

## **Seventh Circuit voids arbitration agreement requiring plaintiff to pay his own costs and attorney's fees**

**By Glenn R. Gaffney, Glendale Heights**

On April 4, 2002, the Seventh Circuit Court of Appeals in the case of *McCaskill v. SCI Management Corp.*, 285 F 3d 623 (CA 7 Ill.)(2002) struck as unenforceable an arbitration agreement which required the plaintiff to pay her own costs and attorney's fees in a Title VII action. At the district court level, defendant moved to dismiss the complaint pursuant to the Federal Arbitration Act (FAA), 9 USC Sec 1 at sec., and the Illinois Uniform Arbitration Act, 710 ILCS 5/2 at sec. McCaskill had signed an agreement with her employer which required that all employment disputes be resolved through binding arbitration including claims governed by Title VII. McCaskill argued that the arbitration agreement precluded her from fully and effectively vindicating her Title VII rights on the basis that: (1) the agreement required each party to pay their own costs and fees regardless of the outcome; and (2) mandated that each party pay one half of the costs associated with arbitration. The district court granted the defendant's motion to compel arbitration and McCaskill appealed to the Seventh Circuit.

The Seventh Circuit referenced courts that refused to enforce arbitration agreements which mandated each party pay one half of the arbitration expenses, but did not address that issue as the attorney fee provision alone rendered the agreement unenforceable. The Seventh Circuit cited *Gilmer v. Interstate-Johnson Lane Corp.*, 500 US 20,26 (1991) for the proposition that federal civil rights statutes may be appropriate for arbitration as long as the litigant can effectively vindicate her statutory cause of action in the arbitral forum. The Seventh Circuit noted that congress has recognized that a plaintiff in a civil rights suit acts not only for himself but as a "private attorney general" vindicating federal policy. The Seventh Circuit found that the attorney fee provision is integral to the purpose of the statute and central to the ability of an aggrieved person to seek redress for alleged violations of Title VII.

The defendant employer argued that the attorney fee provision of the arbitration agreement regulates only what the plaintiff was responsible for paying and that it was it was possible for an arbitrator to award plaintiff attorney fees consistent with the agreement. The Seventh Circuit rejected this argument as a twisted and strained reading of the words contained within the arbitration agreement. The Seventh Circuit then held that the entire arbitration agreement was unenforceable as the agreement prevented McCaskill from effectively vindicating her rights by preemptively denying her an important remedy provided by Title VII.

Of further interest in the majority's decision was the court's reference to *Graham Oil Co. v. Arco Products Co., a division of Atlantic Witch Field Co.*, 43 F 3d 1244 (9<sup>th</sup> Cir. 1994) for the proposition that if a contravening clause is not "severable from the arbitration agreement as a whole" the entire arbitration agreement must be held unenforceable. However the court noted that the defendant SCI Management Corp. did not even raise the issue of whether or not the attorney fee provision could be severed from the arbitration agreement.

Justice Manion dissented on the basis that there was a lack of appellate court jurisdiction. Justice Manion was of the opinion that the district court did not dismiss the plaintiff's action but rather stayed proceedings pending arbitration pursuant to section 3 of the FAA. *Atac Corp. v. Arthur Treacher's Inc.*, 280 F 3d 1091 (6<sup>th</sup> Cir. 2002) (order staying proceedings pending arbitration not appealable under the FAA). The dissent's position was absent a dismissal of the underlying case a district court's order compelling arbitration remains an interlocutory order under section 16 (b)(3) of the FAA. Justice Manion further suggested that the plain language of the FAA provides the court only with the power to grant a stay and not the authority to dismiss a case. (see footnote 3).; *Kroll v. Doctor's Assoc. Inc.*, 3 F3d 1167, 1172 (7<sup>th</sup> Cir. 1993). This issue of stay or dismissal was left "unresolved" by the US Supreme Court in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 US 79 (2000).