

Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending

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INTRODUCTION

A. *Context for Our Empirical Research*

Who will adjudicate legal disputes between employees and their employers? For millions of individuals the answer is not courts, but arbitrators.¹ In compulsory arbitration agreements, employees

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1. No single source tracks this important development. A key study found that 19% of private sector employers were using arbitration by 1997, up from 3.6% in 1991, and that by 2001 the number of employees covered by AAA employment arbitration contracts had grown to 6 million, up from 3 million in 1997. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May-July 2003, at 9, 10. Among employers with 100 more employees who filed compliance reports with the

waive access to courts. The Supreme Court broadly approved the substitution of arbitrators for judges and juries in *Gilmer v. Interstate/Johnson Lane Corp.*² In directing courts to enforce arbitration agreements, *Gilmer* dismissed concerns about precluding an individual's access to courts, explaining that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."³

The decision means that courts are confined to a supporting role in overseeing employment arbitration. Courts are similarly limited in union-management arbitrations.⁴ However, the courts play a larger role in reviewing employment arbitration awards than they do in reviewing labor arbitration decisions. This is because there are fewer grounds for appeal and the reviewing standards are clearer in the labor context. In addition, courts are occasionally influenced by the fact that arbitration agreements for individuals are imposed without any bargaining, and have potential to be adhesive. Labor agreements, in contrast, result from an arm's length bargaining process between a union and employer. Courts, therefore, apply fewer tests when they review labor arbitration awards. To illustrate, courts never examine the validity of a labor arbitration agreement, but occasionally do so when an individual employment award appears to result from an egregiously one-sided agreement to arbitrate.⁵

We focus in this empirical research on court review of individual employment arbitration awards. *Gilmer* emphasized that courts should defer to arbitrator rulings. Speaking only briefly on the subject, the majority opinion reasoned that "generalized attacks on arbitration 'rest on suspicion of arbitration as a method of weakening the

Equal Employment Opportunity Commission, 10% reported that they used arbitration, and more than 25% reported that this process was mandatory. U.S. GEN. ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 7 (1995).

2. 500 U.S. 20 (1991).

3. *Id.* at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

4. *See, e.g.*, *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960) (remarking that "refusal of courts to review the merits of an arbitration award is the property approach to arbitration under collective bargaining agreements").

5. *See Hooters of Am. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (finding that the only possible purpose of the employer's arbitration rules was "to undermine the neutrality of the proceeding").

protections afforded in the substantive law to would-be complainants,' and as such are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'"⁶ *Gilmer* expressed abiding faith in private judges by refusing "to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."⁷

We launched our empirical investigation by taking stock of *Gilmer*'s apparent impact since 1991. As individual employment arbitration rapidly spread, scholarly research examined questions about the fairness and legality of requiring employees to abide by *Gilmer* agreements, especially when individuals did not want to waive access to courts in the first place.⁸ But little is known about why parties appeal adverse arbitration rulings. There is no empirical information about the arguments that parties use to challenge awards. No data exist to explain how federal and state courts rule on these challenges.

6. *Gilmer* 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989)).

7. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985)).

8. See, e.g., Martin H. Malin, *Privatizing Justice – But by How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001); Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199 (2000); Julian J. Moore, Note, *Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572 (2000); Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857 (1999); Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395 (1999); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); George Nicolau, *Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners*, 1 U. PA. J. LAB. & EMP. L. 177 (1998); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. & EMP. L.J. 1 (1996); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635 (1995); Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993); Arthur Eliot Berkeley & E. Patrick McDermott, *The Second Golden Age of Employment Arbitration*, 43 LAB. L.J. 774 (1992); Christine Godsil Cooper, *Where Are We Going with Gilmer? – Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 226-34 (1992); and Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990). See also Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 671-72 (1986).

To answer these questions, we collected our data for this study in 2006, fifteen years after the Court decided *Gilmer*. This timing is significant because employment arbitration has matured beyond the initial phase of pre-arbitration challenges to the use of this forum. By now, a critical mass of individuals and their employers have been to arbitration and appealed arbitrator rulings to courts.

As we pursued answers to these important concerns, we also focused on theoretical problems. *Gilmer* did not set forth reviewing guidelines for courts. This stands in marked contrast to the parallel universe for labor arbitration, where the Court strongly asserted itself in the *Trilogy*⁹ and its progeny by explicating judicial review standards. The Federal Arbitration Act (FAA) does provide statutory standards, but our empirical survey shows that many award challenges raise issues that are unrelated to this law. Even when courts apply FAA standards from the 1925 statute, current arbitrations raise new issues that Congress did not contemplate. In addition, when Congress deliberated over the FAA in committee hearings, lawmakers focused on the enforcement of arbitration agreements but paid little attention to standards for reviewing awards.¹⁰ Thus, contemporary courts play a large role in interpreting statutory reviewing standards without the aid of clear legislative intent. With this background in mind, we posed the following research questions.

9. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); and *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

10. The 1924 Senate report stated that the award could be set aside where it was secured by corruption, fraud, or undue means; or if there was partiality or corruption on the part of the arbitrators; or in a situation where an arbitrator is guilty of misconduct or refuses to hear evidence or because of prejudicial misbehavior by the parties; or the arbitrator exceeds his or her powers. S. REP. NO. 68-536, at 4 (1924). The Senate included a significant excerpt from a lawyer's brief as its main – and only – evidence of intent on award enforcement:

The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that, as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means – cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.

Hearings on the Subject of Interstate Commercial Disputes Before the Subcomm. on the Judiciary, 68th Cong. 6 (1924) [hereinafter *Interstate Commercial Disputes Hearings*] (statement of W. W. Nichols). Meanwhile, the House Report reflected the main legislative concern: "The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of] admiralty, or which may be the subject of litigation in the Federal courts." H.R. REP. NO. 68-96, at 3 (1924).

1. Do courts limit their award reviews to the statutory grounds under the FAA or state equivalents, or do they also generate and apply common law standards? This question has theoretical significance because an empirical answer would suggest the degree to which arbitration is co-regulated by legislatures and courts, and dual systems of federal and state policies.

2. Do reviewing courts supplement FAA standards with the Supreme Court's *Trilogy* standards? This is a more specific form of our first question, one that reflects the special role that the *Trilogy* plays in protecting voluntary labor arbitration from appellate review. This question has theoretical significance because of institutional differences between employment and labor arbitration systems. In labor arbitration, arbitrators are mutually selected by the parties,¹¹ apply the common law of the shop,¹² rarely decide statutory or other legal issues,¹³ and write judicial opinions.¹⁴ By contrast, employment arbitrators tend to apply business norms in an industry,¹⁵ are sometimes chosen only by the

11. William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 656 ("In traditional labor-management relationships the pool is created on the basis of experience testified to by representatives of labor and management who have had contact or experience with the third party neutral who seeks to be on the panel.").

12. W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 105 (2007) ("Labor arbitration offers an example of how a private dispute resolution system can create 'public' law in this fashion. Like the Restatements of the Law, The Common Law of the Workplace, a standard reference in labor arbitration, attempts to distill a large body of "common law" – in this case the decisions of labor arbitrators – into a set of principles to guide future disputes.").

13. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) ("As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the 'industrial common law of the shop' and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.").

14. See *Enter. Wheel*, 363 U.S. at 597-98 (acknowledging that "[a]rbitrators have no obligation to the court to give their reasons for an award"). The Court implicitly recognized that labor arbitrators write judicial opinions when it opined: "To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinion. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." *Id.* at 598.

15. See, e.g., *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 207 (D. Mass. 1998) (concluding "what is deeply troubling is what I can only describe as a structural bias in the system — the extent to which the NYSE arbitration system is dominated by the securities industry, that is, by the employment side of this dispute").

employer,¹⁶ and often make rulings without showing their reasoning in a written opinion.¹⁷ The *Trilogy* was tailored for labor arbitration and restrained courts from interfering in the bargaining relationships of unions and employers. Accounting for these considerable differences in context, we ask whether courts supplement FAA standards with the *Trilogy* precepts.

3. Is the volume of award challenges growing in relation to the increasing adoption of employment arbitration? Our concern is that award challenges are growing faster than the growth in employment arbitration agreements. Disproportionate growth in award appeals would raise a theoretical concern that employment arbitration lacks the social utility of relieving congested court dockets.

Using a self-generated database of federal and state court decisions from 1975-2006, we examine how courts apply reviewing standards and rule on award challenges. Our data show that courts are very deferential in reviewing these awards, but the recent growth in challenges to awards appears to be abnormally high.

B. *Organization of This Article*

Part I provides a brief history of award review standards under the Federal Arbitration Act (FAA) and Labor-Management Relations Act (LMRA). Part I.A shows that when Congress enacted the FAA, lawmakers carefully considered jurisdiction to enforce arbitration agreements without thinking much about award review standards. The FAA allows parties to choose to review awards under the standards in Section 10, or separate standards provided by states. We show that only 19 states have statutes that closely mirror the FAA. In Appendix II, we detail the alternate state reviewing standards. Part I.B shows federal common law standards that were developed for labor arbitration awards. This discussion is pertinent because our empirical study shows that numerous courts apply one or more of these standards to employment awards.

16. *E.g.*, *McMullen v. Meijer, Inc.*, 337 F.3d 697, 705 (6th Cir. 2003) (“We find Meijer’s exclusive control over the pool of potential arbitrators particularly problematic because Meijer could easily have adopted a procedure in which an unbiased third-party, such as the AAA or FMCS selected the pool of potential arbitrators.”).

17. For an example of an award that was issued summarily without a written explanation for the ruling, see *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 200 (2d Cir. 1998) (discussing “absence of a written explanation” by the panel of arbitrators). While the *Halligan* court vacated an award, it also noted: “We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases.” *Id.* at 204.

Part II presents our data. Part II.A discusses our research methods, and Part II.B reports our empirical findings. Table 1 shows a variety of dispute characteristics associated with the award review cases in the sample. Table 2 appears in conjunction with Finding No. 1, showing that federal courts are extremely deferential in reviewing employment arbitration awards. Table 3 supports our next two findings: state courts are less deferential than federal courts in reviewing employment arbitration awards, and award confirmation among states is high but quite variable. Tables 4A and 4B, summarized in Findings 4A and 4B, detail the variety of FAA, state statutory, and common law grounds that parties use in challenging an award and that courts use in ruling on these challenges.

Part III presents details of illustrative cases that add important context to our statistical findings. We show how courts verbalize the policy of deferring to awards when they use strong language to discourage these post-arbitration challenges. Next, in explaining the variability in state confirmation rates, we elaborate on three possible sources for this variability. We proceed to show how courts apply and interpret the four statutory review standards in the FAA. This discussion explains how courts interpret claims of arbitrator fraud, evident partiality, hearing misconduct, and exceeding power. In the final part, we identify federal circuits and state courts that apply a fast-growing common law standard for review, called manifest disregard for the law.

Part IV presents our conclusions. We also include two appendices to aid judges, lawmakers, scholars, practitioners, and students who seek primary materials to aid in their research. Appendix I is a list of all the cases in our sample, while Appendix II shows every state law whose arbitration review standards differ from those in the FAA.

I. STANDARDS FOR JUDICIAL REVIEW OF ARBITRATION AWARDS

A. *The Federal Arbitration Act*

In 1925, Congress enacted the United States Arbitration Act (USAA)¹⁸ – renamed the Federal Arbitration Act (FAA) in 1947 – to help businesses reduce expense and delay in resolving their legal disputes.¹⁹ When the American Bar Association proposed the law, it

18. U.S. Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2000)).

19. S. REP. NO. 68-536, at 3 (1924) (stating that the FAA was proposed to help businesses avoid “the delay and expenses of litigation”); and H.R. REP. NO. 68-96, at 2 (1924) (showing that Congress believed the simplicity of arbitration would “reduc[e]

cited arbitration statutes in New York and New Jersey.²⁰ Congress warmed to this idea by proposing to make arbitration agreements enforceable in a court of law.²¹ Lawmakers conceived a national arbitration model based on federal jurisdiction.²² In passing this law, Congress also intended to end judicial hostility to arbitration.²³

While Congress was pre-occupied with the enforcement of arbitration agreements, it said little about court standards for vacating an award. The 1924 House report stated: "The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form."²⁴ The 1924 Senate report said that the award could be set aside where it was secured by corruption, fraud, or undue means; or if there was partiality or corruption on the part of the arbitrators; or in a situation where an arbitrator was guilty of misconduct or refused to hear evidence or because of prejudicial misbehavior by the parties; or the arbitrator exceeded his or her powers.²⁵ These standards now appear in the law.²⁶ The Senate included a significant excerpt from a brief as part of its report on the USAA, apparently reflecting that chamber's intent on this subject:

The courts are bound to accept and enforce the award of the arbitrators unless there is in it a defect so inherently vicious that,

technicality, delay, and [keep] expense to a minimum and at the same time [safeguard] the rights of the parties").

20. *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1067 (Cal. 1996) (citing 3 CAL. LAW REVISION COMM'N REP., RECOMMENDATION AND STUDY RELATING TO ARBITRATION, at G-28 (1960)); Eddy S. Feldman, *Arbitration Law in California: Private Tribunals for Private Government*, 30 S. CAL. L. REV. 375, 388 n.45 (1957).

21. The bill was reintroduced in the 68th Congress with this heading: "To make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations." H.R. 646, 68th Cong., at 1 (1923); S. 1005, 68th Cong., at 1 (1923).

22. *Interstate Commercial Disputes Hearings*, *supra* note 10 (statement of Charles L. Bernheimer). The House report stated: "The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of [f] admiralty, or which may be the subject of litigation in the Federal courts." H.R. REP. NO. 68-96, at 1.

23. The Senate report emphasized that the effect of the bill would be to abolish the judicial reluctance to enforce arbitration agreements. S. REP. NO. 68-536, at 2-3. During Senate debate, Senator Thomas J. Walsh stated: "In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced." 68 CONG. REC. 984 (1924) (statement of Senator Walsh). The same point was raised during House debates. *See* 68 CONG. REC. 1931 (1924) (statement of Congressman Graham).

24. H.R. REP. NO. 68-96, at 2.

25. S. REP. NO. 68-536, at 4.

26. *See infra* note 32 and accompanying text.

as a matter of common morality, it ought not to be enforced. This exists only when corruption, partiality, fraud or misconduct are present or when the arbitrators exceeded or imperfectly executed their powers or were influenced by other undue means – cases in which enforcement would obviously be unjust. There is no authority and no opportunity for the court, in connection with the award, to inject its own ideas of what the award should have been.²⁷

In addition, this statute preserved dual roles for state and federal courts – a feature that currently complicates review of employment. Congress was determined to make arbitration agreements enforceable everywhere but realized that federal jurisdiction was quite limited in the 1920s. At the same time, many states lacked arbitration laws to reverse the supposed judicial hostility to this ADR process. Legislative history suggests that dual jurisdiction was intended to close these jurisdictional gaps.²⁸ Section 3 authorizes a federal court stay a trial “until such arbitration has been had in accordance with the terms of the agreement.”²⁹ Furthermore, Section 4 allows a party who complains of “failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration” to “petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.”³⁰

27. *Interstate Commercial Disputes Hearings*, *supra* note 10, at 36 (statement of W.W. Nichols). The legislative reports and debates said nothing as to whether post-award and state court litigation rules should be preempted by the new federal law. *Id.*

28. A main proponent of the federal arbitration law and a spokesman for the American Bar Association, Julius Henry Cohen, explained the goals of the legislation: “[F]irst . . . to get a State statute, and then to get a Federal law to cover interstate and Foreign commerce and admiralty, and, third, to get a treaty with Foreign countries.” H.R. REP. NO. 96-68, at 16. Reflecting on this narrow view of federal jurisdiction, Congressman Graham – also a sponsor of the law – told his colleagues that the federal element “only affects contracts relating to interstate subjects and contracts in admiralty.” 65 CONG. REC. 1931 (1924). The Senate Report on this legislation similarly indicated that the bill “[relates] to maritime transactions and to contracts in interstate and foreign commerce.” S. REP. NO. 68-536, at 3. In an earlier hearing on the bill, another arbitration proponent, Charles L. Bernheimer, informed a Senate subcommittee that the proposed legislation “follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction. These fields are in admiralty and in foreign and interstate commerce.” *Hearing on S. 4213 and S. 4214 Before the Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 2 (1923).

29. 9 U.S.C. § 3 (2007)

30. *Id.* § 4.

The law continues by specifying rules for reviewing awards. Section 9, which pertains to procedures for reviewing awards, allows a role for state courts when it says:

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.³¹

Section 10 states four grounds to vacate an award in federal court.³² In conjunction with this provision, all states have arbitration acts that provide for judicial review of awards. Many state laws contain the four statutory standards in Section 10 of the FAA and add a fifth ground for vacatur.³³ Fourteen other states have adopted Section 23 in the Revised Uniform Arbitration Act, in part or in whole; and others enumerate different standards.³⁴

31. *Id.* § 9.

32. *See id.* § 10 (authorizing courts to vacate an award “(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.”).

33. UAA vacatur standards appear in Alaska, ALASKA STAT. § 09.43.120 (2006) (Vacating an Award), Arizona, ARIZ. REV. STAT. ANN. § 12-1512 (2006) (Opposition to an Award), Arkansas, ARK. CODE ANN. § 16-108-212 (2005) (Vacating an Award), Idaho, IDAHO CODE ANN. § 7-912 (2006) (Vacating an Award), Illinois, 710 ILL. COMP. STAT. 5/12 (2007) (Vacating an Award), Indiana, IND. CODE §§ 34-57-1-17, -2-13 (2006) (Grounds Against Rendition of Award on Judgment, Vacation of Award), Kansas, KANSAS STAT. ANN. § 5-412 (2005) (Vacating an Award), Kentucky, KENTUCKY REV. STAT. ANN. § 417.160 (2006) (Vacating an Award), Maine, ME. REV. STAT. ANN. tit. 14, § 5938 (2006) (Vacating Award), Massachusetts, MASS. GEN. LAW ch. 150C, § 12 (2007) (Modification or Correction of Award), Minnesota, MINN. STAT. § 572.19 (2007) (Vacating an Award), Missouri, MO. REV. STAT. § 435.405 (2007) (Vacating an Award), Montana, MONT. CODE ANN. § 27-5-312 (2007) (Vacating an Award), Nebraska, NEB. REV. STAT. § 25-2613 (2005) (Vacating an Award), South Carolina, S.C. CODE ANN. § 15-48-130 (2006), South Dakota, S.D. CODIFIED LAWS § 21-25A-24 (2006) (Grounds for Vacation of an Award), Tennessee, TENN. CODE ANN. § 29-5-213 (2006), and Virginia, VA. CODE ANN. § 8.01-581.010 (2006) (Vacating an Award).

34. *See infra* Appendix II. Section 23 of the Revised Uniform Arbitration Act states:

(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (1) the award was procured by corruption, fraud, or other undue means; (2) there

B. *The Steelworkers Trilogy*

For many years, two sources provided for the review of labor arbitration awards – the FAA and Section 301 of the Labor-Management Relations Act (LMRA). By 1947, when the LMRA was enacted, and in the following years, most unions agreed to no-strike clauses in exchange for employer assurances to submit contract disputes to arbitration.³⁵ Section 301 provided a legal process to enforce this bargain.³⁶ In a landmark 1957 decision, *Textile Workers Union v. Lincoln Mills*,³⁷ the Supreme Court authorized federal courts under Section 301 to fashion a common law for collective bargaining agreements (CBAs), including court petitions to confirm or vacate

was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator's powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

Revised Uniform Arbitration Act § 23, 7 U.L.A. 73-74 (2005).

35. See R.W. FLEMING, *THE LABOR ARBITRATION PROCESS* 31-32 (1965) ("Indeed, it is apparent that the decisions of the Supreme Court which have so greatly enhanced labor arbitration . . . are in large part based on the theory that the arbitration clause is the *quid pro quo* for the no-strike clause."). The use of labor arbitration grew from the 1940s to the 1950s and has been a mainstay ever since. Compare a 1944 survey, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *ARBITRATION PROVISIONS IN UNION AGREEMENTS* 2, 4 tbl.1 col. 2 (where 73% of firms covered by a labor agreement had an arbitration provision in their contract), with a 1953 survey, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *LABOR-MANAGEMENT CONTRACT PROVISIONS* 10, 4 tbl.1 col. 2 (where 89% of firms covered by a labor agreement had an arbitration provision in their contract).

36. S. REP. NO. 80-105 (1947), *reprinted in* 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947*, at 421 (1959). See also H.R. REP. NO. 80-245 (1947), *reprinted in* 1 NLRB, *LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947*, at 337 (1959) (explaining congressional intent for enacting Section 301: "When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of proceedings involving violations of such contracts as those applicable to all other citizens.").

37. 353 U.S. 448 (1957). The Court ruled that federal jurisdiction to enforce collective bargaining agreements, including arbitration provisions, arises under Section 301 of the Labor-Management Relations Act of 1947, and not the Federal Arbitration Act. *Id.* at 450-51.

arbitrator awards that rule on grievances of contract violations.³⁸ *Lincoln Mills* appeared to preclude court review of labor awards under the FAA while confining review to the LMRA.³⁹

This left judges in a statutory vacuum because Section 301 is purely a jurisdictional law. In the *Steelworkers Trilogy*,⁴⁰ the Court fleshed out principles for reviewing awards. In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, the Court emphasized that judges should defer to labor awards, remarking that "refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements."⁴¹ This is because the "federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."⁴² *Enterprise Wheel* said that an arbitrator is "to bring his informed judgment to bear in order to reach a fair solution of a problem,"⁴³ noting that the parties select the arbitrator because these individuals understand the intricacies of unionized work.⁴⁴ Underscoring the difference between the FAA and LMRA, the Court observed that even though collective bargaining agreements are contracts, they are not bargained and administered like commercial transactions.⁴⁵ The Court gave labor arbitrators wide latitude when

38. *Id.* at 458-59.

39. Prior to *Lincoln Mills*, the federal circuit disagreed as to whether a CBA was enforceable under the FAA. Compare *Tenney Eng'g v. United Elec. Radio & Mach. Workers*, 207 F.2d 450 (3d Cir. 1953) (ruling that the FAA applied to CBAs), with *Int'l Union United Furniture Workers of Am. v. Colonial Hardwood Floor Co.*, 168 F.2d 33, 35 (4th Cir. 1948) ("[T]he provisions of the United States Arbitration Act may not be applied to this contract, because it is a contract relating to the employment of workers engaged in interstate commerce, within the clear meaning of the exclusion clause contained in the first section.").

40. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); and *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

41. *Enter. Wheel*, 363 U.S. at 596.

42. *Id.*

43. *Id.* at 597.

44. *Id.* at 596 n.2.

45. *Id.* (explaining that the agreement by unions and employers to submit contract disputes to labor arbitrators is founded in their confidence in this neutral's abilities). We also note that before *Lincoln Mills* and the *Trilogy*, federal courts were divided on the issue of whether labor arbitration procedures and awards were reviewable by federal courts under the FAA. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957) (detailing the split between circuit courts that viewed Section 301 of the LMRA as purely jurisdictional, and other circuits who believed that Section 301 conferred authority on federal courts to fashion a common law of labor arbitration). The problem arose because the FAA excluded the arbitration agreements of seafarers and railroad workers without expressly mentioning the entire domain of labor arbitration agreements. The specific mention of only two unionized industries created an

it said that they might need “flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.”⁴⁶

But *Enterprise Wheel* did not immunize labor awards: “[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.”⁴⁷ An arbitrator “may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.”⁴⁸

Enterprise Wheel also stated that a “mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award.”⁴⁹ An award should not be disturbed unless the arbitrator “has abused the trust the parties confided in him and has not stayed within the areas marked out for his consideration.”⁵⁰ A court should not vacate an award merely because it disagrees with the arbitrator’s construction of the agreement.⁵¹

Other *Trilogy* decisions emphasized the unique institutional features of labor arbitration. *American Manufacturing* noted that the “function of the court is very limited when the parties have agreed to

inference that all other labor arbitration agreements were subject to federal court review under the FAA. But accentuating this mystery, Congress enacted the FAA to address problems that arose in enforcing commercial arbitration agreements – thereby implying, without expressly stating, that the entire field of labor arbitration agreements fell outside the purview of federal court review because they were not the type of arbitration agreement that business interests took before the FAA Congress. In the face of these ambiguities, some courts read the FAA’s exclusion clause broadly to mean that Congress intended to remove all labor arbitration agreements from federal jurisdiction. *See, e.g., Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emp. of Am., Local Div. 1210 v. Pa. Greyhound Lines*, 192 F.2d 310, 312-13 (3d Cir. 1951). *Lincoln Mills* and the *Trilogy* resolved this FAA conflict by construing Section 301 of the LMRA as a unique provision to fashion common law principles for the institution of labor arbitration, thereby separating federal review of labor awards and all other awards, including those that result from individual employment arbitration agreements.

46. *Enter. Wheel*, 363 U.S. at 597.

47. *Id.*

48. *Id.*

49. *Id.* at 598.

50. *Id.*

51. *Id.* at 599 (“[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator’s construction which was bargained for; and so far as the arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”).

submit all questions of contract interpretation to the arbitrator," because it is "the arbitrator's judgment . . . that was bargained for."⁵² *Warrior & Gulf* noted that the arbitrator "is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept He is rather part of a system of self-government created by and confined to the parties."⁵³ The decision emphasized that arbitrators have special competence to resolve workplace disputes.⁵⁴

The Supreme Court has updated the *Trilogy* in one essential area, when an award appears to contradict a public policy. In *United Paperworkers International Union v. Misco*,⁵⁵ an arbitrator reinstated a paper mill worker who was fired after he was arrested in the company parking lot on a drug charge.⁵⁶ Lower courts vacated the award, relieving the employer from reinstating the grievant, because they believed that it would violate a public policy against the operation of dangerous machinery by drug-users.⁵⁷ *Misco* reversed these rulings, holding that awards may be set aside only if they "would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."⁵⁸ Also, *Misco* refined *Trilogy* principles by admonishing lower courts not to interfere with "improvident, even silly, factfinding."⁵⁹ The Court reminded judges: "This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts."⁶⁰

More recently, the Court affirmed these principles in two decisions. In *Eastern Associated Coal Corp. v. United Mine Workers of*

52. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960).

53. *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960). The Court added that "the labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment." *Id.* at 582.

54. *Id.* at 581 ("The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.").

55. 484 U.S. 29 (1987).

56. *Id.* at 34.

57. *Id.* at 34-35.

58. *Id.* at 43 (internal quotations omitted) (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

59. *Id.* at 39.

60. *Id.*

America, District 17,⁶¹ a coal company fired an employee on two different occasions after concluding that he used marijuana while driving heavy machinery on a public highway.⁶² *Eastern* rebuked judges who fail to review awards with great deference.⁶³ A year later, in *Major League Baseball Players Ass'n v. Garvey*,⁶⁴ the Court used another example of judicial interference in arbitration to speak again to judges about the need for restraint.

As we elaborate below, courts choose among different sets of standards when they review employment arbitration awards. A federal court will generally apply Section 10 of the FAA, and a state

61. 531 U.S. 57 (2000).

62. *Id.* at 60. Separate arbitration awards reinstated him with conditions after finding that just cause was lacking. *Id.* at 60-61. The company refused to comply with the second award, contending that it violated a U.S. Department of Transportation rule stating that “the greatest efforts must be expended to eliminate the . . . use of illegal drugs . . . by those individuals . . . involved in . . . the operation of . . . trucks.” *Id.* at 63 (internal quotations omitted) (quoting Department of Transportation and Related Agencies Appropriation Act, Pub. L. No. 102-143, § 2(3), 105 Stat. 917, 953 (1992)). Rejecting the employer’s argument, the Supreme Court noted that DOT rules also favor rehabilitation of drug users, and do not preclude reinstatement of offenders to driving positions. *Id.* at 64.

63. The Court reminded federal judges that “both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract’s language, including such words as ‘just cause.’” *Id.* at 61. Additionally, *Eastern* said: “They have bargained for the arbitrator’s construction of their agreement. And courts will set aside the arbitrator’s interpretation of what their agreement means only in rare instances.” *Id.* at 62 (internal citation and quotations omitted). Reaffirming its guidance in *Misco*, the Court continued: “[A]s long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision.” *Id.* (internal quotations omitted) (quoting *Misco*, 484 U.S. at 38). Thus, “the proper judicial approach to a labor arbitration award is to refuse to review the merits.” *Id.* (internal quotations omitted) (quoting *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)).

64. 532 U.S. 504 (2001). The Supreme Court castigated the Ninth Circuit for insincerely reciting *Trilogy* principles. And the Court embarrassed the Ninth Circuit by calling its behavior “nothing short of baffling.” *Id.* at 510. *Garvey* emphasized that “established law ordinarily precludes a court from resolving the merits of the parties’ dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator’s decision.” *Id.* at 511. *Garvey* charged that the “Court of Appeals usurped the arbitrator’s role by resolving the dispute and barring further proceedings, a result at odds with this governing law.” *Id.* at 511. The Court added: “The arbitrator’s analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or inexplicable error. And, as we have said, any such error would not justify the actions taken by the court.” *Id.* at 511 n.2. *Garvey* sent a clear, reinforcing message to the federal judiciary: Do not overturn “the arbitrator’s decision because it disagree[s] with the arbitrator’s factual findings, particularly those with respect to credibility.” *Id.* at 510. And do not resolve the merits of the parties’ dispute. *Id.* at 511. If a court cannot enforce an award, it must remand the matter “for further arbitration proceedings.” *Id.*

court that reviews under parallel state legislation will be guided by identical principles. Our research shows, however, that there is growing diversity in state arbitration law. This contributes to a wider variety of statutory standards that are used in reviewing awards in these courts. Also, nothing in the FAA or state arbitration laws expressly precludes courts from applying additional standards. While the *Trilogy* was developed for the union-management context, its award-reviewing principles may be applied to individual employment awards. This multi-layered arrangement is further complicated when courts add to the *Trilogy*'s common law regulation of award review – for example, by ensuring that an award is not made in manifest disregard of the law. Awareness of these multiple sources is essential to coding data for this study. More generally, this information is vital in understanding that Section 10 of the FAA provides only one several of standards for court review.

II. EMPIRICAL RESEARCH METHODS AND STATISTICAL FINDINGS

A. *Research Methods*

We used research methods from our earlier empirical studies.⁶⁵ The sample was derived from Westlaw's internet service. Using appropriate federal and state law databases, we employed keywords that incorporated expressions that are tailored to the FAA and state arbitration laws.⁶⁶ We also performed a parallel search using keyword searches from the *Trilogy*.⁶⁷

Cases we included involved a post-award dispute between an individual employee and his or her employer in which the arbitrator's ruling was challenged by either party. Cases involving labor arbitrations under a CBA were excluded. The sample had no historical

65. Michael H. LeRoy & Peter Feuille, *As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 STAN. L. & POL'Y REV. 191 (2007) [hereinafter LeRoy & Feuille, *As the Enterprise Wheel Turns*]; Michael H. LeRoy & Peter Feuille, *Reinventing the Enterprise Wheel Court Review of Punitive Awards in Labor and Employment Arbitrations*, 11 HARV. NEGOT. L. REV. 199 (2006); Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RESOL. 19 (2001); and Michael H. LeRoy & Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How Federal Courts Respond*, 13 INDUS. REL. L.J. 78 (1991).

66. *E.g.*, "PROCURED BY CORRUPTION," or "EVIDENT PARTIALITY," or "REFUSING TO POSTPONE THE HEARING," or "ARBITRATORS EXCEEDED THEIR POWERS," or "IMPERFECTLY EXECUTED."

67. *E.g.*, "TRILOGY" or "WARRIOR & GULF" or "ENTERPRISE WHEEL" or "AMERICAN MANUFACTURING," or "MISCO," or "EASTERN ASSOCIATED COAL," or "GARVEY."

limit. The earliest decision was reported in 1975.⁶⁸ The sample started with this case and moved forward to December 31, 2006.

After a potential case was identified, we read it to see if it met our criteria. For example, many cases involved only a pre-arbitration dispute as to the enforcement of an arbitration clause and were therefore excluded. On the other hand, numerous cases involved employees who attempted at first to resist arbitration, were compelled to arbitrate their claims, and were later involved in a post-award lawsuit.⁶⁹ We found cases where the reluctant-to-arbitrate employee prevailed at the arbitration, and the employer sought to vacate the award.⁷⁰

Once a case met the criteria, we checked it against a roster of previously read and coded cases to avoid duplication.⁷¹ The cases are listed in Appendix I. Next, we took data from each decision for these variables: (1) state or federal court, (2) circuit in which a federal court was located, (3) year of district court, or state equivalent court, decision, (4) year of appellate decision, (5) type of issue that was ruled on by the arbitrator, (6) party who prevailed in the arbitration award, (7) amount of award, (8) party who challenged the award, (9) all legal arguments made by party who challenged the award, (10) party who won at the first judicial level, (11) first court ruling on motion to confirm or vacate an award, (12) party who won at the appellate level, and (13) appellate ruling on motion to confirm or vacate an award.

B. *Statistical Findings*

Table 1 shows parties appealed 240 individual employment arbitration awards. Federal district courts ruled in 144 cases (60% of the sample), though we note that in seven cases the ruling was something other than confirmation or vacatur. State courts with initial jurisdiction ruled likewise in 90 cases.⁷²

68. *McClure v. Montgomery County Cmty. Action Agency*, No. 4798, 1975 WL 181652 (Ohio Ct. App. Nov. 7, 1975).

69. *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144 (2d Cir. 2004).

70. In *Madden v. Kidder Peabody & Co.*, 883 S.W.2d 79 (Mo. Ct. App. 1994), an employee sued but was ordered by the court to arbitrate his claim. After he prevailed and was awarded \$250,000, the employer sued to vacate the award, but the court denied the appeal. *Id.* at 84.

71. In rare cases, an award was challenged once and remanded to arbitration; and after arbitrators ruled again, the award was challenged a second time. We viewed these as separate award review cases, even though the parties and disputes were unchanged, because the awards differed. *See, e.g., Sawtelle v. Waddell & Reed Inc.*, 754 N.Y.S.2d 264 (N.Y. App. Div. 2003).

72. In the remaining six cases, the court's ruling did not fit our coding system for confirmation, partial confirmation, and vacatur. *See, e.g., Wagner v. Kendall*, 413

Some arbitral proceedings were protracted and very expensive, defying the norm of brevity and economy.⁷³ At times, an award of attorney's fees exceeded the amount of damages that were ordered as remedies.⁷⁴ Table 1 reports additional background about the arbitrations. Employees won more often in arbitration than similar plaintiffs in court.⁷⁵ Individuals prevailed in 38.3% of awards, and won a split award in 9.6% of the cases in the sample. The median value of an employee award was \$250,000. This high amount was driven by disputes in the securities industry, which comprised 38.1% of the sample. Unique features of the industry – for example, a centralized clearinghouse to report employee misconduct – resulted in costly

N.E.2d 302 (Ind. Ct. App. 1980) (ruling that the challenged award was reviewable under Uniform Arbitration Act, rather than Administrative Adjudication Act).

73. *Barcume v. City of Flint*, 132 F. Supp. 2d 549 (E.D. Mich. 2001) (five years of arbitration); *Cremin v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, No. 96 C 3773, 2006 WL 1517777 (N.D. Ill. May 25, 2006) (almost ten years of litigation); *Sobol v. Kidder, Peabody & Co.*, 49 F. Supp. 2d 208 (S.D.N.Y. 1998) (62 hearing sessions were conducted between October 1994 and May 1999); *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (N.Y. App. Div. 2003) (more than 50 hearing days occurred over two and-a-half years); *Chisholm v. Kidder, Peabody Asset Mgmt., Inc.*, 164 F.3d 617 (2d Cir. 1998) (43 hearing sessions took place before an arbitration panel of the National Association of Securities Dealers); *Gold v. Deutsche Aktiengesellschaft*, 365 F.3d 144 (2d Cir. 2004) (30 hearing sessions occurred before an arbitration panel of the National Association of Securities Dealers); *Ovitz v. Schulman*, 133 Cal. App. 4th 830 (Cal. Ct. App. 2005) (parties used 23 hearing days); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668 (5th Cir. 2002) (the parties combined costs to arbitrate the dispute totaled over \$650,000); *Bailey v. Am. Gen. Life & Accident Ins. Co.*, No. M2003-01666-COA-R3-CV, 2005 WL 3557840 (Tenn. Ct. App. Dec. 29, 2005) (parties used 36 hearing days); *Eisenberg v. Angelo, Gordon & Co., L.P.*, 234 F.3d 1261 (2d Cir. 2000) (arbitration occurred over 10 hearing sessions).

74. *See, e.g.*, *Hasson v. W. Reserve Life Assurance Co.*, No. 8:06-cv-523-T-23TBM, 2006 WL 2691723 (M.D. Fla. Sept. 19, 2006) (employee was awarded \$168,000 in damages but denied \$245,575 in attorney's fees); *see also DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997) (age discrimination complainant was awarded \$220,000, but his request for attorney's fees totaling \$249,050 was denied).

75. *Cf. Michael Delikat & Morris M. Kleiner, An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J., Nov. 2003-Jan 2004, at 56. In employment discrimination cases filed and resolved between 1997 and 2001 in the Federal District Court for the Southern District of New York, the study found that employees prevailed 33.6% of the time, while similarly situated plaintiffs prevailed in 46% of the cases brought before NASD and NYSE arbitrators. *See also* Jess Bravin, *U.S. Courts Are Tough on Job-Bias Suits*, WALL ST. J., July 16, 2001, at A2. After analyzing nine years of federal trial statistics, Professors Stewart J. Schwab and Theodore Eisenberg concluded that federal appeals courts are less sympathetic to workers who allege job discrimination than they are to almost any other type of plaintiff. *Id.* Appeals courts reversed victories for plaintiffs in forty-four percent of cases. *Id.*

defamation awards.⁷⁶ Also, as individual brokers left one employer for another they took their clients, causing some employers to retaliate by harming their reputations.⁷⁷ Notably, however, workers in low-skilled jobs that are far removed from the securities industry also received substantial awards.⁷⁸

Table 1 also demonstrates a sharp contrast between individual and labor arbitration. Labor arbitration centers on contract disputes. In the present sample there were many contract disputes. Breach of contract claims were arbitrated in 39.2% of the sample. But many of the arbitration agreements also authorized the arbitrator to decide statutory and common law issues. For example, Title VII and emotional distress claims respectively comprised 17.1% and 5.0% of the sample.

Finding No. 1: Federal courts are extremely deferential in reviewing employment arbitration awards. In Table 2, federal district courts confirmed, partly confirmed, or vacated 137 awards. Federal appeals courts ruled in 75 cases. District courts confirmed awards in 93.4% of the cases, compared to 88.0% in appellate cases. The first column of data shows how these decisions ranged across the circuits. The Fifth and Second Circuits had the most cases (respectively, 17.5% and 16.1%), while the First Circuit had comparatively few cases (4.4%). District courts enforced 100% of challenged awards in the Third, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits. The First and Fifth Circuits registered the lowest enforcement rates (respectively, 66.7% and 83.3%). At the appellate level, courts enforced 100% of challenged awards in the First, Third, Seventh, Tenth, Eleventh, and D.C. Circuits. The Sixth Circuit had the lowest confirmation rate (50.0%).

76. See, e.g., *Eaton Vance Distrib., Inc. v. Ulrich*, 692 So. 2d 915 (Fla. Dist. Ct. App. 1997) (arbitration panel awarded employee \$1.25 million in punitive damages for defamation).

77. *Sawtelle*, 754 N.Y.S.2d at 267 (awarding \$25 million in punitive damages after employer discharged an individual broker, who had 2,800 clients who never filed one complaint against him, in retaliation for whistle-blowing activities against a co-worker who was later convicted for embezzlement).

78. In *Castleman v. AFC Enter., Inc.*, 995 F. Supp. 649, 654 (N.D. Tex. 1997), a fast-food employee was awarded \$1,678,622.40 in damages for injuries that arose in the course of employment. The arbitrator found that the design, installation, maintenance, and use of the steel storage shelving in the restaurant was hazardous and constituted an unreasonable risk of harm. *Id.* See also, *May v. First Nat'l Pawn Brokers*, 887 P.2d 185, 187 (Mont. 1994) (the arbitrator awarded two pawn shop managers more than \$132,000 each); *Barcume*, 132 F. Supp. 2d at 552 (ordering more than \$2.2 million in damages for sex discrimination complainants).

<u>Who Wins the Arbitration Award?</u>		<u>Type of Employment?</u>		
Employer	125/240 (52.1%)	Securities Industry	91/240 (38.1%)	
Employee	92/240 (38.3%)	Other Employment	148/240 (61.7%)	
Split Award	23/240 (9.6%)			
<u>Amount of Arbitration Award?</u>				
Employer Wins (N=37)		\$34,000 (Median) / \$2,450 – \$11,245,668 (Range)		
Employee Wins (N=87)		\$250,000 (Median) / \$2,677 – \$38,233,079 (Range)		
<u>What Employment Actions Are Arbitrated?</u>				
Discharge/Termination	91/240 (37.9%)			
Resignation	22/240 (9.2%)			
Post-Employment Pay	37/240 (15.4%)			
Current Employment Pay	19/240 (7.9%)			
Post-Employment Restriction	16/240 (6.7%)			
Worker Injury/Disease	13/240 (5.4%)			
<u>What Legal Issues Are Arbitrated?</u>				
Breach of Contract	94/240 (39.2%)			
Title VII Discrimination	41/240 (17.1%)			
Unjust Dismissal	33/240 (13.8%)			
State Discrimination	25/240 (10.4%)			
ADEA Discrimination	14/240 (5.8%)			
Emotional Distress	12/240 (5.0%)			
Negligence/Miscellaneous Torts	12/240 (5.0%)			
Defamation	11/240 (4.6%)			
ADA Discrimination	10/240 (4.2%)			
Tortious Interference	10/240 (4.2%)			
<u>How Often Do Courts Review Employment Arbitration Awards?</u>				
	<u>1970-1979</u>	<u>1980-1989</u>	<u>1990-1999</u>	<u>2000-2006</u>
Federal District Court	1/144 (0.7%)	6/144 (4.2%)	47/144 (32.6%)	90/144 (62.5%)
Federal Appeals Court	1/84 (1.2%)	4/84 (4.7%)	30/84 (35.7%)	49/84 (58.3%)
State First Court	3/90 (3.3%)	8/90 (8.9%)	44/90 (48.8%)	35/90 (38.9%)
State Appeals Court	2/85 (2.4%)	8/85 (9.4%)	35/85 (41.1%)	40/85 (47.0%)

Finding No. 2: State courts are less deferential in reviewing employment arbitration awards. Table 3 reports similar information for state court rulings. First jurisdiction courts confirmed 57 out of 66 awards (86.4%). This enforcement rate dropped to 74.1% at the appellate level, when courts confirmed only 43 out of 58 awards. The combined confirmation rate was 80.6% (100 awards confirmed in 124 cases).

Finding No. 3: Award confirmation among states is high but quite variable. Table 3 also shows the results for states with five or more award review cases. The states are ranked by their award confirmation rates. In Texas, 100% of the rulings confirmed awards. Other Southern states ranked among the most deferential (Louisiana, Florida, and Arkansas). Two Midwestern states, Michigan and Ohio, had much lower confirmation rates (respectively, 58.3% and 64.2%).

Finding No. 4A: In FAA and equivalent state cases, the most common award challenge was that arbitrators exceeded

Table 2						
Confirmation of Arbitrator Awards						
Federal District Courts and Appellate Courts						
N= 212 Federal Court Decisions						
	Percent of District Sample 137 Awards		District Courts Confirm Awards 128/137 (93.4%)		Appeals Courts Confirm Awards 66/75 (88.0%)	
First Circuit	6/137	(4.4%)	4/6	(66.7%)	2/2	(100%)
Second Circuit	22/137	(16.1%)	21/22	(95.5%)	11/12	(91.7%)
Third Circuit	12/137	(8.8%)	12/12	(100%)	4/4	(100%)
Fourth Circuit	11/137	(8.0%)	10/11	(90.9%)	5/6	(83.3%)
Fifth Circuit	24/137	(17.5%)	20/24	(83.3%)	13/14	(92.9%)
Sixth Circuit	8/137	(5.8%)	8/8	(100%)	3/6	(50.0%)
Seventh Circuit	9/137	(6.6%)	9/9	(100%)	2/2	(100%)
Eighth Circuit	13/137	(9.5%)	13/13	(100%)	8/9	(88.9%)
Ninth Circuit	7/137	(5.1%)	7/7	(100%)	5/6	(83.3%)
Tenth Circuit	9/137	(6.6%)	8/9	(88.9%)	5/5	(100.0%)
Eleventh Circuit	9/137	(6.6%)	9/9	(100%)	4/4	(100.0%)
D.C. Circuit	7/137	(5.1%)	7/7	(100.0%)	4/5	(80.0%)

their powers (24.2%), but this argument rarely succeeded in vacating an award (5.5%). Corruption, fraud, or undue means was a rare basis for challenging an award (5.5%), but on a

Table 3						
Confirmation of Arbitrator Awards						
State Courts of First Jurisdiction and Appellate Courts						
(Arranged by States with Five or More Rulings)						
N=124 State Court Decisions						
Ranked by Rate of Award Confirmation	First Jurisdiction Courts Confirm Awards <i>All States & D.C.</i> 57/66 Awards (86.4%)		Appeals Courts Confirm Awards <i>All States & D.C.</i> 43/58 Awards (74.1%)		Courts Combined Confirm Awards <i>All States & D.C.</i> 100/124 Awards (80.6%)	
1 Texas	5/5	(100%)	5/5	(100%)	10/10	(100%)
2 California	5/6	(83.3%)	5/6	(83.3%)	10/12	(83.3%)
3 Louisiana	3/3	(100%)	2/3	(66.6%)	5/6	(83.3%)
4 Arkansas	2/3	(66.5%)	3/3	(100%)	5/6	(83.3%)
5 Florida	3/3	(100%)	2/3	(66.6%)	5/6	(83.3%)
6 Connecticut	8/10	(80.0%)	4/5	(80.0%)	12/15	(80.0%)
7 Pennsylvania	2/3	(66.6%)	2/2	(100%)	4/5	(80.0%)
8 New Jersey	4/4	(100%)	2/4	(50.0%)	6/8	(75.0%)
9 Ohio	5/7	(71.4%)	4/7	(57.1%)	9/14	(64.2%)
10 Michigan	5/7	(71.4%)	2/5	(40.0%)	7/12	(58.3%)

comparative basis, was more successful than any other basis for challenging an award (15.4%). Table 4A shows how often challengers relied on each of the four statutory grounds to argue for vacating an award under federal or state arbitration law. This statistic is the first percentage that appears by each provision of the law. We now rank these statutory grounds by their frequency as grounds for challenging an award to a court of first jurisdiction: (Rank 1) 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 (in 24.2% of the cases); (Rank 2) where there was evident partiality or corruption by the arbitrators (16.3%); (Rank 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 (14.2%); and (Rank 4) where the award was procured by corruption, fraud, or undue means (5.5%). In 10.0% of award challenges, the party resisting vacatur argued that the lawsuit was not timely filed under the FAA or state equivalent.

Table 4A				
Employment Arbitration Awards Reviewed by Federal and State Courts Using Federal FAA and State Uniform Arbitration Act				
Basis & Frequency for Challenging Awards		Confirm*		Vacate*
<u>Corruption, Fraud, or Undue Means (9 U.S.C. § 10(1) or State UAA Equivalent)</u>				
Argued to District Court	13/238 (5.5%)	District Court Ruling	10/13 (76.9%)	2/13 (15.4%)
Argued to Appeals Court	7/161 (4.3%)	Appeals Court Ruling	5/7 (71.4%)	1/7 (14.3%)
<u>Evident Partiality (9 U.S.C. § 10(2) or State UAA Equivalent)</u>				
Argued to District Court	39/239 (16.3%)	District Court Ruling	37/39 (94.9%)	1/39 (2.6%)
Argued to Appeals Court	32/161 (19.9%)	Appeals Court Ruling	27/32 (84.4%)	2/32 (9.5%)
<u>Hearing Misconduct (9 U.S.C. § 10(3) or State UAA Equivalent)</u>				
Argued to District Court	34/239 (14.2%)	District Court Ruling	29/34 (85.3%)	5/34 (14.7%)
Argued to Appeals Court	21/161 (13.0%)	Appeals Court Ruling	18/161 (85.7%)	2/21 (9.5%)
<u>Exceed Powers or Imperfectly Execute Award (9 U.S.C. § 10(4) or State UAA Equivalent)</u>				
Argued to District Court	58/239 (24.2%)	District Court Ruling	52/58 (89.7%)	3/58 (5.2%)
Argued to Appeals Court	34/161 (21.1%)	Appeals Court Ruling	24/34 (70.67%)	2/34 (5.9%)
<u>Court Lacks Jurisdiction Due to Timeliness Requirements (9 U.S.C. § 12/State Equivalent), or Other</u>				
Argued to District Court	24/239 (10.0%)	District Court Ruling	21/24 (87.5%)	2/24 (8.3%)
Argued to Appeals Court	6/161 (3.7%)	Appeals Court Ruling	3/6 (50.0%)	3/6 (50.0%)
<i>*Excluding Results for Partial Conformation/Partial Vacatur Rulings</i>				

Data in Table 4A also show how frequently these arguments resulted in vacatur. This statistic is the last percentage that appears by each provision of the law. No argument was particularly successful. However, as the following ranking shows, some arguments were

much more effective in vacating an award than others: (Rank 1) where the award was procured by corruption, fraud, or undue means (15.4% of the cases); (Rank 2) 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 (14.7%); (Rank 3) 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 (5.2%); and (Rank 4) where there was evident partiality or corruption by the arbitrators (2.6%). In 8.3% of award challenges, a timeliness argument was associated with a vacatur ruling. In these cases, courts rejected the timeliness argument and proceeded to vacate the award.

Finding No. 4B: Among *Trilogy* and other common law standards for reviewing an award, manifest disregard of the law was the most common basis for a challenge (in 35.1% of the cases), but this argument rarely led to vacatur (7.1%). While used less often, three ***Trilogy* grounds were more potent in vacating awards – the arbitrator exceeded his or her powers (22.5%), the award failed to draw its essence from the agreement (18.2%), and the award violated a public policy (15.1%).** Table 4B shows how frequently *Trilogy* and other common law grounds were used to challenge an award (*see* the first percentage by each argument). These grounds are ranked by their frequency in challenging awards before a court of first jurisdiction: the award was in manifest disregard of the law (35.1%); the award violated a public policy (15.1%); the arbitrator committed a fact finding error (9.7%); the award was arbitrary or capricious, irrational, or gross error (7.9%); the arbitrators exceeded their authority (7.5%); the remedy in the award was punitive, excessive or unauthorized (4.2%); the award failed to draw its essence from the agreement (4.6%); and the award was unconstitutional or more specifically denied a party of due process (3.4%).

Finding No. 5: “Manifest disregard” wastes more judicial resources in reviewing awards than any other standard. This finding compares how often an award loser sought review under a particular standard and the frequency of prevailing on this argument. This measures futility from the perspective of award challengers and waste from the vantage point of courts. When challengers used statutory standards, the largest disparity was observed for the “exceeded powers” element. Nearly one-fourth of courts (24.2%)

Table 4B				
Employment Arbitration Awards Reviewed by Federal and State Courts				
Using <i>Trilogy</i> and Other Common Law Standards				
Basis & Frequency for Challenging Awards			Confirm*	Vacate*
<u>Manifest Disregard of the Law (Common Law Standard)</u>				
Argued to District Court	84/239 (35.1%)	District Court Ruling	75/84 (89.3%)	6/84 (7.1%)
Argued to Appeals Court	49/161 (30.4%)	Appeals Court Ruling	44/49 (89.8%)	4/49 (8.2%)
<u>Arbitrary & Capricious, or Irrational, or Gross Error (Common Law Standard)</u>				
Argued to District Court	19/239 (7.9%)	District Court Ruling	17/19 (89.5%)	0/19 (0%)
Argued to Appeals Court	13/161 (8.1%)	Appeals Court Ruling	10/13 (76.9%)	1/13 (7.7%)
<u>Remedy (Punitive, Excessive, or Unauthorized)</u>				
Argued to District Court	10/239 (4.2%)	District Court Ruling	10/10 (100%)	0/10 (0%)
Argued to Appeals Court	6/161 (3.7%)	Appeals Court Ruling	4/6 (66.6%)	0/6 (0%)
<u>Unconstitutional or Due Process</u>				
Argued to District Court	8/238 (3.4%)	District Court Ruling	7/8 (87.5%)	1/8 (12.5%)
Argued to Appeals Court	6/161 (3.7%)	Appeals Court Ruling	4/6 (66.6%)	1/6 (16.7%)
<u>Trilogy (Arbitrator Exceeded Authority)</u>				
Argued to District Court	18/239 (7.5%)	District Court Ruling	14/18 (77.8%)	4/18 (22.5%)
Argued to Appeals Court	12/161 (7.5%)	Appeals Court Ruling	9/12 (75.0%)	2/12 (16.7%)
<u>Trilogy (Award Did Not Address Its Essence from the Agreement)</u>				
Argued to District Court	11/239 (4.6%)	District Court Ruling	8/11 (72.7%)	2/11 (18.2%)
Argued to Appeals Court	6/161 (3.7%)	Appeals Court Ruling	3/6 (50.0%)	3/6 (50.0%)
<u>Trilogy (Arbitrator Committed a Fact-Finding Error)</u>				
Argued to District Court	23/238 (9.7%)	District Court Ruling	21/23 (91.3%)	1/23 (4.3%)
Argued to Appeals Court	17/161 (10.6%)	Appeals Court Ruling	14/17 (82.4%)	0/17 (0%)
<u>Trilogy (Award Violated a Public Policy)</u>				
Argued to District Court	36/238 (15.1%)	District Court Ruling	29/36 (80.6%)	6/36 (15.1%)
Argued to Appeals Court	27/161 (16.9%)	Appeals Court Ruling	21/27 (77.8%)	4/27(14.8%)
<i>*Excluding Results for Partial Conformation/Partial Vacatur Rulings</i>				

spent time to adjudicate this appeal, but agreed with award-challengers in only one-in-twenty (5.5%) cases. This measure of waste and futility was even greater for manifest disregard, where more than one-third of courts (35.1%) conducted this review but ruled favorably for challengers in one-in-fourteen cases (7.1%).

III. CASES BEHIND THE NUMBERS: QUALITATIVE FINDINGS

This research provides new statistical information about court review of arbitration awards. However, the phenomena we are measuring cannot be understood without more qualitative information. Returning to our initial findings, we improve our understanding by exploring the contexts behind the statistical findings.

Finding No. 1 and Finding No. 2: We find that federal and state courts are highly deferential in reviewing employment arbitration awards. Apart from the award confirmation statistics, many courts verbalized their deference in memorable expressions. We now quote passages that are so vivid that they send a strong deterrent

signal to rational parties who contemplate a challenge to an adverse award.

- “The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.”⁷⁹
- “[A]rbitration does not provide a system of ‘junior varsity trial courts.’”⁸⁰
- “Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called ‘review’ at all.”⁸¹
- “The parties to this action voluntarily entered into an arbitration agreement and further agreed that two arbitrators would decide the dispute. Having entered into this agreement, there is a moral and legal duty to abide by the award in the absence of valid reason not to do so. Simply being dissatisfied with the results is not a good reason for setting aside the award.”⁸²
- “This expectation of finality strongly informs the parties’ choice of an arbitral forum over a judicial one. The arbitrator’s decision should be the end, not the beginning, of the dispute.”⁸³
- “[M]aximum deference is owed to the arbitrator’s decision and the standard of review of arbitration awards is among the narrowest known to law. Once an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily in favor of the award, and courts must exercise great caution when asked to set aside an award.”⁸⁴
- “Once parties bargain to submit their disputes to the arbitration system (a system essentially structured without due process,

79. *McClure v. Montgomery County Cmty. Action Agency*, No. 4798, 1975 WL 181652, at *4 (Ohio Ct. App. Nov. 7, 1975) (quoting *Safeway Stores, Inc. v. Am. Bakery Confectionary Workers, Local 111*, 390 F.2d 79, 82 (5th Cir. 1968)).

80. *Williams v. Katten, Muchen & Zavis*, No. 92 C 5654, 1996 WL 717447, at *6 (N.D. Ill. Dec. 9, 1996) (quoting *Eljer Mfg., Inc., v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994)).

81. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1997).

82. *Dean Witter Reynolds, Inc. v. Deislinger*, 711 S.W.2d 771, 772 (Ark. 1986) (“[E]xclusion of this evidence in an arbitration proceeding is not a statutory ground for vacating the award.”).

83. *Moncharsh v. Heily & Blase*, 832 P.2d 899, 903 (Cal. 1992). The court cited a similar 1852 court decision in confirming the award. *Id.* at 904 (citing *Muldrow v. Norris*, 2 Cal. 74 (Cal. 1852)).

84. *Durkin v. CIGNA Prop. & Cas. Corp.*, 986 F. Supp. 1356, 1358 (D. Kan. 1997) (quoting *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1462-63 (10th Cir. 1995)). The *Durkin* court added: “Because a primary purpose behind arbitration agreements is to avoid the expense and delay of court proceedings, it is well settled that judicial review of an arbitration award is very narrowly limited.” *Id.*

rules of procedure, rules of evidence, or any appellate procedure), we are disinclined to save them from themselves.”⁸⁵

- “Judicial intrusion is restricted to the extraordinary situations indicating abuse of arbitral power or exercise of power beyond the jurisdiction of the arbitrator.”⁸⁶

Finding No. 3: We find substantial variability in award confirmation rates among state courts. Our research provides no definitive explanation, but we believe part of this variability is due to the interaction between specific state laws and the public policy basis in the *Trilogy* for challenging an award. We elaborate on three possible sources for this variability: state laws that regulate (1) the award of attorney’s fees at arbitration, (2) post-employment restrictions, and (3) arbitrator disclosures to the parties. State arbitration laws also appear to reflect regional effects.

The award of attorney’s fees at arbitration: Several states regulate an arbitrator’s award of attorney’s fees. In a Florida case, *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith*,⁸⁷ the arbitration panel awarded a former employee more than \$300,000 in compensatory damages and \$160,000 in attorney’s fees.⁸⁸ By statute, Florida expressly provides that attorney’s fees for time spent in arbitration are recoverable but only in the trial court upon a motion for confirmation or enforcement of the award.⁸⁹ The law creates redundant litigation by requiring two separate proceedings for awarding these fees. However, the *Cassedy* appeals court confirmed the arbitrator’s award of attorney’s fees because Merrill Lynch agreed to submit all issues to arbitration. The employer, therefore, waived its statutory right to have a judicial determination of fees.⁹⁰

In *Moore v. Omnicare, Inc.*,⁹¹ the respondent firm acquired David Moore’s shares in a pharmaceutical supply corporation and named him chief operating officer. After the new company struggled financially, Moore was terminated and he arbitrated numerous claims

85. *Hawrelak v. Marine Bank, Springfield*, 735 N.E.2d 1066, 1070 (Ill. App. Ct. 2000).

86. *Landmark v. Mader Agency, Inc.*, 878 P.2d 773, 776 (Idaho 1994).

87. 751 So. 2d 143 (Fla. Dist. Ct. App. 2000).

88. *Id.* at 145.

89. *Id.* at 145-46 (citing FLA. STAT. § 682.11 (1989)).

90. *Id.* at 151. The court relied upon the broad public policy favoring arbitration in confirming the award of attorney’s fees: “In a lengthy and complex arbitration matter, the entire beneficent purpose of alternative dispute resolution would be sacrificed to a rigid notion that attorney’s fees must be decided in a separate proceeding by a circuit judge.” *Id.* The court added: “We also question the assumption that trial courts sit in a better position than arbitrators to decide entitlement to attorney’s fees.” *Id.*

91. 118 P.3d 141 (Idaho 2005).

against Omnicare.⁹² In a complex series of interim and final awards, Moore was awarded \$130,000 in attorney's fees.⁹³ Omnicare appealed to the state district court, and prevailed in its motion to vacate this part of the award.⁹⁴ The Idaho Supreme Court affirmed the vacatur ruling based on a specific state statute that disallows the award of attorney's fees by an arbitrator.⁹⁵

Post-employment restrictions: Turning to arbitrations involving post-employment restrictions, 16 cases (6.7%) involved this type of dispute. States vary in their treatment of these no-compete employment contracts. In *Malice v. Coloplast Corp.*, an executive who managed the development of prosthetic medical devices resigned his position and received a substantial severance agreement.⁹⁶ Later, Malice became a partner in another medical devices company, prompting his former employer to invoke the no-competition agreement that Malice signed upon his resignation.⁹⁷ The no-competition clause was arbitrated pursuant to the severance agreement.⁹⁸

After the employer prevailed in the award, Malice challenged this outcome before the Georgia Court of Appeals and lost.⁹⁹ Applying state law, the court said that restrictive covenants in employment are "enforceable if they are reasonable, founded on valuable consideration, reasonably necessary to protect the employer's legitimate business interests, and do not unduly prejudice the public's interest."¹⁰⁰ The court determined that Malice successfully bargained for increased severance benefits in return for the restrictive covenants.¹⁰¹ The court concluded that the agreement created no undue hardship on Malice nor prejudiced the public.¹⁰² Thus, the court ruled that "the arbitrator's award does not violate Georgia's public policy against restraint of trade."¹⁰³

92. *Id.* at 145-46.

93. *Id.* at 146.

94. *Id.*

95. *Id.* at 148 ("Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.") (citing IDAHO CODE ANN. § 7-910 (2004)).

96. *Malice v. Coloplast Corp.*, 629 S.E.2d 95, 97 (Ga. Ct. App. 2006).

97. *Id.*

98. *Id.*

99. *Id.* at 98.

100. *Id.* at 99.

101. *Id.* at 100.

102. *Id.* at 99-100.

103. *Id.* at 100.

But the Oklahoma Supreme Court reached a different result in *Cardiovascular Surgical Specialists Corp. v. Mammana*.¹⁰⁴ The doctor, a cardiovascular surgeon, signed an employment contract that barred him from competing within a 20-mile radius of the firm's Tulsa offices for years after leaving the physician group.¹⁰⁵ For nine months, the contract also prohibited the doctor from accepting referrals from any other source except from his former employer.¹⁰⁶ After the doctor resigned to start a solo practice, his former employer invoked the restrictive covenant and the parties arbitrated their dispute.¹⁰⁷ The arbitrators enforced the non-compete provision and ordered injunctive relief.¹⁰⁸

Following a lower court ruling that confirmed the award, the state supreme court reversed and vacated part of the award.¹⁰⁹ After noting that Oklahoma law broadly prohibits restraints, the court reasoned that "this public right cannot be waived by the parties' agreement to submit the issue of the validity of a contract provision to arbitration. A void provision provides no legal basis for enforcement whether through arbitration or judicial pronouncement."¹¹⁰ The employer could not shield itself in an employment contract from ordinary competition for patients. Finding that the arbitration panel was presented with evidence of the importance of physician referrals to cardiovascular surgeons, the court disagreed with the panel's ruling, stating: "One surgeon has no legitimate business interest in another surgeon's referral base regardless of a past employer-employee relationship."¹¹¹ The court refused to confirm the award, and remanded the matter to determine whether the employer owed damages to the doctor.¹¹²

Arbitrator disclosures to the parties: Our third example involves state laws that intensively regulate arbitration. *Ovitz v. Schulman*¹¹³ demonstrates how a California statute strictly requires disclosures that arbitrators provide to the parties. This important decision explains that the California legislature enacted a comprehensive arbitration law "to provide minimum ethical standards and

104. 61 P.3d 210 (Okla. 2002).

105. *Id.* at 211-12.

106. *Id.* at 212.

107. *Id.*

108. *Id.*

109. *Id.* at 215.

110. *Id.* at 213.

111. *Id.* at 214.

112. *Id.* at 215.

113. 35 Cal. Rptr. 3d 117 (Cal. Ct. App. 2005).

remedies for the arbitrator's failure to comply with existing disclosure requirements."¹¹⁴ In this case, where Cathy Schulman claimed that she was wrongfully terminated as president of a film company,¹¹⁵ the arbitrator accepted another appointment in a separate arbitration involving the same movie company.¹¹⁶ After the arbitrator denied Schulman's claims and awarded her former employer approximately \$1.5 million in damages and \$1.8 million in attorney fees and costs,¹¹⁷ Schulman invoked the disclosure law as grounds for vacating the award.¹¹⁸ The California Court of Appeals found merit in her argument and vacated the award.¹¹⁹

Region: Apart from variations in state laws, we noticed a regional pattern in award enforcement. In a companion study on judicial review of labor arbitration awards, we found that federal judges in the Sixth Circuit Court of Appeals were less deferential than many peer courts.¹²⁰ Aware that this circuit adopted an intrusive reviewing standard, called the four-part essence test, Judge Sutton complained that the test "has made it easier to vacate an arbitration award on the merits than the Supreme Court meant it to be."¹²¹

Interestingly, two populous states in the Sixth Circuit – Ohio and Michigan – are at the bottom of our enforcement rankings in Table 3. This outcome is nearly identical to our finding for federal courts that review labor awards.¹²² This suggests that the Sixth Circuit's less deferential posture influences the behavior of state courts.

114. *Id.* at 123. Among the statutory list of required disclosures that the court described, section 1281.9 requires that arbitrators make required written disclosures within 10 calendar days of their appointment. In general, the legislature was concerned about "bias, or appearance of bias, that may flow from one side in an arbitration being a source or potential source of additional employment, and thus additional income, for the arbitrator." *Id.* at 123. Thus, standard 12(b) requires additional disclosures when, in the course of serving as an arbitrator, this individual entertains offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral in another case. Failure to make a timely and complete disclosure may result in disqualification. *Id.* at 123-24.

115. *Id.* at 119.

116. *Id.* at 120-21.

117. *Id.* at 121-22.

118. *Id.* at 122.

119. *Id.* at 136. Having failed to comply with standard 12(b), the Arbitrator was precluded from serving as an arbitrator in any other matter involving the parties or any lawyer for the parties until the Schulman arbitration was completed.

120. LeRoy & Feuille, *As the Enterprise Wheel Turns*, *supra* note 65.

121. *Mich. Family Res., Inc. v. Serv. Emp. Int'l Union Local 517M*, 438 F.3d 653, 661 (6th Cir. 2006) (Sutton, J., concurring).

122. LeRoy & Feuille, *As the Enterprise Wheel Turns*, *supra* note 65, at 217 ("The most controversial evidence of judicial activism that we uncovered is the Sixth Circuit's four-part essence test.").

But two mysteries cloud this preliminary conclusion. We did not read a single state decision from Ohio or Michigan courts that used the suspect four-part essence test. Second, in our earlier finding about the Sixth Circuit, we also concluded that the Fifth Circuit failed to enforce awards in accordance with the national policy of deferring to arbitration. By implication, Texas and Louisiana courts would be expected to appear near the bottom of the award confirmation rankings, along with Ohio and Michigan. Instead, we found the opposite result in Table 3.

This led us to wonder whether these Southern courts are predisposed to take the employer's side in these arbitrations because so many of these private proceedings are the result of employer-imposed agreements to avoid court. However, we found examples of Texas awards that favored ordinary workers which were upheld by Texas courts.¹²³

To summarize, there is a regional pattern in Table 3. However, at this time we cannot explain the statistical variation, nor can we dismiss the possibility that these differences are due to random variation in a small sample.

Finding No. 4: We now highlight cases that involved statutory review of awards under the FAA or state law equivalents. These cases provide essential context for understanding how parties challenged awards and courts applied the law.

• *Where the award was procured by corruption, fraud, or undue means (9 U.S.C. § 10(1) or State UAA Equivalent):* After a lengthy arbitration over discrimination claims that resulted in a multi-million dollar award for employees, the employer in *Barcume v. City of Flint* petitioned to vacate this outcome, citing *ex parte* communication between the arbitrator and a plaintiff's attorney.¹²⁴ The court dismissed this challenge, concluding that "while plaintiffs' counsel behaved unprofessionally by engaging in *ex parte* communications with

123. In *Antenna Prod. Corp. v. Cosenza*, No. 05-05-00701-CV, 2006 WL 1452102 (Tex. App. May 26, 2006), two workers were told that their services were no longer needed in New York and to report to a new location in Texas. *Id.* at *1. The relocation jeopardized one employee's joint custody of his children and disrupted the special education services for the other employee's disabled son. *Id.* Each worker informed his employer that personal circumstances prevented his move to Texas. *Id.* These appeals were rejected, and the company gave each employee a deadline to report. *Id.* When the workers failed to comply they were terminated. *Id.* In the arbitration over severance pay, the former employees prevailed and were awarded severance pay, plus reasonable costs and attorney's fees. *Id.* The award was confirmed by two Texas courts. *Id.* at *3.

124. *Barcume v. City of Flint*, 132 F. Supp. 2d 549, 553 (E.D. Mich. 2001).

an Arbitrator, this Court cannot conclude that her behavior rose to the level of being illegal, immoral, or in bad faith. At its worst, her behavior was sloppy, overzealous lawyering.”¹²⁵

• *Where there was evident partiality or corruption by the arbitrators (9 U.S.C. § 10(2) or State UAA Equivalent):* A variety of cases raised this challenge, and featured these issues and themes:

Relationship between the Arbitrator and a party: In *Bailey v. American General Life & Accident Insurance Co.*,¹²⁶ an employee who claimed that she was raped in her home by a co-worker sued American General in tort for its actions arising after she reported the matter. Pursuant to an arbitration agreement, her claims were adjudicated under American Arbitration Association proceedings.¹²⁷ The arbitrator, a practicing lawyer, noted in the disclosure form that her law firm represented the same employer in other litigation, and concluded: “I assume the claimant will not consent to this conflict [of interest] but let me know.”¹²⁸ Nonetheless, the claimant proceeded to arbitration with this arbitrator. The award denied the claim, and the Tennessee Court of Appeals rejected a challenge that the award resulted from evident partiality of the arbitrator.¹²⁹

In *Merrill Lynch, Pierce, Fenner & Smith v. Lambros*,¹³⁰ a discharged employee challenged an award on grounds that one of the arbitrators was biased. This arbitrator and the employer’s attorney were fraternity brothers in 1962. The Eleventh Circuit denied the motion to vacate, observing that the employee did not object to the disclosed relationship at anytime during the arbitration process.¹³¹ The court added that “a mere school relationship is too remote and speculative to constitute evident partiality.”¹³²

One of the arbitrators in *Montez v. Prudential Securities, Inc.*¹³³ had worked for a law firm that once had a business relationship with the employer. The arbitrator disclosed the relationship orally to the NASD, but not to the plaintiff.¹³⁴ Although the award was challenged on grounds of evident partiality, the court relied on the fact

125. *Id.* at 556.

126. *Bailey v. Am. Gen. Life & Accident Ins. Co.*, No. M2003-01666-COA-R3-CV, 2005 WL 3557840 (Tenn. Ct. App. Dec. 29, 2005).

127. *Id.* at *4.

128. *Id.*

129. *Id.*

130. 214 F.3d 1354 (11th Cir. 2000).

131. *Id.* at 1356.

132. *Id.*

133. 260 F.3d 980, 982 (8th Cir. 2001).

134. *Id.*

that the arbitrator's relationship with the law firm ended five years prior to the arbitration.¹³⁵ The Eighth Circuit wrote, "a federal court cannot vacate an arbitration award based on a failure to disclose merely because an arbitrator failed to comply with NASD rules,"¹³⁶ because the FAA "establishes the standard for vacatur of an arbitration award by a federal court, not the NASD rules."¹³⁷

The Eighth Circuit reached a different result in *Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*¹³⁸ Two arbitrators failed to disclose that their employers had ongoing business relationships with Merrill Lynch and that their employers used the same law firm as Merrill Lynch.¹³⁹ After the employee lost at arbitration, he moved to vacate the arbitration on grounds that failure to disclose these relationships showed evident partiality in the arbitrators.¹⁴⁰ In reversing a district court order that confirmed the award, the Eighth Circuit relied heavily on the Supreme Court's leading case on evident partiality under the FAA, *Commonwealth Coatings Corp.*¹⁴¹ The appeals court cited the Supreme Court's ruling in *Commonwealth Coatings Corp.* that an arbitrator's nondisclosure of a close business relationship with a party to the arbitration showed evident partiality warranting vacation of the arbitration decision, despite the absence of actual bias on the arbitrator's part.¹⁴² An award is subject to vacatur when the arbitrator's relationship creates "an impression of possible bias."¹⁴³ The Eighth Circuit also noted that the nondisclosure violated Section 23 of the NASD arbitration rules, which obligates arbitrators to disclose arbitrators' indirect relationships, "specifically including those between the arbitrators' current employers and any arbitration party or its counsel."¹⁴⁴ We note, however, that this outcome in *Olson* differs from other decisions in our sample.¹⁴⁵

135. *Id.* at 984.

136. *Id.*

137. *Id.*

138. 51 F.3d 157 (8th Cir. 1995).

139. *Id.* at 158.

140. *Id.*

141. *Id.* at 159 (citing *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968)).

142. *Id.*

143. *Id.*

144. *Id.* at 160.

145. See, e.g., *Unstad v. Lynx Golf, Inc.*, No. C7-96-2259, 1997 WL 193805, at *3 (Minn. Ct. App. 1997) ("A remote and unrelated attorney-client relationship between the neutral arbitrator and counsel for one of the parties is not a basis to vacate an arbitration award for undue means or evident partiality."). See also *Umana v. Swidler & Berlin*, 745 A.2d 334 (D.C. 2000) (neutral arbitrator was a former chairman of the Federal Trade Commission and had some professional contacts with an attorney

The arbitrator in *Bender v. Smith Barney, Harris Upham & Co.*, who was discharged in a prior unrelated matter by a securities firm named Newbold, arbitrated his termination claim and prevailed.¹⁴⁶ In the subject arbitration, Smith Barney terminated the plaintiff, who was hired by Newbold following this action.¹⁴⁷ After Ms. Bender lost her arbitration against Smith Barney, she contended to the court that the arbitrator was biased. This employee believed that her present association with Newbold brought back the arbitrator's negative experience with the same firm.¹⁴⁸ But the court viewed the matter as a coincidence,¹⁴⁹ and reasoned: "Evident partiality is strong language and requires proof of circumstances powerfully suggestive of bias."¹⁵⁰

Evidentiary rulings: In *Boyhan v. Maguire*,¹⁵¹ the chairman of the arbitration panel stated on the record that he had "suspicions" about an attorney in the arbitration, and excoriated this advocate for practices that he believed were unethical.¹⁵² After a lunch recess, the attorney moved, pursuant to Rule 19 of the American Arbitration Association, to disqualify the arbitrator.¹⁵³ The motion was denied, and an award was issued.¹⁵⁴ The court found no evident partiality, stating that the challenge to the award was "nothing more than the reaction of the arbitrator to one party's evidence. We do not believe that this kind of reaction to evidence can lawfully be equated with the kind of extrinsic, or improper, bias required by the statute for the vacation of an award."¹⁵⁵

• *Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to*

who served on the tripartite panel). The *Umana* court rejected the evident partiality claim from the employee, stating that the "test in this case is not whether the relationship was trivial; it is whether, having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation, the relationship between . . . [the arbitrator] and . . . [the party to the arbitration] was so intimate – personally, socially, professionally, or financially – as to cast serious doubt on [the arbitrator's] impartiality." *Id.* at 341.

146. *Bender v. Smith Barney, Harris Upham & Co.*, 901 F. Supp. 863 (D.N.J. 1994).

147. *Id.* at 866.

148. *Id.* at 867.

149. *Id.* ("Newbold is not a party to the present litigation. Rather, Newbold happens to be a company which hired plaintiff subsequent to her termination from Smith, Barney, and as such has no stake in the outcome of plaintiff's case against Smith, Barney . . .").

150. *Id.*

151. 693 So. 2d 659 (Fla. Dist. Ct. App. 1997).

152. *Id.* at 661.

153. *Id.*

154. *Id.*

155. *Id.* at 662.

hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced (9 U.S.C. § 10(3) or State UAA Equivalent):

Motions to postpone a hearing: Ten days before the arbitration hearings in *Berlacher v. PaineWebber, Inc.*,¹⁵⁶ the employee's eight-year-old daughter broke her arm and required hospitalization in Pennsylvania.¹⁵⁷ The employee believed that he needed to make medical decisions regarding his daughter and to help tend to his four other children, and therefore requested on May 14 to postpone the May 21-22 hearing.¹⁵⁸ The employer did not object, but the arbitrators denied the individual's request on May 17, and the hearing was held as scheduled.¹⁵⁹

After the employee lost on the merits, and was ordered to pay more than \$350,000 to his former employer, he challenged the award on grounds that he had inadequate opportunity to prepare.¹⁶⁰ Rejecting this contention, the employer reasoned that "arbitrators are given a great deal of latitude in conducting arbitration proceedings,"¹⁶¹ and nothing in the record showed that the arbitrators' conduct constituted misconduct or abuse of discretion.¹⁶²

In *Selby General Hospital v. Kindig*¹⁶³ a panel of arbitrators refused to reschedule a hearing when the employer contended that it needed more time to determine whether to call its own expert witness.¹⁶⁴ A lower court vacated the subsequent award that favored the employee,¹⁶⁵ but on appeal the award was confirmed.¹⁶⁶

Evidentiary objections at the hearing: The losing party in *Castleman v. AFC Enterprises, Inc.* challenged the award on grounds that the arbitrator denied its evidentiary objections.¹⁶⁷ The judge dismissed this challenge, reasoning that "[r]efusals to hear evidence that is irrelevant and/or cumulative do not prevent parties from receiving fundamentally fair hearings. Thus, the Arbitrator's decision

156. 759 F. Supp. 21 (D.D.C. 1991).

157. *Id.* at 23.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* at 24.

162. *Id.*

163. No. 04CA53, 2006 WL 2457436 (Ohio Ct. App. July 17, 2006).

164. *Id.* at *2.

165. *Id.* at *3.

166. *Id.* at *10.

167. *Castleman v. AFC Enter., Inc.*, 995 F. Supp. 649, 652 (N.D. Tex. 1997).

not to hear additional evidence . . . did not render the arbitration fundamentally unfair.”¹⁶⁸

• *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 (9 U.S.C. § 10(4) or State UAA Equivalent):*

No written opinion or explanation: An award without a written opinion may create ambiguity as to whether a legal issue has been adjudicated, but courts do not vacate these rulings.¹⁶⁹ In *Rollins v. Prudential Insurance Co. of North America*,¹⁷⁰ the arbitrators denied all causes of action without specifically stating that they denied the plaintiff’s Family and Medical Leave Act claim.¹⁷¹ In contesting the award, the employee said that failure to rule specifically on the statutory claim meant that the award was imperfectly executed.¹⁷² The court disagreed, concluding that denial of the FMLA claim was clearly implied.¹⁷³ Ruling on a similar challenge, the court in *Bishop v. Smith Barney, Inc.*¹⁷⁴ did not consider an award to be imperfectly executed even when the governing arbitration rules required a written opinion, and the arbitrators ignored this requirement.¹⁷⁵

Courts also confirm awards that fail to explain their reasoning.¹⁷⁶ *Fallon v. Salomon Smith Barney, Inc.* stated that “where, as here, an arbitral panel declines to explain its ruling, the courts must confirm the arbitration award if there is even a barely colorable justification for the outcome reached.”¹⁷⁷ In *Maze v. Prudential*

168. *Id.* at 653.

169. *See, e.g.,* *Bishop v. Smith Barney, Inc.*, No. 97 CIV. 4807(RWS), 1998 WL 50210, at *8 (S.D.N.Y. Feb. 6, 1998).

170. 10 F. App’x 510 (9th Cir. 2001).

171. *Id.* at 512.

172. *Id.* at 511.

173. *Id.* at 512.

174. No. 97 CIV. 4807(RWS), 1998 WL 50210 (S.D.N.Y. Feb. 6, 1998).

175. The employee claimed that the arbitration proceedings and ruling were flawed because the arbitrators violated NYSE rules that require a written opinion. But the court rejected this contention, reasoning: “It is well settled that arbitrators need not disclose the reasoning behind their awards.” *Id.* at *8. The court explained: “Although the arbitration panel in the instant case failed to follow this rule, the narrow scope of judicial review granted by the FAA does not authorize the court to take action on this ground.” *Id.*

176. *Fallon v. Salomon Smith Barney, Inc.*, 55 F. App’x 27 (2d Cir. 2003).

177. *Id.*

*Securities, Inc.*¹⁷⁸ the court refused to vacate an award in which the arbitrators gave a brief, seven-sentence case summary.¹⁷⁹

Punitive awards and other damages: Punitive awards are challenged on various grounds including the arbitrators exceeded their powers. In *Baravati v. Josephthal, Lyon & Ross, Inc.*,¹⁸⁰ the arbitration agreement did not contain a choice of law provision or a provision in the governing arbitration rules concerning the arbitrators' remedial powers.¹⁸¹ The hearing occurred under the auspices of the NASD Code of Arbitration, but the Seventh Circuit said that no negative inference could be drawn from that code's silence on the scope of the arbitrators' powers.¹⁸² Thus, the court turned back a challenge to the award, noting that the rules of the American Arbitration Association authorize these arbitrators to award "any remedy which [is] just and equitable and within the scope of the agreement."¹⁸³ In an emphatic statement of judicial deference, the court said that "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes" ¹⁸⁴

On the other hand, *Shearson Lehman Bros., Inc. v. Hedrich*¹⁸⁵ is an example of a court that appeared to re-arbitrate a dispute under the "exceeds authority" standard. Three employees were awarded lump sum payments after they were terminated.¹⁸⁶ The arbitrators ruled that the employees had become fully vested under the employer's compensation plan.¹⁸⁷ But an Illinois appeals court found

178. No. 93 Civ. 4887 (JFK), 1993 WL 515375 (S.D.N.Y. Dec. 8, 1993), *aff'd*, 47 F.3d 1157 (2d Cir. 1995).

179. The court observed that "the arbitrators chose to give a brief, seven-sentence case summary that was obviously not intended to portray all of the evidence and arguments that were before them. . . . Indeed, even with these allegations in front of it, the panel rejected Maze's counterclaim in its entirety." *Id.* at *2. Because the award rejected Maze's claim in its entirety, the court said that it was "highly unlikely that the arbitrators overlooked Maze's implied covenant argument." *Id.*

180. 28 F.3d 704 (7th Cir. 1997).

181. *Id.* at 706.

182. *Id.* at 710 ("Silence implies – given the tradition of allowing arbitrators flexible remedial discretion – the absence of categorical limitations. Since that is the norm, we assume that the parties would have said something in the arbitration clause had they wanted to depart from it.")

183. *Id.* at 709.

184. *Id.* The court continued, "It is commonplace to leave the arbitrators pretty much at large in the formulation of remedies, just as in the formulation of the principles of contract interpretation." *Id.* at 710.

185. 639 N.E.2d 228 (Ill. App. Ct. 1994).

186. *Id.* at 230.

187. *Id.* at 231.

that the arbitrators exceeded their authority, reasoning that “the arbitrators impermissibly ignored the unambiguous contract language and implemented their own notion of what would be reasonable and fair.”¹⁸⁸ Although the arbitrators dismissed the employees’ wrongful discharge claim, the court said that they “mysteriously calculated amounts” due to the claimants.¹⁸⁹

Finding No. 5: Manifest Disregard for the Law: Inconsistent approaches over the manifest disregard standard appear to spur the surprising popularity of this basis for challenging awards. As the Second Circuit explained in *Halligan v. Piper Jaffray, Inc.*, arbitrators cannot “ignore[] the law or the evidence or both.”¹⁹⁰ Nevertheless, arbitrators are not charged with knowing all provisions of a particular statutory scheme.¹⁹¹ The standard has been adopted by the Fourth,¹⁹² Fifth,¹⁹³ Sixth,¹⁹⁴ Ninth,¹⁹⁵ and Tenth¹⁹⁶ circuits. The

188. *Id.* at 233.

189. *Id.*

190. *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998).

191. In *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997), an age discrimination complainant was awarded \$220,000, but his request for attorney’s fees – totaling \$249,050 – was denied. In his motion to vacate that part of the award, DiRussa argued that the arbitrators manifestly disregarded the ADEA’s policy for granting attorney’s fees to prevailing plaintiffs. The Second Circuit disagreed, stating: “the remedy for that does not lie with us.” *Id.* at 823. The court continued that “‘knowing’ all of the provisions of a particular statutory scheme without assistance from the parties is a daunting task, even for a skilled lawyer or judge.” *Id.* For criticism of the standard, see *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 430-31 (2d Cir. 1974). The manifest disregard standard originated in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), where the court created a non-statutory ground for setting aside arbitral awards. The standard was adopted by the Second Circuit in Judge Friendly’s employment arbitration decision in *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1978). The Supreme Court criticized this decision for its mistrust of arbitration, and confined the standard to its narrowest possible holding in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 231-34 (1987). *But see* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989).

192. *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir. 2006). The employee appealed the arbitrator’s ruling that his claim was time-barred. The arbitration agreement did not have a limit for filing an arbitration claim, but the arbitrator implied a one-year term. Reversing the district court, the Fourth Circuit concluded that “the arbitrator’s ruling constituted a manifest disregard of the law.” *Id.* at 231. The court added to the analysis by concluding that “the arbitration award as to Patten and Signator Investors failed to draw its essence from the governing arbitration agreement.” *Id.* at 237.

193. *See, e.g.*, *Fountouglakis v. Stonhard, Inc.*, No. Civ.A.3:02-CV-2434-D, 2003 WL 21075931, at *5 (N.D. Tex. May 9, 2003). The court explained that “the ‘manifest disregard’ standard is an extremely narrow, judicially-created rule with limited applicability.” *Id.* (citing *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395 (5th Cir. 2003)). *Fountouglakis* repeated the Fifth Circuit’s view of the manifest

Eleventh Circuit was reluctant to adopt the standard,¹⁹⁷ but more recently changed its view.¹⁹⁸ In a scholarly opinion, the Seventh Circuit has expressed strong doubts about the clarity and validity of the manifest disregard standard.¹⁹⁹

Many state courts also apply the manifest disregard standard. *Madden v. Kidder Peabody & Co.*,²⁰⁰ explained: "In certain circumstances, the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it

disregard standard: "It clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Id.*

194. *Buchignani v. Vining Sparks IBG, Inc.*, No. 98-6692, 2000 WL 263344 (6th Cir. Mar. 2, 2000). The court noted that the manifest disregard of the law standard requires that "the [arbitration] decision must fly in the face of clearly established legal precedent." *Id.* at *2. Questions of law are decided with manifest disregard only if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle." *Id.*

195. Courts can set aside arbitral awards if the arbitrators exhibit a manifest disregard of the law. *See Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1060 (9th Cir. 1991).

196. *See Durkin v. CIGNA Prop. & Cas. Corp.*, 986 F. Supp. 1356 (D. Kan. 1997) (award of attorney's fees to discrimination complainant was not in manifest disregard of the law).

197. *Ainsworth v. Skurnick*, 960 F.2d 939, 940-41 (11th Cir. 1992) (per curiam). For criticism of the standard, see *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412-13 (11th Cir. 1990).

198. In addition to the FAA's statutory standards, the Eleventh Circuit Court of Appeals has recognized two non-statutory bases upon which an arbitration award may be vacated. *See Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 779 (11th Cir. 1993) (stating that awards may be vacated under the arbitrary and capricious standard and the public policy standard, but not for manifest disregard of the law).

199. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1997). The court relied on a scholarly study in Brad A. Galbraith, Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 *IND. L. REV.* 241, 251-54 (1993). In *Baravati*, Judge Posner expresses strong doubts about the manifest disregard standard:

We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none – that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles – whether the arbitrators "exceeded their powers" – it is superfluous and confusing. There is enough confusion in the law. The grounds for setting aside arbitration awards are exhaustively stated in the statute. Now that *Wilko* is history, there is no reason to continue to echo its gratuitous attempt at nonstatutory supplementation. So it will be enough in this case to consider whether the arbitrators exceeded their powers.

Baravati, 28 F.3d at 706.

200. 883 S.W.2d 79 (Mo. Ct. App. 1994).

under the rug.”²⁰¹ The Missouri court demonstrated the narrow scope of the standard when it concluded that the “case at bar, however, is not cut to so rare a pattern: appellant has utterly failed to show that the arbitrators inevitably must have recognized [the controlling rule of law].”²⁰² In a Michigan case, where an employee-at-will was promised that he would not be fired without a fair and thorough investigation, the arbitrator did not “display[] a manifest disregard of the applicable law” concerning employment-at-will.²⁰³

IV. CONCLUSIONS

Our research produces many empirical findings but culminates in two main conclusions. (1) Courts are extremely deferential in reviewing employment awards. (2) Nevertheless, court review of arbitration is rapidly growing even though the chance of overturning an award is very poor. The first result is encouraging because Congress and the Supreme Court have repeatedly sought to bolster the finality of arbitration.²⁰⁴ But the recent spurt of cases – exemplified by the finding that 62% of federal district courts decisions occurred since 2000 – is troubling. It means that courts are likely to face a growing docket of post-arbitration appeals. It also implies that parties are seeking to re-litigate the claims that they privately adjudicated. When arbitration becomes a preliminary step in a prolonged dispute resolution process, it has failed.

The grounds for reviewing employment awards are far more numerous than those for labor awards. *Trilogy* courts use a telescope with a narrow field of vision to review labor awards from afar. However, the same courts review employment awards through a kaleidoscope. Too many courts and legislatures have presented arbitration losers with an abundance of judicial review standards – too many choices – to sue on the award.²⁰⁵ The complex presentation of award-review arguments in Tables 4A and 4B supports our conclusion, as do

201. *Id.* at 83.

202. *Id.*

203. *DaimlerChrysler Corp. v. Carson*, No. 237315, 2003 WL 888043, at *1 (Mich. Ct. App. Mar. 6, 2003).

204. *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20 (1991); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

205. To observe a symptom of the problem in a single decision, see *Cray v. NationsBank of N.C., N.A.*, 982 F. Supp. 850, 852 (M.D. Fla. 1997), stating that courts in the Eleventh Circuit review awards under the four statutory grounds in the FAA and two additional non-statutory bases – a standard for arbitrary and capricious rulings, and another for awards that conflict with a public policy. The court pointed out a “third non-statutory ground for vacating an arbitration award – manifest disregard of law – has been recognized in some circuits, though not in the Eleventh Circuit.” *Id.*

the varied and numerous state arbitration statutes in Appendix II. In addition, we believe that major changes in the Revised Uniform Arbitration Act of 2000²⁰⁶ are playing a role in this upsurge – and here we emphasize the coincidence of the appeals upsurge and the RUAA's passage.

This finding relates to our first research question: Do courts limit their award review to the statutory grounds under the FAA or state equivalents, or do they also apply common law standards? The fact that employment arbitration is subject to a widely dispersed regulation – federal and state, statutory and common law – became evident as we continually revised our data extraction form to account for new arguments that an arbitration loser raised on appeal. A party who loses an award can simultaneously cite federal bases such as the four statutory grounds under the FAA, federal common law standards such as manifest disregard for the law and denial of due process, plus all the *Trilogy* arguments such as the public policy exception to award enforcement.

Employment arbitration is regulated by an uncoordinated array of legislatures and courts. These awards should be subject to uniform national standards. The FAA reviewing standards are specific and narrow enough; but they apply only when parties litigate in a federal court. Even then, many federal courts also apply common law standards.

Aggravating the problem, the FAA also allows for review of awards in state courts under those jurisdictional standards. In addition, a challenger can invoke a bewildering thicket of state arguments, such as California's broad ruling holding that unilateral arbitration agreements are unenforceable²⁰⁷ and that state's statute on arbitrator disclosures,²⁰⁸ Florida's statutory limit on arbitrator

206. See James E. Daniels, *The Availability of Preliminary Remedies as a Reason to Arbitrate IP Disputes*, DISP. RESOL. J., Nov. 2006-Jan. 2007, at 38, 40 ("Recognizing that binding arbitration had taken a central place in dispute resolution in America without a uniform set of rules to guide arbitrators and parties through these proceedings, in 2000, the National Conference of Commissioners on Uniform State Laws (NC-CUSL) promulgated the Revised Uniform Arbitration Act (RUAA). 'Revised' is really an understatement. The RUAA was actually a major departure from the 1955 UAA and the past arbitration process.")

207. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).

208. *Ovitz v. Schulman*, 35 Cal. Rptr. 3d 117 (Cal. Ct. App. 2005).

authority to award attorney's fees,²⁰⁹ Connecticut's broad public policy grounds for vacating an award,²¹⁰ among others.

The complex federalism structure of the FAA,²¹¹ which adds to the kaleidoscopic crystals for reviewing employment awards, has confused courts as to whether federal or state law applies in reviewing awards. Courts have noted that "the FAA [Federal Arbitration Act] is something of an anomaly in the field of federal-court jurisdiction because it creates a body of federal substantive law without simultaneously creating any independent federal-question jurisdiction" ²¹² Our database reflects earlier conflicts between state laws that limited an arbitrator's power to award punitive damages, and the FAA's broad dictate to enforce arbitration agreements and their resulting awards.²¹³ We also observed a similar federalism controversy over a choice of law dispute in reviewing an award that was enforceable under Michigan law but whose subject was regulated by federal securities law.²¹⁴

We said that employment arbitration should be subject to a uniform set of national standards. However, our data do not suggest whether uniform regulation should be limited to the current FAA standards or revised to include others. At this juncture, however, our

209. *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith*, 751 So. 2d 143 (Fla. Dist. Ct. App. 2000).

210. *City of Hartford v. Casati*, No. CV000599086S, 2001 WL 1420512 (Conn. Super. Ct. Oct. 25, 2001). The arbitrator found that the deputy chief engaged in "profane, obscene gutter talk aimed at minorities, including women and homosexuals." The Arbitrator upheld the officer's grievance, however, because there was "no testimony or other evidence that [Casati] had ever directed such language directly at any individual nor in the presence of any such person." *Id.* at *4. The court found that the award violated a state court ruling that compelled police departments "to take reasonable steps to eliminate racially, ethnically and sexually discriminatory language" *Id.* at *5.

211. *See supra* notes 27-31.

212. *Bull HN Info. Sys., Inc. v. Hutson*, No. CIV. A. 98-10998-RCL, 1998 WL 426047, at *1 (D. Mass. July 24, 1998) (internal quotations omitted).

213. *See Fahnestock & Co. v. Waltman*, 935 F.2d 512 (2d Cir. 1991). Judge Mahoney's dissenting opinion noted that the "majority's approach effectively disregards the existence of a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate and imposes the diversity regime of *Erie R.R. v. Tompkins*." *Id.* at 520 (internal citation and quotation omitted).

214. *Ford v. Hamilton Invs., Inc.*, 29 F.3d 255 (6th Cir. 1994). Taking sharp exception to the Second Circuit, this court said that "[w]hile the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal question jurisdiction To read section 9 or 10 as bestowing jurisdiction to confirm or vacate absolutely any arbitration award," as the Court of Appeals for the Second Circuit has said, "would open the federal courts to a host of arbitration disputes, an intent that we should not readily impute to Congress." *Id.* at 258.

second research question provides a partial solution. We asked: Do reviewing courts supplement FAA standards with the Supreme Court's *Trilogy* standards? Table 4B shows that *Trilogy* standards are infrequently applied but lead to comparatively high rates of vacatur. We wonder why these standards apply in any case. The *Trilogy* was meant only to apply to voluntary labor arbitration. The *Trilogy* aimed to strengthen labor arbitration as a necessary tool to further industrial peace, and to remove courts as an irritant in the union-management relationship.

We fail to see how these concerns extrapolate to individual employment disputes. In theoretical terms, the labor arbitrator embodies the parties' contractual relationship – a relationship in which disputes are occasionally or even frequently submitted to arbitration. But the employment arbitrator functions differently by substituting for judge and jury in deciding a public law issue, and by resolving a one-time dispute between these parties.

In our final question we asked: Is the volume of award challenges growing in relation to the increasing adoption of employment arbitration? We cannot answer this question definitively because there is no authoritative measure on the number of pre-dispute employment arbitration agreements. Nevertheless, we conclude that the current upsurge in award appeals reflects emerging trends in employment arbitration that deeply frustrate individuals and employers. Also, the cases show that this dispute resolution process is evolving from employer-driven to more balanced and independent forums, where arbitrators exercise uniquely unbounded judgment. We now highlight some prominent forces that drive individual and employer challenges.

On the employee side, it is apparent that numerous individuals do not view arbitration as a legitimate forum for adjudicating their claims. Having been forced into arbitration against their wishes to proceed in court,²¹⁵ they may regard only a court judgment as final and binding. Next, we see prevailing plaintiffs who find that arbitration is shockingly expensive and attended by high representation costs. When arbitrators deny attorney's fees to these victorious plaintiffs, economic logic dictates the imperative to appeal for post-award relief.²¹⁶ In another category, we find employees who might accept

215. Compare *Fahnestock*, 935 F.2d at 520, with *Baravati v. Josephthal, Lyon & Ross Inc.*, 834 F. Supp. 1023 (N.D. Ill. 1993).

216. See *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997).

losing if their award provided an explanation.²¹⁷ However, the absence in many arbitrator awards of a written decision appears to deprive these individuals of an essential part of judgment and justice.

Employers have their own reasons to seek court review of arbitrator rulings. Concerned by mounting litigation, they turned to arbitration with the hope of lowering the cost of employment disputes.²¹⁸ The success rate of employees in arbitration is not likely what employers envisioned.²¹⁹ Remedies have provided employers another unpleasant surprise. To put this in perspective, recall that 92 awards completely favored employees, and 23 awards were split rulings that provided a partial remedy. Thus, a remedy was ordered in 47.9% of cases. We use a common valuation tool for litigation to estimate the average settlement value of claims in these awards.²²⁰ Multiplying this employee-success rate by the median award of \$250,000, the probability model yields an average settlement of \$119,750 per case. The point in computing this hypothetical figure is to show that the high winning rate for employees combined with costly awards has significant implications for settling disputes that are referred to arbitration.

In addition, when *Gilmer* was decided courts did not recognize a specific mathematical limit on punitive damages, but this changed with the Supreme Court's decision in *State Farm Mutual Insurance Co. v. Campbell*.²²¹ While a court of law now shields employers from excessive damage awards, some arbitrators do not recognize this restraint.²²²

Comparing our present research with our companion studies on labor awards, we sense that unions and employers fight smaller battles in arbitration. When they lose and contest the finality of an award, their challenges involve lower stakes. Even if they invoke a *Trilogy* challenge, the parties must accept a certain level of losing in

217. *Supra* notes 170-179.

218. See *Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management*, DAILY LAB. REP., May 14, 2001, at A-5 (reporting an employment lawyer's view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits; David Copus also notes that the biggest financial risk for employers in termination lawsuits – tort claims in which a single plaintiff can be awarded millions of dollars – is controlled by arbitration agreements that cap damages).

219. See Delikat & Kleiner, *supra* note 75, at 56 (statistic for NYSE and NASD arbitrations).

220. ALLEN SCOTT RAU ET AL., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 109-11 (4th ed. 2006).

221. 538 U.S. 408 (2003).

222. See *Sawtelle v. Waddell & Reed, Inc.*, 754 N.Y.S.2d 264 (N.Y. App. Div. 2003).

arbitration to maintain a quiescent relationship. But we also sense that fewer parties in employment arbitration are committed to the norm of finality in arbitration, even though their agreements say as much. Unlike unions and managements, their relationships are often severed by the time they proceed to arbitration. Their arbitrations take more hearing days, cost much more, and involve the arbitrator more directly in the dispute by subjecting this judge to scrutiny over disclosure and qualification issues. This level of rancor and bitterness more often resembles contested divorces than labor arbitrations. If our sense is correct that a winner-take-all mentality pervades these post-award appeals, then many of the disputants in our study are destined to be “happily never after” their arbitrations.

V. RESEARCH APPENDIX

Appendix I (Table of Cases in the Empirical Database) and Appendix II (State Vacatur Standards: Statutes That Differ from the Federal Arbitration Act) are on file with the *Harvard Negotiation Law Review*. Please contact the *Harvard Negotiation Law Review* for access to these files.