TRENDS IN ARBITRATION AND MEDIATION CASE LAW, 
LOCAL AND NATIONAL

1. INTRODUCTION:

The purpose of this 9 page article is to briefly bring you up to date on recent developments in Arizona case law related to Alternative Dispute Resolution (“ADR”), particularly arbitration and mediation. At the conclusion, the article summarizes some of the trends on the National scene.

The first case dealt with is an unpublished decision, but one with a lot of comments regarding the bases for attacks on a large arbitral award.

2. “UNDUE MEANS” AS A BASIS FOR OVERTURNING AND ARBITRAL AWARD IS CLARIFIED IN THE ROBERTS DECISION.

Roberts v. Del Webb Communities, Inc., 2015 WL 770366 was a February 24, 2015 unpublished decision authored by the Honorable Maurice Portley of our Court of Appeals. The opinion affirmed Superior Court Judge Katherine Cooper’s confirmation of an arbitration award in favor of 460 purchasers of homes from Del Webb (and Pulte Homes) who had reported home construction problems ranging from collapsing soils to defective windows. An arbitration of their implied warranty claims had lasted 52 days before a three arbitrator panel and resulted in a $7.8 million award, followed by a $2.6 million award of attorneys’ fees to the claimant homeowners - plus expert costs. In their confirmation petition, the homeowners requested prejudgment and post judgment interest and Judge Cooper had awarded both.

Judge Portley, citing the recent case of Nolan v. Kenner, 226 Ariz. 459, 461 250 P.3rd 236, 238 (App. 2011) stated that the judicial review of arbitration awards is severely restricted under the F.A.A., which governed this arbitration.

(a) Undue means as a basis for overturning an award is defined:

Del Webb alleged that the arbitral award had been obtained by “undue means”, one of the listed F.A.A. bases upon which a court can refuse confirmation of an award. The first of the “undue means” which Del Webb asserted in this case was that one of a myriad of expert witnesses utilized by the plaintiff homeowners had been hired on a “contingent fee” basis. This was a matter which the arbitral panel had evaluated and considered at the time of hearing and had chosen to admit the expert’s opinion, but noted that the fee arrangement impacted the expert’s weight and credibility, not the admissibility of his testimony. Del Webb bolstered its “expert hired with a contingent fee” argument by saying that the panel’s admission of such testimony constituted a

1 Citation to an unpublished decision is subject to the restrictions of 17A Ariz. Sup. Ct. Rules, Rule 111(c)(1)(C): “Memorandum decisions of Arizona state courts are not precedential and such a decision may be cited only: … for persuasive value, but only if … issued on or after January 1, 2015; no opinion adequately addresses the issue before the court; and the citation is not to be a depublished opinion or a depublished portion of an opinion.”

2 The RUAA also restricts judicial review to 6 bases stated in the statute. A.R.S. § 12-3023 (A)(1)-(6).
grave violation of public policy, an argument which the Superior Court and Court of Appeals rejected.

Claiming that there had been overzealous and unethical “solicitation” of the homeowners to join the case, and that the attorneys had an ownership interest in the soil testing lab which they had used, Del Webb asserted that such conduct was “undue means” which would justify a vacating of the award. The courts disagreed.

Judge Portley’s opinion (citing Nolan) states that relief from an award based upon a claim that “undue means” have been utilized by the successful party cannot be granted unless it involves intentional bad actions, not just “sloppy lawyering”. Further, the conduct has to be something which:

1. was not discoverable before the arbitration concluded, if due diligence had been used;
2. related materially to some important issue in the arbitration; and
3. has been established by clear and convincing evidence.

Here in Roberts, the three arbitrator panel and the respondents, knew all about the way in which the claims were gathered and developed. The Appeals Court declined to find “undue means” and ruled that the award had properly been confirmed in the Superior Court.

(b) Attorneys’ fees award merited when both sides request fees:

Del Webb argued that no attorneys’ fees ($2.6 million) should have been awarded under its reading of the sales contract’s attorneys’ fees clause. The Court noted that both the homeowners and Del Webb had asked the panel to award attorneys’ fees and ruled that, when both parties have called for an award of legal fees, that issue is submitted to the panel for its decision and a court will not intervene to roll back the fee award.

(c) Panel’s definition of “costs” to be awarded will not be set aside:

Del Webb argued that, when the arbitral panel awarded the homeowners’ substantial expert fees as “costs of arbitration”, this was an error. The Court of Appeals ruled that such an interpretation of the “costs” which were allowed by the contract’s arbitration clause, was the panel’s construing the terms of the contract, a decision with which the court would not interfere.

(d) Summary:

This 2015 Roberts decision (to the extent citable) now amplifies the earlier decision in Nolan v. Kenner, 226 Ariz. 459, 250 P.3rd 236 (App. 2011). In that case, Judge Kessler on the Court of Appeals wrote that “undue means” to justify overturning an arbitral award had not been shown. The issue there has been that a California lawyer, not registered in Arizona, had represented Kenner in the arbitration proceedings. The Nolan opinion points out such Bar membership was not concealed or misrepresented and was easily discoverable by opposing
counsel who had represented Nolan, thus it could not be urged as “undue means” which would permit vacating the award.

3. “USE IT OR LOSE IT” APPLIES TO ARBITRATION CLAUSES ACCORDING TO THE RUSSO DECISION:

In Russo v. Barger, 1 CA-CV14-0588 (January 26, 2016), the Court of Appeals overturned Judge Richard Gama. The opinion (by Judge Margaret Downie) dealt with a contract under which Russo had purchased a condo in Las Palomas Seaside Golf Community for $135,150 and had signed a purchase contract containing a forum selection clause choosing “the competent courts of the City of Hermosillo, Sonora”, Mexico. The condo developer claimed that there had been a decision by those courts granting the developer certain status, protection, and the right to continue to hold the money though the condo was not constructed after a long delay.

Russo filed suit in Maricopa County in 2009, which suit was timely answered - and the forum selection clause was raised by the developer among other defenses. A Motion for Summary Judgment and one for Cross Summary Judgment (not mentioning the forum selection clause) were filed in 2010. In 2011, an Amended Complaint was filed. Only then (after depositions were taken on various issues in the Motion for Summary Judgment) were Motions to Dismiss filed, raising the forum selection defense - and Judge Gama in Superior Court said that the forum selection clause was enforceable and had not been waived by three (3) years of Maricopa County litigation and discovery.

Analogizing to arbitration clauses and citing two arbitration cases, the Court of Appeals ruled that a party who “participates substantially in litigation without promptly seeking an order from the Court compelling arbitration” (emphasis added) will be held to have waived by his conduct the benefits of that arbitration clause for a forum selection clause. “We hold that, as with arbitration clauses and notice of claim defenses, a party may waive reliance on an otherwise enforceable forum selection clause by participating substantially in litigation without promptly seeking to enforce that clause.” (HN16)

The teaching of this case as regards arbitration is that the Court of Appeals has stridently said that, if one has an arbitration clause that one might enforce, one must not file motions, or do depositions, or prepare disclosures. Instead, one must immediately, and preemptively, assert that arbitration clause (utilizing Section 12-3007, motion to compel or to stay arbitration). If you don’t do so, you will have lost your rights under the arbitration clause. This may be dicta, but it is forcefully stated.

4. FINALLY, SOME COMMENTARY ON CONFIDENTIALITY IN MEDIATION IN THE GRUBAUGH CASE:

We see few reported cases in Arizona which address any aspect of mediation. On September 22, 2015, the Court of Appeals (Div. 1) released a case addressing one of the most important features of mediation, confidentiality.
For 22 years, Arizona has had a simple and clear statute (A.R.S. § 12-2238) which enforces the mediation process in the sort of broad privileged secrecy which we give to the statements made in the confessional. The statute flatly says: “The mediation process is confidential. Communications made…may not be discovered or admitted into evidence” unless one of four listed exceptions has occurred: (1) all parties to the mediation agree, (2) it’s needed to make a claim against the mediator (or his mediation program) related to breach of mediator obligations toward a party, (3) it’s required by a statute (perhaps A.R.S. § 46-454(b) re: elder abuse), or (4) it’s necessary to enforce an agreement to mediate.

In Grubaugh v. Blomo ex rel. County of Maricopa, 238 Ariz. 264, 359 P.3d 1008 (App. 2015), a litigant in family court litigation who sued her former attorneys related to their advice to Grubaugh during a mediation. In the mediation of a dissolution of marriage, the attorney’s advice on a “distribution of assets” question was, to Grubaugh’s belief, below the standard of care. She sued her former attorneys and, before discovery began, she had sought a ruling from the Superior Court that the Section 12-2238(B) mediation privilege was “waived”. The attorneys, faced with the claim, sought to reveal other (privileged) communications which would show why they gave such advice during the mediation. The Superior Court held that all the testimony could come into evidence, stating that the mediation privilege statute had simply failed to address this aspect of mediation (the client’s suing the lawyer).

The Court of Appeals then accepted Grubaugh’s petition for a special action, and Judge Gemmill for the Court of Appeals stated that, had the Legislature wanted to create a 5th exception to the mediation privilege statute, it could have done so as was done in Florida’s statute. (Fla. Stat. § 44.405(4)(a)(4) West 2004). Judge Gemmill went on to state that the mediation privilege is not one which is created by common law (like many other privileges) and therefore the statutory language of Section 12-2228(B) simply “leaves no room” for an “implied waiver” of mediation privilege related to legal malpractice claims. Citing Oregon and California precedents, our Court of Appeals noted that Grubugh’s “implied waiver” argument would invade the Legislature’s prerogative to create limited exceptions - and noted that the mediation privilege is also “held” by others apart from Grubaugh (i.e. the husband and the mediator) and thus the privilege was not one for which Grubaugh alone could engineer a proposed “waiver”.

This opinion issues a ringing endorsement of a broad privilege protecting all of the process of mediation (oral communications, demonstrative exhibits created for the mediation, and acts, all of which were done in or as part of the mediation). The case was sent back down from the Court of Appeal so that the trial court could determine if any of the communications which Grubaugh sought to expose could be said to have occurred “outside” of the mediation process. The final lines of the September 22, 2105 Court of Appeals decision state that, to the extent privileged material was placed in the Superior Court Complaint by Grubaugh, that material will be stricken from the Complaint.

---

3 Amended in 2010 after we adopted our RUAA.
4 A.R.S. § 12-2233.
5. **A SUPREME COURT RULE CHANGE:**

On August 27, 2015, the Arizona Supreme Court amended its Rules (31, 34, 38, 39, 40, 42). Rule 31 regulates the Practice of Law in Arizona. Three important changes in that rule concern mediation in Arizona.

(a) Rule 31(a)(2)(D), altered the definition of mediation in two important aspects. The rule used to require that the mediator had to be engaged by all disputants’ actually signing a written agreement, but that requirement has now in effect, been made obsolescent by our digital age of e-mails (and our electronic signature law). So that requirement of a written agreement with signatures has been removed from the Rule.

(b) A sentence has been added to the same paragraph (D) which sentence states: “Serving as a mediator is not the practice of law.” This too brought the Rule into conformity with modern times, as we have engineers and businessmen, among others, serving as mediators and no one serving as a mediator has a “client relationship” with any party in a mediation.

(c) In Rule 31(d)(25), the Supreme Court dealt with a concern that, in some instances, for example when two pro per litigants appear in a smaller mediated matter, the mediator may draft a settlement agreement for the parties. Such might look as though a mediator (who was not a lawyer) was, in effect, “practicing law”. After some months of “back and forth” commentary, the Supreme Court left in place the text in the rule which permits non-lawyer mediators to write settlement agreements if they are in a court (or government controlled) mediation program or in a non-for-profit community-based organization’s mediation program. The key thing is that a non-lawyer mediator, who is practicing outside of such programs, cannot prepare settlement documents. Such preparation of documents will need to be done by a lawyer or by a “certified document preparer” (under the Arizona Code of Judicial Administration, Part 7, Chapter 2, Section 7 - 208). The process for becoming a “certified document preparer” is not onerous, nor expensive.

6. **MEANWHILE, DOWN AT OUR STATE LEGISLATURE, FORCES HAVE RECENTLY TRIED TO MAKE ARBITRATION MORE COMPLEX AND MORE EXPENSIVE:**

As a prelude to the commentary below about national trends concerning arbitration, I have attached a Bill which was introduced in the Arizona State Senate on January 26, 2016. I am told that it was prepared by a lawyer who represents engineers, architects, and the AIA.

The bill (SB 1294) would have imported into every arbitration (whether conducted under the rules of AAA or JAMS or Tucson Realtors or the F.A.A. or RUAA statutes) a Superior Court procedural requirement. If this bill had been passed, an A.R.S. § 12-2602 Expert Affidavit would have had to accompany any demand for arbitration against any licensed professional. In addition, by adding to A.R.S. § 12-2602 a paragraph H, this bill would have narrowed greatly who can sign such a Section 12-2602 Expert Affidavit. Affidavit-signing experts are hard to find as it is, but the bill would have required that they be able to prove that (a) they are in precisely the same “branch” of engineering or medicine as the professional against whom they are offering testimony, and (b) during the year before their affidavit they devoted “a majority” of their professional time to that
precise “branch” of engineering or medicine. There would have been further restrictions if the expert practiced in a forensic group.

The sidebar litigation that would have resulted from such a requirement would have been considerable and would have delayed arbitration (or litigation), thus increasing expenses for all plaintiffs or claimants.

After some lobbying, this bill was withdrawn by its sponsor and did not become law, but the fact that it was proposed fits well into my comments as to what the trends are nationally re: arbitration.

7. NATIONAL TRENDS, I.E. STRUGGLES TOWARD AND AGAINST ARBITRATION:

In 2007, a bill was filed in our Federal Congress entitled the “Arbitration Fairness Act”.5 If it had been adopted, it would have prohibited most pre-dispute arbitration clauses between companies and individuals.

The sponsors played these three key themes in the 2007 end of year hearings:

- arbitration robs consumers of the “protections” of or jury trial and of court house discovery rules.

- arbitration agreements routinely tilt the playing field against “the little guy” reducing remedies available to them.

- arbitrators are often not independent, but are “beholden” to repeat users of arbitration.

The bill as it was proposed nine years ago, would have benefited one group with certainty, trial lawyers. ATLA supported the bill, which, in its Article 2, said it was intended to roll back U.S. Supreme Court decisions so as to protect “civil rights” from being eroded and to void parts of contracts occurring between all “parties of disparate bargaining power,” such as consumer disputes and employment disputes. Of course, determining whether a contract containing an arbitration clause was one which was between parties of “disparate bargaining power” set up the likelihood that there will be a lot of challenges to a lot of contracts, since “disparate” is a vague term.

The 2007 bill contained in its provisions “findings” that a “rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury…” Another “finding” stated that consumers and employees don’t understand “deliberately fine print” that strips them of their rights and often leaves them unaware that such has occurred.” Various studies were done after 2007 trying to show proponents of the bill that some industries used arbitration - but that others made essentially no use of it; that

consumers fared as well or better in arbitration than in (expensive) court house litigation; and that there is little evidence of a “repeat player” phenomenon.6

Finding No. 7 in Article 2 of the 2007 bill stated:

“Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes.”

As lawyers who follow cases about arbitration know, since approximately 2000, the Nation’s Courts have been generating recorded cases regarding procedural and substantive “unconscionability”. The Courts have been busy declaring as unenforceable those arbitration clauses which unfairly restrict remedies, amounts of damages, allocation of costs, hearing procedures, arbitrator selection, etc.

The 2007 bill as sponsored by Senator Al Franken reappeared in 2009 as S. 931 (111th Congress) and in 2011 as H.R. 1873 and S. 987, (112th Congress), the Arbitration Fairness Act of 2009 and 2011. These bills contained somewhat briefer statements of the “findings” and their number of “findings” was slightly reduced. In 2011, civil rights disputes and consumer disputes were expansively defined and the bill stated flatly:

“no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, or civil rights dispute.”

The same bill was filed once again in 2013 as S. 878 (113th Congress).

Along the way, due to the fracas in the hearings repeatedly held on Capitol Hill, the three major providers of consumer arbitration services (AAA, JAMS, National Arbitration Forum) all adopted rules requiring that the consumer arbitration clauses which they enforce will have to provide basic rights (reasonable fees, fair selection of arbitrators, all remedies available at law, fair locale selection, etc.).

During the run-up to the 2012 and the 2014 mid-term Federal Congressional elections, articles appeared speculating whether one or another of the then just released Supreme Court decisions or arbitration would increase or decrease the odds of a passage of the Arbitration Fairness Act. See “On Babies and Bathwater, the Arbitration Fairness Act and the Supreme Court’s Recent Arbitration Juris Prudence, 48 Houston Law Review, 457 (2011) regarding speculation as to the 2012 election, note 4.

One lesson has to be taken from the repeated refiling and tinkering with the misnamed Arbitration Fairness Act, as it is introduced again and again. Regardless of how well our Courts protect against procedural and substantive unconscionability in arbitration clauses, there are forces

abroad in the land seeking to disable arbitration in a large number of situations. Whenever Courts fail to protect litigants against unreasonable arbitration clauses, the Courts thereby strengthen the hand of people calling for crippling restrictions on arbitration, restrictions which would affect some non-consumer arbitrations, as well as consumer arbitrations.

Bills were introduced at the end of January, 2016, in the New York State Legislature which sound very much like the Federal Fairness in Arbitration Act (Bills A108 and A8191). On February 10, 2016, the New York State Assembly heard those bills. Some commentators have noted that the New York Legislators seem to have “bought into” a very one-sided New York Times Seven Article series in November of 2015 which “slammed” arbitration as being inimical to the “rights” of citizens to endure lengthy and expensive jury trials.

Any state legislation along these lines runs the risk of running afoul of Section 2 of the Federal Arbitration Act (8 USC § 1) which preempts and does not state law to single out and interfere with arbitration clauses under the F.A.A. If New York or other states start adopting acts like the Federal Fairness in Arbitration Act, there will be a lot of litigation to set aside such acts under the F.A.A.

8. NATIONAL TRENDS:

Mentioned above is the “magic” word “unconscionability”.

For at least the last 15 years, the Courts of our nation have been assiduous in reviewing whether an arbitration clause in a contract was obtained by improper means - or whether the clause so unfairly slants the playing field against a party as to deny the litigant basic rights. “Procedural unconscionability” (obtained by improper means) cases are far less numerous than cases weighing “substantive unconscionability”. The grandfather of the substantive unconscionability cases is Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal. 4th 83, 6 P.3rd 660, 99 Cal. Reptr. 2d 745 (Calif. 2000). This case shows that, when there is a contract of adhesion, and the arbitration clause slants the playing field in favor of the dominant party on issues like:

- imposing an unfair allocation of fees and costs;
- not allowing a lawyer to represent a party;
- limiting of evidence that will be received;
- limiting of remedies permitted, like punitive damages;

then the Courts will intervene and will void the clause altogether, not allowing a blue-pencil rewriting or adjusting of the offending arbitration clause. In Arizona, we have RUAA § 12-3004(B), which declares six rights of parties to be ones with which an arbitration clause cannot interfere:

- notice of commencement of proceedings;
- disclosures of conflict and interest of arbitrators;
- legal representation;
- interim judicial remedies, if needed;
- discovery procedures; and
- appeal ability under § 12-3023.

The most virulent trend nationally in arbitration is the constant struggle to define what constitutes “unconscionably drafted” arbitration clauses. For a prime and example of that struggle you should read the 60 days old very short decisions by the U.S. Supreme Court in *The Ritz-Carlton Development Company, Inc. v. Narayan* and the *Ritz-Carlton Development Company v. Nath*, Docket Nos. 14-370 - 379 and 406. The U.S. Supreme Court summarily granted certiorari and vacated and remanded several Super Court of Hawaii decisions, all dealing very strongly with unconscionability. The Hawaii Court had ruled that the arbitration clause before it was unconscionable because it was a contract of adhesion which:

- limited discovery rights;
- even required the arbitration and all discovery facts to be confidential (thus limited the locating of fact witnesses); and
- prohibited punitive damages.

The U.S. Supreme Court sent the case back under Section 2 of the F.A.A. saying it appeared Hawaii was too sensitive and, in effect, was treating arbitration agreements far differently than all other contract clauses, thus raising the preemption issue under the F.A.A. Section 2 - but the *Ritz-Carlton* cases demonstrate the great struggle throughout the country as to unconscionability rulings.

The key question is: When has the drafter of an arbitration cause “tilted the playing field” too far resulting in the clause being so unfair that the Courts will intervene and void the clause, forcing the dispute to enter the Court system?