LANDLORD AND TENANT

LANDLORD MUST USE REASONABLE EFFORTS TO MITIGATE DAMAGES AFTER TENANT'S BREACH

Hoppenstein Properties, Inc v. Schober, 329 S.W.3d 846 (Tex. App.—Fort Worth 2010).

FACTS: Bill Schober ("Tenant") leased commercial premises from Hoppenstein Properties, Inc. ("Landlord") for a period of six years, and spent $40,000 to make the premises business ready. Tenant's business suffered after moving into the leased premises and almost a year after signing the lease Tenant vacated the premises. After Tenant's breach of the lease and after spending over $50,000 to renovate the space, Landlord leased part of the space to a new tenant, a hookah bar needing a smaller space than Schober's antique furniture business. Landlord subsequently sued Tenant for damages for prematurely vacating the premises.

Tenant's default of the lease was not contested, but Tenant argued that Landlord had failed to mitigate its damages because there was another business owner in the same center that was interested in taking over his space as-was. After a trial, a jury awarded Landlord $5,500 in damages, an amount short of the requested $107,584.54. Landlord appealed and argued that the jury's evidence to support its finding that Landlord wholly failed to mitigate its damages caused by Tenant's breach of the lease was insufficient.

HOLDING: Reversed and Remanded.

REASONING: A landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property. *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.,* 948 S.W.2d 293, 299 (Tex. 1997). However, a landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances. A tenant's assertion that a landlord failed to mitigate damages is an affirmative defense. Thus, the tenant properly bears the burden of proof to demonstrate that the landlord has failed to mitigate damages and the amount by which the landlord could have reduced its damages.

In its analysis, the court looked to the jury's award of $5,550 for the past due rent that had accrued before Tenant vacated the premises and determined the amount awarded did not include any amounts of rental, late fees, or cost of improvements to the premises for any time after Tenant vacated the premises (all authorized by the lease agreement in the event of a tenant default). In light of that, the court held that although Tenant brought forward evidence showing that Landlord was not interested in mitigating damages because of his refusal to lease to another tenant in its shopping center, Tenant failed to prove that Landlord could have immediately rented Tenant's premises and failed to prove that Landlord was not entitled to any post-abandonment damages whatsoever.

ARBITRATION

ARBITRATION AGREEMENT MAY BAN CLASS ACTION

AT&T Mobility LLC. v. Vincent Concepcion , ___ U.S. ___ (2011).

As this issue was going to press, the United States Supreme Court held by a vote of 5-4 that arbitration agreements may ban the use of class action. The case involved an arbitration agreement entered into by Vincent and Liza Concepcion as part of the sale and servicing of cellular telephones with AT&T Mobility LLC (AT&T). The contract provided for arbitration of all disputes between the parties but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."

The Ninth Circuit found the provision unconscionable under California law as announced in *Discover Bank v. Superior Court,* 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P. 3d 1100 (2005). It also held that the "*Discover Bank* rule" was not preempted by the FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that "class proceedings will reduce the efficiency and expeditiousness of arbitration" and noted that "*Discover Bank* placed arbitration agreements with class action waivers on the exact same footing as contracts that bar class action litigation outside the context of arbitration." The Supreme Court reversed, holding that "because it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941)*, California's *Discover Bank* rule is preempted by the FAA.

The Court noted that although §2 of the Federal Arbitration Act preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. "As we have said, a federal statute's saving clause 'cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.'" The Court found that California's *Discover Bank* rule interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The Court also noted that "the rule is limited to adhesion contracts, but the times in which consumer contracts were anything other

The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past.

than adhesive are long past. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank*, and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

The Court also found arbitration is poorly suited to the higher stakes of class litigation.

In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. §10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect given these limitations; review under §10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

COURT MAY NOT SUBSTITUTE ARBITRATOR WHEN CONTRACT DESIGNATED NATIONAL ARBITRATION FORUM

Carr v. Gateway, Inc., 944 N.E.2d. 327 (Ill. 2011).

FACTS: Plaintiff William Carr purchased a computer from defendant Gateway, Inc. Carr subsequently filed a class action complaint alleging misrepresentation by Gateway as to the speed of the computer's processor. The circuit court of Madison County severed the counts and Carr's allegations proceeded separately. Gateway sought to dismiss the suit or compel arbitration in accordance with the terms of the sales contract. The circuit court denied the motion, holding, among other things, that there was no valid arbitration agreement between the parties. Gateway appealed. While the case was on appeal, the National Arbitration Forum, the arbitral forum designated in the arbitration agreement, stopped accepting consumer arbitrations. Thereafter, the appellate court affirmed the circuit court on the basis that the arbitration agreement failed due to the unavailability of the arbitral forum.

Gateway appealed, arguing that Section 5 of the Federal Arbitration Act, 9 U.S.C. §. 5 (2006), applied, allowing the circuit court to appoint a substitute arbitrator due to the unavailability of the parties' designated arbitral forum.

HOLDING: Affirmed.

REASONING: The court held that, because the chosen arbitral forum was no longer available and no provision had been made in the arbitration agreement for the naming of a substitute arbitral service or arbitrator, the question became whether Section 5 of the FAA was applicable, which would permit the circuit court to name a replacement for the NAF. The pertinent language of Section 5 states that, "If… for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire," 9 U.S.C. § 5 (2006).

In *Zechman v. Merill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp 1359 (N.D. Ill. 1990), the district court noted that there was a strong federal policy favoring arbitration and held that the decision between substituting a new provision for the failed one and refusing to enforce the agreement turns on the intent of the parties at the time the agreement was executed. To determine this intent, a court looks to the essence of the arbitration agreement, specifically whether the essential term is the agreement to arbitrate or whether the logistical concerns are ancillary or vital to that agreement to arbitrate. The district court in *Zechman* found that the provision at issue was not integral to the agreement to arbitrate. The intent of the agreement focused more on designating the regulations under which the arbitration would proceed.

In the present case, the court noted that the FAA promotes a liberal federal policy favoring arbitration and that section 5 of the FAA may be applied unless the designation of the arbitral forum is integral to the parties' agreement to arbitrate. In dicta, the court agreed with Gateway that the mere fact parties name an arbitral service to handle arbitrations and specify rules to be applied does not, standing alone, make the designation integral to the agreement.

One argument for substitution is the agreement's allowance for the designation of particular rules that could easily be used by a substitute arbitrator. The NAF, however, restricted the use of its rules to those under agreement with the NAF and the rules might not have contained terms applicable to consumer arbitration because it no longer accepted such arbitrations. Any finding by the court based on NAF rules would have been purely speculative. In another section of the agreement, the plain language penalized any party for bringing the dispute in any forum other than the NAF. With these matters in mind, the court held that the designation of the NAF as the arbitral forum was integral to the agreement. In light of that, the court held that section 5 of the FAA did not apply to permit the appointment of a substitute arbitrator and the agreement to arbitrate failed.

DEFENDANT WHO MOVES TO COMPEL ARBITRATION MAY BE SANCTIONED IF IT TURNS OUT THERE IS NO VIABLE DEFENSE TO THE CONSUMER'S CLAIM

In re Olshan Foundation Repair Company, LLC, 328 S.W.3d 883 (Tex. 2010).

FACTS: Between 1998 and 2004, four Texas families – the Waggoners, Kilpatricks, Tingdales, and Tisdales – (collectively, "homeowners") contracted with Olshan Foundation Repair Company, LLC ("Olshan") to repair their home foundations. The four repair contracts were in writing, and each contained an arbitration clause. The arbitration clause in the contracts signed by the Kilpatricks, the Tingdales, and the Tisdales provided that any dis-

pute arising out of the agreement would be resolved by "binding arbitration administered by the American Arbitration Association ("AAA") pursuant to the arbitration laws in [their] state . . . ." The arbitration clause in the Waggoners' contract was identical except for the choice of law – theirs was to be administered pursuant to the Texas General Arbitration Act ("TAA").

Independently of each other, the homeowners filed suit against Olshan, and all were represented by the same counsel. Among the homeowners' arguments was that arbitration with the AAA was substantively unconscionable because of the expense required. Olshan filed petitions for mandamus in the four cases when the three separate trial courts denied its pleas in abatement, refusing to compel arbitration. Three different courts of appeals also declined to order the disputes to arbitration, without reaching the issue of unconscionability based on cost of arbitration. The Texas Supreme Court consolidated the four cases for argument and issued a consolidated opinion.

HOLDING: Remanded and mandamus granted conditionally.

REASONING: The Kilpatricks, Tisdales, and Tingdales contended that the arbitration agreements were unconscionable because "mandatory binding arbitration administered by the [AAA] . . . in accordance with this arbitration agreement and the commercial rules of the AAA" was prohibitively expensive, preventing their ability to vindicate their claims.

The U.S. Supreme Court has held that statutory claims may be arbitrated "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90, 121 S. Ct. 513 (2000). Conversely, an arbitration agreement may render a contract unconscionable if "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating [his or her] federal statutory rights in the arbitral forum." *Id.* Arbitration is favored in both federal and Texas law, and to conclude that an arbitration agreement is unconscionable based merely on the possibility of prohibitive costs to the claimant would undermine the favorable federal policy towards arbitration agreements. Arbitration is intended as a lower cost-efficient alternative to litigation. Where the justifications for arbitration are vanquished by excessive arbitration costs that deter individuals from bringing valid claims, the unconscionability doctrine may protect unfairly disadvantaged consumers. Therefore, excessive costs imposed by an arbitration agreement would render a contract unconscionable if the costs prevented a litigant from effectively vindicating his or her rights in the arbitral forum.

The party opposing arbitration bears the burden to show that the costs of arbitration render it unconscionable. The court required evidence that the homeowners would "likely incur arbitration costs in such an amount as to deter enforcement of statutory rights in the arbitral forum." *In re Poly-America, L.P.*, 262 S.W.3d 337, 356 (Tex. 2008). The court adopted the Fourth Circuit's approach, to evaluate "whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation." *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001). According to that court, the inquiry requires "a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." If the total cost of arbitration is comparable to the total cost of litigation, the arbitral forum is equally accessible. Other factors include the actual cost of arbitration compared to the total amount of damages the claimant is seeking and the claimant's overall ability to pay the arbitration fees and costs. These factors may also show arbitration to be an inadequate and inaccessible forum for the particular claimants to vindicate their rights. However, these considerations are less relevant if litigation costs more than arbitration. Evidence of the "risk" of possible costs of arbitration is insufficient evidence of the prohibitive costs of the arbitration forum. For evidence to be sufficient, its must show that the plaintiffs are likely to be charged excessive arbitration fees. To that end, parties must at least provide evidence of the likely cost of their particular arbitration, through invoices, expert testimony, reliable cost estimates, or other comparable evidence. Evidence that merely speculates about the risk of possible cost is insufficient.

As the arbitration agreement specified that the AAA rules would govern the arbitration, the court found that the AAA's "Supplementary Procedures for Consumer-Related Disputes" ("Supplementary Procedures") applied. The Supplementary Procedures has a separate fee schedule for consumer arbitration, wherein the most a consumer would have to pay is $375 towards an arbitrator's fee.

The homeowners bore the burden to show the likelihood of incurring excessive costs, yet no homeowners in this case provided any concrete idea of the amount of their claims. Merely showing that other claimants have incurred arbitration costs of some amount fell well short of *specific* evidence that the particular parties in this case would be charged excessive fees. Although the homeowners offered invoices from what they called "similar cases," there was no evidence that their claims were similar in amount or difficulty to those where the claimants were charged $35,900 and $11,406. There was also no evidence that they had made any effort to reduce the likely charges through requests for fee waivers, pro bono arbitrators, or even simply requesting a one arbitrator panel. The court noted that even if it took the invoices as evidence of the likely charges facing the homeowners, they had provided no comparison of those charges to the expected cost of litigation, the amount of their claim, or their ability to pay the costs. The record contained no specific evidence that the homeowners would actually be charged excessive arbitration fees, and thus there was no legally sufficient evidence that such fees prevented them from effectively pursuing their claim in the arbitral forum. The parties in the three cases governed by the FAA did not submit legally sufficient evidence that arbitration of their claims would be unconscionable. Therefore, the court found that the trial court erred by denying Olshan's pleas in abatement, and conditionally granted manda-

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mus relief in the Kilpatrick, Tisdale, and Tingdale cases and remanded them to the trial court. The court was confident that the trial court would comply and conduct proceedings consistent with its opinion, and held that it would issue the writs if they failed to do so.

The homeowners also contended that the contracts violated the Texas Home Solicitation Act because they did not contain the requisite notice of their right to cancellation and were therefore void by express provision of the Act. Olshan responded in its brief only that it "will present its defenses . . . in the arbitral forum." Asked at oral argument what defenses it had to the homeowners' contention that their contracts, including the arbitration provisions, were void and unenforceable, Olshan's counsel answered that "there might be an estoppel defense" because the homeowners did not challenge the validity of the contracts until work was completed. Olshan's counsel also argued that even if the contracts were void, the arbitration provision was severable and valid, and the homeowners must still submit their complaints to arbitration. However, Olshan's counsel cited no authority for either of these arguments.

Judge Hecht pointed out that the homeowners acknowledged that the validity of the contract is a matter for the arbitrator to decide. But the homeowners argued that the invalidity of the contract was a foregone conclusion because it violated the Texas Home Solicitation Act, making "the entire process . . . a needless waste of time, energy, and money." Judge Hecht agreed with the court that even if this was true, the contracts are not unconscionable. But being led on a wild goose chase, if that is all arbitration would come to, is not without remedy.

If, as the homeowners predicted, the arbitrator would conclude that the contracts were indeed void, Olshan and its counsel would be subject to being sanctioned by the trial court for filing a groundless motion to compel arbitration. The court's authority to sanction a frivolous motion to compel is not displaced by the arbitrator's authority to determine the predicate issue – that the contracts are unenforceable. Judge Hecht wrote that if the dispute should return to trial court, the homeowners may seek redress for Olshan's lark.

AN OBLIGATION TO ARBITRATE MAY ALSO BIND A NON-SIGNATORY UNDER PRINCIPLES OF CONTRACT LAW AND AGENCY

In Re Rubiola, 334 S.W.3d 220 (Tex. 2011).

FACTS: Brian and Christina Salmon ("Buyers") purchased and financed a home from Rubiola Mortgage and Realty, advertised as a one-stop-shop for real estate purchase and financing, owned and operated by Greg and J.C. Rubiola as President and Vice-president, respectively. The purchase contract from the Rubiolas' real estate branch was a standard Texas real estate sales contract, without an arbitration clause. However, the financing agreement from Rubiola Mortgage Company did contain an arbitration clause, stating that arbitrable disputes included any and all controversies or claims between the parties. The parties subject to the arbitration were defined as "Rubiola Mortgage Company, and each and all persons and entities signing this agreement or any other agreements between or among any of the parties as part of this transaction. 'The parties' shall also include individual partners, affiliates, officers, directors, employees, agents, and/or representatives of any party to such documents, and shall include any other owner and holder of this agreement." Only J.C. Rubiola signed the agreement on behalf of the mortgage company and the Buyers signed a form acknowledging Rubiola's dual role as real estate agent and mortgage broker. Buyers brought suit under the Deceptive Trade Practices Act for misrepresentations in connection with the real estate purchase portion of the transaction and sought to rescind the sale or collect damages. The Rubiola brothers moved to compel arbitration under the arbitration agreement attached to the mortgage contract.

Signatories to an arbitration agreement may identify other parties in their agreement who may enforce arbitration as though they had signed the agreement themselves.

HOLDING: Reversed.

REASONING: An obligation to arbitrate not only attaches to one who has personally signed the written arbitration agreement, but may also bind a non-signatory under principles of contract law and agency. *In re Kellogg Brown & Root, Inc.,* 166 S.W.3d 732, 738 (Tex. 2005). Signatories to an arbitration agreement may identify other parties in their agreement who may enforce arbitration as though they had signed the agreement themselves. The court concluded that parties to an arbitration agreement may grant non-signatories the right to compel arbitration and that the Rubiolas were granted that right. The arbitration clause extended further than financing disputes because the arbitration clause included any conflicts between the parties and defined parties broadly enough to include the Rubiola brothers and their other companies that worked in connection with the mortgage company.

INTERNET PROVIDER'S CLASS ACTION BAN IS UNENFORCABLE

Schnuerle v. Insight Commc'ns Co., ____S.W.3d____, (Ky. 2010).

FACTS: Kentucky residents wishing to receive broadband internet from Insight Communications Co., L.P., were required to sign a service agreement that contained a class action ban within the arbitration clause. Insight upgraded its service, which caused outages and, despite Insight's attempt to issue credits and vouchers for interrupted service, consumers filed a suit alleging failure to provide service, lack of notification for failure of service, failure to promptly remedy, and failure to protect consumer from data loss. Insight moved to dismiss based on the contract's arbitration clause. Consumers argued the clause was unenforceable because Insight was the only service provider in the area and because of the small values for the individual claims, consumers would be unable to bring suit individually. The trial court ruled in favor of Insight and the Court of Appeals affirmed.

HOLDING: Reversed and Remanded.

REASONING: The court determined that the class action ban could produce exculpatory results because the economic loss to each consumer was on average $40, making it a negligible amount

for an individual claim. Individual suits would have been economically impractical, and the lack of an economically viable means would effectively exculpate the company from liability, allowing it to reap unjustly a substantial economic windfall. The court quoted *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), for the policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. Proceeding in a class action eliminates the possibility of repetitious litigation, provides claimants with a method of obtaining redress for claims too small to warrant individual litigation, and prevents an unscrupulous wrongdoer from retaining the benefits of wrongful conduct. Controversies involving widely used contracts of adhesion present ideal cases for class adjudication; the contracts are uniform, the same principles of interpretation apply, and all members of the class will share a common interest in the interpretation of an agreement to which each is a party. Here, Insight's customers were 'weaker' parties required to submit to the exculpatory clause, and accordingly, the rule that such provisions not be enforced is applicable.

MISCELLANEOUS

JUDGE CANNOT REQUEST "VOLUNTEERS" FOR LONG JURY TRIAL

Ford Motor Co. v. Duckett, ____ So. 3d ____ (Ala. 2011).

FACTS: Latoya Duckett was severely injured when the sport utility vehicle in which she was a passenger rolled over and ejected her from the backseat. She sued Ford Motor Company, alleging a strict liability design defect claim and a negligence claim. Before jury selection began, the trial judge noted that the trial could take anywhere from two to four weeks. Over the objections of Ford's defense counsel, the trial judge asked the prospective jurors to indicate who among them could serve for that length of time. The members of the venire who raised their hands were brought into the courtroom, and the jury was selected from that reduced group. The case was tried and the jury returned a verdict of $8.5 million for Duckett on the strict liability claim and for Ford on the negligence claim. Ford sought a new trial on the basis that the trial court violated the statutory requirement of random jury selection by asking for volunteers to serve for a lengthy trial. The trial court denied the motion.

HOLDING: Reversed and remanded.

REASONING: Alabama Code § 12-16-55 mandates that "all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court."

In this case, although the original jury pool was randomly selected in accordance with the statute, the court found that the trial court reduced the original jury pool in a manner that violated the statutory requirement of random selection – asking who could serve on the jury for three or four weeks amounted to a request for volunteers. Such a request constituted a violation because it improperly introduced a subjective criterion for jury service not authorized by the statute. As in *United States v. Branscome*, the selection of volunteers results in a non-random selection process, which violates lawmakers' intent that "random selection be preserved throughout the entire selection process." 682 F.2d 484 (4th Cir. 1982).

The request for volunteers also negated the statutory mandate of random selection by providing the prospective jurors with complete discretion whether or not to serve. Allowing people to decide whether they wish to perform a particular task is the opposite of randomly selecting those who, unless they meet narrow and objectively determined categories of exemptions and excuses, *must* perform the task. *United States v. Kennedy*, 548 F.2d 608, 611 (5th Cir. 1977). The plaintiff attempted to distinguish the cases relied upon by the court by arguing that the alleged error in each occurred during an earlier phase of the jury selection process than did the alleged error in this case. Following *Branscome*, however, the court held that the random-selection requirement must apply to all stages of the jury selection process.

The plaintiff also argued that Ford could not object to the composition of the jury because it had not proven fraud in the selection process. Duckett asserted that the Alabama Code required Ford to prove fraud in the drawing or summoning of the jurors in order to object to the venire of jurors. However, the court responded that the purpose of section 12-16-80, the portion of the Code upon which Duckett relied, is to prevent the quashing of venires for trivial administrative errors. The court explained that the word "fraud" in the statute encompasses more than just criminal actions. It also includes all acts and omissions which involve a breach of legal duty injurious to others. Therefore, a legal fraud is all that is required by the statute to quash a venire. *Kittle v. State*, 362 So. 2d 1271, 1273-74 (Ala. 1978). The trial court's request for volunteers violated the statute and affected Ford's right to a randomly selected jury. A departure from the statutory scheme that directly affects the random nature of selection establishes a substantial violation independently of the departure's consequence in a particular case.

In the absence of a statutory provision permitting juror self-selection based upon a given juror's willingness to serve for an extended period of time and because only court officials – not jurors themselves – are permitted to excuse a juror, the court reversed the lower court's denial of Ford's motion for a new trial and remanded the case for a new trial.

CHOICE OF LAW CLAUSE IS UNENFORCEABLE

Schnuerle v. Insight Commc'ns Co., ____ S.W.3d ____ (Ky. 2010).

FACTS: Plaintiffs were Kentucky residents and customers of Insight Communications, a broadband cable Internet provider. In order to receive service, Insight required customers to enter into a service agreement that contained numerous provisions, including an arbitration clause and a choice of law clause. The choice of law clause provided that New York law would apply to the construction, interpretation, and enforcement of the Service Agreement.

In the spring of 2006, Insight upgraded its high-speed