RECENT DEVELOPMENTS IN ALTERNATIVE DISPUTE RESOLUTION

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I. INTRODUCTION

This article addresses recent developments in Alternative Dispute Resolution. At the forefront of hot topics during the past year sits the ongoing

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debate over provisions mandating individualized arbitration in disputes arising out of consumer contracts and employment agreements. Such provisions often do not just require arbitration, but also may explicitly (or be found to implicitly) prohibit the use of class or collective action, either in court or in an arbitration provision. This article discusses developments in the case law and in actions taken by federal agencies that address the explosive growth in the use of such provisions. How these issues will play out in the courts and in the context of the changing political landscape is yet to be known.

The article also discusses recent decisions on the scope of judicial review for challenges to arbitration rulings. In the world of sports arbitration, recent federal appellate court rulings make clear that the standard of review is particularly deferential under the Labor Management Relations Act (LMRA) and the terms of the collective bargaining agreements that have been at issue. More generally, there have been developments in the law of vacatur and decisions reflecting the difficulty of challenging arbitration decisions for "manifest disregard."

With the ever-increasing significance of ADR in the American judicial system, issues central to the integrity of the process continue to arise. This article surveys recent decisions on the consequences of alleged failures of arbitrators to disclose relationships and purported conflicts of interest. In addition, this article discusses notable decisions responding to concerns over the confidentiality of arbitration proceedings.

Finally, this article discusses cases addressing the authority of arbitrators to order non-parties to appear at pre-hearing depositions under the Federal Arbitration Act (FAA) and the question of when parties may be found to have waived their rights to demand arbitration through participation in litigation.

II. ARBITRATION ENFORCEMENT AND CLASS PROCEEDINGS

The Supreme Court has ruled several times in recent years on issues that have arisen at the crossroads between arbitration and class proceedings, often deciding in accordance with the federal policy favoring arbitration under the FAA over rights to pursue class claims under state or federal law. As set forth below, however, opposition to these provisions has continued and issues concerning their interpretation and validity have been at the center of legal, political, and public debate. The past year has seen conflicting decisions on these issues, as well as controversial action taken by federal agencies seeking to restrict arbitration in the consumer arena. Given this activity, the Supreme Court may return to address these issues once again in the future.

A. *Who Decides If a Class Arbitration Agreement Is Permissible?*

Arbitration agreements are often silent as to whether the arbitration can proceed on a class basis, so when parties seek to send such claims to arbitration, a preliminary question frequently arises as to *who decides* whether a class arbitration process is permissible. In 2003, a plurality of the Supreme Court in *Green Tree Financial Corp. v. Bazzle*[1] interpreted an agreement to submit to the arbitrator all disputes "arising from or relating to this contract or the relationships which result from this contract" as allocating the class arbitration availability question to the arbitrator.[2] However, a majority of the Supreme Court did not—and still has not—definitively ruled on the issue, and subsequent decisions have been interpreted as casting doubt on the *Green Tree* plurality's view.

In 2016, the California Supreme Court sided with the *Green Tree* plurality in *Sandquist v. Lebo Automotive, Inc.*[3] and held that the arbitrator should decide the issue under the parties' agreement.[4] In that case, the court stated that there was "no universal rule" to conclusively decide the issue and that the question should be governed "in the first instance" as a matter of the parties' agreement interpreted under state contract law.[5] Yet where the arbitration provision was silent on the issue, the court allocated the decision to the arbitrator under California law, finding that "no contrary presumption" required a different result under federal arbitration law.[6]

First examining the contractual language under California law, the court found two long-established interpretive principles dispositive: (1) when the allocation to arbitration or the courts is uncertain, doubts are resolved in favor or arbitration; and (2) ambiguities are construed against the drafters.[7] The court noted that the company "could have written the description of matters within the arbitrator's purview less comprehensively" or "prepared an arbitration provision that explicitly addressed any unstated desire to have the availability of class arbitration resolved by a court."[8]

The court then addressed whether the FAA imposes an interpretive presumption that would alter the conclusion reached under state law. Following the reasoning of the plurality in *Green Tree*, the court found that the availability of class arbitration did not fall within the "narrow" class of

1. 539 U.S. 444 (2003).
2. *Id.* at 451–53 (internal quotation marks omitted).
3. 376 P.3d 506 (Cal. 2016).
4. *Id.* at 509.
5. *Id.*
6. *Id.*
7. *Id.* at 513–14 (citations omitted).
8. Sandquist v. Lebo Auto., Inc., 376 P.3d 506, 514 (Cal. 2016).

gateway arbitrability questions that are subject to a presumption that the parties intended the courts, not the arbitrator, to decide the issue.[9] The *Sandquist* court reasoned that the availability of class arbitration, as the *Green Tree* plurality recognized, "has nothing to do with whether the parties agreed to arbitrate" but that "[i]nstead, the question is of the 'what kind of proceeding' sort that arises subsequent to the gateway issue of whether to have an arbitral proceeding at all."[10]

The dissenting opinion in *Sandquist* highlighted that the majority opinion was at odds with recent decisions by the Third, Fourth, and Sixth Circuits ("every federal court of appeals to consider the issue on the merits").[11] In the most recent such ruling, *Dell Webb Communities, Inc. v. Carlson*,[12] the Fourth Circuit held that class arbitration is a gateway issue of arbitrability to be decided by the courts, reasoning that the Supreme Court's "treatment of [*Green Tree*] in subsequent decisions has effectively disavowed that rationale."[13] The court concluded that "[b]ecause the primary goal in enforcing an arbitration agreement is to discern and honor party intent, and because of the fundamental differences between bilateral and class arbitration—which change the nature of arbitration altogether—we hold that whether parties agree to class arbitration is a gateway question for the court."[14]

This position is based on the view that the Supreme Court's decisions in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[15] and *AT&T Mobility LLC v. Concepcion*[16] undermined the premise that questions of class arbitr-

9. *Id.* at 517.

10. *Id*. The *Sandquist* court also rejected the argument that as a policy matter, arbitrators have incentives in the form of higher fees "that would cause them to favor contract interpretations allowing for class arbitration." *Id.* at 522.

11. *Id.* at 527 (Kruger, J., dissenting) (citing Dell Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 873–77 (4th Cir. 2016); Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 598 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 2291 (2014); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 330 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015)). *But see* Wells Fargo Advisors, L.L.C. v. Tucker, 2016 WL 3670577, at *3 (S.D.N.Y. July 1, 2016) (finding "the weight of authority among district courts in [the Second Circuit] is that the arbitrator, rather than the Court, should decide questions regarding the availability of class arbitration").

12. 817 F.3d 867 (4th Cir. 2016).

13. *Id.* at 874 (citing Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 & n.2 (2013) (explaining the high bar for overturning an arbitrator's decision on the grounds that he exceeded his powers, but stating: "We would face a different issue if [the petitioner] had argued below that the availability of class arbitration is a so-called 'question of arbitrability.' Those questions . . . are presumptively for courts to decide."); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 680 (2010) ("For one thing, the parties appear to have believed that the judgment in [*Green Tree*] requires an arbitrator, not a court, to decide whether a contract permits class arbitration. In fact, however, only the plurality decided that question." (internal citations omitted)).

14. *Dell Webb*, 817 F.3d at 869.

15. 559 U.S. 662 (2010).

16. 563 U.S. 333 (2011).

ability merely concern "procedural" questions. As set forth by the dissent in *Sandquist*: "In *Stolt-Nielsen*, the court [stated] . . . 'class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.'"[17] More specifically, switching to class arbitration "strikes at the heart of the bargain the parties make" in seeking less formality, lower costs, and greater efficiency; "calls into question which parties, precisely, are involved"; and dramatically increases the risks for defendants.[18] The *Sandquist* dissent reasoned that given the substantive import of such a decision, it makes little sense that a court would be unwilling to presume silence as consent to class arbitration, but would be willing to presume silence as consent to allow an arbitrator to make that decision.[19]

While the weight of recent federal appellate precedent supports the view that courts should decide the question, the California Supreme Court's decision this year makes clear that the issue is still a source of disagreement left unresolved by the U.S. Supreme Court.

B. *Enforceability of Class Waivers in Employment Agreements*

Another area of significant dispute this year is the use of class action waivers now found in many employment agreements that mandate individualized arbitration. The National Labor Relations Board (NLRB) has repeatedly found that provisions prohibiting class or collective actions violate employee rights to engage in protected concerted activity under the National Labor Relations Act (NLRA).[20] Over the past year, a circuit split has arisen on the validity of the NLRB's view.

The Fifth Circuit has repeatedly rejected the NLRB's position, most recently in *Citi Trends Inc. v. NLRB*,[21] where the court refused to reconsider its prior holdings in *D.R. Horton, Inc. v. NLRB*[22] and *Murphy Oil USA, Inc. v. NLRB*[23] that "an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved though individual arbitrations."[24] In *D.R. Horton*, the court rejected the NLRB's position that the use of class action procedure was a "substantive" right under the NLRA and held that "[b]ecause the Board's interpretation does not fall within the FAA's 'saving clause,' and because

17. Sandquist v. Lebo Auto., Inc., 376 P.3d 506, 525 (Cal. 2016). (quoting *Stolt-Nielsen*, 559 U.S. at 685).
18. *Id.* at 525–26.
19. *Id.* at 527.
20. 29 U.S.C. §§ 151.
21. 2016 WL 4245458 (5th Cir. Aug. 10, 2016).
22. 737 F.3d 344 (5th Cir. 2013).
23. 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (U.S. Sept. 9, 2016) (No. 16-307).
24. *Citi Trends*, 2016 WL 4245458, at *1 (internal quotation marks omitted).

the NLRA does not contain a congressional command exempting the statute from application of the FAA," the arbitration agreement and class action waiver "must be enforced according to its terms."[25]

Similarly, in *Cellular Sales of Missouri, LLC v. NLRB*,[26] the Eighth Circuit refused a request to reconsider its prior holding and denied enforcement of an NLRB decision that a class action waiver in the employer's arbitration agreement restricted the employee's substantive rights to engage in concerted activity in violation of the NLRA.[27]

However, in *Lewis v. Epic Systems Corp.*,[28] the Seventh Circuit held that a company's arbitration agreement, which required employees to agree to bring wage-and-hour claims through individual arbitration and did not permit collective arbitration or collective action in any other forum, violated the NLRA.[29] The court concluded that filing a collective or class action suit constitutes "concerted activit[y]" under Section 7 of the NLRA by looking (1) to the plain meaning of the word "concerted" and (2) to the NLRA's history and purpose to equalize bargaining power "by allowing employees to band together."[30] Moreover, the court found that even if Section 7 were ambiguous—which it did not—it would still find the NLRB's interpretation sensible and entitled to judicial deference.[31]

The court then rejected both the argument that the FAA overrides the labor law provision and the reasoning of the Fifth Circuit in *D.R. Horton*. The Seventh Circuit noted that *D.R. Horton* had drawn on dicta from recent Supreme Court decisions in *Concepcion* and *American Express Co. v. Italian Colors Restaurant*[32] to reason that "the effect of requiring class arbitration is to disfavor arbitration" because class arbitration "sacrifices arbitration's 'principal advantage' of informality, 'makes the process slower, more costly, and more likely to generate procedural morass than final judgment,' 'greatly increases risks to defendants,' and 'is poorly suited to the higher stakes of class litigation.'"[33] Accordingly, the Fifth Circuit

25. *D.R Horton*, 737 F.3d at 362.

26. 824 F.3d 772 (8th Cir. 2016).

27. *Id.* at 774–76 (following Owen v. Bristol Care, Inc., 702 F.3d 1050, 1053–55 (8th Cir. 2013)). The *Cellular Sales* court did, however, enforce the NLRB's order with respect to the finding that the defendant's broad arbitration agreement, which required "[a]ll claims, disputes, or controversies arising out of, or in relation to" employment with the company "shall be decided by arbitration," violated Section 8(a)(1) because its employees would reasonably interpret the agreement to limit or preclude their rights to file unfair labor practice charges with the Board. *Id.* at 777–78 (internal quotation marks omitted).

28. 823 F.3d 1147 (7th Cir. 2016), *petition for cert. filed* (U.S. Sept. 2, 2016) (No. 16-285).

29. *Id.* at 1151.

30. *Id.* at 1152–53.

31. *Id.* at 1153.

32. 133 S. Ct. 2304 (2013).

33. Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1157–58 (7th Cir. 2016) (quoting D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 360 (5th Cir. 2013)).

in *D.R. Horton* then reasoned that, given the FAA's policy favoring arbitration, "any law that even incidentally burdens arbitration—here, Section 7 of the NLRA—necessarily conflicts with the FAA."[34]

In *Epic*, however, the Seventh Circuit relied on the FAA's savings clause, which "confirms that agreements to arbitrate 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,' and [i]llegality is one of those grounds."[35] The court found that the Fifth Circuit had failed to harmonize the statutes—specifically, because the provision at issue was unlawful under the NLRA, the provision met "the criteria of the FAA's savings clause for nonenforcement."[36] Under the Seventh Circuit reasoning, "the NLRA and FAA work hand in glove."[37]

In August 2016, the Ninth Circuit in *Morris v. Ernst & Young, LLP*[38] joined the Seventh Circuit and ruled that mandating concerted action waivers as a condition of employment violates the NLRA and was unenforceable under the FAA.[39] The district court had dismissed a class action alleging violation of the Fair Labor Standards Act[40] and ordered individual arbitration based on the employment agreement.[41] In reversing, the Ninth Circuit gave deference to the NLRB's interpretation that the NLRA's statutory right "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" includes a right "to join together to pursue workplace grievances, including through litigation."[42] The court found the NLRB's interpretation consistent with the clear intent of Congress in passing the NLRA.[43] It also reasoned that the FAA did not dictate a contrary result because the arbitration requirement was not the problem: "The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA. The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration."[44] The court concluded that "[w]hen an illegal provi-

34. *Id.*

35. *Id.* at 1157 (quoting 9 U.S.C. § 2 and citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 (2006)).

36. *Id.*

37. *Id.* Moreover, the court found that the NLRA was actually pro-arbitration, noting "it is entirely possible that the NLRA would not bar Epic's provision if it were included in a collective bargaining agreement," and that if the provision had permitted collective arbitration, "it would not have run afoul of Section 7 either." *Id.* at 1158. The court concluded that "finding the NLRA in conflict with the FAA would render the FAA's savings clause a nullity." *Id.* at 1159.

38. 834 F.3d 975 (9th Cir. 2016), *petition for cert. filed* (U.S. Sept. 8, 2016) (No. 16-300).

39. *Id.* at 979.

40. 29 U.S.C. § 201 (FLSA). The plaintiffs also asserted violations of California labor laws.

41. *Morris*, 834 F.3d at 979.

42. *Id.* at 980 (internal quotation marks omitted).

43. *Id.* at 981.

44. *Id.* at 984.

sion not targeting arbitration is found in an arbitration agreement, the FAA treats the contract like any other; the FAA recognizes a general contract defense of illegality."[45] Echoing the Seventh Circuit in *Epic*, the court stated that the FAA "does not mandate the enforcement of contract terms that waive substantive federal rights," and when it professes to do so, "the FAA's saving clause prevents a conflict . . . by causing the FAA's enforcement mandate to yield."[46]

Finally, the issue also arose before a Second Circuit panel in *Patterson v. Raymours Furniture Co.*[47] In a summary order addressing the "irreconcilabl[e] split" that has now developed on the question, the court indicated that "[i]f we were writing on a clean slate, we might well be persuaded . . . to join the Seventh and Ninth Circuits and hold that the [provision's] waiver of collective action is unenforceable" for the reasons "forcefully stated" in the *Epic* and *Morris* opinions.[48] However, the court found that it was bound by the Second Circuit's prior decision in *Sutherland v. Ernst & Young*,[49] which "aligns our Circuit on the other side of the split," "until such time as [it is] overruled either by an *en banc* panel of our Court or by the Supreme Court."[50]

With petitions for writs of certiorari filed in the *Lewis*, *Morris*, and *Murphy Oil* cases, the Supreme Court may once again step in to resolve another difficult issue on the interplay between the federal policies supporting arbitration under the FAA and the interests of plaintiffs pursing relief on a class basis.

C. *Federal Agency Rules Restricting Mandatory Arbitration Clauses in Consumer Financial and Nursing Home Agreements*

The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act[51] directed the Consumer Financial Protection Bureau (CFPB) to study pre-dispute arbitration agreements and authorized the agency to issue regulations restricting or prohibiting the use of arbitration agreements if the CFPB found that such rules would be in the public interest and for the protection of consumers.[52] In May 2016, the CFPB an-

45. *Id.* at 985.

46. *Id.* at 986; *see also In re* Fresh & Easy, LLC, 2016 WL 5922292 (Bankr. D. Del. Oct. 11, 2016) (holding that class waiver violates NLRA and that inclusion of provision allowing employees to follow procedures to opt-out provision did not save agreement at issue).

47. 2016 WL 4598542 (2d Cir. Sept. 2, 2016).

48. *Id.* at *2.

49. 726 F.3d 290, 296 (2d Cir. 2013) (holding that "[n]o contrary congressional command requires us to reject the waiver of class arbitration under the [Fair Labor Standards Act]").

50. *Patterson*, 2016 WL 4598542, at *2 (internal quotation marks omitted).

51. Pub. L. No. 111-203, § 1028(a), 124 Stat. 1376 (2010).

52. *See* Notice of Proposed Rule at 3, http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf; Dodd-Frank Section 1028(b). In May 2015, the CFPB issued its *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank*

nounced that it was seeking comments on a proposed rule that would prohibit providers from using mandatory arbitration agreements in consumer financial contracts to block class actions in court and require them to insert language into their arbitration provisions reflecting this limitation.[53] The rule would also require providers that use such arbitration agreements to submit records relating the arbitral proceedings to the CFPB.[54] The proposed rule has generated a large number of comments and strong reaction from politicians and interest groups on both sides of the issue, and litigation is expected if the rule is adopted.

One step ahead of the CFPB, the Centers for Medicare & Medicaid Services (CMS) published a new rule on October 4, 2016, effective November 28, 2016, which provides that nursing home facilities "must not enter into" an "agreement for binding arbitration with a resident or [his] representative" until after a dispute arises between the parties. Under the new rule, Medicare and Medicaid-participating long term care (LTC) facilities can no longer enter into pre-dispute binding arbitration agreements with their residents or their representatives and an LTC facility cannot require the resident to sign a post-dispute arbitration agreement as a condition of the resident's continuing to stay at the facility. The rule does not affect existing arbitration agreements or facilities that do not participate in the Medicare or Medicaid programs.[55]

Like the CFPB's proposed rule, this rule is also expected to face legal challenges in court, as foreshadowed by the numerous comments submitted on the proposed rule. Some commentators argued that "both Congress and the courts have repeatedly refused to regulate arbitration agreements between LTC facilities and their residents."[56] Other commentators pointed to "cases in which courts rejected various federal agencies' attempts to prohibit the enforcement of arbitration agreements" and argued that "when Congress intends to give an agency authority to prohibit or impose conditions on the use of arbitration agreements it does so with unambiguous statutory language, and it did not do so in the Social Security Act."[57] Still others cited a 2012 Supreme Court *per curiam* ruling in

Wall Street Reform and Consumer Protection Act § 1028(a). Among the report's findings was that the vast majority of arbitration agreements also included provisions stating that arbitration could not proceed on a class basis. *See* Notice at 44.

53. Press Release, Consumer Finance Protection Board, CFPB Proposes Prohibiting Mandatory Arbitration Clauses That Deny Groups of Consumers Their Day in Court (May 5, 2016), http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/.

54. *See* Notice, *supra* note 52, at 3–4.

55. See 42 C.F.R. § 483.70(n).

56. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities; Arbitration Rule, 81 Fed. Reg. 68688, 68790 (Oct. 4, 2016).

57. *Id.*

Marmet Health Care Center, Inc. v. Brown[58] that reversed a decision of the Supreme Court of Appeals of West Virginia holding that predispute arbitration agreements pertaining to personal injury or wrongful death claims were unenforceable under West Virginia's public policy.[59] In *Marmet*, the court held that "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[60]

CMS's view, however, is that the FAA "applies only to existing arbitration agreements" between private parties" and "does not compel" arbitration, and since "it does not prescribe circumstances in which arbitration agreements must be used, it does not impinge on federal agencies' rights to issue regulations regulating the conditions of adoption of such agreements, assuming that the Secretary otherwise has proper statutory authority."[61] CMS believes that because the regulation "would have no legal effect on the enforceability of existing pre-dispute arbitration agreements," the terms of the FAA are not implicated.[62] Additionally, while there is no explicit statutory authority for CMS to restrict the use of arbitration agreements, CMS believes it has sufficient authority since the Department "regularly requires providers and suppliers of health care items and services to forgo certain rights they might otherwise have with respect to Medicare and Medicaid patients."[63] Additionally, CMS points to the statutory charge to the Secretary concerning the health, safety, and welfare of LTC facility residents and states that "there is significant evidence that pre-dispute arbitration agreements have a deleterious impact on the quality of care for Medicare and Medicaid patients, which clearly warrants our regulatory response."[64]

The new rules proposed by federal agencies restricting the use of mandatory arbitration provisions, along with the first appellate court rulings finding that mandatory class waivers in employment provisions violate then NLRA, may be signs of a potential turning of the tide in the debate over the use of individual arbitration to preclude class proceedings. In past years, however, the Supreme Court has held firm in opposing efforts to invalidate arbitration agreements, and the coming year may see whether the Court continues on the path of enforcing federal policies favoring arbitration under the FAA in the face of efforts to bring class and collective actions.

58. 132 S. Ct. 1201 (2012).
59. *Id.* at 1203.
60. *Id.*
61. 81 Fed. Reg., *supra* note 56, at 68791.
62. *Id.*
63. *Id.*
64. *Id.*

III. PROFESSIONAL SPORTS ARBITRATION UNDER THE LMRA

In 2016, two well-publicized appellate court rulings addressed arbitration decisions imposing discipline by the National Football League (NFL) on players. In both cases, district courts had vacated the arbitration rulings, but the appellate courts reversed and upheld the decisions of the arbitrators under a highly deferential standard of review.

The NFL Players Association (NFLPA) is the exclusive bargaining representative for players in the NFL under a collective bargaining agreement (CBA), which contains a comprehensive system governing the disciplining of players.[65] The CBA authorizes the Commissioner to impose discipline for "conduct detrimental to the integrity of, or public confidence in, the game of professional football" and establishes an arbitration process for resolving disputes over player discipline.[66] Specifically, any player sanctioned for conduct detrimental to the game has the right to appeal to the Commissioner, who may hear the appeal himself or may designate one or more persons to serve as hearing officers.[67]

In *National Football League Players Association on behalf of Peterson v. National Football League*, the Eighth Circuit reversed the district court and held that an arbitrator did not exceed his authority or disregard the "law of the shop" (which forbids retroactive application of a new disciplinary policy) in upholding discipline imposed by NFL Commissioner Roger Goodell on Adrian Peterson, a Minnesota Vikings running back, for conduct detrimental to the game of football.[68] Peterson was suspended following his plea of *nolo contendere* to a charge of misdemeanor reckless assault on one of his children, which had allegedly occurred in May 2014.[69] In reaching his decision, the Commissioner relied on "baseline discipline" of a six game suspension for a first domestic violence offense, which was announced in an August 2014 communication—several months after the alleged assault—and on aggravating circumstances.[70]

After the NFLPA appealed the Commissioner's decision on Peterson's behalf, the Commissioner designated Harold Henderson to hear the appeal.[71] Henderson, who had previously served as the NFL's vice president for labor relations and chairman of the NFL management Council

65. *See* Nat'l Football League Players Ass'n v. Nat'l Football League, 831 F.3d 985, 990 (8th Cir. 2016).
66. *Id.* at 989.
67. *Id.* at 993–96.
68. The Commissioner originally suspended Peterson indefinitely and fined him a sum equivalent to six games, but then reinstated him after the district court ruling so the remaining dispute when the Court of Appeals ruled concerned whether the League may collect the fine imposed by the Commissioner and upheld by the arbitrator. *Id.* at 993.
69. *Id.* at 990.
70. *Id.*
71. *Id.*

Executive Committee, denied a request from the players association to recuse himself.[72] Henderson then affirmed Peterson's discipline, finding it fair and consistent and concluding that the August 2014 communication setting forth the baseline discipline did not constitute a change from the prior existing policy.[73] The NFLPA petitioned the district court to vacate the arbitration award.[74] The district court found the Commissioner had retroactively punished Peterson by applying a "new" policy announced in the August 2014 memorandum and that the arbitrator had exceeded his authority by hypothesizing as to whether the Commissioner could have imposed the discipline in the same manner under the previous policy.[75]

In reversing, the Eight Circuit cited the "very limited" role of the courts in arbitration cases under the LMRA.[76] Because of this limited role, the Eighth Circuit found that it should not "apply [its] own view of what would be appropriate player discipline" or "review whether the arbitrator 'correctly' construed" the CBA.[77] According to the court, the arbitral decision "must stand" as long as the arbitrator "is even arguably construing or applying the contract and acting within the scope of his authority" and vacatur "is appropriate only when the decision does not draw its essence from the collective bargaining agreement, and the arbitrator instead has dispense[d] his own brand of justice."[78] Under this deferential standard, the court found that the arbitrator was at least arguably applying the contract, including the law of the shop, when he found that the August memo only reinforced pre-existing policy.[79] Additionally, the court rejected the argument that the arbitrator exceeded his authority, either by adjudicating a hypothetical discipline or by altering the issues presented for decision, reasoning that the parties did not stipulate to the issues for arbitration and the "scope of the arbitrator's authority, therefore, was itself a question delegated to the arbitrator."[80]

The court also rejected the assertion that the arbitrator was "evidently partial," relying on prior precedent that held that the NFLPA had "waived its objection . . . by agreeing in the CBA that the Commissioner's

72. *Id.* at 990–91.
73. *Id.* at 991.
74. *Id.* at 992.
75. *Id.* at 991.
76. *Id.* at 993 ("This case arises under the [LMRA], in which Congress evinced a preference for private settlement of labor disputes without the intervention of government." (internal quotation marks omitted)).
77. *Id.*
78. *Id.* (internal quotation marks omitted).
79. *Id.* at 997.
80. *Id.*

designee . . . could serve as arbitrator."[81] Finally, the court rejected the contention that the arbitration was "fundamentally unfair," stating that "[f]undamental fairness is not a basis for vacatur identified in the [LMRA] or the [FAA]."[82]

The ruling in *Peterson* came shortly after *National Football League Management Council v. National Football League Players Association* (*Brady*).[83] In *Brady*, the Second Circuit similarly reversed the district court and upheld an arbitration decision rendered by the NFL Commissioner confirming discipline (a four-game suspension) imposed on New England Patriots quarterback Tom Brady for his involvement in a scheme to deflate footballs during a playoff game.[84]

The NFL retained Theodore Wells, Jr., and a law firm to conduct an independent investigation into whether there had been improper ball tampering before or during the game.[85] The investigation's report found that it was "more probable than not" that two Patriots equipment officials had "participated in a deliberate effort" to deflate game balls during the game and that Brady had been "at least generally aware" of their actions.[86] The report also found that Brady and one of the equipment officials had unusual communications when the investigation was announced and that the investigation had been impaired by Brady's refusal to make documents, text messages, and emails available.[87] Following the report, the NFL notified Brady that Goodell had authorized a four-game

81. *Id.* at 998 (internal quotation marks omitted). The court concluded:

> Allowing the Commissioner or the Commissioner's designee to hear challenges to the Commissioner's decisions may present an actual or apparent conflict of interest for the arbitrator. But, the parties bargained for this procedure, and the Association consented to it. *See* CBA art. 46 § 2(a). It was foreseeable that arbitration under the Agreement sometimes would involve challenges to the credibility of testimony from Goodell or other League employees. When parties to a contract elect to resolve disputes through arbitration, a grievant "can ask no more impartiality than inheres in the method they have chosen."

Id. (quoting Winfrey v. Simmons Foods, Inc., 495 F.3d 549, 551 (8th Cir. 2007)).

82. *Id.* at 999. The court stated:

> The Players Association does not identify any structural unfairness in the Article 46 arbitration process for which it bargained. The Association's fundamental fairness argument is little more than a recapitulation of its retroactivity argument against the merits of the arbitrator's decision. We have never suggested that when an award draws its essence from the collective bargaining agreement, a dissatisfied party nonetheless may achieve vacatur of the arbitrator's decision by showing that the result is "fundamentally unfair."

83. 820 F.3d 527 (2d Cir. 2016).
84. *Id.* at 532.
85. *Id.* at 533.
86. *Id.*
87. *Id.* at 534.

suspension for "conduct detrimental to the integrity of and public confidence in the game of professional football."[88]

After Brady appealed through the NFLPA, Commissioner Goodell exercised his discretion under the CBA to serve as the hearing officer himself.[89] After the hearing, Goodell affirmed the four-game suspension.[90] Based upon new evidence that came to light only shortly before the hearing that Brady had had his cell phone destroyed, the Commissioner found that Brady had not only failed to cooperate but also "made a deliberate effort to ensure that investigators would never have access to information that he had been asked to produce."[91] The Commissioner, serving as the hearing officer, drew an adverse inference that the phone would have contained incriminating evidence.[92] After the district court vacated the award, the NFL appealed and the Second Circuit reversed.[93] Like the Eighth Circuit's decision in *Peterson*, the court in *Brady* premised its decision on the "narrowly circumscribed" review of awards under the LMRA, which it described as "among the most deferential in the law."[94] The court described the arbitrator's authority here as especially broad, since he was authorized under the CBA to impose discipline for "conduct detrimental to the integrity of, or public confidence, in the game of professional football."[95]

The court rejected the lower court's bases for overturning the suspension. First, the court rejected the reasoning that Brady had no advance notice (as required by the law of the shop) that either his conduct was prohibited or that it could serve as grounds for suspension.[96] Second, the court rejected the conclusion that the Commissioner had improperly excluded the testimony of the NFL General Counsel in the arbitration proceedings concerning his role in the preparation of the Wells report, reasoning that procedural questions, "such as which witnesses to hear and which evidence to receive or exclude, are left to the sound discretion of the arbitrator and should not be second-guessed by the courts."[97] Addi-

88. Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n, 820 F.3d 527, 534 (2d Cir. 2016).

89. *Id.*

90. *Id.* at 535.

91. *Id.*

92. *Id.*

93. *Id.* at 535–36.

94. *Id.* at 532. ("We must simply ensure that the arbitrator was 'even arguably construing or applying the contract and acting within the scope of his authority" and did not ignore the plain language of the contract." (citing United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987))).

95. *Id.* (internal quotation marks omitted).

96. *Id.* at 538–39.

97. *Id.* at 545 (citations omitted). The court recognized that a narrow exception exists under the FAA only where "'the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy'" and if in such circumstances "'fundamental fairness is violated.'" *Id.* (citations omitted). The court found that any insight the

tionally, the court found no merit in the NFLPA's argument that the Commissioner was evidently partial and should have recused himself because it was improper for him to adjudicate the propriety of his own conduct. The court reasoned that arbitration is a matter of contract, and "the parties to an arbitration can ask for no more impartiality than inheres in the method they have chosen."[98]

The decision emphasized, as did the court in *Peterson*, the "substantial deference" afforded to arbitration decisions issued pursuant to the terms of the CBA under the LMRA and concluded that under such standard of review, "this case is not an exceptional one that warrants vacatur."[99]

IV. VACATUR

The ongoing battle over the finality of arbitration awards was illustrated in *Bankers Life & Casualty Insurance Co. v. CBRE, Inc.*[100] In this case, Bankers had signed a listing agreement with CBRE, under which Bankers agreed to sublease its office space if CBRE could find an alternative location for Bankers and Bankers could net $7 million from the deal.[101] CBRE proposed such a transaction, but in doing so made a $3.1 million miscalculation in its cost benefit analysis provided to Bankers.[102] Bankers filed for arbitration seeking to recover the $3.1 million.[103] The panel award, upheld by the district court, found that although CBRE had made a material mistake, the cost benefit analysis contained a disclaimer that its calculations were not guaranteed.[104] In a decision authored by Judge Posner, the Seventh Circuit reversed, and held that the arbitration panel had exceeded its authority because the CBA was not part of the contract.[105]

general counsel might have had and the role he might have played in the preparation of the report were collateral to the issues in the arbitration and that the commissioner's decision to exclude the testimony thus "fits comfortably within his broad discretion to admit or exclude evidence and raises no questions of fundamental fairness." *Id.* at 546. Similarly, the court found that the arbitrator's denial of access to investigative notes and files from attorneys involved in the investigation did not amount to fundamental unfairness warranting vacatur because the CBA did not require the exchange of such information. *Id.*

98. *Id.* at 548 ("Here, the parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator. . . . They did so knowing full well that the Commissioner had the sole power of determining what constitutes 'conduct detrimental,' and thus, knowing that the Commissioner would have a stake both in the underlying discipline and in every arbitration.").

99. *Id.* at 532.

100. 830 F.3d 729 (7th Cir. 2016).

101. *Id.* at 730.

102. *Id.* at 730–31.

103. *Id.* at 731.

104. *Id.*

105. *Id.*

The court stated that the arbitrators' role "was to interpret the agreement, not additions to it by one party without the consent of the other. . . . The arbitrators attempted to amend the contract with a document that was not part of the contract. The district court let them get away with it."[106] Judge Posner's opinion did acknowledge the limited grounds to challenge arbitration awards and noted "[t]here was a time when commercial arbitration awards contained *no* reasoning, in order to avoid attracting the scrutiny of judges, who were fiercely hostile to arbitration. . . ."[107] Despite that well expressed regard for finality, the court reversed, finding that where "the parties bargained for a reasoned award," as they did by selecting arbitration that required the award to "contain a concise written statement of the reasons for the Award," "reasoning should be part of the 'face of the award.'"[108] The award therefore ignored the parties' agreement and vacatur was required.[109] Strongly dissenting, Judge Sykes agreed the arbitrators had mistakenly construed key documents, but advocated for more limited judicial review.[110]

The authority of a court to vacate an arbitration award that is found to be in manifest disregard of the law remains unclear. The FAA does not include manifest disregard as a ground for vacatur. In *Hall Street Associates, L.L.C. v. Mattel Inc.*,[111] the Supreme Court held that the enumerated grounds for vacatur in FAA Sections 10 and 11 are exclusive,[112] but allowed for ambiguity when it stated that common law grounds for more searching review could exist.[113] This ambiguity has resulted in persisting differences in judicial views of the courts' authority to vacate an award found to be in manifest disregard of the law.[114]

106. *Id.* at 732.
107. *Id.*
108. *Id.* at 733.
109. *Id.*
110. *Id.* at 735 (Sykes, J., dissenting). Other cases in the Seventh Circuit have also noted that judicial review of arbitration awards is limited but not unlimited. *See, e.g.*, U.S. Soccer Fed'n, Inc. v. U.S. Nat'l Soccer Team Players Ass'n, 2016 WL 5239838 (7th Cir. Sept. 22, 2016) (reversing the district court and vacating the award where the parties agreed to arbitrate but also agreed to preserve their right to challenge the decision). Another case deferring to the award and reversing a district court ruling is *Southwest Regional Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524 (9th Cir. 2016).
111. 552 U.S. 576 (2008).
112. *Id.* at 583–84 (stating "We now hold that §§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification.").
113. *Id.* at 590 ("In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well . . . common law, for example, where judicial review of different scope is arguable.").
114. Presented with an opportunity to clarify the issue, the Court denied a petition for writ of certiorari that challenged the validity of manifest disregard as a ground for vacatur. *See* Dewan v. Walia, 544 F. App'x 240, 245–48 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1788 (2014).

In *Sutherland Global Services v. Adam Technologies International SA de C.V.*,[115] the Second Circuit interpreted *Hall Street* to hold that manifest disregard can be a valid ground for vacatur.[116] While Section 10 of the FAA provides the exclusive grounds for vacatur of an arbitration award, *Sutherland* held the manifest disregard standard acts as a "judicial gloss" for those grounds.[117] Litigants challenging an award for manifest disregard, however, bear a heavy burden. As the court stated, "'[i]f the arbitrator has provided even a barely colorable justification for his or her interpretation of the contract, the award must stand.'"[118] In *Sutherland*, for example, the award at issue was challenged on the basis that the arbitration panel manifestly disregarded a provision of the contract requiring a statement of work.[119] The court found that the panel had developed an interpretation of the contract that excused the absence of a required statement of work and held that contract interpretation, regardless of error, does not rise to grounds for vacatur, even under a manifest disregard challenge.[120]

The Third Circuit also considered a manifest disregard claim relating to federal securities law in *Goldman v. Citigroup Global Markets, Inc.*[121] The plaintiffs filed for vacatur on the ground that the Financial Industry Regulatory Authority (FINRA) panel manifestly disregarded the statutory language of 15 U.S.C. § 78(g) in concluding that no margin call had occurred.[122] The district court found that claim "insufficient to raise a substantial question of federal law."[123] The Third Circuit affirmed, finding no "actually disputed" question of law.[124] Without a substantial question of federal law, the court said it "need not inquire into the continuing validity of manifest disregard as a basis for vacatur" and affirmed dismissal for lack of subject matter jurisdiction.[125]

115. 639 F. App'x 697 (2d Cir. 2016).

116. *Id.* at 699.

117. *Id.* (stating that "we have nevertheless held that, 'as "judicial gloss on the specific grounds for vacatur of arbitration awards,"' in the FAA, an arbitrator's 'manifest disregard' of the law or of the terms of the arbitration agreement 'remains a valid ground for vacating arbitration awards'" (quoting Schwartz v. Merrill Lynch & Co., 665 F.3d 444, 451–52 (2d Cir. 2011)).

118. *Id.* (quoting *Schwartz*, 665 F.3d at 451–52).

119. *Id.* at 699–700. The parties had entered a contract for the provision of call center services, and a portion of the master services agreement required a statement of work to be executed prior to any obligation to pay under the statement of work. *Id.*

120. *Id.* at 700.

121. 834 F.3d 242 (3d Cir. 2016).

122. *Id.* at 247–48.

123. *Id.* at 256.

124. *Id.* at 257 (citing Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005)).

125. *Id.* at 256 n.13; *see also* Doscher v. SIA Port Grp. Sec. LLC, 832 F.3d 372 (2d Cir. 2016) (finding no manifest disregard because the petition did not present a substantial question of any violation of federal duty or obligation). On the viability of manifest disregard, the

The Sixth Circuit also chose not to decide the viability of manifest disregard as a challenge to an arbitration award in *Schafer v. Multiband Corp.*,[126] which reversed the district court's vacatur of an arbitration award for manifest disregard of ERISA law.[127] The lower court said the arbitration panel determined that ERISA "categorically bars all private indemnification agreements between plan fiduciaries and third parties," when no such precedent exists.[128] The appellate court did not rule on whether manifest disregard is ground for vacatur but reversed the order to vacate, acknowledging that the arbitrator's decision was an apparent error of law, but not manifest disregard.[129] The case was remanded for further proceedings.[130]

The Southern District of New York affirmed an arbitration award in the face of a manifest disregard challenge in *Benihana, Inc. v. Benihana of Tokyo, LLC*.[131] The award granted injunctive relief to Benihana for violations of its licensing agreement, but found termination of the agreement to be unreasonable.[132] Benihana claimed that the panel's holding was so unfounded in law that it essentially rewrote the contract, constituting a manifest disregard of the agreement.[133] The court held that manifest disregard stands as a valid standard for the vacating of an arbitration award because it is a gloss term on the statutory grounds of FAA Section 10 and a doctrine of "last resort" for "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent but where none of the provisions of the FAA apply."[134] The court affirmed the arbitration award in its entirety because, despite finding the dissenting arbitrator more correct, the court ultimately held that a panel's contract interpretation does not fall within the extremely narrow grounds for judicial review under manifest disregard.[135] Rather, all that is required for confirmation is a "barely colorable justification for the outcome reached."[136]

Third Circuit has stated, "this court has not yet weighed-in. We decline the opportunity to do so now." Whitehead v. Pullman Grp., LLC, 811 F.3d 116, 121 (3d Cir. 2016).

126. 629 F. App'x 653 (6th Cir. 2015).

127. *Id.* at 658.

128. *Id.* at 655.

129. *Id.* at 657–58.

130. *Id.* at 658. The Sixth Circuit also upheld the award in *Samaan v. General Dynamics Land Systems*, 835 F.3d 593 (6th Cir. 2016) (finding the manifest disregard argument was waived).

131. 2016 WL 3913599 (S.D.N.Y. July 15, 2016).

132. *Id.* at *6–8.

133. *Id.* at *12–15.

134. *Id.* at *10 (internal quotation marks omitted).

135. *Id.* at *10–13 ("Its inopportune choice of words aside, the panel majority's conclusion that keeping the Honolulu restaurant in the Aoki family was a purpose of the License Agreement was, therefore, based upon, and within its broad authority to construe, the agreement. This conclusion is beyond the scope of the Court's review.").

136. *Id.* at *10.

In *ICAP Corporates, LLC v. Drennan*,[137] the District of New Jersey avoided ruling on manifest disregard, but vacated an award of $850,000 in compensatory damages for work performed as head of financial futures and options for ICAP.[138] The court acknowledged multiple extra-statutory, common law grounds for vacatur, including the award being in manifest disregard of the law.[139] The court did not actually decide the manifest disregard issue, but instead vacated the award by finding the arbitration panel had acted in a way that was fundamentally unfair under FAA Section 10(a)(3) when it changed the schedule of arbitration proceedings without warning, preventing ICAP from presenting witnesses it was prepared to call on the scheduled dates.[140]

The state courts appear less inclined to use manifest disregard to vacate arbitration awards. In *Hoskins v. Hoskins*,[141] for example, the Supreme Court of Texas rejected manifest disregard as a basis for vacatur of an arbitration award. The case was governed by the Texas General Arbitration Act (TAA), which mirrors the FAA on grounds for vacatur.[142] The challenge claimed "the arbitrator demonstrated a manifest disregard of the law by ignoring the bankruptcy court's injunction, deciding questions of fact in a summary judgment proceeding, dismissing claims against Clifton that were not pled or argued, and disregarding established Texas law."[143] The court held that "[t]he statutory text could not be plainer: the trial court 'shall confirm' an award unless vacatur is required under one of the enumerated grounds. . . . [T]he TAA leaves no room for courts to expand on those grounds, which do not include an arbitrator's manifest disregard of the law."[144]

Manifest disregard met a similar fate in *Cunningham v. LeGrand*,[145] where the West Virginia Supreme Court of Appeals affirmed an award denying petitioner's claims and granting attorney fees to the respondents.[146] One member of an LLC argued manifest disregard to challenge an award denying his request for control of the company and access to all

137. 2016 WL 644145 (D.N.J. Feb. 17, 2016).

138. *Id.* at *2–8.

139. *Id.* at *4 ("Vacatur has been permitted if the award is completely irrational. . . . An arbitrator's manifest disregard for the law is sufficient to vacate an arbitration award." (internal citations omitted)).

140. *Id.* at *5 ("The record reflects that ICAP was prepared to present its evidence and witnesses on the date scheduled and that the Panel altered that schedule, to ICAP's detriment, mid-hearing." (internal citations omitted)).

141. 497 S.W.3d 490 (Tex. 2016).

142. Texas General Arbitration Act § 171.008.

143. *Hoskins*, 497 S.W.3d at 492–93 (internal quotation marks omitted).

144. *Id.* at 494.

145. 785 S.E.2d 265 (W. Va. 2016).

146. *Id.* at 273.

financial records.[147] The arbitrator decided that the request for all records was unreasonable.[148] In rejecting the member's argument, the court interpreted *Hall Street* to hold that manifest disregard is not a legitimate basis for vacatur, stating the "suggestion to this Court that the United States Supreme Court has sanctioned the assertion of a particular non-FAA ground for seeking to vacate an arbitration award lacks both candor and legal support."[149]

Overall, manifest disregard as a ground for vacatur remains in an unsettled grey zone.

V. MANDATORY DISCLOSURES IN ARBITRATION

With the broad power given arbitrators, the hurdles for review of even an incorrect decision, and the absence of public vetting of arbitrators, the integrity of the arbitral process depends on disclosure. Evident partiality of the arbitrator or an undisclosed conflict is one of a few well-recognized grounds for vacatur.[150] On the other hand, disclosure requirements that are too stringent unnecessarily encumber and delay the process. Recent cases explore this delicate balance.

Several opinions over the past year examined the permissible level of relationship between an arbitrator and parties or their counsel to determine the existence of bias sufficient to question the integrity of the award. For example, in *Cooper v. WestEnd Capital Management, L.L.C.*,[151] the Fifth Circuit refused to vacate the award of a JAMS arbitrator who failed to disclose a relationship between one of the parties and a different uninvolved arbitrator (Bates) who also worked for JAMS.[152] Rejecting the argument that two arbitrators working for the same organization was improperly undisclosed, the court said "there is no evidence that Bates had any relationship with the Arbitrator other than the fact that both serve as JAMS arbitrators" and "[m]ost importantly, Cooper points to nothing in the record that would indicate that the Arbitrator had any prejudice against him."[153]

147. *Id.*
148. *Id.* at 267.
149. *Id.* at 270.
150. 9 U.S.C. § 10(a)(2); *see* Noel Madamba Contr. LLC v. Romero, 364 P.3d 518 (Haw. 2015), *reconsideration granted in part by* 2016 WL 197028 (Haw. Jan. 12, 2016).
151. 832 F.3d 534 (5th Cir. 2016).
152. The court also seemed to consolidate the common law manifest disregard standard and the statutory prohibition in FAA § 10(a)(4) on an award that exceeds an arbitrator's contractual powers. The court specifically referenced FAA § 10(a)(4), stating that an award may be vacated where arbitrators exceeds their powers, but went on to use manifest disregard reasoning, stating "[t]he question is whether the arbitrator's award was . . . so unconnected with the wording and purpose of the [contract] as to manifest an infidelity to the obligation of an arbitrator." *Id.* at 545.
153. *Id.*

Similarly, disclosure of the arbitrator's consulting practice was not mandated in *Baxter v. Bock*.[154] In this case, involving a fee dispute, the arbitrator had unquestionably erred but refused to correct his error.[155] Later, it was "discovered the arbitrator was in the business of auditing attorney bills and had written extensively about attorney overbilling."[156] Specifically, the arbitrator's undisclosed expertise was in reviewing attorney bills rather than in representing one side or the other.[157] Because his practice was not devoted exclusively to one side in fee disputes and he had no particular economic incentive affecting his ruling, there was no concern the arbitrator might tend to favor "'steady customers'" or "parties in the industry who commonly appear before them."[158] The court recognized that the arbitrator "cannot reasonably be expected to identify and disclose all events in the arbitrator's past, including those not connected to the parties, the facts, or the issues in controversy, that conceivably might cause a party to prefer another arbitrator."[159]

The materiality of the non-disclosed information can be determinative of implied bias. In *National Indemnity Co. v. IRB Brasil Resseguros S.A.*,[160] the Southern District of New York refused to vacate an award after IRB claimed that the umpire (Schmidt) made an untimely disclosure of a relationship that showed evident bias.[161] In 2009, Schmidt was initially appointed umpire and disclosed that he had worked once as an arbitrator for each party.[162] After three years without progress, the arbitration was resumed and Schmidt was again appointed umpire.[163] Schmidt made a delayed disclosure that included a new relationship with the parties in subsequent arbitrations.[164] Asked to disqualify himself, Schmidt had the parties thoroughly brief the issue, but refused to resign.[165] After the arbitration, the dissatisfied party asked the court to vacate the award.[166] The court confirmed the award, finding that the disclosures, even if not timely, did not show evident bias because they were of the same type as originally disclosed.[167] Specifically, the court explained that "even if IRB were

154. 202 Cal. Rptr. 3d 323 (Cal. Ct. App. 2016).
155. *Id.* at 325.
156. *Id.*
157. *Id.* at 333.
158. *Id.*
159. *Id.* at 332 (quoting Haworth v. Super. Ct., 235 P.3d 152 (Cal. 2010)).
160. 164 F. Supp. 3d 457 (S.D.N.Y. 2016), *amended* 2016 WL 3144057 (S.D.N.Y. Apr. 14, 2016).
161. *Id.* at 466.
162. *Id.* at 465.
163. *Id.* at 466.
164. *Id.* at 464–66.
165. *Id.* at 467.
166. *Id.* at 473.
167. *Id.* at 467, 478.

correct that Schmidt had, and breached, an obligation of 'timely disclosure,' vacatur would still not be appropriate. It is not the nondisclosure itself but the materiality of the undisclosed facts that controls the evident partiality inquiry."[168]

On the other hand, if sufficiently close, even the potential of a relationship may show impermissible bias. The Supreme Court of Hawaii in *Noel Madamba Contracting LLC v. Romero*[169] vacated an award because the arbitrator (Yim) failed to disclose a relationship with Romero's law firm (Cades Schutte).[170] After a partial final award, it was discovered that the administrator of Yim's personal retirement accounts had first considered and later hired Cades Schutte to review his accounts for conformity with state and federal law.[171] The lower courts held that failure to disclose the relationship was immaterial because, at the time of the first disclosure, Yim's administrator was merely considering the law firm and it was then only a "potential" or "future" relationship.[172] Reversing, the Supreme Court held that the relationship "created a reasonable impression of partiality," which mandated vacatur.[173] "[B]ecause review of an arbitration award is limited, an arbitrator's impartiality and appearance of impartiality is paramount. As a corollary, the disclosure process is of utmost import."[174] Not all details of every relationship can be or need be disclosed. The courts will look at the materiality of the non-disclosure before refusing to confirm an award.[175]

VI. MEDIATION CONFIDENTIALITY

Alternative dispute resolution depends on confidentiality, but guarding secrets in our modern age has become a constant challenge. Traditionally, mediation confidentiality has been strictly preserved. Confidentiality of mediation negotiations and discussions usually remains unchallenged, but several recent cases illustrate there are vulnerabilities. A recent dispute between two distinguished jurists in *In re Caesars Entertainment Operating Co.*[176] illustrates the point. During Chapter 11 bankruptcy proceedings and contemporaneous mediation attempts, former federal judge and me-

168. *Id.* at 478.
169. 364 P.3d 518 (Haw. 2015), *reconsideration granted in part by* 2016 WL 197028 (Haw. Jan. 12, 2016).
170. *Id.* at 519–20.
171. *Id.* at 519.
172. *Id.* at 529.
173. *Id.* at 528.
174. *Id.*
175. The untimely disclosure of an arbitration agreement itself is considered in another line of cases. *See, e.g.*, Messina v. N. Cent. Distrib., 821 F.3d 1047 (8th Cir. 2016).
176. *In re* Caesars Ent'mt Operating Co. Inc., 1501145, 2016 WL 7477553 (Bankr. N.D. Ill. Feb. 26, 2016).

diator Joseph Farnan and Judge Goldgar of the U.S. Bankruptcy Court for the Northern District of Illinois reached an impasse that resulted in Farnan's resignation as mediator.[177] The case involved an attempted restructuring of approximately $18 billion in debt.[178] Caesars had successfully negotiated with senior creditors and bondholders to reduce the debt by almost $10 billion but requested mediation when an agreement could not be reached with junior creditors.[179] The primary goal of the mediation was to settle a number of lawsuits filed on behalf of the junior creditors totaling approximately $12.6 billion.[180] The lawsuits alleged that the parent company had stripped the bankrupt operating unit of its most valuable assets.[181] The court had stayed the lawsuits pending mediation.

At a case management hearing, Judge Goldgar expressed displeasure that the report on the status of the mediation omitted specific mediation offers and discussions. The judge suggested that if Farnan wished to continue mediating he had to testify to those specific discussions.[182] Farnan resigned and later commented that the judge's comments expressed an "atypical view" of mediation and that "the Court either misspoke or doesn't understand how such disclosures would be viewed by participants and the markets."[183] The judge refused to extend the stay, and soon after, Caesars reached an agreement to settle the cases for around 66 cents on the dollar (up from the approximately 9 cents on the dollar originally offered, and part of a plan that had been accepted by the senior creditors).[184] Farnan's insistence on guarding confidentiality, the lifting of the stay, and the subsequent settlement raise obvious concerns about preservation of confidentiality.

Even an undisputed confidentiality agreement may be vulnerable absent very specific objections to the mediation statements. In an unpublished and non-precedential memorandum, *Milhouse v. Travelers Commercial Insurance Co.*,[185] the Ninth Circuit upheld a verdict over claims of

177. *See* Lillian Rizzo, *Caesars Bankruptcy Mediator Abruptly Resigns*, WALL ST. J., Sept. 9, 2016, http://www.wsj.com/articles/caesars-bankruptcy-mediator-abruptly-resigns-1473439505 (quoting attorney Benjamin S. Siegal, "'One of the basic tenets of mediation is confidentiality. . . . 'It's like Vegas—what you say here stays here.'").

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Steven Church, *It's Judge Versus Judge in Battle to End Caesars Bankruptcy*, BLOOMBERG MKTS., Sept. 9, 2016, http://www.bloomberg.com/news/articles/2016-09-09/caesars-mediator-quits-debt-talks-over-confidentiality-worry.

183. *Id.*

184. Michael J. de la Merced, *Caesars Entertainment to Emerge from Chapter 11 Bankruptcy*, N.Y. TIMES, Sept. 27, 2016, *available at* http://www.nytimes.com/2016/09/28/business/dealbook/caesars-entertainment-to-emerge-from-chapter-11-bankruptcy.html.

185. 641 F. App'x 714 (9th Cir. 2016).

erroneous admission of confidential mediation statements.[186] Both parties had filed pretrial motions to exclude all evidence related to mediation but the judge instructed the parties to raise their objections during trial.[187] The defendant offered testimony by the mediator about statements the Milhouses allegedly made in mediation and also presented expert testimony on "his impression of the Milhouses' motives at mediation."[188] Hearsay objections to these statements were overruled, under Federal Rule of Evidence 801(d)(2)(C), because the statements were authorized by the Milhouses and the mediator was acting as a type of agent.[189] The appellate court held that this objection, even with the motions *in limine*, was insufficient to raise the issue of confidentiality and deemed it waived.[190] The court also found that the decision to admit the testimony over a hearsay objection was not clearly erroneous and thus affirmed the verdict.[191] The finding that the mediator spoke as a form of agent for a party is particularly notable. Confidentiality in mediation, this case reminds us, is by no means assured.[192]

The Oregon Supreme Court considered the balance of confidentiality against the ability to bring a legal malpractice claim based on communications made during and after the mediation in *Alfieri v Solomon.*[193] At issue was the Oregon Mediation Statute, which makes statements related to mediation confidential and inadmissible in subsequent judicial proceedings.[194] The trial court struck allegations in the complaint detailing mediation communications from the mediator and between plaintiff and his attorneys "that defendant had failed to reasonably advocate for Plaintiff" and "that defendant pressured Plaintiff into eventually agreeing to the mediator's proposal."[195] The appellate court generally affirmed. The supreme court partly reversed the lower courts' decisions, concluding that attorney client communications regarding mediation, but not made during the actual mediation, were not protected by statute.[196] These

186. *Id.* at 716.
187. *Id.* at 717.
188. *Id.*
189. *Id.*
190. *Id.* at 717–18.
191. *Id.*
192. On the other hand, in an earlier Ninth Circuit decision, the court enforced a mediation confidentiality agreement to bar the admission of any aspect of the mediation. Facebook, Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034, 1042 (9th Cir. 2011).
193. 365 P.3d 99 (Or. 2015).
194. *Id.* at 104.
195. *Id.* at 111–12 (internal quotation marks omitted).
196. *Id.* at 111 ("'[M]ediation communications' includes only communications exchanged [among] parties, mediators, representatives of a mediation program, and other persons while present at mediation proceedings, that occur during the time that the mediation is underway and relate to the substance of the dispute being mediated. Private communications between a mediating party and his or her attorney outside of mediation proceedings, however, are not

cases illustrate that preservation of confidentiality requires continuous diligence. Additionally, the confidentiality so highly valued may one day be the very thing preventing enforcement of rights sought another day.[197]

VII. WAIVER OF THE RIGHT TO ARBITRATE

A party may waive its right to arbitrate by a delay in enforcing that right during litigation. In *Chassen v. Fidelity National Financial, Inc.*,[198] the Third Circuit held that a defendant did not waive its right to arbitrate by continuing to litigate in court and by delaying the filing of a motion to compel arbitration because such a motion would have been futile.[199] The defendants were sued in January 2009 by plaintiffs seeking to represent a class of real estate purchasers and refinancers who were allegedly overcharged fees stemming from the recording of their deeds and mortgage instruments.[200] Although the agreements between the parties contained arbitration clauses, the defendants did not seek to compel arbitration based on those clauses and gave no explanation for this inaction.[201] At that time, the New Jersey Supreme Court had ruled that the presence of a class arbitration waiver rendered an agreement unconscionable.[202] However, on April 27, 2011, the Supreme Court in *Concepcion* found a similar rule under California law preempted by the FAA.[203] The defendants quickly demanded enforcement of the arbitration agreements and, on August 1, 2011, filed a motion to compel arbitration.[204] The Third Circuit concluded that because the defendants' motion to compel was "almost certain to fail" prior to *Concepcion*, the futility exception applied and excused the defendants' delay in seeking to compel arbitration.[205]

In *Messina v. North Central Distributing, Inc.*,[206] the Eighth Circuit held that an employer waived its right to arbitrate by defending a lawsuit for

'mediation communications' as defined in the statute, even if integrally related to a mediation.").

197. *See* Jeff Kichaven, *Beware the "Standard" Mediation Confidentiality Agreement*, LAW 360, Aug. 17, 2016, http://www.law360.com/articles/829454/beware-the-standard-mediation-confidentiality-agreement; *See also* Rachel Ehlrich et al., *How Confidential are Mediation Communications? You Might Be Surprised*, ABA Ins. Coverage Litig. Comm., Feb. 21, 2016, http://www.americanbar.org/content/dam/aba/ administrative/litigation/materials/2016_insurance_coverage_litigation_committee/written_materials/1_how_confidential_are_mediation_communications_final_paper.authcheckdam.pdf.

198. 836 F.3d 291 (3d Cir. 2016).

199. *Id.* at 293.

200. *Id.*

201. *Id.*

202. *Id.* at 299–301.

203. *Id.* at 294.

204. *Id.*

205. *Id.* at 301.

206. 821 F.3d 1047 (8th Cir. 2016).

eight months before moving to compel arbitration.[207] The employee filed suit in Minnesota state court; the employer then removed the case to federal court, filed an answer, and moved to transfer venue to the Eastern District of California.[208] After its motion to transfer venue was denied, the employer moved to compel arbitration.[209] The Eighth Circuit held that the employer acted inconsistently with its right to arbitrate by waiting more than eight months before asserting the right to arbitrate and participating in the litigation, thus waiving its right to arbitrate.[210] The court found that the employer, by waiting for a ruling on its motion to transfer before filing the motion to compel, demonstrated that it "wanted to play heads I win, tails you lose," which the court described as "the worst possible reason for failing to move for arbitration sooner than it did."[211]

Several recent decisions have also addressed the question of who decides whether a party has waived the right to arbitrate. In *Principal Investments, Inc. v. Harrison*,[212] the Supreme Court of Nevada held that the issue of whether a defendant had waived its right to arbitrate the named plaintiffs' claims by its litigation conduct was properly decided by the court, not the arbitrator.[213] The court distinguished the Supreme Court's ruling in *Howsam v. Dean Witter Reynolds, Inc.*,[214] which characterized "waiver" as a procedural gateway question.[215] The court found in *Harrison* that *Howsam*'s reference to "waiver, delay, or a like defense" for the arbitrator encompasses "defenses arising from non-compliance with contractual conditions precedent to arbitration, such as the NASD time limit rule at issue in that case" as to when arbitration had to be commenced, but not to "claims of waiver based on active litigation in court."[216]

In *Martin v. Yasuda*,[217] the Ninth Circuit held that a school waived its right to arbitrate a class action lawsuit brought by students alleging violations of the Fair Labor Standards Act.[218] During the litigation, the parties entered a joint stipulation structuring the litigation, and the school filed a motion to dismiss on a merits issue, answered discovery, and prepared to conduct a deposition.[219] Although the school reserved its right to

207. *Id.* at 1051.
208. *Id.* at 1048–49.
209. *Id.* at 1049.
210. *Id.* at 1050.
211. *Id.* at 1051.
212. 366 P.3d 688 (Nev. 2016).
213. *Id.* at 690.
214. 537 U.S. 79 (2002).
215. *Id.* at 84.
216. 366 P.3d at 695.
217. 829 F.3d 1118 (9th Cir. 2016).
218. *Id.* at 1119–20.
219. *Id.* at 1120–21.

arbitrate in pleadings and statements filed with the court, its counsel advised the judge that the school was likely "better off" in federal court.[220] Almost seventeen months after the start of the case, the school moved to compel individual arbitration.[221] The district court found that the school had waived its right to compel arbitration and denied the motion to compel.[222]

On appeal, the school argued that the arbitrator, rather than the district court, should decide the waiver question. The school reasoned that the broad nature of the arbitration clause, which provided that "[a]ll determination as to the scope, enforceability and effect of this arbitration agreement shall be decided by the arbitrator, and not by a court," overcame the presumption that whether a party has waived its right to arbitrate on the basis of litigation conduct is a "gateway issue" for judicial determination.[223] The Ninth Circuit disagreed, holding that, in general, courts decide whether a party has waived its right to arbitration by litigation conduct.[224] The court explained that "[i]f the parties intend that an arbitrator decide that issue under a particular contract, they must place clear and unmistakable language to that effect in the agreement."[225] The Ninth Circuit agreed with the district court that the school's litigation conduct was inconsistent with its right to arbitrate and that the plaintiffs would be prejudiced by arbitrating the matter after expending considerable time and resources in the litigation.[226]

In *Money Mailer, LLC v. Brewer*,[227] the defendant argued that the arbitrator, and not the court, should decide whether it had waived the right to arbitrate by litigation conduct. The defendant argued that the issue was properly decided by the arbitrator because the parties' franchise agreement incorporated the American Arbitration Association commercial arbitration rules, which the Ninth Circuit had held "constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability."[228] The defendant also pointed to the Supreme Court's observation in *Howsam* that the arbitrator should decide allegations of waiver, delay, or a like defense to arbitrability. The Western District Court of Washington disagreed, noting that its decision in *Brennan v. Opus Bank* left open the possibility that an agreement involving an unsophisticated party, such as the plaintiff, would not evidence a "clear and unmistakable"

220. *Id.* at 1122.
221. *Id.*
222. Martin v. Yasuda, 829 F.3d 1118, 1122 (9th Cir. 2016).
223. *Id.* at 1120–23.
224. *Id.* at 1124.
225. *Id.*
226. *Id.* at 1126–27.
227. 2016 WL 1393492 (W.D. Wash. Apr. 8, 2016).
228. *Id.* at *2 (citing Brennan v. Opus Bank, 796 F.3d 1125, 1130 (9th Cir. 2015)).

intent to delegate the issue of arbitrability to the arbitrator.[229] The court also found that the issue of waiver by litigation conduct in particular was more properly handled by the court, rather than an arbitrator, for several practical reasons, including that the conduct at issue would have occurred in the litigation before the court and, therefore, the court is in a better position to decide the issue.[230]

VIII. ENFORCEABILITY OF SUBPOENAS ISSUED IN ARBITRATION

Section 7 of the FAA explicitly grants arbitrators authority to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." However, court decisions conflict as to whether arbitrators have the same authority with respect to pre-trial or pre-hearing discovery. In *CVS Health Corp. v. Vividus LLC*,[231] an arbitration panel located in Arizona issued a subpoena to a non-party located in Missouri requiring the non-party to produce documents for inspection at the offices of a party's attorney in Miami in conjunction with pre-trial/pre-hearing discovery.[232] The non-party filed a motion to quash in the District Court of Arizona. In deciding whether the arbitration panel had the authority to issue the subpoena to the non-party under the FAA, the court noted disagreement among the circuit courts.[233] Specifically, the Second and Third Circuits had held previously that the FAA does not grant arbitrators the authority to order non-parties to appear at depositions or provide documents during pre-hearing discovery.[234] The court explained that the Fourth Circuit had noted that an arbitrator may be able to subpoena a non-party for pre-hearing discovery under "unusual circumstances" and upon a showing of "special need or hardship"[235] and that the Sixth and Eight Circuits had held that the FAA's provision allowing an arbitrator to compel the production of documents for the purpose of a hearing implicitly allows an arbitrator to compel the same for inspection by a party prior to the hearing.[236] The District of

229. *Id.*
230. *Id.* at *3.
231. 2016 WL 3227160 (D. Ariz. June 13, 2016).
232. *Id.* at *1.
233. *Id.* at *1–2.
234. *Id.* at *2 (citing Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008) and Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004)).
235. *Id.* (citing COMSAT Corp. v. Nat'l Sci. Found., 190 F.3d 269 (4th Cir. 1999).
236. *Id.* (citing *In re* Sec. Life Ins. Co., 228 F.3d 865 (8th Cir. 2000) and Am. Fed'n of Television & Radio Artists, AFL-CIO v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999).

Arizona in *Vividus* held that "[i]n the absence of Ninth Circuit case law expanding the apparent scope of Section 7 of the FAA, the Court follows the plain language of the statute and finds that the arbitrator cannot compel a non-party to provide pre-hearing document discovery outside the presence of an arbitrator."[237]

In *Patriot Environmental Services, Inc. v. Cappello Capital Corp.*,[238] a federal magistrate judge recommended dismissal of a petition to quash arbitration subpoenas issued by a party to a FINRA arbitration because the court lacked subject matter jurisdiction. The party issuing the subpoenas argued that the district court lacked subject matter jurisdiction because the FAA does not provide an independent basis for jurisdiction. The petitioners' sole argument for federal court jurisdiction was Section 7 of the FAA.[239] The magistrate concluded that while the Ninth Circuit had not addressed the issue, three other circuits had concluded that parties invoking Section 7 must establish a basis for subject matter jurisdiction independent of the FAA.[240] The magistrate also concluded that district court decisions enforcing Section 7 have occurred in cases where there is an independent basis for subject matter jurisdiction, and noted that the petitioners could seek recourse in California state court.[241]

IX. CONCLUSION

The above cases set forth many of the key developments in Alternative Dispute Resolution in the period from October 2015 through September 2016. Given the recent prominence of the debate on the scope of arbitration, the differing views of courts, governmental agencies, and interest groups and commentators on the subject, and the changing political landscape in Washington and perhaps the courts, the coming year will likely see significant further developments in these areas of the law.

237. *Id.* at *2.

238. 2016 WL 3545542 (C.D. Cal. June 7, 2016).

239. The petitioners argued that Section 7 provides an independent basis for jurisdiction because it permits parties to compel attendance or hold a party in contempt by making a "petition the United States district court for the district in which such arbitrators . . . are sitting." *Id.* at *3.

240. *Id.* (citing Stolt-Nielsen Transp. Group, Inc. v. Gelanese AG, 430 F.3d 567 (2d Cir. 2005), American Fed'n of Television & Radio Artists v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999) and Amgen, Inc. v. Kidney Ctr. of Delaware Cty., 95 F.3d 562 (7th Cir. 1996)).

241. *Id.* at *4.