

ALTERNATIVE DISPUTE RESOLUTION: LITIGATING ARBITRATION SLOWS AS MEDIATION BECOMES MORE POPULAR

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I. INTRODUCTION

Alternative Dispute Resolution as a whole is thriving. Civil jury trials continued at multi-decade lows, both absolutely and as a percentage of dispositions.¹ And alternatives to those trials have become mainstream.²

1. See Carl Reynolds, *Vanishing Jury Trials*, COURTEX (Jan. 7, 2010), <http://courtex.blogspot.com/2010/01/vanishing-jury-trials.html>. The Texas Office of Court Administration (TOCA) recently updated data that Justice Nathan Hecht had collected for his article, *The Vanishing Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2005), building on Professor Marc Galanter’s widely cited article, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. LEGAL STUD. 459 (2004), in reporting its annual statistics. *Id.* During the twenty-year period TOCA studied, the absolute number of civil jury trials declined 43% and

But not all Alternative Dispute Resolution (ADR) is equal.³ As ADR users have become more sophisticated buyers, they are thin-slicing their available processes.⁴ Mediation is growing in popularity and rarely results in a court challenge.⁵ It is popular because it is not rule-bound and stable because of clear law protecting the process.⁶ Arbitration, on the other hand, has drawn more criticism with increased use and dominates this year's case review.⁷

Though nineteen arbitration cases were decided by the Fifth Circuit this term, that is less than half the number decided just two years ago.⁸ And most were quietly decided with unpublished and often per curiam opinions, which is consistent with broader circuit trends.⁹ While circuit activity in the area has calmed, the United States Supreme Court continues to accept and decide arbitration cases that have a pronounced impact on practice not only in the Fifth Circuit but in state-court cases governed by the Federal Arbitration Act (FAA).¹⁰ Three of seventy-three October 2009 Term Supreme Court opinions focused on arbitration, there is at least one more pending this October 2010 Term,¹¹ and the Court has agreed to hear yet another during the October 2011 Term.¹²

Most of the Fifth Circuit cases involved pre-arbitration challenges to the arbitral process, and less than half of those were successful.¹³ Those are good odds compared to the post-arbitration challenges seeking to vacate an award: not a single arbitration award was vacated during the term.¹⁴ This is attributable in large part to two decades of U.S. Supreme Court rulings that have moved pre-dispute arbitration agreements "from disfavored status to judicially-denominated 'super-clauses.'"¹⁵ As a result, arbitrators may

the rate of disposition by jury trial 43.7%. *Id.* In 2009, 0.6% of civil filings were disposed of by jury trial, up from 0.5% in both 2007 and 2008. *Id.*

2. See Hecht, *supra* note 1, at 174-77.

3. See generally Will Pryor, *Alternative Dispute Resolution*, 63 SMU L. REV. 275 (2010) (describing the increasing popularity of mediation and the decreasing popularity of arbitration).

4. Thomas J. Stipanowich, *Arbitration: The "New Litigation"*, 2010 U. ILL. L. REV. 1, 24-35 (2010). For a decision tree outlining many common dispute resolution options, please see Donald R. Philbin Jr., *ADR Decision Tree*, ADR TOOLBOX, <http://www.adrtoolbox.com/wp-content/uploads/2010/03/ADR-Decision-Tree-Web-03142010.jpg> (last visited Feb. 6, 2011).

5. See Pryor, *supra* note 3, at 276.

6. *Id.*

7. See *id.* at 277-89.

8. See Donald R. Philbin Jr., *2010 U.S. Supreme Court and Fifth Circuit Activity Reports*, KARL BAYER DISPUTING BLOG (Jan. 10, 2011), <http://www.karlbayer.com/blog/?p=12281>. The dates of this review period are July 1, 2009 through June 30, 2010.

9. See *id.*

10. See *infra* Parts II-III; see also Donald R. Philbin Jr. & Audrey Lynn Maness, *Still Litigating Arbitration in the Fifth Circuit, but Less Often*, 42 TEX. TECH L. REV. 551 (2010) (summarizing Supreme Court and Fifth Circuit cases involving the FAA).

11. See *infra* Part II.

12. See *Stok & Assocs. v. Citibank*, No 10-514 (Cert. granted Feb. 22, 2011).

13. See *infra* Part III.

14. See *infra* Part III.

15. Stipanowich, *supra* note 4, at 9 (citations omitted).

handle jurisdictional and formational issues around statutory and contractual claims, manage discovery, and might even be asked to certify and supervise “class arbitration” where the parties so consent.¹⁶ Add judicial review and many would say we have what amounts to private litigation—and parties proceed accordingly—litigating in arbitration, and in court *about* arbitration.¹⁷ As a result, arbitration has often become “judicialized” to the point where some wonder if it is still a “more efficient, less costly, and more final method for resolving disputes.”¹⁸

But the expansion has not come quietly. Critics of “mandatory” arbitration agreements in consumer, employment, and franchise contracts say courts should not extend to adhesive-arbitration agreements rules designed principally for commercial and international arbitration agreements between sophisticated parties.¹⁹ Senator Al Franken highlighted the Fifth Circuit case of Jamie Leigh Jones—who was allegedly gang raped by co-workers in employer-provided housing while she was working for Halliburton in Iraq—to help convince Congress to amend the Defense Appropriations Bill to bar the Department of Defense from contracting with companies that require their employees to arbitrate Title VII discrimination claims and tort-related sexual-assault or harassment claims.²⁰ That was seen as a test vote on the broader proposed Arbitration Fairness Act (AFA) in the last Congress.²¹

Congressional action was not limited to Senator Franken’s amendment. As part of the Dodd-Frank Act, Congress directed a newly-created Bureau of Consumer Financial Protection to study mandatory, pre-dispute arbitration in financial-service contracts under its jurisdiction and report back to Congress.²² The agency will then have the power to either ban or regulate pre-dispute arbitration agreements within contracts under its jurisdiction.²³ Dodd-Frank also authorizes the Securities and Exchange Commission (SEC) to:

16. *See id.*

17. *See id.* at 9, 16-18.

18. *Id.* at 8.

19. *See id.* at 8-23.

20. *See* Erin Geiger Smith, *Al Franken Gets Alleged KBR Rape Victim Her Day In Court*, BUSINESS INSIDER LAW REVIEW (Mar. 23, 2010, 3:46 PM), <http://www.businessinsider.com/al-franken-gets-alleged-kbr-rape-victim-her-day-in-court-2010-3>. The court in *Jones* did not compel arbitration of many of Jones’s claims, including the Title VII and state-law claims arising out of the alleged sexual assault. *See infra* Part III.A.7.

21. *See* Michael Fox, *Franken Rape Amendment in Final Defense Bill: A Pre-Cursor to the Arbitration Fairness Act Takes Another Step*, HUMAN CAPITAL LEAGUE (Dec. 17, 2009, 3:38 AM), <http://humancapitalleague.com/Home/743> (discussing the effect of the Franken Amendment).

22. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1001-1100H, 124 Stat. 1376, 1955-2113 (2010).

23. Philip J. Loree Jr., *A Very Brief Look at the Arbitration-Related Provisions of the Dodd-Frank Act*, LOREE REINSURANCE & ARB. L. (July 30, 2010), <http://loreelawfirm.com/blog/a-very-brief-look-at-the-arbitration-related-provisions-of-the-dodd-frank-act> (offering a brief summary of the Dodd-Frank Act’s arbitration-related provisions).

prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any broker, dealer, or municipal securities dealer to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.²⁴

Section 921 of the Act authorizes the SEC to ban or regulate pre-dispute arbitration in contracts between customers or clients of any investment adviser.²⁵ Dodd-Frank also bans pre-dispute arbitration in residential mortgages and home-equity loans, and renders unenforceable pre-dispute agreements to arbitrate whistleblower claims.²⁶

Dodd-Frank aside, and whether or not Congress ever enacts the AFA (which seems less likely in the new Congress), the political debate has already changed practice.²⁷ Anecdotally, contract drafters seem to have toned down or eliminated arbitration agreements.²⁸ For six years Pace Professor Jill Gross has asked law students in her mediation and arbitration course to find pre-dispute arbitration clauses in consumer or employment contracts to which they are a party.²⁹ In the past, her students have never had a “problem locating unfair, unreasonable or arguably unconscionable provisions in at least one student’s arbitration clause.”³⁰ Gross notes that, “This year, for the first time [none of her thirty-one students] could identify an arguably unconscionable provision in a pre-dispute arbitration clause.”³¹ In fact, the students observed that the clauses “appeared to be overly favorable to the consumer, as if the company was bending over backward to make sure the consumer didn’t have a valid challenge to enforceability of the clause.”³² Others have either dropped arbitration agreements altogether or made them optional rather than mandatory.³³ Pepperdine Professor Tom

24. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921(a), 124 Stat. at 1841.

25. *Id.* at § 921(b).

26. *See id.* § 922.

27. *E.g.*, *infra* notes 28-34 and accompanying text. Professor Aaron Bruhl has questioned whether there has been a silent negotiation between Congress and the Supreme Court over arbitral unconscionability. *See also* Donald R. Philbin Jr., *Thankful for Unanswered Prayers? Unconscionability ‘Equilibrium’*, 27 ALTERNATIVES TO HIGH COST LITIGATION 145 (2009) (exploring the Supreme Court’s expansive interpretation of the Federal Arbitration Act); *see generally* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008) (describing the unconscionability analysis involved with striking down arbitration agreements).

28. Jill Gross, *The Decline of Unconscionable Arbitration Clause Provisions?*, ADR PROF BLOG (Dec. 8, 2010), <http://www.indisputably.org/?p=1900>.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *See id.*

Stipanowich starts his indictment of commercial arbitration as the “New Litigation” with this observation: “The latest edition of the American Institute of Architects (AIA) construction forms, the nation’s most widely used template for building contracts, eliminates the default binding arbitration provision”³⁴

Serious efforts to address the stress fractures in arbitration are afoot. Stipanowich and the College of Commercial Arbitrators have developed and championed “Protocols for Expedious, Cost-Effective Commercial Arbitration.”³⁵ Arbitration providers are modifying rules and training their neutrals to streamline proceedings without sacrificing due process.³⁶ And contract drafters are eschewing boilerplate language simply designating certain administrators and their panels and rules in favor of arbitration agreements that are tailored to meet the ADR-related needs of the parties generally, and those of specific transactions in particular.³⁷

Perhaps ironically, arbitration’s bust has been mediation’s boom.³⁸ Mediation has, for all intents and purposes, replaced arbitration as the preferred method of dispute resolution.³⁹ That there is so little litigation about mediation—and no mediation-related Fifth Circuit opinions this term—is further testament to its efficacy and general acceptance.⁴⁰

II. SUPREME COURT CONTINUES TO SUPPORT ARBITRATION

A. Class Arbitration

There were two significant developments concerning class arbitration during the survey period, both from the United States Supreme Court.⁴¹ First, the Court decided *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, holding that courts and arbitrators may not impose class arbitration on parties whose contracts are silent on that score.⁴² The *Stolt-Nielsen* decision has many obvious—and not so obvious—implications on class and consolidated arbitration practice.⁴³

34. Stipanowich, *supra* note 4, at 3.

35. Thomas J. Stipanowich, Curtis E. von Kann & Deborah Rothman, *Protocols for Expedious, Cost-Effective Commercial Arbitration*, COLLEGE OF COMMERCIAL ARBITRATORS, http://www.thecca.net/CCA_Protocols.pdf (last visited Mar. 26, 2011).

36. *See, e.g., id.*

37. *See, e.g., id.*

38. *See generally* Stipanowich, *supra* note 4, at 7 (discussing the perceived benefits of mediation, as opposed to arbitration).

39. *See id.*

40. *See generally id.* (noting the generally positive opinion about mediation).

41. *See infra* notes 42 & 44.

42. *See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775-76 (2010).

43. *See* Philip J. Loree Jr., *Stolt-Nielsen Delivers a New FAA Rule—And Then Federalizes the Law of Contracts*, 28 ALTERNATIVES TO HIGH COST LITIGATION 124, 128-30 (2010) [hereinafter Loree, *New FAA Rule*] (including a discussion by the author about some of those implications); Philip J. Loree Jr.,

Second, on May 24, 2010, the Court granted certiorari in *AT&T Mobility LLC v. Concepcion* to decide whether the FAA preempts a California rule that deems unconscionable class waivers in adhesive contracts when a consumer alleges small-dollar but widespread fraud.⁴⁴

I. Stolt-Nielsen S.A. v. AnimalFeeds International Corp.: Parties Must Consent to Class Arbitration

Stolt-Nielsen involved several arbitration agreements between two sophisticated parties, a shipowner and a charterer.⁴⁵ They submitted to arbitration the question of whether the agreements permitted class arbitration.⁴⁶ A three-person arbitration panel ruled that the agreements permitted class arbitration based on their broad scope and a number of decisions by other arbitration panels that “had construed ‘a wide variety of clauses in a wide variety of settings as allowing for class arbitration.’”⁴⁷ While “the panel acknowledged that none of these decisions was ‘exactly comparable’ to the” one before it, it reasoned that the shipowner’s “expert evidence did not show an ‘inten[t] to preclude class arbitration,’” and that its “argument would leave ‘no basis for a class action absent express agreement among all parties and the putative class members.’”⁴⁸

As explained below, the Court determined that the arbitrators exceeded their authority by issuing an award that was based on their own notions of public policy gleaned from other arbitral decisions imposing class arbitration in the face of silence.⁴⁹ But, the Court did not vacate and merely remand to the arbitrators for a rehearing on “‘whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.’”⁵⁰ It said that “there can be only one possible outcome on the facts”—where the parties’ contracts are undisputedly silent on class

How Will Stolt-Nielsen, S.A. v. Animalfeeds Int’l Corp. Change Reinsurance Arbitration Practice?, LOREE REINSURANCE AND ARB. L. (May 25, 2010), Parts I-V.C, <http://loreelawfirm.com/blog/> (follow “Archives” hyperlink; then follow “May 2010” hyperlink; then follow “How Will Stolt-Nielsen, S.A. v. Animalfeeds Int’l Corp. Change Reinsurance Arbitration Practice?” hyperlink) [hereinafter Loree, *Change Reinsurance Arbitration Practice?*].

44. See *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010); *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856-59 (9th Cir. 2009), cert. granted sub nom. *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (May 2010).

45. See *Stolt-Nielsen S.A.*, 130 S. Ct. at 1764.

46. See *id.* at 1765-66.

47. *Id.* at 1766 (quoting the panel’s award).

48. *Id.* at 1766 (alteration in original) (quoting the panel’s award).

49. See *id.* at 1770; discussion *infra* notes 52-55 and accompanying text.

50. *Id.* at 1765 (quoting Rule 3 of the American Arbitration Association’s Supplementary Rules for Class Arbitrations (as effective Oct. 8, 2003)). Section 10(b) of the FAA states that “[i]f an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.” 9 U.S.C. § 10(b) (2006).

arbitration, save for the parties' agreement to a broad arbitration agreement—and set about to explain why.⁵¹

Acknowledging that “interpretation of an arbitration agreement is generally a matter of state law,” the Court ruled that the FAA nevertheless “imposes certain rules of fundamental importance, including the basic precept that arbitration “is a matter of consent, not coercion.”⁵² The Court provided specific examples of these FAA “rules of fundamental importance,” each of which is designed to promote party autonomy:

1. “parties are ‘generally free to structure their arbitration agreements as they see fit[;]’”
2. parties may “agree to limit the issues they choose to arbitrate[;]”
3. parties may “agree on rules under which any arbitration will proceed[;]”
4. parties may “choose who will resolve specific disputes[;]” and
5. parties may “specify with whom they choose to arbitrate.”⁵³

While these rules came from prior Court decisions, the Court added a new one: “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”⁵⁴ And the Court admonished that it “falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.”⁵⁵

Having set forth the governing rule, the Court considered whether the arbitrators' decision complied with it.⁵⁶ The panel, stated the Court, based its conclusion on the parties' broad arbitration agreement and the absence of any “inten[t] ‘to *preclude* class arbitration,’” even though the parties had stipulated “that they had reached ‘no agreement’” on class arbitration.⁵⁷ The panel found that the agreement's silence was “dispositive” even though “the parties [were] sophisticated business entities, even though there [was] no tradition of class arbitration under maritime law, and even though AnimalFeeds [did] not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment”⁵⁸ The panel's conclusion, said the Court, was “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”⁵⁹

51. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1770.

52. *Id.* at 1773 (citations omitted).

53. *Id.* at 1773-74 (citations omitted).

54. *Id.* at 1775 (emphasis in original).

55. *Id.* at 1774-75.

56. *See id.* at 1775.

57. *Id.* (quoting the panel's award) (emphasis in original).

58. *Id.*

59. *Id.*

The Court could have ended its analysis here, but it did not.⁶⁰ It considered whether consent to class arbitration should be implied.⁶¹ The Court analyzed the question from the standpoint of the procedural arbitrability doctrine, explaining that “[i]n certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties’ agreement.”⁶²

The Court explained that such a presumption was “grounded in the background principle that ‘[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.’”⁶³ Again, the Court could have concluded its analysis at this point by simply stating that the parties’ indisputably bilateral contracts could be given effect by ordering bilateral arbitration, and it was therefore unnecessary to adopt class-arbitration procedures “to give effect” to those contracts.⁶⁴ The Court might have added that implying consent to class arbitration would override the FAA rules of “fundamental importance” discussed above, under which the parties may choose with whom they arbitrate, who the decision makers should be for a “specific dispute,” and whether class arbitration should proceed in the first place.⁶⁵

But instead, the Court went on to explain that class arbitration “changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”⁶⁶ For, in “bilateral arbitration,” the “parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”⁶⁷

By contrast, “the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties’ mutual consent to resolve disputes” in that manner.⁶⁸ The Court cited “just some of the fundamental changes” brought on by class arbitration:

1. “An arbitrator chosen according to an agreed upon procedure no longer resolves a single dispute between the parties to a single

60. *See id.*

61. *See id.* at 1775-76.

62. *Id.* at 1775.

63. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979)).

64. *Id.*

65. *See supra* note 52 and accompanying text.

66. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1775.

67. *Id.*

68. *Id.*

agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties[;]”

2. Under the American Arbitration Association’s Class Arbitration Rules the “presumption of privacy and confidentiality” that ordinarily applies in bilateral arbitration does not apply in class arbitration, “thus potentially frustrating the parties’ assumptions when they agreed to arbitrate[;]”
3. A class arbitration award does not simply purport to bind the parties to a single arbitration agreement but “adjudicates the rights of absent parties as well[;]” and
4. “[T]he commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited”⁶⁹

The opinion notes that the dissent “minimized these crucial differences” by contending that the question before the arbitrators was merely procedural, and said that if the matter “were that simple, there would be no need to consider the parties’ intent with respect to class arbitration.”⁷⁰ Concluding that the “FAA require[d] more,” the Court stated that it sees “the question as being whether the parties *agreed to authorize* class arbitration,” and where, as here, “the parties stipulated that there was ‘no agreement’ on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.”⁷¹

Because the Court found that the parties had stipulated that there was “no agreement” on class arbitration, there was no reason for the Court to discuss what a party must show to establish such an agreement.⁷² The Court acknowledged that fact, stating there was “no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration.”⁷³

2. AT&T Mobility LLC v. Concepcion: *United States Supreme Court to Determine Whether the FAA Preempts a State Rule Deeming Class Waivers Unconscionable in Certain Circumstances*

On May 24, 2010, the Supreme Court agreed to take up the controversial question of whether, and if so, to what extent, the FAA preempts a California rule that deems unconscionable class waivers in adhesive contracts when a consumer alleges small-dollar, but widespread,

69. *Id.* at 1776 (citations omitted).

70. *Id.* at 1776. See Loree, *New FAA Rule*, *supra* note 43, at 129, for a discussion on Associate Justice Ruth Bader Ginsburg’s dissent.

71. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1776 (emphasis in original).

72. *Id.*

73. *Id.* at 1776 n.10.

fraud.⁷⁴ Prior to *Stolt-Nielsen*, a number of state and federal courts voided class waivers in adhesive arbitration agreements on state-law unconscionability grounds, sometimes reasoning that: (1) class waivers deter consumers from pursuing small-dollar claims in bilateral arbitration because the costs of arbitrating them in that manner can easily exceed their value; (2) class waivers are one-sided because corporate parties rarely (if ever) have reason to assert claims against a class of consumers; and (3) class waivers therefore effectively act as exculpatory clauses, enabling sophisticated corporate parties to reduce significantly or eliminate their liability for large-scale, small-dollar fraud.⁷⁵ The Fifth Circuit has taken a more moderate approach to unconscionability claims directed at class waivers or other provisions of arbitration agreements, explaining that courts “must exercise a degree of care when applying state decisions that strike down arbitration clauses as unconscionable” to ensure that “state courts are not . . . employ[ing] . . . general [contract-law] doctrines in ways that subject arbitration clauses to special scrutiny.”⁷⁶

Stolt-Nielsen calls into doubt federal and state court decisions voiding class waivers on unconscionability grounds.⁷⁷ While there are many reasons why that is so, one crucial issue is whether class waivers are even relevant after *Stolt-Nielsen*.⁷⁸ Since, under the FAA, class arbitration cannot be compelled unless the parties expressly *authorize* it, then parties must necessarily be authorized under the FAA to expressly *prohibit* it, notwithstanding state law to the contrary.⁷⁹

The United States Court of Appeals for the Ninth Circuit decided *AT&T Mobility* before the Supreme Court decided *Stolt-Nielsen*.⁸⁰ The Ninth Circuit held that the FAA does not preempt California’s *Discover Bank* rule, which deems unconscionable class action and class arbitration waivers in adhesive contracts if the waiver is: (1) “found in a consumer contract of adhesion,” (2) “in a setting in which disputes between the contracting parties predictably involve small amounts of damages,” and

74. See *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (Apr. 2010); *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. Oct. 2009), cert. granted sub nom. *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (May 2010).

75. See, e.g., *Shroyer v. New Cingular Wireless Serv., Inc.*, 498 F.3d 976, 983-87 (9th Cir. 2007); *Discover Bank v. Superior Ct.*, 36 Cal. 4th 148, 162-63 (2005); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1005-08 (Wash. 2007).

76. *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004) (rejecting unconscionability challenge to class waiver under Louisiana state-law grounds); see generally *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 431-33 (5th Cir. 2004) (holding arbitration agreement unconscionable under general principles of Mississippi unconscionability law); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 301 (5th Cir. 2004) (holding arbitration agreement, including class waiver, not unconscionable under Texas law).

77. See *Stolt-Nielsen S.A.*, 130 S. Ct. at 1775.

78. See *id.*

79. See *id.* at 1768-69.

80. See *id.* at 1758 (decided Apr. 2010); *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. Oct. 2009), cert. granted sub nom. *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (May 2010).

(3) “it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”⁸¹

The preemption question before the Supreme Court raises two issues: (1) whether § 2 of the FAA expressly preempts the *Discover Bank* rule; and (2) whether the FAA impliedly preempts the rule.⁸² The express preemption question turns on § 2 of the FAA, which provides that arbitration agreements are “valid, irrevocable, and enforceable, *save* upon such grounds as exist at law or in equity for the revocation of *any* contract.”⁸³ Section 2 permits states to withhold enforcement of arbitration agreements (or provisions in them) based on generally applicable contract defenses, such as fraud, duress, and unconscionability, but preempts state laws that discriminate against arbitration agreements.⁸⁴

If the Court finds that the *Discover Bank* rule simply implements general principles of California unconscionability law as applicable to “any contract,” then it will presumably hold that the *Discover Bank* rule is not expressly preempted by § 2.⁸⁵ But if it finds that the *Discover Bank* rule is not really a general contract rule, but one that applies principally to arbitration agreements, then it will presumably find that the rule discriminates against arbitration agreements in violation of § 2.⁸⁶

Even if the Court determines that the FAA does not expressly preempt the *Discover Bank* rule, it will likely consider whether the FAA *impliedly* preempts the rule.⁸⁷ One type of implied preemption is known as “conflict preemption”—a/k/a “obstacle preemption”—which “exists if compliance with both federal and state law is impossible or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸⁸ State laws or policies that undermine “the goals and policies of the FAA” are thus preempted by the Act.⁸⁹ If the Court finds that application of the rule frustrates the purposes and intent of the FAA, then it will presumably hold that the FAA impliedly preempts *Discover Bank*.⁹⁰

81. *Laster*, 584 F.3d at 854-56 (quoting *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005)).

82. *See id.* at 854.

83. 9 U.S.C. § 2 (2006) (emphasis added).

84. *See Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

85. *See Laster*, 584 F.3d at 854; *Discover Bank*, 113 P.3d at 1110; 9 U.S.C. § 2.

86. *See sources cited supra* note 85.

87. *See Laster*, 584 F.3d at 856.

88. *Shroyer v. New Cingular Wireless Serv., Inc.*, 498 F.3d 976, 988 (9th Cir. 2007) (citations and quotations omitted).

89. *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Univ.*, 489 U.S. 468, 477-78 (1990).

90. *See id.*

The Court held oral argument in *AT&T Mobility* on November 9, 2010.⁹¹ A decision is expected before the close of the Court's October 2010 Term in June 2011.⁹²

B. Standard of Review for Vacatur Under § 10(a)(4)

The standard of review under § 10(a)(4)—and in particular, whether § 10(a)(4) permits a court to assess whether arbitrators exceeded their powers based on the outcome of an award—has significant implications for commercial arbitration.⁹³ There are two overlapping outcome-based standards of review that potentially fall within the scope of § 10(a)(4): (1) “manifest disregard of the law” and (2) what might be called “manifest disregard of the agreement.”⁹⁴

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court held that § 10 of the FAA stated the exclusive grounds for vacating an award, and left open the question whether the manifest disregard of the law standard was an independent ground for vacatur not authorized by § 10, or whether it might be subsumed within § 10(a)(4)—which authorizes vacatur where the arbitrators exceed their powers—or perhaps within § 10(a)(3), which authorizes vacatur for prejudicial procedural misconduct.⁹⁵

In *Citigroup Global Markets, Inc. v. Bacon*, the Fifth Circuit held “that *Hall Street* restricts the grounds for vacatur to those set forth in § 10 of the Federal Arbitration Act . . . , and consequently, manifest disregard of the law is no longer an independent ground for vacating arbitration awards under the FAA.”⁹⁶ The court remanded the case to the district court to “consider whether the grounds asserted for vacating the award might support vacatur under any of [§ 10’s] statutory grounds,” but said nothing about the manifest disregard of the agreement standard.⁹⁷ Courts in other circuits have held that the manifest disregard of the law standard is subsumed within § 10(a)(4).⁹⁸

The issue of whether an outcome-based standard of review survived *Hall Street* arose again in *Stolt-Nielsen*.⁹⁹ As previously noted, *Stolt-Nielsen* arose out of a motion to vacate an award imposing class arbitration

91. See Kristen Friend, *Supreme Court May Ban Class Action Lawsuits*, SEOLAWFIRM.COM (Nov. 10, 2010), <http://www.seolawfirm.com/2010/11/supreme-court-may-ban-class-action-lawsuits/>.

92. See *id.* (noting that a decision is expected in the spring).

93. See Loree, *Change Reinsurance Arbitration?*, *supra* note 43, at Part II (discussing some of the implications).

94. See *id.*

95. See *Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1403-04 (2008).

96. *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009).

97. *Id.* at 350, 358.

98. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 93-95 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (Apr. 2010); *Comedy Club, Inc. v. Improv West Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009).

99. See *Stolt-Nielsen S.A.*, 130 S. Ct. at 1766.

on the parties even though the parties' agreements were concededly silent on that score.¹⁰⁰ So the Court had to consider whether it could vacate the award only if the arbitrators exceeded the scope of their authority to rule on the matters addressed in the award, or whether it could review the award under §10(a)(4) based on its outcome.¹⁰¹

Because the parties submitted the issue of whether their contracts authorized or forbade class arbitration, the Court imported into the commercial context the labor arbitration manifest-disregard-of-the-agreement standard and found that it was subsumed within § 10(a)(4).¹⁰² The Court said: "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable."¹⁰³ "In that situation," said the Court, "an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy."¹⁰⁴ Applying that standard to the facts, the Court "conclude[d] that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration."¹⁰⁵

The Court also found it relevant that the panel was not persuaded by Stolt-Nielsen's unrebutted expert testimony—including testimony that there had never been a class arbitration under the form of charter-party agreement used—by pre-*Green Tree Financial Corp. v. Bazzle* decisions holding that courts could not compel class or consolidated arbitration where the parties' agreements were silent on that score.¹⁰⁶

The Court said that because the parties had stipulated that they had reached no agreement on class arbitration, the arbitrators should have inquired whether the FAA, maritime law, or New York Law contained a "default rule" that applied.¹⁰⁷ The stipulation "left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task."¹⁰⁸ But instead, "the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation."¹⁰⁹

100. See *id.* at 1767; discussion *supra* Part II.A.1.

101. See *Stolt-Nielsen S.A.*, 130 S. Ct. at 1767.

102. *Id.*

103. *Id.* (quoting *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (*per curiam*)).

104. *Id.*

105. *Id.* at 1767-68.

106. *Id.* at 1769 n.5 (discussing *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion)); see, e.g., *Glencore Ltd. v. Schnitzer Steel Prods.*, 189 F.2d 264, 268 (2d Cir. 1999); *Champ v. Siegal Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *United Kingdom v. Boeing Co.*, 998 F.2d 68, 71, 74 (2d Cir. 1993).

107. See *Stolt-Nielsen S.A.*, 130 S. Ct. at 1768-69.

108. *Id.* at 1770.

109. *Id.* at 1768-69.

While the Court imported into § 10(a)(4) the manifest-disregard-of-the-agreement standard, it stopped short of deciding whether the manifest-disregard-of-the-law standard survived *Hall Street*.¹¹⁰ Yet, it declared that if the manifest-disregard-of-the-law standard applied after *Hall Street*, then it was satisfied as well.¹¹¹

The Court's dictum—and even its holding—strongly suggest that the manifest-disregard standard may be not only alive and well, but thriving.¹¹² By criticizing the panel for not determining whether the FAA, state, or maritime law provided a default rule, and instead applying its own notions of public policy, the Court effectively admonished arbitrators to interpret and apply the law, not their own rules.¹¹³ And while the Court acknowledged that it could remand the matter to the arbitrators under § 10(b) to determine what the default rule was, it did not because it concluded that no outcome was permissible under the FAA under the facts before it other than the one it set out to articulate later in the decision: Class arbitration cannot be imposed without the parties' express consent.¹¹⁴

The Court thus did not consider the arbitrators authorized to disregard—let alone manifestly disregard—what it deemed to be the applicable rule under the FAA.¹¹⁵ Whether that means the Court effectively endorsed vacatur for “disregard of the Federal Arbitration Act” only, or “manifest disregard” of any applicable law, is arguably an open question in the Fifth Circuit in light of *Stolt-Nielsen*, which may provide a basis for the Fifth Circuit to reconsider *Citigroup*.¹¹⁶

C. Allocation of Power Between Courts and Arbitrators

The United States Supreme Court decided two cases concerning the allocation of power between courts and arbitrators: *Rent-A-Center, West, Inc. v. Jackson* and *Granite Rock Co. v. International Brotherhood of Teamsters*.¹¹⁷ *Rent-A-Center* addressed the question of who gets to decide whether an arbitration agreement is unconscionable when the parties have clearly and unmistakably delegated arbitrability questions to the

110. *Id.* at 1768 n.3.

111. *See id.*

112. *See id.*

113. *Id.* at 1768-69.

114. *Id.* at 1770, 1775; *see also* 9 U.S.C. § 10(b) (2006) (“If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.”).

115. *See Stolt-Nielsen S.A.*, 130 S. Ct. at 1775.

116. *See id.*; *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. 2009).

117. *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (June 21, 2010); *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (June 2010).

arbitrator.¹¹⁸ *Granite Rock* addressed the question of who gets to decide when a contract containing an arbitration agreement was formed.¹¹⁹

1. Rent-A-Center: Arbitrators May Decide Unconscionability Questions When the Parties Clearly and Unmistakably Submit Arbitrability Questions to Arbitration

Rent-A-Center arose out of an employment discrimination dispute between an employer and an employee, who were parties to a stand-alone arbitration agreement.¹²⁰ The agreement contained a delegation provision, which clearly and unmistakably delegated arbitrability questions to the arbitrator:

[T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.¹²¹

The employee brought suit in the United States District Court for the District of Nevada and the employer moved to stay litigation and compel arbitration.¹²² The employee argued that the stand-alone arbitration agreement was unconscionable on three independent grounds: (1) the claims-covered provision required the employee to arbitrate all of its claims but allowed the employer to pursue in court certain claims requiring injunctive relief; (2) the agreement required the parties to share expenses equally; and (3) it limited the amount of discovery the parties could take.¹²³ Relying on the delegation provision, the employer argued that the arbitrator had to decide whether the agreement was unconscionable.¹²⁴

The district court granted the employer's motion to stay litigation and compel arbitration, but the United States Court of Appeals for the Ninth Circuit reversed, holding that a court must decide the unconscionability question, notwithstanding the delegation provision.¹²⁵ The Supreme Court granted certiorari and reversed.¹²⁶

The question before the Court was "whether, under the Federal Arbitration Act . . . , a district court may decide a claim that an arbitration

118. *Rent-A-Center*, 130 S. Ct. at 2775.

119. *Granite Rock*, 130 S. Ct. at 2853.

120. *Rent-A-Center*, 130 S. Ct. at 2786.

121. *Id.* at 2775.

122. *Id.*

123. *Id.* at 2780.

124. *Id.* at 2775.

125. *Id.* at 2775-76.

126. *Id.* at 2776, 2781.

agreement is unconscionable, where the agreement explicitly assigns that decision to the arbitrator.”¹²⁷ Extending the *Prima Paint* and *Buckeye Check Cashing* doctrine of severability (a/k/a “separability”) to delegation provisions contained within arbitration agreements, the Court held 5-4 that the answer was “no” where the party opposing arbitration challenges the arbitration agreement as a whole but does not specifically challenge the delegation provision itself.¹²⁸

The Court’s reasoning was syllogistic. First, the Court concluded that, under the doctrine of severability, the delegation provision was severable from the stand-alone agreement in which it was contained and had to be treated as a separate arbitration agreement for the purposes of FAA § 2.¹²⁹ Second, because the delegation provision was severable, a challenge directed at the stand-alone agreement as a whole, and not the delegation provision specifically, was for the arbitrator.¹³⁰ Third, because the employee’s challenge was directed at the stand-alone agreement as a whole, it had to be determined by the arbitrator pursuant to the separately enforceable delegation provision.¹³¹

The Court explained that the severability doctrine did not render delegation clauses immune from attack, provided that the attack was specifically directed at the delegation provision, and not a general attack on the arbitration agreement as a whole.¹³² The Court said “[i]t may be that had [the employee] challenged the delegation provision by arguing that” the fee-sharing and discovery provisions “*as applied* to the delegation provision rendered *that* provision unconscionable, the challenge should have been considered by the court.”¹³³

But the Court also explained that such a challenge would have been more difficult than one directed at the entire stand-alone arbitration agreement.¹³⁴ To show that the discovery provisions, as applied to the delegation provision, were unconscionable, the employee “would have had to argue that the limitation upon the number of depositions causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable.”¹³⁵ But “[t]hat would be . . . a much more difficult

127. *Id.* at 2775.

128. *Id.* at 2779; *see* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967). Associate Justice Antonin Scalia wrote the majority opinion, which Chief Justice John G. Roberts Jr., Associate Justices Anthony M. Kennedy, Clarence Thomas, and Samuel A. Alito Jr. joined. *Rent-A-Center*, 130 S. Ct. at 2774. Associate Justice John Paul Stevens dissented in an opinion joined by Associate Justices Ruth Bader Ginsburg, Stephen G. Breyer, and Sonia Sotomayor. *Id.*

129. *Rent-A-Center*, 130 S. Ct. at 2778-79.

130. *Id.* at 2779.

131. *Id.* at 2779-81.

132. *Id.* at 2778.

133. *Id.* at 2780 (emphasis in original).

134. *Id.*

135. *Id.*

argument to sustain than the argument that the same limitation rendered arbitration of his factbound employment-discrimination claim unconscionable.”¹³⁶ Likewise, demonstrating that the fee-splitting provision was unfair as applied to the delegation provision would be more difficult than demonstrating it unfair as applied to “arbitration of more complex and fact-related aspects of the alleged employment discrimination.”¹³⁷

2. Granite Rock: *The Court Decides When a Contract Containing an Arbitration Agreement was Formed*

Under a long line of Supreme Court decisions, the Court ordinarily determines: (a) whether an arbitration agreement exists; and (b) if so, what it covers.¹³⁸ But the circumstances in *Granite Rock* raised a related, but analytically distinct, question that the Court had not previously considered: Who gets to decide *when* a contract containing an arbitration agreement was formed where the resolution of the “when” question effectively determines whether the arbitration agreement covers the dispute?¹³⁹

In a 7-2 decision, the Court held that, under the facts presented, the Court had to decide when a collective bargaining agreement containing an arbitration agreement was formed.¹⁴⁰ While the Court’s decision did not break significant new ground, it confirmed that the presumption of arbitrability and the severability doctrine do not apply until a court determines that a valid and enforceable arbitration agreement was formed.¹⁴¹

Granite Rock arose out of a labor dispute governed by the Labor Management Relations Act, but the Court said that the governing arbitration-law principles were the same as those applicable to an FAA-governed commercial dispute.¹⁴² The facts and procedural history were somewhat complex:

136. *Id.*

137. *Id.*

138. *See, e.g.,* *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

139. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2853 (2010).

140. *Id.* at 2853. Associate Justice Clarence Thomas wrote for the majority, joined by Chief Justice John G. Roberts Jr., and Associate Justices Antonin G. Scalia, Anthony M. Kennedy, Ruth Bader Ginsburg, Stephen G. Breyer and Samuel A. Alito. *Id.* at 2852. Associate Justice Sonia Sotomayor wrote a dissenting opinion in which Associate Justice John Paul Stevens joined. *Id.* The Court also ruled 9-0 that there was no federal cause of action for tortious interference with contract under § 301 of the Labor Management Relations Act. *Id.* at 2853. That aspect of the Court’s decision, while important, is outside the scope of this article.

141. *Id.* at 2856.

142. *Id.* at 2855, 2857 n.6 & 2857-58.

- Company A and Union B were parties to a collective bargaining agreement that had expired as of date X.¹⁴³
- They entered into negotiations for a new one to be effective as of date X and Union B went on strike.¹⁴⁴ Union B's international union, Union C, advised Union B in the contract negotiations.¹⁴⁵
- Company A and Union B reached agreement on the terms of a new collective bargaining agreement to be effective as of date X (new CBA), but which was subject to ratification by the members of Union B.¹⁴⁶ The new CBA contained an arbitration agreement that applied to all disputes "arising under" the new CBA.¹⁴⁷ The arbitration agreement provided that "[d]ecisions of the impartial Arbitrator shall be within the scope and terms of this agreement . . . provided such decision is specifically limited to the matter submitted and does not amend any provisions of this agreement."¹⁴⁸ The arbitration agreement also required the parties to attempt to mediate their disputes before proceeding to arbitration.¹⁴⁹
- The new CBA contained a no-strike provision, but did not directly address Union B's liability for strike damages during the period between the expiration of the prior CBA and the negotiation and ratification of the new one.¹⁵⁰ At the close of negotiations, Union B's business manager requested that Company A hold Union B harmless for the strike that ensued during the negotiation period.¹⁵¹ The business manager did not condition ratification of the new CBA on a hold-harmless agreement, and Company A did not agree to enter into one.¹⁵²
- After a ratification vote, Company A believed that Union B had ratified the new CBA.¹⁵³
- Union C opposed Union B's decision to return to work, and two days after the ratification vote, Union B demanded a hold-harmless agreement from Company A.¹⁵⁴ Company A refused to provide it, and Union B went back on strike.¹⁵⁵

143. *See id.* at 2853.

144. *See id.* at 2854.

145. *See id.*

146. *See id.*

147. *See id.* at 2862.

148. Joint Appendix Volume 2 of 2, at *435, *Granite Rock v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010) (No. 08-1214), 2009 WL 2877583.

149. *Granite Rock Co.*, 130 S. Ct. at 2862.

150. *See id.* at 2853-54.

151. *See id.*

152. *See id.*

153. *See id.* at 2854-55.

154. *See id.* at 2854.

155. *See id.*

- Company A commenced an action in federal district court seeking an injunction against the strike and damages for breach of the no-strike provision in the new CBA.¹⁵⁶ The injunction was ultimately mooted when Union B returned to work after ratifying the new CBA effective approximately seven weeks after the initial ratification vote and approximately six weeks after Company A commenced its action.¹⁵⁷
- Because the subsequent ratification did not moot Company A's claim for strike-related damages incurred prior to that ratification, the district court held a jury trial on whether the agreement was ratified as of the first ratification vote, or not until the second one.¹⁵⁸ Union B contended that the question of when the new CBA was ratified had to be submitted to arbitration.¹⁵⁹
- A jury held that the new CBA was ratified when the first ratification vote was held, and the district court ordered the parties to arbitrate Company A's strike-related damages claim.¹⁶⁰
- The United States Court of Appeals for the Ninth Circuit reversed and ordered the parties to arbitrate the ratification-date claim.¹⁶¹ Relying on the severability doctrine, it held there was no dispute over whether the parties entered into an arbitration agreement—as opposed to the CBA as a whole—at the time Company A filed suit because (a) Company A sought to enforce the new CBA, which contained the arbitration agreement, and (b) Union B sought to enforce the arbitration agreement, albeit not the rest of the new CBA.¹⁶²
- The Ninth Circuit also ruled that, under the presumption of arbitrability, the dispute over the new CBA's formation fell within the arbitration agreement's arising-under provision. According to the court, “the arbitration clause [was] certainly susceptible of an interpretation that cover[ed]” Union B's formation-date defense.¹⁶³

Reversing the Ninth Circuit's judgment, the Court explained that the Ninth Circuit misapplied two arbitration-law principles: (1) the presumption of arbitrability—doubts concerning “the scope of arbitral issues should be resolved in favor of arbitration,” and (2) severability—the application of the

156. *See id.*

157. *See id.* at 2854-55.

158. *See id.*

159. *See id.* at 2855.

160. *See id.*

161. *See id.*

162. *See id.* at 2856-57.

163. *Id.* at 2861 (quoting *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 546 F.3d 1169, 1177 n.4 (9th Cir. 2008)).

presumption of arbitrability “even to disputes about the enforceability of the entire contract containing the arbitration clause.”¹⁶⁴

The Court said that the Ninth Circuit had applied these principles outside the two-step framework within which they operate.¹⁶⁵ First, courts have a duty to interpret the parties’ agreement to determine whether the parties intended to arbitrate disputes.¹⁶⁶ Second, “[t]hey . . . discharge this duty by: (1) applying the presumption of arbitrability only where a validly formed and enforceable arbitration agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption and ordering arbitration only where the presumption is not rebutted.”¹⁶⁷

The presumption of arbitrability, said the Court, does not “override[] the principle that a court may submit to arbitration only those . . . disputes that the parties have agreed to submit.”¹⁶⁸ It applies:

only where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration of a particular dispute is what the parties intended because their express agreement to arbitrate was validly formed and (absent a provision clearly and validly committing such issues to an arbitrator) is legally enforceable and best construed to encompass the dispute.¹⁶⁹

The Court never “held that courts may use policy considerations [such as the federal policy favoring arbitration] as a substitute for party agreement.”¹⁷⁰

The Court concluded that “[t]his simple framework compels reversal of the [Ninth Circuit’s] judgment because it requires judicial resolution of two questions central to [Union B’s] arbitration demand: when the CBA was formed, and whether its arbitration clause covers the matters [Union B] wishes to arbitrate.”¹⁷¹ *When* the new CBA was formed was the key *Granite Rock* issue.¹⁷² Since this *when* question determined whether the claims were arbitrable, it was for the Court to decide.¹⁷³

Because the arbitration agreement applied only to disputes arising under the new CBA, the Court reasoned that the agreement presupposed that, at the time an arbitrable dispute arose, the new CBA was already formed.¹⁷⁴ If, as Union B contended, the new CBA was not ratified until

164. *Id.* at 2857 (citations and quotation omitted).

165. *See id.* at 2857-58.

166. *Id.* at 2858.

167. *Id.* at 2858-59.

168. *Id.* at 2859 (citations and quotations omitted).

169. *Id.* at 2859-60.

170. *Id.* at 2859 (citations omitted).

171. *Id.* at 2860.

172. *See id.*

173. *See id.*

174. *Id.* at 2860-61.

the second vote was held, then back when the first vote was held, and when Company A commenced its action, “there was no CBA for the . . . no strike dispute to arise under and thus no valid basis for the [Ninth Circuit’s] . . . conclusion that [Company A’s] claims arose under the CBA and were thus arbitrable along with, by extension, [Union B’s] formation date defense to those claims.”¹⁷⁵ The Ninth Circuit relied upon the ratification dispute’s relationship to Company A’s claim that Union B breached the CBA’s no-strike clause (a claim the Ninth Circuit viewed as clearly arising under the CBA) to determine that the arbitration clause was certainly susceptible “of an interpretation that covers [Union B’s] formation date defense.”¹⁷⁶ But the Ninth Circuit “overlooked the fact that [its] theory of the ratification dispute’s arbitrability fails if the CBA was not formed at the time the unions engaged in the acts that gave rise to [Company A’s] strike claims.”¹⁷⁷

As an alternative basis for its conclusion, the Court said the dispute simply fell outside the scope of the arbitration agreement.¹⁷⁸ The Court articulated two reasons why the “ratification-date dispute cannot properly be characterized as falling within the (relatively narrow) scope” of the arbitration agreement.¹⁷⁹

First, the dispute concerning the new CBA’s existence could not “fairly be said to ‘arise under’ the CBA.”¹⁸⁰ Second, even assuming that the arising under provision in and of itself might cover the dispute, the balance of the arbitration agreement “all but foreclose[s] such a reading by describing [the arbitration agreement] . . . as applicable to labor disagreements that are addressed in the CBA and are subject to its requirement of mandatory mediation.”¹⁸¹

The Court reiterated that the Ninth Circuit’s decision “misse[d] the point” “because it focuse[d] on whether [Company A’s] claim to enforce the CBA’s *no-strike* provisions could be characterized as ‘arising under’ the agreement.”¹⁸² The Court said that it could not, for the reasons it previously articulated: “namely, the CBA provision requiring arbitration of disputes ‘arising under’ the CBA is not fairly read to include a dispute about when the CBA came into existence.”¹⁸³

Finally, the Court rejected the Ninth Circuit’s conclusion that the parties did not dispute the existence of the arbitration agreement as of the first ratification vote but merely disputed whether the parties ratified the

175. *Id.* at 2861.

176. *Id.* (quotation omitted).

177. *Id.*

178. *Id.* at 2862.

179. *Id.* (internal citations omitted).

180. *Id.*

181. *Id.*

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

183. *Id.*

new CBA as a whole as of that date.¹⁸⁴ The Ninth Circuit, in the guise of applying the severability doctrine, determined that the parties agreed to arbitrate based not on the reality of the parties' transactions, but by mixing and matching the parties' litigation positions.¹⁸⁵ The Ninth Circuit held that after the employer filed suit to enforce the entire CBA, Union B, through its own litigation position, could effectively ratify the arbitration agreement while rejecting the balance of the agreement, including the no-strike provision.¹⁸⁶

Union B argued that the Ninth Circuit correctly found that Company A had "implicitly consented" to arbitration when it filed suit to enforce the new CBA.¹⁸⁷ While the Court recognized that "when [Company A] sought [an] injunction it viewed the CBA (and all of its provisions) as enforceable," it said that it did not "establish an agreement, 'implicit' or otherwise, to arbitrate an issue (the CBA's formation date) that [Company A] did not raise, and that [Company A] has always (and rightly . . .) characterized as beyond the scope of the CBA's arbitration clause."¹⁸⁸ That Union B raised the formation-date defense to Company A's suit did not "make that dispute attributable to [Company A] in the waiver or estoppel sense the [Ninth Circuit] suggested, . . . much less establish that [Company A] agreed to arbitrate it by suing to enforce the CBA as to other matters."¹⁸⁹

III. FIFTH CIRCUIT FOLLOWS SUPREME COURT PRO-ARBITRATION POLICY

A. Pre-Arbitration Award Challenges

1. Safety National: *FAA Preemption of State Law—Is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards an "Act of Congress" Within the Meaning of the McCarran-Ferguson Act?*

Louisiana has a law that Louisiana courts have interpreted as meaning that arbitration agreements in insurance contracts issued or delivered in the state are unenforceable.¹⁹⁰ Ordinarily, the FAA would preempt a state law purporting to render arbitration agreements unenforceable. But the

184. *Id.* at 2863.

185. *Id.*

186. *Id.*

187. *Id.* (citing Brief of Respondent Teamsters Local 287 at 17-18, *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (June 2010) (No. 08-1214), 2009 WL 3453654).

188. *Id.*

189. *Id.*

190. LA. REV. STAT. ANN. § 22.868 (2008) (formerly LA. REV. STAT. ANN. § 22.629); *see* *Safety Nat. Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 587 F.3d 714, 718-19 & n.11 (5th Cir. Nov. 2009) (en banc), *cert. denied*, No. 09-945 (U.S. Oct. 4, 2010).

McCarran-Ferguson Act¹⁹¹ saves state laws regulating the “business of insurance” from preemption by “Act[s] of Congress” that do not “specifically relate to the business of insurance.”¹⁹²

*Safety National Casualty Corp. v. Certain Underwriters at Lloyd’s London*¹⁹³ concerned whether McCarran-Ferguson saved the Louisiana statute from preemption in a case governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention) and Chapter 2 of the FAA, which implements the Convention.¹⁹⁴ A majority of the en banc court held that the answer was “no.”¹⁹⁵

Safety National arose out of a dispute involving a Louisiana self-insurance fund (the Self-Insurance Fund), its London reinsurers (the London Reinsurers), and a U.S. insurance company (the U.S. Insurer) that had entered into a loss portfolio transfer agreement¹⁹⁶ with the Self-Insurance Fund.¹⁹⁷ The dispute concerned whether the Self-Insurance Fund validly assigned to the U.S. Insurer its rights under its reinsurance¹⁹⁸ agreements with the London Reinsurers, each of which contained an arbitration agreement.¹⁹⁹

The U.S. Insurer sued the London Reinsurers in federal district court.²⁰⁰ The London Reinsurers moved to stay litigation and compel arbitration, and the U.S. Insurer did not oppose the motion.²⁰¹ In the meantime, the Self-Insurance Fund successfully moved to intervene and opposed arbitration on the ground that the Louisiana statute rendered the arbitration agreements in the reinsurance contracts unenforceable.²⁰² The Self-Insurance Fund said that the statute was not preempted by the Federal Arbitration Act, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, because the McCarran-Ferguson Act saves from federal preemption by any “Act of Congress” state laws

191. The McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 et seq. (2006).

192. The McCarran-Ferguson Act states that “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purposes of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance” 15 U.S.C. § 1012(b).

193. *Safety National*, 587 F.3d. at 717.

194. 9 U.S.C. §§ 201, et seq. (2006).

195. *Safety National*, 587 F.3d. at 717.

196. A “loss portfolio transfer” is “[a] financial reinsurance transaction in which loss obligations that are already incurred and which are expected to ultimately be paid are ceded to a reinsurer.” *Reinsurance Glossary*, REINSURANCE ASSOCIATION OF AMERICA, <http://www.reinsurance.org/i4a/pages/index.cfm?pageid=3309#1> (last visited Mar. 8, 2011).

197. *Safety National*, 587 F.3d. at 717.

198. “Reinsurance” is, for all intents and purposes, the insurance of insurance. In a typical reinsurance transaction one party, the reinsurer, promises to indemnify the other, the ceding company, for all or a portion of some or all losses the ceding company has sustained under one or more other insurance or reinsurance contracts.

199. *Id.* at 717-18.

200. *Id.* at 717.

201. *Id.*

202. *Id.* at 717-18.

regulating the business of insurance.²⁰³ Because the Convention was allegedly not self-executing, and therefore required the implementing legislation of FAA Chapter 2 to make it effective, the Convention and its implementing legislation constituted an “Act of Congress” for purposes of the McCarran-Ferguson Act.²⁰⁴

The en banc court held that the Convention preempted the Louisiana statute and that the McCarran-Ferguson Act did not reverse-preempt the Convention because the Convention, despite its non-self-executing nature, was not an “Act of Congress” within the meaning of the McCarran-Ferguson Act.²⁰⁵ The Court concluded that the implementing provisions of FAA Chapter 2 were meaningless “without reference to the contents of the Convention” and that the substance of the case (arbitration) was governed by the Convention, not the implementing legislation.²⁰⁶

2. *Todd: District Court Must Consider Whether Under Arthur Andersen LLP v. Carlisle Insurer May Invoke Insurance Policy’s Arbitration Agreement Against a Direct-Action-Statute Claimant*

Todd v. Steamship Mutual Underwriting Association (Bermuda) demonstrates that the Supreme Court can change established rules of decision even after appellate briefing and oral argument.²⁰⁷ *Todd* involved a claim by Anthony Todd, a chef who was injured while serving onboard the steamboat M/V American Queen.²⁰⁸ Todd sued American Queen’s operator and obtained a favorable verdict, but he was unable to satisfy the judgment because the operator had filed for bankruptcy.²⁰⁹ Todd then sued the American Queen’s insurer under Louisiana’s direct-action statute, which allows injured persons to sue the tortfeasor’s liability insurer when the tortfeasor is insolvent.²¹⁰ The insurer removed the case to federal district court and then moved to compel arbitration.²¹¹ The judge denied the motion, determining that the Fifth Circuit’s decision in *Zimmerman* was dispositive.²¹² In *Zimmerman* and earlier cases, the Fifth Circuit had held that an insurer could not compel a Louisiana direct-action claimant to arbitrate under a liability policy to which the claimant was not a party.²¹³

203. *Id.* at 717-19.

204. *Id.* at 719-24.

205. *Id.* at 724-25.

206. *Id.*

207. *Todd v. Steamship Mut. Underwriting Ass’n (Bermuda)*, 601 F.3d 329, 331-32 (5th Cir. Mar. 2010).

208. *Id.* at 330.

209. *Id.* at 330-31.

210. *Id.* at 331.

211. *Id.*

212. *Id.* (citing *Zimmerman v. Int’l Cos. & Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997)).

213. *Id.*

Arbitration, said the district court, was not appropriate because employees are not parties to their employers' insurance policies.²¹⁴

The insurer appealed and, as luck would have it, while the appeal was pending, the Supreme Court decided *Arthur Andersen v. Carlisle*,²¹⁵ an important case concerning the rights and obligations of non-signatories to arbitration agreements.²¹⁶ In *Arthur Andersen*, the Court rejected the Fifth Circuit's reasoning in *Zimmerman* and earlier cases and held that courts can bind non-signatories to arbitration agreements, or allow them to invoke those agreements, provided there is a state-law contractual basis for doing so.²¹⁷ Such a contractual basis, the Fifth Circuit reasoned, may exist in situations where state law permits a third-party to make a claim under a tortfeasor's insurance policy.²¹⁸ The court accordingly remanded the case to the district court to consider whether there was a permissible state-law contractual basis under the facts and circumstances in *Todd* to permit the insurer to invoke the arbitration agreement against the non-signatory, direct action claimant.²¹⁹

3. U-Save: *Public Policy Challenge Fails*

There are a number of ways to challenge an arbitration agreement, some more common than others.²²⁰ One attack often seen but very rarely successful is a claim that the arbitration agreement is void on public-policy grounds.²²¹ That was the argument made in *U-Save Auto Rental of America, Inc. v. Furlo*.²²² The court, however, disposed of the argument quickly, noting that "[t]he arbitration clause could only be void for public policy if the choice-of-law provision denied the Furlos' causes of action under Florida law without providing access to a reasonable substitute. We find that it did not."²²³

4. Griffin: *Unconscionability and Non-signatories*

There are usually only two issues a court may consider on a motion to stay litigation and compel arbitration: (1) is the arbitration agreement valid and enforceable, and if so, (2) does the dispute in question fall within its

214. *Id.* at 334.

215. *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009).

216. *Todd*, 601 F.3d at 333-34.

217. *Id.* at 334.

218. *Id.*

219. *Id.* at 336.

220. *See, e.g., U-Save Auto Rental of Am., Inc. v. Furlo*, 368 F. App'x 601, 602 (5th Cir. Mar. 2010).

221. *See id.*

222. *Id.* at 602-03.

223. *Id.* at 602.

scope?²²⁴ Both issues arose in *Griffin v. ABN Amro Mortgage Group, Inc.*²²⁵

The dispute centered around the Griffins' mortgage loan, which contained an arbitration agreement.²²⁶ The Griffins argued that the agreement was unconscionable.²²⁷ But the court disagreed, explaining that a dispute over the loan fell plainly within the arbitration agreement, which was entered into voluntarily.²²⁸ The court also rejected the Griffins' argument that, despite the language in the contract, they were required to sign on to the arbitration agreement in order to secure a loan.²²⁹ The court said there was no evidence supporting that claim.²³⁰

The Griffins also argued that the parties were not bound by the arbitration agreement because two of them were non-signatories.²³¹ The Fifth Circuit rejected this argument—invoking the now-established rule that “when the signatory . . . raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract,”²³² the non-signatory may invoke the arbitration agreement. The court determined that the Griffins' claims against the defendants, who included both signatories and non-signatories, were substantially interdependent.²³³

The decision, however, was not a total loss for the Griffins, who “raise[d] the issue that the National Arbitration Forum, the specified forum in the arbitration clause, no longer hears this type of case.”²³⁴ As a result, the court remanded the case to the district court “to decide in the first instance whether this new issue affects its decision to find the arbitration agreement enforceable.”²³⁵

5. Bell: No Procedural or Substantive Unconscionability, or Need for Discovery

The enforceability of the arbitration agreement was also at issue in *Bell v. Koch Foods of Mississippi, LLC*.²³⁶ There, a group of twenty-two chicken farmers (the Growers) filed suit against Koch Foods, alleging that Koch had unlawfully terminated contracts under which the Growers raised

224. See *Griffin v. ABN Amro Mortg. Grp., Inc.*, 378 F. App'x 437, 439-40 (5th Cir. May 2010).

225. *Id.*

226. *Id.* at 439.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 439-40 (quoting *Grigson v. Creative Artists, LLC*, 210 F.3d 524, 527 (5th Cir. 2000)).

233. *Id.* at 440.

234. *Id.*

235. *Id.*

236. See *Bell v. Koch Foods of Miss., LLC*, 358 F. App'x 498, 499-500 (5th Cir. Dec. 2009).

chickens on Koch's behalf.²³⁷ The Growers filed suit in federal court (asserting state-law fraud claims), and Koch moved to compel arbitration.²³⁸ The trial court granted the motion and the Growers appealed.²³⁹

The Growers argued that the arbitration agreements were unconscionable because they were procured by "passive" fraud, and therefore, not enforceable.²⁴⁰ They admitted that Koch did not misrepresent the nature of the arbitration agreements at the time the contracts were entered into but instead argued that "Koch knew that the arbitration agreements would effectively deprive the Growers of any forum due to the excessive costs to have a dispute heard and that Koch's silence on th[e] matter constitute[d] 'passive fraud.'"²⁴¹ The Fifth Circuit determined that, even if the Growers were able to provide evidence of such passive fraud, recovery would be unlikely under Mississippi law, as "[t]he Mississippi Supreme Court 'has never held that one party to an arm's-length contract has an inherent duty to explain its terms to the other.'"²⁴² As a result, the court held that the contract was valid because it was not fraudulently procured.²⁴³

The Growers also contended that the contract was procedurally unconscionable, but the court rejected this argument as well.²⁴⁴ Procedural unconscionability arises when there is "a lack of knowledge, lack of voluntariness, inconspicuous print, the use of complex legalistic language, disparity in sophistication or bargaining power of the parties and/or lack of opportunity to study the contract and inquire about the contract terms."²⁴⁵ In support of their procedural unconscionability claim, the Growers argued that they did not know how arbitration worked at the time they signed the contract.²⁴⁶ The court explained that this did not matter, as "parties are charged with understanding the terms of contracts that they sign."²⁴⁷ The court noted that the arbitration agreement "is written in plain English and conspicuous type."²⁴⁸ And that the contract may be adhesive did not matter, for the Growers did not show that they could not have chosen to contract with another party or to refrain from contracting at all.²⁴⁹

237. *Id.* at 499.

238. *Id.* at 500.

239. *Id.*

240. *Id.* at 502. The Growers also argued that the agreements were not properly authenticated, but the appeals court determined that the Growers had waived this argument because they had not raised it in the district court. *Id.* at 501.

241. *Id.* at 502.

242. *Id.* (citing *MS Credit Ctr. v. Horton*, 926 So. 2d 167, 177 (Miss. 2006)).

243. *Id.*

244. *Id.* at 503.

245. *Id.* (citing *E. Ford, Inc. v. Taylor*, 826 So. 2d 709, 714 (Miss. 2002)).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

The Growers also argued that the costs associated with arbitration rendered the clause substantively unconscionable.²⁵⁰ Even though excessive costs could establish substantive unconscionability, the court rejected the Growers' argument because they did not establish that arbitration costs would preclude them from vindicating their rights.²⁵¹

Underlying the Growers' arguments was their contention that the district court improperly denied discovery.²⁵² The Fifth Circuit found that the district court had acted within its discretion because much of the evidence not found in the record was available to the Growers without formal discovery and could have been submitted to the district court.²⁵³ Because the remaining discovery requests were either irrelevant or did not support a claim under Mississippi law, the Fifth Circuit held that the district court did not abuse its discretion by denying the Growers' plea for discovery.²⁵⁴

6. El Paso: No Judicial Assistance for a Foreign Arbitration Proceeding

Discovery was also at issue in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*.²⁵⁵ There, La Comision petitioned two federal district courts pursuant to 28 U.S.C. § 1728 for judicial assistance in obtaining discovery from a party located in the United States for use in a private international arbitration that was already underway in Geneva, Switzerland.²⁵⁶ Section 1728 provides, among other things, that “[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal”²⁵⁷

The international arbitrator had limited discovery, but La Comision filed its petition *ex parte* (without informing the arbitrator).²⁵⁸ The district courts granted the applications, but El Paso was successful in moving for an order granting reconsideration.²⁵⁹ On reconsideration, the district court determined that § 1728 does not authorize judicial assistance for private, foreign arbitration proceedings.²⁶⁰ While La Comision's appeal was

250. *Id.* at 504.

251. *Id.*

252. *See id.* at 500-01.

253. *Id.* at 501.

254. *Id.*

255. *See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 31-32 (5th Cir. Aug. 2009).

256. *Id.* at 32.

257. 28 U.S.C. § 1728 (2006).

258. *El Paso*, 341 F. App'x at 32.

259. *Id.*

260. *Id.*

pending, the evidentiary period in the arbitration closed and El Paso moved to dismiss the appeal as moot.²⁶¹

The Fifth Circuit first determined that the appeal was not moot, reasoning that an arbitration panel can reopen the evidentiary period if new evidence comes to light.²⁶² It then affirmed the district court on the merits, holding that a private international arbitration proceeding was not “a proceeding in a foreign or international tribunal” within the meaning of § 1782.²⁶³

7. Jones: *Scope of Arbitration Agreement Stopped at Bedroom Door*

The only case this term that directly spurred congressional action was *Jones v. Halliburton Co.*²⁶⁴ The facts were disturbing, to say the least. Jamie Lee Jones was an employee of Halliburton, working in Iraq as a clerical worker for Halliburton subsidiary Kellogg Brown & Root.²⁶⁵ Jones was staying in employer-provided housing when fellow employees allegedly gang-raped her in her bedroom.²⁶⁶ Jones was seriously injured and sustained, among other things, a torn pectoral muscle that later required surgery.²⁶⁷

Jones filed a complaint with the EEOC, which determined that Jones had indeed been raped and that Halliburton’s subsequent investigation was inadequate.²⁶⁸ She then demanded arbitration against Halliburton, alleging simple and gross negligence but shortly thereafter retracted the demand and filed suit in federal court, again asserting negligence and other tort claims.²⁶⁹

Halliburton then moved to compel arbitration of Jones’s claims and stay the court proceedings based on the arbitration agreement in Jones’s employment contract, which provided, in pertinent part:

You . . . agree that you will be bound by and accept as a condition of your employment the terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference. You understand that the

261. *Id.*

262. *Id.* at 33.

263. *See id.* at 33-34.

264. *Jones v. Halliburton Co.*, 583 F.3d 228 (5th Cir. Sept. 2009); *supra* note 20 and accompanying text.

265. *Id.* at 230-31.

266. *Id.* at 231.

267. *Id.* at 232. The facts get worse: Jones reported the rape to another employee the morning after the incident and was taken to see medical personnel. *Id.* While at the medical facility, she was placed under armed guard and not permitted to leave or telephone her family. *Id.* When she told her supervisors about the incident, she was allegedly given two options: (1) stay and “get over it” or (2) return home with no guarantee of a job upon her return. *Id.*

268. *Id.*

269. *Id.*

Dispute Resolution Program requires, as its last step, that any and all claim[s] that you might have against Employer related to your employment, including your termination, and any and all personal injury claims arising in the workplace, you have against other parent or affiliate of Employer, must be submitted to binding arbitration instead of to the court system.²⁷⁰

The arbitration agreement defined “dispute” to mean:

[A]ll legal and equitable claims, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute or regulation, or some other law, between persons bound by the Plan or by an agreement to resolve Disputes under the Plan . . . including, but not limited to, any matters with respect to . . . any personal injury allegedly incurred in or about a Company workplace.²⁷¹

The district court determined that the arbitration agreement was valid and granted in part and denied in part Halliburton’s motion to compel arbitration.²⁷² The court did not compel arbitration of Jones’s claims for assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision; and false imprisonment.²⁷³ The court determined that these claims fell “beyond the outer limits of even a broad arbitration provision” and “were ‘not related to Ms. Jones’ employment.”²⁷⁴ Halliburton appealed.²⁷⁵

Because the parties did not dispute the validity of the arbitration agreement, the Fifth Circuit focused on the scope question.²⁷⁶ The court acknowledged the familiar interpretive rule designed to promote the strong federal policy in favor of arbitration: “‘any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.’”²⁷⁷

But, that rule did not apply here because the Fifth Circuit concluded that there were no legitimate doubts about scope.²⁷⁸ Relying on cases from Mississippi, Kentucky, and California to demonstrate that sexual assault by coworkers is not related to one’s employment, the court said that although

270. *Id.* at 231 (emphasis omitted).

271. *Id.* (emphasis omitted).

272. *Id.* at 233. Jones contended that the clause was invalid because “there was no meeting of the minds; the arbitration clause was fraudulently induced; the provision was contrary to public policy; and enforcing the agreement would be unconscionable.” *Id.* The district court rejected these arguments. *See id.*

273. *Id.*

274. *Id.* (quoting *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339, 352 (S.D. Tex. 2008)). The court explained that although the arbitration clause included personal injury claims arising in the workplace, Jones’s bedroom, albeit employer-provided, should not be considered the workplace. *Id.*

275. *Id.*

276. *Id.* at 233-34.

277. *Id.* at 235 (quoting *Safer v. Nelson Fin. Grp., Inc.*, 422 F.3d 289, 294 (5th Cir. 2005)).

278. *See id.* at 239.

the arbitration agreement in Jones's contract was broad, it was not "unbounded."²⁷⁹ The court stated that there are disputes that fall outside even broadly-worded arbitration agreements, and this was surely one of them.²⁸⁰

The court distinguished *Barker v. Halliburton Co.*, a Southern District of Texas case strikingly similar to *Jones* (and on which the dissent relied).²⁸¹ *Barker* involved an employee who was sexually assaulted by a coworker in her living quarters in Iraq.²⁸² The Southern District of Texas judge found that the assault was sufficiently related to plaintiff's employment to fall within the scope of the employment contract's arbitration agreement.²⁸³ *Barker* determined the employee's claim was arbitrable because,

plaintiff's vicarious-liability theories [were] "predicated on the failure of the Halliburton defendants' employees to follow company policies regarding, among other things, sexual harassment," and on her negligent-undertaking claims alleging that Halliburton "negligently undertook to provide proper training, adequate and sufficient safety precautions [and] adequate and sufficient policies and procedures in the recruitment, training and placement of personnel in Iraq."²⁸⁴

The Fifth Circuit acknowledged that there was some tension between *Barker* and Jones's case and that Jones had conceded that, for the purposes of obtaining workers' compensation benefits, the assault took place in the course and scope of her employment.²⁸⁵ But the court determined the scope of employment for workers-compensation purposes and for arbitration purposes were analytically distinct concepts:

In interpreting the arbitration provision at issue, and in the light of the above-discussed precedent [from Mississippi, Kentucky, and California], we conclude that the provision's scope certainly stops at Jones' bedroom door As such, it was not contradictory for Jones to receive workers' compensation under a standard that allows recovery solely because her employment created the "zone of special danger" which led to her injuries, yet claim, in the context of arbitration, that the allegations the district court

279. *Id.* at 235-36.

280. *See id.* Judge DeMoss dissented for substantially the same reasons cited in the *Barker* case: the assault occurred on employer-provided housing by fellow employees, and the expansive arbitration clause could (and therefore should) be read to cover any claim arising from the assault. *See id.* at 242-43 (DeMoss, J., dissenting).

281. *See id.* at 237-38 (majority opinion).

282. *Id.* at 237.

283. *Id.*

284. *Id.* at 237 (citing *Barker v. Halliburton Co.*, 541 F. Supp. 2d 879, 887 (S.D. Tex. 2008)).

285. *See id.* at 237-38.

deemed non-arbitrable did not have a “significant relationship” to her employment contract.²⁸⁶

Halliburton contended that the claims were arbitrable because the arbitration agreement covered “any personal injury allegedly incurred *in or about the workplace*.”²⁸⁷ Still not persuaded, the court reiterated that Jones’s bedroom, though employer-provided, was not “in or about” the workplace.²⁸⁸ It also rejected Halliburton’s related argument that claims related to accidents occurring on employer premises or at employer-provided housing are arbitrable, noting that the incident at issue here certainly was not an accident, nor was it a risk “distinctly associated with the conditions’ under which she lived.”²⁸⁹

8. C.C.N. Managed Care: *Fourteen Months of Litigation Waived Arbitration*

As a general rule, courts rarely conclude that a party has waived the right to arbitrate, but the facts were unique enough in *C.C.N. Managed Care, Inc. v. Shamieh* to warrant waiver.²⁹⁰ Plaintiffs to the original suit were healthcare providers who contracted with defendant C.C.N., a preferred provider organization (PPO).²⁹¹ The agreement required C.C.N. to refer consumers—insurance companies and employers—to the providers, and in exchange, the providers would provide healthcare to C.C.N. at a discounted rate.²⁹² Upon removal to federal court, the plaintiffs dismissed C.C.N. and several other defendants.²⁹³

C.C.N. then commenced a declaratory judgment action against the providers, seeking confirmation that its contracts were not subject to certain notice requirements and were enforceable.²⁹⁴ Without mentioning the arbitration agreement, the providers sought to stay the case based on other pending cases.²⁹⁵ The court granted a stay in April 2006 and lifted it in December 2006.²⁹⁶ C.C.N. moved for summary judgment on May 3, 2007, and on May 31, the providers moved to compel arbitration.²⁹⁷ The district

286. *Id.* at 239.

287. *Id.* at 241 (emphasis in original).

288. *Id.*

289. *Id.* at 239.

290. *See C.C.N. Managed Care, Inc. v. Shamieh*, 374 F. App’x 506 (5th Cir. Mar. 2010).

291. *Id.* at 507-08.

292. *Id.* at 508.

293. *Id.*

294. *See id.*

295. *Id.*

296. *Id.*

297. *Id.*

court denied the motion, determining that the providers had waived their right to arbitrate.²⁹⁸

In affirming the district court, the Fifth Circuit reviewed well-established waiver principles, including:

- “[W]aiver will be found when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.”²⁹⁹
- The “act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process.”³⁰⁰
- The party opposing arbitration must demonstrate that it was prejudiced by the moving party’s invocation of the judicial process.³⁰¹
- Such prejudice is shown by delay, expense, and damage to a non-moving party’s legal position.³⁰²

Because the providers waited some fourteen months to move to compel for arbitration, and did so only after substantial proceedings had transpired and after C.C.N. had incurred substantial costs, the Fifth Circuit concluded that the providers waived arbitration.³⁰³

9. Jindal: *Substantially Invoking the Judicial Process Leads to Waiver*

The facts also supported waiver in *Petroleum Pipe Americas Corp. v. Jindal Saw, Ltd.*³⁰⁴ In its state suit, Petroleum Pipe alleged that Jindal had sold it defective pipes.³⁰⁵ The case was removed to federal court by Jindal in July 2007, and over a year passed, during which the parties discussed settlement and participated in judicial status conferences.³⁰⁶ At one such conference in May 2008, the judge expressed substantial concern about Jindal’s interpretation of a prior settlement.³⁰⁷ Ten days later, Jindal moved to compel arbitration.³⁰⁸

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.* (quoting *Nicholas v. K.B.R., Inc.* 565 F.3d 904, 910 (5th Cir. 2009)).

303. *Id.*

304. *Petroleum Pipe Ams. Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480-81 (5th Cir. July 2009).

305. *Id.* at 479.

306. *Id.*

307. *Id.*

308. *Id.*

A dispute arose over the sale of drill pipe.³⁰⁹ After an interim settlement contemplating ICC arbitration in London if later necessary, suit was filed in Texas state court and removed to the Southern District where claims and counterclaims, discovery, and an off the record conference regarding the interpretation of the earlier settlement agreement took place over the course of more than a year.³¹⁰ Ten days after the conference, in which Jindal says the court “expressed concern” over its interpretation of the settlement agreement, Jindal moved to stay the litigation and compel arbitration. The trial court summarily denied the motion.³¹¹

Finding that Jindal had waived its right to compel arbitration, the Fifth Circuit reviewed the fact specific test: “A presumption against waiver exists such that the part asserting waiver ‘bears a heavy burden of proof in its quest to show’ waiver.”³¹² The Fifth Circuit explained:

The court finds waiver “when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.” In this context, “prejudice” means “the inherent unfairness in terms of delay, expense, or damage to a party’s legal position that occurs when the party’s opponent forces it to litigate an issue and later seeks to arbitrate the same issue.” And, “[t]hree factors are particularly relevant” to the prejudice determination: (1) whether discovery occurred relating to arbitrable claims; (2) the time and expense incurred in defending against a motion for summary judgment; and (3) a party’s failure to timely assert its right to arbitrate.³¹³

Here, Jindal waived arbitration by substantially invoking the judicial process by waiting to move to arbitrate until the district court’s pronouncements in the May 19 conference and that PPA was prejudiced thereby.³¹⁴ The Court said that “[t]he lack of a formal ruling does not convince us that [one party], having learned that the district court was not receptive to its arguments, should be allowed a second bite at the apple through arbitration.”³¹⁵

309. *Id.* at 478.

310. *Id.* at 479.

311. *Id.*

312. *Id.* at 480 (citation omitted).

313. *Id.* (citations omitted).

314. *Id.* at 482.

315. *Id.*

10. Hall-Williams: *Presumption Against Waiver Sends Fee Application to Arbitration*

Though waiver claims were fairly successful this term, *Hall-Williams* rejected a waiver argument.³¹⁶ There, the Law Office of Paul C. Miniclier was retained by Plaintiff Carolyn Hall-Williams to handle and litigate a Hurricane Katrina claim she submitted to her carrier.³¹⁷ The two attorneys who worked on Hall-Williams's case left the firm while the Hall-Williams's suit against the carrier was pending and formed their own firm.³¹⁸ Hall-Williams decided to take her business to the new firm, and notified Miniclier.³¹⁹ Miniclier then intervened in the suit against the carrier, claiming an interest in the outcome (presumably legal services were provided under a contingency fee arrangement).³²⁰ The case settled shortly thereafter, and the judge ordered Miniclier to file a fee application.³²¹ Instead Miniclier moved to stay the intervention pending arbitration of the fee dispute pursuant to the arbitration agreement contained in the fee agreement.³²²

The judge denied the motion, reasoning that by intervening, Miniclier had submitted the matter of fees to the court, and therefore, arbitration was inappropriate.³²³ Despite Miniclier's protestations, it ultimately filed the fee application and was awarded only \$3,000.³²⁴

Unsatisfied, Miniclier successfully appealed.³²⁵ On appeal the parties agreed that there was a valid agreement to arbitrate and the dispute fell within the scope of the arbitration agreement.³²⁶ Hall-Williams argued, however, that Miniclier had waived its right to arbitrate by invoking the litigation process.³²⁷ The court disagreed, emphasizing the fact that Miniclier had only been involved in the case a mere six weeks before moving to stay.³²⁸ The court also cited the presumption against waiver and noted that waiver was denied in cases involving much more significant delays.³²⁹ Because waiver was improper and the arbitration agreement was otherwise valid and applicable, the Fifth Circuit vacated the lower court

316. *Hall-Williams v. Law Office of Paul C. Miniclier, P.L.C.*, 360 F. App'x 574, 581 (5th Cir. Jan. 2010).

317. *Id.* at 575-76.

318. *Id.* at 576.

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.* at 577.

323. *Id.*

324. *Id.*

325. *Id.* at 581.

326. *Id.* at 578.

327. *Id.* at 579.

328. *Id.*

329. *Id.*

judgment regarding Miniclier's fees and directed the court to send the parties to arbitration.³³⁰

11. Dealer: Procedural Arbitrability

Procedural disputes frequently arise in arbitration proceedings, and under procedural arbitrability doctrine, arbitrators generally get to decide those disputes. In *Dealer Computer Services, Inc. v. Old Colony Motors, Inc.*, the parties were prepared to arbitrate, but one party was not prepared to pay its share of the arbitration fees.³³¹ When Old Colony told the arbitrators that it could not afford the deposit for the final arbitration hearing, the arbitrators asked Dealer Services to foot the bill.³³² Dealer Services refused and petitioned to compel arbitration—with costs split evenly.³³³ The trial court agreed with Dealer Services and ordered Old Colony to pay its share, but Old Colony ultimately prevailed on appeal.³³⁴

The Fifth Circuit reversed, noting that the key premise of the procedural arbitrability doctrine is that parties generally “intend that the arbitrator, not the courts, should decide certain procedural questions which grow out of the dispute and bear on its final disposition.”³³⁵ Citing several cases, the court noted disputes concerning payment of arbitration fees are procedural in nature and subject to arbitration under the procedural arbitrability doctrine.³³⁶

B. Post-Arbitration Motions for Vacatur

1. I.C.M.: Awarding Fees Directly to Lawyer Does Not Exceed Powers

Generally, arbitrators cannot grant relief to persons not party to the arbitration agreement, including attorneys for the arbitrating parties.³³⁷ But, in *Institutional Capital Management, Inc. v. Claus* (ICM), the Fifth Circuit recognized an exception to the general rule based on applicable Texas law.³³⁸ In ICM, the arbitrator awarded compensatory damages to Claus and fees to Claus's attorney.³³⁹ ICM moved to vacate the award, and the

330. *Id.* at 581.

331. *Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.*, 588 F.3d 884, 885 (5th Cir. Nov. 2009). If this sounds familiar, refer back to the *Bell* case, above, where the Growers claimed that the arbitration provision was unconscionable because of the costs associated with arbitration. *See supra* Part III.A.5.

332. *Dealer Computer Servs., Inc.*, 588 F.3d at 885.

333. *Id.*

334. *Id.*

335. *Id.* at 887 (citing *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002)).

336. *Id.*

337. *See Institutional Capital Mgmt., Inc. v. Claus*, 364 F. App'x 168, 170 (5th Cir. Feb. 2010).

338. *See id.*

339. *Id.*

magistrate judge granted the motion and vacated the award on the FAA § 10(a)(4) ground that “the arbitration panel exceeded its authority” by awarding fees directly to the attorney in violation of Texas law.³⁴⁰ Claus appealed.³⁴¹

Reversing the district court, the Fifth Circuit acknowledged that there are only limited grounds on which a court can vacate an arbitration award under § 10 of the FAA.³⁴² Paraphrasing § 10, the court said an award can be vacated: (1) if it is procured by corruption, fraud, or undue means; (2) where there is evident partiality or corruption on the part of the arbitrators or either of [the parties]; (3) where the arbitrators are guilty of misconduct such that it results in prejudice to a party; or (4) where the arbitrator exceeds his or her powers or poorly executes them such that a final decision on the merits is not made.³⁴³ The Fifth Circuit held that the award did not exceed the arbitrator’s powers.³⁴⁴ While “Texas law prohibits the award of fees directly to counsel unless authorized by statute . . . , a party who has been ordered to pay attorney’s fees . . . does not have standing to challenge . . . the attorney’s fee award.”³⁴⁵ The court stated: “It is usually immaterial to the party paying the attorney’s fee award how those fees are handled by the prevailing party; therefore any such error is harmless.”³⁴⁶

2. Householder: *Vacatur Not a Review on the Merits*

In *Householder Group v. Caughran*, the district court confirmed the award, but Caughran cross-moved to vacate, arguing to the court the merits of the arbitration and claiming that he did not receive a fair hearing because the panel prohibited him from using certain evidence.³⁴⁷

The Fifth Circuit rejected Caughran’s merits-based arguments, noting that it does “not have authority to conduct a review of an arbitrator’s decision on the merits.”³⁴⁸ Householder was decided before *Stolt-Nielsen*, which, as discussed in Part II.A.1, authorizes courts to engage in a very limited outcome-based review, albeit not one that permits courts to second-guess merits determinations that have at least a barely colorable basis.³⁴⁹

340. *Id.*

341. *Id.*

342. *Id.* at 171.

343. *Id.* (brackets in original).

344. *Id.*

345. *Id.*

346. *Id.*

347. *Householder Grp. v. Caughran*, 354 F. App’x 848, 850 (5th Cir. Nov. 2009).

348. *Id.* at 851. *But see* *Therault v. FIA Card Servs., N.A.*, 351 F. App’x 859, 860-61 (5th Cir. Oct. 2009) (affirming an arbitration award but addressing the merits of the appellant’s claim that appellee had not complied with the provisions of the Truth In Lending Act).

349. *See supra* Part II.A.1.

As for the fair hearing argument, the court determined that even if the panel erred in prohibiting Caughran from introducing certain evidence, Caughran had not demonstrated that this error “rose to the level of depriving him of a fair hearing.”³⁵⁰ Caughran also alleged that the panel was biased, but, because he submitted no evidence in support of this claim, the court rejected the argument and ultimately affirmed the lower court’s decision—and the underlying arbitration award.³⁵¹

3. Barahona: *Tough to Attack, Even for Alleged Fraud*

Barahona v. Dillard’s, Inc. is yet another example of how disinclined courts are to vacate arbitration awards.³⁵² The dispute concerned Ms. Barahona’s racial-discrimination claims, but the facts of the arbitration are aptly summarized by the court:

Ms. Barahona’s employment contract with Dillard’s contained an arbitration agreement, so the district court, with the parties’ consent, stayed her case to allow the parties to arbitrate her claims. During the arbitration proceedings, the parties conducted discovery, which included depositions and document requests, and the parties participated in a three-day arbitration hearing where they were given the opportunity to present their evidence and arguments. On the third day of the hearing, Mr. Broussard appeared and testified as a witness. Ms. Barahona’s counsel questioned Mr. Broussard on a number of matters, including whether he ever communicated via e-mail with any Dillard’s employee regarding Ms. Barahona. Mr. Broussard answered, “Yes.” Dillard’s, however, had not produced Mr. Broussard’s e-mails during the discovery phase of the arbitration. The reason for Dillard’s failure to produce the e-mails was never elucidated, as neither party elicited any testimony as to why the e-mails were either overlooked or intentionally not produced.

In response to Mr. Broussard’s testimony, Dillard’s counsel moved to continue the arbitration proceeding so that Dillard’s could produce the e-mails. Ms. Barahona’s counsel refused to consent to Dillard’s motion, stating that he was objecting to the continuance “about as much as anybody can” and that he would “have to appeal if this thing was adjourned.” The arbitrator denied Dillard’s motion to continue. The arbitrator penalized Dillard’s by drawing an adverse inference against Dillard’s for its failure to produce Mr. Broussard’s e-mails. The parties then completed the hearing and submitted the case to the arbitrator for his determination. Despite the adverse inference, the arbitrator ruled in favor of Dillard’s, finding that Ms. Barahona did not carry her burden of proof on her discrimination and retaliation claims.

350. *Householder*, 354 F. App’x at 851.

351. *Id.* at 851-52.

352. *Barahona v. Dillard’s, Inc.*, 376 F. App’x 395, 398 (5th Cir. Apr. 2010).

After the arbitrator announced his findings, Ms. Barahona moved the district court to vacate the arbitration award due to Dillard's failure to produce Mr. Broussard's e-mails. After Ms. Barahona moved to vacate, Dillard's produced Mr. Broussard's e-mails and argued that the contents of the e-mails showed that a vacatur was unwarranted. Dillard's also moved to have the arbitration award confirmed. The district court initially chose not to vacate the arbitration award and instead remanded the case back to the arbitrator for reconsideration in light of the newly produced e-mails. The arbitrator refused to reconsider the arbitration award, finding that he lacked jurisdiction to reconsider it. After the arbitrator refused to reconsider the award, the district court granted Ms. Barahona's motion, denied Dillard's motion to confirm, and vacated the arbitration award, finding that the award was procured by fraud as a result of Dillard's failure to produce Mr. Broussard's e-mails. This appeal followed.³⁵³

In analyzing whether the arbitration award was procured by fraud, the Fifth Circuit employed a three-step analysis, which requires (1) clear and convincing evidence of fraud, (2) that materially relates to an issue in the arbitration, and (3) "was not discoverable by due diligence before or during the arbitration hearing."³⁵⁴ The facts of Ms. Barahona's case clearly failed the second prong, for "Dillard's allegedly fraudulent conduct was discovered during the arbitration hearing and brought to the attention of the arbitrator, who addressed it by drawing an adverse inference against Dillard's."³⁵⁵ Because fraud could not be established, the Fifth Circuit reversed the district court's decision to the contrary and remanded the case with instructions to confirm the arbitration award.³⁵⁶

4. United Forming: *No Arbitrator Bias or Misbehavior*

In *United Forming, Inc. v. FaulknerUSA, LP*, Faulkner moved to vacate an award, arguing that (1) the arbitrator "failed to make proper pre-arbitration disclosures of conflicts; (2) the arbitrator's comments at the arbitration demonstrated bias; and (3) the arbitrator's rulings as to the legal issues presented were so grossly wrong as to be 'misconduct' or 'misbehavior' under the FAA."³⁵⁷ The Fifth Circuit addressed each point in turn.³⁵⁸

Faulkner argued that although the arbitrator disclosed that his former partner had represented Faulkner's predecessor company, the arbitrator did not disclose the full scope of that relationship, including that, according to

353. *Id.* at 396-97.

354. *Id.* at 397.

355. *Id.* at 398.

356. *Id.*

357. *United Forming, Inc. v. FaulknerUSA, L.P.*, 350 F. App'x 948, 949 (5th Cir. Oct. 2009).

358. *Id.* at 949-50.

Faulkner, the partner had bad feelings about the sale of the predecessor company to Faulkner.³⁵⁹ Faulkner also complained of the arbitrator's failure to disclose his relationship with the VP and general counsel of a Faulkner competitor.³⁶⁰ The court rejected Faulkner's arguments regarding non-disclosure, citing an earlier decision and explaining that "[a]t most, the undisclosed information would support only a 'speculative impression of bias' and not a 'significant compromising relationship.'"³⁶¹

After rejecting Faulkner's bias claim, the court rejected its § 10(a)(3) "misbehavior" claim.³⁶² The court noted that Faulkner was careful not to use the phrase "manifest disregard of the law" in light of the *Hall Street* and *Citigroup*.³⁶³ The court determined that it need not determine "whether an intentional complete disregard of the applicable law could constitute 'misbehavior' under the FAA because" Faulkner had not presented such a situation.³⁶⁴ The court affirmed the district court's decision.³⁶⁵

5. Yee: *No Collateral Attack—Vacatur the Remedy*

As Dr. Jordan Yee discovered in *Yee v. Bureau of Prisons*,³⁶⁶ a party can move to vacate an award, but cannot collaterally attack an award in a separate action based on the conduct of the other party during the arbitration.³⁶⁷ Dr. Yee, a Bureau of Prisons doctor, filed a union grievance challenging a one-day suspension.³⁶⁸ The arbitration must not have been favorable for Yee, because he subsequently filed a Title VII suit afterwards alleging that his supervisor discriminated against him by not providing exculpatory evidence that would have been helpful to Yee in the arbitration proceeding.³⁶⁹ The district court dismissed the case, and the Fifth Circuit affirmed, finding that Dr. Yee was "attempting to collaterally challenge the arbitration order and the procedure followed in that proceeding by way of this Title VII action, which the district court correctly concluded he cannot do."³⁷⁰

359. *Id.* at 949.

360. *Id.*

361. *Id.* at 950 (quoting *Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 476 F.3d 278, 285-86 (5th Cir.2007)).

362. *Id.*

363. *Id.*; see *supra* Part II.B (discussing *Citigroup* and *Hall Street*).

364. *Id.*

365. *Id.*

366. *Yee v. Bureau of Prisons*, 348 F. App'x 1, 1 (5th Cir. Sept. 2009).

367. *Id.*

368. *Id.*

369. *Id.* at 1-2.

370. *Id.* at 2 (citing *United States Postal Serv. v. Nat'l Assoc. of Letter Carriers*, 64 F. Supp. 2d 633 (S.D. Tex. 1999); *Brown v. Potter*, 67 F. App'x 368 (7th Cir. 2003)).

IV. CONCLUSION

While litigation about arbitration calmed in the Fifth Circuit this term, owing to recent Supreme Court decisions clarifying, or narrowing, challenges and to an overall reduction in case dispositions in the Circuit, U.S. Supreme Court activity overshadowed that apparent calm.³⁷¹ There, important issues were decided and, as respects *AT&T Mobility LLC*, were taken up for the Court's October 2010 Term, which is currently in progress.³⁷² Whether class actions can be conducted in arbitration and whether class action waivers are protected with arbitration "super-clause" status drew in the titans.³⁷³ And, the Supreme Court is still wrangling with the scope of judicial review of arbitration awards.³⁷⁴ Just as it seemed that "manifest disregard" was outside of the enumerated grounds set forth in § 10—the conclusion *Citigroup* reached based on *Hall Street*—other circuits concluded that it was subsumed within § 10(a)(4) of the FAA and the Supreme Court in *Stolt-Nielsen* implied that those courts might be correct about § 10(a)(4)'s scope.³⁷⁵ Further, several amicus briefs in *AT&T Mobility LLC* predict that these are all important details if class action waivers do not survive.³⁷⁶ They claim that no one will want to arbitrate and face in a single arbitration the aggregated claims of multiple parties arising under multiple arbitration agreements.³⁷⁷ Therefore, arbitration will presumably be a hot topic again next year, even if Fifth Circuit cases continue to subside and mediation continues to claim a larger portion of dispositions.³⁷⁸ Because mediation exists outside all of this uncertainty, and for a host of other reasons, it should—and in all likelihood will—continue to thrive.

371. See discussion *supra* Parts II-III.

372. See discussion *supra* Part II.A.2.

373. See *supra* note 15 and accompanying text.

374. See discussion *supra* Part II.

375. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1781 (2010); see *supra* discussion Part II.A.1.

376. See discussion *supra* Part II.A.2.

377. See discussion *supra* Part II.A.2.

378. *Supra* note 39 and accompanying text.

TABLE I: PRE-ARBITRATION CHALLENGES

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
allocation of power between courts and arbitrators	<i>Rent-A-Center, West, Inc. v. Jackson</i> , 130 S. Ct. 2772 (June 2010).	<p><i>Rent-A-Center</i> arose out of an employment discrimination dispute between an employer and an employee, who were parties to a four-page, stand-alone arbitration agreement. The agreement contained a delegation provision, which clearly and unmistakably delegated arbitrability questions to the arbitrator: “[T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable.”</p> <p>The employee brought suit in the United States District Court for the District of Nevada and the employer moved to stay litigation and compel arbitration. The employee argued that the stand-alone arbitration agreement was unconscionable on three independent grounds: (1) the claims-covered provision required the employee to arbitrate all of its claims but allowed the employer to pursue in court certain claims requiring injunctive relief; (2) the agreement required the parties to share expenses equally; and (3) the amount of discovery the parties could take. Relying on the delegation provision, the employer argued that the arbitrator had to decide whether the agreement was unconscionable.</p>	US		US	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
		<p>The district court granted the employer's motion to stay litigation and compel arbitration, but the United States Court of Appeals for the Ninth Circuit reversed, holding that the court must decide the unconscionability question, notwithstanding the delegation provision. The United States Supreme Court granted certiorari and reversed.</p> <p>The question before the Court was "whether, under the Federal Arbitration Act . . . , a district court may decide a claim that an arbitration agreement is unconscionable where the agreement explicitly assigns that decision to the arbitrator." Extending the <i>Prima Paint</i> and <i>Buckeye Check Cashing</i> doctrine of severability (a/k/a "separability") to delegation provisions contained within arbitration agreements, the Court held 5-4 that the answer was "no" where the party opposing arbitration challenges the arbitration agreement as a whole, but does not specifically challenge the delegation provision itself.</p>				

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
allocation of power between courts and arbitrators	<i>Granite Rock Co. v. Int'l Bhd. of Teamsters</i> , 130 S. Ct. 2847 (June 2010).	<p>Company A and Union B entered into negotiations for a new CBA to be effective as of date X and Union B went on strike. Company A and Union B reached agreement on the terms of a new collective bargaining agreement to be effective as of date X , but which was subject to ratification by the members of Union B.</p> <p>The new CBA contained an arbitration agreement that applied to all disputes “arising under” the new CBA. The arbitration agreement provided that “[d]ecisions of the impartial Arbitrator shall be within the the scope and terms of this agreement . . . provided such decision is specifically limited to the matter submitted and does not amend any provisions of this agreement. The arbitration agreement also required the parties to attempt to mediate their disputes before proceeding to arbitration.”</p> <p>The new CBA contained a no-strike provision but did not directly address Union B’s liability for strike damages during the period between the expiration of the prior CBA and the negotiation of the new one.</p> <p>Disputes arose whether (a) Company A ratified the CBA at the first vote or at a subsequent vote held about seven weeks later; and (b) who gets to decide the ratification-date dispute.</p> <p>The Supreme Court held (7-2) that the court had to decide the ratification-date dispute. Because the arbitration agreement applied only to disputes “arising under” the new CBA, the Court reasoned that the agreement presupposed that, at the time an arbitrable dispute arose, the new CBA was already formed.</p>				
				US		US

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
		As an alternative basis for its conclusion, the Court said the dispute simply fell outside the scope of the arbitration agreement because: (a) the “arising under” language in the arbitration agreement did not encompass a dispute concerning the existence of the CBA; and, in any event, (b) the balance of the arbitration agreement “all but foreclose[s] such a reading by describing [the arbitration agreement] . . . as applicable to labor disagreements that are addressed in the CBA and are subject to its requirement of mandatory mediation.”				

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
agreement scope	<i>Jones v. Halliburton Co.</i> , 583 F.3d 228 (5th Cir. Sept. 2009).	Jamie Leigh Jones filed an arbitration demand against Halliburton arising from her alleged gang rape by co-workers in her bedroom of employer-provided housing while she was working in Iraq. The demand claimed negligence, negligent undertaking, and gross negligence in relation to the claimed sexual harassment and assault. She later amended the demand to include claims under Title VII, the Texas Labor Code, and for workers' compensation benefits under the Defense Base Act. With new counsel, she later filed this action in district court against various Halliburton and U.S. entities, and known and unknown individual defendants. The Fourth Amended Complaint asserted claims for: negligence; negligent undertaking; sexual harassment and hostile work environment under Title VII; retaliation; breach of contract; fraud in the inducement to enter the employment contract; fraud in the inducement to agree to arbitration; assault and battery; intentional infliction of emotional distress; and false imprisonment. The trial court compelled arbitration of all claims except: (1) assault and battery; (2) intentional infliction of emotional distress arising out of the alleged assault; (3) negligent hiring, retention, and supervision of employees involved in the alleged assault; and (4) false imprisonment. The court rejected Halliburton's appeal that a broad construction in workers' compensation contexts provides support for the excluded claims being "related to" Jones's employment, and thus arbitrable, by concluding that the arbitration	√*	√*	√*	√*

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
		<p>“provision’s scope certainly stops at Jones’ bedroom door.” The court wrestled with the seeming contradiction that the claimant argued that her injuries were related to her employment for workers’ compensation benefits, but not related for purposes of the arbitration agreement. Despite allowing trial of the tort claims, the case was the impetus for the Franken Amendment, which bars the Defense Department from contracting with companies that require their employees to arbitrate Title VII discrimination claims and tort-related sexual assault or harassment claims.</p>				
non-signatory	<p><i>Todd v. Steamship Mut. Underwriting Ass’n (Bermuda) Ltd.</i>, 601 F.3d 329 (5th Cir. Mar. 2010).</p>	<p>After an insolvent steamboat operator failed to satisfy a personal injury judgment against him, Todd brought a direct action against the liability insurer in state court under Louisiana’s direct action statute. Following removal, insurer moved to stay proceedings and compel arbitration pursuant to the New York Convention. The trial court denied the motion on the strength of <i>Zimmerman</i> before the Supreme Court handed down <i>Arthur Anderson LLP v. Carlisle</i>, which allowed principals of state contract law to be used to interpret the scope of arbitration agreements, “including the question of who is bound by them.” Steamship argued that “since all of Todd’s causes of action derive from Delta Queen’s policy with Steamship, he should be bound by the clause in the policy requiring Delta Queen to arbitrate certain disputes with Steamship.” The Court reversed and remanded so that the trial court could find certain facts and reconsider in light of <i>Carlisle</i> and this opinion.</p>		√		√?

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>Griffin v. ABN AMRO Mortg. Grp., Inc.</i> , 378 F. App'x 437 (5th Cir. May 2010).	Mortgagors were compelled to arbitrate under their loan modification agreement. On appeal, they contended that their claims against the law firm representing a bank and one of its lawyers were not covered by that arbitration agreement. The court held that "equitable estoppel permits a nonsignatory to an arbitration clause to compel arbitration against a signatory 'when the signatory . . . raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract.'" The case was remanded so that the trial court could consider the fact that the National Arbitration Forum was no longer hearing this type of case.	√		√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
procedural arbitrability	<i>Dealer Computer Servs., Inc. v. Old Colony Motors, Inc.</i> , 588 F.3d 884 (5th Cir. Nov. 2009).	Dealer Services filed an arbitration demand seeking almost \$500,000 from Old Colony for computer software upgrades and services. Old Colony countered with affirmative defenses and its own requests for relief. When Old Colony failed to deposit \$26,900 for the final arbitration hearing and Dealer Services refused to advance that amount, the AAA suspended the hearing indefinitely. Dealer Services then moved for an order compelling Old Colony to pay the deposit, which the trial court granted. The court reversed, finding that the payment of fees was a procedural condition precedent and that, absent an agreement to the contrary, such procedural issues were to be decided by the arbitrator, not reviewed by the trial court. Since the arbitrators had given Dealer Services the option to advance the \$26,900 and continue with the final hearing, the court found that Dealer Services should have availed itself of that option, rather than moving to compel arbitration. Accordingly, the trial court erred when it compelled arbitration rather than leaving procedural issues to the discretion of the arbitrators.	√			√

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
unconscionability	<i>Bell v. Koch Foods of Miss., LLC</i> , 358 F. App'x 498 (5th Cir. Dec. 2009).	Twenty-two poultry growers sued Koch for terminating their agreements. Each agreement contained an identical arbitration clause, though there were disputes about whether the agreements were properly authenticated. The growers contended the arbitration clauses were unconscionable under Mississippi law. As respects substantive unconscionability (terms are oppressive), the growers argued that they are not sophisticated business persons and have no knowledge of the working of arbitration; the arbitration agreement was presented on a take-it-or-leave-it basis; the growers were the weaker of the parties who were dependent on the relationship to make a living; Koch controlled every aspect of operations. The court held that parties are charged with understanding the terms of contracts that they sign and that the arbitration clause was written in plain English, conspicuous type, with portions in all capital letters. It further noted that adhesion contracts are not automatically void.	√		√	
	<i>Bell v. Koch Foods of Miss., LLC, supra.</i>	Reviewing twenty-two poultry growers appeal from denial of arbitration-related discovery for abuse of discretion, the court held that the growers' proposed rule that "anytime a party bears the burden of proof, and is either trying to compel or defeat arbitration, then there is a compelling reason for discovery," would defeat the FAA's requirement of summary and speedy disposition of motions and petitions to enforce arbitration clauses.	√		√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
arbitration-related discovery	<i>El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa</i> , 341 F. App'x 31 (5th Cir. Aug. 2009).	Party to a Swiss arbitration sought ex parte to obtain discovery that the arbitration tribunal had denied. The trial court held “that [28 U.S.C.] § 1782 did not apply to discovery for use in a private international arbitration” and that even if it did, the court would not grant the request “out of respect for the efficient administration of the Swiss arbitration.” The court noted that while § 1782 could allow broader discovery than what is authorized by the FAA in domestic arbitrations, it could not overrule another panel and the trial court did not abuse its discretion. The net effect was to compel the parties to use the arbitral forum.	√		√	
fraudulent inducement	<i>Bell v. Koch Foods of Miss., LLC, supra.</i>	The growers also alleged that the arbitration agreements were fraudulently induced. Though they conceded no “active” misrepresentation, they alleged that Koch knew that the arbitration agreements would deprive the growers of a forum due to the excessive costs and that constituted “passive fraud.” The court held that Koch’s alleged silence was insufficient to establish fraud under Mississippi law.	√		√	
	<i>C.C.N. Managed Care, Inc. v. Shamieh A.H.C.</i> , 374 F. App'x 506 (5th Cir. Mar. 2010).	Medical providers sued PPO in state court to void contractual discounts under state law. By filing that suit and their continued delay in federal court before seeking arbitration (“they attempted dismissal, obtained a stay, and waited for CCN’s summary judgment motion, all over a period of fourteen months, before seeking arbitration”), the court held that the trial court’s finding of prejudice was not clearly erroneous, even against the high waiver standard.		√		√

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
waiver	<i>Petroleum Pipe Ams. Corp. v. Jindal Saw, LTD.</i> , 575 F.3d 476 (5th Cir. July 2009).	A dispute arose over the sale of drill pipe. After an interim settlement contemplating ICC arbitration in London if later necessary, suit was filed in Texas state court and removed to the Southern District where claims and counterclaims, discovery, and an off the record conference regarding the interpretation of the earlier settlement agreement took place over the course of more than a year. Ten days after the conference, in which Jindal says the court “expressed concern” over its interpretation of the settlement agreement, Jindal moved to stay the litigation and compel arbitration. The trial court summarily denied the motion. In finding that Jindal had waived its right to compel arbitration, the court reviewed the fact specific test: “A presumption against waiver exists such that the party asserting waiver ‘bears a heavy burden of proof in its quest to show’ waiver.” “The court finds waiver ‘when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party.’ In this context, ‘prejudice’ means ‘the inherent unfairness in terms of delay, expense, or damage to a party’s legal position that occurs when the party’s opponent forces it to litigate an issue and later seeks to arbitrate the same issue.’ And, ‘[t]hree factors are particularly relevant’ to the prejudice determination: (1) whether discovery occurred relating to arbitrable claims; (2) the time and expense incurred in defending against a motion for summary judgment; and (3) a party’s failure to timely assert its right to arbitrate.” Here, Jindal waived arbitration by “substantially invok[ing] the judicial process by waiting to move to arbitrate until the district court’s pronouncements in the May 19 conference and that PPA				
				√		√

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
		was prejudiced thereby.” “The lack of a formal ruling does not convince us that [one party], having learned that the district court was not receptive to its arguments, should be allowed a second bite at the apple through arbitration.”				
	<i>Hall-Williams v. Law Office of Paul C. Miniclier, P.L.C.</i> , 360 F. App’x 574 (5th Cir. Jan. 2010).	After two lawyers resigned from Miniclier’s firm and a Katrina plaintiff followed them to their new practice, a fee dispute arose under Miniclier’s contingency fee agreement with that plaintiff. Miniclier’s firm intervened in the underlying suit against Allstate “to protect its financial interest and lien privilege under Louisiana law in the outcome of the litigation.” After settlement of the underlying claim and on the date for filing an ordered fee application, but only six weeks post intervention, Miniclier moved to stay its intervention pending arbitration of the fee dispute. The magistrate and trial judge found facts and awarded partial fees from which Miniclier appealed. Reviewing the failure to stay pending arbitration de novo, the court found the arbitration agreement in the contingency fee contract enforceable after termination of the representation. Applying the presumption against waiver, the court further found that Miniclier did not waive arbitration with the six-week delay between intervention and motion to stay. It remanded for a stay pending arbitration.		√		√
	<i>South Tex. Elec. Coop. v. Dresser-Rand Co.</i> , 575 F.3d 504 (5th Cir. July 2009).	Electric utility’s failure to invoke non-binding dispute resolution procedures of its contract with turbine manufacturer was, at best, a technical default that did not harm manufacturer.		√		√

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
public policy	<i>U-Save Auto Rental of Am., Inc. v. Furlo</i> , 368 F. App'x 601 (5th Cir. Mar. 2010).	Party to franchise agreement containing an arbitration agreement appealed on public policy grounds from orders compelling arbitration and confirming a resulting arbitration award. The court affirmed, holding that the "arbitration clause could only be void for public policy if the choice-of-law provision denied the Furlos' causes of action under Florida law without providing access to a reasonable substitute. We find that it did not."	√		√	
federal preemption	<i>Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London</i> , 587 F.3d 714 (5th Cir. Nov. 2009), cert. denied, 131 S. Ct. 65 (Oct. 2010).	<p><i>Safety National</i> arose out of a dispute involving a Louisiana self-insurance fund, its London reinsurers, and a U.S. insurance company that had entered into a loss portfolio transfer agreement with the self-insurance fund. The dispute concerned whether the self-insurance fund validly assigned to the U.S. insurers its rights under the reinsurance agreements with the London reinsurers, each of which contained an arbitration agreement.</p> <p>The U.S. insurer sued the London reinsurers in federal district court, the London reinsurers moved to stay litigation and compel arbitration, and the U.S. insurer did not oppose the motion. In the meantime, the self-insurance fund successfully moved to intervene, and opposed arbitration on the ground that a Louisiana statute rendered unenforceable the arbitration agreements in the reinsurance contracts. The self-insurance fund said that the state statute was not preempted by the Federal Arbitration Act, including the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, because the McCarran-Ferguson Act saves from federal preemption by any "Act of Congress" state laws regulating the business of insurance.</p>		√	√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
		Ultimately, an en banc Court held that the Convention preempted the Louisiana statute and that the McCarran-Ferguson Act did not reverse-preempt the Convention because the Convention, despite its non-self-executing nature, was not an “Act of Congress” for McCarran-Ferguson Act purposes. The Court concluded that the implementing provisions of Chapter Two of the Federal Arbitration Act were meaningless “without reference to the contents of the Convention,” and that the substance of the case (arbitration) was governed by the Convention, not the implementing legislation.				
jurisdiction	<i>Nationstar Mortg. LLC v. Knox</i> , 351 F. App’x. 844 (5th Cir. Aug. 2009).	The Knoxes sued their mortgage lender in state court before it could foreclose. Nationstar removed and filed a separate declaratory judgment seeking to compel arbitration, which was assigned to a different judge. The removed action was later remanded and the second judge dismissed the second action on <i>Colorado River</i> abstention grounds. The question became whether it abused its discretion in abstaining. Nationstar claimed that the FAA “requires federal courts to direct parties to proceed to arbitration regardless of whether there is a pending proceeding in another forum.” The Court ultimately found that the <i>Colorado River</i> factors were divided and there was no abuse of discretion. The piecemeal litigation analysis is, however, instructive. “The third factor, the possibility of piecemeal litigation, counsels against abstention. Unlike <i>Colorado River</i> , there is no clear federal policy of avoiding piecemeal adjudication of rights subject to arbitration agreements. On the contrary, ‘the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement.’”		√		√

TABLE II: POST-ARBITRATION CHALLENGES

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
standard of review	<i>Stolt-Nielsen S.A. v. AnimalFeeds, Int'l Corp.</i> , 130 S. Ct. 1758 (Apr. 2010).	<p><i>Stolt-Nielsen</i> arose out of a motion to vacate a class construction award imposing class arbitration on the parties even though the parties' agreements were concededly silent on that score. The Court had to consider whether it could vacate the award only if the arbitrators exceeded the scope of their authority to rule on the matters addressed in the award, or whether it could review the award under § 10(a)(4) based on its outcome.</p> <p>Because the parties had submitted the issue of whether their contracts authorized or forbade class arbitration, the Court imported into the commercial context the labor-arbitration manifest disregard of the agreement standard and found that it was subsumed within § 10(a)(4). The Court said "It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice' that his decision may be unenforceable." "In that situation," said the Court, "an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator 'exceeded [his] powers,' for the task of an arbitrator is to interpret and enforce a contract, not to make public policy." Applying that standard to the facts, the Court "conclude[d] that what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration."</p>				
			US		US	

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
		<p>The Court also found it relevant that the panel was not persuaded by Stolt-Nielsen’s unrebutted expert testimony—including testimony that there had never been a class arbitration under the form of charter-party agreement used—or by pre-<i>Green Tree Financial Corp. v. Bazzle</i> decisions holding that courts could not compel class or consolidated arbitration where the parties’ agreements were silent on class arbitration.</p> <p>The Court said that because the parties had stipulated that they had reached no agreement on class arbitration, the arbitrators should have inquired whether the FAA, maritime law, or New York Law contained a “default rule” that applied. The stipulation “left no room for an inquiry regarding the parties’ intent, and any inquiry into that settled question would have been outside the panel’s assigned task.” But instead, “the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.”</p> <p>While the Court imported into § 10(a)(4) the manifest disregard of the agreement standard, it stopped short of deciding whether the manifest disregard of the law standard survived <i>Hall Street</i>. Yet it declared that if the manifest disregard of the law standard applied after <i>Hall Street</i>, then it was satisfied as well.</p>				

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
class arbitration	<i>Stolt-Nielsen S.A. v. AnimalFeeds, Int'l Corp., supra.</i>	<p>After vacating an arbitration award imposing class arbitration on sophisticated parties whose contracts were concededly silent on that score, the Court did not merely vacate and remand to the arbitrators for a rehearing on “whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class.” It said that “there can be only one possible outcome on the facts” and set about to explain why that was so.</p> <p>Acknowledging that “interpretation of an arbitration agreement is generally a matter of state law,” the Court ruled that the FAA nevertheless “imposes certain rules of fundamental importance, including the basic precept that ‘arbitration is a matter of consent, not coercion.’” The Court provided specific examples of these FAA “rules of fundamental importance,” each of which is designed to promote party autonomy, and added a new one: “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party <i>agreed</i> to do so.” And the Court admonished that it “falls to courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.”</p> <p>Having set forth the governing rule, the Court considered whether the arbitrators’ decision complied with it. The panel, stated the Court, based its conclusion on the parties’ broad arbitration agreement and the absence of any intent “to preclude class arbitration,” even though the parties had stipulated “that they had reached ‘no</p>				
			US		US	

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
		<p>agreement’ on class arbitration.” The panel found that the agreements’ silence was “dispositive” even though “the parties are sophisticated business entities, even though there was no tradition of class arbitration under maritime law, and even though AnimalFeeds does not dispute that it is customary for the shipper to choose the charter party that is used for a particular shipment.”</p> <p>The Court also considered whether consent to class arbitration should be implied. The Court analyzed the question from the standpoint of the procedural arbitrability doctrine, explaining that “in certain contexts, it is appropriate to presume that parties that enter into an arbitration agreement implicitly authorize the arbitrator to adopt such procedures as are necessary to give effect to the parties’ agreement.” The Court explained that such a presumption was grounded “in the background principle that [w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.”</p> <p>But the Court said that class arbitration “changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” For, in “bilateral arbitration,” the “parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”</p>				

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
		By contrast, “the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties’ mutual consent to resolve disputes” in that manner. After citing “just some of the fundamental changes brought” on by class arbitration, the Court concluded that the question was “whether the parties <i>agreed to authorize class arbitration</i> ,” and where, as here, “the parties stipulated that there was ‘no agreement’ on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.”				
exceed authority	<i>Institutional Capital Mgmt., Inc. v. Claus</i> , 364 F. App’x 168 (5th Cir. Feb. 2010).	After an NASD panel awarded attorney fees directly to the attorney (who was not a party to the arbitration agreement) rather than to his client (who was), “the magistrate judge vacated the award because ‘the arbitration panel exceeded its authority’ when it awarded attorney’s fees directly to [the attorney] in violation of Texas law.” In reversing, the court concluded that it did not need to “consider whether the alleged legal error violates the FAA, because there is no reversible error in this case.” While Texas law prohibits the award of fees directly to counsel unless authorized by statute, “a party who has been ordered to pay attorney’s fees in this manner does not have standing to challenge this aspect of the attorney’s fee award. It is usually immaterial to the party paying the attorney’s fee award how those fees are handled by the prevailing party; therefore any such error is harmless.” The court reinstated the arbitration award.		√	√	

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
limited judicial review	<i>Householder Grp. v. Caughran</i> , 354 F. App'x 848 (5th Cir. Nov. 2009).	<p>In an unremarkable <i>pro se</i> collections case, the court patiently reviewed vacatur grounds post-<i>Hall Street</i> in hornbook style. The FAA “imposes significant limits on judicial review in order that arbitration will be ‘efficient and cost-effective’ for the parties.” “The effect is to make judicial review of an arbitration award ‘exceedingly deferential,’ and vacatur is available only for the limited reasons outlined in [§] 10(a) of the FAA.” “Arbitration awards can no longer be vacated on nonstatutory, common law grounds.” “[T]here are only four grounds for which a court can vacate an arbitration award:</p> <ol style="list-style-type: none"> 1. Where the award was procured by corruption, fraud, or undue means; 2. Where there was evident partiality or corruption in the arbitrators, or either of them; 3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or 4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” <p>“Notably, [§] 10(a) does not provide for vacatur of an arbitration award based upon the merits of a party’s claim.”</p>				

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
	<i>Theriault v. FIA Card Servs., N.A.</i> , 351 F. App'x 859 (5th Cir. Oct. 2009).	Credit cardholder brought an action challenging an NAF arbitration award in favor of issuing bank. In affirming confirmation of the award the court wrote that, "Theriault failed to establish grounds for vacating the arbitration award under 9 U.S.C. § 10, thus the district court did not err in confirming the arbitration award."	√		√	
fraud	<i>Barahona v. Dillard's, Inc.</i> , 376 F. App'x 395 (5th Cir. Apr. 2010).	During a Title VII discrimination arbitration, it became clear that e-mail had not been produced by Dillard's. After Dillard's continuance pending production was denied, the hearing was concluded with an inference against Dillard's. Nonetheless, the plaintiff failed to carry her burden. She then moved to vacate the award. After the arbitrator denied jurisdiction in response to a remand, the trial court vacated the award. Reviewing de novo and "deferring greatly to the [arbitrator's] decision", the court found that a party cannot meet the fraud burden if the ground is "brought to the attention of the arbitrators." Here, the arbitrator not only had the information, he drew an adverse inference from it.		√	√	
evident partiality	<i>United Forming, Inc. v. FaulknerUSA, LP</i> , 350 F. App'x 948 (5th Cir. Oct. 2009).	Construction project subcontractor and surety brought an action to confirm an arbitration award against a contractor. Contractor subsequently moved to vacate based on failure to disclose conflicts, bias, and misconduct. The trial court confirmed the award. Returning to its en banc analysis in <i>Positive Software</i> , the court concluded that the undisclosed information about a former partner of the arbitrator and his friendship with the general counsel of a competitor "would support only a 'speculative impression of bias' and not a 'significant compromising relationship.'"	√		√	

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
misconduct	<i>United Forming, Inc. v. FaulknerUSA, LP, supra.</i>	The contractor also alleged “that the AAA panel’s award was so contrary to law that it constitutes ‘misconduct’ or ‘misbehavior’ under the FAA.” The court summarily concluded that, “[e]ven if the AAA panel’s decision was erroneous—a question we do not reach—it was at least debatable.” With that, the Court affirmed the confirmation.	√		√	
public policy	<i>U-Save Auto Rental of Am., Inc. v. Furlo</i> , 368 F. App’x 601 (5th Cir. Mar. 2010).	Party to an arbitration provision found in a franchise agreement appealed from orders rejecting its public-policy defense and compelling arbitration and confirming the resulting award. The court held that the “arbitration clause could only be void for public policy if the choice-of-law provision denied the Furlos’ causes of action under Florida law without providing access to a reasonable substitute. We find that it did not.”	√		√	
collateral attack	<i>Yee v. Bureau of Prisons</i> , 348 F. App’x 1 (5th Cir. Sept. 2009).	After an unfavorable arbitration award arising from a grievance, a Bureau of Prisons doctor filed a Title VII action in district court. The trial court concluded that “all of the plaintiff’s current claims relate to defendants’ alleged wrongful acts before and during the previous arbitration.” The Fifth Circuit agreed, holding that they were, therefore, impermissible collateral challenges to the arbitration order.	√		√	