ALTERNATIVE DISPUTE RESOLUTION

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Table of Contents

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I. INTRODUCTION

Michigan courts and the Sixth Circuit Court of Appeals were prolific in the number of decisions they produced during this *Survey* period.[1] In the main, the decisions were straight-forward and clear, and boded well for the arbitral process. The decisions either solidified existing law, which favors arbitration, or refined existing law, offering practitioners better guidance in terms of tests and standards to use when asserting or defending against a claim of arbitrability, contract unconscionability, or award vacatur.

The United States Supreme Court also decided two significant arbitration cases. In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[2] the Supreme Court addressed the question of expanded judicial review under the Federal Arbitration Act (FAA) sections 9-11.[3] In concluding that expanded grounds of review by party agreement violate the strictures of the FAA, the Court left open the possibility that parties may seek review for errors of law or errors of fact—where the FAA is not implicated—by either incorporating state statutory or common law standards.[4] In *Preston v. Ferrer*,[5] the Supreme Court re-visited the doctrine of pre-emption to determine whether an interstate arbitration agreement was voided under the California Talent Agencies Act. Once again, the Supreme Court came down on the side of pre-emption, strengthening the jurisprudence that establishes the supremacy of the FAA and sending a clear message to

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1. The *Survey* period for this article covers United States Supreme Court, Sixth Circuit Court of Appeals, and Michigan Court of Appeals cases decided June 1, 2007 through May 31, 2008. One case, *Mich. Family Res., Inc., v. Serv. Employees Int'l Union Local 517M*, 475 F.3d 746 (6th Cir. 2007), not included in last year's *Survey* article, is covered this year. *See* discussion, *infra* notes 387-421. This *Survey* article also discusses key uniform statutes and their principal features and adoption patterns.

2. 128 S. Ct. 1396 (2008).

3. Section 10 of the Federal Arbitration Act speaks specifically to vacatur grounds and provides that a court may vacate an award upon application of a party:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators . . . (3) where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy . . . or of any other misbehavior . . . (4) where the arbitrators exceeded their powers.

9 U.S.C. § 10(a) (2006).

4. *Hall St. Assoc.*, 128 S. Ct. at 1407-08 ("The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.").

5. 128 S. Ct. 978 (2008).

practitioners that the FAA will dislodge any state law that forecloses the ability of a party to enforce an otherwise valid agreement to arbitrate.[6]

With *Preston*, the Supreme Court re-affirmed its earlier holding of *Buckeye*,[7] that when parties agree to arbitrate their disputes under a broad arbitration clause, challenges to the contract as a whole, and not specifically to the arbitration clause, are to be decided by an arbitrator.[8]

The Sixth Circuit published ten opinions representing a diverse landscape of arbitral jurisprudence.[9] A majority of the opinions focused

6. *Id.* at 987.

7. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

8. *Preston*, 128 S. Ct. at 984.

9. The following three decisions are not included in this *Survey* article: Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, L.L.P., 521 F.3d 597 (6th Cir. 2008) (affirming the district court decision that non-signatories to the arbitration agreement cannot stay judicial proceedings and compel arbitration under Section 3 of the FAA); Watson Wyatt & Co., v. SBC Holdings, Inc., 513 F.3d 646 (6th Cir. 2008) (reversing the district court decision denying plaintiff's motion to compel arbitration regarding damages that occurred prior to executing the arbitration agreement because the arbitration clause was broadly written so as to encompass claims that arose from events before its execution); Truck Drivers Local No. 164 v. Allied Waste Systems, Inc., 512 F.3d 211 (6th Cir. 2008) (reversing the district court decision to vacate the arbitrator's award because the arbitrator was faithfully attempting to construe and apply the terms of the collective bargaining agreement, the arbitrator was acting within the scope of his authority, and the district court lacked legal authority upon which to vacate the arbitrator's award). The Sixth Circuit also produced several interesting unpublished decisions confined, by and large, to labor and employment arbitration. *See* Appalachian Reg'l HealthCare, Inc. v. Ky. Nurses Ass'n, No. 06-6470 2007 WL 4269063 *2 (6th Cir. Dec. 4, 2007) (affirming the district court decision despite the district court's incorrect usage of the *Cement Division's* broader "essence test" where the arbitrator "appropriately relied on past practice, properly applied context to interpret seemingly explicit language, and therefore construed the contract"); Bauer v. Carty & Co., 246 F. App'x 375, 378 (6th Cir. 2007) (affirming the district court decision where former employee of broker failed to demonstrate by clear and convincing evidence that the arbitrator's award was procured by fraud or undue means. "Disputes [over discovery] in interpretation are hardly unknown . . . and are in fact the stuff of a majority of the motions to compel that find their way to the court. While regretful, such activity could hardly be said to be 'immoral if not illegal'"); Earle v. Netjets Aviation, Inc., 262 F. App'x 698, 702 (6th Cir. 2008) (affirming the district court decision where the arbitrator, in denying the union's grievances, properly considered custom and practice and therefore was arguably construing the provisions of the collective bargaining agreement (c/b/a), incorporated agreements, and Federal Regulations); Hange v. City of Mansfield, 257 F. App'x 887, 897 (6th Cir. 2007) (affirming the district court decision where an arbitrator properly found that the City's conditional termination of the grievant, later rescinded to a demotion, did not violate grievant's constitutional rights; grievant was able to pursue his contractual remedies under the terms of the c/b/a); Int'l Ass'n of Machinists & Aerospace Workers v. ISP Chems., Inc., 261 F. App'x 841, 849 (6th Cir. 2008) (reversing the district court decision where the arbitrator reasonably construed the c/b/a to incorporate by reference a party agreement respecting rate structures for employee contributions of medical benefits, "thereby bringing the matter squarely within the ambit of the CBA's arbitration clause");

on the standard of review of arbitral awards, indicating a disturbing trend that dissatisfied litigants in arbitration are seeking, in greater numbers, the proverbial "second bite of the apple." In other developments, the Michigan Court of Appeals articulated a strong admonition to the judiciary that, "under the plain meaning rule," explicit statutory language which speaks to procedural safeguards incorporated in the Domestic Relations Arbitration Act must be strictly followed.[10]

Finally, on the legislative scene, several important federal statutes were introduced, aimed at incorporating standards of equity in mandatory arbitration agreements which, unlike consensual arbitration agreements, are unilaterally imposed in contracts of adhesion. In addition to federal legislation, the Uniform Mediation Act[11] received renewed attention, as more states consider the feasibility of adoption. This section discusses the central features of the Act, and the nature of the obstacles, real or perceived, that are impeding states from adopting it as part of a unified body of law.

Int'l Union, United Auto., Aerospace & Agric. Workers of Am., Local 174 v. Mich. Mech. Servs., Inc., 247 F. App'x 649, 654 (6th Cir. 2007) (affirming the district court decision where the arbitrator, who found that the grievant was improperly terminated by management for failure to take a drug test, was arguably construing the relevant portions of the c/b/a); Mich. Sugar Co. v. Bakery, Confectionery, Tobacco Workers, & Grain Millers Int'l Union Locals 259-G, 260-G, 262-G, 278 F. App'x 623, 829 (6th Cir. 2008) (reversing the district court decision where the arbitrator was arguably construing the relevant provisions of the contract when he found that the employer had violated the c/b/a and the National Labor Relations Act by discontinuing health care benefits of employees observing picket lines during an economic strike); Roll Coater, Inc. v. Chauffeurs, Teamsters and Helpers Local Union No. 215, 263 F. App'x 445, 448 (6th Cir. 2008) (affirming the district court decision where the arbitrator was arguably construing the relevant provisions of the c/b/a and Rules of Conduct when he reduced an employee's punishment from discharge to notice upon finding that the parties' agreement imposed a progressive discipline procedure which required the employer to "not discharge or otherwise take any disciplin[ary] action against any associate without first giving notice . . . of the conduct expected and of the potential consequence for violating that expectation"); Visconsi v. Lehman Bros., 244 F. App'x 708 (6th Cir. 2007) (affirming the district court decision where an arbitrator's decision did not require a formal opinion under NASD rules). The *Visconsi* Court opined:

> We pause to note that arbitrating parties are not unwittingly at the mercy of an unscrupulous arbitrator who attempts to insulate his decision by refusing to issue an opinion. We must remember that the arbitrator's role is created by contract, and the very contract that empowers the arbitrator to rule is the same contract that may demand a written opinion justifying his award . . .

Id. at 712.

10. Johnson v. Johnson, 276 Mich. App. 1, 8, 739 N.W.2d 877, 882 (2007) (citing Browder v. Int'l Fidelity Ins. Co., 413 Mich. 603, 612, 321 N.W.2d 668, 673 (1982)).

11. Uniform Mediation Act, Nat'l Conf. of Comm'rs on Uniform State Laws (2001), *available at* http://www.pon.harvard.edu/guests/uma/ (last visited Feb. 28, 2009).

II. THE AGREEMENT TO ARBITRATE

A. Interplay Between Federal and State Law

Arbitration is regulated by federal legislation.[12] Passed in 1925, the Federal Arbitration Act (FAA) provides several procedural mechanisms to ensure that arbitration agreements are properly enforced. These procedural mechanisms include motions to stay[13] and motions to compel.[14]

The FAA also limits its application to a contract in maritime or a transaction in commerce.[15] These limitations, and the concern when enacted that the FAA only applied to federal courts, triggered the passage of the Uniform Arbitration Act (UAA) in 1955.[16] Today, the majority of states have created their own versions of the FAA, paralleling their provisions to those of the UAA.[17] This interesting patchwork of

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12. *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2006). The Act was originally designated as the United States Arbitration Act.

13. 9 U.S.C. § 3 (2006) ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, *shall on application of one of the parties stay the trial of the action* until such arbitration has been had in accordance with the terms of the agreement . . . .") (emphasis added).

14. 9 U.S.C. § 4 (2006) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration *may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.*") (emphasis added).

15. 9 U.S.C. § 2 (2006).

16. Uniform Arbitration Act §§ 1–25 (2006). For background on the UAA, see Peter H. Berge, *The Uniform Arbitration Act: A Retrospective on Its Thirty-Fifth Anniversary*, 14 HAMLINE L. REV. 301 (1990), cited in STEPHEN K. HUBER & MAUREEN A. WESTON, ARBITRATION: CASES AND MATERIALS 13 (LexisNexis, 2d ed. 2006).

17. Michigan's arbitration statute parallels generally the provisions of the UAA. *See* MICH. COMP. LAWS ANN. §§ 600.5001 – .5035 (West 2006). In August 2000, the National Conference of Commissioners on Uniform State Laws adopted the Revised Uniform Arbitration Act (RUAA). The revisions were the first since 1955, when the Uniform Arbitration Act was initially adopted. The drafters' goals were to clarify ambiguities under the Act and to limit court intervention, while simultaneously retaining the essential character of arbitration. Unif. Arbitration Act (2000) at 1-6. The following states have enacted the RUAA: Alaska (ALASKA STAT. § 09.43.010 (2007)); Colorado (COLO. REV. STAT. ANN. § 13-22-201 (West 2008)); Hawaii (HAW. REV. STAT. § 658A-1 (2008)); Nevada (NEV. REV. STAT. ANN. 38.206 (West 2007)); New Jersey (N.J. STAT. ANN. §§ 2A:23B-1 (West 2008)); New Mexico (N.M. STAT. ANN. § 44-7A-1 (West 2008)); North Carolina (N.C. GEN STAT. ANN. § 1.569.1 (West 2008)); North Dakota (N.D. CENT. CODE § 32-29.3-01 (2008)); Oklahoma (OKLA. STAT. tit. 12 § 1851 (2008)); Oregon (OR. REV. STAT. § 36.600 (2008)); Utah (UTAH CODE ANN. § 78-31A-101 (West 2008)); and Washington (WASH. REV. CODE ANN. § 7.04A.010 (West 2008)).

legislation, designed to further the national and concomitant state policy favoring arbitration, becomes controversial when parties seek to extricate themselves from arbitration agreements. Despite an impregnable body of Supreme Court case law holding that the FAA pre-empts state laws that overreach to regulate arbitration agreements,[18] questions continue to arise as to the proper intersection of federal and state law, and under what circumstances the FAA will trump state legislation that disfavors arbitration. The following case illustrates this tension.

In *Preston v. Ferrer*,[19] the United States Supreme Court decided whether the California Talent Agencies Act (TAA),[20] which vested in the Labor Commissioner exclusive original jurisdiction over contract validity disputes, would be superseded by the Federal Arbitration Act and the Court's holding in *Buckeye Check Cashing, Inc. v. Cardegna*.[21] The case involved a contract between Ferrer, a former Florida trial court judge who served on the television show, *"Judge Alex,"* and Preston, an attorney who provided professional services to persons in the entertainment industry.[22] The contract between Ferrer and Preston included, among other things, a provision calling for arbitration of "any dispute . . . relating to the terms of [the contract] or the breach, validity, or legality thereof . . . in accordance with the rules [of the American Arbitration Association]."[23] A fee dispute arose, and Preston filed for arbitration.[24] Ferrer responded by filing a petition with the California Labor Commissioner, asserting that the contract was invalid and unenforceable under the TAA because Preston was not licensed as a

18. *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) ("In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . ."); Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Univ., 489 U.S. 468, 477 (1989) ("[E]ven when Congress has not completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law—that is, to the extent that it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (The FAA's "purpose was to reverse the longstanding judicial hostility to arbitration . . . and to place arbitration agreements upon the same footing as other contracts"); Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'").

19. 128 S. Ct. 978.

20. CAL. LAB. CODE ANN. § 1700.44(a) (West 2003 & Supp. 2008).

21. 546 U.S. 440.

22. *Preston*, 128 S. Ct. at 981-82.

23. *Id.* at 982.

24. *Id.*

talent agent.[25] The hearing officer stated that while Ferrer had a "colorable basis for exercise of the Labor Commissioner's jurisdiction," he was without authority to stay the arbitration.[26] Ferrer then initiated suit in Superior Court, seeking both injunctive relief and a declaration that the dispute was not subject to arbitration.[27] Preston moved to compel arbitration.[28] The Superior Court denied Preston's motion to compel arbitration unless the Labor Commissioner determined that she was without jurisdiction to hear the dispute.[29] On appeal, the California Court of Appeals affirmed the Superior Court decision.[30] The United States Supreme Court granted certiorari, following the California Supreme Court's denial of Preston's petition for review.[31]

In oral arguments before the Supreme Court, Preston asserted that Ferrer was required to "litigate his TAA defense in the arbitral forum."[32] Ferrer responded that the "personal manager" inquiry fell, "under California law, within the . . . jurisdiction of the Labor Commissioner."[33] Thus, the Supreme Court determined that the dispositive question, framed by Ferrer's insistence that the TAA had exclusive jurisdiction over the controversy, was not whether the FAA pre-empted the TAA but rather who should decide the question of the contract's validity.[34]

The Supreme Court began its analysis by articulating the foundational language of the FAA: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[35]

The conundrum posited by the language of Section 2 is which entity—an arbitrator or a court—should decide whether "grounds . . . exist at law or in equity" to invalidate an arbitration agreement.[36] Relying on *Prima Paint Corp. v. Flood & Conklin Manufacturing*

25. *Id.*
26. *Id.*
27. *Id.* Ferrer's complaint in the Superior Court proceeding, in which he sought a stay of the arbitration, stated: "[T]he [c]ontract is void by reason of [Preston's] attempt to procure employment for [Ferrer] in violation of the [TAA]," and "the [c]ontract's arbitration clause does not vest authority in an arbitrator to determine whether the contract is void." *Preston*, 128 S. Ct. at 984 n.3.
28. *Id.* at 982.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 983.
33. *Preston*, 128 S. Ct. at 983.
34. *Id.* at 983.
35. 9 U.S.C. § 2 (2006).
36. *Preston*, 128 S. Ct. at 983.

Company,[37] the Supreme Court held that "attacks on the validity of an entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator's ken."[38] More recently, in *Buckeye Check Cashing*, the Supreme Court re-affirmed the doctrine of severability, and held that where parties execute an agreement to arbitrate, an assertion that the contract containing the arbitration clause is illegal under state law and void ab initio lies within the province of the arbitrator to decide.[39] Since Ferrer never challenged the arbitration clause,[40] nor did he dispute that the written arbitration clause came within the rubric of Section 2, the open issue was largely resolved by the application of *Buckeye*.[41] Ferrer, however, attempted to distinguish *Buckeye* by arguing that the TAA did not really foreclose arbitration—that TAA resolution was merely the first step in "exhaust[ing] . . . administrative remedies before the parties proceed[ed] to arbitration."[42] The Supreme Court found this argument unavailing for two reasons. First, the TAA contained various procedural prescriptions which conflicted with the FAA's "dispute resolution scheme."[43] Specifically, the TAA granted the Labor Commissioner exclusive jurisdiction to decide the fee issue, an issue which was encompassed by the parties' agreement to arbitrate.[44] Second, TAA Section 1700.45 imposed prerequisites that applied only to arbitration but not to contracts generally.[45] Although Ferrer countered that the TAA resolution was merely a prelude to other forms of resolution, the Supreme Court rejected this argument since the TAA

37. 388 U.S. 395 (1967). In *Prima Paint*, the Supreme Court decided whether a claim of fraud in the inducement of the entire contract was to be resolved by the federal court, or whether the matter should be referred to an arbitrator. *Id.* at 396-97. The Supreme Court held that the language of Section 4 of the FAA limits the statutory function of the courts to whether an agreement to arbitrate exists. *Id.* at 404. Since *Prima Paint* did not assert that F & C fraudulently induced it to enter into the agreement to arbitrate, the overarching question of whether the consulting agreement between the parties—both the execution and its acceleration—was one which should be decided in arbitration. *Id.* at 406. Although the correctness of *Prima Paint* continues to be heatedly debated in academic circles, it remains the law with few exceptions.

38. *Preston*, 128 S. Ct. at 984.

39. 546 U.S. at 449.

40. *Preston*, 128 S. Ct. at 984. Ferrer's brief in the appeals court stated: "Ferrer does not contend that the arbitration clause in the [c]ontract was procured by fraud. Ferrer contends that Preston unlawfully acted as an unlicensed talent agent and hence cannot enforce the [c]ontract." *Id.*

41. *Id.*

42. *Id.* at 985.

43. *Id.*

44. *Id.*

45. *Preston*, 128 S. Ct. at 985.

specified that after a Labor Commissioner determination, de novo review could occur only in Superior Court, not elsewhere.[46]

Ferrer's second argument focused on the nature of the Labor Commissioner's forum, namely that it was administrative in nature.[47] Ferrer stated that arbitration would "undermine the Labor Commissioner's ability to stay informed of potentially illegal activity . . . and would deprive artists protected by the TAA of the Labor Commissioner's expertise."[48] This argument had been considered and repudiated in *Gilmer*,[49] in which the United States Supreme Court held that the mere involvement of an administrative agency—the EEOC—did not negate the parties' obligation to comply with their arbitration agreement.[50] The Supreme Court also emphasized that in *Gilmer,* the EEOC served as the prosecutorial arm, responsible for determining whether it would initiate judicial proceedings in its own name upon reviewing a charge of discrimination. Here, the TAA was the adjudicator, a role more properly reserved for an arbitrator.[51]

Finally, Ferrer attempted to distinguish *Buckeye* by asserting reliance on *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University.*[52] In *Volt*, the Supreme Court held that where parties incorporate a choice-of-law clause in their contract which implicates procedural rules of arbitration, the parties' choice-of-law clause will govern.[53] *Volt*, however, was factually dissimilar to *Preston* in several important respects. First, *Volt* involved a California statute dealing with cases in which a party to an arbitration agreement was also a party in a court action involving non-parties (non-signatories to arbitration agreements).[54] The California statute was in place to avoid waste of judicial resources.[55] Thus, under the statute, arbitration was not foreclosed.[56] In an effort to reduce the risk of conflicting rulings,

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46. *Id.* at 986.
47. *Id.*
48. *Id.*
49. 500 U.S. 20.
50. *Id.*
51. *Preston*, 128 S. Ct. at 987. The Court stated: "[I]n proceedings under § 1700.44(a), the Labor Commissioner functions not as an advocate advancing a cause before a tribunal authorized to find the facts and apply the law; instead the Commissioner serves as impartial arbitrator. That role is just what the FAA-governed agreement between Ferrer and Preston reserves for the arbitrator." *Id.*
52. 489 U.S. 468.
53. *Id.* at 478.
54. *Id.* at 471.
55. *Id.* at 476.
56. *Id.*

arbitration was simply delayed.[57] In this case, however, the arbitration clause contained a specific reference to the rules of the American Arbitration Association.[58] Both parties executed the agreement, and "there [was] no risk that related litigation [would] yield conflicting rulings on common issues."[59] Second, even though the contract in *Volt* expressly incorporated AAA's Construction Arbitration Rules, "Volt never argued that incorporation of [the AAA] rules trumped the choice-of-law clause" in the parties' contract.[60] Thus, "neither [the Supreme Court's] decision in *Volt* nor the decision of the California appeals court in that case addressed the import of the contract's incorporation by reference of privately promulgated rules."[61]

The ostensible conflict of competing clauses was previously resolved by the Supreme Court in *Mastrobuono v. Shearson Lehman Hutton, Inc.*[62] In *Mastrobuono*, the Supreme Court construed a contract that contained "both a New York choice-of-law clause and a clause [that] provid[ed] for arbitration in accordance with the Rules of the National Association of Securities Dealers."[63] In order to harmonize the two provisions, the Court "read the choice-of-law clause to encompass substantive principles that New York courts would apply, but not to include [New York's] special rules limiting the authority of arbitrators."[64] Similarly, the Preston-Ferrer contract contained two separate provisions—a choice-of-law clause and the AAA rules.[65] Specifically, R-7(b) of the AAA rules stated that "[t]he arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part."[66] Using *Mastrobuono* as the template, the Supreme Court concluded that the California law would be read to encompass the parties' substantive rights and obligations, but

57. *Id.*

58. *Preston*, 128 S. Ct. at 988.

59. *Id.*

60. *Id.*

61. *Id.* At oral argument, Preston's counsel argued that *Volt* was not germane to the case. Transcript of U.S. Oral Argument, 2008 WL 117843 *9 (U.S.). At a minimum, the fact that the parties had incorporated AAA rules into the agreement placed the overarching arbitrability question—one of jurisdiction, not intent—within the purview of arbitral decision-making. *Id.*

62. 514 U.S. 52 (1995).

63. *Preston*, 128 S. Ct. at 988 (discussing *Mastrobuono*, 514 U.S. 52).

64. *Id.* at 989 (quoting *Mastrobuono*, 514 U.S. at 63-64).

65. *Id.* at 988.

66. *Id.* at 989.

would not impact the authority of the arbitrator.[67] The judgment of the California Court of Appeals was reversed and remanded.[68]

Justice Thomas dissented, asserting that the Federal Arbitration Act was never intended to apply to proceedings in state court.[69] According to Justice Thomas, the FAA could not be used to eclipse "a state law that delay[ed] arbitration until administrative proceedings" were concluded.[70] This view, long out of step with majoritarian thinking on the purpose of the FAA, also misreads one fundamental aspect of *Preston*. The state law at issue in *Preston* did not delay arbitration. It precluded arbitration entirely, since the statute restricted review of the Labor Commissioner's decision to the Superior Court. Thus, the only way in which the parties could have arbitrated any issue is if they had agreed to waive the statutory requirement, and proceed to either AAA or non-administered private arbitration.

It would seem that *Preston*, like *Prima Paint* decades before it, is a case of judicial efficiency. The primary question presented under the severability doctrine is whether jurisdiction should shift to the courts, once a party asserts fraud in the inducement or illegality of the contract as a whole. For logical minds, the answer is in the affirmative, since the arbitral tribunal is without authority to exercise jurisdiction. But this is an incomplete analysis, as *Prima Paint*, *Buckeye,* and *Preston* now instruct. As one commentator notes, "[u]nder the contract theory of arbitral adjudicatory authority, the judicial process would always intervene to decide this initial question, thereby creating any opportunity at least to delay the arbitration and to undermine the autonomy of the arbitral mechanism."[71] The severability doctrine counters this prospect, and assures that parties intent on engaging in dilatory tactics will not be given judicial support. To be sure, the FAA does not provide any foundational support for the severability doctrine—it is purely a judicial creation. Nonetheless, *Preston* illustrates that the Supreme Court is not likely to abandon the severability paradigm any time soon.

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67. *Id.*

68. *Id.*

69. *Preston*, 128 S. Ct. at 989 (Thomas, J., dissenting). Justice Thomas' dissent in *Preston* was foreshadowed by earlier dissents in *Buckeye*, 546 U.S. 440, and Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265 (1995).

70. *Preston*, 128 S. Ct. at 989 (Thomas, J., dissenting).

71. THOMAS E. CARBONNEAU, CASES AND MATERIALS ON ARBITRATION LAW AND PRACTICE (Thomson West, 4th ed. 2007).

B. Enforceability of Agreements to Arbitrate

1. Common Law Versus Statutory Arbitration

A recurring theme in Michigan arbitral jurisprudence is the distinction between common law and statutory arbitration. Common law arbitration typically arises when a provision to arbitrate future disputes under a contract omits a provision for entry of judgment upon the award by a circuit court, that is, "to avail themselves of the statutory arbitration provisions, parties to a contract must clearly evidence that intent by contract provision for entry of judgment upon the award by a circuit court."[72] In the following case, the Michigan Court of Appeals narrowed the definition of "common law arbitration," ruling that as long as the magical language—"the award shall be enforced in court"—is embedded in the parties' arbitration clause, an explicit reference to "*circuit*" does not need to appear in the arbitration clause for the agreement to be given statutory arbitration effect.[73]

In *Rooyakker & Sitz*, plaintiffs were accountants employed by Plante & Moran.[74] As a condition of employment, they signed a "Practice Staff-Relationship Agreement" which contained both a client solicitation clause and an arbitration clause.[75] The client solicitation clause essentially precluded employees from engaging in any professional accounting or consulting work provided to the firm's current client base for two years.[76] Breach of the agreement would require the employee to pay back the firm.[77] The arbitration clause provided that "at the option of the firm:"

> any dispute or controversy arising out of or relating to this Agreement, may be settled by arbitration held in Oakland County, Michigan, following the rules then in effect of the American Arbitration Association. The arbitrator may grant injunctive or other relief. The decision of the arbitrator will be final, conclusive, and binding on the parties. Judgment may be

72. *See* THOMAS L. GRAVELLE & MARY A. BEDIKIAN, MICHIGAN PLEADING AND PRACTICE, Vol. 8A § 62C:4 (Callaghan: Lawyers Cooperative Publishing, 2d ed. 1994).

73. Rooyakker & Sitz, P.L.L.C. v. Plante & Moran, P.L.L.C., 276 Mich. App. 146, 154-55, 742 N.W.2d 409, 416 (2007).

74. *Id.* at 148, 742 N.W.2d at 413.

75. *Id.*

76. *Id.* at 148-49, 742 N.W.2d at 413.

77. *Id.* at 149-50, 742 N.W.2d at 413-14.

> entered based on the arbitrator's decision in any court having jurisdiction.[78]

After they executed the above agreements, plaintiffs were informed that Plante & Moran would be ceasing operations in Gaylord.[79] Although plaintiffs were offered an opportunity to move to the Traverse City office, they chose instead to remain in Gaylord, and open their own office.[80] Several of the firm's clients requested that plaintiffs provide accounting and tax-related services.[81] When Plante & Moran learned of this development, they demanded arbitration and pled compensatory damages of $140,000.[82] In response, plaintiffs filed suit, seeking a declaration that the agreement was unreasonable and unenforceable.[83] Defendants motioned for summary disposition.[84] Plaintiffs cross-motioned, asserting that the client solicitation clause violated the Michigan Antitrust Reform Act, Section 445.771 of the Michigan Complied Laws "because its purpose had been frustrated"[85] by virtue of Plante & Moran's closing of the Gaylord office.[86] After oral arguments, the trial court granted defendants' motion for summary disposition, concluding that plaintiffs had failed to meet the requirements of Section 2.116.[87] The trial court found that the arbitration clause inserted into the client solicitation letter was enforceable under the Michigan Arbitration Statute—it was in writing and permitted a circuit court to enter judgment based on the award of the arbitrator.[88] This was tantamount to a statutory arbitration clause, thus it was deemed binding on the parties.[89]

The Michigan Court of Appeals concurred with the circuit court and held that the parties' agreement met the requisites of the Michigan Arbitration Act. To reach this conclusion, the appellate court had to distinguish the facts of this case from those of *Wold Architects & Engineers v. Strat.*[90] In *Wold*, the Michigan Supreme Court stated that in order for parties to arbitrate, their agreements must conform to the

78. *Id.*
79. *Rooyakker*, 276 Mich. App. at 150, 742 N.W.2d at 414.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 151, 742 N.W.2d at 414.
84. *Id.*
85. *Rooyakker*, at 150, 742 N.W.2d at 414.
86. *Id.*
87. *Id.* at 151-52, 742 N.W.2d at 414-15.
88. *Id.* at 151, 742 N.W.2d at 414.
89. *Id.*
90. 474 Mich. 223, 713 N.W.2d 750 (2006).

requirements of Section 600.5001(2) of the Michigan Complied Laws—a writing—and must also require that a circuit court has the authority to enforce an arbitrator's award.[91] Unlike in *Wold*, the parties' agreement here clearly specified that an arbitrator's decision could be confirmed in "court." The language did not need to read "circuit court."

The appellate court went on to note that this decision was consistent with a long line of Michigan cases in which courts have held that arbitration agreements with similarly broad language constituted *statutory* arbitration agreements.[92] By including baseline enforcement language, the parties conveyed their intent to be bound by the arbitrator's award, an indispensable predicate to statutory arbitration.[93]

Plaintiffs raised three additional arguments respecting arbitrability, all of which the court of appeals soundly rejected. First, plaintiffs alleged that the client solicitation clause was tantamount to a non-competition agreement that violated Section 2 of the Michigan Antitrust Reform Act (MARA).[94] In tandem with this argument, plaintiffs asserted that Section 5 of Section 445.775 of the Michigan Complied Laws conveyed exclusive jurisdiction over MARA violations, thus submission to arbitration of any such claims was improper.[95] The appellate court disagreed, stating that Michigan law favors arbitration.[96] Simply because a statute provides jurisdiction to the circuit court does not mean that arbitration is necessarily precluded.[97] Here, the parties own agreement

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91. *Id.* at 238, 713 N.W.2d at 758-59.

92. *See* Gordon Sel-Way, Inc. v. Spence Bros., Inc., 438 Mich. 488, 495, 475 N.W.2d 704, 709 (1991) (holding that "[b]ecause the Spence/Sel-Way arbitration clause provides that judgment may be entered [in any court having jurisdiction] on the arbitration award, it falls within the definition of 'statutory arbitration,' and is governed by MCL § 600.5001 *et seq.*"). *See also* Hetrick v. Friedman, D.P.M., P.C., 237 Mich. App. 264, 269, 602 N.W.2d 603, 606 (1999) (holding that an arbitration agreement was statutory where it "included a provision for a judgment upon the arbitration award to be entered in a court having jurisdiction").

93. The continued viability of common law arbitration, which embraces the unilateral revocation rule, remains open to debate. Justice Corrigan expressed her inclination to abrogate the unilateral revocation rule in her concurring opinion in *Wold*, 474 Mich. at 239, 713 N.W.2d at 759. Commending the policy choice to the Legislature, she explained that the rule applied by the *Wold* majority was "the last vestige of that bygone judicial age when arbitration agreements were regarded as unlawful attempts to oust the courts of jurisdiction." *Id.* at 242, 713 N.W.2d at 761. Its continued existence "undermines the well-established doctrine that parties enjoy the freedom to contract." *Id.* at 239, 713 N.W.2d at 759.

94. *Rooyakker*, 276 Mich. App. at 155, 742 N.W.2d at 417.

95. *Id.*

96. *Id.* at 156, 742 N.W.2d at 417.

97. *Id.*

provided for arbitration of any and all employment disputes.[98] This clause was broad enough to cover plaintiffs' claims. Second, plaintiffs asserted that the trial court erred in allowing their frustration-of-purpose claim to be submitted to arbitration, since this was a question of public policy.[99] The court did not reach the question of public policy, because it determined that the closure of the Gaylord office was foreseeable, and it did not frustrate the purpose of the parties' agreement—"protecting its client relationships."[100] Finally, plaintiffs argued that the trial court should not have submitted their claims to arbitration because two of the plaintiffs, Lang and Carroll, were not parties to the agreement.[101] The court of appeals rejected this argument on two grounds. First, the plaintiffs had not raised this argument in the court below, thus the issue was not properly preserved for appellate review.[102] Second, citing the disposition of Michigan courts to resolve conflicts in favor of arbitration, the court of appeals concluded that the broad language employed by the parties imbued "the arbitrator with the authority to hear plaintiffs' tortious interference and defamation claims, even if [such claims] involv[ed] non-parties to the agreement."[103] "Michigan courts clearly favor keeping all issues in a single forum."[104]

2. Consumer Claims Arising Under Mandatory Arbitration Agreements

It is axiomatic that arbitration is a creature of contract.[105] In the past, courts have been reluctant to compel arbitration of ancillary tort or statutory claims, based on the view that arbitrators were ill-equipped to

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98. *Id.*

99. *Id.* at 159, 742 N.W.2d at 418-19.

100. *Rooyakker*, 276 Mich. App. at 160, 742 N.W.2d at 419.

101. *Id.* at 162, 742 N.W.2d at 420.

102. *Id.* at 162, 742 N.W.2d at 421.

103. *Id.* at 163, 742 N.W.2d at 421.

104. *Id.* (citing Detroit Auto. Inter-Ins. Exch. v. Reck, 90 Mich. App. 286, 289, 282 N.W.2d 292 (1979) (holding that a strong public policy exists in Michigan favoring arbitration "as a simple, expeditious means of resolving disputes," and that "[t]he policy in favor of this expeditious alternative to the judicial system is thwarted if all disputed issues in an arbitration proceeding must be segregated into [arbitrable and nonarbitrable] categories").

105. *See* KATHERINE V.W. STONE, ARBITRATION LAW 1 (Foundation Press 2003) ("arbitration is a creature of the parties and the parties are free to shape the scope of arbitration and the procedures to be used in whatever way they please."). *See also* STEPHEN K. HUBER & MAUREEN A. WESTON, ARBITRATION: CASES AND MATERIALS (LexisNexis, 2d ed. 2006) ("As arbitration is a matter of contract between the parties, only disputes within the scope of the arbitration clause are 'arbitrable.'").

adjudicate such claims. This view was reversed in a series of United States Supreme Court decisions in the 1980s, in which the Court concluded that the mere fact that a claim is public in nature does not automatically preclude an arbitrator from deciding it.[106] Although this remains the prevailing view, questions concerning statutory claims continue to percolate to the forefront. In a case of first impression, a Michigan district court examined the arbitrability of statutory claims under the Credit Repair Organization Act (CROA).

In *Revialo Rex v. CSA Credit Solutions of America, Inc.*, plaintiff, a Michigan resident, filed suit against CAS-Credit Solutions, a Texas corporation offering debt settlement assistance.[107] "Under the terms of the parties' [Client Service] Agreement, defendant was to negotiate with plaintiff's creditors" to reduce plaintiff's debt.[108] On advice of defendant's representative, plaintiff ceased making payments to various credit companies.[109] After plaintiff discontinued the payments, Citibank filed two separate lawsuits.[110] Subsequently, plaintiff filed a complaint with the Better Business Bureau (BBB) in Texas.[111] Defendant agreed to refund plaintiff the service fees that plaintiff had paid to secure defendant's services.[112] Plaintiff did not respond to the BBB's request for additional information but instead filed a complaint in Michigan federal court, asserting a wide spectrum of claims—"a violation of the [Credit Repair Organization Act], fraudulent inducement to contract, a violation of the Michigan Credit Services Protection Act, . . . a violation of the Michigan Consumer Protection Act, . . . a breach of fiduciary duty, negligence, and unauthorized practice of law."[113]

Before addressing plaintiff's claim under the Credit Repair Organization Act, the district court focused on whether a valid arbitration agreement existed between the parties.[114] Looking to "ordinary state-law principles that govern the formation of contracts," the court disposed of the conflict of laws question.[115] The agreement between the parties included a choice of law provision designating Texas law as the governing law.[116] "Under Michigan law, a contractual choice of law

106. *See* discussion *infra* note 143.
107. 507 F. Supp. 2d 788, 792 (W.D. Mich. 2007).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 792.
113. *Revialo Rex*, 507 F. Supp. 2d at 792.
114. *Id.* at 793.
115. *Id.*
116. *Id.*

provision is valid unless: (i) 'the chosen state has no substantial relationship to the parties or the transaction,' or the chosen state's law 'would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state . . . .'"[117] The defendant's domicile—Texas—met the first condition.[118] With respect to the second condition, the district court could not identify "any aspect of Texas law . . . that would be contrary to the fundamental policy of Michigan."[119]

Applying Texas law, the district court initially focused on plaintiff's fraudulent inducement claim.[120] To avoid arbitration, the party opposing arbitration must assert and prove that the challenge is against the arbitration clause, not the container agreement in which the arbitration clause is embedded.[121] Here, plaintiff contended that defendant fraudulently induced him to execute "the agreement to arbitrate because defendant made a series of statements . . . that arbitration [was] not fair to consumers."[122] The district court rejected this claim because plaintiff failed to establish a nexus between the statements and "his decision to enter into the arbitration clause."[123]

Next, plaintiff asserted that the arbitration clause was unconscionable.[124] The law of unconscionability under Texas law includes two aspects—procedural unconscionability, which looks to the surrounding circumstances of the contract's execution, and substantive unconscionability, which examines the fairness of the underlying arbitration provision.[125] The district court found that the Client Service Agreement was not procedurally unconscionable.[126] "[T]he arbitration clause . . . was labeled as an arbitration clause and stated that the parties were waiving the right to a jury trial," and the consumer did not allege "that he was surprised by the arbitration clause."[127] The fact that one party has more bargaining power goes to the question of the contract's overall adhesiveness level, but it does not necessarily "negate a bargain."[128]

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117. *Id.* (citing Chrysler Corp. v. Skyline Indus. Servs., 448 Mich. 113, 126, 528 N.W.2d 698 (1985) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1979)).

118. *Id.*

119. *Revialo Rex*, 507 F. Supp. 2d at 793.

120. *Id.*

121. *Id.* at 793-94.

122. *Id.* at 794.

123. *Id.*

124. *Id.*

125. *Revialo Rex*, 507 F. Supp. 2d at 794.

126. *Id.*

127. *Id.* at 795.

128. *Id.*

Finding no procedural unconscionability, the court next examined substantive unconscionability.[129] Plaintiff asserted that the arbitration provision was substantively unconscionable because the clause provided that arbitration would occur in Dallas, Texas, the venue of defendant's business.[130] The district court responded in two ways to this argument. First, under a *Randolph*-type analysis, the burden was on the plaintiff to establish that the costs of accessing the forum were burdensome.[131] plaintiff failed to provide this evidentiary support. Second, and equally important, the defendant agreed that the arbitration would occur in Michigan.[132]

Finally, plaintiff argued that defendant waived his right to arbitrate, offering two separate and distinct bases.[133] First, plaintiff asserted that defendant's statements with respect to the unconstitutionality and the unfairness of arbitration constituted an intention to waive arbitration.[134] The federal district court concluded that plaintiff did not show how these statements constituted waiver.[135] "For the Court to infer a waiver based on defendant's general statements, would be contrary to the admonition that waiver of the right to arbitration is not to be lightly inferred."[136]

Plaintiff also contended that defendant waived his right to arbitrate because of his efforts in settling plaintiff's claim before the Dallas BBB.[137] One requirement of waiver is that the opposing party incurs actual prejudice.[138] Here, however, defendant waited a short time, only

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129. *Id.*

130. *Id.*

131. *Revialo Rex*, 507 F. Supp. 2d at 795. In Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000), the United States Supreme Court acknowledged that the existence of large arbitration costs may effectively preclude a litigant from vindicating her statutory rights in arbitration. However, the burden is on the moving party to demonstrate that the arbitral forum is not accessible. *Id.* at 92.

132. The arbitration was to occur under AAA rules. The AAA's Consumer Due Process Protocols require arbitration to occur "at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances." *Consumer Due Process Protocol*, Principle 7, American Arbitration Association, *available at* http://www.adr.org/sp.asp?id=22019 (last visited March 29, 2009).

133. *Revialo Rex*, 507 F. Supp. 2d at 796.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* Gen. Star Nat'l Ins. Co. v. Administratia Asigurarilor de Stat, 289 F.3d 434 (6th Cir. 2002) (citing Doctor's Assocs., Inc. v. Distajo, 107 F.3d 126, 131 (2d Cir. 1997) (holding that a delay of seventeen months between litigation and arbitration was sufficiently prejudicial to the other party so as to constitute waiver)).

over a month, before defendant filed the motion to compel arbitration.[139] Moreover, defendant never denied the existence of the service agreement nor did he deny the arbitration clause.[140] Plaintiff could not demonstrate any detriment. "Requiring parties to seek to submit a dispute to arbitration prior to the initiation of litigation would be inconsistent with the general purpose of arbitration—avoiding the expenses often associated with litigation."[141] Accordingly, the federal district court found no waiver.[142]

Having determined that a valid agreement to arbitrate existed, the district court turned its attention to plaintiff's CROA claim. Recognizing the broad breadth of arbitrability, the district court stated that statutory claims are arbitrable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.[143] Such intent is "typically evidenced in the statutory text, legislative history, or by an inherent conflict between arbitration and the underlying purposes of the statute."[144] Here, the federal court concluded that text of the CROA did not evidence a congressional intent for claims under the CROA to be non-arbitrable, finding that the "[t]he language in § 1679g(a) is not materially distinguishable from the language in other federal statutes that the Supreme Court has held are arbitrable."[145]

In addition, neither party identified any part of the legislative history that foreclosed arbitration. "In the absence of any discussion of arbitration in the legislative history, the legislative history cannot provide a basis for the court to conclude that Congress intended claims under the CROA to be non-arbitrable."[146]

Finally, the federal court concluded that there was no inherent conflict between arbitration and the CROA, which was designed to protect the public from unfair or deceptive advertising and business practices by credit repair organizations.[147] "[T]he Supreme Court has

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139. *Revialo Rex*, 507 F. Supp. 2d at 797.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* (quoting *Gilmer*, 500 U.S. 26).

144. *Id.* (quoting Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 313 (6th Cir. 2000)).

145. *Revialo Rex,* 507 F. Supp. 2d at 799. *See, e.g.*, *Randolph*, 531 U.S. 79 (Age Discrimination in Employment Act); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (Securities Act of 1933); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987) (Securities Exchange Act of 1934, Racketeer Influenced and Corrupt Organization Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628-40 (1985) (Sherman Act).

146. *Revialo Rex*, 507 F. Supp. 2d at 800.

147. *Id.* at 800.

repeatedly enforced arbitration of statutory claims where the underlying purposes of the statutes are to protect and inform consumers."[148]

III. DEFENSES TO ARBITRATION

A. Arbitrability

1. Scope of Clause

A major focus of court decisions is the meaning of an arbitration clause, and whether it encompasses a broad range of claims, including those not typically assumed to be covered such as tort claims or quasi-contract claims. Doubts concerning scope are generally resolved in favor of arbitration, particularly if parties have incorporated a broad arbitration clause into their agreement.[149]

In *NCR Corporation v. Korala Associates, Ltd.*,[150] a copyright infringement case, the Sixth Circuit Court of Appeals decided whether *"touches upon matters"* was the proper standard to employ when challenges to arbitrability are asserted.[151] NCR, a provider of ATM equipment, integrated hardware and software systems and support systems, entered into a software license agreement with Korala Associates, Ltd. (KAL) in which KAL agreed to develop and license software components for NCR's ATM machines.[152] As part of the licensing obligations, KAL developed a Triple-DES system upgrade, an encryption standard designed to make ATM transactions more secure.[153] Subsequently, NCR claimed that KAL could not have developed such an upgrade without engaging in unauthorized copying of APTRA XFS and/or S4i software.[154] Asserting a variety of copyright infringement claims, NCR filed suit.[155] In response, KAL moved to dismiss NCR's amended complaint and to compel arbitration of all of NCR's claims pursuant to 9 U.S.C. Section 206 and the parties' 1998 agreement, which

148. *Id. See Rodriguez de Quijas*, 490 U.S. at 485-86; *McMahon*, 482 U.S. at 242. *Accord Allied-Bruce Terminix Co., Inc.*, 513 U.S. at 280-81 (stating that for consumers, arbitration as a forum may be preferable to litigation).

149. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983). *See also* Masco Corp. v. Zurich Am. Ins. Co., 382 F.3d 624, 627 (6th Cir. 2004).

150. 512 F.3d 807 (6th Cir. 2008).

151. *Id.* at 813.

152. *Id.* at 811.

153. *Id.* at 811-12.

154. *Id.*

155. *Id.* at 812.

contained an arbitration clause.[156] The district court granted KAL's motion to compel arbitration, and NCR timely appealed.[157]

Relying on an earlier Sixth Circuit case, *Walker v. Ryan's Family Steak Houses, Inc.*,[158] the appellate court explained its limited role—confined to determining whether the subject dispute was arbitrable. For a court to so conclude, the dispute *must* fall within the ambit of the substantive scope of the arbitration clause.[159] Here, the parties disputed not only the scope of the arbitration clause but the standard by which the court decides arbitrability.[160] At issue was the following language—"any controversy or claim arising out of or relating to this contract . . . encompasses all claims which *touch upon matters* covered by the agreement."[161] The court of appeals rejected the district court's reliance on *Fazio v. Lehman Brothers, Inc.*,[162] stating that the preferred approach is to adopt the narrower standard articulated by the United States Supreme Court in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*[163] Under the Court's more recent precedent—*Alticor, Inc. v. National Union Fire Insurance Company of Pittsburgh*[164]—if an action can be maintained without reference to the contract or relationship at issue, the action is likely outside the scope of the arbitration agreement.[165] In applying the standard to NCR's various claims, the Sixth Circuit held:

> 1. *Copyright infringement claim – APTRA XFS*: This claim was deemed arbitrable "because a court would have to reference the 1998 Agreement for part of NCR's direct infringement claim."[166]
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> 2. *Copyright infringement claim – S4i*: This claim was deemed inarbitrable. The appellate court found that referencing the 1998 Agreement was not necessary "to determine whether (1) NCR owns a copyright in the S4i software or (2) KAL was licensed or

156. *Korala Assocs.*, 512 F.3d at 812.
157. *Id.*
158. 400 F.3d 370 (6th Cir. 2005).
159. *Korala Assocs.*, 512 F.3d at 812.
160. *Id.* at 813.
161. *Id.*
162. 340 F.3d 386 (6th Cir. 2003).
163. *Korala Assocs.*, 512 F.3d at 813-14; *Mitsubishi Motors Corp.*, 473 U.S. 614 (1985).
164. 411 F.3d 669 (6th Cir. 2005).
165. *Korala Assocs.*, 512 F.3d at 814. This standard was reiterated in Nestle Waters N. Am., Inc. v. Bollman, 505 F.3d 498, 505 (6th Cir. 2007) (citing *Fazio*, 340 F.3d at 395).
166. *Korala Assocs.*, 512 F.3d at 815.

authorized to access and/or copy the S4i software."[167] "In contrast to the APTRA XFS software . . . the S4i software has no obvious link to the 1998 Agreement and finding such a link would require us to draw too many inferences that are simply not warranted."[168]

3. *Contributory copyright infringement claim*[169] *relating to APTRA XFS*: This claim was deemed inarbitrable. Although the 1998 Agreement might be implicated, the Sixth Circuit found that "a court could determine that KAL was aware of the alleged infringing activity by referencing some other source of knowledge. Second, a court would not need to reference the 1998 Agreement to determine whether KAL materially contributed to the licensees' infringement."[170]

4. *Contributory copyright infringement claim relating to S4i claim:* This claim was deemed inarbitrable for the reasons specified above.[171]

5. *Tortious interference with contract claim:* This claim was deemed inarbitrable because NCR would not need to refer to the 1998 Agreement to establish the elements of the cause of action.[172]

6. *Illegal importation of infringing copies – APTRA XFS*: This claim was deemed arbitrable because the claim turned on whether KAL in fact infringed NCR copyright of the APTRA XFS software.[173]

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167. *Id.*

168. *Id.*

169. "Contributory [copyright] infringement occurs when one, *with knowledge of the infringing activity*, induces, causes, or materially contributes to the *infringing conduct of another*." *Id.* at 816.

170. *Id.* at 817.

171. *Id.*

172. *Korala Assocs.*, 512 F.3d at 818. To sustain a tortious interference with contact claim, NCR would have to show "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages." *Id.* at 817 (citing Fred Siegel Co., L.P.A. v. Arter & Hadden, 707 N.E.2d 853, 858 (1999)).

173. *Id.* at 818.

7. *Illegal importation of infringing copies – S4i*: This claim was deemed inarbitrable because NCR's direct infringement claim was not arbitrable.[174]

8. *Common law unfair competition*: This claim was deemed arbitrable because the nature of the allegations related to confidentiality provisions and the Mutual Disclosure Agreement incorporated into the 1998 Agreement.[175]

Despite the analytical complexities of *Korala Associates*, the Sixth Circuit's decision solidified three primary points of arbitral jurisprudence. First, arbitration remains a matter of contract between parties. Second, when parties by choice incorporate a broad arbitration clause, the *presumption* is to favor arbitration, absent the most forceful evidence otherwise. And third, to determine whether the presumption applies, courts may conduct a tertiary review. This is often a slippery slope for courts, as they must fulfill this mandate without deciding the claim on the merits. In *Korala Associates*, the Sixth Circuit did not stray from its limited charge.

2. Time-Limitations Bar

In 2006, the Sixth Circuit Court of Appeals decided *United Steelworkers of America, AFL-CIO-CLC v. Saint Gobain Ceramics & Plastics, Inc.*,[176] holding that a time-limitation bar constituted a threshold question for a judge to resolve.[177] This case was one of the few surprise decisions of last year's *Survey* period, now set straight by the appellate court's en banc reversal.[178]

Gobain, which manufactures refractory products for industrial clients, entered into a collective bargaining relationship with the United Steelworkers.[179] Several years into their collective relationship, Gobain

174. *Id.*

175. *Id.*

176. 467 F.3d 540 (6th Cir. 2006).

177. *Id.* at 541. The Sixth Circuit affirmed the district court's decision, stating that they were bound by an earlier decision. *See* General Drivers, Warehousemen & Helpers, Local Union 89 v. Moog Louisville Warehouse, 852 F.2d 871, 873 (6th Cir. 1988) (holding that a federal judge, not an arbitrator, determines whether a time-limitation bar applies to filed grievances).

178. United Steelworkers of Am., AFL-CIO-CLC v. Saint Gobain Ceramics & Plastics, Inc., 505 F.3d 417 (6th Cir. 2007).

179. *Id.* at 419.

fired two employees for insubordination.[180] The union grieved on their behalf.[181] The parties' collective bargaining agreement (c/b/a) included a four-step process for resolving grievances, the last step of which was arbitration.[182] On March 29, 2004, Gobain issued its formal denial with respect to both grievances.[183] Under the parties' c/b/a, the union had 30 days from which to notice the appeal of the grievances' denials.[184] The union informed the company of its decision to appeal in a letter dated May 19 which the company received on May 24.[185] The company refused to arbitrate, asserting that the union violated the time limits explicitly stated in the parties' c/b/a.[186] The union filed suit in federal district court to compel arbitration under Section 301 of the Labor-Management Relations Act.[187] The district court denied the motion, holding the grievances to be inarbitrable; the union appealed.[188]

The Sixth Circuit held that the time limitations bar constituted a condition precedent to arbitration, thus it was a question for the court, not the arbitrator, to determine.[189] Under *Moog*,[190] a time limitation embedded in the steps of a collective bargaining grievance process is the equivalent of an express time-limitations bar.[191] As such, it constituted a question of substantive arbitrability which should be determined by a court.[192]

In an en banc review, the Sixth Circuit reversed and remanded the case to the district court to enter an order permitting arbitration to move forward.[193] Relying on a long line of cases reaching as far back as 1964, the Sixth Circuit once again embraced the historical rule, i.e., that a time-limitation provision involves a matter of procedure.[194] "It is a 'condition

180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*
184. *Gobain Ceramics,* 505 F.3d at 419.
185. *Id.*
186. *Id.*
187. *Id.*; Labor Management Relations Act, 29 U.S.C. § 185 (1947).
188. *Gobain Ceramics*, 505 F.3d at 419.
189. *Id.* at 425.
190. *Moog*, 852 F.2d 871.
191. *Gobain Ceramics*, 505 F.3d at 423. Both the language in *Moog* and the language in *Gobain Ceramics* included a specific provision that stated that the failure to comply with the required time limits would preclude arbitration. *Id.*
192. *Id.* at 425. The Sixth Circuit proceeded to decide the case on the merits, concluding that the union had exceeded the time limits required for proper filing of the grievances.
193. *Id.*
194. *Id.* at 419-20. John Wiley & Sons v. Livingston, 376 U.S. 543 (1964). *See also* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002) (holding that a time-limit

precedent' to arbitration, and it thus is 'presumptively' a matter for an arbitrator to decide. In the absence of an agreement to the contrary, in the absence . . . of language in the agreement rebutting the presumption, arbitrators rather than judges should resolve disputes over time-limitation provisions."[195]

The Sixth Circuit found additional support for its position in the introductory sentence of the ADR provision which stated: "Should disagreements arise as to the meaning and application of or compliance with the provisions of this agreement, there shall be no cessation of work at any time by the matter shall be settled promptly in the following manner . . ."[196] Finding the language consistent with *John Wiley & Sons*, the Sixth Circuit concluded that the time-limitation bar was for an arbitrator to decide.[197]

The decision in *Gobain* clearly recognized that the function of the federal courts is very limited when parties have agreed to submit questions of contract interpretation to the arbitrator. In most cases, parties would prefer to have an arbitrator's read on the interpretive issue, not a court's. The en banc reversal returned the jurisprudence to its more logical starting point,[198] allowing parties to operate with greater certainty that *absent* a specific contractual exclusion, a purely procedural issue remains a question for an arbitrator to determine.

Despite the Sixth Circuit's well-crafted en banc decision, Judge Clay filed an exhaustive dissent, in which he excoriated the majority's rationale.[199] Judge Clay observed that the principal difficulty with the decision is that it insulated decisions respecting arbitrability from judicial review even where it is not at all clear that the parties intended for an arbitrator to determine the subject matter of the dispute.[200] In this case, because the parties had conditioned the right to arbitrate a grievance

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rule is a matter presumptively for an arbitrator to determine). In *John Wiley & Sons*, the Supreme Court rationalized that such an issue was a matter of procedure which arose from a collective bargaining agreement and bore on its final disposition; any other construction would delay arbitration and would place the court in a position of having to separate related issues, producing "frequent duplication of effort." 376 U.S. at 558-59.

195. *Gobain Ceramics*, 505 F.3d at 422.

196. *Id.*

197. *Id.*

198. *See* Raceway Park, Inc. v. Local 47, Serv. Employees Int'l Union, 167 F.3d 953, 954 (6th Cir. 1999) ("*Moog* represents a grave departure from Supreme Court doctrine mandating that issues of procedural arbitrability be determined by arbitrators not judges.").

199. *Gobain Ceramics*, 505 F.3d at 425-37 (Clay, J., dissenting).

200. *Id.* at 426.

based on strict compliance with the time limits noted in the c/b/a,[201] and in the absence of specific express language authorizing the arbitrator to rule on issues of arbitrability, Judge Clay concluded that the parties' own agreement did not contemplate that arbitrability claims be directed into arbitration, without a preliminary ruling from a judicial forum.[202]

The legal framework within which Judge Clay's dissent was crafted certainly buttresses the possibility that the majority may have side-tracked an important consideration in collectively bargained contracts, and that is party intent, divined from the parties' express terms as they appear in such contracts. The other salient point made by the dissent is this—that labor disputes in particular cannot be broken into substantive and procedural aspects as readily as one might assume because "[q]uestions concerning the procedural prerequisites to arbitration do not arise in a vacuum; they develop in the context of an actual dispute about the rights of the parties to the contract or those covered by it."[203] Notwithstanding, the en banc decision in *Gobain Ceramics* forces parties to consider, when bargaining contracts, whether a timeliness provision should fall prey to judicial default rules or presumptions. In the end, the Sixth Circuit, predictably[204] and wisely adopted a preference for arbitral resolution of timeliness claims, even though the parties' contract language may be ambiguous, because arbitrators are not only well-suited

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201. Judge Clay relied on the following language of Article 28, Adjustment of Grievances:

> 4. Both parties mutually agree that grievances to be considered must be filed promptly as set forth above after the occurrence thereof. Grievances not appealed within the time limits set forth in Steps 1, 2, 3, or 4 shall be considered settled on the basis of the decision last made and shall not be eligible for further discussion or appeal.

Id. at 426 (emphasis omitted).

202. *Id.* at 426-28.

203. *Id.* (quoting *John Wiley*, 376 U.S. at 556-57).

204. The Sixth Circuit observed that every court of appeals has held that arbitration prerequisites, *such as time limits*, are for arbitrators to decide. *Id.* at 425. *See* Local 285, Serv. Employees Int'l Union, AFL-CIO v. Nonotuck Res. Assocs., Inc., 64 F.3d 735, 739-40 (1st Cir. 1995); Rochester Tel. Corp. v. Commc'n Workers, 340 F.2d 237, 238-39 (2d Cir. 1965); Chauffeurs, Teamsters & Helpers, Local Union No. 765 v. Stroehmann Bros. Co., 625 F.2d 1092, 1093-94 (3d Cir. 1980); Local 1422, Int'l Longshoremen's Ass'n v. S.C. Stevedores Ass'n, 170 F.3d 407, 410 (4th Cir. 1999); Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 753-54 (5th Cir. 1995); Beer Sales Drivers, Local Union No. 744 v. Metro Distribs., 763 F.2d 300, 303 (7th Cir. 1985); Auto., Petroleum & Allied Indus. Employees Union, Local No. 618 v. Town & Country Ford, Inc., 709 F.2d 509, 511-14 (8th Cir. 1983); Toyota of Berkeley v. Auto. Salesmen's Union, Local 1095, 834 F.2d 751, 754 (9th Cir. 1987); Denhardt v. Trailways, Inc. 767 F.2d 687, 689-90 (10th Cir. 1985); Aluminum, Brick & Glass Workers Int'l Union v. AAA Plumbing Pottery Corp., 991 F.2d 1545, 1548 n.1, 1550 (11th Cir. 1993); Wash. Hosp. Ctr. v. Serv. Employees Int'l Union, Local 722, 746 F.2d 1503, 1506-08 (D.C. Cir. 1984).

but often better-suited than judges to answer questions relating to contract interpretation and compliance with arbitration procedures.[205]

B. Adhesion Contracts and Unconscionability of Contracts of Employment

The decision to use arbitration is strategic. Even when parties employ arbitration clauses deliberately and cautiously, there are times when a party resists arbitration. Resistance is more likely in situations where the negotiation dance is absent. In other words, if arbitration is imposed on the subscribing party through a contract of adhesion, there is a greater likelihood that the subscribing party will challenge arbitration on contract grounds once a dispute arises. The following cases acutely illustrate the problems associated with adhesion contracts, which are generally enforceable according to their terms, unless certain other factors are present.

In *Nance v. The Goodyear Tire & Rubber Company*,[206] the Sixth Circuit addressed the issue of whether contractual and statutory claims asserted under a c/b/a were foreclosed from subsequent judicial determination. Nance was hired by Goodyear as a bargaining unit employee on June 22, 1998.[207] Initially, she was employed as a bead-builder, "which requires the assembly of steel wires called 'beads' that attach a tire to the wheel rim."[208] Several years later, she successfully bid on and received the position of "roll-changer."[209] While on duty, she was injured, causing her to take a medical leave of absence for approximately one year.[210] After numerous attempts to accommodate the residual effects of her injury, Nance was returned to work as a stock trucker.[211] Subsequently, Nance claimed that Goodyear failed to accommodate her physical limitations.[212] Her disqualification became official at a meeting on October 3, 2003, at which Nance, her union steward and two

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205. *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ("The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.").

206. 527 F.3d 539 (6th Cir. 2008).

207. *Id.* at 543.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 544.

212. *Nance*, 527 F.3d at 544.

Goodyear representatives were present.[213] Nance chose not to file a grievance over her disqualification.[214] She continued on medical leave due to a hysterectomy.[215] She was subsequently returned to work as a "Banbury" mixer machine-cleaner, a position for which she had been previously considered.[216] Goodyear determined that she could perform the job with certain accommodations.[217] After four days on the job, she declared the position unsafe.[218] Nance left work and did not return.[219] While Nance's workers' compensation claims were pending, Nance received calls from Goodyear, but Nance was not responsive.[220] After several attempts to reach and speak with Nance personally, Goodyear sent Nance a separation notice, advising her that she was no longer considered employed.[221]

Nance grieved her separation through the c/b/a process. Arbitration was conducted, and an arbitrator determined, after a full evidentiary hearing, that Goodyear had "properly treated Nance as having 'resigned without notice' under Article X of the CBA."[222] The arbitrator concluded that since Nance had not provided notice to Goodyear, as required under the terms of the c/b/a, Goodyear had the right to treat her circumstances as a "voluntary quit."[223] On November 22, 2004, Nance filed suit, alleging discrimination and retaliation in violation of the Americans with Disabilities Act (ADA) and the Tennessee Handicap Act (THA), violations of the Family Medical Leave Act (FMLA), retaliatory discharge, violations of Tennessee whistleblower laws, wrongful and constructive termination, outrageous conduct, intentional infliction of emotional distress, and finally, breach of the common law duty of good faith and fair dealing.[224]

The district court granted Goodyear's motion for summary judgment, and Nance appealed. On appeal, the Sixth Circuit addressed two questions. First, whether Nance was precluded from "re-litigating" her discrimination claims in a related suit in an effort to vindicate her

213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 544-45
218. *Nance*, 527 F.3d at 545.
219. *Id.*.
220. *Id.*
221. *Id.* at 546.
222. *Id.*
223. *Id.*
224. *Nance*, 527 F.3d at 546.

statutory rights under ADA.[225] Second, assuming that the court had jurisdiction to decide the issue on the merits, whether Goodyear was entitled to summary judgment.[226]

Nance argued that the district court erred in finding that her ADA claims were barred by the arbitrator's conclusion that she resigned without notice, since she was asserting a statutory claim, and such claims were permitted under *Alexander*.[227] In contrast, Goodyear argued that Nance's reliance on *Alexander* was misplaced, since Nance only arbitrated the question of whether she had resigned without notice under the terms of the c/b/a, and not the question of whether she was the victim of discrimination.[228]

The Sixth Circuit aligned with Goodyear, stating, "we find it difficult to distinguish this case from *Alexander* . . . [b]oth cases involve the adjudication of statutorily guaranteed rights, an inquiry Congress reposed in federal courts."[229] In reaching this decision, the appellate court relied on *Becton v. Detroit Terminal of Consolidated Freightways*,[230] in which the plaintiff, a discharged employee, claimed on appeal that a prior arbitration involving the question of whether she had been fired for "just cause" prevented her from subsequently asserting in federal court the underlying racial-discrimination claim.[231] The appellate court concluded that there was:

> no realistic way to sever the discharge from the claim of discrimination . . . [i]nasmuch as 'just cause' or similar contract questions are an integral part of many discrimination claims, the better rule avoids judicial efforts to separate and classify evidence offered by the plaintiff under the heading of 'discrimination' or 'just cause.'[232]

A key point made by the Supreme Court in *Alexander*, and one which shaped the decision in *Nance* is that the expertise of arbitrators lies in construing the terms of a collective bargaining agreement. In other

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225. *Id.* at 547.

226. *Id.*

227. *Id.* In Alexander v. Gardner Denver Co., the Supreme Court held "that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII." 415 U.S. 36, 46 n.6 (1974).

228. *Nance*, 527 F.3d at 548.

229. *Id.*

230. 687 F.2d 140, 141-42 (6th Cir. 1982).

231. *Id.*

232. *Nance*, 527 F.3d at 548.

words, "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land."[233] Thus, "the legal and factual issues raised in Nance's ADA claim [were] beyond the competence of the ordinary arbitrator whose primary expertise concerns 'the demands and norms of industrial relations.'"[234]

The appellate court's second rationale focused on the procedural differences between litigation and arbitration. Arbitrators are not required to write opinions, "the record of arbitral proceedings generally is not as complete as a trial record,"[235] judicial review operates under tighter strictures, and there is limited discovery and cross-examination.[236]

Next, the Sixth Circuit considered whether *Alexander* should be read to preclude courts from considering a prior arbitration as part of their analysis. Despite the procedural distinctions noted above, the appellate court was clear that a district court may admit an arbitrator's decision as *evidence* depending on the level of procedural fairness in the arbitral proceedings.[237] In so holding, the majority discounted the fear expressed in the concurring opinion that providing some level of preclusion would "license collateral attacks."[238] The court rationalized its decision by drawing a clear line between an arbitrator's decision, which emanates from a collective bargaining agreement, and a statutory claim asserted in court under a federal statute. Contractual and statutory claims have independent legal origins, which require different judicial treatment.[239]

Finally, the majority opinion took issue with the concurring opinion's reliance on *Michigan Family Resources v. SEIU Local 517M,*[240] and its deferential standard of review which requires affirmance of a lower court decision even when the appellate court believes that "the arbitrator made 'serious,' 'improvident,' or 'silly' errors in resolving the merits of the dispute."[241] Under this standard, courts would be able to overturn an award only in the most egregious of circumstances. Importing the *Michigan Family Resources* standard into *Nance*, however, would limit the application of *Alexander*, which requires independent consideration of the merits of a civil rights claim, despite the fact that the claim may have been determined by an arbitrator under a collective bargaining standard.

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233. *Id.*
234. *Id.* at 548-49.
235. *Id.* (quoting *Alexander*, 415 U.S. at 57).
236. *Id.* at 549.
237. *Nance*, 527 F.3d at 549.
238. *Id.* at 549-51.
239. *Id.* at 551-52.
240. 475 F.3d 746, 753 (6th Cir. 2007).
241. *Nance*, 527 F.3d at 552.

This analysis paved the way for the court to decide the case on the merits. Even though the district court incorrectly concluded that Nance could not assert her statutory claim in federal court post-arbitration, the appellate court nonetheless found that summary judgment for Goodyear was appropriate.[242] The Sixth Circuit stated that Nance failed to establish the elements of a disability discrimination claim, including the existence of an adverse employment determination.[243] However, Nance was not terminated from employment. Under the terms of the collective bargaining agreement, "an employee who is absent for seven scheduled work days or more without . . . explaining the reasons for her absences, is considered to have resigned without notice."[244] The appellate court found that Nance was aware of management's requirements, particularly as it related to her medical leave, since Goodyear communicated with her in writing during the pendency of her leave.[245] Under the ADA, when an employee voluntarily resigns, she cannot trigger the adverse employment decision requirement to establish a prima facie case of discrimination.[246]

The concurring opinion offers the better analysis on the issue of whether a plenary re-interpretation is justified under *Alexander* and its progeny.[247] Specifically, the concurring opinion stated that *Alexander's* application was limited to those claims of a statutory nature.[248] The case here, as found by the majority, was not a discrimination claim. Under this finding, the use of issue preclusion to bar the re-litigation of Nance's claim, solely dependent on the application of the terms of the c/b/a, would not be triggered.[249] Contrary to the majority's assertion that Nance was not precluded from seeking a decision from a federal court that the conduct complained of in her grievance constituted inappropriate termination under a federal statute, "[t]he broader implication—and presumably, the . . . intention—of this assertion is that a plaintiff has a right to a federal-court re-determination of *any* finding, even those that are entirely dependent on the terms of the CBA (and the expertise of the

242. *Id.* at 553.
243. *Id.* at 553-54.
244. *Id.* at 554.
245. *Id.*
246. *Id.* at 554-55. The appellate court also rejected plaintiffs' other claims: FMLA claims (insufficient number of hours to qualify); retaliatory discharge and whistleblower claims (could not satisfy the "discharge" requirement); and outrageous conduct and breach of duty of good faith and fair dealing (arguments not developed with sufficient specificity). *Id.*
247. *Nance*, 527 F.3d at 559-61 (Batchelder, J., concurring).
248. *Id.* at 559.
249. *Id.*

arbitrator)."[250] This assertion, noted Judge Batchelder, undercuts *Alexander*, and empowers plaintiffs with the ammunition to collaterally attack "an express holding of a prior panel."[251]

The concurring opinion asserted a second and equally compelling point. Had the parties appealed the arbitrator's decision directly, the appellate court would have been duty-bound to apply the standard articulated in *Michigan Family Resources*, "confining review to whether the dispute was committed to arbitration . . . whether the arbitrator was, at least arguably, construing or applying the contract to resolve the dispute . . . [and] whether the decision was tainted by any 'procedural aberration,' such as fraud, conflict of interest, or dishonesty."[252] Here, however, the majority used the contractual/statutory dichotomy to conduct the very review not permitted by *Alexander*, a purely contractual claim.[253] Thus,

> by conducting a *de novo* review of the meaning and applicability of Article X of the Goodyear CBA with respect to the resignation-as-determined-by-the-CBA question, [the court] allowed a plaintiff to collaterally attack the arbitrator's decision in a way that contradict[ed] our *Michigan Family Resources* precedent, merely by filing a statutory-rights-based claim in federal court, regardless of its merit, and thus, to circumvent the deferential standard of *Michigan Family Resources* on an issue that is purely contractual.[254]

In another significant development, the Sixth Circuit ruled that an arbitration agreement that met the procedural requirement of a "writing" under the FAA could be enforced against a terminated employee by the mere act of her continuing employment, even if she did not execute the arbitration agreement.[255] Plaintiff, Lisa Seawright, worked as branch manager for American General Financial Services (AGF) from 1978 to 2005.[256] Seawright was terminated in 2005.[257] In 1999, prior to Seawright's termination, AGF notified its employees that it would be implementing an Employee Dispute Resolution (EDR) Program.[258] AGF

250. *Id.* at 559-60 (emphasis in original).
251. *Id.* at 560.
252. *Id.*
253. *Nance*, 527 F.3d at 560-61.
254. *Id.*
255. Seawright v. Am. Gen. Fin. Servs., 507 F.3d 967, 970 (6th Cir. 2007).
256. *Id.* at 970.
257. *Id.*
258. *Id.*

announced the program through a series of informational meetings and publications, followed by letters to its employees.[259] The informational brochure included with the letters made clear that AGF's program was the *sole* means of resolving employment-related disputes, "including disputes for legally protected rights such as freedom from discrimination, retaliation, or harassment . . . ."[260] The brochure stated as follows:

> *Seeking, accepting, or continuing employment with AGF* means that you agree to resolve employment related claims against the company or another employee through this process instead of through the court system.[261]

Several years after the effective date of the EDR Program, in June 2001, AGF sent an additional communication to its employees, reminding them that the EDR Program remained in effect.[262] This letter included an informational brochure similar to those provided in earlier mailings.[263] Seawright continued employment until her termination in April 2005, some six years after the company promulgated its dispute resolution program.[264] In suit, Seawright asserted claims under the Family Medical Leave Act and state law.[265] AGF filed a motion to compel arbitration, which was denied by the district court on the basis that "merely receiving information and acknowledging the EDR program is not tantamount to assent."[266]

The court of appeals re-framed the issue and reversed on two principal grounds. The true issue, stated the appellate court, was not whether receiving information was enough to constitute assent to an arbitration agreement but whether an action—in this case, continuing one's employment—constituted assent.[267] Under Tennessee law, continuing to work was sufficient to bind the employee to arbitrate.[268] In reaching this conclusion, the appellate court distinguished the facts of *Seawright* from those of *Lee v. Red Lobster Inns of America*,[269] an

259. *Id.*
260. *Id.* at 971.
261. *Seawright*, 507 F.3d at 971 (emphasis added).
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.* at 970.
266. *Id.* at 971.
267. *Seawright*, 507 F.3d at 972-73.
268. *Id.* ("Tennessee law recognizes the validity of unilateral contracts, in which acceptance is indicated by action under the contract." (quoting Fisher v. GE Med. Sys., 276 F.Supp.2d 891, 895 (M.D.Tenn. 2003)).
269. 92 F. App'x 158 (6th Cir. 2004).

unpublished case on which the district court relied.[270] First, the agreement in *Lee* did not contain the provision that by continuing to work, an employee was deemed to accept the terms of the arbitration agreement.[271] Second, the plaintiff in *Lee,* unlike Seawright, notified her employer of her objection to the arbitration agreement.[272] Essentially, Seawright's acceptance came principally from the act of doing what the employer in writing indicated would constitute acceptance—coming to work.

Next, the appellate court addressed the question of the "knowing and voluntary waiver" requirement enunciated in *Morrison v. Circuit City Stores, Inc.*[273] In determining whether the plaintiff has knowingly and voluntarily waived his or her right to pursue employment claims in federal court, the following factors are evaluated: "plaintiff's experience, background, and education; the amount of time the plaintiff had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; the clarity of the waiver; consideration of the waiver; and the totality of the circumstances."[274]

The court of appeals concluded that as a managerial employee, Seawright was capable of understanding the terms of the agreement presented by her employer.[275] Moreover, she chose not to exercise her right to seek independent counsel.[276] Accordingly, Seawright waived her right to proceed in court.[277]

Seawright asserted four other grounds, which the appellate court *in seriatim* rejected. First, Seawright claimed that the arbitration agreement lacked consideration.[278] The district court had based its decision not to grant the employer's motion for summary judgment on the fact that Seawright "had no ability to affect the terms of the company's policy."[279] However, the court of appeals observed that this fact is irrelevant as to whether or not there was a bargained-for-exchange.[280] Under the dispute resolution plan, both the "employer and the employee were equally

270. *Seawright*, 507 F.3d at 973.
271. *Id.*
272. *Id.*
273. 317 F.3d 646 (6th Cir. 2003) (en banc).
274. *Seawright*, 507 F.3d at 973-74.
275. *Id.* at 974.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Id.*
280. *Seawright*, 507 F.3d at 974.

obligated to arbitrate the disputes falling within the coverage of the plan."[281]

Second, Seawright asserted that the mere fact that the company could alter its policies and procedures "at any time" suggested that the agreement was illusory in nature and therefore void.[282] Although the Sixth Circuit's position is that such provisions do indeed create illusory contracts, in *Seawright*, the employer agreed to be bound by the terms of the agreement for a period of ninety days after providing notice of its intent to terminate.[283] This provision satisfied the mutuality requirement.[284]

Seawright also claimed that the arbitration agreement was unenforceable as a contract of adhesion because of the unequal bargaining power of the parties, and that the agreement was substantively unconscionable.[285] The Sixth Circuit rejected Seawright's argument, stating that a contract is not adhesive simply because it is offered on a take it or leave it basis. The court further found that Seawright failed to establish the final element of adhesion, that is, "the absence of a meaningful choice for the party occupying the weaker bargaining position, must also be present."[286] Moreover, even if adhesive, a contract requires some level of unconscionability for it to be rendered unenforceable. A contract meets this definition "when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other."[287] Here, the appellate court concluded that the arbitration agreement bound both employer and employee to arbitration, and that it did not limit the obligations and liability of the stronger party—the employer.[288] The only point asserted by Seawright was procedural unconscionability, which goes to the notion of lesser bargaining power.[289] The failure of Seawright to present evidence on the relative bargaining positions of the contracting parties, coupled with the reality that Seawright worked for the company for over twenty-five

281. *Id.*
282. *Id.* at 974-75.
283. *Id.* at 975.
284. *Id.*
285. *Id.* (relying on Nguyen v. City of Cleveland, 121 F. Supp. 2d 643, 647 (N.D. Ohio 2002) ("[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.")).
286. *Seawright*, 507 F.3d at 976 (quotations omitted).
287. *Id.* (quotations omitted).
288. *Id.*
289. *Id.*

years, cut against the possibility that she could garner the required evidence.[290]

Finally, Seawright asserted that the arbitration agreement was not enforceable because it was not in conformity with the writing requirement of the Federal Arbitration Act.[291] The primary substantive provision of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[292]

The Sixth Circuit concluded, based on the above language, that arbitration agreements need to be in writing, but not necessarily signed. The brochure by AGF, outlining the arbitration program, made clear that continued employment constituted acceptance. This conclusion was in accord with other circuits, which have held that such a provision satisfies the requirement of being written.[293]

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290. *Id.*

291. *Id.*

292. *Seawright*, 507 F.3d at 978.

293. *Id.* ("It is not necessary that there be a simple integrated writing or that a party signs the writing containing the arbitration clause."). California courts are moving in a different direction. During this *Survey* period, the California Court of Appeals decided two cases that apply a significantly lower threshold for unconscionability in cases involving arbitration agreements. In Baker v. Osbourne Dev. Corp., 159 Cal. App. 4th 884, 896 (2008), the appellate court held that the underlying agreement to arbitrate was *substantively* unconscionable because homebuilders were not as likely to sue homebuyers. In bold sweeping terms, the California Court of Appeals concluded without analysis that the arbitration agreement flowed one way, i.e., that it lacked mutuality. In support, the appellate court cited two cases—Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2004) and Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003). However, in each of these cases, the underlying arbitration terms were significantly flawed. In *Ingle*, it was not so much that Circuit City would not initiate an action against one of its employees, but rather six very specific and draconian provisions of the arbitration agreement that collectively tilted the scales against enforceability. *Ingle*, 328 F.3d at 1172-73. And, in *Ting*, it was the fact that the parties' arbitration agreement prohibited arbitration of class-wide claims entirely—a right protected by statute. *Ting*, 319 F.3d at 1130. By foreclosing the class action remedy, an aggrieved consumer would have virtually no remedy, since few actions of the type likely to occur in the *Ting* scenario

IV. JUDICIAL REVIEW AND FINALITY

A. Judicial Review Under the Federal Arbitration Act

1. Expanding the Scope of Judicial Review by Party Contract

To function efficiently, arbitration requires minimal judicial intervention. Parties expect that an arbitrator's decision will be final and binding, except for the rare procedural irregularity that could taint the award. From a practical perspective, arbitrators faced with the prospect of heightened judicial review may become overly pre-occupied with "building a record," to ensure that their awards remain invulnerable to outside review.[294] On the other hand, some judicial review is necessary, given the larger public interest associated with specific cases. This tension between minimal intervention to preserve the character of arbitration and the public's need to know was addressed by the drafters of the Federal Arbitration Act by specifying extremely narrow grounds for judicial review of arbitration decisions.[295]

Arbitration is a product of contract and party autonomy. Parties can choose to arbitrate, or they can choose to litigate. Does it not follow then that parties can also choose, when circumstances warrant, to broaden the scope of judicial review provided under the Federal Arbitration Act? For years, this remained an open issue. In a long-awaited decision, the United States Supreme Court in *Hall Street Association, Inc. v. Mattel*,[296] decided the question of whether statutory grounds for vacatur, set forth in Sections 9-11 of the Federal Arbitration Act, may be supplemented by contract.

Hall and Mattel were parties to a lease agreement.[297] The property at issue was a manufacturing site; the leases provided that the tenant,

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could be pressed without invoking the class action. *Id.* at 1150-51. Contract law is clear that the substantive unconscionability of terms is to be "considered in the light of the general commercial background and the commercial needs of the particular trade or case. . . . The test is . . . whether the terms are 'so extreme as to appear unconscionable according to the mores and business practices of the time and place.'" 1 CORBIN ON CONTRACTS § 128 (1963). This is the test the appellate court should have applied, once it found lack of meaningful choice. Instead, in *Baker*, the appellate court focused exclusively on the lack of meaningful choice, which is insufficient to hold a contract substantively unconscionable. *Baker*, 159 Cal. App. 4th at 896. *Accord* Bruni v. Didion, 160 Cal. App. 4th 1272 (2008).

294. ALAN SCOTT RAU, EDWARD F. SHERMAN, & SCOTT R. PEPPET, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 731 (Foundation Press, 4th ed. 2006).

295. *Id.*

296. 128 S. Ct. 1396 (2008).

297. *Id.* at 1400.

Mattel, would indemnify the landlord for any costs incurred from its failure to comply with environmental laws while occupying the premises.[298] Subsequent tests of the property's well water confirmed high levels of trichloroethylene (TCE), "the apparent residue of manufacturing discharges by Mattel's predecessors between 1951 and 1980."[299] Mattel ceased drawing from the well after the Oregon Department of Environmental Quality discovered the existence of more pollutants, and agreed to clean up the site.[300] Mattel terminated the lease, and Hall Street responded by filing suit, contesting Mattel's right to vacate the premises on the date given and also asserting that the lease obligated Mattel to indemnify Hall Street for the costs of clean up.[301] A bench trial occurred, and the result favored Mattel on the termination issue.[302] The parties attempted to mediate the indemnification issue, but to no avail.[303] The parties then sought the concurrence of the district court to arbitrate.[304] The district court's order contained a routine arbitration clause but for one clause—the parties agreed that while judgment may be entered in a court of appropriate jurisdiction, "the Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."[305]

Arbitration occurred and Mattel prevailed.[306] The arbitrator stated that indemnification was not due because the lease obligation which required compliance with federal, state, and local environmental laws applied not to environmental contamination per se but rather to human health.[307] Hall Street filed a motion to vacate, claiming that the arbitrator's decision constituted legal error, a ground for vacatur under the initial district court order.[308] The district court vacated the decision, citing *LaPine Technological Corporation v. Kyocera Corporation*[309] as support, and remanded the case back to the arbitrator for re-consideration in light of the opinion.[310] On remand, the arbitrator corrected his earlier

298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Hall St. Assocs.*, 128 S. Ct. at 1400.
303. *Id.*
304. *Id.*
305. *Id.* at 1400-01.
306. *Id.* at 1401.
307. *Id.*
308. *Hall St. Assocs.*, 128 S. Ct. at 1400-01.
309. 130 F.3d 884, 889 (9th Cir. 1997).
310. *Hall St. Assocs.*, 128 S. Ct. at 1401.

decision, and concluded that the Oregon Drinking Water Quality Act indeed was an applicable environmental law, and thus awarded in favor of Hall Street.[311] Each of the parties sought modification.[312] Using the explicit standard of the order, the district court corrected the interest calculation but otherwise upheld the award.[313] The parties appealed to the court of appeals, where Mattel claimed that the Ninth Circuit's en banc decision to overrule *LaPine* in *Kyocera v. Prudential-Bache Trade Servs., Inc.*,[314] meant that the parties' expanded judicial review provision was unenforceable.[315] The Ninth Circuit reversed in favor of Mattel, and instructed the district court to confirm the original arbitration award, not the subsequent award post-reversal.[316] The district court held for Hall Street, and the Ninth Circuit reversed. The United States Supreme Court granted certiorari to consider whether the explicit grounds set forth in Sections 9-11 of the FAA were exclusive.[317]

Through Justice Souter, the United States Supreme Court held that the FAA provided the "exclusive grounds for expedited vacatur and modification."[318] In so holding, the Supreme Court carefully dissected Hall Street's arguments that the FAA's grounds were not at all exclusive, "taking the position, first, that expandable judicial review authority has been accepted as the law since *Wilko v. Swan*."[319] However, the Court was quick to point out that *Wilko* did not sanction expanded judicial review.[320] *Wilko* held that Section 14 of the Securities Act of 1933 voided any agreement to arbitrate; this decision was later overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*[321] In *Wilko*, the United States Supreme Court explained that the power to vacate an arbitration award under the FAA is limited and that "the interpretations of the law by arbitrators in contrast to manifest disregard [of the law] are not subject, in the federal courts, to judicial review for error in interpretation."[322] Hall Street argued that *Wilko* showed that the Supreme Court acknowledged the "manifest disregard of the law" standard, in

311. *Id.*
312. *Id.*
313. *Id.*
314. 341 F.3d 987, 1000 (2003).
315. *Hall St. Assocs.*, 128 S. Ct. at 1401.
316. *Id.*
317. *Id.*
318. *Id.* at 1398, 1403.
319. *Id.* at 1403.
320. *Id.* at 1403-04.
321. *Hall St. Assocs.*, 128 S. Ct. at 1403.
322. *Id.* at 1398, 1403.

addition to the sections enunciated in Section 10 of the FAA.[323] Recognizing some vagueness in the *Wilko* holding, the Supreme Court went on to indicate that "manifest disregard" could mean a new ground of review, or it could merely refer to the grounds specified in Section 10 collectively.[324]

As to Hall Street's second argument, that broad judicial review should be permitted "because arbitration is a creation of contract," the Supreme Court observed that this statement "'begs the question,' whether the FAA has textual features that undermine the enforcement of a contract to expand judicial review following the arbitration."[325] In concluding that a textual reading of Sections 10 and 11 are exclusive, the Court explained that:

> it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally. Sections 10 and 11 . . . address [arbitral misconduct] . . . exceed[ing] powers . . . and miscalculating awards . . . the only ground with any softer focus is imperfect[ions], and a court may correct those only if they go to [a] matter of form not affecting the merits.[326]

Relying on the maxim of ejusdem generis, the Court struck down Hall Street's argument by stating that the general terms following the enumeration of specific terms relate back to the specific terms.[327] A different construction

> would rub too much against the grain of the §9 language, where provision for judicial confirmation carries no hint of flexibility . . . . Any other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process.'[328]

Finally, the Supreme Court placed little credence on Hall Street's argument that parties will avoid arbitration if judicial review is not

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323. *Id.* at 1403-04.
324. *Id.* at 1404.
325. *Id.*
326. *Id.* (quotations omitted).
327. *Hall St. Assocs.*, 128 S. Ct. at 1404.
328. *Id.* at 1405.

available: "[w]hatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds."[329]

The *Hall Street* decision was far from unanimous. Justices Stevens and Kennedy dissented, stating that the Court's decision ran afoul of the primary purpose of the FAA and ignored its historical context.[330] Principally, the FAA responded to judicial animus by placing arbitration agreements on an equal footing with other contracts.[331] The goal of Congress in enacting the legislation was "to abrogate the general common-law rule against specific enforcement of arbitration agreements."[332] Given the importance of enforcing arbitration agreements, there would be no reason not to give force to agreements parties negotiate that provide for enhanced judicial review.[333] The case for such deference was very strong in *Hall Street* both because the parties entered into the decision to expand judicial review freely, and because the district court approved the decision.[334]

In many respects, *Hall Street* was unique, because the United States Supreme Court confronted the question of how parties *extricate* themselves from the FAA's restrictive vacatur language. To resolve the conflict, the Supreme Court focused on the plain language of the FAA. But, as some commentators note, if parties can contractually "clearly and unmistakably agree" that arbitrators should decide issues of arbitrability, why should it not be possible for parties to contractually agree that arbitral decisions will be reviewed under standards different that those specified under the FAA?[335]

Probably the greatest import of the Court's decision was the evisceration of all non-statutory grounds of review.[336] This includes violations of public policy and arbitrary and capricious decision-making, which the United States Supreme Court cited in *United Paperworkers*

329. *Id.* at 1406.

330. *Id.* at 1408-10.

331. *Id.* at 1402, 1408.

332. *Id.* at 1408.

333. *Hall St. Assocs.*, 128 S. Ct. at 1408.

334. *Id.* at 1408-09.

335. Stuart M. Widman, *Hall Street v. Mattel: the Supreme Court's Alternative Arbitration Universes*, 15 ABA J. OF DISP. RESOL. 24 (2008) (arguing that the *Hall Street* outcome did not resolve the tension between the Supreme Court's prior rulings in *Howsam* and *Bazzle* and the Hall Street appeal. In earlier precedent, the Supreme Court held that parties could alter by contract the statutory authority of courts as long as they did so under a "*clear and unmistakable*" standard). *See also* Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003).

336. *Hall St. Assocs.*, 128 S. Ct. at 1408.

International Union AFL-CIO v. Misco[337] as grounds for award vacatur. In the end, the Supreme Court appeared concerned with the possibility that parties would flock to litigation after arbitration, and use the hook of broad judicial review to get in the door.

Hall Street leaves parties with only a few options. They may operate under common law standards of state statutes; or it is also possible that parties may seek district court approval of expanded judicial review before arbitration occurs, and have such review memorialized in the court's order.

2. Statutory Standards of Review

a. Evident Partiality

One of the more litigious areas in recent years deals with arbitral disclosures, and the impact of failing to disclose a *"disclosable event."* Section 10(a)(2) of the Federal Arbitration Act (FAA),[338] as well as Section 12(a)(2) of the Uniform Arbitration Act and Section 23(a)(2)(A) of the Revised Uniform Arbitration Act (RUAA), provide that an arbitration award may be vacated for "evident partiality" of the arbitrator. *"The UAA and other legal and ethical norms reflect the principle that arbitrating parties have the right to be judged impartially and independently."*[339]

The Sixth Circuit addressed the disclosure question in *Uhl v. Komatsu Forklift Co., Ltd.*[340] Uhl, an employee of Komatsu, was injured and later died as a result of a forklift that malfunctioned.[341] His estate prosecuted, filing a tort action against Komatsu.[342] The parties subsequently stipulated to Pacific Employer's Insurance Company's intervention in the case.[343] After some discovery, the parties agreed to engage in arbitration, setting a deadline of January 31, 2006 for the entire arbitration process to be concluded.[344] In March 2006, after the deadline had expired, Uhl and Pacific filed a motion to compel arbitration with the district court.[345] After the district court reinstated the case to its active docket, the parties once again agreed to arbitrate, this time executing a

337. 484 U.S. 29, 43 (1987).
338. 9 U.S.C. § 10(a)(2) (2006).
339. RUAA Commentary, pg. 42; III MACNEIL TREATISE § 28.2.1.
340. 512 F.3d 294 (2008).
341. *Id.* at 298.
342. *Id.*
343. *Id.*
344. *Id.*
345. *Id.*

written agreement.[346] The agreement provided for three arbitrators, with each party nominating its own arbitrator and the party-appointed arbitrators selecting the third, neutral arbitrator.[347] The agreement provided that the party-selected arbitrators would be "practicing attorney[s] possessing experience in judicial litigation, a substantial portion of which experience shall involve product liability matters."[348] In addition, the agreement imposed specific ethical requirements of disclosure.[349]

The parties also agreed that no appeal from the award would be taken except for a claim of fraud, or if the parties, arbitrators, or their counsel violated one of the Agreement's provisions.[350] In September 2006, the arbitrators rendered an award of $1.9 million dollars in favor of Uhl and Pacific.[351] Shortly afterwards, Komatsu filed a motion to vacate, claiming that Komatsu's party-appointed arbitrator, Stein, failed to disclose his prior connections to the attorney representing Pacific Employer's Insurance Company, and that such failure tainted the ultimate award.[352] The district court held that Komatsu had waived its right to object to Stein's service by not interposing an objection earlier and waiting until an adverse award was rendered.[353] Applying a reasonable-person test, the district court confirmed the award, concluding that Stein did not violate his obligations under the FAA.[354] Komatsu appealed to the Sixth Circuit.[355] Uhl and Pacific requested a motions panel to rule on the feasibility of Komatsu's appeal, but the motions panel demurred to the hearing panel because "[t]he arguments raised in the motion to dismiss and the response in opposition go to the heart of the appeal."[356]

The Sixth Circuit initially examined its jurisdiction to rule on the case.[357] Uhl and Pacific asserted that the arbitration agreement precluded appeal beyond the district court, relying on a specific provision of the agreement that stated, "[t]he award shall be exclusive, final, and binding to all issues and claims, and . . . [t]he parties shall be deemed to have

346. *Uhl*, 512 F.3d at 299.
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *Uhl*, 512 F.3d at 300.
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.* at 300-02.

consented to the Arbitrator's judgment upon the receipt of the arbitration decision."[358] The appellate court determined that such language did not strip it of jurisdiction, since nothing in the language stated that the award itself would be non-appealable, and a final award preserves a level of appealability permitted by law.[359] The court's analysis underscored the idea that, if the parties desired complete non-appealability, this language should have been included in their agreement.

Next, the Sixth Circuit turned its attention to the governing law, namely, which law—state or federal—would govern the ensuing review.[360] The court determined that since the forum state was Michigan, Michigan law applied.[361] Absent a particular choice-of-law clause, the Restatement elements dictated that Michigan contract law would apply when construing the arbitration agreement.[362] In addition, the court stated that while the FAA typically would not apply to this type of case,[363] the fact that the parties included a specific provision in their agreement necessitated a different result.[364] Komatsu's claims and the parties default obligations under the contract would thus be subject to FAA case law.[365]

Having addressed the preliminary issues, the court directed its attention to the primary question in the case—whether the arbitration agreement was violated when Stein, the party-appointed arbitrator of Komatsu, failed to disclose his prior relationship with Johnson, Pacific's counsel. The provision under scrutiny stated:

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358. *Uhl*, 512 F.3d at 300-01.

359. *Id.* at 301.

360. *Id.* at 302-03.

361. *Id.* at 302. The Sixth Circuit recognized that the current trend embraced a more policy-centered approach in addressing choice-of-law conceptions. *Id.* This approach requires that "Michigan courts balance the expectations of the parties to a contract with the interests of the states involved to determine which state's law to apply." *Id.* Relying primarily on the Restatement (Second) of Conflict of Laws, the court recited the following five factors as relevant to the inquiry:

(a) the place of contracting;
(b) the place of negotiation of the contract;
(c) the place of performance;
(d) the location of the subject matter of the contract; and,
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

Uhl, 512 F.3d at 302.

362. *Id.*

363. *Id.* at 303 ("[t]he FAA applies only to written arbitration provisions in 'contract[s] evidencing a transaction involving commerce' and 'maritime transactions.'"); *see also* 9 U.S.C. § 2 (2006).

364. *Uhl*, 512 F.3d at 303.

365. *Id.*

> 2. *Ethical Requirements.* The Arbitrators shall have no financial or personal interest in the result of this Arbitration. Prior to selecting the neutral arbitrator, the party-selected arbitrators *shall disclose* to all parties *any* referral agreements, financial dealings, or other relationships with any of the parties or parties' attorneys that could in any way be construed as a possible conflict of interest.[366]

Komatsu argued that the above language required the arbitrator to disclose anything that could be construed as a conflict of interest.[367] Conversely, Uhl and Pacific argued that the first sentence in the provision limited the nature of the required disclosure to those events which constituted financial or personal connections.[368]

The court first examined the import of the FAA, noting that this special statute provided the exclusive means by which a party could attack an arbitration award.[369] The only time in which a litigant can attack the contract is if there is a defect in the underlying agreement.[370] Although Komatsu's position was that Stein's failure to disclose his conflict was tantamount to such a defect, the Sixth Circuit disagreed; to establish a claim of fraud, Komatsu would have to meet the elements of fraud.[371] Michigan law states that fraud in the inducement is not available for a breach of contract term, "lest fraud in the inducement claims swallow all breach-of-contract claims: '[A] claim of fraud in the inducement, by definition, redresses misrepresentations that induce the buyer to enter into a contract but that do not in themselves constitute contract or warranty terms subsequently breached by the seller.'"[372] The Sixth Circuit concluded that the Komatsu's fraud claim failed since it

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366. *Id.* (emphasis in original).

367. *Id.*

368. *Id.*

369. *Id.* at 304.

370. *Uhl*, 512 F.3d at 304.

371. The elements of fraud the court identified include:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.

Id.

372. *Id.* (quoting Huron Tool & Eng'g Co. v. Precision Consulting Servs., Inc., 209 Mich. App. 365, 375, 532 N.W.2d 541, 546 (1995)).

was absent a representation of any kind.[373] The agreement simply stated that arbitrators would be free of conflicts of interest.[374]

Finally, as to the specific merits of whether the failure to disclose constituted "evident partiality" under the FAA, the court, relying on *Commonwealth Coatings Corporation v. Continental Casualty Company*,[375] stated that not all disclosures or failure to disclose events are to be treated equally.[376] To sustain the burden, i.e., a showing of what a reasonable person would have to conclude that an arbitrator was partial, "the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator. It is not enough to demonstrate 'an amorphous institutional predisposition toward the other side,' because that would simply be the appearance-of-bias standard that we have previously rejected."[377]

In concluding that Komatsu failed to establish "evident partiality," the Sixth Circuit rationalized as follows. First, there was no financial agreement between Stein and Johnson.[378] Second, Komatsu could not show, through probative evidence, that the relationship between Stein and Johnson was "on-going."[379] Third, the type of relationship between Stein and Johnson was not of the ilk to warrant vacatur of the award.[380] In support of its decision, the court relied on *Nationwide IV*,[381] where an arbitrator "served . . . for the defendant six times and as an arbitrator for another defendant over twenty times."[382] In that case, the court held that the law simply does not require disclosure of trivial business relationships.[383]

Finally, the Sixth Circuit rejected Uhl and Pacific's request for sanctions.[384] While sanctions are appropriate in a situation where pleadings are filed wholly without merit and with the intent to harass, it

373. *Id.* As important, Komatsu was unlikely to prevail on the breach of contract claims since Komatsu knew even before it signed the agreement that Uhl and Pacific had selected Stein as their party-appointed arbitrator, and that there was a prior relationship between the two. *Id.* at 305 n.3.

374. *Id.* at 305.

375. 393 U.S. 145 (1968).

376. *Uhl*, 512 F.3d at 306.

377. *Id.* at 306-07 (citations omitted).

378. *Id.* at 307.

379. *Id.*

380. *Id.*

381. Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 644 n.5, 647-48 (6th Cir. 2005) [hereinafter *Nationwide IV*].

382. *Uhl*, 512 F.3d at 307.

383. *Id.*

384. *Id.* at 308-09.

was not shown here that such was Komatsu's intent.[385] The fact that the claim lacked merit was not enough to trigger the punitive remedy of sanctions.[386]

b. Exceeding Scope of Authority

One important case decided by the Sixth Circuit Court of Appeals during this *Survey* period was *Michigan Family Resources*,[387] which resulted in en banc review of whether an arbitration award, arising under a collective bargaining agreement requiring cost-of-living parity between union and non-union employees should be enforced.[388] The decision is important because the Sixth Circuit overruled an earlier four-part test, articulated in *Cement Division, National Gypsum Company v. United Steelworkers of America, Local 135*,[389] against which labor arbitration awards would be measured.[390]

Michigan Family Resources (MFR) ran a federal Headstart Program in Kent County, Michigan.[391] The Service Employees International Union was the bargaining agent for a portion of MFR's employees. Under the negotiated agreement, bargaining unit members were entitled to wage increases, subject to restrictions explicitly noted in the c/b/a.[392] The agreement contained four pertinent provisions: Article 35(1), which entitled bargaining unit members to receive the same cost of living increases as other MFR employees, based on the funding source; Article 35(2), which specified the procedure and the timing of such increases; Article 5 which outlined the "exclusive method of resolution" should a dispute arise as to how such increases would be calculated; and Article

385. *Id.*
386. *Id.*
387. 475 F.3d 746 (6th Cir. 2007).
388. *Id.* at 754.
389. 793 F.2d 759 (6th Cir. 1986).
390. Relying on the *Steelworkers Trilogy*, the court of appeals used a four-part test to guide its review of labor arbitration decisions:

> An award fails to draw its essence from the agreement . . . when (1) it conflicts with express terms of the collective bargaining agreement; (2) [it] imposes additional requirements that are not expressly provided in the agreement; (3) [it] is without rational support or cannot be rationally derived from the terms of the agreement; and (4) [it] is based on general considerations of fairness and equity instead of the precise terms of the agreement.

Mich. Family Res., 475 F.3d at 751 (citing *Cement Divs.*, 793 F.2d at 766).
391. *Id.* at 748.
392. *Id.* at 748-49.

34, which contained the following language: "[t]here are no past practices which are binding upon the parties."[393]

In May 2003, MFR notified its union employees that they would receive a 2.5% cost of living allowance from the federal government, and that the non-union employees would receive 4%; the union grieved.[394] The matter proceeded to arbitration where one of the specified arbitrators rendered an award, resolving the dispute in favor of the union.[395] The arbitrator concluded that the language in Article 35 "became ambiguous" because the employer had previously characterized its individual payment and its payment from the federal funding source as cost of living.[396] The arbitrator resolved the contractual ambiguity by considering the employer's prior practice of granting identical cost of living increases to all employees, thus increasing the union employees' cost of living allocation from 2.5% to 4%.[397] Subsequently, the employer invoked section 301 of the Labor Management Relations Act, and filed suit to vacate the arbitrator's award.[398] The district court granted the employer's motion for summary judgment, concluding that by considering extrinsic evidence, the arbitrator's award did not draw its essence from the c/b/a.[399] A panel of the Sixth Circuit affirmed.[400]

In en banc review, the court of appeals overturned the panel's decision, and used its review as an opportunity to re-craft the standard of judicial review of labor arbitration awards.[401] Looking initially to *Misco*, the court stated that federal courts assume a "limited role" when the losing party seeks judicial review.[402] This role is limited to ensuring

> that the arbitration award grows out of a legitimate process: that the collective bargaining agreement commits the dispute at hand to arbitration; . . . that the prevailing parry did not procure the decision through "fraud;" that the arbitrator did not suffer from a conflict of interest or exercise "dishonesty" in reaching his decision . . . and that the arbitration award did not merely reflect "the arbitrator's own notions of industrial justice."[403]

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393. *Id.* at 749.
394. *Id.*
395. *Id.*
396. *Mich. Family Res.*, 475 F.3d at 749.
397. *Id.* at 750.
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.* at 756.
402. *Mich. Family Res.*, 475 F.3d at 752.
403. *Id.*

The decision in *Misco* was reinforced several years later by the Supreme Court's decision in *Major League Baseball Players Ass'n v. Garvey.*[404] In reversing the Second Circuit Court of Appeals, the Supreme Court explained that judicial review by federal courts of labor arbitration decisions is not just limited, it is *very* limited.[405] The "essence" test was replaced with the "arguably construing" test.[406] Thus, once it is established that the arbitrator is construing or applying the contract, it does not matter whether the arbitrator commits "serious," "improvident," or even "silly" errors in resolving the merits of the dispute.[407]

Guided by the above requirements, the Sixth Circuit concluded that the arbitrator's award should be enforced.[408] Absent fraud or dishonesty, the arbitrator was acting within the scope of his authority.[409] As to whether the arbitrator was engaged in interpretation, in other words, was he "arguably construing" the collective bargaining agreement, the court concluded that the arbitrator's ten-page opinion contained the "hallmarks of interpretation."[410] The arbitrator quoted the pertinent sections of the collective bargaining agreement in his quest "to reach a good-faith interpretation of the contract."[411] The court next examined the language of Article 35(1) and acknowledged that this clause was silent on the question of whether parity had to exist between union and non-union members when the cost of living allowance was funded by the employer, and not the federal government.[412] Given the contractual silence, it was logical for the arbitrator to seek other indicators of meaning, in this case taking into account the employer's prior decision to characterize both its individual payment and its payment from the federal funding source as cost of living.[413] The court then went to note that the fact that the arbitrator

> chose the wrong path in justifying the award, however, does not give [the court] a warrant to vacate it. If it is true that appellate courts generally "review[] judgments, not opinions" while performing *de novo* review, it is assuredly true that we review

404. 532 U.S. 504 (2001).
405. *Mich. Family Res.*, 475 F.3d at 752-53; *Major League Baseball*, 532 U.S. at 509.
406. *Major League Baseball*, 532 U.S. at 509.
407. *Id.*
408. *Mich. Family Res.*, 475 F.3d at 754-56.
409. *Id.* at 754.
410. *Id.*
411. *Id.*
412. *Id.*
413. *Id.* at 755.

> outcomes, not opinions, while performing the exceedingly deferential task of considering whether to vacate an arbitration award.[414]

Finally, in re-enforcing the point that labor arbitration is a distinct form of arbitration which draws its strength from the collective bargaining process, and its associated quid pro quos of conduct, the Sixth Circuit stated:

> It was the "arbitrator's construction," not three layers of federal judicial review that the parties "bargained for," and that delegation of decision-making authority must be respected even when time and further review show that the parties in the end have bargained for nothing more than error . . . [T]hat is the import of having a finality clause in an arbitration agreement, the import of the Supreme Court's decision in this area over the last 47 years and, so far as our jurisdiction is concerned, the import of asking fallible human beings to make final sense of imperfectly worded documents. In the last analysis, we have an arbitrator who plainly was "arguably construing" the contract and who perhaps just as plainly made a "serious error" in construing the contract, a confluence of circumstances that does not invest us with authority to "overturn [the] decision."[415]

It was the arbitrator's error in interpretation and not the application of a new and refined test that became the focal point of the narrow dissent.[416] The dissent explained that for a clause to *become ambiguous* it must first be *unambiguous*. And, assuming that was the case, the arbitrator would be foreclosed from bringing in extrinsic evidence to construe the clause.[417] From the dissent's perspective, it was entirely plausible that Article 35 was unambiguous and, if so, then the arbitrator went beyond the scope of his authority to characterize it as ambiguous.[418]

It is difficult to determine whether factors beyond simply judicial economy and preservation of the finality aspect of labor arbitration awards motivated the majority to reach their decision. In the view of this author, the dissent provided the more compelling view. The language of Article 35 was clear—union and non-union members were to receive the

414. *Mich. Family Res.*, 475 F.3d at 755.
415. *Id.* at 756.
416. *Id.* at 757 (Mertin, J., concurring in part and dissenting in part).
417. *Id.* at 757-58.
418. *Id.*

same payments relating to cost of living allowances *provided* the *federal government* was the source.[419] This clause did not address payments from the employer. Neither did any other clause in the collective bargaining agreement. Moreover, the parties incorporated a zipper clause specifically stating that the arbitrator could not vary the terms of the parties' collective bargaining agreement and that past practice could not used to modify explicit terms. Whether the parties' silence was deliberate or inadvertent, the reality is that there was no clause that spoke to payments made by the employer. And, as the dissent correctly pointed out, relying on a past memorandum which stated that the 2002 raises were being "given on a one-time, non-precedent setting basis," suggests that the arbitrator erred in construing the contract.[420] As such, the arbitrator acting beyond the scope of his authority in ascribing new meaning to Article 35. It was within the province of the parties, not the arbitrator, to imbue the clause with a different meaning. As noted by the dissent, "process and reasoning are important, as they provide the justification and backbone for outcomes . . . [a]nd in a hyper-deferential review situation, as opposed to de novo review, process is often the only thing we can review."[421]

V. DOMESTIC RELATIONS ARBITRATION

Prior to the passage of the Domestic Relations Arbitration Act (DRAA),[422] judges did not have the authority to order a party to submit a domestic relations claim to arbitration. The enabling legislation was careful to mandate arbitration provided certain procedural safeguards were in place. Because power disparities often arise in domestic relations cases, the drafters wanted assurance that parties clearly understood their choice of arbitration, and the significance of an arbitrator's award.[423] As a result, the primary underpinning of arbitration—*voluntary* consent—was incorporated as a key provision of DRAA.[424] The following case raises the question of what constitutes voluntary consent, a question not yet frontally addressed in the general jurisprudence of state and federal courts.

419. *Id.* at 748, 757-58.
420. *Mich. Family Res.*, 475 F.3d at 758.
421. *Id.* at 759.
422. MICH. COMP. LAWS ANN. § 600.5072 (West 2001).
423. Johnson v. Johnson, 276 Mich. App. 1, 9-10, 739 N.W.2d 877, 882-83 (2007).
424. *Id.*

In *Johnson v. Johnson*, plaintiff appealed from the trial court's judgment granting the parties a default judgment of divorce.[425] The parties were married in 1968; in 1978, the parties moved from North Carolina to Michigan "to start a new life."[426] According to the defendant, plaintiff was abusing alcohol and pursuing other female relationships.[427] In 1982, defendant left the plaintiff.[428] Although the testimony at trial produced diametrically opposed accounts of what subsequently transpired, the following was established.[429] In addition to the six children plaintiff had with defendant, plaintiff also fathered a child by another woman.[430] Plaintiff returned to the marital home, and resumed marital relations with defendant until he was hospitalized.[431] Eventually, the parties separated, and plaintiff filed for divorce.[432]

At trial, the case was heard by a visiting judge (the second judge)[433] who inquired about the date of separation and the status of pending issues.[434] When the parties could not respond to the queries, the judge directed the parties to produce evidence relating to the timing of the separation and property issues and valuations.[435] After several days of competing testimony, the judge admonished the parties for not addressing the specific questions necessary to conclude the trial.[436] Concluding that the plaintiff "led two lives with separate families," the judge found defendant entitled to half of plaintiff's person for eighteen years.[437] Following this ruling, the parties agreed to arbitrate "the division of assets."[438] A third judge entered a written order providing that the division of property would be "submitted to binding arbitration with each party responsible for half the fee."[439] The parties subsequently completed an asset disclosure form; however, plaintiff failed to participate in the arbitration, instead requesting a new trial, which was

425. *Id.* at 3, 739 N.W.2d at 879.
426. *Id.*
427. *Id.*
428. *Id.*
429. *Johnson*, 276 Mich. App. at 3, 739 N.W.2d at 879.
430. *Id.*
431. *Id.* at 4, 739 N.W.2d at 880.
432. *Id.* at 3-4, 739 N.W.2d at 879-80.
433. The petition was assigned to a circuit court judge (the first judge). *Id.* at 4, 739 N.W.2d at 880.
434. *Id.*
435. *Johnson*, 276 Mich. App. at 5, 739 N.W.2d at 880.
436. *Id.* at 5-6, 739 N.W.2d at 880-81.
437. *Id.* at 6, 739 N.W.2d at 881.
438. *Id.* at 6-7, 739 N.W.2d at 881.
439. *Id.* at 7, 739 N.W.2d at 881.

denied.[440] The first judge entered a default judgment of divorce, and plaintiff appealed.[441]

The Michigan Court of Appeals initially examined the language of the Domestic Relations Arbitration Act, which contains procedural protections. Parties may agree to binding arbitration, provided the following requirements are met: each party must agree in writing that they have been advised that arbitration is voluntary and binding, and the right of appeal is limited; arbitration does not apply in cases of domestic violence; arbitration may not be appropriate in all cases; the arbitrator's powers and duties must be carefully delineated; during arbitration, the arbitrator will decide the issue and the court will enforce the arbitrator's decision on the issues; a party may consult with an attorney before entering into arbitration and may also choose to be represented by an attorney during the entire process of arbitration; if a party cannot afford an attorney, the party is able to seek free legal service; and a party to arbitration is responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including arbitrator's compensation.[442]

Here, the Michigan Court of Appeals found that the "mandatory pre-arbitration disclosures were not satisfied."[443] When the property issues were submitted to arbitration, the second judge did not inform the parties that their right of judicial review would be curtailed.[444] The Court of Appeals also found that the parties' decision to voluntarily submit the dispute to arbitration was suspect, given the court's "admonishment to the parties that the case would be resolved the next day."[445] "Under these circumstances, the first judge erred in allowing the default judgment premised on plaintiff's failure to participate in arbitration when he was not advised of the statutory criteria for voluntary submission."[446]

Arbitration pundits will appreciate the commentary found in Judge Murray's dissent, which acknowledged the "tortured" history of the case.[447] Judge Murray indicated, based on the record, that plaintiff had been put on notice that the court had executed two separate orders for arbitration.[448] Neither order contained objections or exceptions to the scope of arbitrable issues.[449] Recognizing the possibility that full

440. *Id.*
441. *Johnson*, 276 Mich. App. at 7, 739 N.W.2d at 881.
442. *Id.* at 8-9, 739 N.W.2d at 882.
443. *Id.*
444. *Id.* at 10, 739 N.W.2d at 883.
445. *Id.*
446. *Id.*
447. *Johnson*, 276 Mich. App. at 19, 739 N.W.2d at 887-88.
448. *Id.*
449. *Id.*

compliance of DRAA requisites had not been achieved, the parties simply were not free to ignore the order of the court.[450] It is not clear—though colorable—that Judge Murray's opinion derives not necessarily from his belief that the decision to arbitrate was voluntary, as required by DRAA, but that the parties should not be permitted with impunity to disobey a court order.[451]

Michigan courts continue to abide by the notion that arbitration, as a process in derogation of the common law, requires consent.[452] This is even more apparent in *Johnson*, where despite a trial marked by widely divergent views of what transpired, the Michigan Court of Appeals concluded that there must be full compliance with the requisites of the DRAA, or risk setting aside the results of arbitration, no matter how well-justified the decision.[453] To be sure, the DRAA does not collide with the Michigan Arbitration Act in terms of the consent required to invoke arbitration. While courts have not ruled on what in fact constitutes "voluntary," what emerges from this interesting jurisprudential landscape is the recognition that when a question as to "voluntary" arises, courts will become more circumspect. In the domestic relations arena, even more scrutiny is commanded.

VI. OTHER DEVELOPMENTS

A. RUAA Developments

The Uniform Arbitration Act (UAA), approved by the National Commissioners on Uniform State Laws in 1955, was passed by the Michigan State Legislature in 1961. The UAA, like the FAA, was passed to ensure the enforceability of pre-dispute arbitration agreements under state law. With the expansion of arbitration and an increase in court-annexed arbitration proceedings, commentators have expressed the need for an updated statute that would codify nearly five decades of case law. In 2000, the Commissioners enacted the Revised Uniform Arbitration

450. *Id.*

451. "A party is not entitled to ignore or disobey a court order simply on the belief that the order was invalid and would be overturned on appeal." *Id.* (relying on *In Re Contempt of Dudzinski*, 257 Mich. App. 96, 110, 667 N.W.2d 68 (2003)).

452. The Michigan Supreme Court has stated that "a party cannot be required to arbitrate an issue which he has not agreed to submit to arbitration . . . [and] a party cannot be required to arbitrate when it is not legally or factually a party to the agreement." *See* St. Clair Prosecutor v. American Fed. of State, County and Mun. Employees, 425 Mich. 204, 388 N.W.2d 231 (1986) (quoted with approval in Hetrick v. Friedman, 237 Mich. App. 264, 602 N.W.2d 583 (1999)).

453. *Johnson*, 276 Mich. App. at 2, 10-11, 739 N.W.2d at 879, 883.

Act (RUAA), which is a far more detailed and comprehensive statute than the UAA. At the present time, the RUAA has been adopted in 12 states and the District of Columbia.[454] Five other states have introduced bills to adopt it: Massachusetts, New York, Connecticut, Arizona, and Pennsylvania.[455]

Organizations which have endorsed the RUAA include the American Arbitration Association, Jams/Endispute, National Arbitration Forum, Association for Conflict Resolution [formerly SPIDR], the National Academy of Arbitrators, and the ABA House of Delegates.

B. The Fair Arbitration Act of 2007 and Similar Legislation

Several other bills of a similar nature were introduced in 2007 and 2008. These include the Arbitration Fairness Act of 2007 and the Fairness in Nursing Home Arbitration and Automobile Fairness Acts of 2008. The Arbitration Fairness Act, introduced as Senate Bill 1782 and House Resolution 3010 on July 12, 2007, states that under certain situations no pre-dispute arbitration agreement requiring arbitration shall be valid or enforceable.[456] These situations include (1) employment, consumer, or franchise disputes, and (2) disputes arising under any statute intended to protect civil rights or regulate contracts or transactions between parties of unequal bargaining power.[457]

Further, the Act declares that the enforceability of agreements to arbitrate shall be determined by a court, under federal law, rather than an arbitrator.[458] Determination of arbitrability under the Act resides with the courts irrespective of whether the party resisting arbitration challenges the agreement specifically or in conjunction with other contract terms.[459]

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454. Alaska (ALASKA STAT. § 09.43.010 (2007)); Colorado (COLO. REV. STAT. ANN. § 13-22-201 (West 2008)); Hawaii (HAW. REV. STAT. § 658A-1 (2008)); Nevada (NEV. REV. STAT. ANN. 38.206 (West 2007)); New Jersey (N.J. STAT. ANN. §§ 2A:23B-1 (West 2008)); New Mexico (N.M. STAT. ANN. § 44-7A-1 (West 2008)); North Carolina (N.C. GEN. STAT. ANN. § 1.569.1 (West 2008)); North Dakota (N.D. CENT. CODE § 32-29.3-01 (2008)); Oklahoma (OKLA. STAT. tit. 12 § 1851 (West 2008)); Oregon (OR. REV. STAT. § 36.600 (2008)); Utah (UTAH CODE ANN. § 78-31A-101 (2008)); Washington (WASH. REV. CODE ANN. § 7.04A.010 (West 2008)).

455. Arizona (H.R. 2825, 47th Leg., 2nd Reg. Sess. (AZ 2006)); Connecticut (H.B. 5531); Massachusetts (H.R. 1813 (Mass. 2007)); New York (SB4148/AB7826); Pennsylvania (H.R. 1625 (Penn. 2007)).

456. S. 1782, 110th Cong. § 4, H. Res. 3010, 110th Cong. § 2 (2007).

457. *Id.*

458. *Id.*

459. *Id.*

Notably, the Act exempts arbitration provisions in collective bargaining agreements.[460]

On December 12th, the Senate Committee on the Judiciary Subcommittee on the Constitution held hearings. In the House, the Subcommittee on Commercial and Administrative Law held hearings on October 25, 2007. On July 15, 2008, the Subcommittee held a mark-up session and forwarded the Bill to the full committee via voice vote.

In a more specific effort aimed at reform, the Fairness in Nursing Home Arbitration Act was introduced in the Senate on April 9, 2008 as Senate Bill 2838.[461] It provides that a pre-dispute arbitration agreement between a long-term care facility and a resident (or someone acting on the resident's behalf) shall not be valid or specifically enforceable.[462] Joint hearings were held June 18, 2008 with the Committee on the Judiciary and the Subcommittee on Antitrust, Competition Policy and Consumer Rights. An identical bill, House Resolution 6126, was introduced in the House on May 22, 2008.[463] Eventually referred to the Subcommittee on Commercial and Administrative Law, hearings were held and the Subcommittee forwarded the measure for consideration by the Full Committee on July 15, 2008. On July 30, the Committee held a mark-up session, and ordered the bill to be reported for full house consideration.

Another specific reform, the Automobile Arbitration Fairness Act of 2008 was introduced in the House on February 7, 2008 as House Resolution 5312.[464] The bill amends federal arbitration law to require that controversies arising out of motor vehicle consumer sales or lease contracts, including refusals to perform, may only be settled by arbitration if all parties agree to it in writing *after* the controversy arises.[465] The Subcommittee on Commercial and Administrative Law held hearings on March 6, 2008 and forwarded the bill by voice vote to the full committee for consideration. There are currently no similar bills pending in the Senate.

As of this writing, the bill resides in the Committee on the Judiciary.

460. *Id.*
461. S. 2838, 110th Cong. (2008).
462. *Id.*
463. H. Res. 6161, 110th Cong. (2008).
464. H. Res. 5312, 110th Cong. (2008).
465. *Id.*

C. The Uniform Mediation Act

Over the last several decades the United States has experienced a marked increase in the use of mediation as a preferred means of resolving disputes.[466] The Uniform Mediation Act (UMA)[467] was promulgated by the National Conference of Commissioners on Uniform State Laws in 2001. The Act is designed to provide:

> Certainty: With one comprehensive law for privileges and confidentiality in mediation, the process gains the certainty that comes from a single authority and not multiple complex sources.
>
> Privacy: The Act's central purpose is to provide a privilege that assures confidentiality. Mediators and participants receive a privilege of confidentiality that prohibits what is said during mediation from being used in later legal proceedings.
>
> Privilege Exceptions: Exceptions include threats of bodily harm or other violent crime, attempts to use mediation to plan or commit a crime, when information is needed in instances of allegations of child abuse, or for complaints of mediator misconduct.
>
> Party Protection: The Act requires the mediator to disclose known conflicts of interest, and the mediator's qualifications.
>
> Exceptions: The UMA does not apply to collective bargaining disputes, some judicial settlement conferences, or mediation involving parties who are all minors.
>
> Uniformity: The UMA provides firm assurance that a mediation is privileged by creating uniformity across state lines. This also aids in cross-jurisdictional mediations, where the parties cannot be assured of the reach of the home state's confidentiality provisions. There is considerable debate regarding the benefits of

466. Scott H. Hughs, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 MARQ. L. REV. 9, 15-17 (2001).

467. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM MEDIATION ACT (2001), *available at* http://www.law.upenn.edu/bll/archives/ulc/mediat/-2003finaldraft.htm (last visited Feb. 28, 2009).

uniformity amongst the states and whether the UMA achieves its goals of uniformity and confidentiality.[468]

The UMA ultimately received the support of the "American Bar Association, the National Conference of Commissioners on Uniform State Laws (NCCUSL), most major dispute resolution professional organizations and service providers, and many if not most leading dispute scholars."[469] Since 2001, ten states and the District of Columbia have adopted the Act.[470]

D. The Michigan Foreclosure Act

In response to the foreclosure crisis, Michigan House Bill number 6236 was introduced on June 12, 2008.[471] In effect, the bill mandates mediation prior to foreclosure of a private mortgage; in order to foreclose on a private mortgage: the plaintiff must send notice to the mortgagor no earlier than sixty days after the mortgage becomes delinquent; foreclosure is delayed if the mortgagor has a face-to-face meeting within thirty days of the date of the notice with the person who sent it and a HUD or MSHDA Certified Credit Counseling Agency; after the thirty day period following notice to the mortgagor, any unresolved issues must be discussed in mediation facilitated by an approved Michigan foreclosure mediator; the mediation must begin within sixty days of the temporary stay; and mediation fees shall be shared between the parties.[472]

The legislation is designed to provide a list of approved Michigan foreclosure mediators who are qualified under Michigan Court Rule 2.411 and who have also completed required foreclosure avoidance mediation training.[473] On June 12, 2008, House Bill 6232 was referred to the Committee on Banking and Finance.

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468. Brian D. Shannon, *Dancing with the One that "Brung Us"—Why the Texas ADR Community Has Declined to Embrace the UMA*, 2003 J. DISP. RESOL. 197, 204 (2003).

469. Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 100 (2003).

470. District of Columbia (D.C. CODE §§ 16-4201-16-4213 (2006)), Idaho (IDAHO CODE ANN. § 9-813 (West 2008)), Illinois (710 ILL. COMP. STAT. 35/11-35/99 (2004)), Iowa (IOWA CODE §§ 679C.101-.115 (2008)), Nebraska (NEB. REV. STAT. §§ 25-2930-25-2942 (2008)) New Jersey (N.J. STAT. ANN. 2A:23C-1 to 2A:23C-13 (West 2004)), Ohio (OHIO REV. CODE ANN. §§ 2710.01-.10 (West 008)), Utah (UTAH CODE ANN. 78-31c-101-114 (1953)), Vermont (VT. STAT. ANN. tit. 12, §§ 5711-5723 (West 2008)), and Washington (WASH. REV. CODE §§ 7.07.010-.904 (2006)).

471. H.R. 6236, 94th Leg., 1st Spec. Sess. (Mich. 2008).

472. H.R. 6236, 94th Leg., 1st Spec. Sess. §§ 3116-3205 (Mich. 2008).

473. *Id.*

VII. CONCLUSION

This past year produced an interesting array of decisions in many different sectors—commercial, employment, labor, and domestic relations. In virtually all decisions, courts continued to express their support for arbitration as a viable and flexible alternative to the litigation process. And, at least in the labor sector, arbitration continues to be the only process of resort for parties in conflict. The tenor of this year's *Survey* decisions confirms that the trend toward wider embrace of arbitration, sparked by the passage of the Federal Arbitration Act of decades earlier and now reinforced by the Revised Uniform Arbitration Act, will not abate any time soon.