**Alternative Dispute Resolution Caselaw - January 2014 Update**

**by Marnie Huff**

1. **U.S. Supreme Court ADR Cases & Pending Cert Petition**

**Pending Cert Petition re: Arbitration of Employment Discrimination Claims.** In a cert petition filed September 17, 2013 in *McCutchen v. Harris,* No. 13-351, the issue is "Whether the Federal Arbitration Act preempts a state-law rule that forbids arbitration of state-law employment-discrimination claims unless an arbitration agreement 'clearly and specifically' refers to those claims, even when the parties agree to arbitrate 'any legal disputes . . . which arise out of, or are related in any way to' the 'employment . . . or its termination.'” More at <http://www.scotusblog.com/case-files/cases/mccutchen-v-harris/>

**Arbitrator’s Class Arbitration Decision Upheld.** In a unanimous decision on June 10, 2013, *Oxford Health Plans LLC v. Sutter,* No. 12–135, \_\_ U.S. \_\_, 133 S.Ct. 2064 (2013), the Court considered a situation where the parties had agreed that an arbitrator should decide whether their contract provided for class arbitrations. The contract provided, “No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator.” The arbitrator, construing the wording of the contract, decided the parties’ contract unambiguously authorized class arbitration, even in the aftermath of *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U. S. 662 (2010) (arbitrator may use class procedures only if parties authorized them). The federal circuit courts were split on whether such a decision exceeded the arbitrator’s powers under §10(a)(4) of the Federal Arbitration Act (FAA). *Compare* 675 F. 3d 215 (3rd Cir. 2012) (case below) (vacatur not proper), and *Jock v. Sterling Jewelers Inc.,* 646 F. 3d 113 (2nd Cir. 2011) (same), *with Reed v. Florida Metropolitan Univ., Inc*., 681 F. 3d 630 (5th Cir. 2012) (vacatur proper). The Supreme Court held that the arbitrator’s decision survives the limited judicial review allowed under Section 10(a)(4) of the FAA. That statute allows a federal court to set aside an arbitral award only if the arbitrator exceeded his powers. The Court distinguished *Stolt-Nielsen* where: 1) there was no contractual basis for ordering class procedures, and 2) the parties had stipulated that they had never reached an agreement on class arbitration. Under Section 10(a)(4), “the question for a judge is not whether the arbitrator construed the parties’ contract correctly, but whether he construed it at all.” Slip op. at 9.

In a concurring opinion joined by Justice Thomas, Justice Alito states that “absent members of the plaintiff class never conceded that the contract authorizes the arbitrator to decide whether to conduct arbitration” and “it is far from clear that they will be bound by the arbitrator’s ultimate resolution of this dispute.” Further, absent concessions like Oxford’s in this case, the possibility of absent class members unfairly claiming the “‘benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one,’” should “give courts pause before concluding that the availability of class arbitration is a question the arbitrator should decide.” Concurring slip op. at 2-3, *quoting American Pipe & Constr. Co.* v. *Utah*, 414 U. S. 538, 546– 547 (1974).

**Effective-Vindication Rule Eviscerated by Supreme Court in *Italian Colors*.** On June 20, 2013, in [*American Express Co. v. Italian Colors Restaurant*](http://www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf)*,* No. 12-133, \_\_ U.S. \_\_, 133 S.Ct. 2304 (2013), the Court held that the Federal Arbitration Act (FAA) does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of arbitrating an individual federal statutory claim exceeds the potential amount of recovery*.* The record in the case showed that the expense involved in proving the antitrust claim against American Express Co. (Amex) in arbitration was at least several hundred thousand dollars, while the maximum recovery for an individual plaintiff was only $12,850 to $38,549 when trebled.  *Slip op*  at 2. The Court's analysis is the following. Arbitration is a “matter of contract” which courts must “’rigorously enforce’” pursuant to the FAA, including “’the rules under which that arbitration will be conducted.’” *Id*. at 3, *quoting* *Rent-A-Center, Stolt-Nielsen* and *Volt* cases.  This rule applies to claims alleging violations of federal statutes unless the FAA’s mandate is “‘overridden by a contrary congressional command.’” *Id*. at 4, *citing CompuCredi*t. Congress did not require rejection of the class arbitration waiver in the Amex contract. “[T]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.” *Id.* Moreover, Fed. R. Civ. P. 23 does not establish entitlement to invalidating a class arbitration waiver. *Id.* at 5. Notwithstanding the plaintiffs’ claim that they have no economic incentive to pursue their claims in individual arbitrations, the “effective vindication” exception does not apply here. The *Mitsubishi* dictum on invalidating a prospective waiver of a party’s “’right to pursue statutory remedies’” is not a basis for invalidating the arbitration agreement at issue; *Mitsubishi* “did not hold that federal statutory claims are subject to arbitration so long as the claimant may effectively vindicate his rights in the arbitral forum.” *Id.* at 6 n. 2. “[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.” *Id*. at 7. “*AT&T Mobility* all but resolves this case.” *Id.* at 8. In that case, the Court “rejected the argument that class arbitration was necessary to prosecute claims ‘that might otherwise slip through the legal system.’” *Id*. at 9. Lastly, the FAA’s “command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.” *Id.* at 9 n. 5.

In his concurring opinion, Justice Thomas states that the result in the case “is also required by the plain meaning of the [FAA]” which requires the courts to enforce arbitration agreements “’unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.” *Concurring slip op*. at 1, *quoting* Thomas’s opinion in *AT&T Mobility*. Here, Italian Colors did not argue that the contract was not properly made.

The dissent states that the result of the Court’s decision is that Amex “has insulated itself from antitrust liability—even if it has in fact violated the law.” *Dissenting slip op.* at 1. Prior cases established that an “arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result.” *Id*. at 3. *Green Tree* “confirmed that this principle applies when an agreement thwarts federal law by making arbitration prohibitively expensive.” *Id.* at 4. The effective vindication rule “furthers the purposes not just of laws like the Sherman Act, but of the FAA itself.  That statute reflects a federal policy favoring actual arbitration—that is, arbitration as a streamlined ‘method of resolving disputes,’ not as a foolproof way of killing off valid claims.” *Id*. at 5, quoting *Rodriguez de Quijas.* Here, Italian Colors is faced with a prohibitive cost if its claim were arbitrated on an individual basis. In addition to prohibiting class arbitration, the contract at issue: 1) disallows joinder or consolidation of claims or parties; 2) prevents producing a common expert report; and 3) precludes any cost shifting to Amex. *Id*. at 7. Disagreeing with the majority, the dissent states that the effective vindication rule is not mere dictum in *Mitsubishi.* That case held that “federal statutory claims are subject to arbitration ‘so long as’ the claimant ‘effectively may vindicate its [rights] in the arbitral forum.’” *Id*. at 8, *quoting Mitsubishi* (emphasis added by Court). Further, the majority opinion does not square with the *Randolph* case which involved prohibitive expenses foreclosing consideration of federal statutory claims.  *Id*. at 10. The majority opinion “rests on a false premise: that this case is only about a class-action waiver.” The effective-vindication rule instead “asks whether an arbitration agreement as a whole precludes a claimant from enforcing federal statutory rights.  . . . The [Amex] agreement’s problem is that it bars not just class actions, but all mechanisms—many existing long before the Sherman Act, if that matters—for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses.” *Id*. at 11. The FAA “conceived of arbitration as a “method of resolving disputes”—a way of using tailored and streamlined procedures to facilitate redress of injuries. In the hands of today’s majority, arbitration threatens to become more nearly the opposite—a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability. The Court thus undermines the FAA no less than it does the Sherman Act and other federal statutes providing rights of action.” *Id*. at 15.

1. **Sixth Circuit Cases**

# Sixth Circuit Vacates Award Due to Arbitrator’s Evident Partiality. In [Thomas Kinkade Co. v. White LLC](ftp://www.ca6.uscourts.gov/opinions.htm/13a0087p-06.txt), 711 F.3d 719, 720 (6th Cir. 2013), the Court vacated an award due to the arbitrator’s evident partiality. *See* [article on *Kinkade*](http://apps.americanbar.org/litigation/committees/adr/news.html#summer2013-01.)*.*

1. **Tennessee Cases**
2. **Arbitration**

**Court Rejects Implied Actual Authority and Apparent Authority Theories in Nursing Home Arbitration Case.** In a case of first impression, *Jerald Farmer, Individually and as Surviving Spouse for the Wrongful Death Beneficiaries of Marie A. Farmer v. South Parkway Associates, L.P., D/B/A Parkway Health and Rehabilitation Center*, No. W2012-02322-COA-R3-CV (Tenn. Ct. App. September 25, 2013), the Court affirmed the trial court’s denial of a motion to compel arbitration. No prior Tennessee case discusses implied actual authority in the context of agreements to arbitrate in nursing home cases. Here, the decedent’s sister had signed healthcare facility admissions documents on the decedent’s behalf and an optional arbitration agreement. The arbitration agreement was not explained to the decedent and was signed outside the presence of the decedent. The decedent had not executed any power of attorney and there was no issue as to her competency. In this wrongful death action, the healthcare facility (“Parkway”) moved to compel arbitration, arguing that the sister had authority to bind the decedent to the terms of the arbitration agreement based on two agency theories: 1) implied actual authority and 2) apparent authority. The Court rejected both arguments.

The Court first assumed *arguendo* that implied actual authority could be a basis to establish an agency relationship in the context of this case. But it noted that the court in *Blackmon v. LP Pigeon Forge, LLC*, No. E2010-01359-COA-R3-CV, 2011 WL 9031313, at \*14 (Tenn. Ct. App. Aug. 25, 2011) excluded implied actual authority as a basis for such authority. The Court also pointed out that, unlike the situations discussed in *Barbee v. Kindred Healthcare Operating, Inc.*, No. W2007-00517-COA-R3-CV, 2008 WL 4615858, at \*6 (Tenn. Ct. App. Oct. 20, 2008), the parties here agreed that there was no express grant of actual authority to the sister. There had been a past course of dealings where the sister had routinely signed healthcare documents on behalf of her sister, and conduct Parkway described as a “pattern of acquiescence” by the decedent. But the Court found that is not enough to give the sister implied actual authority. “[T]he fact that [the decedent] never challenged [the sister’s] pattern of routinely signing admission documents on her behalf is not controlling as to the arbitration agreement in question because Farmer could not object to an optional arbitration document she knew nothing about.” *Farmer v. South Parkway Associates* at 9. Although past cases found that execution of an arbitration agreement constitutes a health care decision when there is either express actual authority to sign admission documents or a power of attorney, the Court determined that it did not need to address whether that concept was applicable to a situation involving an optional arbitration agreement with no express actual authority or power of attorney. *Compare Owens v. Nat’l Health Corp.*, 263 S.W.3d 876, 884-85 (Tenn. 2007) and *Necessary v. Life Care Ctrs. of Am. Inc*, No. E2006-00453-COA-R3,CV, 2007 WL 3446636, at \*5 (Tenn. Ct. App. Nov. 16, 2007). The Court also distinguished the *Necessary* casewhere the “husband’s decision to give his wife express oral permission, or actual authority, to sign admitting documents on his behalf also extended to the optional arbitration agreement she chose to sign, although the husband was unaware of it.” Here, there is no express authority. *Farmer v. South Parkway Associates* at 9.

Turning to the apparent authority argument, the Court noted that “in order for a principal to be bound by an agent, the third party’s belief that the agent has such authority must be traceable to the principal’s manifestation and cannot be established by the agent’s acts, declarations, or conduct.” *Id.* at 11. Here, the decedent did not grant apparent authority to her sister by leaving a meeting in the healthcare facility office and allowing her sister to return to the meeting to sign admissions paperwork. This conduct did not clothe the sister with the appearance of authority, particularly where the Parkway representative knew there was no power of attorney. Copy of opinion at <https://www.tba.org/sites/default/files/farmerj_COR_110813_.pdf>.

**Lack of Good Faith in Enforcing Arbitration Clause. *Healthmart USA, LLC and Gregg Lawrence v. Directory Assistants, Inc*.,** No. M2012-00606-COA-R3-CV (Tenn. Ct. App. April 29, 2013), the second appeal of this case, addressed whether Directory Assistants, Inc. (DAI) acted in good faith in enforcing a consulting contract’s arbitration clause when it: 1) sent emails to Healthmart, but never returned Healthmart’s phone call about the disputed invoice or about the selection of arbitration particulars, 2) unilaterally demanded arbitration in a forum of its choice, 3) set an arbitrary deadline, and 4) then unilaterally accelerated the deadline, all giving DAI an unfair advantage in enforcing the arbitration clause. The parties’ contract provided, “Should a dispute arise we both agree to try and resolve it with the other party. If we cannot, we both want to resolve it quickly and cost effectively. To achieve that, we both agree to resolve any dispute arising out of or relating to this contract through confidential binding arbitration and agree to mutually choose an arbitration service, location and choice of law forum. If we are unable to come to a mutual agreement, or if one of us refuses to participate in choosing, the party filing a demand 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, and the non-choosing/non-participating party expressly consents to and waives any and all objections to the choices made.” In the first appeal, the Court interpreted the last clause quoted above as allowing unilateral action, but remanded on the issue of good faith. In this second appeal, the Court affirmed the trial court’s decision that DAI breached the duty of good faith. The Court remanded the case again, with instructions to consider whether DAI’s lack of good faith operated as a waiver of the right to seek arbitration under the contract. Opinion at [healthmartusa\_043013.pdf](http://stage.tba.org/tba/interspire/link.php?M=14371&N=418&L=6954&F=H).

**Right to Enforce Arbitration Clause Not Waived in Three Year Old Case; Arbitration Clause not Unconscionable.** In *Jonathan Burke Skelton v. Freese Construction Company, Inc.,* No. M2012-01935-COA-R3-CV (Tenn. Ct. App. December 9, 2013) the trial court held that the defendant had waived its right to enforce an arbitration clause in a construction subcontractor agreement. The Court of Appeals reversed and remanded the case for entry of an order compelling arbitration. Although the name of the subcontractor in the construction contract was Outdoors Unlimited, LLC, the suit was originally filed by Mr. Skelton individually in January 2009, without naming Outdoors Unlimited, LLC as a plaintiff. The defendant filed a motion to compel arbitration three years later in February 2012. Although a three year delay can be the basis for a successful waiver argument, the Court of Appeals distinguished *Carolyn B. Beasley Cotton Co. v. Ralph,* 59 S.W.3d 110 (Tenn. Ct. App. 2000). In  *Beasley* the party seeking enforcement of an arbitration clause had conducted pre-trial discovery and made no mention of an arbitration clause until the day of trial. Here, on the other hand, the defendant responded to discovery but did not conduct any discovery of its own; it expressly reserved the right to arbitrate shortly after Mr. Skelton filed a Second Amended Complaint. Only in that amended complaint did Mr. Skelton name Outdoors Unlimited, LLC which had been the party to the construction contract that included an arbitration clause, explaining that Outdoors Unlimited, LLC was not a properly formed LLC at the time of execution of the construction contract. After the parties were unable to agree to arbitrate, the defendant promptly filed a motion to compel arbitration. Much of the three year delay in the case was attributable to the plaintiff. Accordingly, the evidence failed to demonstrate that the defendant had unequivocally and decisively waived arbitration.

Regarding the second issue on appeal, the Court declined to accept the defendant’s argument that a contract can never be an adhesion contract if between commercial parties. It did find that Mr. Skelton’s conclusory statement that the construction contract was presented on a take it or leave it basis was insufficient to show a contract of adhesion, even though the arbitration clause gave only the defendant a right to seek arbitration. There was no evidence that “the parties lacked equal commercial sophistication, that Mr. Skelton is a ‘weaker’ party, or that Freese possessed superior knowledge of the subject matter.” The Court did not address a third issue, raised for the first time on appeal, on whether the defendant’s delay in moving to compel arbitration violated an implied duty of good faith and fair dealing. Opinion at <https://www.tba.org/sites/default/files/skeltonj_121013.pdf>.

**Arbitration under CBA not Available – Assignments Did not Require Teacher’s License.** In *The Metropolitan Government of Nashville & Davidson County, Tennessee v. Metropolitan Nashville Education Association*, No. M2012-02006-COA-R3-CV (Tenn. Ct. App. August 27, 2013), an arbitrator had found in favor of a teacher in an arbitration where the County Board of Education declined to participate. The board then sought a court declaration that the teacher’s complaints about re-assignments of certain extracurricular sponsorships were non-grievable and therefore not subject to arbitration under the collective bargaining agreement between the Board and the MNEA. The extracurricular sponsorship assignments did not require a professional teacher’s license. Following previous cases including *Lawrence County Education Association v. Lawrence County Board of Education*, 244 S.W.3d 302 (Tenn. 2007), the Court of Appeals affirmed the trial court’s summary judgment in favor of the board of education. Opinion at <https://www.tba.org/sites/default/files/metrogov_082813.pdf>.

**Prior *Webb* Opinion Vacated as to Findings that Broker Fraudulently Induced Customer. On June 18, 2013, on a petition to rehear, the Court of Appeals withdrew its opinion in *Franda Webb, et al. v. First Tennessee Brokerage, Inc., et al*.,** No. E2012-00934-COA-R3-CV (Tenn. Ct. App. April 23, 2013), and issued a new opinion. *See* Clerk’s docket at <http://www2.tncourts.gov/PublicCaseHistory/CaseDetails.aspx?id=41223&Number=True>. In the new opinion, the Court again 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. 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 Court vacated the lower court’s findings that the account representative fraudulently induced the customer to enter into the agreement. It clarified that it affirmed the decision of the trial court only as to the arbitration issues, vacated any findings that go to the merits of the underlying case, and remanded for further proceedings. Copy of opinion at <https://www.tba.org/sites/default/files/webbf_CORR_06182013.pdf>

1. **Workers Comp; Employment Grievance Procedures**

*Timothy Gilliam v. Bridgestone North American Tire, LLC,* No. M2012-02436-WC-R3-WC (Tenn. Workers Comp. Panel December 16, 2013) involves an employee’s eligibility to seek reconsideration of a workers’ comp settlement. After the employee settled his workers’ comp claim for a shoulder injury, his physician modified his work restrictions for an earlier, unrelated injury to his ankle. He was then laid off. He filed suit in Chancery Court seeking reconsideration of his shoulder injury settlement. He also filed an EEOC complaint, asserting that the employer failed to accommodate his work restrictions that had resulted from his ankle injury at work. While the Chancery Court was pending, the employee returned to work as the result of a confidential settlement of the EEOC claim. The Chancery Court decided the employee could seek reconsideration of the shoulder injury settlement and awarded additional disability benefits. The employer appealed, asserting the employee was not entitled to seek reconsideration. The employer asserted that, despite the layoff, the employee did not meet Tenn. Code Ann. § 50-6- 241(d)(1)(B)(ii)’s requirement of “subsequently no longer employed by the pre-injury employer.” The Special Workers’ Comp Appeals Panel affirmed, holding that the employee could seek reconsideration. Opinion at <https://www.tba.org/sites/default/files/gilliamt_121713.pdf>

**County Civil Service Grievance Case.** In *Jim Hammond, Sheriff of Hamilton County et al. v. Chris Harvey et al.,* No. E2011-01700-SC-R11-CV (Tenn. August 13, 2013), a group of sergeants at the county sheriff’s office filed a grievance regarding pay disparities. The County civil service board upheld the grievance and ordered the sheriff to equalize the pay of all sergeants. Pursuant to Tenn. Code Ann. § 8-8-409(3) (2011), the Tennessee Supreme Court held that the board had the authority to hear the grievance, but found there was no proof that the sheriff violated state law or the sheriff’s department civil service manual. The manual authorized the sheriff to determine individual pay. Therefore, the board lacked the power to order the remedy of salary equalization. Opinion at <https://www.tba.org/sites/default/files/hammondsj_08132013.pdf>.

1. **Settlements**

**Physician Waived Fair Hearing.** In *John R. Roberts, M.D. v. Saint Thomas Health Services d/b/a Saint Thomas Hospital, et al.,* No. M2012-01717-COA-R3-CV (Tenn. Ct. App. October 17, 2013), on the eve of a “fair hearing” pursuant to St. Thomas Hospital’s bylaws, the hospital and a surgeon represented by an attorney reached a settlement. The hospital suspended the surgeon’s hospital privileges pending counseling and evaluation by the TMF Physician Health Program, and restored the privileges less than three months later. The doctor also waived a “fair hearing.” As required by law, the hospital filed an “Adverse Action Report” with the National Practitioner Data Bank, using language negotiated between the attorneys for the surgeon and the hospital. The surgeon later sued the hospital, contending the hospital had not properly followed its own bylaws regarding suspension privileges. The hospital denied violating its bylaws and asserted it was immune from this action, given the Tennessee Peer Review Law of 1967 and the Federal Health Care Quality Improvement Act of 1986. In its motion for summary judgment, the hospital assumed *arguendo* that it had not followed federal law notice and hearing requirements prior to a meeting of its Medical Executive Committee (MEC). At that meeting, the MEC approved recommendations of the hospital’s Physician Performance Review Committee. The Court of Appeals affirmed the summary judgment granted to the hospital because the surgeon failed to show that the hospital did not follow its bylaws and the surgeon waived a fair hearing in his settlement.

**Post-Nup Prevents Widow from Sharing in Wrongful Death Settlement.** In *Gary Rickman v. Virginia Rickman, et al*, No. M2013-00251-COA-R3-CV (Tenn. Ct. App. October 15, 2013), the widow of a decedent sought a share in a wrongful death settlement obtained by the decedent’s personal representative against a nursing home facility. Under Tennessee law, proceeds from a wrongful death action are not property of a decedent’s estate and pass outside the estate through intestacy statutes. In a postnuptial agreement between the widow and the deceased, both parties waived rights in assets of their respective estates and “all other rights which they may have acquired by reason of their marriage.” Distinguishing cases from other states, the Court of Appeals held that the postnuptual agreement prevents the widow from benefitting from the wrongful death settlement. Copy of opinion at <https://www.tba.org/sites/default/files/rickmang_101613.pdf>.

**Post-Mediation Agreement’s Confidentiality Clause Did Not Refer to Contract Itself.** In *Timothy L. Wilson v. Hank E. Sledge, Jr., et al.,* No. W2012-00513-COA-R3-CV (Tenn. Ct. App. August 29, 2013), the Court affirmed the trial court’s order dismissing this action for professional malpractice based upon the running of the statute of limitations. The alleged malpractice related to a workers’ comp claim resolved in a mediation. Wilson had alleged in the malpractice suit that his signature was forged on the post-mediation agreement. In the alternative, he argued that the agreement was inadmissible in court due to a confidentiality clause that “'the parties agree that all mediation and all related proceedings are non-discoverable and inadmissible in any litigation.'” The Court of Appeals pointed out that the quoted language was not in the post-mediation agreement included in the record. In any event, the confidentiality clause only referred to mediation proceedings and not the contract itself. Opinion at <http://www.tba.org/sites/default/files/wilsont_082913.pdf>.