

# COMMENTARY

## ADR SPOTLIGHT

### Review of Michigan appellate decisions concerning arbitration, part 2 of 2

BY LEE HORNBERGER

**Introduction**

This article is the second of two parts reviewing select Michigan appellate cases concerning arbitration.

MICHIGAN COURT OF APPEALS—PUBLISHED DECISIONS  
*Pre-award lawsuit concerning arbitrator selection*

*Oakland-Macomb Interceptor Drain Drainage Dist v Ric-Man Constr, Inc.*<sup>1</sup> reflects viewpoint not part of arbitration more important than selecting arbitrator. AAA did not appoint panel member who had specialized qualifications required in agreement. Plaintiff sued to enforce requirements. Circuit Court ruled in favor of defendant and AAA. COA in split decision reversed. Issue was whether plaintiff could bring pre-award lawsuit concerning arbitrator selection. Majority said courts usually will not entertain pre-award objections to selection. But, when suit is brought to enforce essential provisions of agreement concerning selection, courts will enforce mandates. When such provision is central, Federal Arbitration Act<sup>2</sup> provides it should be enforced by courts prior to arbitration hearing. Party may petition court before award if (1) arbitration agreement specifies qualifications arbitrator must possess and (2) arbitration administrator fails to appoint arbitrator who meets these qualifications. Court may issue order requiring arbitration proceedings conform to arbitration agreement. Majority awarded plaintiff Circuit Court and COA costs and attorney fees.

Judge Jansen dissents stating party cannot obtain judicial review of qualifications of arbitrators pre-award.

*Offsetting decision-maker biases can arguably create neutral tribunal*

*White v State Farm Fire and Cas Co.*<sup>3</sup> discussed whether MCL 500.2833(1)(m) appraiser who receives contingency fee for appraisal is sufficiently neutral. COA said courts have upheld agreements for arbitration conducted by party-chosen, non-neutral arbitrators, particularly when neutral arbitrator is also involved. These cases implicitly recognize it is not necessarily unfair or unconscionable to create effectively neutral tribunal by building in offsetting biases.

*Complaint must be filed to obtain award confirmation*

*Jaguar Trading Limited Partnership v Presler.*<sup>4</sup> Complaint must be filed to obtain confirmation of award. Having failed to invoke Circuit Court jurisdiction under Michigan Arbitration Act by filing complaint, plaintiff not entitled to confirmation. Issue was whether plaintiff, as party seeking confirmation under MCR 3.602(I) and MAA was required to file complaint to invoke Circuit Court jurisdiction. COA held, because no action pending, plaintiff required to file complaint. Since plaintiff timely filed award with court clerk, matter remanded so plaintiff could file complaint in Circuit Court.

*COA affirms Circuit Court that motion to vacate not timely filed*

*Vyltel-Rivard v Rivard.*<sup>5</sup> Defendant challenged Circuit Court denying motion to vacate DRAA award. COA affirmed because motion to vacate not timely filed. On March 28, 2008, defendant filed motion to vacate “awards” of November 13 and December 7, 2007. Party has 21 days to file motion to vacate in DRAA case. Lesson: Time periods are important. Ramifications of filing second post-award errors and omissions motion.

*COA approves probate arbitration*

In split decision, *In re Nestorovski Estate*<sup>6</sup> held probate proceedings are not inherently unarbitrable.



Lee Hornberger

MICHIGAN COURT OF APPEALS—UNPUBLISHED DECISIONS  
*COA affirms Circuit Court confirmation*

*Carmen v Factory Steel and Metal Supply Co, LLC.*<sup>7</sup> Standard applied to arbitration decisions is not clear error. Legal correctness is not standard because arbitrators not necessarily trained in law and are individuals of varying ability and expertise. Reviewing court cannot engage in contract interpretation, which is issue for arbitrator to determine.

*COA affirms Circuit Court confirmation of DRAA award Goma v Sharafeldin.*<sup>8</sup> H challenged “piecemeal” approach used by arbitrator. Circuit Court held arbitrator did not commit any errors permitting court to invade award, and entered JOD consistent with arbitrator’s orders. COA affirmed.

*COA affirms Circuit Court confirmation of award*

*Garza v Estate of Gutierrez.*<sup>9</sup> COA affirmed Circuit Court order confirming award giving plaintiff seven days to cure his \$150,000 default on parcel of property he was buying from defendant, or to surrender property to defendant.

*COA affirms Circuit Court confirmation of DRAA award Mann v Whitefield.*<sup>10</sup> COA affirmed Circuit Court confirmation of DRAA award. Domestic violence protocol was not done and appellant argued this invalidated award. COA stated “... MCR 3.216(H)(2) indicates [domestic violence protocol] applies to mediators during mediation, not arbitrators during arbitration. ... We found no authority applying the domestic violence screening requirement of a mediator under MCR 3.216(H)(2) to arbitrators.”

*COA affirms Circuit Court confirmation UHG Boca, LLC v Medical Mgt Partners, Inc.*<sup>11</sup> Plaintiff moved to vacate award arguing arbitrator improperly applied wrongful conduct rule. Plaintiff also argued arbitrator improperly applied adverse inference rule when arbitrated concluded, on basis of adverse inference, parties were conducting illegal enterprise. Circuit Court disagreed and confirmed award. COA affirmed Circuit Court.

*COA affirms Circuit Court confirmation of DRAA award Maczik v Maczik.*<sup>12</sup> COA affirmed Circuit Court denial of motion to vacate DRAA award because motion to vacate filed late even though arbitrator did not meet requirements to be DRAA arbitrator.

*COA affirms Circuit Court denying arbitration in dentist non-competes case*

*Paine v Godzina.*<sup>13</sup> Appellants argued Circuit Court erred because plain language of contractual agreement required arbitration of dispute regarding non-competes clause. Based on word “and” in arbitration agreement, COA affirmed Circuit Court’s denial of motion to compel arbitration. COA agreed with Circuit Court that language, “[a]ny dispute, controversy or claim between the Associate and the Employer concerning questions of fact arising under this Agreement

and concerning issues related to wrongful termination ... shall be submitted ... [AAA],” means arbitration is required for cases that involve both questions of fact arising under Agreement and issues related to wrongful termination.

*COA affirms Circuit Court confirming award*

*Clancy v Entertainment Managers, LLC.*<sup>14</sup> Advance for wedding reception. AAA administered arbitration under expedited proceedings pursuant to its Commercial Arbitration Rules. According to COA, defendant did not explain how it was prejudiced by use of expedited procedures such that award would have been “substantially otherwise” had arbitration been conducted differently.

*COA affirms Circuit Court denial of motion to vacate DRAA award*

*Pascoe v Pascoe.*<sup>15</sup> COA affirmed Circuit Court denial of motion to vacate DRAA award. COA said review of awards extremely limited. Review of award by court one of narrowest standards of judicial review in jurisprudence. Award may be vacated in DRAA case when arbitrator exceeded powers. Party seeking to prove arbitrator exceeded authority must show arbitrator (1) acted beyond material terms of arbitration agreement or (2) acted contrary to controlling law. Reviewing court may not review arbitrator’s findings of fact, and any error of law must be discernible on face of award. Powerful outline of law concerning deference to arbitration awards.

<sup>1</sup>304 Mich App 46; 850 NW2d 408 (2014). This case discussed at Eshaki, “Judicial Intervention in Arbitration Proceedings Pre-Award,” *Michigan Bar Journal* (June 2023), p. 30. [http://www.michbar.org/file/bar-journal/article/documents/pdf4arti cle2627.pdf?\\_gl=1\\*3ciwoh\\*\\_ga\\* MTUyMDE4NjA3OC4xNjA0NjE0 ODY2\\*\\_ga\\_JVJ5HJZB9V\\*MTY4 MzgxNTY0MC43NzAuMS4xNjg zODE1NjU1LjAuMCA4w](http://www.michbar.org/file/bar-journal/article/documents/pdf4arti cle2627.pdf?_gl=1*3ciwoh*_ga* MTUyMDE4NjA3OC4xNjA0NjE0 ODY2*_ga_JVJ5HJZB9V*MTY4 MzgxNTY0MC43NzAuMS4xNjg zODE1NjU1LjAuMCA4w)

<sup>2</sup>9 USC 1, et seq.

<sup>3</sup>293 Mich App 419; 809 NW2d 637 (2011).

<sup>4</sup>289 Mich App 319; 808 NW2d 495 (2010).

<sup>5</sup>286 Mich App 13; 777 NW2d 722 (2009); *lv gtd* 486 Mich 938; 782 NW2d 502 (2010), *stip dismiss Mich* (2010).

<sup>6</sup>283 Mich App 177; 769 NW2d 720 (2009).

<sup>7</sup>368034 (Sep 9, 2024).

<sup>8</sup>363218 (July 18, 2024).

<sup>9</sup>365633 (April 11, 2024).

<sup>10</sup>359342 (Jan 25, 2024), *lv den*.

<sup>11</sup>361539 (Jan 18, 2024), *lv den*.

<sup>12</sup>363954 (Sep 14, 2023).

<sup>13</sup>363530 (July 27, 2023).

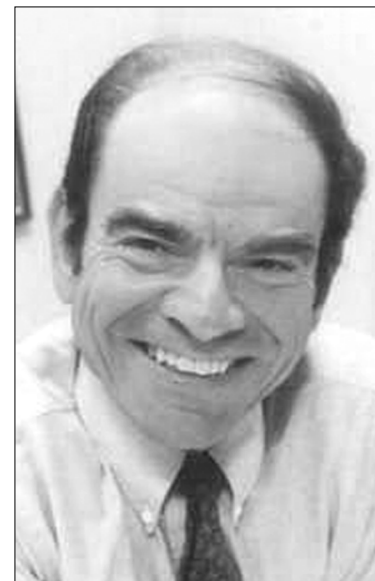
<sup>14</sup>357990 (Feb 2, 2023), *lv den*.

<sup>15</sup>356477 (April 14, 2022).

Lee Hornberger is a member of the National Academy of Arbitrators, the Professional Resolution Experts of Michigan (PREMi), and a diplomat member of The National Academy of Distinguished Neutrals. He is a former chair of the Alternative Dispute Resolution Section of the State Bar of Michigan, editor emeritus of The Michigan Dispute Resolution Journal, a former member of the SBM Representative Assembly, a former president of the Grand Traverse-Leelanau-Antrim Bar Association, and a former chair of the Traverse City Human Rights Commission. He has received the Distinguished Service Award, the George N. Bashara, Jr. Award, and Hero of ADR Awards from the SBM ADR Section.

## Late-night comic might need to reassess his idea of utterly ‘charming’

BY BERL FALBAUM



Berl Falbaum

With this column, I am going to eat some humble pie.

Yes, I goofed in these pages — and badly — when I recently mocked, with my subtle satire, the late-night comic, Bill Maher, for describing our president as “gracious” and “measured” and discovering in a private dinner with him, that the man laughs.

Apparently, I was not the only one who took issue with Maher. I will share my pie with them, but the biggest slice will go to me.

Appearing on a program, “2 Angry Men,” Maher was the third angry man on the show, insisting that he, Maher, was really a “hero” in visiting the gracious and measured president. During the conversation, the three even used the adjective “charming” in describing Trump.

I thought I might have missed a hidden meaning for “charming” so I researched synonyms which included: delightful, alluring, enchanting, and cute. Cute is my favorite.

So, you see, why I have to apologize to Maher and my apology is gracious and measured.

Wait, my wife said, if you want to apologize, it can’t be measured. You mean immeasurably. (I thought I would get away with “measured” but I had the good sense to listen.)

Maher explained the dinner with Trump gave him an opportunity to tell the president things he never hears.

Maher said, he “took truth to power.” If there is anyone who welcomes truth and knows truth when he hears it is Trump.

The comedian said, with a straight face, the reaction on the internet came mostly from “real housewives” yelling at each other and who want to live “in the algorithm of hate.” I guess as opposed to Trump’s algorithm of love.

And the criticism all came from the “far, far left” who hated him (Maher) before his summit with Trump. Incidentally, he objects to calling the meeting a

Maher, in case he was in the office at the same time.

On another show, a “mind-blown” Maher told us that Trump, as president, is not as (expletive) as he thought and applauded the president for his “willingness to listen...”

Sure, that’s charming and cute. Maher also expressed hope that Trump would “accept me as a possible friend even though I’m not MAGA.”

“Possible friend?” Why the hesitancy? Gracious, charming — and cute — friends like Trump are not easy to come by.

On “2 Angry Men,” for some 30 minutes, Maher and the show’s hosts, Harvey Levin and Mark Geragos, played psychiatrists in trying to figure out “the real Donald Trump.”

Is he the charming guy who assaulted women, incited an insurrection, committed real estate fraud, etc. (none of which was mentioned on the show) or the cute, alluring, huggable guy who took 2-½ hours away from issues like Ukraine, Hamas, the economy, Iran to have dinner with a comic was wants to be his friend and was looking for new material for his nightly monologue.

When working on this column, I found this description of another cute, enchanting guy: “He preached a mixture of scientology, the Bible, and law of attraction. He seemed to care for all of those around him. He freely gave away possessions, money and gifts in the thousands of dollars. He seemed to lead by example.” I am confident all reading this column guessed his identity: Charles Manson.

I would have recommended Maher not have dinner with him.

Yes, Levin agreed with Maher, that privately Trump is a great guy. Geragos offered that Trump is just doing his “schtick.” Some schtick!

Now, that was funny. Even Freud would have had to laugh.

Berl Falbaum is a veteran journalist and author of 12 books.

Bankruptcies	JUDGE-Oxholm COUNTY-OAKLAND-MI	23-50902-lsg CPT-7 Date
Chapter 7: Liquidation of a business' assets	Dana Leanne Lambdin 23915 Pheasant Run Novi MI 48375-3351	Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Gold JUDGE-Gretchko COUNTY-OAKLAND-MI Sharon Sue Rose 4901 Strathcona Highland MI 48357
Chapter 11: Gives business protection from creditors while reorganizing		
Chapter 12: Reorganization by court of farm		
Chapter 13: Individuals protect themselves from creditors while restructuring their debts		
(continued from page 9)		
23-50840-tjt CPT-7 Date Filed-12/12/23 Date entered-12/12/23 TRUSTEE-Shapiro JUDGE-Tucker COUNTY-OAKLAND-MI Kwon S. Holloway 27425 Greenfield Rd Apt. 3 Southfield MI 48076-3639	23-50873-mlo CPT-7 Date Filed-12/12/23 Date entered-12/12/23 TRUSTEE-Lewis JUDGE-Oxholm COUNTY-OAKLAND-MI Michael T. Johnson Jr 28437 Franklin Rd Apt 351 Southfield MI 48034-1624	23-50910-mlo CPT-13 Date Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Ruskin JUDGE-Oxholm COUNTY-OAKLAND-MI Joseph Thomas Scola 1532 Moccasin Trail Waterford MI 48328
23-50875-lsg CPT-7 Date Filed-12/12/23 Date entered-12/12/23 TRUSTEE-Lewis JUDGE-Gretchko COUNTY-OAKLAND-MI Vernon A Alexander 23021 Gardner St Oak Park MI 48237		23-50913-mlo CPT-7 Date Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Lewis JUDGE-Oxholm COUNTY-OAKLAND-MI Chanel Caroline Grant 1505 Longfellow St Detroit MI 48206-2066
23-50878-mar CPT-7 Date Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Lewis JUDGE-Randon COUNTY-OAKLAND-MI Devon Swartz 196 W Ann Arbor Ave Pontiac MI 48340		23-50916-mlo CPT-7 Date Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Lewis JUDGE-Oxholm COUNTY-OAKLAND-MI Talia Ivette Shackelford 25548 W. 12 Mile Rd. Apt. 305 Southfield MI 48034
23-50879-mar CPT-13 Date Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Carroll JUDGE-Randon COUNTY-OAKLAND-MI Dwight Walker 28505 Lake Park Dr. Farmington MI 48331 Lakeview Loan Servicing, LLC Michigan First Credit Union 27000 Evergreen Road Lathrup Village MI 48076		23-50918-lsg CPT-7 Date Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Lewis JUDGE-Gretchko COUNTY-OAKLAND-MI Patricia Jestine Sabo 143 S River Dr Clarkston MI 48346-4152
23-50891-mar CPT-7 Date Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Lim JUDGE-Randon COUNTY-OAKLAND-MI Carlyn D McIntosh 9A Greenwoode Ln Pontiac MI 48340 Genisys Credit Union		23-50935-mar CPT-7 Date Filed-12/13/23 Date entered-12/13/23 TRUSTEE-Lewis JUDGE-Randon COUNTY-OAKLAND-MI Kevin Anthony Drummond-Turner 16982 Morrison Street Southfield MI 48076-2017

## COMMENTARY PAGE

The Legal News presents a weekly Commentary Page. Anyone interested in contributing on an occasional or weekly basis to future commentary pages should contact Tom Kirvan, editor-in-chief, at [tkirvan@legalnews.com](mailto:tkirvan@legalnews.com).