

**COURT-ANNEXED ADR PROGRAM  
18<sup>th</sup> 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*

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**WINTER 2007 - 2008**

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***ADR QUARTERLY***

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**18<sup>TH</sup> JUDICIAL CIRCUIT COURT**  
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## **OPENING STATEMENT**

### **HAPPY NEW YEAR!**

Our judges and ADR staff wish you and your families a healthy and prosperous 2008!

### **ADR QUARTERLY IN 2008**

During 2008 comments and suggestions will be actively sought from arbitrators and attorneys who practice in this area. Feedback from clients who have gone through the arbitration process is also appreciated. Future editions of the *Quarterly* will discuss those suggestions and comments, as well as any proposals for change based upon that input. Please address responses to the following Web address, with or without your name:

[www.Kenneth.Abraham@dupageco.org](mailto:www.Kenneth.Abraham@dupageco.org)

Judge Kenneth Abraham, Supervising Judge  
Mandatory Arbitration

### **INCREASE IN CASE FILINGS DURING 2007**

2007 brought a significant increase in the number of new case filings in the Law Division. Lead by Small Claims filings, the growth in number has presented significant challenges to the court system.

<b>TYPE</b>	<b>2006</b>	<b>2007</b>	<b>INCREASE</b>
SC	7,703	10,415	35.2%
SR	2,385	2,710	13.6%
LM	4,548	4,889	7.5%
AR	2,222	2,318	4.3%
L	1,266	1,369	8.1%

### **COURTROOM ASSIGNMENTS**

Every three years, Associate Judges are subject to reassignment. 2008 brings changes to the Law Division. Judge Joseph Bongiorno is now assigned to Courtroom 2018 and Judge Kenneth Abraham is assigned

to Courtroom 1003. As a result of this switch in courtroom assignments, daily schedules for motions, status, and Summons returns may change. The schedule for Courtroom 1003 is as follows:

### **JUDGE KENNETH A ABRAHAM COURTROOM 1003 SCHEDULE**

<b>CASE TYPES</b>	<b>HEARING/MOTION DAY</b>	<b>TIMES</b>
SR Motions, Post Judgment Proceedings, Post-Arb Status	Mon., Tues., Fri.	8:30am
SR Summons Returns, Status, Prove-up	Mon., Tues., Fri.	9:00am
SR Jury Trials	Mon., Tues.	10:00am
SR Bench Trials	Wed., Fri.	10:00am
LM Motions, Post Judgment Proceedings	Wed., Thurs.	8:30am 1:30pm
LM Summons Returns, Status	Wed., Thurs.	9:00am 1:45pm
LM Bench Trials	Wed., Thurs.	10:00am 2:00pm

### **ADR QUARTERLY INDEX**

The *ADR Quarterly* Index on the Dupage County website was imaged in tabloid format, which means that the pages are not consecutive. The County Webmaster will correct this within the next month. In the meantime, all are reminded that the index of past *Quarterly* editions may be reviewed at the following link:

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



## **JUDICIAL TIPS**

### **ARBITRATORS**

#### **PUNITIVE DAMAGES**

Claims seeking punitive damages in connection with bodily injury or physical damage to property that are based upon a theory of negligence or product liability should not be heard by the panel unless there is an order in the file permitting such a claim pursuant to the requirements of 735 ILCS 5/2-604.1. If a situation arises where the panel bars the plaintiff from presenting a punitive damage claim, arbitrators should note that in the Award. Punitive damage claims pursuant to specific statutes (e.g. Consumer Fraud actions) are allowed without order of court.

#### **OBJECTIONS TO 90(C) EXHIBITS**

As a practical matter, a 90(c) packet may be mailed on the eve of expiration of the 30 days prior to the arbitration date, and there may not be sufficient time for the receiving attorney to review the documents, prepare a notice and motion seeking to strike portions of that packet, and have that motion heard prior to the arbitration hearing. Therefore, objections to the contents of a 90(c) packet may be raised either before the trial court or the panel. Those objections may be in the form of a motion in *limine*. While 90(c) may avoid the necessity of foundation or other proof, that rule specifically states a party “may offer” such evidence. It does not bind the panel to accept improper evidence. One example is a police report. Another is the inclusion of a document that is intended solely for cross-examination and not substantive evidence.

#### **FAILURE OF WITNESS/PARTY TO APPEAR**

Issues often arise by way of motion or at trial of who appeared at the arbitration hearing. It is important to note the failure of a party or witness to appear at the arbitration and whether a Rule 237 notice was issued. There is rarely a transcript of the arbitration and often the attorneys appearing before the Court on a motion, hearing or at trial are not the attorneys who attended the arbitration.

### **GAPS OF TIME**

We understand that you have busy schedules and there is nothing worse than gaps between arbitrations or delays in starting a hearing. Sometimes cases settle immediately prior to the start of the hearing. Arbitrators should feel free to bring their work with them or to make calls during those gaps. Empty rooms are often available so arbitrators can make the best use of their time.

### **ATTORNEYS**

#### **PRESENTATION OF CASE**

Arbitrators report that there are a few of attorneys who believe that they can appear before the panel and let them just "figure it out". It is improper for the arbitrators to “present” the attorney’s case or to wade, unguided, through the 90(c) packets to try to determine how those documents fit into a claim or defense. The result at arbitration, just as at trial, reflects not only your preparation but also your presentation.

#### **SUMMARY SHEET**

Rule 90 requires that a 90(c) packet “shall be accompanied by a summary cover sheet listing each item that is included detailing the money damages incurred by the categories as set forth in this rule and specifying whether each bill is paid or unpaid”. This requirement is not aspirational!

#### **MEMORANDUM OF LAW**

Arbitrators are not able to take cases under advisement. Don’t show up at arbitration with a Memorandum of Law and expect arbitrators to spend the time to read it. Rather, include any applicable law in your oral closing argument and have copies of the cases on which you rely available for the panel as well as opposing counsel.

#### **INTERVIEWING WITNESSES**

Caution should be taken when interviewing witnesses before the arbitration hearing. Reports have been received of others overhearing those conversations in the waiting area and building hallway.

## **BRIEFLY NOTED**

### **SUPREME COURT**

#### **TOLLING OF 103(B) REVIEW**

Does the voluntary dismissal of a cause of action under 735 ILCS 5/2-1009 toll the period of time during which the court may examine the diligence of the plaintiff on service of summons under Rule 103(b)? On December 13, 2007 the Supreme Court answered, yes!

In Case v. Galesburg Cottage Hospital, 227 Ill. 2d 207, the Supreme Court reasoned that the court's examination of diligence under Rule 103(b) was, by its very terms, limited to viewing delays in "service" of summons upon defendant. Since no summons may properly be issued when a case is voluntarily dismissed, there is no duty upon plaintiff to advance their cause under Rule 103. Further, the key question is the diligence of plaintiff during the "pendency of the action". Since the action could not have been said to have been "pending" between dismissal and re-filing there was no violation of Rule 103.

The relevant dates under the case holding are as follows:

5/01/01	Date malpractice is alleged to have occurred
4/25/03	Plaintiff files Complaint without 622 Affidavit
5/20/03	Plaintiff voluntarily dismisses Complaint
4/12/04	Plaintiff files new Complaint under Section 13-217
4/20/04 & 4/26/04	Defendants served with Summons

#### **WAIVER OF WORKERS' COMPENSATION LIEN**

In Gallagher v. Lenart, 266 Ill.2d 208 (2007), the Supreme Court resolved disparate holdings in Illinois District courts as to what constitutes a waiver by an employer of its rights to enforce a lien created pursuant to section 5(b) of the Workers' Compensation Act (820 ILCS 305/5(b)). One line of cases, as demonstrated by Borrowman v. Prastein, 356 Ill. App. 3d 546 (4<sup>th</sup>, 2005), holds that where an employer enters into a settlement agreement with knowledge of the existence of a separate action against a third-party, general release provisions may bar that employer from seeking to enforce their lien. That agreement, Borrowman held, acts as a waiver of the rights of the employer.

In Gallagher, the plaintiff and employer entered into two agreements (which the Supreme Court read as one). The first document settled the underlying Workers' Compensation claim, and the second provided consideration for the voluntary resignation of plaintiff from employment (the parties having agreed that, based upon the physical condition of plaintiff and the type of employment available, the plaintiff could not perform those duties). While the Supreme Court recognized that the language in the agreement before the court was similar to that outlined in Borrowman, general provisions may not act to bar enforcement of specific lien rights. Rather, agreement must contain specific reference extinguishments of a worker's compensation lien in order for waiver to exist. Therefore, the holding in Borrowman was overruled.

### **SECOND DISTRICT**

#### **WITHDRAWAL OF REJECTION OF AWARD**

Can a party who has filed a rejection of an arbitration award, withdraw that rejection? In Stempel v. Pickerill, 2007 WL 4562817 (Dec. 21, 2007), a case of first impression, the defendant timely filed a rejection of the award. Plaintiff did not reject. Subsequent to the filing of that rejection and after a pretrial, defendant requested leave to withdraw its rejection. Plaintiff filed a response in opposition to that request and also sought leave to file its rejection. The majority of the appellate court held that there is no provision in the rules governing arbitration that would allow a party to withdraw its rejection. Rather, the party who has not filed a rejection may stand on the rejection of their opponent and need not be concerned that failure to file a rejection could lead to the opponent imposing their will by withdrawing that rejection. One justice, specially concurring, opined that the court has the discretion to allow withdrawal. However, the party opposing withdrawal should have 30 days from the date of the withdrawal order in which to file their rejection.

#### **USE OF TRANSCRIPT OF PRIOR TRIAL DURING RETRIAL**

Anderson v. Kohler, 376 Ill.App.3d 714 (2<sup>nd</sup> 2007) represents the second trip that action took to Elgin. In the first, the appellate court reversed the ruling of the trial court which had found that the plaintiff had not presented a *prima facie* case and remanded for "further proceedings", without specific directions on how the new trial should be conducted.

During the new trial, which was conducted before a different judge, the court utilized the transcript of the case presented by the plaintiff in the first trial. Defendant presented their defense and plaintiff was allowed to call rebuttal witnesses. Following a judgment for defendants, plaintiffs appealed. In Anderson2, the appellate court found that the trial court violated plaintiffs' due process right to an independent credibility finding by the judge who retried the action. Transcripts should not be utilized unless both parties so stipulate or if there are missing witnesses.

## **ADR STATISTICS**

As we have done in past years, we take a closer look at the two categories of cases that represent the vast majority of cases, which proceed to jury trial during the past year.

### **SUBROGATION JURY TRIALS**

<b>DATE</b>	<b>CASE</b>	<b>COMP.</b>	<b>VERDICT</b>	<b>AWARD</b>
1/8/07	06 SC 610		979	1,506
1/23/07	06 SC 1538	10% BY ARBS	4,847	4,362
2/6/07	06 SR 93	45% BY ARBS	5,231	2,877
2/26/07	06 SR 989		7,152	7,152
3/13/07	06 SC 2725	30% BY ARBS	901	0
4/9/07	06 SC 2064	50% BY JURY	1,959	2,350
4/10/07	06 SR 820		0	0
4/16/07	05 AR 3670		0	0
4/16/07	06 SR 1057		5,114	5,114
4/17/07	06 SC 4003		2,767	2,817
4/30/07	06 SR 1322		6,269	6,269
4/30/07	06 AR 1346		15,483	16,906
5/8/07	06 SR 1356		8,653	0
5/8/07	06 SR 1454	50% BY JURY	1,644	3,288
5/21/07	06 SC 2831		3,351	3,351
5/22/07	06 SC 3173		2,097	2,097

6/4/07	05 AR 3961		10,640	17,733
6/5/07	06 SC 4136		2,472	2,472
6/6/07	06 AR 60		14,590	15,942
6/12/07	06 SR 215	20% BY ARBS	4,285	6,884
6/18/07	06 SC 5891		0	3,157
6/19/07	06 SC 4818		277	3,705
6/25/07	06 SR 1657		8,284	8,496
7/9/07	06 SC 4005		0	0
7/10/07	06 SR 1582		0	5,101
7/10/07	06 SC 4725		2,813	2,908
7/16/07	06 SR 1788	25% ARBS 20% JURY	6,845	6,416
7/24/07	06 SC 6232		3,684	3,932
9/10/07	06 SR 1407	50% JURY	3,958	7,916
9/11/07	06 SC 7039		250	2,486
9/18/07	06 SR 1651		4,500	6,228
9/24/07	06 SR 1923	50% BY JURY	3,647	7,294
11/6/07	07 SR 324		5,636	7,473
11/26/07	07 SR 239		7,690	6,876
12/3/07	07 SC 566		838	856
<b>TOTALS</b>			<b>146,856</b>	<b>173,964</b>

The average case received 84.4% of the average award from the jury. Plaintiffs rejected 6 Awards and defendants rejected 29. This statistic may be interpreted in a number of ways, but the similarity between award and verdict is striking, particularly when considering the \$5,800 paid by defendants in rejection fees and the cost of trial. Conversely, plaintiffs did not fare much better considering the costs of rejection and trial costs (including witness fees) and the loss of time of their adjuster/witness.

There certainly has been much discussion about whether sending SC and SR cases to arbitration best serves the parties and the court system. SR (formerly AR) cases seeking \$5,000 - \$10,000 in damages have always been subject to mandatory arbitration. SC cases were not.

The following is the total number of subrogation cases that proceeded to trial during the past three years:

**2005            45**  
**2006            37**  
**2007            15**

Keeping in mind that SC filings increased by over 2,700 cases, during 2007 (*supra*), something must be working right! The fewer the subrogation cases which proceed to trial, the greater the chance that other cases may be tried the first time up.

**PERSONAL INJURY CLAIMS**

<b>DATE</b>	<b>CASE NO.</b>	<b>COMP.</b>	<b>VERDICT</b>	<b>AWARD</b>
1/8/07	05 AR 1343	STIP NEG	10,292	15,000
2/6/07	05 AR 3702	STIP NEG	0	0
2/7/07	05 AR 4334	STIP NEG	3,204	16,032
3/19/07	06 AR 1075	STIP NEG	7,556	15,067
4/9/07	05 AR 2210	STIP NEG	6,081	11,627
4/9/07	06 AR 1357	STIP NEG	0	14,890
4/16/07	05 AR 3246	STIP NEG	0	10,000
4/25/07	05 L 356	STIP NEG	4,000	18,064
5/14/07	06 AR 922	N/A	0	17,609
5/16/07	05 AR 4079	STIP NEG	3,431	5,751
6/11/07	06 AR 1171	49%	2,641	6,002
6/25/07	06 L 669	STIP NEG	0	13,541
7/9/07	05 L 878	5% ON TPC	14,250	20,000
8/20/07	06 AR 1251	STIP NEG	0	12,062
9/24/07	05 L 491	0	0	37,977
10/15/07	06 AR 331	STIP NEG	0	8,172
<b>TOTALS</b>			<b>51,455</b>	<b>221,794</b>

During 2007, the average injury case received a mere 23.2% of the average Award. The average jury verdict in 2007 was \$3,216 per case. Recognizing that a full 50% of the cases received a “0” verdict, plaintiffs, even if we disregard those verdicts, averaged only \$6,432. What is most remarkable about these statistics is that in 75% of the cases tried, the defendant stipulated to negligence!

**Next Edition:** Observations of Jurors

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.