THE FUTURE IS NOW: THE SUPREME COURT'S THIRD AND FOURTH TRILOGIES ENFORCING THE FEDERAL ARBITRATION ACT CREATE CHALLENGES FOR COMMERCIAL LITIGATORS

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Congress enacted the Federal Arbitration Act (FAA) in 1925 to foreclose judicial hostility to arbitration. 9 U.S.C. §1 et seq. Establishing a liberal federal policy favoring arbitration agreements, the FAA provides in relevant part:

> *A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2. The FAA codified the principle that arbitration is fundamentally a matter of contract. Absent a fatal infirmity to the contract itself, then, the FAA requires courts to enforce an agreement to arbitrate, according to its terms. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1773 (2010); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

Since the 1980s, the U.S. Supreme Court has pushed the concept that the FAA, which essentially covers any transaction concerning interstate commerce, pre-empts state laws that diminish the enforceability of arbitration agreements. *See*, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1753 (2011); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This means that states cannot weaken, by legislative rule, the enforceability of certain types of arbitration agreements. If they do so, the FAA will displace the state rule. *See Preston v. Ferrer*, 552 U.S. 346, 353 (2008).

This arguably judicial activist approach has drawn its share of vocal critics, who have expressed legitimate concerns that the U.S. Supreme Court's methodology has "dramatically reduce[d] the ability of courts to ensure the fairness of private agreements requiring consumers and employees to arbitrate instead of bringing suit in court." Thomas Stipanowich, *The Third Arbitration Trilogy: Relevation, Reaction, and Reflection on the Direction of American Arbitration*, SCOTUSBLOG (Sept. 21, 2011, 8:36 AM)[1]; *see* also Alison Frankel, *SCOTUS Confirms Deference to Arbitration, Bench-Slaps Oklahoma Court*, Alison Frankel's ON THE CASE, Thomson Reuters News & Insight (Nov. 27, 2012)[2].

And, the debate continues. In 2012, the U.S. Supreme Court continued to press its aggressive interpretation of the FAA in yet another trilogy of cases, namely, *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (involving the arbitrability of Credit Repair Organizations Act claims); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S.Ct. 1201 (2012) (same, as to nursing home negligence claims); and most recently, *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S.Ct. 500 (2012) (same, as to employee noncompetition agreements). The Supreme

1 http://www.scotusblog.com/2011/09/the-third-arbitration-thrilogy-relevation-reaction-and-reflection-on-the-direction-of-american-arbitration/
2 http://blogs.reuters.com/alison-frankel/2012/11/27/scotus-confirms-deference-to-arbitration-bench-slaps-oklahoma-court/

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Court has also accepted cert petitions in two additional cases, slated to be heard in 2013: *Oxford Health Plans, L.L.C. v. Sutter*, No. 12-135 (Dec. 7, 2012) (involving the proper scope of an arbitrator's powers to decide arbitrability issues), and *American Express Co. v. Italian Colors Rest.*, No. 12-133 (Nov. 9, 2012) (involving whether the FAA permits courts, invoking the "federal substantive law of arbitrability," to invalidate arbitration agreements). As a result, the landscape of arbitration law continues to evolve at a rapid pace. This article will chart the progression of two recent trilogies of cases handed down by our Highest Court in this area.

STOLT-NIELSEN

In 2010, the U.S. Supreme Court decided *Stolt-Nielsen S.A. v. AnimalFeeds International*, 130 S.Ct. 1758 (2010), which addressed whether imposing class arbitration on parties whose arbitration clauses were "silent" on the issue was consistent with the FAA. The litigants were parties to an international maritime contract that contained a clause requiring that any dispute arising out of "the making, performance, or termination" of the contract be resolved per arbitration, to be conducted in accord with the FAA. *Id.* at 1765. The contracts were silent as to whether arbitration was permissible on behalf of a class, and the parties agreed to submit that threshold issue to arbitration.

A panel of arbitrators decided that the arbitration clause allowed for class arbitration. The district court vacated the award, because it was in "manifest disregard" of the law. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 435 F. Supp. 2d 382, 387 (S.D.N.Y. 2006). The Second Circuit reversed, reasoning that because there was no cited authority applying either a federal maritime rule of custom and usage or New York case law against class arbitration, the arbitrators' decision was not in manifest disregard of either body of law. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 97-99 (2d Cir. 2008).

Justice Alito, writing for the 5-3 majority, disagreed. The Supreme Court rejected the arbitration panel's finding that the parties' arbitration clause permitted class arbitration as a matter of public policy. *Stolt-Nielsen*, 130 S.Ct. at 1770. In the majority's view, the arbitration panel exceeded its powers in advancing its own policy choice, instead of identifying and applying a rule of decision derived from the FAA or either maritime or New York law. *Id.*

The Court reiterated the precepts that arbitration "is a matter of consent, not coercion," that "private agreements to arbitrate are enforced according to their terms," and that parties are "generally free to structure their arbitration agreements as they see fit." *Id.* at 1763. Although the majority conceded that the question the arbitration panel was charged with deciding was whether the arbitration clause in the maritime contract allowed for class arbitration, the Court focused on the parties' apparent intent, and found that because the parties stipulated that there was no agreement on class arbitration, the parties could not be compelled to submit to class arbitration under the FAA. *Id.* at 1770.

Justice Ginsburg, joined by Justices Stevens and Breyer, issued a sharp dissent. Justice Ginsburg argued that the arbitration issue was not ripe for judicial review, and that judicial intervention, "so early in the game," was unwarranted. *Id.* at 1778 (Ginsburg, J., dissenting). "Compounding that error," reasoned the minority, "the Court substitutes its judgment for that of the decisionmakers chosen by the parties." *Id.* at 1777. Ginsburg also disagreed that the arbitration panel reached its decision based upon policy, and not the law. *Id.* at 1780-82. On the merits, the dissent would have upheld the arbitrators' ruling due to the strict limitation the FAA places on judicial review of arbitration awards. *Id.* at 1782-83.

According to one prominent legal observer, "many understood *Stolt-Nielsen*, correctly, as a portent of the Court's eventual curtailment of state-law based policies against enforcement of contractual waivers of the ability to participate in a class action when coupled with an agreement to arbitrate." Thomas J. Stipowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, American Review of International Arbitration (2011)[3].

RENT-A-CENTER

A few months after *Stolt-Nielsen* was decided, the Court considered whether, under the FAA, a district court may decide a claim that an arbitration agreement in an unemployment discrimination case is unconscionable, where the agreement explicitly assigns that decision to the arbitrator. *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010). Rent-A-Center required employees to sign a two-part arbitration agreement as a condition of their employment, stipulating first that all disputes arising out of the employment relationship be settled by arbitration, and second, that an arbitrator must settle all challenges to the validity of the arbitration agreement. When Antonio Jackson, a Rent-A-Center account manager, later brought an employment discrimination claim against the company, Rent-A-Center insisted that the claim must be resolved through arbitration.

Jackson asserted that the arbitration agreement was unconscionable, because it denied him important and suitable access to court for a satisfactory remedy in the exact way prohibited by federal statute. Rent-A-Center, on the other hand, argued that the threshold question of whether there was a valid and fair agreement to arbitrate

3 Available at http://works.bepress.com/thomas_stipanowich/2

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Jackson's employment grievance in the first instance was a matter solely for the arbitrator under the FAA. Jackson countered that because the unconscionability challenge went to both parts of the arbitration agreement, the arbitrability of the agreement was a question for the court.

Justice Scalia, writing for the 5-4 majority, held that the FAA may trump the traditional gatekeeping functions of the courts, and delegate questions of fraud, duress, unconscionability, and other contractual defenses, to the realm of arbitrators, if that delegation is clear and unmistakable, as gleaned from the text of the employment agreement itself. *Id.* at 2776-81. Justice Scalia relied on *First Options of Chicago Inc. v. Kaplan*, 514 U.S. 938 (1995), which held that agreements to arbitrate arbitrability — or stated differently, the suitability of the case for arbitration — must be proved by "clear and unmistakable" evidence. *Rent-A-Center*, 130 S.Ct. at 2777 n.1. Under FAA § 2, the U.S. Supreme Court had also previously decided a challenge to the validity of an arbitration agreement, and other challenges to the agreement as a whole that could make the contract unenforceable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). Under *Prima Paint*, only challenges directed to the arbitration agreement's validity determine the enforceability of an agreement to arbitrate. The arbitration clause is considered severable from the remainder of the contract, and may be enforced where the contract itself is stricken.

In *Rent-A-Center*, Justice Scalia utilized *Prima Paint*, and reasoned that even in cases where alleged fraud might affect the whole contract, including the agreement to arbitrate, there must be a *specific* challenge to the validity of the agreement to arbitrate "before the court will intervene" and preempt the arbitration provision. Unfortunately, Respondent Jackson had argued that the agreement "as a whole" was substantively unconscionable. That broad-based attack was fatal to Jackson's claims, in the majority's view.

In his dissenting opinion, Justice Stevens — joined by Justices Ginsberg, Breyer, and Sotomayor — stated that the majority had extended a meaning to arbitrability challenges beyond the parties' contractual intentions and outside the parameters of *Prima Paint*. First, Justice Stevens took issue with the majority's *First Options* reasoning, claiming that unconscionability challenges impact the "clear and unmistakable evidence" standards of a party's intent to arbitrate, by their very nature. *Rent-A-Center*, 130 S.Ct. at 2783 (Stevens, J., dissenting). Second, the dissent rejected *Prima Paint*'s applicability. Justice Stevens complained that the majority had offered a "breezy assertion" that the subject matter of the contract was insignificant. Unlike *Prima Paint*'s broader contract for services, *Rent-A-Center* involved an arbitration agreement exclusively about arbitration, which was only a part of the broader employment agreement.

The dissent also believed that the majority had overextended *Prima Paint*, which had allowed a valid arbitration agreement in the face of a potentially invalid contract. Justice Stevens warned: "the Court adds a new layer of severability — something akin to Russian nesting dolls — into the mix: Courts may now pluck from a potentially invalid arbitration agreement even narrower provisions that refer particular arbitrability disputes to an arbitrator." *Id.*, at 2786 (emphasis omitted).

In November 2010, *The New York Times* roundly criticized the U.S. Supreme Court for its issuance of far-reaching and politically polarized decisions, chiding the quality of the Court's "judicial craftsmanship" by suggesting that "[i]n decisions on questions great and small, the Court often provides only limited or ambiguous guidance to lower courts. And it increasingly does so at enormous length." The article further described the Court's recent rulings as "fuzzy" and "unwieldy." *See* Adam Liptak, *Justices Are Long on Words but Short on Guidance*, *N.Y. Times*, Nov. 17, 2010, at A1[4].

Under *Rent-A-Center*, then, in the commercial litigation context, a party seeking to avoid arbitration may need to persuade a court that the delegation clause in the arbitration agreement should not be enforced, due to unconscionability, fraud, duress, or some other valid contractually-premised defense. From the defense standpoint, if the client desires an arbitration forum, well-crafted delegation clauses, set out in a "clear and unmistakable" fashion in the agreement, would be prudent.

CONCEPCION

In 2006, Vincent and Liza Concepcion sued AT&T Mobility over their mobile phone contract, arguing that AT&T had engaged in deceptive advertising by falsely claiming that its wireless plan included free cell phones. The Concepcion suit was later consolidated into a class action. AT&T requested that the U.S. District Court for the Southern District of California dismiss the suit, claiming that the Concepcions had agreed, in their contract with the company, to use an individual arbitration process, rather than a class action mechanism.

But the district court, in a decision affirmed by the Ninth Circuit, denied the request. It held that the class-action waiver in AT&T's consumer contracts was unconscionable under the California Supreme Court's decision in *Discover Bank v. Superior Court*. Under the *Discover Bank* rule, a class action waiver was deemed unconscionable if three criteria were met: (1) it was a contract of adhesion; (2) it governed disputes over small amounts of money; and (3) it was alleged to be part of a scheme to deliberately cheat

4 Available at http://www.nytimes.com/2010/11/18/us/18rulings.html

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consumers out of individually small amounts of money. *AT&T Mobility*, 131 S.Ct. 1740, 1746 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

Justice Scalia, writing again for a bare 5-4 majority, ruled in *Concepcion* that the FAA preempted California state contract law, because it stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Justice Scalia reasoned that the FAA does not require class arbitration, because essentially it is, as a practical matter, not really arbitration at all. Based on this premise, the majority stated that the *Discover Bank* rule was inconsistent with the FAA, because it unduly interfered with arbitration by requiring the availability of class proceedings in arbitration. *AT&T Mobility*, 131 S.Ct. at 1748-53.

Justice Breyer anchored the dissent, joined by Justices Ginsburg, Sotomayor, and Kagan. Justice Breyer reproached the majority for its overall reasoning, and posited that class arbitration was indeed consistent with the use of arbitration. According to the minority, California was entitled to weigh the pros and cons of class proceedings and create a general rule curtailing the circumstances in which a consumer could waive his or her right to initiate a class proceeding. *Id.* at 1761 (Breyer, J., dissenting). Justice Breyer also opined that the majority's decision was perhaps motivated by its own intrinsic views regarding the "merits and demerits of class actions," which had the effect of impermissibly interfering with California's federalism interests. *Id.* at 1762 (Breyer, J., dissenting).

As voiced by one legal commentator, "[i]t is therefore difficult to avoid the conclusion that, at bottom, the majority struck down the *Discover Bank* rule under the FAA because class arbitration is inconsistent with its substantive conception of what arbitration should be ... [t]his holding leaves the states with no clear way to ban contracts that insulate companies from liability through class proceeding waivers." *See* Christopher Brumwell, *Opinion analysis: What counts as arbitration, and who decides?*, SCOTUSBLOG (Apr. 30, 2011, 8:32 AM)[5].

Although Minnesota courts have not yet addressed the precise issues present in *Concepcion*, courts have applied Minnesota's unconscionability rules to arbitration clauses more generally. In *Siebert v. Amateur Athletic Union of the United States, Inc.*, 422 F. Supp.2d 1033, 1041 (D. Minn. 2006), the U.S. District Court for the District of Minnesota held that an arbitration clause was not unconscionable under Minnesota law. A contract is unconscionable under Minnesota law if it is "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *In re Matter of Hoffbeck*, 415 N.W.2d 447, 449 (Minn. Ct. App. 1988) (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889)). Minnesota courts generally will not find a contract term unconscionable unless it is "inherently objectionable." *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co., Inc.*, 589 N.W.2d 499, 503 (Minn. Ct. App. 1999).

In Minnesota, there is nothing inherently objectionable or unfair about an arbitration agreement, absent the inclusion of some overly broad limitation of statutory actions or remedies. See *Webb v. R. Rowland & Co., Inc.*, 800 F.2d 803, 807 (8th Cir. 1986) (determining enforceability of arbitration clause under Minnesota law). In the commercial litigation arena, a court applying Minnesota unconscionability law to an arbitration clause would likely uphold the clause, as long as the provision did not force a party to either abandon or relinquish substantive rights under a federal statute, such that the statute's mission would be compromised in the case before the court.

COMPUCREDIT

In early 2012, by an 8-1 vote, the U.S. Supreme Court overturned a ruling by the Ninth Circuit Court of Appeals that language in a law, the Credit Repair Organizations Act (CROA), precluded enforcement of an arbitration agreement in a lawsuit alleging violations of that Act. *CompuCredit Corp. et al. v. Greenwood, et al.*, 132 S.Ct. 665 (2012). The CompuCredit lawsuit involved claims that two companies — petitioners CompuCredit and Synovus Bank — marketed and issued a low-rate credit card to people with either low or weak credit ratings. The respondents contended they were promised $300 in available credit, but were charged $257 in fees in the first year they had the card. The lawsuit further alleged that the imposition of certain fees violated the law and that the petitioners failed to make certain required disclosures. See James Vicini, *Court rules for arbitration in credit card case*, Thomson Reuters News & Insight (Jan. 10, 2012)[6].

Three consumers, including respondent Wanda Greenwood, sued in federal court, seeking to represent a nationwide class of holders of the credit card. The companies sought to force arbitration of the dispute because of the binding arbitration clause in the agreement the customers signed to receive the card. The *Greenwood* respondents opposed arbitration, and argued that there had been less than 120 reported cases asserting claims under CROA since its 1996 enactment. *Id.*

The district court denied the petitioners' motion to compel arbitration, concluding that Congress intended CROA claims to be nonarbitrable; the Ninth Circuit affirmed. *CompuCredit*, 132 S.Ct. at 668.

5 http://www.scotusblog.com/2011/04/opinion-analysis-what-counts-as-arbitration-and-who-decides/

6 Available at http://www.reuters.com/article/2012/01/10/us-creditcards-idUSTRE80925A20120110/

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Writing for the majority, Justice Scalia concluded that CROA did not preclude enforcement of the arbitration agreement. Because CROA was silent on whether the *CompuCredit* claims could proceed in an arbitrable forum, the FAA required the parties' arbitration agreement to be enforced according to its terms. *Id.* at 670-72. Justice Scalia observed that when CROA was adopted in the mid-1990s, there had been increased use of arbitration clauses in consumer contracts generally, and in financial services contracts in particular. The majority felt that if Congress had intended to prohibit such common provisions, it would have presumably done so in a more direct manner. *Id.*

Justice Scalia asserted that the FAA's mandate could only be overridden by contrary congressional command, and that CROA contained no such override. *Id.* at 669 (citing *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Justice Ginsburg authored a lengthy dissent, pointing out that Congress created CROA to protect consumers of limited economic means, who were not trained to think like lawyers, and who would, in the ordinary course, likely interpret the phrase "right to sue," as contained in CROA's disclosure and nonwaiver provisions, to confer a right to litigate in a court of law, not the obligation to submit disputes to binding arbitration. *CompuCredit*, 132 S.Ct. at 677-80 (Ginsburg, J., dissenting).

For the commercial litigator, then, if *CompuCredit* serves as any guide, it appears that as long as the client's credit card agreement contains a viable arbitration clause, a claim predicated upon CROA will not command a contrary result.

MARMET HEALTH CARE CENTER

In February 2012, the Supreme Court once again turned its focus upon the states' interpretation and enforcement of the FAA, in *Marmet Health Care Center, Inc. v. Brown et al.*, 132 S.Ct. 1201 (2012). The case involved three negligence suits against nursing homes in West Virginia, brought by family members of deceased nursing home residents. In each case, a family member signed, on behalf of the resident, an agreement with the nursing home to provide health care services.

The contracts contained a clause requiring the parties to arbitrate all disputes, other than for collection efforts. Two of the three agreements included a provision obligating the person filing the arbitration to pay the filing fee in accord with the rules of the American Arbitration Association. *Id.* at 1203. In all three cases, a family member of a resident who had died at the facility sued the nursing home for negligence in state court. In two of those cases, the state trial court dismissed the claims, based upon the agreements to arbitrate. The Supreme Court of Appeals of West Virginia consolidated those cases with the third case, which was before the court on other issues. *Id.*

The state supreme court held that "as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence." *Id.* The West Virginia court went out of its way to criticize the U.S. Supreme Court's interpretation of the FAA, labeling the high court's reasoning "tendentious," and "created from whole cloth." *Id.* The state supreme court concluded that Congress did not intend for the FAA to be, "in any way," applicable to personal injury or wrongful death suits "that only collaterally derive from a written agreement that evidences a transaction affecting interstate commerce, particularly where the agreement involves a service that is a practical necessity for members of the public." *Id.* The court also held that the arbitration agreements at issue were unconscionable and could not be enforced, in part, because of the same public policy.

The U.S. Supreme Court was less than amused, and reversed in a unanimous, per curiam decision. In fact, the Court delivered its brusque opinion *before* any substantive briefing on the merits, predicated only upon the parties' arguments as to why the case ought to be heard by the High Court. Citing *Concepcion*, the justices stated, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Id.* The Court also remained dubious about the state court's "alternative" holding that the nursing home arbitration provisions were unconscionable, because that rationale impermissibly relied on a proclaimed public policy disfavoring arbitration, which appeared to directly conflict with the FAA. The Supreme Court remanded the case to state court, directing West Virginia to consider whether, absent the generally articulated public policy, the arbitration clauses were unenforceable under state common law principles that were not specific to arbitration and pre-empted by the FAA. *Id.* at 1204.

Some months later, the West Virginia Supreme Court of Appeals had the opportunity to again interpret an arbitration clause in the context of the FAA, this time involving a construction dispute between a builder and a residential homeowner. *Dan Ryan Builders, Inc. v. Nelson*, — S.E.2d —, 2012 WL 5834590 (W. Va. Nov. 15, 2012). Answering a certified question from the court below, the West Virginia Supreme Court ruled that in assessing whether a contract provision is substantively unconscionable, a court may consider whether the provision lacks mutuality of obligation. In *Nelson*, the

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builder's contract contained a provision that required the homeowner to resolve all disputes via arbitration, but permitted the builder to seek its remedies either via arbitration or in a court of law. *Id.* at *3.

The *Nelson* court concluded that if a contract provision creates a disparity in the rights of the contracting parties such that it is one-sided and unreasonably favorable to one party, then a court may find the provision is substantively unconscionable. *Id.* at *8-9. The court then specifically found that a trial court could decline to enforce an arbitration clause, if the obligations or rights conferred by the clause unfairly lacked mutuality. *Id.*

The Supreme Court of Illinois refused to rely on *Marmet* as a basis for compelling arbitration of a nursing home wrongful death claim, where the plaintiff was the special administrator of the decedent's estate, and as such, a nonparty to the arbitration agreement. *Carter v. SSC Odin Operating Co.*, LLC, 976 N.E.2d 344, 360 (Ill. 2012). In doing so, the Carter court utilized "common law principles governing all contracts." *Id.* However, *Carter* did rule that the special administrator was bound to arbitrate the case under the state's Nursing Home Care Act, because the contract defense of lack of mutuality was absent. 976 N.E.2d at 353.

NITRO-LIFT TECHNOLOGIES

In November 2012, the U.S. Supreme Court issued another concise, yet emphatic, per curiam lecture to a state supreme court that had failed to "adhere to a correct interpretation of the [FAA]." *Nitro-Lift Technologies, LLC v. Howard, et al.*, 133 S.Ct. 500, 501 (2012). The Oklahoma Supreme Court had ruled that noncompetition agreements in two employment contracts were null and void, rather than reserving that decision for the arbitrator in the first instance. The arbitration clause in *Nitro-Lift* stated that "[a] ny dispute, difference, or unresolved question [between the parties] shall be settled by arbitration..." *Id.* at 502.

The U.S. Supreme Court determined that due to the specific language contained in the employee noncompetition agreements, judicial review of the validity of the contracts was precluded, per the FAA. *Id.* at 503-04. Of particular note, in striking down the state ruling, the Court relied upon the Supremacy Clause, U.S. Const. Art. VI, cl. 2, and its prior holdings in *Concepcion*, *Marmet*, and *AT&T*. *Id.*

MINNESOTA'S UNIFORM ARBITRATION ACT

Minnesota Statutes section 572.08, re-codified effective August 1, 2011 as Minnesota Statutes section 572B.06, involves the validity of agreements to arbitrate. Such agreements are presumptively valid and enforceable, except upon a ground that exists in law or in equity for the revocation of contracts. See Minn. Stat. § 572B.06 (a). The court shall decide whether an agreement to arbitrate exists, or whether a dispute is subject to an agreement to arbitrate, save a grievance under a collective bargaining agreement, when an arbitrator shall decide. Minn. Stat. § 572B.06 (b).

Under the statute, an arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled, and whether a contract containing a valid agreement to arbitrate is enforceable. Minn. Stat. § 572B.06 (c). Finally, if a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court orders otherwise. Minn. Stat. § 572B.06 (d).

RECENT MINNESOTA CASE LAW INVOLVING ARBITRATION

In Minnesota, our courts have acknowledged that the FAA creates a body of federal substantive law applicable to arbitration agreements within the coverage of the Act. *Churchill Envtl. & Indus. Equity Partners, LP v. Ernst & Young, LP*, 643 N.W.2d 333, 335-36 (Minn. Ct. App. 2002) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Arbitration under FAA is a matter of consent, not coercion; a party can be required to arbitrate only those disputes that it agreed to submit to arbitration. *Churchill*, 643 N.W.2d at 336. If no agreement to arbitrate exists, either in fact or because the controversy sought to be arbitrated is not within the scope of the arbitration clause of the contract, the court may interfere and protect a party from being compelled to arbitrate. *Id.*

In *Churchill*, Ernst & Young (E & Y) served as an independent auditor for a trucking company in 1995-1998. In 1999, E & Y agreed to provide due diligence services for Churchill's planned purchase of the trucking company's stock. 643 N.W.2d at 334-35. When Churchill's stock purchase later went south, Churchill sued E & Y in state court for negligent misrepresentation, fraud, and securities violations. E & Y moved to stay the proceedings and compel arbitration. The district court denied E & Y's motion, finding that the court determined arbitrability, and that Churchill's claims fell outside the scope of the parties' agreement to arbitrate. *Id.* at 335.

E & Y's services were detailed in an engagement letter which contained two dispute resolution clauses. The first required voluntary mediation of disputes initially, then binding arbitration if mediation was unsuccessful. The second clause required any dispute over the applicability, interpretation, or enforceability of the agreement to be resolved by arbitration, including procedural invalidity or unenforceability, to be governed by the FAA. *Id.* at 335.

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Churchill did not dispute the terms of E & Y's engagement letter.

The Minnesota Court of Appeals ruled that because the parties intended and agreed to arbitrate the arbitrability of Churchill's claims, the parties' arbitrators would decide that issue. The Court reversed and remanded, with instructions for the district court to compel arbitration. *Id.* at 337-38. Decided in 2002, this case appears to be consistent with the U.S. Supreme Court's subsequent jurisprudence involving state court interpretation of the FAA.

In 2005, in a contract dispute between an engineering firm and a municipality, the Minnesota Court of Appeals held that the engineering firm was required to arbitrate its claims, where the parties' arbitration agreement: (1) stated that either party had the choice to arbitrate, (2) allowed either party to demand arbitration, and (3) the contract permitted arbitration of all questions in dispute under the agreement. *Community Partners Designs, Inc. v. City of Lonsdale*, 697 N.W.2d 629, 634 (Minn. Ct. App. 2005).

In July 2010, in a broker/dealer dispute arising out of the Financial Industry Regulatory Authority (FINRA), the Minnesota Court of Appeals ruled that the issue of whether clients' securities claims against the broker/dealer remained arbitrable after the broker/dealer's agent successfully moved for dismissal of all claims against her originating more than six years before the arbitration complaint was filed was for the arbitrator to decide. *Kilcher v. Dale*, 784 N.W.2d 866, 871 (Minn. Ct. App. 2010). Further, the litigation of the clients' remaining, non-securities-based claims against the broker/dealer in court (based upon the suitability of insurance products), had to be stayed, pending the arbitrator's resolution of the arbitrability issue. *Id.* The *Kilcher* court noted that "[a]lthough this will result in separate proceedings in different forums, the United States Supreme Court has concluded that the principle of upholding parties' contractual agreements to arbitrate disputes outweighs the risk of inefficiency." *Id.* at 871-72 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985)).

CONCLUSION

Given how dynamic arbitration law has become in recent years on both the state and federal levels, one can fully expect the U.S. Supreme Court will provide further guidance in 2013 involving the states' interpretation and application of the FAA. Stay tuned.