

**COURT-ANNEXED ADR PROGRAM
18th JUDICIAL CIRCUIT
DuPAGE COUNTY, ILLINOIS**

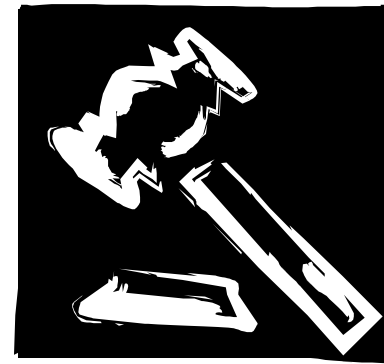
ANN B. JORGENSEN
CHIEF JUDGE

HOLLIS L. WEBSTER
*PRESIDING JUDGE
LAW DIVISION*

KENNETH A. ABRAHAM
SUPERVISING JUDGE ARBITRATION

LORETTA K. GLENNY
ADR ADMINISTRATOR

SPRING 2008



ADR QUARTERLY

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IN THE COURTROOM

OPENING STATEMENT

PROPOSAL FOR INCREASE IN REJECTION FEE

The ADR Coordinating Committee of the Illinois Judicial Conference has advanced a proposal to the Supreme Court to increase the rejection fee for awards not in excess of \$30,000 from \$200 to \$300. No action has been taken on that proposal.

ANNUAL MEETING SUPREME COURT ADR COMMITTEE

On June 13, 2008 the ADR Coordinating Committee will hold a joint meeting with the ADR Administrators and Supervising Judges of Arbitration. If you have any suggestions or comments that you wish to be conveyed, please contact Judge Abraham or Loretta Glenny prior to that date.

MANDATORY PRETRIALS-SUBROGATION CASES

The largest category of cases subject to Mandatory Arbitration that proceeded to jury trial in 2007 was subrogation actions. In fact during 2007, 69% of the jury trials in Courtrooms 1003 and 2018 were subrogation trials.

Recognizing that judicial resources have not grown in proportion to the increase in new case filings and that jury trials constitute the largest consumption of court time, the Law Division searched for a way to promote the quick resolution of subrogation cases. The need has become more obvious because the length of time from trial setting to jury or bench trial has jumped in large measure because Courtroom 1003 hears all SR cases, SC jury trials, and all LM cases. Two full days are devoted to Forcible Entry and Detainer and other "LM" cases.

Commencing June 1, 2008, the Law Division will introduce a Mandatory Subrogation Pretrial Pilot Program. All subrogation actions will be set for pretrial before arbitration setting. The first group of cases will be SC and SR cases. If successful, AR cases will be added to the program.

Attorneys and adjusters with authority to settle and counsel for plaintiff and defendant(s) will meet with Judge Abraham who will set multiple pretrials on cases with the same plaintiff's counsel and defendant's counsel. The results of this program will be evaluated at the close of 2008.

On May 22, 2008 Judge Abraham will meet with subrogation attorneys and insurance adjusters in room 2015 at 1:30 p.m. to exchange ideas and discuss further details of the project. A discussion will also be held on extensions of time to file rejections under Rule 183 and how previously rejected cases will be phased into the program. This will be your opportunity to have input into the mechanics of the program.

SC & SR JURY TRIALS

Since January 23, 2006 all small claims in which a jury demand has been filed have been subject to Mandatory Arbitration. Much confusion has arisen as to whether defendants are required to file an answer or affirmative defenses and whether the parties are required to seek leave of court to conduct discovery, including compliance with Supreme Court Rule 222. Some of that confusion has as its origin the discretionary requirement of filing an answer under Rule 286(a) and the bar on discovery without leave of court contained in Rule 287.

This confusion could result in a party being barred from presenting evidence at an arbitration hearing or at trial. Many of these issues don't arise until the day of hearing or trial, when a defendant seeks to present affirmative defenses and the plaintiff complains of surprise, or when either party raises the other's lack of compliance with Rule 222 and seeks to bar evidence. When those issues arise at trial, the trial attorneys may not be the same attorneys who presented their case at arbitration. Therefore, the court is not able to determine if the claim of surprise is valid or if the issues of which the claim of surprise arises were, in fact, disclosed and presented at the arbitration hearing.

In an effort to avoid the risk of guesswork, on May 1, 2008 Judge Abraham entered a Standing Order. This order applies only to cases where a jury demand has been filed and requires the filing of an answer and any affirmative defenses. It also clears up confusion as to the applicability of Rule 222. A copy of that order is enclosed.



JUDICIAL TIPS

ATTORNEYS

RULE 201(k)

Prior to seeking discovery sanctions or proceeding on a Motion To Compel, counsel seeking compliance must:

- A. Have attempted a “personal consultation” and made reasonable attempts to resolve differences; and
- B. Have incorporated a statement into their motion stating that after the personal consultation and reasonable attempts to resolve differences that they have been unable to reach agreement.

Without both elements, the court cannot hear the motion of the movant. Of course, these requirements were added to the Rules in recognition that many disputes can be resolved if attorneys talk before firing off a motion.

Please note that a “201(k) letter” does not meet the requirements of Rule 201(k) unless the moving attorney has attempted a personal consultation (i.e. phone conference) and there has been no response or that opposing counsel was unreasonable. Information supporting attempts to contact the opponent and the results of those attempts should be included in your motion.

One often-overlooked requirement of Rule 201(k) is that this provision relates to “counsel responsible for trial of the case”. As a practical matter, it is often difficult to determine who will act as trial counsel when your counsel for opponent is a large law firm.

ARBITRATORS

In that case, you may wish to include a paragraph in your motion stating that you attempted to determine who was responsible but, after inquiry, were unable to find out the identity of the trial attorney.

Please note that if there has been a prior court order compelling compliance, a 201(k) conference is not necessary. (Nedzvekas v. Fung, 374 Ill.App.3d 618, 622)

RULE 191(a)-OPINIONS

Where there are disputed facts in a motion for summary judgment, a Section 2-619 motion or a motion contesting personal jurisdiction, the motion must be supported by an affidavit which complies with Rule 191. Where opinions are involved, the motion must:

- A. Be sworn to;
- B. Be based upon personal knowledge and not information and belief;
- C. Comply with the "attached paper rule";
- D. Contain information, which would qualify the affiant as an expert (See e.g. Go-Tane Service Stations, Inc. v. Sharp, 78 Ill.App.3d 785; 2nd Dist, 1979); and
- E. Set forth, with particularity, facts supporting the opinion. Legal conclusions and generalized conclusions are insufficient. (Steiner Elec. Co. v. NuLine Technologies, Inc., 68 Ill.App.3d 876 1st Dist, 2006).

STIPULATION/ADMISSION OF NEGLIGENCE

We still receive many awards, which state that the defendant has stipulated for negligence or has admitted to negligence "for the purpose of arbitration". Such a stipulation is a judicial admission and is binding on the defendant for purposes of trial. Alternatively, one could view such a stipulation as a bad faith participation in arbitration – i.e. we are not going to put on a case now but may at the time of trial. Please do not lead the parties into believing that you are accepting a stipulation for arbitration purposes only.

COSTS TO DEFENDANT

If an award is entered in favor of defendant(s), yes, you can award costs provided that they have presented the amount of their costs to the panel during the arbitration. 735 ILCS 5/5-109 provides that the plaintiff would have been entitled to costs if judgment was entered against defendant, in the event judgment is entered in favor of the defendant then the judgment "shall" be entered for the defendant's costs.

FINDING OF GOOD/BAD FAITH

In October 2003 the Supreme Court amended Rule 94. That rule sets the substance of the Award form. The amendment added a box where the arbitrators could indicate that all parties participated in good faith. The reasons for that change include the inability of the trial court to determine if the arbitrators had intended to leave the bad faith box unchecked or had inadvertently not checked that box. The clear intention of the Supreme Court was to require one of the boxes to be checked.



CASE IN POINT

RELATION-BACK DOCTRINE-SUPREME COURT ADOPTS NEW TEST

The relation-back doctrine holds that an amended complaint may be deemed filed on the date of filing of the original complaint if the plaintiff can establish that the factors set forth in 735 ILCS 5/2-616(b) apply, thus defeating a defense that the complaint was filed beyond the time allowed by the Statute of Limitations. Section 616(b) states, in part:

(b) The cause of action, cross claim or defense set up in any amended pleading shall not be barred by lapse of time under any statute or contract prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense or cross claim interposed in the amended pleading *grew out of the same transaction or occurrence set up in the original pleading...*

This section applies to an amended complaint that names the same parties as the original complaint. Section 616(d) covers a situation where parties differ.

Considerable litigation has developed over the words “grew out of the same transaction or occurrence set up in the original pleading”. On January 25, 2005 the Supreme Court adopted a “sufficiently-close-relationship” test.

A brief synopsis of the relevant facts in Porter v. Decatur Memorial Hospital, 227 Ill.2d 343 follows:

On several occasions we have seen awards where neither box is checked. Whether you are a chair or panel member, please make sure that your panel checks one of the boxes. In multiple party cases where only one plaintiff/defendant fails to participate in good faith, you may add language clarifying who did and did not participate in good faith.

If you find that both parties failed to participate in good faith, please so indicate in the blank provided in the form.

ORDERS TO BAR

If the trial court enters an order barring or limiting evidence, the panel should follow that order regardless of representation of the parties that they have "worked out" their differences. As obvious as this may be to most of our arbitrators, this tip is based upon actual occurrences.

A. Within the time allowed by the Statute of Limitations, plaintiff files an original complaint against the ER doctor for negligence and names the hospital as a respondent in discovery;

B. After conducting discovery, plaintiff files first amended complaint, also before expiration of the limitation. The amended complaint joins hospital;

C. After expiration of the limitation period, plaintiff seeks leave to file its second amended complaint which added an allegation against the physician stating that the doctor failed to recognize a fracture of the cervical spine in a CT scan and also adding a new count against the hospital that alleges agency.

After summarizing existing law, the Supreme Court stated that Section 616(b) should be construed liberally and that the “same transaction or occurrence” issue centers on whether the defendants’ attention had been sufficiently directed to the facts that form the basis of the claim(s) within the limitations period. In evaluating that issue, a new claim is sufficiently close to the original claim(s) if the new allegations as compared with the timely filed allegations show that the events were close in time and subject matter and that they led to the same injury. Applying that test, the second amended complaint related back to the original filing.

The editions of the *ADR QUARTERLY* and the *QUESTION AND ANSWER BOOK* are available through the County Web site, which can be accessed as follows:

<http://www.dupageco.org/circuitcourt>

Thank you to the many attorneys who have phoned, written and spoken to Judge Abraham and the ADR Center staff. We appreciate your opinions and concerns over issues important to the process. Many of your comments and concerns will be addressed and included in future editions. We encourage comments that will not only improve the process but also the result.

The Mandatory Arbitration Program, 18th Judicial Circuit Court, DuPage County, Illinois, provides the *ADR Quarterly* as a service to the arbitrators and other interested parties. Any discussion contained in this publication is offered as general information only and should not be relied upon as a legal opinion regarding any specific matter.

The *ADR Quarterly* is written and edited by Judge Hollis L. Webster, Judge Kenneth A. Abraham, Loretta K. Glenny and Carol A. Robles. Thanks to Dan Amati, Deputy Court Administrator, for running the graphics.

STATE OF ILLINOIS)
COUNTY OF DUPAGE)

IN THE CIRCUIT COURT OF THE EIGHTEENTH
JUDICIAL CIRCUIT
DUPAGE COUNTY, WHEATON, ILLINOIS

IN THE MATTER OF JURY TRIALS) **STANDING ORDER**
SEEKING LESS THAN \$10,000 IN)
MONEY DAMAGES) **05.01.08**

STANDING ORDER
SC & SR JURY TRIALS

WHEREAS, Supreme Court Rule 86(b) provides that all actions seeking money damages not in excess of the monetary limit authorized by the Supreme Court are eligible for Mandatory Arbitration; and

WHEREAS, the 18th Judicial Circuit has been authorized to mandate Arbitration for cases seeking an amount not in excess of \$50,000; and

WHEREAS, the 18th Judicial Circuit has adopted local court Rule 16.04, effective January 26, 2006, which requires that all Small Claims actions (regardless of the letter designation) be subject to Mandatory Arbitration where a jury demand is filed; and

WHEREAS, confusion has arisen between the requirements of Supreme Court Rule 222 and the limitations on discovery contained in Supreme Court Rule 287; and

WHEREAS, confusion has also arisen as to whether an answer or affirmative defenses are required under Rule 286(a).

NOW, THEREFORE, in order to avoid confusion, the filing of needless motions and surprise should affirmative defenses first be presented at arbitration or trial,

IT IS HEREBY ORDERED:

A. In all small claims cases subject to Mandatory Arbitration, the defendant shall file an answer and affirmative defenses, if any, on or before the date set by court: Provided however, that if no court order specifies the time for filing, defendant shall file their answer and affirmative defenses within 28 days after they are first required to appear; and

B. All parties subject to Mandatory Arbitration shall file their Rule 222 disclosure within the time required by that rule and local court rule 13.04; and

C. No other discovery shall be allowed in small claims actions without leave of court.

JUDGE KENNETH A. ABRAHAM
Supervising Judge
Mandatory Arbitration

DATED: May 1, 2008