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HAPPILY NEVER AFTER: WHEN FINAL AND BINDING ARBITRATION HAS NO FAIRY TALE ENDING

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WHEN FINAL AND BINDING ARBITRATION HAS NO FAIRY TALE ENDING

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Summary

We launched this empirical study 15 years after the Supreme Court decided *Gilmer v. Interstate Johnson/Lane Corp.*, a key decision that enforced a mandatory arbitration agreement. *Gilmer* led to the widespread adoption of individual employment arbitration but provided courts no standards for reviewing these arbitration awards.

Until now, researchers have examined the fairness and legality of *Gilmer* agreements and other aspects of employment arbitration. Our timing is significant because employment arbitration has matured beyond the initial phase of pre-arbitration challenges to this forum. By now, a critical mass of individuals and their employers have been to arbitrations and appealed arbitrator rulings to courts.

But little is known about why parties appeal adverse arbitration rulings. There is no empirical information about the legal arguments that parties use to challenge awards. No data exist to explain how federal and state courts rule on these challenges.

We extracted data from 212 federal and 124 state court decisions from 1975-2006. These 336 cases show that the grounds for challenging employment awards are far more numerous than those for labor awards that are reviewed under the Supreme Court’s *Trilogy* standards. Too many courts and legislatures have presented arbitration losers with an abundance of choices to sue on the award. These grounds include federal bases such as the four statutory grounds under the Federal Arbitration Act (FAA), common law standards, all the *Trilogy* arguments that are used to challenge labor arbitration awards; and numerous state statutes and common law grounds.

Federal district courts confirmed awards in 93.4% of the cases, compared to 88.0% in appellate cases. State courts were less deferential, confirming 86.4% of awards in initial reviews and 74.1% at the appellate level. While state courts confirmed a high percentage of awards, these rates were quite variable. Texas courts confirmed 100% of awards, followed by Louisiana, Florida, and Arkansas. Two Midwestern states, Michigan and Ohio, had much lower confirmation rates (respectively, 58.3% and 64.2%).

We also observed a recent spurt of award-review cases—exemplified by the finding that 62.5% of our federal district courts decisions occurred since 2000. This means that courts will likely face a growing docket of post-arbitration appeals as parties seek to re-litigate the claims that were privately adjudicated. This upsurge also suggests that employment arbitration serves too many masters—an uncoordinated array of legislatures and courts that regulate this process—despite the fact that the FAA appears to legislate uniform standards.

Comparing these findings with our companion studies on labor arbitration, we believe that unions and employers limit their award appeals to maintain a stable relationship. But fewer parties in employment arbitration seem committed to the norm of arbitral finality. We see more cases of a winner-take-all mentality in post-award appeals, suggesting that disputants are destined to be “happily never after” their arbitrations.
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I. INTRODUCTION

A. Context for Our Empirical Research

Who will adjudicate legal disputes between employees and their employers? For millions of individuals the answer is not courts, but arbitrators. In compulsory and voluntary arbitration agreements, employees waive access to courts. The Supreme Court broadly approved the substitution of arbitrators for judges and juries in *Gilmer v. Interstate Johnson/Lane Corp.* In directing courts to enforce arbitration agreements, *Gilmer* dismissed concerns about precluding an individual’s access to courts, explaining that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

The decision means that courts are limited to a supporting role in overseeing this private dispute resolution process. Courts have a similar oversight role in union-management arbitrations. But their oversight differs from employment arbitration, particularly in regulating appeals from parties who lose an award. Courts play a more limited role in reviewing labor arbitration awards because there are fewer grounds for

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1 There is no single source that tracks this important development. A key study found that 19% of private sector employers were using arbitration by 1997, up from 3.6% in 1991, and that by 2001 the number of employees covered by AAA employment arbitration contracts had grown to 6 million, up from 3 million in 1997. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISPUTE RESOL. J. (May-July 2003), at 10. Among employers with 100 more employees who filed compliance reports with the Equal Employment Opportunity Commission, 10% reported that they used arbitration, and more than 25% reported that this process was mandatory. U.S. Gen. Accounting Office, GAO/HEHS-95-150, *EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION* 7 (1995).

2 For an example in this study’s sample, see Tinder v. Pinkerton Sec., 305 F.3d 728, 734 (7th Cir. 2002), where the former employee contended that the contract was illusory and unilaterally imposed. An example of a voluntary arbitration agreement appears in Window Concepts, Inc. v. Daly, 2001 WL 1452790 (R.I. Super. 2001).


4 *Id.* at 26.
appealing an award, and the reviewing standards are more clearly defined.

We focus in this empirical research on court review of individual employment arbitration awards. *Gilmer* emphasized that courts should defer to arbitrator rulings. Speaking only briefly on the subject, the majority opinion reasoned that “generalized attacks on arbitration rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, and as such are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.”\

*Gilmer* expressed abiding faith in private judges by refusing “to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.”\

We launched our empirical investigation by taking stock of *Gilmer*’s apparent impact since 1991. As individual employment arbitration rapidly spread, scholarly research examined questions about the fairness and legality of requiring employees to abide by *Gilmer* agreements, especially when individuals did not want to waive access to courts in the first place.\

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5 Id. at 30.
6 Id.
We collected our data for this study in 2006, fifteen years after the Court decided *Gilmer*. This timing is significant because employment arbitration has matured beyond the initial phase of pre-arbitration challenges to the use of this forum. By now, a critical mass of individuals and their employers have been to arbitration and appealed arbitrator rulings to courts. But little is known about why parties appeal adverse arbitration rulings. There is no empirical information about the arguments that parties use to challenge awards. No data exist to explain how federal and state courts rule on these challenges.

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

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

2. Do reviewing courts supplement FAA standards with the Supreme Court’s Trilogy standards? This is a more specific form of our first question, one that reflects the special role that the Trilogy plays in protecting voluntary labor arbitration from appellate review. This question has theoretical significance because of institutional differences between employment and labor arbitration systems. In labor arbitration, arbitrators are mutually selected by the parties, apply the common law of the shop, rarely decide statutory or other legal issues, and write judicial opinions. Employment arbitrators tend to apply business norms in an industry, are sometimes chosen only by the employer, and often make rulings without showing their reasoning in a written opinion. The Trilogy was tailored for labor arbitration and restrained courts from interfering in the bargaining relationships of unions and employers. Accounting for these considerable differences in context, we ask whether courts supplement FAA standards with the Trilogy precepts.

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

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

**B. Organization of This Article**

Part II provides a brief history of award review standards under the Federal Arbitration Act (FAA) and Labor-Management Relations Act (LMRA).\(^8\) Part II.A shows that when Congress enacted the FAA, lawmakers carefully considered jurisdiction to enforce arbitration agreements without thinking much about award review standards.\(^9\) The FAA allows parties to choose to review awards under the standards in Section 10,\(^10\) or separate standards provided by states.\(^11\) We show that only 19 states have statutes that closely mirror the FAA.\(^12\) In Appendix II, we detail the alternate state reviewing standards.\(^13\) Part II.B shows federal common law standards that were developed for labor arbitration awards.\(^14\) This discussion is pertinent because our empirical study shows that numerous courts apply one or more of these standards to employment awards.

Part III presents our data. Part III.A discusses our research methods,\(^15\) and Part III.B reports our empirical findings.\(^16\) Table 1 shows a variety of dispute characteristics associated with the award review cases in the sample.\(^17\) Table 2 appears in conjunction with Finding No. 1, showing that federal courts are extremely deferential in reviewing

\(^8\) *Infra* notes 32 - 77.
\(^9\) *Infra* notes 32 - 47.
\(^10\) *Infra* note 45.
\(^11\) *Infra* notes 46 - 47.
\(^12\) *Infra* note 46.
\(^13\) *Infra* note 47.
\(^14\) *Infra* notes 52 - 77.
\(^15\) *Infra* notes 78 - 84.
\(^16\) *Infra* notes 85 - 91.
\(^17\) *Infra* manuscript page 19.
employment arbitration awards. Table 3 supports our next two findings: State courts are less deferential in reviewing employment arbitration awards, and award confirmation among states is high but quite variable. Tables 4A and 4B, summarized in Findings 4A and 4B, detail the wide variety of FAA, state statutory, and common law grounds that parties use in challenging an award, and that courts use in ruling on these challenges.

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

Part V presents our conclusions. We also include two appendices to aid judges, lawmakers, scholars, practitioners, and students who seek primary materials to aid in

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18 Infra manuscript page 20.
19 Infra manuscript page 21.
20 Infra manuscript pages 23 and 25.
21 Infra notes 92 - 99.
22 Infra notes 100 - 136.
23 Infra notes 137 - 201.
24 Infra notes 137 - 138.
25 Infra notes 139 - 168.
26 Infra notes 169 - 181.
27 Infra notes 182 - 201.
28 Infra notes 202 - 215.
29 Infra notes 216 - 234.
their research. Appendix I is a list of all the cases in our sample, while Appendix II shows every state law whose arbitration review standards differ from those in the FAA.

II. STANDARDS FOR JUDICIAL REVIEW OF ARBITRATION AWARDS

A. The Federal Arbitration Act

In 1925, Congress enacted the United States Arbitration Act and renamed it the Federal Arbitration Act in 1947— to help businesses reduce expense and delay in resolving their legal disputes. When the American Bar Association proposed the law, it cited arbitration statutes in New York and New Jersey. Congress warmed to this idea by proposing to make arbitration agreements enforceable in a court of law. Lawmakers conceived a national arbitration model based on federal jurisdiction. In passing this law, Congress also intended to end judicial hostility to arbitration.

While Congress was pre-occupied with the enforcement of arbitration agreements,

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30 *Infra* manuscript page 50.
31 *Infra* manuscript page 55.
33 S. REP. NO. 68-536, at 2 (1924) (stating that the FAA was proposed to help businesses avoid “the delay and expenses of litigation”); and H.R. REP. No. 68-96, at 2 (1924) (showing that Congress believed the simplicity of arbitration would “reduce[e] technicality, delay, and [keep] expense to a minimum and at the same time safeguard the rights of the parties”).
35 The bill was reintroduced in the 68th Congress with this heading: “To make valid and enforceable written provisions or arrangements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations.” H.R. No. 646, 68th Cong., 1st Sess. (1923), at 1; and Sen. No. 1005, 68th Cong., 1st Sess. (1923), at 1.
36 Statement of Charles L. Bernheimer, January 9, 1924, *Hearings on the Subject of Interstate Commercial Disputes Before the Subcommittees on the Judiciary*, 68th Cong., 1st Sess., p. 6. The House report stated: “The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction of admiralty, or which may be the subject of litigation in the Federal courts.” *Supra* note 3, H.R. REP. No. 68-96, at 3.
37 The Senate report emphasized that the effect of the bill would be to abolish the judicial reluctance to enforce arbitration agreements. *Supra* note 3, SEN. REP. NO. 536, 68th Cong., 1st Sess., at 2-3 (1924). During Senate debate, Senator Thomas J. Walsh, stated: “In short, the bill provides for the abolition of the rule that agreements for arbitration will not be specifically enforced.” Remarks of Senator Walsh, 68 Cong. Rec. 984 (1924). The same point was raised during House debate. See Remarks of Congressman Graham, 68 Cong. Rec. 1931 (1924).
it said little about court standards for vacating an award. The 1924 House report stated: “The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.” The 1924 Senate report stated that the award could be set aside where it was secured by corruption, fraud, or undue means; or if there was partiality or corruption on the part of the arbitrators; or in a situation where an arbitrator is guilty of misconduct or refuses to hear evidence or because of prejudicial misbehavior by the parties; or the arbitrator exceeds his or her powers. These standards now appear in the law. The Senate included a significant excerpt from a brief as part of its report on the USAA, apparently reflecting that chamber’s intent on this subject:

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

In addition, this statute preserved dual roles for state and federal courts—a feature that presently complicates review of employment awards. Section 3 authorizes a federal court stay a trial “until such arbitration has been had in accordance with the terms of the agreement.” Furthermore, Section 4 allows a party who complains of “failure,
neglect, or refusal of another to arbitrate under a written agreement for arbitration” to
“petition any United States district court . . . for an order directing that such arbitration
proceed in the manner provided for in such agreement.”

The law continues by specifying rules for reviewing awards. Section 9, which
pertains to procedures for reviewing awards, allows a role for state courts when it says:
“If the parties in their agreement have agreed that a judgment of the court shall be entered
upon the award made pursuant to the arbitration, and shall specify the court, then at any
time within one year after the award is made any party to the arbitration may apply to the
court so specified for an order confirming the award, and thereupon the court must grant
such an order unless the award is vacated, modified, or corrected as prescribed in sections
10 and 11 of this title.”

Section 10 states four grounds to vacate an award in federal
court. In conjunction with this provision, all states have arbitration acts that provide for
judicial review of awards. But only 19 states have vacatur standards that are identical or
very similar to Section 10 of the FAA. Fourteen other states have adopted Section 23 in

44 See § 9, 61 Stat. at 670.
45 See § 10, 61 Stat. at 670, authorizing courts to vacate an award where
   (1) where the award was procured by corruption, fraud, or undue means; (2) where there
   was evident partiality or corruption by the arbitrators; (3) where the arbitrators were
   guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or
   in refusing to hear evidence pertinent and material to the controversy; or of any other
   misbehavior by which the rights of any party have been prejudiced; or (4) where the
   arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final,
   and definite award upon the subject matter submitted was not made.
46 Alabama (Al. Stat. § 6-6-16, Award Appeals); Alaska (Ak.Stat. § 09-43-120, Vacating An
   Award); Arizona (A.R.S. § 12-1512, Opposition to an Award); Arkansas (A.C.A § 16-108-212, Vacating
   an Award); California (West’s Ann.Cal.C.C.P § 1286.2, Grounds for Vacation of an Award); Colorado
   (C.R.S.A. § 13-22-223, Vacating Award); Hawaii (H.R.S. § 658A-23, Vacating Award); Idaho (I.C. § 7-
   912, Vacating an Award); Indiana (I.C. § 34-57-1-17, Grounds Against Rendition of Award on Judgment);
   Idaho (I.C. § 7-912, Vacating an Award); Michigan (M.C.R. § 3.602(J), Vacating Award); Mississippi
   (Miss. Code Ann. § 11-15-23, Grounds for Vacation); New Jersey (N.J.S.A. § 2A:24-8, Vacation of
   Award); Ohio (R.C. § 2711.10, Court May Vacate an Award); Rhode Island (Gen.Laws 1956, § 10-3-12,
   Grounds for Vacating an Award); South Carolina (Code 1976 § 15-48-130, Vacating an Award); Texas
the Revised Uniform Arbitration Act, in part or in whole; and others enumerate different standards.47

B. The Steelworkers Trilogy

For many years, two sources provided for the review of labor arbitration awards—the FAA and Section 301 of the Labor-Management Relations Act (LMRA).

By 1947, when the LMRA was enacted, and in the following years, most unions agreed to no-strike clauses in exchange for employer assurances to submit contract disputes to arbitration.48 Section 301 provided a legal process to enforce this bargain.49 In a landmark

47 See Appendix II. The Revised Uniform Arbitration Act is located at http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm. The provision states:

SECTION 23. VACATING AWARD.
(a) Upon [motion] to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (1) the award was procured by corruption, fraud, or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 15, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator’s powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 15(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

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

49 S. REP. NO. 80-105 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 421 (1959). Also see H.R. REP. NO. 80-245 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 at 337 (1959), explaining congressional intent for enacting Section 301: “When labor organizations make contracts with employers, such organizations should be subject to the same judicial remedies and processes in respect of
1957 decision, *Textile Workers Union v. Lincoln Mills*, the Supreme Court authorized federal courts under Section 301 to fashion a common law for collective bargaining agreements (CBAs), including court petitions to confirm or vacate arbitrator awards that rule on grievances of contract violations. *Lincoln Mills* appeared to preclude court review of labor awards under the FAA while confining review to the LMRA.

This left judges in a statutory vacuum because Section 301 is purely a jurisdictional law. In the *Steelworkers Trilogy*, the Court fleshed out principles for reviewing awards. In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, the Court emphasized that judges should defer to labor awards, remarking that “[r]efusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements.” This is because the “federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.” *Enterprise Wheel* said that an arbitrator is “to bring his informed judgment to bear in order to reach a fair solution of a problem,” noting that the parties select the arbitrator because these individuals understand the intricacies of unionized proceedings involving violations of such contracts as those applicable to all other citizens.”

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50 353 U.S. 448 (1957). The Court ruled that federal jurisdiction to enforce collective bargaining agreements, including arbitration provisions, arises under Section 301 of the Labor-Management Relations Act of 1947, and not the Federal Arbitration Act. *Id.* at 456-57.

51 Prior to *Lincoln Mills*, the federal circuit disagreed as to whether a CBA was enforceable under the FAA. Compare *Tenney Engineering v. United Electrical R. & M. Workers*, 207 F.2d 450 (3d Cir. 1953), ruling that the FAA applied to CBAs, and *International Union v. Colonial Hardwood Floor Co.*, 168 F.2d 33, 35 (4th Cir. 1948) (“the provisions of the United States Arbitration Act may not be applied to this contract, because it is a contract relating to the employment of workers engaged in interstate commerce, within the clear meaning of the exclusion clause contained in the first section”).


54 *Id.* at 596.

55 *Id.*

56 *Id.* at 597.
work. Underscoring the difference between the FAA and LMRA, the Court observed that even though collective bargaining agreements are contracts, they are not bargained and administered like commercial transactions. The Court gave labor arbitrators wide latitude when it said that they might need “flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.”

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

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

\[57 \text{Id. at 596, n.2.} \]
\[58 \text{Id. at 599, explaining that the agreement by unions and employers to submit contract disputes to labor arbitrators is founded in their confidence in this neutral’s abilities.} \]
\[59 \text{Id. at 597.} \]
\[60 \text{Id.} \]
\[61 \text{Id.} \]
\[62 \text{Id. at 598.} \]
\[63 \text{Id.} \]
\[64 \text{Id. at 598, stating that “the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator’s construction which was bargained for; and so far as the} \]
Other Trilogy decisions emphasized the unique institutional features of labor arbitration. American Manufacturing noted that the “function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator,” because it is “the arbitrator’s judgment . . . that was bargained for.”\textsuperscript{65} Warrior & Gulf noted that the arbitrator “is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept . . . . He is rather part of a system of self-government created by and confined to the parties.”\textsuperscript{66} The decision emphasized that arbitrators have special competence to resolve workplace disputes.\textsuperscript{67}

The Supreme Court has updated the Trilogy in one essential area, when an award appears to contradict a public policy. In United Paperworkers Int’l Union v. Misco\textsuperscript{68} an arbitrator reinstated a paper mill worker who was fired after he was arrested in the company parking lot on a drug charge.\textsuperscript{69} Lower courts vacated the award, relieving the employer from reinstating the grievant, because they believed that it would violate a public policy against operating dangerous machinery by drug-users.\textsuperscript{70} Misco reversed these rulings, holding that awards may be set aside only if they “would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to laws and legal precedents and not from general considerations of supposed arbitrator’s decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.”

\textsuperscript{65} American Mfg., \textit{supra} note 52, at 568.
\textsuperscript{66} Warrior & Gulf, \textit{supra} note 52, at 581. The Court added that “the labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.” \textit{Id.} at 582.
\textsuperscript{67} \textit{Id.} at 581 (“The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts.”)
\textsuperscript{68} 484 U.S. 29 (1987).
\textsuperscript{69} \textit{Id.} at 35.
\textsuperscript{70} \textit{Id.}
public interests.”71 Also, Misco refined Trilogy principles by admonishing lower courts not to interfere with “improvident, even silly factfinding.”72 The Court reminded judges: “This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts.”73

More recently, the Court affirmed these principles in two decisions. In Eastern Associated Coal Corp. v. United Mine Workers District 1774 a coal company fired an employee on two different occasions after concluding that he used marijuana while driving heavy machinery on a public highway.75 Eastern rebuked judges who fail to review awards with great deference.76 A year later, in Major League Baseball Players Ass’n v. Garvey,77 the Court used another example of judicial interference in arbitration

71 Id. at 43.
72 Id. at 39.
73 Id.
74 531 U.S. 57 (2000).
75 A coal company fired an employee on two different occasions after concluding that he used marijuana while driving heavy machinery on a public highway. Id. at 60. Separate arbitration awards reinstated him with conditions after finding that just cause was lacking. Id. at 60–61. The company refused to comply with the second award, contending that it violated a U.S. Department of Transportation rule stating that “the greatest efforts must be expended to eliminate the . . . use of illegal drugs . . . by those individuals . . . are involved in . . . the operation of . . . trucks.” Id. at 63. Rejecting the employer’s argument, the Supreme Court noted that DOT rules also favor rehabilitation of drug users, and do not preclude reinstatement of offenders to driving positions. Id. at 64.
76 The Court reminded federal judges that “both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract’s language, including such words as just cause.” Id. at 61. Additionally, Eastern said: “They have bargained for the arbitrator’s construction of their agreement. And courts will set aside the arbitrator’s interpretation of what their agreement means only in rare instances (emphasis added).” Id. at 62. Reaffirming its guidance in Misco, the Court continued: “[A]s long as an honest arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision (emphasis added).” Id. Thus, “the proper judicial approach to a labor arbitration award is to refuse to review the merits.” Id.
77 532 U.S. 504 (2001). The Supreme Court castigated the Ninth Circuit for insincerely reciting Trilogy principles. And the Court embarrassed the Ninth Circuit by calling its behavior “nothing short of baffling.” Id. at 510. Garvey emphasized that “established law ordinarily precludes a court from resolving the merits of the parties’ dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator’s decision.” Id. at 511. Garvey charged that the “Court of Appeals usurped the arbitrator’s role by resolving the dispute and barring further proceedings, a result at odds with this governing law.” Id. at 511. The Court added: “The arbitrator’s analysis may have been unpersuasive to the Court of Appeals, but his decision hardly qualifies as serious error, let alone irrational or inexplicable error. And, as we have said, any such error would not justify the actions taken by the court.” Id. at 511, n.2. Garvey sent a clear,
III. EMPIRICAL RESEARCH METHODS AND STATISTICAL FINDINGS

A. Research Methods

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

To be included, a case involved a post-award dispute between an individual employee and his or her employer in which the arbitrator’s ruling was challenged by either party. Cases involving labor arbitrations under a CBA were excluded. The sample had no historical limit. The earliest decision was reported in 1975. The sample started with this case and moved forward to December 31, 2006.

After a potential case was identified, we read it to see if it met our criteria. For example, many cases involved only a pre-arbitration dispute as to the enforcement of an reinforcing message to the federal judiciary: Do not overturn “the arbitrator’s decision because it disagree[s] with the arbitrator’s factual findings, particularly those with respect to credibility.” Id. at 510. And do not resolve the merits of the parties’ dispute. Id. If a court cannot enforce an award, it must remand the matter “for further arbitration proceedings.” Id. at 510.


79 E.g., “PROCURED BY CORRUPTION,” or “EVIDENT PARTIALITY,” or “REFUSING TO POSTPONE THE HEARING,” or “ARBITRATORS EXCEEDED THEIR POWERS,” or “IMPERFECTLY EXECUTED.”

80 E.g., “TRILOGY” or “WARRIOR & GULF” or “ENTERPRISE WHEEL” or “AMERICAN MANUFACTURING,” or “MISCO,” or “EASTERN ASSOCIATED COAL,” or “GARVEY.”

arbitration clause and were therefore excluded. On the other hand, numerous cases involved employees who attempted at first to resist arbitration, were compelled to arbitrate their claims, and were later involved in a post-award lawsuit. We found cases where the reluctant-to-arbitrate employee prevailed at the arbitration, and the employer sought to vacate the award.

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

B. Statistical Findings

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

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82 Gold v. Deutsche Aktiengesellschaft, 365 F.3d 144 (2d Cir. 2004).
83 In Madden v. Kidder Peabody & Co., 883 S.W.2d 79 (Mo. App. 1994), an employee sued but was ordered by the court to arbitrate his claim. After he prevailed and was awarded $250,000, the employer sued to vacate the award, but the court denied the motion.
84 In rare cases, an award was challenged once and remanded to arbitration; and after arbitrators ruled again, the award was challenged a second time. We viewed these as separate award review cases, even though the parties and dispute were unchanged, because the awards differed. See Sawtelle v. Waddell Reed Inc., 754 N.Y.S.2d 264 (2003).
with initial jurisdiction ruled likewise in 90 cases.\textsuperscript{85}

Some arbitral proceedings were protracted and very expensive, defying the norm of brevity and economy.\textsuperscript{86} At times, an award of attorney’s fees exceeded the amount of damages that were ordered as remedies.\textsuperscript{87} Table 1 reports additional background about the arbitrations. Employees won more often in arbitration than similar plaintiffs in court.\textsuperscript{88} Individuals prevailed in 38.3\% of awards, and won a split award in 9.6\% of the cases in the sample. The median value of an employee award was $250,000. This high amount was driven by disputes in the securities industry, which comprised 38.1\% of the sample. Unique features of the industry— for example, a centralized clearinghouse to

\textsuperscript{85} In the remaining six cases, the court’s ruling did not fit our coding system for confirmation, partial confirmation, and vacatur. \textit{E.g.}, Wagner v. Kendall, 413 N.E.2d 302 (Ind. App. 1980) (the court ruled that the challenged award is reviewable under Uniform Arbitration Act, rather than Administrative Adjudication Act).


\textsuperscript{87} \textit{E.g.}, Hasson v. Western Reserve Life Assurance Co., 2006 WL 2691723 (M.D. 2006) (employee was awarded $168,000 in damages but denied $245,575 in attorney’s fees). \textit{Also see} DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997) (age discrimination complainant was awarded $220,000, but his request for attorney’s fees totaling $249,050 was denied).

\textsuperscript{88} \textit{Compare} Michael Delikat & Morris M. Kleiner, \textit{An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?}, DISP. RESOL. J. (Nov. 2003-Jan. 2004), at 56. In employment discrimination cases filed and resolved between 1997 and 2001 in the southern federal district court of New York, the study found that employees prevailed 33.6\% of the time, while similarly situated plaintiffs prevailed in 46% of the cases brought before NASD and NYSE arbitrators. \textit{Also see} Jess Bravin, \textit{U.S. Courts Are Tough on Job-Bias Suits}, WALL ST. J., July 16, 2001, at A2, available at 2001 WL-WSJ 2869570. After analyzing nine years of federal trial statistics, Professors Stewart J. Schwab and Theodore Eisenberg concluded that federal appeals courts are less sympathetic to workers who allege job discrimination than they are to almost any other type of plaintiff. \textit{Id.} Appeals courts reversed victories for plaintiffs in forty-four percent of cases. \textit{Id.}
report employee misconduct—resulted in costly defamation awards. Also, as individual brokers left one employer for another they took their clients, causing some employers to retaliate by harming their reputations. Notably, however, workers in low-skilled jobs that are far removed from the securities industry also received substantial awards.

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

---

90 Sawtelle v. Waddell Reed Inc., 754 N.Y.S.2d 264 (2003) (individual broker, who had 2,800 clients who never filed one complaint against him, was awarded $25 million in punitive damages after employer discharged him in retaliation for whistle-blowing activities against a co-worker who was later convicted for embezzlement).
91 In Castleman v. AFC Enterprises, Inc., 995 F. Supp. 649 (N.D. Tex. 1997), a fast-food employee was awarded $1,678,622.40 in damages for injuries that arose in the course of employment. The arbitrator found that the design, installation, maintenance, and use of the steel storage shelving in the restaurant was hazardous and constituted an unreasonable risk of harm. Also see May v. First National Pawn Brokers, 887 P.2d 185 (Mont. 1994), where the arbitrator awarded two pawn shop managers more than $132,000; and Barcume v. City of Flint, 132 F.Supp.2d 549 (E.D. Mich. 2001), where the award ordered more than $2.2 million in damages for sex discrimination complainants.
<table>
<thead>
<tr>
<th>Table 1</th>
<th>Dispute Characteristics in Employment Arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Who Wins the Arbitration Award?</strong></td>
<td><strong>Type of Employment?</strong></td>
</tr>
<tr>
<td>Employer</td>
<td>125/240 (52.1%)</td>
</tr>
<tr>
<td>Employee</td>
<td>92/240 (38.3%)</td>
</tr>
<tr>
<td>Split Award</td>
<td>23/240 (9.6%)</td>
</tr>
</tbody>
</table>

**Amount of Arbitration Award?**

- Employer Wins (N=37) $34,000 (Median) / $2,450 – $11,245,668 (Range)
- Employee Wins (N=87) $250,000 (Median) / $2,677 – $38,233,079 (Range)

**What Employment Actions Are Arbitrated?**

- Discharge/Termination | 91/240 (37.9%)
- Resignation | 22/240 (9.2%)
- Post-Employment Pay | 37/240 (15.4%)
- Current Employment Pay | 19/240 (7.9%)
- Post-Employment Restriction | 16/240 (6.7%)
- Worker Injury/Disease | 13/240 (5.4%)

**What Legal Issues Are Arbitrated?**

- Breach of Contract | 94/240 (39.2%)
- Title VII Discrimination | 41/240 (17.1%)
- Unjust Dismissal | 33/240 (13.8%)
- State Discrimination | 25/240 (10.4%)
- ADEA Discrimination | 14/240 (5.8%)
- Emotional Distress | 12/240 (5.0%)
- Negligence/Miscellaneous Torts | 12/240 (5.0%)
- Defamation | 11/240 (4.6%)
- ADA Discrimination | 10/240 (4.2%)
- Tortious Interference | 10/240 (4.2%)

**How Often Do Courts Review Employment Arbitration Awards?**

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Federal District Court</td>
<td>1/144 (0.7%)</td>
<td>6/144 (4.2%)</td>
<td>47/144 (32.6%)</td>
<td>90/144 (62.5%)</td>
</tr>
<tr>
<td>Federal Appeals Court</td>
<td>1/84 (1.2%)</td>
<td>4/84 (4.7%)</td>
<td>30/84 (35.7%)</td>
<td>49/84 (58.3%)</td>
</tr>
<tr>
<td>State First Court</td>
<td>3/90 (3.3%)</td>
<td>8/90 (8.9%)</td>
<td>44/90 (48.8%)</td>
<td>35/90 (38.9%)</td>
</tr>
<tr>
<td>State Appeals Court</td>
<td>2/85 (2.4%)</td>
<td>8/85 (9.4%)</td>
<td>35/85 (41.1%)</td>
<td>40/85 (47.0%)</td>
</tr>
</tbody>
</table>
Finding No. 1: Federal courts are extremely deferential in reviewing employment arbitration awards. In Table 2, federal district court confirmed, partly confirmed, or vacated 137 awards. Federal appeals courts ruled in 75 cases. District courts confirmed awards in 93.4% of the cases, compared to 88.0% in appellate cases. The first column of data shows how these decisions ranged across the circuits. The Fifth and Second Circuits had the most cases (respectively, 17.5% and 16.1%), while the First Circuit had comparatively few cases (4.4%). District courts enforced 100% of challenged awards in the Third, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits. The First and Fifth Circuits registered the lowest enforcement rates (respectively, 66.7% and 83.3%). At the appellate level, courts enforced 100% of challenged awards in the First, Third, Seventh, Tenth, Eleventh, and D.C. Circuits. The Sixth Circuit had the lowest confirmation rate (50.0%).

| Table 2 |
| Confirmation of Arbitrator Awards |
| Federal District Courts and Appellate Courts |
| N= 212 Federal Court Decisions |

<table>
<thead>
<tr>
<th></th>
<th>Percent of District Sample 137 Awards</th>
<th>District Courts Confirm Awards 128/137 (93.4%)</th>
<th>Appeals Courts Confirm Awards 66/75 (88.0%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>First Circuit</td>
<td>6/137 (4.4%) 4/6 (66.7%) 2/2 (100%)</td>
<td></td>
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</tr>
<tr>
<td>Second Circuit</td>
<td>22/137 (16.1%) 21/22 (95.5%) 11/12 (91.7%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Third Circuit</td>
<td>12/137 (8.8%) 12/12 (100%) 4/4 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fourth Circuit</td>
<td>11/137 (8.0%) 10/11 (90.9%) 5/6 (83.3%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Fifth Circuit</td>
<td>24/137 (17.5%) 20/24 (83.3%) 13/14 (92.9%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sixth Circuit</td>
<td>8/137 (5.8%) 8/8 (100%) 3/6 (50.0%)</td>
<td></td>
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</tr>
<tr>
<td>Seventh Circuit</td>
<td>9/137 (6.6%) 9/9 (100%) 2/2 (100%)</td>
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</tr>
<tr>
<td>Eighth Circuit</td>
<td>13/137 (9.5%) 13/13 (100%) 8/9 (88.9%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ninth Circuit</td>
<td>7/137 (5.1%) 7/7 (100%) 5/6 (83.3%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tenth Circuit</td>
<td>9/137 (6.6%) 8/9 (88.9%) 5/5 (100.0%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Eleventh Circuit</td>
<td>9/137 (6.6%) 9/9 (100%) 4/4 (100.0%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>D.C. Circuit</td>
<td>7/137 (5.1%) 7/7 (100.0%) 4/5 (80.0%)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Finding No. 2: State courts are less deferential in reviewing employment arbitration awards. Table 3 reports similar information for state court rulings. First jurisdiction courts confirmed 57 out of 66 awards (86.4%). This enforcement rate dropped to 74.1% at the appellate level, when courts confirmed only 43 out of 58 awards. The combined confirmation rate was 80.6% (100 awards confirmed in 124 cases).

Finding No. 3: Award confirmation among states is high but quite variable.

Table 3 also shows the results for states with five or more award review cases. The states are ranked by their award confirmation rates. In Texas, 100% of the rulings confirmed awards. Other southern states ranked among the most deferential (Louisiana, Florida, and Arkansas). Two Midwestern states, Michigan and Ohio, had much lower confirmation rates (respectively, 58.3% and 64.2%).

<table>
<thead>
<tr>
<th>Ranked by Rate of Award Confirmation</th>
<th>First Jurisdiction Courts Confirm Awards All States &amp; D.C. 57/66 Awards (86.4%)</th>
<th>Appeals Courts Confirm Awards All States &amp; D.C. 43/58 Awards (74.1%)</th>
<th>Courts Combined Confirm Awards All States &amp; D.C. 100/124 Awards (80.6%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Texas</td>
<td>5/5 (100%)</td>
<td>5/5 (100%)</td>
<td>10/10 (100%)</td>
</tr>
<tr>
<td>2 California</td>
<td>5/6 (83.3%)</td>
<td>5/6 (83.3%)</td>
<td>10/12 (83.3%)</td>
</tr>
<tr>
<td>3 Louisiana</td>
<td>3/3 (100%)</td>
<td>2/3 (66.6%)</td>
<td>5/6 (83.3%)</td>
</tr>
<tr>
<td>4 Arkansas</td>
<td>2/3 (66.5%)</td>
<td>3/3 (100%)</td>
<td>5/6 (83.3%)</td>
</tr>
<tr>
<td>5 Florida</td>
<td>3/3 (100%)</td>
<td>2/3 (66.6%)</td>
<td>5/6 (83.3%)</td>
</tr>
<tr>
<td>6 Connecticut</td>
<td>8/10 (80.0%)</td>
<td>4/5 (80.0%)</td>
<td>12/15 (80.0%)</td>
</tr>
<tr>
<td>7 Pennsylvania</td>
<td>2/3 (66.6%)</td>
<td>2/2 (100%)</td>
<td>4/5 (80.0%)</td>
</tr>
<tr>
<td>8 New Jersey</td>
<td>4/4 (100%)</td>
<td>2/4 (50.0%)</td>
<td>6/8 (75.0%)</td>
</tr>
<tr>
<td>9 Ohio</td>
<td>5/7 (71.4%)</td>
<td>4/7 (57.1%)</td>
<td>9/14 (64.2%)</td>
</tr>
<tr>
<td>10 Michigan</td>
<td>5/7 (71.4%)</td>
<td>2/5 (40.0%)</td>
<td>7/12 (58.3%)</td>
</tr>
</tbody>
</table>
Finding No. 4A: In FAA and equivalent state cases, the most common award challenge was that arbitrators exceeded their powers (24.2%), but this argument rarely succeeded in vacating an award (5.5%). Corruption, fraud, or undue means was a rare basis for challenging an award (5.5%), but on a comparative basis, was more successful than any other basis for challenging an award (15.4%). Table 4A shows how often challengers relied on each of the four statutory grounds to argue for vacating an award under federal or state arbitration law. This statistic is the first percentage that appears by each provision of the law. We now rank these statutory grounds by their frequency as grounds for challenging an award to a court of first jurisdiction: (Rank 1) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made (in 24.2% of the cases); (Rank 2) where there was evident partiality or corruption by the arbitrators (16.3%); (Rank 3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced (14.2%); and (Rank 4) where the award was procured by corruption, fraud, or undue means (5.5%). In 10.0% of award challenges, the party resisting vacatur argued that the lawsuit was not timely filed under the FAA or state equivalent.
### Table 4A

<table>
<thead>
<tr>
<th>Basis &amp; Frequency for Challenging Awards</th>
<th>Confirm*</th>
<th>Vacate*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Corruption, Fraud, or Undue Means (9 U.S.C. § 10(1) or State UAA Equivalent)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued to District Court</td>
<td>13/238 (5.5%)</td>
<td>District Court Ruling 10/13 (76.9%)</td>
</tr>
<tr>
<td>Argued to Appeals Court</td>
<td>7/161 (4.3%)</td>
<td>Appeals Court Ruling 5/7 (71.4%)</td>
</tr>
<tr>
<td><strong>Evident Partiality (9 U.S.C. § 10(2) or State UAA Equivalent)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued to District Court</td>
<td>39/239 (16.3%)</td>
<td>District Court Ruling 37/39 (94.9%)</td>
</tr>
<tr>
<td>Argued to Appeals Court</td>
<td>32/161 (19.9%)</td>
<td>Appeals Court Ruling 27/32 (84.4%)</td>
</tr>
<tr>
<td><strong>Hearing Misconduct (9 U.S.C. § 10(3) or State UAA Equivalent)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued to District Court</td>
<td>34/239 (14.2%)</td>
<td>District Court Ruling 29/34 (85.3%)</td>
</tr>
<tr>
<td>Argued to Appeals Court</td>
<td>21/161 (13.0%)</td>
<td>Appeals Court Ruling 18/161 (85.7%)</td>
</tr>
<tr>
<td><strong>Exceed Powers or Imperfectly Execute Award (9 U.S.C. § 10(4) or State UAA Equivalent)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued to District Court</td>
<td>58/239 (24.2%)</td>
<td>District Court Ruling 52/58 (89.7%)</td>
</tr>
<tr>
<td>Argued to Appeals Court</td>
<td>34/161 (21.1%)</td>
<td>Appeals Court Ruling 24/34 (70.67%)</td>
</tr>
<tr>
<td><strong>Court Lacks Jurisdiction Due to Timeliness Requirements (9 U.S.C. § 12/State Equivalent), or Other</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued to District Court</td>
<td>24/239 (10.0%)</td>
<td>District Court Ruling 21/24 (87.5%)</td>
</tr>
<tr>
<td>Argued to Appeals Court</td>
<td>6/161 (3.7%)</td>
<td>Appeals Court Ruling 3/6 (50.0%)</td>
</tr>
</tbody>
</table>

*Excluding Results for Partial Conformation/Partial Vactur Rulings

Data in Table 4A also show how frequently these arguments resulted in vacatur. This statistic is the last percentage that appears by each provision of the law. No argument was particularly successful. However, as the following ranking shows, some arguments were much more effective in vacating an award than others: (Rank 1) where the award was procured by corruption, fraud, or undue means (15.4% of the cases); (Rank 2) where the arbitrators were guilty of misconduct in refusing to postpone the
hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced (14.7%); (Rank 3) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made (5.2%); and (Rank 4) where there was evident partiality or corruption by the arbitrators (2.6%). In 8.3% of award challenges, a timeliness argument was associated with a vacatur ruling. In these cases, courts rejected the timeliness argument and proceeded to vacate the award.

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

**Employment Arbitration Awards Reviewed by Federal and State Courts Using *Trilogy* and Other Common Law Standards**

<table>
<thead>
<tr>
<th>Basis &amp; Frequency for Challenging Awards</th>
<th>Confirm*</th>
<th>Vacate*</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Manifest Disregard of the Law (Common Law Standard)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued to District Court 84/239 (35.1%)</td>
<td>District Court Ruling 75/84 (89.3%)</td>
<td>6/84 (7.1%)</td>
</tr>
<tr>
<td>Argued to Appeals Court 49/161 (30.4%)</td>
<td>Appeals Court Ruling 44/49 (89.8%)</td>
<td>4/49 (8.2%)</td>
</tr>
<tr>
<td><strong>Arbitrary &amp; Capricious, or Irrational, or Gross Error (Common Law Standard)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued to District Court 19/239 (7.9%)</td>
<td>District Court Ruling 17/19 (89.5%)</td>
<td>0/19 (0%)</td>
</tr>
<tr>
<td>Argued to Appeals Court 13/161 (8.1%)</td>
<td>Appeals Court Ruling 10/13 (76.9%)</td>
<td>1/13 (7.7%)</td>
</tr>
<tr>
<td><strong>Remedy (Punitive, Excessive, or Unauthorized)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Argued to District Court 10/239 (4.2%)</td>
<td>District Court Ruling 10/10 (100%)</td>
<td>0/10 (0%)</td>
</tr>
<tr>
<td>Argued to Appeals Court 6/161 (3.7%)</td>
<td>Appeals Court Ruling 4/6 (66.6%)</td>
<td>0/6 (0%)</td>
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<td><strong>Unconstitutional or Due Process</strong></td>
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<td>District Court Ruling 7/8 (87.5%)</td>
<td>1/8 (12.5%)</td>
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<td>Argued to Appeals Court 6/161 (3.7%)</td>
<td>Appeals Court Ruling 4/6 (66.6%)</td>
<td>1/6 (16.7%)</td>
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<td><strong>Trilogy (Arbitrator Exceeded Authority)</strong></td>
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<td>Argued to District Court 18/239 (7.5%)</td>
<td>District Court Ruling 14/18 (77.8%)</td>
<td>4/18 (22.5%)</td>
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<td>Appeals Court Ruling 9/12 (75.0%)</td>
<td>2/12 (16.7%)</td>
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<td><strong>Trilogy (Award Did Not Address Its Essence from the Agreement)</strong></td>
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<td>District Court Ruling 8/11 (72.7%)</td>
<td>2/11 (18.2%)</td>
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<tr>
<td>Argued to Appeals Court 6/161 (3.7%)</td>
<td>Appeals Court Ruling 3/6 (50.0%)</td>
<td>3/6 (50.0%)</td>
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<td><strong>Trilogy (Arbitrator Committed A Fact-Finding Error)</strong></td>
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<td>District Court Ruling 21/23 (91.3%)</td>
<td>1/23 (4.3%)</td>
</tr>
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<td>Appeals Court Ruling 14/17 (82.4%)</td>
<td>0/17 (0%)</td>
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<tr>
<td><strong>Trilogy (Award Violated A Public Policy)</strong></td>
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<tr>
<td>Argued to District Court 36/238 (15.1%)</td>
<td>District Court Ruling 29/36 (80.6%)</td>
<td>6/36 (15.1%)</td>
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<tr>
<td>Argued to Appeals Court 27/161 (16.9%)</td>
<td>Appeals Court Ruling 21/27 (77.8%)</td>
<td>4/27 (14.8%)</td>
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*Excluding Results for Partial Conformation/Partial Vactur Rulings*
IV. CASES BEHIND THE NUMBERS: QUALITATIVE FINDINGS

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

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

- “The arbiter was chosen to be the Judge. That Judge has spoken. There it ends.”92
- “[A]rbitration does not provide a system of ‘junior varsity trial courts.’”93
- “Judicial review of arbitration awards is tightly limited; perhaps it ought not to be called ‘review’ at all.”94
- “The parties to this action voluntarily entered into an arbitration agreement and further agreed that two arbitrators would decide the dispute. Having entered into this agreement, there is a moral and legal duty to abide by the award in the absence of valid reason not to do so. Simply being dissatisfied with the results is not a good reason for setting aside the award.”95

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92 McClure, supra note 81.
95 Dean Witter Reynolds, Inc. v. Deislinger, 711 S.W.2d 771, 772 (Ark. 1986) (“exclusion of this evidence in an arbitration proceeding is not a statutory ground for vacating the award”).
• “This expectation of finality strongly informs the parties’ choice of an arbitral forum over a judicial one. The arbitrator’s decision should be the end, not the beginning, of the dispute.”

• “[M]aximum deference is owed to the arbitrator’s decision and the standard of review of arbitration awards is among the narrowest known to law. Once an arbitration award is entered, the finality that courts should afford the arbitration process weighs heavily in favor of the award, and courts must exercise great caution when asked to set aside an award.”

• “Once parties bargain to submit their disputes to the arbitration system (a system essentially structured without due process, rules of procedure, rules of evidence, or any appellate procedure), we are disinclined to save them from themselves.”

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

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


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


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

In *Moore v. Omnicare, Inc.*, the respondent firm acquired David Moore’s shares in a pharmaceutical supply corporation and named him chief operating officer. After the new company struggled financially, Moore was terminated and he arbitrated numerous claims against Omnicare. In a complex series of interim and final awards, Moore was awarded $130,000 in attorney’s fees. Omnicare appealed to the state district court, and prevailed in its motion to vacate this part of the award. The Idaho court relied upon the broad public policy favoring arbitration in confirming the award of attorney’s fees: “In a lengthy and complex arbitration matter, the entire beneficent purpose of alternative dispute resolution would be sacrificed to a rigid notion that attorney’s fees must be decided in a separate proceeding by a circuit judge.” *Id* at 151. The court added: “We also question the assumption that trial courts sit in a better position than arbitrators to decide entitlement to attorney’s fees.” *Id*.  

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100 751 So.2d 143 (Fl.App. 2000).
101 *Id.* at 145.
103 The court relied upon the broad public policy favoring arbitration in confirming the award of attorney’s fees: “In a lengthy and complex arbitration matter, the entire beneficent purpose of alternative dispute resolution would be sacrificed to a rigid notion that attorney’s fees must be decided in a separate proceeding by a circuit judge.” *Id* at 151. The court added: “We also question the assumption that trial courts sit in a better position than arbitrators to decide entitlement to attorney’s fees.” *Id*.
104 141 Idaho 809 (2005).
105 *Id.* at 813-814.
106 *Id.* at 814.
107 *Id.*
supreme court affirmed the vacatur ruling based on a specific state statute that disallows the award of attorney’s fees by an arbitrator.108

Turning to arbitrations involving post-employment restrictions, 16 cases (6.7%) involved this type of dispute. States vary in their treatment of these no-compete employment contracts. In Malice v. Coloplast Corp. an executive who managed the development of prosthetic medical devices resigned his position and received a substantial severance agreement.109 Later, Malice became a partner in another medical devices company, prompting his former employer to invoke the no-competition agreement that Malice signed upon his resignation.110 The no-competition clause was arbitrated pursuant to the severance agreement.111

After the employer prevailed in the award, Malice challenged this outcome before the Georgia court of appeals and lost.112 Applying state law, the court said that restrictive covenants in employment are “enforceable if they are reasonable, founded on valuable consideration, reasonably necessary to protect the employer’s legitimate business interests, and do not unduly prejudice the public’s interest.”113 The court determined that Malice successfully bargained for increased severance benefits in return for the restrictive covenants.114 The court concluded that the agreement created no undue hardship on Malice nor prejudiced the public.115 Thus, the court ruled that “the arbitrator’s award

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108 Id. at 816, citing I.C. § 7-910 (“Unless otherwise provided in the agreement to arbitrate, the arbitrators’ expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award,”).
110 Id. at 396.
111 Id.
112 Id. at 397.
113 Id. at 399.
114 Id. at 401
115 Id. at 399 - 400.
HAPPLY NEVER AFTER ARBITRATION

does not violate Georgia’s public policy against restraint of trade.”

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

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

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116 Id. at 401.
117 61 P.3d 210 (Okla. 2002).
118 Id. at 211 - 212.
119 Id. at 212.
120 Id.
121 Id.
122 Id. at 215.
123 Id. at 213.
employee relationship.” The court refused to confirm the award, and remanded the matter to determine whether the employer owed damages to the doctor.

Our third example involves state laws that intensively regulate arbitration. Ovitz v. Schulman demonstrates how a California statute strictly requires disclosures that arbitrators provide to the parties. This important decision explains that the California legislature enacted a comprehensive arbitration law “to provide minimum ethical standards and remedies for the arbitrator’s failure to comply with existing disclosure requirements.” In this case, where Cathy Schulman claimed that she was wrongfully terminated as president of a film company, the arbitrator accepted another appointment in a separate arbitration involving the same movie company. After the arbitrator denied Schulman’s claims and awarded her former employer approximately $1.5 million in damages and $1.8 million in attorney fees and costs, Schulman invoked the disclosure law as grounds for vacating the award. The California court of appeals found merit in her argument and vacated the award.

Apart from variations in state laws, we noticed a regional pattern in award

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124 Id. at 214.
125 Id. at 215.
127 Id. at 839. Among the statutory list of required disclosures that the court described, section 1281.9 requires that arbitrators make required written disclosures within 10 calendar days of their appointment. In general, the legislature was concerned about “bias, or appearance of bias, that may flow from one side in an arbitration being a source or potential source of additional employment, and thus additional income, for the arbitrator.” Id. Thus, standard 12(b) requires additional disclosures when, in the course of serving as an arbitrator, this individual entertains offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral in another case. Failure to make a timely and complete disclosure may result in disqualification. Id. at 839 - 840.
128 Id. at 834.
129 Id. at 836.
130 Id. at 837.
131 Id.
132 Id. at 856. Having failed to comply with standard 12(b), the Arbitrator was precluded from serving as an arbitrator in any other matter involving the parties or any lawyer for the parties until the Schulman arbitration was completed.
enforcement. In a companion study on judicial review of labor arbitration awards, we found that federal judges in the Sixth Circuit Court of Appeals were less deferential than many peer courts.\textsuperscript{133} Aware that this circuit adopted an intrusive reviewing standard, called the four part essence test, Judge Sutton complained that the test “has made it easier to vacate an arbitration award on the merits than the Supreme Court meant it to be.”\textsuperscript{134}

Interestingly, two populous states in the Sixth Circuit— Ohio and Michigan— are at the bottom of our enforcement rankings in Table 3. This outcome is nearly identical to our finding for federal courts that review labor awards.\textsuperscript{135} This suggests that the Sixth Circuit’s less deferential posture influences the behavior of state courts.

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

This led us to wonder whether these southern courts are predisposed to take the employer’s side in these arbitrations because so many of these private proceedings are the result of employer imposed agreements to avoid court. However, we found evidence of

\begin{footnotesize}
\begin{enumerate}
\item[133] Michael H. LeRoy & Peter Feuille, \textit{As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards}, supra note 78.
\item[135] LeRoy & Feuille, \textit{supra} note 78, in manuscript at 37 (“The most controversial evidence of judicial activism that we uncovered is the Sixth Circuit’s four part essence test.”).
\end{enumerate}
\end{footnotesize}
Texas awards that favored ordinary workers and were upheld by Texas courts.\footnote{In Antenna Products Corp. v. Cosenza, 2006 WL 1452102 (Tex. App.- Dallas 2006), two workers were told that their services were no longer needed in New York and to report to a new location in Texas. \textit{Id.} at * 1. The relocation jeopardized one employee’s joint custody of his children and disrupted the special education services for the other employee’s disabled son. \textit{Id.} Each worker informed his employer that personal circumstances prevented his move to Texas. \textit{Id.} These appeals were rejected, and the company gave each employee a deadline to report. \textit{Id.} When the workers failed to comply they were terminated. \textit{Id.} In the arbitration over severance pay, the former employees prevailed and were awarded severance pay, plus reasonable costs and attorney’s fees. \textit{Id.} The award was confirmed by two Texas courts. \textit{Id.} at * 3.}

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

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

- **Where the award was procured by corruption, fraud, or undue means (9 U.S.C. § 10(1) or State UAA Equivalent):** After a lengthy arbitration over discrimination claims that resulted in a multi-million dollar award for employees, the employer in \textit{Barcume v. City of Flint} petitioned to vacate this outcome, citing \textit{ex parte} communication between the arbitrator and a plaintiff’s attorney.\footnote{Barcume v. City of Flint, 132 F.Supp.2d 549, 553 (E.D. Mich. 2001).} The court dismissed this challenge, concluding that while plaintiffs’ counsel “behaved unprofessionally by engaging in \textit{ex parte} communications with an Arbitrator, this Court cannot conclude that her behavior rose to the level of being illegal, immoral, or in bad faith. At its worst, her behavior was sloppy, overzealous lawyering.”\footnote{\textit{Id.} at 556.}

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

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

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

One of the arbitrators in *Montez v. Prudential Securities, Inc.* had worked for a law firm that once had a business relationship with the employer. This relationship was

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140 *Id.* at *4.
141 *Id.*
142 *Id.*
143 214 F.3d 1354 (11th Cir. 2000).
144 *Id.* at 1356.
145 *Id.*
146 260 F.3d 980, 982 (8th Cir. 2001).
disclosed orally by the arbitrator to the NASD, but not to the plaintiff.\footnote{Id.} Although the award was challenged on grounds of evident partiality, the court relied on the fact that the arbitrator’s relationship with the law firm ended five years prior to the arbitration.\footnote{Id. at 984.} The Eighth Circuit added that “a federal court cannot vacate an arbitration award based on a failure to disclose merely because an arbitrator failed to comply with NASD rules,”\footnote{Id.} because the FAA “establishes the standard for vacatur of an arbitration award by a federal court, not the NASD rules.”\footnote{Id.}

The Eighth Circuit reached a different result in Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.\footnote{51 F.3d 157 (8th Cir. 1995).} Two arbitrators failed to disclose that their employers had ongoing business relationships with Merrill Lynch and that their employers used the same law firm as Merrill Lynch.\footnote{Id. at 158.} After the employee lost at arbitration, he moved to vacate the arbitration on grounds that failure to disclose these relationships showed evident partiality in the arbitrators.\footnote{Id.} In reversing a district court order that confirmed the award, the Eight Circuit relied heavily on the Supreme Court’s leading case on evident partiality under the FAA, Commonwealth Coatings Corp.\footnote{Id. at 159, citing Commonwealth Coatings Corp v. Continental Casualty Co., 393 U.S. 145 (1968).} The appeals court recalled that the Supreme Court ruled that an arbitrator’s nondisclosure of a close business relationship with a party to the arbitration showed evident partiality warranting vacation of the arbitration decision, despite the absence of actual bias on the arbitrator’s part.\footnote{Id.} An
award is subject to vacatur when the arbitrator’s relationship creates “an impression of possible bias.” The Eighth Circuit also noted that the nondisclosure violated Section 23 of the NASD arbitration rules, which obligates arbitrators to disclose arbitrators’ indirect relationships, “specifically including those between the arbitrators’ current employers and any arbitration party or its counsel.” We note, however, that this outcome in Olson differs from other decisions in our sample.

The arbitrator in Bender v. Smith Barney, Harris Upham & Co., Inc., who was discharged in a prior unrelated matter by a securities firm named Newbold, arbitrated his termination claim and prevailed. In the subject arbitration, the plaintiff was terminated by Smith Barney, and following this action she was hired by Newbold. After Ms. Bender lost her arbitration against Smith Barney, she contended to the court that the arbitrator was biased. This employee believed that her present association with Newbold brought back the arbitrator’s negative experience with the same firm. But the court viewed the matter as a coincidence, and reasoned: “Evident partiality is strong

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156 Id.
157 Id. at 160.
158 Compare Unstad v. Lynx Golf, Inc., 1997 WL 193805 (Minn.App. 1997), at * 2: “A remote and unrelated attorney-client relationship between the neutral arbitrator and counsel for one of the parties is not a basis to vacate an arbitration award for undue means or evident partiality.” Also see Umana v. Swidler & Berlin, 745 A.2d 334 (D.C. 2000), where the neutral arbitrator was a former chairman of the Federal Trade Commission and had some professional contacts with an attorney who was served on the tripartite panel. The Umana court rejected the evident partiality claim from the employee, stating that the “test in this case is not whether the relationship was trivial; it is whether, having due regard for the different expectations regarding impartiality that parties bring to arbitration than to litigation, the relationship between . . . [the arbitrator] and . . . [party to the arbitration] was so intimate—personally, socially, professionally, or financially— as to cast serious doubt on [the arbitrator’s] impartiality. Id. at 341.
160 Id. at 866.
161 Id. at 867.
162 Id. “Newbold is not a party to the present litigation. Rather, Newbold happens to be a company which hired plaintiff subsequent to her termination from Smith, Barney, and as such has no stake in the outcome of plaintiff's case against Smith, Barney. . . .” Id.
language and requires proof of circumstances powerfully suggestive of bias."163

**Evidentiary Rulings:** In *Boyhan v. Maguire*,164 the chairman of the arbitration panel stated on the record that he had “suspicions” about an attorney in the arbitration, and excoriated this advocate for practices that he believed were unethical.165 After a lunch recess, the attorney moved, pursuant to Rule 19 of the American Arbitration Association, to disqualify the arbitrator.166 The motion was denied, and an award was issued.167 The court found no evident partiality, stating that the challenge to the award was “nothing more than the reaction of the arbitrator to one party’s evidence. We do not believe that this kind of reaction to evidence can lawfully be equated with the kind of extrinsic, or improper, bias required by the statute for the vacation of an award.”168

- Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced (9 U.S.C. § 10(3) or State UAA Equivalent):

  **Motions to Postpone a Hearing:** Ten days before the arbitration hearings in *Berlacher v. PaineWebber, Inc.*,169 the employee’s 8 year old daughter broke her arm and required hospitalization in Pennsylvania.170 The employee believed that he needed to make medical decisions regarding his daughter and to help tend to his four other children,
and therefore requested on May 14 to postpone the May 21-22 hearing.\textsuperscript{171} The employer did not object, but the arbitrators denied the individual’s request on May 17, and the hearing was held as scheduled.\textsuperscript{172}

After the employee lost on the merits, and was ordered to pay more than $350,000 to his former employer, he challenged the award on grounds that he had inadequate opportunity to prepare.\textsuperscript{173} Rejecting this contention, the employer reasoned that “arbitrators are given a great deal of latitude in conducting arbitration proceedings,”\textsuperscript{174} and nothing in the record showed that the arbitrators’ conduct constituted misconduct or abuse of discretion.\textsuperscript{175}

In \textit{Selby General Hospital v. Kindig}\textsuperscript{176} a panel of arbitrators refused to reschedule a hearing when the employer contended that it needed more time to determine whether to call its own expert witness.\textsuperscript{177} A lower court vacated the subsequent award that favored the employee,\textsuperscript{178} but on appeal the award was confirmed.\textsuperscript{179}

\textbf{Evidentiary Objections at the Hearing}: The losing party in \textit{Castleman v. AFC Enterprises, Inc.}, challenged the award on grounds that the arbitrator denied its evidentiary objections.\textsuperscript{180} The judge dismissed this challenge, reasoning that “[r]efusals to hear evidence that is irrelevant and/or cumulative do not prevent parties from receiving fundamentally fair hearings. Thus, the Arbitrator’s decision not to hear additional

\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.} at 24.
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} 2006 WL 2457436 (Ohio App. 4 Dist. 2006).
\textsuperscript{177} \textit{Id.} at *2.
\textsuperscript{178} \textit{Id.} at *3.
\textsuperscript{179} \textit{Id.} at * 10.
evidence . . . did not render the arbitration fundamentally unfair.”

- *Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made* (9 U.S.C. § 10(4) or State UAA Equivalent):

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

  Courts also confirm awards that fail to explain their reasoning. *Fallon v.*

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181 *Id.* at 653.
183 10 Fed. Appx. 510 (9th Cir. 2001).
184 *Id.*
185 *Id.* at 512.
186 *Id.*
187 *Id.*
Salomon Smith Barney, Inc.\textsuperscript{189} stated that “where, as here, an arbitral panel declines to explain its ruling, the courts must confirm the arbitration award if there is even a barely colorable justification for the outcome reached.”\textsuperscript{190} In Maze v. Prudential Securities, Inc.\textsuperscript{191} the court refused to vacate an award in which the arbitrators gave a brief, seven-sentence case summary.\textsuperscript{192}

\textbf{Punitive Awards and Other Damages:} Punitive awards are challenged on various grounds including the arbitrators exceeded their powers. In Baravati v. Josephthal,\textsuperscript{193} the arbitration agreement did not contain a choice of law provision or a provision in the governing arbitration rules concerning the arbitrators’ remedial powers. The hearing occurred under the auspices of the NASD Code of Arbitration, but the Seventh Circuit said that no negative inference could be drawn from that code’s silence on the scope of the arbitrators’ powers.\textsuperscript{194} Thus, the court turned back a challenge to the award, noting that the rules of the American Arbitration Association authorize these arbitrators to award “any remedy which [is] just and equitable and within the scope of the agreement.”\textsuperscript{195} In an emphatic statement of judicial deference, the court said that “short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate

\begin{itemize}
\item \textsuperscript{189} 2003 WL 201321 (2d Cir. 2003).
\item \textsuperscript{190} Id. at *1.
\item \textsuperscript{191} 1993 WL 515375 (S.D.N.Y. 1995), aff'd, 47 F.3d 1157 (2d Cir. 1995).
\item \textsuperscript{192} The court observed that “the arbitrators chose to give a brief, seven-sentence case summary that was obviously not intended to portray all of the evidence and arguments that were before them. . . . Indeed, even with these allegations in front of it, the panel rejected Maze’s counterclaim in its entirety.” Id. at * 2. Because the award rejected Maze’s claim in its entirety, the court said that it was “highly unlikely that the arbitrators overlooked Maze’s implied covenant argument.” Id.
\item \textsuperscript{193} 28 F.3d 704, 706 (7th Cir. 1997).
\item \textsuperscript{194} Id. at 710 (“Silence implies— given the tradition of allowing arbitrators flexible remedial discretion— the absence of categorical limitations. Since that is the norm, we assume that the parties would have said something in the arbitration clause had they wanted to depart from it.”).
\item \textsuperscript{195} Id. at 709.
\end{itemize}
to whatever procedures they want to govern the arbitration of their disputes. . . .”

On the other hand, *Shearson Lehman Brothers, Inc. v. Hedrich* is an example of a court that appeared to re-arbitrate a dispute under the “exceeds authority” standard. Three employees were awarded lump sum payments after they were terminated. The arbitrators ruled that the employees had become fully vested under the employer’s compensation plan. But an Illinois appeals court found that the arbitrators exceeded their authority, reasoning that “the arbitrators impermissibly ignored the unambiguous contract language and implemented their own notion of what would be reasonable and fair.” Although the arbitrators dismissed the employees’ wrongful discharge claim, the court said that they “mysteriously calculated amounts” due to the claimants.

**Finding No. 5: Manifest Disregard for the Law**: Inconsistent approaches over the manifest disregard standard appear to spur the surprising popularity of this basis for challenging awards. As the Second Circuit explained in *Halligan v. Piper Jaffray, Inc.*, arbitrators cannot “ignore[] the law or the evidence or both.” Nevertheless, arbitrators are not charged with knowing all provisions of a particular statutory scheme. The

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196 *Id.* (“It is commonplace to leave the arbitrators pretty much at large in the formulation of remedies, just as in the formulation of the principles of contract interpretation.”).
197 639 N.E.2d 228 (1994).
198 *Id.* at 230.
199 *Id.* at 231.
200 *Id.* at 233.
201 *Id.*
202 *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998).
203 In *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997), an age discrimination complainant was awarded $220,000, but his request for attorney’s fees— totaling $249,050— was denied. In his motion to vacate that part of the award, DiRussa argued that the arbitrators manifestly disregarded the ADEA’s policy for granting attorney’s fees to prevailing plaintiffs. The Second Circuit disagreed, stating: “the remedy for that does not lie with us.” *Id.* at 823. The court continued that “‘knowing’ all of the provisions of a particular statutory scheme without assistance from the parties is a daunting task, even for a skilled lawyer or judge.” *Id.* For criticism of the standard, see *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 430-31 (2d Cir. 1974).

standard has been adopted by the Fourth, \(^{204}\) Fifth, \(^{205}\) Sixth, \(^{206}\) Ninth, \(^{207}\) and Tenth \(^{208}\) circuits. The Eleventh Circuit was reluctant to adopt the standard, \(^{209}\) but more recently changed its view. \(^{210}\) In a scholarly opinion, the Seventh Circuit has expressed strong doubts about the clarity and validity of the manifest disregard standard. \(^{211}\)  

the court created a non-statutory ground for setting aside arbitral awards. The standard was adopted by the Second Circuit in Judge Friendly’s employment arbitration decision, Drayer v. Krasner, 572 F.2d 348, 352 (2d Cir. 1978). The Supreme Court criticized this decision for its mistrust of arbitration, and confined the standard to its narrowest possible holding in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 231-34 (1987) (but see Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989)).  

204 Patten v. Signator Ins. Agency, Inc., 441 F.3d 230 (4th Cir. 2006). The employee appealed the arbitrator’s ruling that his claim was time-barred. The arbitration agreement did not have a limit for filing an arbitration claim, but the arbitrator implied a one year term. Reversing the district court, the Fourth Circuit concluded that “the arbitrator’s ruling constituted a manifest disregard of the law.” Id. at 231. The court added to the analysis by concluding that “the arbitration award as to Patten and Signator Investors failed to draw its essence from the governing arbitration agreement.” Id. at 236.  

205 E.g., Fountoulakis v. Stonhard, Inc., 2003 WL 21075931, at *5 (N.D. Tex. 2003). The court explained that “the manifest disregard standard is an extremely narrow, judicially-created rule with limited applicability.” Id. citing Prestige Ford v. Ford Dealer Computer Svs., Inc., 324 F.3d 391, 395 (5th Cir. 2003). Fountoulakis repeated the Fifth Circuit’s view of the manifest disregard standard: “It clearly means more than error or misunderstanding with respect to the law. The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.” Id.  

206 Buchignani v. Vining Sparks IBG, Inc., 208 F.3d 212 (6th Cir. 2000). The court noted that the manifest disregard of the law standard requires that “the [arbitration] decision must fly in the face of clearly established legal precedent.” Id. at *2. Questions of law are decided with manifest disregard only if “(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.” Id.  

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


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


We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration (we suspect none— that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration. If it is intended to be synonymous with the statutory formula that it most nearly resembles— whether the arbitrators “exceeded their powers”— it is superfluous
Many state courts also apply the manifest disregard standard. *Madden v. Kidder Peabody & Co.,* 212 explained: “In certain circumstances, the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug.” 213 The Missouri court demonstrated the narrow scope of the standard when it concluded that the “case at bar, however, is not cut to so rare a pattern: appellant has utterly failed to show that the arbitrators inevitably must have recognized [the controlling rule of law].” 214 In a Michigan case, where an employee-at-will was promised that he would not be fired without a fair and thorough investigation, the arbitrator did not “display[] a manifest disregard of the applicable law” concerning employment-at-will. 215

**V. CONCLUSIONS**

Our research produces many empirical findings but culminates in two main conclusions. (1) Courts are extremely deferential in reviewing employment awards. (2) Nevertheless, court review of arbitration is rapidly growing even though the chance of overturning an award is very poor. The first result is encouraging because Congress and the Supreme Court have repeatedly sought to bolster the finality of arbitration. 216 But the recent spurt of cases—exemplified by the finding that 62% of federal district courts decisions occurred since 2000— is troubling. It means that courts are likely to face a

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212 883 S.W.2d 79 (Mo. App. 1994).
213 *Id.* at 83.
214 *Id.*
216 *Gilmer,* *supra* note 5, and *Enterprise Wheel,* *supra* note 54.
growing docket of post-arbitration appeals. It also implies that parties are seeking to re-litigate the claims that they privately adjudicated. When arbitration becomes a preliminary step in a prolonged dispute resolution process, it has failed.

The grounds for reviewing employment awards are far more numerous than those for labor awards. Trilogy courts use a telescope with a narrow field of vision to review labor awards from afar. However, the same courts review employment awards through a kaleidoscope. Too many courts and legislatures have presented arbitration losers with an abundance of judicial review standards— too many choices— to sue on the award. The complex presentation of award-review arguments in Tables 4A and 4B supports our conclusion, as do the varied and numerous state arbitration statutes in Appendix II. In addition, we believe that major changes in the Revised Uniform Arbitration Act of 2000 are playing a role in this upsurge— and here we emphasize the similar timing of our finding that award appeals are suddenly spurting and passage of the RUAA.

This finding relates to our first research question: Do courts limit their award review to the statutory grounds under the FAA or state equivalents, or do they also apply common law standards? The fact that employment arbitration is subject to a widely dispersed regulation— federal and state, statutory and common law— became evident as

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

218 See James E. Daniels, The Availability of Preliminary Remedies as a Reason to Arbitrate IP Disputes, 61 DISPUTE RES. J. 38, 40 (2007): Recognizing that binding arbitration had taken a central place in dispute resolution in America without a uniform set of rules to guide arbitrators and parties through these proceedings, in 2000, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Revised Uniform Arbitration Act (RUAA). “Revised” is really an understatement. The RUAA was actually a major departure from the 1955 UAA and the past arbitration process.
we continually revised our data extraction form to account for new arguments that an arbitration loser raised on appeal. A party who loses an award can simultaneously cite federal bases such as the four statutory grounds under the FAA, federal common law standards such as manifest disregard for the law and denial of due process, plus all the Trilogy arguments such as the public policy exception to award enforcement.

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

Aggravating the problem, the FAA also allows for review of awards in state courts under those jurisdictional standards. In addition, a challenger can invoke a bewildering thicket of state arguments, such as California’s broad ruling holding that unilateral arbitration agreements are unenforceable\(^\text{219}\) and that state’s statute on arbitrator disclosures,\(^\text{220}\) Florida’s statutory limit on arbitrator authority to award attorney’s fees,\(^\text{221}\) Connecticut’s broad public policy grounds for vacating an award,\(^\text{222}\) among others.

The complex federalism structure of the FAA,\(^\text{223}\) which adds to the kaleidoscopic

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\(^{220}\) Ovitz, supra note 127.

\(^{221}\) Cassedy, supra note 102.

\(^{222}\) City of Hartford v. Casati, 2001 WL 1420512 (Conn.Super. 2001). The arbitrator found that the deputy chief engaged in “profane, obscene gutter talk aimed at minorities, including women and homosexuals.” His talk was described as being peppered with expressions such as ‘nigger,’ ‘raisin head,’ ‘dyke,’ ‘fag,’ ‘greaseball’ and various other expressions referring to Italians, ‘third worlders,’ ‘fudge packers,’ ‘bimbos’ and ‘drunk fucking micks.’” Id. at *4. The Arbitrator upheld the officer’s grievance, however, because there was “no testimony or other evidence that [Casati] had ever directed such language directly at any individual nor in the presence of any such person.” Id. The court found that the award violated a state court ruling that compelled police departments “to take reasonable steps to eliminate racially, ethnically and sexually discriminatory language. . . .” Id. at *5.

\(^{223}\) See supra notes 42-47.
crystals for reviewing employment awards, has confused courts as to whether federal or state law applies in reviewing awards. Courts have noted that “the FAA [Federal Arbitration Act] is something of an anomaly in the field of federal-court jurisdiction because it creates a body of federal substantive law without simultaneously creating any independent federal-question jurisdiction (internal quotes omitted). . . .”224 Our database reflects earlier conflicts between state laws that limited an arbitrator’s power to award punitive damages, and the FAA’s broad dictate to enforce arbitration agreements and their resulting awards.225 We also observed a similar federalism controversy over a choice of law dispute in reviewing an award that was enforceable under Michigan law but whose subject was regulated by federal securities law.226

We said that employment arbitration should be subject to a uniform set of national standards. However, our data do not suggest whether uniform regulation should be limited to the current FAA standards or revised to include others. At this juncture, however, our second research question provides a partial solution. We asked: Do reviewing courts supplement FAA standards with the Supreme Court’s Trilogy standards? Table 4B shows that Trilogy standards are infrequently applied but lead to comparatively high rates of vacatur. We wonder why these standards apply in any case. The Trilogy was meant only to apply to voluntary labor arbitration. The Trilogy aimed to

225 See Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512 (2d. Cir. 1991). Judge Mahoney’s dissenting opinion noted that the “majority’s approach effectively disregards the existence of a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate and imposes the diversity regime of Erie R.R. v. Tompkins (internal citation and quote omitted).” Id. at 520.
226 Ford v. Hamilton Investments, Inc., 29 F.3d 255 (6th Cir. 1994). Taking sharp exception to the Second Circuit, this court said that “[w]hile the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal question jurisdiction. . . . To read section 9 or 10 as bestowing jurisdiction to confirm or vacate absolutely any arbitration award,” as the Court of Appeals for the Second Circuit has said, “would open the federal courts to a host of arbitration disputes, an intent that we should not readily impute to Congress.” Id. at 258.
strengthen labor arbitration as a necessary tool to further industrial peace, and to remove courts as an irritant in the union-management relationship.

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

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

On the employee side, it is apparent that numerous individuals do not view arbitration as a legitimate forum for adjudicating their claims. Having been forced into arbitration against their wishes to proceed in court, they may regard only a court judgment as final and binding. Next, we see prevailing plaintiffs who find that arbitration is shockingly expensive and attended by high representation costs. When arbitrators deny

attorney’s fees to these victorious plaintiffs, economic logic dictates the imperative to appeal for post-award relief.\textsuperscript{228} In another category, we find employees who might accept losing if their award provided an explanation.\textsuperscript{229} However, the absence in many arbitrator awards of a written decision appears to deprive these individuals of an essential part of judgment and justice.

Employers have their own reasons to seek court review of arbitrator rulings. Concerned by mounting litigation, they turned to arbitration with the hope of lowering the cost of employment disputes.\textsuperscript{230} The success rate of employees in arbitration is not likely what employers envisioned.\textsuperscript{231} Remedies have provided employers another unpleasant surprise. To put this in perspective, recall that 92 awards completely favored employees, and 23 awards were split rulings that provided a partial remedy. Thus, a remedy was ordered in 47.9\% of cases. We use a common valuation tool for litigation to estimate the average settlement value of claims in these awards.\textsuperscript{232} Multiplying this employee-success rate by the median award of $250,000, the probability model yields an average settlement of $119,750 per case. The point in computing this hypothetical figure is to show that the high winning rate for employees combined with costly awards has significant implications for settling disputes that are referred to arbitration.

In addition, when \textit{Gilmer} was decided courts did not recognize a specific mathematical limit on punitive damages, but this changed with the Supreme Court’s

\begin{footnotes}
\item[228] See DiRussa, \textit{supra} note 203.
\item[229] \textit{Supra} notes 182-192.
\item[230] See \textit{Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management}, DAILY LAB. REPT, May 14, 2001, No. 93 (reporting an employment lawyer’s view that mandatory arbitration helps employers limit damages and eliminate class action lawsuits. David Copus also notes that the biggest financial risk for employers in termination lawsuits— tort claims in which a single plaintiff can be awarded millions of dollars— is controlled by arbitration agreements that cap damages).
\item[231] See Delikat & Kleiner, \textit{supra} note 88 (statistic for NYSE and NASD arbitrations).
\item[232] \textit{PROCESSES OF DISPUTE RESOLUTION} 109-111 (Allen Scott Rau, et al., eds. 2006).
\end{footnotes}
decision in *State Farm Mut. Ins. Co. v. Campbell*. While a court of law now shields employers from excessive damage awards, some arbitrators do not recognize this restraint.

Comparing our present research with our companion studies on labor awards, we sense that unions and employers fight smaller battles in arbitration. When they lose and contest the finality of an award, their challenges involve lower stakes. Even if they invoke a *Trilogy* challenge, the parties must accept a certain level of losing in arbitration to maintain a quiescent relationship. But we also sense that fewer parties in employment arbitration are committed to the norm of finality in arbitration, even though their agreements say as much. Unlike unions and managements, their relationships are often severed by the time they proceed to arbitration. Their arbitrations take more hearing days, cost much more, and involve the arbitrator more directly in the dispute by subjecting this judge to scrutiny over disclosure and qualification issues. This level of rancor and bitterness more often resembles contested divorces than labor arbitrations. If our sense is correct that a winner-take-all mentality pervades these post-award appeals, then many of the disputants in our study are destined to be “happily never after” their arbitrations.

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234 *See* Sawtelle, *supra* note 84.
VI. RESEARCH APPENDIX: SAMPLE OF CASES

Publication of the cases is at the discretion of the editors. Our rationale for offering the list is to enable readers to verify our empirical findings, and to share a valuable resource for policy-makers, judges, scholars, practitioners, and students.

Appendix I: Table of Cases in the Empirical Database

Anthony v. Kaplan, 918 S.W.2d 174 (Ark. 1996)
Ball x. SFX Broadcasting, Inc., 165 F.Supp.2d 230 (N.D.N.Y. 2001)
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Booth v. Hume Publishing Inc., 902 F.2d 925 (11th Cir. 1990)
Boyhan v. Maguire, 693 So.2d 659 (Fla.App. 4 Dist. 1997)
Brook v. Peak Int’l, Ltd., 294 F.3d 668 (5th Cir. 2002)
Brown v. ITT Consumer Financial Corp., 211 F.3d 1217 (11th Cir. 2000)
Buchignani v. Vining Sparks IBG, Inc., 208 F.3d 212 (6th Cir. 2000)
Bunzy7 Distribution USA v. Dewberry, 16 Fed. Appx. 519 (8th Cir. 2001)
Caldor, Inc. v. Thornton, 464 A.2d 785 (Conn. 1983)
Campbell v. Cantor Fitzgerald & Co., Inc., 205 F.3d 1321 (2nd Cir. 1999)
Cardiovascular Surgical Specialists Corp. v. Mammmana, 61 P.3d 210 (Okla. 2002)
Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, 751 So.2d 143 (Fl.App. 2000)
Chisholm v. Kidder, Peabody Asset Management, Inc., 164 F.3d 617 (2d Cir. 1998)
City of Hartford v. Casati, 2001 WL 1420512 (Conn.Super. 2001)
Collins v. Blue Cross Blue Shield of Michigan, 103 F.3d 35 (6th Cir. 1996)
Community Memorial Hospital v. Mattar, 165 Ohio App. 3d 49 (Ohio App. Dist. 2006)
Dean Witter Reynolds, Inc. v. Deislinger, 711 S.W.2d 771 (Ark. 1986)
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Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978)
Eaton Vance Distributors, Inc. v. Ulrich, 692 So.2d 915 (Fla.App. 2 Dist. 1997)
Fahnestock & Co., Inc. v. Waltman, 935 F.2d 512 (2d. Cir. 1991)
Florasynt, Inc. v. Pickholz, 750 F.2d 171 (2d Cir. 1984)
Ford v. Hamilton Investments, Inc., 29 F.3d 255 (6th Cir. 1994)
Gaffney v. Powell, 668 N.E.2d 951 (Ohio App. 1 Dist 1995)
Gardner v. Benefits Communications Corp., 175 F.3d 155 (D.C. Cir. 1999)
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Green v. Ameritech Corp., 200 F.3d 967 (7th Cir. 2000)
Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998)
Harris v. Parker College of Chiropractic, 286 F.3d 790 (5th Cir. 2002)
Harris-Baird v. Anthony, 124 F.3d 1309 (D.C. Cir. 1997)
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Herrendeen v. Daimler Chrysler Corp., 2001 WL 304843 (Ohio App. 6 Dist. 2001)
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Kenneth v. Prescott, Ball & Turban, Inc., 949 F.2d 1175 (D.C. Cir. 1991)
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McKenzie v. Seta Corp., 283 F.3d 413 (4th Cir. 2000)
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Montes v. Shearson Lehman Bros., Inc., 128 F.3d 1456 (11th Cir. 1997)
Montez v. Prudential Securities, Inc., 260 F.3d 980 (8th Cir. 2001)
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Owen-Williams v. Merrill Lynch, Pierce, Fenner & Smith, 103 F.3d 119 (4th Cir. 1996)
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PaineWebber, Inc. v. Agron, 49 F.3d 347 (8th Cir. 1995)
Patti v. Rockwell Int'l Corp., 2001 WL 1631483 (9th Cir. 2001)
Pfizer, Inc. v. Uprichard, 422 F.3d 124 (3d Cir. 2005)
Private Healthcare Systems, Inc. v. Torres, 278 Conn. 291 (Conn. 2006)
Prudential-Bache Securities v. Tanner, 72 F.3d 234 (1st Cir. 1995)
Rauh v. Rockford Products, Corp., 574 N.E.2d 636 (Ill. 1991)
Renny v. Port Huron Hospital, 398 N.W.2d 327 (Mich. 1986)
Rollins v. Prudential Ins. Co. of North America, 2001 WL 537775 (9th Cir. 2001)
Rosenbloom v. Mecom, 478 So.2d 1375 (La.App. 4 Cir. 1985)
Schoch v. InfoUSA, Inc., 341 F.3d 785 (8th Cir. 2003)
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Scott v. Borg-Warner Protective Services, 2003 WL 23315 (9th Cir. 2003)
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Shearson Hayden Stone, Inc. v. Liang, 653 F.2d 310 (7th Cir. 1981)
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Smith v. Rush Retail Centers, Inc., 360 F.3d 504 (5th Cir. 2004)
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St. John’s Medical Center v. Delfino, 414 F.3d 882 (8th Cir. 2005)
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Thomas v. Bear Stearns & Co., Inc., 196 F.3d 1256 (5th Cir. 1999)
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Welch v. A.G. Edwards & Sons, Inc., 677 So.2d 520 (La.App. 4 Cir. 1996)
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Williams v. Cigna Financial Advisors Inc., 197 F.3d 752 (5th Cir. 1999)
Yorulmazoglu v. Lake Forest Hospital, 359 Ill.App. 3d 554 (Ill.App. 1 Dist. 2005)
Young v. Community Hosp. & Nursing Home of Anaconda, 304 Mont. 400 (Mont. 2001)
Zandford v. Prudential-Bache Securities, Inc., 112 F.3d 723 (4th Cir. 1997)
Publication of Appendix II is at the discretion of the editors. Our rationale for offering this compendium of state arbitration laws is to share a valuable resource for policy-makers, judges, scholars, practitioners, and students.

### APPENDIX II

**State Vacatur Standards: Statutes That Differ From the Federal Arbitration Act**

<table>
<thead>
<tr>
<th>State</th>
<th>Statute</th>
</tr>
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<tbody>
<tr>
<td>Delaware</td>
<td>Del.C. § 10-5715 (Modification or Correction of an Award by Court): (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or, (3) The award is imperfect in a matter of form, not affecting the merits of the controversy).</td>
</tr>
<tr>
<td>Florida</td>
<td>West’s F.S.A. § 682.14 (Modification or Correction of Award): (1) Upon application made within 90 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when: (a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award. (b) The arbitrators or umpire have awarded upon a matter not submitted to them or him or her and the award may be corrected without affecting the merits of the decision upon the issues submitted. (c) The award is imperfect as a matter of form, not affecting the merits of the controversy).</td>
</tr>
<tr>
<td>Georgia</td>
<td>Ga. Code Ann. § 9-9-13 (Vacation of an Award): (b) The award shall be vacationed on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of that party were prejudiced by: (1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; (4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection; or (5) The arbitrator’s manifest disregard of the law.</td>
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<td>Illinois</td>
<td>710 ILCS 5/13 (Modification or Correction of Awards): (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.</td>
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<tr>
<td>Iowa</td>
<td>(I.C.A. 679A.12, Vacating an Award) a. The award was procured by corruption, fraud, or other illegal means. b. There was evident partiality by an arbitrator appointed as a neutral, corruption in any of the arbitrators, or misconduct prejudicing the rights of a party. c. The arbitrators exceeded their powers. d. The arbitrators refused to postpone the hearing upon sufficient cause being shown for the postponement, refused to hear evidence material to the controversy, or conducted the hearing contrary to the provisions of section 679A.5, in a manner which prejudiced substantially the rights of a party. e. There was no arbitration agreement, the issue was not adversely determined in proceedings under section 679A.2, and the party did not participate in the arbitration hearing without raising the objection. f. Substantial evidence on the record as a whole does not support the award. The court shall not vacate an award on this ground if a party urging the vacation has not caused the arbitration proceedings to be reported, if the parties have agreed that a vacation shall not be made on this ground, or if the arbitration has been conducted under the auspices of the American Arbitration Association.</td>
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<tr>
<td>Kansas</td>
<td>(K.S.A. § 5413, Modification or Correction of Award) (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form not affecting the merits of the controversy.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>(K.R. S. § 417.160, Vacating an Award) (1) Upon application of a party, the court shall vacate an award where: (a) The award was procured by corruption, fraud or other undue means; (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any</td>
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235 Fourteen states in Appendix II have adopted Section 23 in the Revised Uniform Arbitration Act, in part or in whole; however, because many of these states have substantively customized these provisions, we reprint their entire provisions. The states include Iowa, Kentucky, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Utah, and Washington.
<table>
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<tr>
<th>State</th>
<th>Code/Section</th>
<th>Requirements</th>
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<tbody>
<tr>
<td>Montana</td>
<td>(Mt. St. § 27-5-312, Vacating an Award)</td>
<td>(a) The award was procured by corruption, fraud or other undue means; (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (c) The arbitrators exceeded their powers; (d) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 417.060 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court is not ground for vacating or refusing to confirm the award. (2) An application under this section shall be made within ninety (90) days after delivery of a copy of the award to the applicant; except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known. (3) In vacating the award on grounds other than stated in paragraph (a) of subsection (1) of this section, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with KRS 417.070, or, if the award is vacated on grounds set forth in paragraphs (c) and (d) of subsection (1) of this section, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with KRS 417.070. The time within which the agreement requires the award to be made is applicable to the rehearing and commences on the date of the order.</td>
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<td>Missouri</td>
<td>(V.A.M.S. § 435.405, Vacating an Award)</td>
<td>(1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 435.370, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 435.355 and the party did not participate in the arbitration hearing without raising the objection; But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.</td>
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<td>Minnesota</td>
<td>(M.S.A. § 572.19, Vacating an Award)</td>
<td>(1) The award was procured by corruption, fraud or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section 572.12, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 572.09 and the party did not participate in the arbitration hearing without raising the objection; But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.</td>
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<td>Massachusetts</td>
<td>(M.G.L.A. 150C, § 11, Vacation of an Award)</td>
<td>(a) Upon application of a party, the superior court shall vacate an award if: – (1) the award was procured by corruption, fraud or other undue means; (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party; (3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law; (4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party; (5) there was no arbitration agreement and the issue was not adversely determined in proceedings under section two and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.</td>
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<td>Maine</td>
<td>(26 M.R.S.A. § 958, Vacation of Award)</td>
<td>1. Corruption, fraud or undue means. Where the award was procured by corruption, fraud or undue means; 2. Partiality or corruption in arbitrators. Where there was obvious partiality or corruption in the arbitrators, or any of them; 3. Abuse of discretion by arbitrators. Where the arbitrators were guilty of abuse of discretion by which the rights of any party have been prejudiced; or 4. Arbitrators exceeded powers. Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.</td>
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<td>Maryland</td>
<td>(Md. Code, Courts and Judicial Proceedings, § 3-223, Adjustment of an Award by Court)</td>
<td>(b) The court shall modify or correct the award if: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.</td>
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<tr>
<td>State</td>
<td>Code Reference</td>
<td>Criteria</td>
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<td>Nebraska</td>
<td>(Neb. St. § 25-613, Vacating an Award) (a)(1) The award was procured by corruption, fraud or other undue means; (b) There was evident partiality by an arbitrator appointed as a neutral arbitrator; (c) Misconduct by an arbitrator prejudicing the rights of a party; (d) An arbitrator refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or (6) The arbitration was conducted without proper notice of the initiation of an arbitration as required in NRS 38.223 so as to prejudice substantially the rights of a party to the arbitral proceeding.</td>
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<td>Nevada</td>
<td>(N.R.S. § 38.241, Vacating Award) (a) The award was procured by corruption, fraud or other undue means; (b) There was (1) evident partiality by an arbitrator appointed as a neutral arbitrator; (2) corruption by an arbitrator; (3) misconduct by an arbitrator prejudicing the rights of a party to the arbitral proceeding; (c) An arbitrator refused to postpone the hearing upon sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing, contrary to N.R.S. 38.231, as to prejudice substantially the rights of a party; (d) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or (d) An arbitrator exceeded his powers; (e) There was no arbitration agreement, unless the movant participated in the arbitral proceeding without raising the objection under subsection 3 of NRS 38.231 not later than the beginning of the arbitral hearing; or (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in NRS 38.223 so as to prejudice substantially the rights of a party to the arbitral proceeding.</td>
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<td>New Hampshire</td>
<td>(N.H. Rev. Stat. § 542.8, Jurisdiction of Court to Confirm, Modify, or Vacate an Award) At any time within one year after the award is made any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers. Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may in its discretion, direct a rehearing by the arbitrators or by new arbitrators appointed by the court.</td>
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<td>New Mexico</td>
<td>(N.M.S.A. 1978, § 44-7A-24, Vacating Award) (1) the award was procured by corruption, fraud or other undue means; (2) there was: (A) evident partiality by an arbitrator appointed as a neutral arbitrator; (B) corruption by an arbitrator; or (C) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to Section 16, so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator’s powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under Section 16(c) not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in NMSA 38.223 so as to prejudice substantially the rights of a party to the arbitral proceeding.</td>
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<td>New York</td>
<td>(McKinney’s CPLR § 7511, Vacating or Modifying an Award) (b) Grounds for vacating. 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by: (i) corruption, fraud or misconduct in procuring the award; or (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection. 2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that: (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or (ii) a valid agreement to arbitrate was not made; or (iii) the agreement to arbitrate had not been complied with; or (iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.</td>
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| North Carolina | (N.C.G.S.A. § 1-569.23, Vacation of Award) (a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (1) The award was procured by corruption, fraud, or other undue means; (2) There was: a. Evident partiality by an arbitrator appointed as a neutral arbitrator; b. Corruption by an arbitrator; or c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to G.S. 1-569.15 so as to prejudice substantially the rights of a party to the arbitration proceeding; (4) An arbitrator exceeded the arbitrator’s powers; (5) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under G.S. 1-569.15(c) not later than the beginning of the arbitral hearing; or (6) The arbitration was conducted without proper notice of the
initiation of an arbitration as required in G.S. 1-569.9 so as to prejudice substantially the rights of a party to the arbitration proceeding.

### North Dakota

(N.D. St. 32-29.3-23, Vacating award) 1. Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: a. The award was procured by corruption, fraud, or other undue means; b. There was: (1) Evident partiality by an arbitrator appointed as a neutral arbitrator; (2) Corruption by an arbitrator; or (3) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; c. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 32-29.3-15, so as to prejudice substantially the rights of a party to the arbitration proceeding; d. An arbitrator exceeded the arbitrator’s powers; e. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection C of Section 16 of this act not later than the beginning of the arbitration hearing; or f. The arbitration was conducted without proper notice of the initiation of an arbitration as required in section 32-29.3.09 so as to prejudice substantially the rights of a party to the arbitration proceeding.

### Oklahoma

(12 Okl.St.Ann. § 1874, Application to Vacate an Award) A. Upon an application and motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: 1. The award was procured by corruption, fraud, or other undue means; 2. There was: a. evident partiality by an arbitrator appointed as a neutral arbitrator; b. corruption by an arbitrator, or c. misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; 3. An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 6 of this act, so as to prejudice substantially the rights of a party to the arbitration proceeding; 4. An arbitrator exceeded the arbitrator’s powers; 5. There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under subsection C of Section 16 of this act not later than the beginning of the arbitration hearing; or 6. The arbitration was conducted without proper notice of the initiation of an arbitration as required in Section 10 of this act so as to prejudice substantially the rights of a party to the arbitration proceeding.

### Oregon

(O.R.S. § 36.705, Vacating an Award) (1) Upon petition to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (a) The award was procured by corruption, fraud or other undue means; (b) There was: (A) Evident partiality by an arbitrator appointed as a neutral arbitrator; (B) Corruption by an arbitrator; or (C) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to ORS 36.665 so as to prejudice substantially the rights of a party to the arbitration proceeding; (d) An arbitrator exceeded the arbitrator's powers; (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising an objection under ORS 36.665(3) not later than the beginning of the arbitration hearing; or (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in ORS 36.635 so as to prejudice substantially the rights of a party to the arbitration proceeding.

### Pennsylvania

(42 Pa.C.S.A. § 7314, Vacating Award by Court) (1) On application of a party, the court shall vacate an award where: (i) the court would vacate the award under section 7341 (relating to common law arbitration) if this subchapter were not applicable; (ii) there was evident partiality by an arbitrator appointed as a neutral or corruption or misconduct in any of the arbitrators prejudicing the rights of any party; (iii) the arbitrators exceeded their powers; (iv) the arbitrators refused to postpone the hearing upon good cause being shown therefor or refused to hear evidence material to the controversy or otherwise conducted the hearing, contrary to the provisions of section 7307 (relating to hearing before arbitrators), as to prejudice substantially the rights of a party; or (v) there was no agreement to arbitrate and the issue of the existence of an agreement to arbitrate was not adversely determined in proceedings under section 7304 (relating to court proceedings to compel or stay arbitration) and the applicant-party raised the issue of the existence of an agreement to arbitrate at the hearing. (2) The fact that the relief awarded by the arbitrators was such that it could not or would not be granted by a court of law or equity is not a ground for vacating or refusing to confirm the award.

### Tennessee

(T. C. A. § 29-5-314, Awards) (a) Upon application made within ninety (90) days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

### Utah

(U.C.A. 1953 § 78-31a-124, Vacating an Award) (1) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if: (a) the award was procured by corruption, fraud, or other undue means; (b) there was: (i) evident partiality by an arbitrator appointed as a neutral arbitrator; (ii) corruption by an arbitrator; or (iii) misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (c) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to Section 78-31a-116, so as to substantially prejudice the rights of a party to the arbitration proceeding; (d) an arbitrator exceeded the arbitrator's authority; (e) there was no agreement to arbitrate, unless
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<th>Location</th>
<th>Text</th>
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<tbody>
<tr>
<td><strong>Vermont</strong></td>
<td>(VT. ST. T. 3 § 1019, Mediation-Arbitration) (2) Notwithstanding any law to the contrary, upon application of a party, a superior court shall vacate an arbitration award based on one of the following: (A) The award was procured by corruption, fraud or other undue means. (B) There was evident partiality or prejudicial misconduct by the arbitrator. (C) The arbitrator exceeded his or her power or rendered an award requiring a person to commit an act or engage in conduct prohibited by law. (D) There is insufficient evidence on the record to support the award.</td>
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<td><strong>Virginia</strong></td>
<td>(Va. Code Ann. § 8.01-581.011, Vacating Award) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where: 1. There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; 2. The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or 3. The award is imperfect in a matter of form, not affecting the merits of the controversy.</td>
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<td><strong>Washington</strong></td>
<td>(West’s RCWA 7.04A.230, Vacating Award) (1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if: (a) The award was procured by corruption, fraud, or other undue means; (b) There was: (i) Evident partiality by an arbitrator appointed as a neutral; (ii) Corruption by an arbitrator; or (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding; (d) An arbitrator exceeded the arbitrator's powers; (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.</td>
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<td><strong>West Virginia</strong></td>
<td>(W. Va. Code, § 55-10-4, Vacating Award) No such award shall be set aside, except for errors apparent on its face, unless it appears to have been procured by corruption or other undue means, or by mistake, or that there was partiality or misbehavior in the arbitrators, or any of them, or that the arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made. But this section shall not be construed to take away the power of courts of equity over awards.</td>
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