

## STRENGTHENING ARBITRATION BY FACING ITS CHALLENGES

*Joseph L. Daly\* and Suzanne M. Scheller\*\**

### I. INTRODUCTION

The purpose of arbitration is to provide quick, efficient, and inexpensive resolution of disputes.<sup>1</sup> Research shows the purpose is often achieved,<sup>2</sup> but nothing is perfect. Litigation surrounding arbitration has continued. From 2005-2007, more than five hundred new judicial opinions on mandatory arbitration provisions have been published.<sup>3</sup> Such challenges reduce the time, cost, and efficiency savings expected in arbitration.<sup>4</sup>

---

\* Joseph L. Daly, Professor of Law, Hamline University School of Law, Arbitrator for the US Federal Mediation and Conciliation Service (Washington, DC), the American Arbitration Association (New York) and a number of State and other agencies.

\*\* Suzanne M. Scheller, Esq. is a 2008 graduate of Hamline University School of Law where she studied alternative dispute resolution. She is currently an attorney in private practice in the Minneapolis, Minnesota area.

1. See, e.g., *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007) (“[S]implicity, informality, and expedition of arbitration’ . . . is inherent in every agreement to arbitrate.” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

2. See U.S. CHAMBER INST. FOR LEGAL REFORM, *ARBITRATION: SIMPLER, CHEAPER, AND FASTER THAN LITIGATION* 4-5, 19-21, 30 (2005), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf>. A study of 609 adults who had chosen to participate in arbitration over litigation, and who had reached an arbitration decision, found the following results: 74% of respondents found arbitration to be faster; 63% of respondents found arbitration to be simpler; 51% of respondents found arbitration to be less expensive; 66% percent of respondents said they would likely use arbitration again. *Id.* at 19-21, 30.

3. See F. Paul Bland, Jr., Leslie Bailey & Michael Lucas, *Selected Arbitration Decisions Since September 2005*, in 12TH ANNUAL CONSUMER FINANCIAL SERVICES LITIGATION INSTITUTE 397, 403 (PLI Corp. Law & Practice Course, Handbook Series No. 11,165, 2007). A Westlaw search performed on February 24, 2008 revealed over 700 cases from January 1, 2008 to February 24, 2008 with some reference to arbitration.

4. LUCILLE M. PONTE & THOMAS D. CAVENAGH, *CYBERJUSTICE: ONLINE DISPUTE*

The challenges will not disappear by ignoring them. In order for arbitration to maintain its vitality, the problems with arbitration must be addressed.<sup>5</sup> It is possible to make arbitration better by looking at its strengths and weaknesses. The key idea behind this article is to strengthen arbitration by discussing, not solving, its challenges.

## II. VALIDITY AND ENFORCEABILITY OF AN ARBITRATION AGREEMENT

One challenge to arbitration is the validity of the arbitration agreement itself. In a typical case, the plaintiff files suit in court and the defendant seeks to compel arbitration. The plaintiff then resists the motion to compel arbitration by challenging the validity of the arbitration agreement. Reasons for resistance include: contract of adhesion; unconscionability of the agreement; and limitation of statutory rights.<sup>6</sup> Facing these challenges can strengthen arbitration.

### *A. Adhesive Nature of the Contract*

A party may challenge an arbitration agreement by arguing that it is a one-sided contract of adhesion. A contract of adhesion is a standard form agreement presented to one of the parties on a “take-it-or-leave-it” basis with no opportunity to negotiate terms or provisions.<sup>7</sup> Many

---

RESOLUTION (ODR) FOR E-COMMERCE 34 (2005); *see also* ROBERT C. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: CASELOAD TRENDS IN STATE COURTS 1996-2005, at 11 (2007), *available at* [http://www.ncsconline.org/D\\_Research/csp/2006\\_files/EWSC-2007WholeDocument.pdf](http://www.ncsconline.org/D_Research/csp/2006_files/EWSC-2007WholeDocument.pdf).

When a party challenges an award or seeks to enforce settlement, the “time, effort, and money spent” on the original proceeding is lost. PONTE & CAVENAGH, *supra*. Furthermore, parties may also find themselves in the same position they were in before any resolution was attempted. *Id.* These problems, coupled with the finding that the incoming caseload of limited jurisdiction courts in thirty-five states rose by 13% between 1996 and 2005, indicate that the need for arbitration may continue to grow. LAFOUNTAIN ET AL., *supra*.

5. *See* Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 251 (2007) (stating that “much could be done to improve arbitration” especially for those entering contracts of adhesion).

6. *See infra* notes 7-93 and accompanying text.

7. *See, e.g.*, Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 982-84 (9th Cir. 2007); Murphy v. Check ‘N Go of Cal., Inc., 67 Cal. Rptr. 3d 120, 124-25 (Cal. Ct. App. 2007); Lafleur v. Law Offices of Anthony G. Buzbee, P.C., 960 So. 2d 105, 113 (La. Ct. App. 2007); Fiser v. Dell Computer Corp., 165 P.3d 328, 337 (N.M. Ct. App. 2007) (employing a three-prong test for finding a contract of adhesion: (1) a standardized form agreement prepared by one of the parties for the other; (2) a superior bargaining position by one of the parties because the weaker party cannot avoid doing business under the contract terms (having

consumer and employment contracts are presented in this manner. The problem is that form contracts often contain arbitration provisions that require the parties to arbitrate all disputes and foreclose the right to litigate future grievances in court.<sup>8</sup> The troubling issue is whether both parties have knowingly consented to all the terms in the standard form agreement.<sup>9</sup>

For instance, if a consumer wishes to be included in a cell phone plan or sign up for a credit card, the consumer must sign the contract as printed—there is no bargaining for the terms of the agreement. Similarly, an employee may waive the right to a trial when entering into an employment contract. Yet invalidating the arbitration provision is complicated and difficult.

### *1. Invalidating a Contract of Adhesion Requires Proving Unconscionability*

Courts are unwilling to invalidate an arbitration clause simply because it is a contract of adhesion.<sup>10</sup> A contract of adhesion is not *per se* invalid.<sup>11</sup> In order to invalidate the arbitration clause in an adhesive

---

no market alternatives); and (3) a contract being offered to the weaker party on a take-it-or-leave-it basis without negotiation), *rev'd*, 188 P.3d 1215 (N.M. 2008) (reversing on public policy grounds favoring class actions, particularly as a remedy for small monetary claims); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 669-70 (S.C. 2007).

8. *See, e.g.*, *Timmerman v. Grain Exchange, LLC*, 915 N.E.2d 113, 116 (Ill. App. Ct. 2009) (finding an arbitration provision in a one page form contract between farmers and the Grain Exchange to be procedurally unconscionable when the contract stated, "[u]nless otherwise agreed to, this contract is subject to the Rules of the National Grain and Feed Association" but nowhere mentioned that arbitration was part of the Rules nor were buyers given a copy of the Rules).

9. *See Lafleur*, 960 So. 2d at 113 (determining that because the client did not consent to an arbitration provision in the legal engagement agreement, the contract was an unenforceable contract of adhesion); Lisa M. Raleigh, *Consumer Protection in the Hispanic Community*, FLA. B.J., Feb. 2008, at 32, 38 (finding that language barriers pose a special problem to consent and "[c]ompanies advertising in languages other than English need to be cognizant of their responsibilities to make all pertinent disclosures in the same language as the advertisement").

10. *See, e.g.*, *Murphy*, 67 Cal. Rptr. 3d at 127 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005)) (finding that adhesive contracts are generally enforced); *Larsen v. Western States Ins. Agency, Inc.*, 170 P.3d 956, 959-60 (Mont. 2007) (holding that an arbitration clause in an insurance employment contract was valid, even though it was found to be a contract of adhesion); PONTE & CAVENAGH, *supra* note 4, at 8 (stating that courts generally uphold contracts of adhesion unless they can be shown to be "unfairly oppressive, unconscionable, or not within the reasonable expectation of the weaker party").

11. *See Larsen*, 170 P.3d at 959; *Fiser*, 165 P.3d at 337 (stating that finding an adhesive

contract, the clause must be unconscionable.

*i. Unconscionability*

Unconscionability is determined at the time of making the agreement and is marked by unfair terms that are oppressive to a disadvantaged party, taking into account the “setting, purpose and effect” of the particular agreement.<sup>12</sup> Generally, the contract must be both procedurally and substantively unconscionable in order to be invalidated;<sup>13</sup> however, a sliding scale test is sometimes used to find unconscionability in the aggregate.<sup>14</sup> The party challenging the arbitration provision must prove it is unconscionable.<sup>15</sup>

*ii. Procedural Unconscionability*

Procedural unconscionability is defined as an absence of meaningful choice by one of the parties and focuses on the circumstances surrounding formation of the contract.<sup>16</sup> Generally, the

---

contract did not mean that the contract was invalid); *Simpson*, 644 S.E.2d at 669.

12. *Miller v. Cotter*, 863 N.E.2d 537, 545 (Mass. 2007) (internal quotations omitted); *see also Simpson*, 644 S.E.2d at 668 (finding that unconscionability must be found at the time of the making of the contract).

13. *See, e.g., Shroyer*, 498 F.3d at 981 (applying the test under California law that the challenged provision must be both procedurally and substantively unconscionable to be unenforceable); *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 350 (Cal. Ct. App. 2007); *Fiser*, 165 P.3d at 337; *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 920 (Miss. Ct. App. 2007) (defining unconscionability as “an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party” (quoting *Entergy Miss., Inc. v. Burdette Gin Co.*, 726 So. 2d 1202, 1207 (Miss. 1998))).

14. *See Shroyer*, 498 F.3d at 981-82 (“California courts apply a ‘sliding scale,’ so that ‘the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’” (quoting *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1280 (9th Cir. 2006))); *Gatton*, 61 Cal. Rptr. 3d at 350; *Romano ex rel. Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. Dist. Ct. App. 2003). The *Romano* court held an arbitration provision unconscionable “[b]ecause the arbitration contract in this case is substantively unconscionable to a great degree, and we conclude that there is some irregularity in the contract formation amounting to procedural unconscionability of some degree.” *Romano*, 861 So. 2d at 62.

15. *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27, 30-31 (Ala. 2007); *Gatton*, 61 Cal. Rptr. 3d at 350; *Fiser*, 165 P.3d at 337.

16. *See Shroyer*, 498 F.3d at 982 (adding that procedural unconscionability “focus[es] on oppression or surprise due to unequal bargaining power” (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005))) (internal citations omitted); *Geoffroy v. Wash. Mut. Bank*, 484 F. Supp. 2d 1115, 1118 (S.D. Cal. 2007); *Gatton*, 61 Cal. Rptr. 3d at 352; *Romano*, 861 So. 2d at 62; *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 517

existence of a contract of adhesion is just one factor in determining procedural unconscionability.<sup>17</sup> Other factors include the existence of market alternatives,<sup>18</sup> “lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or lack of opportunity to study the contract and inquire about the contract terms,” and the element of surprise in the challenged clause.<sup>19</sup>

### *iii. Substantive Unconscionability*

Substantive unconscionability is defined as contract terms that are unreasonably favorable to one of the parties.<sup>20</sup> Arbitration clauses themselves are not substantively unconscionable.<sup>21</sup> Although, a term that significantly alters the legal rights or remedies available to one of the parties may be *per se* unconscionable.<sup>22</sup> Specific terms of the agreement that represent oppression or gross disparity between the parties may be substantively unconscionable.<sup>23</sup> Even if a term is found to be substantively unconscionable, an attempt will first be made to

---

(Miss. 2005) *overruled by* *Covenant Health & Rehab. of Picayune, L.P. v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009).

17. *See Trinity Mission*, 988 So. 2d at 920 (quoting *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss. 2002)); *Buraczynski v. Eyring*, 919 S.W.2d 314, 320-21 (Tenn. 1996).

18. *See Fiser*, 165 P.3d at 337 (listing one of the factors in finding adhesion as having no market alternatives).

19. *Trinity Mission*, 988 So. 2d at 920 (quoting *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss. 2002)); *see also* *Gainsville Health Care Ctr. v. Weston*, 857 So. 2d 278, 284 (Fla. Dist. Ct. App. 2003); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 669-70 (S.C. 2007); *Buraczynski*, 919 S.W.2d at 321.

20. *See, e.g., Shroyer*, 498 F.3d at 982 (stating substantive unconscionability focuses on “overly harsh or one-sided results” (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005))); *Geoffroy*, 484 F. Supp. 2d at 1118; *Gatton*, 61 Cal. Rptr. 3d at 350; *Murphy v. Check ‘N Go of Cal., Inc.*, 67 Cal. Rptr. 3d 120, 125 (Cal. Ct. App. 2007) (stating mutuality as the key consideration in substantive unconscionability); *Romano*, 861 So. 2d at 62.

21. *See, e.g., Trinity Mission*, 988 So. 2d at 923-24.

22. *See infra* note 78 and accompanying text.

23. *See* *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 737-741 (Miss. 2007) (analyzing provisions for substantive unconscionability by looking at the four corners of the agreement and reforming the contract by invalidating certain unconscionable provisions) *overruled by* *Covenant Health & Rehab. of Picayune, L.P. v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009) (holding the entire contract unconscionable after repeated court challenges of similar contracts containing arbitration clauses resulted in a growing number of clauses being held invalid); *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss. 2002).

strike the term and uphold the remainder of the arbitration agreement.<sup>24</sup>

*iv. Proving Both Procedural and Substantive Unconscionability*

Procedural unconscionability is often easier for consumers or employees to prove than is substantive unconscionability.<sup>25</sup> Consequently, most current litigation surrounds whether the arbitration agreement is substantively unconscionable. For example, a heavily litigated area is whether class action or class arbitration waivers are substantively unconscionable.<sup>26</sup>

In the Ninth Circuit, class arbitration waivers in consumer and employment contracts have been held to be substantively unconscionable.<sup>27</sup> For instance, a class arbitration waiver in a cell phone

---

24. See *Simpson*, 644 S.E.2d at 668; *Trinity Mission*, 988 So. 2d at 922. If, however, the unconscionable term is so intertwined with the arbitration agreement that it cannot be removed, the entire arbitration agreement is invalidated. See *Covenant Health & Rehab. of Picayune, L.P. v. Estate of Moulds ex rel. Braddock*, 14 So. 3d at 695 (holding the entire contract unconscionable due to growing number of invalidated provisions); *Murphy*, 67 Cal. Rptr. 3d at 128 (finding that the court has discretion to invalidate the entire agreement if it is “permeated by unconscionability”); *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773, 775-76 (Fla. Dist. Ct. App. 2007) (stating that offending sentences cannot be severed if they are interdependent on the remaining clauses and would cause the court to rewrite the agreement); *Simpson*, 644 S.E.2d at 674 (finding that the entire arbitration clause in a car dealer’s contract unenforceable due to the cumulative effect of many oppressive and one-sided provisions).

25. See *supra* note 16 and accompanying text (noting that procedural unconscionability is a factual determination based on how the contract was formed rather than a determination of law based on the substance of the contract provision, as is necessary to find substantive unconscionability); see also *Abramson v. Juniper Networks, Inc.*, 9 Cal. Rptr. 3d 433, 442 (Cal. App. Ct. 2004) (characterizing the elements of procedural unconscionability as oppression *or* surprise and summarily finding the contract at issue procedurally unconscionable based upon oppression alone when the employee was given no opportunity to negotiate the arbitration provision in his employment contract and was required to sign the contract as a condition of employment).

26. See generally Randall D. Quarles, *Courts Disagree: Is Arbitration a “Class” Act?*, 68 ALA. LAW. 476 (2007) (highlighting disagreement among the courts as to whether waiver of class actions is enforceable).

27. *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 983-84 (9th Cir. 2007). In *Shroyer*, the court held, without oral argument, that a class action waiver clause in an arbitration agreement was invalid which read:

You and Cingular agree that YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings of more than one person’s claims, and may not otherwise preside over any form of representative or class proceeding.

*Id.* at 980. California State Courts have taken a similar approach to class arbitration waivers. See *Murphy*, 67 Cal. Rptr. 3d at 127-28 (finding an arbitration clause that stated “neither you

contract was held substantively unconscionable in *Shroyer v. New Cingular Wireless Services, Inc.*<sup>28</sup> Prosecution of cases with small sums on an individual basis is difficult and class arbitrations may be the only effective way to redress harm.<sup>29</sup>

A class arbitration waiver was similarly found unconscionable when an employee filed suit on behalf of retail managers alleging misclassification of the managers as exempt employees under state labor laws.<sup>30</sup> The unconscionable waivers went to the heart of the contract and were not separable, causing the entire arbitration provision to be unenforceable.<sup>31</sup>

Reversing the lower court, the New Mexico Supreme Court held that a class action ban in an arbitration clause was unconscionable.<sup>32</sup> In reaching its decision, the court held that “the class action ban is contrary to fundamental New Mexico public policy” of allowing claimants to join in a class action as a remedy for small monetary claims.<sup>33</sup>

Grounds for finding substantive unconscionability include: (1) allowing one party to sue in court for certain disputes, but requiring the

---

nor we may join or participate in a class action” and “you and we agree that an arbitration firm may not arbitrate a Covered Claim as a class action” was substantively unconscionable).

28. *Shroyer*, 498 F.3d at 981. In *Shroyer*, the court stated:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money . . . [S]uch waivers are unconscionable . . .

*Id.* at 983 (citing *Discover Bank v. Superior Court of Los Angeles*, 113 P. 3d 1100 (Cal. 2005), which noted that not all class action waivers are unconscionable). The *Shroyer* court established a three-part test for finding class action waivers in arbitration clauses substantively unconscionable: (1) whether the agreement is a contract of adhesion written by the party with superior bargaining power; (2) whether disputes between the parties predictably involve small amounts of money; and (3) whether it is alleged that the party with superior bargaining power is carrying out a scheme to deliberately cheat consumers out of small sums of money. *Id.* Finding all three prongs of the test met, the court determined that the class action waiver at issue in *Shroyer* was unconscionable. *Id.* at 983-84.

29. *Murphy*, 67 Cal. Rptr. 3d at 127.

30. *Id.* at 122.

31. *Id.* at 128-29 (noting that the employee agreement was also procedurally unconscionable).

32. *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1218 (N.M. 2008). The plaintiffs alleged that the defendants misrepresented the memory size available on defendant’s computers. *Id.* One distinction between the New Mexico and California cases is that the arbitration clauses at issue in California prohibited class arbitrations as well as class actions, while the clause at issue in the New Mexico case precluded only class actions.

33. *Id.* at 1217 (noting that the plaintiff’s monetary damages were approximately ten to twenty dollars per computer).

other party to arbitrate all disputes;<sup>34</sup> (2) limiting damages;<sup>35</sup> (3) prohibiting punitive damages;<sup>36</sup> and (4) requiring that the challenging party pay arbitration fees, regardless of the outcome.<sup>37</sup>

*v. Beyond the Reasonable Expectation of the Parties*

In addition to unconscionability challenges, plaintiffs have also recently challenged arbitration clauses in contracts of adhesion based on the clause being outside the reasonable expectations of the parties. This relatively new challenge has been met with mixed results.<sup>38</sup>

---

34. See, e.g., *Geoffroy v. Wash. Mut. Bank*, 484 F. Supp. 2d 1115, 1123 (S.D. Cal. 2007) (reserving the right of the defendant to offset its own claims against the account holder without arbitration, but allowing no exceptions to mandatory arbitration for the account holder); *Lafleur v. Law Offices of Anthony G. Buzbee, P.C.*, 960 So. 2d 105, 113 (La. Ct. App. 2007) (allowing the lawyers to avail themselves of all legal remedies while binding the client to arbitration); *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 922 n.2 (Miss. Ct. App. 2007) (allowing the nursing home to bring disputes regarding payment to court but requiring that all other disputes be arbitrated); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E. 2d 663, 666 (S.C. 2007) (providing that “nothing in this contract shall require Dealer to submit to arbitration any claims by Dealer against customer for claim and delivery, repossession, injunctive relief, or monies owed by customer”).

35. *Trinity Mission*, 988 So. 2d at 922-23 n.3 (finding unconscionable a provision capping damages at \$50,000).

36. See, e.g., *Lucey v. Fedex Ground Package Systems, Inc.*, No. 06-3738 (RMB), 2007 WL 3052997, at \*6-7 (D. N.J. Oct. 18, 2007) (finding an arbitration clause in an employment contract invalid that gave the arbitrator no power to award punitive damages, and limited the truck driver employees’ remedies to reinstatement); *Trinity Mission*, 988 So. 2d at 924 (prohibiting punitive damages); *Simpson*, 644 S.E.2d at 670-71 (stating that in “no event shall the arbitrator be authorized to award punitive, exemplary, double, or treble damages . . . against either party” while a state statute allowed for punitive damages against the car dealer in the case). *But cf.* *Sinclair v. Servicemaster Co.*, No. Civ. 07-611 FCD/KJM, 2007 WL 3407138, at \*4 (E.D. Cal. Nov. 14, 2007) (holding that a waiver on punitive damages in an employment contract was not substantively unconscionable because both parties were similarly precluded from receiving a punitive damages award).

37. See, e.g., *Geoffroy*, 484 F. Supp. 2d at 1122-23 (finding even a cost splitting provision that required the consumer to pay arbitration costs while vindicating a federal claim, regardless of whether the consumer prevailed, to be substantively unconscionable); *Lafleur*, 960 So. 2d at 113 (imposing the expense of arbitration solely on the plaintiff); *Simpson*, 644 S.E.2d at 666 (requiring that the party initiating arbitration pay the filing fees).

38. Compare *Larsen v. Western States Ins. Agency*, 170 P.3d 956, 959 (Mont. 2007) (validating an arbitration provision in an employment contract by finding that the provision was not outside the reasonable expectation of the parties since the employee worked in the insurance industry for twenty years and signed similar contracts before), with *Murphy v. Check ‘N Go of Cal., Inc.*, 67 Cal. Rptr. 3d 120, 125 (Cal. Ct. App. 2007) (invalidating an employment contract containing an arbitration provision on both unreasonable expectation and unconscionable grounds by finding that a provision authorizing the arbitrator, not the courts, to determine jurisdiction was beyond the expectations of the parties and that a class action waiver was unconscionable).

## *2. The Reality of a Contract of Adhesion Results in Unfairness to an Individual Party*

The court system currently offers little relief to those entering contracts of adhesion. To invalidate the agreement, the contract must be both procedurally and substantively unconscionable.<sup>39</sup> Yet contracts of adhesion are not *per se* procedurally unconscionable and mandatory pre-dispute arbitration clauses are not *per se* substantively unconscionable.<sup>40</sup>

The reality for those entering contracts of adhesion may have similar, oppressive effects as unconscionability. Mandatory, pre-dispute, binding arbitration clauses remain non-negotiated provisions that significantly alter the legal rights of the parties. Moreover, one of the parties is often unaware of the clause.

Arbitration provisions are analyzed under traditional contract principles as between two sophisticated business parties that have meaningful choices when entering the contract.<sup>41</sup> When products become so common in the industry as to entice everyday consumers to enter into contracts with multi-million dollar corporations, however, perhaps variations of traditional contract principles should be considered.

### *B. Arbitrability of Statutory and Common Law Rights*

#### *1. Authority to Arbitrate Statutory Claims*

Some argue that disputes involving the statutory rights of a party should be dealt with only by the court, not an arbitrator.<sup>42</sup> The United States Supreme Court, however, has repeatedly held that statutory disputes are arbitrable, including claims arising under the Age Discrimination in Employment,<sup>43</sup> RICO,<sup>44</sup> Sherman,<sup>45</sup> Securities,<sup>46</sup> Truth

---

39. See *supra* notes 13-15 and accompanying text.

40. See *supra* notes 11, 16, 21 and accompanying text (noting the burden of the plaintiff to prove both procedural and substantive unconscionability).

41. See *Simpson*, 644 S.E.2d at 668 (applying general contract principles to evaluate the enforceability of an arbitration clause); *Sinclair*, 2007 WL 3407138, at \*2.

42. See David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 22 (2003) (noting that arguments in favor of court adjudication include: the hindrance in the development of the law; the expense of arbitration; unfair reduction of available damages; and the need for sufficient procedural safeguards).

43. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28 (1991) (holding that

in Lending, and Equal Credit Opportunity Acts.<sup>47</sup> Understanding and applying the statutory rights afforded in these and similar Acts is complex and critical to many claims.

One challenge with arbitrating a statutory claim is whether the arbitrator accounts for the statutory law when making a decision or simply applies the four corners of the contract.

In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>48</sup> the United States Supreme Court held that the arbitrator should apply substantive law to disputes and that, “[a]lthough all statutory claims may not be appropriate for arbitration, ‘having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.’”<sup>49</sup> The Court’s finding represents a two-part test to determine the enforceability of the arbitration agreement: (1) whether the parties agreed to arbitrate the issue in dispute; and (2) whether Congress has expressed a specific intent to prohibit waiver of judicial remedies on the issue.<sup>50</sup>

Many courts also apply the *Randolph* test<sup>51</sup> which seeks to determine whether the party opposing arbitration “can[] effectively vindicate his statutory rights in the arbitral forum.”<sup>52</sup> The party opposing arbitration has a substantial burden of meeting the test, such as

---

parties may arbitrate claims under the Age Discrimination in Employment Act).

44. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that parties may arbitrate claims under the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations (“RICO”) Act).

45. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636 (1985) (holding that parties may arbitrate claims under the Sherman Act).

46. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 483 (1989) (holding that claims under the Securities Act are arbitrable); *McMahon*, 482 U.S. 220 (holding that parties may arbitrate claims under the Securities Exchange Act of 1934 and the RICO Act).

47. *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 89 (2000) (holding that parties may arbitrate claims under the Truth in Lending Act and Equal Credit Opportunity Act).

48. 500 U.S. 20 (1991).

49. *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The *Gilmer* court also stated that “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (alteration in the original).

50. See *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007) (wording of arbitration agreement must be broad enough to include statutory claim).

51. *Randolph*, 531 U.S. 79.

52. *In re Cotton Yarn*, 505 F.3d at 282 (citing *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

proof of extensive additional costs.<sup>53</sup>

## 2. Split of Court Opinion Regarding Arbitrating Statutory Claims

Circuit courts are split regarding the validity of arbitrating statutory claims. First, disagreement exists as to whether a court or arbitrator must determine the merits of a motion to compel arbitration if the arbitration clause forecloses or limits statutory remedies.

The Ninth and Eleventh Circuits hold that the court, rather than the arbitrator, must determine the merits of such a motion because a prohibition on statutory remedies violates public policy.<sup>54</sup> Challenges to the validity of an arbitration provision itself, including a challenge to the formation of the contract, are properly heard by district courts.<sup>55</sup>

The Eighth Circuit, however, holds that statutory prohibitions are not *per se* invalid.<sup>56</sup> In the Eighth Circuit, arbitration should be compelled if a valid agreement to arbitrate exists and the claim is within the scope of the agreement.<sup>57</sup>

---

53. *Id.* at 286 (citing *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 92 (2000)) (noting that the burden cannot be met by merely listing ways arbitration would differ from litigation); see also *EEOC v. Woodmen of the World Life Ins. Soc’y*, 479 F.3d 561, 566 (8th Cir. 2007).

54. *Faust v. Command Ctr., Inc.*, 484 F. Supp. 2d 953, 955 n.2 (S.D. Iowa 2007) (citing *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1995) and *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998)) (noting in an employment dispute that the Ninth and Eleventh Circuits hold that arbitration agreements that foreclose statutory remedies violate public policy and are invalid and that the court, not the arbitrator, should determine the merits of a motion to compel arbitration).

55. *Toledano v. O’Connor*, 501 F. Supp. 2d 127, 139-41 (D. D.C. 2007). The *Toledano* court found that it had jurisdiction to determine the validity of the arbitration agreement at issue in the plaintiffs’ fraud and copyright infringement claims, under the U.S. Supreme Court’s holding in *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). *Id.* at 139. In *Buckeye Check Cashing*, the Supreme Court found that challenges to the validity of arbitration agreements fall into two categories: (1) specific challenges to the validity of the arbitration agreement; and (2) challenges to the whole contract based on grounds that affect the entire agreement or that the illegality of certain provisions renders the whole contract void. *Id.* (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006)). The Supreme Court held that the court had jurisdiction over the first type of challenge, but that the arbitrator should decide the later. *Id.* The United States District Court for the District of Columbia held, in a case of first impression, that the issue not addressed in *Buckeye Check Cashing* of whether the court had jurisdiction over challenges to the formation of the contract was properly before the court, not the arbitrator. *Toledano*, 501 F. Supp. 2d at 140.

56. *Faust*, 484 F. Supp. 2d at 955 n.2 (citing *Larry’s United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001)).

57. *Id.* (holding that in the Eighth Circuit, statutory waivers do not affect the validity of the agreement and that arbitration should be compelled).

Second, courts differ as to whether arbitration provisions limiting statutory rights are unconscionable. The Fourth Circuit held an arbitration clause unenforceable because it prohibited joinder of co-conspirators in an anti-trust/price-fixing claim and shortened the statute of limitations from four years to one year.<sup>58</sup> On the first issue of joinder, the court concluded that domestic antitrust claims were suitable for arbitration and that the plaintiff could effectively vindicate statutory rights in arbitration, without joining co-conspirators.<sup>59</sup>

Regarding the second issue of the shortened statute of limitations, statutory limitation periods may be shortened by the parties as long as the new timeframe is reasonable.<sup>60</sup> Similar to other courts,<sup>61</sup> the Fourth Circuit found shortening the statutory limitations from four years to one year was reasonable and thus valid.<sup>62</sup> By contrast, the Ninth Circuit held that fixing the statute of limitations on all employment claims to one year was substantively unconscionable.<sup>63</sup>

In another decision upholding statutory limits, the Eighth Circuit stayed a Title VII cross-claim by an employee in an Equal Employment Opportunity Commission (“EEOC”) action against her employer that

---

58. *In re Cotton Yarn*, 505 F.3d at 293 (noting that the price-fixing claim was under the Sherman Act and that the shortened statute of limitations involved the Clayton Act).

59. *Id.* at 282-85. The court relied on the United States Supreme Court’s decision in *Mitsubishi Motors Corp.*, which found antitrust claims arising from international transactions to be arbitrable. *Id.* at 282 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636-37 (1985)). In reaching its decision, the court rejected the plaintiff’s arguments that severing the conspiracy into individual claims would deprive the plaintiff of important proof that must be viewed in combination among all co-conspirators. *Id.* at 283. The court noted that antitrust statutes do not convey a right to sue all co-conspirators in a single action. *Id.* Moreover, plaintiffs may prove conspiracy against only one member of the conspiracy. *In re Cotton Yarn*, 505 F.3d at 284. The plaintiffs also presented no evidence that the cost of separate actions would be unduly burdensome, thus invalidation as to costs would be based on mere speculation. *Id.* at 285; *see also* *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) (explaining that much of the reasoning in *Mitsubishi* relating to the international context could apply to domestic RICO claims as well).

60. *In re Cotton Yarn*, 505 F.3d at 287 (citing *Miss., Kan. & Tex. Ry. Co. v. Harriman Bros.*, 227 U.S. 657, 672 (1913)).

61. *See, e.g.*, *Northlake Reg’l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan*, 160 F.3d 1301, 1303-04 (11th Cir. 1998) (finding a ninety-day limitations period reasonable).

62. *In re Cotton Yarn*, 505 F.3d at 287-88 (citing *Thurman v. DaimlerChrysler, Inc.*, 397 F.3d 352, 357-59 (6th Cir. 2004) (upholding a six month limitation period). The court further noted that since the clock began to run anew on the statute of limitations period each time the plaintiff was injured, the plaintiff was likely still within the one year limit. *Id.* at 290-91.

63. *Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1077 (9th Cir. 2007) (noting that the statutory limit may be two to three years for Federal Fair Labor Standard Act violations).

required the employee to arbitrate her claim individually.<sup>64</sup> The court rejected the plaintiff's argument that the costs of arbitrating her claim individually would be a financial burden and that it would be more efficient to intervene in the EEOC action.<sup>65</sup>

More importantly, the court rejected the plaintiff's arguments that forcing her to arbitrate the claim would interfere with the EEOC action.<sup>66</sup> As noted in *EEOC v. Waffle House, Inc.*,<sup>67</sup> an employee is generally prevented from bringing a separate Title VII action during the pendency of an EEOC action, but may intervene in that action.<sup>68</sup> Yet while intervention by the EEOC action is permitted, it is not necessary to preserve the employee's substantive rights.<sup>69</sup> Because the employee's rights continued to exist apart from the EEOC action, the employee's right to contract for an arbitral forum trumped her right to intervene in the EEOC action.<sup>70</sup>

Other courts find statutory limits unconscionable. The Ninth Circuit held that a waiver of administrative proceedings in a suit under the Fair Labor Standards Act was unconscionable because it violated an employee's statutory right to seek public relief.<sup>71</sup> Since the EEOC may

---

64. *EEOC v. Woodmen of the World Life Ins. Soc'y*, 479 F.3d 561, 563 (8th Cir. 2007).

65. *Id.* at 566-67 (finding, based on *Green Tree*, that invalidating an arbitration agreement on speculation as to increased costs would undermine public policy favoring arbitration).

66. *Id.* at 568.

67. 534 U.S. 279 (2002).

68. *Id.* at 291; *see also* 42 U.S.C. § 2000e-5(c), (f)(1) (2006). The Court stressed the duty of the EEOC to prevent employer discrimination. *Waffle House, Inc.*, 534 U.S. at 291. Therefore, "[i]f . . . the EEOC files suit on its own, the employee has no independent cause of action, although the employee may intervene in the EEOC's suit." *Id.*

69. *Woodmen*, 479 F.3d at 563, 567-69 (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002)). The court acknowledged a difference of opinion of whether an employee must arbitrate her Title VII claims during the pendency of an EEOC action, noting that in *EEOC v. Physician Servs., P.S.C.*, 425 F. Supp. 2d 859, 861-62 (E.D. Ky. 2006), the court held that the reasoning in *Waffle House* relieved an employee of her obligation to arbitrate her claim. *Id.* at 563. In *EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C.*, 273 F. Supp. 2d 260, 264-65 (E.D.N.Y. 2003), however, the court disagreed with the holding in *Physician Services* and required an employee to arbitrate her Title VII claims during the EEOC action. *Id.* at 568.

70. *Id.* at 570 (explaining that the right to intervene was a procedural right while the right to pursue a Title VII claim was a substantive right).

71. *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1082, 1084 (9th Cir. 2007). The challenged clause stated, "neither you nor the Firm will initiate or pursue any lawsuit or administrative action . . . in any way related to or arising from any Claim covered by this Program." *Id.* at 1071. The court found that certain statutory actions seeking public relief, as in the current case, were not appropriate for arbitration. *Id.* at 1082-83 (citing *Gilmer v.*

seek non-individual relief as well as victim-specific relief on behalf of the employee, any requirement that prohibited an employee from ultimately bringing an administrative claim to the EEOC was void as against public policy.<sup>72</sup>

Under California law, a court must vacate an arbitration award if it violates the party's statutory rights.<sup>73</sup> In *Gentry v. Superior Court of Los Angeles*,<sup>74</sup> the court set four minimal requirements to determine a violation: (1) the arbitration agreement may not limit statutory damages; (2) discovery must be sufficient to arbitrate the claim; (3) the arbitration decision must be written and the judicial review sufficient to ensure the arbitrator complied with the statute; and (4) the employer must pay all costs unique to arbitration.<sup>75</sup>

The split of circuit court authority reveals a need to address the validity of arbitrating important statutory rights.

### 3. Split of Court Opinion Regarding Arbitrating Common Law Rights

Similar to arbitrating statutory claims, common law claims may involve complex, significant rights. For example, pre-dispute, mandatory arbitration clauses at issue in wrongful death claims preclude

---

*Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) and *Armendariz v. Found Health Psychcare Servs. Inc.*, 6 P.3d 669, 680-81 (Cal. 2000)).

72. *Id.* at 1083. The defendant acknowledged that prohibitions against filing EEOC actions would be a non-issue if the employer provided an exception in the agreement for filing an EEOC claim. *Davis*, 485 F.3d at 1083. The agreement precluded an employee from bringing certain administrative claims or notifications to the Department of Labor or the California Labor Commissioner, which effectively barred the employees from instituting separate actions under California's Labor Code or Unfair Business Practices Act and thus hampered any potential EEOC claim. *Id.*

73. *Dep't. of Pers. Admin. v. Cal. Corr. Peace Officers Ass'n*, 62 Cal. Rptr. 3d 110, 115 (Cal. Ct. App. 2007).

74. 165 P.3d 556 (Cal. 2007).

75. *Id.* at 563-64. The *Gentry* court remanded the case to determine if a class arbitration waiver limited the right of retail managers to seek recovery of overtime wages. *Id.* at 575. Importantly, the court clarified its holding in *Discover Bank* which denied a motion to compel arbitration, finding that under some circumstances, class arbitration waivers in a consumer contract of adhesion would be unconscionable. *Id.* at 561-62. Unlike *Discover Bank* which involved a *consumer* contract, the current case presented a new issue—the enforceability of class arbitration waivers involving *statutory* rights. *Gentry*, 165 P.3d at 563-64.

In addition, the court stated that even if a provision does not violate a statutory right on its face, it may nevertheless operate as an impermissible de facto waiver of rights. *Id.* at 559. Factors to consider in determining a de facto waiver include: (1) the small amount of individual recovery; (2) the potential for retaliation against class members; (3) the fact that non-class members may be unaware of their rights; and (4) practical obstacles such as costs and efficiency of class versus individual arbitration. *Id.* at 568.

a right to a jury trial. Litigation of wrongful death claims addressing the validity of arbitration agreements in nursing home contracts tripled in 2007.<sup>76</sup> The resulting decisions are varied, suggesting a need to address the problem.

Some courts hold that arbitration clauses in nursing home admissions contracts are binding on the patient as well as the surviving beneficiaries of the deceased patient. For example, in *Covenant Health Rehab of Picayune, L.P. v. Brown*,<sup>77</sup> the Supreme Court of Mississippi upheld an arbitration agreement signed by the deceased patient's daughter.<sup>78</sup> The patient lacked capacity to sign the nursing home agreement and her daughter was in the statutory class of members that could act as a surrogate for her mother.<sup>79</sup>

---

76. A Westlaw search on Nov. 29, 2007 revealed that from 2002 to 2005 general claims against nursing homes involving arbitration clauses doubled, from ten to fifteen per year to twenty to twenty-five; the number of claims doubled once again beginning in 2005, to roughly fifty claims per year. The single biggest reason for the increase appears to be wrongful death claims challenging the validity of the arbitration agreement, which rose from roughly five per year prior to 2007, to fifteen in 2007.

Upholding arbitration agreements: *Gulledge v. Trinity Mission Health & Rehab of Holly Springs, LLC*, No. 3:07CV008-M-A, 2007 WL 3102141 (N.D. Miss. Oct. 22, 2007); *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007); *Miller v. Cotter*, 863 N.E.2d 537 (Mass. 2007); *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574 (Fla. Dist. Ct. App. 2007); *Trinity Mission of Clinton, LLC v. Barber*, 988 So. 2d 910, 915 (Miss. Ct. App. 2007).

Invalidating arbitration agreements: *Covenant Health & Rehab. of Picayune, L.P. v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009); *Noland Health Servs., Inc. v. Wright*, 971 So. 2d 681 (Ala. 2007); *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773 (Fla. Dist. Ct. App. 2007); *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430 (Ga. Ct. App. 2007); *Barnes v. Andover Village Retirement Cmty., Ltd.*, No. 2006-A-0039, 2007 WL 2296459 (Ohio App. Aug. 10, 2007); *Texas Cityview Care Ctr., L.P. v. Fryer*, 227 S.W.3d 345 (Tex. App. 2007); *Sikes v. Heritage Oaks West Retirement Village*, 238 S.W.3d 807 (Tex. App. 2007).

77. 949 So. 2d 732 (Miss. 2007) *overruled by* *Covenant Health & Rehab. of Picayune, L.P. v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009). The entire contract containing the arbitration clause at issue in *Brown* was subsequently held to be unconscionable on other grounds, namely that the presence of numerous unconscionable provisions prevented reformation of the contract. *Braddock*, 14 So. 3d 695 (Miss. 2009).

78. *Brown*, 949 So. 2d at 742. In addition, the court severed substantively unconscionable provisions and upheld the remainder of the arbitration agreement. *Id.* at 741-42. The court struck provisions that limited liability; waived punitive damages; forfeited all claims except for those involving willful acts; allowed the nursing facility to bring suit on issues of payment but prohibited the resident from suing on all grounds; required the party challenging the enforceability of the arbitration agreement or award to pay all costs; and imposed a one year time limit on legal action. *Id.* at 739.

79. *Id.* at 736-37. The relevant Mississippi surrogate statute allowed for "[a]n adult child" to act as a surrogate and that "a health-care decision made by a surrogate for a patient is effective without judicial approval." *Brown*, 949 So. 2d 736 (citing MISS. CODE ANN. § 41-

In *Owens v. National Health Corp.*,<sup>80</sup> the Supreme Court of Tennessee reversed the lower court and held that the attorney-in-fact was authorized to enter into a binding arbitration agreement on behalf of the patient.<sup>81</sup> In a case of first impression, the court found that the nursing home contract was a “health care decision” under the scope of authority of the attorney-in-fact.<sup>82</sup> This means that attorneys-in-fact who sign admissions contracts on behalf of the patient may be subjecting not only the patient to binding arbitration, but also themselves.

Some courts reach a contrary conclusion, finding that arbitration agreements in wrongful death claims are unenforceable. A Texas court held that the deceased patient’s wife was not bound by an arbitration agreement in a wrongful death action when she specifically declined to sign the nursing home admission contract in her individual capacity.<sup>83</sup> Since a wrongful death claim is personal to the statutory beneficiaries asserting the claims, recovery did not benefit the estate of the former patient, but rather the wife in her individual capacity.<sup>84</sup>

In *Noland Health Services, Inc. v. Wright*,<sup>85</sup> the Alabama Supreme Court held that an arbitration clause was unenforceable in a wrongful death claim brought by the administrator of a deceased patient’s estate.<sup>86</sup> The patient’s daughter-in-law signed the nursing home contract as

---

41-211 (West 2005)). The court held that the “estate” of the deceased included the third party beneficiaries that filed suit. *Id.* at 736-37.

80. 263 S.W.3d 876 (Tenn. 2007).

81. *Id.* at 879, 885. The attorney-in-fact possessed a durable power of attorney which authorized him to assist “[the patient] in making health care decisions . . . if [the patient is] incapacitated.” *Id.* at 879 (internal quotations omitted). *But cf.* Blankfeld v. Richmond Health Care, Inc., 902 So. 2d 296, 301 (Fla. Dist. Ct. App. 2005) (invalidating an arbitration agreement because the arbitration clause in the nursing home agreement was not considered a “health care decision,” so the signature of a health care proxy was insufficient to bind the patient). Because the trial court denied the defendant’s motion to compel arbitration, additional discovery as to the unconscionability of the provision was permitted. *Owens*, 263 S.W.3d at 890. Therefore, the court remanded the case to allow the plaintiff time to conduct additional discovery as to unconscionability. *Id.*

82. *Id.* at 889. The court reasoned that “the decision to admit [the patient] to a nursing home clearly constitutes a ‘health care decision.’” *Id.* at 884 (citing TENN. CODE ANN. §§ 34-6-201(2)-(3) (2001)).

83. *In re Kepka*, 178 S.W.3d 279, 294 (Tex. App. 2005) (noting that the wife did sign as legal representative). The Supreme Court of Texas recently held that the beneficiaries of the signatory on a contract requiring disputes to be arbitrated *were* bound by the contract. *In re Labatt Food Service, L.P.*, 279 S.W.3d 640 (Tex. 2009). The employer contract at issue in *In re Labatt*, however, was signed by the employee and specifically stated that the contract was binding “individually and on behalf of heirs and beneficiaries.” *Id.* at 642.

84. *Id.*

85. 971 So. 2d 681, 682 (Ala. 2007).

86. *Id.* at 690.

personal representative; however, the daughter-in-law never had power of attorney and the administrator bringing the action never signed the agreement.<sup>87</sup> Therefore, in some jurisdictions, nursing homes are unable to rely on binding arbitration clauses in wrongful death actions when someone other than the patient signs the admissions contract.

Finally, in wrongful death claims, some courts find arbitration clauses in nursing home contracts void as against public policy.<sup>88</sup> The nursing home contract in *Blankfeld v. Richmond Health Care, Inc.*<sup>89</sup> required that disputes be resolved by arbitration before the National Health Lawyers Association (“NHLA”).<sup>90</sup> The rules of the NHLA required the arbitrator to use a clear and convincing standard to determine liability.<sup>91</sup> The clear and convincing evidence standard, however, is contrary to Florida’s Nursing Home Rights Act (“NHRA”), which requires a preponderance of the evidence burden of proof.<sup>92</sup> In addition, the NHRA allowed an action to be brought in any court of competent jurisdiction, not limited by an arbitral forum.<sup>93</sup>

In conclusion, court opinion is split as to the validity of an arbitration provision itself and as to whether an arbitration provision violates important statutory or common law rights.

---

87. *Id.* at 687-88.

88. *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 299-300 (Fla. Dist. Ct. App. 2005). The court found that the rules of the National Health Lawyers Association (NHLA) effectively limited, if not eliminated some of the remedies provided by the statute. *Id.* The same court invalidated a similar arbitration agreement two years later in *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773, 775-76 (Fla. Dist. Ct. App. 2007). In *Vero Beach*, the court rejected the nursing home’s argument that by specifying that the agreement shall be governed by Florida law, the parties agreed that the American Health Lawyers Association (AHLA) rules were superseded by Florida law, finding no evidence of such an agreement. *Place at Vero Beach, Inc. v. Hanson*, 953 So. 2d 773, 775-76 (Fla. Dist. Ct. App. 2007). Because the arbitration agreement was in conflict with Florida state law and the agreement was “built around” the AHLA provision, the offending provision could not be severed and the entire agreement was unenforceable. *Id.* The Florida Court of Appeals for the Fifth District came to a similar conclusion when it held that an arbitration agreement that required clear and convincing evidence of intentional misconduct in order to recover certain kinds of damages “substantially limited the patient’s remedies under the Nursing Home Resident’s Act,” and was void as against public policy. *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242, 1243 (Fla. Dist. Ct. App. 2006); *see also Fletcher v. Huntington Place L.P.*, 952 So. 2d 1225, 1226-27 (Fla. Dist. Ct. App. 2007) (relying on the ruling in *SA-PG-Ocala, LLC* to reach a similar holding).

89. 902 So. 2d 296 (Fla. Dist. Ct. App. 2005).

90. *Id.* at 297. The NHLA is now entitled the American Health Lawyers Association (AHLA).

91. *Id.* at 297-98.

92. *Id.* at 298 (citing FLA. STAT. § 400.023(2)(a)-(d) (2001)).

93. *Blankfeld*, 902 So. 2d at 298 (citing FLA. STAT. § 400.023(1) (2001)).

## III. APPEALING AN ARBITRATION AWARD

Once the parties have completed arbitration, one party may appeal the award. Under the Federal Arbitration Act, an appellate court must confirm an arbitration award unless it is vacated, modified, or corrected.<sup>94</sup> “[C]ourts may not review the merits of an arbitration award . . . .”<sup>95</sup> Grounds for vacating an award are extremely narrow and include only: (1) corruption or fraud; (2) evident partiality by the arbitrator; (3) misconduct of the arbitrator which prejudices one party; or (4) the arbitrator exceeded his or her scope of authority.<sup>96</sup> Courts have added “complete irrationality” and exhibition of a “manifest disregard for the law” to the statutory reasons for vacating an arbitration award.<sup>97</sup> “[A]n arbitration award is irrational when it, ‘fails to draw its essence from the agreement.’”<sup>98</sup> The award manifests disregard for the law if “arbitrators clearly identify the applicable, governing law and then proceed to ignore it.”<sup>99</sup>

A high burden exists for the party challenging the arbitration award on appeal.<sup>100</sup> Limited review of arbitration awards presents challenges to arbitration that should be addressed, including the validity of non-appealability provisions, arbitrator bias, arbitrators exceeding their scope of power, and manifest disregard for the law.<sup>101</sup>

---

94. 9 U.S.C. § 9 (2006).

95. *Hendrik Delivery Serv., Inc. v. St. Louis Post-Dispatch, LLC*, No. 4:07CV1516 JCH, 2007 WL 3071827, at \*4 (E.D. Mo. Oct. 29, 2007) (quoting *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1064 (8th Cir. 2003)). *But see* *Visconsi v. Lehman Bros., Inc.*, 244 F. App’x 708, 711 (6th Cir. 2007) (“When a party is challenging the merits of an arbitrator’s decision, rather than the arbitral procedure . . . we will vacate only where the arbitrator ‘manifestly disregarded the law’ . . . .”) (internal citations omitted).

96. 9 U.S.C. § 10(a) (2006).

97. *Hendrik*, 2007 WL 3071827, at \*4 (citing *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1064, 1065 (8th Cir. 2003)) (internal quotations omitted); *see also Visconsi*, 244 F. App’x at 711; *White v. Mayflower Transit, LLC*, 481 F. Supp. 2d 1101, 1104 (C.D. Cal. 2007) (citing *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 887 (9th Cir. 1997)); *Lagstein v. Certain Underwriters at Lloyds of London*, No. CV-S-0301075-RCJ, 2007 WL 2363871, at \*2 (D. Nev. Aug. 15, 2007).

98. *Hendrik*, 2007 WL 3071827, at \*4 n.7 (quoting *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793, 799 (8th Cir. 2004)).

99. *Id.* at \*4 n.4.

100. *See White*, 481 F. Supp. 2d at 1104.

101. *See infra* notes 102-57 and accompanying text.

### A. Validity of Non-Appealability Provision

Parties may agree to preclude certain grounds for appeal of an arbitrator's award. For instance, parties may contract to foreclose all appeal of an arbitrator's decision beyond the trial court level.<sup>102</sup> For instance, in a five-year dispute between former business partners who owned twelve automobile dealerships, the defendant appealed the trial court's confirmation of the arbitrator's award based on a post-dispute contractual waiver of appellate review.<sup>103</sup> The court held that post-dispute agreements to arbitrate may prohibit judicial review.<sup>104</sup> The court distinguished a non-appealability clause at the trial court level to that of the appellate level by stating that the former would violate a public policy of providing judicial oversight to an arbitration award while the latter is permissible.<sup>105</sup> The court upheld the non-appealability clause stating that, "courts routinely enforce agreements that waive the right to appellate review over trial court decisions."<sup>106</sup>

### B. Arbitrator Bias

An arbitration award may be vacated by showing "evident partiality" on the part of the arbitrator.<sup>107</sup> An unbiased arbitrator is critical for a fair arbitration, especially because an arbitrator's decision is subject to such limited review.<sup>108</sup> The United States Supreme Court stated that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of

---

102. *Van Duren v. Rzasas-Ormes*, 926 A.2d 372, 375 (N.J. App. Div. 2007); see Justin M. Goldstein & Cassandra L. Seto, *Keeping Private Arbitrations Private*, L.A. LAW., Feb. 2008, at 12 (suggesting that parties contract for limited review to maintain confidentiality).

103. *Van Duren*, 926 A.2d at 374-75. The arbitrator made several interim awards dividing the dealerships and offsetting the debt of the parties' holdings against one another. *Id.* at 375. The defendant complained about the presence of the corporate attorney at the hearing but never raised any objections to his presence during the four days of hearing. *Id.* at 375-76.

104. *Id.* at 378-82 (noting also that both parties were sophisticated businesspeople, with equal bargaining power, and represented by counsel).

105. *Van Duren*, 926 A.2d at 380-81 (noting that the provision trades the risk of not being allowed appellate review for a one-time opportunity at the district court level and that the restriction on appellate review applies equally to both parties).

106. *Id.* at 381.

107. 9 U.S.C. § 10(a)(2) (2006).

108. Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 18 (1994).

bias.”<sup>109</sup>

Bias in arbitration can take on several forms: (1) an arbitrator selection process that is unbalanced; (2) a party-appointed arbitrator that may feel obligated to one of the parties or have an industry bias based on personal experience; (3) an institutional bias due to the arbitrator desiring “repeat-business” from an institutional client; and (4) a permanent-panel arbitrator that may attempt to keep awards for the employer or union even, to avoid allegations of unfairness.

### *1. Forms of Bias*

First, the selection process must be fair. Author Lewis Maltby stated that “[b]efore a court can legitimately defer to the decision of an arbitrator, it must know that the pool from which the arbitrator was chosen was not biased.”<sup>110</sup> The American Arbitration Association (“AAA”) maintains that the process used to select arbitrators is driven by party desires, particularly as to expertise in a particular field.<sup>111</sup> In a majority of cases, neutral arbitrators are selected by an agency.<sup>112</sup> Agencies, however, may select arbitrators who favor big business, not consumers. For example, in a 2007 study of select credit card company arbitrations, an arbitration firm reportedly selected the same twenty-eight arbitrators to perform 90% of the 34,000 arbitrations studied.<sup>113</sup>

---

109. *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150 (1968).

110. Maltby, *supra* note 108, at 21.

111. INDIA JOHNSON, AM. ARBITRATION ASS’N, REALITY VS. MYTH: THE TRUTH ABOUT MANAGEMENT OF THE AAA COMMERCIAL ROSTER 3 (2003), *available at* <http://www.adr.org/si.asp?id=3523>. Some of the factors the AAA lists for the selection of an arbitrator include: (1) expertise for the particular case; (2) compensation practices; (3) absence of conflicts of interest; (4) availability; and (5) a reputation for excellence. *Id.*

112. *See* U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 2, at 13 (finding that of the 609 arbitration participants surveyed, 35% allowed a neutral agency to select the arbitrator, more than any other method, including selection by parties (21%)).

113. *See* PUB. CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 2 (2007), *available at* [http://www.citizen.org/documents/Final\\_wcover.pdf](http://www.citizen.org/documents/Final_wcover.pdf). The report studied over 34,000 binding mandatory arbitrations involving credit card companies performed by the National Arbitration Forum in California from 2003-2007. *Id.* at 1. The selected arbitrators decided in favor of companies 95% of the time. *Id.* at 2. One of the twenty-eight arbitrators handled 1332 arbitrations, signing as many as sixty-eight opinions in one day and favored businesses 97% of the time, and awarding a total of fifteen million dollars to credit card companies. *Id.* at 2-3.

On July 14, 2009 Minnesota Attorney General Lori Swanson sued the National Arbitration Forum for Consumer Fraud, Deceptive Trade Practices, and False Advertising, claiming that “the consumer does not know that the forum works along side creditors behind the scenes—against the interests of consumers.” Robert Berner, *Minnesota Sues a Credit*

Second, party-appointed arbitrators may raise questions of neutrality because of the perception that the arbitrator is obligated to the appointing party. A party-appointed arbitrator may be allied to the industry based on experience and training.<sup>114</sup> Yet “industry bias” is permissible under the AAA rules.<sup>115</sup>

The Eighth Circuit acknowledged that a party-appointed arbitrator need not be completely neutral.<sup>116</sup> Under the terms of an agreement between a group of poultry growers and a packaging company, each party would select their own arbitrator.<sup>117</sup> The defendant alleged bias when it learned that the arbitrator selected by the growers previously represented the growers in litigation against poultry companies and testified on behalf of the growers before a subcommittee of the United States Senate.<sup>118</sup> The court upheld the lower court’s confirmation of the award, reasoning that “parties to an arbitration choose their method of

---

*Arbitrator, Citing Bias*, BUS. WK. ONLINE, July 14, 2009, [http://www.businessweek.com/bwdaily/dnflash/content/jul2009/db20090714\\_952766.htm](http://www.businessweek.com/bwdaily/dnflash/content/jul2009/db20090714_952766.htm).

On July 17, 2009 the Attorney General and NAF signed a Consent Decree that the arbitration firm, by the end of the week, would stop accepting new consumer arbitrations of any sort including disputed credit card debt as well as new lines of business the NAF had moved into, such as arbitrating consumer debts in health care, telecommunications, utilities, mortgages, and consumer leases. Robert Berner, *Big Arbitration Firm Pulls Out of Credit Card Business*, BUS. WK. ONLINE, July 19, 2009, [http://www.businessweek.com/investing/wall\\_street\\_news\\_blog/archives/2009/07/big\\_arbitration.html](http://www.businessweek.com/investing/wall_street_news_blog/archives/2009/07/big_arbitration.html).

114. Robert D. Taichert, *Why Not Provide for Neutral Party-Appointed Arbitrators?*, 57 DISP. RESOL. J. 22 (2003); cf. Stempel, *supra* note 5, at 258. Arbitrators in pre-1980 commercial arbitrations were often selected based on industry expertise. Stempel, *supra* note 5, at 258. Today, however, industry expertise may not be as favored because “disputes are much more likely to focus on consumer rights, employment protections, fair treatment of investors, and other statutory questions.” *Id.*

115. See AM. ARBITRATION ASS’N, THE CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES 9 (2004), available at <http://www.adr.org/si.asp?id=2529> (stating that “Canon X arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness”).

116. See *Winfrey v. Simmons Food, Inc.*, 495 F.3d 549, 551-52 (8th Cir. 2007) (upholding interpretation of “arbitration contract [that] did not require the party-selected arbitrators to be neutral”).

117. *Id.* at 550-51.

118. *Id.* at 551. The defendant did not object to the selection of the arbitrator until more than nine months after the selection of the arbitrator. *Id.* at 550-51. In response to the objection, the arbitration panel twice decided that “the arbitration clause did not require the party-selected arbitrators to be neutral and that the arbitrators were ‘properly appointed pursuant to the arbitration clause in question and [were] qualified to serve and decide all issues in this matter.’” *Winfrey*, 495 F.3d at 551 (alteration in the original). Upon a motion by the growers to confirm an arbitration award of \$510,000 in damages, the defendant moved to vacate the award on evident impartiality grounds. *Id.*

dispute resolution, and can ask no more impartiality than inheres in the method they have chosen.”<sup>119</sup> The court also held that the arbitrator in question was under no obligation to disclose his prior relationship with the plaintiff, holding a party-appointed arbitrator to a different standard than one selected by an agency.<sup>120</sup>

Third, there may be a “tendency for arbitration outcomes to favor one class of participants over another.”<sup>121</sup> An arbitrator might rule a certain way to generate “repeat business” from one of the parties, thus a “repeat player” may hold several advantages over a non-repeat player.<sup>122</sup> While a company or employer may arbitrate many claims with the same arbitrator for various reasons, an employee or consumer is not likely to require arbitration with the same company in the future.

For example, a study of credit card company arbitrations in California concluded that arbitrators decided in favor of businesses 94% of the time, likely due to the repeat player effect.<sup>123</sup> The same study

---

119. *Id.* (quoting *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001)). The court also noted a finding in *Delta Mine* that, “[w]here the parties have expressly agreed to select partial party arbitrators, the award should be confirmed unless the objecting party proves that the arbitrator’s partiality prejudicially affected the award.” *Id.* (quoting *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 821 (8th Cir. 2001)). The court also found it significant that the parties agreement did not require neutrality, and the selection process proscribed by the parties was followed. *Winfrey*, 495 F.3d at 552.

120. *Id.* (noting that “[t]he requirement that neutral arbitrators make disclosures does not extend to party-appointed arbitrators”). The court found inapposite the defendant’s reliance on *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145 (1968), which vacated an arbitration award when a neutral member of the arbitration panel failed to disclose a business connection with the parties, since the arbitrators in the current case were party-appointed. *Id.* (citing *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 146, 150 (1968)).

121. Roger J. Perlstadt, Comment, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983, 1986 (2002).

122. See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 223 (1998); Stempel, *supra* note 5, at 257 (affirming the repeat player effect). Advantages may include:

- (1) experience leading to changes in how the repeat player structures the next similar transaction;
- (2) expertise, economies of scale, and access to specialist advocates;
- (3) informal continuing relationships with institutional incumbents;
- (4) reputation and credibility in bargaining;
- (5) long-term strategies facilitating risk-taking in appropriate cases;
- (6) influence over rules through lobbying and other use of resources;
- (7) playing for precedent and favorable future rules;
- (8) distinguishing symbolic and actual defeats; and
- (9) resources invested in getting rules favorable to them implemented.

*Bingham, supra*; see also *infra* notes 126-27 and accompanying text.

123. PUB. CITIZEN, *supra* note 113, at 1-5. The study looked at over 34,000 binding mandatory arbitrations performed by the National Arbitration Forum in California from 2003-2007. *Id.* at 1. The study concluded that “credit card and other companies drive millions of

reported that companies, not consumers, choose arbitration 99.6% of the time, strengthening the repeat player effect.<sup>124</sup> In consumer arbitrations conducted by the AAA from January to August 2007, “[c]onsumers prevailed in 48% of cases in which they were the claimant,” while business claimants in consumer arbitrations “prevailed in 74% of cases in which they were the claimant.”<sup>125</sup>

In internet domain name arbitration, research shows that trademark holders prevail approximately 60% of the time before a panel of arbitrators and 83% of the time before a single, party-appointed arbitrator.<sup>126</sup>

In addition, evidence shows that employees bringing claims against one-time player employers prevail over 70% of the time, while claims against repeat-player employers result in a win rate for employees of just 16%.<sup>127</sup>

Fourth, permanent panels may be less likely to be impartial. In labor disputes between an employer and the union, for example, a permanent arbitrator may consciously or subconsciously attempt to balance the number of decisions in favor of one side or the other. In addition, the permanent arbitrator becomes quite familiar with the advocates, which may factor into his or her decision.

Regardless of the form taken, bias seems to play a significant role in an arbitrator’s selection and/or decision.

## *2. Difficulty in Proving Bias*

Vacating an arbitration award on the grounds of bias is extremely

---

dollars in business to arbitration firms, which in turn hire arbitrators to rubber-stamp rulings that favor business and then pass many of the costs onto the consumer.” *Id.* at 4. “These clear commercial ties between arbitration providers and corporate interests produce a ‘repeat player’ bias that leaves consumers out in the cold.” *Id.* at 5.

124. PUB. CITIZEN, *supra* note 113 (suggesting that arbitration firms may select individual arbitrators that favor businesses, since consumers are not choosing arbitration in an overwhelming number of cases).

125. AM. ARBITRATION ASS’N, ANALYSIS OF THE AMERICAN ARBITRATION ASSOCIATION’S CONSUMER ARBITRATION CASELOAD 1 (2007), available at <http://www.adr.org/si.asp?id=5027> (noting that the study involved 310 arbitrations).

126. Perlstadt, *supra* note 121, at 1986-87. Because only four companies arbitrate disputes through the Internet Corporation for Assigned Names and Numbers (ICANN), the companies have an incentive to decide in favor of the trademark holder to secure repeat business. *See id.*

127. Bingham, *supra* note 122, at 234. The study involved 270 arbitration awards. *Id.* Also, employees recovered approximately 48% of the amount demanded against non-repeat player employers compared to approximately 11% against repeat player employers. *Id.*

difficult to prove. The party challenging the arbitration on the basis of evident partiality bears the burden.<sup>128</sup> According to *Commonwealth Coatings Corp. v. Continental Casualty Co.*,<sup>129</sup> the challenging party may either: (1) allege non-disclosure of potential conflicts of interest that suggest an appearance of bias; or (2) prove actual bias.<sup>130</sup> Furthermore, bias “may not be shown prior to the arbitrator’s decision, but may only be attacked after the award.”<sup>131</sup>

### 3. Responsibility of Arbitrator to Disclose Conflicts of Interest

One of the ways to prove bias is by showing that the arbitrator failed to disclose a conflict of interest. Justice White’s concurrence in *Commonwealth Coatings Corp.* represents the current sentiment regarding when disclosure of conflicts is necessary:

[I]t is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award.<sup>132</sup>

It is clear that failure to disclose non-trivial conflicts of interest warrants a finding of evident partiality, requiring vacation of the arbitration award in question.<sup>133</sup> Some courts, however, go one step

---

128. *White v. Mayflower Transit, LLC*, 481 F. Supp. 2d 1101, 1104 (C.D. Cal. 2007).

129. 393 U.S. 145 (1968).

130. *See id.* at 148-50 (finding the appearance of bias criteria satisfied in a dispute between a contractor and subcontractor in which the arbitrator failed to disclose that he had previously performed work for the contractor in the amount of approximately \$12,000); *White*, 481 F. Supp. 2d at 1104 (finding no actual bias when the plaintiff presented no facts to support a claim of actual bias except that the arbitrator adopted the reasoning of the defendant).

131. *Championsworld, LLC v. U.S. Soccer Fed’n, Inc.*, 487 F. Supp. 2d 980, 990-91 (N.D. Ill. 2007) (granting a motion to stay litigation pending the outcome of arbitration based on several factors, including the inability to claim futility of an arbitration award due to arbitrator bias in a soccer promotion dispute prospectively, before the arbitration had even begun).

132. *Commonwealth Coatings Corp.*, 393 U.S. at 151 (White, J., concurring).

133. *See, e.g., New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1109 (9th Cir. 2007) (vacating an arbitration award where the arbitrator failed to disclose his position as the Senior Executive Vice President of a company that was in negotiations with one of the parties to produce an upcoming film and failed to investigate the relationship between the two companies); *Applied Indus. Materials Corp., v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007) (vacating an award finding a Turkish corporation liable for breach of contract to deliver petroleum coke upon finding that the arbitrator did not

further by holding that evident partiality “will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”<sup>134</sup> Even potential conflicts of interest must be addressed by the arbitrator. The absence of actual knowledge of a conflict of interest does not mean that evident partiality does not exist. The arbitrator has a two-part duty to either: (1) investigate the potential conflict; or (2) disclose the potential conflict and the intention not to investigate.<sup>135</sup>

The AAA is so concerned with potential conflicts of interest that it requires a detailed check sheet and cautions that allegations of conflict of interest will result in the arbitrator being removed from the list of

---

investigate a known relationship between the company of which he was CEO and the parent company of the plaintiff, nor did he disclose his intention not to investigate the relationship); *Mays-Carr v. State Farm Ins. Co.*, 43 A.D.3d 1439, 1439-40 (N.Y. App. Div. 2007) (upholding an arbitration award because the plaintiff failed to show how the arbitrator’s prior adverse rulings against the plaintiff’s attorney proved evident partiality); *Soma Partners, LLC v. Northwest Biotherapeutics, Inc.*, 41 A.D.3d 257, 257-59 (N.Y. App. Div. 2007) (vacating an arbitration award of \$6,000 in a dispute over a finder’s fee for securing a six million dollar contract with a non-party company when the arbitrator neither investigated nor disclosed a relationship between one of the members of his law firm from another branch office and the director of the non-party company central to the dispute).

134. *Applied Indus. Materials Corp.*, 492 F.3d at 137 (noting Justice White’s reasoning that arbitrators are not subject to the same standard as judges and that the appearance of bias standard was too low while the proof of actual bias was too high) (internal quotations omitted); *see also ANR Coal Co. v. Cogentrix of North Carolina, Inc.*, 173 F.3d 493, 500 (4th Cir. 1999) (setting forth four factors to consider in determining whether a claimant has demonstrated evident partiality: (1) the extent of the arbitrator’s interest in the proceeding; (2) the directness of the arbitrator/party relationship; (3) the connection of the relationship to the arbitration; and (4) the closeness in time between the relationship and the arbitration); AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION: PROCEDURES, <http://www.adr.org/sp.asp?id=22440> (last visited September 16, 2009) (stating that an arbitrator “shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality” and that the obligation to disclose “remains in effect throughout the arbitration”).

135. *Applied Indus. Materials Corp.*, 492 F.3d at 138; *cf. New Regency*, 501 F.3d at 1109 (noting that the Eleventh Circuit alone “has adopted a per se rule that a finding of evident partiality is precluded by an arbitrator’s lack of ‘actual knowledge of the information upon which [an] alleged ‘conflict’ was founded” (quoting *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1313 (11th Cir.1998)) (alteration in the original).

In *Applied Industries Materials Corp.*, the court reasoned that just because the CEO/arbitrator effectively screened himself from knowing the details of a conflict between his company and the parent company of the plaintiff, he did not disclose the potential conflict or his reasons for not investigating. 492 F.3d at 138. Furthermore, the court found that the legal standard it adopted regarding the arbitrator’s duty to disclose met the goals of disclosure—to encourage early resolution of arbitrator conflicts and limit collateral attacks on arbitration awards. *Id.* at 139.

arbitrators until the matter is settled.<sup>136</sup>

### C. Arbitrator Exceeded Power

An arbitrator may exceed his or her powers by granting an award that does not “draw its essence” from the agreement of the parties.<sup>137</sup> Vacation of an award is rare, with the test being whether the award is “rationally inferable from the contract.”<sup>138</sup>

In a rare example of vacatur, a court vacated an arbitration award in an employment dispute because the arbitrator reformed the agreement of the parties after the agreement had already received the requisite statutory approval from the legislature.<sup>139</sup> The court held that even though the arbitrator modified the terms of the agreement based on mutual mistake of the parties, she exceeded her powers by denying the legislature its intended oversight function.<sup>140</sup>

### D. Manifest Disregard for the Law

The arbitrator’s manifest disregard for the law is another ground for vacatur of an arbitration award;<sup>141</sup> however, the grounds are extremely narrow.<sup>142</sup> The arbitration award will not be disturbed for even serious error.<sup>143</sup> Manifest disregard for the law must be found, not mere error of law or failure on the arbitrator’s part to correctly apply the law.<sup>144</sup> The

---

136. AM. ARBITRATION ASS’N, *supra* note 125, at 4-5 (Cannon II); AM. ARBITRATION ASS’N, *supra* note 134 (R-17, R-18).

137. *Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.*, 487 F.3d 255, 259 (5th Cir. 2007) (upholding an arbitration award by resolving doubt in favor of arbitration); *see also* 9 U.S.C. § 10(a)(4) (2006).

138. *Am. Laser Vision*, 487 F.3d at 259 (internal quotations omitted).

139. *Dep’t of Pers. Admin. v. Cal. Corr. Peace Officers Assoc.*, 62 Cal. Rptr. 3d 110, 115-16 (Cal. Ct. App. 2007). The main issue in the dispute was that the arbitrator’s award included an off-the-table agreement to remove a 10,000 hour cap on release time bank hours after the settlement was approved by the legislature without the cap. *Id.* at 113. The settlement given to the legislature did not include the oral agreement due to a scrivener’s error. *Id.* Per California statute, the legislature must approve all collective bargaining agreements. *Id.*

140. *Dep’t of Pers. Admin.*, 62 Cal. Rptr. 3d at 118.

141. *White v. Mayflower Transit, LLC*, 481 F. Supp. 2d 1101, 1104 (C.D. Cal. 2007).

142. *See Am. Laser Vision*, 487 F.3d at 258.

143. *See, e.g., White*, 481 F. Supp. 2d at 1103.

144. *Am. Laser Vision*, 487 F.3d at 258 (finding that an arbitration award will be upheld if it is “rationally inferable from the letter or purpose of the underlying agreement”); *White*, 481 F. Supp. 2d at 1104; *Alpert v. Bennett Law Firm, P.C.*, No. H-06-1642, 2007 WL 2409354, at \*4 (S.D. Tex. Aug. 21, 2007) (finding the plaintiff made no showing of manifest

challenging party must show that the arbitrator knew the applicable law and then completely ignored it when determining the award, revealing error obvious to an average person.<sup>145</sup> Evidence must be presented that: (1) the arbitrator was aware of the legal principle and did not follow it;<sup>146</sup> and (2) the award resulted in significant injustice.<sup>147</sup>

Several courts have decried their ability to properly review arbitration awards on appeal for manifest disregard for the law due to the lack of written findings by the arbitrator.<sup>148</sup> In one case, the plaintiffs in a massive fraudulent investment scheme were awarded \$10.4 million in compensatory damages after the arbitrator found that the defendant/stock-broker misappropriated \$115 million from his clients over a fifteen-year period.<sup>149</sup> The three-arbitrator panel did not issue an opinion to support the award.<sup>150</sup> The court acknowledged that arbitrators are not required to explain their decisions, but that if they do not, “it is all but impossible to determine whether they acted with manifest disregard [of] the law.”<sup>151</sup> Consequently, the court concluded that the defendant did not meet “its ‘all-but-impossible’ burden of demonstrating that the arbitrators’ award, unaccompanied by a legal opinion, was issued in manifest disregard of the law.”<sup>152</sup>

---

disregard aside from mere conjecture that the arbitrator was aware of certain legal standards).

145. See *Visconsi v. Lehman Bros., Inc.*, 244 Fed. App’x. 708, 711 (6th Cir. 2007) (stating a two-part test for manifest disregard for the law: (1) whether the applicable legal standard is clearly defined according to a reasonable person standard; and (2) whether the arbitrators refused to heed the legal standard); *Am. Laser Vision*, 487 F.3d at 259 (finding that an arbitration award will be upheld if it is “rationally inferable from the letter or purpose of the underlying agreement”); *White*, 481 F. Supp. 2d at 1104; *Hendrik Delivery Serv., Inc. v. St. Louis Post-Dispatch LLC*, No. 4:07CV1516 JCH, 2007 WL 3071827, at \*9 n.14 (E.D. Mo. Oct. 19, 2007); *Alpert*, 2007 WL 2409354, at \*4 (finding vacation only if the arbitrator’s error was readily perceived by the average person and the award resulted in significant injustice).

146. See *Alpert*, 2007 WL 2409354, at \*5.

147. See *Am. Laser Vision*, 487 F.3d at 259.

148. See *Visconsi*, 244 Fed. App’x, at 711-12; *Alpert*, 2007 WL 2409354, at \*5 (noting that the court could not deny a motion to confirm an arbitration award for manifest disregard for the law without any record of the arbitration proceedings); Stempel, *supra* note 5, at 258-59 (suggesting that written opinions may lead to more reasoned awards).

149. See *Visconsi*, 244 Fed. App’x. at 709. The plaintiffs requested \$37.5 million in compensatory damages and \$300 million in punitive damages. *Id.* The plaintiffs also sued the companies that the defendant worked for throughout the 1980s and 1990s prior to his confessing his wrongdoing to the FBI. *Id.* Part of the issue on appeal was whether the arbitration panel decided the amount of compensatory damages on a joint and several liability, negligence, or other legal theory. *Id.*

150. *Visconsi*, 244 Fed. App’x at 712.

151. *Id.* at 711 (quoting *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000)) (alteration in the original).

152. *Id.* at 715 (quoting *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000)). The

In another case, the court granted a motion to confirm an arbitration award where no record of the arbitration proceeding was prepared.<sup>153</sup> The defendant claimed that the arbitrator made the award with manifest disregard for the law.<sup>154</sup> The court rejected the claim, however, noting that since the parties agreed that no record of the arbitration would be made, it was “unable to reach back in time and reassess the outcomes of that abbreviated procedure.”<sup>155</sup>

Finally, the Fifth Circuit upheld an award of \$1.84 million in lost income, attorney’s fees, and interest in favor of an ophthalmologists’ professional association against a service company.<sup>156</sup> The parties agreed that the arbitrator need not file findings or explain his decision.<sup>157</sup> The court declined to remand to the arbitrator for explanation because “[t]here are advantages and disadvantages in contracting for private resolution of a dispute announced without explanation of reason. When a party does so and loses, federal courts cannot rewrite the contract and offer review the party contracted away.”<sup>158</sup>

In conclusion, very narrow grounds exist to appeal an arbitrator’s award. The court on appeal may not review the merits of the award or vacate for errors of law. Without a written opinion, the court’s hands are tied in being able to determine whether the arbitrator exceeded his or her

---

court also suggested the possibility that an arbitrator may not write a written opinion in order to protect his or her decision on appeal. *Id.* The court also noted, however, that the absence of a written opinion can be remedied by the parties contracting for a written opinion justifying the award. *Id.*

153. *Alpert*, 2007 WL 2409354, at \*1, \*7. The plaintiff sought to confirm an award of \$90,910 against the defendant law firm for attorney fees caused by the law firm’s misleading and deceptive practices. *Id.* at \*1. The law firm took specific actions to increase the fees, and after the plaintiff paid all reasonable fees, the defendant created additional expenses which it sought to recover. *Id.*

154. *Id.* at \*4.

155. *Alpert*, 2007 WL 2409354, at \*7 (citing *Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.*, 487 F.3d 255, 260 (5th Cir. 2007)).

156. *Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.*, 487 F.3d 255, 257-58 (5th Cir. 2007). Several findings led to the decision including allegations by one of the former doctors that the ophthalmologist company that the service company staff interfered with patient treatment in the laser surgery office, misrepresented patient risk to surgeries, and used improper solution to clean surgical supplies. *Id.* at 257. The service company also failed to remit certain revenues, damaged equipment, and failed to pay vendors. *Id.* One of the two plaintiffs left the company because of the allegations, yet when determining the arbitration award, the arbitrator considered the contract as between the departing doctor and the service company, since the doctor bought out the second partner’s interest in the plaintiff company. *Id.* at 258.

157. *Am. Laser Vision*, 487 F.3d at 258 (noting that even a post-award request by one of the parties to explain the decision was denied by the arbitrator).

158. *Id.* at 260.

power. These findings represent challenges to arbitration that need to be addressed.

#### IV. OTHER CHALLENGES TO ARBITRATION

In addition to the challenges mentioned above, other challenges provide opportunities to strengthen arbitration, including: limited discovery in complex cases; time and cost of arbitration; limited punitive damage awards; use of non-lawyer arbitrators; lack of public access; and lack of definitive research to conclude that arbitration leads to better results for parties.

##### *A. Limited Discovery for Even Complex Cases*

One of the key objectives of arbitration is to avoid complex procedures, including costly and time-consuming discovery as compared to ordinary lawsuits.<sup>159</sup> Depending on the complexity of the case, however, more extensive discovery may be needed.

##### *1. Limits to Discovery*

According to one federal court, “[a]s a general rule, discovery as to arbitrable disputes is denied except upon a showing of need.”<sup>160</sup> Limitations on discovery are “simply one aspect of the trade-off between the ‘procedures and opportunity for review of the courtroom [and] the simplicity, informality, and expedition of arbitration’ that is inherent in every agreement to arbitrate.”<sup>161</sup>

Therefore, discovery is limited in arbitration, even for complex cases. Yet, discovery often produces critical documents to support a

---

159. See PONTE & CAVENAGH, *supra* note 4, at 27 (stating that the high cost of discovery accounts for nearly 80% of legal fees in standard litigation).

160. Block 175 Corp. v. Fairmont Hotel Mgmt. Co., 648 F. Supp. 450, 453 (D. Colo. 1986) (internal quotations omitted); see also AM. ARBITRATION ASS’N, RESOLVING COMMERCIAL FINANCIAL DISPUTES—A PRACTICAL GUIDE (Sept. 15, 2005), <http://www.adr.org/sp.asp?id=22008#AdminFeesMed> (listing limited discovery as one of the benefits of arbitration and stating that “[e]xtensive discovery is avoided. Arbitrators arrange for limited exchange of documents, witness lists and depositions appropriate to the particular dispute.”).

161. *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 286 (4th Cir. 2007) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The court validated an arbitration agreement that prevented joinder and shortened the statutory time limit to bring anti-trust claims, over the plaintiffs’ objection that limited discovery in arbitration was not adequate to prove the complexities of a co-conspirator claim. *Id.*

party's claim or defense.<sup>162</sup> Less than full knowledge of the strengths and weaknesses of the other party's position may lead to an adverse result for one of the parties, especially in complex matters.<sup>163</sup>

## 2. Waiver of Right to Arbitrate if Discovery is Performed

Limited discovery alone is not a reason to invalidate an arbitration agreement.<sup>164</sup> Parties may expand or limit pre-arbitration discovery by agreement.<sup>165</sup> In the absence of an agreement, one defense to compelling arbitration is the claim that a party waived arbitration by significantly participating in the judicial process, such as engaging in substantial discovery.<sup>166</sup> The party challenging arbitration on waiver grounds bears a two-part burden of showing: (1) the other party extensively used the judicial process;<sup>167</sup> and (2) prejudice would result by being forced to proceed to arbitration.<sup>168</sup> Waiver may be found by showing that a party acted "inconsistently with its right to arbitrate and such actions prejudiced the other party."<sup>169</sup>

---

162. See PONTE & CAVENAGH, *supra* note 4, at 33 (finding that critical documents that support a party's claim or defense are often revealed in the opponent's files obtained during discovery).

163. See Maltby, *supra* note 108, at 23-24. In employment discrimination cases, limited discovery may adversely affect the employee more than the employer because the employer has access to key documents and witnesses that are potentially undiscoverable by the employee, such as employee records and other employee witnesses. *Id.*; see PONTE & CAVENAGH, *supra* note 4, at 33 (finding that critical documents that support a party's claim or defense are often revealed in the opponent's files obtained during discovery). Full knowledge of the strengths and weaknesses of each party's case may lead to more meaningful and just results. PONTE & CAVENAGH, *supra* note 4, at 33. In complex matters, "limited discovery may not be beneficial to some parties." *Id.*

164. See *In re Cotton Yarn*, 505 F.3d at 286. (noting that the plaintiffs seeking to establish a conspiracy are not prohibited from presenting information obtained from one manufacturer in a separate action against another co-conspirator).

165. See *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277 (7th Cir. 1995) (holding that the court "must rigorously enforce the parties' agreement as they wrote it").

166. *Structured Capital Res. Corp. v. Arctic Cold Storage, LLC*, 237 S.W.3d 890, 894 (Tex. App. 2007).

167. See *id.*

168. See *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 647 S.E.2d 249, 251 (S.C. Ct. App. 2007) (stating that prejudice may be found if the party requesting arbitration took advantage of the judicial system through discovery).

169. *Structured Capital*, 237 S.W.3d at 894 (finding no prejudice when the defendant requested three discovery documents and filed for arbitration within four months); see also *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217-18, 223 (3d Cir. 2007) (finding the defendant waived its right to arbitrate a personal injury claim when it conducted discovery for four years prior to filing for arbitration); *In re Christus Spohn Health Sys. Corp.*, 231 S.W.3d 475, 478 (Tex. App. 2007) (holding that the plaintiff would be prejudiced by granting a

Actions that substantially invoke the judicial process include filing an answer, lodging a counterclaim, conducting extensive discovery, moving for a continuance, and delaying a request for arbitration.<sup>170</sup> “[T]he degree to which the party seeking to compel arbitration [or to stay court proceedings pending arbitration] has contested the merits of its opponent’s claims” or has assented to pre-trial orders are other factors bearing on the waiver decision.<sup>171</sup>

Factors for finding prejudice include the other party’s “access to information not otherwise discoverable in arbitration,” and “costs and fees due to the other party’s actions or delay.”<sup>172</sup>

Participation in minimal discovery does not invoke the judicial process sufficiently enough to constitute waiver.<sup>173</sup> Minimal discovery has been found when one party requested three discovery documents including disclosure, interrogatories, and production.<sup>174</sup>

If, however, a party substantially litigates the case and participates in extensive discovery, waiver may be found. For example, the Texas Court of Appeals denied a motion to compel arbitration, finding that the movant waived its right to arbitrate when it participated in fourteen months of discovery, filed many court motions, and reset the trial date twice.<sup>175</sup>

---

motion to compel arbitration after the defendant participated in extensive discovery over a fourteen month period and the trial date had be reset twice).

170. See *In re Christus Spohn*, 231 S.W.3d at 479; see also *Rhodes*, 647 S.E.2d at 251 (noting that the court combined both factors for substantially invoking the judicial process with those of finding prejudice into one test).

171. *Ehleiter*, 482 F.3d at 222 (internal quotations omitted) (second alteration in the original).

172. *In re Christus Spohn*, 231 S.W.3d at 479; see *Rhodes*, 647 S.E.2d at 251 (denying a motion to compel arbitration in a car purchase dispute after the defendant waited ten months prior to filing for arbitration, completed full discovery prior to filing, and scheduled the trial date).

173. *In re Christus Spohn*, 231 S.W.3d at 479 (citing *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998)); *Structured Capital*, 237 S.W.3d at 895.

174. *Id.*

175. *In re Christus Spohn*, 231 S.W.3d at 480-82. In the case, a widower with three minor children filed a wrongful death claim against the hospital where his deceased wife worked after she was murdered in the hospital’s parking lot. *Id.* at 478. The court denied the writ of mandamus by the hospital seeking to compel arbitration, finding that the delay would greatly increase both time and cost to the plaintiff, especially after the hospital first told the plaintiff that the murder did not qualify as an event under his wife’s employment agreement and denied all benefits to the plaintiff as well as filed several motions for continuance, seeking discovery on the merits of the case pertaining to both liability and damages. *Id.* at 480-82.

The plaintiff had already incurred at least \$60,000 in attorney fees and an estimated total of \$350,000 worth of services already invested in the case. *Id.* at 482. In addition, the defendant previously requested two continuances and entered a Level III discovery plan. *In re*

In a wrongful death action, the court similarly found that the defendant nursing home waived the right to arbitrate by completing full discovery prior to filing for arbitration.<sup>176</sup> The court found that interrogatories, requests for document production, and notices to non-parties to produce documents, prior to filing for arbitration, was extensive discovery requiring forfeiture of the defendant's right to arbitrate.<sup>177</sup>

The Third Circuit found that the defendant waived its right to arbitrate a slip-and-fall case at a Virgin Islands Casino when it participated in discovery for four years prior to filing for arbitration.<sup>178</sup> The parties had already exchanged several sets of interrogatories, document requests, and expert witness reports.<sup>179</sup> Significantly, the court held that the party challenging the motion to compel arbitration need not demonstrate both unnecessary delay and additional expense to show prejudice, but rather prejudice was inferred from the circumstances, specifically the fact that the challenging party had already invested considerable time and expense litigating the case.<sup>180</sup>

---

*Christus Spohn*, 231 S.W.3d at 480. Affirmative discovery on the part of the defendant included sending seven separate sets of written discovery to the plaintiffs, ordering nineteen sets of business records from third parties, and conducting depositions of seventeen of its employees. *Id.* The court also considered the defendant's motion to find the plaintiff in contempt for alleged discovery abuse in a separate criminal action to be inconsistent with its right to arbitrate the wrongful death claim. *Id.* at 481.

176. *Estate of Orlanis ex rel. Marks v. Oakwood Terrace Skilled Nursing & Rehab. Ctr.*, 971 So. 2d 811, 812 (Fla. Dist. Ct. App. 2007).

177. *Id.* The court acknowledged that other jurisdictions may not find waiver for non-record discovery, but that Florida courts applied a broad rule that any plaintiff who seeks discovery prior to filing for arbitration forfeits a right to arbitrate. *Id.*

178. *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 223 (3d Cir. 2007). The court relied on a First Circuit case to conclude that court and not arbitration was the proper venue to decide whether the parties waived the right to arbitrate. *Id.* at 217-18 (citing *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1 (1st Cir. 2005) (concluding that the United States Supreme Court did not intend its holdings in *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002) to mean that arbitrators must decide on the issue of waiver)).

179. *Id.* at 223.

180. *Id.* at 223-24. The court noted that the plaintiff had already spent \$40,000 in legal fees and the four year delay would require the plaintiff to duplicate efforts if the case now went to arbitration. *Id.* The court looked to the following factors to determine the defendant had waived arbitration:

“[1] the timeliness or lack thereof of a motion to arbitrate . . . [2] the degree to which the party seeking to compel arbitration [or to stay court proceedings pending arbitration] has contested the merits of its opponent's claims; [3] whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; [4] the extent of its non-merits

In conclusion, parties that conduct necessary, extensive discovery may waive the right to arbitration. Consequently, parties should limit discovery.

### *B. Process Too Slow and Too Expensive*

One of the expectations of arbitration is that it is faster and less expensive than litigation. While some research may show that is technically true,<sup>181</sup> arbitration may still take longer and cost more than parties expect, thus reducing its advantages.

#### *1. Length of Arbitration*

The ABA recommends that 90% of general civil cases be disposed of within twelve months and that 100% be disposed of within twenty-four months.<sup>182</sup> The Federal Mediation and Conciliation Services (FMCS) reported that in 2005, the average time between an arbitration panel request and an award was 401.39 days.<sup>183</sup> In 2007, the average time was shortened to 258.86 days.<sup>184</sup> The AAA reported that in 2007, the length of time from filing for arbitration until receiving an award in consumer arbitrations was approximately four months for “[c]ases conducted by documents only” and six months for “[i]n-person hearings.”<sup>185</sup>

In another study, the average time to resolve consumer and

---

motion practice; [5] its assent to the [trial] court’s pretrial orders; and [6] the extent to which both parties have engaged in discovery.”

*Id.* at 422 (quoting *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 926-27 (3d Cir.1992) (internal citations omitted)).

181. See *infra* notes 182-93 and accompanying text.

182. National Center for State Courts, Trial Court Performance Standards and Measurement System, [http://www.ncsconline.org/D\\_Research/TCPS/Measures/me\\_2.1.1.htm](http://www.ncsconline.org/D_Research/TCPS/Measures/me_2.1.1.htm) (last visited September 23, 2009) (Figure 1).

183. See FEDERAL MEDIATION AND CONCILIATION SERVICE, ARBITRATION STATISTICS FISCAL YEAR 2004: AVERAGE DAYS (2005), available at <http://www.fmcs.gov/internet/itemList.asp?categoryID=196> (follow “FY 2005 Arbitration Statistics” hyperlink; then follow “Average Days” hyperlink).

184. See FEDERAL MEDIATION AND CONCILIATION SERVICE, ARBITRATION STATISTICS FISCAL YEAR 2007: AVERAGE DAYS (2007), available at <http://www.fmcs.gov/internet/itemList.asp?categoryID=196> (follow “FY 2007 Arbitration Statistics” hyperlink; then follow “Average Days” hyperlink).

185. See AM. ARBITRATION ASS’N, *supra* note 125 (noting that the length was determined from the arbitrations that proceeded to a hearing out of 310 total cases studied).

employment disputes through arbitration was 116 days.<sup>186</sup> By comparison, the length of time to resolve consumer goods and employment claims in court during roughly the same time period was approximately 650 to 720 days.<sup>187</sup>

The results are varied, and the time savings of arbitration may not be as beneficial as originally desired.

## 2. *Expense of Arbitration*

Although many believe that arbitration is less costly than litigation, there is no empirical evidence to prove that conclusion.<sup>188</sup> It is not uncommon for well-known arbitrators in the United States to charge up to four hundred dollars per hour and thousands of dollars per day.<sup>189</sup>

---

186. CAL. DISPUTE RESOLUTION INST., CONSUMER AND EMPLOYMENT ARBITRATION IN CALIFORNIA: A REVIEW OF WEBSITE DATA POSTED PURSUANT TO SECTION 1281.96 OF THE CODE OF CIVIL PROCEDURE 19 (2004), available at [http://www.mediate.com/cdri/cdri\\_print\\_Aug\\_6.pdf](http://www.mediate.com/cdri/cdri_print_Aug_6.pdf). The data for the study was collected by reviewing the results of 1559 out of a total of 2175 arbitrations conducted by six private, consumer arbitration providers between January 2003 and February 2004. *Id.* at 5, 19. The providers were ADR Services, American Arbitration Association (AAA), Arbitration Works, ARC Consumer Arbitrations, JAMS, and Judicate West. *Id.* at 14. The reporting data was available as a result of the Corbett Bill, which required consumer arbitration providers to report arbitration information quarterly on a website. *Id.* at 5. Most of the disputes used in the study were insurance disputes (618), in addition to employment (213), medical and medical malpractice (234), construction/fast track (200), and buy and sell agreement (170) claims. CAL. DISPUTE RESOLUTION INST., *supra*, at 22. The data specific to the length of arbitration is based on responses from 1559 arbitrations, with the shortest disposition as one day and the longest at 559. *Id.* at 19.

187. See NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 1999-2000: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 38-39 (2001), available at [http://www.ncsconline.org/d\\_research/CSP/1999-2000\\_Files/1999-2000\\_Tort-Contract\\_Section.pdf](http://www.ncsconline.org/d_research/CSP/1999-2000_Files/1999-2000_Tort-Contract_Section.pdf) (stating that arbitrating disputes is approximately 8.5% faster than litigating similar claims and reporting that in 1996, the timeframe in civil tort cases was from 586 to 1525 days).

188. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 784 (2003); see also Susan Zuckerman, *Comparing Cost in Construction Arbitration & Litigation*, DISP. RESOL. J., May-July 2007, at 42. Direct comparison of costs is nearly impossible, since parties do not arbitrate and litigate the same matter. Zuckerman, *supra*, at 43. However, by asking experts to provide detailed cost estimates for arbitrating and litigating a hypothetical construction dispute, the costs of an arbitration were estimated at \$94,500 while the costs of litigation were estimated at \$120,300. *Id.*

189. See PUB. CITIZEN, *supra* note 113. The organization issued a report that studied over 34,000 binding mandatory arbitrations involving credit card companies performed by the National Arbitration Forum in California from 2003-2007. *Id.* at 1. Top arbitrators make up to one million dollars annually, compared to a salary of \$171,648 for California Superior Court judges. *Id.* at 2; see also Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in*

The filing fee alone for AAA commercial arbitration involving less than \$10 million ranges between \$750-\$10,000.<sup>190</sup> By comparison, the cost of filing a case in federal court is \$350.<sup>191</sup> One study of California arbitrations found the average combined total fee for the arbitrator and arbitrator provider in consumer and employment disputes was \$2256.<sup>192</sup> Moreover, international arbitrators frequently charge more than domestic arbitrators.<sup>193</sup> Costs of arbitration continue to rise, undermining the cost savings originally intended through arbitration.

### *C. Punitive Damages are Unusual Even when the Facts Warrant*

Punitive damages are rarely awarded in arbitration. The legal standard for an award of punitive damages requires that the defendant act with “malice which is shown by intentional, knowing commission of a wrongful act without just cause or excuse, and in contravention of, or reckless disregard for the rights of others.”<sup>194</sup>

The arbitrator is given power to award punitive damages, unless the parties agree otherwise.<sup>195</sup> While punitive damages are permitted, arbitrators are hesitant to award them, so the parties may not have the fullest range of available remedies.<sup>196</sup>

---

*Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1250 n.53 (2001) (comparing top arbitrator fees of two or three thousand dollars per day more than six years ago).

190. See AM. ARBITRATION ASS'N, *supra* note 160.

191. 28 U.S.C. § 1914(a) (2006); U.S. DIST. COURT CENT. DIST. OF CAL., SCHEDULE OF FEES 2 (July 2006), available at <http://www.cacd.uscourts.gov> (follow “General Information” hyperlink; then follow “Fee Schedule” hyperlink).

192. CAL. DISPUTE RESOLUTION INST., *supra* note 186, at 21. The figure was calculated from 1404 responses, with a low fee of \$58 and a high of \$108,550. *Id.* The figure, however, does not include additional costs such as attorney fees, and in the majority of the cases in the study (1729), the consumer was represented by an attorney. *Id.* at 26.

193. See INT'L CHAMBER OF COMMERCE, RULES OF ARBITRATION 25 (2008), available at [http://iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf). An International Chamber of Commerce arbitrator handling a case with an amount in dispute of one hundred million dollar would be compensated between \$61,750 and \$285,800. See *id.*

194. Hendrik Delivery Serv., Inc. v. St. Louis Post-Dispatch LLC, No. 4:07CV1516 JCH, 2007 WL 3071827, at \*7 (E.D. Mo. Oct. 19, 2007) (internal quotations omitted).

195. See UNIF. ARBITRATION ACT §§ 4, 21(a) (2000).

196. RESTATEMENT (SECOND) OF TORTS § 908 (1979); see FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 1216-17 (6th ed. 2003) (discussing that an award of punitive damages may adversely affect the working relationships between parties, or may expose the award to vacation if a court determines that an arbitrator exceeded his or her power in awarding punitive damages); see also Michael H. LeRoy & Peter Feuille, *Reinventing the Enterprise Wheel: Court Review of Punitive Awards in Labor and Employment Arbitrations*, 11 HARV. NEGOT. L. REV. 199, 202 (2006). Punitive damage awards are rare, as expressed in

A study comparing punitive damage awards in labor and employment arbitrations found that punitive damages were awarded more frequently in employment disputes than labor disputes, particularly because of the statutory rights involved in employment issues.<sup>197</sup>

In a dispute between a doctor and his insurance carrier, the court found that a punitive damage award of \$4 million “shock[ed] the Court’s conscience” and vacated the entire arbitration award.<sup>198</sup> In another case, an arbitration panel awarded \$1.15 million in punitive damages to an employee for defamation and intentional infliction of emotional distress, in addition to the \$994,361 awarded in actual damages, in a suit by an employee of a car dealership against the dealership and four of its key employees.<sup>199</sup> On appeal, the district court upheld the award of actual damages, but dismissed \$550,000 of the punitive damage award against

---

one labor arbitration, “[p]ower to award punitive damages is a heady wine, however, which carries with it an equally potent obligation and abiding responsibility to invoke the remedy with great care and extreme caution.” *LeRoy & Feuille, supra*, at 200 n.3 (quoting *Seaboard World Airlines*, 53 Lab. Arb. Rep. (BNA) 1056, 1060 (1969) (Turkus, Arb.)).

197. See *LeRoy & Feuille, supra* note 196. The study analyzed forty-nine punitive damage awards from 1974-2004 and found:

- (1) Expressly punitive awards are rare but since 1995 they appear to be ordered and enforced more frequently.
- (2) Arbitral punishment is growing more severe.
- (3) Punitive awards are much higher in employment arbitrations compared to labor arbitrations.
- (4) Judges enforce less than half of the labor awards but nearly all of the individual employment awards.
- (5) In a very small number of employment cases, the ratio of punitive to compensatory damages exceeds due process limits that apply to similar jury awards.

*Id.* at 202.

198. *Lagstein v. Certain Underwriters at Lloyds of London*, No. CV-S-03-1075-R CJ, 2007 WL 2363871, at \*2 (D. Nev. Aug. 15, 2007). The court found the award excessive and against public policy because it also awarded the plaintiff \$900,000 in damages for repudiation of an insurance contract; \$1,500,000 in emotional distress damages; \$350,000 in attorneys’ fees; and interest. *Id.* at \*1-\*2. The court also found that the punitive damages award went beyond the jurisdiction of the arbitration, which expired September 1, 2006 per agreement of the parties, while the hearing for the punitive damages award was held on November 21-22, 2006. *Id.*

199. *DaimlerChrysler Ins. Co. v. Apple*, 265 S.W.3d 52, 58 (Tex. App. 2008). The panel awarded \$500,000 each against two of the defendants and \$50,000 against each of the remaining three defendants. *Id.* The issue on appeal was whether the plaintiff was required to indemnify the defendant employees of a car dealership for repeated racist and derogatory comments made to third parties about a Mexican employee, which formed the basis of the punitive damage award. *Id.* at 55-56. After the arbitration panel ruled against the five defendants, Daimler informed the dealership and its CEO, Apple, that it would no longer defend them, and that it would not indemnify their claims. *Id.* at 58. Later, the panel awarded \$250,000 for injury to reputation; \$216,022 for lost past earnings; \$298,339 for lost future earnings; and \$230,000 for mental anguish. *DaimlerChrysler*, 265 S.W.3d at 58, 72.

two of the five defendants.<sup>200</sup> Upon rehearing on appeal, the court dismissed an additional \$500,000 based on the exclusion of insurance coverage for employment-related practices.<sup>201</sup>

In an opposite example, the court upheld an arbitrator's award of \$750,000 in punitive damages in a newspaper delivery service dispute.<sup>202</sup> The court found that the newspaper declined to reimburse the plaintiff for \$466,330 in carrier expenses and then cut the plaintiff's delivery routes, continuing to "take[] one unreasonable position after another."<sup>203</sup> In light of extensive testimony of the defendant's actions, including threats made to carriers, destruction of documents, and testimony by top management that it would do the same thing again if given the opportunity, the court reasoned that the award was not completely irrational nor evidenced a manifest disregard for the law.<sup>204</sup>

#### *D. Non-Lawyer Oriented: Industry Expertise v. Legal Expertise*

The arbitration process uses both lawyer and non-lawyer arbitrators and advocates, and there is no requirement that an arbitrator have a legal background.<sup>205</sup> The United States Supreme Court recognized that "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."<sup>206</sup> Therefore, because of the business expertise needed in many disputes, industry experts are chosen as arbitrators.<sup>207</sup> Non-lawyer appointments originated with the need for expertise in the construction, shipping, and commodities industries.<sup>208</sup>

---

200. *Id.* at 58 (vacating the \$500,000 award against the CEO of the dealership and \$50,000 against a non-party defendant).

201. *Id.* at 55-56 (noting that the plaintiff's umbrella policy did not cover the employment-related discrimination claim).

202. *Hendrik Delivery Serv., Inc. v. St. Louis Post-Dispatch LLC*, No. 4:07CV1516 JCH, 2007 WL 3071827 (E.D. Mo. Oct. 29, 2007).

203. *Id.* at \*8 (highlighting that the court also awarded the plaintiff \$482,169 in reimbursement of expenses incurred due to the defendant's change in its distribution system and \$892,082 in compensatory damages, as the property value of the routes the plaintiff lost due to the defendant's breach of contract).

204. *Id.* at \*8-\*9 (finding also that the court cannot substitute its own judgment for that of the arbitrator).

205. See AM. ARBITRATION ASS'N, QUALIFICATION CRITERIA FOR ADMITTANCE TO THE AAA NATIONAL ROSTER OF ARBITRATORS 1, available at <http://www.adr.org/si.asp?id=4223> (noting that an individual must possess business or legal experience).

206. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

207. AM. ARBITRATION ASS'N, *supra* note 205 (noting that one of the qualifications to become an arbitrator with AAA is a "[m]inimum of 10 years of senior-level business or professional experience or legal practice").

208. See Wendy Miles, *Practical Issues for Appointment of Arbitrators—Lawyer vs.*

Non-law trained arbitrators, however, may lack the necessary substantive and procedural legal knowledge to properly handle certain circumstances, especially those involved in arbitrating statutory disputes.<sup>209</sup> International disputes also often require expertise in the law to handle complex procedural issues.<sup>210</sup> As a result, one author states that “[p]robably the most important qualification for an international arbitrator is that he should be experienced in the law and practice of arbitration.”<sup>211</sup>

#### *E. Lack of Public Access*

An arbitration hearing is open only to the parties, advocates, and witnesses, unless the parties agree that it be open to the public. If the arbitration involves a socially sensitive area, confidentiality of the proceedings is helpful to parties.<sup>212</sup>

Yet there are several problems that may arise because the arbitration proceeding lacks transparency. First, a particular arbitration decision may have a dramatic impact on society, but the public does not know of the decision because it is confidential. Also, the development of the law is restricted when decisions are not published.<sup>213</sup> Finally, less incentive may exist for a business to change a discriminatory policy or defective product if the party knows the arbitration decision will not be

---

*Non-lawyer and Sole Arbitrator vs. Panel of Three (or More)*, 20 J. INT’L ARB. 219, 220 (2003) (non-lawyer arbitrators are more frequent in America than other countries; in international arbitrations, at least one and more often than not all three of the arbitrators in a tribunal are lawyers).

209. See THOMAS E. CARBONNEAU, *CASES AND MATERIAL ON THE LAW AND PRACTICE OF ARBITRATION* 245-46 (rev. 3d ed. 2003).

210. See Miles, *supra* note 208. International arbitration institutions view the need for law-trained arbitrators as fundamental to the integrity of the process. Arbitrators must know procedural issues as well as produce a reasoned award. *Id.* at 222.

211. *Id.* at 220.

212. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 42-43 (1998) (surmising that employees may benefit from privacy in an arbitration if the claim involves a personal matter); see also Goldstein & Seto, *supra* note 102. Confidentiality in arbitration may be eroded when one of the parties seeks to confirm or appeal the award, which is especially troublesome for high profile individuals. Goldstein & Seto, *supra* note 103, at 13. “To seek court confirmation, parties have to disclose their identities, the existence of a dispute, and the arbitrator’s decision, including any money damages awarded or equitable relief granted or denied.” *Id.* (citing CAL. CIV. PROC. CODE §1285.4 (2007)). Placing provisions in the arbitration agreement that seal records or limit review may be desirable to parties who desire to keep sensitive issues private. *Id.* at 14.

213. See *supra* notes 148-58 and accompanying text.

open to the public, thus avoiding bad publicity.<sup>214</sup>

#### *F. Arbitrator's Lack of Power and Control*

Arbitrators may lack the power and control necessary to conduct an effective adversarial proceeding. For example, the arbitrator has no authority to impose fines or sanctions on an advocate for filing frivolous cases, bad behavior, or unethical actions, as a judge does under the Federal Rules of Civil Procedure.<sup>215</sup> The parties may, however, agree by contract to give the arbitrator power to impose sanctions.

An arbitrator may summon a person to attend an arbitration and direct the person to bring necessary documents.<sup>216</sup> An arbitrator, however, lacks the power to compel a person to comply with a summons, subpoena, or decision.<sup>217</sup> A subpoena or a decision rendered in an arbitration is only enforceable in a court of law. “[A] right without a remedy is not a legal right; it is merely a hope or a wish.”<sup>218</sup>

#### *G. No Better Result for Parties than Litigation*

No proof exists to show that decisions made in arbitration are superior to judge or jury awards. In fact, in a recent study, 33% of the arbitrations resulted in no money damage awards at all.<sup>219</sup> Other research shows that while employees are more likely to win in arbitration, they receive lower awards than if they had won in litigation.<sup>220</sup> The reason for the findings may be a result of the tendency

---

214. Maltby, *supra* note 212 (stating that when employers know that an arbitration proceeding will remain private, they have less incentive to change discriminatory policies, because there is no risk of adverse publicity); PONTE & CAVENAGH, *supra* note 4, at 33. Businesses may hide “vital information about defective products, poor customer service, discriminatory hiring practices, or other unethical business” practices that may impact consumer choices when the business is not threatened with public exposure. *Id.*

215. FED. R. CIV. P. 11.

216. 9 U.S.C. § 7 (2006). The Federal Arbitration Act gives the arbitrator the power to “summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper.” *Id.*

217. See Leslie Trager, *The Use of Subpoenas in Arbitration*, DISP. RESOL. J., Nov. 2007-Jan. 2008, at 14 (noting that arbitrators lack power to subpoena important documents, particularly for out-of-state non-parties).

218. Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L. J. 665, 678 (1987).

219. U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 2, at 17 (reporting the result from a sampling of 609 arbitrations).

220. See Maltby, *supra* note 212, at 48 (Table 1). According to one study, employees won 63% of cases submitted to arbitration, but received only 25% of the amount of damages

of arbitrators to split the difference between the parties, but empirical evidence to support that conclusion is scarce and conflicting.<sup>221</sup>

## V. CONCLUSION

Justice Thurgood Marshall stated that, “the governing principle of a humane society and a good legal system . . . is to recognize the worth and importance of every person . . . and be perceived by all the people as providing equal justice.”<sup>222</sup> Arbitration must be perceived by all to provide equal justice in order to meet Justice Marshall’s definition of a good legal system.

While arbitration is an effective method to resolve disputes, nothing is perfect. Both the strengths and weaknesses of arbitration must be examined in order to continue to meet arbitration’s goals of providing quick, efficient, inexpensive resolution of disputes. By facing the recent challenges in arbitration, such as those addressed in this article, arbitration can be strengthened in the future.

---

requested. *Id.* In litigation, employees won only 14.9% of claims brought, but prevailing employees received 70% of the relief requested. *Id.*

221. See Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, LAW & CONTEMP. PROBS., Winter/Summer 2004, at 105, 114-18.

222. Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer?*, 5 LOY. CONSUMER L. REP. 112, 119 (1993) (quoting *Mr. Justice Marshall Lives on in His Words*, NAT’L L.J., Feb. 8, 1993, at 8 (statements by Justice Thurgood Marshall at the Eighth Conference on the Law of the Word (1977)) (omissions in the original).