

***Timely Topics in Arbitration and  
Mediation: an ADR Bonanza:***

***Arbitration and Mediation  
in Tennessee: Case Law and  
Statutes.***

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# Survey of Arbitration and Mediation

- **Federal cases.**
- **Tennessee cases.**
- **Federal and State Statutes and Rules**
- **Thoughts on Mediation**
- **Class Actions in Arbitration.**
- **International Arbitration**
- **Drafting Arbitration Clauses**

- Federal Cases-
- United States Supreme Court cases

# Hall Street Associates L.L.C. v. Mattel, Inc. 128 S. Ct. 1396 (2008)

- Environmental clean-up when tenant moved out.
- Issue is whether “**implausibility**,” which is not listed as a ground for avoiding an arbitration award under 9 U.S.C. §§ 10 or 11, may nevertheless be used to avoid an award.
- “To that particular question we think the answer is yes, that the text compels a reading of the §§ 10 and 11 categories as exclusive. To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally.” Id. at 1404.
- “Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as **substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway**. Any other reading opens the door to the full-bore legal and evidentiary appeals that can “rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process,” Id. at 1405.

## Hall Street Associates, L.L.C. (cont.)

- “In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review **based on authority outside the statute as well**. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under **state statutory or common law**, for example, where judicial review of different scope is arguable.” Id. at 1406.
- One unusual feature, however, prompted some of us to question whether the case should be approached another way. The **arbitration agreement was entered into in the course of district-court litigation**, was submitted to the District Court as a request to deviate from the standard sequence of trial procedure, and was adopted by the District Court as an order. See App. 46-47; App. to Pet. for Cert. [\*\*\*32] 4a-8a. Hence a question raised by this Court at oral argument: should the agreement be treated as an exercise of the District Court's authority to manage its cases under *Federal Rules of Civil Procedure 16*? Id. at 1407.

**United States Supreme Court**  
**Prima Paint Corp. v. Flood & Conklin,**  
**388 U.S. 395 (1967.)\***

- U.S.S.C. determines **that it is for the arbitrator and not the Federal Courts to determine whether fraud in the inducement** of a contract. It is a matter of national substantive law” and “governs even in the face of a contrary state law.” Id. at 399-400.
- “This contractual language is easily broad enough to encompass Prima Paint’s claim that both execution and acceleration of the consulting agreement itself were procured by fraud. Indeed, no claim is made that Prima Paint ever intended that ‘legal issues’ relating to the contract be excluded from arbitration, or that it was not entirely free so to contract. Federal courts are bound to apply rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power...not intended by Congress to delay granting of a § 3 stay.” Id. at 406.
- \* **Full Cite in Bibliography on all U.S.S.C. cases.**

# Southland Corporation v. Keating, 465 U.S. 1 (1984).

- Number of 7-11 franchisees brought actions in California state court, invoking violation of California Franchise Investment Law, among other causes of action.
- Superior Court compelled arbitration on all causes of action **except under California Franchise Investment Law**. California Court of Appeals reversed and decided F.A.A. required arbitration of all causes of action. California Supreme Court reversed Court of Appeals.
- Chief Justice Burger writing for majority, first states that U.S.S.C. has jurisdiction to decide whether F.A.A. preempts California Franchise Investment Law.
- “In enacting §2 of the federal Act, Congress declared a **national policy favoring arbitration** and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. Id. at 9.

## Southland, (cont.)

- “We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under State law.” Id. at 11.
- “Although the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable **only** in the federal courts.” Id. at 12.
- “This **broader purpose** can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce.” Id. at 13.
- “The **problems** Congress faced were therefore twofold: the old common law hostility towards arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements.” Id. at 14.
- “In creating a substantive rule **applicable in state as well as federal courts**, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. We hold that § 31512 of the California Franchise Investment Law **violates the Supremacy Clause.**” Id. at 16.

# Allied-Bruce Terminix v. Dobson

## 513 U.S. 265 (1995)

- After inspection and sale, termite infestation. Terminix moved for stay to do arbitration per contract. Alabama had a predispute arbitration statute which stated that the F.A.A. only applied if at time contract entered, parties contemplated “substantial interstate” activities. Alabama Supreme Court ruled that was not case here and therefore no arbitration allowed.
- “After examining the statute's language, background, and structure, we conclude that the word "involving" is broad and is indeed the functional equivalent of "affecting." Further, this Court has previously described the Act's reach expansively as coinciding with that of the *Commerce Clause*.” Id. at 273-274.
- .” And, we conclude that the word "involving," like "affecting," signals an intent to exercise Congress' commerce power to the full.” Id. at 277.
- “For these reasons, we accept the **"commerce in fact" interpretation, reading the Act's language as insisting that the "transaction" in fact "involve" interstate commerce, even if the parties did not contemplate an interstate commerce connection.**” Id. at 281.

## Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, (2003).

- Home improvement loan in South Carolina. Several different suits filed. Trial court certified class action and ordered arbitration. Supreme Court of South Carolina ruled that since agreement silent on class action, they were permitted and thus ordered the same. Green Tree argues that contracts forbid class actions.
- Supreme Court notes that contract clause provides for “arbitration of all contract related disputes.” Id. at 447
- Dissolves South Carolina Supreme Court judgment and remands “so that the question may be resolved in arbitration,” Id. at 447.
- “The question here--**whether the contracts forbid class arbitration**--does not fall into this narrow exception. It concerns neither the validity of the arbitration clause nor its applicability to the underlying dispute between the parties... (Cite omitted.) Rather the relevant question here is **what kind of arbitration proceeding the parties agreed to**. That question does not concern a state statute or judicial procedures... (Cite omitted.) It **concerns contract interpretation and arbitration procedures**. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.” Id. at 422-423.
- That being so, we **remand the case so that the arbitrator may decide the question of contract interpretation**--thereby enforcing the parties' arbitration agreements according to their terms. Id. at 424.

# Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006).

- Plaintiff asserted in Florida Circuit Court that personal check cashing transaction was **highly usurious** and therefore criminal and **thus void ab initio**.
- Trial Court refused to enforce arbitration agreement based on alleged illegality. Fourth District Court of Appeals reversed, and it was in turn **reversed by Supreme Court of Florida, because enforcing an unlawful contract would violate state public policy and contract law**.
- “To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (cite omitted). Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts.” Id. at 443.
- “We reaffirm today that regardless of whether the challenge is brought in federal or state court, **a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.**” Id. at 448.

# Alexander V. Gardner-Denver Co.

*415 U.S. 36 (1974).*

- Started as grievance under collective bargaining agreement and then a Title VII racial discrimination charge added. Agreement called for arbitration and Title VII called for E.E.O.C. hearing. Lower Court held Plaintiff had waived Title VII by arbitrating and dismissed Title VII action.
- “Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.” *Id.* at 57-58.

# Alexander (cont.)

- “Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.” Id. at 58.
- “We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices **can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII.**” Id. at 59-60.

14 Penn Plaza LLC v. Pyett  
129 S. Ct. 1456 (2009)

- Union and management freely negotiated arbitration provision in collective bargaining agreement. Age discrimination claim. Union tried to withdraw it from arbitration because of subsequent contract. Employee later filed with E.E.O.C. When he sued, Management sought stay to arbitrate and denied.
- “Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. **Congress has chosen to allow arbitration of ADEA claims.** The Judiciary must respect that choice. The CBA's arbitration provision is also fully enforceable under the *Gardner-Denver* line of cases.” Id. at 1466.
- “We hold that a **collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law.**” Id. at 1474.

Mastrobuono v. Shearson Lehman Hutton, Inc.  
514 U.S. 52 (1995)

- Shearson husband-wife client started securities trading account with arbitration provision and New York choice-of-law provision. Punitive damages not addressed in contract. Eventually file suit for compensatory and punitive damages due to serious mishandling of accounts. NASD arbitration panel awarded both nearly \$160,000 compensatory and \$400,000 punitive damages. Shearson moved to vacate punitive damages because New York Court of Appeals determined arbitrators could not award punitive damages.
- “Respondents drafted an ambiguous document, and they cannot now claim the benefit of the doubt. The reason for this rule is to protect the party who did not choose the language from an unintended or unfair result. That rationale is well suited to the facts of this case. As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard-form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners.” Id. at 87-88.

# Preston v. Ferrer

## 128 S. Ct. 978 (2008)

- Former Florida Judge a/k/a Judge Alex on T.V. sued his attorney/personal manager, claiming he was really an unlicensed talent agent subject to California's Talent Agency Act, which he claimed meant the Labor Commissioner had jurisdiction to hear and decide the matter. Superior Court and California Court of Appeals agreed and stayed arbitration pending hearing by Labor Commissioner. California Supreme Court refused to hear the matter.
- "In sum, we disapprove the distinction between judicial and administrative proceedings drawn by Ferrer and adopted by the appeals court. When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative." Id. at 987.
- "In *Mastrobuono*, we reached that open question while interpreting a contract with both a New York choice-of-law clause and a clause providing for arbitration in accordance with the rules of the National Association of Securities Dealers (NASD)." Following the guide *Mastrobuono* provides, the "best way to harmonize" the parties' adoption of the AAA rules and their selection of California law is to read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not the State's "special rules limiting the authority of arbitrators." Id. at 988-989.

# Scherk v. Alberto-Culver Co.

## 417 U.S. 506 (1974)

- Alberto-Culver bought 3 inter-related businesses existing under German and Liechtenstein laws. Contract signed in Austria and deal closed in Switzerland. Any controversy or claim to be arbitrated before Int'l. Chamber Commerce in Paris. Issues with trademarks, which also violated Securities Exchange Act. Based upon earlier U.S.S.C. case of Wilko, which had held arbitration agreement could not preclude judicial relief under that Act, Northern District of Illinois enjoined arbitration.
- Supreme Court distinguishes Wilko, which involved only U.S. parties and U.S. law. Here, as indicated, above many different countries' laws involved.
- “An agreement to arbitrate before a specified tribunal is, in effect, a **specialized kind of forum-selection clause** that posits not only the situs of suit but also the procedure to be used in resolving the dispute. The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a **"parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."** Id. at 519.
- Cites U.N. Convention, adopted subsequent to Wilko, also.

# Arthur Andersen LLP v. Carlisle

## 129 S. Ct. 1896 (2009)

- Andersen advised on tax shelter scheme, which I.R.S. subsequently determined was illegal. Arbitration provisions in their contracts. Here the unique issue is whether Courts of Appeal may review denials of stay by party, who was **not a party** to the arbitration agreement.
- “We hold that the Sixth Circuit had jurisdiction to review the denial of petitioners' request for a § 3 stay and that a **litigant who was not a party to the relevant arbitration agreement may invoke § 3 if the relevant state contract law allows him to enforce the agreement**. The judgment of the Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.” Id. at 1902.

- Tennessee Cases—  
Tennessee Supreme Court  
cases

Tennessee River Pulp & Paper Company v.  
Eichleay Corporation

637 S.W. 2d 853 (Tenn., 1982)

- Eichleay to expand Tennessee River's plant for cost of \$15,000,000.+. Contract provided that all claims to be decided under AAA Construction Industry Arbitration rules. Another paragraph said it was to be construed in accordance with Tennessee law. Eichleay seeking an additional \$4,000,000 in expenses. Demand for arbitration and Tennessee River filed in Davidson Chancery seeking stay of arbitration. Chancery Court determined FAA was supreme law of land and denied stay.
- "The extent to which this contract involves commerce is clear. The contract exceeds \$15,000,000.00 and is between two Delaware corporations; the plaintiff has its home office in Illinois, whereas, the defendant's home office is in Pennsylvania. The materials used, the labor employed, and the subcontractors involved, in substantial part, came to the project from outside Tennessee. Eichleay [\*\*7] purchased substantial quantities of materials and supplies from vendors in at least 26 states; and 34 per cent of all materials and supplies purchased by Eichleay were from out-of-state vendors. There is ample basis in the record to support the conclusion that the contract was one "involving commerce." Id. at 855.

## Tennessee River (cont.)

- Court of Appeals citing Prima Paint, supra, held that FAA did not supersede state law, which apparently permitted subsequent revocation.
- “The **majority rule in other state jurisdictions** has become that the **Act controls the enforceability of arbitration clauses** in contracts being litigated in state court. 2 95 A.L.R.3d 1145, § 4(a) at 1158 (1979). These jurisdictions recognize that *Prima Paint* holds that the Act pre-empts state law in federal court, but the **language of *Prima Paint* supports the holding that the Act also pre-empts state law in state courts.**” Id. at 857.
- “The supremacy clause, coupled with the sound judicial policy of discouraging unfair forum shopping, **compels us to adopt the majority rule.**” Id. at 857.
- “Fairness, logic, and constitutional constraints require us to enforce federal rights in state courts whenever Congress allows. **Congress has allowed state courts to enforce federal arbitration rights**, and has made state courts the exclusive forum for vindication of those rights except in those situations when the litigant can invoke federal jurisdiction on some independent ground.” Id. at 858.

## Buraczynski v. Eyring, M.D. 919 S.W. 2d 314 (Tenn., 1996)

- Consolidated medical malpractice cases. Dr. Eyring performed total right knee replacement. Two months later he got Bridges to sign a Physician-Patient Arbitration Agreement, which was **retrospective to date of first professional services**. In second case patient signed arbitration agreement 3 months before surgery. Complications with both surgeries. Court reviews history of arbitration. Notes that **some states have special statutes** that pertain to arbitration agreements between physicians and patients.
- “Tennessee has adopted a version of the **Uniform Arbitration Act**. Tennessee's version, like the Uniform Act, is general in its terms and does not specifically include physician-patient agreements. Tennessee has, however, not chosen to enact a specific statute governing arbitration agreements between health care providers and patients.” Id. at 318.
- “While we acknowledge the unique nature of the physician-patient relationship, **we think arbitration is as advantageous in this relationship** as in any other. We, therefore, join the unanimous authority from other states and conclude that arbitration agreements between physicians and patients **are not per se void as against public policy.**” Id. at 319.

## Buraczynski (cont.)

- “We also **disagree** with the contention that the arbitration **agreements are not enforceable because of the breadth** of their application. The question of whether a physician-patient agreement must be limited to a specific surgery or course of treatment was considered and rejected in *Hilleary v. Garvin*, 193 Cal. App. 3d 322, 238 Cal.Rptr. 247 (Cal. App. 1987). Like the agreements in this case, the agreement in *Hilleary* provided that any dispute as to medical malpractice will be determined by submission to arbitration.” Id. at 319.
- “Moreover, **arbitration is not precluded**, in the *Bridges* case because the medical treatment giving rise to this dispute was **rendered prior to the time she signed** the arbitration agreement.” Id. at 319.
- “Our conclusion that the contracts were **contracts of adhesion** is not, however, determinative of the contract's enforceability. Enforceability generally depends upon **whether the terms of the contract are beyond the reasonable expectations** of an ordinary person, or oppressive or unconscionable.” Id. at 320.

## Buraczynski (cont.)

- “Our examination of the arbitration agreements at issue in this case reveals **none of those oppressive provisions**. The agreements were not contained within a clinic or hospital admission contract, but are separate, one page documents each entitled "Physician-Patient Arbitration Agreement." A **short explanation was attached** to each document which encouraged the patient to discuss questions about the agreement with Eyring.” Id. at 321.
- “**None** of the above described provisions **can be construed as unconscionable, oppressive**, or outside the reasonable expectations of the parties. As such, the agreements, though contracts of adhesion, **are enforceable**.” Id. at 321.
- “Having determined that arbitration agreements between physicians and patients are not per se void as against public policy and that the specific agreements at issue in this case are enforceable, **we affirm in all respects the Court of Appeals' judgment** and remand to the trial court for further proceedings consistent with this opinion.” Id. at 321.

Frizzell Construction Company, Inc. v. Gatlinburg, L.L.C.  
9 S.W. 3d 79 (Tenn., 1999)

- Frizzell to build hotel for Gatlinburg. Standard arbitration provisions in contract. Frizzell filed Complaint to enforce mechanics lien and for breach of contract. Chancery Court retained jurisdiction to determine fraudulent inducement issues. Fraudulent inducement concerned Frizzell's misrepresentation of its experience. Contractor argued that under the F.A.A. arbitrator made all decision including issues of fraudulent inducement.
- “At least six out-of-state contractors participated in the construction of the hotel, at least nine employees were employed from outside Tennessee, and at least seven out-of-state vendors supplied more than \$ 380,000 worth of materials for the project. An Ohio corporation insured the project, and a Delaware corporation based in New Jersey issued a payment and performance bond along with a bond to discharge liens filed against the project as required by the contract. The construction financing was accomplished with the assistance of three out-of-state banks, and the purpose and scope of the agreement was to develop a commercial venture extending beyond Tennessee. When all of these factors are viewed together, it is clear that this contract is one that ‘involves commerce.’” Id. at 83.

## Frizzell Construction (cont.)

- “Because the contract in this case is one that involves interstate commerce, the FAA applies to ensure that the arbitration agreement between the parties is enforced according to its terms.” Id. at 83-84.
- “Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.” Id. at 84.
- “By stating that the contract is to be governed by Tennessee law, the parties have indicated their intention to arbitrate all disputes "arising out of, or relating to" their agreement--but only to the extent allowed by Tennessee law. “ Id. at 85.
- “Therefore, because Tennessee law contemplates judicial resolution of contract formation issues, we conclude that the parties have indicated their intention not to submit such issues to arbitration..... We also hold that the chancery court properly withheld the issue of fraudulent inducement from arbitration in accordance with the intention of the parties.” Id. at 85-86.

# Taylor v. Butler and City Auto Sales

## 142 S.W. 3d 277 (Tenn., 2004)

- Used car sale with prior car being sold for down payment. Financing declined after a week. Three day rescission provision. Repossessed vehicle. Buyer sued under Tennessee Consumer Protection Act. Dealer filed Motion to Dismiss to arbitrate. Granted by Trial court, but reversed by Court of Appeals because party cannot be forced to arbitrate fraudulent inducement claim.
- “In this case, the arbitration clause governs "all claims, demands, disputes or controversies of every kind or nature between [the parties] arising from the [sale of the vehicle]." The arbitration clause also states that arbitration shall be "conducted pursuant to the provisions of the Federal Arbitration Act, *9 U.S.C. Section 1 et seq.*" Furthermore, it contains the provision that the parties ‘agree that any question regarding whether a particular controversy is subject to arbitration shall be decided by the arbitrator.’” Id. at 282.

## Taylor v. Butler (cont.)

- “In Frizzell, we stressed that, in deciding whether a claim of fraudulent inducement is subject to arbitration, courts must focus upon the specific terms of the contract at issue. *9 S.W.3d at 84*. We held that if the parties agreed to arbitrate the claim of fraudulent inducement, then despite such a prohibition under Tennessee law, the claim must be submitted to arbitration. *Id.* The converse is equally true - if the parties did not agree to arbitrate the claim of fraudulent inducement, then they could not be compelled to arbitrate the claim despite the fact that the claim could be arbitrated under the FAA.... Therefore, because Taylor knowingly signed the contract, she agreed to arbitrate a claim of fraudulent inducement.” *Id.* at 283.
- “However, her claim that the arbitration provision is unconscionable is a matter to be decided by the courts and not the arbitrator, because it specifically challenges the validity of the agreement to arbitrate irrespective of the validity of the whole contract.” *Id.* at 284.
- “The arbitration agreement in this case is comparable to those that were found to be unconscionable in the aforementioned cases. City Auto has a judicial forum for practically all claims that it could have against Taylor. Indeed, it is hard to imagine what other claims it would have against her other than one to recover the vehicle or collect a debt. At the same time, Taylor is required to arbitrate any claim that she might have against City Auto.” *Id.* at 286.

- **NURSING HOME  
ARBITRATION  
AGREEMENTS**
- **Tennessee Supreme Court**

## Owens v. King

263 S.W. 3d 876 (Tenn., 2007)

- Woman admitted to NHC nursing home in Murfreesboro. Had given a Durable Power of Attorney for Health Care to two people. One of these persons signed all admissions paperwork, including an Admission Contract that contained bolded standard binding Arbitration Agreement. Later filed suit against NHC and others alleging negligence, gross negligence etc. NHC filed Motion to Compel Arbitration and denied by Chancellor Corlew who held that the Durable Power of Attorney should not be so broadly construed.
- In determining whether F.A.A. or T.A.A. applied, Supreme Court determined that Tennessee law applied by virtue of the provisions of the Contract that said the provisions for binding “arbitration shall be governed by and interpreted in accordance with the laws of the state where the Center is licensed.” Id. at 883. This decision determines whether Court or arbitrator decides question of contract formation and since Tennessee law applies, the Court decides.

## Owens v. National Health Care (cont.)

- “*Tennessee Code Annotated section 34-6-201(2)* (2001) defines “[h]ealth care” to mean “any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition, and includes medical care as defined in § 32-11-103(5).” *Section 34-6-201* then defines “[h]ealth care decision” to mean “consent, refusal of consent or withdrawal of consent to health care.” *Tenn. Code Ann. § 34-6-201(3)* (2001). Under these two statutory definitions, the decision to admit King to the nursing home clearly constitutes a ‘health care decision.’” Id. at 884.
- “Our holding on this issue is necessarily based upon both the language of King's power of attorney and the provisions of the Tennessee Durable Power of Attorney for Health Care Act. Our holding, however, is consistent with cases from other jurisdictions considering the issue.... We hold that Daniel was authorized to sign the nursing-home contract, including its arbitration provision.” Id. at 885.
- Justice Holder, writing for Supreme Court rejected Plaintiff's argument that the arbitration agreement violated Federal Law relative to the Medicaid program. She also writes for the majority that the arbitration agreement does not per se violate public policy. However she remands the case to Trial Court for further discovery and proceedings on the issue of unconscionability.

# Tennessee Court of Appeals

## Recent Nursing Home Decisions

- **Howell v. NHC**, 109 S.W. 3d 731 (Ct. App., 2003). Wrongful death action. Illiterate Husband signed without it being explained. Presented agreement as a take-it or leave-it decision; no contract, then no admission. Even though do not excuse him for not having it read to him, there was no bargaining and thus unenforceable.
- **Cabany v. Mayfield Rehabilitation and Special Care Center**, 2007 Tenn. App. LEXIS 696 (Ct., App. 2007). Wrongful death action against Mayfield and NHC. Trial Court determined not valid, because this was a legal and not a health care decision. Appellate Court remands for further proceedings because it was never determined that at time Wife signed agreement, Husband could or could not make his own medical decision and such determination was needed to see whether she properly exercised the authority under the power of attorney. She was only empowered to act “when I can’t make my own medical decision.” Id. 14.

## Tennessee Court of Appeals Nursing Homes cases (cont.)

- **Necessary v. Life Care Centers of America**, App., 2007). Wrongful death action. Wife signed agreement as “Legal Representative.” Now claims that although husband physically incapacitated, he was mentally competent. No specific legal authority to sign document.
- “Although the present case does not involve a written power of attorney, we think the rationale and holding of *Owens* is nevertheless dispositive of this appeal. In the present case, Plaintiff essentially argues that she had express authority from the Decedent, who was competent to give her that authority, to sign all of the admission documents and make all of the decisions regarding his admission to Life Care's facility - except one: she did not have his authority to sign an arbitration agreement, even though he did not withhold such authority. Such a conclusion would result in the type of "untenable" situation described in *Owens, supra*. Therefore, we hold that Plaintiff, who had the Decedent's express authority to sign the admission documents at the healthcare facility, also had the authority to sign the arbitration agreement on the Decedent's behalf as one of those admission documents” Id. at 13-14.

## Tennessee Court of Appeals Nursing Homes cases (cont.)

- **Philpot v. Tennessee Health Management**, 279 S.W. 3d 573 (Ct. App., 2007). Wrongful death action. Durable Power of Attorney to Son. Standard binding arbitration provision. Based upon Owens, supra. Tennessee law applies. Likewise, not against Public Policy. Next must determine whether a contract of adhesion and if so, whether oppressive. Only reason signing session was hurried, was because Son wanted to get it done during his lunch hour. Party is presumed to know the contents of a contract. Arbitration provisions were bolded. Plaintiff has not met his burden of proof that the process would be cost prohibitive. Valid and enforceable agreement.
- See also, **Reagan v. Kindred Healthcare Operating, Inc.** 2007 Tenn. App., LEXIS 798 (Ct. App., 2007).
- **Hendrix v. Life Care Centers of America**, 2007 Tenn. App., LEXIS 791 (Ct. App. 2007).
- **Brodnax v. Quince Nursing and Rehabilitation Center**, 2009 Tenn. App. LEXIS 534 (Ct. App., 2009). **All three cases compel arbitration.**

- Tennessee Court of Appeals
- Other Arbitration decisions

# Tennessee Court of Appeals

## Other arbitration decisions

- **Chapman v. H. & R. Block Mortgage Corporation**, 2005 Tenn. App. LEXIS 737 (Ct. App., 2005). Binding arbitration, except for mortgage foreclosure actions.
- “We are compelled to disagree with Ms. Chapman that this paragraph of the agreement provides Block with a disproportionate share of remedial rights. Under this paragraph, Ms. Chapman is allowed to seek injunctive relief, which she did in this case. Further, she is allowed to raise defenses in a judicial forum with respect to each of the excepted matters. And, even were we to find that the "Exceptions" paragraph provides Block with a disproportionate share of remedial rights, we do not agree that this finding would require that we void the arbitration agreement *in toto* in light of the fact that the agreement also contains the following severability clause.” Id. at 21.
- “Based upon our careful review of the record and relevant law, it is our conclusion that the arbitration agreement between Ms. Chapman and Block is reasonable and is not unconscionable.” Id. at 28.
- Finally determines that filing an Answer and answering Interrogatories does not constitute waiver of arbitration rights.

## Tennessee Court of Appeals

### Other arbitration decisions (cont.)

- **Bodor v. Green Tree Servicing, L.L.C.**, 2007 Tenn. App. LEXIS 548 (Ct. App., 2007). Finance company had security interest in 15 units of manufactured housing. Arbitration clause required arbitration under F.A.A. Issue is whether the clause is broad enough to include tortious interference claim.
- “The fact that Plaintiffs' claims sound in tort rather than contract does not remove them from the ambit of the arbitration clause. Courts have consistently found that broad arbitration clauses like the one between Bodor and Conseco encompass tort claims arising between the parties.” Id. at 8.
- See also, **Dale Supply Company v. York International Corp.**, 2003 Tenn App. LEXIS 720 (Ct. App., 2007). Claim of tortious interference after contractual relationship ended still must be arbitrated.
- **Credit General Insurance Company v. Insurance Service Group, Inc.** 2007 Tenn App. LEXIS 495 ((Ct. App., 2007). Insolvent Insurance Company in receivership in Ohio. Dispute between it and one of its Tennessee brokers. Arbitration provision. “In summary, the parties chose and agreed for the law of the state of Ohio to apply to their agreement. Therefore, we are required to apply Ohio law. On procedural issues, such as whether an issue will be submitted to arbitration or decided by the court, Ohio law requires us to apply the law of the forum state, which is Tennessee.” Id. at 12.

## Tennessee Court of Appeals

### Other arbitration decisions (cont.)

- **Hubert v. Turnberry Homes LLC**, 2006 Tenn. App. LEXIS 648 (Ct. App., 2006). This case has an excellent history of both F.A.A. and T.U.A.A. and the interplay between the two by Judge, now Justice Koch.
- **Pyburn v. Bill Heard Chevrolet**, 63 S.W. 3d 351 (Ct. app., 2001)  
Interest rate charged consumer inflated by so-called dealer reserve. Consumer filed Tennessee Consumer Protection Action claim. Another extensive review of the F.A.A. and other issues already discussed.
- “The Agreement in the present case does not restrict the availability of injunctive relief in arbitration. The TCPA specifically allows for injunctive relief, and Plaintiff's statutory claim for injunctive relief is within the scope of the Agreement. Plaintiff and Defendant agreed to utilize the Commercial Rules of the AAA which authorizes "any remedy or relief that the arbitrator deems just and equitable." It necessarily follows, as a matter of federal law, that injunctive relief can be awarded by the arbitrator in this case. 6 Since injunctive relief is available to Plaintiff to address his individual TCPA claims, the Trial Court erred when it concluded that the unavailability of injunctive relief rendered the Agreement unenforceable.” Id. at 366.

Tennessee Court of Appeals  
Other Arbitration  
Decisions (cont.)

- **Long v. Miller**, 2007 Tenn. App. LEXIS 594 (Ct. App. 2007). Court determined that the Defendant's appeal from the Order denying the arbitration was untimely in that it was not taken within 30 days of the entry of the Order, but after the matter was tried. Tenn. Code Ann. § 29-5-319 and the Tennessee Rules of Appellate Procedure Rule 4 (a) require the appeal to be taken within 30 days of the ruling.

# Caveat!!!!

- Both Houses of Congress have various bills, such as the Fairness in Nursing Home Arbitration Act and the Fairness in Arbitration Act that would severely limit pre-dispute agreements requiring nursing home patients and/or consumers to use binding arbitration in either long term care facility contracts or consumer contracts.

## Mediation cases

- **Pennington v. Boundary, Inc.** 2008 Tenn App. LEXIS 267 (Ct. App. 2007). Here a corporate Special Master was appointed by Court to investigate facts and to intervene to prevent future losses relative to three inter-related restaurants. Suggested that the parties let him try to mediate the dispute, which he did unsuccessfully. Court of Appeals determined that he should not be paid for such mediation hours because outside his scope of referral.
- **Morgan v. Morgan**, 2009 Tenn. App. LEXIS 9 (Ct. App., 2009). Post divorce case concerning arrearages in child support. Friend of Father (does not indicate whether an attorney-presumably not), who was not a Rule 31 Mediator, contacted Mother and represented that he was a mediator, involved with the court system and talked her into a “mediation,” without her Attorney and with him and the Ex. Talked her into lower arrearage amount. Court found “mediator” had engaged in fraudulent conduct, but doesn’t indicate what if anything the Court did because of this. Court of Appeals affirms larger amount for arrearage.

## Cases on Mediation (cont.)

- **Ledbetter v. Ledbetter**, 163 S.W 3d 681,685; 2005 Tenn. LEXIS 345 (Tenn., 2005) states:

“Finally, as noted in *Harbour*, an agreement by the parties [\*\*10] may also be analyzed under contract law. See *Harbour*, 732 S.W.2d at 600. Until approved by the courts, a **mediated agreement is essentially contractual in nature**. See *Envtl. Abatement*, 27 S.W.3d at 539 (stating that “[a] compromise and settlement agreement is merely a contract between parties to litigation and, as such, issues of enforceability of a settlement agreement are governed by contract law.”) **Therefore, the rules of contract law would apply.**” See also, **McMahan v. McMahan**, 2005 Tenn. App. LEXIS 756 (Tenn. Ct. App. 2005); **Myers v. Myers**, 2005 Tenn. App., LEXIS 236 (Tenn. Ct. App., 2005); **Persada v. Persada**, 2002 Tenn. App. LEXIS 952 (Tenn. Ct. app., 2003).
- **Environmental Abatement, Inc. v. Astrum R.E. Corporation**, 27 S. W. 3d 530, 539 2000 Tenn. App. LEXIS 126 (Tenn. Ct. app., 2000), which involved a settlement judge, notes: “A compromise and settlement agreement is merely a contract between parties to litigation and, as such, issues of enforceability of a settlement agreement are governed by contract law. See *Sweeten v. Trade Envelopes*, 938 S.W.2d 383, 385 (Tenn. 1996). The Supreme Court recognized this distinction in *Harbour*, stating, “This is not to say that the compromise agreement may not be a binding contract, subject to being enforced as other contracts, but only that the court may not enter judgment based on the compromise agreement, when it has notice that one of the parties is no longer consenting to the agreement for whatever reason.” *Harbour*, 732 S.W.2d at 599-600.

## Cases on Mediation (cont.)

- **Golden v. Hood**, 2000 Tenn. App. LEXIS 47 (Tenn. Ct. App.2000) concerned a written mediated settlement agreement which settled a motor vehicle accident case for \$9,000. Plaintiff refused to comply with the mediated settlement agreement and argued that she had been duressed by her attorney and the mediator. The Tennessee Court of Appeals (Eastern Section) notes:
  - “**Fundamental principles of contract law are applicable here.** Recission of a contract "is not looked upon lightly" and "is available only under the most demanding circumstances." *Robinson v. Brooks*, 577 S.W.2d 207 (Tenn. Ct. App. 1978). Further, the party seeking recission bears the burden of proof. *Williamson v. Upchurch*, 768 S.W.2d 265 (Tenn. Ct. App. 1988). When a contract is valid and no injustice will result, courts are "bound to enforce it." *Bush v. Cathey*, 598 S.W.2d 777 (Tenn. Ct. App. 1979).” Golden, supra. at 4.
  - Later, the Court concludes: “In the absence of fraud or mistake, an agreement reached in mediation to settle litigation is conclusive against a party seeking to void it. See *Vela v. Hope Lumber & Supply Co.*, 1998 OK CIV APP 162, 966 P.2d 1196, 1198 (Okla. Ct. App. 1998). In this case, the agreement was clear and unambiguous and establishes a binding and enforceable settlement of plaintiff's claim.” Golden, supra. at 6.

# Federal Arbitration Act

- 3 Chapters
  - Chapter 1 Original Act (1925)
- Chapter 2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards
- Chapter 3 Inter-American Convention on International Arbitration

**Federal Statutes**  
**Title 9 Arbitration.**  
**Chapter 1. Federal Arbitration Act.**  
Initially adopted in 1925 and amended in 1947.

- Sec. 1. Defines ‘**Maritime transactions**’ and ‘**Commerce.**’
- Sec. 2.” **Validity, irrevocability, and enforcement of agreements to arbitrate.** Written provision of maritime transaction or contract involving commerce calling for arbitration “shall be valid, irrevocable and enforceable.”
- Sec. 3. “**Stay of proceedings where issue therein referable to arbitration.** If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration,...the court...shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement...”
- Sec. 4. “**Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration;** A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction...for an order directing that such arbitration proceed in the manner provided for in such agreement...The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement...”
- Sec. 5. “**Appointment of arbitrators or umpire.** If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require...”

## Federal Arbitration Act (cont.)

- Sec. 9. “**Award of arbitrators; confirmation; jurisdiction; procedure.** If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made...”
- Sec. 10. “**Same; vacation; grounds; rehearing.** ... (T)he United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration – (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. (b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators...”
- Sec. 11. “**Same; modification or correction; grounds; order.** In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration - (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. (c) Where the award is imperfect in matter of form not affecting the merits of the controversy. The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.”

**Title 9 Arbitration.**  
**Chapter 2. Convention on the Recognition and  
Enforcement of Foreign Arbitral Awards.**

- Done through United Nations in New York on June 10, 1958. entered into force June 7, 1959. 330 U.N.T.S. 28 (1959). Can be found on American Arbitration Association Website, under International Centre for Dispute Resolution, along with many other related items.
- Convention entered into force for United States on December 29, 1970. Declarations and reservations of United States: “The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State. The United States of America will apply the convention only to the differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States.” AAA/ICDR Website. The same Website indicates that 140 countries besides the United States have ratified the Treaty. These Countries are listed along with their declarations and reservations, if any.
- Sec. 201. “**Enforcement of Convention.** The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”

## Chapter 2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards. (Cont.)

- **Sec. 202. “Agreement or award falling under the Convention.** An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.”
- Other sections deal with (**Sec. 203**): **Jurisdiction** (arise under laws and treaties of United States and amount in controversy is irrelevant); (**Sec. 204**): **Venue** (U.S.D.C.); (**Sec. 205**): **Removal from state court**; (**Sec. 206**): **Order to compel arbitration and appoint arbitrators**; (**Sec. 207**): **Confirmation of Arbitration award**.

# Convention on the Recognition and Enforcement of Foreign Arbitral Awards

(The Convention itself, as opposed to the Federal Statute.)

- **Sixteen Articles altogether.** Article VII thru XXVI deal with International Public International Law issues and not Arbitration issues.
- **Article I, Sec 2 states:** “The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.”
- **Article II, Sec. 1 states:** “Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”
- **Article III states:** “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”
- **Article VI states:**  
“If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.”

# Convention on the Recognition and Enforcement of Foreign Arbitral Awards (cont.)

- **Article V states:**

“1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

## Title 9 Arbitration.

### Chapter 3. Inter-American Convention on International Arbitration

- Done through the Organization of American States in Panama City, Panama on January 30, 1975. Entered into force June 16, 1976. 1975 O.A.S.T.S. No. 42, 14 I.L.M. 335 (1975). Can be found on American Arbitration Association Website, under International Centre for Dispute Resolution, along with many other related items. The Convention entered into force for the United States on October 27, 1990. There was no United States declaration or reservation noted on the AAA/ICDR Website. The United States is one of 16 states that have ratified the convention. Among the states that have not accepted the Convention are the Bahamas, Belize, Dominican Republic, Jamaica and Nicaragua.
- **Sec. 301. “Enforcement of Convention.** The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.”
- **Sec. 302. “Incorporation by reference.** Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention. “ (Referenced sections relate to Chapter 2, pertaining to Convention on the Recognition and Enforcement of Foreign Arbitral Awards.)
- **Sec. 303. “Order to compel arbitration; appointment of arbitrators; locale.** a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement...”

### Chapter 3. Inter-American Convention on International Arbitration. (cont.)

- **Sec. 304. “Recognition and enforcement of foreign arbitral decisions and awards; reciprocity.** Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.”
- Three other sections are: **Sec. 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958; Sec. 306. Applicable rules of Inter-American Commercial Arbitration Commission; Sec. 307. Chapter 1; residual application.**
- Convention itself has 13 articles, but last 7 articles deal with Public International Law issues.
- **Article 1 states:** “An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.”
- **Article 2 states:** “Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person. Arbitrators may be nationals or foreigners.” 52

### Chapter 3. Inter-American Convention on International Arbitration. (cont.)

- **Article 4 states:** “An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.”
  
- **Article 5 states:**
  1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:
    - (a) That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made;
    - (b) That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or
    - (c) That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or
    - (d) That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or
    - (e) That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.
  2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:
    - (a) That the subject of the dispute cannot be settled by arbitration under the law of that State; or
    - (b) That the recognition or execution of the decision would be contrary to the public policy ("order<sup>53</sup> public") of that State.”

# Tennessee Statutes

- Tenn. Code Ann. §§ 29-5-101 to 29-5-119
  - Original Arbitration Statute
- Tenn. Code Ann. §§ 29-5-201 to 29-5-220
  - Cotton Arbitration
- Tenn. Code Ann. §§ 29-5-301 to 29-5-320
  - Tennessee Uniform Arbitration Act

Tenn. Code Ann. §§ 29-5-101 to 29-5-119  
Original Arbitration Statute

- Acts of 1983, ch 462 § 24 provides that all laws or parts of laws which are inconsistent with the Uniform Arbitration Act, compiled in part 3 are repealed.
- Mainly of historical interest now.
- Dates back to 1858 Code.

## Original Arbitration Statute (cont.)

- **T.C.A. § 29-5-101. Subjects of arbitration.** “All causes of action, whether there be a suit pending therefore or not, may be submitted to the decision of one (1) or more arbitrators, except in one (1) of the following cases:” (exceptions listed).
- **T.C.A. § 29-5-102. Scope of submission.** “The submission may be of some particular matters or demands, or of all demands which one (1) party has against the other, or of all mutual demands.”
- **T.C.A. § 29-5-104. Contents of agreement -- Court of entry. (a)** “The submission shall be by written agreement, general or special, specifying what demands are to be submitted, the names of the arbitrators or the manner of their selection, but not necessarily that of the umpire, and the court by which the judgment on their award is to be rendered, and if such written agreement requires one (1) of the parties to name an arbitrator and such party fails to do so, the court by which the judgment on the award is to be rendered shall on such failure so to name an arbitrator, upon the petition of the opposite party, appoint such arbitrator.”
- **T.C.A. § 29-5-106. Irrevocability of submission.** “No such submission shall be revocable after the submission agreement is signed by the parties or entered of record, without leave of the court, except by mutual consent 56 entered of record.”

## Original Arbitration Statute (cont.)

- **T.C.A. § 29-5-112. Transmission of award to court.** “The award shall be in writing, and should be delivered by the umpire or one (1) of the arbitrators to the court designated in the agreement, or it may be enclosed and sealed by them, and transmitted to the court, and not opened until the court orders.”
- **T.C.A. § 29-5-114. Rejection or recommitment.** “The award may be rejected by the court for any legal and sufficient reasons, or it may be recommitment for a rehearing to the same or any other arbitrators agreed upon by the parties in writing.”
- **T.C.A. § 29-5-115. Modification of award.** “ The court is empowered, on motion of either party, to correct or modify the award:
  - (1) Where there is manifest a miscalculation of figures, or a mistake in the description of any person, thing or property referred to in the award;
  - (2) Where there has been covered in the award a matter not submitted, if not merely incident, not affecting the merits of matters submitted;
  - (3) Where the award is defective or imperfect in a matter of form not affecting the merits; and
  - (4) To effect the true and just intent thereof.”
- **T.C.A. § 29-5-118. Judgment on award.** “When the award is adopted, it is filed and entered on the records, and judgment shall be rendered including costs and fees to the arbitrators and any umpire, and execution or other necessary process awarded accordingly.”

# Tenn. Code Ann. §§ 29-5-201 to 29-5-220

## Cotton Arbitration

- Same provision re: Uniform Arbitration Act as in T.C.A. §29-5-101.
- **T.C.A. § 29-5-220. Foreign arbitration hearings or awards. “(a)** Notwithstanding any other provision of law to the contrary, the court shall not confirm an award under § 29-5-212 or enter judgment a or decree in conformity therewith under § 29-5-215 where the arbitration hearing or award was made outside of the United States and its territories and the foreign state wherein the award was made does not grant reciprocity in recognition and enforcement of arbitration awards made in the United States or its territories.”
- **T.C.A. § 29-5-221. Application of law.** “The provisions of this part shall apply only to agreements made subsequent to July 1, 1977.”

# Tennessee Uniform Arbitration Act

## First promulgated in 1983

- **T.C.A. § 29-5-302. Agreements to submit to arbitration -- Jurisdiction.**  
“ (a) A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the revocation of any contract; provided, that for contracts relating to farm property, structures or goods, or to property and structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties.”
- **T.C.A. § 29-5-303. Order for arbitration -- Stay of arbitration proceeding -- Effect of other proceedings involving issues subject to arbitration.**  
“(a) On application of a party showing an agreement described in § 29-5-302, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.  
(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.”

# Tennessee Uniform Arbitration Act (cont.)

- **T.C.A. § 29-5-309. Award.** “(a) **The award shall be in writing and signed by the arbitrators joining in the award.** The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.  
(b) An award shall be made within the time fixed therefore by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless that party notifies the arbitrators of such objection prior to the delivery of the award to the other party.”
- **T.C.A. § 29-5-310. Modification of award.** “On application of a party or, if an application to the court is pending under § 29-5-312, § 29-5-313, or § 29-5-314, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in § 29-5-314(a)(1) and (3), or for the purpose of clarifying the award. **The application shall be made within twenty (20) days after delivery of the award to the applicant.** Written notice thereof shall be given forthwith to the opposing party, stating such party must serve **objections thereto, if any, within ten (10) days from the notice.** The award so modified or corrected is subject to the provisions of §§ 29-5-312,<sup>60</sup> 29-5-313, and 29-5-314.”

# Tennessee Uniform Arbitration Act (cont.)

- **T.C.A. § 29-5-312. Confirmation of award.** “Upon application of a party, the court shall confirm an award, unless, within the time limits hereinafter imposed, grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in §§ 29-5-313 and 29-5-314.”
- **T.C.A. § 29-5-313. Vacation of award.** “(a) Upon application of a party, the court shall vacate an award where:
  - (1) The award was procured by corruption, fraud or other undue means;
  - (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
  - (3) The arbitrators exceeded their powers;
  - (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 29-5-306, as to prejudice substantially the rights of a party; or
  - (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 29-5-303 and the party did not participate in the arbitration hearing without raising the objection.”

## Tennessee Uniform Arbitration Act (cont.)

- **T.C.A. § 29-5-314. Grounds and procedure for modification of award.**

“(a) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

  - (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
  - (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
  - (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.”
- **T.C.A. § 29-5-315. Entry and enforcement of judgment -- Costs.**

“Upon the granting of an order confirming, modifying or correcting an award a judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application, and of the proceedings subsequent thereto, and disbursements may be awarded by the court.”

## Tennessee Uniform Arbitration Act (cont.)

- **29-5-319. Appeal.**

“(a) An appeal may be taken from:

**(1) An order denying an application to compel arbitration made under § 29-5-303;**

**(2) An order granting an application to stay arbitration made under § 29-5-303(b);**

**(3) An order confirming or denying confirmation of an award;**

**(4) An order modifying or correcting an award;**

**(5) An order vacating an award without directing a re-hearing;**

and

**(6) A judgment or decree entered pursuant to the provisions of this part.**

**(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.”**

**You need to appeal within 30 days of the Order, not after you try the case.**

# Uninsured Motorist Vehicle Coverage

## Tenn. Code Ann. § 56-7-1206

- **T.C.A. § 56-7-1206** provides: “**(c)** The uninsured motorist provision shall not require arbitration of any claim arising thereunder nor shall the insured be restricted or prevented in any manner from employing legal counsel or instituting legal proceedings.”
- **(f)** Notwithstanding subsection (c), if a party or parties alleged to be liable for the bodily injury or death of the insured offers the limits of all liability insurance policies available to the party or parties in settlement of the insured's claim, the insured or the insured's personal representative may accept the offer, execute a full release of the party or parties on whose behalf the offer is made and preserve the right to seek additional compensation from the insured's uninsured motorist insurance carrier upon agreement of the insured or the insured's personal representative to submit the insured's uninsured motorist claim to binding arbitration of all issues of tort liability and damages, provided:
  - **(1) (A)** The offer must be for the sum of the limits of all liability insurance policies providing coverage to the party or parties on whose behalf the offer is made and in an aggregate amount that is less than the uninsured motorist coverage applicable to the bodily injury or death of the insured;

## Uninsured Motorist Vehicle Coverage (cont.)

- **(3)** “The insured or the insured's personal representative or attorney shall give written notice to the uninsured motorist insurance carrier or its attorney of the insured's intent to accept the offer and agreement to submit the uninsured motorist claim to binding arbitration;
- **(4)** After receipt of both of the notices referred to in subdivisions (g)(2) and (3), the uninsured motorist insurance carrier shall have thirty (30) days to give notice to its insured or the insured's personal representative or attorney and the liability insurance carrier or carriers or their attorneys that it consents to the settlement, that it will agree to binding arbitration of the insured's uninsured motorist claim and that it will waive its subrogation rights against the party or parties.”
- **(h) (1)** The arbitration provided for in this section shall be conducted pursuant to this section and pursuant to the Uniform Arbitration Act, compiled in title 4, chapter 5, part 3 and to title 29, chapter 5, parts 1 and 3.
- **(2)** The arbitrator shall be selected by agreement of the parties. Notwithstanding § 29-5-304, if the parties are unable to agree, either party may request a judge of a court of record in the county in which the arbitration is pending to designate three (3) potential arbitrators. The parties shall then agree upon one (1) of the three (3) arbitrators so designated.
- **(3)** Unless the parties agree otherwise, the arbitration will take place in the county in which the insured resides and the rules of evidence applicable to the state courts where the arbitration is conducted shall apply.

## Uninsured Motorist Vehicle Coverage (cont.)

- **(4)** The arbitrator shall not be informed as to the amount or amounts collected by the insured by way of settlement or judgment prior to the conclusion of the arbitration. Disclosure of the information prior to the conclusion of the arbitration will result in disqualification of the arbitrator.
- **(5)** Coverage issues shall be decided by a court of competent jurisdiction. The arbitrator shall decide issues of tort liability and damages only. The arbitrator shall first decide issues of liability and the apportionment of fault and, if fault is found, the amount of damages sustained by the insured.
- **(6)** If the arbitrator's award to the insured is less than or equal to the total amount collected by the insured by way of settlements or judgments plus the amount of any settlement offer made by the uninsured motorist carrier at least fifteen (15) days prior to the arbitration, the insured will pay the arbitrator's fee. In the event the arbitrator's award to the insured exceeds the total amount collected by the insured by way of settlements or judgments plus the amount of any settlement offer made by the uninsured motorist carrier at least fifteen (15) days prior to the arbitration, the uninsured motorist insurance carrier will pay the arbitrator's fee.

# Federal Rules and U.S.D.C. Rules

- **United States 6<sup>th</sup> Circuit Rule 33** Appeal Conferences-Mediation provides for a so-called “Pre-Argument Conference.”
- U.S.D.C. for Middle District of Tennessee has several Local Rules re ADR:
- **LR 16.02** is titled ADR: Statement of Authority and Purpose.
- **LR.16.03** ADR: Definitions, Procedures and Administration defines: Alternative dispute resolution proceedings, judicially conducted settlement conferences, mediation, nonbinding arbitration, early neutral evaluation, Rule 68 Offer of Settlement and dispute resolution neutrals .It also provides for qualifications and selection of ADR neutrals.
- **LR 16.04** deals with ADR: Judicially Conducted Settlement Conferences.
- **LR16.05** deals with ADR: Mediation and the procedure, including sanctions.
- **LR 16.06** deals with ADR: Early Neutral Evaluation.
- **LR 16.07** deal with ADR: Nonbinding Arbitration.
- **LR 16.08** deals with ADR: Confidentiality and Restrictions on Use of Information.

## Federal Rules and U.S.D.C. Rules (cont.)

- U.S.D.C. for Eastern District of Tennessee has following Local Rules:
  - **LR. 16.3** Alternative Dispute Resolution and list a long number of exemptions.
  - **LR 16.4** deals with Court Annexed Mediation.
  - **LR 16.5** deal with Arbitration, presumably including binding arbitration if the parties consent to it. LR 68.3 discusses Judicially hosted Settlement Conferences.
- U.S.D.C. for Western District of Tennessee has the following Local Rules:
  - LR 16.1 deals with Pretrial Conferences: Alternative Dispute Resolution. This discusses both Settlement Conferences and Mediation.

# Tennessee Supreme Court Rule 31: Alternative Dispute Resolution

- With Appendices and Forms it is 24 pages. It deals not only with procedures, but also training, qualifications and certification. Covers not only Mediation, but also Non-binding Arbitration, Judicial Settlement Conferences, Mini-Trials, Cases Evaluation and Summary Jury Trials. The great bulk deals with training, qualifications and certification of mediators.
- There is a revisions relative to Standards of Professional Conduct for Rule 31 Neutrals, for which the Supreme Court is seeking comments.

# Thoughts on Mediation

## Type of Mediator you have

**FACILITATIVE**

**NARROW**

**BROAD**

**EVALUATIVE**

# Thoughts on Mediation

- Where do you fall as a Mediator and ethically how far can you move to the bottom of the chart, when can or should you ever move to the bottom of the chart, and what do you need to do to go there, if at all.
- **Facilitative style** of mediation is probably what you learned during initial training. Open ended questions, without providing your own input. Identify & explore interests, concerns, motivations, goals and common grounds. Question as to weaknesses and strength on both sides, evidentiary problems on both sides, legal concerns, etc. Mediator gives no in-put of his/her own.
- **Evaluative style** of mediation is where the Mediator based on his/her own experience and with the permission of one or more parties, usually in private caucus offers his/her own opinions on strengths or weakness and probably outcome. This is done only towards end and only with sensitivity and permission of parties. Pitfalls and do not want to step over line.
- **Narrow approach** is where Mediator focuses on the legal positions espoused by parties and simple risk-analysis.
- **Broad approach** is where Mediator also looks at underlying interests, (generally in commercial dispute.)

From : Picker at pp. 40-43. (See Bibliography below for more information as to each book.)

# Five Methods of Integrative Negotiations:

- Expanding the Pie—increasing available resources.
- Nonspecific compensation—one party gets what he/she wants; the other party is repaid with different compensation.
- Logrolling—each party concedes on low priority issues in exchange for concessions on higher priority issues.
- Costcutting—one party gets what he/she wants; the other party's costs are reduced or eliminated.
- Bridging—neither party achieves their initial demand, but a new option is created that satisfies the most important interest underlying their demands.

## Settlement vs. Trial

- **BATNA:** Best Alternative to a Negotiated Agreement.
- **WATNA:** Worst Alternative to a Negotiated Agreement.
- **MLATNA:** Most Likely Alternative to a Negotiated Agreement. [1]
- [1] Theresa Wakeen Materials.

# Identifying & Overcoming Barriers to Resolution:

- 1. Selective perception in making evaluation,
- 2. Wrong baselines,
- 3. Reactive devaluation,
- 4. Failure to communicate,
- 5. Gaps in information,
- 6. Insufficient focus on underlying interests,
- 7. Inability to align client's interests,
- 8. Disconnects between attorney and client,
- 9. Anger & embarrassment,
- 10. Behavior and tactics of parties & counsel,
- 11. Poor negotiating skills,
- 12. Inappropriate reliance on experts,
- 13. Preoccupation with winning,
- 14. Inability to break impasse,
- 15. Process barriers.
- Picker at pp. 49-50 & 56-64.

## **Suggestions from Teresa Wakeen for Successful Mediation**

- Calls Attorneys several weeks before Mediation to determine who is going to be there and whether anyone else needs to be there from that Attorney's side or whether he/she believes someone should be there from the other side.
- She also asks what information each attorney/decider needs from the other side to have a successful mediation.
- Tries to set up for success.
- Encourages each side to provide you at least and preferably the other side a Mediation Memo/Brief.
- Wakeen notes.

# Further Suggestions for Successful Mediation

## Calling Attorneys before Mediation

- Mediation Agreement—including confidentiality and handling of fees.
- Time constraints. Flight other reasons to conclude at certain time.
- Style of mediation: facilitative, evaluative, elicitive, directive, distributive, collaborative, transformative, etc.
- Meeting format
- Specific identity, position of authority of participants.
- Spouse attending.
- Insurance and person attending from insurance company.
- Fact witnesses, or experts, structured settlement representative.
- Telephone conferencing of additional participants and understanding covered by confidentiality.
- Prehearing submission: Length and content, confidential or exchanged, timing if exchanged.
- Any additional documents needed from opposite side to confirm damages, etc.
- Opening statements
- Use of exhibits, Power Point, films, etc.
- Cooley, Vol. 2 at pp. 129-130.

# American Arbitration Association Rules and Programs (cont.) (Class Arbitrations.)

- American Arbitration Association, “Supplementary Rules for Class Arbitrations,” (Effective date October 8, 2003).

## 1. Applicability

“(a) These Supplementary Rules for Class Arbitrations (“Supplementary Rules”) shall apply to any dispute arising out of an agreement that provides for arbitration pursuant to any of the rules of the American Arbitration Association (“AAA”) where a party submits a dispute to arbitration on behalf of or against a class or purported class, and shall supplement any other applicable AAA rules. These Supplementary Rules shall also apply whenever a court refers a matter pleaded as a class action to the AAA for administration, or when a party to a pending AAA arbitration asserts new claims on behalf of or against a class or purported class.

(b) Where inconsistencies exist between these Supplementary Rules and other AAA rules that apply to the dispute, these Supplementary Rules will govern. The arbitrator shall have the authority to resolve any inconsistency between any agreement of the parties and these Supplementary Rules, and in doing so shall endeavor to avoid any prejudice to the interests of absent members of a class or purported class.

(c) Whenever a court has, by order, addressed and resolved any matter that would otherwise be decided by an arbitrator under these Supplementary Rules, the arbitrator shall follow the order of the court.”

# American Arbitration Association

## Rules and Programs (cont.)

### (Class Arbitrations.)

- **3. Construction of the Arbitration Clause**

“Upon appointment, the arbitrator shall determine as a threshold matter, in a reasoned, partial final award on the construction of the arbitration clause, whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class (the "Clause Construction Award"). The arbitrator shall stay all proceedings following the issuance of the Clause Construction Award for a period of at least 30 days to permit any party to move a court of competent jurisdiction to confirm or to vacate the Clause Construction Award. Once all parties inform the arbitrator in writing during the period of the stay that they do not intend to seek judicial review of the Clause Construction Award, or once the requisite time period expires without any party having informed the arbitrator that it has done so, the arbitrator may proceed with the arbitration on the basis stated in the Clause Construction Award. If any party informs the arbitrator within the period provided that it has sought judicial review, the arbitrator may stay further proceedings, or some part of them, until the arbitrator is informed of the ruling of the court.”

# American Arbitration Association

## Rules and Programs (cont.)

### (Class Arbitrations.)

- **4. Class Certification**

- “(a) Prerequisites to a Class Arbitration

- If the arbitrator is satisfied that the arbitration clause permits the arbitration to proceed as a class arbitration, as provided in Rule 3, or where a court has ordered that an arbitrator determine whether a class arbitration may be maintained, the arbitrator shall determine whether the arbitration should proceed as a class arbitration. For that purpose, the arbitrator shall consider the criteria enumerated in this Rule 4 and any law or agreement of the parties the arbitrator determines applies to the arbitration. In doing so, the arbitrator shall determine whether one or more members of a class may act in the arbitration as representative parties on behalf of all members of the class described. The arbitrator shall permit a representative to do so only if each of the following conditions is met:

- (1) the class is so numerous that joinder of separate arbitrations on behalf of all members is impracticable;

- (2) there are questions of law or fact common to the class;

- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

- (4) the representative parties will fairly and adequately protect the interests of the class;

- (5) counsel selected to represent the class will fairly and adequately protect the interests of the class; and

- (6) each class member has entered into an agreement containing an arbitration clause which is substantially similar to that signed by the class representative(s) and each of the other class members.”

# Class Action Arbitrations.

- **Green Tree Financial Corp. v. Bazzle**, Supra, decided by United States Supreme Court in 2003, determined that where sweeping arbitration language and no specific prohibition as to a class action, arbitration could proceed as class action, but arbitrators and not court initially interpreted the agreement.
- **S.D.S. Autos, Inc. v. Chrzanowski, et. al.**, Supra, a 1st DCA decision determined that arbitration agreement could not prohibit class action, when it prevented remedial purpose of the Florida Deceptive and Unfair Trade Practices Act and the individual amounts in controversy were so small as to preclude a single consumer from pursuing a cause of action.
- **Rule 23, Fed. R. Civ. Proc. Deals with Class Actions.**  
“(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
  - (1) the class is so numerous that joinder of all members is impracticable;
  - (2) there are questions of law or fact common to the class;
  - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
  - (4) the representative parties will fairly and adequately protect the interests of the class.”

# Class Action Arbitrations.

- Other provisions in **Fed. R. Civ. Proc., Rule 23** deal with multiple issues certifying Court must decide before certifying a class; Certification Order that must define Class and Notice that must be given to all potential class members; how the litigation must be conducted; what decisions Court must make if asked to approve a settlement and issues Court must decide in appointing Class Counsel and the experience and financial resources required.
- When **Green Tree Financial Corp.** supra. decided, AAA and smaller arbitration entities adopted class action Rules, such as the AAA, “Supplementary Rules for Class Arbitrations,” (Effective date October 8, 2003), Supra.
- Various academics have written about **Green Tree Financial Corp.** supra, and have all generally raised concerns about due process rights of arbitration class members, similar to those rights provided in **Fed. R. Civ. Proc., Rule 23**. See e.g., **Blankley, Kristen M.**, “Class Actions Behind Closed Doors? How Consumer Claims Can (and Should) Be Resolved by Class-Action Arbitration,” 20 Ohio St. J. on Disp. Res. 451 (2005); **Buckner, Carole J.**, “Due Process In Class Arbitration,” 58 Fla. L. Rev. 185 (January, 2006); **Hagans, Fred & Jennifer B. Rustay**, “Class Actions in Arbitration,” 25 Rev. Lit. 293 (Spring, 2006) and **Weston, Maureen A.**, “Universes Colliding: The Constitutional Implications Of Arbitral Class Actions” 47 Wm and Mary L. Rev. 1711 (March, 2006.)

# Drafting Arbitration Clauses

- **Copy and provide to Transactional Attorneys in firm.**
- **See generally, Dilts, David A.**, “Of Words and Contracts: Arbitration and Lexicology,” 60 Disp. Res. J. 10 (May-July 2005.) & **Rubin, Bruce A. and Jennifer J. Roof**, “A Contrarian's Checklist to Arbitration Clauses,” 74 Def. Couns. J. 242 (July, 2007.) & **Burton, Steven J.**, “The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate,” 2006 J. Disp. Resol. 469 (2006.) See also, **American Arbitration Association International Centre for Dispute Resolution**, “AAArbitration Survival Kit: Drafting B2B Commercial Arbitration Clauses.” Undated PowerPoint provided by AI Oroso.
- **To obtain a Drafting Issues Checklist and General Drafting Suggestions and Sample Clauses**, See, **Hammond, Celeste & Jeffrey J. Meyer**, “Arbitration Advocacy: From Clause to Hearing,” 28 Am. J. Trial Advoc. 101 (Summer, 2004.)
- **Forum Selection Clauses. Hinchey, John W. & Thomas V. Burch**, “The Effect of Forum Selection Clauses on a District Court’s Power to Compel Arbitration,” 60 Disp. Res. J. 55 (November 2005<sub>82</sub> January 2006.)

# Drafting Arbitration Clauses (cont.)

- **Choice of Law Clauses in Domestic and Especially International Arbitration Agreements.** See generally, **Eisenberg, Theodore & Geoffrey P. Miller**, “The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies,” 56 DePaul L. Rev. 335 (Winter, 2007.) and **Hanzman, Michael A.** “Arbitration Agreements: Analyzing Threshold Choice of Law and Arbitrability Questions—An Often Overlooked ???” 70 Fla. B. J. 12 (December, 1996.)
- **Statute of Limitations.** **Weintraub, David A.**, “When Do Statutes of Limitations Apply in Arbitration?” 81 Fla. B. J. 25 (Oct., 2007.) See, **O’Keefe Architects, Inc. v. DEC Construction Partners, Ltd.**, 944 So. 2d 181 (Fla., 2006) and **Stinson-Head, Inc. v. City of Sanibel**, 661 So. 2d 119 (Fla. App., 2d DCA, 1995).
- **Confidentiality Agreement** (Either in initial agreement or during administrative conference. Forms provided in **Thomson, Claude R. & Annie M.K. Finn**, “Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution!” 62 Disp. Res. J. 50 (May-July, 2007.)
- **Punitive Damage Preclusion.** See, **Nolan, Michael D. and Andrew M. Leblanc**, “The Punitive Damages Remedy: Lessons for Drafters of Arbitration Agreements,” 60 Disp. Res. J. 50 (November 2005-January 2006.) But see, **Alterra Healthcare Corp., et.al. v. Bryant**, 937 So. 2d 263 (Fla. App., 4th DCA, 2006) & **Alterra Healthcare Corp. v. Estate of Linton**, 953 So. 2d 574 (Fla. App., 1st DCA, 2007).

## Drafting Arbitration Clauses (cont.)

- **Fee-shifting Provisions and Discovery Sanction Clauses.** O'Neill, Philip D., "The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse," 60 Disp. Res. J. 60 (November 2005-January 2006.)
- **Attorneys' Fees for Bad Faith Arbitration.** See, Hinchey, John W. & Thomas V. Burch, "An Arbitrator's Authority to Award Attorney's Fees for Bad Faith Arbitration," 60 Disp. Res. J. 10 (May-July 2005.). See also, Nussbaum, Frank & Meah Rothman Tell, "Arbitration and Attorney's Fees: a Pandora's Box." 76 Fla. B.J. 77 (October, 2002).
- **Claw-Back Agreements** for inadvertent release of privileged information and possible **Sanction for Spoliation of Evidence.** See, Warshauer, Irene C., "Electronic Discovery in Arbitration: Privilege Issues and Spoliation of Evidence," 61 Disp. Res. J. 8 (Nov. 2006-Jan. 2007.)
- **Appellate Arbitrator Review.** Marrow, Paul Bennett, "A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator," 60 Disp. Res. J. 10 (August-October 2005.)
- **Severance provisions.** Alterra Healthcare Corp., et.al. v. Bryant, 937 So. 2d 263 (Fla. App., 4th DCA, 2006).

## ***Drafting Arbitration Clauses (cont.)***

- ***See also, International Centre for Dispute Resolution clauses.***
- ***Most of the AAA Rules pamphlets also have arbitration clauses that can be used in Agreements.***
- ***Further Biographical Material Follows.***