

# ALTERNATIVE DISPUTE RESOLUTION

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I.	INTRODUCTION.....	446
II.	HISTORICAL BACKDROP—EXPANDED USE AND ENFORCEMENT OF ARBITRATION.....	453
III.	THE CURRENT SURVEY PERIOD—MORE ENFORCEMENT OF ARBITRATION.....	454
A.	<i>Pre-Arbitration Challenges—Motions to Compel</i> .....	455
1.	<i>Unconscionability Determined by Circumstances at Time of Contract: Overstreet v. Contigroup Cos.</i> .....	455
2.	<i>Benefits of Agreement Estop Denial of Arbitration Clause: Hellenic Investment Fund, Inc. v. Det Norske Veritas</i> .....	456
3.	<i>Fight Among Insureds Over Proceeds Not Within Arbitration Clause: Tittle v. Enron Corp.</i> .....	457
4.	<i>Dismiss Rather Than Stay Arbitrable Disputes: Brown v. Pacific Life Insurance Co.</i> .....	458
5.	<i>Administrative Dismissal (Stay) Pending Arbitration Not Appealable: CitiFinancial Corp. v. Harrison</i> .....	461
6.	<i>Specialized Federal Law Results in Arbitration of State Injury Claims: Acosta v. Master Maintenance &amp; Construction Inc.</i> .....	462
7.	<i>Agreement to Arbitrate Future Personal Injury Claims Upheld: Terrebonne v. K-Sea Transportation Corp.</i> .....	463
B.	<i>Post-Arbitration—Motions to Vacate</i> .....	465
1.	<i>Undisclosed “Trivial Past Association” Not “Evident Partiality”:</i> Positive Software Solutions, Inc. v. New Century Mortgage Corp. ....	465

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2.	<i>“Exceeding Scope” and “Manifest Disregard” Are High Thresholds: Apache Bohai Corp. LDC v. Texaco China BV</i> .....	467
3.	<i>Denied Motion for Continuance Filed One Day Before Hearing Not Misconduct: Laws v. Morgan Stanley Dean Witter</i> .....	470
4.	<i>Deference to Labor Arbitrator Results in Vacatur Reversal: Resolution Performance Products, L.L.C. v. Paper Allied Industrial Chemical &amp; Energy Workers International Union, Local 4-1201</i> .....	472
5.	<i>Misconduct, Prejudice, or Blatant Disregard Required for Vacatur: American Laser Vision, P.A. v. Laser Vision Institute, L.L.C.</i> .....	473
IV.	CONCLUSION.....	474

## I. INTRODUCTION

With the exception of one nuanced case involving Enron’s Ken Lay and Jeff Skilling, all parties signing arbitration provisions or accepting the benefits of contracts containing such provisions were compelled to arbitration during the survey period—June 1, 2006, through May 31, 2007.<sup>1</sup> And after-the-fact challenges to arbitration awards and to the arbitrators who made them were no more successful.<sup>2</sup> In fact, not a single vacatur stood after a divided en banc court turned a trial court vacatur and panel affirmation around in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*<sup>3</sup> Trial courts in the Fifth Circuit also continued to order parties to mediation, but without much controversy.<sup>4</sup>

The published opinions handed down during this survey period are consistent with the past four surveys.<sup>5</sup> Arbitration has expanded from the

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1. See *infra* Part III.A. Though some unpublished opinions are included in this Article, they have limited weight under Rule 47 of the Fifth Circuit Rules, and thus the focus and broad trends presented here are based on the Fifth Circuit’s published opinions. For an excellent discussion of previously published and unpublished opinions in the Fifth Circuit, see Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round IV*, 39 TEX. TECH L. REV. 463, 468-71 (2006) [hereinafter Huber, *Round IV*].

2. See *infra* Part III.B.

3. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278, 281 (5th Cir. Jan. 2007) (en banc); see also Huber, *Round IV*, *supra* note 1, at 479.

4. E.g., *United States v. Medica-Rents Co.*, Nos. 4:00-CV-483-Y, 4:01-CV-198-Y, 2006 WL 3635416 (N.D. Tex. 2006) (referring the remaining attorneys’ fees question to mediation); see *Cook Children’s Med. Ctr. v. New England PPO Plan of Gen. Consol. Mgmt., Inc.*, 491 F.3d 266, 277 (5th Cir. June 2007) (denying taxation of mediation fees as costs in an ERISA action); *Denville v. United States*, 202 F. App’x 761, 763 (5th Cir. Oct. 2006) (affirming the denial of a motion to set aside a mediated settlement in which the mediator was deposed).

5. The past four surveys on alternative dispute resolution (ADR) were authored by Professor Stephen K. Huber and provide a comprehensive history of arbitration, as well as a detailed and clearly presented review of previous ADR decisions. This Article builds on those efforts, and though it provides a brief history of ADR law in the Fifth Circuit, Huber’s previous articles more comprehensively discuss arbitration

specialized fields of labor relations and international transactions into an oft-used litigation substitute.<sup>6</sup> That growth has been nurtured by a broad federal policy favoring arbitration that has not developed linearly or without controversy.<sup>7</sup> The courts have consistently given arbitrators significant leeway when crafting solutions to varied and wide-ranging disputes.<sup>8</sup> That trend continued during the survey period.<sup>9</sup> Though challenging arbitration appears daunting at first, parties seeking to avoid arbitration due to high procedural cost barriers relative to court filing fees may get traction in the right case.<sup>10</sup>

Before putting the survey period's cases into historical context and digesting each one, a quick summary may reveal trends. Of course, summaries risk oversimplification, and the full opinion is always more enlightening. The following tables divide current cases into two categories: (1) pre-arbitration challenges (litigants seeking to avoid motions to compel arbitration), and (2) post-arbitration challenges (litigants seeking vacatur of adverse arbitration awards). This categorization reduces each case to a binary format—"for" or "against" arbitration. In pre-arbitration challenges, compelling arbitration results in a "yes" indicator. And in post-arbitration challenges, it inverts—denying vacatur is registered as a "no." To align all decisions "for" arbitration—"yes" to compelling arbitration and "no" to vacating its results—the columns are reversed in the post-arbitration challenges table. The resulting columns highlight the one outlier in a survey period that generally followed a "national policy favoring arbitration when the parties contract for that mode of dispute resolution."<sup>11</sup>

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cases decided prior to June 1, 2006. See generally Huber, *Round IV*, *supra* note 1; Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round III*, 38 TEX. TECH L. REV. 535 (2006) [hereinafter Huber, *Round III*]; Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit, Round II*, 37 TEX. TECH L. REV. 531 (2005) [hereinafter Huber, *Round II*]; Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit*, 35 TEX. TECH L. REV. 497 (2004) [hereinafter Huber, *Round I*].

6. See Huber, *Round II*, *supra* note 5, at 532 ("A mere twenty years ago, by contrast, arbitration was a specialized dispute resolution procedure used widely only by trade associations, in labor-management relations, and for international commercial transactions.").

7. *Positive Software*, 476 F.3d at 286 (conceding that "[a]rbitration may have flaws"); see also Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J. L. & PUB. POL'Y 579, 639 (2007) ("Arbitration agreements have been criticized for requiring the consumer to 'opt-out' of the public dispute resolution system, thus giving up the right to a neutral and independent decision-maker, being required to pay for arbitration even if victorious, and losing the right to appeal an arbitration award on all but the most outrageous grounds."); Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123, 124 (2007); Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 321 (2007).

8. See Huber, *Round I*, *supra* note 5, at 498-500 (discussing the growing importance and use of arbitration); see also Christopher D. Kratovil, *Judicial Review of Arbitration Awards in the Fifth Circuit*, 38 ST. MARY'S L.J. 471, 471-72 (2007).

9. See *infra* Part III.

10. See *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 680 (6th Cir. 2003) (invalidating arbitration agreements that place unreasonable financial burdens on consumers); see also Kenneth A. DeVille, *The Jury Is Out: Pre-Dispute Binding Arbitration Agreements for Medical Malpractice Claims*, 28 J. LEGAL MED. 333, 370 (2007) (discussing high costs of arbitration).

11. *Preston v. Ferrer*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 978, 978 (2008).

Table One: Summary of Pre-Arbitration Cases

Case Name	Case Summary	Compel Arbitration?			
		Trial Court		Fifth Circuit	
		Yes	No	Yes	No
<i>Overstreet v. Contigroup Cos.</i> <sup>12</sup>	A chicken company removed contract termination suit and moved to compel arbitration. The farmer responded that the arbitration agreement was unconscionable because costs could reach \$29,000. The trial court agreed, but the Fifth Circuit reversed because the farmer failed to provide evidence of her financial condition at the time the contract was formed.		X	X	
<i>Hellenic Inv. Fund, Inc. v. Det Norske Veritas</i> <sup>13</sup>	If a party accepts the benefits of a contract, it may also get the forum selection clause that comes with it by direct-benefit estoppel. Here, a ship purchaser sought the benefits of an agreement containing a forum selection provision, and its admiralty case was dismissed.	X		X	
<i>Tittle v. Enron Corp.</i> <sup>14</sup>	Insurance companies and others sought to avoid arbitration while insureds sought to compel it. With insurance limits in the court's registry, the remaining fight was between insureds over that money, rather than with the carriers providing it. The trial court's denial of the motion to compel based on the policy's arbitration clause was affirmed.		X		X

12. *Overstreet v. Contigroup Cos.*, 462 F.3d 409 (5th Cir. Aug. 2006); *see infra* Part III.A.1.

13. *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514 (5th Cir. Sept. 2006); *see infra* Part III.A.2.

14. *Tittle v. Enron Corp.*, 463 F.3d 410 (5th Cir. Sept. 2006); *see infra* Part III.A.3.

<i>Brown v. Pac. Life Ins. Co.</i> <sup>15</sup>	Investors' state court claims were removed, remanded, and then stayed while arbitration was compelled by separate federal action. When affirming the order compelling arbitration, the Fifth Circuit addressed jurisdiction under the FAA, invalidation of arbitration clauses (consent and adhesion here), and use of equitable estoppel to send non-parties to the arbitration agreement to arbitration.	X		X	
<i>Omni Hotels Mgmt. Corp. v. Bayer</i> <sup>16</sup>	Omni Hotels brought a declaratory judgment action in federal court seeking an order compelling arbitration of class action employment claims filed in Louisiana state court. The motion was granted, and the Fifth Circuit dismissed the appeal for want of jurisdiction; thus, the parties were left to arbitrate.	X		X	
<i>CitiFinancial Corp. v. Harrison</i> <sup>17</sup>	Two of three defendants in a related action filed a new suit to compel arbitration. The second judge compelled arbitration and stayed proceedings in the first judge's court. Because the first judge "administratively dismissed" the case based on the other order, the Fifth Circuit concluded that it lacked jurisdiction to grant relief.	X		X	
<i>Green v. Serv. Corp. Intern.</i> <sup>18</sup>	An employment suit stayed pending compelled arbitration. Because the trial court expressly denied the request that the case be dismissed and not stayed, the Fifth Circuit dismissed the appeal for want of jurisdiction.	X		X	

15. *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384 (5th Cir. Aug. 2006); *see infra* Part III.A.4.

16. *Omni Hotels Mgmt. Corp. v. Bayer*, 235 F. App'x 208 (5th Cir. May 2007).

17. *CitiFinancial Corp. v. Harrison*, 453 F.3d 245 (5th Cir. June 2006); *see infra* Part III.A.5.

18. *Green v. Serv. Corp. Int'l*, 236 F. App'x 898 (5th Cir. May 2007).

<i>Acosta v. Master Maint. &amp; Const. Inc.</i> <sup>19</sup>	State court plaintiffs found their tort claims removed to federal court and compelled to arbitration because the subject matter related to arbitration agreements falling under the federal Convention Act.	X		X	
<i>Terrebonne v. K-Sea Transp. Corp.</i> <sup>20</sup>	A personal injury plaintiff settled claims through a partial release that required arbitration of any future claims. After reinjury, the plaintiff sought to avoid that requirement by using an FAA exclusion for contracts of employment for seamen by alleging that his injury fell outside the scope of the clause. The trial and appellate courts disagreed. The compelled arbitration award was confirmed, and both rulings were affirmed.	X		X	
<i>Encompass Power Servs., Inc. v. Eng'g &amp; Const. Co.</i> <sup>21</sup>	A general contractor filed suit against subcontractor to compel arbitration. The trial court granted the motion, and the Fifth Circuit affirmed.	X		X	
<i>Ford Motor Co. v. Ables</i> <sup>22</sup>	State court plaintiffs sued Ford in Mississippi state court. Ford filed this action to compel arbitration of those claims. The trial court denied the motion by concluding that the fraud claims fell outside the arbitration agreement. The Fifth Circuit reversed and remanded for an order compelling arbitration.		X	X	

19. *Acosta v. Master Maint. & Const. Inc.*, 452 F.3d 373 (5th Cir. June 2006); *see infra* Part III.A.6.

20. *Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271 (5th Cir. Jan. 2007).

21. *Encompass Power Servs., Inc. v. Eng'g & Const. Co.*, 224 F. App'x 329 (5th Cir. Mar. 2007).

22. *Ford Motor Co. v. Ables*, 207 F. App'x 443 (5th Cir. Nov. 2006).

Table Two: Summary of Post-Arbitration Cases

Case Name	Case Summary	Vacate Arbitral Award?			
		Trial Court		Fifth Circuit	
		No	Yes	No	Yes
<i>Positive Software Solutions, Inc. v. New Century Mortgage Corp.</i> <sup>23</sup>	An 11-5 en banc majority rejected an earlier panel decision and aligned the Fifth Circuit with the majority of circuits by adopting the reasonable impression of bias standard for evident partiality challenges.		X	X	
<i>Apache Bohai Corp. LDC v. Texaco China BV</i> <sup>24</sup>	After a \$71 million arbitration award in favor of Texaco China, Apache sought vacatur by alleging that the arbitrator exceeded his powers and manifestly disregarded the law. The trial court confirmed the award, and the Fifth Circuit affirmed.	X		X	
<i>Laws v. Morgan Stanley Dean Witter</i> <sup>25</sup>	Denial of a continuance that was brought the day before an arbitration hearing did not show the prejudice required to vacate an award for arbitral misconduct.	X		X	

23. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. Jan. 2007); *see infra* Part III.B.1.

24. *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397 (5th Cir. Feb. 2007); *see infra* Part III.B.2.

25. *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398 (5th Cir. June 2006); *see infra* Part III.B.3.

<i>Resolution Performance Prods., LLC v. Paper Allied Indus. Chem. &amp; Energy Workers Int'l Union, Local 4-1201</i> <sup>26</sup>	A company assumed a collective bargaining agreement with a fifty-year course of dealing. After subcontracting maintenance functions to a non-union shop and losing an arbitration, the company won vacatur, but the Fifth Circuit reversed.		X	X	
<i>Am. Laser Vision, P.A. v. The Laser Vision Inst., L.L.C.</i> <sup>27</sup>	After a disgruntled doctor recovered \$1.8 million plus interest and attorneys' fees in an unreasoned arbitration award against a surgery services provider, the provider attempted to vacate the award. Giving deference to the arbitrator, the court affirmed the trial court's confirmation.	X		X	
<i>OneBeacon Am. Ins. Co. v. Turner</i> <sup>28</sup>	An insurance company sought vacatur of an adverse arbitration award. The attorneys' fees award cut against maritime policy by following the American Rule. The trial court largely denied vacatur, and the Fifth Circuit affirmed even though the arbitrator incorrectly applied the law.	X		X	
<i>Reliance Nat. Ins. Co. v. Texaco Exploration &amp; Prod., Inc.</i> <sup>29</sup>	After a pipeline leak, an arbitration panel determined that Texaco was an additional insured and denied contribution. The insurance company filed suit to vacate based on a failure to hear additional evidence. The district court granted summary judgment, and the Fifth Circuit affirmed.	X		X	

26. *Resolution Performance Prods., LLC v. Paper Allied Indus. Chem. & Energy Workers Int'l Union, Local 4-1201*, 480 F.3d 760 (5th Cir. Mar. 2007); *see infra* Part III.B.4.

27. *Am. Laser Vision, P.A. v. The Laser Vision Inst., L.L.C.*, 487 F.3d 255 (5th Cir. May 2007); *see infra* Part III.B.5.

28. *OneBeacon Am. Ins. Co. v. Turner*, 204 F. App'x 383 (5th Cir. Nov. 2006).

29. *Reliance Nat'l Ins. Co. v. Texaco Exploration and Prod., Inc.*, 228 F. App'x 441 (5th Cir. Apr. 2007).



## II. HISTORICAL BACKDROP—EXPANDED USE AND ENFORCEMENT OF ARBITRATION

The use and enforcement of arbitration has expanded during the past twenty years because of the Supreme Court's deciding of more than two dozen cases, including two opinions and two granted certiorari petitions during the 2007-08 term.<sup>30</sup> The Federal Arbitration Act (FAA) is anchored in the expansively interpreted Commerce Clause and has been used to reach cases filed in federal and state courts.<sup>31</sup> Most of the cases heard by the Fifth Circuit (and the Supreme Court) during this twenty-year period were grounded in the FAA<sup>32</sup> and coupled a stated federal policy favoring arbitration<sup>33</sup> with deference to arbitration awards.<sup>34</sup> The federal policy favoring arbitration was

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30. See *infra* Huber, *Round I*, *supra* note 5, at 498-500 (noting that the Supreme Court had decided thirty arbitration related cases); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1396 (2008); *Preston v. Ferrer*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 978 (2008); *14 Penn Plaza LLC v. Pyett*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1223 (2008) (mem.); *Vaden v. Discover Bank*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1651 (2008) (mem.); see also Michael E. Johnson & Piret Loone, *Court's Second '07-'08 ADR Case Challenges Arbitrator Supremacy*, 26 ALTERNATIVES TO THE HIGH COST OF LITIG., Jan. 2003 ("Arbitration and the FAA appear to be high on the Supreme Court's priority list this term.").

31. Huber, *Round I*, *supra* note 5, at 501 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400-02 (1967)). However, as many other circuit courts have explained, the parties must have an independent basis for jurisdiction to challenge an arbitration award in federal, rather than state, court. See *Smith v. Rush Retail Ctrs., Inc.*, 360 F.3d 504, 505 n.6 (5th Cir. 2004); Huber, *Round II*, *supra* note 5, at 537. Huber mentioned this jurisdictional deficiency in his first Fifth Circuit arbitration survey, and the Supreme Court also noted the unusual nature of FAA jurisdiction in the recent case, *Hall St. Assocs., L.L.C. v. Mattel, Inc.* See Huber, *Round I*, *supra* note 5, at 501, 503-04 (discussing *Beiser v. Weyler*, 284 F.3d 665, 666 (5th Cir. 2002)); *Hall St.*, 128 S. Ct. at 1402.

32. See Huber, *Round II*, *supra* note 5, at 534-35. For example, the supremacy of the FAA was reinforced when, in 2004, the Fifth Circuit held that state arbitration law would only be applied in place of federal law if the parties had specifically contracted for such application—a general choice of law provision would not suffice. See *Action Indus., Inc. v. United States Fid. & Guar. Co.*, 358 F.3d 339, 341-43 (5th Cir. 2004); Huber, *Round II*, *supra* note 5, at 534-35. Federal law also controlled in *Washington Mutual Financial Group, LLC v. Bailey*, a case in which the Fifth Circuit determined that federal law controls when deciding whether a party is subject to arbitration. See *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 267 n.6 (5th Cir. 2004); Huber, *Round II*, *supra* note 5, at 536. Huber suggested that the Fifth Circuit did not fully decide this issue in the *Washington Mutual* opinion. Huber, *Round II*, *supra* note 5, at 536-37.

33. *Id.* at 542. Deference was popular during the 2003-2004 survey period when the Fifth Circuit embraced the Supreme Court's *Bazze* decision by determining that class certification decisions should be decided by an arbitrator rather than a judge. *Pedcor Mgmt. Co. Welfare Benefit Plan v. Nat'l Pers. of Tex., Inc.*, 343 F.3d 355, 359-60 (5th Cir. 2003) (citing *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444 (2003)); Huber, *Round II*, *supra* note 5, at 542. Deference is often extended in other ways in arbitration decisions. See Huber, *Round II*, *supra* note 5, at 542. For example, the circuit courts traditionally give great deference to district court judges, and arbitration-based decisions are no exception. See *id.* In the 2003-2004 survey period, broad discretion was given to district courts deciding whether to review a challenge to an arbitration award in their own court or transfer it to a neighboring district court. See *Action Indus., Inc. v. United States Fid. & Guar. Co.*, 358 F.3d 337, 339-43 (5th Cir. 2004); Huber, *Round II*, *supra* note 5, at 542. This attitude continued in the 2004-2005 survey period, in which several Fifth Circuit opinions, as Huber noted, clearly indicate that there "are two, and only two, grounds for vacating an arbitration award: (1) manifest disregard for the law, and (2) public policy." Huber, *Round III*, *supra* note 5, at 550 (citing *Brabham v. A.G. Edwards & Sons Inc.*, 376 F.3d 377, 385 (5th Cir. 2004)).

34. Huber, *Round I*, *supra* note 5, at 505. Consider, for example, the 2002-2003 survey period covered in the first round of Huber's Fifth Circuit Arbitration survey. *Id.* Arbitrability carried the day in *Howsam v.*

recently rearticulated by the Supreme Court in *Preston v. Ferrer*, which cites *Buckeye Check Cashing, Inc. v. Cardegna*.<sup>35</sup> In *Buckeye*, the Court held that questions of contract illegality are to be decided, initially at least, by an arbitrator rather than a judge.<sup>36</sup> The Court reasoned that arbitration is proper because there is no question that the parties agreed to arbitrate.<sup>37</sup> Rather, the question relates to the substance of the agreement, and as the Court restated in *Ferrer*, “questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court.”<sup>38</sup>

The Court reaffirmed *Buckeye* in *Ferrer* in which Fox television personality “Judge Alex” Ferrer, who arbitrates disputes in a theatrical setting, sought to avoid arbitration with “Preston, a California attorney who renders services to persons in the entertainment industry.”<sup>39</sup> Because a California statute regulated talent agents, the question became whether Preston was a personal manager or a talent agent.<sup>40</sup> The Court held that the question was arbitrable under the parties’ agreement, even though it presented a statutory right: “Ferrer relinquishes no substantive rights the TAA or other California law may accord him. But under the contract he signed, he cannot escape resolution of those rights in an arbitral forum.”<sup>41</sup>

### III. THE CURRENT SURVEY PERIOD—MORE ENFORCEMENT OF ARBITRATION

Though the Supreme Court took a short-lived break from ADR cases during the 2006 term, the circuit courts stayed active, and the Supreme Court returned with four arbitration cases during the 2007 term.<sup>42</sup> Indeed, the Fifth

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*Dean Witter Reynolds, Inc.* See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 81-86 (2002); Huber, *Round I*, *supra* note 5, at 505. In *Howsam*, the Supreme Court resolved a circuit split by deciding that, when dealing with contracts between securities brokers and their customers, arbitrators should decide arbitrability. *Howsam*, 537 U.S. at 81-86; Huber, *Round I*, *supra* note 5, at 505 (noting that *Howsam* simply reaffirmed the existing law of the Fifth Circuit as set forth in *Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 752-54 (5th Cir. 1995)).

The Fifth Circuit subsequently followed Supreme Court precedent by finding arbitrable disputes in the fields of employment, admiralty, and commercial transactions, to name a few. Huber, *Round I*, *supra* note 5, at 506-09. The Fifth Circuit, however, deferred to the courts in other circumstances, including two bankruptcy cases and a case where fraud tainted the agreement to arbitrate. *Id.* at 509, 512-14. In a trio of interesting cases, both the Fifth Circuit and the Supreme Court narrowly avoided the question of whether an arbitration agreement can limit statutory damages. *Id.* at 515-20. The Fifth Circuit upheld arbitration over waiver and reaffirmed the limited review available to arbitration awards during the 2002-03 survey period. *See id.* at 505-20.

35. *Preston v. Ferrer*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 978, 979 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006)).

36. *Buckeye*, 546 U.S. at 449.

37. *Id.* at 446.

38. *Ferrer*, 128 S. Ct. at 981 (citing *Buckeye*, 546 U.S. at 440).

39. *Id.* at 981-82.

40. *See id.* at 983.

41. *Id.* at 987.

42. *See* cases cited *supra* note 30.

Circuit decided twenty-three arbitration cases in 2006 and twenty more in 2007. As the tables above highlight, the topics decided during the survey period were as varied as they were numerous.

A. *Pre-Arbitration Challenges—Motions to Compel*

1. *Unconscionability Determined by Circumstances at Time of Contract:*  
*Overstreet v. Contigroup Cos.*

In *Overstreet v. Contigroup Cos.*, a former chicken farmer brought suit in Mississippi state court and alleged that a chicken company fraudulently induced her to enter into a contract, required her to use chemicals that ultimately damaged her farm, and wrongfully terminated her contract.<sup>43</sup> The company removed the case to federal court and filed a motion to compel arbitration.<sup>44</sup> The federal district court held that the plaintiff's financial condition at the time of the motion rendered the arbitration clause unconscionable because the clause's cost-sharing provision could shift between \$27,500 and \$29,000 to the plaintiff.<sup>45</sup> The company appealed that denial.<sup>46</sup>

The Fifth Circuit restricted its review to the unconscionability of the arbitration clause itself, rather than the contract as a whole, by adhering to the rule in *Buckeye Check Cashing, Inc. v. Cardegna*.<sup>47</sup> Having been forced to presume overall contract validity, the Fifth Circuit enforced the choice of law provision and opted into well-established Georgia law, which focuses the unconscionability test on “the *circumstances existing at the time the contract was made, rather than those existing . . . later.*”<sup>48</sup>

Unfortunately for the plaintiff, the trial court record focused on her financial status at the time of the motion to compel arbitration rather than at the time the contract was made.<sup>49</sup> Finding no evidence of financial hardship at contract formation, the Fifth Circuit concluded that the “district court erred by relying entirely on facts relating to Appellee's *current* financial status.”<sup>50</sup> The court reversed and emphasized that “the party resisting arbitration shoulders

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43. *Overstreet v. Contigroup Co.*, 462 F.3d 409, 411 (5th Cir. Aug. 2006).

44. *Id.*

45. *Id.* at 412.

46. *Id.* at 411.

47. *Id.* Under *Buckeye*, courts are limited to deciding whether arbitration clauses themselves are unconscionable—not the validity of the entire contract, which is left to the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006). In *Overstreet*, the Fifth Circuit followed *Buckeye* and its earlier opinion in *Banc One Acceptance Corp. v. Hill*, 367 F.3d 428, 430 (5th Cir. 2004). See *Overstreet*, 462 F.3d at 411 n.1.

48. *Id.* at 412 (quoting *Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73, 79 (Ga. Ct. App. 2000)).

49. *Id.* The trial court found that Mrs. Overstreet and her husband were, at least at the time of the motion, living off of food stamps, Medicaid, and “less than \$1,000 per month in social security benefits.” *Id.*

50. *Id.*

the burden of proving that the dispute is not arbitrable.”<sup>51</sup> The court noted that “the Georgia Supreme Court has affirmed that ‘undisclosed arbitration fees [cannot] be the basis for unconscionability.’”<sup>52</sup> Further, the Fifth Circuit remanded the case with an order to the district court to compel arbitration.<sup>53</sup> This case has since been dismissed with prejudice.<sup>54</sup>

Critics will read the bottom line outcome of *Overstreet* to be inconsistent with a statement in *Green Tree Financial Corp. v. Randolph* that “existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”<sup>55</sup> And other courts may reach different outcomes by applying Texas law to a slightly thicker record.<sup>56</sup>

## 2. *Benefits of Agreement Estop Denial of Arbitration Clause: Hellenic Investment Fund, Inc. v. Det Norske Veritas*

In *Hellenic Investment Fund, Inc. v. Det Norske Veritas*, Hellenic was not directly a party to an arbitration agreement, but because it had accepted the benefits of a contract containing one, Hellenic ended up in arbitration as if it were a party.<sup>57</sup> After Hellenic purchased a vessel from Inlet Navigation Company that had been regularly certified and inspected by Det Norske Veritas (DNV) under a written contract between Inlet and DNV, Hellenic discovered problems with the boat.<sup>58</sup> The contract between Inlet and DNV incorporated DNV’s inspection rules, and those rules contained an arbitration clause and a forum selection provision.<sup>59</sup>

Hellenic’s insurance carrier conducted its own inspection on the day of the sale.<sup>60</sup> Surprised by the insurance carrier’s report of several significant defects, Hellenic sued DNV and alleged fraudulent misrepresentation.<sup>61</sup> DNV then invoked its forum selection clause.<sup>62</sup> Though Hellenic was not a party to the Inlet-DNV contract, the district court compelled arbitration and dismissed.<sup>63</sup> Hellenic appealed.<sup>64</sup>

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51. *Id.*

52. *Id.* at 413 (citing *Results Oriented, Inc.*, 548 S.E.2d at 343).

53. *Id.*

54. *Overstreet v. Contigroup Co.*, No. 2:04CV98-KS-MTP (S.D. Miss. Oct. 3, 2006).

55. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

56. *See, e.g., In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 752-59 (Tex. 2001); *In re Luna*, 175 S.W.3d 315, 318-22 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *see also* Donald R. Philbin, Jr. & Audrey Lynn Maness, *Litigating Arbitration: A 2007 Texas Arbitration Review*, BAYLOR L. REV. (forthcoming 2008); Disputing: Conversations About Dispute Resolution, *Fifth Circuit Rules on Cost as a Basis for Not Arbitrating*, <http://www.karlbayer.com/blog/?p=85> (Aug. 24, 2006, 2:59 pm) (discussing how the Fifth Circuit has handled the issue of prohibitive cost and compelling arbitration).

57. *Hellenic Inv. Fund, Inc. v. Det Norske Veritas*, 464 F.3d 514, 517 (5th Cir. Sept. 2006).

58. *Id.* at 516.

59. *Id.* at 516-17.

60. *Id.* at 516.

61. *Id.*

62. *Id.*

63. *Id.* at 516-17.

The Fifth Circuit affirmed the district court under the theory of direct-benefit estoppel.<sup>65</sup> The court looked to a factually similar Second Circuit case and concluded that Hellenic benefited by the Inlet-DNV contract because Hellenic relied on the past certifications and inspections from DNV by determining an appropriate purchase price.<sup>66</sup> Thus, Hellenic was left to challenge the value of that service in arbitration proceedings arranged by DNV and Inlet.<sup>67</sup>

In light of *Hellenic*, when a nonparty claims the benefit of a contract containing an arbitration agreement, courts may bind the nonparty to that agreement.<sup>68</sup> Moreover, direct-benefit estoppel “applies when a nonsignatory ‘knowingly exploits the agreement containing the arbitration clause.’”<sup>69</sup>

3. *Fight Among Insureds Over Proceeds Not Within Arbitration Clause:*  
Tittle v. Enron Corp.

In *Tittle v. Enron Corp.*, insurance companies and others sought to avoid arbitration while Kenneth Lay and Jeffrey Skilling of Enron sought to compel it.<sup>70</sup> Because the insurance companies had interpleaded policy limits in an employee-initiated class action alleging breach of fiduciary duty, and because those claims exceeded policy limits, Lay and Skilling understandably did not want to pursue their attorneys’ fees claims in court because such pursuit would only reduce the monies available to their former employees.<sup>71</sup> Instead, they moved to compel arbitration.<sup>72</sup>

On tight facts, the ultimate question became whether disputes among the insureds themselves (not the insurance company and its insureds) fell within the scope of the arbitration agreement contained in the policies.<sup>73</sup> Lay and Skilling argued for a broad interpretation of the preamble language—“arising out of or related to”—and cited Supreme Court precedent construing similar

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64. *Id.* at 515.

65. *Id.* at 517. The court noted that direct-benefit estoppel applies when a non-signatory embraces a contract and knowingly exploits the agreement and then attempts to repudiate it during the course of litigation. *Id.* at 517-18 (citing *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 345 F.3d 347, 361-62 (5th Cir. 2003); *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, 269 F.3d 187, 200 (3d Cir. 2001)).

66. *Id.* at 518-19.

67. *Id.* at 519.

68. *See id.*

69. *Id.* at 518 (quoting *Bridas*, 345 F.3d at 361-62).

70. *Tittle v. Enron Corp.*, 463 F.3d 410, 419 (5th Cir. Sept. 2006). While interpleading policy limits reduced the insurers’ role, the insurers apparently joined the settling parties by arguing to the Fifth Circuit that the arbitration clause “applie[d] only to disputes between the [i]nsurer and the parties defined as insureds under the policies,” not between the insureds. *Id.*

71. *See id.* at 424 (stating that insurer used the protections of interpleading and therefore remained neutral about the allocation of the \$85 million).

72. *Id.*

73. *See id.* at 419.

language.<sup>74</sup> But the breadth of the preamble was ultimately limited by the remainder of the provision, which the court held did not cover disputes *between* insureds.<sup>75</sup>

The Fifth Circuit began its opinion with a Supreme Court pronouncement that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.”<sup>76</sup> The court used a two-step analysis to determine whether the parties agreed to arbitrate: it first asked whether there was a valid arbitration agreement between the parties, and then whether the dispute fell within the scope of the agreement.<sup>77</sup> When evaluating whether the dispute fell within the scope of the agreement, the court applied Texas law and determined that the plain language of the agreement dictated that the arbitration clause was meant to cover only disputes between the insured and the insurers, not disputes among the insureds themselves.<sup>78</sup> Because the insurers had tendered limits, the dispute was not between the insured and the insurer and thus fell outside of the arbitration clause.<sup>79</sup> As a result, the district court’s denial of the motion to compel arbitration was affirmed.<sup>80</sup>

Most likely, *Tittle* is limited to its bad facts. The insurance proceeds could not cover all the claimants due to the scale of the Enron calamity.<sup>81</sup> For that reason, the insurance companies attempted to remove themselves from the litigation by interpleading their policy limits.<sup>82</sup> Lay and Skilling were then left to dilute the money pot by intervening to fight for their attorneys’ fees.<sup>83</sup> This unusual case pitted them against other claimants (employee insureds), not the insurance companies.<sup>84</sup> Though the case cites broad arbitration policy, it turns on a specific agreement and hopefully unique facts.<sup>85</sup>

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74. *Id.* at 420 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406 (1967)).

75. *See id.*

76. *Id.* at 418 (quoting *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 473 U.S. 643, 648 (1986)).

77. *Id.*

78. *Tittle*, 463 F.3d at 419-20. The language of the arbitration clause has been dispositive in other cases. In fact, the same rule governed in the Fifth Circuit’s 2004 decision in *Vetco Sales, Inc. v. Vinar*, 98 F. App’x 264, 265-67 (5th Cir. 2004). In *Vetco Sales*, the court found that an arbitration clause covering disputes “arising out of” the contract was not broad enough to cover disputes that “arose out of” a related contract made later. *Id.* at 267. The court suggested that an arbitration clause covering all disputes “arising out of or related to” the first contract would have been broad enough to encompass the dispute at issue in the case. *Id.* at 265-66.

79. *Tittle*, 463 F.3d at 423.

80. *Id.* at 426.

81. *Id.* at 415-17.

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* at 418-26.

4. *Dismiss Rather Than Stay Arbitrable Disputes: Brown v. Pacific Life Insurance Co.*

In *Brown v. Pacific Life Insurance Co.*, an upset family of investors, the Browns, brought suit in Louisiana state court against Smith Barney; its representative, Patrick Holt; G.E. Life & Annuity Insurance Company (GE), and Pacific Life Insurance Company.<sup>86</sup> The allegations were fraud, negligence, and breach of various duties under statutory and common law.<sup>87</sup>

The defendants removed the state-based action to federal court, and Smith Barney then instituted another federal action.<sup>88</sup> The state court defendants quickly invoked the arbitration clause contained in the client agreement between the Browns and Smith Barney, and moved to stay that action and compel arbitration in the federal action.<sup>89</sup> After some procedural bumps,<sup>90</sup> the district court found that the dispute was covered by the arbitration clause and stayed the federal action while compelling arbitration.<sup>91</sup> The Browns appealed.<sup>92</sup>

On appeal, the defendants contested the circuit court's jurisdiction by claiming that a stay was not a "final order" that allowed appeal under 9 U.S.C. § 16(b)(1).<sup>93</sup> The Fifth Circuit disagreed and explained that the order compelling arbitration established appellate jurisdiction.<sup>94</sup> However, the court noted that a stay was improper in this case because "there was nothing left for the district court to stay in the Federal Actions after it remanded the State Action and ordered the parties to the arbitration table."<sup>95</sup>

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86. *Brown v. Pac. Life. Ins. Co.*, 462 F.3d 384, 389 (5th Cir. Aug. 2006).

87. *Id.* at 389.

88. *Id.* GE and Pacific later intervened in the federal action. *Id.* Patrick Holt was notably absent as his presence would have destroyed diversity jurisdiction. *Id.* at 390.

89. *Id.*

90. *Id.* The district court initially remanded the state action and stayed the federal action pending the outcome of the state action. *Id.* However, the post-order briefing convinced the court otherwise, and it lifted the stay "despite the threat of piecemeal litigation in state and federal court." *Id.* at 390.

91. *Id.* The two actions were consolidated, though the state action was ultimately remanded. *Id.*

92. *Id.*

93. *Id.* at 390-91.

94. *Id.*

95. *Id.* at 392 ("Unless the district court was staying some undefined or future proceedings in the Federal Actions, its stay order could have only applied to actions against the Appellees in the remanded State Action. Such a stay could not be properly issued pursuant to section 3."). Because the district court did not specify whether any other federal proceedings could be stayed, and because the circuit court could find none, the circuit court determined that the stay must have been intended for the state court proceedings. *Id.* Such an action is outside the court's jurisdiction and thus improper. *Id.* ("That section, by its terms, does not authorize a federal court to enjoin ongoing state proceedings—such as the remanded State Action—only federal proceedings. . . . [T]here was nothing left for the district court to stay in the Federal Actions after it remanded the State Action and ordered the parties to the arbitration table."); see also *Omni Hotels Mgmt. Corp. v. Bayer*, 235 F. App'x 208, 209-11 (5th Cir. May 2007) (reaching the same outcome as the court in *Brown*).

After establishing its own jurisdiction, the court turned to the Browns' other arguments.<sup>96</sup> The Browns claimed that the district court erred by denying their motion to dismiss because Holt, who was added to the federal action only after the two suits were consolidated, was a non-diverse party who would destroy diversity jurisdiction.<sup>97</sup> The district court determined that Holt was a dispensable party and declined to formally join him in the federal action.<sup>98</sup> The Fifth Circuit reviewed this determination for an abuse of discretion and found none.<sup>99</sup> The court cited its past opinions finding that threats of prejudice or inconsistent outcomes from piecemeal litigation—factors to consider under Federal Rule of Civil Procedure 19(b)—are not enough to overcome the strong policy in favor of arbitration.<sup>100</sup>

The Browns also claimed that a proper application of the *Colorado River* abstention doctrine would have required the district court to abstain from exercising jurisdiction.<sup>101</sup> The Browns' argument echoed their reasoning with respect to Holt's joinder—failure of the district court to abstain might create inconsistencies if the state court determined that the claims against Holt were not arbitrable.<sup>102</sup> The Fifth Circuit again affirmed the district court's decision by explaining that the national policy favoring arbitration outweighs piecemeal litigation concerns.<sup>103</sup>

The Browns' unsuccessful challenges to the district court's jurisdiction were followed by an attack on the arbitration agreement itself.<sup>104</sup> The circuit court first dismissed the Browns' argument that they would not have entered into the arbitration agreement if Holt had not misrepresented the terms of their investments; it reasoned that attacks on the validity of the contract as a whole are for the arbitrator decide.<sup>105</sup> The court did examine the Browns' assertion that the arbitration clause was a contract of adhesion, thus unenforceable, but the court ultimately upheld the clause.<sup>106</sup> The court noted that the Browns were not forced to agree to the terms of the clauses because they could have avoided the contract entirely by not engaging Smith Barney's services.<sup>107</sup>

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96. *Brown*, 462 F.3d at 393.

97. *Id.*

98. *Id.*

99. *Id.* at 394.

100. *Id.* (citing *Doctor's Assocs., Inc. v. Distajo*, 66 F.3d 438, 446 (2d Cir. 1995); *Snap-On Tools Corp. v. Mason*, 18 F.3d 1261, 1267 (5th Cir. 1994)).

101. *Id.*

102. *Id.* at 395.

103. *Id.* at 395-96. The court also found support in the language of the *Colorado River* opinion itself, emphasizing that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Id.* at 395-96 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

104. *Id.* at 396-97.

105. *Id.* at 397.

106. *Id.*

107. *Id.* at 397-98.



The Browns' final argument was that the district court erred by estopping the Browns from arguing that GE and Pacific were not bound to arbitrate.<sup>108</sup> The circuit court relied on its previous holding in *Grigson v. Creative Artists Agency, LLC* and held that the district court did not abuse its discretion by finding that "there was no way to bring actions against GE and Pacific without considering the actions of Smith Barney and Patrick Holt," although it was a close question.<sup>109</sup> Because the Browns failed to allege any tortious acts committed by GE and Pacific that were "separate and apart" from those of Smith Barney, the Fifth Circuit affirmed the district court's decision.<sup>110</sup>

Overall, the greatest impact of *Brown* will likely concern jurisdictional issues for both district courts and circuit courts. Arguably, the court's language will encourage dismissals of arbitrable disputes, and not stays.<sup>111</sup> On the other hand, the improper stay in this case did not strip the circuit court of jurisdiction.<sup>112</sup>

5. *Administrative Dismissal (Stay) Pending Arbitration Not Appealable:*  
*CitiFinancial Corp. v. Harrison*

In *CitiFinancial Corp. v. Harrison*, which originated in a Mississippi state court, all three defendants successfully removed the action to federal court, and two of the defendants filed a separate action to compel arbitration in the same federal court.<sup>113</sup> The separate action was assigned to a different federal judge, who ultimately compelled arbitration, dismissed the case before him, and stayed proceedings in the first action.<sup>114</sup> The initial federal judge retained jurisdiction over the removed action pending the compelled arbitration, but marked his case "administratively dismissed."<sup>115</sup>

On appeal, the Fifth Circuit first addressed whether an "administratively dismissed" case is a final and appealable decision under the FAA.<sup>116</sup> The court determined that it was not by relying on a prior decision that "administrative" closure of a case was equivalent to a stay.<sup>117</sup> After equating the dismissal to a stay, the court quoted the language of section 16 of the FAA, which provides that "[a]n arbitration order entering a stay, as opposed to a dismissal, is not an appealable order."<sup>118</sup> The question then became whether the Fifth Circuit had

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108. *Id.* at 398.

109. *Id.* (citing *Grigson v. Creative Artists Agency, LLC*, 210 F.3d 524, 528 (5th Cir. 2000)).

110. *Id.* at 398-99.

111. *See id.* at 390-91.

112. *Id.*

113. *CitiFinancial Corp. v. Harrison*, 453 F.3d 245, 248 (5th Cir. June 2006).

114. *Id.* at 248-49.

115. *Id.* at 248.

116. *Id.* at 250.

117. *Id.*

118. *Id.* (citing 9 U.S.C. § 16(b)(1) (2000)).

jurisdiction because one of the related actions was still pending.<sup>119</sup> While the court had jurisdiction of the final order, the Fifth Circuit treated the two cases as one, just as the parties and courts below had done.<sup>120</sup> This treatment left a pending matter below and no jurisdiction in the circuit court.<sup>121</sup>

Because the plaintiffs' substantive claims remained pending before the first judge, the Fifth Circuit concluded that it did not have jurisdiction over that stay order and dismissed the appeal for want of jurisdiction.<sup>122</sup> By doing so, the court gently reminded district judges that they do not have jurisdiction over cases pending before other Article III judges.<sup>123</sup>

6. *Specialized Federal Law Results in Arbitration of State Injury Claims:*  
*Acosta v. Master Maintenance & Construction Inc.*

In *Acosta v. Master Maintenance & Construction Inc.*, state court plaintiffs found their tort claims removed to federal court and compelled to arbitration because the subject matter of their intentional tort claims related to arbitration agreements falling under title 9 of the United States Code—9 U.S.C. §§ 201-08 (Convention Act), which enforces the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>124</sup>

The Convention Act gives “federal district courts original and removal jurisdiction over cases related to arbitration agreements falling under the Convention.”<sup>125</sup> The plaintiffs brought a personal injury suit in Louisiana state court following the September 1996 release of mustard gas at the Georgia Gulf Corporation in Plaquemine, Louisiana.<sup>126</sup> Because the State of Louisiana allows personal injury plaintiffs to bring suit against a defendant's insurers, two foreign insurers of Georgia Gulf were named as defendants.<sup>127</sup>

Because the Convention Act allows for removal “[w]here the subject matter of an action or proceeding pending in a State court relates to an

119. *Id.* at 251.

120. *Id.* The court noted that if the defendant-initiated case were viewed in isolation, then jurisdiction would be proper because an order compelling arbitration leads to an outright dismissal, and an outright dismissal is a final appealable order. *Id.* The court held, however, that both proceedings must be viewed together and reasoned that “[f]unctionally, this case sits in a posture no different than had both orders [(the stay and the order compelling arbitration)] been issued by a single district court judge, a situation in which we would conclude we lacked” jurisdiction under the FAA. *Id.* As a result, the court treated the situation as if one judge had compelled arbitration and administratively dismissed the proceedings, which prevents an appeal as explained in prior cases. *Id.* at 250-51 n.11. Thus, the case was dismissed for lack of jurisdiction. *Id.*

121. *Id.* at 251; *see also* *Green v. Serv. Corp. Int'l*, 236 F. App'x 898, 899-200 (5th Cir. May 2007) (dismissing an appeal from stay for want of jurisdiction).

122. *CitiFinancial Corp.*, 453 F.3d at 251-52.

123. *Id.* at 251.

124. *Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 374 (5th Cir. June 2006); *see* 9 U.S.C. §§ 201-08 (2000).

125. *Acosta*, 452 F.3d at 375.

126. *Id.*

127. *Id.*

arbitration agreement or award falling under the Convention,” the foreign insurers removed it to federal court.<sup>128</sup> Because the insurance agreement between Georgia Gulf and the foreign insurers fell within the terms of the Convention Act, the insurers argued that the allegations of an intentional tort against Georgia Gulf created a coverage dispute under the insurance agreement and thus invoked the arbitration clause within that agreement.<sup>129</sup> When the motion to remand was denied, the plaintiffs certified the remand denial for immediate appeal.<sup>130</sup>

The Fifth Circuit emphasized the purposes of the Convention Act and its relation to the FAA: (1) “to provide the federal courts with broad jurisdiction over Convention Act cases in order to ensure reciprocal treatment of arbitration agreements by cosignatories of the Convention,”<sup>131</sup> and (2) to explicitly empower “courts to compel arbitration in accordance with the arbitration agreements involved.”<sup>132</sup>

The court then turned to the question of “whether the subject matter of the underlying lawsuit ‘relates to’ the arbitration agreement in the insurance policy between the alleged tortfeasor and the defendant insurers.”<sup>133</sup> When interpreting the phrase “relates to,” the court referenced *Beiser v. Weyler*, in which it had explained that “‘whenever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff’s case, the agreement ‘relates to’ the plaintiff’s suit.’”<sup>134</sup>

Despite the broad interpretation of “relates to,” the plaintiffs argued that Louisiana’s direct action statute negated any binding effect that the arbitration clause might have.<sup>135</sup> The court disagreed and explained that the claims against the insurer were at least, in part, an assertion of policy coverage, and that an assertion of policy coverage necessarily included the underlying terms of that coverage.<sup>136</sup> In the words of the court, “a clause determining the forum for resolution of specific types of disputes relates to a lawsuit that seeks the resolution of such disputes.”<sup>137</sup> Thus, a clause requiring arbitration of coverage disputes relates to a dispute over whether the insurer, the insured, or both will ultimately be held liable in tort, and the presence of a direct action statute will not defeat this rule.<sup>138</sup> As a result, the court held that the district court had jurisdiction and affirmed the removal.<sup>139</sup>

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128. *Id.* at 375-76 (quoting 9 U.S.C. § 205).

129. *Id.* at 375.

130. *Id.* (citing 28 U.S.C. § 1292(b) (2000)).

131. *Id.* at 376.

132. *Id.* at 377 (citing 9 U.S.C. § 206).

133. *Id.*

134. *Id.* (quoting *Beiser v. Weyler*, 284 F.3d 665, 669 (5th Cir. 2002)).

135. *Id.* at 378.

136. *Id.* at 379.

137. *Id.*

138. *Id.*

139. *Id.*

7. *Agreement to Arbitrate Future Personal Injury Claims Upheld:*  
*Terrebonne v. K-Sea Transportation Corp.*

*Terrebonne v. K-Sea Transportation Corp.* involved a settlement reached between a seaman, Terrebonne, and his employer, K-Sea, following an injury incurred on board a vessel.<sup>140</sup> The settlement agreement contained a provision obligating the parties to arbitrate future claims related to the initial incident.<sup>141</sup> Three months after the settlement, Terrebonne reinjured himself and brought suit against K-Sea.<sup>142</sup> K-Sea moved to stay the proceedings and compel arbitration pursuant to the settlement agreement, and the district court granted the motion over Terrebonne's objections.<sup>143</sup> The arbitrator dismissed Terrebonne's claims and awarded him only the costs of the arbitration.<sup>144</sup> After Terrebonne refused to accept payment from K-Sea, K-Sea moved to re-open the case so the court could enter judgment on the arbitrator's award.<sup>145</sup> The district court re-opened the case, and Terrebonne argued on appeal that the agreement was unenforceable due to his status as a seaman, and that even if the agreement was enforceable, his injury fell outside its scope.<sup>146</sup>

The Fifth Circuit rejected both arguments.<sup>147</sup> Terrebonne first claimed that the agreement was unenforceable because the FAA does not apply to contracts of employment with seamen.<sup>148</sup> Terrebonne argued that the arbitration agreement was subsumed by his employment agreement, but the court found that the agreement was a separate and distinct contract.<sup>149</sup> Terrebonne next argued that the arbitration agreement was invalid because it violated section 5 of the Federal Employers' Liability Act (FELA).<sup>150</sup> Among

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140. *Terrebonne v. K-Sea Transp. Corp.*, 477 F.3d 271, 274 (5th Cir. Jan. 2007).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 275.

145. *Id.* at 276.

146. *Id.* This case follows a long line of seamen-related arbitration exemption cases. For example, in *Circuit City Stores, Inc. v. Adams*, the Supreme Court held that the exemption applied only to those who actually worked in interstate commerce. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 106-07 (2001). However, the Fifth Circuit later qualified the application of the exemption to workers by determining that the interstate commerce requirement only applied to "other workers" and was not applicable to the specifically named categories of exempt workers. *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 392-94 (5th Cir. 2003). The Fifth Circuit has limited the seamen-exemption in other ways, though. For example, seamen are subject to arbitration in the international context. *See Francisco v. Stolt Achievement MT*, 293 F.3d 270, 274 (5th Cir. 2002).

147. *Terrebonne*, 477 F.3d at 266.

148. *Id.* at 278 (citing 9 U.S.C. § 1 (2000)).

149. *Id.* at 278-80. The court explained that, although K-Sea's agreement covered Terrebonne's maintenance and cure claims, the agreement related only to the employment relationship and did not implicate the employment contract. *Id.* at 279. The court's explanation is consistent with prior Fifth Circuit employment cases, which clarify that maintenance and cure are a part of the employment relationship and are separate and distinct from contractual rights. *Id.* (citing *Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1170 (5th Cir. 1982)).

150. *Id.* at 280.

several other reasons, the court rejected this argument because the Jones Act's venue provisions applied, and not FELA's.<sup>151</sup> Distinguishing the cases that Terrebonne had relied on, the court stressed that arbitration has become an increasingly recognized form of dispute resolution and thus provides an appropriate alternative forum for resolving claims, including those brought under the Jones Act.<sup>152</sup> As a result, the court found that the arbitration agreement was valid and enforceable.<sup>153</sup>

The court also summarily rejected Terrebonne's claim that his second injury fell outside the scope of the arbitration agreement.<sup>154</sup> Terrebonne argued that his second injury was separate from the original injury and thus did not relate to the first injury as required by the agreement.<sup>155</sup> Moreover, the court referenced the broad "relates to" language found in the arbitration clause and emphasized that Terrebonne failed to prove that this injury was separate.<sup>156</sup> Therefore, the Fifth Circuit affirmed the district court's decision and the arbitration award.<sup>157</sup> Perhaps the most important implication of *Terrebonne* is that the court employed broad arbitration policy and precedent to enforce an agreement to arbitrate future claims in the face of a Jones Act claim.<sup>158</sup>

### B. Post-Arbitration—Motions to Vacate

#### 1. Undisclosed "Trivial Past Association" Not "Evident Partiality": *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*

The Fifth Circuit's rare en banc opinion in *Positive Software v. New Century Mortgage Corp.* is perhaps the most instructive case from this survey period.<sup>159</sup> The 11-5 majority rejected an earlier panel's decision and aligned the Fifth Circuit with the majority of circuits setting the bar for evident partiality challenges at the higher "reasonable impression of bias" standard rather than at the lower "appearance of bias" standard.<sup>160</sup>

After losing copyright-infringement-related claims and facing an adverse \$1.5 million attorneys' fees award, Positive Software conducted a detailed investigation of the arbitrator's decision to make the award.<sup>161</sup> It found that the arbitrator and co-counsel for the defendants were among thirty-four lawyers in

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151. *Id.* at 281.

152. *Id.* at 284-85.

153. *Id.* at 286.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 286-87.

158. *See id.* at 274-84.

159. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 476 F.3d 278 (5th Cir. Jan. 2007), *cert. denied*, 127 S. Ct. 2943 (2007).

160. *Id.* at 281-83.

161. *Id.* at 280.

seven firms representing the same party in a group of cases known as the Intel litigation in the early 1990s.<sup>162</sup> And “[a]lthough their names appeared together on pleadings,” the record revealed that the arbitrator and co-counsel for the defendants “never attended or participated in any meetings, telephone calls, hearings, depositions, or trials together.”<sup>163</sup>

On these facts, the question became whether the arbitrator’s failure to disclose the connection amounted to “evident partiality”<sup>164</sup> under section 10(a)(2) of the FAA.<sup>165</sup> The district court concluded that it did and granted Positive Software’s motion to vacate; the court explained that arbitrator’s failure to disclose a significant prior relationship “creat[ed] an appearance of partiality requiring vacatur.”<sup>166</sup> A Fifth Circuit panel agreed and affirmed.<sup>167</sup> Neither the panel nor the district court found any evidence of actual bias.<sup>168</sup>

On rehearing en banc, the court began with the plain language of the FAA, which, to the court, “seem[ed] to require upholding arbitral awards unless bias was clearly evident in the decisionmakers.”<sup>169</sup> The court’s analysis looked back to the Supreme Court’s fractured decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*<sup>170</sup> That 1968 plurality decision provided room for two disclosure standards forty years later.<sup>171</sup> As the Fifth Circuit’s en banc majority saw it, “Justice Black’s opinion use[d] an egregious set of facts as the vehicle to require broad disclosure of ‘any dealings that might create an impression of possible bias,’”<sup>172</sup> while “Justice White, for his part, hews closely to the facts and finds it ‘enough for present purposes to hold, as the Court does, that where the arbitrator has a *substantial interest* in a firm which has done *more than trivial business* with a party, that fact must be disclosed.’”<sup>173</sup>

The Fifth Circuit majority followed Justice White’s lead and joined its sister circuits by concluding that the Supreme Court had not endorsed the lower “appearance of bias” standard.<sup>174</sup> After looking to its own case law, the court determined that an appropriate rule in non-disclosure cases does not allow vacatur “because of a trivial or insubstantial prior relationship between

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162. *Id.*

163. *Id.*

164. *Id.* at 281 n.1 (explaining that “evident partiality” is a ground for vacatur under the FAA).

165. *Id.* at 279.

166. *Id.* at 280 (citing *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 337 F. Supp. 2d 862, 865 (N.D. Tex. 2004)).

167. *Id.*

168. *Id.*

169. *Id.* at 281.

170. *Id.* at 281-82 (citing *Commonwealth Coatings Corp. v. Cont’l Cas. Co.*, 393 U.S. 145, 150-55 (1968)).

171. *See id.*

172. *Id.* at 282 (quoting *Commonwealth Coatings*, 393 U.S. at 149).

173. *Id.* at 282-83.

174. *Id.*

the arbitrator and the parties to the proceeding[s].”<sup>175</sup> In other words, such a relationship would not rise to a “reasonable impression of bias.”<sup>176</sup>

The court then applied this standard and found that the arbitrator’s co-representation with New Century’s counsel constituted a “trivial former business relationship” that did not warrant vacatur.<sup>177</sup> The court emphasized that though the arbitrator and co-counsel had signed the same pleadings, they did not once meet in person or even speak to each other prior to the present arbitration.<sup>178</sup> Moreover, the court could find no case that had similar facts and that resulted in vacatur.<sup>179</sup> Looking to policy, the court concluded that if vacatur were to be upheld here, arbitrators would be held to a higher ethical standard than Article III judges, and the pool of available and experienced arbitrators would also be limited.<sup>180</sup>

Judge Reavley, author of the panel opinion, dissented and was joined by Judges Wiener, Garza, Benavides, and Stewart; this dissent followed Justice Black’s *Commonwealth Coatings* opinion and argued that the majority was essentially attempting to overturn a Supreme Court opinion.<sup>181</sup> The dissent would have adopted the stricter standard requiring vacatur for the appearance of partiality.<sup>182</sup> Moreover, the dissent claimed that the relationship here was anything but trivial, and proper disclosure at the appropriate time would have prevented the parties from selecting this arbitrator.<sup>183</sup> Judge Wiener, concurring in the dissent, underscored the importance of disclosure, no matter how trivial, because such disclosure promotes confidence in the arbitration system.<sup>184</sup>

The *Positive Software* en banc decision aligns the Fifth Circuit with the majority of circuits’ disclosure standard for arbitrators.<sup>185</sup> However, the decision also highlights the rift between circuits<sup>186</sup> and may increase the likelihood that the Supreme Court will resolve the issue, though it declined to do so in this case.<sup>187</sup>

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175. *Id.* at 283.

176. *Id.*

177. *Id.* at 283-84.

178. *Id.* at 284.

179. *Id.*

180. *Id.* at 285.

181. *Id.* at 286 (Reavley, J., dissenting).

182. *Id.*

183. *See id.* at 290.

184. *Id.* at 294 (Wiener, J., concurring in dissent).

185. *See* Disputing: Conversations About Dispute Resolution, *Fifth Circuit Hands Down Positive Software Opinion*, <http://www.karlbayer.com/blog/?p=98> (Jan. 18, 2007, 4:05 pm).

186. *See* Laurie E. Foster & Shana R. Cappell, *The Fifth Circuit’s Positive Software Solutions v. New Century Mortgage—Underscoring the Need for a Positive Solution to Arbitrator Disclosure for a New Century*, *TRANSNAT’L DISP. MGMT.*, Sept. 2007, at 3, available at [http://www.morganlewis.com/pubs/FifthCircuitPositiveSoftware-TDM\\_sept07.pdf](http://www.morganlewis.com/pubs/FifthCircuitPositiveSoftware-TDM_sept07.pdf).

187. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 127 S. Ct. 2943, 2943 (2007), *denying cert. to* 476 F.3d 278 (5th Cir. Jan. 2007).

2. “Exceeding Scope” and “Manifest Disregard” Are High Thresholds:  
Apache Bohai Corp. LDC v. Texaco China BV

In *Apache Bohai Corp. LDC v. Texaco China BV*, Apache Bohai Corp. sought vacatur after a \$71 million arbitration award in favor of Texaco China and alleged that the arbitrator exceeded his powers by disregarding an exculpatory clause in the parties’ contract and “manifestly disregarded the law by awarding consequential and cost-of-drilling damages” and failing to offset mitigation.<sup>188</sup> The arbitration arose from an agreement between Texaco and Apache in which Apache agreed to assume Texaco’s drilling commitments in China’s Bohai Bay in exchange for a share of any future oil production.<sup>189</sup> Though Apache agreed to drill three wells under the agreement, it drilled none and instead withdrew from the agreement in an untimely fashion and left Texaco with an unexpected burden.<sup>190</sup> Texaco ultimately salvaged some of its interest in the oil fields, but not without difficulty and a significant loss in a later-profitable oil field.<sup>191</sup>

Texaco initiated arbitration proceedings to recover some of its loss.<sup>192</sup> The arbitrator found that “Apache had fundamentally breached its commitment to Texaco in reckless indifference to Texaco’s interests” and awarded Texaco over \$71 million, despite a clause in the contract allowing only liquidated damages.<sup>193</sup> The district court affirmed the award, and Apache appealed, claiming that the arbitrator exceeded his powers and demonstrated manifest disregard for New York law.<sup>194</sup>

Regarding the first argument—exceeded powers—Apache claimed that the exculpatory clause in the otherwise broad arbitration agreement prevented the arbitrator from reviewing the validity of the liquidated damages provision in the contract.<sup>195</sup> After reviewing Apache’s claim, the Fifth Circuit explained that uncertain or ambiguous limitations on the arbitrator’s authority—the exculpatory clause here—are narrowly construed and that courts look at the intent of the parties to determine whether certain subjects are off limits for arbitrators.<sup>196</sup> The court found no such intent in the exculpatory clause and noted that the only cases in which the court found that the arbitrator had exceeded his powers were ones in which the arbitrator “had intruded on an

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188. *Apache Bohai Corp. LDC v. Texaco China BV*, 480 F.3d 397, 400 (5th Cir. Feb. 2007).

189. *Id.*

190. *Id.*

191. *Id.* at 400-10. Texaco was ultimately awarded a total of \$71 million, which included \$26 million in direct damages stemming from the cost of drilling the wells and \$20 million in consequential damages resulting from Texaco’s lost interest in the profitable oil field. *Id.* at 401.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 402. The arbitration clause covered “any dispute” arising out of the contract, “notwithstanding any other provision in this agreement.” *Id.*

196. *Id.* at 402 n.4.



issue that was reserved for an alternative decisionmaker or was removed from anyone's discretion under the contract."<sup>197</sup> Because such a situation was absent from the Apache-Texaco agreement, the court determined that the arbitrator had the authority to review the liquidated damages provision and to find it unenforceable.<sup>198</sup>

Apache's alternate ground for vacating the arbitration award was that the arbitrator manifestly disregarded the law by awarding consequential damages.<sup>199</sup> As with most appeals of arbitration awards, the court's review was limited, and it made that point clear.<sup>200</sup> The court then reviewed New York case law and found that New York courts had, on multiple occasions, invalidated similar exculpatory clauses due to "reckless disregard" by one party.<sup>201</sup> In light of this case law, the court found that the arbitrator's decision to declare the liquidated damages limitation invalid and award consequential damages was "not so plainly incorrect as to be 'obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.'"<sup>202</sup> The court upheld the arbitrator's calculations for direct damages and mitigation under the same standard.<sup>203</sup>

Before *Hall Street Associates, L.L.C. v. Mattel, Inc.*,<sup>204</sup> commentators wondered if the parties should simply contract for less deferential judicial review.<sup>205</sup> After all, the Fifth Circuit was the first circuit court to expressly allow parties to contract for expanded judicial review, and only with *Mattel* did the Supreme Court reconcile that conflict.<sup>206</sup>

*Mattel* involved a lease between landlord Hall Street and lessee Mattel.<sup>207</sup> Mattel attempted to terminate the lease, and Hall Street then filed suit.<sup>208</sup> The parties agreed to submit the dispute to arbitration in an agreement that read, in part: "The Court shall vacate, modify or correct any award: (i) where the

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197. *Id.* at 403-04.

198. *Id.* at 404-05 ("Contrary to Apache's assertion that this reading renders the Exculpatory Clause meaningless, we interpret 'notwithstanding any other provision' to control the substantive terms of the contract rather than to designate a decisionmaker for questions of validity. . . . Once the arbitrator determined that the clause was unenforceable, there was no longer any barrier to awarding consequential damages where they are allowable under New York law.").

199. *Id.* at 405.

200. *Id.* ("Judicial review under the manifest disregard standard is 'extremely limited,' however, in line with 'our well-established deference to arbitration as a favored method of settling disputes when agreed to by the parties.'") (citing *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003)).

201. *Id.* at 406-07.

202. *Id.* at 407.

203. *Id.* at 408-09.

204. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1396 (2008).

205. See *Disputing: Conversations About Dispute Resolution, Fifth Circuit Confirms Arbitral Award*, <http://www.karlbayer.com/blog/?p=106> (Feb. 27, 2007, 10:34 am).

206. See *Mattel*, 128 S. Ct. at 1403 & n.5 (citing *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995)).

207. *Id.* at 1400.

208. *Id.*

arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."<sup>209</sup> This standard was less deferential than the one in 9 U.S.C. §§ 9-11.<sup>210</sup>

After Mattel won the arbitration, Hall Street filed a motion in the district court to modify the award and alleged that the arbitrator had committed a legal error.<sup>211</sup> The district court agreed and thus applied the standard of review adopted by the parties.<sup>212</sup> The arbitrator then amended the award in favor of Hall Street, and Mattel appealed—first to the district court and then to the Ninth Circuit—arguing that the provisions of the agreement controlling the standard of judicial review were then unenforceable due to a change in Ninth Circuit law.<sup>213</sup> The Ninth Circuit agreed by finding that 9 U.S.C. §§ 10-11 provided the exclusive standards for judicial review.<sup>214</sup> Hall Street appealed.<sup>215</sup>

The Supreme Court rejected the practice of the Fifth Circuit and the majority of other circuits that allowed parties to augment the FAA's limited standards of review.<sup>216</sup> The Court invoked the rule of *ejusdem generis* and found that the "manifest disregard" language in the statute was limited to those types of conduct specifically listed.<sup>217</sup> The tenor of the statute goes to "outrageous" conduct, and the Court reasoned that the parties cannot contract around this statutory purpose.<sup>218</sup> Moreover, the mandatory language of Section 9—the court "must grant" the order confirming arbitration unless vacated or modified under Sections 10-11—suggests that parties cannot modify the court's standard of review.<sup>219</sup> The Court concluded that Sections 9-11 "substantiat[ed] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."<sup>220</sup>

Nonetheless, the Court remanded the case for consideration of additional issues.<sup>221</sup> Because the arbitration agreement had been drafted and entered into during litigation, the Court considered whether the agreement should "be treated as an exercise of the District Court's authority to manage its cases under Federal Rules of Civil Procedure 16."<sup>222</sup> Though the Court received

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209. *Id.* at 1400-01.

210. *See* 9 U.S.C. §§ 9-11 (2000).

211. *Mattel*, 128 S. Ct. at 1401.

212. *Id.*

213. *Id.* (citing *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003)).

214. *Id.*

215. *Id.*

216. *Id.* at 1406.

217. *Id.* at 1404-05.

218. *Id.*

219. *Id.* at 1405.

220. *Id.*

221. *Id.* at 1408.

222. *Id.* at 1407.

supplemental briefing on the issue, it chose to leave the decision to the Court of Appeals.<sup>223</sup>

Though *Mattel* reverses the Fifth Circuit's 1995 *Gateway* opinion, when combined with *Ferrer* it provides current advice for practitioners drafting arbitration agreements. However, a number of bills are pending in Congress that would change the contours of the FAA.

### 3. *Denied Motion for Continuance Filed One Day Before Hearing Not Misconduct: Laws v. Morgan Stanley Dean Witter*

More than three years into a securities arbitration involving an alleged \$689,115.19 margin account deficit, an apparently pro se defendant propounded his first request for discovery documents on Morgan Stanley to be due within a month of hearing in *Laws v. Morgan Stanley Dean Witter*.<sup>224</sup> Objections and trickled production followed.<sup>225</sup> Needing more time to "assess its 'accuracy and application to this suit,'" the defendant, Laws, moved for a continuance the day before the hearing and acknowledged that "the attorneys in the case would have to cancel flight plans at the last minute."<sup>226</sup> The arbitration panel denied the continuance and ultimately ruled against Laws.<sup>227</sup> Laws sought vacatur in the district court by alleging that the failure to grant the continuance amounted to misconduct.<sup>228</sup> When the district court found no misconduct, Laws appealed.<sup>229</sup>

The Fifth Circuit affirmed the district court by first noting the standard of review—abuse of discretion that results in serious prejudice—and then determining that Laws had failed to meet it.<sup>230</sup> The court emphasized Laws's failure to show how he would have presented his case differently if he had been given additional time, and explained that even if Laws would have benefited from a continuance, there was no misconduct because there were several bases on which the arbitration panel could have reasonably denied the continuance.<sup>231</sup> These bases included Laws's failure to explain his own delay of propounding discovery, how additional time might have changed his

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223. *Id.* at 1407-08.

224. *Laws v. Morgan Stanley Dean Witter*, 452 F.3d 398, 399 (5th Cir. June 2006).

225. *Id.*

226. *Id.* at 400-01.

227. *Id.* at 399.

228. *Id.*

229. *Id.*

230. *Id.* at 400. This standard appears to be applicable to a district court's denial of a motion for continuance. The standard for reviewing an arbitrator's denial of the same is whether the error "so affects the rights of a party that it may be said that he was deprived of a fair hearing." *Id.* at 399 (quoting *El Dorado Sch. Dist. v. Cont'l Cas. Co.*, 247 F.3d 843, 848 (8th Cir. 2001)). The circuit court reviews the application of this rule de novo. *Id.* The Fifth Circuit here appeared to blend these standards by concluding both that Laws was not prejudiced and that Laws was not deprived of a fair hearing. *Id.* Whether these are exact synonymous or merely similar remains to be seen.

231. *Id.*

preparation, and whether a hearing delay might be inequitable.<sup>232</sup> On these facts, the result was fairly broad: to show misconduct, the party seeking vacatur of an arbitration award must present evidence showing actual prejudice.<sup>233</sup>

The *Laws* decision is short, but it underlines the challenges of vacatur—limited review on both statutory and non-statutory grounds.<sup>234</sup> A claim of misconduct, like a public policy claim or a claim of “manifest disregard,” requires a showing by the party contesting the arbitrator’s decision.<sup>235</sup> *Laws* failed to demonstrate actual prejudice.<sup>236</sup>

#### 4. *Deference to Labor Arbitrator Results in Vacatur Reversal: Resolution Performance Products, L.L.C. v. Paper Allied Industrial Chemical & Energy Workers International Union, Local 4-1201*

In *Resolution Performance Products, L.L.C. v. Paper Allied Industrial Chemical & Energy Workers International Union, Local 4-1201*, Resolution Performance Products (RPP) purchased a subsidiary of Shell Oil and adopted the collective bargaining agreement (CBA) in place at the time of the transaction.<sup>237</sup> Though Shell’s past practice was to use union members for maintenance work, RPP began employing only subcontractors.<sup>238</sup> When the union invoked the arbitration clause in the CBA, RPP argued that the terms of the agreement did not require it to employ union members.<sup>239</sup> The arbitrator found for the union because by RPP’s adoption of the CBA, it had agreed to continue, at least in part, the past practices under that agreement.<sup>240</sup>

RPP successfully sought vacatur in federal district court, where the court found that the arbitrator had erred by considering past practices in interpreting the agreement.<sup>241</sup> The union appealed.<sup>242</sup>

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232. *Id.* at 400-01.

233. *See id.*

234. *See id.* at 399-401.

235. *See id.*

236. *See id.*; Nat’l Arbitration Forum, *Arbitration Panel’s Award Upheld Despite Refusal to Grant Continuance*, <http://www.adrforum.com/adupdate/arbitrationpanels.htm> (last visited Mar. 23, 2008).

237. *Resolution Performance Prods., L.L.C. v. Paper Allied Indus. Chem. & Energy Workers Int’l Union, Local 4-1201*, 480 F.3d 760, 761 (5th Cir. Mar. 2007).

238. *Id.* at 762-63.

239. *Id.* at 763.

240. *Id.*

241. *Id.* at 764. The court relied on *Beaird Industrial, Inc. v. Local 2297, International Union*, “which directs vacatur where the arbitrator acts contrary to an express provision of the CBA, because Article III of the CBA unambiguously did not require RPP to maintain a fixed number of maintenance workers.” *Id.* (citing *Beaird Indus., Inc. v. Local 2297, Int’l Union*, 404 F.3d 942, 944 (5th Cir. 2005)).

242. *Id.*

Deference to arbitration awards carried the appeal even though the court might have reached a different conclusion: “a court must affirm an arbitral award “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.””<sup>243</sup> By affirming the award and reversing the district court, the Fifth Circuit determined that the arbitrator had rightfully found that the CBA was ambiguous regarding RPP’s right to employ subcontractors.<sup>244</sup> Because of this ambiguity, the arbitrator enjoyed wide latitude when construing the agreement, and as the court stated, “mere disagreement with the performance of that task is not alone a basis for vacating the award.”<sup>245</sup> Thus, while the circuit court might have found otherwise *de novo*, it deferred to the arbitrator by reversing the trial court’s vacatur.<sup>246</sup>

5. *Misconduct, Prejudice, or Blatant Disregard Required for Vacatur:*

*American Laser Vision, P.A. v. Laser Vision Institute, L.L.C.*

In *American Laser Vision, P.A. v. Laser Vision Institute, L.L.C.*, two eye surgeons comprising American Laser Vision (ALV) contracted with the Laser Vision Institute (LVI) to provide surgery support services.<sup>247</sup> LVI’s relationship with one of the doctors soured after a few months, and that doctor left.<sup>248</sup> The disgruntled doctor eventually bought out the other doctor’s interest in ALV and sought over \$3 million in lost revenue from LVI.<sup>249</sup> The arbitrator awarded the disgruntled doctor over \$1.8 million plus interest and attorneys’ fees in an unreasoned award.<sup>250</sup> The district court affirmed the award, and LVI appealed.<sup>251</sup>

The Fifth Circuit began its opinion with familiar deference:

Judicial review of an arbitration award is “exceedingly deferential.” Vacatur is available “only on very narrow grounds,” and federal courts must “defer to the arbitrator’s decision when possible.” An award must be upheld as long as it “is rationally inferable from the letter or purpose of the underlying agreement.” Even “the failure of an arbitrator to correctly apply the law is not a basis for setting aside an arbitrator’s award.” “It is only when the

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243. *Id.* at 765 (quoting *Beird*, 404 F.3d at 944).

244. *Id.* at 768 (“In sum, the CBA did not clearly allow RPP to subcontract out the maintenance work. The arbitrator resolved the dispute over this uncertainty by precluding subcontracting, a resolution we cannot fault, footed as it is in the terms of the contract.”).

245. *Id.* at 766.

246. *See id.* at 764-65 (“Even where a court would have interpreted the contract differently, a court must still affirm the award.”).

247. *Am. Laser Vision, P.A. v. Laser Vision Inst., L.L.C.*, 487 F.3d 255, 257 (5th Cir. May 2007) (*per curiam*).

248. *Id.*

249. *Id.* at 258.

250. *Id.*

251. *Id.*

arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.” Moreover, “the arbitrator’s selection of a particular remedy is given even more deference than his reading of the underlying contract,” and “the remedy lies beyond the arbitrator’s jurisdiction only if there is no rational way to explain the remedy . . . as a logical means of furthering the aims of the contract.”<sup>252</sup>

Given that LVI alleged that the arbitrator had manifestly disregarded the law, the court’s review was limited.<sup>253</sup> The court found that the facts justified the arbitrator’s construction of the contract, interpretation of the notice provisions, and the amount of damages awarded.<sup>254</sup> Because the record supported the arbitrator’s findings, the court affirmed the award with a warning: “There are advantages and disadvantages in contracting for private resolution of a dispute announced without explanation of reason. When a party does so and loses, federal courts cannot rewrite the contract and offer review the party contracted away.”<sup>255</sup>

Thus, the Fifth Circuit continues to require some affirmative showing of misconduct, prejudice, or blatant disregard to vacate an arbitration award.<sup>256</sup> Commentators have explained that though *American Laser* is not groundbreaking, it is “helpful as a recent and cogent explanation of the analysis on these two fairly common grounds parties assert when attempting to appeal arbitral awards.”<sup>257</sup> This case also serves to reaffirm the limited review available for arbitration awards.<sup>258</sup>

#### IV. CONCLUSION

During the survey period, the Fifth Circuit continued to review arbitration agreements and awards with deference.<sup>259</sup> Though rendered after the survey period, the Supreme Court’s *Mattel* opinion is noteworthy because it alters the Fifth Circuit’s thirteen-year practice of allowing parties to contract for expanded judicial review. Combined with *Ferrer*, two certiorari grants, dozens of Fifth Circuit opinions, and multiple pending Congressional bills, arbitration law remains an active and evolving area.

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252. *Id.* at 258-59 (citations omitted).

253. *Id.* at 259 (explaining that vacatur is rare, but warranted when the contract is not the basis for the award).

254. *Id.* at 259-60.

255. *Id.* at 260.

256. *See id.* at 258-59.

257. Disputing: Conversations About Dispute Resolution, *Fifth Circuit Confirms Arbitration Award*, <http://www.karlbayer.com/blog/?p=122> (May 18, 2007, 9:19 am).

258. *See Am. Laser*, 487 F.3d at 260.

259. *See supra* Part III.