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## Article

# Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration

Maureen A. Weston<sup>†</sup>

Arbitration, as a form of private dispute resolution, has been used for centuries in various commercial and labor-management sectors.<sup>1</sup> Traditionally, entities with relatively equal bargaining power used arbitration primarily in specialized industries.<sup>2</sup> In the past ten to twenty years, however, arbitration has gained acceptance in other areas, notably proliferating as a result of mandatory predispute and form arbitration contracts between corporate entities and their customers, patients, or employees.<sup>3</sup> As the use of arbitration has increased, the need for arbitration services has correspondingly risen and spawned a market for professional private arbitrators and an industry of private businesses that provide arbitration support and administrative services (provider institutions). For example, major provider institutions such as the American Arbitration Association (AAA), National Arbitration Forum (NAF), and Judicial Arbitration and Mediation Services, Inc. (JAMS), con-

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1. Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969–73 (1999) (describing the genesis of arbitration in Europe and the United States).

2. *See id.* at 978. In the early twentieth century, commercial trade associations often urged or required arbitration to resolve disputes over contract interpretation or industry standards between group members. *Id.*

3. *See, e.g.*, Stephen K. Huber & E. Wendy Trachte-Huber, *Top Ten Developments in Arbitration in the 1990s*, DISP. RESOL. J., Nov. 2000–Jan. 2001, at 26, 30 (describing the “explosion” in consumer arbitration including the areas of consumer sales and service contracts, insurance claims, medical relationships, attorney-client disputes, and bank-customer agreements).

tinue to report growth in caseload and neutral membership.<sup>4</sup> In 2002, the AAA administered more than 230,255 cases through mediation or arbitration.<sup>5</sup> In 2001, the AAA reported its seventh consecutive year of growth, with over 218,000 cases administered.<sup>6</sup> This is up from a caseload of approximately 61,000 between 1991 and 1995.<sup>7</sup> JAMS likewise reports that its caseload has increased 2300% from 1987 to 1993.<sup>8</sup> The decision makers operating within the private arbitration industry range from individual arbitrators operating out of their homes to multinational corporate provider institutions.<sup>9</sup> Arbitrators are

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4. The AAA, NAF, JAMS, the Center for Public Resources Institute for Dispute Resolution (CPR), and the National Association of Securities Dealers (NASD) are among the leading national private alternative dispute resolution (ADR) service providers. See Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1301-03 (1998). The number of entities operating as for-profit ADR service providers, including entities such as WebMediate.com (specializing in administering online arbitrations), has grown tremendously. While obtaining a complete listing of ADR or arbitration service providers is difficult, many institutions compile lists of prominent or locally available providers. See, e.g., ADVANCED DISPUTE RESOLUTION INSTITUTE, ADR ORGANIZATIONS (listing the major American and international ADR organizations), at [http://adrinstitute.com/library/adr\\_organizations.htm](http://adrinstitute.com/library/adr_organizations.htm) (last visited Oct. 12, 2003); AM. BAR ASS'N, CONFLICT RESOLUTION INFORMATION SOURCE (listing 146 arbitration organizations), at <http://www.crimfo.org/masterresults.cfm?pid=544> (last visited Oct. 12, 2003); ASS'N FOR CONFLICT RESOLUTION NEW ENGLAND CHAPTER, LIST OF ADR PROVIDERS, at <http://www.neacr.org/directory/NNames.htm> (last visited Oct. 12, 2003).

5. See AM. ARBITRATION ASS'N, OVERVIEW, at <http://www.adr.org/index2.1.jsp?JSPssid=15765> (last visited Oct. 12, 2003).

6. See AM. ARBITRATION ASS'N, 2001 PRESIDENT'S LETTERS AND FINANCIAL STATEMENTS (2001), <http://www.adr.org/index2.1.jsp?JSPssid=15705>. The large increase in caseloads is attributable in part to contractual arbitration provisions in the consumer, employment, health care, and international arbitration arenas, as well as in certain types of cases, such as collection actions (by the NAF) and no-fault insurance claims. See AM. ARBITRATION ASS'N, OVERVIEW, *supra* note 5.

7. See STEPHEN K. HUBER & E. WENDY TRACHTE-HUBER, *ARBITRATION: CASES AND MATERIALS 2* (Aug. 2002 Supplement).

8. See Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2103-04 (2002) (reporting on the increase in private ADR caseloads and private arbitration providers); Matthew David Disco, Note, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California*, 45 HASTINGS L.J. 113, 138-39 (1993) (noting the rapid increase in revenue for arbitration providers); Cameron L. Sabin, Note, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1340 (2002) (describing exponential caseload growth for JAMS, the AAA, and the NASD).

9. See, e.g., Stephen Hayford & Ralph Peebles, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP.

not restricted to individuals trained in the law or a particular area of expertise. Likewise, arbitration provider institutions or entities have no particular standard for entry.<sup>10</sup> Statistics on the number of private arbitrators are difficult to track, as there is neither an official registry nor a need for affiliation with a particular organization. The AAA, however, reports a roster of over 8000 neutrals in diverse fields and professions that represent a broad spectrum of expertise.<sup>11</sup> A single Internet search of “arbitrators” results in a list of over 300,000 entries.<sup>12</sup> The number, size, and quality of private entities operating as alternative dispute resolution (ADR) providers also vary. Provider institutions can offer an array of arbitration administrative services, as well as other consulting and training services. In some cases, a provider organization may have an exclusive contractual arrangement with a company to administer all of the company’s arbitrations or dispute resolution processes; a party may also unilaterally include a provision in its contracts requiring that all disputes subject to arbitration be filed with a particular provider organization.<sup>13</sup>

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RESOL. 343, 362–64 (1995) (discussing the provider’s role in arbitration and in the appointment of arbitrators); *Boundaries for Arbitrators*, L.A. TIMES, Mar. 16, 2002, at B20 (discussing proposed legislation designed to “eliminate secrecy, financial conflicts and excessive fees from mandatory arbitration”).

10. Aspirational standards have been developed to guide the conduct and practice of arbitrators and provider institutions. Compliance with these standards is voluntary and enforcement is difficult; thus, a party aggrieved of a violation generally has no legal remedy other than possible vacatur of the underlying award in extreme situations. See *infra* Part I.A.3 for full discussion.

11. AM. ARBITRATION ASS’N, OVERVIEW, *supra* note 5.

12. An Oct. 12, 2003, Google search of “arbitrators” turned up 334,000 results, including a variety of entities such as the “Chartered Institute of Arbitrators” ([www.arbitrators.org](http://www.arbitrators.org)), the “Society of Maritime Arbitrators” ([www.smany.org](http://www.smany.org)), and the “Society of Construction Arbitrators” ([www.arbitrators-society.org](http://www.arbitrators-society.org)).

13. For example, the exclusive contract between Blue Cross and the AAA subjects all Blue Cross patient disputes to AAA binding arbitration. See Press Release, Pamela Pressley, The Foundation for Taxpayer & Consumer Rights, HMO Forces Arbitrators to Deny Patients Fair Arbitration Process, (May 26, 2000), <http://www.consumerwatchdog.org/healthcare/pr/pr000576.php3>; see also Johanna Harrington, Comment, *To Litigate or Arbitrate? No Matter—The Credit Card Industry Is Deciding for You*, 2001 J. DISP. RESOL. 101, 103–04 (noting that credit card companies tend to name specific arbitration providers in their mandatory arbitration contracts with consumers). Similarly, MCI’s service agreement has a dispute resolution provision which requires the AAA or JAMS to be the provider organization for arbitration of any disputes under the agreement. See MCI, GENERAL SERVICE AGREEMENT FOR RESIDENTIAL CUSTOMERS 26–27 (2003), available at [http://consumer.mci.com/mci\\_service\\_agreement/res\\_GSAjsp](http://consumer.mci.com/mci_service_agreement/res_GSAjsp).

Arbitration is customarily defined as “a simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding.”<sup>14</sup> The process is touted as an inexpensive, speedy, informal, and private alternative to the judicial system.<sup>15</sup> Whether one agrees that these traditional characterizations of arbitration have continued vitality in a prevailing environment of mandatory predispute consumer and employment arbitration,<sup>16</sup> it is clear that private arbitrators have significant power to determine not only contractual, but also statutory and other legal rights and liabilities of the parties involved, and that judicial review is quite limited.<sup>17</sup>

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14. MARLIN M. VOLZ & EDWARD P. GOGGIN, *ELKOURI & ELKOURI: HOW ARBITRATION WORKS* 2 (5th ed. 1997).

15. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (“The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties . . .” (quoting H.R. REP. NO. 97-542, at 13 (1982))).

16. Empirical research has not necessarily substantiated claims that arbitration costs less than litigation. See PUBLIC CITIZEN, *THE COSTS OF ARBITRATION* (summarizing the results of a survey of costs related to arbitration), at <http://www.citizen.org/publications/release.cfm?ID=7173> (last visited Oct. 12, 2003) [hereinafter PUBLIC CITIZEN]. This Article does not engage in the important inquiry of whether predispute mandatory arbitration contracts should be enforceable, as many others adequately address this ongoing debate. See, e.g., David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1 (1997). Although most consumer predispute arbitration contracts are arguably not voluntary or the product of negotiation and consent, Supreme Court precedent holds that such mandatory arbitration contracts are enforceable, unless other contractual defenses (such as unconscionability, duress, or fraud) apply to negate the arbitration contract. See, e.g., *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 89–90 (2000). This Article focuses on potential recourse against illegal conduct that occurs in the arbitration process itself.

17. Arbitrators derive their authority from the appointing contract. *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 62 (3d Cir. 1986) (“[O]nce the parties have gone beyond their promise to arbitrate and have supplemented the agreement by defining the issue to be submitted to an arbitrator, courts must look both to the contract and to the submission to determine his authority.”). General clauses requiring arbitration of disputes, however, have been interpreted to include not only contractual, but other statutory and common law claims. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (holding that claims under the Age Discrimination in Employ-

Arbitration provider institutions can also play a significant role in the conduct and outcome of the arbitration process by designing rules and procedures, setting fees, and determining who may be on the list of potential arbitrators, in addition to selecting the arbitrator in the event of default.<sup>18</sup>

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ment Act are arbitrable); *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (holding that claims alleging violations of RICO and the 1934 Securities Exchange Act are arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (finding that statutory claims may be subject to arbitration if congruent with the parties' intent).

18. Provider institutions design rules and procedures for the process, set fees, and determine the arbitrator to the extent that they provide a list of prospective neutrals, as well as select the neutral in the event of default. *See, e.g.*, AM. ARBITRATION ASS'N, OVERVIEW, *supra* note 5; NAT'L ARBITRATION FORUM, CODE OF PROCEDURE, (July 1, 2003), <http://www.arb-forum.com/code/>. These institutions have been, and continue to be, influential in "shaping the arbitration landscape." *See also* Thomas J. Stipanowich, *Behind the Neutral: A Look at Provider Issues*, 3 ADR CURRENTS 1 (Dec. 1998) [hereinafter *Behind the Neutral*]; Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 878 [hereinafter *Contract and Conflict Management*] (noting that the various activities of provider institutions in the arbitral process may have a profound effect upon the parties' experience); JUDICIAL ARBITRATION & MEDIATION SERVS., THE ARBITRATION EXPERTS, at [http://www.jamsadr.com/arb\\_practice.asp](http://www.jamsadr.com/arb_practice.asp) (last visited Oct. 12, 2002). Provider functions include identifying and selecting interveners, establishing and maintaining a pool of neutrals, and evaluating and ruling upon challenges to appointees. *See Contract and Conflict Management, supra*, at 878. For example, major provider institutions have promulgated rules under which most arbitrations are conducted. *See, e.g.*, AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES, (July 1, 2003), [http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules\\_Procedures\International\International\...\focusArea\commercial\AAA235current.htm](http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\International\International\...\focusArea\commercial\AAA235current.htm) [hereinafter AAA COMM. ARBITRATION RULES]; CPR INST. FOR DISPUTE RESOLUTION, RULES FOR NON-ADMINISTERED ARBITRATION, (Sept. 15, 2000) [hereinafter CPR RULES], <http://www.cpradr.org/arb-rules.htm>. The AAA worked with the American Bar Association (ABA) to develop a Code of Ethics for Arbitrators. *See* AM. ARBITRATION ASS'N/AM. BAR ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES [hereinafter AAA/ABA, CODE OF ETHICS], [http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules\\_Procedures\Ethics\\_Standards\code.html](http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\Ethics_Standards\code.html) (last visited Oct. 12, 2003). AAA President William K. Slate has taken positions on state legislative proposals to regulate arbitration and also served on the commission that developed the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR. *See* William K. Slate II, *The Justice-at-a-Price Guys Take Aim at Arbitration*, L.A. TIMES, Aug. 13, 2002, at B12; CPR-GEORGETOWN COMM'N ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER INSTITUTIONS (May 1, 2002), <http://www.cpradr.org/finalProvider.pdf>. Two major arbitration providers filed amicus briefs in support of the employer in a recent Supreme Court case. *See* Brief of Amici Curiae Am. Arbitration Ass'n, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (No. 99-1379); Brief of Nat'l Academy of Arbitrators, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (No. 99-1379).

Arbitration is used on a variety of scales, yet in many ways, arbitration itself has become a profession, if not big business. Although some arbitrators work for reduced or no compensation in certain cases, the costs of a private arbitration typically include the fees paid to the arbitrator (or panel of arbitrators) on a flat fee or hourly (which can range from \$75 to well over \$500 per hour) basis.<sup>19</sup> Parties may also be responsible for paying a provider institution fee for a range of administrative support services, such as for filing claims, motions, or responses, for case management, for the use of conference rooms, or for participating in a hearing.<sup>20</sup> According to a report by Public Citizen, a nonprofit public interest research organization, the administrative fees charged by provider institutions can cost approximately 700% more than courts charge for similar services.<sup>21</sup>

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19. The fees paid to the arbitrator are usually charged by the hour, and vary according to the experience and background of the arbitrator. See JUDICIAL ARBITRATION & MEDIATION SERVS., FEE INFORMATION (referring to the arbitrator's fee as the "professional/hearing fee" and stating that this "hourly rate varies depending upon the choice of judge, attorney-neutral or mediator and the geographic location of the hearing"), [http://www.jamsadr.com/fee\\_info.asp](http://www.jamsadr.com/fee_info.asp) (last visited Oct. 12, 2003). Among the services that may be included in this fee are "scheduled hearing time, extra session time, conferences, reading time, research time, written agreements, decisions, orders and award preparation time, conference calls, follow-up and any additional services or work." *Id.*

20. See AM. ARBITRATION ASS'N, BILLING GUIDELINES FOR NEUTRALS (Apr. 17, 2003), <http://www.adr.org/index2.1.jsp?JSPssid=15773&JSPsrc=upload/LIVESITE/Resources/Roster/Billing%20Guidelines.htm>. The AAA's Guidelines are based on the idea that, while an objective of ADR is to lower costs, "both the AAA and arbitrators deserve to be fairly compensated for their time and services." *Id.*; see also NAT'L ARBITRATION FORUM, SCHEDULE OF FEES (including as costs the following: filing fees assessed when a claim is filed, commencement fees assessed when the arbitration begins, administrative fees assessed when a response is filed, document hearing fees, and participant hearing fees), <http://www.arbitration-forum.com/code/appx-c.asp> (last visited Oct. 13, 2003). For example, the NAF's fee schedule includes filing fees ranging from \$25 to \$240 and other administrative fees ranging from \$25 up to \$1000. See *id.* The fee schedules are based on the amount of the claim. *Id.* Additionally, there are fees for findings of fact and conclusions, which range from \$100 to \$750, and the fee schedules also state that the responsible parties will pay each arbitrator a fee that is determined by the Forum Director. *Id.*

21. PUBLIC CITIZEN, *supra* note 16 (discussing the results of a survey of costs related to arbitration). The report summary notes that case administration costs by a county court clerk average \$44.20, while the AAA's average administrative cost per case is \$340.63. *Id.* As another example of the disparate costs, the report notes that the NAF charges \$75 to issue a subpoena, whereas a litigant can obtain a subpoena for free simply by downloading a

Federal legislation, specifically the Federal Arbitration Act of 1925 (FAA),<sup>22</sup> provides for the judicial enforcement of written contracts to resolve disputes by arbitration.<sup>23</sup> Although initially reluctant to interpret the FAA expansively,<sup>24</sup> the United States Supreme Court now regularly relies on the statute as the basis to preempt state laws regulating arbitration and to uphold the enforcement of mandatory predispute arbitration agreements in a variety of contexts, including resolution of statutory and common law claims in employment and consumer transactions.<sup>25</sup> According to the Court, the FAA evinces a "federal policy favoring arbitration."<sup>26</sup>

The FAA's statutory framework primarily addresses procedural matters providing for the judicial enforcement of arbitration agreements and awards, but also identifies specific grounds for vacating such awards.<sup>27</sup> However, the FAA does not address increasingly important issues in contemporary arbitration. For example, the FAA is silent on whether, if at all, parties are entitled to minimum standards of due process in mandatory consumer and employment arbitration; what standards of ethics, disclosure, or conduct apply to arbitrators and provider institutions; or whether arbitrators or provider institutions are or should be accorded immunity from civil actions to the same extent as public judges.<sup>28</sup> State arbitration legislation

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form on the Internet. *Id.*

22. See 9 U.S.C. §§ 1–16 (2000).

23. *Id.* § 2 ("A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")

24. See *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) (holding that the Securities Act of 1933 prohibited a waiver of a judicial remedy by a predispute arbitration agreement because the underlying purpose of the Act was to protect investors), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477, 481 (1989) (relying on the federal policy of favoring arbitration to reverse *Wilko* and finding securities claims arbitrable).

25. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (holding that statutory claims are also subject to a pre-employment arbitration agreement contained in an employment application); *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (requiring arbitration of consumer protection statutory claims).

26. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing federal policy favoring arbitration in ruling that federal age discrimination claims are arbitrable).

27. See, e.g., 9 U.S.C. § 9 (providing for judicial confirmation of arbitration awards); *id.* § 10 (specifying grounds for vacatur of an arbitration award).

28. See REVISED UNIFORM ARBITRATION ACT, Prefatory Note (2000) [here-



typically mirrors the FAA's structure, leaving these questions unanswered or addressed by *ad hoc* judicial decisions, precatory standards set by the arbitration community, or by contract between the private arbitral institutions or the individual arbitrator and the parties.<sup>29</sup>

Prominent national ADR professionals and provider institutions have been at the forefront in promulgating aspirational rules and standards for the professional ethics, disclosure, and conduct of private arbitrators<sup>30</sup> and provider institutions.<sup>31</sup> Some provider institutions maintain internal policies and standards in an attempt to ensure a fair arbitration process for their users.<sup>32</sup> At least one state, California, has enacted specific

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inafter RUAA], <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.pdf>.

29. See Huber & Trachte-Huber, *supra* note 3, at 32 (noting that the substantive provisions of the Uniform Arbitration Act, enacted in thirty-five states, largely track the FAA and that nearly all of the other states have adopted a similar statute).

30. See, e.g., AAA/ABA, CODE OF ETHICS, *supra* note 18; CPR-GEORGETOWN COMM'N ON ETHICS AND STANDARDS OF DISPUTE RESOLUTION PRACTICE, ADR ETHICS PROJECT (noting the need to consider the ethical duties and obligations of institutions providing and seeking ADR services), <http://www.cpradr.org/ethics.htm> (last visited Oct. 12, 2003).

31. See, e.g., AM. ARBITRATION ASS'N, A GUIDE FOR COMMERCIAL ARBITRATORS: RULES AND PROCEDURES, [http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules\\_Procedures\ADR\\_Guides\comguide.html](http://www.adr.org/index2.1.jsp?JSPssid=15727&JSPsrc=upload\LIVESITE\Rules_Procedures\ADR_Guides\comguide.html) (last visited Nov. 10, 2003); CPR-GEORGETOWN COMM'N ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (May 1, 2002), <http://www.cpradr.org/FinalProvider.pdf>; MODEL RULES OF PROF'L CONDUCT R. 4.5 (CPR-Georgetown Comm'n on Ethics and Standards in ADR, Draft for Comment, 1999), <http://www.cpradr.org/cpr-george.html>.

32. See, e.g., AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL (May 1998), [http://www.adr.org/index2.1.jsp?JSPssid=15769&JSPsrc=upload\LIVESITE\Rules\\_Procedures\Protocols\...\Resources\EduResources\consumer\\_protocol.html](http://www.adr.org/index2.1.jsp?JSPssid=15769&JSPsrc=upload\LIVESITE\Rules_Procedures\Protocols\...\Resources\EduResources\consumer_protocol.html); AM. ARBITRATION ASS'N, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (May 9, 1995), <http://www.adr.org/index2.1.jsp?JSPssid=15717&JSPsrc=upload\LIVESITE\focusArea\employment\protocol.html>; JUDICIAL ARBITRATION & MEDIATION SERVS., ETHICS GUIDELINES FOR ARBITRATORS (2002), [http://www.jamsadr.com/ethics\\_for\\_arbs.asp](http://www.jamsadr.com/ethics_for_arbs.asp); JUDICIAL ARBITRATION & MEDIATION SERVS., JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2003), [http://www.jamsadr.com/images/PDF/Employment\\_Arbitration\\_Min\\_Std-2003.PDF](http://www.jamsadr.com/images/PDF/Employment_Arbitration_Min_Std-2003.PDF). See AM. ARBITRATION ASS'N, OVERVIEW, *supra* note 5 (noting that AAA neutrals are guided by the Code of Ethics); AM. ARBITRATION ASS'N, CODE OF ETHICS FOR COMMERCIAL ARBITRATORS, [http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload\livesite\Rules\\_Procedures\Ethics\\_Standards/code.html](http://www.adr.org/index2.1.jsp?JSPssid=16235&JSPsrc=upload\livesite\Rules_Procedures\Ethics_Standards/code.html) (last visited Nov. 10, 2003); AM. ARBITRATION ASS'N, STATEMENT OF ETHICAL PRINCIPLES FOR THE AMERICAN ARBITRATION

conduct and disclosure standards for arbitrators, but does not provide an independent mechanism for enforcement or oversight.<sup>33</sup> Due to the unregulated nature of the arbitration practice, however, enforcement of these rules is difficult, if not impossible, leaving compliance largely voluntary.<sup>34</sup> Moreover, even though many providers set forth standards and rules for an arbitration under their auspices, these rules or contractual agreements typically contain provisions exculpating them from “any and all” liability, including liability for failing to follow the provider’s own rules, policies, and contractual obligations.<sup>35</sup> Some providers even condition their services upon the parties’ agreement to waive compliance with internal rules or applicable laws.<sup>36</sup> Irrespective of the efforts for, or legality of, contractual immunity for arbitrators and providers,<sup>37</sup> the law in vari-

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ASSOCIATION, AN ADR PROVIDER ORGANIZATION [hereinafter STATEMENT OF ETHICAL PRINCIPLES], [http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPsrc=upload\LIVESITE\Rules\\_Procedures\Ethics\\_Standards\principals.htm](http://www.adr.org/index2.1.jsp?JSPssid=15718&JSPsrc=upload\LIVESITE\Rules_Procedures\Ethics_Standards\principals.htm) (last visited Nov. 10, 2003).

33. CAL. R. OF COURT, app. VI Standards 1–17 (2003) [hereinafter California Arbitrator Ethics Standards], <http://www.courtinfo.ca.gov/rules/appendix/appdiv6.pdf>; see *id.* Standard 1(d) (“These standards are not intended either to affect any existing cause of action or to create any new cause of action.”). Violation of the standards can cause disqualification of the arbitrator. *Id.* Standard 10. These standards have been challenged under FAA preemption grounds. See *infra* note 50 and accompanying text.

34. See Stipanowich, *Behind the Neutral*, *supra* note 18, at 14 (“All providers, whether for-profit or non-profit, facilitate or implement ADR in one or more forms and, for good or ill, they all compete in the marketplace without significant outside regulation.”).

35. See, e.g., AAA, COMM. ARBITRATION RULES, *supra* note 18, R. 8(d) (“[N]either the AAA nor any arbitrator shall be liable to any party . . . for any act or omission in connection with any arbitration under these rules.”); CPR RULES, *supra* note 18, R. 19 (“Neither CPR nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these Rules”); JUDICIAL ARBITRATION & MEDIATION SERVS., EMPLOYMENT ARBITRATION RULES AND PROCEDURES, R. 28(c) (2003) [hereinafter JAMS, RULES AND PROCEDURES] (disqualifying the arbitrator as a witness or a party and precluding arbitrator liability), [http://www.jamsadr.com/images/PDR/Employment\\_Arbitration\\_Rules-2003.PDF](http://www.jamsadr.com/images/PDR/Employment_Arbitration_Rules-2003.PDF).

36. The New York Stock Exchange, Inc., and the National Association of Securities Dealers (NASD) sought an exemption from the state arbitrator ethics standards. See Margaret Graham Tebo, *Stock Answer to Ethics Spat: Wall Street Bypasses California’s Securities Arbitration Rules*, 89 A.B.A. J., Mar. 2003, at 14, 14. In California, these entities administer securities arbitrations on the condition that the parties consent to a waiver of the provider’s compliance with the California Arbitrator Ethics Standards. *Id.*

37. The validity of these contractual disclaimers has not been widely litigated. As a matter of general tort law, one may not contract away his own negligence or intentional torts. See, e.g., RESTATEMENT (SECOND) OF TORTS

ous guises confers substantial protection from civil liability through the doctrine of arbitral immunity. As a result, parties injured by arbitral misconduct have limited recourse and effectively no remedy.

While codes for arbitrator and provider ethics provide important guidelines, their impact is questionable if true enforcement is unavailable. Ensuring the enforcement of standards and providing meaningful remedies to those injured by arbitral misconduct is equally as important as articulating standards of conduct and professional ethics for arbitrators and provider institutions. The availability of judicial recourse, a key step towards this objective, is restricted not only by the FAA's limited vacatur remedy<sup>38</sup> but also by broad arbitral immunity doctrines recognized by state statute or common law.<sup>39</sup> The Revised Uniform Arbitration Act (RUAA), promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), proposes not only to codify this immunity for arbitrators and provider institutions but also to penalize audacious challenges.<sup>40</sup>

Despite a seemingly entrenched rule of arbitral immunity, numerous individuals have alleged a range of claims against arbitrators and provider institutions, including breach of contract, failure to follow internal policies, failing to disclose conflicts of interest, negligence, bias, deceptive advertising, con-

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(2002); CAL. CIV. CODE § 1668 (West 2000) ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.").

38. See 9 U.S.C. § 10 (2000).

39. See *infra* Part II.C.

40. See RUAA § 14(a) (2000) ("An arbitrator or an arbitration organization acting in that capacity is immune from civil liability . . ."), <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.pdf>; see also *id.* § 14(e) ("If a person commences a civil action against an arbitrator, arbitration organization, or representative of an arbitration organization . . . the court shall award to the arbitrator, organization, or representative reasonable attorney's fees and other reasonable expenses of litigation."). According to commentary accompanying this provision, "[b]y definition, almost all suits against arbitrators, arbitration organizations, or representatives of an arbitration organization arising out of the good-faith discharge of arbitral powers are frivolous because of the breadth of their respective immunity." *Id.* at cmt. 6. The preemptive force of the FAA limits states' ability to enact protective legislation that conflicts with the FAA or that imposes higher standards on arbitration than other contracts. See, e.g., *Doctor's Assocs., Inc. v. Cassarotto*, 517 U.S. 681, 687 (1996). However, the FAA is silent on the issue of arbitrator immunity and thus, state legislatures or the courts may act. RUAA, *supra* note 28, at Prefatory Note.

spiracy, and antitrust violations.<sup>41</sup> In all of these cases, plaintiffs lost due to the seemingly impenetrable doctrine of arbitral immunity.<sup>42</sup> The changing nature of the arbitration industry and the fact that so many individuals have been discouraged from asserting arbitral misconduct claims, combined with the RUAA's proposal to effectively bar and penalize mere challenges, necessitates an examination of the continued propriety of the doctrine.<sup>43</sup>

The use of arbitration has changed significantly since the FAA's inception in 1925, from the traditional model involving voluntary arbitration between parties of relatively equal bargaining power, to a system where arbitration has become a profession and a commercialized industry that is imposed upon consumers and employees. Meanwhile, a significant body of federal and state laws has since developed to protect civil rights, market competition, employees, and consumers.<sup>44</sup> Presumably, the policy of enforcing agreements to arbitrate does not supplant laws requiring individuals engaging in contracts, albeit contracts to provide arbitral services, to comply with their promises and to be held accountable for their conduct. Individuals of nearly every profession are held accountable for

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41. See *infra* Part II.C.

42. See *infra* Part II.C.

43. I do not purport to offer statistical evidence concerning the degree to which arbitral misconduct, broadly defined, is a problem. A review of such complaints does indicate that the problem is at least an issue in some cases. In addition, public attention and concern over the problematic aspects of private mandatory consumer arbitration has been piqued by media reports and individual accounts of seemingly appalling arbitration experiences. A series of articles in the *San Francisco Chronicle* presented an apparently disturbing picture of private arbitration. Reynolds Holding, *Can Public Count on Fair Arbitration?*, S.F. CHRON., Oct. 8, 2001, at A15; Reynolds Holding, *Judges' Actions Cast Shadow on Court Integrity*, S.F. CHRON., Oct. 9, 2001, at A13 (reporting claims of financial ties between provider institutions); Reynolds Holding, *Millions Are Losing Their Legal Rights*, S.F. CHRON., Oct. 7, 2001, at A1; see also *Hundley-Paul v. Allred, Maroko & Goldberg*, No. B144980, slip op. at 2-6 (Cal. App. Dep't Super. Ct. Sept. 27, 2001) (upholding an arbitration of an attorney malpractice claim where the mandatory arbitration lasted forty-nine months); PUBLIC CITIZEN, *supra* note 16 (describing several cases of individuals aggrieved by the arbitration process); *Moore v. JAMS, Inc.*, Pl's First Am. Compl., No. BC249553 (Cal. Super. Ct. 2002) (alleging contractual breaches by a consumer against a for-profit arbitration provider).

44. Arbitral agreements cannot preclude causes of action or remedies provided for by statute. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum.").

complying with their contractual obligations and for exercising a reasonable degree of competency. Does it continue to make sense to exempt from the law the entire arbitration industry?

This Article examines the assumption that arbitrators and provider institutions should be *per se* immune from civil liability. Further, this Article considers options for meaningful redress where an arbitrator or provider institution has breached its own policies or contractual obligations; negligently performed professional services; engaged in fraud, misconduct, or corruption; exceeded his or her powers; violated ethical codes requiring impartiality and disclosure of conflicts of interest; or otherwise engaged in conduct subject to civil liability (arbitral failures).<sup>45</sup> Part I sets forth the general legal framework for arbitration and identifies the limited statutory means for vacating an arbitration award and obtaining recourse against arbitral failures. Part II traces the development and theoretical foundation of the immunity doctrine, as established to insulate public judges and certain other public officials who act in a comparable adjudicatory capacity. Part II also follows the doctrine's growth to cover a range of acts by private arbitrators and private arbitration institutions. Part III argues against the broad and uncritical expansion of arbitral immunity. This Part recognizes that a broad doctrine of arbitral immunity deviates from established parameters of the judicial immunity doctrine, particularly with respect to immunizing provider institutions from answering independent claims of contractual breaches, tortious conduct, or statutory violations. Significant differences exist between public judges operating in an open judicial process and the private judging world of arbitration, which necessitates a more exacting scope of immunity. Part IV submits that a standard of qualified immunity appropriately balances the competing policy concerns of protecting arbitrators in their decisional roles, while also holding the arbitration industry accountable to parties and the public. This Article also proposes a system for public oversight of arbitration to better ensure process fairness to participants, meaningful enforcement of arbitral codes of conduct, and accountability of the arbitration industry.

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45. For example, although the FAA provides for vacatur, is it also appropriate to insulate independent acts of arbitral misconduct by absolute immunity? Should contractual immunity provisions, liability disclaimers, and penalty challenge provisions be upheld notwithstanding a limited application of arbitral immunity?

## I. ARBITRATION LEGISLATION AND LIMITED RECOURSE FOR ARBITRAL FAILURES

### A. THE FAA AND THE “FEDERAL POLICY FAVORING ARBITRATION”

#### 1. Key Provisions and Intent

The Federal Arbitration Act of 1925 provides for the enforcement of written agreements to resolve disputes by private arbitration.<sup>46</sup> The FAA’s purpose is to provide for the judicial enforcement of agreements to arbitrate on the same basis as other contracts,<sup>47</sup> and it is considered the basis for a national policy in favor of arbitration.<sup>48</sup> Based on the FAA and substantial Supreme Court precedent articulating the FAA’s wide application and strong federal policy preference for arbitration, parties to an arbitration agreement can be bound to arbitrate a wide variety of disputes—including federal and state statutory claims as well as contractual and common law claims—unless specifically excluded in the agreement or indicated by Congress in specific legislation.<sup>49</sup> The Supreme Court has also ruled that the FAA preempts state laws that negate arbitration by mandating a judicial forum for particular disputes.<sup>50</sup> Finding that the FAA is a “substantive rule applicable in state as well as

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46. See 9 U.S.C. § 2 (2000).

47. H.R. REP. NO. 68-96, at 1 (1924) (discussing congressional intent to place an arbitration agreement “upon the same footing as other contracts, where it belongs”); see also *Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (comparing freedom of contract with the right to arbitration); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (“Congress has thus mandated the enforcement of arbitration agreements.”).

48. See *Southland Corp.*, 465 U.S. at 12.

49. For example, courts have upheld compulsory arbitration when required by an employer for statutory civil rights claims of its employees as a condition of employment, provided the agreements comply with traditional principles of contract law. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) (finding predispute agreements to arbitrate Title VII claims valid); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 614, 628 (1991); *EEOC v. Luce, Forward, Hamilton & Scripps*, 303 F.3d 994, 104 (9th Cir. 2002), *vacated by* 319 F.3d 1091 (9th Cir. 2003).

50. See *Southland Corp.*, 465 U.S. at 10 (stating that “[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration”); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983) (stating “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”).

federal courts," the Court has struck down state law that "attempts to undercut the enforceability of arbitration agreements" as a violation of the Supremacy Clause.<sup>51</sup>

## 2. The Basis for Broad Enforcement of Arbitration Contracts

Courts enforce predispute mandatory arbitration clauses based on contractual principles that parties waived their rights to a judicial forum by consenting to arbitration.<sup>52</sup> Standard contract defenses can apply to void an arbitration agreement, including duress, unconscionability, fraud, undue influence, lack of capacity, lack of mutuality, and waiver.<sup>53</sup> For example, some courts have held arbitration clauses unenforceable where the proposed arbitration procedure was deemed unconscionable for want of adequate procedural protections or for failure to ensure a nonbiased process.<sup>54</sup>

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51. *Southland Corp.*, 465 U.S. at 16; see also *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that the FAA preempts a state statute mandating that arbitration agreements comply with a special notice requirement); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-73 (1995) (preempting an Alabama statute that barred predispute arbitration agreements). Two courts have held that California's recently enacted ethical and conduct standards for arbitrators are preempted by the FAA and federal securities legislation. See *Wilmot v. McNabb*, 269 F. Supp. 2d 1203, 1207-12 (N.D. Cal. 2003) (concluding that application of the California standards to self-regulatory organizations is preempted by the Exchange Act, the comprehensive system of federal regulation of the securities industry established pursuant to the Exchange Act, and by Section 2 of the FAA); *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1111-12 (N.D. Cal. 2003) (concluding that application of the California standards to self-regulatory organizations is preempted by the Exchange Act, the comprehensive system of federal regulation of the securities industry established pursuant to the Exchange Act, and by Section 2 of the FAA).

52. See Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington and Haagen)*, 29 MCGEORGE L. REV. 195, 220 (1998) (stating that the Supreme Court has ruled that the decision to arbitrate does not violate substantive rights, but instead acts as a forum choice).

53. See *Allied Bruce-Terminix Cos.*, 513 U.S. at 281 (noting that states can regulate arbitration clauses under general principles of contract law). To avoid arbitration under a fraud defense, however, it is insufficient that a party was defrauded into making the entire contract which included an arbitration clause; under the "separability" doctrine, the parties must demonstrate that fraud occurred in the formation of the arbitration clause itself. See *Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395, 403-04 (1967).

54. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 896 (9th Cir. 2002) (ruling an arbitration clause was unenforceable due to its unilateral nature and limits on damages award); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 935 (4th Cir. 1999) (declining to compel arbitration where an employer had "set up a dispute resolution process utterly lacking in the rudi-

A party cannot avoid the arbitration obligation, however, merely based on a generalized grievance that the arbitration process is skewed in favor of the repeat player or party with inordinate bargaining power,<sup>55</sup> or that the fees may be prohibitively expensive.<sup>56</sup> Despite these concerns, a party must submit to the process. Thereafter, vacatur is the only remedy available to the party who can prove, in a separate judicial action, actual arbitral bias, fraud, misconduct, or an inability to vindicate rights. Upon vacatur, the party may return to arbitration.<sup>57</sup>

### 3. The FAA's Limited Recourse for Arbitral Failures, Token Remedy, and the Arbitral Immunity Backdrop

This broad legislative and judicial support, coupled with the perceived business advantages, has caused the use of arbitration to increase dramatically, most notably in predispute mandatory arbitration clauses in consumer transactions and as conditions of employment.<sup>58</sup> Procedurally, arbitration is gener-

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ments of even-handedness"); *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp. 2d 940, 946 (N.D. Ind. 2000) (finding that provisions for selecting an arbitration panel were inherently unfair when the employer and the provider were in collaboration for repeat and exclusive dispute resolution services).

55. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991).

56. See *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 92 (2000) (requiring an actual showing that prohibitive costs render an individual unable to vindicate her rights in arbitration).

57. See 9 U.S.C. § 10 (2000) (providing grounds for vacating an arbitral award); CAL. CIV. PROC. CODE § 1287 (2003) (authorizing a court to order a rehearing before the same panel of arbitrators, even though the panel was found to have exceeded its powers, but only before a new panel if the decision was vacated due to arbitrator corruption, misconduct, or fraud).

58. See KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 4–5 (Foundation Press ed., 2000) (providing statistical evidence of the growing use of arbitration and other forms of ADR); Julia A. Scarpino, Comment, *Mandatory Arbitration of Consumer Disputes: A Proposal to Ease the Financial Burden on Low-Income Consumers*, 10 AM. U. J. GENDER SOC. POL'Y & L. 679, 688 (2002) (noting the increase in both the use of arbitration for consumer disputes and in costs). Many companies have inserted mandatory arbitration clauses in consumer contracts as a way to avoid adverse publicity, class actions, punitive damages, and large verdicts. See Jean S. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 55–56 (2000) (noting that “[i]nspired by the Supreme Court’s heightened enthusiasm for arbitration in case after case, most federal and state courts have found arbitration may be compelled based on clauses contained in . . . form contracts”); Harrington, *supra* note 13, at 102–03 (describing various credit card companies’ use of mandatory arbitration clauses). *But cf.* *Ting v. AT&T*, 319 F.3d 1126, 1149–52 (9th Cir. 2003) (holding that a mandatory arbitration clause with the main purpose of shielding the company from liability was unconscionable and



ally a confidential process that contains no guarantees of due process, discovery, appeal, or other protections that are available in the judicial system.<sup>59</sup> By design, parties submitting to arbitration have minimal judicial recourse. The use of mandatory arbitration in these situations can be problematic, however, because once a party is in arbitration, the law provides them little remedy, regardless of improprieties in the process or arbitral misconduct.

The FAA sets forth limited grounds for the judicial review of arbitration awards, permitting a court to *vacate* an arbitration award:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the sub-

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unenforceable).

59. Arbitration is rarely given the same statutory confidentiality protections as mediation. As a matter of agreement, however, arbitration is private, not public. See CHRISTOPHER R. DRAHOZAL, *COMMERCIAL ARBITRATION: CASES AND PROBLEMS* 417 (LexisNexis ed., 2002) (noting that most arbitration statutes are silent on confidentiality but that provider arbitration rules or arbitration contracts may impose confidentiality obligations); Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 AM. U. INT'L L. REV. 969, 973 (2001) (noting confidentiality and privacy as "among the hallmarks of arbitration" (citation omitted)); Stipanowich, *Contract and Conflict Management*, *supra* note 18, at 882 (noting the exclusion of outside parties from the hearing room, the lack of an official record of arbitration proceedings, and the tradition of publishing an award without an accompanying rationale); AM. ARBITRATION ASS'N, *CONSUMER DUE PROCESS PROTOCOL*, *supra* note 32; JAMS, *RULES AND PROCEDURES*, *supra* note 35, at 6 (describing the exchange of information in arbitration proceedings); *id.* at 11 (outlining the "Optional Arbitration Appeal Procedure"). In addressing confidentiality in arbitration, the AAA notes that "[c]onsistent with general expectations of privacy in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law. The arbitrator should also carefully consider claims of privilege and confidentiality when addressing evidentiary issues." AM. ARBITRATION ASS'N, *CONSUMER DUE PROCESS PROTOCOL*, *supra* note 32, Principle 12(2); see also AAA/ABA, *CODE OF ETHICS*, *supra* note 18, at Canon VI (B) ("Unless otherwise agreed by the parties, or required by applicable rules of law, an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.").

ject matter submitted was not made.<sup>60</sup>

The threshold for establishing these grounds for vacatur is stringent.<sup>61</sup> Courts appear extremely reluctant to inquire into the propriety of arbitrator conduct or the arbitral process and accordingly impose a high standard of willfulness to even vacate an arbitration award.<sup>62</sup>

Redress under the FAA for arbitral misconduct, bias, or fraud—that the award is “set aside,” returning the parties to the same system for round two—is itself unsatisfactory, a token.<sup>63</sup> Vacatur is a small consolation when a party injured by arbitrator fraud or misconduct is out attorney fees, arbitration fees, costs, and time for the underlying arbitration and the judicial appeal to overturn the award. This consolation prize is even smaller considering that the party must return to the same unjust forum, with the same lack of procedural safeguards, for a repeated attempt to resolve the underlying

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60. 9 U.S.C. § 10 (a)(1)–(4). In addition, a party may petition a federal court to modify or correct an award “[w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award . . . [w]here the arbitrators have awarded upon a matter not submitted to them,” or “[w]here the award is imperfect in matter of form not affecting the merits of the controversy.” *Id.* § 11(a)–(c).

61. *See, e.g., In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 701 (2d Cir. 1987) (affirming an arbitration award although the arbitrator failed to disclose that he had recently sat on nineteen arbitration panels with the president of a party, who had also selected the arbitrator in twelve panels); *Card v. Stratton Oakmont, Inc.*, 933 F. Supp. 806, 815 (D. Minn. 1996) (holding that the violation of the NASD Code of Arbitration Procedure did not require nullification of the arbitration award); *cf. Rogers v. Schering Corp.*, 165 F. Supp. 295, 302–03 (D.N.J. 1958) (finding that the failure of the AAA to follow its own rules disclosing circumstances likely to create a presumption of bias required a section ten vacation of a royalties payment award).

62. *See In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 47 Fed. Appx. 78, 79 (3d Cir. 2002) (noting that the effect of the FAA has been that “judicial review of an arbitration award is very deferential,” and “only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop may a reviewing court disturb the award” (citation omitted)).

63. Maureen A. Weston, *Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality*, 76 IND. L.J. 591, 607 (2001); Mark A. Sponser, Note, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L.J. 421, 424 (1993) (claiming that vacatur fails to “compensate the aggrieved party for [its] lost time, wasted attorney’s fees, payments to arbitrators, and other incidental and consequential damages” and “is at best [an] incomplete remedy”).

claims.<sup>64</sup> Obviously, simply setting aside the outcome does not compensate the aggrieved party for the costs, fees, time, consequential damages, and anguish incurred in enduring an arbitration proceeding tainted with bad faith or misconduct.<sup>65</sup>

The policy favoring arbitration rests upon the belief that contracts to settle disputes by arbitration should be “upon the same footing” as other contracts and thus respected and enforced.<sup>66</sup> Nevertheless, parties to an arbitration also generally contract with the arbitrator and the provider institution to provide arbitration services, implicitly if not expressly, in accordance with the contractual terms and the representations about the quality of services.<sup>67</sup> What recourse is or should be available when a party is injured by an arbitral failure? Does the reverence for contract apply equally to the enforcement of contractual obligations by arbitration providers?

## B. STATE REGULATION OF PROFESSIONS—IS ARBITRATION ON THE HORIZON?

### 1. Professions Regulated to Protect the Public Interest

Pursuant to its police power and in the interest of public protection, states regulate virtually all professions—from doctors, lawyers, accountants, dentists, and real estate agents, to plumbers and cosmetologists.<sup>68</sup> For example, attorneys are sub-

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64. Weston, *supra* note 63, at 608. Similar costs may be incurred in public adjudication where a case is remanded or reversed due to judicial error, but the process is governed by due process standards and procedural rules.

65. *Id.*

66. See H.R. REP. NO. 68-96, at 1 (1924).

67. Arbitration providers widely advertise their services, members, and expertise in legal newspapers, glossy brochures, and on Web sites. These advertisements indicate an impressive display of neutral services, high commitments to procedural fairness, neutrality, various due process protocols, and adherence to codes of ethics. See generally AM. ARBITRATION ASS'N (listing information about AAA rules and procedures), at <http://www.adr.org> (last visited Oct. 12, 2003); JUDICIAL ARBITRATION & MEDIATION SERVS. (describing their “expert” arbitration services), at <http://www.jamsadr.com> (last visited Oct. 12, 2003). Announcing adherence to ethical standards is attractive marketing, but lack of compliance or enforcement calls this into question. For example, although the AAA had publicly adopted its commitment to the Health Care Due Process Protocol in 1996, it did not require its arbitrators to comply with the policy until brought under public scrutiny in 2002. See Reynolds Holding, *Arbitration Reform in Works*, S.F. CHRON., Mar. 11, 2002, at A1.

68. See, e.g., CAL. BUS. & PROF. CODE, §§ 5000–9999 (2003) (containing regulations for over twenty-one categories of licensed professions). The purpose of the California State Department of Consumer Affairs is to

ject to an elaborate set of rules of professional conduct enforced by the state bar. The rationale in regulating lawyers is that it is necessary to maintain continued public confidence in the judicial system and to protect the public.<sup>69</sup> Professions requiring special training or specific skills are within the scope of occupations affected with the public interest.<sup>70</sup>

Professionals and companies operating within professional industries are held to a standard of care for their respective

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[e]nsur[e] that those private businesses and professions deemed to engage in activities which have potential impact upon the public health, safety, and welfare are adequately regulated in order to protect the people of California.

To this end, they establish minimum qualifications and levels of competency and license persons desiring to engage in the occupations they regulate upon determining that such persons possess the requisite skills and qualifications necessary to provide safe and effective services to the public, or register or otherwise certify persons in order to identify practitioners and ensure performance according to set and accepted professional standards. They provide a means for redress of grievances by investigating allegations of unprofessional conduct, incompetence, fraudulent action, or unlawful activity brought to their attention by members of the public and institute disciplinary action against persons licensed or registered under the provisions of this code when such action is warranted. In addition, they conduct periodic checks of licensees, registrants, or otherwise certified persons in order to ensure compliance with the relevant sections of this code.

*Id.* § 101.6.

69. See MODEL RULES OF PROF'L CONDUCT, Preamble at 6 (1983); see also *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) ("[T]he regulation of the activities of the bar is at the core of the State's power to protect the public."). In *Lebbos v. State Bar of California*, the court noted that

Attorneys and counselors at law have long been known as "officers of the court," and as such they have for centuries been required to undergo certain courses of preparation and to assume certain solemn obligations relative to their training, character and conduct as such; and these not only with respect to their relation to the courts, but also with regard to their relation to the public at large. Thus it is that the profession and practice of the law, while in a limited sense a matter of private choice and concern in so far as it relates to its emoluments, is essentially and more largely a matter of public interest and concern, not only from the viewpoint of its relation to administration of civil and criminal law, but also from that of the contacts of its membership with the constituent membership of society at large, whose interest it is to be safeguarded against the ignorances or evil dispositions of those who may be masquerading beneath the cloak of the legal and supposedly learned and upright profession. . . . It is for each and all of these reasons that the membership, character and conduct of those entering and engaging in the legal profession have long been regarded as the proper subject of legislative regulation and control . . . .

806 P.2d 317, 323-24 (Cal. 1991) (citation omitted).

70. See *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935).

profession and are accountable for their acts and omissions.<sup>71</sup> Many of these professions, including public judges, are subject to codes of conduct and public oversight. While a professional ethics or code of conduct violation does not per se indicate malpractice or a breach of the duty of care, such violations are a factor in measuring professional negligence.<sup>72</sup> Significantly, public policy considerations and codes of professional conduct generally preclude members of these professions from attempting to limit their liability for their professional negligence.<sup>73</sup>

## 2. Arbitration's Lack of Regulation

Unlike other professionals or businesses, arbitrators and provider institutions are not subject to specific regulatory standards or public oversight. Voluntary and aspirational codes for arbitral conduct have been in effect for years, however.<sup>74</sup> Other

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71. See Richard A. Glaser & Leslee M. Lewis, *Redefining the Professional: The Policies and Unregulated Development of Consultant Malpractice Liability*, 72 U. DET. MERCY L. REV. 563, 576 (1995) (noting that malpractice now extends beyond the four "learned professions"—law, medicine, ministry, and teaching—to "dentists, pharmacists, veterinarians, architects and engineers, accountants, abstractors of title, among others" who undertake the "educational, organizational, ethical and licensing characteristics of the professions"); see also John W. Wade, *An Overview of Professional Negligence*, 17 MEM. ST. U. L. REV. 465, 477–78 (1987) (discussing other professions that have applied professional standards similar to those of law and medicine).

72. See Glaser & Lewis, *supra* note 71, at 575. A profession may be distinguished by

[1] the requirements of extensive formal training and learning, [2] admission to practice by qualifying licensure, [3] code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, [4] a system for discipline of its members for a violation of the code of ethics, [5] duties to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional manners, to conduct themselves as members of a learned, disciplined and honorable occupation.

*Id.* (citation omitted).

73. See, e.g., CAL. CIV. CODE § 1668 (2003) ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."); MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (1983) (stating that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making this agreement").

74. See, e.g., AAA/ABA, CODE OF ETHICS, *supra* note 18 (setting forth six canons that arbitrators should follow, to "uphold the integrity and fairness of the arbitration process," "disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality or bias," "avoid impropriety or the appearance of impropriety," "conduct the proceedings fairly

codes and protocols have also been developed to ensure fairness in the arbitration process.<sup>75</sup> Although many arbitrators and provider institutions ascribe to such ethical precepts, compliance is voluntary and subject only to private self-enforcement.<sup>76</sup> As one commentator has observed, arbitration associations "have an economic disincentive to enforcing their codes of ethics. There is an inherent conflict of interest for arbitration associations: they must enforce codes of ethics enough to preserve the good name of arbitration, but not so much that they generate unwanted publicity and lawsuits."<sup>77</sup>

The potential for abuse in such an unregulated environment is illustrated by the case of Southern California Arbitration Association (SCAA), a particularly disconcerting report of a pop-up arbitration provider business arrangement.<sup>78</sup> The SCAA was essentially a shell company run by an associate of a real estate developer.<sup>79</sup> The developer's contracts with purchasers provided for mandatory arbitration of all disputes exclusively before the SCAA, named a specific arbitrator (also closely associated with the developer), and required waiver of any conflicts of interest. The arbitrator, whose previous experience was limited to one case, awarded the developer \$558,270.<sup>80</sup> Landlords who dealt with the developer filed a lawsuit, describing the defendant's control over the arbitration service as a means to extract money from adversaries.<sup>81</sup> The SCAA situation appears an

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and diligently," "make decisions in a just, independent and deliberate manner," and "be faithful to the relationship of trust and confidentiality inherent in that office"); JUDICIAL ARBITRATION & MEDIATION SERVS., ETHICS GUIDELINES FOR ARBITRATORS, *supra* note 32 ("[T]he purpose of these Ethics Guidelines is to provide basic guidance to JAMS Arbitrators regarding ethical issues.").

75. See *supra* notes 17, 31 (citing various ethical standards and due process protocols for the arbitration of health care, employment, and consumer disputes).

76. See Sabin, *supra* note 8, at 1355 (explaining that ethics codes are ineffective because some associations admittedly fail to enforce codes of ethics, any enforcement powers extend only to members, and as the associations provide "no public listing of sanctioned or expelled arbitrators, other associations and the public have no means to identify and avoid unethical arbitrators . . . [or any] way to insure consistent enforcement").

77. *Id.* at 1355-56.

78. Myron Levin, *Caveat: Know Your Arbitrator*, L.A. TIMES, Jan. 19, 1997, at D1.

79. *Id.*

80. *Id.*

81. Myron Levin, *L.A. Landlords Sue Arbitration Group, Accuse It of Fraud*, L.A. TIMES, June 6, 1997, at D1; see also Myron Levin, *Judge Hits De-*

appalling and rare case. However, the opportunities for such exclusive provider relationships are real and legitimate issues of public concern.<sup>82</sup>

### 3. The California Experiment

In 2003, California became the first state to enact legislation regulating provider institutions and to adopt a code of ethics for arbitrators.<sup>83</sup> The California Arbitrator Ethics Standards set forth detailed requirements demanding that an arbitrator disclose any relationships that could call an arbitrator's impartiality into doubt and imposed a duty upon arbitrators to refuse gifts from parties, to conduct the arbitration fairly and diligently, to avoid *ex parte* communications with parties, to maintain confidentiality of information, and to not imply favoritism in marketing.<sup>84</sup> The California legislature also enacted limited measures to regulate provider institutions that administer consumer arbitrations.<sup>85</sup> Despite these steps towards regulating

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*funct Arbitration Panel*, L.A. TIMES, July 1, 2000, at C2 (reporting that plaintiffs have "little hope of collecting damages" on their default judgment from the now-defunct SCAA). The article also notes that "[d]espite the explosive growth of private dispute resolution, no requirements exist for arbitration firms or arbitrators to have legal training or be licensed, as even court reporters must." *Id.*

82. See, e.g., *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 922 (Cal. 1997) (finding, in part, that Kaiser had engaged in egregious conduct and dilatory tactics in administering its compulsory arbitration process); *Disco*, *supra* note 8, at 138 (analyzing the potential for bias because provider institutions have a financial interest in arbitrations with repeat corporate parties); *Harrington*, *supra* note 13, at 104 (stating that "[a]n arbitration provider named to receive all disputes from one company may have an incentive to rule in favor of the 'repeat player'" (quoting Marc L. Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974))).

83. See CAL. CODE CIV. PROC. § 1281.92 (2003) (prohibiting providers from administering consumer arbitrations where the provider has a financial relationship with a party); *id.* § 1281.96 (requiring the publication of consumer arbitration information by providers); *id.* § 1284.3(a) (prohibiting providers from administering arbitrations with "loser pays" requirements).

84. California Arbitrator Ethics Standards, *supra* note 33, Standards 1-17.

85. CAL. CODE CIV. PROC. § 1281.92(a)-(b). The Code prohibits a private arbitration company from administering a consumer arbitration [i]f the company has, or within the preceding year has had, a financial interest . . . in any party or attorney for a party, or . . . if any party or attorney for a party has, or within the preceding year has had, any type of financial interest in the private arbitration company.

*Id.*; see also *id.* § 1281.96 (requiring the publication of a range of data, including the nonconsumer party names, arbitrator names, arbitrator fees, amount

arbitral services, the laws “[a]re not intended either to affect any existing civil cause of action or to create any new civil cause of action,” with disqualification as the primary sanction.<sup>86</sup>

California was also one of the few states to have legislation codifying arbitral immunity.<sup>87</sup> However, the provision that expressly conferred immunity from civil liability for arbitrators expired in 1997.<sup>88</sup> The statute’s repeal reinstated the state’s

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of the claim, nature of the dispute, outcome of the case, and number of times nonconsumer has been subject to arbitration, if any, in the past); *id.* § 1284.3 (prohibiting arbitration providers from administering a case where the arbitration clause contains a “loser pays” provision and requiring providers to waive fees for indigent claimants (exclusive of arbitrator fees), and prohibiting disclosures of information obtained by a private arbitration company (e.g., financial condition, income, wealth, and fee waiver request) to any adverse party or nonparty to the arbitration); *id.* § 170.1 (providing for disqualification of any judge who has arranged for future employment or other compensated service as a dispute resolution neutral arbitrator or who has discussed prospective employment or service as a neutral within the previous two years). Two other bills were not enacted: A.B. 1714, which attempted, *inter alia*, to provide consumers with the opportunity to opt out of a contractual obligation that named a particular provider, and A.B. 1713, which provided for “disgorgement” of the provider’s administrative fees if a court found a violation of any of the above laws. The latter two bills were reintroduced in the 2003 session but failed to win approval. See *Opposition Kills Second California Consumer Arbitration Bill* (June 2, 2003), at <http://www.adrworld.com/opendocument.asp?Doc=B6AcDjCAIg&code=saNOem00>; see also *infra* note 94 and accompanying text. Similar legislation introduced in Texas was killed by business opposition in the legislature. *Business Opposition Kills Consumer Arbitration Bill in Texas* (July 7, 2003) (discussing proposed Texas state legislation that would have prohibited “loser pays” clauses in consumer arbitration agreements, limited consumer arbitration fees, and shifted most arbitration costs to business), at <http://www.adrworld.com/opendocument.asp?Doc=pnCB61xGrD&code=saNOem00>.

86. California Arbitrator Ethics Standards, *supra* note 33, Standard 1(d).

87. See Sponseller, *supra* note 63, at 434 n.119 (listing four states, in addition to California, which have codified absolute arbitral immunity). Few states, however, have express immunity for arbitrators serving in a court-annexed arbitration. See FLA. STAT. § 44.107 (2003) (providing immunity for court-appointed mediators and arbitrators); MD. CODE ANN. § 3-2A-04(g) (2002) (stating an arbitrator should have immunity from suit); N.C. GEN. STAT. § 7A-37.01(e) (2002) (providing arbitrators in court-ordered and court-annexed nonbinding arbitration “the same immunity as judges from civil liability for their official conduct”); UTAH CODE ANN. § 78-31b-4(4) (2002) (“[A]n ADR provider is immune from all liability when conducting proceedings under the rules of the Judicial Council and the provisions of this act, except for wrongful disclosure of confidential information, to the same extent as a judge of the courts in this state.”).

88. CAL. CODE CIV. PROC. § 1280.1 (amended 1995) (repealed 1997) (“An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract. . . . The immunity afforded by this section shall supplement, and not supplant, any otherwise ap-



common law immunity for quasi-judicial acts of private arbitrators, which is not entirely coherent.<sup>89</sup> For example, case law decided while the statute was in force extended immunity to arbitrators as well as to sponsoring institutions, despite the absence of specific reference to sponsoring institutions in the statute.<sup>90</sup> Some decisions rendered before the statute's enactment, such as *Baar v. Tigerman*, viewed arbitral immunity more critically.<sup>91</sup> In *Baar*, the court held that although an arbitrator was entitled to immunity for actions taken in a quasi-judicial capacity, arbitral immunity did not extend to liability for failure to render an award, and that arbitral immunity did not protect the sponsoring organization where the arbitrator was not immune.<sup>92</sup>

Legislation proposed in the State Assembly Judiciary Committee aimed to distinguish immunity accorded to arbitrators for their decisional acts from the independent conduct of provider institutions.<sup>93</sup> The bill's remedy, as introduced in the 2003 legislative session, was limited to disgorgement of administrative fees in the event that a private arbitration company administering a consumer arbitration violated any of the dis-

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plicable common law or statutory immunity.”). The provision was initially due for repeal on January 1, 1991, but was twice amended. First, in 1990, the repeal date was extended to January 1, 1996, and then in 1995, the repeal date was extended to January 1, 1997. *Id.* The provision has not been subsequently amended and the statutory guarantee of arbitral immunity in California has thus expired.

89. See 79 Op. Cal. Att’y Gen. 294 (1996), 1996 WL 737291 (Cal. A.G.) (concluding that the statute’s repeal reinstated the common law immunity applicable to judicial arbitrators).

90. See *In re Marriage of Assemi*, 872 P.2d 1190, 1198 (Cal. 1994) (extending the protection of judicial immunity to arbitrators because they perform the function of adjudicating private rights); *Am. Arbitration Ass’n v. Superior Court*, 10 Cal. Rptr. 2d 899, 900 (Cal.App. 2 Dist. 1992) (concluding that the statute implicitly extended to the sponsoring organization); *Coopers & Lybrand v. Superior Court*, 260 Cal. Rptr. 713, 721 (Cal.App. 2 Dist. 1989) (holding that an arbitrator’s misconduct or fraud will not void arbitral immunity; the remedy for arbitrator misconduct lies in vacation of the award).

91. 189 Cal. Rptr. 834 (Cal. Ct. App. 1983); see also *United States v. City of Hayward*, 36 F.3d 837 (9th Cir. 1994) (refusing to extend arbitral immunity to the City of Hayward as a sponsoring organization where the city appointed a partisan arbitrator to preside over a mandatory arbitration).

92. *Baar*, 189 Cal. Rptr. at 836, 839.

93. See Hudson Sangree, *Legislators Push Bills to Curb Arbitration Abuse*, L.A. DAILY J., Mar. 12, 2002, at 3 (describing A.B. 1713 as a “proposal to make it clear that arbitration firms do not enjoy absolute immunity for wrongdoing, as some courts have suggested”).

closure and reporting requirements.<sup>94</sup>

### C. THE REVISED UNIFORM ARBITRATION ACT'S ENDORSEMENT OF BROAD ARBITRAL IMMUNITY AND PENALTIES FOR AUDACIOUS CHALLENGES

Although arbitral immunity for private arbitrators and provider institutions is not addressed in the FAA or most state legislation, the drafters of the RUAA intended to provide nearly absolute certainty that legal challenges to arbitral conduct are barred.

#### 1. The RUAA's Endorsement of Immunity for Arbitrators and Provider Institutions

The RUAA, recently approved and recommended for enactment in all states by the National Conference of Commissioners on Uniform Laws in 2000, explicitly endorses broad arbitral immunity.<sup>95</sup> Section 14 of the Act provides express civil immunity to both arbitrators and arbitration provider institutions:

- (a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.
- (b) The immunity afforded by this section supplements any immunity under other law.
- (c) The failure of an arbitrator to make a disclosure required by Section 12 does not cause any loss of immunity under this section.<sup>96</sup>

To discourage parties from subpoenaing arbitrators, the Act provides that arbitrators and representatives of arbitration institutions are, like judges, "not competent to testify . . . and may not be required to produce records as to any statement, conduct, decision, or ruling occurring during the arbitration

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94. Cal. A.B. 3030, signed by Governor Gray Davis in August 2002, was contingent on approval of another bill that did not pass. Both have been reintroduced in the 2003 legislative session as A.B. 1713. See *California Assembly Revives Vetoed Consumer Arbitration Bills* (Mar. 3, 2003), at <http://www.adrworld.com/opendocument.asp?Doc=srD0HuySrN&code=saNOem00>. No action has been taken on the proposed legislation. See OFFICIAL CAL. LEGISLATIVE INFORMATION, CURRENT BILL STATUS, [http://www.leginfo.ca.gov/pub/bill/asm/ab\\_1701-1750/ab\\_1713\\_bill\\_20030912\\_status.html](http://www.leginfo.ca.gov/pub/bill/asm/ab_1701-1750/ab_1713_bill_20030912_status.html) (last visited Nov. 23, 2003).

95. RUAA § 14 (2000), <http://www.law.upenn.edu/bl/ulc/uarba/arbitrat1213.pdf>.

96. *Id.* § 14(a)-(c).

proceeding.<sup>97</sup> An exception is made for the limited circumstance of an arbitrator, arbitration organization, or representative of an arbitration organization filing a claim against a party, such as for payment of fees, or to respond to a party's vacatur action based on alleged arbitral corruption, fraud, or evident partiality. The statute deters attempts to challenge arbitral acts by imposing an attorney fees penalty against parties unsuccessful in litigation against arbitrators or provider institutions.<sup>98</sup>

## 2. Extension to Provider Institutions

The RUAA expressly includes arbitration provider institutions under the immunity blanket, reasoning that such coverage is appropriate

to the extent that [the provider institutions] are acting "in certain roles and with certain responsibilities" that are comparable to those of a judge. This immunity to neutral arbitration institutions is appropriate because the duties that they perform in administering the arbitration process are the functional equivalent of the roles and responsibilities of judges administering the adjudication process in a court of law.<sup>99</sup>

The commentary explains the impact of the immunity provision, stating that "[S]ection 14(c) is included to insure that, if an arbitrator fails to make a disclosure required by Section 12, then the typical remedy is vacatur . . . and not loss of arbitral immunity under Section 14. Such a result is similar to the effect of judicial immunity."<sup>100</sup> These provisions of the RUAA codify a number of court decisions extending absolute immunity from civil liability to arbitrators, as well as to provider institutions in some cases.<sup>101</sup>

## D. EVALUATING THE RUAA IMMUNITY PROPOSAL

As private arbitration has proliferated as an often mandatory process for resolving consumer legal disputes, the business

97. *Id.* § 14(d). The comments note that three other states currently provide some form of arbitral immunity in their arbitration statutes. *Id.* § 14 cmt. 1.

98. *Id.* § 14(e) (imposing the sanction of attorney fees and costs payable to the arbitrator, organization, or representative).

99. *Id.* § 14 cmt. 2 (adding that "[t]here is substantial precedent for this conclusion" (citations omitted)).

100. *Id.* § 14 cmt. 4.

101. *Id.* §14 cmt. 2 (listing case law extending immunity to arbitration organizations).

of arbitration has become more widespread and lucrative. States are now asked by the RUAA to codify a broad and vague rule that equates the private arbitration industry with public judges by conferring upon them the same level of absolute immunity from civil liability.

In reference to a societal concern that the trend toward privatized justice may result in increased settlements reached by coercion, in secrecy, and without legal accountability or due process protection, Professor Carrie Menkel-Meadow, Chair of the CPR-Commission on Ethics and Standards of Practice in ADR at Georgetown University, comments:

As some third party neutrals are granted immunity because they are either servicing the judicial system or acting in "quasi-judicial" capacities, some worry that there will be no way to monitor competence or quality and our legal system will not only fail to produce publicly declared precedents, but will produce "bad" private justice.<sup>102</sup>

Professor Menkel-Meadow also notes that "[i]n other situations, parties (or the neutral) have been accused of violating contract terms or good faith by breaching confidentiality, engaging in self-dealing and promotion and rapacious competitive behavior."<sup>103</sup> She is concerned that "our flexible, adaptive and creative processes, 'alternatives' to litigation and court have produced their own abuses . . . Our 'informal' system is in need of 'policing' and ethical sanctions (as well as other internal regulations) may be necessary in order to maintain public confidence and legitimacy."<sup>104</sup>

What is the appropriate level of response, regulation, and immunity? Unfettered immunity? Part II of this Article examines the basis for arbitral immunity and the aptness of the analogy to public judges, with the aim to articulate a standard that balances the need for arbitrators and providers to engage in their arbitral duties with the policy goal of ensuring accountability and providing protection to arbitration consumers.

## II. JUDICIAL IMMUNITY AND ITS PROGENY: THE DOCTRINAL INTENT, LIMITED SCOPE, AND WAYWARD EXPANSION IN ARBITRATION

Immunity for arbitrators and provider institutions is prem-

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102. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 419 (1997).

103. *Id.*

104. *Id.*

ised on an analogy to judicial immunity. The United States Supreme Court has never specifically endorsed arbitrator immunity, although the doctrine is established in many state and federal cases<sup>105</sup> and in a few states that have arbitral immunity legislation.<sup>106</sup> Part II of this Article explores the judicial immunity doctrine and its limited extension to certain public officials, and then examines the basis for extending judicial immunity to arbitrators and provider institutions.

#### A. THE PRECURSOR: JUDICIAL IMMUNITY

The law has long accorded absolute immunity from civil liability to federal and state judges who act in their judicial capacity.<sup>107</sup> The doctrine of judicial immunity derived from English common law and developed as the appellate system emerged as a means to correct errors of the court.<sup>108</sup> The policy justifications underlying the doctrine are to ensure the finality of judicial decisions, to preserve judicial independence, and to protect the integrity of the judicial process by preventing interference in judicial decision making that arises from harassment

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105. See J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 897-920 (exploring case precedent for judicial immunity in the United States). While selective state courts recognized versions of judicial immunity, the Supreme Court formally articulated its version in 1868. *Randall v. Brigham*, 74 U.S. 523, 533 (1868) ("To secure the maximum of impartiality, a judge must be protected from personal responsibility for his errors."); see also *Bradley v. Fisher*, 80 U.S. 335, 347 (1872) (stating that "[a] judge shall be free to act upon his own convictions without apprehension of personal consequence to himself"). In short, a judge enjoys absolute civil immunity from suit so long as a contested action is *judicial* in nature, and is not taken in the complete absence of jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978).

106. See, e.g., FLA. STAT. ANN. § 44.107 (1995); N.C. GEN. STAT. § 7A-37.1(e) (2001); UTAH CODE ANN. § 78-31b-4 (2002).

107. See, e.g., *Mireles v. Waco*, 502 U.S. 9, 10-12 (1991) (according immunity to a state judge against the claim that he knowingly authorized and approved excessive force against the plaintiff); *Sparkman*, 435 U.S. at 351-64 (holding a state judge absolutely immune in an action by a daughter alleging that a judge, without authority and with malice, approved a mother's request for the tubal ligation of a "somewhat retarded" fifteen-year-old girl); *Bradley*, 80 U.S. at 354 (establishing that judicial immunity from civil suit is absolute).

108. Jay M. Feinman & Roy S. Cohen, *Suing Judges: History and Theory*, 31 S.C. L. REV. 201, 203-47 (1980) (asserting that English law began with a position of general liability for judges but developed some limited immunity, and as the law developed in America, the power of appellate courts to correct error was offered as one justification for the expansion of judicial immunity); cf. Block, *supra* note 105, at 884 (noting that collateral attacks on judgments by way of suits against judges were disallowed because it strengthened the burgeoning appellate system).

or intimidation by the parties.<sup>109</sup>

Despite this persuasive rationale, the doctrine is subject to specific limitations, even with respect to public judges.<sup>110</sup> First, immunity does not extend to judges who act clearly without subject matter jurisdiction.<sup>111</sup> Second, immunity is predicated on the challenged action being a “judicial act.”<sup>112</sup> Finally, the doctrine does not extend to the criminal acts of judges.<sup>113</sup> Absolute judicial civil immunity, subject to the above limitations, bars actions against judges for damages brought under section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983.<sup>114</sup> However, this immunity does not preclude § 1983 actions for injunctive relief against a judicial officer for alleged violations of constitutional rights while acting in a judicial capacity, nor does immunity preclude an award of attorney fees.<sup>115</sup> In addition, judges can be subject to a variety of public remedies for their misconduct, such as discipline for violations of the code of judicial conduct, or removal from office via the political process if the judge was elected rather than appointed.<sup>116</sup> Appellate re-

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109. See *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (“[A judge] should not have to fear that unsatisfied litigants may hound him with litigation. . . . Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.”); *Bradley*, 80 U.S. at 347–49 (stressing the public need for “independence of the judges” and stating that a judge “shall be free to act upon his own convictions, without apprehension of personal consequences to himself”); see also *Block*, *supra* note 105, at 880 (discussing policy rationales).

110. See *Bradley*, 80 U.S. at 347, 352 (adopting two constraints on absolute immunity). This framework, adopted by the Supreme Court in 1871, continues to guide judicial immunity from civil suits today. See, e.g., *Sparkman*, 435 U.S. at 356–60 (noting that a judge enjoys absolute civil immunity from suit so long as a contested action is judicial in nature, and is not taken in the complete absence of jurisdiction).

111. *Bradley*, 80 U.S. at 351–52.

112. *Id.* at 347.

113. *O’Shea v. Littleton*, 414 U.S. 488, 503 (1974) (noting that “we have never held that the performance of the duties of judicial . . . officers requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights” or conduct in violation of Acts of Congress).

114. *Pierson*, 386 U.S. at 548.

115. *Pulliam v. Allen*, 466 U.S. 522, 524–25 (1984) (recognizing, pursuant to 42 U.S.C. § 1983 and § 1988, civil suit and attorney fees are available to an individual seeking injunctive relief against a state magistrate who jailed individuals for non-jailable misdemeanors); *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 735 (1980) (suggesting that immunity from liability in damages may not bar prospective or injunctive relief against a judge).

116. See generally MODEL CODE OF JUDICIAL CONDUCT (2002) (setting forth standards for judicial conduct). Under the Code, judges are required to “act at

view, equitable relief, and procedural writs, such as mandamus, also offer parties a remedy to compel judicial officers to perform legal duties.<sup>117</sup>

In actions for damages, the Supreme Court has rarely found an absence of subject matter jurisdiction for public judges and has been considerably generous in construing judicial acts. In *Stump v. Sparkman*, a case was brought against a judge who had approved a mother's ex parte request for the tubal ligation of a "somewhat retarded" fifteen-year-old girl.<sup>118</sup> Following the judge's order, the girl went to the hospital and was told she was having her appendix removed.<sup>119</sup> After marrying two years later, the girl learned of the mendacious operation worked upon her and brought a suit for damages.<sup>120</sup>

Even under these unsettling circumstances, the Court could not agree that there was a "clear absence of all jurisdiction" because Indiana law gave Judge Stump general jurisdiction to hear any type of case.<sup>121</sup> Under the *Sparkman* Court's sprawling conception of jurisdiction, this limitation on judicial immunity is virtually nonexistent,<sup>122</sup> unless a law expressly prohibits jurisdiction over a specified area (for example, a family court judge hears and sentences a criminal case in spite of plain state statutory language restricting jurisdiction to family proceedings).<sup>123</sup>

Judge Stump's tubal ligation order was also held to be a

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all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," and violation of the law is grounds for discipline. *Id.* at Canon 2. Specifically, judges are required to decide matters assigned to them and perform their duties without bias or prejudice. *Id.* at Canon 3. The purpose of the Code is not to create "a basis for civil liability or criminal prosecution." *Id.* at Preamble. Violations, however, may be "sufficient to result in involuntary retirement, removal, or censure." Sponseller, *supra* note 63, at 427.

117. See 28 U.S.C. § 1361 (2000) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.").

118. *Stump v. Sparkman*, 435 U.S. 349, 351 (1978).

119. *Id.* at 353.

120. *Id.*

121. *Id.* at 357.

122. Caroline Turner English, *Stretching the Doctrine of Absolute Quasi-Judicial Immunity: Wagshal v. Foster*, 63 GEO. WASH. L. REV. 759, 764 (1995) ("As [*Sparkman*] demonstrates, the 'lack of jurisdiction' restriction is not a meaningful limitation on the doctrine of judicial immunity.").

123. See also *Sparkman*, 435 U.S. at 357 n.7 (providing an illustration distinguishing lack of jurisdiction and excess of jurisdiction).

“judicial act.”<sup>124</sup> The Court directed that a judicial act determination should look “to the nature of the act itself” and “to the expectations of the parties.”<sup>125</sup> Although Judge Stump’s approval was not the product of a formal adversary proceeding, the Court found that “[s]tate judges with general jurisdiction not infrequently are called upon in their official capacity to approve petitions relating to the affairs of minors, as for example, a petition to settle a minor’s claim.”<sup>126</sup> This sufficed to make Judge Stump’s order a judicial act.<sup>127</sup> Combined with the determination that jurisdiction was not clearly absent, the Court cloaked Judge Stump with absolute immunity from civil liability.<sup>128</sup>

The Court made a similarly generous determination of a judicial act in *Mireles v. Waco*.<sup>129</sup> In *Mireles*, an angry judge allegedly directed police officers to use excessive force in summoning an absent attorney.<sup>130</sup> The Court held that this conduct of bringing parties before the court constituted a judicial act, counseling that the nature of a judge’s action should be considered at a level of abstraction, since “if only the particular act in question were to be scrutinized, then any mistake . . . [would be] ‘nonjudicial.’”<sup>131</sup>

The “judicial act” limitation on absolute judicial immunity is somewhat circularly expressed in terms of a function that could be performed only by a judge.<sup>132</sup> Although a judge’s inter-

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124. *Id.* at 360. The Sparkman Court’s conception of judicial act has been criticized by commentators. See e.g., K.G. Jan Pillai, *Rethinking Judicial Immunity for the Twenty-First Century*, 39 HOW. L.J. 95, 98 (1995) (“What constitutes a ‘judicial act’ deserving immunity has been so open-ended as to encompass even the blatantly outrageous and unethical conduct of judges which have the most remote and tenuous links to normal and proper judicial functions.”).

125. *Sparkman*, 435 U.S. at 362.

126. *Id.* at 361–62.

127. *Id.* at 362–63.

128. *Id.*

129. 502 U.S. 9 (1991).

130. *Id.* at 10.

131. *Id.* at 12.

132. See, e.g., *Sparkman*, 435 U.S. at 362 (“[W]hether an act by a judge is a ‘judicial’ one relate[s] to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his judicial capacity.”); see also *Forrester v. White*, 484 U.S. 219, 227 (1988) (stating that although there is no “precise and general definition of the class of acts” which are entitled to judicial immunity, there is “an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be as-



action with parties in a judicial capacity is broadly construed as a judicial act, it has long been recognized that some regular conduct of judges is administrative, not judicial, and therefore not protected.<sup>133</sup> For example, at English common law, "seventeenth and eighteenth century courts also came to realize that many of a justice's administrative duties were not judicial in the accepted sense, and that the mere exercise of discretion should not automatically insulate a justice from the consequences of an arbitrary exercise of his administrative powers."<sup>134</sup>

Significantly, the Supreme Court has distinguished between immune "judicial acts" and other "administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform."<sup>135</sup> In *Forrester v. White*, the Court employed a functional approach, examining the nature of the functions performed and entrusted, rather than the identity of the actor who performed them, in order "to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions."<sup>136</sup> Thus, the Court held that a state judge, who allegedly discriminated against an employee on the basis of sex, had acted in an administrative, not judicial, capacity, and thus was not entitled to absolute immunity from a § 1983 damages suit.<sup>137</sup> The Court

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signed by law to perform"); Pillai, *supra* note 124, at 111-12 (distinguishing between "judicial acts" and other "official acts" which are not judicial, such as "a judge's legislative, executive, and administrative or ministerial acts even when they are taken in his official capacity").

133. Block, *supra* note 105, at 890.

134. *Id.*

135. *Forrester*, 484 U.S. at 227.

136. *Id.* at 224. The Court acknowledged that the threat of liability can have salutary effects to encourage officials to perform their duties in a lawful manner, yet such threats can also "create perverse incentives that operate to inhibit officials in the proper performance of their duties," which may detract rather than contribute to the rule of law. *Id.* at 223. Because of "the undeniable tension between official immunities and the ideal of the rule of law," the Court counseled that claims of absolute immunity are sparingly recognized. *Id.* at 223-25 (citing the legislative and executive immunity provided under the Constitution as examples); see also *id.* at 230 ("Absolute immunity, however, is 'strong medicine, justified only when the danger of officials' being deflected from the effective performance of their duties 'is very great.'" (quoting *Forrester v. White*, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting))). The Court offered that a category of "qualified immunity" avoids "unnecessarily extending the scope of the traditional concept of absolute immunity." *Id.* at 224.

137. *Forrester*, 484 U.S. at 221, 229 (holding that a state court judge's act of demoting staff personnel was administrative).

added that “[a]dministrative decisions, even though they may be essential to the very functioning of the courts,” are not judicial acts.<sup>138</sup> Similarly, the act of jury selection was considered a ministerial function that could be performed by either a judge or nonjudicial personnel in *Ex parte Virginia*.<sup>139</sup> Thus, a judge who excluded African-Americans from jury lists was not immune.<sup>140</sup> Neither did judicial immunity apply to judges acting to promulgate a code of conduct for attorneys because such an act “was not an act of adjudication.”<sup>141</sup>

## B. LIMITED EXTENSION OF JUDICIAL IMMUNITY TO OTHER PUBLIC OFFICIALS

The Supreme Court has also recognized that, in certain situations, the policy considerations that warrant immunity for judges also apply to other public officials exercising discretionary functions, such as administrative law judges and prosecutors. In *Butz v. Economou*,<sup>142</sup> the Supreme Court set forth a three-prong functional approach to analyze whether immunity may extend to other public officials. This test examines (1) whether the official acted in a comparable quasi-judicial or public adjudicatory capacity, (2) the likelihood that harassment or intimidation by personal liability would interfere with the performance of the quasi-judicial duties, and significantly, (3) whether the system has procedural safeguards that would adequately protect against unconstitutional conduct by the im-

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138. *Id.* at 228 (citing as an administrative decision the duty of selection of jurors, as held in *Ex parte Virginia*); see also *Burns v. Reed*, 500 U.S. 478, 492–96 (1991) (declining to extend absolute immunity to a state prosecutor for the act of giving legal advice to a police officer but extending immunity for in-court conduct).

139. 100 U.S. 339, 348 (1879) (noting that the nonjudicial character of jury selection does not change merely because it was performed by a judge). The Court noted that because

[t]he duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge . . . it is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads. That the jurors are selected for a court makes no difference.

*Id.*; see also *Forrester*, 484 U.S. at 228 (stating that the criminal charge raised against the judge in *Ex parte Virginia* did not limit the analysis).

140. *Ex parte Virginia*, 100 U.S. at 348.

141. Supreme Court of Va. v. Consumers Union of the United States, Inc., 446 U.S. 719, 731 (1980).

142. *Butz v. Economou*, 438 U.S. 478 (1978).

mune official.<sup>143</sup> Such safeguards include “[t]he insulation of the [official] from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal.”<sup>144</sup>

In extending absolute immunity to executive branch officials engaged in administrative adjudication, *Butz* emphasized that, because other means within the judicial process exist to correct errors, decision makers in the judicial process must be free to exercise their discretion without fear of personal consequences.<sup>145</sup> With this safeguard in place, the importance of preserving independent judgment outweighs the risk of an official committing an unconstitutional act while presiding at an agency hearing.<sup>146</sup> Thus, as the “agency officials [who perform functions analogous to those of a prosecutor] must make the decision to move forward with an administrative proceeding free from intimidation or harassment,”<sup>147</sup> those officials who make decisions in proceedings are entitled to immunity from liability for their participation in that decision.<sup>148</sup> Similar considerations led the Court to accord immunity to certain public officials who must perform quasi-adjudicatory functions and discretionary actions.<sup>149</sup> Only private individuals, specifically

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143. *Id.* at 512.

144. *Id.*

145. *Id.* (extending absolute immunity to executive branch officials engaged in administrative adjudication based on the nature of the official's functions, the likelihood of harassing lawsuits, and the procedural safeguards in place to control misconduct).

146. *Id.* at 514.

147. *Id.* at 516.

148. *Id.* at 514.

149. See *Westfall v. Erwin*, 484 U.S. 292, 297–98 (1988) (extending absolute immunity from state law tort claims to executive officials only when their conduct is discretionary); *Cleavinger v. Saxner*, 474 U.S. 193, 203 (1985) (distinguishing between absolute and qualified immunity and according the prison discipline committee only qualified immunity because it did not perform a “classic” adjudicatory function and was not “independent”); *Mitchell v. Forsyth*, 472 U.S. 511, 521–24 (1985) (applying an analysis similar to the *Butz* Court in according qualified immunity to the Attorney General in national security functions); *Procunier v. Navarette*, 434 U.S. 555, 561 (1978) (agreeing that prison administrators are entitled to qualified immunity); *Imbler v. Pachtman*, 424 U.S. 409, 410, 423 n.20 (1976) (granting prosecutors absolute quasi-judicial immunity for their functions of initiating and pursuing criminal prosecutions and noting that grand jurors and prosecutors are afforded absolute immunity because they “exercise a discretionary judgment” comparable to that of a judge); *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (indicating qualified immunity applies to the state hospital superintendent); *Wood v. Strickland*, 420 U.S. 308, 322 (1975) (holding that public school administrators

witnesses and jurors, who assist the public judicial system in decision-making activities have been specifically included in this extended immunity.<sup>150</sup> As with the nonjudicial acts of public judges, the Court has declined to extend immunity to public officials for nondiscretionary acts. Thus, because court reporters do not exercise discretion in performing their duties, they are not immune from civil liability.<sup>151</sup>

Again, judges and public officials are immune from civil liability because they exercise discretionary judgment based on the evidence presented to them.<sup>152</sup> It is the functional similarity of their judgments to those of a judge that has resulted in both grand jurors and prosecutors being referred to as “quasi-judicial” officers, and their immunities being termed “quasi-judicial” as well.<sup>153</sup> Even where immunity for public officials is warranted, the presumption is that qualified, not absolute, immunity is sufficient to protect government officials in the exercise of their duties.<sup>154</sup> In these cases, the official seeking immunity bears the burden of showing that such immunity is justified for the function in question.<sup>155</sup>

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are entitled to qualified immunity); *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974) (extending qualified immunity to state officials against charges that they intentionally, recklessly, willfully, and wantonly ordered National Guard members to perform allegedly illegal acts resulting in university students’ deaths, on the grounds that the scope of immunity correlated with the scope of the discretion, responsibilities of the particular office, and the circumstances existing at the time the action was taken); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (finding legislators absolutely immune from § 1983 suits).

150. *Briscoe v. LaHue*, 460 U.S. 325, 334 (1983) (extending immunity for witnesses at trial). The Supreme Court has not specifically endorsed an extension of absolute immunity to private arbitrators. See *infra* Parts II.C, III.A (discussing the functional equivalency of arbitrators).

151. *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993) (“We are also unpersuaded by the contention that our ‘functional approach’ to immunity requires that absolute immunity be extended to court reporters because they are ‘part of the judicial function.’” (citation omitted)).

152. *Id.* (“When judicial immunity is extended to officials other than judges, it is because their judgments are ‘functional[ly] comparab[le]’ to those of judges—that is, because they, too, ‘exercise a discretionary judgment’ as a part of their function.” (citing *Imbler*, 424 U.S. at 423 n.20)).

153. *Imbler*, 424 U.S. at 423 n.20.

154. *Id.* at 424–29.

155. *Forrester v. White*, 484 U.S. 219, 224 (1988); *Butz v. Economou*, 438 U.S. 478, 506 (1978).

### C. EXTENSION TO ARBITRATORS: THE ARBITRAL IMMUNITY DOCTRINE

Based on a presumed analogy between public judges and private arbitrators, courts have broadly extended absolute judicial immunity to private arbitrators and provider institutions. This extension of judicial immunity is largely based on the notion that the role of an arbitrator is, under *Butz*, "functionally equivalent" to the role of a judge, with a corresponding need to protect the integrity and finality of the arbitration and decision-making process from reprisals by dissatisfied parties.<sup>156</sup> The rationale is that arbitrators are required to exercise independent judgment and therefore need to be free from the threat of liability for their decisions.<sup>157</sup> Immunity has also been justified as socially useful and as a recruitment tool, since shielding arbitrators from suit encourages individuals to volunteer as arbiters.<sup>158</sup> Without such immunity, few would be willing to serve as arbitrators.<sup>159</sup> Notably absent, however, is mention of the disparity in procedural safeguards as present in the public justice system and lacking in private arbitration.

#### 1. Historical Development of Arbitral Immunity

A history of arbitral immunity in the United States can be

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156. *Galuska v. N.Y. Stock Exch.*, No. 99-3522, 2000 WL 347851, at \*2 (7th Cir. Apr. 3, 2000); *New England Cleaning Servs. v. Am. Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999); *Olson v. Nat'l Ass'n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996).

157. *See, e.g., Lundgren v. Freeman*, 307 F.2d 104, 117 (9th Cir. 1962) ("If their decisions can thereafter be questioned in suits brought against them by either party . . . their decisions will be governed more by the fear of such suits than by their own unfettered judgment as to the merits of the matter they must decide.").

158. *See* Arthur A. Chaykin, *The Liabilities and Immunities of Mediators: A Hostile Environment for Model Legislation*, 2 OHIO ST. J. ON DISP. RESOL. 47, 77 (1986) ("The granting of an immunity is a matter of public policy that balances the social utility of the immunity against the social loss of being unable to attack the immune defendant."); *see also* *Tamari v. Conrad*, 552 F.2d 778, 781 (7th Cir. 1977) ("[I]ndividuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in [a lawsuit].").

159. *See generally* Chaykin, *supra* note 158. No empirical study confirms the assumption that either arbitrators or arbitration provider institutions would refuse to participate in arbitration without immunity. *Cf. New England Cleaning Servs.*, 199 F.3d at 546 ("Failure to extend immunity to the AAA in these circumstances could discourage it from sponsoring future arbitrations."). This concern seemingly also applies to many other skilled and noble professionals, such as doctors and lawyers, who nonetheless are not immune from liability by law or contract.

traced back as early as 1880 in *Jones v. Brown*.<sup>160</sup> In *Jones*, a tribunal was selected to arbitrate the differences of N.B. Brown and William Harper.<sup>161</sup> The arbitration allegedly adjourned before Brown was given an opportunity to submit all his evidence, and no further proceedings were held.<sup>162</sup> Without the knowledge of the third arbitrator, two arbitrators allegedly conspired to decide against Brown for \$41,000.<sup>163</sup> Upset, Brown refused to pay \$240 in arbitrator fees.<sup>164</sup> One of the arbitrators, O.C.L. Jones, brought suit for payment, and Brown counterclaimed for \$1000 in damages allegedly resulting from Jones's corrupt acts as arbitrator.<sup>165</sup>

The *Jones* court assumed that the arbitrator had a judge-like role and proceeded to see if the arbitrator's actions were judicial. The court determined that an arbitrator's acts of adjourning a proceeding and rendering an award were comparable to a judge's act of "reducing an opinion to writing."<sup>166</sup> Thus, the arbitrator was held to have acted in a judicial, not ministerial, capacity.<sup>167</sup> Accordingly, as a judge is not "liable to civil actions for judicial acts," neither was the arbitrator.<sup>168</sup>

Like *Jones*, ensuing cases did not compare the similarities and differences between the roles and acts of private arbitrators and public judges in any detail. However, citing *Jones* with approval, these cases articulate the same justifications for extending judicial immunity to arbitrators: to protect the decision maker's independence, to protect against fear of reprisal by a disgruntled party, and to provide a social benefit to the public by encouraging individual service as an arbitrator.<sup>169</sup> Few early

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160. 6 N.W. 140, 142-43 (Iowa 1880) (ruling that an arbitrator is immune from fraud claim liability for judicial acts); see also *Shiver v. Ross*, 3 S.C.L. (1 Brev.) 293, 293 (1803) (providing testimonial immunity to an arbitrator called as a witness to examine an alleged error in an arbitral award and holding that impeachment of an award would not be considered absent arbitrator misconduct or error on the face of the award).

161. *Jones*, 6 N.W. at 141.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 142.

167. *Id.*

168. *Id.* at 143; see also *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977) (holding that arbitrators are immune from suit regarding questions involving their authority to resolve a dispute).

169. See *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (Mass. 1884) ("An arbitrator is a quasi judicial officer, under our laws, ex-

cases extended immunity to private individuals, such as architects, appraisers, or members of boards of directors, who engaged in discretionary conduct that was "functionally comparable" to the adjudicative decision-making process.<sup>170</sup> Although recognizing that many aspects of a professional's tasks involve discretionary determinations, other courts do not equate such professionals with immune adjudicatory decision makers, but rather hold them to the standards of their respective professions.<sup>171</sup>

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exercising judicial functions. There is as much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror."); *Melady v. S. St. Paul Live Stock Exch.*, 171 N.W. 806, 807 (Minn. 1919) ("Any man [serving] in a judicial capacity ought to feel free to act on his own convictions, uninfluenced by the fear of consequences personal to himself . . . [Immunity] . . . should be extended to all to whom the law or the agreement of the parties commits the exercise of authority of an essentially judicial nature."); *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221, 224 (N.Y. Sup. Ct. 1956) ("[A]rbitrators must be free from the fear of reprisals by an unsuccessful litigant. . . . I see no reason to distinguish between a judge and an arbitrator . . . . [T]he same rule of immunity should apply to arbitrators as applies to the judiciary, inasmuch as the same reasons of public policy are applicable.").

170. *See, e.g.*, *Lundgren v. Freeman*, 307 F.2d 104, 119 (9th Cir. 1962) (holding that architects, authorized by contract to resolve disputes between an owner and a contractor, acted as quasi-arbitrators and were immune from tortious interference claim); *Hutchins v. Merrill*, 84 A. 412, 416 (Me. 1912) (granting immunity from a negligence claim against a surveyor, whose appraisal of plaintiffs' timber was binding on the parties to a service contract); *Melady*, 171 N.W. at 807 (granting immunity to a board of directors of an exchange empowered by statute to arbitrate matters concerning its membership, against charges of malicious action in finding a member guilty of uncommercial conduct); *cf. E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1033-34 (5th Cir. 1977), *modified*, 559 F.2d 268 (5th Cir. 1997) (rejecting immunity for architects serving as arbitrators where the alleged wrongdoing was a failure to render decisions, as opposed on an error in decision making).

171. *Levine v. Wiss & Co.*, 478 A.2d 397, 402 (N.J. 1984) (holding that court-appointed accountants who evaluated the value of a business were not entitled to arbitral immunity because they were merely acting as assessors, not decision makers); *see also* Russell L. Wald, Annotation, *Accountant's Malpractice Liability to Client*, 92 A.L.R.3d 396, 400-01 (1979). Wald notes:

As in the case of lawyers, doctors, architects, engineers, and others engaged in rendering professional services for compensation, it is implied in all contracts for the employment of public accountants that they will render their services with that degree of skill, care, knowledge, and judgment usually possessed and exercised by members of that profession in the particular locality, in accordance with accepted professional standards and in good faith without fraud or collusion. While not insurers against damage, it is generally recognized that accountants may be held liable to clients for damages resulting from fraud, misconduct, or negligence in their professional undertaking;

Other early instances of arbitral immunity arose in cases involving labor arbitration.<sup>172</sup> In these cases, courts noted the essential role that arbitrators regularly perform in labor disputes and emphasized that labor arbitrators develop law.<sup>173</sup> National labor law declares that the policy for settlement of labor-management disputes is through collective bargaining,<sup>174</sup> and arbitration is a central feature of that process. Typically, courts

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and, as in other like situations, they are liable for the acts and omissions of their subordinates.

The courts have rejected contentions that accountants were shielded from malpractice liability to their clients on grounds of judicial immunity as quasi-arbitrators.

*Id.* See generally Constance Frisby Fain, *Accountant Liability*, 21 OHIO N.U. L. REV. 355 (1994) (discussing various grounds for accountant liability); Patricia A. McCoy, *Realigning Auditors' Incentives*, 35 CONN. L. REV. 989, 1002 (2003) (noting the availability of malpractice action against accountants).

172. See *Int'l United Auto Workers v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1186 (6th Cir. 1983) (finding a labor arbitrator who ruled on ERISA claims immune from liability for acts committed within his official capacity); *Cahn v. Int'l Ladies' Garment Union*, 311 F.2d 113, 114-15 (3d Cir. 1962) (per curiam) (affirming dismissal of conspiracy claims against a labor arbitrator and holding the arbitrator immune against challenges brought by either party arising out of his conduct in his arbitral capacity); *Babylon Milk & Cream Co. v. Horvitz*, 151 N.Y.S.2d 221, 224 (N.Y. Sup. Ct. 1956) (dismissing an employer's claim against a labor arbitrator alleging collusion with union officials on the grounds that "like other judicial officers, arbitrators must be free from the fear of reprisals by an unsuccessful litigant . . . [and] must of necessity be uninfluenced by any fear of consequences for their acts"), *aff'd*, 165 N.Y.S.2d 717 (N.Y. App. Div. 1957); *Hill v. Aro Corp.*, 263 F. Supp. 324, 326 (N.D. Ohio 1967) (finding a labor arbitrator immune from claims for his conduct in capacity as an arbitrator and noting the important role of the labor arbitrator in the developing federal common law of labor relations); see also *Ozark Air Lines, Inc. v. Nat'l Mediation Bd.*, 797 F.2d 557, 564 (8th Cir. 1986) (noting that decreasing an arbitration board's immunity diminishes its impartiality and efficacy); *Fong v. Am. Airlines, Inc.*, 431 F. Supp. 1340, 1343-44 (N.D. Cal. 1977) (stating that arbitrators are "independent decision-makers who have no obligation to defend themselves").

173. *Hill*, 263 F. Supp. at 326 ("[T]here is not the slightest doubt about the all-important role of the labor arbitrator in the developing federal common law of labor relations."); see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (noting that arbitrators have authority only to enforce collective bargaining agreements, not statutory claims, and that they are chosen because of their expertise in the "law of the shop, not the law of the land").

174. See National Labor Relations Act, 29 U.S.C. § 171(b) (2000) (encouraging "the settlement of issues between employers and employees through collective bargaining . . . [including] voluntary arbitration"); see also *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (stressing the "federal policy of settling labor disputes by arbitration"). The Federal Arbitration Act does not establish an independent basis for federal subject matter jurisdiction. See *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984).



limit the arbitrator's authority to matters involving interpretations under the collective bargaining agreement.<sup>175</sup> Individual union members retain rights to judicial resolution of other statutory or common law claims, unless expressly waived.<sup>176</sup>

## 2. Extension to Regulated Provider Institutions

Although arbitral immunity, like judicial immunity, historically applied only to the decision maker involved in the discretionary process of adjudicating disputes (arbitrator or judge), the doctrine evolved in cases involving claims against providers or sponsoring institutions in federal securities industry disputes.<sup>177</sup> As with labor cases, arbitration is the traditional and generally exclusive means of resolving securities industry related complaints. Federal law also highly regulates the securities industry. Providers or sponsoring organizations, such as the National Association of Securities Dealers (NASD), are congressionally mandated self-regulatory institutions subject to oversight by the Securities and Exchange Commission (SEC).<sup>178</sup> The Fifth Circuit described these institutions as

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175. *United Steelworkers of Am.*, 363 U.S. at 597 (giving substantial deference to an arbitrator's contractual interpretation); *N. Ind. Pub. Serv. Co. v. United Steelworkers of Am.*, 243 F.3d 345, 347 (7th Cir. 2001) (noting the arbitrator's authority of contract interpretation); see also Van Wezel Stone, *supra* note 1, at 1010-12 (noting significant deference by the courts, as well as the National Labor Relations Board, to labor arbitral decisions).

176. *Wright v. Universal Mar. Serv.*, 525 U.S. 70, 80 (1998) (requiring a "clear and unmistakable" waiver of a union employee before a court could compel a federal statutory claim involving disability discrimination to arbitration).

177. See *Olson v. Nat'l Ass'n. of Sec. Dealers*, 85 F.3d 381 (8th Cir. 1996) ("A sponsoring organization is immune from civil liability for improperly selecting an arbitration panel, even when the selection violates the organization's own rules."); *Austern v. Chi. Bd. Options Exch., Inc.*, 898 F.2d 882, 886-87 (2d Cir. 1990) (holding that "arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process," and that the options exchange, in sponsoring and administering the arbitration proceeding, was immune from suit for alleged failure to follow its own policies regarding panel composition and notice of proceeding); *Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 691-92 (5th Cir. 1985); *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1210 (6th Cir. 1982) (holding that the defendant, "acting through its arbitrators, is immune from civil liability for the acts of the arbitrators arising out of contractually agreed upon arbitration," and stating that the FAA provided the exclusive remedy for challenging the award).

178. See *Austin Mun. Sec., Inc.*, 757 F.2d at 679-80, 686 (explaining the extensive regulatory framework governing self-regulatory agencies such as the NASD, and registered stock exchanges, including the NYSE).

“quasi-governmental,” akin to an agent of the SEC.<sup>179</sup>

Thus, courts have extended the cloak of arbitrator immunity to protect securities-sponsoring organizations from challenges to their acts and obligations in administering the arbitrations, including the arbitrator selection, disclosure of conflicts of interests, violations of internal policies, and even failure to provide notice to a party.<sup>180</sup> The oft-cited case in this area is *Corey v. New York Stock Exchange*, which ignored the plaintiffs' claim that the NYSE employed improper arbitrator selection procedures because, according to the court, the common law policy of arbitrator immunity protected the NYSE.<sup>181</sup> The court offered three rationales: (1) that such “[e]xtension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity [for] otherwise the immunity extended to arbitrators is illusory,” (2) that “[i]t would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association,” and (3) that “the federal Arbitration Act provides the exclusive remedy for challenging acts that taint an arbitration award.”<sup>182</sup>

Likewise, *Olson v. National Ass'n of Securities Dealers* affirmed dismissal of a suit against the NASD for, *inter alia*, breach of contract, fraudulent misrepresentation, gross negligence, and negligent processing due to the arbitrator's ongoing business relationship with the employer.<sup>183</sup> The court rejected the plaintiff's argument that the selection of arbitrators occurs before any decision making and therefore falls outside the scope of arbitral immunity, concluding that the organization's immunity protects all acts that are “a necessary part of arbitration administration.”<sup>184</sup> According to *Olson*, “[w]ithout this extension [of arbitrator immunity to sponsoring institutions], arbitral immunity would be almost meaningless because liability would simply be shifted from individual arbitrators to the sponsoring institutions.”<sup>185</sup>

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179. *Id.* at 692 (“The NASD's actions are more akin to those of the SEC, which has sovereign immunity from damage suits . . . [The NASD] requires absolute immunity from civil liability for actions connected with the disciplining of its members.” (citation omitted)).

180. *See supra* note 177; *infra* note 192.

181. 691 F.2d 1205 (6th Cir. 1982).

182. *Id.* at 1211.

183. 85 F.3d 382 (8th Cir. 1996).

184. *Id.* at 383.

185. *Id.*

*Austern v. Chicago Board Options Exchange, Inc.* extended absolute immunity from liability in damages to the options exchange (which administered the arbitration proceeding) despite alleged violation of two of its own policies.<sup>186</sup> These policies required that (1) the majority of the panel be composed of arbitrators not from the securities industry, and (2) notice of time and place for the hearing be given at least eight days prior.<sup>187</sup> In fact, all the arbitrators were from the securities industry, and the plaintiff (living in Israel) never received notice.<sup>188</sup> Although recognizing that these tasks were administrative, the court characterized them as “integrally related to the arbitral process.”<sup>189</sup> Echoing *Corey*, the court stated that

[e]xtension of arbitral immunity to encompass boards that sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusory. It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association.<sup>190</sup>

The court also noted that “[r]educing the [Board’s] immunity based on the arbitral deficiencies present here would merely serve to discourage its sponsorship of future arbitrations.”<sup>191</sup> These assumptions have led numerous courts to follow in the broad grant of immunity to securities arbitral institutions.<sup>192</sup>

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186. 898 F.2d 882, 886 (2d Cir. 1990).

187. *Id.* at 884.

188. *Id.*

189. *Id.* at 886.

190. *Id.* (quoting *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205 (6th Cir. 1982)).

191. *Id.*

192. See *Galuska v. N.Y. Stock Exch.*, No. 99-3522, 2000 WL 347851, at \*2 (7th Cir. Apr. 3, 2000) (holding an arbitral organization immune from the plaintiff’s claims for breach of contract, breach of fiduciary duty, negligence, and conspiracy); *Honn v. Nat’l Ass’n of Sec. Dealers, Inc.*, 182 F.3d 1014, 1018 (8th Cir. 1999) (rejecting the claim that the arbitral organization’s acts were outside the scope of the NASD’s arbitration sponsoring role, and concluding that the challenged acts were “normal administrative functions” for which the organization is entitled to immunity); *Hawkins v. Nat’l Ass’n of Sec. Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998) (holding that an arbitral organization “is immune from civil liability arising from its actions taken in the course of conducting arbitration proceedings”); *Barbara v. N.Y. Stock Exch., Inc.*, 99 F.3d 49 (2d Cir. 1996) (finding that a sponsoring agency has absolute quasi-judicial immunity for arbitration of member discipline); *Yadav v. N.Y. Stock Exch., Inc.*, 1992 WL 197409, at \*3 (S.D.N.Y. 1992) (concluding that the provider institution was immune to the plaintiff’s claim relating to allegedly defective notice because the act of providing such notice was “integrally related to the arbitral process” (quoting *Austern*, 898 F.2d at 886)).

### 3. The Wayward Expansion of Arbitral Immunity in Contemporary Arbitration

Beginning in the 1990s, as the use of mandatory arbitration provisions began to proliferate in commercial and consumer contracts, cases against providers of private arbitration services emerged. In some of these cases, the courts upheld immunity for the provider institution where the claim was based on allegedly improper conduct by a labor arbitrator, thus defeating an attempt to shift liability from an immune arbitrator to the sponsoring organization.<sup>193</sup> Most litigation has involved claims against provider institutions for failing to abide by policies involving the administration of an arbitration.<sup>194</sup> Perhaps resigned to seemingly impenetrable immunity, few reported cases challenged an individual arbitrator's conduct.

Although providers often describe their role as purely administrative, they routinely invoke the arbitral immunity defense against any legal claims raised against them, and courts have facilely equated provider institutions with arbitrators and judges.<sup>195</sup> Courts have broadly extended immunity to providers based on acts not of the arbitrator, but of the providers' own administrative responsibilities. For example, the court in *New England Cleaning Services, Inc. v. American Arbitration Ass'n* conferred immunity upon the AAA for a panoply of administrative tasks, including determining jurisdiction, selecting arbitrators, billing for services, and scheduling arbitrations, stating that these are "integrally related to the arbitration."<sup>196</sup> Contemporary cases summarily dismiss claims against arbitrators or provider institutions on the grounds that (1) "[a]ll of the federal courts of appeals that have considered this question" have applied arbitral immunity to "a suit designed to interfere with arbitral jurisdiction,"<sup>197</sup> (2) the parties to the arbitration agreed to

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193. See, e.g., *Richardson v. Am. Arbitration Ass'n*, 888 F. Supp. 604 (S.D.N.Y. 1995) (upholding the immunity of a sponsoring organization in an action based on allegedly improper conduct by the labor arbitrator).

194. See *supra* Part II.C; *infra* note 196.

195. See *supra* note 192.

196. 199 F.3d 545, 546 (1st Cir. 1999). The court reasoned that "interfer[ing] with the organization's neutrality and likely add[ing] further cost and delay to the arbitral process," as well as "fail[ing] to extend immunity to the AAA in these circumstances could discourage it from sponsoring future arbitrations . . . [and] would impede the implementation of federal policy favoring arbitration." *Id.* at 546 (citations omitted).

197. *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. Med-Partners, Inc.*, 203 F.R.D. 677, 688 & n.8 (S.D. Fla. 2001) (dissolving an in-

abide by the organization's procedural rule "neither [it] nor any arbitrator shall be liable to any party for any act or omission in connection with any arbitration conducted under these rules,"<sup>198</sup> and (3) there remained available alternative relief in the form of judicial review to modify, vacate, or amend the arbitration award.<sup>199</sup>

Courts have held that provider institutions are immune from liability for a variety of acts that strain credulity to regard as anything but administrative or ministerial. For example, arbitral immunity has insulated providers from liability for failing to send notice of a hearing,<sup>200</sup> to inform a party of a disclosed conflict of interest between an arbitrator and opposing party,<sup>201</sup> or to abide by party instructions not to send out an award pending settlement discussions.<sup>202</sup> The characterization of administrative tasks as "integrally related to the arbitral process" eviscerates any possible distinction between protected and unprotected functions, expanding the doctrine well beyond the judicial act limitation applied in cases involving public officials and judges.

Based on the foregoing precedent, the district court in *Jason v. American Arbitration Ass'n* decided that arbitral immunity attaches to "all acts within the scope of the arbitral process."<sup>203</sup> The court characterized the role of the AAA in the arbitration process as that "of a court clerk," after the AAA argued that "arbitral immunity shields the arbitrators and the association administering the arbitration . . . from any liability

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junction enjoining the arbitral organization from "conducting an improper arbitration"), *aff'd in part, appeal dismissed in part* by 253 F.3d 709 (11th Cir. 2002); *see also supra* notes 177-96.

198. *Med-Partners*, 203 F.R.D. at 688 (quoting AAA Rules, R. 50(d)).

199. *Id.*

200. *Austern v. Chi. Bd. Options Exch.*, 898 F.2d 882, 886 (2nd Cir. 1990).

201. *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1260 n.6 (7th Cir. 1992) (noting that the AAA "clearly violated" its own rule requiring its disclosure of personal, financial, or professional relationships with either party); *see also L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 377 (Minn. 1989) (conferring immunity despite an arbitrator's failure to disclose conflicts of interest).

202. *Thiele v. RML Realty Partners*, 14 Cal. App. 4th 1526, 1532 (Cal. Ct. App. 1993) (construing an act of sending out an arbitral award allegedly contrary to express instructions not as "administrative," but rather "as much a part of the arbitral process as is determining the award").

203. No. 02-474, 2002 U.S. Dist. LEXIS 9645, at \*6 (E.D. La. May 23, 2002) (citing *Galuska v. N.Y. Stock Exch.*, No. 99-3522, 2000 WL 347851, at \*2 (7th Cir. Apr. 3, 2000) (citations omitted)).

for misconduct coming within the scope of the dispute resolution process.<sup>204</sup> The court agreed with the AAA, summarily dismissing the employee's claims against the AAA for negligence and breach of contract in failing to properly and equitably administer the arbitration proceeding against the employer.<sup>205</sup>

#### 4. Who Has Not Been Afforded Arbitral Immunity

Due to the broad interpretation of all activities that relate to the arbitration process as arbitral (or judicial acts), with practically nothing accepted as merely administrative, the case law is sparse in presenting situations in which immunity has not been afforded. The limited examples are (1) complete non-feasance, such as when the arbitrator renders no decision at all,<sup>206</sup> (2) where the arbitrator was considered an "agent" of a party,<sup>207</sup> and (3) where the acts complained of lie outside of the

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204. *Id.* at \*5, 8.

205. *Id.* at \*8-9 (asserting that the FAA also "provides the exclusive remedy for challenging misconduct in the administration of an arbitration award"). Similarly, in *International Medical Group, Inc. v. American Arbitration Ass'n*, the court upheld the AAA's immunity from a suit based on wrongful exercise of jurisdiction in part because the claim was "integrally related to the administrative tasks of the AAA . . . similar to the administrative tasks of a court clerk accepting a complaint for filing." 312 F.3d 833, 844 (7th Cir. 2002). The plaintiff, who was not a party to the arbitration agreement, was drawn into arbitration and asked the court to recognize a new "bad-faith arbitration" cause of action against arbitration providers. *Id.* at 837, 845. The court refused and emphasized that if an arbitration provider makes an administrative mistake, the wronged party could find an appropriate remedy in court by seeking injunctive relief against the party initiating the arbitration. *Id.* at 844.

206. See *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1033 (5th Cir. 1977) (holding that an arbitrator loses his claim to immunity "[w]here his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decisionmaking"); *Baar v. Tigerman*, 189 Cal. Rptr. 834 (Ct. App. 1983) (refusing immunity to an arbitrator or a sponsoring organization where after a four-year period that included forty-three days of evidentiary hearings and ten days of closing arguments, the arbitrator failed to report the decision within the AAA and statutory time limit). The court in *Baar v. Tigerman* viewed arbitral immunity more critically, holding that although arbitral immunity covered quasi-judicial actions, it did not extend to protect the arbitrator from liability for failure to render an award and did not protect the sponsoring organization where the arbitrator was not immune from liability. 189 Cal. Rptr. at 836, 839.

207. See *United States v. City of Hayward*, 36 F.3d 832, 838 (9th Cir. 1994) (concluding that the immunity doctrine for a neutral processing agency is *inapplicable* to a municipality when the municipality appointed an arbitrator pursuant to a local ordinance mandating arbitration).

arbitrator's jurisdiction.<sup>208</sup>

By this substantial precedent, the arbitral acts of arbitrators and private nonprofit or for-profit provider institutions appear to be beyond the reach of the law.<sup>209</sup>

#### D. REINING IN THE DOCTRINE

The cases in which the arbitral immunity doctrine was developed predate the ubiquitous and modern practice of arbitration and arose primarily where arbitration was the exclusive means of resolving disputes, and where arbitrators largely volunteered out of a public service to their respective industry, akin to jury service, on matters related to the specific industry and not general law. Further, arbitration traditionally occurred in industries regulated by federal law or oversight of a federal regulatory agency.<sup>210</sup> These factors, along with the similarity of the adjudicatory decision-making functions of judges and arbitrators, encouraged acceptance of immunity for arbitrators and, later, for self-regulated sponsoring institutions. The doctrine became so entrenched, however, that courts seemed to cloak all acts of an arbitrator or provider with immunity without critical analysis. This wayward expansion of immunity has not been

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208. See *Kemner v. Dist. Council of Painting & Allied Trades No. 386*, 768 F.2d 1115, 1119–20 (9th Cir. 1985) (holding that the defendants are not immune from suit as to the plaintiff's claims for relief for acts allegedly taken in excess of the committees' jurisdiction).

209. States have largely followed the immunity coverage in the federal cases. See, e.g., *Alexander v. Am. Arbitration Ass'n*, No. C 01-1461 PJH, 2001 WL 868823, at \*3–4 (N.D. Cal. July 27, 2001) (concluding that “[a]rbitration associations are granted absolute immunity for a broad category of acts performed during the course of an arbitration proceeding,” and then granting arbitral immunity despite alleged violation of *internal policy*, which the court held falls within the scope of the arbitration process because the policy dictates how arbitration proceeds); *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970, 972–73 (N.D. Cal. 1992) (dismissing the plaintiff's claim that the selection of arbitrators constituted an administrative decision rather than a judicial act); *Am. Arbitration Ass'n. v. Superior Court*, 10 Cal. Rptr. 2d 899 (App. Dep't Super. Ct. 1992) (extending statutory-based arbitral immunity to a sponsoring organization for an alleged procedural error).

210. See *Van Wezel Stone*, *supra* note 1, at 996–1012 (describing the use of arbitration in the securities industry and labor-management relations). *Van Wezel Stone* notes that

both the NLRA and the Securities Exchange Act were enacted in the 1930s, and both rely on governmental agencies for their implementation. In each case, the agency has delegated its authority to pre-existing private organizations that have long had internal governance structures, including private dispute resolution mechanisms.

*Id.* at 1008.

faithful to the careful distinctions made in judicial immunity jurisprudence or to the Supreme Court's admonition that immunity be granted sparingly.<sup>211</sup>

Recent cases rarely provide any justification for extending immunity to providers other than the established rule or mantra that arbitrators and providers are simply immune.<sup>212</sup> Yet, as the court in *Ernst* identified:

The arbitrator's "quasi-judicial" immunity arises from his resemblance to a judge. The scope of his immunity should be no broader than this resemblance. The arbitrator serves as a private vehicle for the ordering of economic relationships. He is a creature of contract, *paid by the parties to perform a duty*, and his decision binds the parties because they make a specific, private decision to be bound. His decision is not socially momentous except to those who pay him to decide. The judge, however, is an official governmental instrumentality for resolving societal disputes. The parties submit their disputes to him through the structure of the judicial system, at mostly public expense. His decisions may be glossed with public policy considerations and fraught with the consequences of *stare decisis*. When in discharging his function the arbitrator resembles a judge, we protect the integrity of his decisionmaking by guarding against his fear of being mulcted in damages. *But he should be immune from liability only to the extent that his action is functionally judge-like. Otherwise we become mesmerized by words.*<sup>213</sup>

### III. ABSOLUTE ARBITRAL IMMUNITY: DOES IT MAKE SENSE FOR COMMERCIALIZED ARBITRATION?

#### A. EXAMINING THE ANALOGY OR FUNCTIONAL EQUIVALENCE

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211. See *Forrester v. White*, 484 U.S. 219 (1988) (denying absolute immunity to a state court judge based on the judge's decision to demote and dismiss a probation officer). Although judicial immunity jurisprudence criticized the broad scope of judicial immunity, the justification for broad protection of private arbitral actors is more problematic. See Pillai, *supra* note 124, at 99 (urging that the judiciary limit absolute judicial immunity to a narrow class of judicial acts within the judiciary and not extend it to other officials outside the judiciary).

212. See *supra* Part II.C.

213. *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1033 (5th Cir. 1977) (emphasis added) (citation omitted). The court also noted:

In his role as interpreter of the contract and as private decision-maker, the arbitrator has a duty, express or implied, to make reasonably expeditious decisions. Where his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decisionmaking (good or bad), he loses his claim to immunity because he loses his resemblance to a judge. He has simply defaulted on a contractual duty to both parties.

*Id.*



## BETWEEN PUBLIC JUDGING AND CONTEMPORARY ARBITRATION PRACTICE

Given the increasingly commercialized nature of the private arbitration industry, broad extension of the judicial immunity doctrine to arbitrators and provider institutions requires a critical reexamination. The analogy to judicial immunity ("the judicial analogy") is increasingly unsuitable, and significant differences warrant distinct treatment for arbitral immunity.<sup>214</sup>

1. Unqualified Arbitral Immunity Fails the *Butz* Test

Courts have extended immunity to public officials in limited situations that comport with the three prongs of *Butz v. Economou*.<sup>215</sup> When applied to private arbitrators and provider institutions in contemporary arbitration practice, crucial aspects of these factors are lacking. For example, notably absent from the cases establishing arbitral immunity is discussion of the procedural safeguards prong of *Butz*. Arbitral awards are final, subject to a restricted remedy of vacatur, where the offending conduct of the arbitrator goes unpenalized and the aggrieved party uncompensated.<sup>216</sup> Even upon obtaining vacatur, the party is bound to return to the private arbitration system, with its lack of guarantees of fair process.

The judicial analogy is also weakened by the fact that the Supreme Court has only extended immunity to individuals in a *public* setting, and that fundamental differences exist between a public judge in an adjudicatory process and the private arbi-

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214. Rather, given the significant differences between publicly paid judges and private arbitrators who charge a market rate, a professional services analogy for arbitrators is more apt.

215. 438 U.S. 478, 508–17 (1978); see *supra* text accompanying note 143.

216. Although the FAA permits vacatur of an arbitration award based on an arbitrator's bias, fraud, or misconduct, the law does nothing to compensate the aggrieved party for the lost time, arbitration costs, or fees incurred in challenging the award. See 9 U.S.C. § 10 (2000) (stating permissible grounds for vacating an arbitration award); see also *Rubenstein v. Otterbourg*, 357 N.Y.S.2d 52, 62 (N.Y. Civ. Ct. 1973) (denying the plaintiff's claim to recover legal fees incurred as a result of a successful challenge that vacated a unanimous arbitration award due to arbitrator bias and the arbitration association's failure to intervene or remove a biased arbitrator); Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 60 (1997) ("Judicial review of arbitration awards is far narrower than the scope of review of trial court judgments . . . . Most errors of fact or law are not reviewable.").

tration industry.<sup>217</sup> Moreover, cases extending immunity to arbitrators typically rest on authority and arbitration use that predate the now ubiquitous use of predispute mandatory arbitration cases and the proliferation of an industry of numerous private arbitration provider institutions and professional private arbitrators, many of whom market their services as professional neutrals and charge substantial fees. That the private arbitration industry should enjoy the same absolute immunity afforded public judges, and be exempt from accountability required by other professionals or industries, is increasingly dubious.<sup>218</sup>

For example, arbitrators perform professional services under contract for which they are highly compensated (in contrast to judges, who are paid public-servant salaries). Unlike judges, they are in a position to purchase malpractice insurance. Arguably, the market for malpractice insurance could somewhat efficiently signal the competence of individual arbitrators and arbitration providers and shift costs more efficiently among the contracting parties. An immunity rule takes the market out of the picture, and is better suited to government functions than private contractual arrangements.

## 2. Public and Private Adjudication Proceedings Are Significantly Different

Despite a strong public policy favoring arbitration, the significant differences between private arbitration and public adjudication cannot be ignored.<sup>219</sup> The important differences be-

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217. See *Butz*, 438 U.S. at 512.

218. The same policy considerations supporting immunity for arbitrators and provider institutions—to ward off lawsuits—can be true for all professions where difficult judgments must be made, including doctors, lawyers, plumbers, and accountants. But does the recent Enron and Arthur Andersen controversy instruct us to shield independent auditors from scrutiny? The analogy to auditors is particularly apt: Auditors perform a quasi-judicial function in rendering a decision regarding whether a company's books fairly state their financial condition under appropriate SEC rules. See *supra* Part I.B.1 (discussing the regulation of professions).

219. The Supreme Court acknowledged these significant differences between arbitration and public adjudication in *Bernhardt v. Polygraphic Co. of America*:

The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and [the state constitution]. Arbitrators do not have the benefit of judicial instruction on the

tween public and private judges necessitate a narrower scope of immunity for arbitral providers. As the California Supreme Court acknowledged,

superior court judges are accountable to the public in ways arbitrators are not. Superior court judges are [state] *constitutional officers* who are sworn to uphold the United States and California Constitutions. They are locally elected and may be recalled. They are *subject to discipline by a public body*, the Commission on Judicial Performance. Virtually all of their proceedings take place in *public view*. Their decisions are subject to *appellate review*. By contrast, arbitrators are not public officers and are in no way publicly accountable. Their proceedings take place in private. They are subject to minimal appellate review. There can be little doubt that publicly accountable judges, rather than arbitrators, are the most appropriate overseers of injunctive remedies explicitly designed for public protection.<sup>220</sup>

The court in *Baar v. Tigerman* raised similar concerns in noting fundamental differences between judicial proceedings and arbitrations:

[J]udges derive their power from the Constitution and the people while arbitrators derive their power from private contracts; judicial action has far-reaching and precedential consequences whereas arbitrators do not create and are not bound by precedent; an independent judiciary is essential to the preservation of democracy whereas arbitration plays a less noble role; trials are public whereas arbitration is private; and judges must follow the law while arbitrators may disregard it.<sup>221</sup>

In fact, arbitration providers are less accountable than judges or immune public officials. Arbitration providers, which by their own definition simply administer and do not decide

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law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial . . . .

350 U.S. 198, 203 (1956). In that case the Court ruled the FAA did not apply to the discharged employee's claim because the transaction did not involve interstate commerce. *Id.* at 200-02. The Court, regarding the FAA as "substantive" law, noted, "If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State." *Id.* at 203.

220. *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67, 77-78 (Cal. 1999) (emphasis added) (citations omitted).

221. Sponseller, *supra* note 63, at 429 (citing *Baar v. Tigerman*, 189 Cal. Rptr. 834, 837-38 (Cal. Ct. App. 1983)). In *Baar*, the court refused to grant immunity to an arbitrator who breached his contract to render a timely award, and reasoned that "arbitration remains essentially a *private contractual arrangement* between parties." *Baar v. Tigerman*, 189 Cal. Rptr. 834, 838 (Cal. Ct. App. 1983).

cases, receive a wide scope of immunity by extension to publicly accountable entities.<sup>222</sup> Unlike public officials, private arbitrators are not susceptible to injunctive relief in § 1983 civil rights litigation because of their private actor status. Furthermore, unlike judges, arbitrators are not subject to the political process for removal, retention, or election, or to procedures for punishing judicial misconduct. Whereas judges are subject to significant scrutiny and free press, the lack of a public record of arbitral decisions insulates private arbitrators from any public scrutiny.

The judicial act limitation has been discarded and replaced with a presumption that all acts related to an arbitration, including administrative acts, are “integrally related” to the arbitral process, and thus immune.<sup>223</sup> Even if arbitrators or providers are in some ways *comparable* to the public judges and court clerks, that does not mean they are *identical*.<sup>224</sup> Even court clerks are not entitled to absolute immunity for administrative or ministerial acts.<sup>225</sup> Summarily regarding private arbitration businesses, from the local pop-up provider to the large national and multinational arbitration companies, as court clerks ignores reality and the need to protect the public from abuse.

### 3. The Assumptions Motivating Arbitral Immunity Are Outdated

The stated policy justifications for broad arbitral immunity do not require the industry’s wholesale exemption from the law.

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222. See AAA, COMM. ARBITRATION RULES, *supra* note 18 at R. 2.

223. *New England Cleaning Servs., Inc. v. Am. Arbitration Ass’n*, 199 F.3d 542, 545 (1st Cir. 1999).

224. See *Feingberg v. Katz*, No. 01 Civ. 2739, 2003 LEXIS 1677, at \*19 (S.D.N.Y. Feb. 3, 2003) (“The tendency to analogize arbitration to trial, and arbitrator to judge, should thus be avoided.”).

225. See, e.g., *Geitz v. Overall*, 62 Fed. Appx. 744, 746 (8th Cir. 2003) (holding court clerks absolutely immune only for discretionary acts or acts taken at the direction of a judge or court order, but not for a claim based on charges that the clerks intentionally failed to perform ministerial acts); *X v. Casey*, No. 90-667, 1991 U.S. App. LEXIS 1488, at \*5 (4th Cir. Feb. 4, 1991) (rejecting absolute immunity for a court clerk’s ministerial duties but finding a court clerk’s negligence in filing actionable); *McCray v. Maryland*, 456 F.2d 1, 4 (4th Cir. 1972) (rejecting absolute immunity for a court clerk’s ministerial duties but finding a court clerk’s negligence in filing actionable); see also Claire E. Harkrider, Note, *An Act-Based Analysis of Immunity and Its Application to Unconstitutional Acts of Court Clerks*, 76 MINN. L. REV. 1393, 1419–20 (1992) (concluding that court clerk immunity should be limited to discretionary acts or acts done pursuant to a court order, but not to ministerial acts).

First, the policy favoring arbitration should also support favoring integrity in arbitration. Second, the claim that arbitrators and providers will not serve without immunity is hardly realistic given the growing market, hourly rates, and economic incentives of private arbitration practice. Compliance with the law should be a cost of doing business. Other professionals, such as lawyers and doctors, also run the risk of being sued by disgruntled clients or patients, and generally carry liability insurance. It is doubtful that the private arbitration industry will go away if arbitrators, like other professionals, are responsible for their contracts and nonjudicial acts. Third, the claim that private provider institutions are like court clerks can be questioned, at a minimum, by comparing the costs charged by the two entities for case administration. Even if a private individual or institution performs tasks comparable to a public official, that does not itself mean that the same level of immunity should apply to both public and private actors. Should private security guards, for example, have the same immunity as police officers?<sup>226</sup> There are significant differences between public and private adjudication. The private industry should not be *less* accountable than public officials.

Another contention in support of immunity is that the FAA vacatur provisions are the exclusive remedy for arbitral misconduct.<sup>227</sup> The statute provides that arbitral awards may be vacated, *inter alia*, on the grounds of evident partiality in the arbitrators or misconduct that prejudiced the rights of the parties.<sup>228</sup> The FAA does not express any grant of immunity for the

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226. *Richardson v. McKnight*, 521 U.S. 399, 407–12 (1997) (denying immunity to private prison guards on the grounds that the policy goals that had led the Court to imply immunity in other contexts would not be vindicated by doing so in this one).

227. See *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1211–12 (6th Cir. 1982); *Prudential Secs., Inc. v. Hornsby*, 865 F. Supp. 447, 450–52 (N.D. Ill. 1994) (holding that the FAA's provision is the exclusive avenue for reopening arbitration decisions and considering motions to vacate).

228. 9 U.S.C. § 10 (2000). The statute provides that a court may vacate an award

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

underlying conduct. Although the statute is silent on whether its vacatur provisions are the exclusive means for vacatur, some authorities consider the FAA exclusive, while others disagree.<sup>229</sup> The FAA's process for vacatur of an award on the basis of arbitral misconduct does not necessarily foreclose independent actions. In public adjudication, the fact that court procedural rules permit a court to set aside a judgment where a party engaged in fraud, misrepresentation, or other misconduct, does not preclude independent sanction and recourse against the illegal conduct or abuse of process.<sup>230</sup> Arbitration should be no different.

Finally, immunity is considered to support the finality of arbitral awards. Recognizing that provider institutions may be subject to independent claims does not attack the finality of the award itself. Where, for example, an award has been vacated on the grounds of arbitral misconduct, such misconduct should not necessarily escape independent accountability. Thus, the finality of the award itself is subject to the statutory vacatur process to challenge the awards based on arbitral misconduct, but the misconduct need not go unredressed.

The policy favoring arbitration rests upon the belief that contracts to settle disputes by arbitration should be "on the same footing" as other contracts and thus respected and enforced.<sup>231</sup> Recourse should be available when an arbitrator or

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(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.

*Id.*

229. Sabin, *supra* note 8, at 1349–50. Sabin notes:

Many federal circuits recognize several nonstatutory grounds for vacatur. These include awards in "manifest disregard of the law," in conflict with "public policy," "arbitrary and capricious," "completely irrational," or contrary to the "essence" of the arbitration agreement. Yet, the value of nonstatutory vacatur is illusory because arbitrators are not required to issue a formal opinion. . . . [E]ven when recognized as a ground for vacatur, "the absence of substantive reasoned awards revealing the manner in which arbitrators have decided the cases before them has been a major factor in effectively insulating challenged arbitration awards from vacatur on the basis of nonstatutory grounds. Hence, nonstatutory vacatur is "virtually precluded."

*Id.* (citations omitted). Thus, judicial review is not an effective means of overseeing arbitrators. *Id.*; see also Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 464–65 (1998).

230. See FED. R. CIV. P. 60(b).

231. See *supra* note 47; see also *supra* note 67 and accompanying text.

provider breaches such a contractual obligation, engages in tortious conduct, or violates statutory laws. The reverence for contract should apply equally to require accountability in arbitration.

#### 4. Arbitrator Ethical Guidelines Need Enforcement Remedies

Substantial efforts by concerned leaders in the arbitration industry have led to the development of various arbitration due process protocols, in addition to codes of ethics for arbitrators and provider organizations.<sup>232</sup> These are invaluable in articulating good practice standards. Nevertheless, such standards largely fail to provide a means of enforcement or remedy to an aggrieved party.<sup>233</sup> Interestingly, when the state of California acted to mandate a code of arbitrator ethics, many arbitrators and providers, who apparently subscribed to such ethical standards, opposed the legislation.<sup>234</sup>

A broad application of arbitral immunity to shield accountability for nondecisional acts and violations of these standards or general principles of law does not accord with the traditional justification for judicial immunity and public policy regulating professions. The need exists for both courts and legislatures to examine critically the application of arbitral immunity. The contours and application of arbitral immunity must be defined so as to provide meaningful redress for arbitral failures.

### B. RESPECTING THE DOCTRINE'S LIMITS ACCOMMODATES THE NEED FOR ARBITRATOR INDEPENDENCE AND FINAL DECISIONS YET DEMANDS ACCOUNTABILITY FOR INDEPENDENT ILLEGAL ACTS

#### 1. Abide by the Judicial Act and Jurisdictional Limitations

Immunity for public judges is provided only for judicial acts within the court's jurisdiction. Administrative or legislative acts, even though performed by a judge, are not immune. The cases extending broad immunity to arbitration providers rarely analyze this distinction, and in effect redefine judicial

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232. See *supra* notes 30–32.

233. See *supra* Part I.B.2.

234. See Jay Folberg, *Arbitration Ethics—Is California the Future?*, 18 OHIO ST. J. ON DISP. RESOL. 343, 352–55 (2003) (describing various opposition to arbitrator ethics standards); Caroline E. Mayer, *Arbitration Standards Challenged*, WASH. POST, July 30, 2002, at E1 (noting opposition by the securities industry to new arbitration ethics standards and disclosure rules).

acts to include any tasks that are “integrally related to the arbitration.”<sup>235</sup> This characterization sweeps too broadly and eliminates any distinction between administrative and judicial acts, contrary to the narrow interpretation urged by the Supreme Court.<sup>236</sup> Limiting arbitral immunity within the traditional confines adequately protects concerns for independence, finality of arbitral decisions, and efforts to shift liability.

Arbitral provider institutions, by their own proclamation, only administer arbitration cases and retain arbitrators as independent contractors.<sup>237</sup> Parties who arbitrate under a provider institution contract generally have the institution administer the arbitration in accordance with the provider’s rules and procedures. These rules set forth the provider’s obligation to manage virtually every aspect of the arbitration, from the filing of a case to final disposition, including providing the parties with a list of potential arbitrators, notice of filings and hearings, and information regarding arbitrator disclosures that per-

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235. *New England Cleaning Servs. v. Am. Arbitration Ass’n*, 199 F.3d 542, 545 (1st Cir. 1999); *see also* *Olson v. Nat’l Ass’n of Sec. Dealers*, 85 F.3d 381, 382–83 (8th Cir. 1996) (holding that “[a] sponsoring organization is immune from civil liability for improperly selecting an arbitration panel, even when the selection violates the organization’s own rules,” and affirming dismissal of plaintiff’s suit against NASD for, *inter alia*, breach of contract, fraudulent misrepresentation, gross negligence, and negligent processing of arbitration due to arbitrator’s ongoing business relationship with employer, on grounds that the NASD’s appointment of the arbitrator was within the scope of the arbitral process protected under the doctrine of arbitral immunity); *Austern v. Chi. Bd. Options Exch., Inc.*, 898 F.2d 882, 886–87 (2d Cir. 1990) (holding that “arbitrators in contractually agreed upon arbitration proceedings are absolutely immune from liability in damages for all acts within the scope of the arbitral process,” and that the options exchange, in sponsoring and administering arbitration proceedings, was immune from suit for alleged failure to follow its own policies regarding panel composition and notice of proceeding); *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982) (holding that the plaintiff’s claims against the NYSE for improper arbitrator selection procedures were barred by the common law policy of arbitrator immunity because such “[e]xtension of arbitral immunity to encompass boards which sponsor arbitration is a natural and necessary product of the policies underlying arbitral immunity; otherwise the immunity extended to arbitrators is illusory”).

236. *See supra* Part II.B.

237. *See* AM. ARBITRATION ASS’N, STATEMENT OF ETHICAL PRINCIPLES, [http://www.adr.org/index2.1.jsp?JSPssid+15718&JSPsrc=upload\LIVESITE\Rules\\_Procedures\Ethics\\_Standards\principals.html](http://www.adr.org/index2.1.jsp?JSPssid+15718&JSPsrc=upload\LIVESITE\Rules_Procedures\Ethics_Standards\principals.html) (last visited Oct. 12, 2003). The AAA Web site advertises, “The AAA administers cases. It does not determine the merits of a case: arbitrators decide cases. AAA staff members do not hear evidence, do not write awards, and do not review the reasoning of awards. AAA awards are only reviewed to ensure proper format. Arbitrators and mediators at the AAA are independent.” *Id.*



tain to potential conflicts of interest.<sup>238</sup> The provider institution's filing and administrative fees for its services are generally separate from the arbitrator's fee.<sup>239</sup>

Although the courts have not articulated a precise definition of judicial act, in essence the function to be protected is the decisional act and exercise of discretionary judgment based on the evidence presented in an adversarial proceeding.<sup>240</sup> Under this definition some, but not all, actions of provider institutions may fairly be considered judicial acts. For example, in *International Medical Group, Inc. v. American Arbitration Ass'n*,<sup>241</sup> the AAA had to exercise discretion in determining that a party had satisfied the filing requirements and thus proceed with administering an arbitration despite an opposing party's objection.<sup>242</sup> Other administrative tasks by a provider, however, do not require such discretion. Thus, failing to send notice to a party or to report a conflict disclosure, sending out an award contrary to the parties' instructions, misrepresenting the nature of the arbitral services, failing to follow internal rules or contractual representations, violating statutory laws prohibiting discrimination, conspiracy or consumer deception, or engaging in acts that do not involve discretionary decisions based on a presentation of evidence are not judicial acts and should not be immune.<sup>243</sup> The jurisdictional limitation also restricts arbitral

238. See, e.g., AAA, COMM. ARBITRATION RULES, *supra* note 18.

239. See *id.* at R. 49; see also NAT'L ARBITRATION FORUM, SCHEDULE OF FEES, *supra* note 20 (setting forth administrative fees for, *inter alia*, filing, hearings, processing, suspension for nonpayment, and hearing room rental).

240. See *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993) (holding that the key to the extension of judicial immunity to nonjudicial officials is the "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights"); *Imbler v. Pachtman*, 424 U.S. 409, 422-23 n.20 (1976) ("It is the functional comparability of their judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well."). Even absolute judicial immunity has been restricted to exclude ministerial acts. See *Ex parte Virginia*, 100 U.S. 339, 348-49 (1879).

241. 312 F.3d 833 (1st Cir. 2002).

242. *Id.* at 844. The court analogized these discretionary administrative tasks to those of a court clerk who receives a filing that complies with the court's rules; precedent supports granting immunity in such situations. *Id.* at 843. The court went on to state, however, that if an arbitration provider organization does make an administrative mistake, the wronged party is not without relief. The appropriate remedy "would be for the wronged party to seek injunctive relief against the party initiating the arbitration in an appropriate court." *Id.* at 844.

243. Compare *New England Cleaning Servs. Inc., v. Am. Arbitration Ass'n*,

immunity. Jurisdiction for arbitrators and providers is derived from the authority granted by the parties in the appointing contract. Where arbitrator providers engage in misconduct that exceeds their jurisdictional authority, immunity is unwarranted. Finally, attempts to escape responsibility for these failures or other statutory violations by contractual disclaimer should be considered void as contrary to public policy.<sup>244</sup>

## 2. Reframe the Analysis: Identifying the Claim and Real Party in Interest Avoids Disrupting Award Finality and Attempts to Shift Liability

Immunity has been granted to arbitrators and providers without an analysis of whether claims arise out of decisional acts, administrative acts, or independent obligations. Where the claims relate to the latter two categories that do not involve discretionary or deliberative acts, immunity is misplaced.<sup>245</sup>

The better analysis is not to press the fiction that the private arbitration industry, particularly with respect to arbitrations between corporate parties and individual consumers and employees, is equivalent to the public justice system, or that corporate provider institutions are “like court clerks.”<sup>246</sup> The policy justifications for conferring immunity can be assuaged by reframing the question, not as to whether the arbitral actors are *per se* immune, but rather by identifying, as to the particu-

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199 F.3d 542, 545 (1st Cir. 1999) (holding that immunity extends to administrative tasks performed by an arbitration association that are “integrally related to the arbitration,” even if the provider fails to follow its own internal procedural rules), and *Olson v. Nat’l Ass’n of Sec. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996) (holding an arbitration organization immune from civil liability for improperly selecting an arbitration panel, even though the selection violated the organization’s own rules), and *Thiele v. RML Realty Partners*, 14 Cal. App. 4th 1526, 1528–32 (Cal. Ct. App. 1993) (finding an arbitration association immune from liability for sending out an arbitrator’s award contrary to the party’s instructions), with Holding, *supra* note 67 (discussing a proposed bill in the California Assembly that would eliminate arbitration firms’ immunity from lawsuits and allow arbitration parties to sue for misconduct).

244. See *supra* notes 35, 73 and accompanying text.

245. See *supra* note 225.

246. *Int’l Med. Group*, 312 F.3d at 841–45 (refusing to recognize a new “bad-faith arbitration” cause of action against arbitration providers for acting in the absence of jurisdiction after the plaintiff was drawn into an arbitration). The plaintiff, who was not a party to the arbitration agreements, brought suit alleging that the arbitration provider (the AAA) engaged in tortious conduct by asserting jurisdiction over the plaintiff when the AAA proceeded with an insurance claimant’s demand for arbitration naming the plaintiff company as a respondent. *Id.* at 837–41.

lar claim presented: Who is the real party in interest?<sup>247</sup> Courts and legislators should distinguish claims that challenge a judicial act or attempt to shift liability to the provider from claims that seek to enforce a contractual obligation or independent standard of law. If a claim against a provider is really a disguised complaint against the arbitrator's decisional acts or a form of vicarious liability, the provider simply is not the real party in interest—immunity is irrelevant.<sup>248</sup> However, where it is alleged that an arbitrator or provider has violated an independent obligation based on their agreed-upon contractual duties or laws of general application, broad immunity is unwarranted.

### 3. Recognize Viability of Independent Claims

The Seventh Circuit in *Caudle v. American Arbitration Ass'n* recognized that in these “shifting the blame” situations, the correct analysis is to identify that the “arbitrators and organizing bodies are not the real parties in interest” to the dispute.<sup>249</sup> In *Caudle*, the Seventh Circuit correctly acknowledged that provider institutions should not be responsible for acts that would fall within an arbitrator's realm of immunity; however, it acknowledged that claims against providers or even arbitrators that are independent of the decisional function should not be summarily foreclosed.<sup>250</sup>

Likewise, the plaintiffs in *Garcia v. Wayne Homes, LLC*<sup>251</sup> asserted claims against the AAA challenging (1) the propriety of the AAA's exclusive contracts with the defendant under the federal and state antitrust laws, and (2) the truthfulness in the AAA's marketing and sales practices under the consumer pro-

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247. FED. R. CIV. P. 17(a).

248. Thus, where a party has challenged the merits of an adjudicatory decision, or when a claim against a provider is really a disguised complaint against the arbitrator's decision (shifting liability), the provider is not the real party in interest and the claim should be dismissed.

249. 230 F.3d 920, 922 (7th Cir. 2000).

250. *Id.* The district court concluded that the organization was immune from the plaintiff's breach of contract claim due to unreasonably high fees for an arbitration. *Id.* The Seventh Circuit dismissed the claim for lack of jurisdiction and hinted that a contract claim may have been tenable, for example, “if Caudle had paid the entire amount requested by the AAA to conduct the arbitration and the AAA had then pocketed the money without arbitrating the dispute.” *Id.* The court noted “it is unlikely that the AAA could claim ‘immunity’ in response to a demand for a refund.” *Id.*

251. CA. Case No. 2001 CA 53, 2002 LEXIS 1917, at \*1 (Ohio. Ct. App. Apr. 19, 2002).

tection and civil conspiracy laws.<sup>252</sup> In response, the AAA argued it was immune under arbitral immunity, and that it was not a real party in interest to the contract.<sup>253</sup>

The court recognized the need for arbitrators to be “immune from suits for acts performed within their capacity as arbitrators and performed within their assigned duties and authority,”<sup>254</sup> yet identified a key distinction:

Where, however, a claim is presented asserting an independent cause of action against an arbitral body, one contending that the body has liability that is distinct from that of the parties to the arbitration proceeding and falls outside of the scope of recognized immunities, the arbitral body is a real party in interest.<sup>255</sup>

Although the court found that the claims against the AAA were premature, it recognized the possibility that independent claims survive immunity.<sup>256</sup>

In *Olson v. American Arbitration Ass'n*, a lack of sufficient supporting evidence, as opposed to *carte blanche* immunity,

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252. *Id.* at \*53–56. Specifically, the plaintiffs asserted that the arbitration agreement forced them to purchase services from the AAA and was, therefore, an illegal tying arrangement in violation of federal and state antitrust laws. *Id.* at \* 53. In addition, the plaintiffs

alleged that the AAA committed unfair and/or deceptive acts or practices by making general misrepresentations to the public regarding the nature of the arbitration services it provides to consumers, *i.e.*, that they conform with Consumer Due Process Protocol adopted by the National Consumer Disputes Advisory Committee. The Appellants also claimed that the AAA falsely represented that its arbitration services are, and would be, fair and equitable.

*Id.* at \*55–56.

253. *Id.* at \*56.

254. *Id.* at \*62.

255. *Id.* at \*58.

256. *Id.* at \*64–66. The court noted:

They claim that AAA falsely represented to the general public that its processes for consumer arbitration procedures are fair and equitable, and that these procedures comply with the Consumer Due Process Protocol . . . . Until the services are performed, however, it is premature to determine whether they are fair and equitable, or whether they are performed in accordance with particular standards or representations. In other words, AAA may yet perform the services as advertised . . . . Whether any claim based upon AAA’s failure to perform arbitration services as advertised can survive arbitral immunity is an interesting issue, but one that we decline to decide in a vacuum. Once AAA has arbitrated the dispute, if the Appellants conclude that they are aggrieved under the Consumer Sales Practices or Deceptive Trade Practices acts, they can bring an action under either or both acts, and the issue of whether their claims are barred by arbitral immunity can be litigated . . . .

*Id.*

was the basis for the court's dismissal of the plaintiff's claims against the AAA for violating the Texas Deceptive Trade Practices Act.<sup>257</sup> The plaintiff claimed that the AAA misrepresented its services by telling the public that it provides impartial arbitration services through neutral, nonbiased arbitrators.<sup>258</sup> The plaintiff claimed that the AAA's process for choosing panels resulted in arbitration panels biased in favor of employers because of five factors:

(1) the panels are stacked with lawyers who primarily represent employers in employment disputes; (2) a vast majority of the panelists are men; (3) a vast majority of the panelists are white; (4) a vast majority of the panels are comprised of lawyers who do not represent a cross-section of society; and (5) the AAA receives substantial contributions from employers.<sup>259</sup>

The court recognized, over the AAA's claim of immunity, that the alleged actions were independent of the decisional aspects of the arbitration.<sup>260</sup>

#### IV. PRESCRIBING THE CONTOURS OF ARBITRAL IMMUNITY AND OPTIONS FOR ARBITRAL ACCOUNTABILITY

##### A. CLARIFYING ITS SCOPE

###### 1. The Need for a Balanced Standard

Holding any individual or entity immune from its acts is contrary to the established maxim that no one is above the law.<sup>261</sup> The Supreme Court has urged caution even with judicial

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257. 876 F. Supp. 850, 851-52 (N.D. Tex. 1995).

258. *Id.* at 851.

259. *Id.* at 852 ("Accepting these allegations as true, these allegations do not as a matter of law show bias. Olson speculates on stereotypical characteristics that the arbitration panel in this case is biased. Olson's conclusion that the panel is biased is unsupported by her remaining allegations in her complaint.")

260. *See id.*

261. *See Austin Mun. Sec., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 757 F.2d 676, 687 (5th Cir. 1985). The court noted:

Our judicial system assumes that all individuals, whatever their official position, are subject to law.

"No man in this country is so high that he is above the law. No officer of the law may set that law of defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it."

Qualified immunity reconciles these conflicting factors by subject-

immunity, stating that “[a]bsolute immunity . . . is ‘strong medicine, justified only when the danger of [officials being] deflect[ed from the effective performance of their duties] is very great.’”<sup>262</sup> Conferring immunity on a private actor or entity gives, at a minimum, the appearance that those under its cloak are accountable to neither the parties involved nor the public. The assumption that providing absolute immunity to private arbitrators and arbitration provider institutions is in the public interest requires reassessment. This is particularly because both arbitrators and providers are effectively unaccountable to the public and parties, yet wield substantial power to impact the disposition of legal disputes.

The intent underlying judicial and arbitral immunity is to protect the decision-making function. For acts relating to decisional authority, immunity for arbitrators is appropriate, but this immunity must be accompanied by explicit standards determining the scope of its application. Existing limits on immunity and judicial procedural standards for challenging arbitral decisions suffice to ensure a dissatisfied party is not simply attempting a retrial on the merits.<sup>263</sup> There are, however, significant differences between private arbitration and public adjudication, notably the disparity in procedural safeguards, that counsel for a cautious application of immunity.

## 2. Qualified Immunity More Appropriately Balances Concerns for Finality and Accountability

Immunity may be appropriate where an arbitral institution is sued simply as a surrogate for the arbitrator’s decision-making acts. However, when arbitral providers are alleged to have violated their own internal rules, failed to fulfill their con-

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ing an official to liability only when he has intentionally violated a person’s constitutional rights.

*Id.* (quoting *United States v. Lee*, 106 U.S. 196, 220 (1882)).

262. *Forrester v. White*, 484 U.S. 219, 230 (1988) (quoting *Forrester v. White*, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting)).

263. *See, e.g.*, *United States v. City of Hayward*, 36 F.3d 832, 838 (9th Cir. 1994) (refusing to extend arbitrator immunity to the city, a party-appointed arbitrator in an arbitration required by the city, where the arbitrator was deemed an “agent” of the city); *E.C. Ernst, Inc. v. Manhattan Constr. Co. of Tex.*, 551 F.2d 1026, 1033 (5th Cir. 1977) (rejecting immunity for architects serving as arbitrators when the alleged wrongdoing was the failure to render decisions, as opposed to an error in decision making); *Levine v. Wiss & Co.*, 478 A.2d 397, 401–02 (N.J. 1984) (holding that the court-appointed accountants who evaluated the value of a business were not entitled to arbitral immunity because they were merely acting as assessors, not decision makers).

tractual obligations with the parties, or improperly performed duties with respect to the administration and oversight of the arbitral process, immunity for arbitral institutions exceeds the level of immunity the Supreme Court has recognized for judges or other public officials. The result is an unjustified abdication of contractual responsibilities to parties who relied upon the provider's promised services.

The significant differences between the public judicial system and the private world of arbitration, including the lack of due process assurances in the latter, suggest that arbitral immunity ought to be applied carefully. No other private professional exercising difficult discretionary functions or services is so immune.<sup>264</sup> Particularly in the present environment where powerful companies force many consumers and employees into mandatory arbitration and the use of provider institutions, blanket immunity undermines public confidence. If it is true that "[a]rbitral immunity exists for the parties and the public, not for the arbitrators themselves,"<sup>265</sup> the public is better served by a more restrained scale of arbitral immunity. Again, a qualified standard of immunity, limited to arbitral decisional acts on the merits of the substantive dispute upon which evidence was presented, comports with the need to ensure finality of the underlying arbitral award.<sup>266</sup>

#### B. OPTIONS FOR MEANINGFUL APPLICATION AND ENFORCEMENT OF ARBITRAL ACCOUNTABILITY AND COMPLIANCE WITH CONDUCT AND ETHICS STANDARDS

Absolute arbitral immunity impedes judicial enforcement of arbitral conduct and professional ethics standards and prevents redress for parties injured by arbitral failures. Because both the FAA and the doctrine of arbitral immunity limit recourse by aggrieved claimants in the judicial system, other options to provide a mechanism for meaningful enforcement merit consideration.

The following proposals seek to balance the policy justifications for arbitral immunity with the need to assure consumers and the public that the process is not without any checks.

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264. See *supra* note 218.

265. Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 INDUS. REL. L.J. 228, 237 (1989).

266. See also discussion *supra* Part III.A.3.

*Option 1—Judicial Analogy Status Quo: Rely on the Market and Internal Oversight*

Attempts to regulate arbitration may be viewed as burdening a process that by design is intended to be the product of the parties' private choice to relinquish traditional means of resolution and confer final and binding powers to the arbitrator. Thus, one option is to keep the status quo. That is, maintain broad immunity, trust that the process of self-regulation and the goodwill of arbitrators and providers is working, i.e., that the market will weed out those with unscrupulous or negligent practices and reward those who adhere to standards of competency and fairness.<sup>267</sup> This option maintains the privacy, flexibility, and process choice that make arbitration an attractive alternative. The obvious limitation of this option is that most consumer arbitration users, many of whom are subject to arbitration through nonnegotiated form contracts, have only one case, and the mere passage of time to obviate bad arbitration is no consolation.

In this process, private arbitrators, not necessarily skilled in the law, render final and binding determinations as to not only the parties' contractual rights, but also statutory rights and liabilities, including the possibility of collective or class action claims.<sup>268</sup> Some arbitration participants have voiced frustration, if not horror,<sup>269</sup> and distrust the current process, which is shielded from public and judicial scrutiny. A response is necessary if consumer arbitration is to retain legitimacy in the eyes of the public. At some point, people who find themselves bound to arbitration, whether voluntarily or as a result of adhesive mandatory arbitration contracts, must have assurance that the players in the process are not above the law. Accordingly, the apparent commitment to standards of process fairness in arbitration must be accompanied by an enforcement

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267. For example, some of the major provider institutions have selection criteria that must be met in order to qualify to serve as an arbitrator on behalf of that organization, and presumably an internal process for handling grievances. See AM. ARBITRATION ASS'N, STATEMENT OF ETHICAL PRINCIPLES, *supra* note 32.

268. See *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2406–07 (2003) (stating that the FAA does not preclude class action claims); see also *Sternlight*, *supra* note 58, at 12–13.

269. See *Engalla v. Permanente Med. Group, Inc.*, 938 P.2d 903, 922–24 (Cal. 1997) (reporting frustration with arbitrators' dilatory practices); PUBLIC CITIZEN, *supra* note 16 (reporting the arbitration experiences of Stephanie Hundley-Paul and others).



mechanism. The effort by reputable arbitrator institutions to promulgate and adopt standards of conduct and professional ethics for arbitrators and providers is an important step, but the missing link of adequate reporting and enforcement makes this option only half the answer.<sup>270</sup>

*Option 2—The Professional Services Analogy: Treat Arbitrators Like Other Professions Subject to Public Oversight, Accessible Grievance Reporting, and Perhaps Registration, Certification, or Licensing*

Other methods for monitoring quality and providing redress to parties aggrieved by alleged arbitral failures involve various elements of governmental regulation, such as through a state board or commission overseeing the arbitration industry, or through a registration, licensure, or credentialing process. This option may be met with objection due to the private contractual nature of arbitration. However, most professionals, including judges,<sup>271</sup> are subject to standards of conduct and public oversight.<sup>272</sup> When one considers the purpose and process guiding the regulation of other professions, the need to exempt arbitration is not obvious.<sup>273</sup> To protect the public, states regulate many private professions through licensing or credentialing processes and frequently provide accessible reporting or grievance mechanisms. This permits consumers to report concerns of misconduct or negligence by a variety of other professionals working in the state.<sup>274</sup> Arbitrators are not currently licensed,

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270. See *supra* notes 30–32 and accompanying text (describing various ethics codes for arbitrators and provider institutions).

271. The Commission on Judicial Performance monitors judicial performance and may impose a variety of punishments, from censure to removal, when a judge acts inappropriately. See MODEL CODE OF JUDICIAL CONDUCT (2002), *supra* note 116, at Preamble.

272. The California Constitution includes provisions creating the Commission on Judicial Performance. CAL. CONST. art. 6, §§ 8, 18, 18.5.

273. The previous examples provide illustrations of programs that provide some form of reporting and investigating complaints about an ADR process. For example, the California Business and Professions Code contains provisions for the regulation of more than thirty-five different professions. These professions include accountants, advertisers, interior designers, locksmiths, contractors, private investigators, alarm companies, funeral directors, pest control operators, land surveyors, lawyers, real estate agents, athlete agents, chiropractors, dentists, dietitians, psychologists, physical therapists, optometrists, veterinarians, and social workers. See generally CAL. BUS. & PROF. CODE (2003) (providing regulations for various professions).

274. For example, physical therapists are regulated under the Physical Therapy Practice Act. *Id.* § 2600 *et seq.* Oversight for regulations of physical

certified, or subject to specific standards for education, training, or experience.<sup>275</sup>

A comparable means of oversight, grievance reporting, and review as used for other professions should be considered in the context of the growing private arbitration industry. A public board monitoring arbitrators can enforce standards in ways that private institutions and the courts (presuming broad immunity and FAA limitations) cannot. For example, a permanent committee on Arbitrator Ethics at the state level could be charged with monitoring complaints, ensuring that ethical standards are effectively enforced, and ordering restitution where warranted. Support for this option is found in similar programs at the state or federal level, which have reporting and grievance mechanisms to monitor the quality of court-connected neutrals, attorneys, or other professionals.<sup>276</sup> The process for reporting grievances or ethical violations in arbitration can be straightforward, accessible, and not overly intru-

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therapists is the responsibility of the Physical Therapy Board, within the State of California Department of Consumer Affairs. The Board is responsible for licensing those in the profession as well as for providing information to consumers. When a consumer believes his or her "issue of concern is a violation of the Board's licensing laws or regulations," a complaint may be filed with the Board. See PHYSICAL THERAPY BOARD, CAL. DEP'T OF CONSUMER AFFAIRS, CONSUMER COMPLAINT PROCESS, at <http://www.ptb.ca.gov/enforce/consinfo.htm> (last visited Oct. 3, 2003). The Board's Web site provides very user-friendly instructions on how to file such a complaint, and it includes a downloadable version of the complaint form. Upon receiving the complaint, the Board has authority to conduct a full and thorough investigation, and where there is clear and convincing evidence of a violation, the Board may take appropriate disciplinary action, which may include loss of license. *Id.*

275. Similarly, there are no specific standards for mediators, and there is also a debate over quality control in the context of mediators. See Arthur A. Chaykin, *Mediator Liability: A New Role for Fiduciary Duties?*, 53 U. CIN. L. REV. 731 (1984); Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147 (2003).

276. Concerns about quality control of third-party neutrals in court-connected arbitration or ADR proceedings have prompted some courts to institute programs, procedures, or court rules to permit reporting of grievances. For example, the District of Columbia has a process in place whereby complaints regarding the court-connected ADR process are heard before a nonpresiding judge designated as the Dispute Resolution Compliance Judge. U.S. DIST. CT. R. D.C. Appx. B. This judge has authority over complaints alleging that parties or neutrals engaged in misconduct or otherwise failed to comply with court orders or to participate in good faith. *Id.* This program applies only to court-connected ADR proceedings and does not assist users of private/contractual arbitration proceedings. *Id.*; see also *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1874 (2000) (discussing the need for quality control of court-connected ADR neutrals).

sive.<sup>277</sup> The benefit of instituting such a program for consumer arbitration would be that parties who feel trapped by a perceived unfair process have an accessible and inexpensive avenue to report a grievance. This suggestion does not presuppose that all such complaints and allegations of misconduct are either legitimate or illegitimate, but promotes public confidence that a fair review process is available. Adoption of such an oversight program would require, however, an investment of public fiscal resources and the creation of a state entity, unless the oversight program is placed within an existing regulatory scheme.<sup>278</sup> Alternatively, establishment of a program whereby arbitrators and providers voluntarily register with and agree to abide by rules of arbitration conduct and protocol of an independent, public, or private entity charged with receiving, investigating, and remedying arbitration-related complaints, i.e., a

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277. For example, medical doctors in California are regulated by the Medical Board of California, which serves as the “agency that licenses medical doctors, investigates complaints, disciplines those who violate the law, conducts physician evaluations, and facilitates rehabilitation where appropriate.” MEDICAL BOARD OF CALIFORNIA, CAL. DEPT’ OF CONSUMER AFFAIRS, at <http://www.medbd.ca.gov/> (last visited Oct. 3, 2003). The Medical Board’s Web site provides consumers with a large amount of useful information, including applicable laws, services for consumers, and instructions for complaints. See *id.* Once a complaint is filed, the Medical Board evaluates the complaint to determine if a full investigation is necessary. MEDICAL BOARD OF CALIFORNIA, CAL. DEPT’ OF CONSUMER AFFAIRS, HOW COMPLAINTS ARE HANDLED, <http://www.medbd.ca.gov/howcompweb.pdf> (last visited Oct. 3, 2003). If an investigation confirms a violation, the complaint is submitted to the Attorney General, who makes a formal charge and brings any appropriate disciplinary action, such as suspension or loss of license. *Id.* Attorneys are regulated by the state bar, which sets the guidelines for admission to practice law, sets the standards for required education and training, and handles complaints and disciplinary procedures. In California, the state supreme court and the state legislature, as well as the courts in cases of malpractice, enforce the standards of conduct and professional ethics for lawyers who practice in the state. See CALIFORNIA STATE BAR, WHAT DOES IT DO? HOW DOES IT WORK 1–3 (2003), at <http://www.calbar.gov/calbar/pdfshowwhat1.pdf>. The state bar has a complaint process, and its Web site provides thorough information about this process, advising users to “[r]egister a complaint with the State Bar if [they] believe that [their] lawyer acted improperly.” *Id.* at 4.

278. For example, a state department of consumer affairs could review complaints. See CAL. BUS. & PROF. CODE § 101.6 (2003) (charging the state department of consumer affairs with the oversight of licensed professionals, including establishing minimum qualifications). The Department of Consumer Affairs is also required to “[p]rovide a means for redress of grievances by investigating allegations of unprofessional conduct, incompetence, fraudulent action, or unlawful activity brought to their attention by members of the public and institute disciplinary action . . . [and to] conduct periodic checks of licenses, registrants, or otherwise certified persons.” *Id.*

“Better Arbitration Bureau,” could promote confidence in arbitration. Presumably, arbitration users would opt to select arbitral actors who have made such a commitment.

*Option 3—The Legislative Option: Statutorily Recognized Qualified Immunity and Remedies*

An option that would not require fiscal resources is legislative enactment of a statute that recognizes a standard of qualified arbitral immunity and that articulates specific standards of practice and remedies for conduct violations.<sup>279</sup> First, defining arbitral immunity as limited to decisional acts of the arbitrator, taken within the arbitrator’s jurisdiction, and in the absence of intentional bad faith, comports with the judicial/administrative distinction imported in judicial immunity determinations.<sup>280</sup> A *qualified* immunity standard balances the competing policy concerns of protecting arbitrators in their decisional roles while holding arbitral providers accountable for their contractual, statutory, and other independent legal obligations.<sup>281</sup> Such leg-

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279. A qualified immunity standard is also used in the context of international arbitration. See, e.g., AM. ARBITRATION ASS’N, INTERNATIONAL ARBITRATION RULES art. 35 (2003) (“The members of the tribunal and the administrator shall not be liable to any party for any act or omission in connection with any arbitration conducted under these rules *except that they may be liable for the consequences of conscious and deliberate wrongdoing.*” (emphasis added)), [http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules\\_Procedures\National\International\...\focusArea\international\AAA175current.htm](http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National\International\...\focusArea\international\AAA175current.htm). The standard for immunity under international arbitration rules does not apply to conscious and deliberate wrongdoing. See WIPO ARBITRATION RULES art. 77 (2003) (providing for exclusion of liability for arbitrators and providers “[e]xcept in respect of deliberate wrongdoing”), <http://www.arbiter.wipo.int/arbitration/rules/miscellaneous.html>. Other commentators have also endorsed a qualified immunity standard. See Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT’L & COMP. L. 1, 56–59 (2000); Sponseller, *supra* note 63, at 441–46.

280. See *Forrester v. White*, 484 U.S. 219, 229 (1988) (holding that a state judge who fired a probation officer performed an administrative function and therefore was not entitled to judicial immunity from the resulting discrimination suit). Neither judicial nor arbitral immunity should extend to criminal conduct. See *O’Shea v. Littleton*, 414 U.S. 488, 503 (1974) (citing *Gravel v. United States*, 408 U.S. 606, 627 (1972)).

281. See *supra* Part III.B.1; see also Sponseller, *supra* note 63, at 441–43. In comparison with the broader immunity that many U.S. courts appear to grant arbitrators and provider institutions, the standard in international arbitration is qualified arbitral immunity. See Franck, *supra* note 279, at 33–40. Like other professionals, arbitrators should find it prudent and not onerous to maintain liability insurance. See David I. Bristow & Jesmond Parke, *The Gathering Storm of Mediator & Arbitrator Liability*, 55 DISP. RESOL. J., Aug.–

isolation should also provide an express remedy, such as fee disgorgement, and the opportunity for an aggrieved party to select a different arbitral provider to the extent arbitral failures involved violations of ethical standards for disclosure of bias or conflicts, or where an arbitral award has been vacated under existing statutory standards.<sup>282</sup>

### C. A PROPOSAL TO AMEND AND CLARIFY THE ARBITRAL IMMUNITY PROVISION OF THE RUAA

States contemplating adoption of the RUAA should hesitate to adopt the Act's provisions on arbitral immunity wholesale. The standard of immunity should be expressly qualified, not absolute, and define coverage for judicial acts taken within the scope of the jurisdictional limits to the arbitrator as granted under the contract. Further, the statute should express that independent claims, which do not relate to judicial acts, are not barred. Importantly, the mandatory cost-shifting provision proposed by the RUAA should be eliminated as onerous and abusive to the consumer. At a minimum, the RUAA should contain a reciprocal provision providing for the disgorgement of fees when a party has obtained vacatur of an award based on arbitral misconduct or otherwise demonstrated a violation of ethical standards.

### CONCLUSION

The traditional notions of arbitration, involving parties of relatively equal bargaining power who consent to having an arbitrator of their own selection (who likely served as a volunteer and determined only contractual interpretation issues), that underlie the pro-arbitration policy of the FAA and the arbitral

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Oct. 2000, at 23 (discussing the availability of arbitrator and mediator professional indemnity insurance). The authors note that "[t]o date, insurance provides liability protection at a relatively low premium cost. The fact that mediation and arbitration are considered relatively low-risk insurance activity does not in any fashion negate the necessity of insurance nor does it suggest that it should be overlooked." *Id.* For example, members of the ABA Section on Dispute Resolution are eligible to apply for Arbitrator's and Mediator's Professional Liability Insurance, underwritten by Complete Equity Markets, Inc. Joyce F. Clough, *Claims Against Arbitrators and Mediators Are on the Rise*, Essay by Joyce F. Clough, Counsel, Lloyds of London, distributed with liability insurance application materials (2002); COMPLETE EQUITY MARKETS, INC., ARBITRATORS AND MEDIATORS PROFESSIONAL LIABILITY INSURANCE (2002), available at <http://www.cemins.com/aba.html>.

282. See, e.g., *supra* notes 30–33, 60 and accompanying text.

immunity doctrine do not reflect the current reality of mandatory, predispute consumer and employment arbitration or of arbitration as a profession and a potentially lucrative industry. Because of important differences between judges and arbitrators, arbitral immunity should be qualified, not absolute, and limited to protecting the arbitral decision-making process from reprisals by parties dissatisfied with the outcome. The justification for extending arbitral immunity to provider institutions, which by their own proclamation perform only administrative tasks, does not align with the purpose underlying the immunity doctrine. Thus, the general legal standards that apply to other professionals should apply to provider institutions.

The time has come to reexamine arbitral immunity, to require accountability of arbitrators and provider institutions, and to provide meaningful recourse to individuals aggrieved by illegal conduct arising out of the arbitral process. State legislatures considering the RUAA should give specific scrutiny to the Act's broad arbitral immunity proposal. Rather than uncritically accepting absolute immunity as a given for arbitrators and provider institutions, legislatures and courts should carefully examine the doctrine in light of modern arbitration practices and state responsibility to regulate businesses and professions. Qualified immunity provides a more appropriate standard that protects arbitral decision making while not shielding nondecisional acts, administrative acts, failure to follow internal administrative or procedural rules, or egregious misconduct, breach of ethics, fraud, or statutory violations. Options to provide oversight of, and redress for, arbitral failures should also be seriously considered, lest public perception, justified or not, of private arbitration become entirely skeptical and unaccepting of a viable form of dispute resolution.