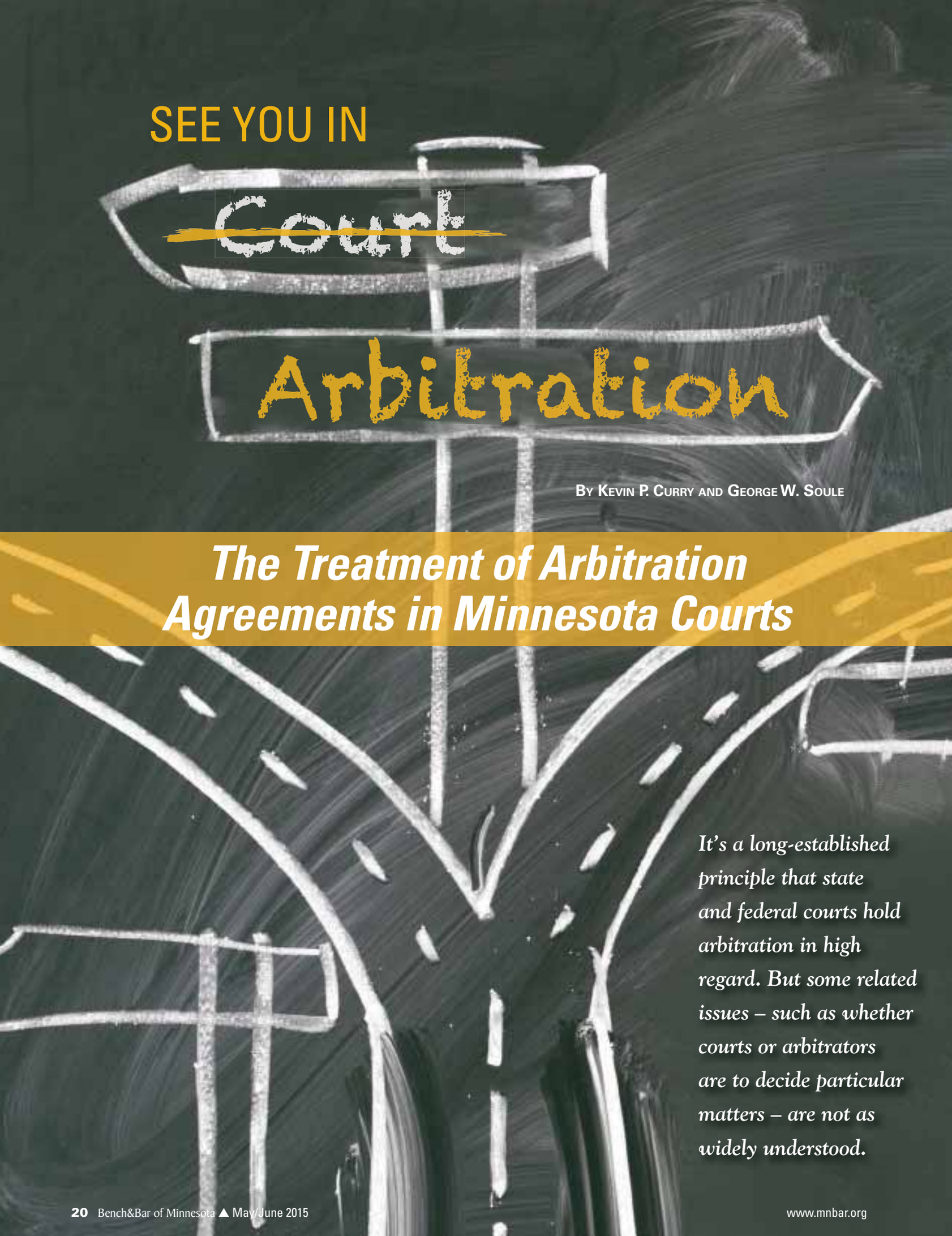

By Kevin P. Curry and George W. Soule

The Treatment of Arbitration Agreements in Minnesota Courts

It's a long-established principle that state and federal courts hold arbitration in high regard. But some related issues – such as whether courts or arbitrators are to decide particular matters – are not as widely understood.

If you seek to enforce or contest an arbitration agreement, you must be aware that courts view arbitration with favor, arbitration is a matter of contract, and the principles of contract law apply. Thus, if your client signed a contract containing an arbitration agreement, the client in most circumstances will have to arbitrate disputes within the scope of the agreement. This article reviews the relevant federal and state statutes, discusses the roles of court and arbitrator in determining whether and how an arbitration will occur, and analyzes recent cases in which a motion to compel arbitration was either granted or denied.

Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §1 *et seq*, to establish a national policy favoring arbitration. The FAA, which is applicable in circumstances involving interstate commerce, requires courts to rigorously enforce agreements to arbitrate. The FAA, however, does not encourage arbitration for its own sake, but aims to guarantee the enforcement of private contracts.[1] Both the FAA and the Minnesota equivalent, Minn. Stat. §572B.01 *et seq*, provide that arbitration agreements are valid, irrevocable and enforceable, except on grounds that exist at law or in equity for the revocation of any contract.

If a party seeks to compel arbitration, Section 4 of the FAA provides the federal process, while Minn. Stat. §572B.05 and §572B.07 explain the state mechanism. Importantly, however, the FAA is not a basis for federal jurisdiction; a federal court must have an independent basis for jurisdiction over the dispute.[2] Also, because the Federal Rules of Civil Procedure do not explicitly provide for a "Motion to Compel Arbitration," a party can bring such a motion under Rule 12(b)(3) or 12(b)(6).[3] In either state or federal court, when a suit is subject to arbitration, the court generally will stay the suit.[4]

State Courts: Who Is to Decide?

A major issue in lawsuits in which a party seeks arbitration is whether the court or an arbitrator is to decide certain questions. Minnesota courts have decided many cases involving this issue in the last few decades. The 2010 adoption of the Revised Uniform Arbitration Act, however, changes Minnesota practice in several respects.[5]

Whether the contract contains an agreement to arbitrate.

Minn. Stat. §572B.06(b) specifies, "The court shall decide whether an agreement to arbitrate exists...." This provision is consistent with prior Minnesota law. Minnesota courts routinely decide whether the parties' agreement contains an arbitration clause.[6]

Whether the arbitration agreement is revocable "upon a ground that exists at law or in equity."

If the court is to decide whether an agreement to arbitrate exists, it follows that the court should determine whether the arbitration agreement is revocable (or enforceable). Minn. Stat. §572B.07 supports this conclusion: "Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate." The court is to "proceed summarily to decide the issue." Minnesota courts have found arbitration agreements enforceable against a host of challenges, including that one of the parties was mentally incompetent and coerced into agreeing to arbitration,[7] and that the subject agreement was an adhesion contract.[8]

Whether the controversy is subject to an agreement to arbitrate.

The Uniform Arbitration Act, which governed in Minnesota from 1957 until repealed and replaced in 2010, did not specify whether the court or an arbitrator should decide arbitrability. The Revised Act, however, resolves this issue: "The court shall decide whether... a controversy is subject to an agreement to arbitrate, except in the case of a grievance arising under a collective bargaining agreement when an arbitrator shall decide." Minn. Stat. §572B.06(b).

Before adoption of the Revised Act, Minnesota courts decided some questions of arbitrability, but referred others to arbitrators. The courts were to decide arbitrability unless "the intention of the parties is reasonably debatable as to the scope of the arbitration clause"; then "the issue of arbitrability is to be initially determined by the arbitrators."[9] The adoption of Minn. Stat. §572B.06(b) places the question squarely in the courts' domain.The parties, however, may stipulate in their arbitration agreement that issues of arbitrability must be decided by the arbitrator, not the court.[10]

Whether the contract is enforceable.

The Revised Act provides that "[a]n arbitrator shall decide... whether a contract containing a valid agreement to arbitrate is enforceable." Minn. Stat. §572B.06(c). This provision was intended to follow the rule established in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* that "a broad arbitration clause encompassed arbitration of a claim alleging that the underlying contract was induced by fraud."[11] If a disputed issue is within the scope of the arbitration clause, "challenges to the enforceability of the underlying contract on grounds such as fraud, illegality, mutual mistake, duress, unconscionability, ultra vires and the like are to be decided by the arbitrator and not the court."[12]

In *Atcas v. Credit Clearing Corp.*, the Minnesota Supreme Court held that fraud in the inducement will be decided by the court, unless the parties' agreement specifically provided that they would arbitrate the issue.[13] But if a party alleging fraud seeks damages rather than rescission, it "elect[s] to affirm the contract rather than rescind it. Accordingly, the general rule favoring arbitration applies... and the dispute should have been submitted to arbitration."[14] After the adoption of Minn. Stat. §572B.06(c), whether fraud invalidates a contract, or entitles a party to damages, will likely be decided by an arbitrator.

A separate question is whether the parties have formed a valid contract (that contains an arbitration provision). Minnesota courts have traditionally decided that question.[15] In *Onvoy, Inc. v. SHAL, LLC*, the Minnesota Supreme Court distinguished between claims that a contract is void, *i.e.*, never legally existed, and voidable. The court held under the FAA that the court should decide a claim that a disputed contract is void, unless the arbitration clause specifically designates that issue for arbitration. But claims "that a contract is voidable must be arbitrated."[16]

Whether one of the parties has waived arbitration by engaging in litigation.

When a party claims that another party has waived the right to enforce an arbitration agreement by engaging in litigation conduct, courts have often decided the question. The issue of waiver does not address the substantive controversy between the parties, but typically deals with whether the party seeking arbitration has caused prejudice to the other party by litigating the merits in court. Waiver by litigation conduct "is not based on the underlying dispute but instead is derived from activity before the very court being urged to compel arbitration," and it is "sensible" for the court to rule on waiver.[17] "It is... a matter of judicial economy to require that a party, who pursues an action in a court proceeding but later claims arbitrability, be held to a decision of the court on waiver."[18]

Whether a "condition precedent to arbitrability has been fulfilled."

"An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled...." Minn. Stat. §572B.06(c). This means that "issues of procedural arbitrability, *i.e.*,

whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide."[19] The Minnesota Supreme Court has voiced agreement with the general rule that procedural issues such as laches or waiver are generally decided by the arbitrator rather than the court, because procedural issues are often intertwined with the substantive dispute intended for arbitration.[20]

Upon application, however, Minnesota courts have reached mixed results in deciding whether the court or an arbitrator should decide these questions. In cases involving delays in requesting arbitration (other than delays caused by the parties engaging in litigation), courts have held that an arbitrator should decide whether such delays result in waiver.[21] In other instances, courts have decided preliminary issues to deny arbitration, such as when a party seeking arbitration delayed its request beyond timelines established by agreement and provided no justification for the delay.[22] The adoption of Minn. Stat. §572B.06(c) likely means that all of these preliminary, procedural questions should be referred to arbitrators for decision.

Federal Court's Role in Motion to Compel Arbitration

When considering a motion to compel, a federal court's role is "limited to determining (1) whether a valid agreement to arbitrate exists, and, if it does, (2) whether the agreement encompasses the dispute."[23] The court applies state law contract principles to decide whether parties have agreed to arbitrate a matter.[24] An order to arbitrate should not be denied, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[25] The party opposing arbitration bears the burden of proving that the claims at issue are not suitable for arbitration.[26]

Under the FAA, attacks on the validity of a contract as a whole, rather than the arbitration clause itself, are to be decided by an arbitrator.[27] Conversely, if a party challenges the validity of the arbitration clause, the court must consider the challenge. But parties to a contract can alter this rule and delegate to the arbitrator threshold issues of arbitrability if the arbitration clause contains an expression of "clear and unmistakable" intent that the parties agreed to reserve issues of arbitrability for the arbitrator.[28] Contracting parties clearly delegate arbitrability when they incorporate into their agreement rules allowing the arbitrator to determine the existence or scope of jurisdiction, such as the American Arbitration Association Commercial Arbitration Rules.[29]

Arbitration Agreements Generally Upheld

Denials of motions to compel arbitration are comparatively rare. Minnesota courts have consistently found for arbitration agreements even when the parties' intent was not expressly stated. For example, a clause labeled "arbitration" and providing for an "award" was an enforceable arbitration provision, as was a lease dispute when the agreement referred to arbitration for matters arising under the lease.[30] Conversely, when a contract provided that disputes "may be settled in binding arbitration," arbitration was not mandatory. But when a contract provided that arbitration "shall be the choice of either party," the court ordered arbitration on one party's request.[31] Absent evidence the plaintiff was "coerced or defrauded" in agreeing to arbitration, an arbitration clause will not be invalidated on the ground it was not voluntary.[32]

In *LeMaire v. Beverly Enters. MN, LLC*,[33] the federal court upheld an arbitration agreement. But in so doing, the court provided a thorough discussion of the grounds consumers commonly use to contest "adhesion" arbitration agreements. The plaintiff challenged the subject "ADR Agreement" as unconscionable. The court found the agreement was "not so unreasonably favorable" to defendant as to be substantively unconscionable. The court reasoned that plaintiff retained all of his substantive rights to raise claims, the agreement did not place undue financial burdens on plaintiff, or subject him to burdensome travel or time requirements. Additionally, the court reasoned defendant was responsible for virtually all fees and that the agreement informed plaintiff of his right to seek counsel before signing and was conspicuous.

In *Rasschaert v. Frontier Communs. Corp.*,[34] the court noted that other courts upheld arbitration clauses in "'clickwrap' or 'shrinkwrap' form contracts," which occur "when the terms are provided online, or only after plaintiffs have manifested assent."[35] The *Rasschaert* court reasoned that, "[w]hat presents a closer question, however, is whether a change-in-terms provision of a business's terms of service permits that business to unilaterally add an arbitration clause to its Terms and Conditions, where those Terms and Conditions contained no arbitration provision at the outset." The court ultimately ordered arbitration because plaintiffs were given sufficient notice of the arbitration clause and continued to use the service.

Since 2010, Minnesota federal courts have denied arbitration in relatively few cases, and the reasoning in each case was fact-dependent. A court has denied arbitration in instances when the plaintiff was not subject to the arbitration agreement, the dispute was not within the scope of the arbitration agreement, the arbitration proponent waived its right to arbitrate by its litigation conduct, and the defendant had yet to prove the plaintiff accepted the terms of the arbitration agreement.[36]

Waiving Arbitration by Litigation Conduct

A party cannot significantly litigate a case and then claim the case should be submitted to arbitration. But as arbitration has won more favor, the point at which waiver will be declared has changed. Recently, courts have been willing to order arbitration after the parties have litigated a case, as long as the party opposing arbitration has not been prejudiced. For example, when the "defendant would have engaged in the same preparation for arbitration as for trial," plaintiff's request for arbitration after the lawsuit started and discovery was conducted was not prejudicial and plaintiff did not waive right to arbitration.[37]

Similarly, in federal court, merely filing a lawsuit prior to seeking arbitration is likely not grounds for granting a waiver. A party waives its right to arbitrate if that party knew of an existing right to arbitrate, acted inconsistently with that right, and thus prejudiced the other party. A party acts inconsistently with its right to arbitrate if it "substantially invokes" the litigation machinery.[38] But this can be a high bar. For instance, in *Ikechi v. Verizon Wireless*,[39] the court found no waiver even though Verizon removed the case to federal court, filed a motion to dismiss, answered the complaint, participated in discovery, and was apparently aware of the arbitration clause for over a year before bringing a motion to compel.

Recent United States Supreme Court Decisions

Minnesota case law suggests that an agreement to arbitrate a statutory claim is enforceable unless the statute under

which the claim is brought precludes arbitration.[40] But in recent cases, the United States Supreme Court has reinforced its pro-arbitration stance and indicated that state laws that interfere with arbitration are preempted. For instance, in *AT&T Mobility, LLC v. Concepcion*, the Court stated the overarching purpose of the FAA "is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."[41] The Court held that the FAA preempts state laws that make certain claims non-arbitrable. Similarly, *Preston v. Ferrer* states that, "[w]hen parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."[42]

A ramification of this pro-arbitration policy is that the party opposing arbitration, already bearing the burden of proof, must be certain that much of its opposition is based on grounds that exist at law or in equity for the revocation of a contract, as policy arguments or arguments based on state statutes are unlikely to succeed.

Conclusion

Minnesota courts take seriously the notion that arbitration agreements are valid, irrevocable and enforceable, except on grounds that exist for the revocation of a contract. Given the recent Supreme Court decisions endorsing arbitration, this situation will not change any time soon. ▲

***KEVIN P. CURRY** is Counsel at Soule & Stull LLC. His practice focuses on litigating and trying complex civil cases. Kevin has tried cases in five states, and is a former Chair of the MSBA Civil Litigation Section. He is presently a member of the MSBA Judiciary Committee.*
KCURRY@SOULESTULL.COM

***GEORGE W. SOULE** is a Partner at Soule & Stull LLC in Minneapolis. He has tried over 60 cases to verdict or arbitration award in 19 states. George is former Chair of the Minnesota Commission on Judicial Selection.*
GSOULE@SOULESTULL.COM

Notes

1 *Lyster v. Ryan's Family Steak Houses*, 239 F.3d 943, 945 (8th Cir. 2001).
2 *Northport Health Servs. of Arkansas, LLC v. Rutherford*, 605 F.3d 483, 486 (8th Cir. 2010).
3 *Minn. Supply Co. v. Mitsubishi Caterpillar Forklift Am.*, 822 F.Supp.2d 896, 904 n. 10 (D. Minn. 2011).
4 Minn. Stat. §572B.07; 9 U.S.C. §3.
5 Minn. Stat. §572B.01 - .31.
6 *Vesledahl Farms v. Rain & Hail Ins. Serv.*, 1996 Minn. App. LEXIS 1424, at *4 (Minn. Ct. App. Dec. 17, 1996) (unpublished).
7 *Costigan v. Williams*, 1995 Minn. App. LEXIS 325 (Minn. Ct. App. March 7, 1995) (unpublished).
8 *Ottman v. Fadden*, 575 N.W.2d 593, 597 (Minn. Ct. App. 1998).
9 *Atcas v. Credit Clearing Corp.*, 197 N.W.2d 448, 452 (Minn. 1972), *overruled in part*, 669 N.W.2d 344 (Minn. 2003).
10 *Churchill Envtl. & Indus. Equity v. Ernst & Young,* 643 N.W.2d 333, 338 (Minn. Ct. App. 2002).
11 Revised Uniform Arbitration Act §6, Comment 4 (2000) discussing *Prima Paint,* 388 U.S. 395 (1967).
12 Revised Uniform Arbitration Act §6, Comment 4 (2000).
13 197 N.W.2d 448 (Minn. 1972), *overruled in part*, 669 N.W.2d 344 (Minn. 2003).
14 *Stahl v. McGenty*, 486 N.W.2d 157, 159 (Minn. Ct. App. 1992).
15 *See, e.g., Herman v. Stielow Props.*, 2007 Minn. App. Unpub. LEXIS 632 (Minn. Ct. App. June 19, 2007).
16 669 N.W.2d 344, 353 (Minn. 2003).
17 *Brothers Jurewicz v. Atari,* 296 N.W.2d 422, 427-28 (Minn. 1980).
18 Revised Uniform Arbitration Act §6, Comment 5 (2000).
19 R.U.A.A. § 6, Comment 2 (2000).
20 *Brothers Jurewicz,* 296 N.W.2d at 427.
21 *City of Morris v. Duininck Bros.*, 531 N.W.2d 208, 210 (Minn. Ct. App. 1995).
22 *In re Griev. Arbitration between AFSCME, Council 96 and I.S.D. No. 704*, 2004 Minn. App. LEXIS 944 (Minn. Ct. App. Aug. 17, 2004) (unpublished).
23 *Pro Tech Indus. v. URS Corp.*, 377 F.3d 868, 871 (8th Cir. 2004).
24 *Keymer v. Management Recruiters Int'l,* 169 F.3d 501, 504 (8th Cir. 1999).
25 *AT&T v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986).
26 *LeMaire v. Beverly Enters. MN, LLC*, 2013 U.S. Dist. LEXIS 4685, at *9 (D. Minn. Jan. 9, 2013) (unpublished); *accord Onvoy,* 669 N.W.2d at 349.
27 *Preston v. Ferrer*, 552 U.S. 346, 353 (2008).
28 *Rent-A-Center v. Jackson*, 130 S.Ct. 2772, 2783 (2010).
29 *Fallo v. High-Tech Inst.* 559 F.3d 874, 877-78 (8th Cir. 2009).
30 *Vaubel Farms v. Shelby Farmers Mut.*, 679 N.W.2d 407, 411 (Minn. Ct. App. 2004); *Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667, 672 (Minn. Ct. App. 2011).
31 *Waymouth Farms v. Olam Ams., Inc.*, 2009 Minn. App. Unpub. LEXIS 694, at *2 (Minn. Ct. App. June 30, 2009); *Cmty. Partners Designs. v. City of Lonsdale*, 697 N.W.2d 629, 633 (Minn. Ct. App. 2005).
32 *Johnson v. Piper Jaffray,* 530 N.W.2d 790, 802 (Minn. 1995).
33 2013 U.S. Dist. LEXIS 4685, at *11-16 (D. Minn. Jan. 9, 2013) (unpublished).
34 2013 U.S. Dist. LEXIS 37688, at *16-17 (D. Minn. March 19, 2013) (unpublished).
35 *See also Siebert v. Amateur Athletic Union*, 422 F.Supp.2d 1033, 1040 (D. Minn. 2006).
36 *Berthel Fisher & Co. Fin. Servs. v. Larmon*, 2011 U.S. Dist. LEXIS 84627 (D. Minn. Aug. 1, 2011) (unpublished); *Unison Co. v. Juhl Energy Dev.*, 2014 U.S. Dist. LEXIS 47469 (D. Minn. April 7, 2014) (unpublished); *Webster Grading, Inc. v. Granite Re, Inc.*, 879 F.Supp.2d 1013, 1021 (D. Minn. 2012); *Traylor v. I.C. Sys.*, 2012 U.S. Dist. LEXIS 70850 (D. Minn. May 22, 2012) (unpublished).
37 *Fedie v. Mid-Century Ins. Co.*, 631 N.W.2d 815, 820 (Minn. Ct. App. 2001).
38 *Lewallen v. Green Tree Servicing,* 487 F.3d 1085, 1090-91 (8th Cir. 2007).
39 2012 U.S. Dist. LEXIS 105717 (D. Minn. July 6, 2012) (unpublished).
40 *Correll v. Distinctive Dental Services*, 607 N.W.2d 440, 447 (2000).
41 *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740, 1748 (2011).
42 *Preston*, 552 U.S. at 359.