

# STILL LITIGATING ARBITRATION IN THE FIFTH CIRCUIT, BUT LESS OFTEN

*Donald R. Philbin, Jr.* \* and *Audrey Lynn Maness* \*\*

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\* Don Philbin is an AV-rated attorney-mediator, negotiation consultant and trainer, and arbitrator. He has resolved disputes and crafted deals for more than twenty years as a commercial litigator, general counsel, and president of communications and technology-related companies. Don has mediated hundreds of matters in a wide variety of substantive areas and serves as an arbitrator on several panels, including CPR’s Panels of Distinguished Neutrals. He is an adjunct professor at the Straus Institute for Dispute Resolution at Pepperdine Law School, Chair of the ABA Dispute Resolution Section’s Negotiation Committee, and a member of the ADR Section Council of the State Bar of Texas. Don is a Fellow of the American Academy of Civil Trial Mediators and is listed in The Best Lawyers in America (Dispute Resolution), The Best Lawyers in San Antonio, and the Bar Register of Preeminent Lawyers.

\*\* J.D., *summa cum laude*, Pepperdine University School of Law, 2007; B.S., Central Michigan University, 2004. While at Pepperdine, Ms. Maness served as a Note & Comment Editor for the *Pepperdine Law Review* and as a research assistant for Professor Roger Alford and Dean Ken Starr. After graduating, Ms. Maness clerked for the Honorable Steven M. Colloton of the United States Court of Appeals for the Eighth Circuit. She is admitted to the Texas Bar and now practices law at Weil, Gotshal & Manges, L.L.P. in Houston, Texas.

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Arbitration remains under national klieg lights. It has “become a wide-ranging surrogate for civil litigation” in a wider variety of contracts than at any time in our nation’s history.<sup>1</sup> This increased use has revealed stress fractures and drawn criticism. Congress has reacted, too: A party to a recent Fifth Circuit case was the impetus for the Franken Amendment, even though she ultimately won the right to take most of her claims to court. Other bills seek to exclude entire classes of claims (consumer, employee, franchise, and civil rights) from arbitration and to redraw the procedural line between decisions made by a court and decisions left to the arbitrator when the parties so provide. Arbitration is also being criticized in business circles for becoming “arbitigation.”<sup>2</sup>

But change has not awaited policy shifts, raising more questions about whether blunt legislative changes are necessary when commercial and judicial scalpels appear to be working. Pressure release valves, like unconscionability challenges, have been growing in popularity and use despite repeated petitions for writs of certiorari seeking to level geographic differences.<sup>3</sup> That may change. The U.S. Supreme Court recently granted

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1. Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 ILL. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1297526> [hereinafter Stipanowich, *Arbitration*].

2. Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation,”* 7 DEPAUL BUS. & COM. L.J. 383, 384-85 (2009) [hereinafter Stipanowich, *Arbitration and Choice*].

Despite meaningful efforts to promote better practices and ensure quality among arbitrators and advocates, criticism of American arbitration is at a crescendo. Much of this criticism stems from standard arbitration procedures that have taken on the trappings of litigation—extensive discovery and motion practice, highly contentious advocacy, long cycle time and high cost.

*Id.* Prof. Stipanowich goes on to suggest a possible “blueprint for a Protocol for Business Users of Arbitration” that includes selecting arbitration providers that “Get It.” *Id.* at 386, 430.

3. Donald R. Philbin, Jr., *Thankful for Unanswered Prayers? Unconscionability ‘Equilibrium,’*

certiorari in a Ninth Circuit case to decide whether courts or arbitrators should decide unconscionability challenges to arbitration agreements when the parties clearly and unmistakably assign that gateway decision to the arbitrator.<sup>4</sup> While major U.S. corporations expected overall disputes to increase in these tough economic times, one study indicates that corporations prefer to resolve their domestic disputes in litigation.<sup>5</sup> This preference is already permeating standard contracts. The American Institute of Architects' widely used template for building contracts has changed arbitration from the default procedure to a mere party option.<sup>6</sup> Even those that have not modified their standard contracts have focused on early case assessment, mediation, and tailored arbitration.<sup>7</sup> While mediation is frequently used, and may be the current default procedure, it was not controversial enough to generate a Fifth Circuit opinion during this survey period.<sup>8</sup> "In the current 'toolbox' of approaches to conflict, mediation is the equivalent of a multi-functional Swiss-Army knife."<sup>9</sup> But lest anyone overstate the demise of commercial arbitration, the American Arbitration Association reports business arbitration to be relatively stable.<sup>10</sup> And other studies show that it is still viewed as less costly and quicker than litigation.<sup>11</sup>

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27 ALTERNATIVES TO HIGH COST OF LITIG. 145, 145 (2009) [hereinafter Philbin, *Thankful*] (citing Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1499 (2008)).

4. Rent-a-Center W. v. Jackson, No. 09-497, 2010 WL 144073, at \*1 (U.S. Jan 15, 2009); Posting of Jean Sternlight to ADR Prof Blog, <http://www.indisputably.org/?p=883> (Jan 19, 2010).

5. FULBRIGHT & JAWORSKI, L.L.P., FULBRIGHT'S 6TH ANNUAL LITIGATION SURVEY REPORT 10, 21 (6th ed. 2009), available at <http://amlawdaily.typepad.com/fulbrightreport2009.pdf>. "For the second consecutive year, expectations of an increase in disputes across the entire sample have risen, from 22% in 2007 to 31% in 2008 to 40% this year." *Id.* at 10. "Half of the largest companies prefer litigation, while mid-sized and smaller companies are more equally weighted in the 40% range between arbitration and litigation." *Id.* at 21. One respondent said that litigation was "less expensive, more certainty, and arbitration is about splitting the baby." *Id.* at 22. Whether that assertion matches Fulbright's comparison of costs for arbitration and litigation is an area for debate. *Id.* at 49-50.

6. See Stipanowich, *Arbitration*, *supra* note 1, at 4.

7. See CPR EARLY CASE ASSESSMENT (Int'l Inst. Conflict Prevention & Resolution ed. 2009), available at <http://www.cpradr.org/Portals/0/CPR%20ECA%20Guidelines--FINAL%20April%2010%202009%202.pdf>; Stipanowich, *Arbitration*, *supra* note 1, at 8; Stipanowich, *Arbitration and Choice*, *supra* note 2, at 401.

8. Stipanowich, *Arbitration*, *supra* note 1, at 29. "It is now commonplace to hear or read about corporate counsel drawing unfavorable comparisons between binding arbitration and mediated negotiation. When one general counsel was asked why her company had virtually supplanted arbitration with mediation, she immediately responded with three words: 'Speed, cost and control.'" *Id.* at 26. "[I]t appears that some businesses that regularly utilize mediation may more readily accept litigation rather than arbitration as an adjudicatory 'backdrop.'" *Id.* at 26 n.170.

9. *Id.* at 27. "It is not surprising that in head-to-head comparisons with arbitration, mediation is usually perceived more positively by business persons and their counsel on several grounds." *Id.*

10. *Id.* at 6. "Over the last decade, the Association's commercial case load has increased from 15,232 cases in 1998 to 20,711 cases in 2007." *Id.* at 6 n.20.

11. *Id.* at 23 (citing Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?*, CORP. LEGAL TIMES, Feb. 2004, at 45). But the Fulbright study may bring those figures forward to remind us of what Lord Mustill memorably quipped about international arbitration: "[A]ll the

Despite this, consumer credit arbitration imploded in the aftermath of a Minnesota attorney general action against the largest administrator of credit card arbitrations.<sup>12</sup> The largest U.S. administrator of arbitration (AAA) quickly followed suit.<sup>13</sup> The banks that hold most of the U.S. credit card debt quit writing and enforcing arbitration clauses shortly thereafter.

Employment arbitration appears to have softened generally—certainly among defense contractors and their wide net of subcontractors in the wake of the *Jones* case. Jamie Leigh Jones was a Halliburton (KBR) employee on assignment at Camp Hope in Baghdad when she was allegedly gang-raped by seven other KBR employees.<sup>14</sup> Criminal charges have been slow in coming, and Jones sought to tell her story in the civil suit she filed in 2007. While the trial court ultimately compelled arbitration on some employment claims, it found that many of Ms. Jones's claims were outside the scope of the arbitration provision, including vicarious liability for assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision; and false imprisonment.<sup>15</sup>

In September, the Fifth Circuit affirmed that holding while going to lengths to say that “sexual assault is independent of an employment relationship.”<sup>16</sup> The Fifth Circuit detailed the factors supporting its conclusion:

(1) Jones was sexually assaulted by several Halliburton/KBR employees in her bedroom, after-hours, (2) while she was off-duty, (3) following a social gathering outside of her barracks, (4) which was some distance from where she worked, (5) at which social gathering several co-workers had been drinking (which, notably, at the time was only allowed in “non-work” spaces).<sup>17</sup>

Within days of the *Jones* opinion, Senator Al Franken introduced an amendment to the 2010 Department of Defense (DoD) appropriations bill prohibiting the use of appropriated funds for DoD contractors that require employees to resolve certain claims in arbitration.<sup>18</sup> Ms. Jones testified in

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elephantine laboriousness of an action in court, without the saving grace of the exacerbated judge's power to bang together the heads of recalcitrant parties. *Id.* (citing Lord Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43, 56 (1989)).

12. Philbin, *Thankful*, *supra* note 3, at 152.

13. *Id.*

14. *Jones v. Halliburton Co.*, 625 F. Supp. 2d 339, 343 (S.D. Tex. 2008).

15. *Id.* at 356.

16. *Jones v. Halliburton Co.*, 583 F.3d 228, 236 (5th Cir. 2009) (citing *Abov-Khalil v. Miles*, No. G037752, 2007 WL 1589456, at \*2 (Cal. Ct. App. June 4, 2007)).

17. *Id.* at 240.

18. See S. Amend. 2588, 111th Cong. (2009). The Franken Amendment is embodied in § 8116 of H.R. 3326 (making appropriations for the Department of Defense for the fiscal year ending September 30, 2010 and for other purposes). H.R. 3326, 111th Cong. (2009) (prohibiting the use of funds for any new or existing federal contract if the contractor or subcontractor at any tier requires that an employee or

support of the amendment and President Obama signed it into law on December 19, 2009—three months after the September 15, 2009 opinion.<sup>19</sup>

Some see the Franken Amendment as a test vote on the Arbitration Fairness Act of 2009 (AFA), which goes further to carve out certain classes of claims while changing procedure that would cut across all types of arbitration.<sup>20</sup> The AFA was expected to hit the floor of Congress in the Spring of 2010, but the scheduling and the overall prospects for the bill may have been impacted by the Massachusetts special U.S. Senate election and the ongoing healthcare debate.<sup>21</sup> Whether there is activity on the expansive AFA bill or the more than two dozen smaller bills affecting arbitration, the Supreme Court is poised to answer two important arbitration issues this term.<sup>22</sup> Against that national backdrop, the number of Fifth Circuit arbitration opinions declined by half during this survey period (June 1, 2008 to June 30, 2009).

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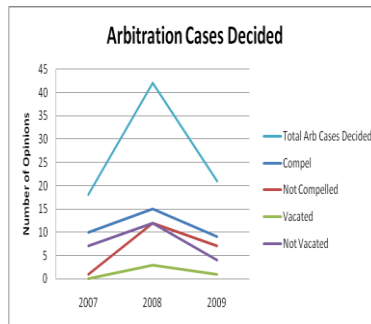
independent contractor, as a condition of employment, sign a contract that mandates resolving through arbitration “any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention,” and making such prohibition inapplicable with respect to contracts that may not be enforced in a U.S. court); see also Richard Siegal, *The “Franken Amendment”: A Blow to Arbitration and Increased Litigation and Compliance for Government Contractors* (Dec. 18, 2009), [http://www.martindale.com/litigation-law/article\\_Sheppard-Mullin-Richter-Hampton-LLP\\_869958.htm](http://www.martindale.com/litigation-law/article_Sheppard-Mullin-Richter-Hampton-LLP_869958.htm) (discussing the effect of the Franken Amendment, such as increased litigation costs, on government contractors).

19. See Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, 123 Stat. 3409 (2009).

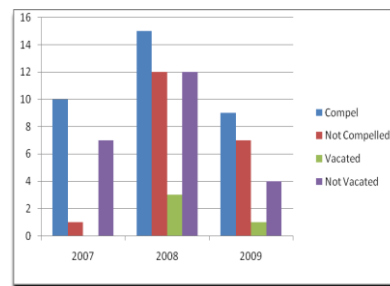
20. See H.R. 1020, 111th Cong. (2009); S.R. 931, 111th Cong. (2009); see also Michael Fox, *Franken Rape Amendment in Final Defense Bill: A Pre-Cursor to the Arbitration Fairness Act Takes Another Step* (Dec. 17, 2009), <http://humancapitalleague.com/Home/743> (discussing the effect of the Franken Amendment).

21. See Fox, *supra* note 20 (discussing the future of the AFA). Philip J. Loree, Jr. provides a thorough discussion of *Stolt-Nielsen S.A., et al. v. AnimalFeeds International Corp.* through oral argument. See Postings of Philip J. Loree, Jr. to KarlBayer.com, <http://www.karlbayer.com/blog/?cat=267> (Sept. 21, 2009); see also Postings of Philip J. Loree, Jr. to Loree Reinsurance and Arbitration Law Forum, <http://loreelawfirm.com/blog/stolt-nielsen-oral-argument-analysis-part-iv> (Jan. 6, 2010) (analyzing the oral argument); Posting of Anna Christenson to SCOTUSblog, <http://www.scotusblog.com/wp/is-silence-a-fiction/> (Dec. 11, 2009, 13:20 EST) (recapping oral argument); Posting of Anna Christenson to SCOTUSblog, <http://www.scotusblog.com/wp/does-the-faa-permit-class-arbitration-when-the-arbitration-agreement-is-silent/> (Dec. 8, 2009, 15:52 EST).

22. See *supra* notes 4, 16 and accompanying text.



During the three-year review period, the number of arbitration opinions doubled from 2007 to 2008 and then returned to 2007 levels in 2009.<sup>23</sup> Because arbitration orders neatly fall into binary categories (arbitration is compelled—or not—at the front-end, and the resulting awards are vacated—or not—on the back-end),



we have included overly simplistic schedules tallying those binary results. While the sample sizes are not large enough to draw statistically significant conclusions, it is interesting to note that when 2009 case counts returned to 2007 levels, the number of cases being compelled to arbitration had gone from a ratio of 10:1 to near parity (seven orders compelling arbitration and six orders not compelling arbitration). This shift to near parity has to be an encouraging development to those resisting arbitration. Because the odds of vacating an award after rendition remain daunting, however, that parity may be misleading. The Supreme Court's *Mattel* decision last term and the Fifth Circuit's *Citigroup* opinion (discussed below) have curtailed non-FAA vacatur grounds.<sup>24</sup> Some kindle hope that the manifest disregard of the law standard will survive under § 10(a)(4) of the FAA as an instance in which an arbitrator exceeded her authority.<sup>25</sup> Meanwhile, the Fifth Circuit has gone from one of the first to recognize judicial review of arbitral awards to the opposite position by one panel faster than other circuits.<sup>26</sup>

23. United States Court of Appeals for the Fifth Circuit, Opinions Page, <http://www.ca5.uscourts.gov/opinions.aspx> (last visited Feb. 25, 2010). During the same time, arbitration related mandamus actions consumed half of the Texas Supreme Court's mandamus docket. Donald R. Philbin, Jr. & Audrey Lynn Maness, *Litigating Arbitration: A 2007 Texas Arbitration Review*, 60 BAYLOR L. REV. 613, 614 (2008).

24. See *infra* Part IV.A.3.

25. Victoria Van Buren, *Hall Street Meets S. Maestri Place: What Standards of Review Will the Fifth Circuit Apply to Arbitration Awards Under FAA Section 10(a)(4) After Citigroup?* (May 4, 2009), <http://www.karlbayer.com/blog/?p=6487>.

26. See *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 996-97 (5th Cir. 1995) (enforcing party expanded judicial review); *infra* Part IV.A.3.

With that overview, we turn to the specific opinions of the Fifth Circuit during the period. These case summaries are followed by charts that broadly categorize the issues and force the outcomes into binary result flags depending on whether the holding compelled arbitration on the front-end or vacated the resulting award on the back-end.

On the front-end, parties seeking to compel another to arbitration have the relatively easy initial burden to show that an arbitration clause exists and the matters to be arbitrated are within its scope. The burden then shifts to the party seeking to avoid arbitration to prove a defense.

## I. FEDERAL COURT JURISDICTION

### A. *Does the Court Have Jurisdiction to Hear the Dispute?*

Both state and federal courts are able to hear disputes arising under the Federal Arbitration Act; in fact, state courts often hear such disputes because the FAA does not confer jurisdiction on federal courts.<sup>27</sup> Rather, there must be some independent basis for jurisdiction at the federal level.<sup>28</sup>

#### 1. *MAPP Construction, L.L.C. v. M&R Drywall, Inc.*

A federal court may nonetheless be barred from hearing a dispute arising under the FAA even when there is an independent basis for jurisdiction. In *MAPP Construction, L.L.C. v. M&R Drywall, Inc.*, a Louisiana state court judge denied MAPP's motion to compel arbitration under the Louisiana Arbitration Act.<sup>29</sup> MAPP appealed the denial to the Louisiana Supreme Court, to no avail.<sup>30</sup> Still unsatisfied, MAPP then brought suit in federal court seeking to compel arbitration under the FAA.<sup>31</sup>

The district court dismissed the case for lack of jurisdiction, and the Fifth Circuit affirmed.<sup>32</sup> The Fifth Circuit explained that the *Rooker-Feldman* doctrine, which "provides that a United States District Court has no authority to review final judgments of a state court in judicial proceedings," prevented the district court from hearing the case.<sup>33</sup> The Fifth Circuit also rejected the appellant's theory that this was a different case because it was based on the FAA, not the Louisiana Act.<sup>34</sup> The Fifth Circuit noted that the appellant could have raised arguments based on the

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27. See *Oteeva, L.P. v. X-Concepts L.L.C.*, 253 F. App'x 349, 350 (5th Cir. 2007) (per curiam) (citing *Smith v. Rush Retail Ctrs., Inc.*, 360 F.3d 504, 506 (5th Cir. 2004)).

28. See *id.*

29. *MAPP Constr., L.L.C. v. M&R Drywall, Inc.*, 294 F. App'x 89, 90 (5th Cir. Sept. 2008).

30. See *id.*

31. See *id.*

32. *Id.* at 89.

33. *Id.* at 91 (quoting *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 198 (4th Cir. 2000)).

34. *Id.*

FAA in state court, and the fact that the appellant did not does not prevent the application of the *Rooker-Feldman* doctrine.<sup>35</sup>

## 2. Vaden v. Discover Bank

The Supreme Court weighed in on the jurisdictional question in *Vaden v. Discover Bank*.<sup>36</sup> There, Discover Bank sued cardholder Vaden in Maryland state court seeking to recover an unpaid charge card balance.<sup>37</sup> Vaden counterclaimed, arguing that Discover's finance charges violated Maryland law.<sup>38</sup> In response, Discover approached the federal district court seeking to compel arbitration under 9 U.S.C. § 4.<sup>39</sup> Discover argued that federal court jurisdiction was proper because Vaden's counterclaims were completely preempted by federal law.<sup>40</sup> The district court agreed, and the Fourth Circuit affirmed, explaining that a court may "look through" the § 4 petition to the substantive controversy between the parties to determine whether the court has jurisdiction.<sup>41</sup>

The Supreme Court reversed in part, invoking the well-pleaded complaint rule.<sup>42</sup> The Court explained that though a "complaint purporting to rest on state law . . . can be recharacterized as one 'arising under' federal law if the law governing the complaint is exclusively federal. . . , A state-law-based counterclaim, however, even if similarly susceptible to recharacterization, would remain nonremovable."<sup>43</sup> The Court did, however, agree with the Fourth Circuit that a court can "'look through' a § 4 petition to determine whether it is predicated on an action that 'arises under' federal law," but it held that a court may only do so to the extent consistent with the well-pleaded complaint rule.<sup>44</sup>

## II. THRESHOLD ISSUES OF ARBITRABILITY

### A. *Who Decides Whether Arbitration Is Proper?*

In general, disputes are arbitrable when (1) there exists between the parties a valid arbitration agreement, and (2) the substance of the dispute

35. *Id.*

36. *See* *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1268 (2009).

37. *Id.*

38. *Id.*

39. *Id.* at 1269.

40. *Id.*

41. *Id.*

42. *Id.* at 1272 ("[A] suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon [federal law].'" (quoting *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908))).

43. *Id.* at 1273 (citing *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003)).

44. *Id.*



falls within scope of that agreement.<sup>45</sup> Generally, “the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.”<sup>46</sup> As with most general rules, however, an exception applies: “[E]ven the issue of arbitrability ‘may be submitted to binding arbitration . . . if there has been a clear demonstration that the parties contemplated it.’”<sup>47</sup>

### *I. Agere Systems, Inc. v. Samsung Electronics Co.*

This was the case in *Agere Systems, Inc. v. Samsung Electronics Co.*<sup>48</sup> The parties could not agree on whether their dispute fell within the scope of the arbitration clause.<sup>49</sup> Though this constituted a “threshold question” normally reserved for the court, the parties’ agreement provided that “[t]he arbitrator shall be knowledgeable in the legal and technical aspects of this Agreement and shall determine issues of arbitrability . . . .”<sup>50</sup> This language made it clear to the court that “[t]hese provisions explicitly confer upon an arbitrator the power of determining what ‘arises out of or relates to’ the 2000 agreement.”<sup>51</sup> The argument as to whether the arbitration clause was still in effect was thus left to the arbitrator.<sup>52</sup>

### *B. Do the Parties Have a Valid Agreement to Arbitrate?*

#### *I. Vinewood Capital, L.L.C. v. Dar Al-Maal Al-Islami Trust*

Though it seems like a simple question, each year the Fifth Circuit analyzes disputes over whether the parties actually have an agreement to arbitrate. This year was no exception, as seen in the case of *Vinewood Capital, L.L.C. v. Dar Al-Maal Al-Islami Trust*.<sup>53</sup> The case presented a long history of disputes between the litigants: In 2004, Overland employees Pardue, Fairchild, and Conrad entered into a settlement agreement with defendant DMI Trust and related entities.<sup>54</sup> The employees later went on to form a company, Vinewood Capital, which entered into a credit agreement

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45. See, e.g., *E.E.O.C. v. Woodmen of World Life Ins. Soc’y*, 479 F.3d 561, 565 (8th Cir. 2007) (citing *Faber v. Menard, Inc.*, 367 F.3d 1048, 1052 (8th Cir. 2004)).

46. *AT&T Tech., Inc. v. Comm’n Workers of Am.*, 475 U.S. 643, 649 (1986).

47. *Agere Sys., Inc. v. Samsung Elecs. Co.*, 560 F.3d 337, 339 (5th Cir. Feb. 2009) (quoting *Piggly Wiggly Operators’ Warehouse, Inc. v. Piggly Wiggly Operators’ Warehouse Indep. Truck Drivers Union, Local No. 1*, 611 F.2d 580, 584 (5th Cir. 1980)).

48. See *id.*

49. See *id.*

50. *Id.* at 340.

51. *Id.*

52. See *id.*

53. See *Vinewood Capital, L.L.C. v. Dar Al-Maal Al-Islami Trust*, 295 F. App’x 726 (5th Cir. Oct. 2008).

54. *Id.* at 728.

with August Investment Fund, a subsidiary of DMI Trust.<sup>55</sup> The plaintiffs also alleged that Vinewood entered into a series of oral agreements with DMI Trust and its directors.<sup>56</sup> When the defendants allegedly breached these agreements, the plaintiffs filed suit.<sup>57</sup> The defendants moved to stay the case and compel arbitration.<sup>58</sup>

The Fifth Circuit agreed with the district court that DMI Trust and Vinewood had no agreement to arbitrate.<sup>59</sup> The Fifth Circuit explained that the alleged breach related to the oral agreements, not the settlement agreement or the credit agreement, and the oral agreements did not include an agreement to arbitrate disputes.<sup>60</sup> The Fifth Circuit rejected the defendants' arguments that the three agreements were interrelated, noting that Vinewood was not a party to the settlement agreement and that both written agreements contained provisions explicitly stating that the written document constituted the entire agreement between the parties.<sup>61</sup> Finally, the Fifth Circuit rejected the defendants' theory of equitable estoppel on the grounds that equitable estoppel requires the claimant to be a party to the agreement.<sup>62</sup> Vinewood, the party bringing the claim, was not a party to the settlement agreement, and the credit agreement was only "peripherally related" to the claims of the present dispute.<sup>63</sup> Because the defendant could not demonstrate the existence of an agreement to arbitrate, its attempts to arbitrate were unsuccessful.<sup>64</sup>

## 2. Gulfside Casino Partnership v. Mississippi Riverboat Council

The Fifth Circuit reached a similar result when it found that no valid assignment occurred in *Gulfside Casino Partnership v. Mississippi Riverboat Council*.<sup>65</sup> The defendant in *Gulfside* entered into a memorandum of agreement (MOA) with Grand Casino; that agreement contained an arbitration clause.<sup>66</sup> Grand Casino later entered into an

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55. *Id.*

56. *Id.*

57. *Id.* at 729.

58. *Id.*

59. *Id.* at 729-30.

60. *See id.* at 729.

61. *See id.* at 730.

62. *See id.* at 731. Equitable estoppel applies in two situations. *See id.* First, equitable estoppel may require a signing party to arbitrate a claim against a non-signatory if the signing party's claim relies on the existence and provisions of a written agreement containing an arbitration clause. *See id.* Second, equitable estoppel applies when a signatory claims "substantially interdependent and concerted misconduct" by both a non-signatory and a signatory to the contract. *Id.* at 730-31 (citing *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000)).

63. *Id.* at 731.

64. *See id.*

65. *See Gulfside Casino P'ship v. Miss. Riverboat Council*, 282 F. App'x 328, 329 (5th Cir. June 2008).

66. *Id.*

agreement with plaintiff Gulfside; that agreement purported to assign Grand Casino's rights and obligations under the MOA to Gulfside.<sup>67</sup> Based on this assignment, the defendant argued that Gulfside was obligated to arbitrate.<sup>68</sup> The district court disagreed, and the Fifth Circuit affirmed.<sup>69</sup>

The Fifth Circuit first noted, “[w]hen a party challenges the very existence of an agreement, as opposed to its continued validity or enforcement, the court, not the arbitrator, must first resolve the dispute.”<sup>70</sup> After determining that the issue was properly before it, the Fifth Circuit continued by analyzing the substance of the assignment.<sup>71</sup> The Fifth Circuit found that no valid assignment had taken place because the MOA applied only to active casinos, and Gulfside had been closed for some time prior to the assignment.<sup>72</sup> As a result, the agreement, and the arbitration clause, was not applicable to Gulfside.<sup>73</sup>

### 3. Arthur Andersen L.L.P. v. Carlisle

The Supreme Court had the opportunity to address binding non-signatories to an arbitration agreement in *Arthur Andersen L.L.P. v. Carlisle*.<sup>74</sup> There, Arthur Andersen referred investor Carlisle and others to Bricolage L.L.C.; the investors ultimately invested in a group of LLCs that were parties to an investment-management agreement with Bricolage.<sup>75</sup> The agreement between the LLCs and Bricolage contained an arbitration provision that covered “[a]ny controversy arising out of or relating to this Agreement or the br[ea]ch thereof . . . .”<sup>76</sup> The investments eventually proved fruitless, and the investors sued Bricolage, Arthur Andersen, and others.<sup>77</sup> The defendants moved to compel arbitration, but the district court denied their request, and the Sixth Circuit dismissed the defendants’ interlocutory appeal for want of jurisdiction.<sup>78</sup> The Sixth Circuit invoked its bright line rule that “those who are not parties to a written arbitration agreement are categorically ineligible for relief.”<sup>79</sup> The Sixth Circuit determined that because non-signatories are unable to invoke § 3 of the

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67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See Arthur Andersen L.L.P. v. Carlisle*, 129 S. Ct. 1896, 1899 (2009).

75. *Id.*

76. *Id.*

77. *Id.* at 1899-1900.

78. *Id.* at 1900.

79. *Id.* at 1901.

Federal Arbitration Act, it did not have jurisdiction to hear the interlocutory appeal.<sup>80</sup>

The Supreme Court reversed the decision, first rejecting the notion that a court of appeals loses jurisdiction because an interlocutory appeal under § 3 is meritless.<sup>81</sup> The Court explained that “[j]urisdiction over the appeal, however, ‘must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order.’”<sup>82</sup> The Court rejected the respondents’ argument that this rule would result in frivolous appeals, explaining that there are procedures in place to deal with such appeals.<sup>83</sup>

The Court also rejected the Sixth Circuit’s bright line rule that “those who are not parties to a written arbitration agreement are categorically ineligible for relief.”<sup>84</sup> The Court pointed to § 2 of the FAA and its previous determination that this provision requires “courts ‘to place [arbitration] agreements upon the same footing as other contracts.’”<sup>85</sup> Because other contracts may be enforced against non-parties under a variety of theories (including alter ego, incorporation by reference, third-party beneficiary, waiver, and estoppel), it follows that contracts to arbitrate may also be enforced against non-parties under these same theories.<sup>86</sup> The Court thus remanded the case to the Sixth Circuit for reconsideration.<sup>87</sup>

#### 4. Graves v. BP America

*Carlisle* has little effect on Fifth Circuit case law, for the Fifth Circuit has consistently recognized that non-signatories to a contract may nonetheless be bound to arbitrate.<sup>88</sup> In fact, the Fifth Circuit bound non-signatories to an arbitration clause in *Graves v. BP America, Inc.*<sup>89</sup> There, survivors brought a wrongful death action against the decedent’s employer after the decedent was killed in a workplace accident.<sup>90</sup> The Fifth Circuit

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80. See *Carlisle v. Curtis, Mallet-Prevost, Colt & Mosle, L.L.P.*, 521 F.3d 597, 600 (6th Cir. 2008), *rev’d sub nom.*, *Arthur Andersen L.L.P. v. Carlisle*, 129 S. Ct. 1896 (2009).

81. See *Arthur Anderson, L.L.P.*, 129 S. Ct. at 1900.

82. *Id.* (quoting *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996)).

83. See *id.* at 1901 (“[T]here are ways of minimizing the impact of abusive appeals.”).

84. *Id.*

85. *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

86. *Id.* at 1902.

87. *Id.* at 1903. Three justices dissented, arguing that requiring the movant to be a signatory provides a simple, bright-line rule for the courts of appeals. *Id.* at 1903-04 (Souter, J. dissenting). Justice Souter explained that the right to an interlocutory appeal must be construed narrowly, and the bright-line rule would be consistent with such a construction. *Id.*

88. See, e.g., *Fleetwood Enters., Inc. v. Gaskamp*, 280 F.3d 1069, 1075 (5th Cir. 2002) (third party beneficiary); *JP Morgan Chase & Co. v. Conegie*, 492 F.3d 596, 600 (5th Cir. 2007) (third party beneficiary).

89. *Graves v. BP Am., Inc.*, 568 F.3d 221, 223-24 (5th Cir. May 2009).

90. *Id.* at 222.

held that the survivors were bound by the arbitration clause contained in the decedent's employment agreement because, under Texas law, "the non signatory plaintiffs 'stand in [the decedent's] legal shoes,' [and] they are [therefore] bound by his agreement."<sup>91</sup>

#### 5. Sherer v. Green Tree Servicing L.L.C.

The Fifth Circuit again permitted a non-signatory to compel arbitration in *Sherer v. Green Tree Servicing L.L.C.*<sup>92</sup> There, plaintiff Sherer entered into a loan agreement with Conseco Bank, and Conseco later transferred the servicing rights under the loan to Green Tree Servicing L.L.C.<sup>93</sup> Though Sherer paid his loan in full, Green Tree allegedly charged Sherer a prepayment penalty in violation of the loan agreement.<sup>94</sup> Sherer sued, and Green Tree moved to compel arbitration.<sup>95</sup> The district court denied the motion, and Green Tree appealed.<sup>96</sup>

The Fifth Circuit reversed, finding that the language in the agreement subjected Sherer to arbitration with a non-signatory.<sup>97</sup> Under the agreement, Sherer "agreed to arbitrate any claims arising from 'the relationships which result from th[e] [a]greement.'"<sup>98</sup> The Fifth Circuit explained that a relationship with a loan servicer qualifies because "without the Loan Agreement, there would be no loan for Green Tree to service."<sup>99</sup> The Fifth Circuit found no need to rely on state law theories to bind a non-signatory—when the terms of the agreement clearly dictate who is bound by the agreement, the inquiry ends.<sup>100</sup>

#### 6. Wood v. Penntex Resources, L.P.

In *Wood v. Penntex Resources, L.P.*, Wood argued that he was not subject to arbitration because he signed the contract in his corporate capacity only, not in his personal capacity.<sup>101</sup> The Fifth Circuit agreed with the district court in concluding that Wood was personally subject to arbitration, reasoning that the agreement "provided for obligations personal to Wood in addition to the corporation's obligations."<sup>102</sup>

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91. *Id.* at 223 (quoting *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 644 (Tex. 2009)). *Labatt* held that a wrongful death claim is one that is "entirely derivative of the decedent's right." *Id.*

92. *See* *Sherer v. Green Tree Servicing L.L.C.*, 548 F.3d 379, 383 (5th Cir. Nov. 2008).

93. *Id.* at 380.

94. *Id.*

95. *Id.* at 380-81.

96. *Id.*

97. *See id.* at 383.

98. *Id.* at 382.

99. *Id.*

100. *Id.* (citing *Bridas S.A.P.I.C. v. Gov't of Turkm.*, 345 F.3d 347, 355 (5th Cir. 2003)).

101. *See* *Wood v. Penntex Res., L.P.*, 322 F. App'x 410, 410 (5th Cir. Apr. 2009).

102. *Id.*

C. *Does the Dispute Fall Within the Scope of the Agreement?*

1. *Baudoin v. Mid-Louisiana Anesthesia Consultants, Inc.*

Even when the parties have a valid agreement to arbitrate, not all claims are subject to arbitration. Consider *Baudoin v. Mid-Louisiana Anesthesia Consultants, Inc.*<sup>103</sup> There, Baudoin argued that he was wrongfully terminated by the defendant; the defendant disagreed and moved to compel arbitration under the agreement.<sup>104</sup> The arbitration provision in the contract was contained within the severability clause and read: “[I]f the validity of any portion of this Agreement should be contested as invalid or unenforceable by any party hereto, all parties . . . hereby agree to submit any such dispute to binding arbitration . . . .”<sup>105</sup> The district court granted the motion and dismissed the case; Baudoin appealed.<sup>106</sup>

The Fifth Circuit reversed, determining that the arbitration provision dealt only with disputes regarding the validity or enforceability of the agreement.<sup>107</sup> Thus, a dispute dealing with the parties’ substantive rights under the agreement, in which the validity and the enforceability of the agreement are admitted, is not subject to the provision.<sup>108</sup>

2. *Woodmen of the World Life Insurance Society/Omaha Woodmen Life Insurance Society v. JRY*

Contrast *Baudoin* with *Woodmen of the World Life Insurance Society/Omaha Woodmen Life Insurance Society v. JRY*.<sup>109</sup> In *Woodmen*, plaintiff JRY filed several tort claims against the Woodmen of the World Life Insurance Society/Omaha Woodmen Life Insurance Society (the Society) related to an alleged sexual assault of his minor son at a Woodmen-sponsored camp.<sup>110</sup> The Society moved to compel arbitration under the agreement between the parties, but JRY argued that his tort claims did not fall within the scope of the arbitration agreement.<sup>111</sup> The district court agreed with JRY, and the Society appealed.<sup>112</sup>

On appeal, the Fifth Circuit focused on the federal presumption that “ambiguities in the language of the agreement should be resolved in favor

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103. *Baudoin v. Mid-Louisiana Anesthesia Consultants, Inc.*, 306 F. App’x 188 (5th Cir. Jan. 2009).

104. *Id.* at 191-92.

105. *Id.* at 190.

106. *Id.* at 191.

107. *See id.* at 192.

108. *See id.* at 193.

109. *Woodmen of the World Life Ins. Soc’y/Omaha Woodmen Life Ins. Soc’y v. JRY*, 320 F. App’x 216 (5th Cir. Mar. 2009).

110. *Id.* at 218.

111. *Id.*

112. *Id.*

of arbitration.”<sup>113</sup> The arbitration clause applied “whenever a member . . . makes a claim for damages, or claims any form of redress for a violation of his or her individual rights or a denial of individual privileges or benefits which he or she claims as a member.”<sup>114</sup> The appellees argued that the arbitration provision covered only disputes relating to membership rights, not to rights that exist absent membership.<sup>115</sup> The Fifth Circuit disagreed that the right to proper supervision was entirely separate from rights resulting from membership in the Society, explaining that JRY’s son could not have attended the camp if he had not been a member of the Society.<sup>116</sup> Because the arbitration clause was, at a minimum, “susceptible of an interpretation that covers the asserted dispute,” the Fifth Circuit concluded that it must resolve the ambiguity in favor of coverage.<sup>117</sup>

### III. DEFENSES TO ARBITRATION

#### A. *The Agreement Is Invalid*

##### 1. *14 Penn Plaza L.L.C. v. Pyett*

Even when parties have agreed to arbitrate, a court may find that an agreement is contrary to law. This was the case (at least initially) in *14 Penn Plaza L.L.C. v. Pyett*, in which an employer sought to compel union workers to arbitrate their age discrimination claims.<sup>118</sup> The district court denied the employer’s motion to compel, and the Second Circuit affirmed, explaining that the Supreme Court case of *Gardner-Denver* held “that a collective bargaining agreement could not waive covered workers’ rights to a judicial forum for causes of action created by Congress.”<sup>119</sup> Though the Second Circuit noted the tension between *Gardner-Denver* and the later case of *Gilmer v. Interstate/Johnson Lane Corp.*, it reasoned that an individual may waive his right to a judicial forum, but a union cannot waive that right on behalf of the individual.<sup>120</sup> The employer appealed, and the Supreme Court granted certiorari.<sup>121</sup>

In a 5-4 split, the Supreme Court reversed, reading *Gardner-Denver* narrowly.<sup>122</sup> The Court explained that, pursuant to federal law, employees

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113. *Id.* at 221.

114. *Id.* at 221-22.

115. *Id.* at 222.

116. *See id.*

117. *Id.* (quoting *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650 (1986)).

118. *See Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 89 (2d Cir. 2007), *rev’d sub nom.*, *14 Penn Plaza L.L.C. v. Pyett*, 129 S. Ct. 1456 (2009).

119. *Id.* at 92 n.3.

120. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Pyett*, 498 F.3d at 93-94.

121. *14 Penn Plaza L.L.C.*, 129 S. Ct. at 1456.

122. *See id.* at 1474.

selected the union as their exclusive representative for collective bargaining.<sup>123</sup> The union bargained in good faith, and “[c]ourts generally may not interfere in this bargained-for exchange.”<sup>124</sup> As a result, “the CBA’s arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA’s broad sweep. It does not.”<sup>125</sup> The Court noted that, apart from *Gardner-Denver*, nothing in the law suggested “a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be ‘explicitly stated’ in the collective-bargaining agreement.”<sup>126</sup> Because the agreement in this case did just this, the Court held that the employees’ statutory claims were subject to arbitration.<sup>127</sup>

While the majority rejected the language in *Gardner-Denver* “that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights” as dicta, the four-justice dissent authored by Justice Souter found this same language dispositive.<sup>128</sup> In a separate dissent, Justice Stevens argued that the majority was making a policy determination, favoring arbitration over the Court’s precedent.<sup>129</sup> Both dissents displayed a distrust for collective bargaining that is absent in the majority opinion.<sup>130</sup> The majority’s holding, however, is clear: A union may bargain with an employer for arbitration of statutory discrimination claims so long as the contract explicitly provides for arbitration of such claims.<sup>131</sup>

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123. *See id.* at 1461.

124. *Id.* at 1464.

125. *Id.* at 1464-65 (citations omitted).

126. *Id.* at 1465.

127. *See id.* at 1474.

128. *Id.* at 1469; *see id.* at 1478-79 (Souter, J., dissenting). Though the majority treated the language in *Gardner-Denver* as non-precedential dicta, it also went to some length explaining why this language had reduced weight under principles of stare decisis. *See Pyett*, 129 S. Ct. at 1470 (majority opinion) (“The timeworn ‘mistrust of the arbitral process’ harbored by the Court in *Gardner-Denver* thus weighs against reliance on anything more than its core holding.” (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987))).

129. *See id.* at 1475 (Stevens, J., dissenting) (“Today the majority’s preference for arbitration again leads it to disregard our precedent.”).

130. *See, e.g., id.* at 1480 (Souter, J., dissenting).

131. *Id.* at 1465 (majority opinion). Justice Souter explains in dissent that the majority’s holding may not have much practical import, “for it explicitly reserves the question whether a CBA’s waiver of a judicial forum is enforceable when the union controls access to and presentation of employees’ claims in arbitration . . . which ‘is usually the case.’” *Id.* at 1481 (Souter, J., dissenting) (quoting *McDonald v. City of W. Branch*, 466 U.S. 284, 291 (1984)) (citation omitted).



*B. The Agreement Is Illusory*

*1. Zamora v. Swift Transportation Co.*

Courts will not require parties to arbitrate when the agreement is invalid. Consider, for example, the case of *Zamora v. Swift Transportation Co.*, in which the Fifth Circuit affirmed the district court in finding that the arbitration agreements in question were illusory.<sup>132</sup> The Fifth Circuit explained that the agreements could not be enforced because, under the agreements, Swift reserved the right to revoke or modify the agreements at any time without notice.<sup>133</sup>

*2. ITT Educational Services, Inc. v. Arce*

Even when an agreement is invalid, the arbitration clause may survive on its own. In *ITT Educational Services, Inc. v. Arce*, the plaintiff sought to use information disclosed in an earlier, unrelated arbitration; the defendant, on the other hand, argued that the information could not be disclosed because it was subject to a confidentiality provision contained in the arbitration agreement.<sup>134</sup> The plaintiff argued that the arbitrator in the earlier arbitration held the contract in that case to be invalid because of fraudulent inducement, and therefore the confidentiality provision in the arbitration provision was void.<sup>135</sup> The district court disagreed and the Fifth Circuit affirmed, holding that the arbitration provision, with its associated confidentiality clause, was severable from the remainder of the contract.<sup>136</sup> The Fifth Circuit correctly noted that this decision was entirely consistent with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, in which the Supreme Court held that “arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded.”<sup>137</sup>

*C. The Right to Arbitrate Has Been Waived*

The Fifth Circuit continues to deal with the issue of waiver. The rule is fairly straightforward—a party may waive its right to arbitrate by

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132. See *Zamora v. Swift Transp. Co.*, 319 F. App'x 333, 334 (5th Cir. Apr. 2009) (per curiam).

133. See *id.*

134. See *ITT Educ. Servs., Inc. v. Arce*, 533 F.3d 342, 344 (5th Cir. June 2008).

135. *Id.*

136. *Id.* at 344-47.

137. *Id.* at 344-45 (quoting *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402 (1967)). The *Prima Paint* decision was later held to be equally applicable in state courts. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).

substantially participating in the litigation process.<sup>138</sup> Most cases in recent years have found no waiver, noting that “a defendant’s . . . minimal participation in discovery [does] not result in a waiver of arbitrability.”<sup>139</sup>

### I. *Nicholas v. KBR, Inc.*

This past year was different. In *Nicholas v. KBR, Inc.*, James Nicholas executed a severance agreement with his employer, KBR, whereby KBR agreed to continue providing Nicholas employment benefits in exchange for Nicholas releasing KBR from any liability (Nicholas had recently developed mesothelioma, a fatal lung cancer associated with asbestos exposure).<sup>140</sup> The agreement contained an arbitration clause.<sup>141</sup> After Nicholas died in 2006, his wife brought suit, claiming that KBR breached its agreement by failing to make certain payments.<sup>142</sup> Mrs. Nicholas did not mention the arbitration clause in her complaint and again failed to mention it after the district court judge removed the case to federal court and she filed amended pleadings.<sup>143</sup> Mrs. Nicholas responded to discovery requests and was deposed, all without objection.<sup>144</sup> After ten months of litigation, Mrs. Nicholas moved to compel arbitration.<sup>145</sup> The district court held that Mrs. Nicholas waived her right to arbitrate.<sup>146</sup> Nicholas appealed.<sup>147</sup>

The Fifth Circuit framed the question on appeal as two inquiries: “(1) Did [Mrs.] Nicholas substantially invoke the judicial process, and if so, (2) was KBR prejudiced thereby?”<sup>148</sup> In addressing the first inquiry, the Fifth Circuit noted the unusual posture of the motion to compel arbitration: in most cases, it is the defendant, not the plaintiff, that seeks to arbitrate.<sup>149</sup> When the plaintiff files suit and pursues litigation in court, she demonstrates a “disinclination” to arbitrate.<sup>150</sup> For the Fifth Circuit, this is enough—“the act of a plaintiff filing suit without asserting an arbitration clause constitutes substantial invocation of the judicial process, unless an exception applies.”<sup>151</sup> The fact that Mrs. Nicholas continued to litigate the

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138. See *Petroleum Pipe Ams. Corp. v. Jindal Saw, Ltd.*, 575 F.3d 476, 480 (5th Cir. 2009) (noting waiver of the right to arbitrate occurs “when the party seeking arbitration substantially invokes the judicial process.”).

139. *Trafigura Beheer B.V. v. M/T Probo Elk*, 266 F. App’x 309, 313 (5th Cir. 2007) (per curiam); see *Joseph Chris Pers. Servs., Inc. v. Rossi*, 249 F. App’x 988, 990-93 (5th Cir. 2007) (per curiam).

140. *Nicholas v. KBR, Inc.*, 565 F.3d 904, 906 (5th Cir. Apr. 2009).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 907.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 907-08.

149. *Id.* at 908.

150. *Id.* at 907.

151. *Id.* at 908.

suit for ten months after filing the complaint only strengthened the court's finding of waiver.<sup>152</sup>

The Fifth Circuit also found that Mrs. Nicholas's delay prejudiced KBR.<sup>153</sup> Mrs. Nicholas filed a motion to compel arbitration just before discovery was complete.<sup>154</sup> KBR incurred costs answering Mrs. Nicholas's complaints, propounding discovery requests, and deposing Mrs. Nicholas.<sup>155</sup> In light of the "relatively straightforward" claims brought by Mrs. Nicholas, KBR's pre-motion activities constituted the bulk of litigation activity warranted in this case, and the Fifth Circuit determined that KBR should not be forced to repeat this same activity in arbitration.<sup>156</sup>

#### IV. JUDICIAL REVIEW OF ARBITRATION AWARDS

Once an arbitration award is rendered, the party seeking to vacate that award in court bears the heavy burden of establishing that vacatur is appropriate.<sup>157</sup> As one noted commentator recently framed the issue:

[J]udicial review of arbitration awards is limited to looking for fundamental procedural deficiencies such as procurement of the award "by corruption, fraud, or undue means," "evident partiality or corruption in the arbitrators," prejudicial arbitrator misconduct such as a failure to hear material and relevant evidence, a decision beyond the scope of the arbitrators' contractual authority, or "so imperfectly executed . . . that a . . . final . . . and definite award upon the subject matter submitted was not made. These limited grounds for review, generally adhered to by courts reviewing commercial arbitration awards, have long been viewed as rendering arbitration awards much more impervious to reversal than court judgments.<sup>158</sup>

##### A. *Can the Award Be Overturned?*

###### 1. *In re United States Brass Corp.*

What should be clear to litigators by now is that an arbitration award cannot be overturned simply because of an unfavorable outcome.<sup>159</sup> This enduring rule nonetheless finds challengers. In *In re United States Brass Corp.*, appellants initially elected voluntary, binding arbitration.<sup>160</sup> Though

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152. *See id.*

153. *Id.* at 907.

154. *Id.* at 910.

155. *Id.*

156. *Id.* at 910-11.

157. *See Stipanowich, Arbitration, supra* note 1, at 18.

158. *Id.*

159. *See supra* Part III.

160. *In re U.S. Brass Corp.*, 295 F. App'x 660, 661 (5th Cir. Oct. 2008) (per curiam).

the contract allowed the arbitrator to award damages only for actual, completed repair work, documented by receipts, invoices, and the like, the appellants submitted mere *estimates* of costs that were likely to be incurred *if* the work were to be done.<sup>161</sup> Understandably, the arbitrator rejected the appellants' claims and dismissed the complaint without prejudice to allow the appellants the opportunity to return with proper forms of proof.<sup>162</sup> The appellants contested the arbitrator's decision instead—first in the bankruptcy court, then in the district court, and finally in the appeals court.<sup>163</sup> The Fifth Circuit agreed with the lower courts that the arbitrator clearly had subject matter jurisdiction in this case and had properly dismissed the claims.<sup>164</sup>

## 2. Rogers v. KBR Technical Services Inc.

The deference given to arbitration awards was reaffirmed in *Rogers v. KBR Technical Services Inc.*<sup>165</sup> There, after being compelled to arbitrate his claims against his employer, KBR employee Rogers appealed the district court's confirmation of the \$252.84 award.<sup>166</sup> The Fifth Circuit set out the standard of review, explaining that, though its review of the district court's confirmation of the award is *de novo*, the court's review of the underlying arbitration decision is entitled to great deference, quoting an earlier case as follows:

We must sustain an arbitration award even if we disagree with the arbitrator's interpretation of the underlying contract as long as the arbitrator's decision draws its essence from the contract. In other words, we must affirm the arbitrator's decision if it is rationally inferable from the letter or the purpose of the underlying agreement. In deciding whether the arbitrator exceeded its authority, we resolve all doubts in favor of arbitration.<sup>167</sup>

As the Fifth Circuit goes on to note, this high level of deference is consistent with 9 U.S.C. §§ 1 *et seq.*, which allows for vacatur on four grounds:

- (1) where the award was procured by corruption, fraud, or undue means;

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161. *Id.*

162. *Id.* at 661-62.

163. *Id.* at 662.

164. *Id.*

165. See *Rogers v. KBR Technical Servs. Inc.*, No. 08-20036, 2008 WL 2337184, at \*2 (5th Cir. June 2008).

166. *Id.* at \*1.

167. *Id.* (quoting *Executone Info. Sys. Inc. v. Davis*, 26 F.3d 1314, 1320 (5th Cir. 1994)).

- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.<sup>168</sup>

On appeal, Rogers argued that the Fifth Circuit should vacate the award because the arbitrator relied on the wrong version of the American Arbitration Association (AAA) rules and attempted to rely on a 2005 letter to Halliburton to show when he first initiated his complaint.<sup>169</sup> The Fifth Circuit rejected this argument, explaining that the letter was a request for legal services, not the initiation of a complaint.<sup>170</sup>

The Fifth Circuit also rejected Rogers's argument that his motion for a default judgment should have been granted, explaining that an untimely response in an arbitration forum does not result in a court-based default.<sup>171</sup> It also dismissed Rogers's remaining two arguments.<sup>172</sup> Rogers claimed that KBR forced him to perform an illegal act by entering Afghanistan without a visa, but the Fifth Circuit explained that there are separate legal provisions for individuals arriving via military transportation.<sup>173</sup> Rogers was such an individual.<sup>174</sup> Rogers also pointed out the arbitrator's failure to issue a written opinion on some of the claims, but the law required a written opinion only if requested, and Rogers did not make such a request.<sup>175</sup> Because Rogers failed to show that the arbitrator engaged in misconduct or otherwise exceeded its powers in any way, the Fifth Circuit affirmed the district court decision confirming the award.<sup>176</sup>

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168. *Id.* at \*2 (quoting 9 U.S.C. § 10(a) (2006)). The Fifth Circuit goes on to note that it previously allowed the reversal of arbitration awards on other, non-statutory grounds, but notes that its pre-*Mattel* precedent has been called into question. *Id.* Of course, as with most issues not squarely before it, the Fifth Circuit declined to address whether that precedent is still viable after *Mattel*. *See id.*

169. *Id.* at \*3.

170. *Id.*

171. *Id.*

172. *Id.* at \*4.

173. *Id.*

174. *See id.*

175. *See id.*

176. *See id.* at \*6.

### 3. Citigroup Local Markets, Inc. v. Bacon

One question that remained after the Supreme Court's decision in *Mattel* was whether a court could overturn an arbitration award because the arbitrator exhibited "manifest disregard" for the law.<sup>177</sup> The Fifth Circuit left this question open in cases after *Mattel*, but the issue was ready for review in *Citigroup Local Markets, Inc. v. Bacon*.<sup>178</sup> After an arbitration panel awarded Debra Bacon \$256,000, Citigroup moved the district court to vacate the award, arguing that the arbitrator had manifestly disregarded the law.<sup>179</sup> The district court obliged, and Bacon appealed.<sup>180</sup>

Not surprisingly, the Fifth Circuit reversed, explaining that *Mattel* prevents courts from overturning arbitral awards on non-statutory grounds.<sup>181</sup> The Fifth Circuit pointed to the clear language in *Mattel* and reiterated *Mattel*'s holding: §§ 10 and 11 provide the exclusive bases for vacatur and modification of an arbitration award under the FAA.<sup>182</sup> The Fifth Circuit noted that its decision reversed a series of its earlier decisions that condoned the manifest disregard standard, and that its decision placed it in conflict with three other circuits.<sup>183</sup> Two of these circuits reasoned that manifest disregard is simply another way of reading § 10(a)(4), which allows for vacatur "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."<sup>184</sup> The Fifth Circuit panel rejected this reading, reasoning that courts must focus on the actual text of the statute, not on legal terms of art that have been, at the very least, questioned by the Supreme Court.<sup>185</sup>

### 4. BNSF Railway Co. v. Brotherhood of Maintenance of Way Employees

Not all arbitration awards are subject to the same standards of review—*Mattel* applies only to those awards awarded and appealed under

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177. See *Citigroup Local Mkts., Inc. v. Bacon*, 562 F.3d 349, 350 (5th Cir. Mar. 2009).

178. See *id.*

179. *Id.*

180. *Id.*

181. *Id.* at 355.

182. *Id.*

183. See *id.* at 355-58.

184. *Id.* at 352, 355-58; see also Stipanowich, *Arbitration*, *supra* note 1, at 20. ("The Supreme Court's pronouncement in *Hall Street Associates, L.L.C. v. Mattel, Inc.* that such relief could not be obtained under the FAA, far from putting the matter to bed, has opened up a whole new realm of questions regarding the ability of parties to contract for judicial appeal under some other body of law."); KarlBayer.com, *Disputing: Conversations About Dispute Resolution*, <http://www.karlbayer.com/blog/?p=6992> (last visited Feb. 1, 2010) (commenting on the Fifth Circuit).

185. See *Bacon*, 562 F.3d at 358.

the FAA.<sup>186</sup> The Fifth Circuit dealt with a different standard of review in *BNSF Railway Co. v. Brotherhood of Maintenance of Way Employees*.<sup>187</sup> In *BNSF*, the arbitrator was asked to review whether the railway violated a condition of the collective bargaining agreement.<sup>188</sup> The condition contained two requirements: (1) subcontracting has increased, and (2) the employees' furloughs are a direct result of that increase.<sup>189</sup> The railway refused to produce documents showing that subcontracting had increased or decreased; as a result, the arbitrator appropriately drew an adverse inference and found that the railway's failure to produce the documents indicated that subcontracting had increased.<sup>190</sup> The arbitrator, however, failed to address the causation requirement.<sup>191</sup> The district court vacated the award, and the union appealed.<sup>192</sup>

On appeal, the Fifth Circuit explained that "[t]he findings of the NRAB are conclusive, and we review only for: (1) failure to comply with the RLA; (2) failure to conform or confine itself to matters within its jurisdiction; and (3) fraud or corruption."<sup>193</sup> Because the Fifth Circuit "previously held that an arbitration panel exceeds the scope of its jurisdiction if it ignores an explicit term in a CBA," the district court properly vacated the arbitration award and remanded the case.<sup>194</sup>

##### 5. Continental Airlines, Inc. v. Air Line Pilots Ass'n, International

The Railway Labor Act also governed in *Continental Airlines, Inc. v. Air Line Pilots Ass'n, International*.<sup>195</sup> After an arbitration panel reinstated a pilot, Continental appealed to the district court.<sup>196</sup> The district court vacated the award, but the Fifth Circuit reversed.<sup>197</sup> In doing so, the Fifth Circuit emphasized that it "must defer to the SBA's decision if it may be supported by *any* analysis of the [contracts], whether or not relied on by the SBA, that 'arguably construes' those agreements."<sup>198</sup> Because the SBA

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186. See *BNSF Ry. Co. v. Bhd. of Maint. of Way Employees*, 550 F.3d 418, 423-24 (5th Cir. Nov. 2008).

187. See *id.*

188. *Id.* at 420.

189. *Id.* at 421.

190. See *id.* at 421-22.

191. *Id.* at 422-23.

192. *Id.* at 423.

193. *Id.* at 424 (citing 45 U.S.C. § 153(q) (2006)).

194. *Id.* at 425-30. The Fifth Circuit reversed the district court's determination that the arbitrator had exceeded his authority when he ordered the railway to produce documents. *Id.* at 426. The Fifth Circuit reasoned that the essence of the contract required production in certain instances, particularly when one party is relying on documents to meet or avoid a condition under the CBA. *Id.*

195. *Continental Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 555 F.3d 399, 405 (5th Cir. Jan. 2009).

196. *Id.*

197. *Id.* at 403-04.

198. *Id.* at 407.

construed the agreements in a plausible (though not necessarily the most natural) manner, the Fifth Circuit reluctantly determined that the district court could not vacate the arbitration award and remanded the case.<sup>199</sup>

#### 6. *In re Notre Dame Investors, Inc.*

A final note: though arbitration appeals are generally brought by a party unhappy with an arbitration award, occasionally a party will appeal a district court determination, believing that arbitration would result in a more satisfying outcome. Such was the case in *In re Notre Dame Investors, Inc.*<sup>200</sup> There, creditor Wilson Refining L.P. agreed to the bankruptcy court's confirmation of a plan of reorganization in a bankruptcy matter.<sup>201</sup> The bankruptcy court valued Wilson's claim at \$2 million, and the debtor paid the claim in full.<sup>202</sup> Unsatisfied, Wilson moved to arbitrate in an attempt to get further recovery.<sup>203</sup> The bankruptcy court denied Wilson's motion, and the Fifth Circuit confirmed, explaining that res judicata barred Wilson's claim.<sup>204</sup>

### V. CONCLUSION

By opinion numbers, litigation of arbitration appears to be down in the Fifth Circuit.<sup>205</sup> Successful challenges to arbitration are up.<sup>206</sup> Of thirteen opinions turning on the motion to compel question during the survey period, the Fifth Circuit did not compel six of them to arbitration.<sup>207</sup> That is good news to those challenging arbitration, especially since the odds of vacating a rendered award after the fact appear to have further deteriorated. A panel opinion in *Citigroup* interpreting *Mattel* to curtail non-FAA vacatur grounds and eliminate manifest disregard challenges, unless later found to

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199. *See id.* at 421.

200. *See In re Notre Dame Investors, Inc.*, 306 F. App'x 62, 63 (5th Cir. Jan. 2009).

201. *Id.* at 64.

202. *Id.* at 65.

203. *Id.*

204. *Id.* at 64. The Fifth Circuit explained:

Here, all the elements of res judicata are satisfied: (1) Wilson and NDI were both parties before the bankruptcy court at the confirmation hearing and the hearing on the objection to the claim; (2) Wilson does not argue that the bankruptcy court was incompetent to value its claim, only that it was an abuse of discretion for the court to refuse to send the issue to arbitration; (3) the plan and confirmation order are final judgments discharging Wilson's claim after it accepted the distribution payment; and (4) all the issues raised by Wilson on appeal relate to the discharged claim against NDI and could have been raised at the confirmation hearing or at the hearing on the objection to the claim.

*Id.*

205. *See supra* note 23 and accompanying text.

206. *See supra* notes 23-26 and accompanying text.

207. *See supra* notes 23-26 and accompanying text.



be rooted in § 10(a)(4) (arbitrator exceeding her authority), will make daunting odds even worse for challengers.<sup>208</sup>

There is also a great deal of activity outside the Fifth Circuit that could affect the law of arbitration within it. The Supreme Court will address important questions this spring, and the Arbitration Fairness Act of 2009 and some two dozen narrower bills are pending in Congress.<sup>209</sup> For better or worse, litigating arbitration will continue to be a hot topic.

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208. *See supra* Part IV.A.3.

209. *See supra* notes 4, 20-22.

TABLE I: PRE-ARBITRATION CHALLENGES

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
Movant's burden Jurisdiction	<i>Vaden v. Discover Bank</i> , 129 S. Ct. 1262 (2009).	Discover sued cardholder to collect debt in state court. Consumer brought state-law class action counterclaims. Discover filed a federal suit to compel arbitration, which was granted twice by the trial court. In reversing, the Court held that the trial court must "look through" the arbitrability dispute to the underlying "well plead" complaint to determine jurisdiction. The dissent argued that the "controversy" was the subject matter of the arbitration.	√			* US
	<i>MAPP Constr., L.L.C. v. M&amp;R Drywall, Inc.</i> , 294 F. App'x 89 (5th Cir. Sept. 2008).	Louisiana trial court denied motion to compel subcontractor to arbitrate dispute. The Fifth Circuit declined jurisdiction to disturb the final judgment of a state court.		√		√

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>In re Notre Dame Investors, Inc.</i> , 306 F. App'x 62 (5th Cir. Jan. 2009).	Creditor who participated in the confirmation of a bankruptcy plan that distributed \$2 million to it sought relief of stay to pursue the remaining balance in arbitration. The bankruptcy court denied relief and the district court affirmed. The Fifth Circuit affirmed on res judicata grounds—no jurisdiction to compel arbitration.		√		√
Agreement exists	<i>Arthur Andersen, L.L.P. v. Carlisle</i> , 129 S. Ct. 1896 (2009).	When a lawsuit against one of the parties to an arbitration agreement was automatically stayed by a bankruptcy filing, non-signatory parties sought to stay the lawsuit as to them as well. That motion was denied in the trial court and affirmed by the Sixth Circuit drawing a bright-line, excluding non-parties to the arbitration agreement from relief. The Supreme Court reversed, holding that the Sixth Circuit erred in holding that § 3 relief under the FAA is categorically not available to non-signatories.		√	US	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>Graves v. BP Am., Inc.</i> , 568 F.3d 221 (5th Cir. May 2009).	Decedent's employment contract contained an arbitration provision. When his beneficiaries asserted wrongful death claims, his former employer sought to compel arbitration on the force of the Texas Supreme Court's opinion in <i>In re Labatt Food Serv., L.P.</i> Without reaching the question of whether state or federal law applied, the Fifth Circuit concluded that they were consonant on the fact that the non-signatory plaintiffs "stand in [the decedent's] legal shoes," and are, therefore, bound by his agreement.		√	√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>Sherer v. Green Tree Servicing, L.L.C.</i> , 548 F.3d 379 (5th Cir. Nov. 2008).	Sherer signed a manufactured home promissory note with Conseco, the servicing rights to which were subsequently obtained by Green Tree. Sherer paid the note off early and Green Tree charged a prepayment penalty and reported Sherer's failure to pay that penalty to credit reporting agencies. When Sherer sued, Green Tree moved to compel arbitration, which the trial court denied. The Fifth Circuit found that the express language of the agreement ("relationships which result from this Agreement") covered the claims. Accordingly, the Fifth Circuit did not need to reach the second prong (equitable estoppel) to enforce the agreement. The Fifth Circuit reversed with instructions to compel arbitration.		√	√	
	<i>Wood v. Penntex Res., L.P.</i> , 322 F. App'x 410 (5th Cir. Apr. 2009).	Wood signed an agreement to arbitrate. The question was whether it bound him personally or as a corporate representative. Because it provided for obligations personal to Wood, the Fifth Circuit affirmed the trial court in compelling arbitration.	√		√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>Vinewood Capital, L.L.C. v. Dar Al-Maal Al-Islami Trust</i> , 295 F. App'x 726 (5th Cir. Oct. 2008).	Parties were unable to bootstrap an oral agreement giving rise to the dispute to the arbitration clauses in two other written agreements containing integration clauses. Accordingly, the trial and appellate courts found no agreement to arbitrate the pled controversy.		√		√
	<i>Gulfside Casino P'ship v. Miss. Riverboat Counsel</i> , 282 F. App'x 328 (5th Cir. Oct. 2008).	After a purported assignment, the assignee attempted to compel the counterparty to the underlying agreement to arbitration. Because the underlying agreement did not cover the disputed property, the courts held that the arbitration provision did not apply.		√		√
	<i>Allstate Life Ins. Co. v. Rapid Settlements, Ltd.</i> , 328 F. App'x 289 (5th Cir. May 2009).	Factoring company tried to bind Allstate to an arbitration award to which it was not a party. The Fifth Circuit held that the FAA did not apply because non-signatories will be bound to arbitration agreements only in very limited circumstances, none of which were applicable here.	√		√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
Arbitrability	<i>Agere Sys., Inc. v. Samsung Elects. Co., Ltd.</i> , 560 F.3d 337 (5th Cir. Feb. 2009).	A stepped dispute resolution clause provided that the “arbitrator shall determine issues of arbitrability.” The Fifth Circuit upheld that clause by holding that the question of whether the arbitration clause was still in effect was for the arbitrator.		√	√	
Separability	<i>ITT Educ. Servs., Inc. v. Arce</i> , 533 F.3d 342 (5th Cir. June 2008).	When student plaintiff attempted to use information produced under a confidentiality provision in an unrelated arbitration and ITT objected, plaintiff alleged that the confidentiality provision was unenforceable because it was fraudulently induced (similar finding in ancillary arbitration). Because arbitration agreements are separable from the underlying agreement, the trial and appellate courts compelled arbitration.	√		√	

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
	<i>Baudoin v. Mid-La. Anesthesia Consultants, Inc.</i> , 306 F. App'x 188 (5th Cir. Jan. 2009).	Anesthesiologist made claims under his employment agreement and USERRA. Employer sought arbitration and dismissal, which the trial court granted. While the parties could agree to arbitrate all disputes arising out of an employment relationship, including statutory claims, the provision here was more narrowly drawn. Because the claims were not covered by the scope of the clause, the Fifth Circuit reversed.	√			√
Scope	<i>Woodmen of World Life Ins. Soc'y/Omaha Woodmen Life Ins. Soc. v. JRY</i> , 320 F. App'x 216 (5th Cir. Mar. 2009).	The Society filed federal action seeking to compel arbitration of a state court negligence action. The trial court denied the motion. Focusing on the federal presumption that “ambiguities . . . should be resolved in favor of arbitration,” the Fifth Circuit reversed because the clause was, at a minimum, “susceptible of an interpretation that covers the asserted dispute.”		√	√	



	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
Respondent's defenses to arbitration	Invalidity <i>14 Penn Plaza, L.L.C. v. Pyett</i> , 129 S. Ct. 1456 (2009).	After repositioned union members brought ADEA claims against their employer, the question became whether their collective-bargaining agreement requiring members to arbitrate ADEA claims was enforceable against the individuals. The Second Circuit held that <i>Alexander v. Gardner-Denver</i> forbids enforcement of such arbitration provisions. The Supreme Court limited <i>Alexander</i> by concluding that the NLRA provided the union with statutory authority to collectively bargain for arbitration of workplace discrimination claims. Congress did not terminate that authority in the ADEA, and, therefore, there was no legal basis for striking down the freely negotiated arbitration clause of the parties' union representative.		√	US	
	Illusory <i>Zamora v. Swift Transp. Co.</i> , 319 F. App'x 333 (5th Cir. Apr. 2009).	When one party to an arbitration agreement reserves the right to unilaterally revoke or modify it, the agreement is illusory according to the trial and appellate courts.		√		√

	Case Name	Case Summary	Compel Arbitration?			
			Trial Court		Fifth Circuit	
			Yes	No	Yes	No
Waiver	<i>Nicholas v. KBR, Inc.</i> , 565 F.3d 904 (5th Cir. Apr. 2009).	Widow of former employee brought breach of contract action under a severance agreement (continue extending “company-provided” benefits) alleging employer’s failure to pay life insurance benefits. After removal, she added ERISA claims but did not mention arbitration in the pleading amendments. When she did move to compel ten months later, after she had responded to discovery and been deposed, the trial court found that she had substantially invoked the judicial process to the prejudice of defendant. The circuit court affirmed the trial court’s denial of the motion to compel.		√		√

TABLE II: POST-ARBITRATION CHALLENGES

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
Manifest disregard	<i>Citigroup Global Mkts., Inc. v. Bacon</i> , 562 F.3d 349 (5th Cir. Mar. 2009).	After an arbitration panel awarded Bacon \$256,000, Citigroup moved to vacate on the basis that the arbitrators had manifestly disregarded the law. After considering whether manifest disregard remained a valid ground for vacatur, and after the Supreme Court's decision in <i>Hall Street Assocs., L.L.C., v. Mattel, Inc.</i> , the Fifth Circuit concluded that the manifest disregard standard is no longer an independent ground for vacating awards under the FAA and vacated the trial court's ruling.		√	√	
	<i>Rogers v. KBR Technical Servs., Inc.</i> , No. 08-20036, 2008 WL 2337184 (5th Cir. June 2008).	Unsatisfied with a \$252.84 arbitration award for employment claims arising out of an assignment at Camp Eggers in Afghanistan, former employee, acting <i>pro se</i> , sought to vacate on a variety of grounds. The courts denied vacatur and confirmed the award—noting that <i>Mattel</i> “calls into doubt the non-statutory grounds [for vacatur] which have been recognized by this Circuit.”	√		√	

	Case Name	Case Summary	Vacate Arbitral Award?				
			Trial Court		Fifth Circuit		
			No	Yes	No	Yes	
	<i>In re U.S. Brass Corp.</i> , 295 F. App'x 660 (5th Cir. Oct. 2008).	Unsuccessful party to an arbitration award, made pursuant to the ADR provisions of a bankruptcy reorganization plan, sought to vacate the award because of the arbitrator's "loose" use of the term "jurisdictional," which they claimed limited its subject matter jurisdiction. The trial court and Fifth Circuit made short work of those arguments, leaving the award intact.	√		√		
Exceed authority	<i>Continental Airlines, Inc. v. Air Line Pilots Ass'n, Int'l</i> , 555 F.3d 399 (5th Cir. Jan. 2009).	Pilot discharged for refusing to take a no-notice alcohol test obtained a reinstatement order from a labor arbitrator. Continental sought and obtained vacatur in district court. The Fifth Circuit concluded that it must defer to the arbitration decision if any analysis of the agreements would support the outcome. Accordingly, the Fifth Circuit reversed the vacatur except as to an appended EAP condition.		√	√		
RLA							

	Case Name	Case Summary	Vacate Arbitral Award?			
			Trial Court		Fifth Circuit	
			No	Yes	No	Yes
	<i>BNSF Ry. Co. v. Bhd. of Maint. of Way Employees</i> , 550 F.3d 418 (5th Cir. Nov. 2008).	NRAB arbitrator drew adverse inference from railroad's refusal to produce documents and rendered an award for the Brotherhood. Railroad moved for vacatur in the district court claiming that the arbitrator exceeded its authority. The trial court vacated the award and entered judgment for the railroad. Because the arbitrator reached a conclusion based on the inference, the Fifth Circuit vacated the judgment and remanded the matter to the arbitrator to consider the causation element on the merits without the adverse inference. With that remand, the Fifth Circuit affirmed the vacatur.		√		√