

## Archive – Summaries of Tennessee Cases on Arbitration (2008-12)

### 1. Statutory Construction

**Rule 31 Does Not Trump Tennessee Uniform Arbitration Act When Arbitrability Issue Pending.** In Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. v. B. J. Wade et al., 404 S.W. 3d 464 (Tenn. 2013), a law firm sued a former partner and a former paralegal. Both defendants moved to compel arbitration on the basis of arbitration clauses in a Shareholder Agreement (as to the partner) and an unsigned employment agreement (as to both). The firm denied any agreement to arbitrate. The trial court initially limited discovery to the issue of whether the cases were subject to arbitration. But it later ordered the parties to engage in mediation and to disclose “all necessary documents to conduct a meaningful attempt at resolution.” On an extraordinary appeal, the Court held that the trial court erred in not limiting the scope of discovery to the issue of arbitrability, and erred in referring the parties to mediation in an effort to resolve all issues. The Tennessee Uniform Arbitration Act requires that the court summarily determine whether there is an enforceable arbitration clause and limit discovery to that issue.

### 2. Waiver of Jury Trial

**Pre-Dispute Contractual Waiver of Jury Trial Upheld, even though No Enforceable Arbitration Agreement.** In Gregory Poole v. Union Planters Bank, 337 S.W. 3d 771 (Tenn. Ct. App. 2010), a case of first impression, the Court of Appeals upheld enforcement of a pre-dispute contractual waiver of the right to a jury trial where there was no enforceable arbitration agreement. The plaintiff truck driver signed a note and 2 other documents that included a jury trial waiver. In a suit to recover damages incurred due to the bank's failure to timely provide a copy of a certificate of title, the defendant bank moved to compel arbitration and to strike the plaintiff's jury demand. The trial court declined to compel arbitration but granted the motion to strike the

jury demand. Regarding one of the issues on appeal, the Court of Appeals adopted the majority view of state courts that there is no state constitutional or statutory bar to enforcement of pre-dispute jury-waiver provisions. Such pre-dispute provisions are not against public policy, are not inconsistent with Tenn. R. Civ. P. 39.01, need not be raised as a Tenn. R. Civ. P. 8.03 affirmative defense, and may be enforced on the eve of trial. Declining to decide who has the burden of proof, the court further held that the plaintiff's waiver was a knowing waiver, regardless of which party had the burden of proof.

### 3. Rule 31 on Non-Binding Arbitration

**Issues Not Subject to Binding Arbitration.** In Elizabeth Sams Tuetken v. Lance Edward Tuetken, 320 S.W. 3d 262 (Tenn. 2010), the Tennessee Supreme Court addressed the trial court's scope of review of the parties' arbitration award. It first concluded that Tenn. Sup. Ct. R. 31 did not govern the consent order at issue. Rule 31, in contrast, governs non-binding arbitrations where a party may choose to accept the result of the arbitration or choose to reject the result and return to court for a resolution of the dispute. The provision in Paragraph 15 of Appendix B to Rule 31, permitting parties to stipulate “in writing that the award shall be final and binding,” does not alter the substance and intent of Rule 31. Rather, it permits parties, after receiving the result of their non-binding arbitration, to then agree to make the result binding and entered as a judgment of the court. Here, the parties agreed to and entered into binding arbitration governed by the Tennessee Uniform Arbitration Act (“TUAA”). Reaffirming its holding in Pugh's Lawn Landscape Co., Inc v. Jaycon Development Corp., No. W2008-01366-SC-R11-CV, \_\_\_ S.W.3d\_\_\_ (Tenn. 2010), the Court stated that judicial review of an arbitration award is confined to the limited grounds enumerated in the TUAA. Reversing the trial court, the Court held that the provision in the parties' arbitration agreement expanding the trial court's scope of review is invalid, and the invalidity of this provision is a mutual mistake justifying rescission of the parties' agreement to arbitrate. Because the

holding necessitated additional proceedings on remand, it further held that parenting issues may not be submitted to binding arbitration in Tennessee, but parties may submit these issues to non-binding arbitration.

#### **4. Enforcement of Arbitration Clauses**

##### **a. Poorly Drafted Contract and Fraudulent Inducement Considered in Investor/Broker Dispute.**

In Franda Webb, et al. v. First Tennessee Brokerage, Inc., et al., No. E2012-00934-COA-R3-CV (Tenn. Ct. App. April 23, 2013)(Opinion withdrawn and superseded on rehearing by N. E2012-00934-COA-R3-CV (Tenn Ct. App. June 18, 2013) by , the Court affirmed the trial court's order denying the defendants' motion to compel arbitration. Interpretation of the customer agreement, including enforceability of the arbitration clause was governed by state law. Claims of fraudulent inducement were for a court, not an arbitrator, to decide. The arbitration agreement at issue was an unconscionable contract of adhesion that was not enforceable under state law. The investor did not agree to arbitration, given her testimony that she never saw an arbitration agreement when she signed documents for the broker, and the brokerage was never able to locate pages containing a signed arbitration agreement. The investor was fraudulently induced to open the brokerage account and enter into the agreement.

##### **b. Applicable Law: FAA vs. Tennessee Law**

**FAA Governs; Arbitration Clause Ambiguity; Arbitrability of Fraudulent Inducement Claim.** Healthmart USA, LLC et al. v. Directory Assistants, Inc., 2011 WL 1314662, No. M2010-00880-COA-R3-CV (Tenn. Ct. App. April 6, 2011) addresses enforceability of an arbitration provision in a contract and applicability of the Federal Arbitration Act. On the first issue, Healthmart argued that the following language was ambiguous: "If we are unable to come to a

mutual agreement [as to choice of arbitration service, location and choice of law forum], or if one of us refuses to participate in choosing [an arbitrator], the party filing a demand [to arbitrate] will have the right to make the choices unilaterally, as long as the filing party made a good faith effort to come to a mutual agreement [to resolve a dispute under the contract], and the non-choosing/non-participating party expressly consents to and waives any and all objections to the choices made" (emphasis added). Rejecting the trial court's finding, the Court of Appeals determined that the final clause in the quoted language was not ambiguous. Nevertheless, the record was not clear as to whether Directory Assistants, Inc. had made a good faith effort to come to a mutual agreement, as required by the contract. Therefore, the Court remanded the case for a ruling on this condition precedent to arbitration. On the second issue, the Court held that the FAA applied. Unlike the FAA, Tennessee law prohibits arbitration of fraudulent inducement claims. But the parties' contract did not state whether Tennessee law or the FAA governed. The contract "involves commerce" and its arbitration clause "purports to govern 'any dispute arising out of or relating to this contract.'" Under these circumstances, the FAA (and not Tennessee law) governs. Therefore, if the parties reach arbitration, the arbitrator may decide Healthmart's claim of fraudulent inducement.

#### **5. Enforcement of Arbitration Clauses: Procedure - Motions to Compel Arbitration**

**Proper Procedure Not Followed on Motion to Compel Arbitration.** David White v. Empire Express, Inc. and Empire Transportation, Inc., 2011 WL 6182091, No. W2010-02380-COA-R3-CV (Tenn. Ct. App. December 13, 2011) involved a truck lease-purchase agreement. At the end of the lease, the leasing company refused to transfer title to the truck to the truck driver, repossessed and sold the truck. The driver filed suit, alleging breach of contract, conversion, and violation of the Tennessee Consumer Protection Act. The defendants asserted affirmative defenses of set-off

and recoupment, based on the plaintiff's employment agreement. After a bench trial, the trial court held in favor of the plaintiff on all of his claims and awarded damages. Based on an arbitration provision in the employment agreement, it also granted the plaintiff's motion to dismiss and to compel arbitration of the defendants' affirmative defenses of set-off and recoupment. The trial court's order dismissing defenses that it did not allow in the bench trial and compelling arbitration of the affirmative defenses was contrary to the Tennessee Uniform Arbitration Act. Tenn. Code Ann. § 29-5-303(d). The trial court should have stayed the case pending arbitration. Because of the erroneous procedure followed, the trial court failed to resolve all the rights and liabilities of all the parties. Thus, the case is not final and appealable under TRAP 3(a). The Court of Appeals did not address the issues raised on appeal, dismissed the appeal, and remanded with instructions for the trial court to stay the matter pending arbitration, and then conduct proceedings to determine whether and to what extent the plaintiff's damage award is affected by the decision reached in arbitration.

**Failure to Amend Damages Claim in Appeal of General Sessions Case to Circuit Court not Corrected through Motion to Compel Arbitration.** In Sheila Brown v. Rico Roland, 357 S.W.3d 614 (Tenn. 2012), the Court affirmed the Court of Appeals decision in Brown v. Roland, No. M2009-01885-COA-R3-CV, 2010 WL 3732169 (Tenn. Ct. App. Sept. 23, 2010). The Tennessee Supreme Court held that 1) the amount of damages the plaintiff sought to recover, after an appeal from general sessions to circuit court, was limited to the amount sought in the general sessions warrant because the plaintiff failed to file an amendment to increase the amount of damages; and 2) the circuit court did not err in denying the plaintiff's motion to compel arbitration.

#### **6. Enforcement of Arbitration Clauses: Attacks on Contract**

**Fraud in inducement claim to be arbitrated, not decided by court, under arbitration agreement's terms.** In Franke Elliott, et al. v. Icon in the Gulch, LLC, 2010 WL 2025456, No. M2009-01554-COA-R3-CV (Tenn. Ct. App. May 19, 2010) purchasers of pre-construction condominium units sued for rescission of their contracts to purchase the units. The plaintiff developer filed a motion to compel mediation and/or arbitration pursuant to the contracts. Reversing the trial court's denial of the motion and remanding the case, the Court of Appeals held that contract formation issues are not excluded from the agreement to arbitrate provision in the parties' contracts. Tennessee law prohibits arbitration of contract formation issues, including fraud in the inducement allegations, while the Federal Arbitration Act (FAA) permits arbitration of such issues if agreed to in the parties' contract. Here, the contract's choice of law provision stated that Tennessee law governed, but the contract also expressly provided that the FAA applied. Under these circumstances, the contract is not ambiguous: issues of substantive law will be determined by Tennessee law, but contract formation issues will be governed by the FAA. The facts in the case are closer to those in Taylor v. Butler, 142 S.W.3d 277 (Tenn. 2004), rather than Frizzell Construction Co., Inc. v. Gatlinburg, LLC, 9 S.W. 3d 79 (Tenn. 1999) and Hubert v. Turnberry Homes, LLC, No. M2005-00955-COA-R3-CV, 2006 WL 2843449 (Tenn. Ct. App. Oct. 4, 2006).

**Evidentiary Hearing on Fraudulent Inducement Claim.** In Elite Emergency Services, LLC v. Stat Solutions, LLC, 2010 WL 845392, No. M2008-02793-COA-R3-CV (Tenn. Ct. App. Mar. 10, 2010), the Court addressed denial of a second motion to compel arbitration. The parties' contract included an arbitration clause. After terminating the contract, the plaintiff sued and alleged the defendant had fraudulently induced the plaintiff to enter into the contract. The defendant did not appeal its first unsuccessful motion to compel arbitration, which was denied because the parties had not conducted discovery on the plaintiff's fraudulent inducement

claim. As directed by the trial court, the parties conducted discovery on fraudulent inducement. The defendant then filed a second motion to compel arbitration, which was denied without an evidentiary hearing. The Court of Appeals reversed and remanded with two points of interest in its opinion. First, the Court had subject matter jurisdiction. Under the circumstances, the first denial of the motion to compel arbitration was not a final order. The case is distinguishable from *Vest v. Duncan-Williams, Inc.*, No. M2005-00466-COA-R3-CV (Tenn. Ct. App. Aug. 3, 2006) (appellate court lacked subject matter jurisdiction over appeal of second motion to compel arbitration because first denial was final order affirmed on appeal, implicating law of the case doctrine). Second, denial of the second motion to compel arbitration was premature, since the trial court failed to hold the motion in abeyance, in order to conduct an evidentiary hearing on whether the contract containing the arbitration clause was unenforceable. In its opinion, the Court outlines the proper procedure to follow.

**Home Inspection Company Fails to Separately Sign or Initial Arbitration Clause.** In *Abby Wells v. Tennessee Homesafe Inspections, LLC*, 2008 WL 5234724, No. M2008-00224-COA-R3-CV (Tenn. Ct. App. Dec. 15, 2008), a homeowner's suit against a home inspection company, the trial court properly denied the company's motion to compel arbitration because the arbitration clause was not signed or initialed by a company representative as required by TCA 29-5-302(a) ("A written agreement to submit . . . to arbitration . . . is valid . . . provided that for contracts relating to farm property, structures or goods, or to property or structures utilized as a residence of a party, the clause providing for arbitration shall be additionally signed or initialed by the parties."). The Court of Appeals distinguished three cases relied upon by the inspection company, including *Hubert v. Turnbery Homes, LLC*, 2006 WL 2843449 (Tenn. Ct. App. Oct. 4, 2006) (holding that Section 2 of Federal Arbitration Act preempted TCA 29-5-302(a)). The Court stated that there was no evidence of interstate commerce and a

preemption argument, not raised below, was waived.

## **7. Enforcement of Arbitration Clauses: Judicial Economy**

**Judicial Economy Not Valid Reason to Deny Motion to Enforce Arbitration Agreement; *Melz* Distinguished.** In *Victor J. Thomas, M.D., et al., v. Pediatrix Medical Group of Tennessee, P.C.*, 2010 WL 3564424, No. E2009-01836-COA-R3-CV (Tenn. Ct. App. Sept. 14, 2010), the plaintiffs asked the trial court to declare null and void certain restrictive covenants in their employment contracts with the defendant. The trial court denied the defendant's motion to dismiss the action and enforce the arbitration agreement contained in the employment contracts. It ruled that, in the interest of judicial economy, it - not an arbitrator - should decide the issues raised in the declaratory judgment action. On appeal, the Court of Appeals reversed and remanded, directing the court to stay the proceeding and order the parties to arbitrate the issues arising from the employment contracts. The Court distinguished *River Links at Deer Creek, LLC v. Melz*, 108 S.W.3d 855 (Tenn. Ct. App. 2002), appeal den. (Tenn. May 27, 2003). Unlike the unique situation in *Melz*, where only a few of the issues between the parties were subject to arbitration and an arbitrator would have had no guidance on proper interpretation of a recently enacted Tennessee statute, the case here does not involve novel questions of law.

## **8. Enforcement of Arbitration Clauses: Waiver**

**Waiver of Mandatory Arbitration.** In *Wendy Wilson et al. v. Battle Creek Milling & Supply, Inc.*, 2008 WL 5330498, No. M2007-02830-COA-R3-CV (Tenn. Ct. App. Dec. 19, 2008), the plaintiffs sought to domesticate a default judgment awarded in a Virginia Circuit Court for breach of contract. The defendant moved to dismiss and require arbitration. It contended that the Virginia court lacked jurisdiction because the contract contained a mandatory arbitration provision. The Tennessee

trial court properly denied the defendant's motions and domesticated the foreign judgment. The defendant waived any right to arbitration by not demanding it in the Virginia court.

**9. Enforcement of Arbitration Clauses: Nursing Home Admission Contracts with Arbitration Clauses.**

After the Tennessee Supreme Court addressed nursing home arbitration clause issues in the *Owens* case in 2007, appellate courts have decided a number of nursing home contract cases. In summary, a pre-dispute arbitration clause in such contracts is not per se against public policy and does not violate federal laws governing facilities that participate in Medicaid. Depending on the facts and circumstances, however, the contract may be unenforceable.

The Tennessee Supreme Court case, *Owens v. National Health Corp., et al.*, 268 S.W. 3d 876 (Tenn. 2007), addresses several issues. First, applying *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989) to this case, where a nursing home contract specified that the arbitration agreement was governed by the laws of the state where the nursing home was licensed, the Court held that the Tennessee Uniform Arbitration Act applied, not the Federal Arbitration Act. Second, the Court found that the power of attorney at issue, which included the power to "execute on my behalf any waiver, release or other document which may be necessary in order to implement" health care decisions, authorized the attorney-in-fact to sign the arbitration agreement on behalf of the principal, notwithstanding the argument that the waiver of a jury trial and agreement to arbitrate were not "health care" decisions. Third, the Court rejected the plaintiff's argument that the arbitration agreement was unenforceable because a material term (selecting certain arbitration providers) was incapable of performance. The provision was not so material to the contract that it must fail if the arbitrators were available. Also, one of the arbitration providers will arbitrate cases such as this one involving a pre-dispute arbitration

agreement, if ordered to do so by a court. Fourth, the arbitration agreement requiring a nursing home admittee to agree to arbitrate any future disputes with the nursing home is not equivalent to charging an additional fee or other consideration, which would violate federal laws governing facilities that participate in the Medicaid program. Fifth, pre-dispute arbitration agreements in nursing-home contracts do not per se violate public policy. Sixth, given the scant factual record, the Court remanded the case for the trial court to decide whether the arbitration agreement was an unconscionable, and thus unenforceable, adhesion contract. Seventh, discovery on remand should not include discovery on the claim that the nursing home violated a fiduciary duty since no such fiduciary duty exists as to a potential patient prior to execution of the contract.

In *Mary Ann Caudle, Next of Kin and Co-Executor of Estate of Louise K. Fite, Deceased, and on Behalf of Wrongful Death Beneficiaries of Louise K. Fite v. Columbia Operations, LLC d/b/a Life Care Centers of Columbia and Life Care Centers of America, Inc.*, 2012 WL 3674573, No. M2011-02194-COA-R9-CV (Tenn. Ct. App. August 27, 2012), the Court of Appeals reversed and remanded the trial court's grant of a motion to compel arbitration in a nursing home wrongful death case. Pursuant to a durable power of attorney, the decedent's daughter had signed nursing home admission documents, including an agreement to arbitrate disputes with the nursing home. The arbitration clause provided that the arbitrator would be selected from the AAA and AAA rules of procedure would apply. Relying on *Wilson v. Americare Systems, Inc.*, No. M2008-00419-COA-R3-CV, 2009 WL 890870 (Tenn. Ct. App. March 31, 2009), the Court held that the daughter's authority to contract for her mother's "entry into and maintenance" at the nursing home, including the authority to execute the arbitration agreement, was subject to the power of attorney's condition precedent that, in the opinion of her physician, the mother was "incompetent or incapable of action" for herself. Declining to consider a second issue that was not certified for

the interlocutory appeal, the Court stated that, on remand, if the trial court were to find that the mother was incompetent, then it will consider the second issue of whether the arbitration agreement is not enforceable because the AAA no longer takes such cases.

Martha Duke v. Kindred Healthcare Operating, Inc., et al., 2011 WL 864321, No. W2010-01534-COA-R3-CV (Tenn. Ct. App. March 14, 2011) involves an arbitration agreement signed by the patient's sister when the patient was admitted to a nursing home. The sister showed nursing home staff a power of attorney document designating her as the patient's attorney-in-fact. The Court of Appeals affirmed the trial court's finding, by clear and convincing evidence, that the patient was incompetent when he signed the power of attorney and, therefore, the sister lacked authority to sign the arbitration agreement on his behalf.

In Allison J. Person, as Administratrix of the Estate of Effie J. Wooten, Deceased, et al. v. Kindred Healthcare, Inc., d/b/a Primacy Healthcare and Rehabilitation Center, et al. No. M2009-01918-COA-R3-CV (Tenn. Ct. App. May 7, 2010), the administrator for decedent patient's estate sued a nursing home. The trial court denied the nursing home's motion to dismiss or, in the alternative, for summary judgment. The trial court found the decedent was not competent to execute the power of attorney pursuant to which the decedent's daughter had signed an arbitration agreement. The Court of Appeals held that it lacked subject matter jurisdiction to hear this interlocutory appeal. In its motion in the trial court, the defendant had moved to stay "proceedings not relevant to the validity and enforceability of the alternative dispute resolution agreement at issue," but failed to move to compel arbitration pursuant to TCA § 29-5-303. Rejecting the nursing home's suggestion that the Court look to the "substance" of the motion to dismiss, the Court held that the appeal does not fall under the provisions of TCA § 29-5-319 (permitting immediate appeals of orders denying motions to arbitrate).

Judy Davis, as next friend of Eloise Gwinn, an incapacitated person v. Kindred Healthcare Operating, Inc., et al., 2011 WL 1467212, No. W2010-01575-COA-R3-CV (Tenn. Ct. App. April 19, 2011), a nursing home abuse case, involved a power of attorney naming "Thomas L. Davis and Judy L. Davis" as agents of the principal. Only one of the agents signed the nursing home admission paperwork, including an ADR agreement, on behalf of the patient. In response to the defendants' motion to compel arbitration, the plaintiff asserted that the joint nature of the power of attorney prevented enforcement of the ADR agreement. The Court of Appeals held that "unless there is language in the instrument authorizing the agents to act severally, 'and' should be . . . interpreted to create a joint agency relationship." Therefore, "an instrument signed by less than all of the joint agents does not bind the principal unless the action of less than all joint agents is otherwise ratified." Ratification was not an issue in the case. The Court affirmed the trial court's decision denying the motion to compel arbitration,

In Lula McGregor, et al. v. Christian Care Center of Springfield, L.L.C., 2010 WL 1730131, No. M2009-01008-COA-R3-CV (Tenn. Ct. App. April 29, 2010), a patient was in a great deal of pain and under medication when she signed a nursing home admission agreement. The agreement included an arbitration agreement that allowed revocation within 30 days, but the patient never received a copy of the agreement. She fell and broke her ankle and sued the nursing home. The trial court denied the nursing home's motion to compel arbitration, holding that the arbitration agreement was a contract of adhesion and it would be unconscionable to enforce it. On appeal pursuant to TCA § 29-5-319, the Court of Appeals agreed the arbitration agreement was a contract of adhesion and substantively unconscionable. The patient, who was on Medicare and Medicaid, had no real alternative to this nursing home which presented the contract on a "take it or leave it" basis. The contract terms favored the nursing home by giving it a judicial forum of any claims it

might have against the patient, while requiring arbitration of all patient claims.

In Ginger Wise, Individually, and as Next of Kin of Anne Smith, Deceased, v. Heritage Assisted Living d/b/a/ Heritage Home For Seniors, LP, 2009 WL 2877427, No. E2008-02710-COA-RV-CV (Tenn. Ct. App. Sept. 9, 2009), a nursing home filed a motion to compel arbitration in a wrongful death action. Affirming the trial court's denial of the motion, the Court of Appeals found that 1) the holder of a power of attorney (POA) was not authorized to sign a nursing home residency agreement containing an arbitration clause: the decedent had not been found incompetent by a physician, as required by the POA, so the POA did not become effective; 2) the holder of the POA did not have express authority under the POA to sign the agreement. The Court declined to determine whether the arbitration clause was unconscionable.

In Casey Barclay, as Next of Kin of Odis Doyle Barclay, Jr., Deceased, and on behalf of the Wrongful Death Beneficiaries of Odis Doyle Barclay, Jr. v. Kindred Healthcare Operating, Inc., et al., 2009 WL 2615821, No. W2008-02828-COA-R3-CV (Tenn. Ct. App. August 26, 2009), the decedent was competent at the time his nephew signed the optional arbitration agreement. The Court reversed the trial court's decision that decedent's nephew had express oral authority to bind the decedent to the arbitration agreement, and declined to decide whether the arbitration agreement was unconscionable. Regarding the case's procedural posture, the Court noted that the correct procedure in a trial court (if a motion to compel arbitration is granted) is to stay the matter pending arbitration pursuant to TCA § 29-5-303(d), not dismiss it. Dismissal of the case, making the trial court judgment a final judgment under TRAP 3, is an "end run" around the statute. When a trial court decides a dispute is subject to arbitration, the "correct procedure to be followed by the trial court is to stay the matter and permit an interlocutory appeal of its judgment on the gateway issue(s) or make its judgment on . . . [those issues] final pursuant to Tennessee Rules of

Civil Procedure 54.02." After a brief discussion of dicta in *Green Tree Fin. Corp. - Alabama v. Randolph*, 531 U.S. 79, 89 (2000) (if federal trial court had entered stay and not order dismissing case, the order would not be appealable under Federal Arbitration Act), the Court invited the Tennessee Supreme Court and General Assembly to "address the procedural mechanism that best reconciles Tennessee's statutory provisions, the court's role as adjudicator of gateway issues, and the Tennessee Rules of Appellate Procedure."

In Corine Broadnax, Individually and as heir and on behalf of the Estate of Mary Alice Johnson v. Quince Nursing And Rehabilitation Center, LLC, et al., 2009 WL 2425959, No. W2008-02130-COA-RC-CV (Tenn. Ct. App. Aug. 10, 2009), the parties to a nursing home admission agreement disputed enforceability of the agreement's arbitration provision. The Court reversed the trial court's grant of summary judgment and remanded for entry of an order compelling arbitration. The Court reasoned that: 1) the trial court erred in applying a subjective "meeting of the minds" standard, rather than the objective "reasonable person" test for mutual assent to the contract; 2) where the arbitration agreement is not a contract of adhesion (here, it was not a precondition to nursing home admission and could be rescinded within 30 days), the nursing home is not required to prove that the parties bargained over its terms, distinguishing this case on its facts from *Howell v. NHC Healthcare-Fort Sanders, Inc.*, 109 S.W.3d 731 (Tenn. Ct. App. 2003); 3) accordingly, the arbitration agreement is enforceable, even if the plaintiff did not read it and even if the nursing home did not explain its terms.

In Deborah Mitchell, as Executrix of Gaynell Metts, Deceased v. Kindred Healthcare Operating, Inc., et al., 349 S.W. 3d 492 (Tenn. Ct. App. 2009), the plaintiff signed an arbitration agreement when her mother was admitted to the nursing home, after the plaintiff told nursing home employees that she had a power of attorney. When the nursing home later sought to enforce the arbitration agreement, the plaintiff claimed she was not actually authorized to act as her mother's

attorney-in-fact. On appeal, the Court affirmed the trial court's refusal to enforce the arbitration agreement because the daughter lacked authority to sign it. The Court rejected the nursing home claims that: 1) the daughter was authorized to sign the arbitration agreement due to a document stating the mother "would like" to make the daughter her power of attorney; or 2) even if the document was ineffective, the daughter had actual authority. The Court declined to consider a new theory of implied actual authority not raised at the trial court level.

In Rheaetta F. Wilson, et al. v. Americare Systems, Inc. et al., 2009 WL 890870, No. M2008-00419-COA-R3-CV (Tenn. Ct. App. Mar. 31, 2009) (Reversed at 397 S.W. 3d 552 (Tenn. 2013)), a nursing home filed a motion to arbitrate more than 3 years after plaintiff had filed suit. The Court of Appeals affirmed the trial court's denial of the motion because the nursing home failed to prove the arbitration agreement was enforceable: the nursing home resident was not incompetent at the time of admission; the resident did not designate anyone as a surrogate to make health care decisions; and no designated physician made any determination of incapacity. The Court also rejected the nursing home's argument that the daughter had apparent authority. But the Court vacated the trial court's additional ruling that the nursing home had waived any right to arbitration, given the incomplete record on that issue.

In Estate of Elizabeth Mooring v. Kindred Nursing Centers, et al. 2009 WL 130184, No. W2007-02875-COA-R3-CV (Tenn. Ct. App. January 20, 2009) the decedent's husband signed an arbitration agreement when the decedent was admitted to a nursing home. The Court of Appeals vacated the trial court's decision denying the nursing home's motion to compel arbitration and remanded for further proceedings. The arbitration agreement was not a contract of adhesion: it was a separate document; it was optional; and it allowed the patient to revoke the contract within 30 days. Therefore, the nursing home was not required to prove that the parties actually bargained over the terms or prove that the

terms were reasonable. The lower court did not make any findings on the nursing home's claims that the decedent's husband had express or implied actual authority or that the court should apply the doctrine of ratification.

In NHC Healthcare Inc. v. Betty Fisher and Aisha Fisher, as Power of Attorney for Betty Fisher, 2008 WL 5424012, No. M2007-02459-COA-R3-CV (Tenn. Ct. App. Dec. 30, 2008), the Court of Appeals affirmed a trial court's confirmation of an arbitration award against respondents, a mother and daughter. The daughter had signed a nursing home admission and arbitration agreements on behalf of her mother as the mother's power of attorney. After the mother incurred over \$50,000 in charges, the nursing home filed an arbitration action against the mother and her daughter, as power of attorney, seeking an award for the amount owed. An arbitration award in favor of the nursing home was confirmed by the trial court. On appeal, the daughter challenged the trial court's decision, claiming it held her individually liable for the amount due on her mother's debt. The Court of Appeals affirmed the trial court's confirmation of the arbitration award because the respondents failed to challenge the award within 90 days, as required under TCA 29-5-313 (unless corruption, fraud or other undue means are proven). The Court did note, however, that neither the final arbitration decision nor the trial court's order held the daughter liable in her individual capacity.

In Dwight Barbee, as Administrator of the Estate of Faye Glen v. Kindred Healthcare Operating, Inc. et al., 2008 WL 4615858, No. W2007-00517-COA-R3-CV (Tenn. Ct. App. Oct. 20, 2008), the decedent's son signed nursing home admission documents which included an arbitration agreement. In this suit alleging neglect and abuse, the nursing home moved to dismiss and compel arbitration. The trial court granted the motion, finding that the agreement was not unconscionable and that the son had apparent authority to sign the agreement in view of his mother's incompetence and exigent circumstances. The Court of appeals reversed, holding that the

son was not his mother's agent and did not have apparent authority to sign on her behalf. Agency status “stems from the actions of the principal” whether alleged to establish actual or apparent authority. Also, under the Tennessee Health Care Decisions Act, the son was not his mother's surrogate, and did not have authority to bind her to the arbitration agreement. At the time of the nursing home admission, no physician had made the required determination that the decedent lacked the capacity to make health care decisions.

In Lovie Mitchell, as Executrix of the Estate of Mack Mitchell, Deceased v. Kindred Healthcare Operating Inc. et al, 349 S.W. 3d 492 (Tenn. Ct. App. 2008), the Court of Appeals reversed the trial court's denial of the nursing home's motion to compel arbitration. The patient's wife had authority to sign the agreement under the terms of a power of attorney. The contract, identical to the one addressed in Reagan v. Kindred Healthcare Operating Inc., 2007 WL 4523092 (Tenn. Ct. App. Dec. 20, 2007) is not unconscionable. The wife failed to prove that she lacked the mental capacity to sign the arbitration.

In Cheryl Mclemore Hearn, et al. v. Quince Nursing and Rehabilitation Center, LLC, et al, 2008 WL 4614265, No. W2007-02563-COA-R3-CV (Tenn. Ct. App. Oct. 16, 2008), the trial court found that an arbitration agreement was unenforceable because the nursing home's agent incorrectly told the patient's daughter that one could still sue in court if she signed the agreement. Not reaching the merits of the trial court's decision on that issue, the Court of Appeals affirmed because the patient's daughter did not have apparent authority to sign the agreement on her father's behalf. The agreement was signed before passage of the Tennessee Health Care Decisions Act, so the Act does not apply.

In Merry Leshane, as Next of Kin of Winnie Brumley, Deceased v. Quince Nursing and Rehabilitation Center, LLC, 2008 WL 4613585, No. W2007-01484-COA-R3-CV (Tenn. Ct. App. Oct. 14, 2008), the trial court denied a motion to compel arbitration. The Court of Appeals vacated

and remanded for further proceedings on the issue of whether the decedent's daughter had authority to sign an arbitration agreement with the nursing home.

In Virginia L Ricketts et al. v. Christian Care Center of Cheatham County, Inc. et al., 2008 WL 3833660, No. M2007-02036-COA-R9-CV (Tenn. Ct. App. Aug. 15, 2008), the trial court upheld enforceability of an arbitration agreement in a nursing home admission contract. The Court of Appeals reversed, finding that the person who signed the admission agreement did not have authority to act for the decedent. Rejecting the nursing home's arguments on appeal, the Court held that: 1) the Tennessee Health Care Decisions Act does not operate retroactively; 2) the decedent was not a third party beneficiary of the contract because there was no valid contract, finding certain caselaw from other jurisdictions unpersuasive.

In Nina McKey, Administratrix of the Estate of Ruby Irene Brewer, Deceased v. National Healthcare Corp et al., 2008 WL 3833714, No. M2007-02341-COA-R3-CV (Tenn. Ct. App. Aug. 15, 2008), the Court of appeals refused to enforce an arbitration agreement. The Court rejected the defendants' claim that they had complied with the Tennessee Healthcare Decisions Act, TCA 68-11-1801, et seq. The Act requires that: 1) a designated physician make a prior determination that the patient lacked capacity to sign the contract; 2) no agent or guardian has been appointed or is reasonably available, and 3) the supervising health care provider identifies a patient's surrogate.

In Matthew Thornton, et al. v. Allenbrooke Nursing and Rehabilitation Center, LLC, et al., 2008 WL 2687697, No. W2007-00950-COA-R3-CV (Tenn. Ct. App. July 3, 2008), the decedent's daughter had signed all the paperwork for the decedent's nursing home admission, including an arbitration agreement, as a “designated representative.” The trial court properly denied the nursing home's motion to stay the case and compel arbitration because the daughter did not

have authority to waive decedent's constitutional right to a jury trial. The nursing home failed to determine whether the decedent was competent to sign the arbitration agreement. There was no actual or apparent agency relationship between the decedent and the daughter. The decedent did not ratify the contract through her inaction, since ratification would require that a party acquiesce after full knowledge of the material facts. Although the decedent received the benefits of healthcare and residence at the nursing home, this did not constitute mutual assent to the terms of the contract.

In Bill Heath, as Administrator of the Estate of Hazel Christine Heath, Deceased, and on behalf of the Wrongful Death Beneficiaries of Hazel Christine Heath v. National Health Corporation, et al. 2008 WL 2648926, No. M2008-00960-COA-R9-CV (Tenn. Ct. App. July 1, 2008), the decedent's representative challenged the enforceability of an arbitration agreement allegedly signed by the decedent upon her admission to the defendants' nursing facility. Plaintiff alleged unconscionability and disputed the authenticity of the decedent's signature on the contract. After limiting discovery to the issue of the decedent's competence, the trial court found the decedent had signed the contract and was competent. The Court of Appeals vacated the trial court's order and remanded the case for additional discovery and an evidentiary hearing on the validity and enforceability of the arbitration agreement.

In Bridgett Hill, et al. v. NHC Healthcare/Nashville, LLC, et al., 2008 WL 1901198, No. M2005-01818-COA-R3-CV (Tenn. Ct. App. April 30, 2008), the nursing home filed a motion to compel arbitration, relying on an agreement to arbitrate in the admissions agreement signed by the decedent. Affirming the trial court, the Court of Appeals held that the arbitration clause was an unconscionable adhesion contract and unenforceable under the facts and circumstances of that case, distinguishing the Philpot and Reagan cases. Among other things, the Court relied on the trial court's finding that, under the contract, the decedent's family would

have experienced prohibitive up-front costs of arbitration, perhaps reaching \$18,000, that unreasonably favored the nursing home.

In Janie Cabany v. Mayfield Rehabilitation and Special Care Center et al., 2007 WL 3445550, No. M2006-00594-COA-R3-CV (Tenn. Ct. App. November 15, 2007) the trial court declined to compel arbitration, concluding that the durable power of attorney for health care at issue applied only to medical decisions and that the decision to waive the right to a jury trial was a legal, not a medical, decision. Following the Owens case, the Court of Appeals held that the trial court erred in interpreting the power of attorney too narrowly, remanding the case on the issue of whether the patient's spouse was authorized to sign the admission contract. The durable power of attorney allowed the spouse to act for the patient only when the patient was not able make his own medical decisions.

Dorothy Necessary v. Life Care Centers of America, Inc. d/b/a Life Care Center of Jefferson City, 2007 WL 3446636, No. E2006-00453-COA-R3-CV (Tenn. Ct. App. Nov. 16, 2007) involved validity of an arbitration agreement signed by the plaintiff while signing documents on her husband's behalf to have him admitted to a nursing facility. Although the husband had not appointed her attorney-in-fact in a durable power of attorney, he had given oral express authority for her to sign all necessary admission paperwork. Citing Owens v. National Health Corp. as dispositive, despite the different facts, the Court of Appeals held that the arbitration agreement was enforceable.

In Gary Philpot v. Tennessee Health Management, Inc., et al., 279 S.W.3d 573 (Tenn. Ct. App. Dec. 12, 2007), the decedent's son signed an arbitration agreement on behalf of his mother. Under the arbitration agreement, both parties waived jury trials and agreed to arbitration of all claims, except small claims court claims. The trial court ruled the arbitration agreement was an unenforceable contract of adhesion. The Court of Appeals held that the case was governed by the

Tennessee Uniform Arbitration Act and that pre-dispute arbitration agreements in nursing home contracts are not per se invalid on public policy grounds, following the Owens case. As for enforceability of the contract at issue, the court noted that any urgency in getting the plaintiff's mother admitted in the nursing home was due primarily to the plaintiff wanting to attend to the matter during his lunch break, the claim that the arbitration agreement was not explained by nursing home staff was contradicted by an affidavit filed by the nursing home, and the arbitration provision was not hidden in the contract. Rejecting the trial court's conclusion of lack of mutuality, the Court found no legal or factual basis for the plaintiff's argument that the practical effect of the contract was to put all plaintiff claims in arbitration because they would always be for dollar amounts larger than General Session Court limits, while all nursing home claims would be expected to be within the General Sessions Court's jurisdictional limits. The Court further held that the record was not sufficient to support the trial court's finding that the arbitration procedure specified in the agreement - the party bringing a claim must initially advance all arbitration fees and costs - would be cost prohibitive. The only evidence the plaintiff presented on this point, the AAA fee schedule, was not relevant because the arbitration agreement did not require using an AAA arbitrator and the AAA will not honor pre-dispute arbitration agreements in the context of a medical services contract. Finally, the Court found that the 10 day revocation clause of the arbitration agreement was indicative of the reasonableness of the agreement, citing *Buraczynski v. Eyring*, 919 S.W. 2d 314, 320-321 (Tenn. 1996) (involving arbitration agreement between a physician and patient).

In a lengthy opinion cataloging cases on arbitration agreements executed upon admission to nursing homes, the Court in *Ira Lynn Reagan, as conservator of the property and person of Hazel Rayborn, an incapacitated person v. Kindred Healthcare Operating, Inc., et al.* (Tenn. Ct. App. Dec. 20, 2007) reversed a trial court decision denying a motion to compel arbitration. The mentally competent nursing

home resident executed the arbitration agreement after her son, who had signed other admission documents with his mother's oral permission, left the nursing home. Despite the son's numerous requests, the nursing home did not provide to the son copies of the documents signed by the resident. The plaintiff argued that: 1) the arbitration agreement was incapable of performance for failure of an essential term; 2) the nursing home breached fiduciary duties it owed to the resident by obtaining her signature on the agreement; 3) the agreement was an unconscionable contract of adhesion; and 4) the resident was unable knowingly to agree to arbitrate disputes and waive her right to a jury trial. Without holding an evidentiary hearing or making any findings of fact or conclusions of law, the trial court dismissed the motion. The Court of Appeals rejected the impossibility of performance and breach of fiduciary duty arguments. Certain facts presented on the alleged procedural unconscionability were outweighed by other facts in the case. In any event, the terms of the contract did not shock the conscience.

In *Eva Hendrix, et al. v. Life Care Centers Of America, Inc., et al.*, 2007 WL 4523876, No. E2006-02288-COA-R3-CV (Tenn. Ct. App. Dec. 21, 2007), plaintiff daughter of a deceased nursing home patient successfully resisted the nursing home's demand for arbitration despite an arbitration clause signed by the plaintiff when her mother was admitted to the nursing home. The Plaintiff was not authorized to act as her mother's attorney-in-fact at that time because her mother was able to make her own medical decisions. There was no actual or apparent agency relationship between the plaintiff and her mother, even though the plaintiff had treated the power of attorney document as though it was effective.

#### 10. Selection of Arbitrator

**Court Rejects Challenge to Selection of Arbitrator.** In *Pediatrix Medical Group of Tennessee, P.C., v. Victor J. Thomas, M.D., et al.*, 2012 WL 5293044, No. E2011-02421-COA-R3-CV (Tenn. Ct. App. October 29, 2012), an

employment contract dispute, the parties had been ordered to arbitrate. The parties' contract provided for selection of one arbitrator by the employer, one by the employee doctors, and one selected by the other two arbitrators. Another provision stated that the arbitration proceedings "shall be conducted in accordance with the American Health Lawyer's Association [AHLA] Dispute Resolution Service, Rules of Procedure for Arbitration." The doctors challenged the employer's selected arbitrator on two grounds: 1) the selection process was limited to the default process in the AHLA Rules; 2) an unsupported allegation that the employer's arbitrator had previously served as an arbitrator in a matter where the employer or a related party had been successful. Rejecting the doctors' claims on appeal, the Court affirmed the trial judge's ruling that 1) the employer's selection was appropriate because that the AHLA default rule for arbitrator selection did not apply where the parties' contract spelled out a selection process; and 2) the trial court did not have subject matter jurisdiction (at this time) to appoint one or more arbitrators pursuant to the Tennessee Uniform Arbitration Act, Tenn. Code Ann. § 29-5-304, because the agreed selection method had not "failed."

#### **11. Scope of Arbitration Clause: Arbitrability**

**Arbitrability of Fraudulent Inducement Claim.** Healthmart USA, LLC et al. v. Directory Assistants, Inc., 2011 WL 1314662, No. M2010-00880-COA-R3-CV (Tenn. Ct. App. April 6, 2011) addresses enforceability of an arbitration provision in a contract and applicability of the Federal Arbitration Act. On the first issue, Healthmart argued that the following language was ambiguous: "If we are unable to come to a mutual agreement [as to choice of arbitration service, location and choice of law forum], or if one of us refuses to participate in choosing [an arbitrator], the party filing a demand [to arbitrate] will have the right to make the choices unilaterally, as long as the filing party made a good faith effort to come to a mutual agreement [to resolve a dispute under the contract], and the non-

choosing/non-participating party expressly consents to and waives any and all objections to the choices made" (emphasis added). Rejecting the trial court's finding, the Court of Appeals determined that the final clause in the quoted language was not ambiguous. Nevertheless, the record was not clear as to whether Directory Assistants, Inc. had made a good faith effort to come to a mutual agreement, as required by the contract. Therefore, the Court remanded the case for a ruling on this condition precedent to arbitration. On the second issue, the Court held that the FAA applied. Unlike the FAA, Tennessee law prohibits arbitration of fraudulent inducement claims. But the parties' contract did not state whether Tennessee law or the FAA governed. The contract "involves commerce" and its arbitration clause "purports to govern 'any dispute arising out of or relating to this contract.'" Under these circumstances, the FAA (and not Tennessee law) governs. Therefore, if the parties reach arbitration, the arbitrator may decide Healthmart's claim of fraudulent inducement.

#### **12. Scope of Arbitration Clause: Preemption**

**Two Related Cases on Scope of Arbitration Clause: Claims not Preempted by Federal Law or Barred Due to Prior Arbitration in Crop Insurance Case.** In Plants, Inc. v. Fireman's Fund Insurance Company et al., No. M2011-02063-COA-R3-CV (Tenn. Ct. App. August 13, 2012), the Court addressed the scope of a binding arbitration clause in a federally-reinsured multiple peril crop insurance policy and the scope of federal preemption of state common law claims. Plants, Inc. had catastrophic loss of nursery stock, primarily trees and shrubs, due to a tornado. The adjuster determined, due to "under-reporting of inventory," that Plants, Inc. was entitled to recover only \$195,225 on a claim in excess of \$1 million. Plants, Inc. demanded arbitration where the arbitrator determined that Plants, Inc. was due no additional payment. Plants, Inc. then filed this action asserting common law claims against the insurer, its adjustment firm, and the independent insurance agency that solicited the policy, for

breach of contract, negligence, breach of the duty of care, negligent misrepresentation, and statutory bad faith. The trial court granted summary judgment with regard to all claims against the insurer and its adjustment firm, who had been parties to the arbitration, on collateral estoppel and res judicata grounds because the issues were decided at arbitration and Plant, Inc.'s only remedy was judicial review of the arbitration decision. On appeal, the Court held that Plant, Inc.'s state law claims for breach of contract, breach of duty of care, and statutory bad faith were preempted by federal law because they "pertain to actions or inactions 'required or authorized' under the FCIC [Federal Crop Insurance Corporation]." The claims for negligence and negligent misrepresentation, on the other hand, were not preempted by federal law and not barred by collateral estoppel or res judicata: the arbitrator "only considered the state law claims in the context of reforming the insurance policy" and did not consider the merits of the negligence or negligent misrepresentation claims "except to evaluate them in the context of whether [one of the parties] failed to comply with FCIC procedures."

In Plants, Inc. v. Fireman's Fund Insurance Company et al., 2012 WL 3326295, No. M2011-02274-COA-R3-CV (Tenn. Ct. App. August 13, 2012), the second appeal among the same parties, the Court again considered the scope of a binding arbitration clause in a federally-reinsured multiple peril crop insurance policy and the scope of federal preemption of common law claims. In this case, the insured, Plants, Inc., suffered a catastrophic loss due to a severe freeze in 2007. The adjuster determined there was "under-reporting of inventory," so the insured was only entitled to recover \$115,822. Plants, Inc. initiated arbitration pursuant to the insurance policy, but then withdrew from arbitration. Instead, it filed suit, asserting common law claims against the insurer, its adjustment firm, and the independent insurance agency that solicited the policy, for negligent misrepresentation, breach of duty of care, negligence, breach of contract, and statutory bad faith. The trial court granted summary

judgment on the claims against the insurer and its adjustment because the policy mandated arbitration. The Court of Appeals determined the breach of contract, breach of duty of care, and statutory bad faith claims were preempted by federal law that requires arbitration and judicial review of the arbitration as the exclusive remedy for such claims, in addition to permitted mediation. The negligence and negligent misrepresentation claims, on the other hand, were not preempted and did not fall within the scope of the arbitration clause.

### 13. Malpractice

#### **Legal Malpractice Claim Regarding Representation in Securities Arbitration.**

Joseph Barna v. Preston Law Group, P.C. et al., 2012 WL 1965615, No. M2011-02016-COA-R3-CV (Tenn. Ct. App. May 31, 2012) involved a malpractice claim against an investor's attorney. The investor had filed a claim against his stockbroker that was dismissed in a NASD arbitration. The investor then sued his former attorney for legal malpractice. The Court affirmed summary judgment in favor of the attorney because the defendants negated an essential element of the plaintiff's claim. In an earlier appeal involving the same parties, the Court had reversed summary judgment because the attorney had submitted insufficient conclusory opinions in an affidavit. In this second appeal, the record now included the affidavit of a Nashville attorney, who was an expert in securities litigation, stating that the arbitration case was not winnable by any attorney. The affidavit of the plaintiff's expert was insufficient to create a disputed issue of fact.

### 14. Teacher Grievance Arbitrations

**Teacher Grievance Arbitrations.** The Tennessee Supreme Court and the Court of Appeals have addressed arbitration of teacher grievances.

In Lawrence County Educ. Ass'n. v. Lawrence County Bd. of Educ., 244 S.W.3d 302 (Tenn. 2007), a Lawrence County tenured teacher and the

Lawrence County Education Association primarily sought reinstatement of the teacher's additional role as a high school coach. The court held, among other things, that although the collective bargaining agreement at issue had an arbitration clause that teachers could invoke with regard to transfers, the teacher - in his capacity as coach - was not entitled to an arbitration hearing under the agreement, with respect to his transfer from coaching. The court noted that an arbitrator's decision cannot be in contravention of statutes and in this case the arbitrator should not have interceded with respect to the decision of the director of schools regarding the coaching position. Under the unique facts of this case, however, where the board of education adopted the arbitrator's recommendations at a board meeting, the board thereby established a policy granting contract rights to the teacher which he did not otherwise possess under the collective bargaining agreement.

In Metropolitan Nashville Education Association, et al v. The Metropolitan Board of Public Education, 2009 WL 837884, No. M2008-00405-COA-RM-CV (Tenn. Ct. App. Mar. 30, 2009), the Tennessee Supreme Court had remanded the case to the Court of Appeals for reconsideration in light of Lawrence Co. Education Assn. v. Lawrence Co. Bd. of Education, 244 S.W.3d 302 (Tenn. 2007). Rejecting the teacher and MNEA's attempts to distinguish Lawrence Co., the Court held that, when the arbitrator resolved a dispute over the teacher losing his coaching position, the arbitrator exceeded his authority in this dispute between a math teacher and a board of education.

In Wilson County Board of Education v. Wilson County Education Association and Steve Johnson, 2010 WL 2612691, No. M2005-02719-COA-R3-CV (Tenn. Ct. App. June 30, 2010), and a companion case, Wilson County Board of Education v. Wilson County Education Association and Bill Repsher, No. M2005-02720-COA-R3-CV (Tenn. Ct. App. July 7, 2010), the Court of Appeals affirmed the trial court's decision, but on alternative grounds. The trial court held that a local school board was not

required to arbitrate, as a last step in a grievance procedure with an assistant principal who was transferred to a teaching position, because "assistant principals" were statutorily the same as "principals" under Tenn. Code Ann. § 49-2-303. On appeal, the Court found that the parties' agreement regarding arbitration contained inconsistent terms. Step 4 of the agreement provided that " [i]f dissatisfied with the disposition of the grievance at Step 3 . . . the Association may submit the grievance to either (1) panel binding arbitration or (2) regular binding arbitration." Johnson at 8. But both types of "binding arbitration" were "subject to provisions stating the panel or arbitrator 'may recommend'" certain remedies. *Id.* There was no meeting of minds on the procedure to use as the final step of the grievance procedure. No enforceable agreement to arbitrate exists.

In Franklin County Board of Education v Lisa Crabtree, et al., 337 S.W. 3d 808 (Tenn. Ct. App. 2010), a teacher who was also a coach was removed from her coaching position. The Court of Appeals affirmed the trial court's decision that the teacher/coach's grievance against the county Board of Education was not subject to arbitration under the collective bargaining agreement between the Board and the Franklin County Education Association. It also affirmed the trial court's dismissal of the teacher's counterclaim under Tenn. Code Ann. § 49-5-510 that the transfer from her coaching position was arbitrary and capricious.

In Cannon County Board of Education v. Goldy Wade and Cannon County Education Association, 2008 WL 3069466, No. M2006-02001-COA-R3-CV (Tenn. Ct. App. July 31, 2008), an arbitrability issue arose in the context of the Education Professional Negotiation Act (EPNA), TCA 49-5-601 et seq., and a local school board's non-renewal of its contract with a probationary teacher. The Court of Appeals held that the locally negotiated agreement could not be interpreted to delegate to an arbitrator the decision of whether to renew a probationary teacher's contract because state statutes and other

legal authority, including *Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ.*, 244 S.W.3d 302 (Tenn. 2007) reserve that decision to local school officials. Although the EPNA authorized inclusion of arbitration clauses in a collective bargaining agreement between a school board and a professional employees' organization, it also provided that the Tennessee Arbitration Act did not govern. Therefore, neither the Tennessee Arbitration Act's statutory policy favoring arbitration, nor the same policy in the Federal Arbitration Act, apply here. Unlike private parties who may agree to any legal method for dispute resolution in a contract, the school board is limited by statute.

### 15. Vacating Arbitration Award: Grounds

**Claims that Arbitrator Exceeded Scope of Authority.** In *Pierre Pons, et al. v. Barry Harrison d/b/a B. Harrison Housewright*, 2008 WL 2695665, No. M2007-01909-COA-R3-CV (Tenn. Ct. App. July 9, 2008), defendant homebuilder left plaintiff homeowners' job site before completing construction of their residence. The homebuilder appealed the chancery court's confirmation of an adverse arbitration award, arguing that the arbitrator exceeded his authority by refusing to enforce a provision of the contract that would have time barred the homeowners' suit. The limitation provision applied to suits for defective improvements to real estate. The Court of Appeals, recognizing the severe limits of judicial review of arbitration awards, found that this was a breach of contract action due to partial performance, not defective performance; therefore, the contractual limitation period did not apply.

**Ex Parte Communication with Arbitrator per Agreement; Award not Vacated.** In *Herbal Integrity, LLC, et al. v. Scott Huntley, Jr., et al.*, 2012 WL 113094, No. M2011-00810-COA-R3-CV (Tenn. Ct. App. January 11, 2012), the parties agreed to submit valuation of the defendants' membership in Herbal Integrity LLC to binding arbitration. An agreed order provided that "All parties may supply the Arbitrator with whatever

documents or information that they deem relevant to the process. . . . [Subject to deadlines], the arbitrator shall have the discretion to determine the documents and information that the parties may be required or permitted to produce, as well as how, when, and where such documents and information will be produced. Each party shall serve counsel for opposing parties with copies of any materials that are submitted to the arbitrator." An engagement letter with the arbitrator provided that the arbitrator would provide copies of information provided to him "upon request." The defendants moved to vacate the arbitrator's award under T.C.A. § 29-5-313(a) on multiple grounds. On appeal, the defendants asserted that the arbitrator exceeded his authority because certain documents were not served on them by opposing counsel and they were not given an opportunity to respond to documents and information provided ex parte to the arbitrator. Given the provisions of the engagement letter, the Court of Appeals agreed with the trial court's determination that the arbitrator was not responsible to provide copies of the evidence absent a request from the defendants. The defendants did not dispute that they received emails advising them that opposing counsel was providing documents to the arbitrator. They never demanded copies from the arbitrator or opposing counsel.

### 16. Vacating Arbitration Award: Procedure

**Issues of First Impression in Arbitration Case.** *Morgan Keegan & Company Inc. v. Smythe*, W2010-01339-COA-R3-CV (Tenn. Ct. App. November 14, 2011)(Reversed 401 S.W. 3d 595(Tenn. Ct. App. 2013)) involves a trial court order vacating an arbitration award. The parties arbitrated a dispute in which the investors claimed the investment company mismanaged their funds. The investors received a substantial arbitration award. The investment company petitioned the trial court to vacate the arbitration award, alleging bias of two members of the arbitration panel. The investor did not file a motion to confirm the award. After a hearing, the trial court vacated the arbitration award and remanded the case for a

rehearing before another panel of arbitrators. The Court of Appeals dismissed for lack of appellate jurisdiction. Under the circumstances of the case, the trial court order was not an order denying confirmation of an arbitration award under Tenn. Code Ann. § 29-5-319(a)(3). Tenn. Code Ann. § 29-5-319(a)(5) should be interpreted as in *Crack Team USA, Inc. v. American Arbitration Association*, 128 S.W.3d 580 (Mo. Ct. App. 2004), reflecting the majority view of courts on this issue. “Without directing a hearing” in § 29-5-319(a)(5) modifies “[a]n order vacating an award” in the statute. So the trial court’s order is not included in the statute’s list of appealable orders. With regard to another issue of first impression in Tennessee, the Court followed the strong majority of courts holding that an order vacating an arbitration award and remanding for a rehearing is appealable under the Federal Arbitration Act. With respect to the choice of law issue in the case, the Court again followed the majority view, finding that the Tennessee Uniform Arbitration Act’s provision on appealability is a procedural provision applicable to arbitration cases in state courts and it not preempted by the FAA. Lastly, the Court declined to exercise its discretion to permit the appeal under TRAP 2. The Court dismissed the case for lack of subject matter jurisdiction.

**Time Limits: Attack on Arbitration Award Untimely and Not Supported by Facts.** In *MBNA America Bank, N.A. v. Deborah L. Akers*, 2010 WL 175103, No. M2009-00821-COA-R3-CV (Tenn. Ct. App. Jan. 19, 2010), MBNA sued under Tenn. Code Ann. § 29-5-101, et seq., to enforce an arbitration award on a credit card debt. The circuit court confirmed the general sessions court’s judgment in favor of MBNA. The Court of Appeals affirmed the circuit court’s finding that the defendant failed to apply to vacate the arbitration award within 90 days after receipt of notice of the award, as required under Tenn. Code Ann. § 29-5-313(b). The pro se defendant’s conclusory allegation that the National Arbitration Forum was biased, based on information found in Wikipedia, was not supported by facts.

**Time Limits: Untimely Attack of Arbitration Award to Bank.** In *MBNA America Bank, N.A. v. Charles Hendricks*, 2008 WL 440492, No. M2007-00583-COA-R3-CV (Tenn. Ct. App. February 14, 2008), the bank sued to enforce an arbitration award for a debt owed by a former credit card holder. The Court of Appeals affirmed the summary judgment against the pro se debtor, who did not timely apply to vacate or object to the arbitration award. Moreover, a trial court’s ability to correct an arbitration award is severely limited under the Uniform Arbitration Act, TCA §29-5-313(a) and 29-5-314(a).

### 17. Appeals: Trial Court Orders on Motions to Compel Arbitration

**Subject Matter Jurisdiction: Court of Appeals Has Jurisdiction over Appeal of Order Denying Second Motion to Compel Arbitration & on Remand Requires Evidentiary Hearing on Fraudulent Inducement Claim.** In *Elite Emergency Services, LLC v. Stat Solutions, LLC*, 2010 WL 845392, No. M2008-02793-COA-R3-CV (Tenn. Ct. App. Mar. 10, 2010), the Court addressed denial of a second motion to compel arbitration. The parties’ contract included an arbitration clause. After terminating the contract, the plaintiff sued and alleged the defendant had fraudulently induced the plaintiff to enter into the contract. The defendant did not appeal its first unsuccessful motion to compel arbitration, which was denied because the parties had not conducted discovery on the plaintiff’s fraudulent inducement claim. As directed by the trial court, the parties conducted discovery on fraudulent inducement. The defendant then filed a second motion to compel arbitration, which was denied without an evidentiary hearing. The Court of Appeals reversed and remanded with two points of interest in its opinion. First, the Court had subject matter jurisdiction. Under the circumstances, the first denial of the motion to compel arbitration was not a final order. The case is distinguishable from *Vest v. Duncan-Williams, Inc.*, No. M2005-00466-COA-R3-CV (Tenn. Ct. App. Aug. 3, 2006) (appellate court lacked subject matter jurisdiction over

appeal of second motion to compel arbitration because first denial was final order affirmed on appeal, implicating law of the case doctrine). Second, denial of the second motion to compel arbitration was premature, since the trial court failed to hold the motion in abeyance, in order to conduct an evidentiary hearing on whether the contract containing the arbitration clause was unenforceable. In its opinion, the Court outlines the proper procedure to follow.

#### **18. Appeals: Appellate Jurisdiction under Tennessee Uniform Arbitration Act.**

In a case of first impression in Tennessee, Morgan Keegan & Company, Inc. v. William Hamilton Smythe, III, Individually; William H. Smythe, IV, Trust U/A/Dtd 12/29/87, William H. Smythe, Iii, Trustee; And Smythe Children's Trust #2 fbo Katherine S. Thinner U/A/Dtd 12/29/87, No. W2010-01339-COA-R3-CV (Tenn. Ct. App. March 24, 2011), the parties had arbitrated a dispute where the investors received a substantial award on a claim that the investment company mismanaged their funds. The investment company petitioned the trial court to vacate the award, alleging that two of the arbitrators were biased. Holding in favor of the investment company, the trial court vacated the arbitration award and remanded the matter to the regulatory authority for a rehearing before another panel of arbitrators. On the investors' appeal, the Court of Appeals dismissed for lack of appellate jurisdiction under the Tennessee Uniform Arbitration Act. First, no appeal is available under Tenn. Code Ann. § 29-5-319(a)(3) because the investors did not file a motion to confirm and the trial court did not address confirmation of the arbitration award. Second, an order vacating an arbitration award

and remanding for a rehearing is not appealable under Tenn. Code Ann. § 29-5-319(a)(5). Third, the investors did not show good cause under TRAP 2 for suspending rules of finality.

**Parties Cannot Expand Scope of Judicial Review of Arbitration Award; *Arnold* Decision Clarified.** In Pugh's Lawn Landscape Company, Inc. v. Jaycon Development Corporation, 320 S.W. 3d 252 (Tenn. 2010), the issue before the Tennessee Supreme Court was whether parties may modify by agreement the scope of judicial review of an arbitrator's award. Guided by the analysis in *Hall Street Assoc., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), the Court held that judicial review of arbitration awards is governed by the Tennessee Uniform Arbitration Act ("TUAA"). Therefore, the provision in the parties' arbitration agreement purporting to expand the scope of judicial review beyond what the TUAA allows is invalid. The invalidity of this provision in the agreement is a mutual mistake requiring rescission of the parties' arbitration agreement. The Court therefore reversed the Court of Appeals, vacated the trial court's judgment confirming the arbitrator's award, and remanded the case to the trial court. In dicta, the Court clarified its holding in *Arnold v. Morgan Keegan & Co., Inc.*, 914 S.W. 2d 445 (Tenn. 1996), to the extent it could be read to adopt a standard of review of issues other than de novo. The Court adopted the statement of the U.S. Supreme Court in *First Options of Chicago, Inc.* that "ordinary, not special, standards' of appellate review should apply in arbitration cases and that appellate courts need not 'give extra leeway to district courts that uphold arbitrators.'" *Pugh's Lawn Landscape* at 6 n. 4, quoting *First Options of Chicago, Inc.*, 514 U.S. 938, 948 (1995).