

A Three-Year Survey of Colorado Appellate Decisions on Arbitration—Part I

by Steven C. Choquette

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This column is sponsored by the CBA Alternative Dispute Resolution Committee. The articles printed here describe recent developments in the evolving field of ADR, with a particular focus on issues affecting Colorado attorneys and ADR providers.

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This two-part article reviews Colorado state appellate decisions pertaining to arbitration. The decisions discussed here were issued between January 1, 2002 and December 31, 2004.

Colorado state appellate courts considered a number of significant arbitration-related issues from January 1, 2002 through December 31, 2004.¹ The growing prevalence of appellate input in the field of arbitration is illustrated by simple data. From 1869 through 2001, Colorado's appellate courts decided roughly 150 cases involving arbitration issues, approximately one decision per year. By contrast, during the three-year period of this survey, Colorado appellate courts decided fourteen cases involving arbitration matters.²

This two-part article reviews Colorado state appellate decisions dated between January 1, 2002 and December 31, 2004. Part I covers: (1) interlocutory appeals of trial court decisions to grant or deny motions to compel or stay arbitration; (2) application of the Federal Arbitration Act ("FAA"); and (3) arbitration contracts and federal preemption.

Part II, which will be published in this column in March 2005, discusses cases involving: (1) appellate guidance on arbitrators' powers; and (2) judicial review of arbitral awards. Part II also analyzes apparent trends in arbitration suggested by the cases discussed in Parts I and II.

Motions to Compel or Stay Arbitration

During the survey period, Colorado appellate courts devoted significant at-

tention to interlocutory appeals of trial court decisions granting or denying motions to compel or stay arbitration. The four survey-period cases, all of which involved construction disputes, should guide trial courts in deciding such motions and disputants in determining whether to pursue interlocutory appeals of adverse rulings.

Gergel II

Of the four cases discussed in this section of the article, *Gergel v. High View Homes, L.L.C.* ("*Gergel II*"),³ represented homeowner plaintiffs' most ambitious effort to avoid arbitration. *Gergel II* ended "round two" of the parties' dispute. In "round one," defendant builders moved to compel arbitration under the parties' home purchase contract. The trial court denied that motion in *Gergel I*,⁴ holding that plaintiffs' claims were not subject to arbitration due to Colorado's "intertwining doctrine."⁵ The Colorado Court of Appeals reversed.⁶

Round two commenced on remand from that reversal. The trial court stayed the proceedings before it per the mandate, and directed the parties to arbitrate.⁷ They contacted the American Arbitration Association ("AAA"), as their contract required. However, after initial efforts to select a panel, the homeowners returned to court and filed motions to: (1) supplement their complaint by, among

other things, adding AAA as a defendant and seeking declaratory and injunctive relief against it; (2) obtain a temporary restraining order, preliminary injunction, and permanent injunction against arbitration, and have the trial court decide the merits; and (3) in the alternative, have the court select an arbitrator.

The homeowners based their motions on contentions that the AAA was not impartial, and that its excessive, unreasonable administrative fees rendered the arbitration clause unconscionable.⁸ The trial court denied the motions,⁹ and again directed the parties to arbitrate. The homeowners then brought their second interlocutory appeal.¹⁰

The *Gergel II* court dismissed the homeowners' appeal for lack of subject matter jurisdiction, basing its decision on relevant provisions of the version of Colorado's Uniform Arbitration Act ("CUAA") in effect at that time.¹¹ In reaching its decision, the Court of Appeals addressed a new issue: Could parties pursue an interlocutory appeal of an order denying a motion to *stay* an arbitration?¹²

The court referenced its prior decisions holding that a party who opposes, but fails to defeat, a motion to *compel* arbitration cannot pursue an interlocutory appeal of the ruling, because the CUAA does not permit such appeals.¹³ It then considered the CUAA's provisions concerning stay orders related to arbitration.¹⁴ The CUAA permitted appellate review only of an order "*granting* an application to stay arbitration"¹⁵; therefore, the court held that the CUAA "does not authorize an appeal from an order *denying* a stay of arbitration."¹⁶ (*Emphasis in original.*)

The court found unpersuasive the plaintiffs' attempt to make their interlocutory appeal viable by alleging that AAA's administrative fees rendered the arbitration clause unconscionable, and consequently requesting injunctive relief. It concluded that the assertion of unconscionability did not materially alter the appeal, because "the essence of the dispute is the existence of a valid agreement compelling arbitration of the claims at issue."¹⁷ Moreover, the issue would not become moot if the homeowners proceeded

to arbitration or defaulted by failing to pay the administrative fees, inasmuch as they could appeal the trial court's adverse ruling on unconscionability following entry of a final arbitration award.

The *Gergel II* court also rejected the homeowners' argument that the motion for an injunction created jurisdiction, because the Colorado Appellate Rules permit an interlocutory appeal of the grant or denial of a temporary or preliminary injunction.¹⁸ To determine whether the district court's order was subject to review, the court stated it must consider "the substance and not the form of the order."¹⁹ Noting its prior holdings precluding interlocutory appeal of an order that is the "functional equivalent" of an order requiring arbitration,²⁰ the *Gergel II* court ruled that the trial court order declining to enjoin arbitration was not an appealable order denying injunctive relief. Instead, it was an unappealable order compelling arbitration. Consequently, the *Gergel II* court dismissed the appeal and remanded for arbitration.²¹

Summary of Colorado Appellate Decisions Regarding Arbitration—Part I

(January 1, 2002 through December 31, 2004)

Case Name	Arbitration Issue Addressed	Summary of How Issue Was Addressed
<i>Gergel v. High View Homes, L.L.C.</i> (" <i>Gergel II</i> ")	Interlocutory appeals of trial court decisions to grant or deny motions to compel or stay arbitration	CUAA does not permit interlocutory appeal of order denying motion to stay arbitration. Motion to enjoin arbitration did not render appeal viable, because order denying stay was functional equivalent of order compelling arbitration.
<i>Fonden v. U.S. Home Corp.</i>	Same	If trial court grants motion to compel arbitration and stays claims before it, the FAA does not permit interlocutory appeal. If trial court grants motion to compel and dismisses claims before it, FAA permits immediate appeal, because dismissal is "final decision."
<i>Ferla v. Infinity Development Associates, LLC</i>	Same	CUAA permits interlocutory appeal of orders denying motions to compel arbitration but does not permit interlocutory appeal of orders granting motions to compel; this does not violate equal protection.
<i>Eagle Ridge Condominium Association v. Metropolitan Builders, Inc.</i>	Same	Trial court may refuse to compel arbitration only if: (1) there is no agreement to arbitrate; or (2) the issue sought to be arbitrated is clearly beyond scope of arbitration agreement—which may be met if arbitrable and unarbitrable claims are "intertwined." Note: <i>Certiorari</i> was granted.
<i>1745 Wazee, LLC v. Castle Builders, Inc.</i>	Application of FAA	General choice of law provision in contract does not constitute parties' election to arbitrate under state law rather than FAA. Award upheld because contract's exculpatory provision did not violate public policy exception to FAA.
<i>Allen v. Pacheco</i>	Arbitration contracts and federal preemption	Because provision of Colorado's Health Care Availability Act (" <i>HCAA</i> ") setting certain requirements for health care-related arbitration agreements regulates business of insurance, federal McCarren-Ferguson Act reverse-preempted FAA. Thus, HCAA, not FAA, governed arbitration clause, and clause was void for failure to comply with HCAA.

Fonden v. U.S. Home

In *Fonden v. U.S. Home Corporation*,²² the homeowner contracted with U.S. Home Corporation ("U.S. Home") to buy land and have a home built. The contract included an arbitration clause stating that: (1) the transaction involved interstate commerce; (2) disputes would be mediated; and (3) if mediation failed, the parties would arbitrate under the Federal Arbitration Act ("FAA").²³ After discovering alleged defects in the home, Fonden sued U.S. Home to rescind the contract or recover damages. U.S. Home moved to compel arbitration and the trial court granted its motion. Fonden appealed.²⁴

Considering first whether the FAA applied, the court decided that it did, based on the above-described contractual language and the parties' concessions.²⁵ The court then considered whether the FAA permitted Fonden's appeal, and held that the FAA permits no appeal from an interlocutory order staying a lawsuit or compelling arbitration.²⁶ Thus, the court concurred with U.S. Home's contention that the order granting its motion to compel arbitration was not subject to interlocutory appeal and dismissed the appeal for lack of subject matter jurisdiction.²⁷

Notwithstanding the FAA's seemingly dispositive language, Fonden contended her appeal was permitted under the U.S. Supreme Court's decision in *Green Tree Financial Corp.—Alabama v. Randolph*.²⁸ The Colorado Court of Appeals disagreed, distinguishing *Green Tree* because although the federal district court had granted a motion to compel arbitration in the underlying action, it also had denied a related motion to stay the court proceedings and, instead, dismissed the arbitrable claims. That dismissal, the U.S. Supreme Court had held, was a "final decision" under the FAA and, therefore, appealable.²⁹

By contrast, the *Fonden* trial court had not dismissed any claims, but stayed them pending arbitration. As a result, the order compelling arbitration was not a final decision, *Green Tree* was inapplicable, and the Colorado Court of Appeals concluded it therefore lacked jurisdiction over Fonden's appeal.³⁰

Thus, *Fonden* indicates that a trial court order compelling arbitration and staying court proceedings pending arbitration probably is not subject to interlocutory appeal under either the CUA or the FAA. However, if the trial court not only compels arbitration but also dismiss-

es the proceedings before it, it has rendered a "final decision" subject to appeal.³¹

Ferla v. Infinity Development

In *Ferla v. Infinity Development Associates, LLC*,³² the Court of Appeals reaffirmed *Gergel II* and *Fonden*. It also concluded that the fact that the CUA permits interlocutory appeal of an order denying a motion to compel arbitration, but does not provide for interlocutory appeal of an order granting a motion to com-

pel, does not violate disputants' constitutional right to equal protection.³³ After holding that plaintiffs' equal protection arguments warranted only "rational basis" review, it found:

The existing statutory scheme, which allows for appellate review to protect the right to compel arbitration, serves a legitimate purpose because it is rationally based on . . . [Colorado's] public policy favoring arbitration. If an arbitrable claim is adjudicated by the trial court,



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the benefits of a speedy resolution by arbitration are lost.³⁴

Through this holding, the court made it that much clearer that a disputant denied arbitration by a trial court may pursue an interlocutory appeal of the decision, whereas a disputant compelled to arbitrate over his or her objection may not.

Eagle Ridge v. Metropolitan Builders

In *Eagle Ridge Condominium Association v. Metropolitan Builders, Inc.*,³⁵ the Court of Appeals provided more specific guidance regarding grounds on which a district court may deny a motion to compel arbitration, describing and applying the intertwining doctrine. Whether *Eagle Ridge* is authoritative remains to be seen, because the Colorado Supreme Court has granted *certiorari*.³⁶

Defendant 370 Development, LLC was the developer; defendant Metropolitan Builders, Inc. was the general contractor for the Eagle Ridge Condominiums. These defendants, whom the Court of Appeals jointly called “the builders,” formed plaintiff Eagle Ridge Condominium Association (“association”) to own, operate, and maintain common areas of the complex.³⁷ The builders adopted bylaws for the association mandating that association claims against them for construction defects must be arbitrated, but the bylaws also included procedures for making amendments. After the builders constructed Eagle Ridge, they sold units to the original homeowners via contracts that also included an arbitration clause.³⁸

In 2002, the association amended its bylaws to eliminate the arbitration provision, then sued the builders, alleging numerous defects and claims. In its complaint, the association alleged that the builders had engaged in a joint venture, acted as each other’s agents and alter egos, and both were liable for defects in the common areas and individual units.³⁹ After the builders answered, they moved to compel arbitration under the CUA. The trial court denied the motion.⁴⁰

The Court of Appeals acknowledged that the builders had standing to bring an interlocutory appeal.⁴¹ Turning to the builders’ motion to compel, the Court of Appeals ruled that a trial court may refuse to compel arbitration only “[1] upon a showing that there is no agreement to arbitrate or [2] if the issue sought to be arbitrated is clearly beyond the scope of the arbitration provision.”⁴²

Turning to the first prong, the court upheld the association’s amendment of its bylaws. Hence, the association and the builders no longer had an agreement to arbitrate when the association filed suit.⁴³ However, the builders had also asserted the arbitration provision in sales contracts between the developer and original unit purchasers.⁴⁴ Although the parties did not dispute the applicability of that provision to some of the claims asserted against the developer, the court concluded that claims the association brought for unit owners in a representative capacity also could be subject to arbitration under this provision.⁴⁵ The court further decided that because the general contractor was not a party to the original purchase contracts, the arbitration provision did not apply to the claims asserted against it, and none of the claims against the general contractor was subject to arbitration.⁴⁶

The Court of Appeals indicated that the second prong of the analysis inquired as to whether the non-arbitrable claims against the general contractor were so inextricably intertwined with the arbitrable claims against the developer that it would prevent their severance, thereby warranting denial of the builders’ motion to compel.⁴⁷ It outlined the intertwining doctrine as follows:

If an arbitrable claim is joined with claims that are not arbitrable, and if the arbitrator would be required to review the same facts needed to establish the non-arbitrable claims, referral to arbitration should be denied, and the court should resolve all the claims asserted.⁴⁸ (*Emphasis added.*)

Applying the intertwining doctrine, the court concluded that, because the association had not distinguished its claims against the developer from its claims against the general contractor and because the builders had asserted affirmative defenses of comparative negligence or fault of non-parties, the arbitrator “must necessarily consider the relationship and obligations of each defendant in determining which of them, if any, owed or breached a duty or contractual obligation.”⁴⁹ With regard to the association’s tort claims, the arbitrator

may be required to determine the existence of a non-party at fault, the proportional fault of multiple parties, and the total extent of damages caused by each party. We therefore conclude the arbitrator would be required to review the same facts needed to establish the non-arbitrable claims, and severance of

the claims would be impractical. Thus, the trial court should resolve all of the association’s claims.⁵⁰

The Court of Appeals affirmed the trial court’s denial of the builders’ motion to compel arbitration.⁵¹

Applying the Federal Arbitration Act

In *1745 Wazee, LLC v. Castle Builders, Inc.*,⁵² the Court of Appeals construed the FAA.⁵³ Castle Builders, Inc. (“Castle”) contracted with 1745 Wazee, LLC (“Wazee”) to construct a building. In turn, Castle retained DRD & Associates (“DRD”) to install the building’s boiler. After DRD installed the boiler, fire damaged the building. Wazee alleged that DRD’s negligent installation caused the fire.⁵⁴

In accordance with the contract, Wazee requested arbitration, seeking only loss of use damages, not costs of repair. In the arbitration proceeding, Castle and DRD moved for summary judgment, contending that an exculpatory provision in the Wazee-Castle contract precluded Wazee from recovering loss-of-use damages that arose from a fire. The arbitrator agreed, granted summary judgment for Castle and DRD, and dismissed Wazee’s claims.⁵⁵

Wazee then filed suit, arguing that the CUA governed the arbitration and that the district court should vacate the summary judgment award because it violated Colorado public policy. The trial court applied the FAA, treated the complaint as a motion to vacate the award, and denied Wazee’s request.⁵⁶ The Court of Appeals affirmed, rejecting Wazee’s argument that the CUA should govern its analysis.

Wazee acknowledged that the arbitration clause did not specify whether the FAA or the CUA applied. Wazee contended that a governing law clause, which stated the contract would be governed “by the law of the place where the contract is located,”⁵⁷ meant that Colorado law and the CUA applied. However, consistent with federal precedent, the *Wazee* court disagreed, concluding that this general choice of law provision did not constitute the parties’ election to have their arbitration governed by state law rather than the FAA.⁵⁸ Further, because the contract revealed that the transaction involved interstate commerce (something Castle conceded), the FAA governed the arbitration.

Addressing Wazee’s public policy argument under the FAA and cases construing it,⁵⁹ the court acknowledged that a violation of public policy was one of a “handful

of judicially created reasons” why a trial court could vacate an arbitration award under the FAA.⁶⁰ Nevertheless, after finding that the FAA’s public policy exception is “narrow,” arising only when an arbitration award creates an “explicit conflict” with other “laws and legal precedents,”⁶¹ the *Wazee* court concluded that the contract’s exculpatory clause did not violate public policy.⁶²

Arbitration Contracts and Federal Preemption

The Colorado Supreme Court decided only one arbitration-related case during the survey period, but it has important implications. *Allen v. Pacheco*⁶³ was a wrongful death case brought by Karen Pacheco (“Pacheco”) against a health maintenance organization (“HMO”) and several HMO physicians whose malpractice she alleged caused the death of her husband.

After Pacheco—who was not herself a member of the HMO—filed suit, the defendants moved to compel arbitration.⁶⁴ The trial court ruled that the arbitration clause in the contract between Pacheco’s deceased husband and the HMO was en-

forceable against her, because as a surviving spouse she was an “heir” as that term was used in the arbitration clause.⁶⁵ Further, the trial court found the arbitration clause enforceable, despite its noncompliance with provisions of Colorado’s Health Care Availability Act (“HCAA”), because the FAA federally preempted the HCAA.⁶⁶

The claim proceeded to arbitration, and the arbitrator ruled for the defendants. After the trial court denied Pacheco’s motion to vacate the award, she appealed, arguing that the trial court had erred in binding her to the arbitration agreement.⁶⁷ The Court of Appeals agreed and reversed. Because it based its decision on its construction of the arbitration clause and Colorado’s wrongful death act,⁶⁸ the Court of Appeals did not reach the issue of federal preemption.⁶⁹

The Colorado Supreme Court granted *certiorari*. Although a five-member majority of the high court affirmed the Court of Appeals’ conclusion that Pacheco was not bound by the arbitration clause, it did so on entirely different, federal preemption-based grounds.⁷⁰

Noting that construction and interpretation of the arbitration clause was a mat-

ter of state contracts law,⁷¹ the Court revealed an area of disagreement with the Court of Appeals, which had held that ambiguities in an insurance contract normally are construed against the insurer. Although the Supreme Court acknowledged this general rule of construction, it found that such rule was trumped by its more specific holding that “courts must afford ambiguities in *arbitration* agreements a presumption *in favor of arbitration*.”⁷² (*Emphasis added.*)

Based on the latter rule and the language of the arbitration clause, the Supreme Court ruled that the arbitration clause applied to wrongful death claims, and therefore was binding on Pacheco.⁷³ In reaching that conclusion, the Court issued a ruling of first impression: where parties to an arbitration agreement specifically express their intent to bind non-parties, the non-parties may be compelled to arbitrate disputes related to the agreement.⁷⁴ However, after reaching these decisions, the majority nonetheless concluded that the agreement was unenforceable as a result of the federal McCarran-Ferguson Act’s “reverse federal preemption” of the FAA.

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The parties had conceded that the arbitration agreement did not comply with the HCAA,⁷⁵ but the trial court had ruled that Pacheco was still required to arbitrate because the FAA preempted the HCAA.⁷⁶ The Supreme Court concluded it must revisit that issue, even though the Court of Appeals had not.

The Supreme Court noted that FAA preemption applied only to state statutes of “general applicability.”⁷⁷ However, it found that the relevant HCAA provisions were not statutes of general applicability, because they targeted “only arbitration agreements contained in medical services contracts.”⁷⁸ After quoting the McCarran-Ferguson Act’s operative provision, which states that no act of Congress “shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ,”⁷⁹ the Court further examined the relevant HCAA sections.

The Court acknowledged that those sections would apply to contracts between patients and both insurer and non-insurer health care providers, such as physicians. However, the Court relied on federal precedent for the proposition that a state statute need not relate *only* to insurance, or appear in an insurance code, to qualify as a statute “enacted ‘for the purpose of regulating the business of insurance’ under the meaning of the McCarran-Ferguson Act.”⁸⁰

The Court concluded that the HCAA sections “not only directly regulate contracts between health insurance policy holders and their insurers (in this case, HMOs), but also further the interests of these policy holders.”⁸¹ Consequently, the McCarran-Ferguson Act exempted the HCAA sections from FAA preemption, meaning that the HCAA sections governed the parties’ arbitration agreement. Because the agreement did not comply with the HCAA, it was unenforceable and Pacheco was not required to arbitrate her claim.⁸²

Conclusion

The second part of this two-part article will be published in March 2005. Part II addresses cases concerning appellate guidance on arbitrators’ powers and judicial review of arbitral awards. In addition, the author discusses trends apparent in all cases decided during the survey period.

NOTES

1. The U.S. District Court for the District of Colorado, Tenth Circuit Court of Appeals, and

U.S. Supreme Court may have decided any number of Federal Arbitration Act (“FAA”) or Colorado Uniform Arbitration Act (“CUAA”)-related questions during the survey period. Such federal cases are beyond the scope of this article.

2. These data arise from the author’s search on Westlaw® for all reported cases appearing under West’s Key Topic No. 33, “Arbitration,” from the inception of reported Colorado appellate cases to December 31, 2004.

3. *Gergel II*, 58 P.3d 1132 (Colo.App. 2002), cert. denied (Colo. 2002).

4. *Gergel v. High View Homes, L.L.C.*, 996 P.2d 233 (Colo.App. 1999) (hereafter, “*Gergel I*”).

5. The “intertwining doctrine” is described and discussed in more detail below in relation to *Eagle Ridge Condo. Ass’n v. Metro. Builders, Inc.*, 98 P.3d 915 (Colo.App. 2004), cert. granted, S.Ct. No. 04SC273 (Colo. Oct. 18, 2004).

6. *Gergel I*, supra, note 4.

7. *Gergel II*, supra, note 3 at 1133.

8. *Id.* at 1133-34.

9. *Id.* at 1134.

10. *Id.*

11. *Id.* See also CRS §§ 13-22-201 et seq. It is critical to note that the legislature substantially amended the CUAA in the most recent legislative session, causing, as the editors of the Colorado Revised Statutes stated, “some addition, relocation and elimination of sections as well as subject matter.” *Id.* at Editor’s Note. The amendments went into effect August 4, 2004. In this article, statutory references to the CUAA are to those sections the court cited in deciding the case under discussion. Where that cited provision now appears in a different section of the amended CUAA or has been altered or eliminated, the author has so noted. Full review of the amended CUAA is beyond the scope of this article. For such a review, see Carr, Stone, and Boonin, “Colorado’s Revised Uniform Arbitration Act,” 33 *The Colorado Lawyer* 9 (Sept. 2004).

12. *Gergel II*, supra, note 3 at 1134-35.

13. *Id.* at 1135, citing *Associated Natural Gas, Inc. v. Nordic Petroleum, Inc.*, 807 P.2d 1195 (Colo.App. 1990); *Frontier Materials, Inc. v. City of Boulder*, 663 P.2d 1065 (Colo.App. 1983).

14. *Id.* at 1134-35. The court examined UAA provisions CRS §§ 13-22-204(1), -204(2), and -221(1). These sections remain the same in the amended CUAA, supra, note 11, but CRS § 13-22-204(2) now further provides that if the court finds there is no enforceable agreement to arbitrate, it may not order arbitration.

15. *Id.* at 1134, quoting CRS § 13-22-221(1)(b), which now appears in the amended CUAA at CRS § 13-22-228(1)(b).

16. *Id.* at 1135. In so holding, the court said its decision was consistent with those in other jurisdictions, and also found support in parallel provision of the FAA. *Id.*, citing *Hodes v. Comprehensive Health Assoc., P.A.*, 670 P.2d 76 (Kan.App. 1983); *JM Huber Corp. v. Maine Erbauer, Inc.*, 493 A.2d 1048 (Me. 1985); *Sch. Comm. v. Agawam Educ. Ass’n*, 359 N.E.2d 956

(Mass. 1977); 9 U.S.C. § 16(b)(4); and *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79 (2000). Note that the result would be the same under the amended CUAA; see CRS § 13-22-228(1)(b), allowing interlocutory appeal only of an order “granting a motion to stay arbitration.” (*Emphasis added.*)

17. *Gergel II*, supra, note 3 at 1133.

18. *Id.*, citing C.A.R. 1(a)(3).

19. *Id.* (*Citations omitted.*)

20. *Id.*, citing *Thomas v. Farmer’s Ins. Exch.*, 857 P.2d 532 (Colo.App. 1993); *Camelot Invs., LLC v. LANDesign, LLC*, 973 P.2d 1279 (Colo. App. 1999).

21. *Id.* at 1136.

22. *Fonden*, 83 P.2d 600 (Colo.App. 2003), cert. denied (Colo. 2004)

23. *Id.* at 601. The FAA appears at 9 U.S.C. §§ 1 through 16.

24. *Id.*

25. *Id.* at 602.

26. *Id.* at 602-03, citing and quoting 9 U.S.C. §§ 3 and 16(b)(1).

27. *Id.* at 603. As a preliminary matter, Fonden argued that the issue of subject matter jurisdiction was not properly before the court, because U.S. Home had not raised it in a cross-appeal. The Court of Appeals disagreed, holding that the issue of subject matter jurisdiction may be addressed at any time and that an appellee may, “without filing a notice of cross-appeal, raise arguments in support of a judgment that would not increase its rights under the judgment.” *Id.* at 602.

28. *Green Tree*, supra, note 16.

29. *Fonden*, supra, note 22 at 603, citing and summarizing *Green Tree*, supra, note 16.

30. *Id.* at 603.

31. *Fonden* is not the only decision in which Colorado’s appellate courts have so implied. See, e.g., *Gergel II*, supra, note 3 at 1134 (“the stay of proceedings in the trial court mandated by *Gergel I*, did not constitute a final judgment”) (*Citations omitted.*); *Ferla v. Infinity Dev. Assocs., L.L.C.*, 33 Colo. Law. 233 (Sept. 2004) (App. No. 04CA0631, *ann’cd* 7/29/04) (stating that trial court’s dismissal of arbitrable claims could transform otherwise unappealable interlocutory decision into appealable final order). Notably, according to the amended CUAA, if a court orders arbitration, it “shall stay any judicial proceeding that involves a claim subject to arbitration. If a claim subject to arbitration is severable, the court may limit the stay to that claim.” (*Emphasis added.*) CRS § 13-22-207(7).

32. *Ferla*, supra, note 31.

33. *Id.* at 234.

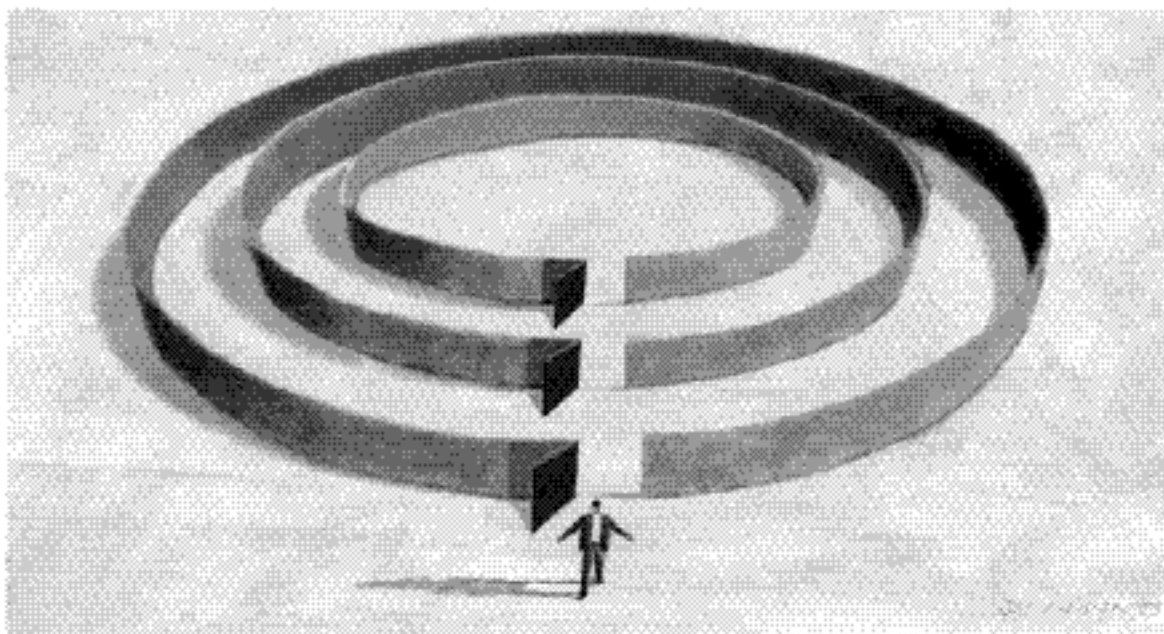
34. *Id.*

35. *Eagle Ridge Condo. Ass’n*, supra, note 5.

36. *Id.* The Supreme Court granted *certiorari* on the following issues (bracketed numerals added by the author):

[1.] Whether the intertwining doctrine precludes arbitration of a signatory’s arbitrable claims if the claims are intertwined with a non-signatory’s non-arbitrable claims.

[2.] Whether a non-signatory to an agreement containing an arbitration clause may



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compel arbitration when a signatory to the agreement raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and affiliated signatory.

[3.] Whether Colorado should follow *Dean Whitter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), and reject the intertwining doctrine.

37. *Eagle Ridge Condo. Ass'n, supra*, note 5 at 917. The association was composed of and represented all owners of individual units in the complex.

38. *Id.*

39. *Id.* As discussed below, the court found the association's lack of distinction between the acts of the developer and general contractor consequential to its decision regarding the builders' motion to compel arbitration.

40. *Id.* The builders relied on CRS § 13-22-204, which now appears in the amended CUA A at CRS § 13-22-207.

41. *Id.*, citing CRS § 13-22-221(1)(a), which now appears in the amended CUA A at CRS § 13-22-228(1)(a), and *Mountain Plains Constructors, Inc. v. Torrez*, 785 P.2d 928 (Colo. 1990).

42. *Id.*, citing *Eychner v. Van Vleet*, 870 P.2d 486, 489 (Colo.App. 1993), quoting *Shorey v. Jefferson Cty. Sch. Dist. No. R-1*, 807 P.2d 1181, 1183 (Colo.App. 1990) and citing CRS § 13-22-204(1).

43. *Eagle Ridge Condo. Ass'n, supra*, note 5 at 918-19.

44. *Id.* at 919. See also *id.* at 920 (quoting arbitration clause).

45. *Id.* at 920, citing CRS § 38-33.3-302(1)(d).

46. *Id.*

47. *Id.*

48. *Id.* at 919, citing *Breaker v. Corrosion Control Corp.*, 23 P.3d 1278 (Colo.App. 2001), but also noting a contrary federal rule with the reference "*But see Dean Whitter Reynolds, Inc. v. Byrd*, 470 U.S. 213 . . . (1985) (intertwining doctrine not applicable under FAA)."

49. *Eagle Ridge Condo. Ass'n, supra*, note 5 at 920.

50. *Id.*

51. *Id.*

52. *Wazee*, 89 P.3d 422 (Colo.App. 2003), cert. denied (Colo. 2004).

53. See note 1, *supra*.

54. *Wazee, supra*, note 52 at 424.

55. *Id.*

56. *Id.* The Court of Appeals did not state that *Wazee* had argued that the CUA A governed the arbitration and mandated vacating the award; however, given the nature of the issues the court reviewed, it appears that *Wazee* made this argument.

57. *Id.* at 425.

58. *Id.*, citing and discussing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). The court distinguished its prior decision in *Byerly v. Kirkpatrick Pettis Smith Polian, Inc.*, 996 P.2d 771 (Colo.App. 2000) on the ground that such decision did not consider the applicability of the FAA's public policy exception. The *Wazee* court also limited and declined to follow *Byerly* to the extent it conflicted with the *Wazee* court's choice of law analysis.

59. *Wazee, supra*, note 52 at 425.

60. *Id.*, citing and quoting *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001).

61. *Id.* at 425-26, quoting *Seymour v. Blue Cross/Blue Shield*, 998 F.2d 1020, 1024 (10th Cir. 1993) (quoting *United Paper Workers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)).

62. *Id.* at 426.

63. *Pacheco*, 71 P.3d 375 (Colo. 2003).

64. See *id.* at 377.

65. *Id.* The arbitration clause provided that claims "shall be submitted to binding arbitration if the action is asserted: By . . . a Member's heir or personal representative . . . [f]or any reason, including, but not limited to, death. . . ."

66. *Id.* The relevant provisions of the HCAA regarding arbitration clauses appear at CRS §§ 13-64-403(3) and (4), and specify the proper form and nature of arbitration clauses between patients and health care providers, including HMOs. "Generally, . . . the FAA preempts state law that conflicts with it, by operation of the Supremacy Clause. U.S. Const. Art. VI, cl. 2." *Id.* at 385 (J. Kourlis, dissenting).

67. *Id.*

68. *Id.* See also *Pacheco v. Allen*, 55 P.3d 141, 143-44 (Colo.App. 2001) (HMO contract could not be binding on *Pacheco* because she was not a party to it, was not her husband's "heir" as that term was used in Colorado's wrongful death act, CRS §§ 13-21-201 *et seq.*, and arbitration clause did not cover wrongful death action), *aff'd on other grounds, Pacheco, supra*, note 63.

69. *Pacheco, supra*, note 63 at 377.

70. *Id.* at 377-78.

71. *Id.*

72. *Id.* at 378 n.3, citing *City and Cty. of Denver v. Dist. Ct.*, 939 P.2d 1353, 1364 (Colo. 1997).

73. *Id.* at 378-80 (decedent and HMO had intended to bind non-parties; *Pacheco* was "heir" under agreement because term should be broadly construed within context of arbitration agreement—which could include all manner of claims by member against HMO—rather than under narrower definition of "heir" employed in Colorado's wrongful death act).

74. *Id.* at 379-80 and 380 n.4.

75. *Id.* at 381.

76. *Id.* at 377.

77. *Id.* at 381.

78. *Id.*

79. *Id.*, quoting 15 U.S.C. § 1012(b).

80. *Id.* at 383-84, citing *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 934 (10th Cir. 1992).

81. *Id.* at 383 (footnote omitted).

82. *Id.* at 384. Justices Kourlis and Bender dissented, arguing that because the HCAA was not aimed at regulating the business of insurance, the McCarran-Ferguson Act was inapplicable. Because relevant provisions of the HCAA did not regulate insurance, they would be preempted by the FAA, and the arbitration clause was valid and enforceable even though it did not contain the special notice required by the HCAA. *Id.* at 385-86. The dissenters therefore would have reversed the Court of Appeals' decision and reinstated the trial court judgment confirming the arbitration award. *Id.* at 388. ■



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