

SMU Annual Texas Survey

Volume 1

2014

Alternative Dispute Resolution

Will Pryor

Follow this and additional works at: <http://scholar.smu.edu/smuatxs>

Recommended Citation

Will Pryor, *Alternative Dispute Resolution*, 1 SMU Ann. Tex. Surv. (2014)
<http://scholar.smu.edu/smuatxs/vol1/iss1/1>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Annual Texas Survey by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

ALTERNATIVE DISPUTE RESOLUTION

*Will Pryor**

“Y’know my heart keeps tellin’ me

You’re not a kid at 33

Y’play around y’lose your wife

Y’play too long, y’lose your life . . .

Some gotta win,

Some gotta lose

Good Time Charlie’s got the blues”¹

Alternative Dispute Resolution (ADR) is a field that invites parties to a dispute to pursue resolution outside the judicial process. Mediation, a non-binding, informal ADR process facilitated by a neutral third-party, is sometimes referred to as a “win-win” opportunity, where the parties control the outcome of the dispute and negotiate an outcome that is acceptable, if not ideal. But in the form of ADR we refer to as binding arbitration, eventually there is a winner, and a loser—at least that is how it is supposed to work. As a consequence of a judicial narrowing in recent years regarding the grounds for setting aside or vacating arbitration awards, lawyers are searching high and low to find creative ways to achieve vacature. This year we have an active area of appellate activity, challenges to arbitration awards for “evident partiality,” and arguments that arbitrators “exceeded their power”.²

This is the sixth installment of an Annual Survey chapter on ADR, the first installment being published in 2008.³ There can be no disputing that in the past

* Mediator and arbitrator in Dallas. Yale University, B.A., 1978; Harvard Law School, J.D., 1981. The author wishes to thank Corey Harris and Javier Delgado of The Merlin Law Group in Tampa, Florida, Todd Lipscomb of Loree & Lipscomb in San Antonio, and Steve Badger of the Zelle Hofmann firm in Dallas for their contributions to the section on insurance appraisals, Mike Amis of Dallas for his input regarding public discussion of the Rule 169 debacle, and John Allen Chalk, Sr. of Whitaker Chalk Swindle & Schwartz, PLLC in Fort Worth, an esteemed authority on arbitration in Texas, and everywhere. Finally, as always, the author is grateful to Professor Ellen Smith Pryor for her support, encouragement, and limitless talent.

1. DANNY O’KEEFE, *Good Time Charlie’s Got The Blues*, on O’KEEFE (Signpost Records 1972).

2. Fed. Arbitration Act of 1925, 9 U.S.C. § 10 (2012).

3. Will Pryor, *Alternative Dispute Resolution*, 61 SMU L. REV. 519 (2008).

six years mediation has continued to saturate the legal marketplace, and the use of arbitration throughout the state of Texas has skyrocketed—as has the controversy that surrounds it. Appellate decisions abound. In this survey piece we will examine a few of the more intriguing and important cases in ADR, particularly cases pertaining to arbitration. For the first time we will also examine the development of an ADR process unique to the insurance industry—the insurance appraisal process.

I. ARBITRATION

Most appellate decisions addressing arbitration issues can be easily segregated into cases addressing the “front end”—whether an arbitration clause is enforceable and arbitration can be compelled against one party’s wishes, and cases addressing the “back end”—whether an award published by an arbitrator or arbitration panel should be confirmed or set aside.

But much attention has been focused during the survey year on whether class action waivers in arbitration clauses are binding and enforceable, or whether courts or state statutes can invalidate them. This attention derives from two recent decisions by the U.S. Supreme Court.

A. CLASS ACTION WAIVERS

The first is *American Express Co. v. Italian Colors Restaurant*,⁴ decided in June 2013. In an agreement between American Express and merchants accepting the American Express charge card, the binding arbitration clause provided that there “shall be no right or authority for any Claims to be arbitrated on a class action basis.”⁵ The merchants filed a class action, arguing that the cost of expert analysis of any individual merchant’s claim, relative to the amount recoverable by any single merchant, rendered pursuit of any individual claim impractical and meaningless.⁶ The Court held that the “[Federal Arbitration Act] does not permit courts to invalidate a contractual waiver of class arbitrations” based on an economic impracticality argument.⁷ Addressing the holding, one commentator noted, “If you sign an arbitration agreement that says you are waiving your right to class arbitration, that means you are waiving your right to class arbitration.”⁸ Expect these waivers to become commonplace in all sorts of contracts.

Only days earlier, the Court had published *Oxford Health Plans LLC v. Sutter*, which affirmed an arbitrator’s decision that the arbitration clause at issue allowed for class action arbitrations.⁹ The issue for the Court was not whether the arbitrator’s interpretation of the provision was correct, but merely whether

4. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

5. *Id.* at 2306.

6. *Id.*

7. *Id.*

8. David Garcia & Leo Caseria, *Opinion analysis: A class action waiver in an arbitration agreement will be strictly enforced under the Federal Arbitration Act*, SCOTUSBLOG (June 21, 2013, 10:45 AM), <http://www.scotusblog.com/2013/06/opinion-analysis-a-class-action-waiver-in-an-arbitration-agreement-will-be-strictly-enforced-under-the-federal-arbitration-act/>.

9. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013).

the arbitrator (even arguably) was interpreting the contract.¹⁰ The Court explicitly was not concerned with the correctness of the arbitrator's decision, and all but stated that the decision was wrong. This deference to the decision of an arbitrator is consistent with the Court's recent favorable view of binding arbitration.¹¹ The opinion may have more importance with respect to judicial deference of arbitrator decision-making than to the issue of class action arbitration, in light of *American Express*.

B. VALIDITY OF THE ARBITRATION AGREEMENT: WHO DECIDES?

In recent years, courts have wrestled with the preliminary question of who, the court or the arbitrator, should determine whether an arbitration agreement is enforceable, and what issues are included and excluded from the scope of the arbitration. As a general proposition, courts tend to give great deference to the authority of arbitrators, particularly when the arbitration agreement itself includes or incorporates a specific rule blessing the arbitrator with authority to decide these preliminary issues.

This deference was highlighted by the U.S. Supreme Court in *Nitro-Lift Technologies, L.L.C. v. Eddie Lee Howard*, where a claim was filed by oil field workers in Oklahoma attempting to set aside their non-compete agreements with their prior employer.¹² The Oklahoma Supreme Court reversed the lower court and invalidated the non-compete agreements under Oklahoma law, enjoining their enforcement.¹³ The U.S. Supreme Court held this was an impermissible usurpation of the arbitrator's authority because "it is for the arbitrator to decide in the first instance whether the covenants not to compete are valid as a matter of applicable state law."¹⁴

Texas appellate courts will usually reinforce the principle that the arbitrator makes the critical preliminary decision regarding arbitrability, assuming the arbitration agreement or relevant rules contain an appropriate expression of such authority.¹⁵ In the survey year, the best examples include *Jones v.*

10. *Id.* at 2071.

11. *Id.*

12. *Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500, 501-02 (2013).

13. *Id.* at 502.

14. *Id.* at 504.

15. It is the prerogative of this writer to remind the reader that this "arbitrator decides" scheme is, according to many, illogical, to put it kindly. In his dissent in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), Justice Black responded to the majority's holding that a federal court, in the context of a claim of "fraudulent inducement," may consider only whether the claim is that the arbitration agreement itself was fraudulently induced, or whether the claims goes to the agreement as a whole. *Id.* at 398-402.

The Court here holds that the [FAA] . . . compels a party to a contract containing a written arbitration provision to carry out his "arbitration agreement" even though a court might, after a fair trial, hold the entire contract—including the arbitration agreement—void because of fraud in the inducement. The Court holds, *what is to me fantastic*, that the legal issue of a contract's voidness because of fraud is to be decided by persons designated to arbitrate factual controversies arising out of a valid contract between the parties. And the arbitrators who the Court holds are to adjudicate the legal validity of the contract need not even be lawyers . . ."

Id. at 407 (Black, J. Dissenting) (emphasis added). By "fantastic" Justice Black did not mean "wonderful."

Mainwaring,¹⁶ a case involving a contract between future homeowners and their architect. When the relationship went awry and the clients filed suit, the architect sought to compel arbitration pursuant to a straightforward arbitration clause in their agreement.¹⁷ The homeowners, however, contended that the Defendant was not a licensed architect at the time he entered into the agreement, and therefore lacked capacity, rendering the entire agreement unenforceable.¹⁸ Quoting well-settled Supreme Court authority, the court held that:

regardless of whether the challenge is brought in federal or state court, a challenge to the validity of a contract as a whole, and . . . not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.¹⁹

“[T]he issue presented in this appeal is who properly decides the issue of arbitrability against a non-signatory—the trial court or the arbitrator,” wrote the Houston Court of Appeals in *Elgohary v. Herrera*.²⁰ Seemingly at odds with the opinion just discussed, the court concluded that “[b]ecause the trial court, not the arbitrator, should have decided the ‘gateway issue’ of whether Herrera had agreed to be bound by the arbitration, the arbitrator exceeded his authority.”²¹ Is there an inconsistency in these opinions? Perhaps. But in the *Elgohary* case, the clause at issue was in a contract signed by Gilbert Herrera, a limited partner in a Texas limited partnership, signing in his capacity as president of the limited partnership.²² Herrera, individually, was a non-signatory to the agreement.²³ Consequently, it could not be shown that Herrera, individually, “clearly and unmistakably agreed” to submit claims against him personally to arbitration,²⁴ a standard set forth by the U.S. Supreme Court in *First Options of Chicago, Inc. v. Kaplan*.²⁵

Consider this scenario. Plaintiff files a suit, which is followed by the defendant’s motion to compel arbitration. Plaintiff files a motion to compel limited discovery, a one hour deposition, to explore the issue of validity or non-

16. *Jones v. Mainwaring*, No. 09-12-00324, 2012 WL 6643849, at *1 (Tex. App.—Beaumont Dec. 20, 2012, no pet.) (mem. op.).

17. *Id.*

18. *Id.*

19. *Id.* at *3 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 446, 449 (2006) (internal quotation marks omitted)).

20. *Elgohary v. Herrera*, 405 S.W.3d 785, 787 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

21. *Id.* at 793.

22. *Id.* at 788.

23. *Id.*

24. *Id.* at 790.

25. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 934, 944 (1995). Opinions can be found in which appellate courts, somewhat inexplicably, seem to wander off into analysis of arbitrability, under circumstances where it appears they should have been delegating such a decision to the arbitrator. It would be reassuring if they would at least acknowledge the issue, and perhaps refer to the “clearly and unmistakably” standard. See *Jones v. Villareal*, No. 13-12-00166-CV, 2013 WL 656839, at *7 (Tex. App.—Corpus Christi Feb. 21, 2013, no pet.) (mem. op.); *Baumeister v. Reagan*, Nos. 02-12-00276-CV, 02-12-00277-CV, 2013 WL 530976, at *5-6 (Tex. App.—Fort Worth Feb. 14, 2013, no pet.) (mem. op.).

validity of the arbitration clause. Sound reasonable? Not according to the El Paso Court of Appeals in *In re ReadyOne Industries, Inc.*²⁶

ReadyOne[, the Defendant,] contends that the trial court abused its discretion in ordering limited discovery before ruling on the merits of ReadyOne's motion to compel arbitration because Flores[, the Plaintiff,] failed to raise a colorable basis or reason to believe that discovery was necessary or would reveal that the arbitration agreement was unenforceable. We agree.²⁷

The ruling is clear, but authority also exists for the proposition that the "colorable basis" or "reason to believe" standard is irrelevant.²⁸ The prevailing rule is that a motion to compel arbitration trumps all other pending motions and proceedings, and must receive priority.²⁹

C. VALIDITY OF THE ARBITRATION AGREEMENT

In *Richmont Holdings, Inc. v. Superior Recharge Systems, L.L.C.*, the Texas Supreme Court found that where an employment agreement did not include an arbitration clause, but an asset-purchase agreement between the same parties signed on the same day provided for arbitration, a dispute involving both agreements was arbitrable.³⁰ Regrettably, the result seems dictated by a mysterious "throwing in of the towel" by the party that had succeeded in persuading the court of appeals that only the employment agreement was at issue, negating the obligation to arbitrate, and resulting in the short, per curiam decision.³¹

Most decisions addressing challenges to the enforceability of an arbitration clause will recite, "In evaluating a motion to compel arbitration, a court must determine first whether a valid agreement exists, and then whether the agreement encompasses the claims raised."³² In *Dish Network L.L.C. v. Brenner*, in a dispute between the satellite television services provider and a former customer service representative, the former employee challenged the arbitration on the grounds that it was an agreement between him and a corporate parent of his employer.³³ The court determined that the agreement was valid, was not illusory, did not lack consideration, and did not require Dish Network's signature on the agreement to make it valid.³⁴

26. *In re ReadyOne Industries, Inc.*, 400 S.W.3d 164 (Tex. App.—El Paso 2013, no pet.).

27. *Id.* at 168.

28. See, e.g., *In re Houston Pipe Line Co.*, 311 S.W.3d 449, 451 (Tex. 2009).

29. See *In re Champion Technologies, Inc.*, 173 S.W.3d 595, 599 (Tex. App.—Eastland 2005, no pet.); TEX. CIV. PRAC. & REM. CODE ANN. § 171.021 (West 2012).

30. *Richmont Holdings, Inc. v. Superior Recharge Sys., L.L.C.*, 392 S.W.3d 633, 634–35 (Tex. 2013).

31. *Id.*

32. *Dish Network L.L.C. v. Brenner*, Nos. 13-12-00564-CV, 13-12-00620-CV, 2013 WL 3326640, at *3 (Tex. App.—Corpus Christi June 27, 2013, no pet.) (mem. op.) (quoting *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006) (orig. proceeding)) (internal quotation marks omitted).

33. *Id.* at *7.

34. *Id.* at *4–6.

While on the subject of non-signatories, it seems almost paradoxical that some judicial decisions every year address circumstances in which one party wants to compel non-signatory parties to participate in arbitration, and other circumstances in which it is the non-signatories who want to be included in an arbitration process. It is not unusual for these battles to occur in the context of construction disputes, which almost inherently involve multiple parties, where some of the parties will have a signed arbitration agreement and some have not.

In one such case decided during this survey year, a condominium owner filed suit against an architect, a general contractor, several sub-contractors, insurance provider, and insurance broker for damages to the condominium incurred during a hurricane.³⁵ After a considerable amount of procedural jockeying and motion practice, including the entry of an agreed discovery control plan and scheduling order, the general contractor filed a motion to compel arbitration and to stay the litigation.³⁶ All of the other parties, though non-signatories, joined in the motion.³⁷ Interestingly,

Sapphire[, the property owner,] argued that it did not have a written contract with any of the appellants, except for GTL[, the general contractor,] and that its contract with GTL “specifically provide[d] that there are no third party beneficiaries and that non-signatories to the contract [could not] claim any rights under its terms, including the right to arbitrate.”³⁸

Finding the arbitration agreement with GTL valid, the court nonetheless concluded that arbitration was not required because the demand for arbitration was outside a limitations restriction to which the parties had also agreed.³⁹ As for the non-signatories, the court relied upon a specific section of the GTL contract which “merely *allows for* the consolidation or the joinder of third-parties in the arbitration proceeding. It does not give non-signatories a *right* to compel arbitration.”⁴⁰

Perhaps of narrow interest, but still important to many, the Texas Supreme Court took up the issue of a “donative arbitration clause,” a clause in an *inter vivos* trust.⁴¹ In a dispute between a trust beneficiary and the trustee, should arbitration be compelled? This issue is surfacing for the first time in other state courts and other state legislatures, and the Texas Supreme Court’s decision seems to follow a recent trend:

Reitz’s[, the beneficiary’s,] assent to the trust is reflected in his acceptance of the benefits of the trust and his suit to compel the trustee to comply with the trust’s terms. Reitz’s claims that Rachal[, the trustee,] violated the terms of the trust are within the scope of the arbitration provision, which

35. G.T. Leach Builders, L.L.C. v. Sapphire V.P., L.P., No. 13-11-00793-CV, 2013 WL 2298447, at *1 (Tex. App.—Corpus Christi May 23, 2013, pet. filed) (mem op.).

36. *Id.* at *1-2.

37. *Id.* at *2.

38. *Id.*

39. *Id.* at *6.

40. *Id.* at *8 (emphasis added).

41. See Will Pryor, *Alternative Dispute Resolution*, 65 SMU L. REV. 247, 259 (2012).

requires the arbitration of “any dispute of any kind involving this Trust.” Thus, Rachal carried his burden of demonstrating that the trust contains a valid arbitration agreement that covers Reitz’s claims.⁴²

Having discussed the threshold issues of validity and “who chooses,” we move on to defenses to otherwise valid arbitration agreements. By far the most discussed defense is waiver, specifically the notion that when one party “substantially invokes judicial process,” the party may be deemed to have waived their opportunity to arbitrate. Since the infamous *Perry Homes v. Cull* decision by the Texas Supreme Court in 2008, many cases have addressed the issue.⁴³

In *Baty v. Bowen, Miclette & Britt Inc.*, the Houston 14th Court of Appeals summarized the waiver factors set forth in *Perry Homes* as follows:

[W]hether the party who pursued arbitration was the plaintiff or the defendant; how long the party who pursued arbitration delayed before seeking arbitration; when the party who pursued arbitration learned of the arbitration clause’s existence; how much the pretrial activity related to the merits rather than arbitrability or jurisdiction; how much time and expense has been incurred in litigation; whether the party who pursued arbitration sought or opposed arbitration earlier in the case; whether the party who pursued arbitration filed affirmative claims or dispositive motions; how much discovery has been conducted and who initiated the discovery; whether the discovery sought would be useful in arbitration; what discovery would be unavailable in arbitration; whether activity in court would be duplicated in arbitration; when the case was to be tried; and whether the party who pursued arbitration sought judgment on the merits.⁴⁴

Applying these factors to a dispute between a former employee of a corporation and the corporation, the court observed:

The Supreme Court of Texas has instructed that in a close case we should conclude that the heavy burden of showing waiver of arbitration has not been satisfied. Therefore, in this close case, we conclude that the trial court did not err by impliedly finding that the [corporation] did not waive their rights to arbitration.⁴⁵

How close were the circumstances? Although the corporation included a request to arbitrate in its original answer to the lawsuit, it did not file a motion to compel arbitration for *eight months*.⁴⁶ In the meantime, the defendants filed numerous affirmative counterclaims, requested a temporary restraining order and injunctive relief—though these requests were never set for hearing—and

42. *Rachal v. Reitz*, 403 S.W.3d 840, 851 (Tex. 2013); see Pryor, *supra* note 41 (discussing *Rachal v. Reitz*, 347 S.W.3d 305 (Tex. App.—Dallas 2011) *rev’d*, 403 S.W.3d 840 (Tex. 2013)).

43. See *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008). See discussion at Will Pryor, *Alternative Dispute Resolution*, 62 SMU L. REV. 843, 845-48 (2009).

44. *Baty v. Bowen, Miclette & Britt, Inc.*, No. 14-11-00663-CV, 2013 WL 2253584, at *4-5 (Tex. App.—Houston [14th Dist.] May 23, 2013, pet. denied) (citing *Perry Homes*, 258 S.W.3d at 591-92).

45. *Id.* at *12.

46. *Id.* at *2.

engaged in “significant” discovery.⁴⁷

In similar fashion, in a dispute between a borrower and guarantor against a lender, the court in *Paul Jacobs, P.C. v. Encore Bank, N.A.* found that no waiver by substantially invoking judicial process had occurred.⁴⁸ What were the circumstances deemed to not constitute waiver? The borrower, though aware of the arbitration clause from the time suit was filed, waited eight months to demand arbitration.⁴⁹ During this period, the lender’s first summary judgment on the merits was granted, and the second motion for summary judgment was filed.⁵⁰ In addition, the borrower asserted counterclaims and third-party claims, responded to the lender’s first motion for summary judgment on the merits, and filed a motion for a new trial after the court’s unfavorable ruling on the motion for summary judgment.⁵¹ A respectable argument could be made that this case was wrongly decided.

But we do have a case where waiver by substantially invoking judicial process was found.⁵² In *Ellman v. JC General Contractors*, an ophthalmologist got into a dispute with the contractor hired to build his new clinic and surgical center in El Paso.⁵³ The court found waiver where, after being sued by his contractor, the physician waited almost three years to demand arbitration.⁵⁴ In the interim, the physician filed counterclaims, engaged in substantial and extensive discovery on the merits, filed a joint motion for continuance followed by more discovery, and otherwise adhered to the court’s scheduling order for many months.⁵⁵ The motion to compel arbitration was filed less than three months before the second trial setting.⁵⁶ The waiver circumstances in this case seem clear and the result somewhat obvious, but if you have trouble reconciling recent cases that discuss waiver by substantially invoking judicial process, you are not alone.

D. VALIDITY OF THE ARBITRATION AGREEMENT: UNCONSCIONABILITY?

Once we have determined that an arbitration agreement exists, the dispute falls within the agreement, and there has been no waiver of the agreement by the parties, must the parties arbitrate their dispute? Not if the agreement is procedurally or substantively unconscionable.

We have three opinions in which arbitration agreements were deemed unconscionable. Briefly summarized, these opinions are:

- (1) *Venture Cotton Cooperative v. Freeman*, in which a group of cotton farmers entered into an agreement with a shipper that incorporated

47. *Id.*

48. *Paul Jacobs P.C. v. Encore Bank, N.A.*, No. 01-12-00699-CV, 2013 WL 3467197, at *1, *5 (Tex. App.—Houston [1st Dist.] July 9, 2013, no pet.) (mem. op.).

49. *Id.* at *3.

50. *Id.* at *2.

51. *Id.*

52. See *Ellman v. JC Gen. Contractors*, No. 08-12-00029-CV, 2013 WL 5741411, at *4 (Tex. App.—El Paso Oct. 23, 2013, no pet.) (mem. op.).

53. *Id.* at *1.

54. *Id.* at *4.

55. *Id.* at *1.

56. *Id.*

the arbitration rules of the American Cotton Shippers Association.⁵⁷ Unfortunately, these rules allowed for the recovery of attorney's fees by the *shipper* on a claim of breach of contract, but eliminated the farmer's similar statutory right to such fees; consequently, the agreement was one-sided, sought to eliminate a statutory remedy, and was substantively unconscionable.⁵⁸

- (2) *Delfingen US-Texas, L.P. v. Valenzuela*, in which a temporary employee who could not read English was required as a condition of her employment to sign several documents, one of which included an arbitration clause.⁵⁹ Even though her "illiteracy in English is insufficient to establish that the Agreement is unconscionable,"⁶⁰ the totality of the circumstances in which her signature on the document was secured resulted in a determination that the arbitration agreement was procedurally unconscionable.⁶¹
- (3) *Royston, Rayzor, Vickery & Williams v. Lopez* involved a contract between a law firm and a client.⁶² "Agreements to arbitrate disputes between attorneys and clients are generally enforceable under Texas law";⁶³ in this case, however, "we conclude that the specific agreement before the Court is so one-sided that it is unconscionable under the circumstances."⁶⁴ The one-sided feature that offended the court was that the agreement reserved the law firm's right to litigate its claims against the client but obligated the client to arbitrate his claims against the firm.⁶⁵

E. THE BACK END: DID THE ARBITRATORS "EXCEED THEIR AUTHORITY"?

According to the Fifth Circuit, the broad authority of arbitrators may include an inherent power to impose sanctions. In *Hamstein Cumberland Music Group v. Estate of Williams*,⁶⁶ an arbitrator awarded a music publisher certain royalties against the estate of a songwriter and recording artist. The award far exceeded the actual damages incurred by including \$500,000 as a sanction for non-compliance with ordered discovery obligations.⁶⁷ The Respondent argued that the arbitrator was not empowered to issue sanctions and therefore exceeded the authority granted by Section 10(a)(4) of the Federal Arbitration Act.⁶⁸

57. *Venture Cotton Coop. v. Freeman*, 395 S.W.3d 272, 274 (Tex. App.—Eastland 2013, pet. granted).

58. *Id.* at 276.

59. *Delfingen US-Tex., L.P. v. Valenzuela*, 407 S.W.3d 791, 794 (Tex. App.—El Paso 2013, no pet.).

60. *Id.* at 801.

61. *Id.* at 803.

62. *Royston, Rayzor, Vickery & Williams, L.L.P. v. Lopez*, Nos. 13-11-00757-CV, 13-12-0023-CV, 2013 WL 3226847, at *1 (Tex. App.—Corpus Christi June 27, 2013, pet. filed) (mem. op.).

63. *Id.* at *6.

64. *Id.* at *8.

65. *Id.*

66. *Hamstein Cumberland Music Grp. v. Estate of Williams*, 532 Fed. App'x 538, 544 (5th Cir. 2013).

67. *Id.*

68. *Id.* at 543.

Disagreeing with this conclusion, the court found that, “First, arbitrators enjoy inherent authority to police the arbitration process and fashion appropriate remedies to effectuate this authority, including with respect to conducting discovery and sanctioning failure to abide by ordered disclosures.”⁶⁹ Holding that the scope of an arbitrator’s authority is not limited to the arbitration agreement, the Fifth Circuit viewed the sanctioned party’s own cross-motion for sanctions as conduct conferring the power on an arbitrator to order sanctions—almost an estoppel argument.⁷⁰

By the time the arbitration of a non-compete dispute could be concluded, the twelve-month restrictive period on conduct of the departed employees had expired. This apparently frustrated the arbitrator, who found that the departed employees had breached the agreement but the former employer had not suffered monetary damages.

In *Nationsbuilders Insurance Services, Inc. v. Houston International Insurance Group, Ltd.*, the arbitrator determined that the former employer should “be restored the benefit of the bargain it made pursuant to the May 4, 2011 Settlement Agreement,” and concluded that “Delaware law supported an equitable extension of the restrictive period.”⁷¹ The arbitrator awarded the former employer a twelve-month extension of the restrictions on the departed employees.⁷² In the past, the challenge might have been phrased as one of “manifest disregard of the law,” but these days and in this opinion the departed employees argued that the arbitrator “exceeded his powers.”⁷³ Finding that the equitable extension of the restricted period was within the powers of the arbitrator, the court noted that the remedy “drew its essence” from the parties’ agreement.⁷⁴

The Dallas Court of Appeals also rejected an argument that an arbitration panel exceeded their powers.⁷⁵ In *Cambridge Legacy Group, Inc. v. Jain*, the arbitrators awarded the claimant in a FINRA action compensatory damages and attorney’s fees.⁷⁶ On appeal, the respondent argued that the arbitrators impermissibly subsumed claims the claimant could have brought against respondent’s wholly owned subsidiaries.⁷⁷ When the issue came up during the arbitration hearing, “the arbitration panel denied [respondent’s] motion to dismiss and stated they would continue on with the arbitration hearing as if all three companies were in the same group under the same claim.”⁷⁸ The court was persuaded that the broad language of the arbitration agreement (“all related

69. *Id.*

70. *Id.*

71. *Nationsbuilders Ins. Servs., Inc. v. Houston Int’l Ins. Grp. Ltd.*, No. 05-12-01103-CV, 2013 WL 3423755, at *2 (Tex. App.—Dallas July 3, 2013, no pet.) (mem. op.).

72. *Id.*

73. *Id.*

74. *Id.* at *4 (referring to a standard set out in *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

75. *Cambridge Legacy Grp., Inc. v. Jain*, 407 S.W.3d 443 (Tex. App.—Dallas 2013, pet. denied).

76. *Id.* at 447.

77. *Id.* at 449.

78. *Id.* at 449–50.

crossclaims, counterclaims, and/or third-party claims which may be asserted”), as well as FINRA by-laws, rules, and code of arbitration procedure, captured the broad claims set out in the arbitration proceeding.⁷⁹

F. THE BACK END: DISCLOSURES AND “EVIDENT PARTIALITY”

The standards available for setting aside arbitration awards (vacature) have narrowed, making vacature more and more unlikely for reasons such as “manifest disregard of the law” or even “exceeded authority.” The “hail Mary” challenge now appears to be the challenge of “evident partiality,” most often a discussion of whether an arbitrator failed to disclose circumstances creating a conflict of interest, or giving rise to even the appearance of a conflict. A new line of authority is emerging in favor of placing a greater burden on the parties to reasonably investigate an arbitrator’s potential conflicts.

In *Dealer Computer Services v. Michael Motor Co.*, the Fifth Circuit Court of Appeals overruled a District Court ruling that had vacated an arbitration award in favor of Dealer Computer Services (DCS) on the grounds of “evident partiality.”⁸⁰ In the underlying AAA arbitration, DCS appointed as arbitrator Ms. Carol Butner.⁸¹ Ms. Butner made various disclosures under the AAA’s rules.⁸² After the panel ruled unanimously in favor of DCS, the losing party (MMC) argued that Ms. Butner’s disclosures were inadequate, particularly her failure to disclose her service in a prior arbitration involving DCS and similar contract issues.⁸³ DCS countered that MMC had waived its right to object because it failed to raise its objection at any time prior to publication of the award.⁸⁴ “A party seeking to vacate an arbitration award based on an arbitrator’s evident partiality generally must object during the arbitration proceedings.”⁸⁵ Reversing the district court and confirming the arbitration award, the court relied on the following circumstances to support its conclusion that MMC waived its right to object:

Ms. Butner completed and filed her Acceptance of Party-Appointed Arbitrator questionnaire;

The questionnaire had a box checked by Ms. Butner next to the statement: “I HEREBY DISCLOSE THE FOLLOWING;”

Ms. Butner also checked a box that stated: “SEE DISCLOSURE DATED MAY 23, 2008”;

In the disclosure memorandum, Ms. Butner specifically referred to the prior arbitration involving DCS;

79. *Id.* at 450.

80. *Dealer Computer Serv. v. Michael Motor Co.*, 485 Fed. App’x. 724, 725 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 945 (2013).

81. *Id.* at 726.

82. *Id.*

83. *Id.*

84. *Id.* at 727.

85. *Id.*

Ms. Butner checked the “YES” box next to the question: “[h]ave any of the party representatives, law firms, or parties appeared before you in past arbitration cases.”⁸⁶

“Particularly in light of MMC’s duty to reasonably investigate, Butner’s disclosures were sufficient to put MMC on notice.”⁸⁷

Expect more cases to address the duty of counsel and the parties to investigate evidence of evident partiality. The duty to investigate appears to be emerging as a sort of common sense or rule of reason solution to a “gotcha” problem. The court in *Dealer Computer Services* did not address whether Ms. Butner’s prior service in a similar case involving DCS would presumptively have disqualified her, but disclosure can cure a lot of ills. Arbitrators, often reluctant to provide too much detail about involvement in other proceedings that may have been private and confidential, should consider providing at least enough information to allow a party to seek further information, if requested. When in doubt, disclose.

Whether the arbitrator was reluctant or whether the law firm appointing him to an arbitration panel guided his disclosures is part of the murky record in *Ponderosa Pine Energy, LLC v. Tenaska Energy*, in which a \$125,000,000 arbitration award—vacated by a trial court—was reinstated in an opinion by the Dallas Court of Appeals.⁸⁸ It would not be surprising if the Texas Supreme Court, which has accepted a petition for review in this case, sides with the trial court and vacates the award. While the arbitrator’s disclosures reference his prior involvement in other matters with the law firm, the record included disturbing evidence that the law firm assisted in editing the disclosures, and the disclosures appear to have deliberately downplayed the prior contacts.⁸⁹ In addition, once the party-appointed arbitrators engaged in the task of designating a third arbitrator, “Stern[, the arbitrator appointed by lawyers Penski and Boland,] communicated with both Penski and Boland about who should serve as the third arbitrator. In these communications, Stern referred to [Penski and Boland’s client] as ‘we’ and ‘us’ and referred to [the other party] as ‘opponents’.”⁹⁰ This opinion has the potential to truly shift the burden of arbitrator disclosures from the arbitrator to the parties. Quoting the Ninth Circuit: “If arbitration is to work, it must not be subjected to undue judicial interference. Moreover, parties must be encouraged, nay required, to raise their complaints about the arbitration during the arbitration process itself, when that is possible.”⁹¹

86. *Id.* at 728.

87. *Id.*

88. *Ponderosa Pine Energy, LLC v. Tenaska Energy*, 376 S.W.3d 358, 360 (Tex. App.—Dallas 2012, pet. granted).

89. *Id.* at 364.

90. *Id.* at 365.

91. *Id.* at 376 (quoting *Marino v. Writers Guild of Am. E., Inc.*, 992 F.2d 1480, 1484 (9th Cir. 1993)).

II. MEDIATION

A. ENFORCEABILITY OF MSAs

There are very few windows of opportunity for appellate courts to review any issue pertaining to mediation. As always, given the informality and lack of structure of the mediation process, this is as it should be. But in the survey year several appellate courts turned their attention to the enforcement of mediated settlement agreements (MSAs).

No opinion of the Texas Supreme Court has ever devoted as much attention to the enforceability of an MSA as the opinion of *In re Stephanie Lee*.⁹² Though specifically discussed within the context of the Texas Family Code, the analysis should be of interest to all.

The Texas Family Code provides that, “[i]f a mediated settlement agreement meets [certain requirements], a party is entitled to judgment on the mediated settlement agreement notwithstanding . . . another rule of law.”⁹³ The Court summarized its task as follows:

We are called upon today to determine whether a trial court abuses its discretion in refusing to enter judgment on a statutorily compliant mediated settlement agreement (MSA) based on an inquiry into whether the MSA was in a child’s best interest. We hold that this language means what it says: a trial court may not deny a motion to enter judgment on a properly executed MSA on such grounds.⁹⁴

In *Lee*, the MSA included the following in boldfaced, capitalized, and underlined letters: “THE PARTIES ALSO AGREE THAT THIS MEDIATION AGREEMENT IS BINDING ON BOTH OF THEM AND IS NOT SUBJECT TO REVOCATION BY EITHER OF THEM.”⁹⁵ In the face of a lengthy dissent, the majority held: “Because the MSA in this case meets the Family Code’s requirements for a binding agreement, and because neither party was a victim of family violence, we hold that the trial court abused its discretion by denying the motion to enter judgment on the MSA.”⁹⁶ Though obviously decided with strict reference to the Texas Family Code, the opinion reflects a philosophy that MSAs should be respected and enforced.

That the enforceability of MSAs may be an appellate topic in future cases is foreshadowed by *Cisnado v. Shady Oak Estate Homeowner’s Association*, where in a standard MSA, the parties agreed to perform certain post-mediation actions: issue payment of settlement proceeds, forward final settlement documents, and execute and file releases pursuant to an agreed order of dismissal.⁹⁷ But plaintiffs failed to perform their obligations under the MSA, and instead sent opposing counsel notice that they wished to rescind the agreement and return to

92. *In re Stephanie Lee*, 411 S.W.3d 445 (Tex. 2013).

93. TEX. FAMILY CODE ANN. § 153.0071(e) (West 2008).

94. *Lee*, 411 S.W.3d at 447.

95. *Id.* at 448.

96. *Id.* at 461.

97. *Cisnado v. Shady Oak Estate Homeowner’s Ass’n*, No. 14-12-00028-CV, 2013 WL 151624, at *1 (Tex. App.—Houston [14th Dist.] Jan. 15, 2013, no pet.) (mem. op.).

mediation.⁹⁸ Finding that the plaintiffs had failed to attempt to mandamus the trial court's entry of orders incorporating the MSA, the plaintiffs failed to preserve an opportunity to challenge the MSA.⁹⁹ Although the opinion is decided on procedural grounds, it can be cited as authority for the proposition that MSAs are binding and enforceable contracts.

Levetz v. Sutton is an intriguing case in which a trial court was found to have erred in granting a motion to enforce an MSA.¹⁰⁰ This is a rare outcome, indeed. The facts are complicated, and the outcome was the result of a trial court hearing on the single issue of whether one of the parties had capacity to enter into a binding agreement—she alleged that her fibromyalgia, coupled with sleep deprivation and her medications, resulted in a lack of capacity.¹⁰¹ The Court of Appeals determined that the trial court should have also addressed on an evidentiary basis the alleged breach of the MSA, and therefore returned the matter for further consideration.¹⁰²

As in the opinion just discussed, there was an MSA between siblings who engaged in a dispute following the death of a parent, but this claim for breach of the MSA was submitted to a jury! In *McDonald v. Fox*, the court was not persuaded that the mere initials of a party's counsel to a deletion in the MSA of a particular recipient of life insurance proceeds did not bind the party to the MSA.¹⁰³ "There was other evidence that all parties, including McDonald, were aware of the deletion before the end of the mediation."¹⁰⁴ Part of this author's fascination with this opinion is the rarity of appellate decisions that address communication that occurred during mediation.¹⁰⁵ The opinion is not remarkable in any respect other than that it actually addresses issues such as a suggestion that the court abused its discretion by admitting into evidence the mediator's report to the court.¹⁰⁶

B. SHAME, SHAME, SHAME

Should you and your client not adhere to an order by the Fort Worth Court of Appeals to mediate, you can be scolded. The per curiam decision in *Applewhite v. Applewhite* is fascinating:

98. *Id.* at *2.

99. *Id.* at *6; *see also* Gen. Metal Fabricating Corp. v. Stergiou, No. 01-11-00460-CV, 2013 WL 5228494, at *1 (Tex. App.—Houston [1st Dist.] 2013) (mem. op.) (providing an excellent analysis, not of an MSA, but of a Rule 11 settlement agreement which, like most MSAs, expressly contemplates the execution of more elaborate settlement documents; the Rule 11 agreement was deemed binding and enforceable where the details of the subsequent detailed documentation required to consummate the settlement did not have the same "foundational" importance to the underlying dispute as the "essential terms" agreed to by the parties.).

100. *Levetz v. Sutton*, 404 S.W.3d 798, 801 (Tex. App.—Dallas 2013, pet. denied).

101. *Id.*

102. *Id.* at 806.

103. *McDonald v. Fox*, No. 13-11-00479-CV, 2012 WL 5591795, at *10 (Tex. App.—San Antonio Nov. 15, 2012, no pet.) (mem. op.).

104. *Id.* at *8.

105. *See id.* at *7.

106. *Id.* at *9. ("I am pleased to announce that the parties have entered into a settlement of the case. . . .").

[I]t is disturbing and regretful that the parties have apparently defied this court's order to mediate this appeal. While we are not privy to the details of what has transpired, the parties have utterly wasted not only their own time and resources but those of this court and the mediator, who had graciously agreed to mediate this appeal at cost. . . . [O]ur system of justice is dependent upon parties and their attorneys abiding by court orders, including those court orders that command the parties to schedule and attend a mediation and not meaningless "squabbling." Though we are tempted to issue further orders requiring the parties to comply with this court's previous orders, it is apparent from what has already transpired that doing so would only further waste time and resources.¹⁰⁷

C. THE SKY WAS NOT FALLING (OR WAS IT?): THE CHANGE TO RULE 169

The survey year saw a rare and exciting public dispute over an amendment to the Texas Rules of Civil Procedure. This survey chapter on ADR is traditionally limited to a discussion of appellate cases and the judiciary's impact on how the practice of ADR in a survey year has changed. But stepping back a bit, on May 25, 2011, the Texas legislature required that the Supreme Court of Texas adopt rules "to promote the prompt, efficient, and cost-effective resolution of civil actions," particularly actions in which the claim, all inclusive, did not exceed \$100,000.¹⁰⁸ The Supreme Court appointed a Task Force.¹⁰⁹ The Task Force proposals were referred to the Supreme Court Advisory Committee.¹¹⁰ On November 13, 2012, the Court proposed new rules and changes.¹¹¹ All hell broke loose in the mediation community, as many felt the landscape of mediation was shifting.¹¹²

The initial proposal removed the discretion to refer certain claims to ADR, which has been granted to all courts in Texas since the passage of the Texas Alternative Dispute Resolution Procedures Act in 1987.¹¹³ The ADR community rose up and protested.¹¹⁴ The final rule allows the parties to agree to not engage in mediation—which courts previously could ignore—but absent such agreement the parties can be ordered to mediate for no more than a half-day, for a mediation fee not to exceed twice the amount of the filing fee.¹¹⁵ Whether this

107. *Applewhite v. Applewhite*, No. 02-12-00445-CV (158th Dist. Ct., Denton County., Tex. Mar. 12, 2013). This author would have liked to have been present for the oral argument.

108. TEX. GOV'T CODE ANN. § 22.004(a) (West Supp. 2013).

109. Order of Appointment of Task Force For Rules in Expedited Cases, Misc. Docket No. 11-9193 (Tex. Sept. 26, 2011).

110. *Id.*

111. Order of Adoption of Rules for Dismissals and Expedited Cases, Misc. Docket No. 12-9191 (Tex. Nov. 13, 2012).

112. See Angela Morris, *After tsunami of feedback, Texas Supreme Court revises and issues rule for expedited actions*, TEXAS LAWYER BLOG (Feb. 15, 2013), http://texaslawyer.typepad.com/texas_lawyer_blog/2013/02/after-tsunami-of-feedback-texas-supreme-court-revises-and-issues-rule-for-expedited-actions.html. The feedback referred to by the Texas Lawyer reporter consists of hundreds of unpublished letters to the Court by mediators and others in the short time-frame allowed. Anecdotally, the author participated as a panelist at a conference of the Texas Association of Mediators in Dallas on Feb. 23, 2013, on the topic of *Is Rule 169 the Beginning of the End of Mediation?*

113. Misc. Docket No. 12-919 at 10.

114. See Morris, *supra* note 112.

115. TEX. R. CIV. P. 169(d)(4) (2013).

new rule alters the mediation landscape remains to be seen, but the fury with which the initial proposal was met is a clear indication that the mediation community has become a self-aware community, interested in preserving mediation as a commercial enterprise.

It has been pointed out that the 1987 statute was passed during an era of concern that our civil justice system was collapsing, ineffective, irrelevant, and broken. So after a quarter of a century of “mediation every where, all the time,” where are we?

The Texas ADR act has been remarkably effective in providing litigants and courts an earlier, institutionalized method of settlement: the court-ordered, timely use of a trained settlement expert, mediator or other neutral. *It is unclear, however, whether the actual rate of settlement has increased since 1987. No known research exists in Texas to support such a claim.*¹¹⁶

III. INSURANCE APPRAISALS

Wind and hail and other weather events can wreak havoc on commercial and residential property. In this survey year, due a surge in activity in this area, it seems appropriate to call attention to an ADR procedure unique to property damage insurance claims: the appraisal process.

Appraisal clauses in insurance agreements provide a process for resolving disputes about a property’s value or the amount of a covered loss.¹¹⁷ Typically the clause resembles the following:

If we and you disagree on the amount of loss, either may make written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser and notify the other of the appraiser with 20 days of such demand. The two appraisers will select an umpire. If they cannot agree within 15 days upon such umpire, either may request that selection be made by a judge of a court having jurisdiction. Each appraiser will state separately the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding as to the amount of loss.¹¹⁸

In theory appraisal clauses are sensible and intuitive. Should the insured and insurer fail to agree—in the context of a covered claim—about the amount of the loss or value of the property, the appraisal provides a relatively efficient method for turning the decision over to knowledgeable tradesmen, eliminating the need for lawyers, lawsuits, experts, and trials. But in practice, controversy abounds.

There was very little controversy involving appraisals until the Texas Supreme Court decided *State Farm Lloyds v. Johnson* in 2009.¹¹⁹ Appraisals were to

116. Frank A. Elliott & Kay Elkins Elliott, *Exciting Expedited Innovations: Whose Needs Matter More?*, ALTERNATIVE RESOLUTIONS, Summer 2013, at 27. This article is an excellent history and analysis of the Rule 169 debacle.

117. *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404, 405 (Tex. 2011).

118. *In re Pub. Serv. Mut. Ins. Co.*, No. 03-13-00003-CV, 2013WL 692441, at *2 (Tex. App.—Austin Feb. 21, 2013, orig. proceeding [mand. denied]).

119. *State Farm Lloyds v. Johnson*, 290 S.W.3d 886 (Tex. 2009).

determine the amount of loss, not coverage or liability.¹²⁰ In a perfect violation of the “if it ain’t broke, don’t fix it” rule, the Court completely changed the appraisal landscape, stating that appraisers “must always consider causation, at least as an initial matter. An appraisal is for damages caused by a specific occurrence, not every repair a home might need.”¹²¹ The opinion has been a disaster, according to some commentators. This has produced a result sought by neither insurers nor insureds, making the appraisal process now a minefield of confusion, added cost, additional litigation, additional delay, and uncertainty:

Johnson’s broad language does a disservice to insurers and insureds. Instead of limiting the reasoning in *Johnson* to the facts in the summary judgment record, the Texas Supreme Court went far beyond the facts to permit futile exercises which needlessly complicate and increase the cost of a claim and ultimately litigation.¹²²

With this background and with an appreciation for why appellate court treatment of appraisal was relatively rare for decades, we now note an opinion from the survey year in the aftermath of *Johnson* and *In re: Universal Underwriters*. In *In re Guideone Mutual Insurance Company*, in a truly remarkable conclusion, waiver did not occur where the insurer invoked appraisal “several years after litigation commenced and two months before a trial setting.”¹²³

The court stated that

[The insured] contends it has been prejudiced because it incurred litigation expenses due to [the insurer’s] delay before invoking the appraisal process. Over a period of several years, the parties engaged in the discovery process, answering written discovery, taking deposition, and disclosing experts. The expenses [the insured] incurred developing its case included approximately \$10,000 in expert fees for accounting services and over \$100,000 in attorney fees. Nevertheless, the mandamus record does not establish that these expenses would not have been incurred if [the insurer] had moved for appraisal earlier.¹²⁴

Perhaps this is what the court in *Universal Underwriters* meant in saying “it is difficult to see how prejudice could ever be shown.”¹²⁵

120. *Id.* at 889.

121. *Id.* at 893.

122. Mark A. Ticer et al., *Appraisal In the New World Order*, J. TEX. INS. LAW, Spring 2013, at 4. This article is an excellent and balanced summary of the history and current status of the appraisal process in Texas. The next landmark decision by the Texas Supreme Court, also outside the survey year, was *In re Universal Underwriters of Tex. Ins. Co.*, 345 S.W.3d 404 (Tex. 2011), finding that waiver of appraisal occurs when it is not invoked within a reasonable time from the point of “impasse” between the parties, and announcing a prejudice requirement, a prong to the waiver test that “it is difficult to see how prejudice could ever be shown when the policy . . . gives both sides the same opportunity to demand appraisal”. *Id.* at 409, 412.

123. *In re Guideone Mut. Ins. Co.*, No. 09-12-00581-CV, 2013 WL 257371, at *1, *3 (Tex. App.—Beaumont Jan. 24, 2013, orig. proceeding [mand. denied]) (mem. op.) (emphasis added).

124. *Id.* at *2 (emphasis added).

125. *Universal*, 345 S.W.3d at 412. No waiver was also the result in *In re Texas Windstorm Insurance Association*, No. 14-13-00632-CV, 2013 WL 4806996, at *1 (Tex. App.—Houston [14th District] Sept. 10, 2013 orig. proceeding) (mem. op.), regardless of the argument made by the insured that the insurer waited until after suit was filed to invoke appraisal. Again, no waiver was

The author predicts that a considerable amount of attention by the insurance industry, consumer advocates, the Texas Department of Insurance, and the Texas legislature will be focused on appraisal sooner, rather than later. The use, and misuse, of the process is now common. The process is working to the benefit of no one. There are no rules, no standards, no ethical guidelines—just a wild, wild west sort of chaos. Clip on a shiny badge and you can be the sheriff! Changes are in order.

IV. CONCLUSION

The expansion of mediation and arbitration and the increase in the use of the appraisal process are evidence that our civil justice system remains broken. Our courthouses are imperfect forums; the litigation process is so slow, so expensive, and so inefficient as to be irrelevant to many. But with the steady increase in the use of alternative methods of dispute resolution comes an increase in the concerns and the controversies over how these alternatives are evolving. We may have reached the saturation point with mediation. The unexpected proposed rule change in the survey year to scale back judicial discretion to order parties to mediate may have been a way to send an “enough is enough” message. We seem obsessed with mediation to the point that virtually every pending lawsuit in most jurisdictions around the state is ordered to mediation at least once, even over the objections of the parties. Is this the vision of mediation that sponsors and promoters of the ADR statute had in 1987? It is doubtful. That today’s advocates often prefer to skip the “joint session” at the outset of mediation, something almost unthinkable in the practice of mediation twenty years ago, might be a sign that too much mediation sometimes results in a mechanical approach to the process.

Even more controversy swirls around arbitration, especially in the consumer and employment contexts. Sometimes it now seems that courts are too willing to acquiesce in allowing arbitration to be imposed on the unknowing and unwilling through the wide use of pre-dispute arbitration clauses, regardless of how adhesive these “agreements” truly are.

In the world of commercial arbitration, many have voiced the opinion that arbitration has become “The New Litigation,” more expensive, more time-consuming, and more inefficient than litigation.¹²⁶

How did we get to this point, and where is the use of ADR headed? One thing is certain about ADR: it may be evolving, but it is not going away.

the result in *In re Pub. Serv. Mut. Ins. Co.*, No. 03-13-00003, 2013 WL 692441, at *6 (Tex. App.—Austin Feb. 21, 2013, orig. proceeding [mand. denied]) (mem. op.).

126. See Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 1 (2010); Thomas J. Stipanowich, *Arbitration and Choice: Taking Charge of the “New Litigation”*, 7 DEPAUL BUS. & COM. L.J. 383 (2009). Professor Stipanowich was instrumental in the publication of *Protocols For Expectations, Cost-Effective Commercial Arbitration*, published in 2010 by the College of Commercial Arbitrators, following a “summit” of major participants in the field of arbitration in 2009. THOMAS J. STIPANOWICH ET AL., *PROTOCOLS FOR EXPEDITIONS, COST-EFFECTIVE COMMERCIAL ARBITRATION I* (2010).