No. 02-215

In The
Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., ET AL.,

Petitioners,

v.

JEFFREY BOOK, D.O., ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES

TREATISES

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

INTEREST OF *AMICUS CURIAE*

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary practice involves the protection and representation of consumers.[1] Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. Consistent with its goal of promoting justice for consumers, NACA has appeared as *amicus curiae* before a number of federal and state appellate courts including appearing as *amicus curiae* before the United States Supreme Court in *Heintz v. Jenkins*, 514 U.S 291 (1995), in support of the consumer's contention, adopted by the Court unanimously. It has also advocated the interests of consumers in the areas of home ownership, automobile lemon laundering and consumer credit before federal administrative agencies.

NACA submits this brief in order to address arguments not fully made in the parties' briefs and to discuss the issues before the Court in light of their impact upon consumers.

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[1] Both Petitioners and Respondents have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, NACA states that no counsel for any party authored this brief in whole or in part and that no person other than NACA, its counsel, and its members contributed monetarily to the preparation or submission of this brief.

NACA is concerned that some arbitration providers have conceived and implemented arbitration procedures without adequately taking the special nature of consumer transactions into account, with the result that these procedures sometimes deprive consumers of meaningful opportunities to present their claims. NACA wishes to assist the Court in making a decision that will enable all participants in arbitrations to have a meaningful opportunity to be heard and to vindicate their legal rights.

SUMMARY OF ARGUMENT

Studies of decisions rendered pursuant to certain arbitration programs, including programs administered by the National Arbitration Forum and by certain HMOs, reveal disturbing patterns of unfair bias against consumers. At least one arbitration provider, the National Arbitration Forum, almost openly markets its bias to sellers of consumer goods and services. The National Arbitration Forum has also adopted rules that can, under certain circumstances, put consumers at a significant disadvantage in the presentation of their claims.

Given the apparent unfairness that seems to exist in these particular forums and the potential for other forums to evolve in similar directions, the courts should reserve to themselves the role of gatekeeper to distinguish between fair and unfair arbitration forums and to ensure that consumers are not forced into forums that unfairly impair their claims. This is particularly true when the alleged unfairness results from the actions of the arbitration provider itself.

Where as here, an arbitration agreement is alleged to be unenforceable because it contains an unconscionable term, the Court should not rewrite the agreement to make it enforceable. To do so would be inconsistent with the FAA's requirement that arbitration agreements be enforced as written, would be an improper application of basic contract law, and would invite overreaching sellers to include unconscionable provisions in their arbitration clauses for tactical advantage.

Finally, because the grounds upon which a court may review the results of an arbitrator's decision are extremely narrow, a relatively extraordinary error is required to set aside such a decision. Accordingly, empowering an arbitrator to decide in the "first instance" whether a statutory remedy is available to the Respondents is for all practical purposes authorizing a final decision by the arbitrator, with little likelihood of any meaningful review.

ARGUMENT

I. The Courts Should Protect Consumers From Arbitration Requirements That Are Unconscionable or Prevent the Vindication of Important Statutory Rights

The role of arbitration has dramatically changed in recent years. It is no longer primarily a tool for resolving commercial disputes between sophisticated parties. Increasingly, consumers who seek to borrow money, purchase a home or a car, contract for telephone or other services, or even use the Internet are presented with contracts requiring them to submit disputes to arbitration.

These arbitration contracts are not merely used to streamline the process of resolving disputes. Instead, they are increasingly being used to unfairly thwart consumer rights and remedies.

There is evidence that some arbitration providers, notably the National Arbitration Forum, a for-profit entity based in Minnesota, have tilted the arbitration playing field against consumers by operating forums that are consistently and unfairly biased against consumers. The pattern of unfair bias is demonstrated in the decisions of their arbitrators and can be understood by looking at their procedures and the impact of those procedures on consumer claims.

It is incumbent upon courts to ensure that arbitration is not misused in this fashion. Under Section 2 of the Federal Arbitration Act, courts should refuse to enforce arbitration agreements if they are unconscionable, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), or if they prevent the vindication of statutory rights. *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

A. Studies Reveal Significant Biases in the Outcomes of Arbitrations Conducted by Certain Providers, including HMOs and the National Arbitration Forum

There is significant evidence of actual bias in the results obtained in arbitrations administered by certain entities.

The California Research Bureau, a non-partisan agency within the California State Library, studied the results of arbitration by California HMOs. The Bureau issued a report finding that arbitrators were 20 times more likely to enter summary judgment for HMOs than were courts and that the awards to plaintiffs by arbitrators were lower than those by courts. Marcus Nieto & Margaret Hosel, California Research Bureau No. 00-09, *Arbitration in California Managed Health Care Systems* 18 (Dec. 2000).[2] The Bureau also found that 30 percent of one HMO's claims were decided by 8 repeat arbitrators (five or more arbitrations each) and that six of these eight repeat arbitrators ruled in favor of the HMO in four-fifths of their cases. By contrast, in each of 3 instances in which an arbitrator awarded a plaintiff more than $1,000,000, the arbitrator was not employed in any other cases. Nieto and Hosel, at 22-23.

Another study, reviewing arbitrations administered by the National Arbitration Forum, suggests that NAF influences the selection of decision makers for the benefit of repeat players. Michael Geist, a Professor at the University of Ottowa Law School, found that NAF Arbitrators rule for the complainant in internet domain dispute resolutions far more often than arbitrators from other providers, because of NAF's practice of "granting an ever-larger share of its caseload to a small group of panelists."

[2] This report is available in two parts from the California State Library's web site at the following addresses: http://www.library.ca.gov/crb/00/09/00-009.pdf (report) and http://www.library.ca.gov/crb/00/09/Appendix_009.pdf (appendix).

New UDRP Study Finds Forum Shopping, Panel Problems, ADRWorld.com (March 26, 2002).[3] The study found that three of NAF's busiest arbitrators decided all 324 out of 324 cases in favor of complainants in default cases, while noting that default cases in this setting are not automatic wins in front to non-NAF arbitrators because of the UDRP's proof requirements.[4] *Id*.

Perhaps the most striking evidence of bias was revealed in interrogatory answers filed in *Bownes v. First USA Bank, N.A.*, Civil Action No. 99-2479-PR (Cir. Ct. Montgomery Cty., Alabama). In an interrogatory response in that case, First USA stated that it had prevailed in 19,618 cases before the National Arbitration Forum while its card members had prevailed in only 87 cases. Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post (March 1, 2000). First USA's success rate of 99.6% is astounding and strongly suggests that the National Arbitration Forum is unable to provide a fair and unbiased mechanism for resolution of disputes involving First USA.

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[3] This article can be found on the ADRWorld.com website at the following address: http://www.adrworld.com/opendocument.asp?Doc=uLrb7JKqR0&printerfriendly=1&limit=300&code=UuhOoC6V (subscription required). A copy of the article is included at page 2 of the Appendix to this brief.

[4] UDRP refers to the Uniform Domain Name Dispute Resolution Policy as set forth by the Internet Corporation for Assigned Names and Numbers ("ICANN") on its website and incorporated into domain name registration agreements. The policy can be found at http://www.icann.org/udrp/udrp-policy-24oct99.htm.

B. Arbitration Providers Like the National Arbitration Forum Have the Ability to Create Forums That Are Unfairly Biased Against Consumer Claims

There are many potential sources of bias in consumer arbitrations. Arbitration providers have the ultimate control over the fairness of their arbitration because they have control over their rules. These rules may appear neutral on their face, but may in reality unfairly bias the arbitration process. Unfair bias can arise as a result of the internal workings of a particular rule, or as a result of the interplay between the rule and a particular party or a particular kind of dispute. Consideration of some of the National Arbitration Forum's Rules illustrates the way such unfair bias can occur.

1. Repeat Player Bias Can Result From the Interplay Between Rules like the National Arbitration Forum's Confidentiality Rule and Repeat Players' Experiences With the Forum

The results of the studies discussed above suggest a substantial amount of what has been called "repeat player bias."

In the consumer context, the repeat player is almost always the seller of the goods and services from which the dispute arises. Repeat players typically exercise control over the designation of the forum by unilaterally drafting the arbitration clause and presenting it to the consumer as a non-negotiable part of a form contract. The consumer's choice is to either accept the contract or forgo the purchase.

Repeat player bias can appear as an unfair advantage for the repeat player within an otherwise neutral forum. Such bias can be fostered by rules like the National Arbitration Forum's confidentiality rule.[5] Repeat players are able to gain an advantage by cataloging their own experience with the forum. The confidentiality rule makes it virtually impossible for infrequent users such as consumers to access this same information.

This information can afford repeat players an advantage in the manner in which they present cases to decision makers. Prior knowledge of how a particular decision maker has responded to particular arguments allows repeat players to tailor presentations to individual decision makers. Absent such knowledge, consumers have no similar opportunity.

This information can also afford repeat players an advantage in the manner in which decision makers are selected. The National Arbitration Forum provides participants with a list of arbitrators equal in number to the number of parties plus the number of arbitrators required to hear the case, then allows each party to strike one arbitrator.[6] A repeat player in this system has a superior ability to exclude the arbitrator who has demonstrated in the past that he or she is most likely to render an unfavorable decision.

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[5] National Arbitration Forum Rule 4. (The National Arbitration Forum Rules referenced herein are set forth on page 1 of the Appendix to this brief.)

[6] National Arbitration Forum Rule 21(D).

This type of advantage may well explain some of the bias found in the California Research Board's report on HMO arbitration. To the extent HMOs were able to use secret information to steer cases away from arbitrators with a history of making large awards, they would have an of unfair advantage over the consumers making claims.

2. Repeat Player Bias Can Also Result From Business Relationships Between Repeat Players and an Arbitration Forum

Repeat player bias can also appear in the form of unfair conduct by the administrator of the forum. Such bias can be driven by the arbitration provider's need for repeat business. The potential for this sort of bias is well documented. The Equal Employment Opportunity Commission has stated that "results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitration." Gilbert F. Caselias, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 11 EEOC Compliance Manual at 8 (July 10, 1997). *See also* David Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisc. L. Rev. 33, 61 ("[T]he independent arbitration companies have an economic interest in being looked on kindly by large institutional corporate defendants who can bring in repeat business.").

While it is not clear why First USA Bank was able to win 99.6% of its arbitrations in the National Arbitration Forum, it is clear that by using the Forum for almost 20,000 arbitrations, First USA Bank represented a significant amount of business for the Forum. Given this

extraordinary volume of business it is hard to imagine that the Forum functioned as anything other than an extension of First USA's general counsel's office.

3. Arbitration Rules Like the National Arbitration Forum's Loser Pays and Capped Claims Rules Can Be Additional Sources of Unfair Bias in Consumer Arbitrations

Other rules, such as the National Arbitration Forum's "loser pays" rule, which permits the award of fees and costs to any party,[7] and its "capped claim" rule, which prohibits awards in excess of the amount claimed,[8] can significantly bias a forum against consumer claims.

Although loser pays rules are promoted as deterrents to frivolous litigation, they penalize all claimants. Loser pays rules essentially reduce the value of a claim by the amount of a possible loser pays award multiplied by the probability of suffering the loser pays award. For example, a claim valued at $12,000 on its face may be worth $9,000 if the claimant has a 75% chance of success. The value of the claim is reduced to $8,000 if a loser pays rule introduces a 25% chance of suffering a $4,000 loser pays award. Every claim has some element of risk. Accordingly, loser pays rules operate to reduce the value of all claims, not just frivolous claims. The smaller the claim relative to the fees and costs at stake, the greater the impact of the loser

[7] National Arbitration Forum Rule 37(C).

[8] National Arbitration Forum Rule 37(B).

pays rule. As a result, the effect of the rule on small consumer claims can be particularly harsh.

Although loser pays rules are widely sought by the tort reform lobby, they have not been widely implemented in most U.S. jurisdictions. To the extent that they apply to consumer claims, federal and state rules awarding fees to prevailing defendants are typically limited to instances in which the factfinder determines the plaintiff's claim to be frivolous,[9] thereby avoiding negative impact on the vast majority of non-frivolous claims asserted in courts.

The National Arbitration Forum's loser pays rule can be a further source of bias against consumer cases because it turns the economics of those cases upside down. Most state and federal consumer protection statutes award attorney's fees to prevailing consumers as an incentive to ensure that consumers with small claims have access to the courts. By enforcing a loser pays rule, an arbitration provider can effectively neutralize this important and widely granted incentive.

Another National Arbitration Forum rule that biases that forum against consumers is its capped claim rule. Under the capped claim rule, if an arbitrator decides that the evidence supports an award in excess of the amount

[9] A typical example of such a rule under federal law is the Fair Debt Collection Act, 15 U.S.C. § 1621k(a)(3), which requires a finding that an action was brought "in bad faith and for the purpose of harassment" as a prerequisite to an award to the defendant. The Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.50(c) is typical of many state consumer protection laws in limiting awards of fees to defendants to actions that were "groundless in fact or law or brought in bad faith, or brought for the purpose of harassment."

requested, he or she must disregard the evidence and award the smaller amount.

The significance of this rule was emphasized in a February 24, 1997 letter from Ed Anderson, Managing Director of the National Arbitration Forum to Richard Shepherd, General Counsel of Saxon Mortgage, Inc.[10] In the letter, Mr. Anderson thanked Mr. Shepherd for sharing a copy of Saxon's arbitration clause and expresses disappointment that Saxon invoked the rules of "the other guys." Mr. Anderson pointed out that all arbitration systems are not the same and in particular noted that failure to "have a claim capped could have drastic consequences." He closed the letter with his wish that a future version of the clause would designate the NAF as the arbitration provider.

Mr. Anderson also touted the effect of the Forum's rules on the desirability of arbitration for businesses in an interview with a magazine targeted to corporate counsel. Mr. Anderson described the Forum's loser pays rule as making "[t]he economics of dispute resolution by arbitration . . . entirely different from the economics of bringing lawsuits." *Do An LRA: Implement Your Own Civil Justice Reform Program NOW*, Metropolitan Corporate Counsel (Aug. 2001).

The clear import of the discussion with Mr. Anderson was that NAF's arbitration rules afford businesses

[10] A copy of this letter is included at page 6 of the appendix to this brief, as one of a series of letters (appendix 4-7) between NAF and Mr. Shepherd touting the NAF.

substantive legal advantages in their disputes with consumers that they would not find in court proceedings.

4. An Arbitration Forum Can be Unfairly Biased as a Result of Other Factors

Of course, arbitration rules are not the only potential sources of unfairness in consumer arbitrations. As the Court recognized in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000), high arbitration fees and costs can potentially bar the claims of consumers who do not have the means to pay.

Similarly, as is at issue in the case at bar, sellers of consumer goods and services can attempt to gain advantage in arbitration by explicitly altering the rules of the forum or by including other limitations on rights or remedies in the terms of the arbitration agreement. The bias can be overt, as would be the case if the term applies only to the consumer, or covert, as would be the case if the term applies to both parties, but applies to a right or remedy only of value to the consumer.

5. Cumulative Unfair Bias in An Arbitration Forum Can Effectively Bar Small Consumer Claims

There may not be any single overridingly unfair feature of a particular arbitration forum. Even so, the sum total of lesser unfairnesses and biases can rise to the level of unconscionability. This is particularly true for consumers as their claims, while meritorious, are often small and therefore sensitive to even minor impediments. Of course, the converse is true for large consumer claims. Such

claims may be relatively unaffected by certain kinds of impediments, such as a loser pays rule.

Arbitration's claim of superior efficiency is founded in large part upon its flexible procedures. However, when those procedures are abused in the ways described above or in new ways not yet invented, many consumers risk being stripped of their right to basic fairness.

Ironically, many meritorious consumer claims are not large enough to be economically viable in the current legal system. The promise of consumer arbitration is that reduced legal fees and increased efficiency can revive such small claims. However, in the wrong forum, the bias against consumer claims can devalue those claims to such an extent that no amount of efficiency and fee reduction can make them viable.

C. Courts Must Act As Gatekeepers to Protect Consumers From the Unconscionable Use of Biased Arbitration Forums

A gatekeeper is necessary to distinguish in individual cases between reasonable agreements to arbitrate and arbitration agreements that are unconscionable or that prevent the vindication of statutory rights. As the Court noted in *Green Tree Financial Corp. v. Randolph*, this inquiry is essentially a factual one. *Green Tree*, 531 U.S. at 91-92. Given the variety of arbitration forums and the flexibility with which arbitration providers and the drafters of arbitration contracts can adjust and modify the operation of the forums and given the myriad means by which unfair bias can be injected into the arbitration process, it is not possible to establish a one-size-fits-all rule that clearly distinguishes the acceptable from the

unacceptable. Each case must be judged according to its own circumstances.

The gatekeeper must be able to fairly examine not only the terms of the arbitration agreement, but the arbitration rules and procedures of the forums themselves to determine whether consumers have fair opportunities to present their claims.

It is not reasonable to rely upon an arbitrator to evaluate the fairness of his or her own forum subject only to the kind of oversight afforded by post-arbitration review under the FAA. The inherent conflict of interest involved is too great to rely upon such an evaluation to safeguard consumer interests.

It is therefore incumbent upon the courts, as provided in Section 2 of the FAA, to act as gatekeepers to ensure that consumers are not subjected to forums in which their access and ability to participate is impaired in an unconscionable manner or in a manner that prevents vindication of their statutory rights.

II. Courts Should Not Reward Overreaching By Rewriting Unconscionable Arbitration Clauses To Make Them Enforceable.

The Petitioner HMOs suggest to the Court that if it agrees with the courts below that the limitation on punitive damages language in the arbitration clause is impermissible, it should be severed from the arbitration clause and the remainder of the clause enforced. Brief of Petitioners at 40-43. The Court should not indulge this suggestion.

The Court has held that arbitration agreements are to be enforced according to their terms. *Volt Info Sciences, Inc. v. Bd. Of Trustees*, 489 U.S. 468, 479 (1989). If a court strikes illegal provisions or adds other provisions to an arbitration clause, it is not enforcing an agreement according to its terms, and thus violates (rather than follows) the FAA.

In essence, the Petitioners are proposing to amend the arbitration agreement. Their unilateral offer to amend need not be accepted by the Respondents, and the Court should not force such an amendment upon the Respondents. *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 779 (N.D. Ill. 2002); *Flyer Printing Co. v. Hill*, 805 So. 2d 829, 833 (Fla. Ct. App. 2001); and *Lelouis v. W. Directory Co.*, 2001 U.S. Dist. LEXIS 12517, *28 (D. Or. Aug. 10, 2001).

When a corporation drafts an unenforceable contract of adhesion, it is not the responsibility of a court to supply the legal acumen to re-write the contract to find a legal way for the drafter to enjoy the otherwise unobtainable results. As a comment to the Restatement (Second) of Contracts states, "a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable." Restatement (Second) of Contracts, § 184, comment b.

Finally, redrafting the arbitration clause after the fact would invite overreaching. The burden of proving a contract unenforceable is substantial, both in terms of the legal standard and the cost of litigating a fact intensive

inquiry into unconscionability. If the drafter of an arbitration agreement knows that the unconscionable portions of the agreement will simply be stricken, without risk of losing the benefit of the entire agreement, then it has every incentive to include unlawful provisions in such agreements, knowing that even if ultimately stricken, such provisions may deter claims from being filed or at the very least make claims more costly to pursue. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 124 (Cal. 2000); *Cooper v. MRM Investment Co.*, 199 F. Supp. 2d 771, 782 (M.D. Tenn. 2000); *Lelouis* at 2001 U.S. Dist. LEXIS at 12517 at *29.

III. Examining the Extremely Limited Grounds For Reviewing an Arbitrator's Decision Demonstrates That Empowering an Arbitrator to Decide an Issue "In the First Instance", is in Actuality, Authorizing a Final Decision

A court's authority to review or set aside an arbitrator's decision "'is among the narrowest known to the law.' For courts 'do not sit to hear claims of factual or legal error by an arbitrator[,] as an appellate court does in reviewing decisions of lower courts. . . .' In fact, 'federal court review of arbitral decisions is extremely narrow and extraordinarily deferential.'" *Coastal Oil v. Teamsters Local Union No. 25*, 134 F.3d 466, 469 (1st Cir. 1998) (citations omitted).

The narrow bases for overturning an arbitration decision are restricted to statutory or judicially created grounds.

The four statutory bases are found in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 10 and 11 (2002), and are limited to circumstances "relating to the breakdown in

the integrity of the arbitration process itself." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

The single judicially created basis requires that a decision be made in "manifest disregard of the law." *Id.* (*citing Wilko v. Swan*, 346 U.S. 427 (1953)). Courts have interpreted and applied these standards extremely narrowly, erecting a formidable barrier for a party seeking to vacate a decision and, for all intents and purposes, rendering an arbitrator's decision final.

A. The Four Statutory Bases

The FAA authorizes a court to vacate an arbitration award in four instances: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators, or either of them; (3) 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 that prejudiced a party's rights; or (4) 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. 9 U.S.C. § 10(a). Applying these standards, courts vacate arbitral decisions in only the most narrow circumstances.

1. Corruption, Fraud, Undue Means

A party seeking to vacate a decision under 9 U.S.C. § 10(a)(1), because it was procured by corruption, fraud, or

undue means, generally must show, by clear and convincing evidence, that the necessary misconduct occurred, was not discovered with due diligence before or during the proceeding, and that it was material to an issue in the arbitration. *See, e.g., Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988).

A decision that is attributable to corruption or fraud nevertheless will be enforced if the party challenging it could have discovered it and brought it to the arbitrator's attention before the decision was rendered. *See, e.g., Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.2d 815, 821 (8th Cir. 2001). Such a decision will also be enforced if there was no nexus between the corruption or fraud and the arbitrator's decision. *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990). *But see Bonar*, 835 F.2d at 1383-385.

The phrase "undue means," as used in this section to describe a basis for overturning an award, has been narrowly construed. In *Am. Postal Workers Union v. U.S. Postal Serv.*, for example, the court said that undue means was "limited to an action by a party that is equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator or other improper influence." 52 F.3d 359, 362 (D.C. Cir. 1995).

2. Evident Arbitrator Partiality or Corruption

In construing 9 U.S.C. § 10(a)(2) (2002), the Court has said that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). The

Court thus vacated an award based on bias where the arbitrator previously had conducted regular business as a consultant for one of the parties but had not disclosed this relationship to the opposing party. *Id.* at 147-48. Other courts have required compliance with this disclosure requirement. *See Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995).

But for challenges based upon such failures to disclose, a challenge based on arbitrator partiality or corruption "must establish specific facts that indicate improper motives on the part of the arbitrator" and that the "alleged impartiality [is] direct, definite, and capable of demonstration." *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000), *cert. denied*, 531 U.S. 878 (2000).

It is insufficient to rely merely on an individual arbitrator's financial interest outside the specific case being arbitrated. *See, e.g., Harter v. Iowa Grain Co.*, 220 F.3d 544, 555 (7th Cir. 2000). Nor have parties succeeded in showing structural bias based on an arbitration service provider's financial interests or its decisional record in other cases involving a party appearing before it in more than one matter. *See, e.g., The Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998).

3. Arbitrator Misconduct Concerning Postponement, Evidence, Etc.

A court may vacate an arbitration decision when an arbitrator has refused to postpone a hearing upon sufficient cause shown, 9 U.S.C. § 10(a)(3), but here too the party seeking to overturn the decision has a significant burden. *Floyd County Bd. of Educ. v. EUA Cogenex Corp.*, 19 F. Supp. 2d 735 (E.D. Ky. 1998), *rev'd*, 198 F.3d 245 (6th

Cir. 1999) (unpublished) (text available at 1999 U.S. App. LEXIS 29692). Noting that "a court's review of an arbitrator's decision not to postpone a hearing must necessarily be limited," 1999 U.S. App. LEXIS 29692 at *6, the court stated that the party seeking to vacate an award "must prove by clear and convincing evidence that the arbitrator had no reasonable basis for his decision." *Id.* at *7.

4. Arbitrators Exceeding Their Powers

The FAA provides that a court can vacate a decision when arbitrators exceed their powers or fail to render a final decision. 9 U.S.C. § 10(a)(4). Because arbitrators derive their powers from the parties' agreement and there is no federal policy favoring arbitration of claims the parties have not agreed to arbitrate, a court can vacate an award on a claim not covered by an agreement. *See, e.g., Geneva Secs., Inc. v. Johnson*, 138 F.3d 688, 692 (7th Cir. 1998). Courts have also declined to enforce arbitration awards that involve parties who were not subject to the underlying arbitration agreement or which granted relief the arbitrator was not authorized to award. *See, e.g., Pa. Power Co. v. Int'l Brotherhood of Elec. Workers Local 272*, 276 F.3d 174, 179 (3d Cir. 2001).

B. The Judicial Basis

While the FAA does not provide any grounds to vacate an arbitration decision related to the merits, the Court has recognized the availability of some judicial review of the merits of arbitral awards. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Despite the importance of resolving a claim according to the proper statutory standards and requirements, even here, in

contrast to the review of a lower court's ruling, judicial review is quite limited. *See, e.g., First Options*, 514 U.S. at 942; *Lattimer-Stevens Co. v. United Steelworkers of Am. Dist. 27*, 913 F.2d 1166, 1169 (6th Cir. 1990).

Courts reviewing the merits of an arbitration decision generally follow *First Options* and *Wilko* to determine whether the decision reflects a "manifest disregard of the law." While courts use different formulations of this standard, their decisions are consistent to the extent that it is a difficult standard to meet. Some courts draw a distinction between an arbitrator's misinterpretation of the law, which would not justify vacating an award, and a manifest disregard of the law. For example, in *Merrill Lynch, Pierce, Fenner & Smith, Inv. v. Jaros*, the Sixth Circuit stated that manifest disregard is "a very narrow standard of review. A mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal precedent." 70 F.3d 418, 421 (6th Cir. 1995). Moreover, the arbitrator must have refused to follow an applicable legal principle that was clearly defined and not subject to reasonable debate. *Id.*

Some courts also require proof that the party seeking to vacate the award had clearly informed the arbitrator of the controlling legal standard. Thus, the Second Circuit enforced a decision that denied a prevailing plaintiff attorneys' fees under the Age Discrimination in Employment Act (ADEA). While fees are mandatory under the Act, the court found the plaintiff's mere assertion that he was entitled to fees was insufficient to inform the arbitrator of the statutory requirement. *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 822-23 (2d Cir. 1997).

Other courts look at whether any basis in the record could justify the arbitrator's decision and will only vacate awards that are wholly irrational. In the Sixth Circuit, for example, an award must be confirmed if a court can find any legally plausible argument to support it. *Jaros*, 70 F.3d at 421. In the Second Circuit the arbitrator's "error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1987).

Because manifest disregard must be apparent on the face of the record, the significant burden placed on a party seeking to overturn a decision on this basis is compounded by the fact that arbitrators are not required to issue written decisions or to explain their decisions. The Sixth Circuit recognized this, stating:

> Where, as here, the arbitrators decline to explain their resolution of certain questions of law, a party seeking to have the award set aside faces a tremendous obstacle. If a court can find any line of argument that is legally plausible and supports the award, then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.

Jaros, 70 F.3d at 421.

The extremely limited bases for challenging an arbitral award, both under the FAA and the "manifest disregard" standard, and the significant burden placed on parties seeking to establish one of these bases, demonstrate that allowing an arbitrator to decide "in the first instance" whether a statutory remedy is available notwithstanding an explicit prohibition in the arbitration

clause will, in most instances, allow the arbitrator to render a final decision. This result should not be allowed as it creates too large a possibility that an erroneous determination will go unchallenged and flies in the face of the Court's ruling that parties must be able to vindicate their statutory rights in arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

CONCLUSION

For these reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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Attorney for the National Association of Consumer Advocates

January 13, 2003

Appendix

National Arbitration Forum

Selected Rules (June 1, 2001)

Rule 4. Confidentiality.

Arbitration proceedings are confidential, unless all Parties agree otherwise. A Party who improperly discloses confidential information shall be subject to sanctions. The Arbitrator, Director, and Forum staff shall not disclose confidential information. Parties may disclose Orders and Awards they receive.

Rule 21. Selection of Arbitrators.

D. For a Participatory Hearing in a matter which is not a Small Claim and in which the Claimant is an individual and not a business or other entity, the Director shall provide to each Party a list of Arbitrator candidates equal in number to the number of Parties plus the number of Arbitrators required under Rule 22. Each Party may notify the Director in writing, within ten (10) days of the date of receipt of the list, striking one of the candidates. A Party may request disqualification of any other Arbitrator in accord with Rule 23.

Rule 37. Awards.

B. An Award shall not exceed the money or relief requested in a Claim or amended Claim and any amount awarded under Rule 37(C).

C. An Award may include fees and costs awarded by an Arbitrator in favor of any Party as permitted by law or in favor of the Forum for fees due.

New UDRP Study Finds Forum Shopping, Panel Problems

March 26, 2002 By Staff Reporters, ADRWorld.com

A new study suggests that the outcome of cases under the Internet Corporation for Assigned Names and Numbers' domain name dispute resolution policy may depend on the arbitration provider selected by complainants, raising concerns about forum shopping under the policy.

Michael Geist, a professor at the University of Ottawa Law School and author of the study Fundamentally Fair.com, said his findings show that "nothing much has changed" to improve the Internet Corporation for Assigned Names and Numbers' (ICANN) Uniform Dispute Resolution Policy (UDRP). The study, which is a follow-up to a similar survey conducted by Geist last year, indicates that "things have actually gotten worse" with regard to differences between the outcomes of cases handled by different arbitration providers.

Geist also said the study shows that case outcomes can hinge on whether they are heard by a single arbitrator or a three-member panel.

The UDRP provides an expedited arbitration procedure to settle disputes over the registration of Internet domain names that may infringe upon a trademark or intellectual property. Currently, UDRP arbitrations are administered by three organizations: the CPR Institute for Dispute Resolution, the National Arbitration Forum and the World Intellectual Property Organization. A fourth provider, eResolution, quit the business earlier this year.

In August 2001, Geist released the results of Fair.com?: An Examination of the Allegations of Systematic Unfairness

in the ICANN UDRP, which identified problems with forum shopping – parties going to an arbitrator provider who is more likely to rule in their favor – and case outcomes. However, the study was criticized by some who said the results could be attributed to its inclusion of "default cases" where a respondent declined or otherwise failed to participate in the arbitration process.

The new study more clearly accounts for default and non-default cases, and the "default cases have no bearing on non-default issues," Geist said.

Geist said the follow-up study shows that for non-default cases, complainants won 70 percent of the time when the complainant selected either the World Intellectual Property Association or the National Arbitration Forum. Claimants who used eResolution to administer their arbitration won in 50 percent of the cases.

The study's analysis of default cases also showed differences between providers: Complainants won 98 percent of the cases before NAF, 92 percent of the cases before WIPO, and 79 of the cases before eResolution. Default cases are "not automatic wins" because complainants must still prove that a registration infringes on their trademark and meet other tests under the UDRP, and the study still indicates differences in outcomes, Geist said.

In addition, the study shows that three of NAF's busiest panelists have decided 324 out of 324 cases in favor of complainants in default cases with the two other busiest panelists deciding 184 out of 187 default cases in favor of the complainant.

The study also shows variations in cases when a complaint is heard by a single arbitrator versus a three-member

arbitration panel: Complainants won 68 percent of cases before a single arbitrator panel, but only 46 percent of those before a three-member panel, Geist said.

The study analyzed all 4332 cases completed as of Feb 18, 2002 and included a detailed look at the cases examined in the original study "to verify the accuracy of the data, the collection of default information" and new decisions since July 2001. The follow-up study "provides compelling evidence that forum shopping and suspect case allocation concerns continue to taint the fairness of the ICANN UDRP," according to Geist's report.

Geist said "there are some real systematic problems with the UDRP," and changes should be considered regarding selection of arbitration providers and using three-member arbitration panels for contested cases. In his report, he said with eResolution in bankruptcy, "NAF granting an ever-larger share of its caseload to a small group of panelists, and the red herring of defaults vs. non-defaults conclusively disproved, the need for ICANN UDRP reform has become increasingly urgent."

[LOGO] NATIONAL ARBITRATION FORUM

September 23, 1996

Richard E. Shephard
Asst. Gen'l Counsel
Saxon Mortgage, Inc.
4880 Cox Rd.
Glen Allen, VA 23060

Dear Richard:

Thanks for your call last week. It was good talking to you.

Following on our conversation, I am enclosing the **National Arbitration Forum's 1996 Arbitration Overview** for your review.

By adding arbitration language to your contracts, the National Arbitration Forum's national system of arbitration lets you minimize lawsuits, and the threat of lender liability jury verdicts.

We have successfully handled more than 20,000 creditor-debtor and other cases nationwide. You will probably be most interested in the **Gammaro** case that is enclosed since it involves the National Arbitration Forum in a mortgage transaction.

After you have had a chance to review these materials, I will give you a call. In the meantime, if you have any questions, do not hesitate to contact me.

Sincerely,

/s/ Brown
Curtis D. Brown, Esq.
Director of Development

CDB/ls
Enclosures

[LOGO] NATIONAL ARBITRATION FORUM

January 29, 1997

Richard Sheppard
General Counsel
Saxon Mortgage, Inc.
4880 Cox Rd.
Glen Allen, VA 23060

Dear Richard:

Enclosed is the information you requested. As these articles point out, arbitration has great advantages over litigation. There is no reason for Saxton Mortgage, Inc. to be exposed to the costs and risks of the jury system.

When considering arbitration providers, remember, all arbitration is not the same. The Forum's procedures offer the most rational system for lenders and their customers. At the **National Arbitration Forum**:

> Every issue is **resolved according to the law.**
>
> Every decision is **made by a legal professional.**
>
> Every award is **limited to the amount claimed.**
>
> Every claim is **decided on its own merits.**

To review further information regarding arbitration law and implementing arbitration in your business, give us a call at 800/474-2371.

Sincerely,

National Arbitration Forum

/s/ Leif Stennes
Leif Stennes
Policy Analyst

LMS:ls
Enc

[LOGO] NATIONAL ARBITRATION FORUM

Monday, February 24, 1997

Richard Shepherd
General Counsel
Saxon Mortgage, Inc.
4880 Cox Road
Glen Allen, VA 23060

Dear Dick:

Thank you for sending a copy of your arbitration clause. We were disappointed to see you had invoked the Rules of "the other guys".

All arbitration systems are **not** the same!

At the **National Arbitration Forum**:

Every issue is **resolved according to the law!**

Every decision is **made by a legal professional!**

Every award is **limited to the amount claimed!**

Every claim is **decided on its own merits!**

The failure to follow the law or to have a claim "capped" could have drastic consequences. We hope, when you redraft this form, we can convince you that our team of professionals can deliver better service for you and your customers.

Sincerely,

/s/ Edward C. Anderson
Edward C. Anderson
Managing Director

ECA:mkm

Enc

[LOGO] NATIONAL ARBITRATION FORUM

Friday, September 04, 1998

Richard Shepherd
Saxon Mortgage, Inc.
4880 Cox Road
Glen Allen, VA 23060

Dear Dick,

The presentations at the **1998 ABA Convention** confirmed what has become national knowledge: Arbitration can save financial providers millions of dollars *and* properly drafted **arbitration clauses will be enforced!**

There have been hundreds of pro-arbitration court opinions in the last year, as tens of millions of contracts have included arbitration clauses.

As analysis has become more sophisticated, it becomes increasingly important to conform arbitration agreements to the legal standards created by the courts. To that end, the **Forum** has adopted the *Consumer Due Process Standard*, setting out the minimum requirements for agreements adopting arbitration for consumer disputes. Conforming to the *Standard* will assure that an arbitration clause meets legal requirements throughout the country.

The *Code of Procedure* of the **National Arbitration Forum** has been the choice of more businesses in the last year than any alternative. To learn why, talk to the lawyers on the attached list or give us a call at 800/474-2371.

Sincerely,

/s/ Edward C. Anderson
Edward C. Anderson
Director

ECA:mkm

Enc