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By Sheila J. Carpenter – June 6, 2018

Arbitration agreements are, as we all know, creatures of contract. The lengthy contracts we lawyers draft for our clients notwithstanding, it does not take much to create a basic contract. Thus, an arbitration agreement can be created with a few words. Even a quick email can create an agreement to arbitrate. On the other hand, an oral agreement relating to arbitration can be problematic.

Email Resurrects a Dead Arbitration Agreement

So v. EverBeauty, Inc., No. A-3560-16T4 (N.J. Super. Ct. App. Div. Jan. 2, 2018), is an unpublished decision but nonetheless instructive. Jang Won So was an employee of EverBeauty who sued his employer under New Jersey’s antidiscrimination and workers’ compensation laws. His employment contract contained an arbitration clause. Defense counsel asserted in a conversation with plaintiff’s counsel that the matter should be submitted to arbitration. Defense counsel followed up via email, and after consulting with his client, plaintiff’s counsel agreed via email to proceed with arbitration and offered to draft a stipulation of dismissal. When the stipulation was not forthcoming, defense counsel inquired about it and was told that the plaintiff had changed his mind about arbitrating.

EverBeauty filed a motion to enforce the arbitration agreement, conceding that the arbitration agreement in the plaintiff’s employment contract was unenforceable. Instead, it argued that the exchange between counsel created an arbitration agreement. The trial court denied the motion, holding that any agreement to arbitrate was not supported by consideration. It also reasoned by analogy to a New Jersey rule of civil procedure that giving up the right to a jury trial “required proof ‘that the promise was actually bargained for.’”

The Appellate Division of the Superior Court of New Jersey reversed. Noting that arbitration agreements are not subjected to more burdensome requirements than other types of contracts, it held that the contract was formed when plaintiff’s counsel emailed defense counsel that his client agreed to arbitrate. The court held that, at that point, the parties had agreed on the essential terms of their contract and manifested an intention to be bound by those terms, creating a binding contract. To illustrate this point, the court pointed out than an email exchange between counsel offering $1,000 to settle a case and accepting the offer would create a binding contract to settle for that amount.

The court rejected the argument that there had been no consideration for the promise to arbitrate. The adequacy of the consideration was not important as long as there was some...
consideration. Because "arbitration is faster and less expensive than a trial, the agreement provided benefits to both parties."

**Practice tip:** It is ironic that an unenforceable arbitration agreement in an employment contract became enforceable via email between counsel. When representing a party who may not want to arbitrate, first consider whether the arbitration agreement is valid in the state where it would be enforced. This can be a complex question. A lawyer with insufficient experience to make that determination should take prompt steps to educate himself or herself or consult an expert.

### Oral Arbitration Agreements

An arbitration clause sometimes can also be modified through an oral agreement to change its terms significantly. In *Hamilton Park Health Care Center, Ltd. v.1199 SEIU United Healthcare Workers East*, 817 F.3d 857 (3d Cir. 2016), the parties to a collective bargaining agreement (CBA) disputed, inter alia, how much of the increased cost of health benefits the employer would bear. The CBA provided the arbitrator with authority to decide this question for a single year. The CBA also provided that it could be amended only in writing and that the arbitrator had no authority to modify the CBA. During the course of the arbitration, the arbitrator suggested that the parties grant him the authority to make a multiyear award so that the increase in health care costs could be spread out over a longer period of time. The arbitrator rendered a multiyear award, reciting that the parties had orally agreed to this change to the arbitration clause. He said that the parties tentatively agreed to expanding his authority in joint session and subsequently firmly agreed in ex parte meetings with him. The employer filed a petition to vacate the award on the grounds that the arbitrator exceeded his authority because the CBA permitted only a single year award. However, the Third Circuit held that the employer had not produced evidence that the attorney working for the employer in the arbitration had not agreed to modify the CBA. During the course of the arbitration, the arbitrator rendered a multiyear award, reciting that the parties had orally agreed to this change to the arbitration clause. He said that the parties tentatively agreed to expanding his authority in joint session and subsequently firmly agreed in ex parte meetings with him. The employer filed a petition to vacate the award on the grounds that the arbitrator exceeded his authority because the CBA permitted only a single year award. However, the Third Circuit held that the employer had not produced evidence that the attorney working for the employer in the arbitration had not agreed to the extension of the arbitrator's authority. It deemed the arbitrator's finding in the award that there had been such an agreement to be conclusive.

The California Court of Appeal for the Second District took a different view of an alleged oral agreement to modify an arbitration clause. In *Magness Petroleum Co. v Warren Resources of California, Inc.*, 127 Cal. Rptr. 2d 159, 103 Cal. App. 4th 901 (Cal. Ct. App. 2d Dist. 2003), the parties' contract specified that arbitration was to be conducted before the American Arbitration Association (AAA). However, when the parties' first dispute arose, they agreed in writing to arbitrate before a retired judge affiliated with JAMS, not AAA. There were further disputes between the parties, and the party that lost the first round before the JAMS arbitrator attempted to bring those disputes before the AAA. The JAMS arbitrator and the other party asserted that the parties had orally stipulated that any further disputes would come before the same arbitrator. Although it noted its dismay that the party demanding AAA only did so after it lost the first round and another arbitrator would have to read into a large and complex case, the court of appeal held that disputes subsequent to the first one must be heard before the
AAA. The California arbitration statute required that agreements to arbitrate be in writing in order to be enforced. Thus, the agreement to change from AAA to JAMS required a writing signed by both parties.

**Practice Tip**
There are some circumstances and some states in which an oral agreement to arbitrate or an oral agreement to modify an arbitration agreement can be enforced. But because arbitration is a creature of contract, and "put it in writing" is almost always the best way to create a contract, practitioners need to keep in mind that not only must the initial arbitration clause be properly drawn and signed by the parties, agreements to add to, subtract from, or modify that clause should be committed to a writing signed by the parties, not just counsel. It can be tempting to rely on an oral agreement or a statement on the record when in the middle of arbitration or litigation. When adversaries agree to something in front of a neutral, we think we can rely on it. Unfortunately, when a party loses, that party may look desperately for some way to overturn the award. Because there are few grounds to overturn an arbitration award, arguing that the arbitrators exceeded their powers can look attractive.

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Defining Finality: What Constitutes a Final Arbitration Award

By Christian J. Bromley – June 6, 2018

An arbitration award "must" be confirmed under the Federal Arbitration Act (FAA)—unless a party to that arbitration demonstrates that one of the limited grounds for vacatur exists. *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576, 582 (2008). On February 22, 2018, the Fourth Circuit Court of Appeals issued an opinion in *Norfolk Southern Railway Co. v. Sprint Communications Co.*, 883 F.3d 417 (4th Cir. 2018), vacating the confirmation of an arbitration award because that award was not "final" under section 10(a)(4) of the FAA. This decision adds precedent to a notably underdeveloped area of arbitration jurisprudence.

**Section 10 Grounds for Vacating Awards**

Section 10(a) of the FAA enumerates the four categories of grounds for vacating awards. 9 U.S.C. § 10. The first three categories permit federal courts to vacate an award when (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; or (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing or in refusing to hear pertinent and material evidence or guilty of any other misbehavior prejudicing any party.

The fourth category of section 10(a) applies when "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." The federal court opinions examining litigants' requests to vacate arbitration awards appear to treat the fourth category as providing two individual and separate subcategories to vacate an award: (1) where the arbitrators allegedly exceeded their powers or (2) where the award is purportedly not mutual, final, and definite. The Fourth Circuit's opinion in *Norfolk Southern Railway Co. v. Sprint Communications Co.* continues this bifurcated treatment of the fourth category and considered only whether the award was sufficiently "final."

*Norfolk Southern Railway Co. v. Sprint Communications Co.*

The dispute between Norfolk Southern Railway and Sprint Communications arose from a disagreement over the amount Sprint Communications owed for continued use of certain rights of way. The parties' agreement called for a three-person panel of appraisers to determine the amount owed. One of the three appraisers, with the assent of a second, issued a decision on this amount. Sprint Communications disagreed with the appraisers' decision, the "majority decision," and instituted an arbitration proceeding before a panel of American Arbitration Association arbitrators. Those arbitrators determined the majority decision was final and
binding. Sprint Communications brought an appeal to the Fourth Circuit after the U.S. District Court for the Eastern District of Virginia confirmed the arbitration award—ostensibly the majority decision.

The Fourth Circuit has since vacated the confirmation based on a significant caveat from the third appraiser in the majority decision: He expressly reserved his right to withdraw assent without prejudice or time limitation if either of two "extraordinary appraisal assumptions" made in the decision turned out not to be true. 883 F.3d at 421. The Fourth Circuit declined to find the majority decision was final under section 10(a)(4) when the third appraiser not only based his assent on assumptions but also reserved his right to completely withdraw assent if his assumptions proved to be incorrect.

Vacating Awards When "Arbitrators Exceeded Their Powers"

Parties seeking relief under the first effective subcategory of section 10(a)(4)—whether the arbitrators exceeded their power—face a heavy burden to vacate an arbitration award. As articulated by the U.S. Supreme Court, "[o]nly if 'the arbitrator act[s] outside the scope of his contractually delegated authority'—issuing an award that 'simply reflect[s] [his] own notions of [economic] justice' rather than 'draw[ing] its essence from the contract'—may a court overturn his determination." Oxford Health Plans LLC v. Sutter, 569 U.S. 564, 569 (2013) (citations omitted). The Fourth Circuit has agreed with this position and will overturn an award on this ground only if the arbitrator exceeded his or her authority by issuing an award based simply on the arbitrator's own notions of economic justice. Jones v. Dancel, 792 F.3d 395, 405 (4th Cir. 2015).

Vacating Awards as Not "Mutual, Final, and Definite"

The Fourth Circuit found in Norfolk Southern Railway Co. v. Sprint Communications Co. that "[a]n award is not 'final' under the FAA if it fails to resolve an issue presented by the parties to the arbitrators." 883 F.3d at 422. The Fourth Circuit, however, considered only finality and does not appear to opine on whether the award was also mutual and definite under section 10(a)(4). Other circuits have articulated their own versions of this section 10 subcategory and sometimes deal only with finality, while at other times also considering the requirements for an award to be mutual and definite. The following are examples:

- Second Circuit: "[A]n arbitration award, to be final, must resolve all the issues submitted to arbitration, and . . . it must resolve them definitively enough so that the rights and obligations of the two parties, with respect to the issues submitted, do not stand in need of further adjudication." Rocket Jewelry Box, Inc. v. Noble Gift Packaging, Inc., 157 F.3d 174, 176 (2d Cir. 1998).
• Third Circuit: "It is axiomatic that an arbitration award becomes final if it is intended by the arbitrator to be a 'complete determination of all claims submitted' to it." *Robinson v. Littlefield*, 626 F. App'x 370, 373 (3d Cir. 2015) (citations omitted).

• Seventh Circuit: "We take 'mutual' and 'final' to mean that the arbitrators must have resolved the entire dispute (to the extent arbitrable) that had been submitted to them, . . . and 'definite' to mean . . . that the award is sufficiently clear and specific to be enforced should it be confirmed by the district court and thus made judicially enforceable." *IDS Life Ins. Co. v. Royal All. Assocs., Inc.*, 266 F.3d 645, 650 (7th Cir. 2001) (citations omitted).

• Eighth Circuit: "The arbitrator must 'resolve all issues submitted to the arbitration, and determine each issue fully so that no further litigation is necessary to finalize the obligations of the parties under the award.'" *Gas Aggregation Servs., Inc. v. Howard Avista Energy, LLC*, 319 F.3d 1060, 1069 (8th Cir. 2003) (citations omitted).

Impact on Actions to Vacate Awards

The *Norfolk Southern Railway Co. v. Sprint Communications Co.* opinion provides added precedent in the otherwise limited and usually fact-intensive arena where federal courts are examining the enforecability of arbitration awards. Courts consistently agree on the well-established rule that they "may vacate an arbitrator's decision 'only in very unusual circumstances.'" *Oxford Health*, 569 U.S. at 568 (citations omitted). There remains to be, however, a consensus among the federal circuits on what precisely constitutes an unenforceable award under the fourth category of section 10. As the *Norfolk Southern Railway Co. v. Sprint Communications Co.* opinion reveals, there is not yet even a consensus on what constitutes a "final" arbitration award, as opposed to a "mutual, final, and definite" arbitration award—if there is any difference at all—under the second subcategory of section 10(a)(4) for vacating an award.

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On Remand, Second Circuit District Court Vacates Arbitrator’s Certification of an Opt-Out Class

By P. Jean Baker – June 6, 2018

It was a precedent-setting decision. On remand the District Court for the Southern District of New York became the first court to apply Justice Alito’s concurrence in Oxford Health Plans to strike down an arbitrator’s class certification award. Oxford Health Plans LLC v. Sutter, 569 U.S. 574 (2013) (Alito, J., concurring). The court determined that, absent an express class arbitration provision in each putative class member’s arbitration agreement, an arbitrator does not have the authority to bind absent class members to a class judgement—even if the absent class members signed the same arbitration agreement as the named plaintiffs. Jock v. Sterling Jewelers Inc., No. 08 Civ. 2875 (S.D.N.Y. Jan. 15, 2018).

"Interminable Litigation"

In 2008, the plaintiffs, current and former female employees of defendant Sterling Jewelers, filed a putative class action alleging that Sterling discriminated against them in pay and promotion on the basis of their gender. The named plaintiffs had each signed a dispute resolution agreement, the "RESOLVE agreement." The RESOLVE agreement provided for arbitration in accordance with the rules of the American Arbitration Association (AAA). The court granted the plaintiffs' motion to compel arbitration (Jock v. Sterling Jewelers, Inc., 564 F. Supp. 2d 307 (S.D.N.Y. 2008), and the appearing parties in a joint ad hoc submittal granted an arbitrator the authority to decide whether class arbitration was permitted.

In 2009, the arbitrator, applying the AAA Supplementary Rules for Class Arbitrations, issued a partial final award. Although the RESOLVE agreement did not mention class proceedings, the form agreement did not expressly prohibit class arbitration. Under the governing law of Ohio, absent an express prohibition, signatories to contracts of adhesion may avail themselves of class proceedings. Finding that the RESOLVE agreement was adhesive, the arbitrator ruled that class arbitration was permitted.

Sterling moved to vacate the clause construction partial final award. The court initially denied Sterling's motion. (Jock v. Sterling Jewelers, Inc., 677 F. Supp. 2d 661 (S.D.N.Y. 2009) While the appeal was pending, the Supreme Court issued an opinion in Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S. Ct. 1758 (2010), reversing the Second Circuit's reversal of the undersigned's decision holding that a class action proceeding is not available unless the contracting parties so provide.
In 2010, Sterling again moved for relief against the court's decision to confirm the arbitrator's clause construction award permitting class arbitration. The court reversed its decision and granted Sterling's motion to vacate, finding the record did not identify any concrete basis for the arbitrator to conclude that the parties had manifested their intent to arbitrate class claims. *Jock v. Sterling Jewelers, Inc.*, 725 F. Supp. 2d 444 (S.D.N.Y. 2010).

The plaintiffs appealed and a divided panel of the Second Circuit reversed, with the majority finding the parties had "squarely presented" the question of whether the RESOLVE agreement allowed for class arbitration to the arbitrator and the parties were bound by the arbitrator's decision—whether rightly or wrongly decided. *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d Cir. 2011), *cert. denied*, 565 U.S. 1259 (2012).

In 2015, the arbitrator issued a class determination award, certifying a class of about 44,000 persons for the plaintiffs' Title VII disparate impact claims. An opt-out class for injunctive and declaratory relief was among the classes certified in the award. Sterling moved to vacate the award, arguing that the arbitrator exceeded her authority (1) by purporting to bind employees other than the named plaintiffs and the 254 who had affirmatively opted in to the proceedings before the AAA and (2) by permitting opt-out rights in a mandatory Rule 23(b)(2) class. The court, having found that the arbitrator exceeded her authority and manifestly disregarded settled law (see *Wal-Mart Stores, Inc. v. Dukes*, 131 St. Ct. 2541 (2011)), granted Sterling's motion to vacate the arbitrator's class determination award to the extent that it permitted individuals to opt out of a class certified for the purposes of seeking class-wide injunctive and declaratory relief. In all other respects, the award was confirmed. *Jock v. Sterling Jewelers, Inc.*, 143 F. Supp. 3d 127 (S.D.N.Y. 2015).

Sterling again appealed.

In 2017, the Second Circuit vacated the 2015 opinion and order, holding that the earlier rulings had not clearly addressed whether the arbitrator had the power to bind absent class members who had not either consented to the arbitrator determining whether class arbitration was permissible under the RESOLVE agreement or opted in to the class proceeding. *Jock v Sterling Jewelers Inc.*, 703 F. App'x 15 (2d Cir. 2017).

**Second Circuit's Analysis**

The court began its analysis by stating that its review would be de novo regarding legal questions. And the court's focus would be on whether the arbitrator had the power to address a certain issue, not whether the arbitrator correctly decided a certain issue. The court quickly concluded that it is the law of the case that the arbitrator does not have the authority, based on the RESOLVE agreement, to certify a 70,000-person class. As to whether the RESOLVE
agreement authorized class procedures, the court had decided, in a memorandum order dated July 27, 2010, that it does not. Thus, individuals who did not affirmatively opt in to the current class proceedings did not agree to permit class procedures by virtue of having merely signed identical RESOLVE agreements.

So the remaining question was whether the arbitrator had the authority to certify a 70,000-person class solely because the named plaintiffs and the defendant agreed to submit to an arbitrator the question of whether class arbitration was permitted. The court's answer to that question mirrored the concerns raised in Justice Alioto's concurrence in Oxford Health Plans—namely, should an arbitrator's erroneous interpretation of contracts that do not authorize class arbitration bind absent class members who have not affirmatively authorized the arbitrator to make that determination or opted in to the class proceedings? The court addressed in dicta whether the arbitrator's initial decision to permit class arbitration was "erroneous." In footnote 1, the court cites the decision of an Ohio intermediate appellate court that found, while construing the same RESOLVE agreements, that they were not adhesive or unconscionable. See W.K. v. Farrell, 167 Ohio App. 3d 14 (2006).

Explaining why courts would be unable to enforce an arbitration award against absent class members who did not opt out but who have also not otherwise opted in to being bound by an arbitrator's decision, the court found that the arbitrator had no authority to decide whether the RESOLVE agreement permitted class action procedures for anyone other than the named parties who choose to present her with that question and those other individuals who chose to opt in to the proceeding before her. The court vacated the clause construction award insofar as the award certified a class that included individuals who had not affirmatively opted in to the arbitral proceedings.

Questions Not Addressed by the Decision
In footnote 2, the court made it very clear that the court's decision did not address the question of whether—had the RESOLVE agreement, in fact, permitted class arbitration—an arbitrator would have had the authority to bind absent class members based on the fact that each absent class member had agreed to such procedures when they executed the RESOLVE agreement.

To Be Continued
The plaintiffs have filed an appeal.
Conclusion
Allowing an arbitrator or a court to decide whether class or collective arbitration is permissible can easily result in interminable litigation—litigation that could have easily been avoided by drafting an arbitration clause that clearly stated whether class or collective arbitration was or was not permitted. As courts continue to grapple with procedural issues surrounding class arbitration, attorneys need to remain current regarding the evolving legal landscape and quickly revise their clients' arbitration agreements as soon as changes are warranted.

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Arbitration Agreement Allowing for De Novo Review of an Award Deemed Unenforceable

By Melinda G. Gordon – June 6, 2018

Citizen Potawatomi Nation and the State of Oklahoma had a tribal-state gaming compact that provided for arbitration of disagreements arising under the compact pursuant to American Arbitration Association (AAA) rules. The parties' arbitration clause permitted either party to bring an action against the other in a federal district court for de novo review of an award.

In *Citizen Potawatomi Nation v. Oklahoma*, 2018 WL 718606 (10th Cir. Feb. 6, 2018), the U.S. Court of Appeals for the Tenth Circuit invalidated the parties' arbitration agreement and determined that de novo review of an arbitration award in federal court is in contravention of the U.S. Supreme Court decision in *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008). In *Hall Street*, the Supreme Court precluded the parties to an arbitration agreement from contracting for review of an award beyond the scope set forth under Federal Arbitration Act (FAA) sections 10 and 11. *Citizen Potawatomi* alerts parties that an arbitration agreement that expands the review of the award beyond what is provided for under the FAA can invalidate the entire agreement.

**Background**

In *Citizen Potawatomi*, the parties arbitrated a dispute regarding liquor licensing and an alcohol sales tax. Initially, Oklahoma filed a motion to dismiss the Nation's demand for arbitration, arguing that regulatory disputes between the parties should be adjudicated through administrative proceedings, not arbitration. The arbitrator declined to dismiss the Nation's demand, determining that the matter was arbitrable, and hearings were conducted.

The arbitrator found in favor of the Nation, and the award resulted in the Nation being exempted from $27 million in alcohol sales tax. The Nation moved in federal court to confirm the award. Oklahoma moved to vacate the award, alleging that the arbitrator exceeded his authority and that the state was entitled to de novo review in federal court. The district court, relying on *Hall Street*, held that parties to an arbitration agreement cannot expand the review of an award beyond what is set forth in the FAA. Citing *Hall Street*, the district court applied the narrow standard of review articulated in FAA section 10 and confirmed the award. The district court failed to address Oklahoma's argument that the arbitration provision in the compact was invalid if the de novo review provision was found unenforceable under *Hall Street*.
The Appeal
On appeal, Oklahoma asserted that the district court erred on two grounds. Oklahoma maintained that the district court erred in confirming the award because the award failed to resolve all submitted issues to finality, was fatally vague, and exceeded the arbitrator's powers. Oklahoma also asserted that the district court failed to conduct a de novo review of the merits of the parties' dispute pursuant to the parties' compact. According to Oklahoma, if de novo review is unavailable, the district court should have severed the obligation to engage in binding arbitration from the compact because de novo review is a material aspect of the parties' agreement to arbitrate disputes arising under the compact.

Analysis
The Tenth Circuit focused on the validity of the compact's requirement to engage in binding arbitration. After an in-depth examination of the compact, the Tenth Circuit determined that the provision for de novo review was material to the parties' agreement to arbitrate disputes and could not be severed from the agreement. According to the Tenth Circuit, under Hall Street, it is clear that the parties may not contract to change the standard of review articulated in section 10 of the FAA. The Tenth Circuit determined that because Hall Street clearly indicates that the compact's de novo review provision is legally invalid and because the obligation to arbitrate is contingent on de novo review, the obligation to arbitrate as set forth in the compact is unenforceable. The Tenth Circuit remanded the matter to the district court for vacatur of the arbitration award. The Tenth Circuit, noting that the parties' arbitration clause derived from Oklahoma's "model tribal gaming compact," declared that addressing this issue has the salutary effect of resolving legal uncertainty for Oklahoma's gaming compacts with other tribes when gaming-related disputes arise.

The Citizen Potawatomi Nation recently announced that it will seek review of the Tenth Circuit's order from the U.S. Supreme Court.

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The Convergence of Agency Action and Administrative Review in Regulating Arbitration

By Gary C. Norman – June 6, 2018

How many of us—even lawyers—peruse, or even carefully study, the "fine print" of important agreements of financial transactions, such as credit card agreements?

Considering the rise of inclusion of arbitration clauses, which some such as the Consumer Financial Protection Bureau (CFPB) argue are "one-sided" in these agreements, we fail in reading such fine print at our financial risk. These clauses arguably favor arbitration over plaintiff-related litigation, such as seeking redress via causes of action pursued as class actions. To this point, a final Rule published in the Federal Register in 2017, and then withdrawn by a congressional review tool also in late 2017, sheds further light on the propriety of such arbitration clauses, more highlighting what I view as interesting administrative law issues and other questions. (If you are able, it may be worth reading the hundreds of pages of the rulemaking and the related reactions to the rulemaking.) This article briefly notes the final rule and the Congressional Review Act leveraged as a response to the final rule, and then notes what I view as the implications of this clash of the regulatory state with, what is unlikely to disappear across differing administrations, the withdrawal of federal regulations by Congress.

The Facts of the History of the Final Rule and of the Congressional Response

Agency action. In July 2017, the CFPB published the final rule in the Federal Register as follow-up to a national, if involved, study of arbitration clauses. Arbitration Agreements, 82 Fed. Reg. 33, 210 (July 19, 2017). It issued the final rule in accordance with section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The final rule sought to prohibit and eliminate bans against class actions that had become a staple of arbitration clauses in consumer financial transactions, such as in credit card agreements and in student loan agreements. Before discussing the final rule more, it seems worth mentioning briefly the extensive process for arriving at a final rule of this kind.

At the simplest of levels, a final rule will be issued only after the following steps have been taken:

1. A rule is first proposed internally at an agency, such as the CFPB, by a subject matter expert after significant internal clearance often in consultation with an
executive secretariat. Sometimes this may also involve the Federal Register, as did this final rule, where input is solicited from the public.

2. A proposed rule is published in the Federal Register in accordance with certain notice and comment requirements under the Administrative Procedure Act.

3. Along the way, the Office of Management and Budget, a sub-agency of the West Wing, is involved as a clearing authority.

4. In accordance with a range of requirements in the Administrative Procedure Act—among them, a need to address the comments that have been received from the public—a final rule or interim final rule is published.

Administrative Law, Justia.com.

Among other portions of the preamble, I found the discussion of arbitration interesting. The final rule on arbitration agreements experienced all these levels as part of the process to arrive at the Federal Register. In the preamble, the CFPB stated that the final rule imposes two sets of limitations on the use of pre-dispute arbitration agreements by covered providers of consumer financial products and services. According to the preamble, the final rule, if implemented, will prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court and will require most providers to insert language into their arbitration agreements reflecting this limitation.

The CFPB stated, if perhaps argumentatively, that the final rule is based on its findings—which are consistent with the study—that pre-dispute arbitration agreements are widely used to prevent consumers from seeking relief from legal violations on a class basis and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief. According to the preamble, the final rule will require providers that use pre-dispute arbitration agreements to submit certain records relating to arbitral and court proceedings to the CFPB. The CFPB will use the information it collects to continue monitoring arbitral and court proceedings to determine whether there are developments that raise consumer protection concerns warranting possible further action.

Note: The final rule applies to providers of certain consumer financial products and services in the core consumer financial markets of lending money, storing money, and moving or exchanging money, including, subject to certain exclusions specified in the
providers that are engaged in, among others, credit-related transactions, such as credit cards.

Despite the multiple steps to issue a final rule, that is not the final stop.

**Congressional review.** In July 2017, the House of Representatives quickly passed Joint Congressional Resolution 111, initiating the Congressional Review Act, so that the proposed final rule could be withdrawn. In October 2017, the Senate passed the resolution by a narrow vote of 51 to 50 with two notable Republicans joining Democrats. Republican Senators Graham and Kennedy joined Democrats in voting against the withdrawal of the final rule. Considering that the final rule would not come into effect, pending congressional review, until September 2017, these legislative actions occurred quickly. The vice president assumed his constitutional role as president of the Senate, casting a vote to withdraw the CFPB action. See Kelsey Ramirez, "**Vice President Pence Casts Tie-Breaking Vote to Kill CFPB Arbitration Rule**," *HousingWire*, Oct. 25, 2017.

As far as I am aware, administrations since that of President Clinton have explored how to reform the regulatory state. In its campaign, the Trump administration avowed that, in "making America great again," it would rebalance the role of the regulatory state in terms of whether the regulatory state is a hindrance to economic growth. In spring 2017, the Trump administration issued several executive orders related to reducing regulations and paperwork burden. Whether one favors the reduction of federal regulations or not, the Trump administration has remained true to this promise, notably advancing a deregulatory agenda within the government since the issuance of the executive orders. See Sam Batkins, "**The Congressional Review Act in 2017**," *Am. Action Forum*, May 10, 2017. The administration has claimed that, in its first 11 months, it has delayed or canceled 1,500 proposed regulatory actions to a net economic benefit of the people. Laurent Belsie, "**Trump’s Deregulation Drive Is Epic in Scale and Scope. And Yet . . .**," *Christian Sci. Monitor*, Jan. 5, 2018.

In November 2017, the president signed the joint resolution, passed by both houses of Congress under the Congressional Review Act, instituting Public Law 115-74. It nullified the final rule.

**Congressional Review Act Concisely Noted**

Passed in March 1996, the Congressional Review Act is one of a range of laws that itself regulates the nature of federal rulemaking. Despite its interesting intent of redirecting the
regulatory state back to congressional oversight of rulemaking, it has not been a regular part of that oversight process until the current administration. See Stephen Dinan, "Congress Overturns Anti-Arbitration Rule as GOP Flexes Legislative Muscle," Wash. Times, Oct. 24, 2017. By all accounts, it has been used 15 times since February 2017.

In November 2016, the Congressional Research Service, an arm or sub-agency of the Library of Congress, issued a list of more than 50 "major" rules finalized on or after June 13, 2016, that are subject to removal by the 115th Congress. "Major rule[s]" are defined as having an "annual effect on the economy of $100 million or more," comprising an increase in costs or prices for consumers, for federal, state, or local government agencies, or for geographic regions.

The Congressional Review Act, 5 U.S.C. § 801 et seq., basically provides a kind of "cooling-off period" for major rules. The act provides for procedures to review and even nullify rulemakings.

Generally, Congress has 60 working days—legislative days in the House, and session days in the Senate—from the time at which a rule is submitted to Congress and published in the Federal Register—to nullify that rulemaking. Section 801(d) of the act provides that, if a rule is submitted to Congress fewer than 60 working days before it adjourns its session sine die, a new period for congressional review opens for the incoming session of Congress. Congress then operates as though the rules had been submitted to Congress and the Federal Register on the 15th working day of the incoming Congress, at which point a new 60-day review period is opened. If a resolution of disapproval is signed into law, the act prohibits that rule from coming into effect and prohibits that federal agency from "reissuing" the same regulation in the future or promulgating a regulation that is "substantially" similar. Moreover, the act limits or eliminates judicial review. 5 U.S.C. ch. 8.

In one of many valid points in the November 2017 commentary by Scott McCleskey ("Mandatory Arbitration Is Bad Policy and Bad for Business," Thomson Reuters Reg. Intelligence, Nov. 27, 2017), the Congressional Review Act (leveraged as a tool in withdrawing the final rule and many rules moving forward likely) has its flaws—at least in terms of deliberation. He stated, "This abandonment of principle is compounded by Congress rushing the resolution through without the same level of consideration and analysis that is invariably demanded of new regulations (the CFPB spent five years studying the issue before issuing its rule)."

Despite its orientation toward a narrow review window, I am not opposed to the Congressional Review Act when used properly and non-politically as a check and balance.

My Brief Reaction
As an arbitrator and mediator, I view the final rule and its withdrawal via the Congressional
Review Act of interest. All these regulatory and legislative happenings implicate, in my view, a series of issues, if not a continued need for conversation.

1. What is the best door in a multi-door courthouse for resolving our conflicts? Arbitration? Class action litigation? A process in between? In perusing the preamble, I am not sure if this broader question was not somewhat lost in the process.

2. Federal rulemaking is a complicated process that involves a range of multiyear steps. I fret that our public policy process in all its complexity is often simplistically discussed in the media under the current climate. The Congressional Review Act is one of a range of laws that regulate that process. The preamble is an example of the unwieldy nature of proposed agency actions in the Federal Register and where tools, such as the act, are not unreasonable when used wisely. But how do we create law capable of implementation, and who is best equipped for that—Congress? Agencies, such as the CFPB?

Gary C. Norman is a lawyer, arbitrator, and mediator. This article is the opinion of the author and does not represent any organization with which he might be involved.
Text Message Plaintiff Not Bound to Arbitrate

By Nicole O’Toole – May 23, 2018

The Seventh Circuit recently held in Warciak v. Subway Restaurants, Inc. 880 F.3d 870 (7th Cir., 2018) that Subway Restaurants, Inc. could not use the doctrine of equitable estoppel to require a cell phone user to arbitrate his spam text message claims based on the arbitration agreement in his mother’s cell phone contract with T-Mobile.

In Warciak, the plaintiff’s mother entered into an agreement with T-Mobile for a cell phone plan in 2006, and again in 2012, when she purchased a new phone. Both agreements contained an arbitration clause. Warciak was an authorized user under his mother’s cell phone plan, but he never signed or otherwise became a party to either agreement.

In 2016, Warciak received a spam text message promoting Subway sandwiches. He sued Subway, and Subway moved to compel arbitration arguing that federal estoppel law required Warciak to arbitrate under the arbitration clauses contained in his mother’s contracts with T-Mobile. Warciak argued that under Illinois law, he is not bound by his mother’s contracts. The district court granted Subway’s motion to compel arbitration, and Warciak appealed.

The Seventh Circuit recently held that the court must apply traditional state promissory estoppel principles to decide whether a non-party should be bound by the terms of another person’s contract. Scheurer v. Fromm Family Foods, LLC, 863 F.3d 748, 752 (7th Cir. 2017). Accordingly, it applied Illinois law here and held that “Subway cannot rely on estoppel to enforce T-Mobile’s arbitration agreement against Warciak.” The court reiterated a 2004 case holding that “[a] claim of equitable estoppel exists where a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the first person.” Ervin v. Nokia, Inc., 812 N.E.2d 534, 541 (Ill. App. Ct. 2004). The Seventh Circuit stated that Subway could not show detrimental reliance, and in fact expressly disclaimed detrimental reliance, in its reply brief in support of its motion to compel arbitration. Therefore, the district court was incorrect when it relied on estoppel to enforce the arbitration agreements against Warciak.
The court concluded that Warciak is not bound to the arbitration agreements between T-Mobile and his mother. Thus, it reversed the district court’s order. The court compelled arbitration and remanded for further proceedings.

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Wanna Be a Mediator? Find a Niche

By John Bickerman – May 16, 2018

About once or twice a month, I receive an inquiry from a lawyer who would like to make a career change to becoming a neutral. Sometimes the person is nearing retirement and looks favorably upon the apparent flexibility and freedom that an ADR practitioner seems to enjoy.

Of course, the reality is quite different. Becoming a successful neutral is not an easy task and there is no guarantee for success. Ten years ago, when I chaired the Section of Dispute Resolution, it was rumored and oft-quoted that the median income of a mediator was $0. Stated differently, more than one-half of the attorneys that identified themselves as mediators had no income. While I was never able to confirm the veracity of the statistic, anecdotally, it seemed quite plausible.

The reasons for the failure of so many would-be mediators (and arbitrators) is that little thought has been given to the business of being a neutral. Many prospective neutrals invest in training. Excellent programs to teach skills exists at many fine universities. Conferences also offer some cutting-edge knowledge of the field. What is lacking, or given very short shrift, is how to start and run a business. No, it’s not as easy has putting up a web page, getting a phone number and a clever name and waiting for the clients to pour in. The competition for work has grown significantly in the last decade. As mediation and arbitration have become commonplace, the field has been flooded. Well established mediators with thriving practices a few years ago have seen their workload decline, and there has been increasing pressure to reduce fees for all but the most well-known and successful neutrals. This downward pressure on neutral fees is a sure sign of the increased supply of neutrals and the higher level of competition. This pointer will focus on just one element of starting a practice: identifying and developing a niche.
I can usually tell within five minutes of meeting with a prospective neutral whether s/he will be successful. The defining characteristics are almost always a degree of confidence, commitment, enthusiasm, perseverance and, most importantly, a clear idea of the type of practice to be developed. With so many neutrals competing for work, establishing a brand and differentiating it from the masses is essential for success. Presenting oneself as an all-purpose neutral that can handle any case might have been a successful approach when the field was new, but it’s unlikely to lead to a thriving practice today. Instead, figure out a substantive area and specialize. For example, a number of years ago, a friend recognized that the field of health law was filled with conflicts that were better resolved outside of court. He developed an expertise in several aspects of health law. He promoted his expertise by writing and speaking on the topics he knew to prospective clients. Over time, he became the “go-to” mediator for this area of law and has built a very successful practice. While there is no right path to finding your niche, start with areas of law in which you have practiced and built a successful reputation. Or follow the example of my friend and identify an area where there is an unfulfilled need. Establishing a successful practice will not happen overnight but with creativity, diligence and planning, it can be done.

John Bickerman is the founder of Bickerman Dispute Resolution in Washington, D.C.
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