

***Mikohn Gaming Corp. v. McCrea*, 120 Nev. Adv. Op. 29 (May 12, 2004).**<sup>1</sup>

## **PROCEDURE – STAY OF LOWER COURT PROCEEDINGS – ARBITRATION**

### **Summary**

Appellants sought a stay of the district proceedings under Nevada Rules of Appellate Procedure 8(c), during their appeal of the district court's denial of appellant's motion to compel arbitration.

### **Disposition/Outcome**

Granted. The court determined that absent a strong showing of irreparable harm or lack of merit, a stay should issue pending the resolution of an appeal from the district court's order refusing to compel arbitration.

### **Factual and Procedural History**

Appellant Mikohn Gaming Corporation (Mikohn) hired Respondent McCrea as general counsel and secretary in May 1994. McCrea and Mikohn entered into an employment agreement and a separate indemnification agreement. The employment agreement contained a binding arbitration clause for certain issues arising from McCrea's employment. However, the indemnification contract did not include an arbitration clause.

After Mikohn brought an action against McCrea for breach of promissory notes in district court, McCrea countersued Mikohn based on seven causes of action.<sup>2</sup> Mikohn filed a motion to either dismiss or compel arbitration of all of McCrea's claims. Because the district court concluded that five of McCrea's allegations were based on the indemnification agreement, it only granted the motion for two of the claims.

As a result, Mikohn appealed and sought a temporary stay in the district court. The district court denied the motion to stay. Thereafter, Mikohn sought a stay from the Nevada Supreme Court. The court granted a temporary stay on October 14, 2003, to maintain the status quo while it considered "the interplay of NRAP 8(c)'s stay factors in an appeal from an order refusing to compel arbitration."<sup>3</sup>

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<sup>2</sup> The court does not specify either McCrea's or Mikohn's claims.

<sup>3</sup> *Mikohn Gaming Corp. v. McCrea*, 120 Nev. Adv. Op. 29, 3 (May 12, 2004). Nevada Rule of Appellate Procedure 8(c) states:

Stays in Civil Cases Not Involving Child Custody. In deciding whether to issue a stay or injunction, this court will generally consider the following factors: (1) whether the object of the appeal will be defeated if the stay or injunction is denied; (2) whether appellant will suffer irreparable or serious injury if the stay or injunction is denied; (3) whether respondent will suffer irreparable or serious injury if the stay or injunction is granted; and (4) whether appellant is likely to prevail on the merits in the appeal.

## **Discussion**

The court analyzed the issue by looking at whether denial of the stay would: (1) defeat the object of the appeal; (2) result in irreparable harm or serious injury to appellant; (3) result in irreparable harm or serious injury to respondent; and (4) whether appellant is likely to succeed on the merits of the appeal.<sup>4</sup> While acknowledging it has not “indicated that any one factor carries more weight than the others,”<sup>5</sup> the court stated the “first stay factor takes on added significance and generally warrants a stay of trial court proceedings pending resolution of the appeal.”<sup>6</sup>

Accordingly, the court began its discussion by defining the object of an appeal from an order refusing to compel arbitration. It concluded “the object of an appeal seeking to compel arbitration is to enforce the arbitration agreement and attain the bargained-for benefits of arbitration.”<sup>7</sup> The court outlined three reasons supporting its conclusion: (1) The Uniform Arbitration Act favors arbitration as recognized in the Nevada Supreme Court’s prior decisions;<sup>8</sup> (2) arbitration is designed to avoid the higher monetary and temporal costs of traditional litigation and those benefits would be destroyed if a litigant were forced to participate in both “judicial and arbitral forums;”<sup>9</sup> and (3) the Nevada Legislature demonstrated an intent to allow review of a denial of a motion to compel arbitration when it provided for interlocutory review of such an order.<sup>10</sup>

The Nevada Supreme Court also analyzed the remaining three factors. Regarding the second and third factors, the court reasoned that, normally, they will not play a significant role in a stay decision arising from an appeal of an order denying a motion to compel arbitration. The court ruled that neither party had shown a danger of irreparable harm. Although the court concluded that “a stay is generally warranted,”<sup>11</sup> the court left open the possibility that a party could defeat a stay by showing that appellate relief is unattainable. In looking at this final factor, the court determined McCrea made no showing that the appeal likely would fail on the merits. Hence, the court granted the stay.

## **Conclusion**

In sum, this opinion reiterates the court’s interest in promoting arbitration. Given the strong presumption in favor of arbitration, a litigant seeking to defeat a stay pending the outcome of an order denying a motion to compel arbitration would be prudent to argue the merits of the pending appeal. The result of this decision may be increased litigation because parties involved in an appeal from an order refusing to compel arbitration will litigate the merits of the appeal twice.

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NEV. R. APP. P. 8(c) (2004).

<sup>4</sup> *Mikohn*, 120 Nev. Adv. Op. at 4-5 (citing NEV. R. APP. P. 8(c)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Id.* (quoting *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990)).

<sup>9</sup> *Mikohn*, 120 Nev. Adv. Op. at 5 (citing *Bradford-Scott Data v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997)).

<sup>10</sup> *Id.* (citing NEV. REV. STAT. 38.205(1)(a) (repealed 2001)).

<sup>11</sup> *Id.* at 7.

