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# Alternative Dispute Resolution

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# ALTERNATIVE DISPUTE RESOLUTION

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## I. INTRODUCTION

The field of ADR[1] is in constant flux. During this *Survey* period,[2] arbitration witnessed several important developments. The United States

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1. Although the term ADR refers to many processes — negotiation, mediation, arbitration, and various hybrids — this *Survey* article focuses on arbitration. Compulsory arbitration of unresolved contract disputes in police and fire departments, subject to Michigan Public Act 312, is outside the scope of coverage. Compulsory arbitration, in contrast to voluntary arbitration, is a process of settling disputes between employer and employee by a government agency. A decision-maker investigates the facts and makes an award, which the parties must accept. There is no front-end choice whether to employ arbitration. It is compelled by law.

2. The *Survey* period for this article covers United States Supreme Court, Sixth Circuit Court of Appeals, and Michigan Court of Appeals cases decided June 1, 2008 through May 31, 2009.

Supreme Court decided three cases,[3] a prolific number when compared to recent years. In a long-awaited decision, *14 Penn Plaza v. Pyett*,[4] the Supreme Court revisited the question of whether statutory claims arising under a collective bargaining agreement may be arbitrated if subject to a union-negotiated waiver which is clear and unmistakable. The decision tested the sustainability of *Textile Workers Union of America v. Lincoln Mills of Alabama*,[5] a case in which the Supreme Court held that section 301(a) of the Labor Management Relations Act of 1947 (LMRA)[6] is more than jurisdictional, it authorizes federal courts to fashion a body of federal law to enforce collective bargaining agreements, including promises to arbitrate under such agreements. In *14 Penn Plaza*, however, the Supreme Court used the Federal Arbitration Act (FAA),[7] not the LMRA, to decide the fundamental issue of collective waiver.[8] According to some commentators, the Supreme Court's decision to rely on the FAA, an Act historically construed to exclude collective bargaining agreements,[9] may signal the court's willingness to unify arbitral jurisprudence and bring labor law under the umbrella of the more predictable statutory framework of the FAA.

Following the lead of the United States Supreme Court, the Sixth Circuit Court of Appeals and the Michigan Court of Appeals also decided cases that recast the law of arbitral jurisprudence. In one case, the Michigan Court of Appeals considered the question of whether parties under an unintended common law arbitration agreement may authorize an arbitrator to issue an award involving quitclaim deeds, even though the Michigan Arbitration Act (MAA) explicitly prohibits the arbitration of real estate disputes.[10] In deciding the case, the appellate

3. In a fourth case, *Improv West Associates v. Comedy Club, Inc.* 129 S. Ct. 45, 45 (2008), the U.S. Supreme Court reversed a Ninth Circuit Court of Appeals decision, 514 F.3d 833 (2007) and remanded the case back to the Ninth Circuit to reconsider its decision in light of *Hall Street Associates v. Mattel*, 128 S. Ct. 1396 (2008). *See* Mary A. Bedikian, *Alternative Dispute Resolution: 2009 Ann. Survey of Mich. Law*, 55 WAYNE L. REV. 21 (2009). Since *Hall Street* was decided, state supreme courts and the federal circuits are split on whether the non-statutory "manifest disregard of the law" standard can be invoked to vacate an arbitral award. *See* Sherry Hereford v. D.R. Horton, No. 1070396, 2008 WL 4097594 (Ala. Sept. 5, 2008) (holding that the "manifest disregard of the law" standard is dead). *But see* Kashner Davidson Security Corp. v. Mscisz, 531 F.3d 68 (1st Cir. 2008).

4. 129 S. Ct. 1456, 1458 (2009).

5. 353 U.S. 448, 456-57 (1957).

6. 29 U.S.C.A. § 185 (West 2010).

7. 9 U.S.C.A. §§ 1-14 (West 2010).

8. *14 Penn. Plaza*, 129 S.Ct. at 1469.

9. *See infra* note 44 for an explanation of the Supreme Court's bifurcated approach in the area of collective bargaining agreements and statutory claims.

10. *In re* Nestorovski, 283 Mich. App. 177, 197-99, 769 N.W.2d 720, 733-34 (2009).

court re-affirmed the mutual co-existence of common law and statutory arbitration agreements, a phenomenon unique to Michigan.[11] In other developments, Michigan courts addressed a wide variety of issues including subject-matter jurisdiction, waiver, access to arbitration, judicial review, and interlocutory appeals.[12] On the whole, the cases analyzed in this *Survey* article reinforce the view that arbitration has cut a wide swath across many substantive areas of law, and that state and federal courts continue to respect, if not favor, arbitration as a viable method of resolving conflict.

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11. *Id.* at 200, 769 N.W.2d at 734.

12. In addition to the cases covered in this *Survey* article, the Sixth Circuit Court of Appeals also decided the following cases of note: *Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 471 (6th Cir. 2009) (affirming the district court's judgment in compelling arbitration between a United States non-profit corporation and an Australian corporation engaged in creation science ministry, and in declining to issue a foreign antisuit injunction to halt the Australian litigation; "[c]omity dictates that [these injunctions] be issued sparingly and only in the rarest of cases"); *Cook v. All State Home Mortgage, Inc.*, 329 Fed. Appx. 584, 585 (6th Cir. 2009) (affirming the district court's judgment in granting an employer's motion to dismiss and to compel arbitration where an arbitration clause was embedded in an employment agreement, however, no award of attorneys' fees and costs was supported where the plaintiff employees elected not to subsequently arbitrate their dispute); *Dealer Computer Servs., Inc. v. Fox Valley Ford*, 310 Fed. Appx. 749, 750 (6th Cir. 2009) (vacating the district court's judgment upholding an American Arbitration Association panel's ruling that distinct arbitration clauses in various contracts between seller and buyers did not preclude class arbitration; the ruling did not speak to whether buyers actually satisfied class requirements, thus the award was not ripe for judicial review); *Ganim v. Columbia Cas. Co.*, 574 F.3d 305, 305 (6th Cir. 2009) (affirming the district court's judgment that Columbia properly refused to defend Ganim in arbitration because the allegations against Ganim did not state a claim potentially within the scope of the policy's coverage); *Mazera v. Varsity Ford Mgmt. Servs., LLC*, 565 F.3d 997, 999, 1002 (6th Cir. 2009) (affirming the district court's judgment upholding the arbitration agreement, where employee's assertions that he lacked bargaining power and did not understand English well was insufficient to place in issue the making of the arbitration agreement, and the arbitration agreement was supported by consideration, but reversing the portion of the district court's judgment with respect to the cost-splitting provision that required the employee to pay a $500 deposit towards the arbitration); *R.H. Cochran & Assocs., Inc. v. Sheet Metal Workers Int'l Ass'n Local Union No 33*, 335 Fed. Appx. 516, 517-18 (6th Cir. 2009) (affirming the district court's judgment not to vacate an arbitral award since the award did not offend any of the requirements of vacatur, and the arbitrator was "arguably construing or applying the contract"); *Quixtar, Inc. v. Brady*, 328 Fed. Appx. 317, 321-22 (6th Cir. 2009) (affirming the district court's judgment in compelling distributors to resume arbitration; this was a "final" order under the provisions of the Federal Arbitration Act and was not subject to further appeal).

## II. ENFORCEMENT OF AGREEMENTS TO ARBITRATE

### *A. Statutory Claims Under Collective Bargaining Agreements*

In *14 Penn Plaza*[13] the United States Supreme Court addressed the question of whether a provision in a collective bargaining agreement that "clearly and unmistakably" required union members to arbitrate Age Discrimination in Employment Act (ADEA)[14] claims was enforceable under federal law.[15] The Supreme Court's affirmative response to this question, decided within the statutory constructs of the FAA,[16] may well suggest a trend toward harmonizing federal labor law and bringing it within the ambit of a statute that has long excluded collective bargaining agreements from its scope.[17]

Respondents were members of the Service Employees International Union, Local 32BJ (Union).[18] The union had a collective bargaining agreement with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multi-employer bargaining association for the New York City real-estate industry.[19] The collective bargaining agreement contained two significant provisions — an anti-discrimination clause and a mandatory grievance procedure.[20] The two clauses were linked into a single provision and provided, in relevant part, as follows:

> §30. NO DISCRIMINATION There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability, national origin, sex, union membership, or any other characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules or regulations. All such claims shall be subject to the

13. 129 S. Ct. 1456 (2009).
14. 29 U.S.C.A. §§ 421-634 (West 2010).
15. *Id.*
16. *Id.* at 1462-63.
17. *See* Galanter and McLaughlin, *Does the Supreme Court Decision in* 14 Penn Plaza *Augur the Unification of the FAA and Labor Arbitration Law*, DISP. RESOL. J. May/July 2009 at 57 (arguing that the Supreme Court's decision in *14 Penn Plaza* may reflect the court's desire to "diminish the role of federal common law standards" and to expand the role of the FAA, resulting in a more "coherent basis for judicial review of labor arbitration proceedings and awards").
18. *14 Penn Plaza*, 129 S. Ct. at 1461.
19. *Id.*
20. *Id.*

> grievance and arbitration procedures (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims of discrimination."[21]

14 Penn Plaza was a member of RAB.[22] In August 2003, with approval from the union, 14 Penn Plaza contacted an affiliate of Temco, Spartan Security (also unionized) to provide licensed security guards to staff the lobby of its building.[23] As a result, respondents were reassigned [from night lobby watchmen] to jobs as night porters and light duty cleaners.[24] Claiming that the reassignments resulted in emotional distress and loss of income, respondents filed grievances in which they asserted multiple contract violations.[25] First, the company violated the collective bargaining agreement's ban on workplace discrimination by reassigning job functions based on age.[26] Second, the company violated seniority rules by failing to promote one plaintiff to a handyman position.[27] And third, the company failed to equitably rotate overtime.[28] When the company denied the grievances, the union filed for arbitration.[29] Shortly afterwards, the union dropped the age discrimination claim.[30] While the balance of the case was pending in arbitration, respondents filed a separate duty of fair representation (DFR) suit against the union, alleging that the union had breached its duty of fair representation by withdrawing the age discrimination grievance before it could be heard in arbitration.[31] An arbitrator was appointed and heard evidence on the transfer and overtime grievances; both grievances were denied in their entirety.[32]

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21. *Id.*
22. *Id.*
23. *Id.* at 1461-62.
24. *14 Penn Plaza*, 129 S. Ct. at 1462.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *14 Penn Plaza*, 129 S. Ct. at 1462. The union had consented to the security personnel contract. *Id.* For this reason, the union did not believe it could legitimately object to the personnel reassignments. *Id.*
31. *Id.* at 1463. This was a "hybrid" suit against the union and 14 Penn Plaza under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C.A. § 185 (West 2010), claiming that the union breached its duty of fair representation and that 14 Penn Plaza breached the collective bargaining agreement by reassigning respondents. *14 Penn Plaza*, 129 S. Ct. at 1463. Respondents subsequently dismissed this suit, with prejudice. *Id.*
32. *Id.* at 1462.

Subsequently, respondents filed a claim with the Equal Employment Opportunity Commission (EEOC), alleging that the company had violated their rights under ADEA.[33] The EEOC issued a Dismissal and Notice of Rights, stating that the agency's "review of the evidence . . . fail[ed] to indicate that a violation ha[d] occurred."[34] Respondents then initiated suit in federal district court, asserting discrimination claims under ADEA and state and local laws.[35] Petitioners, 14 Penn Plaza, filed a motion to compel arbitration pursuant to section 3[36] and section 4[37] of the Federal Arbitration Act.[38] Relying on Second Circuit precedent that "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and state statutory claims in a judicial forum is unenforceable," the district court denied petitioner's motion.[39] Petitioners appealed under section 16 of the FAA,[40] but the Second Circuit Court of Appeals affirmed.[41] According to the Second Circuit, petitioner's motion

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33. *Id.*

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

35. *Id.*

36. Section 3 of the Federal Arbitration Act provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C.A. § 3 (West 2010).

37. Section 4 of the Federal Arbitration Act provides, in material part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C.A. § 4 (West 2010).

38. *14 Penn Plaza*, 129 S. Ct. at 1462.

39. Pyett v. Pa. Bldg. Co., No. 04 Civ. 7536 (NRB), 2006 WL 1520517, at *3 (S.D.N.Y. June 1, 2006).

40. Section 16 of the Federal Arbitration Act authorizes an interlocutory appeal of "an order . . . refusing a stay of any action under section 3 of this title" or "denying a petition under section 4 of this title to order arbitration to proceed." 9 U.S.C.A. § 16(a)(1)(A)-(B) (West 2010).

41. *14 Penn Plaza*, 129 S. Ct. at 1462. The Second Circuit relied on its earlier decision in *Rogers v. New York University*, 220 F.3d 73, 75 (2nd Cir. 2000) (holding that union-negotiated mandatory arbitration clauses which require arbitration of federal statutory causes of action are unenforceable to the extent they waive the right of judicial recourse).

was barred by *Alexander v. Gardner-Denver Co.*, which held that a union could not prospectively waive workers' rights to a judicial forum "for causes of action created by Congress."[42] In recognizing the tension between *Gardner-Denver* and the Supreme Court's more recent holding in *Gilmer v. Interstate/Johnson Lane Corp.*,[43] the court of appeals explained that unlike *Gardner-Denver* which involved a collective environment, an individual employee is free to choose compulsory arbitration.[44] Although the Supreme Court had an earlier opportunity to resolve the *Gardner-Denver/Gilmer* tension in *Wright v. Universal Maritime Service Corp.*,[45] it declined to do so, finding that the waiver at issue in *Wright* was not "clear and unmistakable."[46] The Supreme Court granted certiorari, to resolve the issue left open by *Wright*.[47]

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42. Pyett v. Pa. Bldg. Co., 498 F.3d 88, 92 (2007) (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-51 (1974)).

43. Gilmer v. Interstate/Johnson Corp., 500 U.S. 20 (1991).

44. *Pyett*, 498 F.3d at 91-92. Since *Gilmer*, two distinct lines of Supreme Court precedent exist. The first line traces back to *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), and involves statutory causes of action under collective bargaining agreements. *Id.* at 38. Suspicious of the ability of arbitrators to decide matters implicating protective federal legislation, the Supreme Court concluded that the nature of the collective bargaining relationship with focus on the "collective good" militated against the union's ability to waive the statutory rights of its individual members. *Id.* at 55. The Supreme Court's jurisprudence assumed a decisive shift with a second line of cases in the mid-1980s, when the court decided *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), a case involving claims arising under the Sherman Act, 15 U.S.C.A. §§ 1-7 (West 2010). After examining anew the feasibility of arbitration, the Supreme Court observed, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral rather than a judicial forum. *Mitsubishi*, 473 U.S. at 628. Furthermore, "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 637. The Supreme Court's embrace of arbitration, once a hotbed of judicial hostility, was more enduring than commentators expected. Six years later, in *Gilmer*, 500 U.S. 20, the Supreme Court held, for the first time, that discrimination claims under ADEA may be submitted to compulsory arbitration. In a detailed opinion, the Supreme Court discussed the salient features of arbitration, speed, quality of decision-making, ability to acquire essential evidence, and finality. *Id.* at 30-32. The court concluded that even where arbitration is mandated as a condition of employment, it is an appropriate forum, provided nothing in the legislative history of the applicable federal [or state] statute forecloses arbitration. *Id.* at 26-27. Although arbitration pundits believed that the Supreme Court overruled *Gardner-Denver* in *Gilmer*, on closer review, the court's decision in *Gilmer* merely solidified the dichotomy between discrimination claims arising under collective bargaining agreements and individual discrimination claims, a dichotomy which the court clarified but did not technically overrule in *14 Penn Plaza*.

45. 525 U.S. 70 (1998). The Supreme Court decided in *Wright* that the waiver was not "clear and unmistakable."

46. *Id.* at 81.

47. *14 Penn Plaza*, 129 S. Ct. at 1463.

Speaking through Justice Thomas, the United States Supreme Court reversed the holding of the Second Circuit.[48] First, the court rejected respondent's argument that the arbitration clause was outside the permissible scope of the collective bargaining process because it involved individual, non-economic, statutory rights.[49] Invoking *Wright*, Justice Thomas stated that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative."[50] *Wright* only requires that an agreement to arbitrate statutory antidiscrimination claims be explicitly stated.[51] The Supreme Court determined that the collective bargaining agreement at issue here met the "explicitly stated" obligation.[52]

The Supreme Court also rejected respondent's second contention, specifically that section 118 of the Civil Rights Act of 1991[53] barred enforcement of the arbitration agreement.[54] Indeed, the court found that section 118 endorsed the use of ADR, and nothing in the legislative history suggested otherwise.[55] "Moreover, reading the legislative history in the manner suggested by respondents would create a direct conflict with the statutory text, which encourages the use of arbitration for dispute resolution without imposing any constraints on collective bargaining. In such a contest, the text must prevail."[56] Here, under the National Labor Relations Act, the union had the authority to negotiate on behalf of its membership and to collectively bargain, an obligation the union fulfilled when it bargained in good faith with RAB and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration.[57]

Next, the Supreme Court examined the collective bargaining agreement's mandatory arbitration provision in the context of *Gardner-Denver*.[58] Respondents argued that *Gardner-Denver* and its progeny precluded a union from waiving an employee's right to a judicial forum

48. *Id.*
49. *Id.* at 1464.
50. *Id.* at 1465.
51. *Id.*
52. *Id.*
53. Pub. L. 102 – 166, § 118, 105 Stat. 1081 (1991).
54. *14 Penn Plaza*, 129 S. Ct. at 1465. The court observed that "Section 118 expresses Congress' support for alternative dispute resolution: 'where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under' the ADEA." *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 1466.
58. *Id.*

under federal antidiscrimination statutes because "allowing the union to waive this right would substitute the union's interests for the employee's antidiscrimination rights."[59] Essentially, the combination of union control over [arbitration] and the inherent conflict of interest with respect to discrimination claims . . . provided the foundations for the court's holding [in *Gardner-Denver*] that arbitration under collective bargaining agreements could not foreclose an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim.[60]

Clarifying that the holding in *Gardner-Denver* was not as broad as respondents suggested, the Supreme Court explained that the collective bargaining agreement at issue in *Gardner-Denver* did not mandate arbitration of statutory claims.[61] The arbitrator ruled on the "unjust termination" claim, but he did not address the claim of racial discrimination which the employee had added at the final pre-arbitration step.[62] Although the arbitration was premised on the same underlying facts as the Title VII claim, the Supreme Court held that "the federal policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII."[63] In this case, the collective bargaining agreement contained a specific clause that covered statutory and contractual discrimination claims.[64] Accordingly, respondents' forum was arbitration, not federal court.[65]

The Supreme Court also spoke briefly to *Gardner-Denver's* progeny.[66] In *Barrentine v. Arkansas-Best Freight System, Inc.*,[67] the Supreme Court considered whether an employee, who unsuccessfully submitted a wage claim to a joint grievance committee under the terms of his collective bargaining agreement, could assert a claim under the wage provisions of the Fair Labor Standards Act.[68] The Supreme Court held that the employee was not foreclosed from pursuing his claim in federal court because the arbitration provision did not explicitly incorporate the type of statutory claim at issue in *Barrentine*.[69] The court held similarly

59. *14 Penn Plaza*, 129 S. Ct. at 1466.
60. *Id.*
61. *Id.*
62. *Id.* at 1467.
63. *Id.*
64. *Id.* at 1469.
65. *14 Penn Plaza*, 129 S. Ct. at 1462.
66. *Id.* at 1466.
67. 450 U.S. 728 (1981).
68. *Id.* at 729-30.
69. *14 Penn Plaza*, 129 S. Ct. at 1468.

in *McDonald v. West Branch*,[70] which entailed a section 1983 claim under the Civil Rights Act.[71] Neither case involved the enforceability of an agreement to arbitrate statutory claims but rather "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims."[72]

Finally, the majority addressed the anti-arbitration dicta in *Gardner-Denver*, and explained that such "skepticism . . . rested on a misconceived view of arbitration that this Court has since abandoned."[73] *Gardner-Denver* "erroneously assumed that an agreement to submit statutory claims to arbitration was tantamount to a waiver of those rights."[74] The decision to resolve ADEA claims in arbitration does not waive the substantive right of being free of workplace discrimination but instead merely substitutes the arbitration forum for that of litigation.[75] Second, tracing *Gardner-Denver* to *Wilko v. Swan*,[76] which held that an agreement to arbitrate claims under the Securities Act of 1933 was not enforceable as a matter of federal law, the court observed that *Wilko* has "fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[77] Thus, "reliance on any judicial decision . . . littered with *Wilko's* overt hostility to the enforcement of arbitration agreements would be ill-advised."[78]

*14 Penn Plaza* invited two dissents. Justice Stevens' dissent was prompted by what he characterized as "the court's subversion of precedent to the policy favoring arbitration."[79] Excoriating the majority for departing from well-grounded prior decisions, Justice Stevens asserted that the split of opinion rested largely on how a judge views the respective lawmaking responsibilities of Congress and the court rather than on conflicting policy interests.[80] He opined, "Judges who have confidence in their own ability to fashion public policy are less hesitant to change the law than those of us who are inclined to give wide latitude to the views of the voters' representatives on non-constitutional matters."[81]

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70. 466 U.S. 284, 286 (1984).
71. 42 U.S.C.A. § 1983 (West 2010).
72. *14 Penn Plaza*, 129 S. Ct. at 1468.
73. *Id.* at 1469.
74. *Id.*
75. *Id.*
76. 346 U.S. 427 (1953).
77. *14 Penn Plaza*, 129 S. Ct. at 1470.
78. *Id.*
79. *Id.* at 1474.
80. *Id.* at 1476.
81. *Id.*

Justice Souter also dissented from the majority.[82] Joined by Justice Ginsburg and Justice Breyer, this coalition stated that Title VII, much like ADEA, "contains a vital element . . . . It grants an injured employee a right of action to obtain the authorized relief."[83] Thus, Justice Souter argued that rights conferred by Title VII [and by extension, other protective statutes such as ADEA], "cannot be waived as 'part of the collective bargaining process,' in large measure because 'Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunities.'"[84] The majority's rejoinder to this criticism was that Justice Souter merely subscribed to "the key analytical mistake in *Gardner-Denver's* dicta by equating the decision to arbitrate Title VII and ADEA claims to a decision to forego these substantive guarantees against workplace discrimination."[85]

Both dissents are analytically flawed. Unless arbitration eviscerates important substantive rights, these arguments reflect the same judicial hostility and turf protectionism of pre-FAA decisions. Using the mantra of "stare decisis," the dissents were clear to avoid the "assumption that arbitral processes are commensurate with judicial processes," a view now widely embraced by a Supreme Court majority.[86]

The Supreme Court's decision in *14 Penn Plaza*, while perhaps not unanticipated, has stirred interesting controversy on several levels. First, it is now clear that unions and employers may bargain and agree to include a mandatory arbitration clause in the collective bargaining agreement which specifically covers statutory claims. To some extent, such a clause will offer predictability, and simultaneously enhance the labor-management relationship by reducing post-grievance litigation that might otherwise occur if the union member were to get the proverbial "second bite of the apple." The decision puts to rest, once and for all, the view of arbitration as a form of second-class justice, provided arbitration includes the same panoply of protections of civil litigation. However, *14 Penn Plaza* triggers a second, practical concern. Under what circumstances might a union desire to bargain aggressively to include a mandatory arbitration clause? It is possible, and clearly not far-fetched, to state that the mere availability of arbitration, which is easier to access, may in fact increase the number of statutory claims that might otherwise be filed. This, in turn, would have an adverse impact on the efficiencies of arbitration. For now, the Supreme Court's decision in *14 Penn Plaza*

82. *Id.* at 1476.
83. *14 Penn Plaza*, 129 S. Ct. at 1477.
84. *Id.*
85. *Id.* at 1464.
86. *Id.* at 1478.

provides the clarity lacking in prior decisions that when a union negotiates an explicit mandatory arbitration clause covering both statutory and contractual discrimination claims, the only forum for redress is arbitration.[87]

*B. Other Statutory Claims*

During this *Survey* period, the Sixth Circuit Court of Appeals addressed the question of whether a terminated employee who signed a Last Chance Agreement (LCA) waived his right to sue the employer under the Kentucky Civil Rights Act.[88] The discharged employee claimed the employer terminated him in retaliation for filing an age discrimination claim with the Equal Employment Opportunity Commission.[89]

The plaintiff, Hamilton, was a long-term employee of General Electric (GE) who at the time of his termination had a relatively clean disciplinary record.[90] On June 18, 2004, Hamilton was cited for taking excessive break time.[91] As a result, Whitehouse, his manager, suspended him for a month.[92] Shortly after Hamilton returned to work, another incident arose involving Hamilton's request to have GE honor his medical restrictions.[93] Hamilton left work voluntarily, only to learn subsequently that he had been terminated due to insubordination.[94]

On August 17, 2004, less than one month after he was terminated, Hamilton, GE and the union signed a Last Chance Agreement.[95] Hamilton's agreement provided that if GE terminated him for violating the Last Chance Agreement, "any grievance filed protesting your discharge [will] not be subject to arbitration and that no legal action respecting said discharge will be filed."[96] The Last Chance Agreement was to remain in effect for two years.[97]

Hamilton continued to work for GE without incident for almost a year.[98] Two subsequent altercations led to Hamilton's eventual

87. In cases involving statutory claims, an employee may still pursue independent relief before the EEOC. However, traditional judicial recourse is foreclosed.

88. Hamilton v. Gen. Elec. Co., 556 F.3d 428, 430 (2009).

89. *Id.*

90. *Id.*

91. *Id.* at 431.

92. *Id.*

93. *Id.*

94. *Hamilton*, 556 F.3d at 431.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

termination.[99] On May 6, 2005, Hamilton was involved in a dispute over when he should take his lunch break.[100] According to Hamilton, he went back to work.[101] While at work, his supervisor called the guards; he was escorted out of the building.[102] The supervisor's account of this incident varied, specifically that Hamilton refused to return to work after the lunch break episode, causing him to call the guards and remove Hamilton from the plant.[103] When Hamilton returned to work the following Monday, he learned that he had been terminated.[104] The union intervened, and Hamilton's termination was converted to a thirty day suspension.[105] While serving the suspension, Hamilton filed an age-discrimination action with the EEOC against GE.[106]

On August 9, 2005, Hamilton became embroiled in his last altercation, when he was told to "move skids" during an assembly line break.[107] Even though the facts surrounding this final incident are contested, at least two supervisors confirmed that after Hamilton was suspended, he swore and threw his badge down.[108] This led to Hamilton's discharge.[109] GE sent to Hamilton a letter which identified "repeated verbal and written warnings" and the failure of Hamilton to "abide by Appliance Park Rules of Conduct and GE's policies."[110] On December 14, 2006, fourteen months after his termination, Hamilton filed suit against GE in state court, asserting that GE had violated the Kentucky Civil Rights Act by terminating him in retaliation for having filed an EEOC complaint.[111] Immediately afterward, GE filed a notice of removal to the district court based on diversity jurisdiction.[112] On GE's motion for summary judgment, the district court concluded that the Last Chance Agreement did not bar Hamilton's suit, however, Hamilton could not establish a prima facie case of retaliatory firing.[113] From this ruling, Hamilton appealed.[114] On appeal, Hamilton argued that he had provided

99. *Id.*
100. *Hamilton*, 556 F.3d at 431.
101. *Id.*
102. *Id.*
103. *Id.* at 432.
104. *Id.*
105. *Id.*
106. *Hamilton*, 556 F.3d at 432.
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Hamilton*, 556 F.3d at 433.
112. *Id.*
113. *Id.*
114. *Id.*

sufficient evidence to establish a prima facie case of retaliatory discharge, and that he also made a sufficient showing of pretext.[115] In response, GE argued that the district court correctly concluded that Hamilton's termination was not retaliatory in nature.[116] GE also claimed that the district court erred in concluding that the Last Chance Agreement did not foreclose Hamilton from asserting his claims in court, rejecting GE's waiver argument.[117]

The Sixth Circuit concurred in the district court's conclusion that the LCA did not bar Hamilton's retaliatory discharge suit.[118] "[I]t is the general rule in this circuit that an employee may not prospectively waive his or her rights under . . . Title VII."[119] The court explained:

> An employer cannot purchase a license to discriminate. An employment agreement that attempts to settle prospective claims of discrimination for job applicants or current employees may violate public policy . . . unless there were continuing or future effects of past discrimination, or unless the parties contemplated an unequivocal, complete and final dissolution.[120]

The Sixth Circuit rejected GE's reliance on Kentucky law, which permits waivers of statutory claims.[121] The two cases on which GE relied involved situations where an individual was faced with a known violation.[122] "Neither case, however, [stood] for the proposition that, under Kentucky law, an employee [could] prospectively waive statutory claims relating to potential future violations."[123] When Hamilton executed his Last Chance Agreement, months before his actual termination, he did not forego future remedies based on GE's future statutory violations.[124] Thus, the Sixth Circuit concluded that Hamilton's Last Chance Agreement did not bar the legal action.[125]

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115. *Id.*
116. *Id.*
117. *Hamilton*, 556 F.3d at 433.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 434; *see* Frear v. P.T.A. Indus., Inc., 103 S.W. 3d 99 (2003); *see also* Am. Gen. Life & Accident Ins. Co. v. Hall, 74 S.W.3d 688 (2002).
123. *Hamilton*, 556 F.3d at 434.
124. *Id.* at 435.
125. *Id.* On the merits, the Sixth Circuit Court of Appeals concluded that: 1) Hamilton met the requisites of a prima facie case of retaliatory discharge; 2) GE satisfied its burden of producing a legitimate non-retaliatory reason for terminating Hamilton; and, 3) Hamilton made a sufficient showing of pretext ("a reasonable fact-finder could determine

## III. DEFENSES TO ARBITRATION

### *A. Subject Matter Jurisdiction*

In *In re Nestorovski Estate*,[126] the Michigan Court of Appeals, in a split decision, clarified the scope of the probate court's jurisdiction to order arbitration when parties agree to arbitrate real estate interests under a common-law rather than a statutory arbitration agreement.[127] The court used this critical distinction to hold that the "arbitrability" limitations which exist in statutory arbitration do not apply when parties agree to arbitrate under a common-law agreement, thus an arbitrator has the authority to issue an award involving quitclaim deeds.[128] In order to reach this holding, the court also had to decide whether the parties could contractually agree to submit the question of testamentary capacity to an arbitrator for "final and binding" determination.[129] Over the dissent of Judge Saad, the court of appeals held that based on procedural innovations since the promulgation of the 1929 Probate Code and the "jurisprudential recognition of the 'desirability of arbitration as an alternative to the complications of litigation,'"[130] parties are not precluded "from conducting binding common-law arbitration of probate disputes, including the question of testamentary capacity."[131]

The case commenced when decedent's daughter initiated suit in Oakland County Probate Court, challenging the validity of a will and two deeds executed by her father.[132] The petition alleged that decedent's son had unduly influenced Vlado, her father, and that Vlado lacked testamentary capacity because he suffered from Alzheimer's at least two years prior to executing the will and deeds.[133] The daughter sought to

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that GE waited for, and ultimately contrived, a reason to terminate Hamilton to cloak its true, retaliatory motive for firing him."). *Id.* at 436-37. Under these circumstances, summary judgment was not proper. *Id.* at 436.

126. 283 Mich. App. 177, 769 N.W.2d 720 (2009).

127. *Id.* at 200, 769 N.W.2d at 734. Under statutory arbitration, parties must comply with the requirements of Michigan Arbitration Statute, MICH. COMP. LAWS ANN. § 600.5005 (West 2010), which allows "[a]ll persons, except infants and persons of unsound mind" to submit "any controversy existing between them, which might be the subject of a civil action" memorialized "by an instrument in writing." *In re Nestorovski Estate*, 283 Mich. App. at 198, 769 N.W.2d at 733. Statutory arbitration, by definition, includes award enforcement language. *Id.*

128. *Id.* at 201, 769 N.W.2d at 735.

129. *Id.* at 184, 769 N.W.2d at 726.

130. *Id.* at 195-96, 769 N.W.2d at 732.

131. *Id.* at 196, 769 N.W.2d at 732.

132. *In re Nestorovski Estate*, 283 Mich. App. at 180, 769 N.W.2d at 723-24.

133. *Id.* at 181, 769 N.W.2d at 724.

have the will and deeds set aside.[134] The probate court ordered the parties into facilitation, which resulted in impasse.[135] On the day the matter was scheduled for trial, the probate court entered a handwritten order prepared by the daughter's attorney, and approved by son's attorney, stating, "[t]his matter is to be scheduled for binding arbitration before a sole arbitrator to be determined by the parties within one week."[136] Neither party filed an objection to arbitration, and neither attempted to revoke the agreement before arbitration occurred.[137]

After three days of extended evidentiary hearings, the arbitrator prepared a detailed "Arbitration Decision and Award," in which she found that Vlado had been subject to undue influence.[138] The arbitrator concluded that Vlado's lack of capacity warranted the setting aside of two quitclaim deeds he signed in 2001, and the power of attorney he signed one year earlier.[139] Shortly afterwards, the son filed "Objections of Certain Provisions" in probate court, contesting the arbitral rulings related to the real estate and the power of attorney.[140] On the same day, the son also filed a "Supplemental Objection" to the entire arbitration decision and award, asserting that the probate court did not have the authority to refer to arbitration estate-based disputes deriving from Vlado's testamentary capacity.[141] The probate court confirmed the award.[142] Decedent's son appealed.[143]

The Michigan Court of Appeals initially addressed the son's contention "that because the parties did not have a written arbitration agreement, the probate court erred by adopting the arbitrator's award."[144] Although decedent's son failed to raise this issue in the probate court, the court of appeals proceeded to resolve the question because "the question [was] one of law."[145] Respondent admitted that the probate court entered a stipulated order of arbitration.[146] Relying on *Phillips v. Jordan*,[147] the court of appeals stated that "stipulated orders that are accepted by the trial court are generally construed under the same rules of construction as

134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 181-82, 769 N.W.2d at 724.
138. *In re Nestorovski Estate*, 283 Mich. App. at 182, 769 N.W.2d at 724.
139. *Id.* at 182, 769 N.W.2d at 725.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *In re Nestorovski Estate*, 283 Mich. App. at 183, 769 N.W.2d at 725.
145. *Id.*
146. *Id.*
147. 241 Mich. App. 17, 21, 614 N.W.2d 183, 186 (2000).

contracts."[148] Because the son participated in the arbitration,[149] without interposing an objection, the appellate court rejected "as factually and legally unfounded respondent's claim that the parties lacked a written arbitration agreement."[150]

Next, the court of appeals reviewed de novo the question of whether the arbitrator's ruling violated M.C.L.A. section 700.1302, which vests in the probate court exclusive jurisdiction over estate-related disputes.[151] Respondent's jurisdictional argument was premised on *In re Meredith Estate*,[152] which held that parties by agreement cannot supersede the probate court's statutorily vested responsibility to assess testamentary capacity.[153] Finding *In re Meredith Estate* inapplicable on the bases of notice and structural process deficiencies, the court of appeals proceeded to examine the language of the 1978 Revised Probate Code (RPC),[154] which expanded the powers of the probate courts and authorized "the same powers as the circuit court to hear and determine any matter and make any proper orders."[155] In 1998, the Michigan Legislature augmented the RPC by enacting the Estates and Protected Individuals Code (EPIC),[156] conferring "on probate courts the 'exclusive legal and equitable jurisdiction' of matters that 'relate[] to the settlement of a deceased individual's estate.'"[157] EPIC was considered a "user friendly code" designed primarily to simplify court procedures, and to lessen judicial involvement in trusts and estates.[158] Given these revisions, the parallel between probate court proceedings and all other civil proceedings except as modified by court rule, and at least one recent court of appeals decision rejecting the notion that arbitration divests a court of its jurisdiction, the court of appeals stated, "[a]rbitration simply

148. *In re Nestorvoski Estate*, 283 Mich. App. at 183, 769 N.W.2d at 725.

149. The court of appeals stated, "[A] party may not participate in an arbitration and adopt a 'wait and see' posture, complaining for the first time only if the ruling on the issue submitted is unfavorable." *Id.* at 183-84, 769 N.W.2d at 725 (citing Arrow Overall Supply Co. v. Peloquin Enters, 414 Mich. 95, 99-100, 323 N.W.2d 1, 3 (1982)).

150. *Id.* at 184, 769 N.W.2d at 725.

151. *Id.*, 769 N.W.2d at 725-26.

152. 275 Mich. 78, 266 N.W.2d 351 (1936).

153. *Id.* at 291-92, 266 N.W.2d at 353. In *In re Meredith Estate*, the Michigan Supreme Court considered whether executors had the authority to submit the question of the testator's mental capacity to a third party, in this case, a well-known Detroit attorney. *Id.* at 285, 266 N.W.2d at 352. The court answered this question in the negative, reasoning that the probate statutes then in existence did not permit testator competency issues to be submitted to arbitration. *Id.* at 292, 266 N.W.2d at 355.

154. MICH. COMP. LAWS ANN. § 600.847 (West 2010).

155. *In re Nestorvoski Estate*, 283 Mich. App. at 189, 769 N.W.2d at 728.

156. MICH. COMP. LAWS ANN. § 700.1101-8102 (West 2010).

157. *In re Nestorovski Estate*, 283 Mich. App. at 189, 769 N.W.2d at 728.

158. *Id.* at 190, 769 N.W.2d at 729.

removes a controversy from the arena of litigation. It is no more an ouster of judicial jurisdiction than is compromise and settlement or that peculiar offspring of legal ingenuity known as the covenant not to sue."[159] Each disposes of issues without litigation.[160] Thus, the parties in *In re Nestorovski Estate* were not precluded from instituting common-law arbitration of probate disputes, including the question of testamentary capacity.[161]

Next, the court of appeals addressed respondent's argument that the arbitrator lacked authority to render an award regarding quitclaim deeds.[162] To decide this issue, the appellate court focused on the distinction between statutory and common-law arbitration, finding that for statutory arbitration to occur, parties must comply with the requirements of the statute.[163] In the absence of such compliance, which was the case here, the parties default to common-law.[164] Under common-law, and consistent with the Michigan Supreme Court's decision in *Wold Architects & Engineers*,[165] the heirs were free to contractually agree to arbitrate the issue of Vlado's testamentary capacity.[166]

Respondent's third argument challenged the power of the arbitrator or the probate court to set aside the power of attorney Vlado executed in 2000 with respect to property he owned in Macedonia.[167] Respondent based his argument on *Niemetta v. Teakle*,[168] which held that a court lacked power "to make decrees affecting property beyond its jurisdiction."[169] Here, contrary to respondent's assertion, the probate court did not assume jurisdiction over Vlado's property in Macedonia.[170] Thus, the court of appeals held that the arbitrator's recommendation to the probate court that it set aside the power of attorney based on Vlado's lack of competency and to treat the foreign property as an asset of the

159. *Id.* at 192, 769 N.W.2d at 730.
160. *Id.* at 193, 769 N.W.2d at 730.
161. *Id.* at 196, 769 N.W.2d at 732.
162. *Id.* at 197, 769 N.W.2d at 732.
163. *In re Nestorovski Estate*, 283 Mich. App. at 197-98, 769 N.W.2d at 733.
164. *Id.* at 198, 769 N.W.2d at 733. *See* THOMAS L. GRAVELLE & MARY A. BEDIKIAN, MICHIGAN PLEADING AND PRACTICE, Vol. 8A (2d. ed 1994).
165. 474 Mich. 223, 234, 713 N.W.2d 750, 756 (2006) (holding that common-law and statutory arbitration co-exist in Michigan, "and the language of the [Michigan Arbitration Act] does now show an intention to abrogate common law arbitration").
166. *In re Nestorovski Estate*, 283 Mich. App. at 200, 769 N.W.2d at 734.
167. *Id.* at 201, 769 N.W.2d at 735.
168. 210 Mich. 590, 178 N.W.2d 37 (1920).
169. *Id.* at 592-93, 178 N.W.2d at 38.
170. *In re Nestorovski Estate*, 283 Mich. App. at 202, 769 N.W.2d at 735.

probate estate was within the arbitrator's authority, as was the ultimate decision by the probate court to adopt the recommendation.[171]

Respondent's fourth and final argument related to the scope of arbitration, an argument which respondent had failed to raise in probate court.[172] The court of appeals first explained Michigan's three-part test for assessing arbitrability, established in *Detroit Automotive Inter-Insurance Exchange v. Reck*:[173]

(1) Is there an arbitration agreement in a contract between the parties;
(2) Is the disputed issue on its face or arguably within the contract's arbitration clause; and,
(3) Is the dispute expressly exempted from arbitration by the terms of the contract?[174]

Applying this test, the court stated that the parties' stipulation described the scope of the contemplated arbitration as "[t]his matter."[175] This terminology was broad enough to include distribution of Vlado's entire probate estate, not merely selected assets.[176] Respondent's failure to argue this point in the probate court suggested that the parties understood that the issue was one subject to arbitration. [177]

For several reasons, the holding *In re Nestorovski Estate* is seriously problematic. First, with respect to the issue of testamentary capacity, it is clear that the court's primary motivation in circumventing Michigan Supreme Court precedent was the prevailing view that "the aversion to arbitration articulated in *In re Meredith Estate* must give way to the substantial changes in the substantive and procedural law governing probate practice," and the desirability of arbitration.[178] Even though the court of appeals, in a footnote, emphasized that their holding neither overruled *In re Meredith Estate* nor altered the rule of *stare decisis*,[179] this statement alone is insufficient to overcome the fundamental barrier observed by Judge Saad in his dissent–that the "distinct" issue under consideration in both cases was whether testamentary capacity is arbitrable.[180] In addition, the question of whether the Michigan Supreme Court would overrule *Meredith* today is inconsequential. To this point, Judge Saad observed, "[w]hile the court of appeals may properly express

171. *Id.*
172. *Id.*
173. 90 Mich. App. 286, 282 N.W.2d 292 (1979).
174. *Id.* at 290, 282 N.W.2d at 294.
175. *In re Nestorvoski Estate*, 283 Mich. App. at 203, 769 N.W.2d at 736.
176. *Id.*
177. *Id.*
178. *Id.* at 195, 769 N.W.2d at 732.
179. *Id.* at 196, 769 N.W.2d at 732.
180. *Id.* at 206, 769 N.W.2d at 737.

its belief that a decision of this Court was wrongly decided or is no longer viable, that conclusion does not excuse the court of appeals from applying the decision to the case before it."[181] Simply put, Michigan Supreme Court precedent precludes appellate courts from overruling decisions of the Michigan Supreme Court.[182] By "diluting" the holding of *Meredith*, the court of appeals "[arrogated] to itself powers it does not have."[183]

*B. Time-Limitations Bar*

In 2008, the Sixth Circuit Court of Appeals decided *Warehouse, Production, Maintenance and Miscellaneous Employees, Furniture, Piano and Express Drivers and Helpers Local Union No. 661*[184] *v. Zenith Logistics, Inc.*,[185] holding that an employer's position of non-participation in arbitration, communicated to the union in the early stages of grievance processing, and repeated to the union when the union transferred its focus from grievance procedures generally to arbitration specifically, triggers the statute of limitations even if subsequent communications between employer and union do not explicitly reference arbitration.[186]

Kroger owned a warehouse in Ohio.[187] In November 1998, it leased the warehouse to Zenith, which began providing Kroger with storage and transportation services.[188] Zenith hired Kroger's employees and subsequently negotiated a new collective bargaining agreement to cover the new hires.[189] Kroger was not a party to the agreement.[190]

Subsequently, Zenith subcontracted portions of the work, specifically, "freight dock" and salvage work that had been previously done at the warehouse.[191] In response, on January 21, February 2, and April 7, 2006, the Helpers Union sent grievances to Kroger and Zenith.[192] The Teamsters, with which the Helpers Union was affiliated, also filed grievances with Kroger and Zenith on February 21, February 23, and

181. *In re Nestorovski Estate*, 283 Mich. App. at 208, 769 N.W.2d at 738.
182. *Id.* at 206, 769 N.W.2d at 737.
183. *Id.* at 210, 769 N.W.2d at 739-40.
184. The union is affiliated with the International Brotherhood of Teamsters.
185. 550 F.3d 589 (6th Cir. 2008).
186. *Id.* at 590.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Zenith Logistics*, 550 F.3d at 590.
192. *Id.* at 591.

April 3, 2006.[193] On February 3, Kroger's vice president of labor relations notified Teamsters, with a copy to the union, responding to the initial grievance and the Teamsters' January 30 letter, asserting that the agreement was between Zenith and the Teamsters, not Kroger.[194] Teamsters acknowledged Kroger's position but invited Kroger to participate.[195] Once again, Kroger responded, stating, "any grievances of disputes Local 135 and 661 have with Zenith Logistics are for those unions and that employer to resolve and not for [Kroger]."[196]

On April 15, the Helpers Union sent a letter to Kroger enclosing the April 7 grievance, and acknowledging Kroger's non-participation.[197] This letter informed Kroger, however, of the union's intent to proceed with the grievances, with or without the participation of Kroger.[198] On April 24, 2006, Kroger's Vice-President responded by enclosing copies of earlier correspondence which confirmed Kroger's unwillingness to participate.[199] A formal request to arbitrate was then sent to Zenith, excluding Kroger.[200]

On June 14, 2006, the Helpers Union filed for arbitration, naming both Kroger and Zenith as party-respondents.[201] The American Arbitration Association (AAA) acknowledged receipt of the demand, and enclosed a list of potential arbitrators.[202] Kroger responded by sending a letter to the union, with a copy to AAA, asserting that it was not party to a collective bargaining agreement, thus it would not participate in arbitration.[203]

The Helpers Union filed a complaint to compel arbitration, and Kroger moved to dismiss.[204] The district court granted Kroger's motion on limitations grounds, and the Helpers Union appealed.[205]

The Sixth Circuit affirmed the district's holding that the complaint was filed outside the limitations period.[206] Treating Kroger's Rule 12(b)(6) motion as a Rule 56(c) motion for summary judgment "because its resolution depends on matters neither included in nor referred to in the

193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Zenith Logistics*, 550 F.3d at 591.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Zenith Logistics*, 550 F.3d at 591.
204. *Id.*
205. *Id.*
206. *Id.* at 593-94.

complaint," the Sixth Circuit examined the fundamental issue of timeliness.[207] The overarching question in this case was not the period of time for filing the motion which the parties had agreed was subject to a six-month statute of limitations, but rather when the six-month period was triggered.[208] The Sixth Circuit rejected the Helpers Union's argument that Kroger's April 24 letter did not refer specifically to arbitration, thus it did not trigger the statute of limitations.[209] Examining the context of the letter, the Sixth Circuit noted that by April 24, Kroger had not once, but twice notified the Teamsters and the union in writing that it was not a party to the agreement and would not participate in any aspect of the grievances.[210] These communications were "mildly unequivocal"[211] as they dealt with the grievance process generally, not to arbitration specifically.[212] The union's April 15 letter dealt specifically with arbitration, indicating that the union intended to proceed with the grievances, and stated the union's belief that "the evidence will show that Kroger is a joint employer with Zenith."[213] The Sixth Circuit construed this correspondence to be referring to arbitration, since the prior communications did not mention "taking evidence" and moving the grievances to the next level.[214] It was this response that the court of appeals deemed unequivocal.[215] "[T]he unequivocal refusal stand does not turn on whether the party resisting arbitration has . . . uttered the magic words 'we refuse to arbitrate this dispute.'[216] What matters is that, by any reasonable measure, the union should have understood Kroger's April 24 response to be an unequivocal refusal to arbitrate."[217]

The Sixth Circuit rejected the balance of the union's arguments, namely that the union did not formally request arbitration before May 16.[218] This position, however, skews the focus. Theoretically, under the union's proposed scheme, even if an employer were to express in no uncertain terms its unwillingness to arbitrate, all the union would have to do is simply withhold a formal request.[219] "That would only stultify the

207. *Id.* at 591.
208. *Id.* at 592.
209. *Zenith Logistics*, 550 F.3d at 592.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.* at 592.
215. *Zenith Logistics*, 550 F.3d at 592-93.
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*

statute."[220] Thus, "what is required is not 'rejection' of a Union's formal request, but *refusal* to arbitrate.[221] Such a refusal can be made clear even in advance of a formal request."[222] The fact that Kroger's communication was directed to the Teamsters, with only a copy to the union, was immaterial.[223] Both unions were on notice that Kroger did not intend to participate in arbitration.[224]

## IV. JUDICIAL REVIEW AND FINALITY

### *A. Modification of Award*

In *Grain v. Trinity Health, Mercy Health Services, Inc.*,[225] the Sixth Circuit affirmed the lower court's decision to confirm an arbitrator's award and to refuse to increase the size of the award.[226] In 2003, Grain and Barnes, husband and wife medical doctors, "sued Mercy Hospital and related defendants for taking a variety of 'punitive actions' that allegedly interfered with their medical practices."[227] While Barnes sought state law relief only, Grain asserted, in addition to state law violations, a claim of race discrimination under 42 U.S.C.A. section 1981.[228] "[T]he district court dismissed the state law claims that were subject to a pre-existing arbitration agreement and stayed the remaining claims pending arbitration" after the defendants made a motion to compel arbitration.[229]

Grain and Barnes were awarded $1,641,870.44 in the arbitration proceeding.[230] Subsequently, they filed a motion in the district court seeking to confirm the award but also to simultaneously increase the damages.[231] The district court confirmed the award; however, it refused to increase the amount.[232] "After a failed motion to reconsider," Grain and Barnes appealed to the Sixth Circuit.[233]

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220. *Id.*
221. *Zenith Logistics*, 550 F.3d at 592.
222. *Id.*
223. *Id.*
224. *See id.*
225. Grain v. Trinity Health, Mercy Health Servs., 551 F.3d 374 (6th Cir. 2008).
226. *Id.* at 380.
227. *Id.* at 376.
228. *Id.*
229. *Id.*
230. *Trinity Health*, 551 F.3d at 376.
231. *Id.*
232. *Id.* at 377.
233. *Id.*

The Sixth Circuit initially considered their jurisdiction to resolve the appeal.[234] Rejecting the final judgment rule, 28 U.S.C.A. section 1291, and its exceptions, the court of appeals found jurisdiction in 9 U.S.C.A. section 16(a)(1)(D), which permits appeals from an order confirming an award.[235] The court of appeals explained that this section of the FAA does not require parties to seek confirmation of the district court's decision in its entirety.[236]

Next, the court of appeals examined Grain's and Barnes' appeal in the context of Sections 10 and 11 of the FAA, which provide the "exclusive regime" for judicial review.[237] Section 11 enumerates the grounds for modification:

> (a) Where 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.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.[238]

Grain and Barnes argued that the award "must" be modified because of an "evident material miscalculation of figures."[239] The court of appeals found this argument unavailing for two reasons.[240] First, the argument was not raised in the district court.[241] Second, for a material miscalculation to exist, it must be both evident and mathematical.[242] Grain's and Barnes' allegation—that the arbitrators made a mistake on the merits by considering the appropriate start and stop dates for calculating the interest award—did not fall within the requirements of Section 11.[243]

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234. *See id.*
235. *Id.* at 377-78.
236. *Trinity Health*, 551 F.3d at 378 (citing Hall St. Assoc. v. Mattel, Inc., 128 S. Ct. 1396, 1406 (2008)).
237. *See id.*
238. *Id.*
239. *Id.*
240. *See id.*
241. *Id.*
242. *See Trinity Health*, 551 F.3d at 378.
243. *Id.* at 379.

Grain's and Barnes' second argument—that the award was imperfect as to form because it did not include a sufficient grant of attorneys' fees—was equally unavailing.[244] "An award that is 'imperfect in matter of form,' . . . is one that suffers from a scrivener's error or that otherwise does not deliver on the arbitrator's stated purpose in granting relief."[245] Simply put, this was a dispute over the merits, not the form of the award.[246]

Grain's and Barnes' final argument—that the arbitrator's failure to grant a more substantial award constituted a "manifest disregard of the law"—was inventive but non-persuasive.[247] In rejecting the argument, the court of appeals explained that the "manifest disregard of the law" standard is not a statutory basis of judicial review.[248] It is judicially created, and since the United State Supreme Court's decision in *Hall v. Mattel*, the use of this standard has been brought into question.[249] Moreover, Sixth Circuit precedent holds that the manifest disregard of the law standard cannot be used to modify an award.[250] Thus, the Sixth Circuit affirmed the district court's order confirming the arbitrator's award.[251]

### *B. Supplemental Award*

In another significant decision of this *Survey* period, *Totes Isotoner Corporation v. International Chemical Workers Union Council/UFCW Local 664C*,[252] the Sixth Circuit revisited the test of judicial review under collective bargaining agreements, once again re-affirming that an arbitrator's award is legitimate and must be upheld where it is drawn from the collective bargaining agreement and is consistent with the issues submitted for determination by the parties.[253] The appellate court used this test to strike down an arbitrator's supplemental award, concluding that such an award exceeded the arbitrator's authority.[254]

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244. *Id.*
245. *Id.*
246. *See id.*
247. *Id.*
248. *See Trinity Health*, 551 F.3d at 379-80.
249. *See id* (citing *Hall*, 128 S. Ct. at 1406).
250. *See id.* (citing NCR Corp. v. Sac-Co, Inc., 43 F.3d 1076, 1080 (6th Cir. 1995)) (holding that "[a] court's power to *modify* an arbitration award is confined to the grounds specified in [FAA] § 11").
251. *Id.*
252. 532 F.3d 405 (6th Cir. 2008).
253. *See id.* at 406.
254. *See id.* at 415.

Totes Isotoner Corp. entered into a collective bargaining agreement with a union that represented the company's production and maintenance employees at the company's distribution center in Butler County, Ohio.[255] The agreement memorialized rates of pay, work hours, and conditions of employment, including health care benefits to be provided under an "Umbrella of Benefits" plan that was made available to employees after sixty working days.[256] Additionally, under the collective bargaining agreement, both parties agreed that no modification to the collective bargaining agreement could take place without notice and consent of the other party and that all grievances under the collective bargaining agreement would be resolved in the arbitration arena.[257]

In November of 2001, the company announced changes to the Umbrella of Benefits plan that included increased costs for health insurance premiums and other out-of-pocket expenses.[258] Not surprisingly, the union protested these unilateral changes and in February of 2002, the union gave notice that it was seeking changes to the 1998 collective bargaining agreement because the existing agreement automatically terminated when the company sought unilateral changes.[259] After negotiations, the two parties reached a new collective bargaining agreement that went into effect on April 27, 2002 and that also called for arbitration in the event of grievances.[260]

On March 19, 2002, the union filed a charge against the company and the National Labor Relations Board ("NLRB") alleging that the company "failed and refused to bargain in good-faith" with regard to the unilateral changes made to the Umbrella of Benefits plan.[261] In accordance with the 1998 collective bargaining agreement, the NRLB Region 9 deferred the union's charge to arbitration.[262] Thus, on June 17, 2002, the union again filed a grievance seeking to have pre-January 1, 2002 insurance premiums reinstated and employees reimbursed for the additional premiums paid as a result of the unilateral increase imposed by the company.[263] Still, the parties could not settle the grievance and therefore submitted it to arbitration before a jointly-selected arbitrator.[264]

255. *Id.* at 406.
256. *Id.*
257. *Id.* at 407.
258. *Totes Isotoner*, 532 F.3d at 407.
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 407-08.
263. *Id.*
264. *Totes Isotoner*, 532 F.3d at 408.

The arbitrator found that the company violated the collective bargaining agreement when it unilaterally made changes in the healthcare insurance benefits and, as a result, ordered those changes rescinded and all of the benefits previously in effect to be reinstated.[265] Moreover, the employees were to be reimbursed for any and all additional costs they incurred as a result of the unilateral change and for all monies spent for benefits that would have been paid for under the coverage in effect before the changes occurred, but were not paid for after the changes took effect.[266] Finally, the arbitrator ruled that the company must cease and desist from making unilateral changes to the collective bargaining agreement and that the arbitrator will retain jurisdiction over the matter until the award is fully implemented.[267]

The company calculated the losses incurred by its employees as a result of the benefits plan change, but did not revoke the January 1, 2002 change to the healthcare plan or reinstate the prior terms of the Umbrella of Benefits plan.[268] As a result, the union filed another complaint with the arbitrator arguing that the company was not in compliance with the arbitrator's March 5, 2004 award.[269] This non-compliance dispute was submitted to the arbitrator through supplemental proceedings.[270] The union argued that the company failed to comply with his previous award because the company did not "rescind the increase in insurance premiums and limited its employee reimbursement to the date on which the 1998 collective bargaining agreement expired," contrary to the arbitrator's cease and desist order which required the company to make employees whole for the entire period that the increased premiums were in effect.[271]

The company argued that the arbitrator's award was effective "only during the life of the 1998 c/b/a" and noted that the arbitrator heard no evidence regarding the 2002 collective bargaining agreement or the negotiations leading up to its inception.[272] The company insisted that "a determination of what health care benefits employees are entitled [to] at any point in time during the term of the new labor agreement — that is, after April 26, 2002, can only be determined by an interpretation and application of the terms of that agreement" and "to the extent that the union complained about benefit premiums after April 26, 2002, the

265. *Id.*
266. *Id.*
267. *Id.* at 408.
268. *Id.* at 408-09.
269. *Id.* at 409.
270. *Id.*
271. *Id.*
272. *Id.*

company" argued that "the union must file a separate grievance under the 2002 collective bargaining agreement."[273]

After hearing arguments from both sides, the arbitrator asked for a copy of the 2002 c/b/a and the company complied, but did so only "as a convenience to the arbitrator."[274] The arbitrator found that the company was not in compliance with is March 5, 2004 award, and issued an award in a quasi-injunctive form of relief via a cease and desist order even though the NLRB and the courts have long recognized that arbitrators have limited authority to issue this form of relief.[275] In doing so, the arbitrator noted that, like the old collective bargaining agreement, nothing in the new agreement gives the company the right to make unilateral changes to the employee's health insurance benefit program.[276] The arbitrator ordered the company to "comply with the provisions of the March 5, 2004 Award," and once again retained jurisdiction over the matter until the award was fully implemented.[277]

Subsequently, the company filed a complaint with the United States District Court for the Southern District of Ohio seeking to have the arbitrator's supplemental award set aside and vacated.[278] The company alleged that the arbitrator acted outside of his authority when he interpreted the 2002 collective bargaining agreement in rendering his supplemental award.[279] The union counterclaimed, requesting that the court enforce "both the supplemental award as well as the arbitrator's original March 5, 2004 Award."[280] Finally, the parties each filed cross motions for summary judgment.[281] "The district court confirmed the original March 5, 2004 award but vacated the Arbitrator's supplemental award, and remanded the compliance issue back to the arbitrator for further proceedings."[282] The union timely appealed to the Sixth Circuit Court of Appeals.[283]

The court initially discussed the applicable de novo standard of review of a district court's grant of summary judgment in a labor arbitration proceeding.[284] In the context of arbitration, the appellate court

273. *Totes Isotoner*, 532 F.3d at 409.
274. *Id.*
275. *Id.* at 410.
276. *Id.*
277. *Id.*
278. *Id.*
279. *Totes Isotoner*, 532 F.3d at 410.
280. *Id.*
281. *Id.*
282. *Id.*
283. *Id.*
284. *See id.* at 410.

recognized that "courts play only a limited role" and that "review of an arbitration award 'is one of the narrowest standards of judicial review in all of American jurisprudence.'"[285] Using this tightly circumscribed standard, the appellate court first turned to the *Steelworkers' Trilogy* test–"that an arbitrator's award is legitimate and must be upheld if it is drawn from the collective bargaining agreement and the issues submitted for determination by the parties."[286] As long as an arbitrator is "even arguably construing or applying the contract and acting within the scope of this authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."[287] This is because the parties have contracted for the arbitrator's interpretation of the contract, not the court's interpretation.[288]

The court then examined the scope of judicial review in the context of *Michigan Family Resources, Inc. v. Service Employees International Union Local 517M*,[289] in which this court further narrowed the scope of labor arbitration disputes.[290] In *Michigan Family Resources*, the Sixth Circuit overruled the test established in *Cement Division, National Gypsum Co. v. United Steelworkers of America*,[291] and announced a new test:

> Arbitration awards should be reversed on appeal only where a "procedural aberration" occurs within the arbitration process. To determine whether a procedural aberration has occurred, [the] Court must ask:
>
> Did the arbitrator act 'outside his authority' by resolving a dispute not committed to arbitration? Did the arbitrator commit fraud, have a conflict of interest or otherwise act dishonestly in issuing his award? And in resolving any legal or

285. *Totes Isotoner*, 532 F.3d at 411 (quoting Tenn. Valley Auth. V. Tenn. Valley Trades & Labor Council, 184 F.3d 510, 514 (6th Cir. 1999)).

286. *Id.* (citing United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

287. *Id.* (quoting Major League Baseball Players Assoc. v. Garvey, 532 U.S. 504, 509 (2001)).

288. *Id.* at 411 (citing United Paper Workers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 37-38 (1987)).

289. Mich. Family Res., Inc. v. Serv. Employees Int'l Union Local 517M, 475 F.3d 746, 756 (6th Cir. 2007) (en banc).

290. *Totes Isotoner*, 532 F.3d at 412 (citing *Mich. Family Res. Inc.*, 475 F.3d at 756).

291. Cement Div., Nat'l Gypsum Co. v. United Steelworkers of Am., 793 F.2d 759, 766 (6th Cir. 1986).

> factual disputes in the case, was the arbitrator arguably construing or applying the contract?[292]

The Sixth Circuit explained that an arbitrator may "arguably construe a contract" in a supplemental proceeding "which clarifies or enforces an original" as long as it is rooted in the relevant c/b/a."[293] Here, however, the arbitrator acted outside his authority by reaching a dispute not committed to arbitration — whether the unilateral healthcare benefits increase was violative of the 2002 collective bargaining agreement.[294] In reaching this decision, the Sixth Circuit made clear that it was not deciding the issue of whether the arbitrator could issue quasi-injunctive relief, or whether he could issue such relief after the expiration of the 1998 collective bargaining agreement.[295] The question before the appellate court was whether an arbitrator's decision to stray from the 1998 collective bargaining agreement, and issue a supplemental award which drew its essence from the 2002 collective bargaining agreement, constituted the type of procedural aberration that would run afoul of *Michigan Family Resources* narrow review standard.[296] Relying on two Sixth Circuit cases, *International Brotherhood of Electrical Workers v. Toshiba America*[297] and *Peterbilt Motors Co. v. UAW Int'l Union*,[298] the appellate court concluded that the district court properly vacated the arbitrator's supplemental award.[299] Guided by the important policy of freedom of contract, the court explained:

> Indeed, were we to uphold the arbitrator's supplemental decision, as the dissent would urge us to do, we would likely undermine the parties' freely negotiated, bargaining-for-procedures which require the submission of a grievance prior to the determination of remedies. This end-run around the collective bargaining agreement would, therefore, produce a windfall to the union by opening up an opportunity for the union to seek sanctions against the company for the violations of the 2002 CBA as found by the arbitration. The company, on the

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292. *Id.* at 412.

293. *Id.* (citing Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local 24, 357 F.3d 546, 557 (6th Cir. 2004)).

294. *Id.* at 414.

295. *Totes Isotoner*, 532 F.3d at 413 (quoting *Mich. Family Res., Inc.*, 475 F.3d at 753).

296. *See id.* at 414, 415, 420.

297. 879 F.2d 208, 211 (6th Cir. 1989).

298. 219 F. App'x 434, 438 (6th Cir. 2007).

299. *Totes Isotoner*, 532 F.3d at 416.

> other hand, would be stuck with a decision, rendered in the absence of a full hearing, finding that it violated the 2002 CBA. In the end, both the union and the company would have been subjected to remedies and obligations under the 2002 CBA that they did not agree to arbitrate. For this reason alone, we must vacate the arbitrator's supplemental award.[300]

Finally, the majority rejected the union's argument in support of sustaining the supplemental award that an arbitrator's powers are co-extensive with the National Labor Relations Board.[301] The Sixth Circuit held that even if the arbitrator did possess such powers, nothing in the authorities cited by the union hold that an arbitrator has the authority to determine that a violation of a new agreement occurred absent a separate charge or grievance being filed under that agreement.[302] Clearly, this was not the case here.[303]

Judge McKeague dissented, arguing that the arbitrator had directed the company to cease and desist from unilaterally increasing the employees' share of health care insurance premium costs.[304] It could be argued that this directive "was reasonably intended to apply beyond the expiration of the 1998 CBA."[305] In order to determine whether the directive had been complied with, the arbitrator would have to go outside the 1998 collective bargaining agreement and examine the relevant evidence, in this case, the 2002 collective bargaining agreement.[306] Here, the arbitrator issued the Original Award in March 2004, after the expiration of the 1998 collective bargaining agreement.[307] "By definition, any forward-looking, 'quasi-injunctive' relief awarded at that time must have had life beyond the date the 1998 CBA expired to avoid being a nullity."[308]

Judge McKeague's argument in dissent presents the more compelling view. It has long been observed that arbitration is the *sine qua non* for the union's right not to strike.[309] Thus, in the end, remedies

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300. *Id.* at 416 n.3.
301. *Id.* at 417.
302. *Id.*
303. *See id.*
304. *Id.* at 419 (McKeague, J., dissenting).
305. *See Totes Isotoner*, 532 F.3d at 419 (McKeague, J., dissenting).
306. *Id.*
307. *Id.* at 422.
308. *Id.*
309. *See* Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448 (1957) (relying on a Senate report that explained Congress' interest in promoting collective bargaining that ended with agreements not to strike – "[T]he chief advantage which an

for violations of the collective bargaining agreement are provided through the arbitration vehicle.[310] Collective bargaining agreements are by definition ambiguous and often incomplete. The document does not represent the totality of the relationship but merely the parties' best estimate at the bargaining table of the issues that will dominate the relationship going forward. Thus, as Judge McKeague points out, the arbitrator's Original Award would have little meaning — other than to refund the premiums under the 1998 collective bargaining agreement — if the company were permitted to impose the desired changes in the successor contract without engaging in the bargaining process.[311] The only remedy available is the one pursued by the union — to file a grievance and obtain an arbitrator's determination on whether the company's action was proper.[312]

### *C. Confirmation*

In *Greater Bethesda Healing Springs Ministry v. Evangel Builders & Construction Managers, LLC*,[313] the Michigan Supreme Court decided the question of whether a general contractor's failure to file an award with the circuit court precluded the court from confirming it.[314]

Greater Bethesda Healing Springs Ministry (Ministry) filed suit in connection with a church Evangel was contracted to build.[315] Evangel hired defendants, HMC Mechanical Corp and its owner, Leslie Upfall, as subcontractors, to perform some of the work under the contract.[316] Ministry asserted in the complaint that the defendants performed defective work, and they were paid for services not completed.[317] Cross-claims and counter-claims followed, including a separate suit by one of the subcontractors against HMC, Upfall, Evangel Builders, Ministry and

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employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract").

310. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS, SEVENTH EDITION (Alan Miles Ruben, ed., 2003) ("An agreement to arbitrate effects a complete surrender of any right of the employer to determine the controversy by unilateral action and of any right of both parties to support their contentions by a show of economic strength.")

311. *See Totes Isotoner*, 532 F.3d at 422.

312. *Id.*

313. 282 Mich. App. 410, 766 N.W.2d 874 (2009).

314. *Id.* at 411, 766 N.W.2d at 875.

315. *Id.*

316. *Id.*

317. *Id.*

others for damages arising out of the church construction project.[318] The actions were consolidated, and the parties, on stipulation, proceeded to binding arbitration under the Michigan Arbitration Act, M.C.L.A. sections 600.5001 to 600.5035.[319]

The arbitrator issued an award, finding that Upfall was jointly and severally liable with HMC to Evangel Builders and Colbert, the owner of Evangel Builders, in the amount of $75,000.[320] Five days after the arbitrator decided the case, KEK Enterprises filed the arbitration award with the clerk of the court.[321] Upfall sought protection under the Bankruptcy Code.[322] The trial court entered judgment on June 27, 2006.[323] Following entry of order by the United States Bankruptcy Court, the trial court set aside the judgment and entered a new (but substantially same) judgment on July 13, 2007.[324] Upfall requested reconsideration, which the trial court denied.[325] An appeal followed.[326]

Upfall initially argued that the trial court's judgment was improperly entered, as it did not meet the requirements of MCR 3.602(I).[327] MCR 3.602(I) states:

> Award; Confirmation by Court. An arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.[328]

Applying this rule to Upfall's argument, the Michigan Court of Appeals stated that nothing in the language of MCR 3.602(I) required all parties seeking to enforce an award to *separately* file the award with the court clerk.[329]

Next, Upfall asserted that MCR 3.602(I) "requires that judgment on an arbitration award be entered within one year" of the date the award is

318. *Id.*, 766 N.W.2d at 876.
319. *Greater Bethesda*, 282 Mich. App. at 411, 766 N.W.2d at 876 (2009); MICH. COMP. LAWS ANN. §§ 600.5001-600.5035 (West 2009).
320. *Id.* at 411-12, 766 N.W.2d at 876.
321. *Id.* at 412, 766 N.W.2d at 876.
322. *Id.*
323. *Id.*
324. *Id.*
325. *Greater Bethesda*, 282 Mich. App. at 412, 766 N.W.2d at 876.
326. *Id.*
327. MICH. CT. R. § 3.602(I) (West 2009).
328. *Greater Bethesda*, 282 Mich. App. at 412, 766 N.W.2d at 876 (quoting MICH. CT. R. § 3.602(I)).
329. *Id.* at 413, 766 N.W.2d at 876.

issued.[330] Since the trial court entered judgment on July 13, the judgment was in error.[331] The Michigan Court of Appeals rejected this argument with equal force, stating that "statutory language must be read within its grammatical context unless a contrary intent is clearly expressed."[332] Using the "last antecedent" rule of statutory construction, *i.e.*, that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause, here the clause "within one year after the award was rendered" applies to the filing of the award with the court clerk, not to the confirmation of the award by the court.[333] Since the appellant had not filed an application to vacate, modify, or correct the arbitration award, the confirmation and entry of judgment was proper.[334]

## V. INTERLOCUTORY APPEALS

In *Arthur Andersen, LLP v. Carlisle*,[335] the United States Supreme Court held that non-signatories to an arbitration agreement had the right to appeal a district court's decision to deny a Section 3 motion to stay pursuant to section 16(a)(1)(A) of the Federal Arbitration Act.[336]

Wayne Carlisle and his partners (Carlisle) consulted with Arthur Andersen to reduce taxes on the 1999 sale of their construction-equipment business.[337] Two other advisers — Bricolage Capital and Curtis, Mallet Prevost Colt & Mosle — joined forces with Arthur Andersen in recommending to Carlisle that he consider a tax shelter known as a "leveraged option strategy."[338] To implement the strategy, Carlisle was asked to execute an investment-management agreement with Bricolage.[339] The agreement included a standard AAA arbitration clause, which provided that "[a]ny controversy arising out of or relating to this Agreement or the br[ea]ch thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association."[340]

330. *Id.*
331. *Id.*
332. *Id.* at 414, 766 N.W.2d at 877.
333. *Id.*
334. *Greater Bethesda*, 282 Mich. App. at 414, 766 N.W.2d at 877.
335. Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896 (2009).
336. *See id.* at 1899 (citing 9 U.S.C.A. §§ 3, 16(a)(1)(A) (West 2009)).
337. *Id.*
338. *Id.*
339. *Id.*
340. *Id.*

The IRS later determined that the leveraged option strategy was an illegal tax shelter.[341] The IRS offered an amnesty program, but Bricolage did not notify Carlisle that he could seek shelter under it.[342] Carlisle was forced to enter into a settlement agreement with the IRS, involving the payment of over $25 million in taxes and penalties.[343]

Carlisle filed a diversity suit in the Eastern District of Kentucky against Bricolage, Arthur Andersen, and two individual employees of Bricolage, alleging fraud, civil conspiracy, malpractice, breach of fiduciary duty, and negligence.[344] Arthur Andersen responded by invoking Section 3 of the FAA, demanding that Carlisle arbitrate its claims as required by the arbitration clause in the Carlisle-Bricolage agreement.[345] The district court denied the motion.[346] On interlocutory appeal, the Sixth Circuit dismissed "for want of jurisdiction."[347] Given the importance of the jurisdictional question, the United States Supreme Court granted certiorari.[348]

The Supreme Court made two separate rulings. First, speaking through Justice Scalia, the court concluded that Section 16(a)(1)(A), which provides that "an appeal may be taken from . . . an order . . . refusing a stay of any action under Section 3 of this title," is clear and unambiguous.[349] Rationalizing that "jurisdiction over the appeal must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds of reversing the order,"[350] the Supreme Court made clear that the underlying merits are simply irrelevant, "for even utter frivolousness of the underlying request of a § 3 stay cannot turn a denial into something other than an order . . . refusing a stay of any action under Section 3."[351] The court observed that even if the decision were to engage the courts of appeal in fact-intensive jurisdictional inquiries (respondent's primary argument), it would not alter its reading of Section 16.[352] Merits determinations are easier once the court has accepted jurisdiction.[353]

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341. *Arthur Andersen*, 129 S. Ct. at 1899.
342. *Id.*
343. *See id.*
344. *Id.* 1899-1900.
345. *Id.* at 1900.
346. *Id.*
347. *Arthur Andersen*, 129 S. Ct. at 1900.
348. *See id.*
349. *See id.* (citing 9 U.S.C.A. § 16(a)(1)(A)).
350. *Id.* (quoting Behrens v. Pelletier, 516 U.S. 299, 311 (1996)).
351. *Id.* at 1901.
352. *See id.*
353. *See Arthur Andersen*, 129 S. Ct. at 1901.

The court also addressed the alternative ground, *i.e.*, that parties who are not signatories to a written arbitration agreement are categorically ineligible for Section 3 relief.[354] In examining both the content of Sections 2 and 3, the court explained that neither provision alters the requirement that courts look to state contract law to assess the scope of the agreement, including who is bound to arbitrate.[355] Under state law, a non-signatory to a contract may be bound through "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel."[356] The court stated: "There is no doubt that, where state law permits it, a third-party claim is 'referable to arbitration under an agreement in writing.'"[357] "It is not our role to conform an unambiguous statute to what we think 'Congress probably intended.'"[358]

Finally, the court addressed respondents' fallback argument comprised of reliance on dicta of earlier opinions, namely *First Options* and *EEOC v. Waffle House, Inc.*[359] With respect to *First Options*, the court said the dicta pertained to issues the parties agreed to arbitrate, not whether there was an underlying agreement to arbitrate.[360] And *Waffle House, Inc.* involved a determination of whether a third party, specifically the EEOC, was bound to arbitrate under a contract to which it was not party.[361] "Neither case raises the question of whether an arbitration agreement otherwise enforceable by (or against) third parties "triggers protection under the FAA."[362]

Justice Souter, joined by Justice Roberts and Justice Stevens, dissented.[363] They argued that the question is whether section 16 "opens the door to [a Section 3 appeal] at the behest of one who has not signed a written arbitration agreement.[364] The dissent took issue with the majority's assumption that section 3 is "merely a labeling requirement, without substantive import."[365] With respect to interlocutory appeals specifically, any interruptions to the "normal process of litigation"

354. *See id.* at 1902.
355. *Id.*
356. *Id.* (quoting Richard A. Lord, *Williston on Contracts* § 57:19 (4th ed. 2001)).
357. *Id.* at 1902 n.6.
358. *Id.*
359. *Arthur Andersen*, 129 S. Ct. at 1902-03; First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995); EEOC v. Waffle House, Inc., 534 U.S. 279 (2002).
360. *Arthur Andersen*, 129 S. Ct. at 1902-03 (citing *First Options*, 514 U.S. at 943).
361. *Id.* (citing *Waffle House, Inc.*, 534 U.S. at 294).
362. *Id.* at 1903.
363. *Id.* (Souter, J., dissenting).
364. *Id.*
365. *See Arthur Andersen*, 129 S. Ct. at 1903.

should be carefully circumscribed.[366] Thus, a preferred way of limiting the scope of such extraordinary interruption is to perform a "look through" of the section 3 petition, and confine its usage only to signatories of the underlying arbitration agreement.[367] "While it is hornbook contract law that third parties may enforce contracts for their benefit as a matter of course, interlocutory appeals are a matter of limited grace."[368] Responding to the majority's point that savvy parties who "game the system" may be subject to sanctions, the dissent explained that sanctions tend to apply to the frivolous, "not to the far-fetched."[369]

During this *Survey* period, the United States Supreme Court also decided *Vaden v. Discover Bank*,[370] which involved two questions: First, whether a federal court may "look through" a petition to compel arbitration, asserted under the Federal Arbitration Act, to the parties' underlying substantive controversy and, second, whether a federal court may entertain a petition to compel arbitration based on the content of a counterclaim.[371] To decide these issues, the Supreme Court was required to revisit the "substantive supremacy" of the FAA, which presents an interesting anomaly in the realm of federal legislation because it is not a source of subject-matter jurisdiction.[372]

The case originated in state court, when Discover Bank filed a breach of contract claim against its cardholder, Vaden, to recover past due charges of $10,610.74, plus interest and counsel fees.[373] Vaden responded and counterclaimed, alleging that Discover's financial charges, interest, and late fees violated Maryland's credit laws.[374] Even though the credit card agreement contained an arbitration clause, Discover Bank did not initially avail itself of this provision.[375] It was not until Vaden filed her response and counterclaim that Discover then invoked Section 4 of the FAA, which permits a federal court to compel arbitration, provided the underlying controversy "arises under" federal law.[376] Although the counterclaims were grounded in state law, Discover argued that they were pre-empted by section 27(a) of the Federal Deposit

366. *See Arthur Andersen*, 129 S. Ct. at 1904.
367. *Id.*
368. *Id.*
369. *Id.*
370. 129 S. Ct. 1262 (2009).
371. *Id.* at 1268.
372. *See id.* at 1271-72.
373. *Id.* at 1268.
374. *Id.*
375. *Id.* at 1268-69.
376. *Vaden*, 129 S. Ct. at 1269; *see supra* note 37 for text of statutory language.

Insurance Act (FDIA).[377] The district court ordered arbitration, and Vaden appealed.[378] The Fourth Circuit remanded the case to the district court to determine whether it had subject-matter jurisdiction, instructing it to undertake this review by "looking through" the section 4 petition to the substantive controversy between the parties and assess whether it presented "a properly invoked federal question."[379] Vaden conceded that her state-law claims were pre-empted under section 27 of the Federal Deposit Insurance Act.[380] The district court granted Discover's motion, and ordered the parties into arbitration.[381] Vaden appealed this decision, asserting in part that the district court lacked subject-matter jurisdiction to review the petition.[382] The Fourth Circuit, in a split vote, affirmed.[383] In conducting its own analysis, the majority subordinated the "well-pleaded complaint" rule of *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*,[384] and concluded instead "that the complete preemption doctrine is paramount."[385] In other words, the FDIA pre-empted Vaden's state-law claims, thus the district court was empowered to entertain the Section 4 petition.[386]

The Supreme Court granted certiorari, to resolve the split among the lower federal courts, namely whether federal courts must find jurisdiction on the face of the petition or whether they may "look through" the petition and take into account the federal character of the underlying controversy.[387] The circuits that adopted the narrow approach held that a district court was without authority to entertain a section 4

377. 12 U.S.C.A. § 1831d(a) (West 2009) (providing in relevant part: In order to prevent discrimination against State-chartered insured depository institutions . . . with respect to interest rates . . . such State bank[s] . . . may, notwithstanding any State constitution or statute which is hereby preempted for the purposes of this section, take, receive, reserve, charge on any loan or discount made, or upon any note, bill of exchange, other evidence of debt, interest at a rate allowed by the laws of the State . . . where the bank is located.); *Vaden*, 129 S Ct. at 1269.

378. *Vaden*, 129 S.Ct. at 1269.

379. *Id.*

380. *Vaden*, 129 S.Ct. at 1269.

381. *Id.*

382. *See id.*

383. *Id.* at 1269.

384. 535 U.S. 826 (2002).

385. *Vaden*, 129 S. Ct. at 1270.

386. *Id.*

387. *See* Wisconsin v. Ho-Chunk Nation, 463 F.3d 655, 659 (7th Cir. 2006) (holding that the district court may "look through" the petition and focus on the underlying dispute). *Accord* Smith Barney, Inc. v. Sarver, 108 F.3d 92, 99 (6th Cir. 1997); Westmoreland Capital Corp v. Findlay, 100 F.3d 263, 267-69 (2nd Cir. 1996); Prudential-Bache Securities, Inc. v. Fitch, 966 F.2d 981, 986-89 (5th Cir. 1992)).

petition if the underlying controversy raised a federal question.[388] The broader approach permits a federal court to "look through" the petition and determine if a federal question is present.[389]

In an opinion written by Justice Ginsburg, the Supreme Court held that a district court may "look through" a section 4 petition to determine whether or not it has subject-matter jurisdiction.[390] The court reached this decision by examining the text of section 4, finding the phrases, "save for [the arbitration] agreement" and "jurisdiction under title 28" to mean jurisdiction over the parties' underlying controversy.[391] The court observed that even though this approach was not consistent with the mainstream view of most federal circuits which had rejected the "look through" standard, it is textually in line with the statutory frame of the FAA.[392] Adopting Vaden's argument, that the "controversy between the parties" is "simply and only the parties' discrete dispute over the arbitrability of their claims," does not comport with the language.[393] "Section 4 directs courts to determine whether they would have jurisdiction "save for [the arbitration] agreement."[394] In rejecting Vaden's argument that the "save for" clause was to ensure that courts were not ousted of jurisdiction, the Supreme Court explained that section 2 of the FAA, the Act's "centerpiece provision" addressed the problem.[395] This section mandates that agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[396] Vaden's approach, to link the "save for" language to the 'ouster of jurisdiction' is imaginative, but utterly unfounded and historically inaccurate."[397] In addition, Vaden's approach would also assume impractical consequences.[398] It would essentially permit a federal court to entertain a section 4 petition in only three specific instances — when a federal question suit is before the court, when the parties satisfy the requirements for diversity of citizenship jurisdiction, or when the dispute over arbitrability involves a maritime contract.[399] Under this approach, someone who could file a

388. *Vaden*, 129 S. Ct. at 1275.
389. *Id.*
390. *Id.*
391. *Id.* at 1273.
392. *Id.* at 1274.
393. *Id.*
394. *Vaden*, 129 S. Ct. at 1274.
395. *Id.*
396. *Id.*
397. *Id.* at 1275.
398. *See id.*
399. *Id.*

federal question suit but who had not done so would not be able to avail themselves of the advantages of a section 4 petition. The "look through" approach enables parties to seek federal intervention on the question of whether arbitration should be compelled "without first taking a formal step of initiating or removing a federal question suit."[400]

With respect to the second fundamental question of jurisdiction, however, the Supreme Court split five to four, holding that counterclaims cannot be the basis for jurisdiction.[401] The majority began its analysis by examining the language of Section 2, which authorizes a United States district court to entertain a petition to compel arbitration if the court would have jurisdiction, "save for [the arbitration] agreement," over "a suit arising out of the controversy between the parties."[402] Taking issue with the Fourth Circuit's identification of the "dimensions of 'the controversy between the parties,'" the majority held that appellate court focused only on a "slice of the parties' entire controversy," specifically Vaden's counterclaims.[403] "Lost from sight was the triggering plea–Discover's claim for the balance due on Vaden's account."[404] The majority observed that it is well-recognized federal rule that jurisdiction cannot be created via defense or counterclaim.[405] In taking issue with the dissent's characterization of "controversy," the court opined:

> Artful dodges by a § 4 petitioner should not divert us from recognizing the actual dimensions of that controversy. The text of § 4 instructs federal courts to determine whether they would have jurisdiction over "a suit arising out of the controversy between the parties"; it does not give § 4 petitioners license to recharacterize an existing controversy, or manufacture a new controversy, in an effort to obtain a federal court's aid in compelling arbitration.[406]

Because the majority found that Discover's claim against Vaden was filed as a state law cause of action, which voided appellate court jurisdiction, the Supreme Court reversed the judgment of the court of appeals affirming the district court's order and remanded the case for further proceedings consistent with its opinion.[407]

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400. *Vaden*, 129 S. Ct. at 1275.
401. *See id.* at 1278.
402. *Id.* at 1275.
403. *Id.* at 1268.
404. *Id.*
405. *Id.* at 1278.
406. *Vaden*, 129 S. Ct. at 1276.
407. *See id.* at 1279.

The impact of *Vaden* is that parties who seek federal court intervention will closely examine how they wish to fashion their initial complaint. While the "look through" approach provides some elasticity, practitioners must recognize that this is only an initial inquiry—to determine whether an underlying federal controversy exists. In most instances where a section 4 petition fails, the state enforcement remedy is still available. Section 2 of the FAA binds state courts, and renders agreements to arbitrate "valid, irrevocable, and enforceable."[408] State court analogues to the FAA generally contain similar enforcement language. In *Vaden*, Discover could have sought an order from Maryland state court to compel arbitration of Vaden's claims, an avenue it chose not to exercise. The clarity of the Supreme Court's decision in *Vaden*, however, will better inform practitioners of their pleading options.

## VI. DOMESTIC RELATIONS ARBITRATION

In *Washington v. Washington*,[409] the Michigan Court of Appeals addressed the issue of whether an arbitrator exceeded his authority when he awarded the wife assets of substantially less value based on his assessment that the wife dissipated assets unreasonably during the time leading up to the divorce.[410] In affirming the lower court's ruling, the court of appeals held that unequal property distribution in a divorce action is not contrary to law, as long as it is based on proper criteria.[411]

Defendant wife appealed the trial court's denial of her motion to vacate the arbitrator's award.[412] The parties had been married for approximately fourteen years when the plaintiff husband filed for divorce.[413] The parties reached a partial settlement through mediation; however, property issues remained unresolved.[414] To achieve closure, the parties entered into an arbitration agreement, which specified that they would be "guided by the laws of the state of Michigan during the arbitration process and also agree that the Rules of Evidence may be applied or relaxed at the discretion of the Arbitrator."[415] The parties selected an arbitrator, who conducted a hearing and made an award.[416] The arbitrator determined that the fair market value of the husband's

408. 9 U.S.C.A. § 2 (West 2009).
409. Mich. App. 667, 770 N.W.2d 908 (2009).
410. *See id.* at 670, 770 N.W.2d at 912.
411. *Id.* at 673, 770 N.W.2d at 913.
412. *Id.* at 668, 770 N.W.2d at 910.
413. *Id.* at 668, 770 N.W.2d at 910-11.
414. *See id.* at 668-69, 770 N.W.2d at 911.
415. *See Washington*, 283 Mich. App. at 673 n.5, 770 N.W.2d at 913 n.5.
416. *Id.* at 669, 770 N.W.2d at 911.

dental practice was $165,000, however, because child support and spousal support would come out of the husband's dental practice, the arbitrator devalued the practice to $99,000, for purposes of dividing the property; the practice was awarded to the husband.[417]

The arbitrator also valuated the property on which the dental practice was located, using the same fair market valuation formula.[418] After taking into account the existing mortgage of $47,000, the arbitrator determined the fair market value of the property to be $123,000.[419] In addition, the arbitrator awarded other assets including the wife's personal injury settlement proceeds, cars, bank accounts, and play furniture for the children.[420] In the end, the total value of the assets awarded to the husband was $177,428 more than what he awarded to the wife.[421] However, the arbitrator explained that this division of property was equitable for two reasons.[422] First, the wife made $80,555 of home improvements using the parties' home equity line of credit, "less than necessary and beyond that which the parties could afford."[423] Thus, these expenses were properly attributable to the wife, with "remainder of the expenses joint in nature."[424] Second, with respect to the wife's personal injury settlement, a portion should be taken into account "in the overall award."[425]

The wife subsequently filed with the trial court a motion to vacate the arbitrator's award, asserting that the arbitrator: 1) exceeded his jurisdictional authority; 2) displayed evident partiality; and, 3) rendered an untimely award by exceeding the time limits specified by statute.[426]

The Michigan Court of Appeals began its analysis by articulating the narrow standard of judicial review operative in arbitration.[427] This standard is no less in domestic relations arbitration proceedings.[428] Under the Michigan Arbitration Act, a reviewing court may vacate a domestic relations arbitration award under the following circumstances:

417. *Id.*
418. *Id.*
419. *Id.*
420. *Id.* at 670, 770 N.W.2d at 911.
421. *Washington*, 283 Mich. App. at 670, 770 N.W.2d at 911.
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.*
426. *Id.* at 670, 770 N.W.2d at 912.
427. *Washington*, 283 Mich. App. at 671, 770 N.W.2d at 912.
428. *Id.*

> (a) The award was procured by corruption, fraud, or other undue means.
>
> (b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.
>
> (c) The arbitrator exceeded his or her powers.
>
> (d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.[429]

Under Michigan law, arbitrators exceed their authority "whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law."[430] To determine whether the arbitrator has strayed from his contractual obligation, "any error of law must be discernible on the face of the award itself."[431] In other words, it is not permissible for a reviewing court to scrutinize "intermediate mental indicia."[432] "Courts will not engage in a review of an 'arbitrator's mental path leading to [the] award.'"[433] Thus, in order to vacate an award for legal error, such error must be "so substantial that, but for the error, the award would have been substantially different."[434]

Applying the above tests to this case, the Michigan Court of Appeals rejected the wife's argument that a facially inequitable award subjected the award to vacatur.[435] The appellate court explained that the goal in dividing marital property is to reach an equitable distribution in light of all the circumstances.[436] Such a distribution "need not be an equal distribution, as long as there is an adequate explanation for the chosen distribution."[437] In this case, the arbitrator adequately explained that the

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429. *Id.* at 671-72, 770 N.W.2d at 912 (quoting MICH. COMP. LAWS ANN. § 600.5081(2) (West 2009)).

430. *Id.* at 672, 770 N.W.2d at 912; *see* Dohanyos v. Detrex Corp., 217 Mich. App. 171, 176, 550 N.W.2d 608, 611 (1996).

431. *Id.* at 672, 770 N.W.2d at 913.

432. *Id.*

433. *Washington*, 283 Mich. App. at 672, 770 N.W.2d at 913.

434. *Id.* (quoting Krist v. Krist, 246 Mich. App. 59, 67, 631 N.W.2d 53 (2001)).

435. *See id.* at 672-74, 770 N.W.2d at 913-14.

436. *Id.* at 673, 770 N.W.2d at 913.

437. *Id.*

basis for distributing assets was largely driven by the wife's profligate spending habits leading up to the divorce.[438] This constitutes a factual finding which is beyond the scope of judicial review.[439] As to whether the arbitrator erred by considering in the division of marital property part of the non-economic damages obtained from the personal injury settlement, the court of appeals stated that the arbitrator acted within his authority by recognizing the controlling law.[440] The assets were available for distribution, "to ensure an equitable distribution of property."[441] Thus, the court of appeals concluded that nothing on the face of the award would suggest a *Gavin*-violation, and accordingly, the arbitrator did not exceed his authority when he rendered an award that split assets in disparate proportions.[442]

Finally, with respect to the wife's timeliness argument — that the arbitrator violated M.C.L.A. section 600.5078(1) by not issuing his ruling within sixty days after the arbitration hearing — the court of appeals concluded that the wife failed to show the impact of a timely ruling.[443] The arbitrator fulfilled his obligation under the law by convening a hearing and rendering an award based on his factual findings.[444] That he did not render such an award within the sixty days was of no consequence where it could not be shown that the delay had any effect on the property division in the arbitration ruling.[445] Thus, the trial court did not err in denying the wife's motion on this ground.[446]

## VII. UNIFORM MEDIATION ACT

Between 2008 and 2009 five states introduced bills relating to the Uniform Mediation Act.[447] Hawaii introduced House Bill 782 and Senate Bill 120.[448] Passed in the Senate, the House will review the bill in the

438. *Id.* at 674, 770 N.W.2d at 913.
439. *Washington*, 283 Mich. App. at 675, 770 N.W.2d at 914.
440. *Id.* at 674, 770 N.W.2d at 914.
441. *Id.*
442. *Id.* at 675, 770 N.W.2d at 914.
443. *Id.* at 676 n.6, 770 N.W.2d at 915 n.6.
444. *See id.*
445. *See Washington*, 283 Mich. App. at 676 n.6, 770 N.W.2d at 915 n.6.
446. *See id.* at 676, 770 N.W.2d at 915.
447. Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, *A Few Facts About The Uniform Mediation Act*, *available at* http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp (last visited November 16, 2009).
448. S.B. 120, Reg. Sess (Hi. 2009); H.B. 782, Reg. Sess. (Hi. 2009).

2010 regular session.[449] In February 2009, the Rhode Island Senate introduced the UMA in Senate Bill 765.[450] The bill was referred to committee where it is currently being held for study.[451] The Maine Legislature also introduced the UMA in 2009.[452] The two bills were referred to the Committee on the Judiciary, and will be carried over to the next session.[453] In Massachusetts, House Bill 94 introduced the UMA.[454] In September, the House discharged the bill to the Joint Committee on the Judiciary.[455] New York introduced the UMA in both houses as AB 8497 and SB 5422.[456] In May, it was referred to the Assembly Judiciary Committee and the Senate Codes Committee.[457] The number of states (including the District of Columbia) adopting the UMA remains at eleven (D.C., Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, and Washington).[458]

The State Bar of Michigan ADR Section's Effective Practices and Procedures Committee (EPP) began reviewing the Uniform Mediation Act in late 2008.[459] The State Courts Administrative Office's (SCAO) Office of Dispute Resolution formed a Mediation Confidentiality and Standards of Conduct Committee at the end of 2008.[460] The EPP decided to withhold final comment until the SCAO committee finished their work.[461] Through multiple meetings and numerous drafts, the SCAO committee created proposed rule MCR 2.412 which utilizes many (but not all) of the features of UMA.

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449. Hawaii State Legislature, 2009 Regular Session, *SB120 Status*, *available at* http://www.capitol.hawaii.gov/session2009/lists/measure_indiv.aspx?billtype=SB&billnumber=120 (last visited November 16, 2009).

450. S. 765 (R.I. 2009).

451. State of Rhode Island General Assembly, *Legislative Status Report*, *available at* http://dirac.rilin.state.ri.us/BillStatus/WebClass1.ASP?WCI=BillStatus&WCE=ifrmBillStatus&WCU (last visited November 16, 2009).

452. H.P. 968 (Me. 2009); L.D. # 1378 (Me. 2009).

453. State of Maine Legislature, *Actions for LD1378*, *available at* http://www.mainelegislature.org/LawMakerWeb/dockets.asp?ID=280032522 (last visited November 16, 2009).

454. H.B. 94 (Ma. 2009).

455. Commonwealth of Massachusetts, *Legislative Tracking System*, *available at* http://www.mass.gov/legis/186history/h00094.htm (last visited November 16, 2009).

456. A.B. 8497 (Ny. 2009); S.B. 5422 (Ny. 2009).

457. New York State Assembly, *Bill Search Results*, *available at* http://assembly.state.ny.us/leg/?bn=S05422 and http://assembly.state.ny.us/leg/?bn=A08497 (last visited November 16, 2009).

458. Uniform Law Commissioners, *supra* note 447.

459. Personal knowledge of author from involvement on the committee.

460. Personal knowledge of author from involvement on the committee.

461. Personal knowledge of author from involvement on the committee.

## VIII. CONCLUSION

In the main, the decisions of this *Survey* period clarify aspects of arbitral law that were previously murky. The United State Supreme Court's decision in *14 Penn Plaza* provides guidance to unions and employers as to the repercussions of a union-negotiated waiver of judicial recourse and mandatory arbitration of statutory claims. The Supreme Court made clear that it was not overruling *Gardner-Denver*,[462] though for all practical purposes, it is moving closer in that direction. And, in more than one case, the Michigan Court of Appeals and the U.S. Sixth Circuit Court of Appeals, in examining unique fact patterns, abided by the historical standard of limited judicial review which circumscribes their authority to peer into the mind of the arbitrator and ascertain the correctness of an award. The judiciary reinforced that this is not their mandate. When parties agree to arbitrate, they agree to accept the arbitrator's reading of the contract, and the arbitrator's factual findings.

The one case that included a surprise element was *In re Nestorovski Estate*. In concluding that an arbitrator may decide real estate interests, the court of appeals stated that parties operating under a common law arbitration agreement are not subject to the same strictures as those who agree to arbitrate under the Michigan Arbitration Statute.[463] Regardless of whether one agrees with the court's ruling, the decision gives practitioners pause when they are in litigation, and they agree, in the interest of time or financial exigencies, to submit outstanding issues to arbitration. The decision compels practitioners to be cautious in crafting their arbitration agreements, to ensure that the remedy an arbitrator is likely to impose is in keeping with party expectations.

462. *14 Penn Plaza*, 129 S. Ct. at 1469 n.8.

463. *In re Nestorovski Estate*, 283 Mich. App. at 200, 769 N.W.2d at 734.