2001).
160. *Id.*
161. *Id.* at 296.
162. *Id.*
163. *Id.*
164. *Schroeder*, 746 N.E.2d at 299, (citing *Yates v. Dr.'s Assoc., Inc.*, 549 N.E.2d 1010 (Ill.App. 1990)).
165. *Id.* at 301, (citing *St. Farm Mut. Automobile Ins. Co. v. George Hyman Constr. Co.*, 715 N.E.2d 749 (Ill.App. 1999)).
166. *Id.* at 301-02.
167. *Id.* at 302.
168. *Id.*
169. *Id.*
170. *Qestec, Inc. v. Krummenacker*, 164 F. Supp. 2d 172 (D. Mass. 2001).

arbitration clauses made under the same employment relationship. Qestec hired Krummenacker as a Sales Executive, and the parties executed a Sales Employment Agreement containing an arbitration clause.[171] Subsequently, Krummenacker was made an officer along with another employee through the purchase of stock, and both signed a Cross Purchase Agreement.[172] Months later, Krummenacker was notified that his employment was suspended until further notice.[173] A suspension notice was later sent to Krummenacker outlining the grounds for his suspension.[174] Krummenacker notified Qestec that the suspension notice was void because it was without action by Qestec's Board of Directors.[175] In response, Qestec filed an action in state court alleging that Krummenacker's conduct constituted a material breach of the Sales Employment Agreement.[176] Krummenacker removed the case to federal court on diversity grounds and filed an answer and counterclaim.[177] Qestec then filed a demand for arbitration pursuant to the arbitration clause contained in the Sales Employment Agreement.[178]

Krummenacker relied on *F.A. Bartlett Tree Expert Co. v. Barrington,*[179] arguing that the arbitration agreement in the Sales Employment Agreement was abrogated when he was promoted from employee to director.[180] However, the district court distinguished the present case from *Bartlett* since Krummenacker's situation involved two parallel relationships, employee and shareholder, that are not inconsistent.[181] On the other hand, *Bartlett* involved one employment relationship that substantially changed mid-stream.[182] The court found that because Krummenacker's duties did not change as a sales executive, and all of the new duties were benefits of being a stockholder, the Sales Employment Agreement was not abandoned.[183] In addition, the court disagreed with Krummenacker that the Cross Purchase Agreement supplanted the Sales Employment Agreement.[184] Furthermore, the court disagreed with Krummenacker that the Sales Employment Agreement expired because there was nothing in the agreement that required renewal to be in writing.[185] The court found that Krummenacker's continued employment

171. *Id.* at 173.

172. *Id.* at 174. The CPA provided for the purchase of shares of Qestec's original stockholders upon their death, incapacity, retirement or termination of employment. In addition, new by-laws were adopted that provided for arbitration only in an event of deadlock and listed personnel decisions of hiring and firing of employees as requiring approval by a quorum. *Id.*

173. *Id.* at 174.

174. *Id.*

175. *Id.*

176. *Id.* The original stockholders held a special Board meeting where all but one board member was present and voted to remove Krummenacker as a director and terminate his employment. *Id.* at 175.

177. *Id.* at 175.

178. *Id.*

179. 233 N.E.2d 756. This case held that fundamental changes in the employment relationship over a seventeen year period amounted to an abandonment of the original employment agreement. *Qestec.*, 164 F. Supp. 2d at 177.

180. *Id.* at 176.

181. *Id.* at 177.

182. *Id.*

183. *Id.*

184. *Id.* at 177-78.

185. *Id.* at 178.

automatically renewed the agreement by implicitly assenting to its renewal.[186] Accordingly, the court held that the claims were to be arbitrated pursuant to the clause contained in the Sales Employment Agreement.[187]

In *Brandon, Jones, Sandall, Zeide, Kohn, Chalal, & Musso, P.A. v. MedPartners, Inc.*,[188] Orthopedic Center and MedPartners entered into a clinic services management agreement that contained an arbitration clause.[189] Orthopedic Center made a demand to arbitrate a claim for anticipatory breach of contract, and MedPartners objected to the arbitration, arguing that the claim went beyond the scope of the arbitration provisions of the agreement.[190] The court disagreed, and held that the arbitrators had authority to remedy a breach of contract in any way reasonably related to the contract terms, including money damages or even specific performance.[191]

In *Hurd v. Spine-Tech, Inc.*,[192] Hurd wished to arbitrate a dispute over whether Spine-Tech owed him commission income he earned as an independent sales representative.[193] The parties entered into a sales representative agreement in 1994 that contained an arbitration clause.[194] In 1996, Spine-Tech decided to stop relying on independent sales representatives, and hired its own sales force.[195] Spine-Tech offered a position to Hurd that Hurd accepted.[196] In 1997, Spine-Tech terminated Hurd from his sales position and Hurd, relying on the 1994 agreement, argued that Spine-Tech owed him commission and demanded that they agree to arbitration.[197]

In actions to compel arbitration, courts look to the parties' intentions as evidenced by the arbitration agreement's language.[198] However, if there is no agreement to arbitrate, or if the dispute is not within the scope of the agreement, the court may intervene and protect a party from being compelled to arbitrate.[199] In *Hurd*, the Minnesota Court of Appeals found that because the parties intended

186. *Id.*

187. *Id.* The court also addressed the scope of the arbitration clause in deciding the counterclaims. It held that the counterclaims may not be arbitrable but because the plaintiff did not seek to arbitrate those claims, Krummenacker's arguments are moot. The court did note that the arbitrator may have to consider issues related to the counterclaims but that those inquiries were only incidental. *Id.* at 178-79.

188. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc.*, 203 F.R.D. 677 (Fla. Dist. App. 2001).

189. *Id.* at 678-79.

190. *Id.* at 679.

191. *Id.* at 686.

192. 2001 WL 605618 (Minn. App. 2001).

193. *Id.* at *1.

194. *Id.* The 1994 agreement was to terminate on March 31, 1997, but either party could terminate it earlier with or without cause by giving 120 days written notice to the other party. In addition, it was agreed that once Spine-Tech received pre-market approval the contract could not be canceled without cause. The parties agree that the agreement was not extended by writing. *Id.*

195. *Id.*

196. *Id.* Hurd also signed an employment agreement. The 1996 agreement was intended to replace the 1994 agreement. *Id.*

197. *Id.* at *2. The district court denied the motion to compel arbitration finding that the parties did not agree to arbitrate the dispute. An appeal followed. *Id.*

198. *Id.*, (citing *Minn. Fedn. Of Teachers v. Indep. Sch. Dist.* No. 361, 210 N.W.2d 482, 484 (Minn. 1981)).

199. *Id.*

Hurd's independent contractor relationship with Spine-Tech to end and an employee relationship to begin in 1996, the 1994 agreement containing the arbitration agreement was not in effect.[200] The court's conclusion is buttressed by the fact that the 1996 agreement stated that it "supersedes all previous negotiation, commitments, writings, and understandings between the parties."[201] Thus, the *Hurd* court held that the 1996 agreement replaced the 1994 agreement and no arbitration agreement covered Hurd's claim.[202]

In addition, Hurd also argued that the court was not permitted to consider the merits of the case or make factual findings.[203] Although under most circumstances a court is not allowed to make factual findings, when one party denies the existence of an arbitration agreement, the court "shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied." Likewise, a court may make a factual finding as to whether an arbitration agreement governs a dispute.[204] The court held that under the circumstances of this case, the district court did not err in making factual findings necessary to ascertain whether or not this dispute was governed by the parties' arbitration agreement.[205]

In *Salsitz v. Kreiss,*[206] Salsitz executed letters of understanding agreeing to invest money in Alternative Utility Service of Illinois ("AUS"), and Kreiss executed the letters of understanding as president of AUS. These letters of understanding did not contain an arbitration clause.[207] Subsequently, Salsitz executed an addendum to the letters of understanding regarding the incentive stock option program containing an arbitration clause.[208] After requesting return of his investment, Salsitz received the original investment, but was not reimbursed for his expenses. Thereafter, Salsitz filed suit against Kreiss for breach of contract.[209] Kreiss moved to dismiss the action based on the arbitration clause found in the stock option agreement.[210] Salsitz denied agreeing to arbitrate the issues in dispute because they fell under the letters of understanding which did not contain an arbitration clause.[211]

The Illinois Supreme Court found that there was nothing in the stock option agreement to indicate that the parties intended to submit the matter to arbitration, since the stock option agreements were separate from the letters of understanding which did not contain an arbitration clause.[212] Thus, the court held that because the disputes between the parties arose from the letters of understanding, the disputes did

200. *Id.* Hurd argues that the 1994 agreement is still in effect because it could only be canceled for cause after the pre-market approval that occurred prior to the 1996 agreement. *Id.*
201. *Hurd* at *3.
202. *Id.*
203. *Id.* at *4.
204. *Id.*, (citing *Minn. Teamsters Pub. Law Enforcement Employee's Union, Local 320 v. County of St. Louis*, 611 N.W.2d 355, 359 (Minn. App. 1990)).
205. *Id.*
206. 761 N.E.2d 724 (Ill. 2001).
207. *Id.* at 726.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 732.

not fall within the scope of the arbitration clauses and were not subject to arbitration.[213]

III. SECTION 5: HEARING

Farmers Insurance Exchange v. Taylor[214] involved an insurance settlement achieved through arbitration pursuant to the terms of the insurance policy.[215] The policy stated that the arbitrator should determine (1) the existence of the operator or an uninsured motor vehicle; (2) that the insured person was legally entitled to recover damages from the owner or operator of an uninsured motor vehicle; and (3) the amount of payment under this part as determined by this policy or any other applicable policy.[216] The arbitrator awarded the insured $513,960 in damages and $270,968.93 in costs and interest.[217] The insurer subsequently filed an application with the trial court to vacate the award, and the insured filed a counterclaim requesting confirmation of the award.[218] The trial court confirmed the award, and an appeal followed.[219]

The insurer contended that the arbitration award should be vacated because the arbitrator exceeded his authority.[220] Courts must vacate an award when an arbitrator exceeds her authority, which is determined by defining the scope of the arbitration clause in the insurance policy.[221] The insurer argued that the arbitrator's authority was limited to determining the "amount of payment" the insured was entitled to recover from the underinsured motorist, and not from the insurer.[222] In *Farmers Insurance*, the Colorado Court of Appeals found that the language of the policy supported a finding that the arbitrator was clearly empowered to determine the amount of the underinsured motorist benefits.[223]

IV. SECTION 7: WITNESSES, SUBPOENAS, DEPOSITIONS

Section Seven of the UAA states, *inter alia*, that arbitrators may issue subpoenas for the production of evidence and the attendance of witnesses.[224] In addition,

213. *Id.* at 733. The court also held that Salsitz did not waive his objections to arbitration by participating in the arbitration hearings. *Id.*

214. 45 P.3d 759 (Colo. App. 2001).

215. *Id.* at 760. The insurance policy contained an uninsured or underinsured motorist claim limit of $100,000. *Id.* The policy provided for arbitration as follows: if insured and insurer do not agree (1) that the insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle, or (2) as to the amount of payment under this part, either the insured or insurer may demand the issue be submitted to arbitration. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.* at 760-61.

220. *Id.* at 761.

221. *Id.*

222. *Id.*

223. *Id.* at 762.

224. U.A.A. § 7(a).

Section Seven allows an arbitrator to permit depositions under the arbitrator's terms when witnesses cannot be subpoenaed or attend the hearing.[225]

In *CPK/Kupper Parker Communications, Inc., v. HGL/L. Gail Hart*,[226] the arbitrator denied Kupper Parker's request to depose twenty witnesses.[227] Kupper Parker, an employer accused of discrimination by a former employee, petitioned the circuit court to stay the arbitration, and to determine the extent of deposition discovery permitted under the arbitration agreement.[228] The circuit court stayed the arbitration until Kupper Parker could take "such depositions as it shall feel necessary."[229] The former employee, L. Gail Hart, appealed the stay, arguing that the circuit court was without jurisdiction to overturn the arbitrator's denial of a discovery request.[230]

Noting that Missouri had adopted the UAA, the court stated that there was nothing in either the FAA or the UAA which suggested a court had any power to order or prohibit discovery in an arbitration proceeding.[231] The only statutory reference to the court's power over arbitration discovery is found in Mo. Rev. Stat. § 435.380.1, which grants the court power to enforce subpoenas issued by arbitrators.[232] Kupper Parker claimed *Group Health Plan, Inc. v. BJC Health Systems, Inc.*[233] was authority for the trial court's jurisdiction to stay the arbitration proceeding and order the taking of depositions.[234] In *BJC*, the Missouri Court of Appeals found that the circuit court had jurisdiction to determine if the arbitrator's request to issue a subpoena was lawful, and to deny the subpoena if it was not lawful.[235] The court declined Kupper Parker's invitation to extend *BJC*, stating that the trial court in *BJC* had jurisdiction because the court was called upon to issue and enforce the summons and subpoena.[236] Conversely, in *Kupper Parker*, the arbitrator did not request for a summons to be issued or subpoena enforced, so there was no reason for the court to use its power.[237] The court pointed to *Thompson v. Zavin*[238] as authority on the issue.[239] In *Thompson,* the court stated it had no jurisdiction to reverse the arbitrators' decision not to issue subpoenas compelling individuals to attend the arbitration hearing.[240]

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225. U.A.A. § 7(b).
226. 51 S.W.3d 881 (Mo. App. 2001).
227. *Id.* at 882.
228. *Id.*
229. *Id.* at 883.
230. *Id.* at 882.
231. *Id.* at 883-84.
232. The statute provides: The arbitrators may issue or cause to be issued subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action. Mo. Rev. Stat. § 435.380.1 (2000).
233. 30 S.W.3d 198 (Mo. App. 2000).
234. *Kupper Parker,* 51 S.W.3d at 885.
235. *BJC*, 30 S.W.3d at 205.
236. *Kupper Parker*, 51 S.W.3d at 885.
237. *Id.* at 886.
238. 607 F. Supp. 780 (C.D. Cal. 1984).
239. *Kupper Parker*, 51 S.W.3d at 886.
240. *Thompson*, 607 F. Supp. at 782-83.

The Missouri Court of Appeals stated that permitting Kupper Parker to appeal the arbitrator's decision to deny a deposition request would frustrate the purpose of arbitration, which was designed to be a less expensive and more efficient way of resolving disputes.[241] The court stated that certain constitutional, statutory, and court-created rights are sacrificed in arbitration in order to streamline the process and reduce expenses.[242] The court noted that one of the rights sacrificed is the right to depose every witness endorsed by one's opponent.[243] Under the informal procedures set forth through the Rules of the American Arbitration Association, arbitrators usually direct limited document disclosure and deny requests for interrogatories and depositions absent compelling reasons.[244] Because the court had no jurisdiction to reverse an arbitrator's denial of a request to take depositions, the order of the circuit court was quashed.[245]

V. SECTION 11: CONFIRMATION OF AN AWARD

Section Eleven of the UAA provides that a court shall confirm an arbitrator's award unless one party opposes its confirmation and urges the award be modified, vacated, or corrected within the prescribed statute of limitations.[246] Judicial confirmation turns the arbitrator's award into a judicial ruling, thereby allowing the ruling all of the judicial remedies available to enforce the award. When a party asks that an award be modified, vacated, or corrected within the time limits imposed, courts shall proceed as provided in Section Twelve and Section Thirteen of the UAA.[247]

A. The Scope of Judicial Review

In *Pelc v. Petoskey*,[248] decedent Roger Pelc and defendant Charles Petoskey were business partners in two entities, both of which were subject to a partnership agreement.[249] The partnership agreement included a provision regarding the rights of a surviving partner,[250] and a provision to arbitrate disputes arising out of the

241. *Kupper Parker*, 51 S.W.3d at 886.
242. *Id.* at 883.
243. *Id.*
244. *Id.*
245. *Id.* at 886.
246. U.A.A. § 11.
247. *Id.* Section 12 of the U.A.A. is concerned with vacating awards and section 13 of the U.A.A. pertains to the modification or correction of awards.
248. 2001 WL 710188 (Mich. App. 2001).
249. *Id.* at *1.
250. *Id.* The partnership agreement stated:
12. *Death*. Upon the death of either partner, the surviving partner shall have the right either to purchase the interest of the decedent in the partnership or to terminate and liquidate the partnership business. If the surviving partner elects to purchase the decedent's interest, he shall serve notice in writing of such election, within three months after the death of the decedent, upon the executor or administrator of the decedent, or, if at the time of such election no legal representative has been appointed, upon any one of the known legal heirs of the decedent at the last-known address of such heir. *Id.*

partnership agreement.[251] After the death of Roger Pelc,[252] decedent's wife, the plaintiff, sought an award of monies she alleged were owed to her under the partnership agreement.[253] Plaintiff subsequently filed a complaint against defendants in Macomb Circuit Court[254] alleging a breach of fiduciary and other duties owed to the estate, and requested an accounting, dissolution, and liquidation of one of the partnerships under the Uniform Partnership Act.[255] Defendants responded by asserting that the plaintiff's allegations were subject to arbitration under the partnership agreement.[256]

Pursuant to the partnership agreement's arbitration clause, the circuit court held that the counts brought by plaintiff were subject to arbitration, and ordered them dismissed without prejudice.[257] The court subsequently entered a stipulated order of dismissal in which the parties agreed the court would retain jurisdiction to interpret and enforce the partnership agreement and any arbitration award relating to plaintiff's causes of action.[258] Arbitration proceedings commenced, and the arbitrator issued an interim ruling that defendant Petoskey was not precluded from purchasing decedent's partnership interest, despite Petoskey's failure to provide written notice of his decision to do so within three months of decedent's death.[259]

Plaintiff subsequently filed a motion to have the trial court vacate the arbitration award on the basis that the arbitrator exceeded his powers.[260] The trial court found the arbitrator was correct in holding that the notice provision was not a condition precedent which prevented defendants from repurchasing the partnership interest.[261]

On appeal, the Michigan Court of Appeals found that the trial court erred in attempting to retain jurisdiction to interpret the partnership agreement and arbitration award through a stipulation of the parties.[262] The court stated that an award by an arbitrator is final and binding, and that judicial review by a Michigan court is limited to review in accordance with standards for reviewing arbitration awards as established by law[263] or because the arbitrator committed legal error.[264] The Court of Appeals held that the trial court exceeded the permissible scope of judicial review

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251. *Id.* The agreement to arbitrate found within the partnership agreement stated:

13. *Arbitration.* Any controversy or claim arising out of or relating to this Agreement, or the breach hereof, shall be settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. *Id.*

252. *Id.* It was undisputed that Petoskey did not provide plaintiff written notice of his election to purchase decedent's partnership interest following Pelc's death. *Id.* at *2

253. *Id.* at *1.

254. The defendants named to the lawsuit were Petoskey and Production Rubber Products Co., Inc., one of the partnership entities within which decedent and Petoskey were engaged.

255. *Id.* at *1.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at *2.

260. *Id.*

261. *Id.*

262. *Id.* at *3.

263. *Id.* Namely that a court may only: (1) confirm an award; (2) vacate an award if it was obtained by fraud, duress, or other undue means; or (3) modify or correct errors that are apparent on the face of the award. *Id.*

264. *Id.* at *4.

by engaging in an independent interpretation of the parties' partnership agreement and analyzing alleged errors of law not apparent on the face of the award.[265]

In *Excavating, Grading, Asphalt, Private Scavengers v. A.W. Zengeler Cleaners, Inc.*,[266] the United States District Court for the Northern District of Illinois stated that an award cannot be enforced if it is deemed ambiguous, and the court retains authority to remand the award to the original arbitrator for clarification.[267] However, the district court went on to state that the remand procedure should be used sparingly by courts and that when possible courts should avoid remanding matters back to arbitration because of the preference for prompt and final arbitration.[268] Because of this interest, courts are permitted to interpret ambiguous awards if the ambiguity contained in the award can be resolved by reference to the record.[269]

In *Zengeler*, the portion of the arbitrator's award the district court found to be ambiguous was the portion granting back pay to plaintiff.[270] The award stated that "the parties are directed to determine the amount of money earned by the grievant at the second company until the date of this Award."[271] The district court reasoned that the most logical interpretation of the award would provide the plaintiff with back pay up to the date of reinstatement, make the greivant whole, and hasten Zirkle's return to work.[272] However, the language of the award provided that back pay was to be calculated "until the date of this Award," language which the district court found ambiguous based on the record from arbitration, and inadequate to determine the arbitrator's intent on the matter.[273] The district court held that the remand order was limited to calculation of back pay and the remainder of the original arbitrator's award was confirmed.[274]

B. U.A.A. Preemption of Common Law Award Confirmation

In *Capron v. Buccini*,[275] appellant Capron, an architect, contracted with the Buccinis to provide drawings for the construction of a home.[276] When a dispute

265. Id. at **2-5.
266. 2001 WL 138932 (N.D. Ill. 2001).
267. *Id.* at *3.
268. *Id.*
269. *Id.*
270. *Id.* The relevant portion of the arbitration award read:
The proper remedy for this case is to make the grievant whole by reinstating Zirkle with appropriate back pay. However, Zirkle took action to mitigate his damages . . . . After seven weeks of unemployment, Zirkle began working for another delivery company. If Zirkle suffered a loss of wages as a result of working for the second company, he is entitled to receive the difference in pay. Therefore, the parties are directed to determine the amount of money earned by the grievant at the second company until the date of this Award. If the total amount exceeds the amount of money he would have received at Zengeler for the comparable period of time, then he is not eligible for back pay for this period. If the amount is less than the amount he would have earned at Zengeler, then he is to receive the difference as back pay. *Id.* at *1.
271. *Id.*
272. *Id.* at *3.
273. *Id.*
274. *Id.* at *4.
275. 2001 WL 237929 (Del. Super. 2001).
276. *Id.* at *1.

arose between the parties, an arbitration hearing was held as directed by the parties' agreement and an award was issued in favor of Capron.[277] Capron then filed a complaint in the Court of Chancery two years later seeking confirmation of the award but her action was barred by the statute of limitations found in the Delaware statute.[278] Because of the time bar, she abandoned relief under the Delaware statute and sought recovery under the common law.[279] The litigation was thereafter removed from the Chancery Court to the Court of Common Pleas and the court granted summary judgment in favor of the Buccinis.[280] The Delaware Superior Court dismissed Capron's claim on appeal, and stated that Delaware's version of the UAA was the exclusive remedy available to a party seeking to confirm an arbitration award, and the one year statute of limitations for confirmation of an arbitration award contained in Delaware statute prevented the matter from proceeding.[281]

VI. SECTION 12: VACATING AN AWARD

Section Twelve of the UAA determines when courts should vacate an award, the statute of limitations for bringing forth motions to vacate, and when courts may order a rehearing before new arbitrators.[282] The UAA also provides that if an application to vacate is denied and no motion to modify or correct the award is pending, courts shall confirm the award.[283] Section Twelve states that upon application by a party, courts shall vacate an award where: (1) the award was obtained through fraud, corruption, or undue means; (2) there exists evidence of misconduct by the arbitrator that prejudiced the rights of one of the parties; (3) the arbitrator exceeded her powers; (4) the arbitrator refused to postpone arbitration after sufficient cause was shown or refused to hear evidence material to the matter thereby substantially prejudicing the rights of one party; or (5) there was no arbitration agreement in existence, the issue was not adversely determined in proceedings under Section Two, and the party did not participate in the arbitration hearing without raising an objection.[284]

The statute of limitations provision contained in Section Twelve articulates that an application to vacate an award under Section Twelve shall be made within ninety days of a copy of the award being delivered to the applicant, unless the award was predicated upon "undue means."[285] In the case of such undue means, the application to vacate shall be made within ninety days after a party seeking to vacate an award

277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.* The Court of Chancery dismissed the litigation, transferring the case to the Court of Common Pleas because the Chancery Court's jurisdiction was based solely on the UAA as enacted in Delaware. *Id.*
281. *Id.* at **2-3. The appeal in this matter was dismissed because the Court of Common Pleas did not have subject matter jurisdiction to review the matter, and because of this, there was no right of appeal to the Delaware Superior Court. *Id.*
282. U.A.A. § 12.
283. *Id.*
284. *Id.*
285. U.A.A. § 12(b).

had constructive knowledge of the grounds to vacate.[286] If the application to vacate is denied and no motion for modification or correction of the award is pending, the award shall be confirmed.[287]

A. Awards Procured by Corruption, Fraud, or Other Undue Means

In *Rosenthal-Collins Group v. Reiff*,[288] Rosenthal-Collins Group and its partners operated a futures trading company, which managed Reiff's futures account.[289] Reiff claimed the company made unauthorized trades from his futures account, resulting in over $200,000 in financial losses.[290] The issue proceeded to arbitration, as provided for by the parties' management agreement.[291] On August 21, 1997, during the arbitration proceeding, Reiff sent a letter to one of the members of the arbitration panel.[292] The letter contained evidence rebutting a claim made at the arbitration hearing stating Reiff was a convicted drug dealer.[293] On August 25, 1997, the arbitration panel issued an award in favor of Reiff and awarded him in excess of $240,000 in damages.[294] After hearing that Reiff had sent a letter to one of the arbitrators, Rosenthal-Collins Group filed a motion to vacate the arbitration award in the Cook County Circuit Court.[295] The trial court vacated the arbitration award under the Illinois arbitration statute.[296] The court found that the letter constituted ex parte communication with an arbitrator, which suggested corruption in the arbitration process.[297] Reiff appealed the decision to the Illinois Court of Appeals, claiming there was no corruption in the arbitration process because the arbitration panel actually found in his favor on August 19, 1997, before he sent the letter to the arbitrator.[298] Reiff stated that the notification issued on August 25th was merely a reiteration of the arbitration decision reached on August 19th.[299] Reiff also claimed no fraud existed because the arbitrator never read the letter that was sent to his office.[300]

The Illinois Court of Appeals vacated the arbitration award because the ex parte communication constituted fraud in the procurement of the arbitration award.[301] The Illinois arbitration statute allows courts to vacate an arbitration award if it was "procured by corruption, fraud, or other undue means."[302] First, the court determined

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286. *Id.*
287. *Id.*
288. *Rosenthal-Collins Group, L.P., Lehigh Valley Futures, Inc., and Gregory Deuth v. Reiff*, 748 N.E.2d 229 (Ill. App. 2001).
289. *Id.* at 230-31.
290. *Id.*
291. *Id.* at 231.
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 232.
297. *Id.*
298. *Id.*
299. *Id.* at 234.
300. *Id.*
301. *Id.* at 232.
302. *Id.*; *See* U.A.A. § 12(a) as adopted by Illinois U.A.A. 710 ILCS 5/12(a) (West 1998).

that an arbitration order is final when the award is issued, not when the decision is made.[303] Because the arbitration award could have been altered at any time before it was issued on August 25th, the award could not be considered final until that date.[304] Therefore, the arbitration process was still going on at the time the letter was sent, making it a ex parte communication.[305] Second, the court stated that ex parte contact with an arbitrator during the arbitration process raises a presumption that the award was procured by "fraud or other undue means."[306] A party can overcome the presumption of fraud "by providing sufficient evidence that the presumption is unwarranted."[307] Reiff attempted to do this by claiming the arbitrator's secretary returned the letter to him unopened and the arbitrator was out of the country when the letter was at his office.[308] However, Reiff provided no evidence to prove these assertions and failed to overcome the presumption of fraud, and due to the presumption of fraud, the Illinois Court of Appeals upheld the trial court's order to vacate the award.[309]

B. Arbitrators Exceeding Their Authority

Arbitration is a matter of contract and an arbitrator can only act pursuant to the authority given to him in the arbitration agreement.[310] If the arbitrator exceeds this authority, the U.A.A. allows a court to vacate the arbitration award.[311] In *Fort Wayne Education Association v. Fort Wayne Community Schools*,[312] the Indiana Court of Appeals decided whether an arbitrator exceeded his authority by interpreting a collective bargaining agreement.[313] Fort Wayne Community Schools ("School District") terminated a teacher for violating the school's Role Model and Sexual Harassment Policies.[314] The collective bargaining agreement between the Fort Wayne Education Association ("Association") and the School District stated that termination issues would be determined by binding arbitration.[315]

The arbitrator concluded that the teacher did violate the School District's policies by engaging in inappropriate interaction with a student, but determined that the violation only required suspension rather than termination.[316] The School District appealed the arbitration award to the Allen County Superior Court, claiming the arbitrator exceeded his authority by deciding the conduct only warranted suspension.[317] The School District's code of conduct specifically allowed for

303. *Id.* at 234.
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 233.
308. *Id.* at 231.
309. *Id.* at 235.
310. *Hart v. McChristian*, 42 S.W. 3d 552, 556 (Ark. 2001).
311. U.A.A. § 12(a)(3).
312. *Ft. Wayne Educ. Assn. v. Ft. Wayne Community Schools*, 753 N.E. 2d 672 (Ind. App. 2001).
313. *Id.* at 674.
314. *Id.*
315. *Id.*
316. *Id.* at 675.
317. *Id.*

termination if the policies were violated.[318] The trial court vacated the arbitration award, finding that the arbitrator exceeded his authority in his interpretation of the policies.[319]

The Indiana Court of Appeals concluded that the arbitrator did not exceed his authority in his interpretation of the school policies, and upheld the arbitration award.[320] The court explained that "[t]he role of the appellate court in reviewing the arbitration award is limited to determining whether the challenging party has established any grounds [for vacating the award] under the UAA."[321] Under Indiana statute, an arbitration award can be vacated if the arbitrator's decision exceeds his power.[322] However, in *Fort Wayne Education*, the Indiana Court of Appeals found that the arbitrator did not exceed his power since he did not reach a conclusion that conflicted with the School District's Role Model and Sexual Harassment Policies.[323] Had the arbitrator determined that termination could not result from a violation of the School District's policies, the arbitrator would be guilty of exceeding his powers by rewriting the School District's disciplinary policies.[324] The court found that the arbitrator's interpretation did recognize termination as an option for the violations, but determined suspension was a more appropriate remedy.[325] Since this interpretation was within the arbitrator's authority, the Indiana Court of Appeals reversed the decision and the arbitration award was upheld.[326]

In *Pelc v. Petoskey*,[327] the Michigan Court of Appeals concluded that arbitrators exceed the scope of their authority when they act beyond the material terms of the contract from which they draw their authority, or in contravention of controlling principles of law.[328] However, the *Pelc* court added that only the arbitrator can interpret the contract, and the trial court has no jurisdiction to replace the arbitrator's interpretation with its own.[329] The court held that the trial court exceeded its authority by interpreting the terms of the contract, but upheld the decision, concluding that no harm was caused because the trial court reached the same legal conclusion as the arbitrator.[330]

Arbitrators do have the power to interpret contracts under the arbitration agreement, but they are limited as to which issues they can decide.[331] Arbitration is a creature of contract; therefore the parties can choose which issues to submit to arbitration.[332] An arbitrator exceeds his authority if he addresses issues not

318. *Id.* at 676.
319. *Id.*
320. *Id.* at 676-77.
321. *Id.* at 675. Ind. Code § 34-57-2-13(a) (2002) provides grounds upon which a trial court may vacate an arbitration award.
322. Ind. Code. § 34-57-2-13(a) (2002).
323. 753 N.E. 2d at 676.
324. *Id.*
325. *Id.*
326. *Id.* at 676-77.
327. *Pelc v. Petoskey*, 2001 WL 710188 (Mich. App. 2001).
328. *Id.* at *3 (quoting *DAIIE v. Gavin*, 331 N.W.2d 418, 434 (Mich. 1982)).
329. *Id.*
330. *Id.* at *4.
331. *Hart v. McChristian*, 42 S.W. 3d 552, 557 (Ark. 2001).
332. *Id.* at 557.

authorized by the arbitration agreement.[333] In *Virginia Eastern Company, LLC v. N.C. Monroe Construction Company*,[334] the Circuit Court of Virginia determined whether an arbitrator exceeded his authority by deciding who was responsible for time delays and expense payment problems in a construction case.[335] Virginia Eastern was the owner of a parcel of land who contracted with Monroe Construction to complete a Hampton Inn Motel on the property.[336] Several delays occurred in the construction process, and Monroe Construction claimed that Virginia Eastern failed to make certain payments during the course of the project.[337] The construction contract called for arbitration to resolve any disputes, and the arbitration proceeding was to be governed by the Construction Industry Arbitration Rules.[338]

The arbitrator determined Virginia Eastern was responsible for the time delays and payment problems, and entered an award in favor of Monroe Construction.[339] Virginia Eastern filed a motion to vacate the arbitration award, claiming that the arbitrator did not have the authority to answer the types of questions addressed in the case.[340]

The Virginia Circuit Court held that the arbitrator had the authority to make decisions regarding time delays and expense problems, and that by doing so, he did not violate Virginia statute.[341] The court stated that arbitration is simply a matter of contract between the parties, and a way to resolve disputes that the parties have agreed to submit to arbitration.[342] The contract between the parties stated that "any controversy or claim arising out of or related to the contract or the breach thereof, shall be settled by arbitration."[343] The court concluded time delays and expenses were clearly related to the contract or the breach of the contract, and therefore the arbitrator did not exceed his authority by addressing these issues.[344]

Similarly, an arbitrator has no authority to ignore the plain language of a contract in dispute or interpret contractual language that is not ambiguous. In *7-Eleven v. Dar*,[345] a convenience store franchiser brought a motion to vacate an arbitration award.[346] The Cook County Circuit Court denied the franchisor's motion and the franchisor appealed.[347] The Illinois Court of Appeals reversed and remanded the cause with directions to vacate the arbitration award, and ordered a rehearing before the arbitrator.[348] The Illinois Supreme Court then entered an order directing

333. *Id.*
334. *Va. E. Co., L.L.C. v. N.C. Monroe Constr. Co.*, 2001 WL 700368 (Va. Cir. 2001).
335. *Id.* at *1.
336. *Id.*
337. *Id.* at *4.
338. *Id.*
339. *Id.*
340. *Id.*
341. Id. at *4. *See* Va. Code Ann. § 8.01-581.09 (2000).
342. *Va. E. Co.*, 2001 WL 700368, *3.
343. *Id.*
344. *Id.* at *4.
345. 757 N.E.2d 515 (Ill. App. 2001).
346. *Id.* at 518.
347. *Id.* at 519.
348. *Id.* at 524.

the Illinois Court of Appeals to vacate its earlier order and reconsider the issue in light of the Supreme Court's holding in *Voyles v. Sandia Mortgage Corp.*[349]

In *7-Eleven*, petitioner 7-Eleven argued the arbitrator exceeded his authority in several different ways. First 7-Eleven asserted that the arbitrator exceeded his authority when he determined that respondent Dar did not waive his right to arbitration.[350] In the contested arbitration, the arbitrator did not construe the limitations period in the context of the agreement between the parties, instead finding as a matter of law that the limitations period under Illinois law controlled over the limitation period in the parties' agreement.[351] Because of this, the Illinois Court of Appeals held that the arbitrator correctly determined that the notice limitation period in the agreement was in conflict with Illinois law, and therefore did not exceed his authority.[352]

7-Eleven also asserted that the arbitrator exceeded his authority when he determined that the agreement had been wrongfully terminated.[353] However, the Illinois Court of Appeals found that the Illinois Franchise Disclosure Act of 1987 contained a "good cause" termination requirement and thus the arbitrator did not exceed his authority in concluding petitioner 7-Eleven had wrongfully terminated the agreement.[354]

Next, 7-Eleven contended that the arbitrator exceeded his authority by awarding punitive damages contrary to an express provision of the arbitration agreement.[355] Under Illinois law, arbitrators may award punitive damages only where the parties have agreed that the arbitrator has authority to confer such a damage award.[356] Pursuant to the Illinois Supreme Court's recent decision in *Voyles*, the Illinois Court of Appeals concluded that the arbitrator's damage award for breach of the covenant of good faith and fair dealing were punitive in nature.[357] Since the parties to the arbitration proceeding did not expressly agree for the arbitrator to have the authority to confer punitive damages, the arbitrator exceeded his authority by doing so.[358]

Petitioner 7-Eleven's last allegation of the arbitrator exceeding his authority centered on the fact that the arbitrator did not decide all of the issues presented before him in the arbitration proceeding.[359] At common law, an arbitration award is void and unenforceable unless it disposes of all matters properly submitted to the

349. 751 N.E.2d 1126 (Ill. App. 2001).

350. 757 N.E.2d at 520.

351. *Id.* The agreement required the parties to submit all controversies arising between them that could not be mutually resolved to arbitration. The agreement further provided that:

> A demand for arbitration: if based in whole or part on wrongful termination, shall be filed with the [American Arbitration Association] within 10 days after a 30 day or longer notice of termination is issued or prior to any other notice of termination becoming effective. *Id.*

352. *Id.* at 521. The Illinois Court of Appeals determined that the arbitrator did not ignore the notice limitation period contained in the arbitration agreement and did not interpret unambiguous contractual language as petitioner 7-Eleven suggested. *Id.*

353. *Id.* at 521.

354. *Id.* at 521-522.

355. *Id.* at 522.

356. *Id.* at 523.

357. *Id.*

358. *Id.*

359. *Id.*

proceeding.[360] In *7-Eleven*, the arbitration award provided that it was in "full settlement of all claims submitted to this arbitration."[361] While there exists a presumption that the arbitrators considered and fully determined all matters submitted, the Illinois Court of Appeals agreed with petitioner 7-Eleven, and held that the arbitrator failed to decide all of the issues properly presented.[362] The Illinois Court of Appeals went on to state that since there were still controversies in existence that the parties to the arbitration could not mutually resolve and that remained undecided after the arbitration proceeding concluded, the arbitrator had failed to fully decide all of the issues properly.[363]

The Illinois Court of Appeals concluded that the arbitrator exceeded his authority in awarding damages to the respondent for breaches of the implied covenant of good faith and fair dealing, and for failing to decide all of the issues presented. As of result of this finding, the judgment of the circuit court was reversed and the cause remanded to the circuit court with directions to enter an order vacating the award and order a rehearing before the arbitrator consistent with the Illinois Court of Appeals' decision.[364]

It is clear that an arbitrator is limited to addressing issues submitted to arbitration by the parties.[365] Additionally, the arbitrator's power to award remedies is also restricted by the agreement. In *Flenory v. Eagle's Nest Apartments*,[366] the Kansas Court of Appeals held that an arbitrator exceeds his authority if he imposes a legislative cap on the amount of a possible award when the parties have not agreed to the cap in their contract.[367] Flenory's son drowned in a apartment complex swimming pool, and a wrongful death suit was subsequently brought against Eagle's Nest Apartments.[368] The parties agreed to settle the claim through arbitration with a high-low cap of $50,000-$300,000 on the arbitration award.[369] The arbitrator awarded pecuniary damages in the amount of $100,000 or $137,500, depending on which legislative cap applied to pecuniary damages.[370] Flenory then filed a motion with the district court to determine which legislative cap applied.[371] The district court determined that the $100,000 cap was applicable and awarded pecuniary damages accordingly.[372] Flenory then filed a motion with the Kansas Court of Appeals to determine if the application of the $100,000 cap was correct.[373]

The Kansas Court of Appeals held that the arbitrator exceeded his authority by applying a cap to the recovery of pecuniary damages when the parties had not

360. *Id.*
361. *Id.* at 524.
362. *Id.*
363. *Id.*
364. *Id.* at 524.
365. *Va. E. Co., L.L.C.*, 2001 WL 700368 at *4.
366. *Flenory v. Eagle's Nest Apartments*, 22 P.3d 613 (Kan. App. 2001).
367. *Id.* at 613.
368. *Id.*
369. *Id.*
370. *Id.* at 613-614. The Kansas Legislature had recently amended the cap on pecuniary damages for wrongful death claims in civil litigation, increasing it from $100,000 to $250,000. *See* Kan. Stat. Ann. § 60-1903 (1994).
371. *Id.* at 614.
372. *Id.*
373. *Id.*

consented to such a cap.[374] The *Flenory* court stated that the high-low cap agreement should have replaced the legislative cap for the arbitration proceedings.[375] However, since Flenory did not claim the arbitrator exceeded his authority and only asked the court for a decision on which the legislative cap should apply, the court concluded that it did not have the power to vacate the decision.[376] The court then remanded the case to the district court to confirm the award in an amount not limited by the legislative cap.[377]

The Tennessee Supreme Court's decision in *D & E Construction v. Robert J. Denley Co.*,[378] also addressed an arbitration award outside the arbitrators authority.[379] In that decision, the Tennessee Supreme Court held that the arbitrator exceeded his authority by awarding attorney's fees to D & E Construction.[380] The court stated that arbitrators only have the power to arbitrate issues put before them by the parties, and even if the agreement gives an arbitrator broad discretion to determine disputes arising from the contract, the contract must be read as a whole to determine the scope of power.[381] Reading the contract as a whole, the *D&E Construction* court found that the arbitration agreement did not allow for the arbitrator's award of attorney's fees.[382]

While the Tennessee Supreme Court found that the arbitrator did not have the power to award attorney's fees, the court chose not to vacate the entire award.[383] The *D&E Construction* court only vacated the portion of the arbitration award conferring attorney's fees, stating that where parts of an award are not dependent on one another, the award is severable in part and sustainable in part.[384] The court followed this course of action because the purpose of arbitration is to promote prompt settlement of disputes, and vacating only the offensive portion of the arbitration award helps further that goal.[385]

In *Sportsman's Quickstop I, Ltd. v. Didonato*,[386] defendant Didonato appealed from a judgment confirming an arbitration award which settled the amount of monthly rent charged in a sublease with plaintiff Sportsman's Quickstop, and from a subsequent order denying his motion to amend the judgment of the trial court.[387] Defendant contended that the arbitrators exceeded their authority and their award was ambiguous.[388] For an arbitrator's award to be vacated under Colorado law, an application seeking such relief must be made "within thirty days after delivery of a copy of the award to the applicant."[389] The Colorado Court of Appeals held that

374. *Id.*
375. *Id.*
376. *Id.*
377. *Id.*
378. *D & E Constr. v. Robert J. Denley Co., Inc.*, 38 S.W.3d 513 (Tenn. 2001).
379. *Id.* at 514.
380. *Id.*
381. *Id.* at 518.
382. *Id.* at 519.
383. *Id.*
384. *Id.*
385. *Id.* at 520.
386. 32 P.3d 633 (Colo. App. 2001).
387. *Id.* at 634.
388. *Id.*
389. *Id.*

because defendant's response to plaintiff's motion to confirm the award was filed fifty-five days after he received a copy of the award, he was barred from requesting that the award be vacated and from presenting other substantive defenses in response to plaintiff's motion.[390]

C. Arbitrators Refusing to Hear Material Evidence

Section Twelve of the UAA also allows courts to vacate an award if an arbitrator refused to admit relevant evidence.[391] *Virginia Eastern Company v. N.C. Monroe Construction Company*[392] illustrates the application and limitations of this provision.[393] In *Virginia Eastern*, the arbitrator refused to allow Virginia Eastern Company to present relevant evidence to the arbitrator.[394] Virginia Eastern claimed a violation of the Virginia arbitration statute, which specifically allows for the admission of relevant evidence.[395] The circuit court determined that although parties have the right to introduce evidence material to the controversy, the arbitrator is only bound to admit evidence that the parties agreed to allow pursuant to the arbitration agreement.[396] In the arbitration agreement at hand, the parties agreed to be governed by the Construction Industry Arbitration Rules, which state that "the arbitrator shall be the judge of the admissibility of the evidence offered, and conformity to legal rules of evidence shall not be necessary."[397] Because the parties agreed to allow the arbitrator to determine the admissibility of evidence, the court can only overturn the decision if it is based on palpable error that is obvious and easily perceptible.[398] The court found that the error in this case was not severe enough to be considered palpable error, and refused to vacate the award based on the arbitrator's refusal to allow the evidence.[399]

In *United School District v. United Education Association*,[400] a school district argued that the arbitrator erred in refusing to consider negotiating history, custom, and practice of parties to a collective bargaining agreement.[401] While the Pennsylvania Commonwealth Court found this argument persuasive, the court still had to address the issue of what standard of review to apply in addressing what consequences would result from the arbitrator's error.[402] Under the UAA as adopted by Pennsylvania, courts shall vacate an arbitration award when an arbitrator refuses to hear evidence material to the controversy, or otherwise conducts a hearing in such a way as to substantially prejudice the rights of one party.[403] The Pennsylvania court

390. *Id.* at 634-35.
391. U.A.A. § 12(a)(4).
392. *Virginia E. Company, L.L.C.*, 2001 WL 700368 (Va. Cir. Ct. June 11, 2001).
393. *Id.* at *1. For a full account of the facts *see supra* n. 334.
394. *Id.*
395. *Id*; *See* Va. Code Ann. §§ 8.01-581.010(4) (1998).
396. *Id.* at *4.
397. *Id.*
398. *Id.* at *5.
399. *Id.*
400. 782 A.2d 40 (Pa. Cmmw. 2001).
401. *Id.*
402. *Id.* at 42.
403. *Id.* at 47.

held that it could not vacate the award under this "substantial prejudice" standard since the arbitrator did in fact admit the evidence, but rebutted in his opinion, believing it to be irrelevant to the matter.[404]

D. Vacating Awards Where No Arbitration Agreement Existed

Because arbitration agreements define the scope of an arbitrator's authority, a valid arbitration agreement must exist before parties may submit a dispute to arbitration. If no arbitration agreement exists between the parties, a court may vacate the arbitration award.[405] In *Wahl v. Chicago Roofing Contractors Association,*[406] Wahl was accused of violating a provision of the collective bargaining agreement ("CBA") between the Roofers Union ("Union") and the Chicago Roofing Contractors Association.[407] A Joint Grievance Committee addressed the issue, finding that Wahl violated the CBA.[408] Wahl subsequently filed a motion to vacate the award with the United States District Court for the Northern District of Illinois, claiming that the Union violated the CBA.[409] The Union and the Roofing Contractors Association then filed a motion to dismiss Wahl's motion to vacate because it was time barred under the Illinois arbitration statute.[410] Wahl claimed that the Illinois arbitration statute's ninety-day filing statute of limitations did not apply to his appeal because the Joint Grievance Committee was not an arbitrator, meaning the case was not subject to Illinois' arbitration statute.[411] Wahl asserted that the Joint Grievance Committee was not an arbitrator because the committee was not referred to in the CBA as an arbitrator, and the contract between the parties stated that an "arbitrator" will be called on only if the Joint Grievance Committee failed to reach a resolution.[412]

The Northern District of Illinois concluded the Joint Grievance Committee was an arbitrator.[413] Therefore, the ninety day statute of limitations for filing a motion to vacate applied to Wahl.[414] The court stated that "courts have consistently considered decisions by grievance panels, with other designations, as arbitration awards."[415] The court also determined that Wahl's complaint was an appeal of an arbitration award since the allegations contained in his petition were of a type typically heard in arbitration appeals.[416] The CBA did not provide for a specific procedure to vacate an arbitration award; therefore the court applied the Illinois version of the UAA, and the ninety day deadline for applications to vacate an award was in effect.[417] Since Wahl did not file his motion within the ninety day time frame, the court held that his complaint was barred by the statute of limitations.[418]

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404. *Id.*
405. U.A.A. § 12(a)(5).
406. *Wahl v.Lab. Rel. Group of Chicago Roofing Contractors Assn.*, 2001 WL 789424 (N.D. Ill. July 11, 2001).
407. *Id.* at *2.
408. *Id.*
409. *Id.*
410. *Id.*
411. *Id.*
412. *Id.*
413. *Id.*
414. 2001 WL 789424 at *3.
415. *Id.* at *2.
416. *Id.* at *3.
417. *Id.* at *4.
418. *Id.*

In *Louisiana Safety Systems, Inc. v. Tengasco, Inc.*,[419] Louisiana Safety Systems, Inc. ("LSS") filed suit against Tengasco and Ted Scallan alleging that they provided drilling equipment and supplies to Tengasco pursuant to a credit agreement personally guaranteed by Scallan.[420] Tengasco asserted that Scallan no longer worked for Tengasco and that Torch, Inc. was the entity who solicited purchase of the products provided by LSS, but did not raise this defense until the agreement had already been to arbitration.[421] The Knox County Circuit Court confirmed the arbitration award, and overruled Tengasco's motion to vacate the award.[422]

Under Tennessee law, a trial court may modify or correct an award "if arbitrators have awarded upon a matter not submitted to them, and the award may be corrected without affecting the merits of the decision upon the issues submitted."[423] Tengasco argued the arbitrator exceeded his authority because he had no authority since no arbitration was in effect when the majority of events giving rise to LSS's and Torch's claims occurred.[424] Several elements must be met before a claim such as Tengasco's can succeed. A party claiming there was no arbitration agreement in existence at the relevant time can succeed in having the arbitration award vacated on that basis if: (1) there was no arbitration agreement and no judicial determination that an arbitration agreement did exist; and (2) the party did not participate in the arbitration hearing without raising an objection.[425] Because Tengasco participated in the arbitration hearing without objection, the Tennessee Court of Appeals held that Tengasco was estopped from asserting that the arbitrator exceeded his authority.[426]

E. An Exception to U.A.A. Section 12(a)(5)

Model UAA Section Twelve(a)(5) states the general rule that relief awarded by arbitrators that could not or would not be granted by a court is not grounds for vacating or refusing to confirm an award.[427] In *Sherman v. Amica Mutual Ins. Co.*,[428] the Superior Court of Pennsylvania outlined an exception to this general rule, stating that in limited circumstances, the UAA as adopted in Pennsylvania provides a second standard for the review of statutory arbitration claims.[429] This second standard is

419. 2001 WL 1105395 (Tenn. App. Sept. 21, 2001).
420. *Id.* at *1.
421. *Id.* at **1-4.
422. *Id.*
423. *Id.* at *4.
424. *Id.* at *5.
425. *La. Safety Sys., Inc.*, 2001 WL 1105395 at *5.
426. *Id.*
427. U.A.A. § 12(a)(5).
428. 782 A.2d 1006 (Pa. Super. 2001).
429. *Id.* at 1007-10. A different argument for a similar remedy is discussed by the Superior Court of Pennsylvania in *Cerankowski v. State Farm Mutual Automobile Ins. Co.* where the court stated that a trial court may vacate an award under the U.A.A. as enacted in Pennsylvania when the relevant clause in an insurance policy is claimed to be void as against public policy:

> An allegation that a statutory arbitration award is contrary to law is not a sufficient basis for vacating the award. However, a trial court can review a clause in an insurance policy where the claimant alleges that such a provision is contrary to public policy. In general, we will reverse a trial court's decision regarding whether to vacate an arbitration award only for an abuse of discretion or error of law. However, where the trial court determines that a provision in an insurance policy violates the public policy of this Commonwealth, our standard of review is plenary as said issue presents a question of law for our determination.

Cerankowski v. State Farm Mutual Automobile Ins. Co., 783 A.2d 343, 345 (Pa. Super. 2001).

limited to instances when: (1) the Commonwealth government submits a controversy to arbitration; (2) a political subdivision submits a controversy with an employee or representative of employees to arbitration; or (3) any person has been required by law to submit or agree to submit a controversy to arbitration pursuant to this subchapter.[430]

When the second standard is applicable, a court may modify or correct an award when the award is contrary to law and the court would have entered a different judgment or a judgment notwithstanding the verdict.[431] In *Sherman*, the Superior Court of Pennsylvania held that the insurance policy containing the agreement to arbitrate could not be reviewed under the second "contrary to law" standard, namely because the insurance policy was issued well after the effective date of the act,[432] and an endorsement to the parties' insurance policy provided for the arbitration of claims in accordance with the Pennsylvania arbitration statute.[433] Because appellant's arbitration agreement failed to meet the requirements for a contrary to law standard to apply, the Pennsylvania Superior Court ordered that the award be confirmed.[434]

F. Judicial Review of Errors of Law

The UAA does not allow judicial review of errors of law made by an arbitrator.[435] In *Hough v. State Farm Insurance*,[436] Hough was walking along the highway and was hit by a passing car.[437] After settling with the driver's insurance company, Hough made an underinsured motorist claim with his insurance company, State Farm.[438] A dispute arose over the amount of underinsured motorist coverage available under his insurance policy, and the matter proceeded to arbitration pursuant to the insurance contract.[439] The arbitrator concluded that the policy provided $15,000 to $30,000 of coverage.[440] Hough filed a motion to vacate the arbitration award due to an error of law made by the arbitrator.[441] State Farm filed a motion to dismiss Hough's motion to vacate the award on the ground that the court lacked jurisdiction over his petition.[442]

The Court of Common Pleas of Pennsylvania held that the court could not vacate an arbitration award due to an error of law made by the arbitrator.[443] The court reasoned that Pennsylvania's arbitration statute ("PUAA") sets forth situations when a court may vacate an award, and that the court did not have jurisdiction to vacate an award for an error of law made by the arbitrator.[444] The PUAA states that "[t]he fact that the relief awarded by the arbitrators was such that it could not or

430. *Sherman*, 782 A.2d at 1008.
431. *Id.* at 1008-1009.
432. The effective date of the act was December 4, 1980.
433. *Sherman*, 782 A.2d at 1009.
434. *Id.*
435. U.A.A. § 12(a)(5).
436. *Hough v. State Farm Insurance Company*, 51 Pa. D. & C. 4th 64, 65 (Pa. Super. 2001).
437. *Id.* at 65.
438. *Id.*
439. *Id.*
440. *Id.*
441. *Id.* Hough claims that the arbitrator erred in interpreting the insurance contract with State Farm, leading to an improper conclusion regarding the amount of available under-insured motorist coverage available on his policy.
442. *Id.*
443. *Id.* at 70.
444. *Id.*

would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm an award."[445] The court therefore granted State Farm's motion to dismiss on these grounds.[446]

Although a court following the UAA generally does not have jurisdiction to vacate an arbitration award for an error of law, parties can agree to this type of judicial review in their arbitration agreements. In *Northern Indiana Commuter Transportation District v. Chicago Southshore and South Bend Railroad*,[447] Northern Indiana Commuter Transportation District ("NICTD") operated passenger trains between Chicago and South Bend, Indiana.[448] NICTD also owned the track, leasing rights to use the track to Chicago Southshore and South Bend Railroad ("Chicago Southshore") for freight transportation.[449] Chicago Southshore agreed to pay for a portion of the maintenance costs for the track, and agreed to arbitrate any disputes arising out of the agreement.[450] The arbitration agreement contained a provision allowing either party to seek judicial review of any errors of law made in arbitration proceedings.[451] After a dispute arose over maintenance payments, the parties sent the issue to arbitration, and the arbitrator ruled in favor of Chicago Southshore.[452] NICTD appealed the decision, citing an error of law made by the arbitrator.[453] The trial court confirmed the arbitration award without reviewing the error of law claim, stating that it was outside the jurisdiction of the court.[454] NICTD then appealed the confirmation to the Indiana Court of Appeals, claiming the trial court erred by not reviewing the question of law as provided for by the arbitration agreement.[455]

The Indiana Court of Appeals reversed the trial court's decision, holding that the court should have reviewed the error of law claim in the arbitration award.[456] The Indiana Court of Appeals stated that "parties are free to define the nature and scope of the questions which may be arbitrated and the extent to which the arbitrator's decision must conform to general principles of law."[457] Indiana statutory would normally not allow a trial court to review errors of law made by the arbitrator, but the "parties may contractually agree to expand the subjects for judicial review beyond those set forth in the Uniform Arbitration Act."[458] Because the terms of the arbitration provision called for judicial review of questions of law, the trial court should have addressed the issue on appeal.[459]

445. *Id. See* 42 Pa. Consol. Stat. Ann. § 7314(a) (2001).
446. *Id.* at 77.
447. 744 N.E.2d 490 (Ind. App. 2001).
448. *Id.* at 492.
449. *Id.*
450. *Id.*
451. *Id.* at 493.
452. *Id.* at 494.
453. *Id.* NICTD claims that the arbitrator erred in interpreting the contract by miscalculating the amount of maintenance fees owed by Chicago Southshore under the terms of the contract's maintenance fee formula. *Id.* at 493.
454. *Id.*
455. *Id.* at 494.
456. *Id.* at 497.
457. *Id.* at 494 (citing *Bopp v. Bramers*, 677 N.E.2d 629, 632 (Ind.App. 1997)).
458. *Id.* at 495 (citing *Hayden v. Allstate Ins. Co.*, 5 F. Supp. 2d 649, 653 (N.D. Ind. 1998)).
459. *Id.*

G. Judicial Review of Errors of Fact

In addition to the limitations on judicial review of errors of law, the UAA also limits judicial review of errors of fact.[460] In *Hart v. McChristian*,[461] the Supreme Court of Arkansas determined that the trial court did not have jurisdiction to decide an issue of fact before submitting the issue to arbitration.[462] Mr. and Mrs. Hart were general partners in a radio station, owning ten percent of the business.[463] Pursuant to an agreement giving the Harts exclusive discretion in the business's management and control, McChristian gained ownership of the other ninety percent of the station as a limited partner, and thereafter attempted to remove the Harts as managers.[464] The partnership contract allowed for removal of the managers upon agreement of partners holding seventy five percent of the partnership units, and if the general partners objected to the removal, the case would proceed to arbitration.[465] In objecting to the removal, the Harts maintained arbitration was not warranted because at the time of the vote, McChristian only owned eighteen percent of the station, and therefore lacked proper standing to remove them as general partners.[466]

In the arbitration proceeding, the arbitrator found in favor of McChristian and ordered the Harts removed from management.[467] The Harts subsequently filed a motion to vacate the decision, claiming that the chancery court should have first decided whether McChristian had standing to remove them as managers.[468] The chancery court affirmed the arbitration order, and on appeal, the Arkansas Court of Appeals affirmed removal of the Harts.[469] The Harts appealed to the Arkansas Supreme Court to determine if the trial court erred by not deciding the threshold question of whether McChristian had standing to remove them as managers before the issue was submitted to arbitration.[470]

The Arkansas Supreme Court held that the trial court was correct in refusing to vacate the arbitrator's award based on an error of fact.[471] The Arkansas arbitration statute only allows for judicial review of arbitration decisions in a limited number of situations.[472] Therefore it was not within the trial court's jurisdiction to determine if McChristian owned eighteen percent or eighty percent of the radio station at the time of the Harts' removal.[473] Since a trial court must defer to the factual findings of the arbitrator and may only determine if the arbitrator acted within his jurisdiction, the Arkansas Supreme Court confirmed the arbitration award in favor of McChristian.[474]

460. U.A.A. § 12(a)(5).
461. 42 S.W.3d 552 (Ark. 2001).
462. *Id.* at 560.
463. *Id.* at 555.
464. *Id.*
465. *Id.*
466. *Id.*
467. *Id.* at 556.
468. *Id.*
469. *Id.*
470. *Id.*
471. *Id.* at 561.
472. *Id. See* Ark. Code Ann. § 16-108-212(b) (LEXIS L. Publg. 2002).
473. *Id.*
474. *Id.*

H. Timeliness of Motions to Vacate

Section Twelve (b) of the UAA states that "an application under this section [to vacate an arbitration award] must be made within ninety days after the delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud, or other undue means, it shall be made within ninety days after such grounds are known or should have been known."[475]

In *Marks v. Marks*,[476] the parties entered into arbitration proceedings to determine division of marital property after a divorce.[477] After the arbitrator made his determination and the arbitration award was confirmed by the trial court, Mr. Marks appealed to the Virginia Court of Appeals, seeking to vacate the order for errors made by the arbitrator in the property division.[478]

The Virginia Court of Appeals determined that the UAA as adopted by Virginia governed the case since the parties agreed to arbitrate under Virginia law.[479] The court stated that under these circumstances "the Uniform Arbitration Act . . . provides the exclusive means for challenging errors in the award by the arbitrator and sets forth the procedures for obtaining judicial review and confirmation of the arbitration award."[480] The UAA requires a party to file a motion to vacate an arbitration award within ninety days after receiving the award.[481] Because Mr. Marks failed to file an application for vacation of the arbitration award within the ninety day statute of limitations, the Virginia Court of Appeals prohibited him from raising the issue on appeal.[482]

While it is clear that motions to vacate awards are limited by the ninety day statute of limitations, courts differ in their holdings on when the statute begins to run. In *Cianflone v. Indep. School Dist. #112*,[483] Cianflone lost his job as a teacher, and, pursuant to Cianflone's contract, the termination issue proceeded to arbitration where Cianflone's termination was upheld.[484] On August 2, 1999, the arbitrator sent a copy of the arbitration award to Cianflone's attorney, but Cianflone did not receive a copy of the award by certified mail until February 1, 2000.[485] On March 21, 2000, Cianflone filed a motion to vacate the arbitration award with the district court.[486] The School District filed a motion to dismiss, claiming that the motion to vacate was time barred by the ninety day statute of limitations.[487] Cianflone claimed that the statute of limitations period did not begin to run until he received a copy of the arbitration award by certified mail.[488] The court granted the motion to dismiss because Cianflone failed to file a motion to vacate within ninety days after his attorney received a copy of the arbitration award.[489]

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475. U.A.A § 12(b).
476. 548 S.E.2d 919 (Va. App. 2001).
477. *Id.* at 921.
478. *Id.* at 922.
479. *Id.*
480. *Id.*
481. *Id.* at 923. *See* Va. Code Ann., §§ 8.01-581.010 (1998). *Id.*
482. *Id.* at 925.
483. 2001 WL 215711 (Minn. App. Mar. 6, 2001).
484. *Id.* at *1.
485. *Id.*
486. *Id.*
487. *Id. See* Minn. Stat. § 572.19(1)-(2) (1998).
488. *Id.*
489. *Id.*

The Minnesota Court of Appeals held that the trial court erred in dismissing the motion to vacate on statute of limitations grounds because the statute was tolled until Cianflone received a copy of the arbitration award by certified mail.[490] The UAA as enacted in Minnesota states that an arbitrator shall deliver a copy of the award to each party personally or by certified mail.[491] Because Minnesota statute determined the procedural requirements for motions to vacate arbitration awards, the statute of limitations could not begin to run until the arbitration award was properly delivered.[492]

Another Minnesota case addressed the issue of whether a motion to vacate an arbitration award must be "filed" or "heard" within the ninety day statute of limitations period. In *Khawaja v. State Farm Ins. Co.*,[493] an arbitration decision determined that State Farm was not required to pay no-fault insurance benefits to Khawaja following a car accident, where he settled the claim with a second insurer.[494] Khawaja then filed a motion to vacate the arbitration award.[495] State Farm acknowledged that the motion was filed within the ninety day statute of limitations period as required by Minnesota statute, but claimed that the motion must be heard within the ninety day period.[496] The trial court dismissed State Farm's motion and the company appealed.[497]

The Minnesota Court of Appeals held that the statutory language of the Minnesota version of the UAA should be interpreted to require the parties to file an application to vacate an arbitration award within the ninety day time period, but the motion did not have to be heard within the ninety day period.[498] In dismissing State Farm's claim, the Minnesota Court of Appeals followed the trend stating that "motions are generally considered timely when they are filed within a prescribed period of time."[499]

I. Judicial Review of Ambiguous Terms in the Arbitration Award

The UAA allows reviewing courts to vacate awards if the arbitrator exceeds his jurisdiction.[500] While this does not allow a court to substitute its determination of law or fact into the place of the arbitrators, courts are given some discretion to interpret ambiguous terms in an arbitration award or remand them back to the arbitrator for clarification.[501] In *Gen. Accident Ins. Co. of Am. v. MSL Enter., Inc.*,[502] the North Carolina Court of Appeals determined the amount of discretion a court has in interpreting an arbitration award's ambiguous terms.[503] In *Gen. Accident Ins.*, an insurance dispute arose between the parties, and arbitration proceedings were initiated to resolve the conflict.[504] The arbitrator issued an award in favor of General

490. *Id.* at *2.
491. *Id. See* Minn. Stat. § 572.15(a) (1998).
492. *Id.*
493. 631 N.W.2d 106 (Minn. App. 2001).
494. *Id.* at 107.
495. *Id.*
496. *Id.* at 112.
497. *Id.* at 108.
498. *Id.* at 112.
499. *Id.*
500. *Fort Wayne Educ. Assn. v. Fort Wayne Community Sch.*, 73 N.E. 2d 672 (Ind. App. 2001).
501. *Gen. Accident Ins. Co. of Am. v. MLS Enter., Inc.*, 547 S.E.2d 97 (N.C. App. 2001).
502. *Id.*
503. *Id.*
504. *Id.* at 98

Accident Insurance, but the arbitrator's decision of who was included as "unpaid vendors" was ambiguous.[505] MLS Enterprises subsequently filed a motion to vacate the arbitration award.[506] The trial court used its own interpretation of "unpaid vendors," and granted summary judgment in favor of General Accident Insurance.[507] On appeal, MLS Enterprises claimed that the trial court acted outside its jurisdiction by interpreting the contract.[508]

The North Carolina Court of Appeals held that the trial court erred in granting summary judgment based on its own interpretation of the contract.[509] The Court stated: "a court is permitted to interpret and enforce an ambiguous award if the ambiguity can be resolved from the record."[510] However, in the case at hand, the interpretation went straight "to the heart of the arbitrators' intent," and letting the court make its own interpretation would allow the court to substitute its conclusions of law for those of the arbitrator.[511] The court remanded the order to the arbitration board for clarification, vacating the trial court's interpretation.[512]

Fed. Signal Corp. v. SLC Tech.[513] is another case in which the trial court was allowed to remand an arbitration award to the arbitrator for clarification.[514] In this dispute over a distributor agreement, the arbitrator awarded SLC Technologies ("SLC") $230,000 in damages and reasonable attorney's fees.[515] Federal Signal then filed a motion to vacate the award of attorney's fees for incompleteness, because the award of attorney's fees was not reduced to a specific amount.[516] SLC filed a motion to compel arbitration to determine the amount of attorney's fees.[517] The trial court dismissed SLC's motion and vacated the award of attorney's fees.[518] SLC then appealed to the Illinois Court of Appeals.[519]

The Illinois Court of Appeals held that the Illinois arbitration statute specifically allowed a court to remand an issue to the arbitrator for clarification.[520] The application of this section of the UAA allows an arbitrator to revisit an arbitration provision for clarification if an ambigous or missing term makes the award incomplete.[521] Under this provision, SLC had ninety days to make an application to the court to remand a case for clarification.[522]

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505. *Id.* Determining which parties classified as unpaid vendors impacted the distribution of the arbitration award. *Id.*
506. *Id.*
507. *Id.*
508. *Id.*
509. *Id.* at 99.
510. *Id.* at 100 (quoting *Flender Corp. v. TechnaQuip Co.*, 953 F.2d 273, 280 (7th Cir. 1992)). An ambiguous arbitration award can be interpreted by the trial court if the record makes the arbitrators intentions clear. However, if the courts interpretation would determine the overall outcome of the arbitration, it is outside the courts jurisdiction to interpret the award. *Id.*
511. *Id.*
512. *Id.*
513. 743 N.E.2d 1066. (Ill. App. 2001).
514. *Id.* at 1074.
515. *Id.* at 1068.
516. *Id.*
517. *Id.*
518. *Id.*
519. *Id.*
520. *Id.* at 1070.
521. *Id.*
522. *Id.*

J. Appealing an Order to Vacate an Arbitration Award

When an arbitration award is vacated under Section Twelve, a party may appeal a final order of dismissal.[523] In *Nebraska Department of Health and Human Services v. Struss,*[524] the Nebraska Supreme Court determined what constituted a final order to vacate an arbitration award.[525] The Nebraska Department of Health and Human Services ("NDHHS") terminated Struss's employment and an arbitrator was called upon to determine if the dismissal was appropriate.[526] The arbitrator heard the case, found in favor of Struss, and reinstated him to his job.[527] NDHHS filed a motion to vacate the arbitration award and the trial court granted the motion, remanding the case for rehearing by a new arbitrator.[528] Struss appealed the decision to the Nebraska Court of Appeals.[529] However, the NDHHS then filed a motion to dismiss, claiming that the court had no jurisdiction to decide the case.[530]

The Supreme Court of Nebraska held that the Nebraska Court of Appeals had no jurisdiction to hear the case.[531] Nebraska's version of the UAA provides that an order vacating an award without directing a rehearing may be appealed because it signals the final termination of the arbitration process.[532] However, "an order which vacates an award and directs a rehearing is not appealable."[533] Because the trial court remanded the case to arbitration, the Nebraska Court of Appeals did not have jurisdiction to decide the issue because the arbitration process was still continuing.[534]

VII. SECTION 13: MODIFICATION OR CORRECTION OF AWARD

Section Thirteen allows a court to modify or correct an award if application is made within ninety days after delivery of a copy of the award to the applicant in three situations: (1) where there was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in an award; (2) where the arbitrators awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) where an award is imperfect in a matter of form, not affecting the merits of the controversy.[535] If the application for modification or correction is granted, then the court shall modify or correct the award so as to effect its intent, and shall confirm the award as so modified and corrected, or the court shall confirm the award as made.[536] An application to vacate an award may be joined in the alternative with an application to modify or correct an award.[537]

523. *Nebraska Dept. of Health and Human Services v. Struss*, 623 N.W. 2d 308 (Neb. App. 2001).
524. *Id.* at 308.
525. *Id.*
526. *Id.* at 310.
527. *Id.*
528. *Id.* at 311.
529. *Id.*
530. *Id.* at 312.
531. *Id.*
532. *Id.* at 313.
533. *Id.*
534. *Id.* at 315.
535. U.A.A. § 13(a).
536. U.A.A. § 13(b).
537. U.A.A. § 13(c).

In *Dadak v. Commerce Ins. Co.*,[538] the court defined "evident miscalculation" as used in Section Thirteen. The *Dadak* court found that the arbitrator's award did not contain an evident miscalculation because the award stemmed from the arbitrator's adoption of a particular substantive position.[539] Therefore, the application for modification was not granted.[540] The court stated that the Superior Court judge who found an "evident miscalculation" in the arbitrator's award mistook the meaning of the statutory phrase.[541] The court stated that the "evident miscalculation of figures" arises in the working out of mathematical terms of an agreed or assumed standard or principle.[542] In *Dadak*, the disagreement was about the standard or principle itself (the interpretation of a clause), and the award reflected the arbitrator's adoption of one interpretation of clause three in an automobile insurance policy rather than the other interpretation.[543] The court said that awards so arrived at, whether perceived to be sensible or not, are impregnable short of fraud, arbitrary conduct, or significant procedural irregularity.[544]

In *Drysdale Design Assoc. v. Frist*,[545] the court denied an application for an award to be vacated and modified, citing the exceedingly narrow standard of review to challenge arbitrators' decisions.[546] In *Frist*, a contractor, Drysdale, brought an action against the homeowners, Frists, seeking to overturn the district court's decision not to vacate or modify an arbitration award rendered against Drysdale relating to the renovation of the Frists' home.[547] Drysdale complained that the arbitrator impermissibly allowed the Frists to raise new allegations in their rebuttal submissions without allowing Drysdale the opportunity to respond, thereby violating the UAA as enacted in the District of Columbia.[548] Drysdale also complained that the arbitrator adopted a new pricing formula which either contained an obvious mathematical error, or was premised on evidence that the arbitrator could not have considered unless he avoided violation of D.C. Code § 16-4311(4) by allowing rebuttal.[549] The court denied that Drysdale had an inadequate opportunity to respond to "new allegations" raised by the Frists, because each of the "new" items had been the subject of previous testimony and exhibits produced by both sides during a seven-day arbitration hearing.[550] The court also rejected Drysdale's argument that the arbitrator used the incorrect coefficient stating that "ambiguities present in the record on this issue preclude us from finding that the arbitrator's choice of 1.4 as the coefficient was 'an evident miscalculation of figures,' so as to fall within the statutory grounds for correcting an arbitration award."[551]

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538. 758 N.E.2d 1083 (Mass. App. 2001).
539. *Id.* at 1086.
540. *Id.*
541. *Id.* at 1085.
542. *Id.*
543. *Id.* at 1084-85.
544. *Id.* at 1086, (citing *Grobet File Co. of America, Inc. v. RTC Sys., Inc.*, 524 N.E.2d 404 (Mass.App. 1988)).
545. 2001 WL 1491350 (D.C.Cir. Oct. 31, 2001).
546. *Id.* at *1.
547. *Id.*
548. D.C. Code § 16-4311(4) (2001).
549. *Frist*, at *1.
550. *Id.*
551. *Id.* at *2. *See* D.C. Code § 16-4312 (2001); *Apex Plumbing Supply, Inc. v. United States Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1998) (holding, in construing the F.A.A., that the remedy of modification of an "evident miscalculation of figures" could only apply to mathematical errors appearing on the face of the award).

In another case defining evident miscalculation of figures, *Jones v. Summit Ltd. Partn. Five*,[552] the court found no evident miscalculation of figures and therefore denied the application for modification.[553] Summit, a general contractor, hired Jones to do painting and drywalling on a hotel owned by Summit.[554] Summit was dissatisfied with Jones' work and subsequently terminated its contractual relationship with Jones.[555] After Jones filed a construction lien against the hotel and a construction lien foreclosure petition and praecipe in district court, the parties filed a joint stipulation to arbitrate the dispute and agreed to stay the district court proceedings pending an outcome in arbitration.[556] Summit sought modification of the arbitration award pursuant to Nebraska statute, which allows modification or correction in the case of "evident miscalculation of figures."[557] In a case of first impression, the court addressed what constitutes an "evident miscalculation of figures" under § 25-2614(a)(1).[558] The court looked to federal and state decisions interpreting similar portions of the UAA and the FAA for guidance.[559] The Nebraska court looked at state courts and found that they similarly defined an "evident miscalculation of figures" under the UAA.[560] The court was most persuaded by *Severtson v. Williams Cons. Co.*,[561] which stated an evident miscalculation is "something which is apparent by an examination of the [document] needing no evidence to make it more clear."[562] The court concluded that under the UAA as adopted by Nebraska, an "evident miscalculation of figures" occurred when there was a mathematical error in the arbitration award that was both obvious and unambiguous.[563]

The Colorado Court of Appeals addressed the narrow standard of review trial courts are to give an arbitration award in *Duncan v. Natl. Home Ins. Co.*[564] The *Duncan* court found that the trial court's modification of an arbitration award to include prejudgment interest was impermissible because such was not requested during arbitration.[565] The court stated that courts are limited on review to modify or correct an arbitration award only upon statutory grounds, and may not review the

552. 635 N.W.2d 267 (Neb. 2001).
553. *Id.* at 271.
554. *Id.* at 268.
555. *Id.*
556. *Id.*
557. *Id.* at 269.
558. *Id.* at 270.
559. *Id.* The Eighth Circuit, for example, defined "evident material miscalculation of figures" under 9 U.S.C. § 11(a) of the FAA as a "mathematical mistake." *Stroh Container Co. v. Delphi Indus. Inc.*, 785 F.2d 743, 749 (8th Cir. 1986). The Fifth and Sixth Circuits held that evident material miscalculation occurs only where the record before the arbitrator demonstrates an unambiguous and undisputed mistake of fact in making the award. *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 821 (5th Cir. 1993); *Natl. Post Off. v. U.S. Postal Serv.*, 751F.2d 834 (6th Cir. 1985). The Fourth Circuit held that "evident material miscalculation" is a mathematical error appearing on the face of the award. *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1995).
560. *Id. See e.g. Foust v. Aetna Cas. & Ins. Co.*, 786 P.2d 450 (Colo. App. 1989) (stating that only mathematical errors that do not alter award on merits); *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 413; 255 S.E.2d 414, 419 (1979) (stating that "mathematical errors committed by arbitrators which would be patently clear to a reviewing court").
561. 173 Cal. App. 3d 86 (1985).
562. *Jones*, 635 N.W.2d at 270.
563. *Id.* at 271.
564. 36 P.3d 191 (Colo. App. 2001).
565. *Id.* at 192-93.

merits of the arbitrator's decision.[566] Therefore, the trial court is limited to granting "an order confirming, modifying, or correcting an award, judgment or decree [which] shall be entered in conformity therewith and be enforced as any other judgment or decree."[567] After reviewing cases from other jurisdictions, the court concluded that the addition of prejudgment interest upon confirmation of an arbitration award is an impermissible modification of the award.[568] The arbitration award in this case stated that it was "in full settlement of all claims submitted to this arbitration."[569] This statement, along with authority from other jurisdictions, precluded the trial court from awarding prejudgment interest.[570]

The narrow standard of review was applied in *Sherman v. Amica Mutual Ins. Co.*[571] where the court denied a petition to modify, correct, or vacate an arbitration award.[572] The appellants filed the petition alleging a mistake of law and demanding review pursuant to 42 Pa.C.S.A. § 7302(d)(2).[573] Pennsylvania's version of the UAA[574] provides similar standards for review of an arbitration decision as the UAA.[575] In more limited circumstances, the Pennsylvania statute also provides a second standard of review for the review of statutory arbitration claims, stating: "a court in reviewing an arbitration award shall modify or correct the award where the award is contrary to law, and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict."[576] However, a historical footnote accompanying § 7302 provides only two types of agreements for which this standard is applicable: 1) an agreement made prior to the effective date of this act which expressly provides that it be interpreted pursuant to the law of this Commonwealth and which expressly provides for statutory arbitration; and 2) an agreement heretofore or hereafter made which expressly provides for arbitration pursuant to the former provisions of the Act of April 25, 1927 (P.L. 381, No. 248), relating to statutory arbitration.[577] The court found that neither of the conditions in § 7302 applied to the insurance policy, so §§ 7314 and 7315 were applicable to the instant case.[578] Sections 7314 and 7315 do not allow review under a "contrary to law" standard and the court affirmed the judgment below, denying appellant's request to modify, correct, or vacate the arbitration award.[579]

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566. *Id.* at 192. *See McNaughton & Rodgers v. Besser*, 932 P.2d 819, 822 (Colo. App. 1996)("In the absence of appropriate grounds to modify, vacate, or correct an award, a trial court is required to affirm the amount without review of the merits."); *Judd Constr. Co. v. Evans Joint Venture*, 642 P.2d 922, 924 (Colo. 1982)(stating that the role of the court in considering an arbitrator's award is strictly limited, which is in conformity with the Arbitration Act and the significance of an arbitration award).

567. *Id. See* § 13-22-216, C.R.S. 2001; *Judd Construction Co.*, 642 P.2d at 925.

568. *Id.* at 192-93. *See Ebasco Constructors, Inc. v. Ahtna, Inc.*, 932 P.2d 1312 (Alaska 1997)(holding that arbitrators and not trial courts determine the availability of prejudgement interests on arbitration awards); *see e.g. Creative Builders v. Avenue Developments, Inc.*, 715 P.2d 308 (Ariz. Ct. App. 1986); *Wolfe v. Farm Bureau Ins. Co.*, 913 P.2d 1168 (Idaho 1996); *Mausbach v. Lemke*, 866 P.2d 1146 (Nev. 1994); *Palmer v. Duke Power Co.*, 499 S.E.2d 801 (N.C. App. 1998).

569. *Id.* at 193.

570. *Id.*

571. 782 A.2d 1006 (Pa. Super. 2001). For full account of the facts, see *supra* n. 428

572. *Id.* at 1007.

573. *Id.*

574. 42 Pa. C.S.A. § 7301 *et. seq.*

575. *Sherman*, 782 A.2d at 1007-1008.

576. *Id.* at 1008-1009 (citing 42 Pa. C.S.A. § 7302).

577. *Id.* at 1009 (citing 42 Pa.C.S.A. § 7302 (historical footnote)).

578. *Id.*

579. *Id.* at 1010.

In *Farmers Ins. Exchange v. Taylor*,[580] the court denied an insurer's petition to modify or correct an arbitration award citing the narrow standard of review.[581] The insurer contended that the arbitrator exceeded his authority in that: "1) the arbitration clause did not empower the arbitrator to determine the amount of payment the insured was to receive from the insurer under the underinsured motorist coverage; 2) the arbitrator impermissibly awarded the insured damages against the insurer; 3) the award, including the prejudgment interest, impermissibly [exceeded] the applicable policy limit; and 4) the arbitrator failed to subtract [the amounts the insured received from the tortfeasor and her daughter's insurer from the damages.]"[582] The court noted that Colorado has adopted the UAA[583] to give a uniform statutory framework for arbitration and to encourage settlement of disputes through the arbitration process.[584] The court stated that the role of the courts in evaluating an arbitration award is strictly limited, and the arbitrator is the final judge of both fact and law.[585] The court found that the language of the arbitration provision unambiguously empowered the arbitrator to determine the amount of underinsured motorist benefits payable to the insured under the terms of the policy.[586] Additionally, the court stated that the parties to an arbitration have an absolute right to be heard and present evidence before the arbitrator, and to have a fair opportunity to rebut evidence and arguments presented by the opposing party.[587] The parties to an arbitration are obligated to present all relevant arguments, defenses, and evidence during the arbitration because judicial review of an arbitration award is limited by the presumption of finality.[588] The court found that there was nothing in the record to indicate that the insurer advised the arbitrator at the hearing that any award would be subject to policy limits and setoffs, affirmative defenses to the insurer's obligation to pay benefits to the insured.[589]

In another recent case addressing the narrow standard of review, *Sportsman's Quikstop I, Ltd., v. Didonato*,[590] the court denied modification of an arbitration award because of failure to comply with procedural requirements.[591] The court noted that "[t]he sole bases for vacating, modifying, or correcting an arbitration award are set forth in Sections 13-22-214(1) and 13-22-215(1), C.R.S. 2000."[592] Both sections "require that an application seeking such relief be made 'within thirty days after delivery of a copy of the award to the applicant.'"[593] The court stated that "[f]ailure to comply with the UAA's special statutory procedure for challenging an arbitration award on its merits or the power of arbitrators to make an award bars any such

580. 45 P.3d 759 (Colo. App. 2001). For full account of facts, see *supra* n. 214
581. *Id.* at 761.
582. *Id.*
583. Colo. Rev. Stat. §§ 13-22-201 to 223 (2000).
584. *Taylor*, 45 P.3d at 761.
585. *Id. see Judd Construction Co. v. Evans Joint Venture*, 642 P.2d 922, 924-926 (Colo. 1982).
586. *Taylor*, 45 P.3d at 762.
587. *Id.; see Dodge City, Inc. v. Chrysler Motors Corp.*, 780 P.2d 41, 43 (Colo. App. 1989).
588. *Id.* (referring to *Fisher v. State Farm Mutual Automobile Ins. Co.*, 243 Cal. App. 2d 749, 752 which states that where a party failed to produce evidence at arbitration on an issue properly before the arbitrator pursuant to a broad arbitration agreement, that party cannot subsequently seek modification if the only reason for the erroneous award is that party's failure to produce evidence on the issue).
589. *Id.* at 762-63.
590. 32 P.3d 633 (Colo. App. 2001).
591. *Id.* at 635.
592. *Id.* at 634. *See Foust v. Aetna Cas. & Ins. Co.*, 786 P.2d 450, 451 (Colo. App. 1989) (identifying the Colorado Statutes as the basis for reviewing the arbitration award).
593. *Didonato*, 32 P.3d at 634.

objection to the award in a confirmation proceeding."[594] In this case, the response was filed fifty-five days after the defendant received a copy of the award; thus, the defendant failed to timely follow the procedures set forth in the UAA for modifying, correcting, or vacating the award.[595] Because of such failure, the defendant was barred from presenting substantive defenses in response to plaintiff's motion.[596]

In a recent case about the narrow standard of review and clarification of ambiguity in arbitration awards, the court in *General Accident Ins. Co. of America v. MSL Enter., Inc.*[597] addressed a fundamental first-impression issue: "[h]ow may a party seek to clarify an ambiguous term in an arbitration award that had been confirmed under N.C. Gen. Stat. § 1-567.12 (1999), following the expiration of the statutorily-prescribed period for vacating the award, or modifying or correcting the award."[598] The ambiguity at issue was whether General Accident was an unpaid "vendor" within the meaning of the arbitration award.[599] The court stated that when deciding whether to modify or correct an award for one of the statutorily-enumerated reasons, it shall do so to effectuate the arbitrators' intent.[600] "[T]he legislative intent is that only awards reflecting mathematical errors, errors relating to form, and errors resulting from arbitrators exceeding their authority shall be modified or corrected by the reviewing courts."[601] "Courts are not to modify or correct matters affecting the merits which reflect the intent of the arbitrators."[602] The court concluded that the trial court's interpretation of the term "vendors" went to the heart of the arbitrators' intent and was impermissible.[603] The court looked to *In re Boyte*[604] as authority on the issue of first impression.[605] In *Boyte*, the court recognized the trial court's authority under the UAA to remand an arbitration award to the arbitration panel for clarification in certain circumstances.[606] The court concluded that N.C. Gen. Stat. § 1-567.10 (1996) granted authority to the trial court to remand an ambiguous award for clarification.[607] However, the court never confronted or addressed the issue "of whether a trial court may remand an arbitration award for clarification when: (1) there were not motions before the court for the confirmation, clarification, or modification of the award, and the time within which to file such motions has expired, and (2) the confirmation of the award has been upheld on appeal."[608]

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594. *Id.* (citing *Kutch v. State Farm Mut. Auto. Ins. Co.*, 960 P.2d 93, 97 (Colo. 1998)).

595. *Id.* at 634-35.

596. *Id.* at 635. *See Kutch*, 960 P.2d at 99 (defending a similar holding "in order to preserve the integrity of the Uniform Arbitration Act's statutory framework.").

597. 547 S.E.2d 97 (N.C. App. 2001). For full account of the facts, see *supra* nn. 501-12.

598. *General Accident*, 547 S.E.2d at 99. *See* N.C. Gen. Stat. §§ 1.567.13 to .14 (1999).

599. *Id.* at 98.

600. *Id.*

601. *Id.*

602. *Id.* at 98-99 (citing *Carolina Virginia Fashion Exhibitors, Inc., v. Gunter*, 255 S.E.2d 414, 419 (N.C. App. 1979)).

603. *Id.* at 99.

604. *Boyte v. Dickson*, 303 S.E.2d 418 (N.C. App. 1983).

605. *General Accident*, 547 S.E.2d at 99.

606. *Id.*

607. *Boyte*, 303 S.E.2d at 421 (citing to the following cases: *Accord Borough of Dunmore v. Dunmore Police Dep't.*, 526 A.2d 1250 (Pa. Cmmw. 1987); *McIntosh v. State Farm Fire and Casualty Co.*, 625 A.2d 63 (Pa. Super. 1993); *H.E. Sargent, Inc., v. Town of Millinocket*, 478 A.2d 683 (Me. 1984); *Weiss v. Metalsalts Corp.*, 222 N.Y.2d 7 (1961); *University of Alaska v. Modern Constr., Inc.*, 522 P.2d 1132 (Alaska 1974); *Federal Signal Corp. V. SLC Techs., Inc.*, 743 N.E.2d 1066 (Ill. App.3d 2001); *see generally Gibbs v. Douglas M. Grimes, P.C.*, 491 N.E.2d 1004 (Ill. App. 3d 1986) (stating that,a reviewing court may remand an award to the arbitrator for clarification in exceptional circumstances, which usually involve vagueness)).

608. *General Accident*, 547 S.E.2d at 99.

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"Instead, '[i]f an award is unclear, it should be sent back to the arbitrator for clarification.'"[609] "Because 'remand for clarification is a disfavored procedure,'[610] where possible, 'a court should avoid remanding a decision to the arbitrator because of the interest in prompt and final arbitration.'"[611] The court, in *Flender*, held that "a court is permitted to interpret and enforce an ambiguous award if the ambiguity can be resolved from the record."[612] In other words, where an ambiguity is resolved by the record, the district court does not need to remand for clarification. However, where the ambiguity is not resolved by the record, the district court may not interpret the term, and must remand the matter to the arbitration panel for clarification.[613] The court also looked to *Office & Prof'l Employees Int'l Union v. Brownsville Gen. Hosp.*,[614] where the United States Court of Appeals for the Third Circuit stated that in the case of ambiguity in an award, any attempt by the court "to divine the intent of the arbitrator [is] a perilous endeavor."[615] The Pennsylvania court asserted that a remand to the arbitrator avoids misinterpretation of the award by the court, and is more likely to result in the award for which the parties bargained.[616]

In *General Accident*, the court stated that it found it "both ironic and unfortunate that arbitration, a process designed to accomplish the peaceful and speedy resolution of disputes, should have devolved into the bitter impasse before us."[617] The *General Accident* court concluded that when the trial court is asked to interpret an ambiguous term in an arbitration award, such matters may be determined by the trial court only where the ambiguity may be resolved from the record.[618] However, in disputes like "the instant case, where the ambiguity is not resolved by the record, the only proper [way] to resolve the dispute is to remand the matter to the arbitration panel for clarification of the [disputed] term."[619] The North Carolina Court of Appeals stated that upon remand, "the arbitration panel must limit its review to a clarification of the meaning of the word 'vendors' in the award."[620]

In *Bensalem Township Police Benevolent Assoc., Inc. v. Bensalem Township*,[621] the court addressed the issue of whether failing to strictly comply with notice requirements of the UAA as enacted in Pennsylvania[622] prevented the "Board of Arbitrators from exercising its jurisdiction to modify or correct an award."[623] Section 7311(b) requires "the party seeking reconsideration to provide written notice 'to all other parties stating that they must serve objections thereto within ten days from the date of notice.'"[624] "This court previously waived strict conformance to the

609. *Id.* at 100 (quoting *Flender*, 953 F.2d at 279-80).
610. *Flender*, 953 F.2d at 280.
611. *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 278 (7th Cir. 1989); *see Tri-State*, 221 F.3d at 1017 (citing to *Teamsters* as well in order to be "mindful of several principles governing judicial consideration of such awards.").
612. *General Accident*, 547 S.E.2d at 100 (quoting *Flender*, 953 F.2d at 280)
613. *Id.* (citing *Tri-State*, 221 F.3d at 1019-20).
614. 186 F.3d 326 (3d Cir. 1999).
615. *Id.* at 333
616. *Id.* (citing *Colonial Penn. Ins. Co. v. Omaha Indem. Co.*, 943 F.2d 327, 334 (3d Cir. 1991)).
617. *General Accident*, 547 S.E.2d at 101 (quoting *Brownsville Gen. Hosp.*, 186 F.3d at 328).
618. *Id. See Tri-State*, 221 F.3d at 1017.
619. *General Accident*, 547 S.E.2d at 100.
620. *Id.*
621. 777 A.2d 1174 (Pa. Cmmw. 2001).
622. 42 Pa. Consol. Stat. Ann. § 7311(b).
623. *Bensalem*, 777 A.2d at 1177.
624. *Id.* (citing 42 Pa. Consol. Stat. Ann. § 7311(b)).

notice provisions under the [UAA]."[625] The court found "no evidence that PBA was prejudiced by the Township's failure to inform the PBA that it had ten days to file objections to the Township's application for reconsideration."[626] Therefore, the court held that the Board had jurisdiction under § 7311(b) to change the arbitration award.[627]

An Illinois court recently addressed remanding an ambiguous arbitration award. In *Excavating, Grading, Asphalt, Private Scavengers, Automobile Salesroom Garage Attendants, linen and Laundry Drivers, Local 731 v. A.W. Zengeler Cleaners, Inc.*,[628] modification of an arbitration award was ordered by the district court because it could not enforce an ambiguous award in which the record did not clarify the ambiguity.[629] The Illinois court stated that judicial review of an arbitration award is limited, and "[a] district court has no authority to substitute its judgment for the judgment of an arbitrator."[630] While remanding an arbitration award back to the arbitrator for clarification should be used sparingly, a district court cannot enforce an ambiguous award.[631] According to the court, the proper procedure for a court when confronted with an ambiguity that cannot be resolved on the record is to send the award back to the arbitrator for clarification.[632]

In *D & E Constr. Co., Inc. v. Robert J. Denley Co, Ins.*,[633] the court discussed the limited clearly erroneous standard of review which they were to apply to the case.[634] The court found that the arbitrator exceeded his authority when he awarded attorney's fees, because such was not within the scope of the contract's arbitration provision.[635] Tennessee applied its version of the UAA[636] and vacated the award.[637] The court stated that modification or correction of an arbitration award is appropriate when "[t]he arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted."[638]

VIII. SECTION 17: COURT, JURISDICTION

Section Seventeen of the UAA defines "court" as any court of competent jurisdiction.[639] Jurisdiction is conferred on the trial court to enforce an agreement

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625. *Id. See Big Beaver Falls Area Sch. Dist. v. Big Beaver Falls Educ. Ass'n*, 492 A.2d 87, 88-89 (Pa. Cmmw. 1985) (holding improper mode of service under § 7317 will not divest trial court jurisdiction when a party acts in good faith to notify the other party and "refrained from a course of conduct serving to stall the legal machinery"); *see generally Nagy v. Upper Yoder Township*, 652 A.2d 428, 430 (Pa. Cmmw. 1994) ("[P]laintiffs have been found to exercise good faith when the defendant has received notice, albeit defective notice").

626. *Bensalem*, 777 A.2d at 1178.

627. *Id.*

628. 2001 WL 138932 (N.D.Ill. 2001). For the full account of this case, see *supra* nn. 266-74.

629. *Id.* at 3.

630. *Id. See Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 183-84 (7th Cir. 1985).

631. *Excavating*, 2001 WL 138932 at 3. "It is well-settled that a district court generally may not interpret an ambiguous arbitration award" *Id.* (quoting *Tri-State*, 221 F.3d at 1017 (quoting *Flender Corp. v. Techna-Quip. Co.*, 953 F.2d 273, 279 (7th Cir. 1992))).

632. *Id.*

633. 38 S.W.3d 513 (Tenn. 2001). See *supra* nn. 378-85 for a full account of the facts in this case.

634. *Id.* at 518. *See Arnold v. Morgan Keegan & Co., Inc.*, 914 S.W.2d 445, 450 (Tenn. 1996).

635. *D &E*, 38 S.W.3d at 517.

636. Tenn. Code Ann. §§ 29-5-301 to 320 (2000).

637. *D & E*, 38 S.W.3d at 521.

638. *Id.* at 518 (quoting Tenn. Code Ann. § 29-5-313(a)(3)).

639. U.A.A. § 17.

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under the UAA, and to enter judgment on an arbitration award pursuant to the making of arbitration agreements as provided in Section One of the UAA.[640]

A. Jurisdiction for Reconsideration and Questions of Mootness

In *Bensalem Township*,[641] a dispute arose regarding negotiations for a new collective bargaining agreement ("CBA") between Bensalem Township ("Township") and Bensalem Township Police Benevolent Association, Inc. ("PBA").[642] The Township and PBA submitted the disputed issues to a board of arbitrators ("Board") who resolved the issues in dispute, and handed down an award that was delivered to each of the arbitrators for their signature.[643] Within ten days of the delivery of the award, the Township requested that the Board modify or correct the award pursuant to Pennsylvania's adaptation of the UAA.[644] The PBA subsequently filed a protective petition with the Bucks County Court of Common Pleas seeking to change the duration of the award.[645] In response, the Township filed preliminary objections to the PBA's petition, maintaining that the trial court did not have jurisdiction to review the petition.[646] The Township's "basis for this jurisdictional challenge was that they had already filed a timely application to the Board for modification or correction of the award", and that the PBA had acknowledged the issue was already before the Board.[647] The Board then issued a "supplemental award" to address the issues raised by the Township while the matter was pending before the trial court.[648] As a result, the trial court dismissed PBA's petition as moot, and determined that if the PBA was dissatisfied with the Board's modified award, the PBA should have filed a petition to vacate or a petition to correct the modified supplemental award.[649] The PBA then appealed the trial court's decision.[650]

The Commonwealth Court of Pennsylvania first addressed whether the Board had jurisdiction to correct the initial award.[651] Under Pennsylvania law, a party seeking reconsideration of an arbitrator's award "must provide written notice to all other parties stating that they must serve objections thereto within ten days from the date of the notice."[652] Thus the court had to determine whether failing to strictly conform to the notice requirements found in the UAA as enacted in Pennsylvania prevented a board of arbitrators from exercising jurisdiction to modify or correct an award.[653] The court stated that determination of whether defects in notice requirements were fatal must address both the timeliness and content of the notice.[654]

640. *Id.*
641. *Bensalem Township Police Benevolent Assn., Inc.*, 777 A.2d 1174.
642. *Id.* at 1175.
643. *Id.*
644. *Id.*
645. *Id.* at 1176.
646. *Id.*
647. *Id.*
648. *Id.* The supplemental award issued by the Board modified the original award. *Id.*
649. *Id.*
650. *Id.*
651. *Id.*
652. *Id.* at 1177 (citing 42 Pa.C.S. § 7311(b) (2002).
653. *Id.*
654. *Id.*

The court concluded that the Township's arbitrators gave notice to the PBA within nine days of the award, making the notice given timely.[655]

The Commonwealth Court then addressed the content requirements of notice, and stated the general rule that if notice is timely provided, "failure to comply with the content requirements of notice will not necessarily preclude jurisdiction."[656] The court concluded that while the Township did not comply with the technical notice requirements, there was no evidence of the PBA being prejudiced by the Township's failure to inform the PBA that they had ten days to file objections to the Township's application for reconsideration.[657] Therefore because of the defective content of the Township's notice of application to the PBA, the Board did not prejudice the PBA, and the Board had jurisdiction under Pennsylvania law to change the award.[658]

The Commonwealth Court of Pennsylvania next addressed the question of mootness.[659] The general rule regarding mootness is that an actual case or controversy must exist at all stages of appellate review, and "where intervening changes in the factual matrix of a pending case" occur eliminating actual controversy and making it impossible for a court to grant the relief requested, the case will be dismissed as moot.[660] Following the general rules, the court affirmed the trial court's decision and held that the Board's modification of the initial award and issuance of a supplementary award made the PBA's petition moot.[661]

B. Subject Matter Jurisdiction

In *Artrip v. Samons Construction, Inc.*,[662] Artrip and Samons Construction ("Samons") executed an agreement for the construction of an addition to Artrip's business, which included a provision that all disputes be arbitrated.[663] A dispute arose concerning the work done by Samons, and Artrip filed a complaint in the Boyd Circuit Court.[664] An agreed order "placed the action in abeyance pending arbitration of the dispute."[665] Arbitration proceedings commenced in Cincinnati, Ohio, and Samons was awarded monies for amounts due under the contract.[666] Samons subsequently filed a motion in the Boyd Circuit Court seeking a judgment confirming the arbitrator's award, and Artrip moved to vacate the award as being "grossly deviant from applicable law."[667] The portion of the award denying Artrip recovery was vacated by the court and resubmitted to arbitration, but Artrip was once again unsuccessful in his claim for damages.[668] Following the second arbitration

655. *Id.* The Commonwealth Court of Pennsylvania stated that in previous cases they have waived strict compliance to notice provisions under the U.A.A. and proceeded in the instant case under the premise that absolute conformance with U.A.A. notice provisions is not required for jurisdiction to be proper. *Id.*

656. *Id.*

657. *Id.*

658. *Id.* at 1178.

659. *Id.*

660. *Id.* Pennsylvania law states that petitions for review of an arbitrator's award are to be considered an appeal to the trial court. *Id.*; *see* Pa.C.S. § 933(b).

661. *Id.* at 1179.

662. 54 S.W.3d 169 (Ky. App. 2001).

663. *Id.* at 170.

664. *Id.*

665. *Id.*

666. *Id.*

667. *Id.*

668. *Id.*

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proceeding, Samons filed a renewed petition for confirmation of the arbitrator's award and entry of judgment in their favor.[669] Artrip argued that the court lacked jurisdiction to enforce the arbitrator's award since it was rendered in Ohio.[670]

The Kentucky Court of Appeals began by stating that Kentucky courts have jurisdiction to confirm awards procured through arbitration where the parties' agreement provided for the arbitration itself to be within Kentucky.[671] The Kentucky Court of Appeals went on to state that the court's jurisdiction to enforce an award is governed by the UAA as enacted in Kentucky, and not statutes and constitutional provisions that delineate general circuit court subject matter jurisdiction for other matters.[672] Because Kentucky statute dictates that an arbitration agreement must provide for the arbitration itself to be in Kentucky to confer subject matter jurisdiction on a Kentucky court,[673] the *Artrip* court held that the intervening arbitration severed the circuit court's original jurisdiction over the matter because the parties to the agreement failed to designate that the arbitration was to take place in Kentucky.[674] Failure to designate Kentucky as the locus of the arbitration proceeding in the original agreement prevented the parties from invoking the jurisdiction of Kentucky courts to enforce a subsequent arbitration award.[675]

IX. SECTION 19: APPEALS

Section Nineteen addresses appeals of arbitration decisions.[676] There are six situations in which an appeal may be taken: (1) an order denying an application to compel arbitration made under Section Two; (2) an order granting an application to stay arbitration made under Section Two(b); (3) an order confirming or denying confirmation of an award; (4) an order modifying or correcting an award; (5) an order vacating an award without directing a rehearing; or (6) a judgment or decree entered pursuant to the provisions of the UAA.[677]

In *Fedie v Mid-Century Ins. Co.*,[678] the court held that an order compelling arbitration is not appealable.[679] After the district court entered an order confirming the arbitration award, Mid-Century alleged that the district court "abused its discretion by allowing respondent Fedie to amend her complaint to request mandatory arbitration of her claim for underinsured motorist benefits," and by ordering the parties to arbitration.[680] Fedie argued that Mid-Century's failure to

669. *Id.*
670. *Id.*
671. *Id.* at 171 (citing *Tru Green Corp. v. Sampson*, 802 S.W.2d 951, 953 (Ky.App. 1991)).
672. *Id.* (citing *Tru Green*, 802 S.W.2d at 953).
673. *Id.* at 172. The Kentucky Court of Appeals stated that it is after this initial inquiry that Kentucky statutes and the Kentucky Constitution are referenced to determine whether the circuit court is the "court of competent jurisdiction." *Id.*
674. *Id.*
675. *Id.* at 173. The Kentucky Court of Appeals noted that other jurisdictions have held that where an arbitration agreement does not specifically provide for the location of the arbitration, a state's prerequisites for subject matter jurisdiction under the UAA are satisfied if arbitration could have taken place in that state. *Id.* In these jurisdictions, courts have held that the state court had jurisdiction to enforce the arbitrator's award since the arbitration had actually taken place in state. *Id.* However, the Kentucky Court of Appeals was unable to find a case with facts similar to those in Artrip holding that a court has subject matter jurisdiction to enforce an arbitration award. *Id.*
676. U.A.A. § 19.
677. U.A.A. § 19(a).
678. 631 N.W.2d 815 (Minn. App. 2001).
679. *Id.* at 818.
680. *Id.* at 817.

appeal the order compelling arbitration precluded appeal.[681] Mid-Century relied on *County of Hennepin v. Ada-Bec Sys.*[682] for the proposition that an order compelling arbitration is appealable.[683] *Ada-Bec* involved an appeal from a denial of a motion to stay court proceedings pending arbitration.[684] In *Ada-Bec*, the Minnesota Court of Appeals noted that the UAA as adopted in Minnesota provided for appeal from an order denying an application to compel arbitration.[685] The court there found that "[b]ecause this order effectively operates as a denial of arbitration, it is the functional equivalent of an order to compel arbitration and is appealable."[686] The *Fedie* court stated that although the wording of *Ada-Bec* implies that an order compelling arbitration is appealable, "it is clear from the context of the statement and the facts of the case that this court was relying on statutory language that makes an order denying an application to compel arbitration appealable."[687] The court added that the implication that an order to compel arbitration is appealable was dictum, and no right of appeal was created.[688]

The court stated that because no statute or case law makes an order to compel arbitration appealable, Mid-Century did not waive its right to appeal by failing to appeal from the order compelling arbitration.[689] Furthermore, the record supported the district court's finding that Mid-Century would not suffer any prejudice by allowing Fedie to amend her complaint.[690]

In *J.P. Meyer Trucking and Constr., Inc. v. Co. Sch. Dist. Self Ins. Pool*,[691] the Colorado Supreme Court addressed the issue of whether the UAA authorizes an interlocutory appeal from the denial of a motion to dismiss.[692] In *J.P. Meyer*, a dump truck owned by J.P. Meyer rear-ended a school bus owned by the Denver School District No. 1, a member of the Colorado School Districts Self Insurance Pool.[693] The Pool paid personal injury protection ("PIP") benefits to the injured passengers and then filed a direct action against J.P. Meyer pursuant to section 10-4-713(2)(a), 5 Colorado Revised Statutes ("C.R.S.") (2000) of the No Fault Act for reimbursement of all PIP benefits paid to the injured bus riders.[694] J.P. Meyers moved to dismiss the action, and the trial court granted the motion.[695] The Pool appealed the dismissal, and the court of appeals reversed, vacating the trial court order dismissing the case.[696] On remand, J.P. Meyer renewed its motion to dismiss the complaint, asserting that the Pool is an "insurer licensed to write motor vehicle insurance," and therefore is required to arbitrate any dispute under section 10-4-717

681. *Id.*
682. 394 N.W.2d 611 (Minn. App. 1986).
683. *Fedie*, 631 N.W.2d at 818.
684. *Ada-Bec*, 394 N.W.2d at 613.
685. *Id.* (citing Minn. Stat. § 572.09(a) (1984), now codified at Minn. Stat. § 572.26, subd.1 (2000) (listing appealable orders, not including orders to compel arbitration)).
686. *Id.*
687. *Fedie*, 631 N.W.2d at 818.
688. *Id. See* Minn. R. Civ. App. P. 103.03 (listing which judgments and orders are appealable); Minn. R. Civ. App. P. 103.03(j) (indicating appeal may be taken from such other orders or decisions as may be appealable by statute or under decisions of the Minnesota appellate courts).
689. *Id.* at 818-19.
690. *Id.* at 817
691. 18 P.3d 198 (Colo. 2001) (en banc).
692. *Id.* at 201.
693. *Id.* at 200.
694. *Id.*
695. *Id.*
696. *Id.*

of the No Fault Act.[697] The trial court denied J.P. Meyer's motion without citing reasons for its decision, but the order was not made final pursuant to Colorado Rules of Civil Procedure ("C.R.C.P.") 54(b).[698]

J.P. Meyer filed a notice of appeal pursuant to Colorado Rule of Appellate Procedure ("C.A.R.") 3, stating that the court of appeals had jurisdiction in this case because, although not a final order, the denial of the motion to dismiss was "tantamount to the denial of a motion to enforce arbitration under an agreement to arbitrate [and therefore] a final appealable order pursuant to § 13-22-221."[699] At the same time, J.P. Meyer filed a petition for a writ of prohibition under C.A.R. 21, requesting that the court exercise its original jurisdiction to prevent the trial court from proceeding.[700] The trial court declined to issue a rule to show cause, but the court of appeals accepted the case on appeal.[701] The court of appeals noted the absence of a final order and that the No Fault Act does not authorize interlocutory appeals.[702] The Colorado Court of Appeals concluded that it had jurisdiction under section 13-22-221(1)(a) of the UAA, which provides that denial of a motion to compel arbitration is an appealable order.[703] The court stated that the trial court's denial of J.P. Meyer's motion to dismiss was equivalent to the denial of a motion to compel arbitration.[704] After concluding it had jurisdiction to review the matter, the Colorado Court of Appeals upheld the trial court's denial of J.P. Meyer's motion to dismiss,[705] finding that the Pool was not an insurer licensed to write motor vehicle insurance in Colorado "within the meaning of section 10-4-717, and was therefore not subject to the arbitration provisions of that section."[706]

The Colorado Supreme Court had never previously addressed whether section 13-22-221(1)(a) authorized an interlocutory appeal from the denial of a motion to dismiss based on an allegations that the dispute should be resolved by arbitration.[707] The Colorado Supreme Court disagreed with the court of appeals' finding that it had jurisdiction, because the denial of J.P. Meyer's motion to dismiss was the equivalent of a denial of a motion to compel arbitration.[708] The Colorado Supreme Court stated that the plain language of the UAA did not provide for interlocutory appellate jurisdiction in this case, because the language clearly required either a written arbitration agreement or a contractual arbitration provision, neither of which existed in the case.[709] The court further noted that the plain language of the UAA clearly provides for an appeal only after a motion to compel arbitration under section 13-22-204 has been denied.[710] J.P. Meyer filed a motion to dismiss pursuant to C.R.C.P. 12; J.P. Meyer did not seek to compel arbitration pursuant to section 13-22-204.[711]

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697. *Id.*
698. *Id.*
699. *Id.* (citing R. at 48).
700. *Id.*
701. *Id.*
702. *Id.*.
703. *Id.*
704. *Id.*
705. *Id.* at 201.
706. *Id.* at 200.
707. *Id.* at 201. *See Hughley v. Rocky Mtn. Health Maint. Org.*, 927 P.2d 1325, 1329 n. 8 (Colo. 1996) (noting that "[b]y our judgment today we do not address whether the court of appeals had jurisdiction to review the trial court's various orders . . . under [section 13-22-221].").
708. *Id.*
709. *Id.*
710. *Id.*
711. *Id.*

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