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ALTERNATIVE DISPUTE RESOLUTION

MARY A. BEDIKIAN†

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I. INTRODUCTION

The decisions during this *Survey* period[1] continued to promote

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1. The *Survey* period for this article covers Michigan Supreme Court and Michigan Court of Appeals cases, in addition to United States Supreme Court and Sixth Circuit cases, decided June 1, 2005 through May 31, 2006. Also covered are statutes enacted or introduced during this period.

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arbitration and other forms of dispute resolution. In the majority of cases, the decisions were clear and well-analyzed, and resulted in either solidifying precedent or clarifying the more esoteric areas of arbitral jurisprudence. For example, in a near-unanimous decision, the United States Supreme Court crystallized the distinction between claims of fraud that relate to the contract as a whole, and those that reach or are directed to the arbitration clause specifically. The Sixth Circuit, which published nine opinions,[2] spun off an interesting and diverse array of jurisprudence. This

2. The Sixth Circuit also rendered a number of unpublished but important decisions in the realm of labor arbitration primarily. *See* Armco Emp. Indep. Fed'n, Inc. v. AK Steel Corp., 149 Fed. Appx. 347 (6th Cir. 2005) (holding that arbitrator exceeded his authority by failing to limit the employer's liability for monetary damages for improperly discontinuing the transportation program for apprentices, only some of whom qualified for relief); Bixby Med. Center, Inc. v. Michigan Nurses Ass'n, 142 Fed. Appx. 843 (6th Cir. 2005) (holding that arbitrator's timeliness determination that was predicated on whether the nurses' union and not just individual nurses had the independent right to assert a grievance under the collective bargaining agreement was proper, given that the CBA terms with respect to the prosecution of claims were ambiguous); Brokate v. Express Jet Airlines, Inc., 174 Fed. Appx. 867 (6th Cir. 2006) (holding that flight attendant's failure to seek arbitration on her own behalf before the System Board of Adjustment was fatal to her claims); D.E.I., Inc. v. Ohio and Vicinity Reg'l Council of Carpenters, 155 Fed. Appx. 164 (6th Cir. 2005) (holding that arbitration award, where the panel found that an architectural firm, which the bank hired as the construction manager for a bank project, violated a term of the collective bargaining agreement prohibiting the firm from subcontracting with non-union contractors, fell within the scope of the collective bargaining agreement); Gilreath v. Clemens & Co., 212 Fed. Appx. 451 (6th Cir. 2005) (holding that arbitrator's decision that employer did not breach its contractual obligations through its alleged failure to offer employee overtime opportunities and its alleged discharge of him in retaliation for "whistleblower" activity drew its essence from the collective bargaining agreement); Golden v. Commc'ns Workers of America, AFL-CIO, 182 Fed. Appx. 459 (6th Cir. 2006) (holding that union did not breach its duty of fair representation in electing not to process grievance after three rounds of representation, since collective bargaining agreement did not furnish a basis for an arbitrator to rule in favor of employee on her demotion claim); Hartco Flooring Co. v. United Paperworkers of America, Local 14597, 192 Fed. Appx. 387 (6th Cir.2006) (holding that arbitrator whose decision with respect to whether the employer lacked requisite just cause to terminate employee for violating safety policy was based on a plausible construction of the collective bargaining agreement); Howell v. Rivergate Toyota, Inc., 144 Fed. Appx. 475, (6th Cir. 2005) (holding that a provision in an arbitration agreement embedded in an employment contract which vested in the employer the unilateral right to amend the arbitration procedures was neither unreasonable nor unconscionable under Tennessee law; by its terms, the unilateral amendment provision authorized only those changes that were necessary or appropriate to give effect to intent of procedure in light of changed circumstances, and employer's duty of good faith and fair dealing prohibited it from amending procedure for an improper or oppressive purpose); Legair v. Circuit City, Inc., 213 Fed. Appx. 436 (6th Cir. 2005) (arbitration agreement between retailer and employee, requiring binding arbitration of employer-employee disputes, was not procedurally unconscionable, given that retailer made extensive effort to explain the terms of the arbitration program and provided a 30-day window for consulting an attorney); Liberte

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Court decided cases which addressed substantive versus procedural arbitrability, the impact of non-disclosure in arbitral proceedings under the FAA, whether the cost-deterrent equation under *Green Tree* applies to state-based claims, and the impact of offending provisions in an employer-promulgated arbitration agreement. In other developments, the Michigan Supreme Court reversed the 2005 decision of the Michigan Court of Appeals, and held that the Domestic Relations Arbitration Act does not require the formality of a hearing comparable to hearings in court. Finally, the Michigan Court of Appeals, though less prolific than in prior years, re-affirmed the presumption favoring arbitration. The court found that a deficient statutory arbitration scheme is not cured by the default of a common law agreement, and held that in cases where common law principles and clear statutory language conflict, the statute controls.[3]

Capital Group, LLC v. Capwill, 148 Fed. Appx. 413 (6th Cir. 2005) (holding that elderly couple's arbitration claims against a financial investment firm whose agent sold them viatical insurance investments were not encompassed by the class action against the company so as to preclude arbitration under the National Association of Securities Dealers {NASD} procedures); McMullen v. Meijer, Inc., 166 Fed. Appx. 164 (6th Cir. 2005) (holding that invalid arbitrator-selection clause was severable from the remainder of the agreement); Pennington v. Frisch's Rests., Inc., 147 Fed. Appx. 463 (6th Cir. 2005) (holding that employees who asserted that they did not assent to arbitration because they did not receive the terms of the employer's arbitration plan but who signed an arbitration agreement indicating that they received and read the Employee Guide, which included the terms of the arbitration plan, were required to arbitrate); Robert Bosch Corp. v. ASC Inc., 195 Fed. Appx. (6th Cir. 2005) (holding that a broad reservation of rights and remedies clause in purchase order did not render arbitration clause in price quotations unenforceable under Michigan's knock out rule, since "rights and remedies" did not cover the right to judicial fora); Sterling Fluid Sys. (USA), Inc. v. Chauffeurs, Teamsters & Helpers Local Union # 7, 144 Fed. Appx. 457 (6th Cir. 2005) (holding that arbitrator's decision that employer violated the subcontracting clause of the collective bargaining agreement when it closed a foundry and shipped molds and dies to other facilities did not draw its essence from the CBA, since the decision conflicted with the express terms of the CBA's management rights clause, which authorized the employer to close the foundry and to relocate molds and dies); United Steelworkers of America, AFL-CIO, CLC v. Century Aluminum of Kentucky, 157 Fed. Appx. 869 (6th Cir. 2005) (holding that Last Chance Agreement, which stated that neither employee's termination nor any issue involving termination would be subject to the grievance and arbitration provisions of the collective bargaining agreement, was susceptible to reasonable construction that excluded only punishment, not whether violation of employer's rules occurred, thus the dispute as to whether employee's conduct violated the employer's rule was arbitrable); and, Zucker v. After Six, Inc., 174 Fed. Appx. 944 (6th Cir. 2005) (holding that former sales representatives wrongful termination suit was not subject to mandatory arbitration in employment contract since the contract had expired two years prior to his termination and the dispute did not involve facts that arose while the agreement was in effect).

3. The Michigan Court of Appeals also rendered a number of unpublished decisions. Among the most noteworthy are Biram v. City of Detroit, No. 256131, 2006 WL 171508

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II. ARBITRABILITY

A. The Severability Doctrine under Prima Paint

In *Buckeye Check Cashing, Inc. v. Cardegna*,[4] the United States Supreme Court finally issued a clear and concise statement regarding who determines the question of the validity of a contract, whether under federal or state law, where the contract contains an arbitration clause. In 1967, the United States Supreme Court established a doctrine which permitted courts to address and decide challenges to the formation of various contracts and clauses independent of other provisions in the agreement, such as an arbitration clause itself.[5] Specifically, the Supreme Court held that since the plaintiff in the case under review only objected to the arbitration clause and not the entire contract in which the clause was contained, there was no requirement that the arbitration clause issues be referred to the arbitrator or arbitration panel for determination.[6] However, it was not until 1995 that the Supreme Court confronted and answered the question about who decides arbitrability questions in the absence of a clear and unmistakable finding that the parties agreed to submit the question of arbitrability to arbitration.[7] In *First Options*, the United States Supreme Court explained that the law treats silence or ambiguity regarding a question concerning appropriate party differently from questions regarding whether a particular dispute is within the scope of a valid arbitration agreement.[8] As to the latter question, *First Options* held that where a valid arbitration agreement exists, any doubts about what will be included in it will be resolved in favor of

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(Mich. Ct. App. Jan. 24, 2006) (holding that where the parties agree that any challenge to an arbitrator's decision would be resolved according to the "Civil Service Commission Rules" and state law, the arbitration decision is not a self-enforcing final decision. The case was remanded for a factual determination whether the commission followed its own rules in overturning the arbitrator's decision without any written factual findings); Castle Mgmt. v. August, No. 253822, 2005 WL 217449 (Mich. Ct. App. Sept. 8, 2005) (holding that affirmative defenses may be asserted in response to a motion for award confirmation); Davis v. Meade Group, Inc., No. 262189, 2006 WL 51872 (Mich. Ct. App. Jan. 10, 2006) (holding that a separate dispute resolution policy, imposed on employees as a condition of employment, is not undercut by later language disclaiming the agreement as an employment contract); and, Socianu v. Socianu, No. 256590, 2006 WL 141717 (Mich. Ct. App. Jan. 19, 2006) (holding that a court order referring a marital property distribution issue to arbitration is not tantamount to a written arbitration agreement as required by the Domestic Relations Arbitration Act).

4. 546 U.S. 440 (2006).

5. Prima Paint Corp. v. Flood and Conklin Mfg. Co., 388 U.S. 395 (1967).

6. *Id.* at 406.

7. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995).

8. *Id.* at 944-45.

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arbitration.[9] With respect to the question focusing on who should decide questions of arbitrability, however, the Supreme Court reversed the pre-existing presumption and held that unless the parties, by the terms of their arbitration agreement, explicitly vest authority in the arbitrator to determine issues of arbitrability, it is *presumed* that the parties intended that the courts decide the issue.[10]

The issue of deciding whether a dispute is arbitrable was previously addressed by the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[11] which held that if the arbitration agreement comes within the scope of the Federal Arbitration Act (FAA), a court must apply federal substantive law to determine the question of arbitrability.[12] However, the remaining major roadblock to a clear understanding of when the FAA would apply to the arbitrability determination was not resolved until the Supreme Court's ruling in *Allied-Bruce Terminix Cos., Inc. v. Dobson.*[13] In *Allied-Bruce,* the United States Supreme Court clarified that the FAA applies to all written *arbitration* provisions contained in a contract involving any transaction in which interstate commerce is involved.[14] Pre-emption of state law arbitration by the Federal Arbitration Act had first appeared in *Bernhardt v. Polygraphic Co. of America,*[15] in which the United States Supreme Court was invited to consider whether, in light of *Erie*, a federal court should apply the Federal Arbitration Act in a diversity case when faced with state law hostile to arbitration.[16] The Court did not reach the question because it found that the contract did not involve interstate commerce.[17] However, in *Allied-Bruce,* the United States Supreme Court enforced an arbitration provision in a residential termite-treatment contract between a pest control company and an Alabama homeowner, effectively overruling an Alabama statute which would have voided the arbitration clause.[18] In order to reach that result, the Supreme Court found the necessary interstate commerce connection by virtue of the fact that many chemicals used by the pest control company in the treatment of termites had been shipped from an out-of-state location to

9. *Id.*
10. *Id.*
11. 473 U.S. 614 (1985).
12. *Id.* at 626.
13. 513 U.S. 265 (1995).
14. *Id.* at 281.
15. 350 U.S. 198 (1956).
16. *Id.* at 200.
17. *Id.*
18. *Allied Bruce*, 513 U.S. at 282.

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the local company in Alabama.[19] Thus, the Supreme Court held that the FAA would pre-empt the field in every case that could be reached by the commerce clause and, as a result, to the extent that the FAA was applicable, it would pre-empt state laws to the extent that they were not consistent with the Act.[20]

In *Buckeye* the Supreme Court identified three distinct types of challenges to arbitration agreements in FAA cases. The first type addressed specifically the validity of the portion of the contract regarding agreement to arbitrate. The second type challenged the contract as a whole, either on a ground that directly affects the entire agreement (*i.e.*, the agreement was procured as a result of fraud or misrepresentation, *etc.*) or on the ground that the legality of one of the contract provisions rendered the entire contract invalid. The third type of challenge was whether any agreement between the alleged obligor and obligee was ever created and concluded (focusing on issues such as whether the alleged obligor ever executed the contract containing the arbitration clause, whether the person signing the contract with the arbitration clause lacked authority to bind the alleged principal and/or whether the person executing the contract lacked the mental capacity to assent as a matter of law).

Buckeye addressed the second type of challenge, namely whether challenges to the validity of the contract as a whole based on fraudulent inducement or illegality of one of the contract's provisions renders the entire contract, inclusive of the arbitration provision, invalid. In *Buckeye*, Respondent Cardegna initiated a class action against Buckeye, alleging that Buckeye made illegal usurious loans disguised as check cashing transactions.[21] In response, Buckeye filed a motion to compel arbitration, based on an arbitration provision contained in the Deferred Deposit and Disclosure Agreement.[22] This provision stated, in relevant part:

> ***Arbitration provisions***. Any claim, dispute, or controversy (whether in contract, tort or otherwise, whether pre-existing, present, or future, and including statutory, common law, intentional tort, and equitable claims) arising from or relating to this Agreement . . . or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively *"Claim"*), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration pursuant to this Arbitration

19. *Id.*
20. *Id.*
21. *Buckeye*, 546 U.S. at 443.
22. *Id.*

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> Provision . . . . This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ('FAA'), 9 U.S.C. Sections 1-16. The arbitration shall apply applicable substantive law constraint *[sic]* with the FAA and applicable statu[t]es of limitations and shall honor claims of privilege recognized by law . . . ."[23]

The trial court denied Buckeye's motion to compel arbitration, holding that it was within the province of the court to decide a contract illegality claim.[24] Buckeye appealed to the Florida Court of Appeals, asserting that the decision was in violation of the severability doctrine enunciated in *Prima Paint v. Flood & Conklin Manufacturing Co.*[25] The Florida Court of Appeals agreed with Buckeye but the respondents appealed. The Florida Supreme Court reversed the appellate court decision, reasoning that to enforce an agreement to arbitrate in a contract challenged as unlawful "could breathe life into a contract that not only violates state law, but is also criminal in nature ."[26]

The United States Supreme Court reversed the Florida Supreme Court decision. First, the Supreme Court addressed the question of who decides allegations of contract validity—a court or an arbitrator. Relying on *Prima Paint,* the Supreme Court noted that "challenges to the validity of arbitration agreements "'upon such grounds as exist at law or in equity for the revocation of any contract' can be divided into two types."[27] The first type challenges specifically the validity of an agreement to arbitrate.[28] The other challenges the agreement as a whole, either on a ground that directly affects the contract as a whole, such as fraudulent inducement, or on the ground that the illegality of one of the contract's provisions renders the

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23. *Id.* at 442-43.

24. *Id.* at 448-49.

25. 388 U.S. 396 (1967). *Prima Paint,* as alluded to earlier in text, was the culmination of a series of cases decided by the United States Supreme Court and the Second Circuit Court of Appeals focusing on the character of the FAA, and whether it was a *procedural* enactment that could dislodge state law in diversity and non-diversity cases. *See* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1950) (holding that permitting claims to be submitted through the federal courts in diversity cases might lead to outcomes not contemplated by state law, thus undermining the directives of *Erie*); *see also* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2nd Cir. 1959) (holding that the FAA represented federal substantive law on arbitration agreements, since questions of contract interpretation and contract validity are inextricably intertwined).

26. 546 U.S. at 443 (quoting Party Yards, Inc. v. Templeton, 751 So. 2d 121, 123 (Fla. Dist. Ct. App. 2000)).

27. *Id.* at 444.

28. *Id.*

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entire contract invalid.[29] Here, respondents' claim was deemed to be of the second type.[30] "The crux of the complaint is that the contract as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge."[31] In this circumstance, the statutory language of the FAA does not permit a federal court to adjudicate the claim. As a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Unless the challenge is to the arbitration clause itself, the issue of the contract's validity is one to be considered by an arbitrator, not a court.

As to the question of whether the doctrine of severability in *Prima Paint* applied in state court, the Supreme Court held that the doctrine emerges not from sections 3 and 4 of the FAA, but rather the foundational provision of section 2, which commands that arbitration agreements be treated like all other contracts.[32] Relying on *Southland v. Keating*,[33] the Supreme Court stated that Congress did not intend to limit the Federal Arbitration Act to disputes subject only to federal court jurisdiction.[34] Thus, regardless of whether the challenge is brought in state or federal court, a challenge to the validity of the contract as a whole, even if later deemed by an arbitrator to be void, is one for an arbitrator to decide.

Justice Thomas dissented, stating that the Federal Arbitration Act does not apply to proceedings in state court, since the FAA cannot serve as the basis for displacing a state law that prohibits enforcement of an arbitration clause in a contract that might be deemed unenforceable given its illegal character.[35]

As a result of the Supreme Court's opinion in the *Buckeye* case, it is now clear that the question of who decides whether or not the dispute will be arbitrated depends upon the type of challenge made to arbitration agreements in cases to which the FAA applies. Specifically, challenges that

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29. *Id.*

30. *Id.*

31. *Id.*

32. *Buckeye*, 546 U.S. at 444-46.

33. 465 U.S. 1, 15 (1984).

34. *Buckeye*, 546 U.S. at 445 (reasoning that, "[o]ne of the bases for *Southland's* application § 2 in state court was precisely *Prima Paint's* "reli[ance] for [its] holding on Congress' broad power to fashion substantive rules under the Commerce Clause"). *Id.* at 447.

35. *Id.* at 449. Justice Thomas' dissent in *Allied-Bruce* foreshadowed his dissent in *Buckeye*, which continued to cast the Federal Arbitration Act as a procedural statute. Specifically to this point, Justice Thomas stated, "An arbitration agreement is a species of forum-selection clause: without laying down any rules of decision, it identifies the adjudicator of disputes. A strong argument can be made that such forum-selection clauses concern procedure rather than substance." *Dobson*, 513 U.S. at 289.

go the validity of the portion of the agreement requiring arbitration only are for the court to decide (*i.e.*, whether the arbitration clause portion of the contract was procured as a result of fraud, misrepresentation, or some other inappropriate conduct). By implication, the question of whether an agreement within the scope of the FAA was ever concluded between the parties (such as an issue dealing with whether or not the alleged obligor ever signed the contract or had authority to do so) is determined by the court. However, any and all challenges to the contract as a whole, whether on grounds that affect the entire agreement or on grounds that the legality of a portion of the agreement render the entire contract invalid, are to be determined by the arbitrator (or arbitration panel) to which the case has been assigned.[36]

To be sure, the result in *Buckeye* was not nuanced. The Supreme Court merely re-affirmed the importance of *Prima Paint's* severability doctrine, and made clear in its opinion that those who challenge a contract based on illegality, which may render the contract void *ab initio*, will not necessarily defeat an otherwise viable arbitration clause. This ruling is consistent with the Supreme Court's pronounced desire to avoid dilatory or frivolous objections to arbitration, and also preserve the character of arbitration sketched in the FAA.[37]

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36. While the court did not address specifically the third issue as to whether the person signing had authority or lacked the mental capacity to enter into a valid and enforceable contract, a number of federal courts have addressed those types of issues and by implication, therefore, it would appear that questions falling within the scope of that category are to be determined by the court and not the arbitrator. *See* Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003) (holding that under the Federal Arbitration Act, a court and not an arbitrator should decide mental capacity challenge to contract providing for arbitration of all disputes, relying on the *Prima Paint* doctrine that a court may compel arbitration of particular dispute under § 4 of the FAA only when satisfied that the "making" of the agreement to arbitrate is not at issue). *But see* Primerica Life Ins. Co. v. Brown, 304 F.3d 469 (5th Cir. 2002) (holding that a claim that one of the parties lacked the capacity to contract must be submitted to the arbitrator, rationalizing that capacity defense did not relate specifically to the arbitration clause but was rather part of the underlying dispute).

37. Interestingly, the English courts decided a comparable case during the *Survey* period. OAO Sovcomflot, Russia's largest shipper, initiated proceedings in London's High Court against former employees and their companies, alleging that various shipping deals resulted from bribery. The contracts included an arbitration clause. The London Court of Appeals permitted the case to proceed to arbitration, stating "[i]t is not enough to say that the bribery impeaches the whole contract unless there is some special reason for saying that the bribery impeaches the arbitration clause in particular. There is no such reason here." The London Court of Appeals focused on the importance of liberally construing the arbitration clause, *i.e.*, the presumption favoring "one-stop arbitration." The appellate court emphasized that "commercial man" would not knowingly create a system that requires a court to initially decide whether a contract should be rectified or rescinded and if held to be valid, then requires the arbitrator to resolve the underlying issue. Fiona Trust & Holding Corp. v. Yuri

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B. Procedural versus Substantive Arbitrability; Time-Limitation Bar

In a case involving a more traditional arbitrability question, the Sixth Circuit Court of Appeals decided whether a time bar in a collective bargaining agreement constituted a question of procedural arbitrability.[38] This case was one of the few surprise decisions of the Survey period, since the Sixth Circuit treated the time bar as a limitation on arbitration generally, thus precluding an arbitrator from deciding the merits of the claim.[39]

Gobain, which manufactures refractory products for industrial clients, entered into a collective bargaining relationship with the United Steelworkers. Several years into their collective bargaining relationship, Gobain fired two employees for insubordination.[40] The union grieved.[41] The parties' collective bargaining agreement ("c/b/a") included a four-step process for resolving grievances, the last step of which was arbitration.[42] On March 29, 2004, Gobain issued its formal denial with respect to both grievances.[43] Under the parties' c/b/a, the union had 30 days from which to notice the appeal of the grievances' denials.[44] The union informed the company of its decision to appeal in a letter dated May 19 which the company received on May 24.[45] The company refused to arbitrate, asserting that the union violated the time limits explicitly stated in the parties' c/b/a.[46] The union filed suit in federal district court under section 301 of the Labor-Management Relations Act to compel arbitration of the grievances. The district court held the grievances to be inarbitrable, and the union appealed.[47]

The Sixth Circuit began its analysis by framing the question—whether a collective bargaining agreement commits a dispute to arbitration is a question of substantive arbitrability for the courts to decide. By contrast, the question of whether the parties have complied with the procedural requirements is for the arbitrator to determine. Where the line is murky between what is procedural and what is substantive, the presumption of

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Privalov, Case No: 2006 2353 A3 QBCMF, [2007] EWCA civ. 20; decided Jan. 24, 2007.

38. United Steelworkers of Am., AFL-CIO-CLC v. Saint Gobain Ceramics & Plastics, Inc., 467 F.3d 540 (6th Cir. 2006).

39. *Id.* at 547.

40. *Id.* at 541.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Saint Gobain Ceramics*, 467 F.3d at 541-42.

45. *Id.* at 542.

46. *Id.*

47. *Id.*

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arbitrability which operates in this context places the question squarely before the arbitrator.

The Sixth Circuit held that the time limitations bar constituted a condition precedent to arbitration, and thus was a question for the court, and not the arbitrator, to determine.[48] Under *Moog*,[49] a time limitation embedded in the steps of a collective bargaining grievance process is the equivalent of an express time-limitations bar.[50] As such, it constitutes a question of substantive arbitrability which must be determined by a court.

Having determined that the matter was one of substantive arbitrability, the Sixth Circuit then decided whether the union satisfied the time limits set forth in the c/b/a. Under the c/b/a, the union had 30 days from the time of the written Step 3 decision to notify the company that it intended to appeal, and file for arbitration. The company issued its written denial of the Step 3 grievance on March 29, it was received by the union on April 8, and the decisions were appealed on May 19 (Saturdays, Sundays, holidays and off days did not count toward the 30 days). The main question was when the clock started to run, *i.e.*, on March 29 when the company denied the grievances, or on April 8 when the union received the notice of the company's denial. The language in the contract read, "from the time of the written Step 3 decision." This language favored the company's interpretation that the clock started to run on March 29 and not when the union received the decision. The next sentence of the agreement stated, "Upon receipt of such notice of appeal to arbitration . . . ." "The juxtaposition of these two sentences shows that the drafters understood the difference between a time requirement premised on "receipt" on the one hand and "the time of . . . decision" on the other , and we may assume that they made these linguistic choices intentionally."[51] The decision of the district court, which dismissed the union's action to enforce the arbitration clause, was affirmed.[52]

The Sixth Circuit's reticence to take a position contrary to *Moog* resulted in a decision that clearly confuses the line of demarcation between procedural arbitrability and substantive arbitrability. In the context of collective bargaining agreements, which typically involve intense bargaining sessions prior to contract ratification, arbitrability determinations

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48. *Id.*

49. General Drivers, Warehousemen and Helpers, Local Union 89 v. Moog Louisville Warehouse, 852 F.2d 871 (6th Cir. 1988).

50. Both the language in *Moog* and the language in *Gobain Ceramics* included a specific provision that stated that the failure to comply with the required time limits would preclude arbitration.

51. *Gobain Ceramics*, 467 F.3d at 546.

52. *Id.* at 547.

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are often left to the arbitrator as an "expert contract-reader."[53] Moreover, the role of federal courts in addressing claims where arbitrability is contested is restricted by the teachings of the *Steelworkers' Trilogy*, in which the Supreme Court stated:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on it face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.[54]

Despite the Supreme Court's caveats in the *Trilogy*, the Sixth Circuit's decision to treat a time-limitation bar as a question of substantive arbitrability flies in the face of long-standing precedent.[55] The end result of this linguistic imbroglio is two-fold. First, courts are likely to see more arbitrability claims. Second, courts will now be placed in a position of having to tease the arbitrability issue from the merits, something that is difficult for courts to do.

C. Exhausting Conditions Precedent to Arbitration

During the *Survey* period, the Sixth Circuit addressed the question of conditions precedent in arbitration and whether language in a contract which vested authority in the hands of one party to determine the adjudicatory forum in the event of a dispute could defeat the right to arbitrate.[56] Higley, a primary contractor, hired N/S as a subcontractor.[57] The parties' agreement contained a "Buy America" provision. This provision

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53. *See* John Wiley & Sons v. Livingston, 376 U.S. 543, 557-58 (1964) (holding that "a different ruling would produce frequent duplication of effort by court and arbitrator, and needless delay"). *See also* FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS (6th ed. 2003).

54. United Steelworkers, 363 U.S. at 567-68.

55. *Seee.g., John Wiley & Sons*, 376 U.S. 543; Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002); *see also* criticisms of *Moog*, discussed in Armco Emp. Indep. Fed'n v. AK Steel Corp., 252 F.3d 854, 860-61 (6th Cir. 2001) and Raceway Park, Inc. v. Local 47, Serv. Emp. Int'l Union, 167 F.3d 953, 963 (6th Cir. 1999).

56. Albert M. Higley Co. v. N/S Corp., 445 F.3d 861 (6th Cir. 2006).

57. *Id.* at 862.

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was inserted into the contract by Higley because it affected the use and availability of Federal Transit Administration funds. During contract performance, N/S informed Higley that he would not be able to comply with the "Buy America" provision.[58] After pursuing negotiation and mediation, Higley sued N/S for breach in federal district court, under diversity jurisdiction. N/S filed a motion to stay the litigation and compel arbitration, which was denied. N/S appealed.

The Sixth Circuit observed that while there is a strong federal policy in favor of arbitration, that policy is not absolute.[59] Arbitration is a matter of consent, not coercion, and a clear expression of party intent will govern disposition of the issue.[60] Here, the parties' arbitration clause, contained in the Subcontract, provided that should N/S and Higley be unable to resolve their disputes through mediation, any and all disputes, at the sole discretion of Higley, shall be decided by arbitration in accordance with Construction Industry Arbitration Rules of the American Arbitration Association.[61] This clause vested in Higley the discretion to decide the forum—either arbitration or litigation. The district court's decision denying N/S's motion to stay litigation and to compel arbitration was affirmed and remanded for further proceedings.[62]

It is clear from the holding in this case that the appellate court, appropriately so, restrained itself from re-writing the contract of the parties. The opinion illustrates what can occur when human dynamics, which focus on creating and preserving the relationship, interface with contract formation issues. More foresight in the drafting stage might have culminated in an agreement that would have permitted either party to make an election to arbitrate. Despite the unevenness of the contractual terms,[63] N/S did not assert fraud or unconscionability, claims that might otherwise permit the Sixth Circuit to penetrate the language of the contract. Neither was the arbitration clause ambiguous. The real trigger for N/S' challenge was adroitly captured by the Sixth Circuit: "Hindsight is 20/20 and no contract could possibly hold up to the scrutiny of the inquiry N/S would have us undertake—that is N/S asks us to consider whether the clause could have been written better given the dispute that developed between the

58. *Id.* at 862-63.

59. *Id.* at 863.

60. *Id.*

61. *Id.* at 863-64.

62. *Higley*,. 445 F.3d at 865.

63. The Subcontract also gave Higley sole discretion to select the commercial mediation service and the power to decide the location of the mediation or arbitration. *Id.* at 861.

parties."[64]

III. ENFORCEMENT OF AGREEMENTS TO ARBITRATE

A. Forum Inaccessibility; Cost-Deterrent Analysis under Green Tree

Unlike a judicial proceeding, parties in arbitration are required to privately compensate the arbitrator. In addition to compensation for the neutral, parties also pay a forum fee. This fee is often significantly greater than the filing fee in court. The subject of costs and fees in arbitration has received public attention.[65] One study, published in 2002, found that arbitration "saddles claimants with a plethora of extra fees that they would not be charged if they went to court."[66] This report went on to excoriate arbitration as an employer-driven or controlled process which places plaintiffs at a distinct disadvantage in arbitration. At a minimum, the forum/access fees have a deterrent effect, which at times prevents a claimant {plaintiff in arbitration] from even asserting a claim.

The United States Supreme Court addressed the question of fees in *Green Tree Financial Corp.-Alabama v. Randolph*,[67] holding that where an agreement is silent on the question of arbitration fees and costs, and a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.[68]

Lower courts are split on how to handle forum fees. Some courts have simply stated that the employee should not have to pay *any* fees and expenses when the employer requires arbitration as a condition of employment.[69] The underlying rationale for this position is found in the

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64. *Id.*

65. *See also* David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication,* 24 BERKELEY J EMP & LAB L 1 (2003); *see also* Edward Burnett, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts,* 23 BERKELEY J EMP & LAB L 107 (2002); Melissa G. Lamm, *Who Pays Arbitration Fees?: The Unanswered Question in Circuit City Stores, Inc. v. Adams,* 24 CAMPBELL L. REV. 93 (2001).

66. Public Citizen, Report on Costs of Arbitration, May 1, 2002, *available at* www.citizen.org (accessed from homepage by searching for 'costs of arbitration') (last visited Nov. 13, 2007).

67. 531 U.S. 79 (2000).

68. *Id.*

69. *See, e.g.,* Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998); Shankle v. B-G Maintenance Management of Colorado, Inc., 163 F.3d 1230 (10th Cir. 1999); and Armendariz v. Foundation Health Psychcare Servs., 6 P.3d 669 (Cal. 2000).

D.C. Circuit decision of *Cole v. Burns International Security Services*, in which the appellate court explained, "[W]e are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case."[70] As a consequence of *Cole,* many employer-promulgated plans were revised to impose the financial burden of both forum and neutral compensation on the employer. Nevertheless, courts continue to examine the question of whether it is unconscionable to require arbitration without a fee-shifting provision. A variance of this question was addressed by the Sixth Circuit during this *Survey* period in *Stutler v. T.K. Constructors, Inc.*[71] Plaintiffs, the Stutlers, residents of Kentucky, hired T.K., resident of Indiana, to build a personal residence for them.[72] T.K. completed the project and provided the Stutlers with a written acceptance of the workmanship.[73] Subsequently, the Stutlers noticed defects and requested T.K to perform the repairs which were covered by a home warranty.[74] T.K. performed an initial inspection, but before any repair work occurred, the Stutlers retained counsel and initiated court action.[75] The filed complaint alleged state law claims for negligent misrepresentation breach of contract, breach of warranty, and miscellaneous other claims, resulting in a request for damages in excess of $100,000.[76] The parties' construction project was covered by a broad arbitration clause that provided that any claims or dispute arising out of the contract or its breach would be settled by arbitration under the Construction Rules of the American Arbitration Association unless both parties mutually agreed otherwise.[77] The contract also provided that if a dispute over workmanship arose, the buyer and the builder would engage the services of an independent third party inspector to resolve the issue.[78]

Relying on the contract, T.K. filed a motion to stay litigation.[79] The district court denied T.K.'s motion, finding that the cost of arbitration would be prohibitive to the Stutlers.[80] T.K. appealed. Since this appeal was from an order denying a motion to stay litigation, the decision was

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70. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1484 (D.C. Cir. 1997).
71. 448 F.3d 343 (6th Cir. 2006).
72. *Id.* at 344.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Stutler*, 448 F.3d at 344.
78. *Id.*
79. *Id.* at 345.
80. *Id.*

immediately appealable under U.S.C. § 16(a)(1)(A).[81]

Although the Sixth Circuit readily admitted that the disposition of the appeal was governed by the Federal Arbitration Act, it reversed the district court decision, stating that *Morrison*[82] and *Cooper*,[83] on which the district court relied, were not applicable.[84] *Morrison* held that "the resolution of an arbitral civil rights dispute must reconcile the liberal federal policy favoring arbitration agreements with the *important rights created and protected by federal civil rights legislation.*"[85] Under *Morrison*, potential litigants must be able to demonstrate whether the costs of arbitration preclude them from effectively accessing the arbitral forum.[86] *Cooper*, another Title VII employment discrimination case, held that the cost-deterrent analysis required by *Morrison* was critical to determining whether the underlying functions of the federal statute would be compromised.[87] The Sixth Circuit also considered the relevancy of *Green Tree*. All three of these cases involved federally protected interests. Here, the Stutlers, through diversity jurisdiction, sought to enforce contractual rights provided by state law. Thus, neither *Morrison* nor *Cooper* applied. And, even if *Morrison* and *Cooper* were not explicitly limited to the arbitration of federal statutory rights, *Erie R. C. v. Tompkins* would preclude their application to a question of state law. The Sixth Circuit was adamant that *Erie* not be used as a springboard to invalidate state law in order to achieve a preference for federal common law:

> [I]f we were to flout *Erie* by extending *Green Tree, Morrison* and

81. *See e.g.*, Lloyd v. Hovsena, LLC, 369 F.3d 263 (2004) (district court order compelling arbitration and dismissing party's underlying claims with prejudice was "final decision with respect to an arbitration" within meaning of Federal Arbitration Act (FAA) provision governing appellate review of arbitration orders, and thus was immediately appealable. 9 U.S.C. § 16(a)(3); Vetco Sales, Inc. v. Vinar, 98 Fed. Appx. 264 (5th Cir. 2004) (holding that district court order denying defendants' motion to stay trial proceedings pending arbitration was immediately appealable under the Federal Arbitration Act (FAA). 9 U.S.C. §§ 3, 16(a)(1)(A); Boomer v. AT & T Corp., 309 F.3d 404 (7th Cir. 2002) (holding that Court of Appeals had jurisdiction over appeal from district court order that expressly denied movant's request to compel arbitration and to stay or dismiss proceeding, even though district court also entered minute order demonstrating its intent to revisit question of arbitrability following further fact-finding and possibly a trial pursuant to provision of Federal Arbitration Act allowing for immediate appeal of order refusing stay under Act or denying petition to compel arbitration).

82. Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003).

83. Cooper v. MRM Investment Co., 367 F.3d 493 (6th Cir. 2004).

84. *Stutler*, 448 F.3d at 345-46.

85. *Id.* at 346 (quoting *Morrison* at 652-53) (Emphasis in opinion).

86. *Id.*

87. *Id.*

> *Cooper* to disputes over purely state law claims, we would, in effect, limit enforcement of arbitration agreements to situations in which all of the parties to the agreement are wealthy. This absurd result, we think, is not what Congress intended when it enacted the FAA.[88]

Judge Moore concurring opinion refused to embrace the majority opinion's condemnation of the district court's decision. Judge Moore held that "the majority opinion's fervid rejection of the extension of the cost-deterrent defense to state-law disputes *as a matter of federal law*"[89] was not relevant to whether such a claim was cognizable under state law. Challenging the majority for not making an appropriate prediction of what the Kentucky Supreme Court would do if confronted with the question, Judge Moore proceeded to examine the analogous case of *Conseco Finance Serv. Corp. v. Wilder*,[90] which involved the exact arbitration clause in *Green Tree.* There, the Kentucky Court of Appeals relied on *Green Tree's* reasoning to hold that plaintiff's contention of unconscionability must be rejected based on plaintiff's existing level of proof. As with *Green Tree, Conseco* rejected the attempt to avoid the arbitral forum based on a mere presumption of unconscionability.

During this *Survey* period, the Sixth Circuit also decided *Scovill v. WSYX/ABC, Sinclair Broadcast Group, Inc.*,[91] a case involving unconscionability. In *Scovill,* the plaintiff initiated suit against his former employer claiming that he was discriminated against on account of his age in violation of the Age Discrimination Employment Act.[92] Plaintiff also brought a claim for unlawful retaliation, invasion of privacy, promissory estoppel, and violation of Ohio public policy.[93] The defendants removed the case to federal court and filed a Motion to Dismiss, or in the alternative, Stay the Action Pending Arbitration because the plaintiff had previously signed an arbitration agreement.[94] The district court held the arbitration agreement was enforceable, and granted Defendant's Motion to Dismiss, but severed three provisions from the agreement. On appeal, the plaintiff argued that the district court erred in finding that the arbitration agreement was not unconscionable.[95]

88. *Id.*
89. *Id.* at 347-49
90. *Stutler*, 448 F.3d at 348.
91. 425 F.3d 1012 (6th Cir. 2005).
92. *Id.* at 1014.
93. *Id.*
94. *Id.*
95. *Id.*

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Under Ohio law, the unconscionability doctrine has two components: (1) substantive unconscionability, and (2) procedural unconscionability.[96] Both elements must be present to find a contract unconscionable.[97] Procedural unconscionability exists where the circumstances surrounding a party to the contract were such that no voluntary meeting of the minds was possible; it is not enough, however, that the parties have unequal bargaining power.[98] Vast disparity is required. The Sixth Circuit noted that, in this case, the plaintiff was college-educated, experienced in his profession, and knowledgeable about arbitration clauses.[99] Further, he admitted reading the agreement, and he was aware of the opportunity to discuss the agreement. Thus, the appellate court found no procedural unconscionability, and no further discussion was necessary.

B. Invalid Arbitrator-Selection Clause; Severability of Offending Provision

One prolific area of arbitral jurisprudence in recent years has been in the employment sector. The presumption favoring enforcement of arbitration of federal and state statutory claims, and claims arising under state common law[100] faired well in the Sixth Circuit's most recent decision of *McMullen v. Meijer, Inc.*,[101] in which the Sixth Circuit addressed the question of whether an arbitration agreement could survive a deficient arbitrator selection mechanism. Meijer hired McMullen as a store detective. Following a workplace incident, McMullen was given the option of demotion or termination. McMullen chose termination and subsequently challenged the termination through the employer-promulgated appeal plan established by Meijer. The termination appeal plan ("TAP") called for a two-step process, which required Meijer to initially identify the arbitrator pool from which an arbitrator would be selected, and then conduct arbitration under the Employment Rules of the American Arbitration Association. At the time McMullen was hired, Meijer presented her with a

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96. *Id.* at 1017.

97. *Scoville*, 425 F.3d at 1017.

98. *See* Cooper v. MRM Inv. Co., 367.3d 493 (6th Cir. 2004). (holding that mere inequality of bargaining power is not a sufficient reason to hold an arbitration agreement unenforceable).

99. The plaintiff had previously signed such an agreement.

100. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (holding that claims arising under the Age Discrimination in Employment Act of 1967 (ADEA) could be subject to arbitration under the Federal Arbitration Act). Following *Gilmer*, lower courts began to enforce arbitration agreements between employer and employee, using *Gilmer* to support the presumption favoring arbitration of federal and state statutory claims, and claims arising under state common law.

101. 166 Fed. Appx. 164 (6th Cir. 2006).

copy of an employee handbook describing the TAP. McMullen signed an acknowledgment form assenting to the company's policies and procedures. McMullen did so after participating in the arbitrator selection process, and one day before the beginning of her evidentiary hearing, she filed a declaratory judgment action in state court challenging the fairness of TAP's arbitrator-selection process.

The case was removed to federal court on the basis of federal question jurisdiction.[102] The district court granted summary judgment to Meijer, issuing an order compelling arbitration (based on the agreement between McMullen and Meijer that all employment disputes arising out of an employee's termination would be arbitrated).[103] McMullen appealed.[104]

The Sixth Circuit initially recited the procedural history, which included an earlier challenge of the arbitrator-selection process. In *McMullen v. Meijer, Inc.*,[105] the appellate court held that the arbitrator-selection process was flawed in that it provided Meijer with exclusive control over the arbitrator pool.[106] The case was remanded to the district court to determine whether the offending provision could be severed from the contract.[107] The district court held that severance was appropriate where the provision did not taint the entire contract, and where the parties had clearly expressed their intent to arbitrate disputes arising from an employee's termination from employment.[108] McMullen again appealed, this time asserting that 1) the district court erred in holding that severance was a proper remedy, and 2) that she could arbitrate her claim under the procedures set forth in AAA's Employment Arbitration Rules (with an arbitrator selected in accordance with such rules).[109]

In Michigan, general contract law provides that the failure of a distinct part of the contract does not void valid severable provisions.[110] Despite no express severability clause, the Sixth Circuit held that the parties had expressly evidenced their intention to arbitrate, and that this intention should be given effect.

One critical factor in this case was that during oral argument, plaintiff's attorney was given a hypothetical choice between using the AAA rules or having the district court appoint an arbitrator. Counsel opted to use the

102. *Id.* at 165.
103. *Id.*
104. *Id.*
105. 355 F.3d 485 (6th Cir. 2004).
106. *Id.* at 487.
107. *Id.*
108. *Id.* at 485.
109. *Id.*
110. *McMullen*, 166 Fed. Appx. 4 at 168.

AAA rules, which provide a default mechanism for arbitrator selection, in the event the parties' selection process does yield a mutual choice.[111]

C. Common Law Arbitration

In an important case, the Michigan Supreme Court re-visited the circumstances under which an otherwise statutory arbitration agreement might default into common law.[112] Common law arbitration typically arises when a provision to arbitrate future disputes under a contract omits a provision for entry of judgment upon an award by a circuit court.[113] Incorporating the rules of an arbitral service will satisfy the entry of judgment requirement.[114] The effect of a common law agreement to arbitrate future disputes is that the agreement can be revoked by either party at any time before an award is issued.[115]

Wold Architects entered into an agreement to purchase the assets of Strat, an architectural firm specializing in government and institutional work. As part of the purchase agreement, Strat entered into a five-year employment agreement with Wold, under which he would be expected to develop business and consult. This compensation was based entirely on profitability of Wold's Troy, Michigan operation. The employment agreement between the parties included a clause for binding arbitration, subject to the Voluntary Labor Arbitration Rules of the American Arbitration Association. Parties also had an asset purchase agreement. Unlike the employment agreement, the asset purchase agreement did not contain an arbitration clause. One of the projects pending at the time of the transaction was the renovation of the Macomb County courthouse. Strat had billed the county for fifty-three percent of the total project fee, leaving forty-seven percent to be collected by Wold upon completion. After the

111. AAA Employment Arbitration Rules and Mediation Procedures, Rule 12: *Number, Qualifications and Appointment of Neutral Arbitrators*; and AAA Commercial Arbitration Rules and Mediation Procedure, Rule 11: *Appointment From National Roster*.

112. Wold Architects and Engineers v. Strat, 474 Mich. 223, 713 N.W.2d 750 (2006).

113. *See* THOMAS L. GRAVELLE & MARY A. BEDIKIAN, MICHIGAN PLEADING AND PRACTICE, Vol. 8A (Callaghan: Lawyers Cooperative Publishing, 2d ed. 1994).

114. *See, e.g.*, AAA Commercial Arbitration Rules and Mediation Procedures, Rule 48(c): *Application to Court and Exclusion of Liability*, which states, "Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Id.*

115. *See, e.g.*, Tony Andreski, Inc. v. Ski Brule, Inc., 190 Mich. App. 343, 475 N.W.2d 469 (1991); Gaines Twp. v. Carlson, Hohloch, Mitchell & Pietrowski, Inc., 79 Mich. App. 523, 261 N.W.2d 71 (1977); Umbenhower v. Copart, Inc., No. 03-2476-JWL, 2004 WL 2660649 (D. Kan. Nov. 19, 2004) (restricting the application of the common law rule to circumstances where arbitration is not governed by statute).

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parties had entered into the respective agreements, however, Wold concluded, upon inspection, that the project was seventy percent incomplete. As a result, it began to withhold payments due under the employment agreement, maintaining that Strat had overstated the percentage of completion of the courthouse project and other undertakings.

Strat filed a demand for arbitration with the American Arbitration Association, asserting that it was owed money by Wold. AAA wrote the parties, and indicated that its commercial arbitration rules were better suited to resolve the controversy. The commercial rules state that judgment on an arbitration award may be entered in the circuit court.[116] The parties did not agree to this change in writing, and wiring is available to confirm the parties' agreement on this change. Subsequently, Wold filed a counter-demand for arbitration, claiming that Strat had billed too much for the work done on the courthouse. While the arbitration was pending, Wold requested, in writing, that AAA define the scope of arbitration moving forward. Shortly afterwards, Wold revoked its agreement to arbitrate, asserting that Strat's claims fell under the asset purchase agreement, which did not contain an arbitration clause. The arbitrator, on the other hand, decided that the arbitration hearing would proceed as scheduled, concluding that the arbitration provision in the employment agreement could not be revoked unilaterally.

Wold filed a declaratory judgment action, asserting that the pending arbitration was invalid because 1) the asset purchase agreement did not contain an arbitration clause, and 2) that the arbitration provision in the employment agreement was unilaterally revocable because it did not contain the requisite statutory language relative to specific enforcement.[117] The circuit court disagreed, stating that the claims submitted to AAA could be arbitrated without irreparable harm to Wold.[118] The arbitration continued, resulting in a $104,559.27 award in favor of Strat, who then filed a summary disposition motion. Strat contended that there was no longer a genuine issue of material fact concerning whether the parties had a valid arbitration agreement that comported with the statutory requirements.[119] Wold moved to vacate, which the trial court denied, granting Strat's motion for summary disposition.[120] Wold appealed to the Court of Appeals, resulting in a reversal of the judgment of the trial court.[121] The Michigan

116. *Wold,* 474 Mich. at 227, 713 N.W.2d at 753.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 226, 713 N.W.2d at 752.
121. *Id.*

Supreme Court granted leave to appeal.

The Michigan Supreme Court affirmed the Court of Appeals decision.[122] The Court recognized the distinction between statutory and common-law arbitration, with the primary difference being that in common law, parties are not divested of the power to unilaterally revoke agreements made pursuant to MCL section 600.5001.[123] Because the parties' agreement did not include the statutory language of enforcement, the parties by default fell subject to the dictates of common law arbitration. Under common law, one party to the agreement may terminate arbitration at any time before the arbitrator renders an award.[124]

Having determined that the parties were operating under a common law arbitration agreement, the Michigan Supreme Court next addressed the question of whether the Legislature pre-empted it when it enacted the Michigan Arbitration Act. The Court examined the language of the arbitration statute and concluded that it did not demonstrate an intention to abrogate the common-law option.[125] "Statutory and common-law agreements to arbitrate have long co-existed . . . Nothing in the MAA indicates that the Legislature intended to change this existing law."[126] As further support, the Michigan Supreme Court pointed to MCL section 600.501, which specifically removes from its purview all agreements to arbitrate that do not conform to MCL section 600.5001(1) or (2).[127]

Finally, the Michigan Supreme Court addressed the question of whether common-law arbitration agreements retained their unilateral revocability. Common law arbitration formed at a time when courts were skeptical of arbitration. Recognizing that this skepticism no longer exists, the Court was not persuaded to alter the common law arbitration unilateral revocation rule. "The unilateral revocation rule protects the right to bring suit when claims arise that a party did not anticipate and would not want handled outside the courts' direct protection. The Legislature has determined that public policy concerns do not require abrogation of the unilateral revocation rule, and we

122. *Wold*, 474 Mich. at 226,713 N.W.2d at 752.

123. *Id.* at 238, 713 N.W.2d at 759. MICH. COMP. LAWS ANN. § 600.5001(1) provides for statutory arbitration, and states:

> All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators any controversy existing between them, which might the subject of a civil action, except as herein otherwise provided, and may, in such submission, *agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission.*

MICH. COMP. LAWS ANN. § 600.5001(1) (West 2000) (emphasis added).

124. *Wold.* 474 Mich. at 226, 713 N.W.2d at 752.

125. *Id.* at 231, 713 N.W.2d at 755.

126. *Id.* at 232, 713 N.W.2d at 756.

127. *Id.*

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see no need to contravene that determination."[128] Since the parties' agreement in this case did not meet the writing requirement of MCL section 600.5001 *et seq*, the parties had, by default, a common law arbitration agreement. And, although the parties acquiesced in using the commercial arbitration rules of the AAA, that did not change the fact that there was no written agreement containing the required language. Justice Corrigan wrote separately to urge the Legislature to consider disposing of the unilateral revocability rule.[129]

This case presents an interesting scenario in that the parties' contract called for the use of AAA's "Labor Arbitration Rules." Unlike the commercial rules, the labor rules (which apply to collective bargaining disputes) do not include a specific enforcement provision. Had the parties agreed in writing to use the commercial rules, it is the opinion of this author that the result in *Wold* would have been different. The lesson of this case is that mere acquiescence is not enough for a common law arbitration agreement to be transformed into statutory arbitration. This decision is consistent with the view that arbitration should be a matter of consent, not coercion, and that parties are free to structure their arbitration as they see fit, including preserving the right to revoke their consent to arbitration.

This straight-forward, traditional analysis of common law arbitration principles was adopted by the Michigan Court of Appeals in *City of Ferndale v. Florence Cement Company*.[130] In *City of Ferndale*, the plaintiff entered into a contract with the defendant, Florence Cement Company to install new concrete for a roadway in the city. Defendant, Hartford Casualty Insurance Company provided a maintenance and guarantee bond on the work performed by Florence. The parties' contract established an appeal process that would be invoked in the event the project engineer, Giffels-Webster Engineers declared the work to be defective. The project manager for the engineer notified Florence that the plaintiff was seeking replacement of 300 yards of concrete due to a defect and therefore was requesting that Florence perform full-depth repairs. Florence responded by proposing an alternative remedy which the plaintiff rejected.

Defendants filed a joint motion for summary disposition arguing that, under the parties' contract, the engineer's determination constituted an arbitration award that Plaintiff did not seek to enforce within one year of the engineer's "decision," and therefore plaintiff's claim was time-barred.[131] In opposition to the summary disposition motion, plaintiff argued that because

128. *Id.* at 237, 713 N.W.2d at 758.
129. *Id.* at 239-40, 713 N.W.2d at 759-60.
130. 269 Mich. App. 452, 712 N.W.2d 522 (2006).
131. *Id.* at 455-56, 712 N.W.2d at 525.

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the engineer "ruled" in its favor, the decision became binding when Florence failed to appeal. Further, plaintiff argued that the parties' contract controlled and not MCR 3.602(l) because the parties' agreement did not contain an arbitration clause.

The trial court held that plaintiff's claim was time-barred.[132] Relying on *City of Huntington Woods v. Ajax Paving Indus.*,[133] the trial court stated that because the parties' agreement provided for a contractually agreed method of ADR that designated the engineer's decision as "final and binding" if the appellate procedures were not followed, the engineer's ruling constituted a final arbitration award subject to the one-year limitation period in MCL section 3.602(l).[134] Plaintiff appealed.[135]

The Michigan Court of Appeals first discussed the requisites of contract formation as they apply to the existence of an arbitration agreement. Under the Michigan arbitration statutes, an agreement to arbitrate is valid, enforceable, and irrevocable if the agreement provides that a circuit court can render judgment on the arbitration award.[136] Such intent must be clearly and unambiguously conveyed.[137] Here, the parties' agreement did not contain an arbitration clause nor did it specify that any resultant aware was enforceable in a court of competent jurisdiction. Moreover, the parties did not make a "Dispute Resolution Agreement" part of their contract. It is only through this vehicle that a circuit court may obtain jurisdiction to enforce the agreement and render judgment. Since the agreement did not provide for statutory arbitration, MCR 3.602(l), which governs the confirmation of a statutory arbitration award, was deemed inapplicable.

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132. *Id.*

133. 196 Mich. App. 71, 492 N.W.2d 463 (1992).

134. *Id.* at 72, 492 N.W.2d at 464. The controlling language stated, "ENGINEER will render a formal decision in writing within thirty days after receipt of the opposing party's submittal, if any, in accordance with this paragraph. ENGINEER's written decision on such claim, dispute, or other matter will be final and binding upon OWNER and CONTRACTOR unless: (i) an appeal from ENGINEERS's decision is taken within the time limits and in accordance with the procedures set forth in EXHIBIT GCA, "Dispute Resolution Agreement," entered into between OWNER and CONTRACTOR . . . or (ii) if no such Dispute Resolution Agreement has been entered into, a written notice of intention to appeal from ENGINEER's written decision is delivered by OWNER or CONTRACTOR to the other and to ENGINEER within thirty days after the date of such decision and a formal proceeding is instituted by the appealing party in a forum of competent jurisdiction to exercise such rights or remedies as the appealing party may have with respect to such claim, dispute or other matter in accordance with applicable Laws and Regulations within sixty days of the date of such decision, unless otherwise agreement *(sic)* in writing by OWNER and CONTRACTOR." *Ferndale*, 269 Mich. App. at 452, 712 N.W.2d at 522.

135. *Ajax Paving,*. 196 Mich. App.at 71, 492 N.W.2d at 463.

136. MICH. COMP. LAWS ANN. § 600.5001(2) (West 2000).

137. *Id.*

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IV. VACATUR OF ARBITRAL AWARDS

A. Manifest Disregard of the Law

The Federal Arbitration Act specifies limited statutory grounds on which an award may be vacated.[138] Despite this, courts have supplemented the act with non-statutory grounds for vacatur. One such ground is where the arbitrators have acted in "manifest disregard of the law."[139] This standard initially appeared in *Wilko v. Swan*,[140] where the United States Supreme Court stated, "the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."[141] Since *Wilko*, the federal courts continue to struggle with this judicially-devined standard.[142] An acute example of the struggle is the following Sixth Circuit decision.

In *Solvay Pharmaceuticals, Inc. v. Duramed Pharmaceuticals, Inc.*,[143] the Sixth Circuit Court of Appeals applied the manifest disregard of the law standard. In that situation, the arbitrators' determined that the original contract's no-damages clause did not extend to the profit-splitting agreement, leaving the court to determine whether such a determination

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138. U.S.C. § 1 *et. seq.* Grounds include undue means, evident partiality, misconduct, and imperfect execution of powers. "A nearly irrebuttable presumption exists in the federal case law that arbitral awards, once rendered, are legally enforceable. The vacatur of an award remains an unusual result." THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL, 77 (West 2007).

139. DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 821 (1997).

140. 346 U.S. 427 (1953).

141. *Id.* at 436-37.

142. The difficulties in applying the standard are evident from the recent jurisprudence. "The Second Circuit severely limits the doctrine of manifest disregard of the law, describing it as 'a doctrine of last resort—its use is limited only to those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply." MetLife Securities, Inc. v. Bedford, 456 F.Supp.2d 468 (2006) (quoting Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383, 389 (2nd Cir. 2003)). "Generally, arbitrators' decisions must be granted great deference, and may be vacated for manifest disregard of the law only if the Court finds both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." "[I]n applying the manifest disregard of the law test for whether to vacate an arbitration award, an arbitrator is ordinarily assumed to be a blank slate unless educated in the law by the parties." *MetLife Securities*, 456 F.Supp.2d at 473 (2006); *see also* Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2nd Cir. 1998) (reversing the district court's order refusing to vacate an award where the arbitrators were correctly advised of the applicable legal principles, but they ignored the law or the evidence or both).

143. 442 F.3d 471 (6th Cir. 2006).

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"drew its essence" from both documents.[144] Duramed and Solvay entered into a series of agreements related to the marketing of a new menopause drug. The specific agreement that gave rise to the case involved the Cenestin Co-Promotion Agreement (CPA), which provided that Solvay's services, not cash, would serve as consideration for Duramed's services under the related agreements. The CPA stated that if the parties failed to negotiate a long-term agreement after the agreement expired, and one of the parties terminated the CPA afterwards, there would be a penalty. Duramed was required to pay Solvay a "residual payment" equal to five percent of Cenestin's gross margin in the final quarter of the CPA, every quarter for the subsequent five years.

The CPA also included two other important provisions—a "no damages" provision and an arbitration provision. Duramed's financial condition deteriorated and it could no longer afford to pay its sales force to market Cenestin. To stabilize the situation, Solvay agreed to guarantee a twenty million dollar loan to Duramed by Merrill Lynch Business Financial Services, Inc.. Memorialized in a letter "agreement," the guarantee was linked to the CPA, extended the CPA's term, required Solvay to pay additional marketing expenses, and included a shifting profit-sharing arrangement. Unlike the CPA, the Letter Agreement did not contain a "termination without cause" provision, an "exclusive remedy/no damages" provision, a "damages for termination" provision, or an arbitration provision.

Although Solvay spent nearly $100 million to promote Cenestin, sales continued to lag. The parties were unsuccessful in their attempts to reach a broader alliance as contemplated by the initially-executed CPA. Duramed subsequently gave notice that it intended to terminate the initial agreement and the subsequent Letter Agreement, along with a related agreement executed at the outset of the business relationship. In response, Solvay filed arbitration seeking damages for Duramed's alleged breach of the ten-year investment recovery, and the profit-split arrangement under the Letter Agreement. Arbitration resulted in a split decision, awarding Solvay 68 million dollars in damages, and determining that the exclusive remedy/no damages provision did not apply to Duramed's breach of the Letter Agreement.[145] Solvay filed a motion to confirm the arbitration, and Duramed opposed confirmation and filed a motion to vacate. The district court confirmed the appeal, and Duramed appealed.[146]

The Sixth Circuit first distinguished its review function by assessing the

144. *Id.* at 482.
145. *Id.* at 475.
146. *Id.*

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type of question presented. If the issue presented is one of pure arbitrability, *i.e.*, whether the matter is even capable of being arbitrated, then the level of review is heightened. In that instance, the appellate court would be governed by *First Options of Chicago, Inc. v. Kaplan*,[147] where the United States Supreme Court indicated that the question of who should decide pure questions of arbitrability is predicated on whether the parties expressed their intent in a clear and unmistakable manner. "[A]bsent 'clear and unmistakable' evidence that contracting parties intended an arbitrator (rather than a court) to resolve questions of arbitrability, courts 'should *independently* decide whether an arbitration panel has jurisdiction over the merits of any particular dispute.'"[148] "Courts thus review questions of arbitrability *de novo*, but with a thumb on the scale in favor of arbitration."[149] Whether a contract provision implicates arbitrability is divined in several ways.[150] First, one may consider the location of the targeted provision. "If the limitation appears in close proximity to the arbitration clause," it would be reasonable to conclude that this constitutes a limitation on the proper subjects of arbitration.[151] If the limitation appears in distant proximity to the arbitration clause, it is reasonable to conclude that the parties did not intend to limit the subjects of arbitration.[152] Courts also may engage in a functional inquiry, asking parties to express their preference for an industry-based resolution, or a more "searching judicial review" undertaken by the court.[153]

The Sixth Circuit Court of Appeals held that the "exclusive remedy/no damages" provision "did not bear on arbitrability."[154] As such, the appellate court was required to apply the standard of substantial deference to the arbitrators' determination that the clause did not apply to breaches of the Letter Agreement. In reaching this conclusion, the appellate court examined the location of the "exclusive remedy/no damages" provision in Section 13, and compared it to the singular arbitration provision in Section 22. The arbitration agreement broadly encompassing *"[a]ny* dispute, controversy, or claim arising out of or relating to [the agreement]."[155] Had the parties intended to limit the matters eligible for arbitration, they should have included qualifying language. In addition, the CPA agreement contained an

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147. *Kaplan*, 514 U.S. at 938.
148. *Solvay*, 442 F.3d at 477 (quoting *First Options*, 514 U.S. at 941, 945).
149. *Id.* at 478.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Solvay*, 442 F.3d at 480.
155. *Id.* at 481. (emphasis in opinion).

explicit provision with respect to termination, default, and exclusive remedy, under "*this* agreement."[156] The third indication that the "exclusive remedy/no damages" provision did not impact or concern arbitrability was that complex monetary awards in certain circumstances could issue, even under the CPA.

Given the above analysis, the appellate court determined that judicial intervention was warranted only if the award: (1) conflicts with the express terms of the agreement; (2) imposes additional requirements not expressly provided for in the agreement; (3) is not rationally supported by or derived from the agreement; or (4) is based on "general considerations of fairness and equity" instead of the exact terms of the agreement.[157] Under this standard, the Sixth Circuit Court of Appeals held that the arbitrators' decision, awarding damages to Solvay, was legally plausible and should be confirmed. The judgment of the district court was thus affirmed.

In *Electronic Data Systems Corp. v. Donelson*,[158] the Sixth Circuit again confronted the manifest disregard standard, this time in the context of an employment agreement. Donelson and Lotts, both African-American, worked for Electronic Data Systems (EDS). Each was subsequently terminated from employment for different reasons. During the time of their termination, their immediate supervisor was Caucasian. This supervisor also participated in the termination of two other African-American employees. No Caucasians were terminated during the same period.

Donelson and Lotts filed separate suits against EDS alleging that their termination was driven by racial discrimination and, with respect to Lotts specifically, a separate claim was asserted for disability discrimination.[159] Subsequently, Donelson and Lotts agreed to submit their respective claims to arbitration. The arbitration was conducted, with briefing and award deadlines established. When the arbitrators failed to render their award within the prescribed deadline, EDS submitted a written objection to the panel, stating that by exceeding the time allotted for rendering the award, the panel was without authority to issue a decision. The panel proceeded to award money damages to each claimant, without any specific findings of fact or conclusions of law, and subsequently, after appropriate briefing, also awarded attorney fees to each claimant. EDS moved in federal district court to vacate the arbitration awards. The district court denied the motion.[160]

156. *Id.* at 483.

157. *Id.* at 482-83 (quoting Beacon Journal Pub. Co. v. Akron Newspaper Guild, Local No. 7, 114 F.3d 596 (6th Cir. 1997)).

158. 473 F.3d 684 (6th Cir. 2007).

159. *Id.* at 687.

160. *Id.*

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EDS appealed from this decision.

Under the Federal Arbitration Act, court review of an arbitrator's decision is limited in scope.[161] One ground for vacatur is where the arbitration panel exceeds its powers.[162] EDS argued that the arbitration panel exceeded their power by first failing to set forth findings of fact and conclusions of law, as required by the Elliot Larsen Civil Rights Act,[163] and second, by awarding attorney fees and costs to both claimants in arbitration, despite the fact that the arbitration agreement provided only for an award of damages.

The Sixth Circuit rejected EDS' first argument. Although the Elliot Larsen Civil Rights Act does not discuss arbitration, federal and state courts favor arbitration to resolve statutory claims provided the procedures in arbitration are deemed fair.[164] In *Rembert*,[165] the Michigan Court of Appeals imposed a requirement that arbitral awards include findings of fact, as a necessary predicate to establishing the fairness of the arbitration process. However, the holding in *Rembert* is limited to *pre-dispute* arbitration agreements.[166] Here, the agreement to arbitrate was executed after the alleged statutory violations had taken place, and indeed, after both claimants had initiated suit in state court. With respect to the awards of attorney fees and costs, the appellate court observed that EDS was an accomplice to numerous delays and extensions throughout the course of the arbitration. It was therefore disingenuous for them to argue that the panel exceeded its authority to award fees and costs.

Finally, EDS asserted that the arbitration panel manifestly disregarded the law by refusing to require Donelson and Lotts to establish a *prima facie* case of discrimination. The Sixth Circuit recognized that under *Gavin*[167] and other pertinent jurisprudence, a manifest disregard of the law standard is very narrow. "An arbitration must fly in the face of established legal precedent' for us to find manifest disregard of the law."[168] Furthermore, arbitrators are not required to explain their decisions.[169] In this case, even though the arbitrators did not proffer an explanation of their award, the record reflects sufficient evidence supporting the arbitral decision. First, the

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161. *Id.* at 688.

162. *Id.*

163. MICH. COMP. LAWS ANN. § 37.2101 *et seq.* (West 2001).

164. *Donelson*, 473 F.3d at 360 (citing Rembert v. Ryan's, 596 N.W.2d 208 at 210).

165. Rembert v. Ryan's Family Steak Houses, Inc., 235 Mich. App. 118, 596 N.W.2d 208 (1999)).

166. *Id.*

167. Detroit Auto. Inter-Ins. Exch. v. Gavin, 416 Mich. 407, 331 N.W.2d 418 (1982).

168. Dawanare v. Spencer, 210 F.3d 666, 669 (6th Cir. 2000).

169. *Id.*

supervisor's office contained a black-faced doll suspended by its neck. Second, the supervisor participated in the termination of four African-American employees. Third, during this same period of time, no Caucasian employees were terminated. Accordingly, the Sixth Circuit affirmed the decision of the district court, which concluded that the arbitrators did not manifestly disregard the law.

B. Evident Partiality

One of the more litigious areas in recent years deals with arbitral disclosures, and the impact of failing to disclose a *"disclosable event."*[170] Section 10(a)(2) of the Federal Arbitration Act (FAA), 9 U.S.C. §10(a)(2), as well as section 12(a)(2) of the Uniform Arbitration Act and Section 23(a)(2)(A) of the Revised Uniform Arbitration Act (RUAA), provide that an arbitration award may be vacated for "evident partiality" of the arbitrator.

The Sixth Circuit addressed the disclosure question in *Nationwide Mut. Ins. Co. v. Home Ins. Co.*[171] Nationwide filed suit against Home for breach of a reinsurance contract that the parties had entered into in 1977. The district court referred the parties to arbitration, pursuant to the terms of an arbitration clause in the parties' reinsurance agreement. Interim decisions of the arbitrators were challenged in court during various stages of arbitration. After the Sixth Circuit decided *Nationwide III*,[172] the parties proceeded to a hearing on the merits before a three-member arbitration panel. The panel awarded Home the sum of $1,250,000 in costs and interests.[173]

Subsequently, Nationwide filed suit in district court to vacate the final award along with two interim rulings of the arbitration panel. Home cross-motioned for confirmation. The district court denied Nationwide's motion

170. *See* Cross v. Costello, BC 313366 (Cal. Super. Ct. 2004) in which a Los Angeles Superior Court judge allowed a lawsuit alleging fraud, fraudulent concealment, breach of contract, negligence and violation of Business Code Section 17200 and initiated by partners of a former LA firm to proceed against the arbitrator who presided over their law firm breakup dispute. In their suit, plaintiffs asserted that the arbitrator and the American Arbitration Association, which furnished the name of the appointed arbitrator, concealed important background information about the arbitrator that would have cast doubts on his ability to remain neutral throughout the proceedings.

171. 429 F.3d 640 (6th Cir. 2005), *rehearing en banc denied* (Feb. 16, 2006).

172. Nationwide Mut. Ins. Co. v. Home Ins. Co., 150 F.3d 545 (6th Cir. 1998) (*Nationwide I*); Nationwide Mut. Ins. Co. v. Home Ins. Co., 278 F.3d 621 (6th Cir. 2002) (*Nationwide II*); and Nationwide Mut. Ins. Co. v. Home Ins. Co., 330 F.3d 843 (6th Cir. 2003) (*Nationwide III*).

173. *Nationwide II*, 429 F.3d at 642.

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for vacatur.[174] Nationwide appealed, asserting evident partiality in violation of FAA 9 U.S.C. § 10(a)(2) based on an arbitrator's alleged nondisclosure of certain business and social relationships with Home. Specifically, Nationwide stated that Jacks, a member of the arbitration panel, failed to disclose both business and social relationships with Home and its counsel, and also conducted improper *ex-parte* contacts with one of Home's attorneys and with employees of CIGNA and ACE.[175]

In assessing the effects of nondisclosure, the Sixth Circuit Court of Appeals looked to *Commonwealth Coatings Corp. v. Continental Cas. Co.*[176] In *Commonwealth Coatings,* the United States Supreme Court, in a divided opinion, held that an arbitrator's failure to disclose a significant business relationship with the successful party in arbitration justified vacating the arbitration award for evident partiality.[177] The plurality opinion indicated that arbitrators, like judges, must avoid even the appearance of bias.[178] Two other justices concurred in the result, but declined to hold that arbitrators are to be held to the Article III standards of judicial decorum.[179]

In this case, the arbitration agreement required that 1) arbitrators come from within the insurance industry and 2) that the arbitration panel would be comprised of a tri-partite panel consisting of two party-appointed arbitrators and a single neutral.[180] By virtue of this language, the parties agreed to submit their disputes to persons who are knowledgeable about the dynamics of the insurance industry. "Since they are chosen precisely because of their involvement in that community, some degree of overlapping representation and interest inevitably results."[181] "[T]he Arbitration Act does not fasten on every industry the model of the disinterested generalist judge."[182]

During the course of arbitration, Jacks did make various disclosures, none of which at the time were objected to by Nationwide. Specifically, Jacks disclosed that he had served approximately twenty times over a twenty-three year period as an ACE or CIGNA-appointed arbitrator. Jacks

174. *Id.* at 643.

175. In 1983, Home sold part of its business, including the reinsurance contract at issue, to CIGNA (later ACE).

176. 393 U.S. 145 (1968).

177. *Id.* at 147.

178. *Id.* at 150.

179. *Id.* at 151.

180. *Nationwide II,* 429 F.3d at 645.

181. *Id.* at 646 (quoting Int'l. Produce, Inc. v. A/S Rosshavet, 638 F.2d 548, 552 (2nd Cir. 1981).

182. *Id.* (quoting Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002).

subsequently, at the behest of Nationwide, made additional disclosures involving other arbitrations between insurers and re-insurers. Jacks did not disclose the amount of compensation he received from his participation in matters involving Home and ACE/CIGNA. These facts, concluded the Sixth Circuit, do not lead a reasonable person to believe that Jacks was partial to one side of the arbitration. This is not a case of nondisclosure, but rather one of ample disclosure. Accordingly, the district court did not err in denying Nationwide's application for vacatur based on evident partiality of the arbitrator.[183]

During the *Survey* period, the subject of disclosure also received attention from the Fifth Circuit Court of Appeals, which decided *Positive Software Solutions, Inc: v. New Century Mortgage Corp.*[184] In *Positive Software*, the parties were involved in a business arrangement that required Positive Software to develop market and manufacture computer-software products for the mortgage industry. A dispute arose over the software products, and Positive Software subsequently filed a lawsuit, alleging copyright infringement, theft of trade secrets, breach of contract, and other causes of action. In the lawsuit, Positive Software sought specific performance, money damages, and preliminary and permanent injunctive relief. The district court granted Positive Software's preliminary injunction and ordered the parties into arbitration, pursuant to their Software Subscription Agreement.[185] Arbitration proceeded under the rules of the American Arbitration Association, with the parties ranking and selecting their arbitrators. The parties jointly selected Shurn, who was requested by AAA under its normal procedures to disclose any circumstances likely to affect impartiality or create an appearance of partiality. Shurn did not make any disclosures. After a seven-day hearing, Shurn awarded against Positive Software on all claims. Afterwards, Positive Software conducted an investigation into Shurn's background, discovering that Shurn had a professional relationship with new Century's arbitration counsel. Positive Software then filed a motion to vacate the award, based on the arbitrator's failure to disclose.[186] The district court granted the motion, and ordered the parties back into arbitration, with the *caveat* that they refrain from referring to the first arbitrator's ruling.[187] New Century appealed, and a panel of the Fifth Circuit affirmed the district court's vacatur on the ground that the

183. *Id.* at 649.

184. 436 F.3d 495 (5th Cir. 2006); *en banc review granted and reversed*, 476 F.3d 278 (5th Cir. 2007).

185. *Id.* at 496.

186. *Id.* at 497.

187. *Id.*

prior relationship "might have conveyed an impression of possible partiality to a reasonable person."[188]

On rehearing *en banc*, the Fifth Circuit Court of Appeals reversed, holding that vacatur of an arbitration award was improper under the "evident partiality" theory.[189] Specifically, an arbitrator's failure to disclose that he and the attorney for one of the parties had been two of thirty-four attorneys who previously represented a non-party corporation in unrelated litigation (that concluded seven years earlier), did not rise of the appropriate standard of partiality. "Nondisclosure alone does not require vacatur of an arbitral award for evident partiality. An arbitrator's failure to disclose must involve a significant compromising connection to the parties."[190]

The Sixth Circuit's holding in *Nationwide III* and the Fifth Circuit's holding in *Positive Software* make abundantly clear that practitioners have a high threshold to meet when attempting to vacate an award on the ground of evident partiality. In both cases, the relationship was simply too attenuated to be of any consequence.

V. DOMESTIC RELATIONS ARBITRATION

In *Miller v. Miller*,[191] the Michigan Supreme Court reversed the Court of Appeals decision that held that the Domestic Relations Arbitration Act requires the formality of a hearing in arbitration proceedings. *Miller* involved several unsuccessful efforts to resolve contentious issues in a divorce matter. The trial court entered a stipulated order for binding arbitration. The arbitrator convened the parties, and attempted to resolve the case by shuttle diplomacy, a form of mediation to which the parties had agreed. The arbitrator later produced an "arbitral award," disposing of the outstanding issues. Plaintiff wife filed suit, asserting that the arbitrator violated MCL section 600.5070 which mandates a hearing. The trial court affirmed the award, but a divided panel of the Michigan Court of Appeals reversed, holding that DRAA requires a formal hearing.[192]

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188. 436 F.3d at 504 (5th Cir. 2006) (relying on Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968)).

189. *Id.*

190. *Id.*

191. 474 Mich. 27, 707 N.W.2d 341 (2005).

192. The *only* issue the court of appeals decided was whether a domestic relations litigant is bound by an "arbitral award" if the arbitrator does not conduct a hearing, but instead meets with the parties *ex parte* to settle the case. The court did not decide a second spin-off issue, and that is the question of whether a stipulated order satisfies the requirement under the DRAA that parties who agree to binding arbitration should do so "by a signed agreement that specifically provides for an award" regarding delineated issues. MICH. COMP.

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The Michigan Supreme Court reversed the Court of Appeals decision on statutory grounds. The Court initially examined MCL section 600.5081, which is the statutory provision that governs vacatur and modification of arbitration awards under the Domestic Relations Arbitration Act. The statute permits vacatur if there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights. The Court of Appeals concluded that the arbitrator violated the prejudicial prong of the statute by reason of the informality of the hearing.[193]

The Michigan Supreme Court closely examined the Domestic Relations Arbitration Act and concluded that it does not define the term "hear" or "hearing." It also does not set any procedural requirements for arbitration. "This purposeful requirement of little or no record shows that the Legislature intended not to require specific procedures in arbitration proceedings."[194] "It is inappropriate for a court to read into a statute something that was intended."[195] Given the lack of statutory guidance, and the general informal nature of arbitration, the Michigan Supreme Court concluded that the Court of Appeals should not have restricted the parties' freedom to decide how the arbitration hearing should be conducted.

VI. OTHER DEVELOPMENTS

A. RUAA Developments

The Uniform Arbitration Act (UAA), approved by the National Commissioners on Uniform State Laws in 1955, was passed by the Michigan State Legislature in 1961.[196] The UAA, like the FAA, was passed to ensure the enforceability of pre-dispute arbitration agreements under state law. With the expansion of arbitration, and an increase in court-annexed arbitration proceedings, commentators have expressed the need for an updated statute that would codify nearly five decades of case law. In 2000, the Commissioners enacted the Revised Uniform Arbitration Act {RUAA}, which is a far more detailed and comprehensive statute than the UAA. At the present time, the RUAA has been adopted in 12 states.[197]

LAWS. ANN. § 600.5071 (West 2000).

193. *Miller,* 474 Mich. at 30, 707 N.W.2d at 344.

194. The Supreme Court did admit that without a record, reviewing courts cannot necessarily assess what procedures have been followed. *Id.*

195. *Id.* at 31, 707 N.W.2d at 344 (relying on AFSCME v. Detroit, 468 Mich. 388, 662 N.W.2d 695 (2003)).

196. MICH. COMP. LAWS ANN. § 600.5011 (West 2000).

197. *See e.g.,* ALASKA STAT. § 09.43.010 (West 2004)); COLO. REV. STAT. ANN. § 13-

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Organizations which have endorsed the RUAA include the American Arbitration Association, JAMS/ENDISPUTE, National Arbitration Forum, Association for Conflict Resolution [the former SPIDR], the National Academy of Arbitrators, and the ABA House of Delegates.

The RUAA improves upon the UAA in several material respects:

> ARBITRABILITY: Under the RUAA, if the agreement does not specify, matters of *substantive* arbitrability are for a court to decide, whereas matters of *procedural* arbitrability are for the arbitrators to decide. The statute offers some clarification on what is or is not procedural in nature. Moreover, the RUAA adopts the *separability doctrine*, which provides that if an allegation is made with respect to the validity of the contract *as a whole*, this issue is for an arbitrator to determine, not the courts.
>
> PROVISIONAL REMEDIES: A question often arises during the pendency of a case whether the arbitrator has the authority to impose provisional remedies. Section 8 authorizes the arbitrator to decide temporary relief if the request is made after the arbitrator's appointment.
>
> CONSOLIDATION: Section 10 of the RUAA gives court discretion to order consolidation of separate arbitration proceedings in the absence of an agreement to consolidate if the claims arose from the same transaction.
>
> DISCLOSURE: Section 12 of the RUAA imposes on the arbitrator the requirement to disclose to the parties and other arbitrators [in case of a tri-partite arrangement] any known facts that a reasonable person would consider, including existing or past relationships with parties, counsel, witnesses or other arbitrators.[198]
>
> IMMUNITY: Section 14 ensures that arbitrators and arbitration organizations are immune from civil liability to the same extent as a judge, even if the arbitrator fails to make disclosures required by Section 12 of the RUAA.[199]
>
> DISPOSITIVE MOTIONS AND PRE-HEARING CONFERENCE: Arbitrators have been reluctant to grant relief without a full evidentiary hearing

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22-201 (West 2004); HAW. REV. STAT. § 658A-1 (West 2006); NEV. .REV. .STAT. 38.206 (West 2001); N.J. STAT. ANN. § 2A:23B-1 (West 2003); N.M. STAT. ANN.§ 44-7A-1(West 1978); N.C. GEN. STAT. § 1.569.1 (West 2004); N.D Cent. Code 32-29.3-01 (2003); 12 OKL. ST.ANN. § 1851 (2006); OR. REV. STAT. § 36.600 (West 2003); UTAH CODE ANN. 78-31A-101 (West 2003); and WASH. REV. CODE ANN. 7.04A.010 (West 2006).

198. Uniform Arbitration Act § 12(a)-(b) (2000). [hereinafter "UAA"].

199. UAA § 14.

because one ground for vacating an arbitrator's award is the arbitrator's refusal to consider all the evidence material to a controversy. The RUAA makes clear that, with respect to conducting the arbitration, arbitrators have essentially the same powers as judges in terms of deciding dispositive motions, including motions for summary judgment.[200]

DISCOVERY AND SUBPOENAS: One of the advantages of arbitration is the cost savings achieved by virtue of a more streamlined process.[201] However, to achieve cost savings, discovery in arbitration has been limited.[202] This creates a tension between the need to acquire information for a fair hearing versus the need to have a cost-effective process.[203] The RUAA provides the arbitrators with discretion to engage in discovery that takes into account the needs of the parties.[204] For example, the arbitrator may:

—Issue protective orders;[205] and,

—Issue subpoenas for enforcement by a court in another jurisdiction that has adopted the Act.[206]

NON-WAIVEABILITY: The RUAA provides that some rights may not be contracted away, as these rights are seen as critical to the functioning of arbitration.[207] For example, before a dispute arises, parties may not adjust the arbitrator's power to grant provisional remedies or the court's jurisdiction to enforce an agreement to arbitrate, and the right to be represented by counsel.[208] In other respects, parties may never waive fundamental rights.[209] These rights include:

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200. *See* UAA § 15(a)-(b).

201. *See, e.g.*, Symposium, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (2001).

202. *See*, e.g., Jason F. Darnall and Richard Bales, *Arbitral Discovery of Non-Parties*, 2001 J. DISP. RESOL. 321, 355 (2001) (arguing that cost savings are gained by limiting discovery in arbitration).

203. *See, e.g.*, Natl. Conf. of Commrs. on Unif. St. Laws, Unif. Arb. Act, § 17(c) (August 2000) (stating that an arbitrator may order discovery, but should do so only when "appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective").

204. UAA § 17(c).

205. UAA § 17(e).

206. UAA § 17(g).

207. *See* UAA § 4(b)-(c).

208. UAA § 4(b).

209. See RUAA § 4(b)-(c).

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—the right to confirm, modify, or vacate an award;[210] and,
—the arbitrator's immunity.[211]

B. The Fair Arbitration Act of 2007

On April 17, 2007, a bill was introduced in the United States Senate that if passed would amend chapter 1 of Title 9 of the United States Code.[212] The overarching aim of the bill's sponsors is to establish fair procedures for arbitration clauses in contracts.[213] In short, a contract containing an arbitration clause must be bolded and capitalized, and explicitly state whether participation in the arbitration program is mandatory or permissive.[214] The bill requires notice to all parties that they retain the right to initiate suit in small claims court {assuming such a court has jurisdiction over the claim}.[215] The bill also lists a series of procedures relative to the competence and neutrality of arbitrators, and protects each party's right to vote in the selection of the arbitrator.[216] Interestingly, the bill requires that the arbitrator be a member in good standing of the bar of the highest court of the state in which the hearing is being conducted, unless the parties forego this requirement.[217]

Other protections include the right to be represented or not represented by counsel, the right to present testimony at a live hearing or to conduct the proceedings electronically, the right to be governed by the same substantive law that would apply if the case were filed in court, the right to a written decision within 30 days of the hearing's closure, and the right to receive a written explanation of the factual and legal basis of the decision.[218] Finally, under the framework of the bill, the arbitrator may assess fees and costs "in the interests of the justice" and the administrative agency may waive, defer, or reduce any fee or charge from the claimant in the event of extreme hardship.[219]

As of this writing, the bill resides in the Committee on the Judiciary.

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210. *Id.*
211. *Id.*
212. S. 1135, 110th Cong. (1997).
213. *Id.*
214. *Id.* at § 17(a)(1)-(2).
215. *Id.* at § 17(a)(4).
216. *Id.* at § 17(b)(2)(A)-(B).
217. *Id.* at § 17(b)(2)(B)(i).
218. *See* S. 1135, 110th Cong. § 17(b).
219. *Id.*

VII. CONCLUSION

The last two years of decisions continue to reflect considered, careful, and cogent thinking on the part of federal and Michigan state courts in the area of arbitral jurisprudence. First, the United States Supreme Court left undisturbed the separability doctrine initially enunciated in *Prima Paint*.[220] In doing so, the Supreme Court preserved the arbitrator—court division of decision-making responsibilities, reserving to the court only those challenges which go directly to the totality of the contract, inclusive of the arbitration clause.[221] The Sixth Circuit Court of Appeals continued to be relatively circumspect in so far as challenges to arbitral awards, protecting the narrow standard of review, whether the basis of review was manifest disregard of the law[222] or evident partiality.[223] Both the Michigan Supreme Court and the Michigan Court of Appeals continued to embrace common law arbitration despite the fact that a good argument can be made that such agreements are arcane and no longer serve the public good.[224]

To be sure, some decisions ran afoul of expectations, serving to confuse the jurisprudence. First, in *Stutler,* the Sixth Circuit refused to apply the *Green Tree* analysis to justify its support of arbitration.[225] While its embrace of arbitration is laudable, the appellate court's decision to decline to assess whether the cost of arbitration would be prohibitive to the client as a matter of federal law plays directly into the hands of the critics of arbitration who see arbitration, at least in the mandatory context, as a threat to important civil rights.[226] The decision in *Stutler* leaves practitioners in a tenuous state, certainly in situations where state law claims are asserted.[227] Second, in *Gobain Ceramics,* the Sixth Circuit confused the procedural versus substantive arbitrability dichotomy by ruling that a time-limitation bar constituted a substantive limitation on arbitration.[228] All circuits but the Sixth addressing this question have taken the view, first articulated in *Wiley & Sons*,[229] and endorsed by *Howsam*,[230] that the application of time-bar provisions generally constitutes a question of procedural arbitrability for the

220. *See Buckeye*, 546 U.S. 440.
221. *Id.*
222. *Donelson*, 473 F.3d 684.
223. *Nationwide III*, 330 F.3d 843.
224. *Wold Architects*, 474 Mich. 223, 713 N.W.2d 750.
225. *Stutler*, 448 F.3d 343.
226. *Id.*
227. *Id.*
228. *Gobain Ceramics*, 467 F.3d 540.
229. *John Wiley & Sons*, 376 U.S.at 556-57.
230. *Howsam*, 537 U.S. 79.

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arbitrator.[231]

Despite these two problematic decisions, the remaining decisions provide practitioners with a useful guidepost to effectively represent clients in arbitration.

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231. *See* the following cases cited in *Gobain Ceramics*: Local 285, Serv. Emp. Int'l Union, AFL-CIO v. Nonotuck Res. Assocs., Inc., 64 F.3d 735, 739-40 (1st Cir. 1995); Rochester Tel. Corp. v. Commc'n Workers, 340 F.2d 237, 238-39 (2nd Cir. 1965); Chauffers, Teamsters & Helpers, Local Union No. 765 v. Stroehmann Bros. Co., 625 F.2d 1092, 1093-94 (3rd Cir. 1980); Local 1422, Int'l Longshoremen's Ass'n v. S.C. Stevedores Ass'n, 170 F.3d 407, 410 (4th Cir. 1999); Smith Barney Shearson, Inc. v. Boone, 47 F.3d 750, 753-54 (5th Cir. 1995); Beer Sales Drivers, Local 744 v. Metro. Distribs., 763 F.2d 300, 303 (7th Cir. 1985); Auto., Petroleum & Allied Indus. Emp. Union, Local No. 618 v. Town & Country Ford, Inc., 709 F.2d 509, 511-14 (8th Cir. 1983); Toyota of Berkeley v. Auto. Salesmen's Union, Local 1095, 834 F.2d 751, 754 (9th Cir. 1987); Denhardt v. Trailways, Inc., 767 F.2d 687, 689-90 (10th Cir. 1985); Aluminum, Brick & Glass Workers Int'l Union v. AAA Plumbing Pottery Corp., 991 F.2d 1545, 1548 n. 1, 1550 (11th Cir. 1993); Washington Hosp. Ctr. v. Serv. Emp. Int'l Union, Local 722, 746 F.2d 1503, 1506-08 (D.C.Cir. 1984).

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