Chapter 12

WHERE IS THE NEW *ENTERPRISE WHEEL*? JUDICIAL REVIEW OF EMPLOYMENT ARBITRATION AWARDS

I. Introduction

Moderator: Robert J. Rabin, NAA, Syracuse, New York
Panelists: Peter Feuille, NAA Member, Professor of Labor and Industrial Relations, University of Illinois, Champaign, Illinois
Michael H. LeRoy, Professor, Institute of Labor and Industrial, Relations and College of Law, University of Illinois, Champaign, Illinois
Commentators: Judith Droz Keyes, Davis, Wright & Tremaine, San Francisco, California
Sharon R. Vinick, The Vinick Law Firm, San Francisco, California

Rabin: The title of this paper takes us back a long time ago to 1960 and the famous Supreme Court *Trilogy*.[1] Title VII of the Civil Rights Act, the source of so many claims that now go to arbitration, was not enacted until four years later. *Enterprise Wheel*,[2] decided under the Labor Management Relations Act (LMRA), dealt with private disputes under collective bargaining agreements. The employee enjoyed a package of workplace rights only because a union had negotiated them. Having created what are essentially private rights, it would be appropriate for the parties to provide a limited forum in which to protect those rights. Similarly, the scope of judicial review of arbitrations dealing with these claims could be narrow, as the *Enterprise Wheel* decision prescribed.

[1] *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).
[2] 363 U.S. 593 (1960).

But it may be a very different matter when arbitration is utilized to resolve questions of public law, such as a claim that an employee has been discriminated against under Title VII. Is the case for meaningful judicial review stronger in these cases? Is a person who attempts to vindicate a Title VII right entitled to a process that has some safeguards against error?

When this question first came before the Supreme Court in the *Gilmer* case,[3] the Court tangentially addressed the issue of judicial review in a footnote, quoting an earlier opinion to the effect that although "judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." The *Gilmer* opinion states elsewhere, again quoting an earlier case, that a party doesn't forgo its substantive rights by agreeing to arbitrate them, but only submits them to resolution in an arbitral forum. I take the footnote to mean that the parties are entitled to judicial review that is sufficient to ensure that the arbitration process has adequately protected those statutory rights.

The degree of appropriate judicial scrutiny of the award might depend upon the circumstances and setting of the arbitration agreement. An arbitration pursuant to a collective bargaining agreement may not require more extensive judicial review than under the *Trilogy*. For at least as long as *Alexander v. Gardner-Denver*[4] remains good law (a debatable proposition), the individual will have independent access to the courts to attempt to vindicate a statutory right. Where the parties agree to submit their dispute to arbitration after it has arisen and its contours are fully understood, and where the choice to arbitrate is voluntary, it may be appropriate to conclude that they are bound by the arbitrator's determination without further significant judicial review. Perhaps such narrow judicial review is also appropriate in a pre-dispute agreement to arbitrate where the parties are equally sophisticated and have relatively equal bargaining power, as in the case of an executive hire. But, in order to secure the objectives that are implicit in the *Gilmer* footnote, more extensive judicial review may be called for in the pre-dispute agreement where the employee is in a weaker bargaining position and the agreement is one of adhesion.

---

[3] *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991), fn. 4.
[4] 415 U.S. 36 (1974).

This excellent paper by Michael LeRoy and Peter Feuille provides a rich data base to explore the approaches courts are taking to judicial review of arbitration awards. However, the study and the paper were not designed to draw distinctions between the kinds of cases that go to arbitration, nor do the data reveal the arguments the parties make in an attempt to overturn an award. The cases studied show us that most awards survive judicial review. However, the cases don't give us any confidence that the courts are developing a comprehensive and consistent approach to the scope of judicial review. Nor do the data reveal any variation in the approach depending upon the setting and dynamics of the agreement to arbitrate.

Both the authors and the two commentators, the seasoned practitioners Judith Droz Keyes and Sharon R. Vinick, appear to accept the reality that arbitration is relatively final. They suggest that we'd better focus our energies securing our position in the arbitration process itself.

The question raised in the *Gilmer f*ootnote has not yet been addressed definitively by the courts. We need a comprehensive approach to the question of judicial review in these cases, so that arbitration is in fact an effective and fair process for dealing with statutory claims.

Our first speaker is Peter Feuille. Michael is not with us today, but we're fortunate to have Pete to present the paper for both of them.

Pete spent some of his formative years here in the Bay Area, where he tells me he enjoyed an abundant amount of surfing. He is now a professor of labor and industrial relations at the University of Illinois, where I understand the only surfing is on the Web.

Our two commentators are both experienced labor and employment law practitioners here in the Bay Area. Both of them, along with Peter, have impressive academic credentials, and I discovered that all three have Berkeley connections and took one of their major degrees there. So, this is somewhat of a reunion for them.

Sharon Vinick is a plaintiffs' lawyer, and she recently went to work for the best boss in the world—herself. Judy Keyes is a management-side employment lawyer; a partner in the Davis, Wright & Tremaine firm here in San Francisco. So without further ado, I'm going to turn the podium over to Peter.

II. PRESENTATION BY PETER FEUILLE

MICHAEL H. LEROY* AND PETER FEUILLE**

Summary

We launched this empirical study 15 years after the Supreme Court decided *Gilmer v. Interstate Johnson/Lane Corp.*,[1] a key decision that enforced a mandatory arbitration agreement. *Gilmer* led to the widespread adoption of individual employment arbitration but provided courts no standards for reviewing these arbitration awards.

Until now, researchers have examined the fairness and legality of *Gilmer* agreements and other aspects of employment arbitration. Our timing is significant because employment arbitration has matured beyond the initial phase of pre-arbitration challenges to this forum. By now, a critical mass of individuals and their employers have been to arbitrations and appealed arbitrator rulings to courts. But little is known about why parties appeal adverse arbitration rulings. There is no empirical information about the legal arguments that parties use to challenge awards. No data exist to explain how federal and state courts rule on these challenges.

We extracted data from 213 federal and 174 state court decisions from 1975–2006. These 387 cases show that the grounds for challenging employment awards are far more numerous than those for labor awards that are reviewed under the Supreme Court's *Trilogy* standards. Too many courts and legislatures have presented arbitration losers with an abundance of choices to sue on the award. These grounds include federal bases such as the four statutory grounds under the Federal Arbitration Act (FAA), common law standards, all the *Trilogy* arguments that are used to challenge labor arbitration awards, and numerous state statutes and common law grounds.

Federal district courts confirmed 128 awards in 137 rulings (93.4 percent of the cases), compared with 66 awards in 76 rulings (86.8 percent) in appellate cases. State courts showed less defer-

*Professor, Institute of Labor and Industrial Relations, and College of Law, University of Illinois at Urbana-Champaign, Champaign, IL.

**Professor, Institute of Labor and Industrial Relations, and College of Law, University of Illinois at Urbana-Champaign, Champaign, IL.

[1]500 U.S. 20 (1991).

ence, confirming 79.8 percent of awards in initial reviews and 72.5 percent at the appellate level, yielding a combined confirmation rate of 76.4 percent. Confirmation rates varied widely among states. Texas courts confirmed 100 percent of awards, followed by Louisiana, Florida, and Arkansas. California and Illinois also recorded comparatively rates, but Michigan and Ohio had much lower confirmation rates (respectively, 64.7 percent and 64.3 percent).

We also observed a recent spurt of award-review cases—exemplified by the finding that 65 percent of our federal district courts decisions occurred since 2000. This means that courts may face a growing docket of post-arbitration appeals as parties seek to re-litigate the claims that were privately adjudicated. This upsurge also suggests that employment arbitration serves too many masters—an uncoordinated array of legislatures and courts that regulate this process—despite the fact that the FAA appears to legislate uniform standards.

Because we have no data on the total number of employment arbitration awards issued during the time period we examined, we don't know the proportion of employment awards that are appealed to the courts. Our findings suggest, however, that some arbitrating parties are not committed to the norm of arbitral finality. If additional research confirms our inference, employment arbitration may not be as effective as the private substitute for litigation that its proponents anticipated.

Introduction

Context for Our Empirical Research

Who will adjudicate legal disputes between employees and their employers? For millions of individuals the answer is not courts, but arbitrators.[2] In compulsory and voluntary arbitration

[2]There is no single source that tracks this important development. A key study found that 19% of private sector employers were using arbitration by 1997, up from 3.6% in 1991, and that by 2001 the number of employees covered by American Arbitration Association (AAA) employment arbitration contracts had grown to 6 million, up from 3 million in 1997. Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, Disp. Resol. J. (May–July 2003), at 10. Among employers with 100 or more employees who filed compliance reports with the Equal Employment Opportunity Commission, 10% reported that they used arbitration, and more than 25% reported that this process was mandatory. U.S. Gen. Accounting Office, GAO/HEHS-95-150, Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution 7 (1995).

agreements, employees waive access to courts.[3] The Supreme Court broadly approved the substitution of arbitrators for judges and juries in *Gilmer v. Interstate Johnson/Lane Corp.*[4] In directing courts to enforce arbitration agreements, *Gilmer* dismissed concerns about precluding an individual's access to courts, explaining that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[5]

The decision means that courts are limited to a supporting role in overseeing this private dispute resolution process. Courts have a similar oversight role in union-management ("labor") arbitrations. But their oversight differs from employment arbitration, particularly in regulating appeals from parties who lose an award. Courts play a more limited role in reviewing labor arbitration awards because there are fewer grounds for appealing an award, and the reviewing standards are more clearly defined.

In this empirical research we focus on court review of individual employment arbitration awards. *Gilmer* emphasized that courts should defer to arbitrator rulings. Speaking only briefly on the subject, the majority opinion reasoned that "generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, and as such are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[6] *Gilmer* expressed abiding faith in private judges by refusing "to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."[7]

We launched our empirical investigation by taking stock of *Gilmer*'s apparent impact since 1991. As individual employment arbitration rapidly spread, scholarly research examined questions about the fairness and legality of requiring employees to abide

---

[3]For an example in this study's sample, *see Tinder v. Pinkerton Sec.*, 305 F.3d 728, 734 (7th Cir. 2002), where the former employee contended that the contract was illusory and unilaterally imposed. An example of a voluntary arbitration agreement appears in *Window Concepts, Inc. v. Daly*, 2001 WL 1452790 (R.I. Super. 2001).

[4]500 U.S. 20 (1991).

[5]*Id.* at 26.

[6]*Id.* at 30.

[7]*Id.*

by *Gilmer* agreements, especially when individuals did not want to waive access to courts in the first place.[8]

We collected our data for this study in 2006, 15 years after the Court decided *Gilmer*. This timing is significant because employment arbitration has matured beyond the initial phase of pre-arbitration challenges to the use of this forum. By now, a critical mass of individuals and their employers have been to arbitration and appealed arbitrator rulings to courts. But little is known about why parties appeal adverse arbitration rulings. There is no empirical information about the arguments that parties use to challenge awards. No data exist to explain how federal and state courts rule on these challenges.

As we pursued answers to these important concerns, we also focused on theoretical problems. *Gilmer* did not set forth reviewing guidelines for courts. The FAA provides statutory standards, but our empirical survey shows that many award challenges raise issues that are unrelated to this law. Even when courts apply FAA standards from this 1925 statute, current arbitrations raise new issues that Congress did not contemplate. In addition, when Congress deliberated over the FAA in committee hearings, lawmakers focused on the enforcement of arbitration agreements but paid little attention to standards for reviewing awards. Thus, contemporary courts play a large role in interpreting statutory reviewing standards without clear legislative intent or specific high court guidance. This stands in marked contrast to the parallel universe

---

[8]Malin, *Privatizing Justice— But By How Much? Questions* Gilmer *Did Not Answer*, 16 Ohio St. J. on Disp. Resol. 589 (2001); Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 Hastings L.J. 1199 (2000); Moore, Note, *Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 Colum. L. Rev. 1572 (2000); Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 Utah L. Rev. 857 (1999); Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 Wash. & Lee L. Rev. 395 (1999); Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. Rev. 931 (1999); Nicolau, Gilmer v. Interstate/Johnson Lane Corp.*: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. Pa. J. Lab. & Emp. L. 177 (1998); Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (1996); Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 Hofstra Lab. & Emp. L.J. 1 (1996); Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 St. Louis U. L.J. 77 (1996); Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017 (1996); Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. Ill. L. Rev. 635 (1995); Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 Minn. L. Rev. 1443 (1993); Berkeley & McDermott, *The Second Golden Age of Employment Arbitration*, 43 Lab. L.J. 774 (1992); Cooper, *Where Are We Going with* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 St. Louis U. Pub. L. Rev. 203, 226–34 (1992); and Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 Chi.-Kent L. Rev. 753 (1990). *Also see* Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 Harv. L. Rev. 668, 671–72 (1986).

for labor arbitration, where the Court strongly asserted itself in the *Steelworkers Trilogy*[9] and its progeny by explicating judicial review standards. With this background in mind, we posed these research questions.

1. How likely/unlikely are courts to defer to employment arbitrator decisions?
2. Do courts limit their award reviews to the statutory grounds specified in the FAA or state equivalents, or do they also generate and apply common law standards? (This question has theoretical significance because an empirical answer suggests the degree to which arbitration is co-regulated by legislatures and courts, and dual systems of federal and state policies.)
3. Do reviewing courts supplement FAA standards with the Supreme Court's *Trilogy* standards? (This is a more specific form of our first question, one that reflects the special role that the *Trilogy* plays in protecting voluntary labor arbitration from appellate review. This question has theoretical significance because of institutional differences between employment and labor arbitration systems. In labor arbitration, arbitrators are mutually selected by the union and employer, apply the common law of the shop to the interpretation of the collective bargaining agreement, rarely decide statutory or other legal issues, and write explanatory opinions. Employment arbitrators handle legal or contractual claims presented by individual employees, administer a highly structured process, and sometimes issue rulings without explaining their reasoning in a written opinion. Labor arbitration was designed to replace economic pressure (strikes, slowdowns, etc.) as a method of resolving grievances, while employment arbitration was designed as a substitute for litigation. The *Trilogy* was tailored for labor arbitration and restrained courts from interfering in the bargaining relationships of unions and employers. Accounting for these considerable differences in context, we ask whether courts supplement FAA standards with the *Trilogy* precepts.)

[9] *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

4. Is the volume of award challenges growing in relation to the increasing adoption of employment arbitration or the total number of employment awards? (We have no data about the number of employment arbitration agreements or awards, so we cannot answer this question directly. However, our data show that award appeals have grown in recent years, and we address our concern that employment arbitration may not generate the degree of dispute resolution finality its adopters sought.)

Using a self-generated database of federal and state court decisions from 1975–2006, we examine how courts apply reviewing standards and rule on award challenges. Our data show that courts are very deferential in reviewing these awards, but the recent growth in challenges to awards appears to be abnormally high.

Organization of This Article

The second section of this paper provides a brief history of award review standards under the FAA and Labor-Management Relations Act (LMRA). It shows that when Congress enacted the FAA, lawmakers carefully considered jurisdiction to enforce arbitration agreements without thinking much about award review standards. The FAA allows parties to choose to review awards under the standards in Section 10, or separate standards provided by states. We show that only 19 states have statutes that closely mirror the FAA. In Appendix 2, we detail the alternate state reviewing standards. The second section also shows federal common law standards that were developed for labor arbitration awards. This discussion is pertinent because our empirical study shows that numerous courts apply one or more of these standards to employment awards.

The third section of this paper presents our data. It discusses our research methods and reports our empirical findings. Table 1 shows a variety of dispute characteristics associated with the award review cases in the sample. Table 2 appears in conjunction with Finding No. 1, showing that federal courts are extremely deferential in reviewing employment arbitration awards. Table 3 supports our next two findings: State courts are less deferential in reviewing employment arbitration awards, and award confirmation among states is high but quite variable. Tables 4A and 4B, summarized in Findings 4A and 4B, detail the wide variety of FAA, state statutory,

and common law grounds that parties use in challenging an award, and that courts use in ruling on these challenges.

The fourth section of this paper presents details of illustrative cases that add important context to our statistical findings. We show how courts verbalize the policy of deferring to awards when they use strong language to discourage these post-arbitration challenges. Next, in explaining the variability in state confirmation rates, we elaborate on three possible sources for this variability. We proceed to show how courts apply and interpret the four statutory review standards in the FAA. This discussion explains how courts interpret claims of arbitrator fraud, evident partiality, hearing misconduct, and exceeding power. In the final part, we identify federal circuits and state courts that apply a fast-growing common law standard for review, called manifest disregard for the law.

The fifth section of this paper presents our conclusions. We also include two appendices to aid judges, lawmakers, scholars, practitioners, and students who seek primary materials to aid in their research. Appendix 1 is a list of all the cases in our sample; Appendix 2 shows every state law whose arbitration review standards differ from those in the FAA.

Standards for Judicial Review of Arbitration Awards

The Federal Arbitration Act

In 1925, Congress enacted the United States Arbitration Act (USAA)[10]—and renamed it the Federal Arbitration Act (FAA) in 1947—to help businesses reduce expense and delay in resolving their legal disputes.[11] When the American Bar Association proposed the law, it cited arbitration statutes in New York and New Jersey.[12] Congress warmed to this idea by proposing to make arbitration agreements enforceable in a court of law.[13] Lawmakers

[10]United States Arbitration Act, ch. 213, 43 Stat. 883 (1925), codified as amended at 9 U.S.C. §§1-16 (2000).

[11]S. Rep. No. 68-536, at 2 (1924) (stating that the FAA was proposed to help businesses avoid "the delay and expenses of litigation"); and H.R. Rep. No. 68-96, at 2 (1924) (showing that Congress believed the simplicity of arbitration would "reduce[e] technicality, delay, and [keep] expense to a minimum and at the same time safeguard the rights of the parties").

[12]Rosenthal v. Great W. Fin. Sec. Corp., 14 Cal. 4th 394, 406 (1996), citing Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 S. Cal L. Rev. 375, 388, fn. 45 (1957).

[13]The bill was reintroduced in the 68th Congress with this heading: "To make valid and enforceable written provisions or arrangements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or

conceived a national arbitration model based on federal jurisdiction.[14] In passing this law, Congress also intended to end judicial hostility to arbitration.[15]

While Congress was pre-occupied with the enforcement of arbitration agreements, it said little about court standards for vacating an award. The 1924 House report stated: "The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form."[16] The 1924 Senate report stated that the award could be set aside where it was secured by corruption, fraud, or undue means; or if there was partiality or corruption on the part of the arbitrators; or in a situation where an arbitrator is guilty of misconduct or refuses to hear evidence or because of prejudicial misbehavior by the parties; or the arbitrator exceeds his or her powers.[17] These Senate report standards now appear in the law.[18] The Senate included a significant excerpt from a brief as part of its report on the USAA, apparently reflecting that chamber's intent on this subject:

> The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means—cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.[19]

---

with foreign nations." H.R. No. 646, 68th Cong., 1st Sess. (1923), at 1; and Sen. No. 1005, 68th Cong., 1st. Sess. (1923), at 1.

[14]Statement of Charles L. Bernheimer, Jan. 9, 1924, *Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the Judiciary*, 68th Cong., 1st Sess., p. 6. The House report stated: "The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction o[f] admiralty, or which may be the subject of litigation in the Federal courts." *Supra* note 35, H.R. Rep. No. 68-96, at 3.

[15]The Senate report emphasized that the effect of the bill would be to abolish the judicial reluctance to enforce arbitration agreements. *Supra* note 35, Sen. Rep. No. 536, 68th Cong., 1st Sess., at 2–3 (1924). During Senate debate, Senator Thomas J. Walsh, stated: "In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced." Remarks of Senator Walsh, 68 Cong. Rec. 984 (1924). The same point was raised during House debate. *See* Remarks of Congressman Graham, 68 Cong. Rec. 1931 (1924).

[16]H.R. Rep. No. 68-96, *supra* note 35, at 2.

[17]Sen. Rep. No. 536, 68th Cong., 1st Sess., *supra* note 35, at 4.

[18]*See infra* note 47.

[19]Statement of W.W. Nichols, January 9, 1924, *Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the Judiciary*, 68th Cong., 1st Sess., p. 36. The legislative reports and debates said nothing as to whether post-award and state court litigation rules should be preempted by the new federal law.

In addition, this statute preserved dual roles for state and federal courts—a feature that presently complicates review of employment awards. Section 3 authorizes a federal court to stay a trial "until such arbitration has been had in accordance with the terms of the agreement."[20] Furthermore, Section 4 allows a party who complains of "failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" to "petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."[21]

The law continues by specifying rules for reviewing awards. Section 9, which pertains to procedures for reviewing awards, allows a role for state courts when it says: "If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title."[22] Section 10 states four grounds to vacate an award in federal court.[23] In conjunction with this provision, all states have arbitration acts that provide for judicial review of awards. But only 19 states have vacatur standards that are identical or very similar to Section 10 of the FAA.[24] Fourteen other states have adopted Section 23 in the Revised

---

[20] United States Arbitration Act, *supra* note 34.

[21] *See* §4, 61 Stat. at 670.

[22] *See* §9, 61 Stat. at 670.

[23] *See* §10, 61 Stat. at 670, authorizing courts to vacate an award where

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption by the arbitrators; (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.

[24] Alabama (Ala. Stat. §6-6-16, Award Appeals); Alaska (Alaska Stat. §09-43-120, Vacating An Award); Arizona (A.R.S. §12-1512, Opposition to an Award); Arkansas (A.C.A §16-108-212, Vacating an Award); California (West's Ann.Cal.C.C.P §1286.2, Grounds for Vacation of an Award); Colorado (C.R.S.A. §13-22-223, Vacating Award); Hawaii (H.R.S. §658A-23, Vacating Award); Idaho (I.C. §7-912, Vacating an Award); Indiana (I.C. §34-57-1-17, Grounds Against Rendition of Award on Judgment); Idaho (I.C. §7-912, Vacating an Award); Michigan (M.C.R. §3.602(J), Vacating Award); Mississippi (Miss. Code Ann. §11-15-23, Grounds for Vacation); New Jersey (N.J.S.A. §2A:24-8, Vacation of Award); Ohio (R.C. §2711.10, Court May Vacate an Award); Rhode Island (Gen. Laws 1956, §10-3-12, Grounds for Vacating an Award); South Carolina (Code 1976 §15-48-130, Vacating an Award); Texas (V.T.C.A., Civil Practice & Remedies Code §171.088, Vacating Award); Wisconsin (W.S.A. §788.10, Vacation of Award); and Washington (W.S.1977 §1-36-115, When Court to Modify or Correct Award).

Uniform Arbitration Act, in part or in whole; and others enumerate different standards.[25]

The Steelworkers Trilogy

For many years, two sources provided for the review of labor arbitration awards—the FAA and Section 301 of the LMRA. By 1947, when the LMRA was enacted, and in the following years, most unions agreed to no-strike clauses in exchange for employer assurances to submit contract interpretation disputes to arbitration.[26] Section 301 provided a legal process to enforce this bargain.[27] In a landmark 1957 decision, *Textile Workers Union v. Lincoln Mills*,[28] the Supreme Court authorized federal courts under Section 301 to fashion a common law for collective bargaining agreements (CBAs), including court petitions to confirm or vacate

---

[25]See Appendix 2 of this chapter. The Revised Uniform Arbitration Act is located at http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm. The provision states:

SECTION 23. VACATING AWARD.

(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (1) the award was procured by corruption, fraud, or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator's powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

[26]*See* Fleming, The Labor Arbitration Process 31–32 (1965): "Indeed, it is apparent that the decisions of the Supreme Court which have so greatly enhanced labor arbitration . . . are in large part based on the theory that the arbitration clause is the quid pro quo for the no-strike clause." The use of labor arbitration grew from the 1940s to the 1950s, and has been a mainstay ever since. *Compare* a 1944 survey, Bureau of Labor Statistics, U.S. Dep't of Labor, Arbitration Provisions in Union Agreements 2, 4 tbl. 1 col. 2 (73% of firms covered by a labor agreement had an arbitration provision in their contract) and a 1953 survey in Bureau of Labor Statistics, U.S. Dep't of Labor, Labor-Management Contract Provisions 10, 4 tbl. 1 col. 2 (89% of firms covered by a labor agreement had an arbitration provision in their contract).

[27]S. Rep. No. 80-105 (1947), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947 at 421 (1959). *Also see* H.R. Rep. No. 80-245 (1947), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947 at 337 (1959), explaining congressional intent for enacting Section 301: "When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens."

[28]353 U.S. 448 (1957). The Court ruled that federal jurisdiction to enforce collective bargaining agreements, including arbitration provisions, arises under Section 301 of the Labor-Management Relations Act of 1947, and not the Federal Arbitration Act. *Id.* at 456–57.

arbitrator awards that rule on grievances of contract violations. *Lincoln Mills* appeared to preclude court review of labor awards under the FAA while confining review to the LMRA.[29]

This left judges in a statutory vacuum because Section 301 is purely a jurisdictional law. In the *Steelworkers Trilogy*,[30] the Court fleshed out principles for reviewing awards. In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*,[31] the Court emphasized that judges should defer to labor awards, remarking that "[r]efusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."[32] This is because the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."[33] *Enterprise Wheel* said that an arbitrator is "to bring his informed judgment to bear in order to reach a fair solution of a problem,"[34] noting that the parties select the arbitrator because these individuals understand the intricacies of unionized work.[35] Underscoring the difference between the FAA and LMRA, the Court observed that even though collective bargaining agreements are contracts, they are not bargained and administered like commercial transactions.[36] The Court gave labor arbitrators wide latitude when it said that they might need "flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency."[37]

But *Enterprise Wheel* did not immunize labor awards: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice."[38] An arbitrator "may of course

---

[29]Prior to *Lincoln Mills*, the federal circuit disagreed as to whether a CBA was enforceable under the FAA. *Compare Tenney Engineering v. United Electrical R. & M. Workers*, 207 F.2d 450 (3d Cir. 1953), ruling that the FAA applied to CBAs, and *International Union v. Colonial Hardwood Floor Co.*, 168 F.2d 33, 35 (4th Cir. 1948) ("the provisions of the United States Arbitration Act may not be applied to this contract, because it is a contract relating to the employment of workers engaged in interstate commerce, within the clear meaning of the exclusion clause contained in the first section").

[30]*United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[31]363 U.S. 593 (1960).

[32]*Id.* at 596.

[33]*Id.*

[34]*Id.* at 597.

[35]*Id.* at 596, n.2.

[36]*Id.* at 599, explaining that the agreement by unions and employers to submit contract disputes to labor arbitrators is founded in their confidence in this neutral's abilities.

[37]*Id.* at 597.

[38]*Id.*

look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement."[39]

Enterprise Wheel also stated that a "mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award."[40] An award should not be disturbed unless the arbitrator "has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration."[41] A court should not vacate an award merely because it disagrees with the arbitrator's construction of the agreement.[42]

Other *Trilogy* decisions emphasized the unique institutional features of labor arbitration. *American Manufacturing* noted that the "function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator," because it is "the arbitrator's judgment . . . that was bargained for."[43] *Warrior & Gulf* noted that the arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. . . . He is rather part of a system of self-government created by and confined to the parties."[44] The decision emphasized that arbitrators have special competence to resolve workplace disputes.[45]

The Supreme Court has updated the *Trilogy* in one essential area—when an award appears to contradict a public policy. In *United Paperworkers Int'l Union v. Misco,*[46] an arbitrator reinstated a paper mill worker who was fired after he was arrested in the

---

[39] *Id.*

[40] *Id.* at 598.

[41] *Id.*

[42] *Id.* at 598, stating that "the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

[43] *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 568 (1960).

[44] *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 581 (1960). The Court added that "the labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *Id.* at 582.

[45] *Id.* at 581 ("The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.")

[46] 484 U.S. 29 (1987).

company parking lot on a drug charge.[47] Lower courts vacated the award, relieving the employer from reinstating the grievant, because they believed that doing so would violate a public policy against drug-users operating dangerous machinery.[48] *Misco* reversed these rulings, holding that awards may be set aside only if they "would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed public interests."[49] Also, *Misco* refined *Trilogy* principles by admonishing lower courts not to interfere with "improvident, even silly factfinding."[50] The Court reminded judges: "This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts."[51]

More recently, the Court affirmed these principles in two decisions. In *Eastern Associated Coal Corp. v. United Mine Workers District 17,*[52] a coal company fired an employee on two different occasions after concluding that he used marijuana while driving heavy machinery on a public highway.[53] *Eastern* rebuked judges who fail to review awards with great deference.[54] A year later, in *Major League Baseball Players Ass'n v. Garvey,*[55] the Court used another

---

[47] *Id.* at 35.
[48] *Id.*
[49] *Id.* at 43.
[50] *Id.* at 39.
[51] *Id.*
[52] 531 U.S. 57 (2000).
[53] A coal company fired an employee on two different occasions after concluding that he used marijuana while driving heavy machinery on a public highway. *Id.* at 60. Separate arbitration awards reinstated him with conditions after finding that just cause was lacking. *Id.* at 60–61. The company refused to comply with the second award, contending that it violated a U.S. Department of Transportation rule stating that "the greatest efforts must be expended to eliminate the . . . use of illegal drugs . . . by those individuals . . . are involved in . . . the operation of . . . trucks." *Id.* at 63. Rejecting the employer's argument, the Supreme Court noted that DOT rules also favor rehabilitation of drug users, and do not preclude reinstatement of offenders to driving positions. *Id.* at 64.
[54] The Court reminded federal judges that "both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language, including such words as just cause." *Id.* at 61. Additionally, Eastern said: "They have bargained for the arbitrator's construction of their agreement. And courts will set aside the arbitrator's interpretation of what their agreement means only in rare instances (emphasis added)." *Id.* at 62. Reaffiming its guidance in *Misco,* the Court continued: "[A]s long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision (emphasis added)." *Id.* Thus, "the proper judicial approach to a labor arbitration award is to refuse to review the merits." *Id.*
[55] 532 U.S. 504 (2001). The Supreme Court castigated the Ninth Circuit for insincerely reciting *Trilogy* principles. And the Court embarrassed the Ninth Circuit by calling its behavior "nothing short of baffling." *Id.* at 510. *Garvey* emphasized that "established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision." *Id.* at 511. *Garvey* charged that the "Court of Appeals usurped the arbitrator's role by resolv-

example of judicial interference in arbitration to remind judges about the need for restraint.

Empirical Research Methods and Statistical Findings

Research Methods

We used research methods from our earlier empirical studies.[56] The sample was derived from Westlaw's Internet service. Using appropriate federal and state law databases, we employed keywords that incorporated expressions that are tailored to the FAA and state arbitration laws.[57] We also performed a parallel search using keyword searches from the *Trilogy*.[58]

To be included, a case involved a post-award dispute between an individual employee and his or her employer in which the arbitrator's ruling was challenged by either party. Cases involving labor arbitrations under a CBA were excluded. The sample had no historical limit. The earliest decision was reported in 1975.[59] The sample started with this case and moved forward to December 31, 2006.

After a potential case was identified, we read it to see if it met our criteria. For example, many cases involved only a pre-arbitration dispute as to the enforcement of an arbitration clause and were therefore excluded. On the other hand, numerous cases involved employees who attempted at first to resist arbitration,

---

ing the dispute and barring further proceedings, a result at odds with this governing law." *Id.* at 511. The Court added: "The arbitrator's analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or inexplicable error. And, as we have said, any such error would not justify the actions taken by the court." *Id.* at 511, n.2. *Garvey* sent a clear, reinforcing message to the federal judiciary: Do not overturn "the arbitrator's decision because it disagree[s] with the arbitrator's factual findings, particularly those with respect to credibility." *Id.* at 510. And do not resolve the merits of the parties' dispute. *Id.* If a court cannot enforce an award, it must remand the matter "for further arbitration proceedings." *Id.* at 510.

[56]LeRoy & Feuille, *As the* Enterprise Wheel *Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 Stan. L. & Pol'y Rev. __ (forthcoming, 2007); LeRoy & Feuille, *Reinventing the* Enterprise Wheel *Court Review of Punitive Awards in Labor and Employment Arbitrations*, 10 Harv. Negot. L. Rev. 199 (2006); LeRoy & Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 Ohio St. J. on Disp. Res. 19 (2001); and LeRoy & Feuille, *The* Steelworkers Trilogy *and Grievance Arbitration Appeals: How Federal Courts Respond*, 13 Indus. Rel. L. J. 78 (1991).

[57]*E.g.*, "PROCURED BY CORRUPTION," or "EVIDENT PARTIALITY," or "REFUSING TO POSTPONE THE HEARING," or "ARBITRATORS EXCEEDED THEIR POWERS," or "IMPERFECTLY EXECUTED."

[58]*E.g.*, "TRILOGY" or "WARRIOR & GULF" or "ENTERPRISE WHEEL" or "AMERICAN MANUFACTURING," or "MISCO," or "EASTERN ASSOCIATED COAL," or "GARVEY."

[59]*McClure v. Montgomery County Cmty. Action Agency,* 1975 WL 181652 (Ohio App. 2 Dist. 1975).

were compelled to arbitrate their claims, and were later involved in a post-award lawsuit.[60] We found cases where the reluctant-to-arbitrate employee prevailed at the arbitration, and the employer sought to vacate the award.[61]

Once a case met the criteria, we checked it against a roster of previously read and coded cases to avoid duplication.[62] The cases are listed in Appendix 1. Next, we took data from each decision for these variables: (1) state or federal court; (2) circuit in which a federal court was located; (3) year of district court, or state equivalent court, decision; (4) year of appellate decision; (5) type of issue that was ruled on by the arbitrator; (6) party who prevailed in the arbitration award; (7) dollar amount of award; (8) party who challenged the award; (9) all legal arguments made by party who challenged the award; (10) party who won at the first judicial level; (11) first court ruling on motion to confirm or vacate an award; (12) party who won at the appellate level; and (13) appellate ruling on motion to confirm or vacate an award.

Statistical Findings

Table 1 shows that parties appealed 240 individual employment arbitration awards. Many award challenges were appealed after a first court ruling to a higher court. Overall, when we measured the total number of federal and state court rulings where the year of the court ruling was also reported, our sample had 213 federal and 174 state decisions yielding a total of 387 court rulings.

We pause to explain that due to missing data for certain variables, there is some discrepancy in the total court rulings we report over several tables. Consider the data for court rulings by year of decision, which we just discussed. For some award challenges, only an appellate decision is reported, yet this opinion has enough information about a lower court ruling to code data for numerous variables. But in some of these appellate cases, no year was reported for a lower court ruling and therefore we coded that variable as missing data. The same decision would have data for other variables, such as the legal arguments presented to a lower

[60] *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144 (2d Cir. 2004).

[61] In *Madden v. Kidder Peabody & Co.*, 883 S.W.2d 79 (Mo. App. 1994), an employee sued but was ordered by the court to arbitrate his claim. After he prevailed and was awarded $250,000, the employer sued to vacate the award, but the court denied the motion.

[62] In rare cases, an award was challenged once and remanded to arbitration; and after arbitrators ruled again, the award was challenged a second time. We viewed these as separate award review cases, even though the parties and dispute were unchanged, because the awards differed. *See Sawtelle v. Waddell Reed Inc.*, 754 N.Y.S.2d 264 (2003).

court. In sum, this explains why our total number of federal and state decisions fluctuates from chart to chart.

Continuing with Table 1, some arbitral proceedings were protracted and very expensive, defying the norm of brevity and economy.[63] At times, an award of attorneys' fees exceeded the amount of damages that were ordered as remedies.[64] Table 1 also reports additional background about the arbitrations. Employees won more often in arbitration than similar plaintiffs in court.[65] Individuals prevailed in 38.3 percent of awards, and won a split award in 9.6 percent of the cases in the sample. The median value of an employee-favorable award was $250,000. This high amount was driven by disputes in the securities industry, which comprised 38 percent of the sample. Unique features of the industry—for example, a centralized clearinghouse to report employee misconduct—resulted in costly defamation awards.[66] Also, as individual brokers left one employer for another they took their clients, causing some employers to retaliate by harming their

---

[63] *Barcume v. City of Flint*, 132 F. Supp. 2d 549 (E.D. Mich. 2001) (five years of arbitration); *Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 2006 WL 1517777 (N.D. Ill. 2006) (10 years of litigation); *Sobol v. Kidder, Peabody & Co., Inc.*, 49 F. Supp. 2d 208 (S.D.N.Y. 1998) (62 hearing sessions were conducted between October 1994 and May 1998); *Sawtelle v. Waddell Reed Inc.*, 754 N.Y.S.2d 264 (2003) (more than 50 hearing days occurred over 2 ½ years); *Chisholm v. Kidder, Peabody Asset Mgmt., Inc.*, 164 F.3d 617 (2d Cir. 1998) (43 hearing sessions took place before an arbitration panel of the National Association of Securities Dealers); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144 (2d Cir. 2004) (30 hearing sessions occurred before an arbitration panel of the National Association of Securities Dealers); *Ovitz v. Schulman*, 133 Cal. App. 4th 830 (Cal. App. 2 Dist. 2005) (parties used 23 hearing days); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668 (5th Cir. 2002) (the parties combined costs to arbitrate the dispute totaled $650,000); *Bailey v. American Gen. Life & Acc. Ins. Co.*, 2005 WL 3557840 (Tenn. Ct. App. 2005) (parties used 36 hearing days); and *Eisenberg v. Angelo, Gordon & Co., L.P.,* 234 F.3d 1261 (2d Cir. 2000) (arbitration occurred over 10 hearing sessions).

[64] *E.g., Hasson v. Western Reserve Life Assurance Co.*, 2006 WL 2691723 (M.D. 2006) (employee was awarded $168,000 in damages but denied $245,575 in attorneys' fees). *Also see DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997) (age discrimination complainant was awarded $220,000, but his request for attorneys' fees totaling $249,050 was denied).

[65] Compare Delikat & Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, Disp. Resol. J. (Nov. 2003–Jan. 2004), at 56. In employment discrimination cases filed and resolved between 1997 and 2001 in the southern federal district court of New York, the study found that employees prevailed 33.6% of the time, while similarly situated plaintiffs prevailed in 46% of the cases brought before NASD and NYSE arbitrators. *Also see* Bravin, *U.S. Courts Are Tough on Job-Bias Suits*, Wall St. J., July 16, 2001, at A2, available at 2001 WL-WSJ 2869570. After analyzing nine years of federal trial statistics, Professors Stewart J. Schwab and Theodore Eisenberg concluded that federal appeals courts are less sympathetic to workers who allege job discrimination than they are to almost any other type of plaintiff. *Id.* Appeals courts reversed victories for plaintiffs in 44% of cases. *Id.*

[66] *E.g., Eaton Vance Distribs., Inc. v. Ulrich*, 692 So. 2d 915 (1997) (arbitration panel awarded employee $1.25 million in punitive damages for defamation).

reputations.[67] Notably, however, workers in low-skilled jobs that are far removed from the securities industry also received substantial awards.[68]

In addition, Table 1 demonstrates a sharp contrast between individual and labor arbitration. Labor arbitration centers on contract disputes. In the present sample there were many contract disputes. Breach of contract claims were arbitrated in 39.2 percent of the sample for which these data were available. But many of the arbitration agreements also authorized the arbitrator to decide statutory and common law issues. For example, Title VII and emotional distress claims respectively comprised 17.1 percent and 5.0 percent of the sample.

TABLE 1: Dispute Characteristics in Employment Arbitration in Award Appeal Cases

Who Wins the Arbitration Award?		**Type of Employment?**
Employer	125/240 (52.1%)	Securities Industry 91/240 (37.9%)
Employee	92/240 (38.3%)	Other Employment 149/240 (62.1%)
Split Award	23/240 (9.6%)	

Amount of Arbitration Award?

Employer Wins (N = 37)	$34,000 (Median) / $2,450–$11,245,668 (Range)
Employee Wins (N = 87)	$250,000 (Median) / $2,677–$38,233,079 (Range)

What Employment Actions Are Arbitrated?

Discharge/Termination	91/240 (37.9%)
Resignation	22/240 (9.2%)
Post-Employment Pay	37/240 (15.4%)
Current Employment Pay	19/240 (7.9%)
Post-Employment Restriction	16/240 (6.7%)
Worker Injury/Disease	13/240 (5.4%)

[67] *Sawtelle v. Waddell Reed Inc.*, 754 N.Y.S.2d 264 (2003) (individual broker, who had 2,800 clients who never filed one complaint against him, was awarded $25 million in punitive damages after employer discharged him in retaliation for whistle-blowing activities against a co-worker who was later convicted for embezzlement).

[68] In *Castleman v. AFC Enters., Inc.*, 995 F. Supp. 649 (N.D. Tex. 1997), a fast-food employee was awarded $1,678,622.40 in damages for injuries that arose in the course of employment. The arbitrator found that the design, installation, maintenance, and use of the steel storage shelving in the restaurant was hazardous and constituted an unreasonable risk of harm. *See also May v. First Nat'l Pawn Brokers*, 887 P.2d 185 (Mont. 1994), where the arbitrator awarded two pawn shop managers more than $132,000; and *Barcume v. City of Flint*, 132 F. Supp. 2d 549 (E.D. Mich. 2001), where the award ordered more than $2.2 million in damages for sex discrimination complainants.

Table 1—*Continued*

What Legal Issues Are Arbitrated?

Breach of Contract	94/240 (39.2%)
Title VII Discrimination	41/240 (17.1%)
Unjust Dismissa	33/240 (13.8%)
State Discrimination	25/240 (10.4%)
ADEA Discrimination	14/240 (5.8%)
Emotional Distress	12/240 (5.0%)
Negligence/Miscellaneous Torts	12/240 (5.0%)
Defamation	11/240 (4.6%)
ADA Discrimination	10/240 (4.2%)
Tortious Interference	10/240 (4.2%)

How Often Do Courts Review Employment Arbitration Awards?

	1970–1979	*1980–1989*	*1990–1999*	*2000–2006*
Federal District Court	1/134 (0.1%)	6/134 (4.4%)	40/134 (29.8%)	87/134 (64.9%)
Federal Appeals Court	1/80 (1.3%)	4/80 (5.0%)	28/80 (35.0%)	47/80 (58.7%)
State First Court	3/90 (3.3%)	8/90 (8.9%)	44/90 (48.8%)	35/90 (38.9%)
State Appeals Court	2/79 (2.5%)	7/79 (8.8%)	35/79 (44.3%)	35/79 (44.3%)

Finding No. 1: Federal courts are extremely deferential in reviewing employment arbitration awards. Federal district courts, shown in Table 2, ruled on 137 awards (see the denominator in the first column). Appeals courts ruled in 76 cases (the sum of all denominators in the last column on the right). District courts confirmed 128 awards in 137 rulings (93.4 percent of the cases), compared with 66 awards in 76 rulings (86.8 percent) on appeal. In the far-left column, the Fifth and Second Circuits had the most cases (17.5 percent and 16.1 percent, respectively), while the First Circuit had comparatively few cases (4.4 percent). District courts enforced 100 percent of challenged awards in the Third, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits. The district courts in the First and Fifth Circuits registered the lowest enforcement rates (66.7 percent and 83.3 percent respectively). At the appellate level, courts enforced 100 percent of challenged awards in the First, Third, Seventh, Tenth, and D.C. Circuits. The Sixth Circuit had the lowest confirmation rate (50.0 percent).

TABLE 2: Confirmation of Arbitrator Awards—*Federal* District Courts and Appellate Courts

	Percent of District Sample 137 Awards		District Courts Confirm Awards 128/137 (93.4%)		Appeals Courts Confirm Awards 66/76 (86.8%)	
First Circuit	6/137	(4.4%)	4/6	(66.7%)	2/2	(100%)
Second Circuit	22/137	(16.1%)	21/22	(95.5%)	11/12	(91.7%)
Third Circuit	12/137	(8.8%)	12/12	(100%)	4/4	(100%)
Fourth Circuit	11/137	(8.0%)	10/11	(90.9%)	5/6	(83.3%)
Fifth Circuit	24/137	(17.5%)	20/24	(83.3%)	13/14	(92.9%)
Sixth Circuit	8/137	(5.8%)	8/8	(100%)	3/6	(50.0%)
Seventh Circuit	9/137	(6.6%)	9/9	(100%)	2/2	(100%)
Eighth Circuit	13/137	(9.5%)	13/13	(100%)	8/9	(88.9%)
Ninth Circuit	7/137	(5.1%)	7/7	(100%)	5/6	(83.3%)
Tenth Circuit	9/137	(6.6%)	8/9	(88.9%)	5/5	(100%)
Eleventh Circuit	9/137	(6.6%)	9/9	(100%)	4/5	(80.0%)
D.C. Circuit	7/137	(5.1%)	7/7	(100%)	4/5	(80.0%)

*Note: Partially confirmed awards are *not* included in the "confirm awards" column.

Finding No. 2: State courts are less deferential in reviewing employment arbitration awards. Table 3 reports similar information for state court rulings. First jurisdiction courts confirmed 75 out of 94 awards (79.8 percent). This enforcement rate dropped to 72.5 percent at the appellate level, when courts confirmed only 58 out of 80 awards. The combined confirmation rate was 76.4 percent (133 awards confirmed in 174 cases).

Finding No. 3: Award confirmation among states is high but quite variable. Table 3 also shows the results for all states in our database. The states are arranged in alphabetical order. Among states with five or more total rulings, only Texas had courts confirm 100 percent of the challenged awards. Keeping with states that had five or more rulings, southern states ranked among the most deferential (Louisiana, Florida, and Arkansas), as did California and Illinois. New Jersey and Pennsylvania ranked in the middle. Two Midwestern states, Michigan and Ohio, had lower confirmation rates (64.7 percent and 64.3 percent, respectively). New York courts confirmed only 44.4 percent of awards, but this is mislead-

ing because this figure is dominated by several rounds of award review in a single controversy.[69]

TABLE 3: Confirmation of Arbitrator Awards—*State* Courts of First Jurisdiction and Appellate Courts

State	First Jurisdiction Courts Confirm Awards *All States & D.C. 75/94 Awards (79.8%)*		Appeals Courts Confirm Awards *All States & D.C. 58/80 Awards (72.5%)*		State Court Combined Confirm Awards *All States & D.C. 133/174 Awards (76.4%)*	
Arkansas	2/3	(66.6%)	3/3	(100%)	5/6	(83.3%)
California	6/7	(85.7%)	6/7	(85.7%)	12/14	(85.7%)
Colorado	1/1	(100%)	0/1	(0%)	1/2	(50.0%)
Connecticut	11/14	(78.6%)	5/6	(100%)	16/20	(80.0%)
Florida	3/3	(100%)	2/3	(6(6.6%)	5/6	(83.3%)
Georgia	1/1	(100%)	1/1	(100%)	2/2	(100%)
Hawaii	1/1	(100%)	1/1	(100%)	2/2	(100%)
Idaho	1/2	(50.0%)	0/2	(0%)	1/4	(25.0%)
Illinois	7/8	(87.5%)	6/8	(75.0%)	13/16	(81.3%)
Indiana	1/1	(100%)	0/0	(0%)	1/1	(100%)
Louisiana	3/3	(100%)	2/3	(66.6%)	5/5	(83.3%)
Maryland	0/1	(0%)	0/1	(0%)	0/2	(0%)
Massachusetts	0/1	(0%)	0/1	(0%)	0/2	(0%)
Michigan	6/9	(66.7%)	5/8	(62.5%)	11/17	(64.7%)
Minnesota	1/1	(100%)	1/1	(100%)	2/2	(100%)
Missouri	2/2	(100%)	2/2	(100%)	4/4	(100%)
Montana	2/2	(100%)	2/2	(100%)	4/4	(100%)
New Jersey	4/4	(100%)	2/4	(50.0%)	6/8	(75.0%)
New York	2/5	(40.0%)	2/4	(50.0%)	4/9	(44.4%)
North Carolina	1/1	(100%)	1/1	(100%)	2/2	(100%)
Ohio	5/7	(71.4%)	4/7	(57.1%)	9/14	(64.3%)

[69] *See Sawtelle v. Waddell Reed Inc.*, 754 N.Y.S.2d 264 (2003), summarizing court review of two separate awards rooted in the same facts. This trail of award-review litigation is so complex and unusual that it distorts the characteristics of the small number of New York state cases in our sample.

Table 3—*Continued*

Oklahoma	1/1	(100%)	0/1	(0%)	1/2	(50.0%)
Pennsylvania	2/4	(50.0%)	3/3	(100%)	5/7	(71.4%)
Rhode Island	2/2	(100%)	1/1	(100%)	3/3	(100%)
South Carolina	1/1	(100%)	0/1	(0%)	1/2	(50.0%)
Tennessee	1/1	(100%)	1/1	(100%)	2/2	(100%)
Texas	5/5	(100%)	5/5	(100%)	10/10	(100%)
Wisconsin	1/1	(100%)	1/1	(100%)	2/2	(100%)
D.C.	2/2	(100%)	2/2	(100%)	4/4	(100%)

*Note: Partially confirmed awards are *not* included in the "confirm awards" column.

Finding No. 4A: In FAA and equivalent state cases, the most common award challenge was that arbitrators exceeded their powers (24.2 percent), but this argument rarely succeeded in vacating an award (5.5 percent). Corruption, fraud, or undue means was a rare basis for challenging an award (5.5 percent), but on a comparative basis, was more successful than any other basis for challenging an award (15.4 percent). Table 4A shows how often challengers relied on each of the four statutory grounds to argue for vacating an award under federal or state arbitration law. This statistic is the first percentage that appears by each provision of the law. We now rank these statutory grounds by their frequency as grounds for challenging an award to a court of first jurisdiction: (Rank 1) 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 (in 24.2 percent of the cases); (Rank 2) where there was evident partiality or corruption by the arbitrators (16.3 percent); (Rank 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 (14.2 percent); and (Rank 4) where the award was procured by corruption, fraud, or undue means (5.5 percent). In 10.0 percent of award challenges, the party resisting vacatur argued that the lawsuit was not timely filed under the FAA or state equivalent.

TABLE 4A: Employment Arbitration Awards Reviewed By Federal and State Courts Using Federal FAA and State Uniform Arbitration Act

Basis & Frequency for Challenging Awards	Confirm*	Vacate*
Corruption, Fraud, or Undue Means (9 U.S.C. §10(1) or State UAA Equivalent)		
Argued to District Court 13/238 (5.5%)	District Court Ruling 10/13 (76.9%)	2/13 (15.4%)
Argued to Appeals Court 7/161 (4.3%)	Appeals Court Ruling 5/7 (71.4%)	1/7 (14.3%)
Evident Partiality(9 U.S.C. § 10(2) or State UAA Equivalent)		
Argued to District Court 39/239 (16.3%)	District Court Ruling 37/39 (94.9%)	1/39 (2.6)%
Argued to Appeals Court 32/161 (19.9%)	Appeals Court Ruling 27/32 (84.4%)	2/32 (9.5%)
Hearing Misconduct (9 U.S.C. § 10(3) or State UAA Equivalent)		
Argued to District Court 34/239 (14.2%)	District Court Ruling 29/34 (85.3%)	5/34 (14.7%)
Argued to Appeals Court 21/161 (13.0%)	Appeals Court Ruling 18/161 (85.7%)	2/21 (9.5%)
Exceed Powers or Imperfectly Execute Award (9 U.S.C. §10(4) or State UAA Equivalent)		
Argued to District Court 58/239 (24.2%)	District Court Ruling 52/58 (89.7%)	3/58 (5.2%)
Argued to Appeals Court 34/161 (21.1%)	Appeals Court Ruling 24/34 (70.67%)	2/34 (5.9%)
Court Lacks Jurisdiction Due to Timeliness Requirements (9 U.S.C. §12/State Equivalent), or Other		
Argued to District Court 24/239 (10.0%)	District Court Ruling 21/24 (87.5%)	2/24 (8.3%)
Argued to Appeals Court 6/161 (3.7%)	Appeals Court Ruling 3/6 (50.0%)	3/6 (50.0%)

*Excluding results for partial confirmation/partial vacatur rulings.

Data in Table 4A also show how frequently these arguments resulted in vacatur. This statistic is the last percentage that appears by each provision of the law. No argument was particularly successful. However, as the following ranking shows, some arguments were much more effective in vacating an award than others: (Rank 1) where the award was procured by corruption, fraud, or undue means (15.4 percent of the cases); (Rank 2) 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 (14.7 percent); (Rank 3) 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 (5.2 percent); and (Rank 4) where there was evident partiality or corruption by the arbitrators (2.6 percent). In 8.3 percent of award challenges, a timeliness argument was associated with a vacatur ruling. In these cases, courts rejected the timeliness argument and proceeded to vacate the award.

Finding No. 4B: Among* Trilogy *and other common law standards for reviewing an award, manifest disregard of the law was the most common basis for a challenge (in 35.1 percent of the cases), but this argument rarely led to vacatur (7.1 percent). Although used less often, three* Trilogy *grounds were more potent in vacating awards—the arbitrator exceeded his or her powers (22.5 percent), the award failed to draw its essence from the agreement (18.2 percent), and the award violated a public policy (15.1 percent). Table 4B shows how frequently *Trilogy* and other common law grounds were used to challenge an award (see the first percentage by each argument). These grounds are ranked by their frequency in challenging awards before a court of first jurisdiction: the award was in manifest disregard of the law (35.1 percent); the award violated a public policy (15.1 percent); the arbitrator committed a fact-finding error (9.7 percent); the award was arbitrary or capricious, irrational, or gross error (7.9 percent); the arbitrators exceeded their authority (7.5 percent); the remedy in the award was punitive, excessive, or unauthorized (4.2 percent); the award failed to draw its essence from the agreement (4.6 percent); and the award was unconstitutional or more specifically denied a party of due process (3.4 percent).

Table 4B: Employment Arbitration Awards Reviewed by Federal and State Courts Using *Trilogy* and Other Common Law Standards

Basis & Frequency for Challenging Awards	Confirm*	Vacate*
Manifest Disregard of the Law (Common Law Standard)		
Argued to District Court 84/239 (35.1%)	District Court Ruling 75/84 (89.3%)	6/84 (7.1%)
Argued to Appeals Court 49/161 (30.4%)	Appeals Court Ruling 44/49 (89.8%)	4/49 (8.2%)
Arbitrary & Capricious, or Irrational, or Gross Error (Common Law Standard)		
Argued to District Court 19/239 (7.9%)	District Court Ruling 17/19 (89.5%)	0/19 (0%)
Argued to Appeals Court 13/161 (8.1%)	Appeals Court Ruling 10/13 (76.9%)	1/13 (7.7%)
Remedy (Punitive, Excessive, or Unauthorized)		
Argued to District Court 10/239 (4.2%)	District Court Ruling 10/10 (100%)	0/10 (0%)
Argued to Appeals Court 6/161 (3.7%)	Appeals Court Ruling 4/6 (66.6%)	0/6 (0%)
Unconstitutional or Due Process		
Argued to District Court 8/238 (3.4%)	District Court Ruling 7/8 (87.5%)	1/8 (12.5%)
Argued to Appeals Court 6/161 (3.7%)	Appeals Court Ruling 4/6 (66.6%)	1/6 (16.7%)
***Trilogy* (Arbitrator Exceeded Authority)**		
Argued to District Court 18/239 (7.5%)	District Court Ruling 14/18 (77.8%)	4/18 (22.5%)
Argued to Appeals Court 12/161 (7.5%)	Appeals Court Ruling 9/12 (75.0%)	2/12 (16.7%)
***Trilogy* (Award Did Not Address Its Essence From the Agreement)**		
Argued To District Court 11/239 (4.6%)	District Court Ruling 8/11 (72.7%)	2/11 (18.2%)
Argued to Appeals Court 6/161 (3.7%)	Appeals Court Ruling 3/6 (50.0%)	3/6 (50.0%)

Table 4B—*Continued*

***Trilogy* (Arbitrator Committed a Fact-Finding Error)**

Argued to District Court 23/238 (9.7%) District Court Ruling 21/23 (91.3%) 1/23 (4.3%)

Argued to Appeals Court 17/161 (10.6%) Appeals Court Ruling 14/17 (82.4%) 0/17 (0%)

***Trilogy* (Award Violated a Public Policy)**

Argued to District Court 36/238 (15.1%) District Court Ruling 29/36 (80.6%) 6/36 (15.1%)
Argued to Appeals Court 27/161 (16.9%) Appeals Court Ruling 21/27 (77.8%) 4/27(14.8%)

*Excluding results for partial confirmation/partial vacatur rulings.

Cases Behind the Numbers: Qualitative Findings

This research provides new statistical information about court review of arbitration awards. However, the phenomena we are measuring cannot be understood without more qualitative information. Returning to our initial findings, we improve our understanding by exploring the contexts behind the statistical findings.

Finding No. 1 and Finding No. 2

We find that federal and state courts are highly deferential in reviewing employment arbitration awards. Apart from the award confirmation statistics, many courts verbalized their deference in memorable expressions. We now quote passages that are so vivid that they send a strong deterrent signal to rational parties who contemplate a challenge to an adverse award:

- "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends."[70]
- "[A]rbitration does not provide a system of 'junior varsity trial courts.'"[71]

---

[70] *McClure v. Montgomery County Cmty. Action Agency,* 1975 WL 181652 (Ohio App. 2 Dist. 1975).

[71] *Williams v. Katten, Muchen & Zavis,* 1996 WL 717447 * 6 (N.D. Ill. 1996), quoting *Eljer Mfg., Inc., v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994).

- "Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called 'review' at all."[72]
- "The parties to this action voluntarily entered into an arbitration agreement and further agreed that two arbitrators would decide the dispute. Having entered into this agreement, there is a moral and legal duty to abide by the award in the absence of valid reason not to do so. Simply being dissatisfied with the results is not a good reason for setting aside the award."[73]
- "This expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one. The arbitrator's decision should be the end, not the beginning, of the dispute."[74]
- "[M]aximum deference is owed to the arbitrator's decision and the standard of review of arbitration awards is among the narrowest known to law. Once an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily in favor of the award, and courts must exercise great caution when asked to set aside an award."[75]
- "Once parties bargain to submit their disputes to the arbitration system (a system essentially structured without due process, rules of procedure, rules of evidence, or any appellate procedure), we are disinclined to save them from themselves."[76]
- "Judicial intrusion is restricted to the extraordinary situations indicating abuse of arbitral power or exercise of power beyond the jurisdiction of the arbitrator."[77]

Finding No. 3

We find substantial variability in award confirmation rates among state courts. Our research provides no definitive explanation, but we believe part of this variability is due to the interaction

---

[72] *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1997).

[73] *Dean Witter Reynolds, Inc. v. Deislinger*, 711 S.W.2d 771, 772 (Ark. 1986) ("exclusion of this evidence in an arbitration proceeding is not a statutory ground for vacating the award").

[74] *Moncharsh v. Heily & Base*, 10 Cal. Rptr. 2d 183 *10 (Cal. App. 1992). The court cited a similar 1852 court decision in confirming the award. *Id.* at *11, citing *Muldrow v. Norris*, 2 Cal. 74, 1852 WL 515 (Cal. 1852).

[75] *Durkin v. CIGNA Property & Cas. Corp.*, 986 F. Supp. 1356, 1358 (D. Kan. 1997), quoting the Tenth Circuit Court of Appeals in *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462–63 (10th Cir. 1995). The *Durkin* court added: "Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited." *Id.*

[76] *Hawrelak v. Marine Bank, Springfield*, 735 N.E.2d 1066, 1070 (Ill. App. 4 Dist. 2000).

[77] *Landmark v. Mader Agency, Inc.*, 878 P.2d 773, 776 (Idaho 1994).

between specific state laws and the public policy basis in the *Trilogy* for challenging an award. We elaborate on three possible sources for this variability: state laws that regulate (1) the award of attorneys' fees at arbitration, (2) post-employment restrictions, and (3) arbitrator disclosures to the parties.

Several states regulate an arbitrator's award of attorneys' fees. In a Florida case, *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith*,[78] the arbitration panel awarded a former employee more than $300,000 in compensatory damages and $160,000 in attorneys' fees.[79] By statute, Florida expressly provides that attorneys' fees for time spent in arbitration are recoverable but only in the trial court upon a motion for confirmation or enforcement of the award.[80] The law creates redundant litigation by requiring two separate proceedings for awarding these fees. However, the *Cassedy* appeals court confirmed the arbitrator's award of attorneys' fees because Merrill Lynch agreed to submit all issues to arbitration. The employer, therefore, waived its statutory right to have a judicial determination of fees.[81]

In *Moore v. Omnicare, Inc.*,[82] the respondent firm acquired David Moore's shares in a pharmaceutical supply corporation and named him chief operating officer. After the new company struggled financially, Moore was terminated and he arbitrated numerous claims against Omnicare.[83] In a complex series of interim and final awards, Moore was awarded $130,000 in attorneys' fees.[84] Omnicare appealed to the state district court, and prevailed in its motion to vacate this part of the award.[85] The Idaho Supreme Court affirmed the vacatur ruling based on a specific state statute that disallows the award of attorneys' fees by an arbitrator.[86]

---

[78] 751 So. 2d 143 (Fla. App. 2000).
[79] *Id.* at 145.
[80] *Id.* at 145–46, citing §682.11, Fla. Stat. (1989).
[81] The court relied upon the broad public policy favoring arbitration in confirming the award of attorneys' fees: "In a lengthy and complex arbitration matter, the entire beneficent purpose of alternative dispute resolution would be sacrificed to a rigid notion that attorney's fees must be decided in a separate proceeding by a circuit judge." *Id* at 151. The court added: "We also question the assumption that trial courts sit in a better position than arbitrators to decide entitlement to attorney's fees." *Id.*
[82] 141 Idaho 809 (2005).
[83] *Id.* at 813–14.
[84] *Id.* at 814.
[85] *Id.*
[86] *Id.* at 816, citing I.C. §7-910 ("Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.").

Turning to arbitrations involving post-employment restrictions, 16 cases (6.7 percent) involved this type of dispute. States vary in their treatment of these no-compete employment contracts. In *Malice v. Coloplast Corp.*,[87] an executive who managed the development of prosthetic medical devices resigned his position and received a substantial severance agreement. Later, Malice became a partner in another medical devices company, prompting his former employer to invoke the no-competition agreement that Malice signed upon his resignation.[88] The no-competition clause was arbitrated pursuant to the severance agreement.[89]

After the employer prevailed in the award, Malice challenged this outcome before the Georgia Court of Appeals and lost.[90] Applying state law, the court said that restrictive covenants in employment are "enforceable if they are reasonable, founded on valuable consideration, reasonably necessary to protect the employer's legitimate business interests, and do not unduly prejudice the public's interest."[91] The court determined that Malice successfully bargained for increased severance benefits in return for the restrictive covenants.[92] The court concluded that the agreement created no undue hardship on Malice nor prejudiced the public.[93] Thus, the court ruled that "the arbitrator's award does not violate Georgia's public policy against restraint of trade."[94]

But the Oklahoma Supreme Court reached a different result in *Cardiovascular Surgical Specialists Corp. v. Mammana*.[95] The doctor, a cardiovascular surgeon, signed an employment contract that barred him from competing for patients within a 20-mile radius of the firm's Tulsa offices years after leaving the physician group.[96] For nine months, the contract also prohibited the doctor from accepting referrals from any other source except for his former employer.[97] After the doctor resigned to start a solo practice, his former employer invoked the restrictive covenant and the parties

[87] 278 Ga. App. 395, 396 (Ga. App. 2006).
[88] *Id.* at 396.
[89] *Id.*
[90] *Id.* at 397.
[91] *Id.* at 399.
[92] *Id.* at 401
[93] *Id.* at 399–400.
[94] *Id.* at 401.
[95] 61 P.3d 210 (Okla. 2002).
[96] *Id.* at 211–12.
[97] *Id.* at 212.

arbitrated their dispute. [98] The arbitrators enforced the non-compete provision and ordered injunctive relief. [99]

Following a lower court ruling that confirmed the award, the state supreme court reversed and vacated part of the award.[100] After noting that Oklahoma law broadly prohibits restraints, the court reasoned that "this public right cannot be waived by the parties' agreement to submit the issue of the validity of a contract provision to arbitration. A void provision provides no legal basis for enforcement whether through arbitration or judicial pronouncement."[101] The employer could not shield itself in an employment contract from ordinary competition for patients. Finding that the arbitration panel was presented with evidence of the importance of physician referrals to cardiovascular surgeons, the court disagreed with the panel's ruling, stating: "One surgeon has no legitimate business interest in another surgeon's referral base regardless of a past employer-employee relationship."[102] The court refused to confirm the award, and remanded the matter to determine whether the employer owed damages to the doctor.[103]

Our third example involves state laws that intensively regulate arbitration. *Ovitz v. Schulman*[104] demonstrates how a California statute strictly requires disclosures that arbitrators provide to the parties. This important decision explains that the California legislature enacted a comprehensive arbitration law "to provide minimum ethical standards and remedies for the arbitrator's failure to comply with existing disclosure requirements."[105] In this case, where Cathy Schulman claimed that she was wrongfully terminated as president of a film company,[106] the arbitrator accepted another appointment in a separate arbitration involving the same

---

[98] *Id.*
[99] *Id.*
[100] *Id.* at 215.
[101] *Id.* at 213.
[102] *Id.* at 214.
[103] *Id.* at 215.
[104] 133 Cal. App. 4th 830 (Cal. App. 2 Dist. 2005).
[105] *Id.* at 839. Among the statutory list of required disclosures that the court described, §1281.9 requires that arbitrators make required written disclosures within 10 calendar days of their appointment. In general, the legislature was concerned about "bias, or appearance of bias, that may flow from one side in an arbitration being a source or potential source of additional employment, and thus additional income, for the arbitrator." *Id.* Thus, standard 12(b) requires additional disclosures when, in the course of serving as an arbitrator, this individual entertains offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral in another case. Failure to make a timely and complete disclosure may result in disqualification. *Id.* at 839–40.
[106] *Id.* at 834.

movie company.[107] After the arbitrator denied Schulman's claims and awarded her former employer approximately $1.5 million in damages and $1.8 million in attorneys' fees and costs,[108] Schulman invoked the disclosure law as grounds for vacating the award.[109] The California Court of Appeals found merit in her argument and vacated the award.[110]

Apart from variations in state laws, we noticed a regional pattern in award enforcement. In a companion study on judicial review of labor arbitration awards, we found that federal judges in the Sixth Circuit Court of Appeals were less deferential than many peer courts.[111] Aware that this circuit adopted an intrusive reviewing standard, called the four-part essence test (that the court repudiated shortly after our study was completed), Judge Sutton complained that the test "has made it easier to vacate an arbitration award on the merits than the Supreme Court meant it to be."[112]

Interestingly, two populous states in the Sixth Circuit—Ohio and Michigan—are at the bottom of our enforcement rankings in Table 3. This outcome is nearly identical to our finding for federal courts that review labor awards.[113] This suggests that the Sixth Circuit's less deferential posture influences the behavior of state courts.

But two mysteries cloud this preliminary conclusion. We did not read a single decision from Ohio or Michigan state courts that used the suspect four-part essence test. Second, in our earlier labor arbitration research findings, we also concluded that the Fifth Circuit failed to enforce awards in accordance with the national policy of deferring to arbitration. By implication, accordingly, Texas and Louisiana state courts would be expected to appear near the bottom of the award confirmation rankings, along with Ohio and Michigan. Instead, we found the opposite result in Table 3.

This led us to wonder whether these southern courts are predisposed to take the employer's side in these arbitrations because

---

[107] *Id.* at 836.
[108] *Id.* at 837.
[109] *Id.*
[110] *Id.* at 856. Having failed to comply with standard 12(b), the Arbitrator was precluded from serving as an arbitrator in any other matter involving the parties or any lawyer for the parties until the *Schulman* arbitration was completed.
[111] LeRoy & Feuille, *As the* Enterprise Wheel *Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 Stan. L. & Pol'y Rev. (forthcoming, 2007).
[112] Michigan Family Resources, Inc. v. Service Employees Int'l Union Local 517M, 438 F.3d 653, 658 (6th Cir. 2006) (Judge Sutton, concurring).
[113] LeRoy & Feuille, *supra* note 135 ("The most controversial evidence of judicial activism that we uncovered is the Sixth Circuit's four part essence test.").

so many of these private proceedings are the result of employer-imposed agreements to avoid court. However, we found evidence of Texas awards that favored ordinary workers and were upheld by Texas courts.[114]

To summarize, there is a regional pattern in Table 3. However, at this time we cannot explain the statistical variation, nor can we dismiss the possibility that these differences are due to random variation in a small sample.

Finding No. 4

We now highlight cases that involved statutory review of awards under the FAA or state law equivalents. These cases provide essential context for understanding how parties challenged awards and courts applied the law.

Where the Award Was Procured by Corruption, Fraud, or Undue Means (9 U.S.C. §10(1) or State UAA Equivalent). After a lengthy arbitration over discrimination claims that resulted in a multi-million dollar award for employees, the employer in *Barcume v. City of Flint*[115] petitioned to vacate this outcome, citing *ex parte* communication between the arbitrator and a plaintiff's attorney. The court dismissed this challenge, concluding that although the plaintiffs' counsel "behaved unprofessionally by engaging in *ex parte* communications with an Arbitrator, this Court cannot conclude that her behavior rose to the level of being illegal, immoral, or in bad faith. At its worst, her behavior was sloppy, overzealous lawyering."[116]

Where There Was Evident Partiality or corruption by the Arbitrators (9 U.S.C. §10(2) or State UAA Equivalent). A variety of cases raised this challenge, and featured these issues and themes:

Relationship Between the Arbitrator and a Party. In *Bailey v. American General Life & Acc. Ins. Co.*,[117] an employee who claimed that she was raped in her home by a co-worker sued American General in

---

[114]In *Antenna Products Corp. v. Cosenza*, 2006 WL 1452102 (Tex. App.–Dallas 2006), two workers were told that their services were no longer needed in New York and to report to a new location in Texas. *Id.* at *1. The relocation jeopardized one employee's joint custody of his children and disrupted the special education services for the other employee's disabled son. *Id.* Each worker informed his employer that personal circumstances prevented his move to Texas. *Id.* These appeals were rejected, and the company gave each employee a deadline to report. *Id.* When the workers failed to comply they were terminated. *Id.* In the arbitration over severance pay, the former employees prevailed and were awarded severance pay, plus reasonable costs and attorneys' fees. *Id.* The award was confirmed by two Texas courts. *Id.* at *3.

[115]*Barcume v. City of Flint*, 132 F. Supp. 2d 549, 553 (E.D. Mich. 2001).

[116]*Id.* at 556.

[117]*Bailey v. American Gen. Life & Acc. Ins. Co.*, 2005 WL 3557840 (Tenn. Ct. App. 2005).

tort for its actions arising after she reported the matter. Pursuant to an arbitration agreement, her claims were adjudicated under American Arbitration Association proceedings.[118] The arbitrator, a practicing lawyer, noted in the disclosure form that her law firm represented the same employer in other litigation, and concluded: "I assume the claimant will not consent to this conflict (of interest) but let me know."[119] Nonetheless, the claimant proceeded to arbitration with this arbitrator. The award denied the claim, and the Tennessee court of appeals rejected a challenge that the award resulted from evident partiality of the arbitrator.[120]

In *Merrill Lynch, Pierce, Fenner & Smith v. Lambros*,[121] a discharged employee challenged an award on grounds that one of the arbitrators was biased. This arbitrator and the employer's attorney were fraternity brothers in 1962. The Eleventh Circuit denied the motion to vacate, observing that the employee did not object to the disclosed relationship at anytime during the arbitration process.[122] The court added that "a mere school relationship is too remote and speculative to constitute evident partiality."[123]

One of the arbitrators in *Montez v. Prudential Securities, Inc.*[124] had worked for a law firm that once had a business relationship with the employer. This relationship was disclosed orally by the arbitrator to the National Association of Securities Dealers (NASD), but not to the plaintiff.[125] Although the award was challenged on grounds of evident partiality, the court relied on the fact that the arbitrator's relationship with the law firm ended five years prior to the arbitration.[126] The Eighth Circuit added that "a federal court cannot vacate an arbitration award based on a failure to disclose merely because an arbitrator failed to comply with NASD rules,"[127] because the FAA "establishes the standard for vacatur of an arbitration award by a federal court, not the NASD rules."[128]

The Eighth Circuit reached a different result in *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[129] Two arbitrators failed to

---

[118] *Id.* at *4.
[119] *Id.*
[120] *Id.*
[121] 214 F.3d 1354 (11th Cir. 2000).
[122] *Id.* at 1356.
[123] *Id.*
[124] 260 F.3d 980, 982 (8th Cir. 2001).
[125] *Id.*
[126] *Id.* at 984.
[127] *Id.*
[128] *Id.*
[129] 51 F.3d 157 (8th Cir. 1995).

disclose that their employers had ongoing business relationships with Merrill Lynch and that their employers used the same law firm as Merrill Lynch.[130] After the employee lost at arbitration, he moved to vacate the arbitration on grounds that failure to disclose these relationships showed evident partiality in the arbitrators.[131] In reversing a district court order that confirmed the award, the Eight Circuit relied heavily on the Supreme Court's leading case on evident partiality under the FAA, *Commonwealth Coatings Corp.*[132] The appeals court recalled that the Supreme Court ruled that an arbitrator's nondisclosure of a close business relationship with a party to the arbitration showed evident partiality warranting vacation of the arbitration decision, despite the absence of actual bias on the arbitrator's part.[133] An award is subject to vacatur when the arbitrator's relationship creates "an impression of possible bias."[134] The Eighth Circuit also noted that the nondisclosure violated Section 23 of the NASD arbitration rules, which obligates arbitrators to disclose arbitrators' indirect relationships, "specifically including those between the arbitrators' current employers and any arbitration party or its counsel."[135] We note, however, that this outcome in *Olson* differs from other decisions in our sample.[136]

The arbitrator in *Bender v. Smith Barney, Harris Upham & Co., Inc.*,[137] who was discharged in a prior unrelated matter by a securities firm named Newbold, arbitrated his termination claim and prevailed. In the subject arbitration, the plaintiff was terminated by Smith Barney, and following this action she was hired by Newbold.[138] After Ms. Bender lost her arbitration against Smith

---

[130] *Id.* at 158.

[131] *Id.*

[132] *Id.* at 159, citing *Commonwealth Coatings Corp v. Continental Cas. Co.*, 393 U.S. 145 (1968).

[133] *Id.*

[134] *Id.*

[135] *Id.* at 160.

[136] *Compare Unstad v. Lynx Golf, Inc.*, 1997 WL 193805 * 2 (Minn.App. 1997): "A remote and unrelated attorney-client relationship between the neutral arbitrator and counsel for one of the parties is not a basis to vacate an arbitration award for undue means or evident partiality." *Also see Umana v. Swidler & Berlin*, 745 A.2d 334 (D.C. 2000), where the neutral arbitrator was a former chairman of the Federal Trade Commission and had some professional contacts with an attorney who was served on the tripartite panel. The *Umana* court rejected the evident partiality claim from the employee, stating that the "test in this case is not whether the relationship was trivial; it is whether, having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation, the relationship between . . . [the arbitrator] and . . . [party to the arbitration] was so intimate—personally, socially, professionally, or financially—as to cast serious doubt on [the arbitrator's] impartiality." *Id.* at 341.

[137] *Bender v. Smith Barney, Harris Upham & Co., Inc.*, 901 F. Supp. 863 (D.N.J. 1994).

[138] *Id.* at 866.

Barney, she contended to the court that the arbitrator was biased. This employee believed that her present association with Newbold brought back the arbitrator's negative experience with the same firm.[139] But the court viewed the matter as a coincidence,[140] and reasoned: "Evident partiality is strong language and requires proof of circumstances powerfully suggestive of bias."[141]

Evidentiary Rulings. In *Boyhan v. Maguire,*[142] the chairman of the arbitration panel stated on the record that he had "suspicions" about an attorney in the arbitration, and excoriated this advocate for practices that he believed were unethical.[143] After a lunch recess, the attorney moved, pursuant to Rule 19 of the American Arbitration Association (AAA), to disqualify the arbitrator.[144] The motion was denied, and an award was issued.[145] The court found no evident partiality, stating that the challenge to the award was "nothing more than the reaction of the arbitrator to one party's evidence. We do not believe that this kind of reaction to evidence can lawfully be equated with the kind of extrinsic, or improper, bias required by the statute for the vacation of an award."[146]

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 (9 U.S.C. §10(3) or State UAA Equivalent). *Motions to Postpone a Hearing.* Ten days before the arbitration hearings in *Berlacher v. PaineWebber, Inc.*,[147] the employee's eight-year-old daughter broke her arm and required hospitalization in Pennsylvania.[148] The employee believed that he needed to make medical decisions regarding his daughter and to help tend to his four other children, and therefore requested on May 14 to postpone the May 21–22 hearing.[149] The employer did not object, but the arbitrators

---

[139] *Id.* at 867.
[140] *Id.* "Newbold is not a party to the present litigation. Rather, Newbold happens to be a company which hired plaintiff subsequent to her termination from Smith, Barney, and as such has no stake in the outcome of plaintiff's case against Smith, Barney. . . ." *Id.*
[141] *Id.*
[142] *Boyhan v. Maguire*, 693 So. 2d 659, 661 (Fla. App. 4 Dist. 1997).
[143] *Id.* at 661.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 662.
[147] 759 F. Supp. 21, 23 (D.D.C. 1991).
[148] *Id.*
[149] *Id.*

denied the individual's request on May 17, and the hearing was held as scheduled.[150]

After the employee lost on the merits, and was ordered to pay more than $350,000 to his former employer, he challenged the award on grounds that he had inadequate opportunity to prepare.[151] Rejecting this contention, the court reasoned that "arbitrators are given a great deal of latitude in conducting arbitration proceedings,"[152] and nothing in the record showed that the arbitrators' conduct constituted misconduct or abuse of discretion.[153]

In *Selby General Hospital v. Kindig*,[154] a panel of arbitrators refused to reschedule a hearing when the employer contended that it needed more time to determine whether to call its own expert witness.[155] A lower court vacated the subsequent award that favored the employee,[156] but on appeal the award was confirmed.[157]

Evidentiary Objections at the Hearing. The losing party in *Castleman v. AFC Enterprises, Inc.*,[158] challenged the award on grounds that the arbitrator denied its evidentiary objections. The judge dismissed this challenge, reasoning that "[r]efusals to hear evidence that is irrelevant and/or cumulative do not prevent parties from receiving fundamentally fair hearings. Thus, the Arbitrator's decision not to hear additional evidence . . . did not render the arbitration fundamentally unfair."[159]

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 (9 U.S.C. § 10(4) or State UAA Equivalent). *No Written Opinion or Explanation.* An award without a written opinion may create ambiguity as to whether a legal issue has been adjudicated, but courts do not vacate these rulings.[160] In *Rollins v. Prudential Ins. Co. of North America*,[161] the arbitrators denied all causes of action without specifically stating that they denied the plaintiff's Family and Medical Leave Act (FMLA) claim.[162] In contesting the award, the employee said that failure to rule

---

[150] *Id.*
[151] *Id.*
[152] *Id.* at 24.
[153] *Id.*
[154] 2006 WL 2457436 (Ohio App. 4 Dist. 2006).
[155] *Id.* at *2.
[156] *Id.* at *3.
[157] *Id.* at *10.
[158] 995 F. Supp. 649, 652 (N.D. Tex. 1997).
[159] *Id.* at 653.
[160] *E.g.*, *Bishop v. Smith Barney, Inc.*, 1998 WL 50210 * 8 (S.D.N.Y. 1998).
[161] 10 Fed. Appx. 510 (9th Cir. 2001).
[162] *Id.*

specifically on the statutory claim meant that the award was imperfectly executed.[163] The court disagreed, concluding that denial of the FMLA claim was clearly implied.[164] Ruling on a similar challenge, the court in *Bishop v. Smith Barney, Inc.*[165] did not consider an award to be imperfectly executed even when the governing arbitration rules required a written opinion, and the arbitrators ignored this requirement.

Courts also confirm awards that fail to explain their reasoning.[166] *Fallon v. Salomon Smith Barney, Inc.*[167] stated that "where, as here, an arbitral panel declines to explain its ruling, the courts must confirm the arbitration award if there is even a barely colorable justification for the outcome reached."[168] In *Maze v. Prudential Securities, Inc.*,[169] the court refused to vacate an award in which the arbitrators gave a brief, seven-sentence case summary.[170]

Punitive Awards and Other Damages. Punitive awards are challenged on various grounds, including that the arbitrators exceeded their powers. In *Baravati v. Josephthal*,[171] the arbitration agreement did not contain a choice of law provision or a provision in the governing arbitration rules concerning the arbitrators' remedial powers. The hearing occurred under the auspices of the NASD Code of Arbitration, but the Seventh Circuit said that no negative inference could be drawn from that code's silence on the scope of the arbitrators' powers.[172] Thus, the court turned back a challenge to the award, noting that the rules of the AAA authorize these

---

[163] *Id.* at 512.

[164] *Id.*

[165] *Bishop v. Smith Barney, Inc.*, 1998 WL 50210 (S.D.N.Y. 1998). The employee claimed that the arbitration proceedings and ruling were flawed because the arbitrators violated NYSE rules that require a written opinion. But the court rejected this contention, reasoning: "It is well settled that arbitrators need not disclose the reasoning behind their awards." *Id.* at *8. The court explained: "Although the arbitration panel in the instant case failed to follow this rule, the narrow scope of judicial review granted by the FAA does not authorize the court to take action on this ground." *Id.*

[166] *Fallon v. Salamon Smith Barney, Inc.*, 2003 WL 201321 (2d Cir. 2003).

[167] 2003 WL 201321 (2d Cir. 2003).

[168] *Id.* at *1.

[169] 1993 WL 515375 (S.D.N.Y. 1995), *aff'd*, 47 F.3d 1157 (2d Cir. 1995).

[170] The court observed that "the arbitrators chose to give a brief, seven-sentence case summary that was obviously not intended to portray all of the evidence and arguments that were before them.…Indeed, even with these allegations in front of it, the panel rejected Maze's counterclaim in its entirety." *Id.* at *2. Because the award rejected Maze's claim in its entirety, the court said that it was "highly unlikely that the arbitrators overlooked Maze's implied covenant argument." *Id.*

[171] 28 F.3d 704, 706 (7th Cir. 1997).

[172] *Id.* at 710 ("Silence implies—given the tradition of allowing arbitrators flexible remedial discretion—the absence of categorical limitations. Since that is the norm, we assume that the parties would have said something in the arbitration clause had they wanted to depart from it.").

arbitrators to award "any remedy which [is] just and equitable and within the scope of the agreement."[173] In an emphatic statement of judicial deference, the court said that "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes. . . ."[174]

On the other hand, *Shearson Lehman Brothers, Inc. v. Hedrich*[175] is an example of a court that appeared to re-arbitrate a dispute under the "exceeds authority" standard. Three employees were awarded lump-sum payments after they were terminated.[176] The arbitrators ruled that the employees had become fully vested under the employer's compensation plan.[177] But an Illinois appeals court found that the arbitrators exceeded their authority, reasoning that "the arbitrators impermissibly ignored the unambiguous contract language and implemented their own notion of what would be reasonable and fair."[178] Although the arbitrators dismissed the employees' wrongful discharge claim, the court said that they "mysteriously calculated amounts" due to the claimants.[179]

Finding No. 5

Manifest Disregard of the Law. Inconsistent approaches over the manifest disregard standard appear to spur the surprising popularity of this basis for challenging awards. As the Second Circuit explained in *Halligan v. Piper Jaffray, Inc.*, arbitrators cannot "ignore[] the law or the evidence or both."[180] Nevertheless, arbitrators are not charged with knowing all provisions of a particular statutory scheme.[181] The standard has been adopted by

---

[173] *Id.* at 709.

[174] *Id.* ("It is commonplace to leave the arbitrators pretty much at large in the formulation of remedies, just as in the formulation of the principles of contract interpretation.").

[175] 639 N.E.2d 228 (1994).

[176] *Id.* at 230.

[177] *Id.* at 231.

[178] *Id.* at 233.

[179] *Id.*

[180] *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998).

[181] In *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997), an age discrimination complainant was awarded $220,000, but his request for attorneys' fees—totaling $249,050—was denied. In his motion to vacate that part of the award, DiRussa argued that the arbitrators manifestly disregarded the ADEA's policy for granting attorneys' fees to prevailing plaintiffs. The Second Circuit disagreed, stating: "the remedy for that does not lie with us." *Id.* at 823. The court continued that "'knowing' all of the provisions of a particular statutory scheme without assistance from the parties is a daunting task, even for a skilled lawyer or judge." *Id.* For criticism of the standard, see *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 430–31 (2d Cir. 1974).

The manifest disregard standard originated in *Wilko v. Swan*, 346 U.S. 427, 436–37 (1978), where the court created a non-statutory ground for setting aside arbitral awards. The standard was adopted by the Second Circuit in Judge Friendly's employment arbi-

the Fourth,[182] Fifth,[183] Sixth,[184] Ninth,[185] and Tenth[186] circuits. The Eleventh Circuit was reluctant to adopt the standard,[187] but more recently changed its view.[188] In a scholarly opinion, the Seventh Circuit has expressed strong doubts about the clarity and validity of the manifest disregard standard.[189]

---

tration decision, *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978). The Supreme Court criticized this decision for its mistrust of arbitration, and confined the standard to its narrowest possible holding in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231–34 (1987) (*but see Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 485 (1989)).

[182] *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir. 2006). The employee appealed the arbitrator's ruling that his claim was time-barred. The arbitration agreement did not have a limit for filing an arbitration claim, but the arbitrator implied a one-year term. Reversing the district court, the Fourth Circuit concluded that "the arbitrator's ruling constituted a manifest disregard of the law." *Id.* at 231. The court added to the analysis by concluding that "the arbitration award as to Patten and Signator Investors failed to draw its essence from the governing arbitration agreement." *Id.* at 236.

[183] *E.g.*, *Fountouslakis v. Stonhard, Inc.*, 2003 WL 21075931, at *5 (N.D. Tex. 2003). The court explained that "the manifest disregard standard is an extremely narrow, judicially-created rule with limited applicability." *Id.* citing *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003). *Fountouslakis* repeated the Fifth Circuit's view of the manifest disregard standard: "It clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Id.*

[184] *Buchignani v. Vining Sparks IBG, Inc.,* 208 F.3d 212 (6th Cir. 2000). The court noted that the manifest disregard of the law standard requires that "the [arbitration] decision must fly in the face of clearly established legal precedent." *Id.* at *2. Questions of law are decided with manifest disregard only if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Id.*

[185] Courts can set aside arbitral awards if the arbitrators exhibit a manifest disregard of the law. *See Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991).

[186] *See Durkin v. CIGNA Property & Cas. Corp.*, 986 F. Supp. 1356 (D. Kan. 1997) (award of attorneys' fees to discrimination complainant was not in manifest disregard of the law).

[187] *Ainsworth v. Skurnick*, 960 F.2d 939, 940–41 (11th Cir. 1992) (per curiam). For criticism of the standard, *see Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412–13 (11th Cir. 1990).

[188] In addition to the FAA's statutory standards, the Eleventh Circuit Court of Appeals has recognized two non-statutory bases upon which an arbitration award may be vacated. *See Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993) (court states that awards may be vacated under the arbitrary and capricious standard and the public policy standard, but not for manifest disregard of the law).

[189] *Baravati v. Josephthal, Lyon & Ross, Inc.,* 28 F.3d 704, 706 (7th Cir. 1997). The court relied on a scholarly study in Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 Ind. L. Rev. 241, 25154 (1993). In *Baravati*, Judge Posner expressed strong doubts about the manifest disregard standard:

> We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles—whether the arbitrators "exceeded their powers"—it is superfluous and confusing. There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that Wilko is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation. So it will be enough in this case to consider whether the arbitrators exceeded their powers.

Id. at 706.

Many state courts also apply the manifest disregard standard. *Madden v. Kidder Peabody & Co.*[190] explained: "In certain circumstances, the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug."[191] The Missouri court demonstrated the narrow scope of the standard when it concluded that the "case at bar, however, is not cut to so rare a pattern: appellant has utterly failed to show that the arbitrators inevitably must have recognized [the controlling rule of law]."[192] In a Michigan case, where an employee-at-will was promised that he would not be fired without a fair and thorough investigation, the arbitrator did not "display[] a manifest disregard of the applicable law" concerning employment-at-will.[193]

Conclusions

Our research produces many empirical findings but culminates in two main conclusions. (1) Courts are extremely deferential in reviewing employment awards. (2) At the same time, court review of arbitration is increasing even though the chance of overturning an award is very poor. The first result is encouraging because Congress and the Supreme Court have repeatedly sought to bolster the finality of arbitration.[194] But the recent spurt of cases—exemplified by the finding that 65 percent of federal district courts decisions in our sample occurred since 2000—is potentially troubling. It means that courts may face a growing docket of post-arbitration appeals. It also implies that some parties are seeking to relitigate the claims that they arbitrated in a private forum that they promised would yield a final outcome. When arbitration becomes a preliminary step in a prolonged dispute resolution process, it has failed.

The grounds for reviewing employment awards are far more numerous than those for reviewing labor awards. *Trilogy* courts use a telescope with a narrow field of vision. However, the same courts review employment awards through a kaleidoscope. Too many

---

[190] 883 S.W.2d 79 (Mo. App. 1994).
[191] *Id.* at 83.
[192] *Id.*
[193] *DaimlerChrysler Corp. v. Carson*, 2003 WL 888043 *1 (Mich. App. 2003).
[194] *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991); and *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

courts and legislatures have presented arbitration losers with an abundance of judicial review standards—too many choices—to sue on the award.[195] The complex presentation of award-review arguments in Tables 4A and 4B supports our conclusion, as do the varied and numerous state arbitration statutes in Appendix 2. In addition, we believe that major changes in the Revised Uniform Arbitration Act of 2000[196] may be playing a role in this upsurge in appeals.

This finding relates to our first research question: Do courts limit their award review to the statutory grounds under the FAA or state equivalents, or do they also apply common law standards? The fact that employment arbitration is subject to a widely dispersed regulation—federal and state, statutory and common law—became evident as we continually revised our data extraction form to account for new arguments that an arbitration loser raised on appeal. A party who loses an award can simultaneously cite federal bases such as the four statutory grounds under the FAA, federal common law standards such as manifest disregard of the law and denial of due process, plus all the *Trilogy* arguments such as the public policy exception to award enforcement.

Employment arbitration is regulated by an uncoordinated array of legislatures and courts. These awards should be subject to uniform national standards. The FAA reviewing standards are specific and narrow enough; but they apply only when parties litigate in a federal court. Even then, many federal courts also apply common law standards.

Aggravating the problem, the FAA also allows for review of awards in state courts under those jurisdictional standards. In addition, a challenger can invoke a bewildering thicket of state arguments, such as California's ruling that mandatory arbitration

---

[195] To observe a symptom of the problem in a single decision, *see Cray v. NationsBank of N.C., N.A.*, 982 F. Supp. 850, 852 (M.D. Fla. 1997), stating that courts in the Eleventh Circuit review awards under the four statutory grounds in the FAA and two additional non-statutory bases—a standard for arbitrary and capricious rulings, and another for awards that conflict with a public policy. The court pointed out a "third non-statutory ground for vacating an arbitration award—manifest disregard of law—has been recognized in some circuits, though not in the Eleventh Circuit." *Id.*

[196] *See* Daniels, *The Availability of Preliminary Remedies as a Reason to Arbitrate IP Disputes*, 61 Dispute Res. J. 38, 40 (2007):

> Recognizing that binding arbitration had taken a central place in dispute resolution in America without a uniform set of rules to guide arbitrators and parties through these proceedings, in 2000, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Revised Uniform Arbitration Act (RUAA). "Revised" is really an understatement. The RUAA was actually a major departure from the 1955 UAA and the past arbitration process.

agreements must meet specific procedural standards[197] and that state's statute on arbitrator disclosures,[198] Florida's statutory limit on arbitrator authority to award attorneys' fees,[199] and Connecticut's broad public policy grounds for vacating an award,[200] among others.

The complex federalism structure of the FAA, which adds to the kaleidoscopic crystals for reviewing employment awards, has confused courts as to whether federal or state law applies in reviewing awards. Courts have noted that "the FAA [Federal Arbitration Act] is something of an anomaly in the field of federal-court jurisdiction because it creates a body of federal substantive law without simultaneously creating any independent federal-question jurisdiction (internal quotes omitted)...."[201] Our database reflects earlier conflicts between state laws that limited an arbitrator's power to award punitive damages, and the FAA's broad dictate to enforce arbitration agreements and their resulting awards.[202] We also observed a similar federalism controversy over a choice of law dispute in reviewing an award that was enforceable under Michigan law but whose subject was regulated by federal securities law.[203]

We said that employment arbitration should be subject to a uniform set of national standards. However, our data do not suggest whether uniform regulation should be limited to the current FAA

---

[197] *Armendariz v. Found. Health Pscychcare Servc., Inc.,* 24 Cal.4th 83 (2000).

[198] *Ovitz v. Schulman,* 133 Cal. App. 4th 830 (Cal. App. 2 Dist. 2005).

[199] *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith*, 751 So. 2d 143 (Fla. App. 2000).

[200] *City of Hartford v. Casati*, 2001 WL 1420512 (Conn. Super. 2001). The arbitrator found that the deputy chief engaged in "profane, obscene gutter talk aimed at minorities, including women and homosexuals." His talk was described as being peppered with expressions such as 'nigger,' 'raisin head,' 'dyke,' 'fag,' 'greaseball' and various other expressions referring to Italians, 'third worlders,' 'fudge packers,' 'bimbos' and 'drunk fucking micks.'" *Id.* at *4. The Arbitrator upheld the officer's grievance, however, because there was "no testimony or other evidence that [Casati] had ever directed such language directly at any individual nor in the presence of any such person." *Id.* The court found that the award violated a state court ruling that compelled police departments "to take reasonable steps to eliminate racially, ethnically and sexually discriminatory language...." *Id.* at *5.

[201] *Bull NH Info. Sys., Inc. v. Hutson*, 1998 WL 426047 *1 (D. Mass. 1998).

[202] *See Fahnestock & Co., Inc. v. Waltman*, 935 F.2d 512 (2d. Cir. 1991). Judge Mahoney's dissenting opinion noted that the "majority's approach effectively disregards the existence of a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate and imposes the diversity regime of *Erie R.R. v. Tompkins* (internal citation and quote omitted)." *Id.* at 520.

[203] *Ford v. Hamilton Invs., Inc.*, 29 F.3d 255 (6th Cir. 1994). Taking sharp exception to the Second Circuit, this court said that "[w]hile the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal question jurisdiction.... To read section 9 or 10 as bestowing jurisdiction to confirm or vacate absolutely any arbitration award," as the Court of Appeals for the Second Circuit has said, "would open the federal courts to a host of arbitration disputes, an intent that we should not readily impute to Congress." *Id.* at 258.

standards or revised to include others. At this juncture, however, our second research question provides a partial solution. We asked: Do reviewing courts supplement FAA standards with the Supreme Court's *Trilogy* standards? Table 4B shows that *Trilogy* standards are infrequently applied but lead to comparatively high rates of vacatur. More important, we wonder why these standards apply in any case. The *Trilogy* was meant to apply to only voluntary labor arbitration. The *Trilogy* aimed to strengthen labor arbitration as a necessary tool to further industrial peace, and to remove courts as an irritant in the union-management relationship.

We fail to see how these concerns extrapolate to individual employment disputes. In theoretical terms, the labor arbitrator embodies the parties' contractual relationship—a relationship in which disputes are occasionally or even frequently submitted to arbitration. But the employment arbitrator functions differently by substituting for judge and jury in deciding a public law issue, and by resolving a one-time dispute between these parties.

In our final question we asked: Is the volume of award challenges growing in relation to the increasing adoption of employment arbitration? We cannot answer this question definitively because there is no authoritative measure on the number of pre-dispute employment arbitration agreements, nor is there an authoritative tally of the total number of employment awards issued each year. Nevertheless, we tentatively conclude that the recent upsurge in award appeals reflects selected features of employment arbitration that deeply frustrate individuals and employers. Also, the cases show that this dispute resolution process is evolving from an employer-driven process to a much more balanced and independent forum, where arbitrators exercise uniquely unbounded judgment.

Our data suggest several features that may be driving individual and employer challenges. On the employee side, it is apparent that numerous individuals do not view arbitration as a legitimate forum for adjudicating their claims. For those employees who have been forced into arbitration against their wishes to proceed in court,[204] they may regard only a court judgment as final and binding. Next, we see prevailing plaintiffs who find that arbitration is sufficiently expensive that a favorable award on the merits unaccompanied by an award of attorneys' fees results in a very

---

[204]Compare *Fahnestock*, *supra* note 227, and *Baravati v. Josephthal Lyon & Ross Inc.*, 834 F. Supp. 1023 (N.D. Ill. 2004).

hollow "victory." When arbitrators deny attorneys' fees to these victorious plaintiffs, economic logic dictates an appeal for post-award relief.[205] In another category, we find employees who might accept losing if their award provided an explanation. However, the absence in many arbitrator awards of a written decision appears to deprive these individuals of an essential part of judgment and justice.

Employers have their own reasons to seek court review of arbitrator rulings. Concerned by mounting litigation, they turned to arbitration with the hope of lowering the cost of employment disputes.[206] The relatively high success rate of employees in arbitration is not likely what employers envisioned.[207] Remedies have provided employers another unpleasant surprise. To put this in perspective, recall that 92 awards in our sample completely favored employees, and 23 awards were split rulings that provided a partial remedy (see Table 1). Thus, a remedy was ordered in 48 percent of cases. We use a common valuation tool for litigation to estimate the average settlement value of claims in our sample of awards.[208] Multiplying this employee success rate by the median award of $250,000, the probability model yields an expected settlement value of $120,000 per case. The point in computing this hypothetical figure is to show that the high win rate for employees combined with costly awards has significant implications for settling disputes that are referred to arbitration.

In addition, when *Gilmer* was decided, courts did not recognize a specific mathematical limit on punitive damages, but this changed with the Supreme Court's decision in *State Farm Mut. Ins. Co. v. Campbell.*[209] While a court of law now shields employers from excessive damage awards, some arbitrators do not recognize this restraint.[210]

Comparing our present research with our companion studies on labor awards, we sense that unions and employers fight smaller

---

[205] *See DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997).

[206] *See Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management*, 2001 Daily Lab. Rep. (BNA) (May 14), No. 93 (reporting an employment lawyer's view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits. David Copus also notes that the biggest financial risk for employers in termination lawsuits—tort claims in which a single plaintiff can be awarded millions of dollars—is controlled by arbitration agreements that cap damages).

[207] *See* Delikat & Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, Disp. Resol. J. (Nov. 2003–Jan. 2004) (statistic for NYSE and NASD arbitrations).

[208] Rau et al. eds., Processes of Dispute Resolution 109–111 (2006).

[209] 538 U.S. 408 (2003).

[210] *See Sawtelle v. Waddell Reed Inc.*, 754 N.Y.S.2d 264 (2003).

battles in arbitration. When they lose and contest the finality of an award, their challenges involve lower stakes. Even if they invoke a *Trilogy* challenge (a statistically rare occurrence), the parties must accept a certain level of losing in arbitration to maintain a continuing relationship. Turning to the employment arbitration arena, some of the cases in our sample suggest that some parties in employment arbitration are not committed to the norm of finality in arbitration, even though their agreements say as much. Unlike unions and managements, their relationships are often severed by the time they proceed to arbitration. Their arbitrations generally require more hearing days; involve the arbitrator more directly in the dispute by subjecting this judge to scrutiny over disclosure, qualification, and discovery issues; and cost much more than labor arbitration. The rancor in some of our cases resembles contested divorces more than labor arbitrations. Employment arbitration eventually may prove to be as final a dispute resolution process as its adopters anticipated, but the increasing number of employment award appeals we uncovered suggests we should be cautious about the length of time necessary to achieve that goal.

Appendix I to Chapter 12

Table of Cases in the Empirical Database

A

Acciardo v. Millenium Sec. Corp., 83 F. Supp. 2d 413 (S.D.N.Y. 2000)

A.G. Edwards & Sons, Inc. v. Ferman, 2005 WL 1876153 (E.D. Mo. 2005)

Ahing v. Lehman Bros., 2000 WL 460443 (S.D.N.Y. 2000)

Antenna Prods. Corp. v. Cosenza, 2006 WL 1452102 (Tex. App.–Dallas 2006)

Anthony v. Kaplan, 918 S.W.2d 174 (Ark. 1996)

Autrey v. Ultramar Diamond Shamrock Corp., 2002 WL 102198 (Tex. App.–Dallas 2002)

Azpell v. Old Republic Ins. Co., 584 A.2d 950 (Pa. 1991)

B

Bailey v. American Gen. Life & Acc. Ins. Co., 2005 WL 3557840 (Tenn. Ct. App. 2005)

Baize v. Eastridge Cos., 142 Cal. App. 4th 293 (2006)

Ball x. SFX Broad., Inc., 165 F. Supp. 2d 230 (N.D.N.Y. 2001)

Baravati v. Josephthal, 28 F.3d 704 (7th Cir. 1997)

Barcume v. City of Flint, 132 F. Supp. 2d 549 (E.D. Mich. 2001)

Bargenquast v. Nakano Food, Inc., 243 F. Supp. 2d 772 (N.D. Ill. 2002)

Barker v. Burlington N. Santa Fe, 71 Fed. Appx. 442 (5th Cir. 2003)

Bazzone v. Nationwide Mut., 123 Fed. Appx. 503 (3d Cir. 2003)

Bell v. Seabury, 622 N.W.2d 347 (Mich. App. 2000)

Bender v. Smith Barney, Harris Upham & Co., Inc., 67 F.3d 291 (3d Cir. 1995)

Berlacher v. PaineWebber, Inc., 759 F. Supp. 21 (D.D.C. 1991)

Bishop v. Smith Barney, Inc., 1998 WL 50210 (S.D.N.Y. 1998)

Bison Bldg. Materials v. Aldrich, 2006 WL 2641280 (Tex. App.–Houston [1 Dist.], 2006)

Blake v. Transcommunications, Inc., 2004 WL 955893 (D. Kan. 2004)

Booth v. Hume Publ'g Inc., 902 F.2d 925 (11th Cir. 1990)

Boyhan v. Maguire, 693 So. 2d 659 (Fla. App. 4 Dist. 1997)

Brennan v. CIGNA Corp., 2006 WL 3254529 (E.D. Va. 2006)

Briamonte v. Liberty Brokerage, Inc., 2000 WL 666350 (S.D.N.Y. 2000)

Brooks v. Cintas Corp., 91 Fed. Appx. 917 (5th Cir. 2004)

Brook v. Peak Int'l, Ltd., 294 F.3d 668 (5th Cir. 2002)

Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000)

Brown v. Wheat First Sec., Inc., 257 F.3d 821 (D.C. Cir. 2001)

Buchignani v. Vining Sparks IBG, Inc., 208 F.3d 212 (6th Cir. 2000)

Bull NH Info. Sys., Inc. v. Hutson, 1998 WL 426047 (D. Mass. 1998)

Bunzyl Distribution USA v. Dewberry, 16 Fed. Appx. 519 (8th Cir. 2001)

Butler v. Munsch, Hardt, Kopf & Harr, P.C., 145 Fed. Appx. 475 (5th Cir. 2005)

Byerly v. Kirkpatrick Pettis Smith & Polian, Inc., 996 P.2d 771 (Colo. App. 2000)

C

CACI Dynamic Sys. v. Spicer, 2005 WL 831469 (E.D. Va. 2005)

CACI Premier Tech., Inc. v. Faraci, 2006 WL 3692615 (E.D. Va 2006)

Caldor, Inc. v. Thornton, 464 A.2d 785 (Conn. 1983)

Campbell v. Cantor Fitzgerald & Co., Inc., 205 F.3d 1321 (2d Cir. 1999)

Capgemini v. Sorenson, 2005 WL 1560482 (S.D.N.Y. 2005)

Cardiovascular Surgical Specialists Corp. v. Mammana, 61 P.3d 210 (Okla. 2002)

Carmel v. Circuit City Stores, Inc., 2000 WL 12089 (E.D. Pa. 2000)

Carpenter v. Potter, 91 Fed. Appx. 705 (2d Cir. 2003)

Caron v. Reliance Co., 703 A.2d 63 (Pa. Super. 1997)

Carson v. PaineWebber, Inc., 62 P.3d 996 (Colo. App. 2002)

Cashman v. Sullivan & Donegan, 578 A.2d 167 (Conn. App. 1990)

Castleman v. AFC Enters., Inc., 995 F. Supp. 649 (N.D. Tex. 1997)

Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, 751 So .2d 143 (Fla. App. 2000)

Chisholm v. Kidder, Peabody Asset Mgmt., Inc., 164 F.3d 617 (2d Cir. 1998)

Cigna Ins. Co. v. Squires, 628 A.2d 899 (Pa. Super. 1993)

City of Hartford v. Casati, 2001 WL 1420512 (Conn. Super. 2001)

Cole v. West Side Auto Employees Fed. Credit Union, 583 N.W.2d 226 (Mich. App. 1998)

Collins v. Blue Cross Blue Shield of Mich., 103 F.3d 35 (6th Cir. 1996)

Collins v. D.R. Horton, Inc., 361 F. Supp. 2d 1085 (D. Ariz. 2005)

Columbia Med. Ctr. of Lewisville v. Heller, 31 Fed. Appx. 839 (5th Cir. 2002)

Community Mem'l Hosp. v. Mattar, 165 Ohio App. 3d 49 (Ohio App. Dist. 2006)

Cowle v. Dain Ruascher, Inc., 66 Fed. Appx. 525 (5th Cir. 2003)

Cowle v. PaineWebber, 1999 WL 194900 (S.D.N.Y. 1999)

Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 2006 WL 1517777 (N.D. Ill. 2006)

Cray v. NationsBank of N.C., N.A., 982 F. Supp. 850 (M.D. Fla. 1997)

Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F.2d 851 (11th Cir. 1989)

D

DaimlerChrysler Corp. v. Carson, 2003 WL 888043 (Mich. App. 2003)

Daniels v. Clear Channel Broad., Inc., 2002 WL 3193885 (S.D. Fla. 2002)

Davis v. Reliance Elec., 104 S.W.3d 57 (Tenn. Ct. App. 2002)

Davis v. Reliance Ins. Co., 703 A.2d 63 (Pa. Super. 1997)

Dean Witter Reynolds, Inc. v. Deislinger, 711 S.W.2d 771 (Ark. 1986)

Dexter v. Prudential Ins. Co. of Am., 215 F.3d 1336 (10th Cir. 2000)

DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997)

Dorfner v. Point Emergency Physicians, P.A., 2006 WL 1071547 (N.J. A.D. 2006)

Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978)

Drexel Burnham Lambert, Inc. v. Pyles, 701 F. Supp. 217 (N.D. Ga. 1988)

Dupree v. UltraDiamond Shamrock Corp., 2003 WL 21801520 (5th Cir. 2003)

Durkin v. CIGNA Property & Cas. Corp., 986 F. Supp. 1356 (D. Kan. 1997)

E

Eaton Vance Distributors, Inc. v. Ulrich, 692 So. 2d 915 (Fla. App. 2 Dist. 1997)

Ehresman v. Bultynck & Co., P.C., 511 N.W.2d 724 (Mich. App. 1994)

Edward D. Jones & Co. v. Schwartz, 969 S.W.2d 788 (Mo. App. W.D. 1998)

Eisenberg v. Angelo, Gordon & Co., L.P., 234 F.3d 1261 (2d Cir. 2000)

Environmental Indus. Servs. Corp. v. Saunders, 304 F. Supp. 2d 599 (D. Del. 2004)

Everen Sec., Inc. v. A.G. Edwards & Sons, Inc., 719 N.E.2d 312 (Ill. App. 3 Dist. 1999)

F

Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512 (2d Cir. 1991)

Fallon v. Salamon Smith Barney, Inc., 2003 WL 201321 (2d Cir. 2003)

Fanning v. Bear Stearns & Co., 1991 WL 169057 (N.D. Ill. 1991)

Farias v. North Am. Logistics, Corp., 2006 WL 2037562 (S.D. Tex. 2006)

First Union Sec., Inc. v. Lorelli, 168 N.C. App. 398 (N.C. App. 2005)

Florasynth, Inc. v. Pickholz, 750 F.2d 171 (2d Cir. 1984)

Flournoy v. Am. Interactive Media, Inc., 2001 WL 177067, 2001 WL 1167545 (E.D. Pa. 2001)

Ford v. Hamilton Investments, Inc., 29 F.3d 255 (6th Cir. 1994)

Fountouslakis v. Stonhard, Inc., 2003 WL 21075931 (N.D. Tex. 2003)

Frazier v. City of Warren, 1997 WL 33350534 (Mich. App. 1997)

G

Gaffney v. Powell, 668 N.E.2d 951 (Ohio App. 1 Dist 1995)

Gardner v. Benefits Commc'ns Corp., 175 F.3d 155 (D.C. Cir. 1999)

Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 882 (9th Cir.1993)

GFI Sec. LLC v. Labandeira, 2002 WL 460059 (S.D.N.Y. 2002)

Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132 (6th Cir. 1996)

Glover v. IBP, Inc., 334 F.3d 471 (5th Cir. 2003)

Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144 (2d Cir. 2004)

Gonzalez v. Shearson Lehman Bros., Inc., 794 F. Supp. 53 (D.P.R. 1992)

Grambow v. Associated Dental Servs., 546 N.W.2d 578 (Wis. App. 1996)

Green v. Ameritech Corp., 200 F.3d 967 (7th Cir. 2000)

Gupta v. Cisco Sys., Inc., 274 F.3d 1 (1st Cir. 2001)

H

Hackett v. Millbank, Tweed, Hadley & McCoy, 630 N.Y.S2d 274 (N.Y. 1995)

Hakala v. Deutsche Bank AG, 2004 WL 1057788 (S.D.N.Y. 2004)

Haliakis v. Warburg Dillon Reed LLC, 759 N.Y.S.2d 288 (2000)

Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998)

Hamilton v. Sirius Satellite Radio, Inc., 375 F. Supp. 2d 269 (S.D.N.Y. 2005)

Harris v. Parker College of Chiropractic, 286 F.3d 790 (5th Cir. 2002)

Harris-Baird v. Anthony, 124 F.3d 1309 (D.C. Cir. 1997)

Hasson v. Western Reserve Life Assurance Co., 2006 WL 2691723 (M.D. 2006)

Hawrelak v. Marine Bank, Springfield, 735 N.E.2d 1066 (Ill. App. 4 Dist. 2000)

Hayett v. Kemper Sec., Inc., 573 N.W.2d 899 (Wis. App. 1997)

Heatherly v. Rodman & Renshaw, Inc., 678 N.E.2d 59 (Ill. App. 1 Dist. 1997)

Henry v. Halliburton Energy Servs., Inc., 100 S.W.3d 505 (Tex. App.–Dallas 2002)

In re Heritage Organization LLC, 2006 EL 2642204 (N.D. Tex. 2006)

Herrendeen v. Daimler Chrysler Corp., 2001 WL 304843 (Ohio App. 6 Dist. 2001)

Hill, Rogal & Hobbs Co. v. Golub, 2006 WL 2403390 (E.D. Va. 2006)

Holman v. Trans World Airlines, Inc., 737 F. Supp. 527 (E.D. Mo. 1989)

Hruban v. Steinman, 2002 WL 1723889 (3d Cir. 2002), 40 Fed. Appx. 723 (3d Cir. 2002)

Hughes Training Inc. v. Cook, 254 F.3d 588 (5th Cir. 2001)

I

In re Prudential Ins. Co. of Am. Sales Practice Lit., 47 Fed. Appx. 78, 2002 WL 2007188 (3d. Cir. 2002)

In re Arb. between Atherton & Online Video Net. Inc., 2003 WL 21787457 (S.D.N.Y. 2003)

In Regard to Arb. between Lanier Prof. Servs. and Cannon, 2001 WL 303285 (S.D. Ala. 2001)

International Marine Holdings, Inc. v. Stauff, 691 A.2d 1117 (Conn. App. 1997)

J

Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631 (10th Cir. 1988)

Johnston, Lemon & Co., Inc. v. Smith, 84 F.3d 1452 (D.C. Cir. 1996)

K

Kanuth v. Prescott, Ball & Turban, Inc., 949 F.2d 1175 (D.C. Cir. 1991)

Keil-Koss v. CIGNA, 211 F.3d 1278 (10th Cir. 2000)

Kergosian v. Ocean Energy, Inc., 390 F.3d 346 (5th Cir. 2004)

Kelly v. Camillo, 2006 WL 2773600 (Conn. Super. 2006)

Kiernan v. Piper Jaffray Cos., Inc., 137 F.3d 588 (8th Cir. 1998)

L

Lancaster v. West, 891 S.W.2d 357 (Ark. 1995)

Landmark v. Mader Agency, Inc., 878 P.2d 773 (Idaho 1994)

LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702 (D.C. Cir. 2001)

Lee v. McDonald Sec., Inc., 2004 WL 2535277 (N.D. Ill. 2004)

Lewis v. Circuit City Stores, Inc., 2005 WL 2179085 (D. Kan. 2005)

Long John Silver's Restaurants, Inc. v. Cole, 409 F. Supp. 2d 682 (D.S.C. 2006)

Lovell v. Harris Methodist Health, 235 F.3d 1339 (5th Cir. 2000)

Luong v. Circuit City Stores, Inc., 368 F.3d 1109 (9th Cir. 2004)

M

Mack v. Strategic Materials, Inc., 106 Fed. Appx. 1000 (6th Cir. 2004)

Madden v. Kidder Peabody & Co., 883 S.W.2d 79 (Mo. App. 1994)

Malice v. Coloplast Corp., 278 Ga. App. 395 (Ga. App. 2006)

Manion v. Nagin, 392 F.2d 294 (8th Cir. 2004)

Martindale v. Sandvik, Inc., 2006 WL 1450586 (N.J. Super. A.D. 2006)

Martinez v. Univision Television Group, 2003 WL 21470103 (Cal. App. 1 Dist.)

Massaro v. The Port Authority of N.Y. & N.J., 2005 WL 3077918 (D.N.J. 2005)

Mathewson v. Aloha Airlines, Co., 919 P.2d 969 (Hawaii 1996)

Matter of Standard Coffee Serv. Co., 499 So. 2d 1314 (La. App. 4 Cir. 1986)

May v. First Nat'l Pawn Brokers, 887 P.2d 185 (Mont. 1994)

Mays v. Lanier Worldwide, Inc., 115 F. Supp. 2d 1330 (M.D. Ala. 2000)

Maze v. Prudential Sec., Inc., 47 F.3d 1157 (2d Cir. 1995)

Mendez v. Commercial Credit Corp., 189 F.3d 478 (10th Cir. 1999)

Merrill Lynch, Pierce, Fenner & Smith v. Lambros, 214 F.3d 1354 (11th Cir. 2000)

McCarthy v. Citigroup Global Mkts., Inc., 2005 WL 3447958 (D.N.H. 2005) (1st Vacatur Appeals)

McCarthy v. Citigroup Global Mkts., Inc., 2005 WL 3447958 (D.N.H. 2005) (2d Vacatur Appeals)

McClure v. Montgomery County Cmty. Action Agency, 1975 WL 181652 (Ohio App. 2 Dist. 1975)

McDonald v. Wells Fargo Investments LLC, 2005 WL 2562993 (N.D. Ind. 2005)

McGee v. Oak Tree Realty Co., 1990 WL 75190 (Ohio App. 1990)

McGrann v. First Albany Corp., 424 F.3d 743 (8th Cir. 2005)

McKenzie v. Seta Corp., 283 F.3d 413 (4th Cir. 2000)

Millenium Validation Servs., Inc. v. Thompson, 3159821 (D. Del. 2006)

Mills v. James Helwig & Son, Inc., 2005 WL 1421810 (N.D. Tex. 2005)

Moncharsh v. Heily & Base, 10 Cal. Rptr. 2d 183 (Cal. App. 1992)

Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456 (11th Cir. 1997)

Montez v. Prudential Sec., Inc., 260 F.3d 980 (8th Cir. 2001)

Morado v. Service Employees Int'l Inc., 2002 WL 31422374 (W.D. Tex. 2002)

Morrill v. G.A. Wright Mktg., Inc., 2006 WL 2038419 (D. Colo. 2006)

Murray v. Jackman, 2002 WL 31876005 (Cal. App. 1 Dist.)

N

Ngheim v. NEC Elecs., Inc., 25 F.3d 1437 (9th Cir. 1994)

Ngheim v. Fujitsu Microelectronics, Inc., 2006 WL 3617017 (Cal. App. 6 Dist. 2006)

Neary v. Prudential Ins. Co. of Am., 63 F. Supp. 2d 208 (D. Conn. 1992)

New Hampshire Ins. Co. v. Duboys, 1995 WL 319987 (Conn. Super. 1995)

Norton v. AMIBUS St. Joseph Hosp., 155 F.3d 1040 (8th Cir. 1998)

Nutrition 21, Inc. v. Wertheim, 150 Fed. Appx. 108 (2d Cir. 2005)

NuVision, Inc. v. Dunscombe, 415 N.W.2d 234 (Mich. App. 1987)

O

Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157 (8th Cir. 1995)

Owen-Williams v. Merrill Lynch, Pierce, Fenner & Smith, 103 F.3d 119 (4th Cir. 1996)

Ovitz v. Schulman, 133 Cal. App. 4th 830 (Cal. App. 2 Dist. 2005)

P

PaineWebber, Inc. v. Agron, 49 F.3d 347 (8th Cir. 1995)

R

S

Sawtelle v. Waddell Reed Inc., 754 N.Y.S.2d 264 (2003) (Award II)

Schaad v. Susquehanna Capital Group, 2004 WL 1794481 (S.D. 2004); 2005 WL 517335 (S.D.N.Y. 2005)

Schoch v. InfoUSA, Inc., 341 F.3d 785 (8th Cir. 2003)

Schoonmaker v. Cummings & Lockwood of Conn., 747 A.2d 1017 (Conn. 2000)

Scott v. Borg-Warner Protective Servs., 2003 WL 23315 (9th Cir. 2003)

Scott v. Road Comm'n for County of Oakland, 2003 WL 21279570 (Mich. App. 2003)

Selby Gen. Hosp. v. Kindig, 2006 WL 2457436 (Ohio App. 4 Dist. 2006)

Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310 (7th Cir. 1981)

Shearson Lehman Brothers, Inc. v. Hedrich, 639 N.E.2d 228 (Ill. 1994)

Shearson Lehman Hutton, Inc. v. Meyer, 571 N.Y.S.2d 465 (1991)

Siegel v. Prudential Ins. Co. of Am., 67 Cal. App. 4th 1270 (Cal. App. 2 Dist. 1998)

Smith v. Lyondell Citgo Refinery Co., 2005 WL 2875306 (S.D. 2005)

Smith v. PSI Servs. II, Inc., 2001 WL 41122 (E.D. Pa. 2001)

Smith v. Rush Retail Ctrs., Inc., 360 F.3d 504 (5th Cir. 2004)

Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698 (2d Cir. 1985)

Sobol v. Kidder, Peabody & Co., Inc., 49 F. Supp. 2d 208 (S.D.N.Y. 1998)

SoBran, Inc. v. Garg, 2006 WL 2382499 (S.D. Ohio 2006)

St. John's Med. Ctr. v. Delfino, 414 F.3d 882 (8th Cir. 2005)

Syncor Int'l Corp. v. McLeland, 120 F.3d 262 (4th Cir. 1997)

T

Taylor v. Delta Electro Power, Inc., 741 A.2d 265 (R.I. 1999)

Thomas v. Bear Stearns & Co., Inc., 196 F.3d 1256 (5th Cir. 1999)

Tinder v. Pinkerton Sec., 305 F.3d 728 (7th Cir. 2002)

Turgeon v. City of Bedford, 799 N.E.2d 578 (Mass. 2003)

Trivisonno v. Metropolitan Life Ins. Co., 2002 WL 1378229 (6th Cir. 2002)

U

Unstad v. Lynx Golf, Inc., 1997 WL 193805 (Minn. App. 1997)

Umana v. Swidler & Berlin, 745 A.2d 334 (D.C. 2000)

V

Vascular and General Surg. Assocs. v. Loiterman, 599 N.E.2d 1246 (Ill. App. 1 Dist. 1992)

Vincent v. American Gen. Life & Accident Ins. Co., 2004 WL 856330 (M.D.N.C. 2004)

W

Wachter v. UDV N. Am., Inc., 816 A.2d 668 (Conn. App. 2003)

Wagner v. Kendall, 413 N.E.2d 302 (Ind. App. 1980)

Watts v. Kemper Sec., Inc., 1998 WL 209228 (Tex. App.–Hous. 1 Dist 1998)

Welch v. A.G. Edwards & Sons, Inc., 677 So. 2d 520 (La. App. 4 Cir. 1996)

Weiss v. Carpenter, Bennett & Morrisey, 672 A.2d 1132 (N.J. 1996)

Williams v. Cigna Fin. Advisors Inc., 197 F.3d 752 (5th Cir. 1999)

Williams v. Colejon Mechanical Corp., 1995 WL 693129 (Ohio. App. 8 Dist. 1995)

Williams v. Katten, Muchen & Zavis, 1996 WL 717447 (N.D. Ill. 1996)

Window Concepts, Inc. v. Daly, 2001 WL 1452790 (R.I. Super. 2001)

Y

Yorulmazoglu v. Lake Forest Hosp., 359 Ill. App. 3d 554 (Ill. App. 1 Dist. 2005)

Young v. Community Hosp. & Nursing Home of Anaconda, 304 Mont. 400 (Mont. 2001)

Z

Zandford v. Prudential-Bache Sec., Inc., 112 F.3d 723 (4th Cir. 1997)

Zavaski v. Worldwide Fin. Servs. of Cent. Conn., Inc., 1993 WL 452256 (Conn. Super. 1993)

Zeldes, Needle & Cooper v. Shrader, 1997 WL 644908 (Conn. Super. 1997)

Appendix 2 to Chapter 12

State Vacatur Standards: Statutes That Differ From the Federal Arbitration Act[211]

Delaware	Del. C. §10-5715 (Modification or Correction of an Award by Court): (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or, (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.
Florida	West's F.S.A. §682.14 (Modification or Correction of Award): (1) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when: (a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award. (b) The arbitrators or umpire have awarded upon a matter not submitted to them or him or her and the award may be corrected without affecting the merits of the decision upon the issues submitted. (c) The award is imperfect as a matter of form, not affecting the merits of the controversy.
Georgia	Ga. Code Ann. §9-9-13 (Vacation of an Award): (b) The award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand

[211]Fourteen states in Appendix 2 of this chapter have adopted Section 23 in the Revised Uniform Arbitration Act, in part or in whole; however, because many of these states have substantively customized these provisions, we reprint their entire provisions. The states include Iowa, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington.

	for arbitration if the court finds that the rights of that party were prejudiced by: (1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; (4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; or (5) The arbitrator's manifest disregard of the law.
Illinois	710 ILCS 5/13 (Modification or Correction of Awards): (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.
Iowa	(I.C.A. 679A.12, Vacating an Award) a. The award was procured by corruption, fraud, or other illegal means. b. There was evident partiality by an arbitrator appointed as a neutral, corruption in any of the arbitrators, or misconduct prejudicing the rights of a party. c. The arbitrators exceeded their powers. d. The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or conducted the hearing contrary to the provisions of section 679A.5, in a manner which prejudiced substantially the rights of a party. e. There was no arbitration agreement, the issue was

	not adversely determined in proceedings under section 679A.2, and the party did not participate in the arbitration hearing without raising the objection. f. Substantial evidence on the record as a whole does not support the award. The court shall not vacate an award on this ground if a party urging the vacation has not caused the arbitration proceedings to be reported, if the parties have agreed that a vacation shall not be made on this ground, or if the arbitration has been conducted under the auspices of the American Arbitration Association.
Kansas	(K.S.A. §5413, Modification or Correction of Award) (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form not affecting the merits of the controversy.
Kentucky	(K.R. S. §417.160, Vacating an Award) (1) Upon application of a party, the court shall vacate an award where: (a) The award was procured by corruption, fraud or other undue means; (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (c) The arbitrators exceeded their powers; (d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of KRS 417.090, as to prejudice substantially the rights of a party; or (e) There was no arbitration

	agreement and the issue was not adversely determined in proceedings under KRS 417.060 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award. (2) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant; except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known. (3) In vacating the award on grounds other than stated in paragraph (a) of subsection (1) of this section, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with KRS 417.070, or, if the award is vacated on grounds set forth in paragraphs (c) and (d) of subsection (1) of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with KRS 417.070. The time within which the agreement requires the award to be made is applicable to the rehearing and commences on the date of the order.
Maine	(26 M.R.S.A. §958, Vacation of Award) 1. Corruption, fraud or undue means. Where the award was procured by corruption, fraud or undue means; 2. Partiality or corruption in arbitrators. Where there was obvious partiality or corruption in the arbitrators, or any of them; 3. Abuse of discretion by arbitrators. Where the arbitrators were guilty of abuse of discretion by which the rights of any party have been prejudiced; or 4. Arbitrators exceeded powers. 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.
Maryland	(Md. Code, Courts and Judicial Proceedings, §3-223, Adjustment of an Award by Court) (b) The court shall modify or correct the award if: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.
Massachusetts	(M.G.L.A. 150C, §, Vacation of an Award) (a) Upon application of a party, the superior court shall vacate an award if:—(1) the award was procured by corruption, fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law; (4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party; (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not

	grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.
Minnesota	(M.S.A. §572.19, Vacating an Award) (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 572.12, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 572.09 and the party did not participate in the arbitration hearing without raising the objection; But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.
Missouri	(V.A.M.S. §435.405, Vacating an Award) (1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 435.370, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue

	was not adversely determined in proceedings under section 435.355 and the party did not participate in the arbitration hearing without raising the objection; But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.
Montana	(Mt. St. §27-5-312, Vacating an Award) (1)(a) The award was procured by corruption, fraud or other undue means; (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (c) The arbitrators exceeded their powers; (d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 27-5-213, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 27-5-115 and the party did not participate in the arbitration hearing without raising the objection; But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.
Nebraska	(Neb. St. §25-613, Vacating an Award) (a)(1) The award was procured by corruption, fraud or other undue means; (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (c) The arbitrators exceeded their powers; (d) The arbitrators refused to postpone the hearing upon sufficient

	cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or (6) An arbitrator was subject to disqualification pursuant to section 25-2604.01 and failed, upon timely receipt of demand, to disqualify himself or herself as required by such section. The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.
Nevada	(N.R.S. §38.241, Vacating Award) (a) The award was procured by corruption, fraud or other undue means; (b) There was (1) evident partiality by an arbitrator appointed as a neutral arbitrator; (2) corruption by an arbitrator; (3) misconduct by an arbitrator prejudicing the rights of a party to the arbitral proceeding; (c) An arbitrator refused to postpone the hearing upon sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise so conducted the hearing, contrary to N.R.S. 38.231, as to prejudice substantially the rights of a party; (d) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or (d) An arbitrator exceeded his powers; (e) There was no arbitration agreement, unless the movant participated in the arbitral proceeding without raising the objection under subsection 3 of NRS 38.231

	not later than the beginning of the arbitral hearing; or (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in NRS 38.223 so as to prejudice substantially the rights of a party to the arbitral proceeding.
New Hampshire	(N.H. Rev. Stat. §542.8, Jurisdiction of Court to Confirm, Modify, or Vacate an Award) At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers. Where 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 or by new arbitrators appointed by the court.
New Mexico	(N.M.S.A. 1978, §44-7A-24, Vacating Award) (1) the award was procured by corruption, fraud or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to Section 16, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator's powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section

	16(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 so as to prejudice substantially the rights of a party to the arbitration proceeding.
New York	(McKinney's CPLR §7511, Vacating or Modifying an Award) (b) Grounds for vacating. 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection. 2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that: (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or (ii) a valid agreement to arbitrate was not made; or (iii) the agreement to arbitrate had not been complied with; or (iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.
North Carolina	(N.C.G.S.A. §1-569.23, Vacation of Award) (a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration

	proceeding if: (1) The award was procured by corruption, fraud, or other undue means; (2) There was: a. Evident partiality by an arbitrator appointed as a neutral arbitrator; b. Corruption by an arbitrator; or c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) An arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) An arbitrator exceeded the arbitrator's powers; (5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) no later than the beginning of the arbitration hearing; or (6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.
North Dakota	(N.D. St. 32-29.3-23, Vacating award) 1. Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: a. The award was procured by corruption, fraud, or other undue means; b. There was: (1) Evident partiality by an arbitrator appointed as a neutral arbitrator; (2) Corruption by an arbitrator; or (3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitrator proceeding; c. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 32-29.3-15, so as to prejudice substantially the rights of a

	party to the arbitration proceeding; d. An arbitrator exceeded the arbitrator's powers; e. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection 3 of section 32-29.3-15 not later than the beginning of the arbitration hearing; or f. The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 32-29.3.09 so as to prejudice substantially the rights of a party to the arbitration proceeding.
Oklahoma	(12 Okla. Stat. Ann. §1874, Application to Vacate an Award) A. Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: 1. The award was procured by corruption, fraud, or other undue means; 2. There was: a. evident partiality by an arbitrator appointed as a neutral arbitrator, b. corruption by an arbitrator, or c. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; 3. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 6 of this act, so as to prejudice substantially the rights of a party to the arbitration proceeding; 4. An arbitrator exceeded the arbitrator's powers; 5. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection C of Section 16 of this act not later than the beginning of the arbitration hearing; or 6. The arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 of this act so as to

	prejudice substantially the rights of a party to the arbitration proceeding.
Oregon	(O.R.S. §36.705, Vacating an Award) (1) Upon petition to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (a) The award was procured by corruption, fraud or other undue means; (b) There was: (A) Evident partiality by an arbitrator appointed as a neutral arbitrator; (B) Corruption by an arbitrator; or (C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to ORS 36.665 so as to prejudice substantially the rights of a party to the arbitration proceeding; (d) An arbitrator exceeded the arbitrator's powers; (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under ORS 36.665(3) not later than the beginning of the arbitration hearing; or (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in ORS 36.635 so as to prejudice substantially the rights of a party to the arbitration proceeding.
Pennsylvania	(42 Pa. C.S.A. §7314, Vacating Award by Court) (1) On application of a party, the court shall vacate an award where: (i) the court would vacate the award under section 7341 (relating to common law arbitration) if this subchapter were not applicable; (ii) there was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct in any of the arbitrators prejudicing the rights of any party; (iii) the arbitrators exceeded their

	powers; (iv) the arbitrators refused to postpone the hearing upon good cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 7307 (relating to hearing before arbitrators), as to prejudice substantially the rights of a party; or (v) there was no agreement to arbitrate and the issue of the existence of an agreement to arbitrate was not adversely determined in proceedings under section 7304 (relating to court proceedings to compel or stay arbitration) and the applicant-party raised the issue of the existence of an agreement to arbitrate at the hearing. (2) The fact that the relief awarded by the arbitrators was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.
Tennessee	(T. C. A. §29-5-314, Awards) (a) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.
Utah	(U.C.A. 1953 §78-31a-124, Vacating an Award) (1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (a) the award was procured by corruption, fraud, or other undue means; (b) there was: (i) evident partiality by an arbitrator appointed

	as a neutral arbitrator; (ii) corruption by an arbitrator; or (iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78-31-a-116, so as to substantially prejudice the rights of a party to the arbitration proceeding; (d) an arbitrator exceeded the arbitrator's authority; (e) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under Subsection 78-31a-116(3) not later than the beginning of the arbitration hearing; or (f) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 78-31-a-110 so as to substantially prejudice the rights of a party to the arbitration proceeding.
Vermont	(VT. ST. T. 3 §1019, Mediation-Arbitration) (2) Notwithstanding any law to the contrary, upon application of a party, a superior court shall vacate an arbitration award based on one of the following: (A) The award was procured by corruption, fraud or other undue means. (B) There was evident partiality or prejudicial misconduct by the arbitrator. (C) The arbitrator exceeded his or her power or rendered an award requiring a person to commit an act or engage in conduct prohibited by law. (D) There is insufficient evidence on the record to support the award.
Virginia	(Va. Code Ann. §8.01-581.011, Vacating Award) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: 1. There was an evident miscalculation

	of figures or an evident mistake in the description of any person, thing or property referred to in the award; 2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or 3. The award is imperfect in a matter of form, not affecting the merits of the controversy.
Washington	(West's RCWA 7.04A.230, Vacating Award) (1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if: (a) The award was procured by corruption, fraud, or other undue means; (b) There was: (i) Evident partiality by an arbitrator appointed as a neutral; (ii) Corruption by an arbitrator; or (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding; (d) An arbitrator exceeded the arbitrator's powers; (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.
West Virginia	(W. Va. Code, §55-10-4, Vacating Award) No such award shall be set aside, except for errors apparent on its face, unless it appears to have been procured

> by corruption or other undue means, or by mistake, or that there was partiality or misbehavior in the arbitrators, or any of them, or that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made. But this section shall not be construed to take away the power of courts of equity over awards.

III. PANEL PRESENTATION

Vinick: I'm Sharon Vinick, and I'm a plaintiffs' employment lawyer. Prior to going into solo practice, I spent many years working for a law firm that was one of the most vociferous advocates against employment arbitration. So, I want to be clear that I definitely have a perspective, and from my perspective it's problematic to force employees into arbitration. I think that despite the fact that Pete says that this study doesn't really bear upon the debate about whether employment arbitrations are a good or a bad thing, I think that it actually bears upon that a great bit because it tells a lot about what's going on in the arbitrations, although, admittedly, from a pretty far distance.

I also think that it tells us a lot about the process of arbitration and what we should be paying attention to in the process of arbitration. The thing that was most striking to me was the reason why the courts decided not to overrule the arbitration decisions. The courts essentially say: Employees came here voluntarily, employers came here voluntarily, and unless there is something just completely appalling about the arbitration process, we should affirm the award. And, that's what the statistics show us. But, what that tells us is that what goes on in the arbitration process is crucial because whether you're an employee or an employer, arbitration is pretty much the end of the line. Now, I understand that Pete said that you don't see percentage-wise more discrimination employees appealing, but there could be many reasons for that such as a lack of resources or exhaustion. It's very difficult to get plaintiffs' attorneys who are working on a contingency fee basis to take an appeal, let alone an appeal of an arbitration decision.

But, when I look at this, what it tells me is that once an employee and an employer go down the path of arbitration, it's crucial that the process is fair to all who are involved. And, not only that it's fair, but that everyone is convinced that it's fair. I think that's why you see so many appeals where it's based upon a complete disregard of the law. If you look at the statistics that Pete discussed, it shows us that the vast majority of appeals were based upon a manifest disregard of the law. When you have an arbitration decision that is not clearly written as to what the decision was based upon, and there is a perception that arbitrators don't always pay attention to the law, that's what happens when you see it on appeal.

So, what I think what we can take away from this paper is that arbitration is here to stay, whether I like it or my clients like it.

I mean, until there's a change, my clients are stuck with these agreements. Our ability to overturn them is getting smaller and smaller. So, when an employee comes to me or my colleagues with an employment arbitration agreement, my advice generally is that you're going to have to arbitrate.

What I think the paper is most meaningful in telling us is that it's important that everybody put their best foot forward in the arbitration process. Plaintiffs' attorneys, when they're in the process, have to say, "This is the process that we have and I'm going to try to do the best I can within this process because there's not going to be a successful appeal afterwards except in extremely limited circumstances." Although I think that the arbitrators I've worked with in arbitration do a great job, there's a perception that the rules are not necessarily fair and that they are not fairly spelled out. Because this is going to be the final forum, it's important that you, as arbitrators, make sure that the process is as fair as you possibly can make it because this is absolutely the last thing. My experience in talking to employers and lawyers is that their feeling is pretty much the same. I mean, once we go into the arbitration process, there is no moving anyplace else.

One of the things that I wonder about is why we're having more and more appeals. From my perspective, I think it's because there are more and more arbitration agreements that employees are signing. I mean, 10 years ago, those agreements weren't common. Now, when an employee comes into my office, the first thing I ask is whether he or she signed an arbitration agreement. And I would say that in the securities industry, it's a given. But, even outside the securities industry, it's becoming more and more common.

The other thing that I find interesting is that I'm also hearing more and more employers saying that they don't necessarily want to enforce their arbitration agreement, and they will waive that agreement. I don't think that the paper reflects upon that, but I think that the paper confirms that the courts have done exactly what the rules were intended to do, which is to make arbitration the end of the line. You can appeal if you want, and, as a matter of fact, if you look at the statistics, you'll see that in the state court context, almost 90 percent of the initial decisions are appealed to a second court. So, when you're going to the state court, these are people for who one bite at the apple wasn't enough. They're appealing another time. When they look at these statistics I think it would be quite discouraging because the chances of winning

regardless of the grounds that you're appealing on are very, very slim.

Keyes: Thanks, Sharon, and thanks Pete. I practice employer-side employment law in the Bay Area. A question before I get started, do we know how many of those appeals were from employers as contrasted with employees?

Feuille: Well, we don't know that information directly from our data. We could draw an inference by assuming that the party that wins the award is not the party that's challenging it. What you see in Table 4 is that employers in this sample won 52 percent of these awards; employees won 38 percent; and then there was a split award about 10 percent of the time. There are two things that could be going on in these cases. Let's say an employee wins an award. The employer could appeal it if it really thinks the arbitrator screwed it up. Or, the employer could simply say, "Screw this, we're not going to implement this award," and force the employee to go into court as the plaintiff moving for enforcement of the award. In this context, the employee is not really the challenging party, the employee simply is seeking the award in which they prevailed to be confirmed. So it's sort of tricky. Just looking at who is the first party listed in the court decision isn't necessarily going to tell you which party is challenging the award.

Could we dig that information out of our data? We probably could. We just didn't do it for purposes of this paper.

Keyes: Okay, I was just curious about that. And, I don't know what difference it makes, but I am interested to know because it is an ongoing question for employers as to whether it is a good idea to adopt these arbitration agreements. But, I don't at all disagree with what Sharon just said. From the employer's perspective, we view this as your one bite at the apple, that this is the forum where it will be resolved, and that there will not be the opportunity for an appeal. Now, something could happen that would make people wonder whether they might want to appeal, but, certainly, the assumption going in is that this will be the final process. I've probably had 20 arbitration decisions, and in none of them, win or lose, did we give anything but passing thought to appealing.

I have to say, in the paper that we've had privilege to read, there's a footnote that describes a case where there was an appeal, and if there's something called a "chutzpah" award, here you go. This was a Missouri case where the employee sued but was ordered by the court to arbitrate. So, apparently, the employee initially resisted arbitration, and there was an order from the

court that it be arbitrated. The footnote goes on to indicate that after the employee prevailed in the arbitration and was awarded $250,000, the employer sued to vacate the award. The court denied the motion. So, there was a case that was before the same court twice. The "chutzpah" award, I should think, would go to that employer.

So, anyway, the question is why is it that employers have gone down this road? I think there are really four things that employers have thought about and continue to think about as potentially advantageous in wanting to have arbitrations. The most significant one is that arbitrators are less likely than juries to be swayed by emotion. If there are particularly salacious facts or emotional facts, the notion is that you're going to be better off in front of an arbitrator who is more likely to rule from a place of reason than from a place of emotion. How has that notion fared? According to this study, 52 percent of the cases were decided for the employer, 38 percent were for the employee, while another 10 percent were split somehow or other. So, 48 percent of the awards were in favor of the employee to some degree. In the paper, there is a footnote to suggest that at least from some of the data that are available, employees are doing better in arbitration than they do in court. In one study involving the Southern District of New York Federal Court over a five- or six-year period of time, employees prevailed only 33.6 percent of the time in employment cases. In another study, the federal appeals courts generally were far less sympathetic to workers who allege discrimination than to other types of plaintiffs. So, I don't know that it is necessarily true that arbitrators are less sympathetic to employees than the courts. And, I don't know that it's necessarily true that the size of the award is significantly different in arbitration than in court. You'd need another study; but I can say that from my own anecdotal experience, I have not found that to be the case, nor have my colleagues with whom I have spoken found it to be the case. So, I think that reason is up for serious question and debate.

The second reason that employers cite for choosing the arbitration route is the notion that it would be faster and less cumbersome than a court proceeding, that you'll just not have to go through all of the stuff that you have to go through waiting for a trial such as discovery, motions in limine, or what have you. Now, here is where my experience is very disappointing. Arbitrators have pretty much free reign for what they're going to permit. So, not only is the award itself not appealable, but the process is not

appealable. My colleagues in the Bay Area have heard me more than once describe what I call the "arbitration from hell." It went on for years, and there was discovery that went way beyond what any court would have permitted. And, we had no recourse. Arbitrators have free reign with the procedure as well as with the law when they make their awards. And then, we must factor in that, at least in California under the *Armendariz* case,[1] the employer has to pay all of the arbitrator's fees all along the way. So, each time there is a claim to the arbitrator—"Please we really don't need the 53rd deposition of the customer"—the arbitrator charges us for the time that is spent in hearing that petition! So, I'm not really sure that it is any less expensive or less cumbersome for employers than would be a court proceeding.

The third reason that employers choose arbitration is the thought that arbitration might deter the claim from being brought in the first place. That is, if a plaintiff's lawyer or employee realizes that they have to go through arbitration rather than getting to go to court, they may be less inclined to bring the claim. I do not think that's true any more. I think that plaintiffs' lawyers have come to grips with arbitration or are comfortable enough with it. Certainly, employees are still free to go to agencies. So, if that was a factor for the employer, I don't think it is any longer.

The fourth reason that I've heard articulated for choosing the arbitration route is confidentiality. The notion here is that you don't have something that is filed in court so that the dirty laundry isn't a matter of public record. But, there are issues around that, particularly with the confirmation of an award. If the employer wins, maybe it is kept confidential because nobody wants to publish it. But, if the employee prevails and wants to go to court to have it enforced, then there's very little the employer can do to prevent that. Although I have not had that experience personally, I know colleagues who have; there can be enormous problems and debates. So, I don't think that confidentiality is an attraction.

My time is pretty much up, but just to say by way of summary that the other aspect of this, of course, is if one is going the private employment arbitration route, what are the rules going to be? I mean, who's going to make them up? Is the employer going to try to write all the rules? Not any employer that I know. It's just too complicated. And when you get an employer that tries—most

[1]Armendariz v. Foundation Health Psychcare Services, Inc., 99 Cal. Rptr. 2d 745, 6 P.3d 669 (Cal. 2000).

of us in the room probably recently saw the May 14, 2007, decision of the Ninth Circuit Court of Appeals overturning the arbitration agreement that the O'Melveny and Meyers law firm had imposed on its employees. The Ninth Circuit found that that law firm's arbitration agreement was unconscionable, both as a matter of procedure and as a matter of substance. The procedure that O'Melveny and Meyers had put into place was a procedure that they wrote, and what the court did was pick apart the procedure and find it to be unconscionable. Most employers are not going to write their own procedures because it's too difficult to figure it out, so they'll use either the AAA's employment resolution rules or the JAMS employment arbitration rules and procedures. In preparing for this presentation, I was surprised to discover that JAMS revised their rules effective March 26, 2007. The AAA, of course, revised their rules effective in July of 2006, making some significant changes in response, I think, to the kinds of things that we're here talking about. The problem is that employers that write these arbitration agreements may see the rules change in a way they didn't anticipate when they wrote them, and then they're stuck with the new rules that they may or may not like.