ARIAS U.S.

QUARTERLY

Stafford v. IBM: Why New York Federal Courts May Not Confirm Your Arbitration Award

ALSO IN THIS ISSUE

Q1 • 2025

TABLE OF CONTENTS

FEATURES

ALSO IN THIS ISSUE

EDITORIAL POLICY — ARIAS·U.S. welcomes manuscripts of original articles, book reviews, comments, and case notes from our members dealing with current and emerging issues in the field of insurance and reinsurance arbitration and dispute resolution. All contributions must be double-spaced electronic files in Microsoft Word or rich text format, with all references and footnotes numbered consecutively. The text supplied must contain all editorial revisions. Please include a brief biographical statement and a portrait style photograph in electronic form. The page limit for submissions is 5 single-spaced or 10 double-spaced pages. In the case of authors wishing to submit more lengthy articles, the *Quarterly* may require either a summary or an abridged version, which will be published in our hardcopy edition, with the entire article available online. Alternatively, the *Quarterly* may elect to publish as much of the article as can be contained in 5 printed pages, in which case the entire article will also be available on line. Manuscripts should be submitted as email attachments. Material accepted for publication becomes the property of ARIAS·U.S. No compensation is paid for published articles. Opinions and views expressed by the authors are not those of ARIAS·U.S., its Board of Directors, or its Editorial Board, nor should publication be deemed an endorsement of any views or positions contained therein.

This issue of the Quarterly arrives as ARIAS·U.S. is running on all cylinders to start 2025. We had a fabulous 2024 Fall Conference, putting an exclamation point on of the Society's 30th Anniversary, and the installation of a new Board with our new Executive Committee led by Josh Schwartz as Chair, Sarah Gordon as President, and Stacey Schwartz and Seema Misra as Vice Presidents. You can read the highlights of the Fall Conference in this issue in a summary prepared by the conference co-chairs, with Sarah Phillips of Simpson Thacher taking the lead.

Also, the ARIAS website has been refreshed. We kept the same look and feel, but cleaned up the website and made it more user-friendly. Let us know what you think. There will be more enhancements to the website as we move forward, as websites are always a work in progress.

As for programming, we had a very well attended Law Committee sponsored webinar in February, and we have a March Regional Workshop in Boston hosted by Choate Hall, the annual Intensive Arbitrator Workshop on April 29, the day before the Spring Conference, and the Spring Conference coming up on April 30 – May 2 at The Biltmore: Miami-Coral Gables, Florida. Registration is well underway for all these events.

ARIAS also is kicking off its nascent Future Leaders committee with a March reception in New York City hosted by Chaffetz Lindsey, and a Task Force on Non-Adversarial Arbitration is being formed.

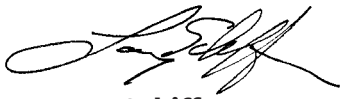
This issue of the Quarterly features an interesting article about confirming arbitration awards. In *Stafford v. IBM: Why New York Federal Courts May Not Confirm Your Arbitration Award*, Kyley Davoodi and Michael Phillips from Clyde & Co. discuss an important case on award confirmation that might surprise you.

Next, we have the final (?) installment of *How to Cheat in Arbitration – Allegedly: Part Three* by recently retired Daniel Fitz-Maurice, formerly at Day Pitney, and Joseph Scully. Dan and Joe artfully take us on a journey through all sorts of arbitration behaviors that generally do not result in the outcome that the perpetrators desire. Always an interesting read.

Social Inflation is more than a buzzword. As explained by the TransRe triumvirate of Board member Frank DeMento; as well as Bryan McCarthy and Howard Freeman, there is a lot to Social Inflation and a lot to be concerned about. Read their analysis in *Social Inflation is Here to Stay – Part I: An Analysis of the Key Underlying Drivers of Social Inflation.*

Our Editorial Committee member Robert Hall of Hall Arbitrations this time provides us with a short case note on an interesting decision concerning greenhouse gases. In *Are Greenhouse Gases "Pollutants" for Insurance Purposes?* Bob discusses a recent case in Hawaii that addressed the pollution exclusion in the context of greenhouse gases. Finally, we have three new ARIAS Law Committee reports on cases practitioners and arbitrators should know about, new Certified Arbitrator and Qualified Mediator profiles, and some other news and items of note.

We hope you enjoy this issue of the Quarterly. We continue to need your contributions to future issues. The deadlines and requirements are on the ARIAS website under Publications. We welcome ARIAS committee reports, letters to the editor, original articles and repurposed articles from ARIAS CLE programs. If you are on a panel at the Spring Conference or have made a proposal for the Spring Conference that was not accepted, please turn your presentation or proposal into an article. Leverage your thought leadership and publish an article in the Quarterly. Your thought leadership needs to be recognized.



Larry P. Schiffer
Editor

Stafford v. IBM: Why New York Federal Courts May Not Confirm Your Arbitration Award

By: Kyley Davoodi & Michael Phillips, Clyde & Co US LLP

It has been long and universally recognized that the courts' role in determining whether to confirm an arbitration award is "severely limited."[1] The Federal Arbitration Act ("FAA") provides that an arbitration award "must" be confirmed "unless" grounds for vacatur exist.[2] The narrow grounds a court may consider for refusing to confirm an award are generally limited to enumerated instances of arbitral misconduct – fraud, corruption, evident partiality, and exceeding powers, to name a few.[3] Guided by this statutory framework, courts have adamantly refused to consider the merits of the underlying arbitration on an FAA § 9 petition, and limit their review to determining that no statutory ground for vacatur is present.

All of these settled points have arguably been stood on their head by a decision of the Court of Appeals for the Second Circuit in *Stafford v. IBM*, 78 F.4th 62 (2d Cir. 2023). The *Stafford* Court declined to confirm an arbitration award – not because one of the FAA's enumerated bases for doing so was met – but on the ground of mootness under Article III of the Constitution. The reason? The arbitration award had already been satisfied.

The simple facts of *Stafford* made this mootness determination a straightforward matter. But not all cases are as

simple as *Stafford*. In more complex commercial cases – such as reinsurance disputes – the question of whether an arbitration award is fully satisfied may not be so clear-cut. By focusing the question of mootness (and therefore the question of confirmability) on the particulars of the underlying dispute rather than whether the statutory bases for a petition to confirm are met, *Stafford* has opened the courts to the risk of becoming mired in the sort of lengthy, fact-intensive proceedings of which the FAA and case law have historically disapproved.

Whether that happens may be difficult to discern given the *Stafford* Court's second ruling sealing the arbitration award. The Second Circuit attributed to the FAA a "strong policy" that arbitration be confidential, irrespective of whether the parties have agreed to confidentiality, and held that this policy outweighed the presumption of public access to judicial documents. This ruling stands in stark contrast to existing Second Circuit precedent declining to withhold most arbitration awards from the public.

The *Stafford* Arbitration and Petition to Confirm

Elizabeth Stafford brought an employment action against her former employer, IBM. Stafford prevailed at arbitration and received an award granting her monetary compensation and no other relief. She immediately filed a petition to confirm that award under Section 9 of the FAA. Shortly thereafter, IBM paid the full amount of the award. IBM did not oppose Stafford's petition to confirm, but it did oppose Stafford's simultaneous motion to unseal the arbitration award. The district court concluded that no basis for vacating, modifying, or correcting the award existed and therefore granted Stafford's unopposed petition to confirm.[4] The district court also granted Stafford's motion to unseal the arbitration award due to the strong presumption of public access to judicial documents.

The Second Circuit's Reversal

On IBM's appeal, the Second Circuit Court of Appeals vacated the district court's judgment and remanded with instructions to dismiss the petition as moot.[5] The Second Circuit ruled that because the arbitration award was "purely monetary," Stafford had "obtained all the relief she could receive" upon IBM's payment.[6] According to the court, Stafford "no longer ha[d] any 'concrete interest' in enforcement" of her award, and she therefore lacked the standing required by Article III of the Constitution.[7]

The Second Circuit acknowledged Stafford's statutory right to confirmation under the FAA but held that was insufficient, by itself, to establish a "concrete" injury to maintain a "live" case or controversy under Article III. Stafford's § 9 petition was therefore dismissed as moot. The Second Circuit expressed the rule as follows:

> *A "petition to confirm an arbitration award is moot when there is* ***no longer any issue over payment or ongoing compliance*** *with a prospective award."*[8]

In so ruling, the Second Circuit Court of Appeals considered not only the facts of the underlying dispute in the *Stafford* arbitration and the arbitrator's conclusions, but post-arbitration facts concerning the conduct of the parties. Admittedly, this was all quite easily done given *Stafford's* simple fact pattern – a sum certain awarded and indisputably paid.[9] But most cases are not so simple. More complex commercial arbitration awards – such as those involving reinsurance disputes – may reveal future challenges for courts in following the principles enunciated in *Stafford*.

Sophisticated Commercial Disputes: Can *Stafford* Apply?

Many sophisticated commercial disputes, including insurance and reinsurance disputes, can be resolved with an award for a sum certain and no other relief. In those cases, *Stafford* is clear that if payment in full is made any time before a petition to confirm is decided, the petition becomes moot. Similarly straightforward is a case where an award provides for the prospect of payments into the future, or some other conduct in the future, and the parties mutually acknowledge that there is yet to be an occasion to fulfil these future obligations. In such a straightforward case, it seems obvious that the petition would not be deemed moot according to the *Stafford* rule because issues "over payment or ongoing compliance" may still remain.[10]

But not all reinsurance disputes are so straightforward, and not all parties will agree whether future obligations remain. Consider the following scenario: an arbitration panel issues a "Final Award" declaring that the *"Reinsurer shall pay its share of liability under the facultative certificate on the basis of cedent's single occurrence presentation, plus a pro rata share of 'loss expense'*

> "Many sophisticated commercial disputes, including insurance and reinsurance disputes, can be resolved with an award for a sum certain and no other relief."

in the same ratio as the reinsurer's limit of liability bears to the cedent's gross limit of liability under the policy reinsured." No dollar amount is stated on the award. Upon receipt of the award, the cedent files a petition to confirm, but before the court rules, the reinsurer makes a payment which it avers is payment of the full amount awarded. On that basis, the reinsurer opposes the petition to confirm as moot, but the cedent disagrees that the payment was in the correct amount and argues that the petition is therefore not moot.

According to *Stafford*, before the court could assume jurisdiction over the petition, it would need to determine whether the petition was mooted by the reinsurer's payment. In effect, the court would need to conduct a fact-hearing – not to decide whether the arbitrators' award was correct, but to determine the precise sum certain owed under the award and whether it was satisfied by the payment made. By focusing the mootness determination on the question of whether the award has been satisfied, rather than whether the statutory grounds for confirmation are met, the Second Circuit created a Catch-22: a court is not authorized to review a petition over which it has no jurisdiction, but a court cannot determine if it has jurisdiction according to *Stafford* without first conducting a review.

A court's instinct might be to simply refer the matter back to the arbitrators for disposition of whether the award was satisfied. There seem to be two obstacles to this approach. First, in cases where the arbitrators have issued a "final award," they would likely be deemed *functus officio* and it would therefore be impossible to refer the question of compliance back to the disempowered arbitrators. Second, even where the arbitrators have retained jurisdiction (perhaps by issuing a "partial final award"), there is authority in the Second Circuit forbidding a district court considering a § 9 petition from referring the matter of compliance back to the arbitrators. In *Ottley v. Schwartzberg*, the court unequivocally held:

> It was improper for the district court to remand the proceedings to the arbitrator for a determination of the parties' compliance. A remand for further arbitration is appropriate in only certain limited circumstances such as when an award is incomplete or ambiguous.
>
> The district court remanded solely for purposes of monitoring compliance. However, we are directed to no authority for the proposition that arbitrators may review compliance with their own awards. . . . Because there is no indication that the parties agreed to submit the issue of compliance to the arbitrator, we think it clear that the arbitrator was without authority to rule on that issue.[11]

Unless *Ottley* is overturned, or unless the parties expressly agree to keep the arbitrators in place until full and final compliance with the award is achieved (which might be years down the road in a reinsurance case), it does not seem that a court confronted with a petition to confirm can sidestep a jurisdictional inquiry by referring the matter of compliance back to the arbitrators. Under *Stafford*, a court may be forced to conduct a fact-hearing involving reinsurance billings and payments merely to determine whether it has jurisdiction to review the matter in the first place.

It is impossible to predict how *Stafford* will hold up under circumstances involving more labyrinthine and inchoate arbitration awards. Any case approaching the complexity of the average reinsurance dispute would likely put the *Stafford* ruling to test (not to say test a judge's patience). Perhaps after courts become enmeshed in hearings regarding complex commercial issues merely to determine mootness, the principles

enunciated in Stafford might be refined or revisited.

Will the Fruits of *Stafford* be Public?

We will conclude by saying that we are eager to see our prediction play out in the courts, but we may not have the chance given the Second Circuit's view on public access to arbitration awards. *Stafford* overturned the district court's decision to unseal the arbitration award on the basis of "the FAA's strong policy in favor of arbitration." It held that "any presumption of public access to judicial documents is outweighed by the importance of confidentiality under the FAA and the impropriety of Stafford's effort to evade the confidentiality provision in her arbitration agreement."[12] We confess no familiarity with an FAA "policy" in respect of confidentiality. But should other courts concur that confidentiality trumps public access in these cases, it seems likely that *Stafford's* progeny may be decided outside of the public eye, at least in part.

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Michael Phillips counsels insurers and reinsurers in litigation and arbitration matters. He has experience providing advice in complex disputes involving reinsurance, trade credit, and political risk coverage. In addition to advising insurers and reinsurers in commercial disputes, Phillips offers coverage advice to insurers regarding errors and omissions (E&O) policies.

During law school, Phillips worked as a law clerk for the Honorable Katharine H. Parker, Magistrate Judge, S.D.N.Y. and the Honorable Saliann Scarpulla, New York State Supreme Court, Commercial Division, New York, New York. Phillips also worked in the St. John's University Securities Arbitration Clinic, providing legal services to and representing underserved investors in FINRA arbitrations.

Endnotes

1 *Willemijn Houdstermaatschappij, BV v. Standard Microsys. Corp.*, 103 F.3d 9, 12 (2d Cir. 1997).

2 9 U.S.C. § 9 (emphasis added); *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008). Confirmation may also be avoided on the limited grounds for modifying or correcting an award under FAA § 11.

3 9 U.S.C. § 10.

4 *Stafford v. Int'l Bus. Mach. Corp.*, No. 21-CV-6164, 2022 WL 1486494, at *2 (S.D.N.Y. May 10, 2022).

5 *Stafford v. Int'l Bus. Mach. Corp.*, 78 F.4th 62, 71 (2d Cir. 2023), *cert. denied*, 144 S. Ct. 1011, 218 L. Ed. 2d 175 (2024).

6 *Stafford*, 78 F.4th at 68.

7 *Id.* at 68 (quoting *Knox v. Serv. Emps. Int'l Union, Loc.* 1000, 567 U.S. 298, 307 (2012)). Article III established the "case-or-controversy" requirement, which has been construed to require that the matter before a court involves a live dispute which, if left unresolved by the court, would result in concrete harm to one of the litigants. That must be true for the life of the case, and if at any point a "live" controversy should cease to exist, the case becomes moot for Article III purposes. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90 (2013).

8 *Stafford*, 78 F.4th at 68 (emphasis added).

9 Indeed, the only court which has since relied on *Stafford* to dismiss a petition to confirm as moot also considered an arbitration award for a sum certain. *CrossBorder Sols., Inc. v. Macias, Gini & Oconnell LLP*, No. 20 CIV. 4877-NSR-JCM, 2023 WL 7297242, at *4 (S.D.N.Y. Nov. 6, 2023).

10 We must raise the question: if an issue of payment or compliance is required for a § 9 petition to be justiciable, can an award for declaratory relief ever be confirmed following *Stafford*?

11 *Ottley*, 819 F.2d at 376 (internal citations and quotation marks omitted).

12 *Stafford*, 78 F.4th at 65.

How to Cheat in Arbitration – *Allegedly*: Part Three

By: Daniel L. FitzMaurice and Joseph K. Scully

One upon a time, Eris, the goddess of discord, learned she had been omitted intentionally from the guest list to a wedding. She responded to this "unvitation" in a signature way: she inscribed the words "to the fairest one" on a golden apple and left the ambiguously addressed prize at the reception. Three goddesses – Hera, Athena, and Aphrodite – claimed the apple. Wisely dodging this controversy, Zeus directed Hermes to escort the contestants to Troy[1] to arbitrate before a mortal named Paris.[2] Each goddess offered Paris a bribe. Paris chose Aphrodite's offering: the love of the greatest beauty in the world, Helen. After rendering his award in favor of Aphrodite, Paris abducted Helen from Sparta to Troy. The King of Sparta, Menelaus, was furious. After all, Helen was already married to a Spartan – him. With a Greek army that included his brother (Agamemnon) and a major hero (Achilles), Menelaus waged war on Troy for over ten years. Troy ultimately fell through a trick that Odysseus conceived, the Trojan Horse. Leaving aside the chestnut about Greeks bearing gifts, this epic myth holds at least two lessons: (a) bad things happen when arbitrators accept bribes (even from deities); and (b) arbitration and cheating in arbitration have ancient roots.

This article adds the following tactics to the cheating ways we addressed in Parts I and II:

- Make evidence, appear, disappear, and transform;
- Persuade through bribes and threats;
- Get to know your arbitrators better by gaining access to their deliberations;

- Ghostwrite decisions and dissents;
- Induce errors that might make an unfavorable award subject to challenge; and
- When all else favors, destroy everything!

Tactic: Make evidence appear, disappear, and transform

While successfully defending British soldiers charged in the Boston Massacre, John Adams observed: "Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."[3] Cheaters have a different take: they firmly believe that the truth can be suppressed, altered, and re-invented. Fabricating documents and testimony are ways to change facts. So, too, are forging signatures and backdating records. And making witnesses and documents become unavailable are yet other ways to "alter the state of facts and evidence." In the hands of cheaters, facts may prove to be far more malleable and less stubborn than Adams posited.

> "Cheaters...firmly believe that the truth can be suppressed, altered, and re-invented."

For those who would fabricate evidence, *Seagate Tech v. Western Digital*[4] presents a cautionary tale. When Seagate hired a senior director of advanced technology, the parties signed an employment contract with non-disclosure and arbitration provisions. The employee later defected to a competitor, Western. Seagate sued Western and the former employee claiming, among other things, misappropriation of eight trade secrets. The defendants denied the allegations and demanded arbitration. Among other defenses, the defendants maintained that the information in three of the trade secrets was publicly available and, thus, unprotected. As proof, the former employee produced a PowerPoint presentation he claimed he gave at a tech conference while in Seagate's employ. Certain slides did disclose the three trade secrets, but Seagate was able to establish that those slides were created only *after* the employee had joined Western, and that Western was aware of this ruse. The arbitrator sanctioned the defendants by barring them from disputing either the validity or the misappropriation of the three trade secrets. These sanctions proved to be crucial because Seagate lost all of its other claims. Ultimately, the arbitrator awarded Seagate $525 million in compensatory damages, $96 million in prejudgment interest, plus post-judgment interest. A trial judge partially vacated the award, but an intermediate appellate court and the Minnesota Supreme Court reinstated the award in full. Thus, this attempted fabrication failed spectacularly, resulting in a judgment in excess of $630 million. With post-award interest accruing at a rate of 10% per year, a later ruling assessed over $800 million against the Western and the employee.[5] These cheaters certainly did not prosper.

Forgery is another way to fabricate evidence. In *Marjam Supply v. American Contractors*,[6] a supplier sought balances that a contractor owed under a credit agreement. Citing to a personal guaranty section in the contract, the supplier also sued the corporate contractor's owner, who had signed the credit agreement. The court referred the dispute to arbitration, where the arbitrator awarded $1,774,514.71 against both respondents. While the owner's motion to vacate was pending, his son found the original, signed version of the credit agreement. The owner's signature appeared on both versions of the credit agreement, but the personal guaranty section was crossed out in the original. The owner's administrative assistant provided additional context. She testified that, consistent with the owner's policy of not giving personal guaranties, she had crossed out the guaranty on the original and then watched him sign. Marjam maintained that it had received its version of the agreement, with an intact guaranty, via fax. A defense expert disputed that account: he explained that Marjam's version was missing a fax banner, and its metadata revealed that the document was an eight-bit image, whereas a fax would be a two-bit image. The expert opined that someone had fabricated Marjam's version by electronically copying the original signature and pasting it onto a form with an intact guaranty. The trial court vacated the award against the owner,

and the appellate court affirmed. Thus, what appears to have been a computer-aided forgery failed.

Aside from fabricating PowerPoint slides and forging signatures, technology may facilitate other forms of cheating, including coaching witness. A medical device manufacturer pursued several claims against a corporate sales representative and others in *Nuvasive, Inc. v. Absolute Medical, LLC.* [7] The parties arbitrated some claims and litigated others. The arbitration's final hearing proceeded remotely, via videoconference, because of the Pandemic. Nuvasive lost the arbitration but later discovered damning evidence in the litigation: copies of text messages that a witness received while he was testifying during the hearing. In these messages, one of the individual defendants provided to the witness suggested responses to pending questions and "corrections" to earlier testimony. Nuvasive petitioned for vacatur even though the arbitrators had issued the award more than three months earlier.[8] In opposition, the respondents submitted a sworn statement in which the witness claimed he first became aware of the texts only after he testified. The court disbelieved the witness. By carefully comparing the hearing transcript and the texts, the judge found several occasions in which the witness appeared to frame or change his testimony in response to content in the messages. The judge also noted a number of instances in which the witness echoed exact words and phrases from the texts. Citing to fraud and equitable tolling, the court excused Nuvasive's delay in filing the petition and vacated the award. The Eleventh Circuit affirmed. Thus, a favorable award was undone because of witness coaching via texts.

One way to suppress unfavorable evidence is to discourage adverse witnesses from testifying. *Zastrow v. Houston Auto Imports Greenway Ltd.*[9] concerned an attempt to pressure the claimants' expert witness into dropping out of an arbitration. The claimants were an African American couple, who asserted that a Mercedes Benz dealer mistreated them based on their race and sold them a defective car. The couple asked Zastrow, an auto repairer who specialized in German vehicles, to inspect the car. Zastrow found several mechanical problems and agreed to serve as the couple's expert witness. Zastrow, however, also had a connection to the dealership, which supplied Mercedes-Benz parts to his shop. The dealer attempted to exploit this relationship by warning Zastrow that "he would regret it" if he proceeded with his deposition in the arbitration.[10] After Zastrow appeared at the deposition, the dealer carried through on the threat by advising Zastrow verbally and in writing that it was severing their ties because of his testimony. Zastrow did not appear at the arbitration hearing, but the couple put his deposition transcript into evidence and won. Subsequently, Zastrow sued the dealer claiming the threats and retaliation violated federal racketeering and civil rights laws. Although the racketeering claim failed, the civil rights claim succeeded. Zastrow received only modest damages (slightly less than $1,000), but the court ordered the dealer to pay $110,000 for Zastrow's legal fees.[11] Thus, the dealer's attempt to suppress this witness's testimony proved to be a costly failure.

The fictional world of Jerry McGuire provides the setting for a real-life leading case involving perjury in arbitration..[12] Jason Bernstein and Todd France are "certified contract advisors" – sports agents – who represent NFL players and, accordingly, have agreed to abide by the National Football Players Association Regulations, which include arbitration provisions. [13] One of Bernstein's clients fired him and immediately signed with France. Bernstein became suspicious when he learned that the player had appeared at an autograph-signing event three days before the firing. As the player's agent, Bernstein should have arranged for any appearances, but he had played no part in this one. Believing France had poached his player in violation of NFLPA Regulations, Bernstein initiated two proceedings: (a) an arbitration against France, and (b) a lawsuit against the event organizers and CAA Sports, France's employer.

Throughout the arbitration, France denied he improperly contacted the player or was involved in the autograph event. In response to discovery requests, he gainsaid the existence of any text messages or emails with the player or concerning the event. Lacking evidence, Bernstein could not prove his suspicions and lost the arbitration. Two months later, however, Bernstein obtained through discovery in the litigation copies of emails and texts showing that, when Bernstein was still the official agent, France sent the player the contract for his appearance at the autograph signing, and other messages referred to France's plans to travel to the event with the player.[14] Nevertheless, the district judge denied a petition to vacate the award, reasoning that Bernstein was insufficiently diligent in uncovering France's fraud. In reaching this conclusion, the district judge focused on Bernstein's failure to seek enforcement of the arbitrator's subpoenas

to third parties. The Third Circuit overruled that call, finding that Bernstein's diligence was "reasonable" even though it was not "perfect" and explaining that "[r]easonable diligence does not require parties to assume the other side is lying."[15] The Third Circuit concluded that France's false testimony and sworn denials in the arbitration constituted perjury and fraud.[16] At the Third Circuit's direction, the district court vacated the award.[17]

The same arbitrator handled the rematch. This time, however, the arbitrator saw the evidence that France had disclaimed. In ruling for Bernstein, the arbitrator made some choice comments about perjury in arbitration:

> The evidence established that **France prevailed in my 2020 Decision because he lied under oath**. . . . France's untruthfulness, that is now evident following the **exposure of his lie, demonstrates that France's position** in that proceeding and in the instant proceeding **is "frivolous and/or totally without merit.**"
>
> * * *
>
> It is well-settled that **lying under oath is an abominable offense** and, in addition, constitutes **perjury**. Lying under oath has been and is regarded as **among the most reprehensible of offenses**. . . . Bearing false witness **undermines the entire arbitration process**, whose foundation includes the reliable gathering of information in the form of evidence upon which decisions are rendered. France's conduct during the 2019 arbitration hearing is **an affront to good order in the arbitration process**.[18]

The arbitrator awarded $810,846.67 to Bernstein, "including $450,000 in punitive damages."[19] As of this writing, France's motion to vacate the second award is pending. In support of that motion, France has argued that, by granting summary disposition, the arbitrator "end[ed] the 'do-over' contest during halftime" and "tilted the playing field" in favor of Bernstein.[20] Some might consider these arguments to be "Hail Mary" passes when presented by a perjurer.[21]

Cheaters sometimes destroy or "spoliate" evidence to avoid accountability.

> "Cheaters sometimes destroy or 'spoliate' evidence to avoid accountability."

Hallmark Cards was the intended victim of spoliation in what turned into a substantial dispute.[22] Hallmark hired a consulting firm, Monitor, to work on a confidential project. After becoming privy to some of Hallmark's trade secrets, Monitor improperly shared that information with another of its clients, Clipper. Clipper took advantage of Hallmark's trade secrets in acquiring and managing a competing card company. Upon learning that one of Monitor's clients had purchased a competitor, Hallmark demanded that Monitor and Clipper institute litigation holds on all materials related to the deal. Instead, they "began systematically to destroy evidence documenting their transactions, erasing hard drives containing Hallmark's proprietary information while continuing to represent to Hallmark that Clipper had never possessed this information."[23] Despite these assurances, Hallmark remained suspicious. It instituted and won an arbitration against Monitor, receiving a damage award of $4.1 million. But that was not all: The award also required Monitor to retain an independent, forensic investigator to search its computer systems and to report any findings to both parties. The investigator determined that Monitor had retained Hallmark's trade secrets and willfully transmitted them to Clipper. These findings helped persuade a court to reopen the arbitration, while leaving intact the $4.1 million award. Monitor subsequently agreed to settle the arbitration by paying an additional $12.5 million. Hallmark also relied on the investigator's findings to sue Clipper. Hallmark won the lawsuit, receiving a judgment for $21.3 million in compensatory and $10 million in punitive damages. The Eighth Circuit sent its felicitations to Hallmark by affirming the judgment. Thus, by requiring a forensic examination, the arbitral award led to key information that Monitor had attempted to destroy – evidence that was instrumental in Hallmark's recovery of $43.8 million in addition to the initial award of $4.1 million.

The cases discussed above are but a small sample of alleged cheating in arbitration by altering, destroying, fabricating, forging, and otherwise tampering with documents and testimony. In the United Kingdom, a court overturned an $1-billion award in an international arbitration, because of, among other things, the alleged bribery of a witness to give false testimony.[24] Over the past few years, auto insurers in New York have brought a spate of preemptive suits to address anticipated fraud by medical providers and device suppliers in arbitrations involving reimbursements under no-fault insurance.[25] Artificial intelligence and deep fakes will only compound the ways cheaters may try to game the system. Participants in arbitrations need to be aware that evidence might not be what it appears to be and that important facts may be concealed, changed, or destroyed. To guard against possible cheating, arbitrants need be diligent in pursuing appropriate discovery and remedial measures, including obtaining metadata and, in some instances, forensic examinations by independent experts.[26]

This article discusses only incidents in which cheating in arbitrations was revealed. It is impossible to know how often cheating occurs but remains concealed. To deter cheating and to protect the essential truth-seeking component of the arbitral process, arbitrators and courts should contemplate imposing serious sanctions – including possibly lifting any cloak of confidentiality – when they find someone has tampered with evidence.

Tactic: Add persuasive force to your case through bribes, incentives, and threats

The story of the Apple of Discord illustrates the efficacy of bribery. In recognition of the pernicious nature of this tactic, ethical codes uniformly prohibit bribery and other efforts to corrupt the arbitral process by offering a gift, issuing a threat, or presenting some incentive/disincentive to an arbitrator. For example, the California Judicial Council[27] has adopted ethical standards for arbitrators, including the following:

(a) **An arbitrator must not, under any circumstances, accept a gift, bequest, favor, or honoraria from a party or any other person** or entity whose interests are reasonably likely to come before the arbitrator in the arbitration.

(b) **From service of notice of appointment or appointment until two years after the conclusion of the arbitration, an arbitrator must not, under any circumstances, accept a gift, bequest, favor, or honoraria** from a party or any other person or entity whose interests [are reasonably likely to] come before the arbitrator in the arbitration.[28]

In applying the Federal Arbitration Act, several court decisions identify bribery of an arbitrator as the type of fraud, corruption, or undue means that could warrant vacating an award.[29] Moreover, some jurisdictions[30] make it a crime to attempt to influence an arbitrator or umpire by payment or gift, or for an umpire or arbitrator to accept the same.[31] For example, Iowa Code Ann. § 722.1 provides it is a felony for a person to offer, promise, or give anything of value or any benefit to a person serving as a member of a board of arbitration or a witness in an arbitration. Thus, more than reputational harm may be visited upon one who pays or receives an arbitral bribe.

> “Artificial intelligence and deep fakes will only compound the ways cheaters may try to game the system.”

> “...alleging bribery is a far cry from proving it.”

Of course, alleging bribery is a far cry from proving it. In *Kaufman v. Joseph*,[32] the court dismissed a complaint alleging that an arbitrant and its attorneys employed bribery to procure an award rendered a decade earlier. The court concluded that *res judicata* barred the complaint, because "the facts that supposedly support plaintiff's allegation of a bribe in the arbitration proceedings are neither new nor clear and convincing evidence that a fraud occurred."[33] In another case, a court concluded that it was appropriate to levy sanctions against plaintiffs who claimed their opponent had bribed an arbitrator and then bribed the federal judge who presided over some post-arbitration proceedings, where the plaintiffs offered only rank speculation to support these serious accusations.[34] Similarly, another court swatted away assertions of bribery based solely on the fact that, because the respondent lacked the resources to pay its share, the petitioner had paid the entire cost of the arbitration, including the arbitrators' compensation.[35] A more technical attack – one that asserted no actual bribery but only that the arbitrator failed to incant an anti-bribery oath – failed in another case.[36]

The Ninth Circuit considered what might be called a negative bribe – the alleged threat of retaliation – in *United Transportation Union v. BNSF Railway*.[37] The Union demanded that the Railway arbitrate over the firing of a conductor. The National Mediation Board ("NMB") [38] administered the proceeding, and a tripartite panel presided. The umpire circulated a draft ruling in favor of the Union/employee based on what she thought had been a tentative settlement agreement as proposed by the Railway's arbitrator. The Railway's arbitrator disputed the alleged proposal and responded to the draft by stating to the umpire: "If you are going to issue these kinds of opinions, you will never work for a Class One railroad again."[39] The umpire withdrew the draft and denied the grievance without prejudice, so that a different panel could preside. After the Railway prevailed before the new panel, the Union moved to vacate, arguing the alleged threat by the Railway's arbitrator tainted both arbitrations. The Ninth Circuit concluded that the original and succeeding umpires could have interpreted the comment from the Railway's arbitrator as threatening retaliation if the Railway lost. Accordingly, the Ninth Circuit remanded the case for fact-finding. On remand, the first umpire testified that she did not perceive the Railway's comments as a threat of economic retaliation but had resigned to avoid any appearance of partiality that might have arisen from issuing the draft award. Based on this testimony, the district court concluded that the Union failed to provide the necessary clear and convincing evidence that the Railway procured the award through corrupt means. The district court denied the petition to vacate, and the Ninth Circuit affirmed.[40]

Even where clear and convincing proof of bribery exists, it may not suffice if it arrives too late. In *Asmar Construction v. Afr Enterprises*,[41] the losing party to an arbitration sought relief ten years after the award. The petitioner offered strong evidence of bribery: the arbitrator's sworn statement that he ruled against the petitioner, because the respondent offered him the opportunity to participate in lucrative contracts. The arbitrator also stated that, but for this inducement, he would have issued a substantial award in favor of the petitioner. As remarkable as it was for the arbitrator to admit under oath that he accepted a bribe, this evidence came too late: the trial and appellate courts concluded the petition was untimely. The courts were unpersuaded that the petitioner acted as soon as it had the evidence necessary to allege fraud, because the petitioner had made similar allegations eight years earlier – albeit without the benefit of the arbitrator's admissions. In that earlier attack on the award, the petitioner had sought discovery to prove its allegations, including the deposition of the arbitrator, which the trial court had denied. The appellate court in the second attack concluded that this new attempt to undo the award was untimely because the petitioner had not appealed the trial court's denial of discovery the first time around. Practitioners beware!

"Even where clear and convincing proof of bribery exists, it may not suffice if it arrives too late."

> "Despite the various obstacles to accountability, arbitral bribery remains a risky enterprise."

Like judges, arbitrators enjoy immunity from suit for actions taken in their adjudicatory roles.[42] Where an arbitrator has accepted a bribe and issued an award in favor of a cheater, will arbitral immunity nevertheless shield the arbitrator from civil liability to the victim of this scheme? The First Circuit has expressed doubt that arbitral immunity prevents a tort claim against a bribed arbitrator,[43] but that *dictum* may not square with U.S. Supreme Court cases that accord broad immunity to judges and presidents.[44] A party pursuing a civil action for arbitral bribery faces other potential obstacles, including prohibitions on collateral attacks of awards[45] and limitations on personal jurisdiction over the arbitrator or opposing party.[46] Whether because bribery seldom occurs or it usually remains concealed, or for other reasons, litigation arising from arbitral bribery is exceptionally rare. In a case alleging an attempted bribe, an arbitrator sued a lawyer and his client, claiming that the defendants intentionally subjected him to emotional distress by proposing he participate in an illicit transaction.[47] The court dismissed this action based on a statute of limitations.

Despite the various obstacles to accountability, arbitral bribery remains a risky enterprise. If a party proposes a bribe and the arbitrator refuses, the repercussions will likely be devastating. Alternatively, if an arbitrator accepts a bribe and is discovered, erasure of the award is only one of several consequences that may include criminal prosecution. Bribery indelibly stains all the participants. In *Velez Org. v. J.C. Contracting Corp.*,[48] one member of a tripartite panel failed to disclose that, in a separate matter unrelated to the arbitration, he was being prosecuted for commercial bribery. The arbitrator still concealed this problem even after he was convicted of commercial bribery. Indeed, the arbitrator participated in rendering the award. The New York Appellate Division concluded the award should be vacated, because an appearance of impropriety arose from the arbitrator's conviction and failure to disclose. The court observed that "[t]he nature of the [bribery] conviction established corruption on the part of the arbitrator in question and placed serious doubt on his ability to act impartially and fairly."[49] Thus, even though the conviction arose from a different matter, the taint of bribery besmirched the arbitrator's character and conduct in the arbitration.

Tactic: Get to know your arbitrators better by gaining access to their deliberations

"Know your audience" is a foundational commandment in the art of persuasion.[50] For an audience consisting of arbitrators, the best access to their candid thoughts and reactions might come from observing their deliberations. Of course, arbitral deliberations are usually confidential and inaccessible to the parties. For example, Canon VI of the ARIAS·U.S. Code of Conduct provides in part as follows:

> Arbitrators shall not inform anyone of an arbitration decision, whether interim or final, in advance of the time it is given to all parties, or assist a party in post-arbitral proceedings, except as is required by law. An arbitrator shall not disclose contents of the deliberations of the arbitrators or other communications among or between the arbitrators.[51]

Similarly, the JAMS Arbitrator Ethics Guidelines provide in part as follows:

> Where there is more than one Arbitrator, an Arbitrator should not disclose to anyone the deliberations of the Arbitrators.[52]

Despite the ubiquity of this type of prohibition, parties and counsel have occasionally received deliberative information.

In *Northwestern National v. Insco*,[53] the reinsurer's party-appointed arbitrator forwarded to its counsel some 182 pages of email communications among

the members of the tripartite panel. The emails included the umpire's views about depositions (some of which were ongoing), lengthy discussions about discovery issues, as well as drafts and proposed texts of interim orders (some of which addressed yet unresolved issues in the proceedings).[54] Also included were email exchanges in which Insco's counsel made certain observations to its party-arbitrator who then transmitted those same points to the other panelists.[55] The other arbitrators reacted strongly when they learned that Insco's arbitrator had disclosed the intra-panel communications. They issued an order describing the revelations as "highly inappropriate" and stating that this misconduct "struck at the heart of the arbitral process in that the deliberations among the Panel are solely for the Panel's use and no one else."[56] In litigation filed in the Southern District of New York, Northwestern sought to disqualify Insco's counsel for conduct "prejudicial to the administration of justice." The court granted the motion, finding the attorneys' conduct inappropriate under New York State Rules of Professional Conduct.[57] Thus, receiving access to the panel's deliberations proved to be a disqualifying event for Insco's counsel.

Are there any circumstances in which an arbitrator can appropriately reveal panel deliberations? As noted in endnote 51, Canon IV to the ARIAS·U.S. Code of Conduct contemplates that "an arbitrator may put such deliberations or communications on the record in the proceedings (whether as a dissent or in a communication to all parties and panel members) to the extent (but only to the extent) reasonably necessary to expose serious wrongdoing on the part of one or more panel members, including actions that are contemplated by Section 10(a) of the Federal Arbitration Act." A second exception emerged in *Delta Mine v. AFC Coal*,[58] a case involving parallel arbitrations over the cancellations of two leases of coal mines. The parties used the same party-appointed arbitrators in both arbitrations but chose a different umpire for each proceeding. The arbitrations followed an unorthodox practice of permitting the arbitrators alone to question witnesses, subject to requests for clarification from counsel. Delta Mine's party-arbitrator behaved in a highly partisan manner, including participating in witness preparation and engaging in strategic discussions with the arbitrant and its counsel over "how to sway the arbitrators to rule in Delta Mine's favor."[59] The arbitrator also communicated with Delta Mine and its counsel about panel deliberations, and he sought advice on how to deal with a proposed ruling. The district court found that the arbitrator's conduct was unethical and amounted to "undue means" that "destroy[ed] the confidentiality of the panels' deliberations" and "manipulate[d] the process to Delta Mine's advantage."[60] The Eighth Circuit disagreed, however, because the other panel members had consented. The appellate court stated: "there is no evidence that [the conduct of Delta Mine's arbitrator in revealing panel deliberations] was contrary to what the neutral arbitrators expected and encouraged, and there is considerable evidence that party arbitrator [for AFC] knew the role [the arbitrator for Delta Mine] was playing and had equal access to his client and to the neutral arbitrators."[61] Thus, disclosure of panel deliberations will not be problematic in the exceptional circumstance that the parties and arbitrators agree that confidentiality does not apply. Otherwise, a party arbitrator's disclosure of panel deliberations to the appointing party is improper – a/k/a cheating.

> "Are there any circumstances in which an arbitrator can appropriately reveal panel deliberations?"

Tactic: Ghostwrite decisions and dissents

One reason a party-appointed arbitrator might want to reveal panel deliberations to the appointing party and its counsel is to enlist their assistance. For example, in the *Northwestern* case discussed above, the reinsurer's counsel provided perspective on certain issues and then Insco's arbitrator made those points to the other arbitrators.[62] When it comes to assisting arbitrators, what could be more helpful than drafting an award for the panel or a dissenting opinion for an arbitrator?

In Part II of this series, we referred to an arbitration between National Indemnity Company ("NICO") and IRB Brasil Resseguros S.A. ("IRB").[63] In addition to the misconduct previously discussed, that arbitration also involved counsel for IRB ghostwriting a dissenting opinion for its arbitrator.[64] Shortly after the panel majority issued two rulings in NICO's favor, IRB's party-arbitrator submitted "a scathing 6-page, single-spaced opinion objecting to the Panel's first and second awards and accusing the other Panel members of bias in favor of NICO and of substantial, intentional errors of fact and law."[65] The umpire, a highly experienced arbitrator and a member of the first Board of Directors of ARIAS·U.S., immediately questioned the provenance of the dissent.[66] In particular, the umpire sent an email in which he stated: "comparing the clearly written (although inaccurate) dissent with the manner in which [IRB's party-arbitrator] has communicated within the panel over the past three years, [I] can only surmise that he was not the (sole) author." IRB's party-arbitrator refused to answer when his fellow panelists asked if he wrote the dissent. After being pressed by NICO's counsel, IRB's counsel admitted they "had communicated on an *ex parte* basis with [IRB's party-arbitrator], provided him copies of documents from the record and transcript citations, and provided him with a template draft dissent for his consideration."[67] The exchange between IRB's arbitrator and counsel occurred after the case was under submission to the panel, at a time when no *ex parte* communications were allowed.[68] Thus, both the content and timing of the communications were improper. Before the ghostwriting came to light, IRB had relied in part on the dissenting opinion in a pending petition to vacate the majority awards. After the ghostwriting was revealed, IRB asked that the court not consider the dissent and withdrew that basis for its requests for vacatur.[69] Furthermore, IRB hired new counsel, and its former lawyers withdrew from the post-arbitral proceedings. Ghostwriting the dissent certainly did not aid IRB's challenges to the panel's rulings, which proved to be unsuccessful.

"Ghostwriting" connotes misattribution of authorship.[70] As in the case of *NICO v. IRB*, the process usually includes *ex parte* communications between the real and nominal authors. Is it "ghostwriting" for an arbitrator or panel to adopt a proposed ruling that has been openly shared among all participants in the process, with attribution to the original author? In the *Romanzi*[71] case, a party complained about the arbitrators' adopting an award that an opposing party proposed. The parties disagreed over who was entitled to certain legal fees: a law firm or the Trustee in the involuntary bankruptcy of a lawyer who previously worked at the firm. They also disputed the amount at issue. As the Sixth Circuit wryly noted, "[l]awyers and math often do not mix, and the precise amount of money awarded to the Firm has varied depending on who is doing the counting."[72] A majority of the arbitrators ruled in favor of the Trustee, adopting his proposed form of award, which included an embedded math error. In seeking to vacate this award, the law firm argued that "the panel's soliciting findings from both parties, but only receiving submissions from the Trustee, constituted *ex parte* contact," and, thus, "raise[d] a presumption that the arbitration award was procured by fraud, corruption, or other undue means."[73] The court disagreed, concluding there were no *ex parte* communications because counsel for the law firm "was copied on all of the emails between the Trustee's counsel and the arbitrators."[74] Indeed, the law firm's counsel not only received these communications but responded to some. The Trustee was the sole party to submit a proposed award only because the law firm chose not to make a submission. Accordingly, the arbitrators' adoption of the Trustee's openly proposed form of award was not improper, and the law firm's challenge failed.

In another case, the dissatisfied party to an appraisal process claimed that the ruling was "80% ghostwritten" by the other side and was "the product of a secret *ex parte* engagement letter between" the other party and the appraiser.[75] The court was unconvinced. The court found the claim of ghostwriting rested solely on the fact that the appraisal described the valuation formula with language similar to wording that appeared in a brief that the other party had filed earlier – a brief that the complaining party had received and that the appraisers could have reviewed when they chose the appropriate formula.[76] Although the case was later reversed on other grounds,[77] the district court aptly rejected the claim of ghostwriting as unfounded.

In sum, where a party or counsel secretly authors a decision or a dissenting opinion that an arbitrator passes off as his or her own, it is cheating; openly submitting a proposed opinion is not.

Tactic: Induce errors that might provide a basis to challenge an unfavorable award

As we have noted before, the best strategy is to win at the arbitration, because obtaining post-arbitral relief is difficult, to say the least. Winning, however, may not be on the menu. When faced with a likely loss, can a cheater plant an error in the proceedings as a backup plan? Counterfeiting a "get-out-of-jail free" card is not a novel idea. Indeed, this tactic is so well recognized it has a name: the invited or induced error doctrine. The invited error doctrine is an equitable one, similar to estoppel: a party cannot challenge a ruling by the arbitrators that the party either proposed or acquiesced in by failing to object.[78] For example, in *Fostoria v. Ohio Patrolmen's Benevolent Association*,[79] the City of Fostoria complained after an arbitrator granted an employee's request that he and two other police dispatchers be reinstated. A trial court granted the City's petition to vacate because the award reinstated two employees who were not parties to the arbitration. The Ohio Supreme Court restored the award, however, ruling that the City had invited this error by failing to object during the arbitration to the claimant's inclusion of the non-parties in his request for relief.[80]

Arbitrants should be careful in what they ask of the arbitrators because they may invite an error that cannot be corrected later. For example, when a party asks the arbitrators to accord relief that they have no authority to give, that party cannot later challenge an award granting that remedy to the opponent. In a dispute between a bank and software developers over ownership of certain intellectual property and trade secrets, each party asked the arbitrators to enjoin the opponent from exercising these legal rights.[81] The arbitration panel sided with the bank and granted an injunction against the software developers. When the developers later claimed that the panel had no authority to award injunctive relief, the court relied on the invited error doctrine to reject the developers' request to vacate. Not only had the developers failed to advise the panel of the absence of this authority, they effectively invested this power in the arbitrators by requesting this remedy for themselves.[82] In another case, both parties invoked a contractual provision that allowed the prevailing party to recover its fees.[83] The arbitrator initially found that neither side prevailed and denied both requests for fees. The claimant sought reconsideration. In reply, the respondents asked the arbitrator to rule that they were the prevailing parties and, thus, entitled to fees. The arbitrator reconsidered, declared the claimant the prevailing party, and granted fees to the claimant. In post-arbitral proceedings, the respondents argued that the arbitrator exceeded his authority. The California Court of Appeal responded: "[w]e agree [the arbitrator exceeded his powers under the applicable rules and law], but conclude that the [respondents] are not entitled to relief because they invited the error when they acquiesced in the request for reconsideration [by not objecting] and urged the arbitrator to issue a new award declaring [the respondents were] the prevailing party."[84]

As the preceding cases demonstrate, judges generally are not receptive when a party complains that an arbitrator or panel exercised authority that the party requested for its own benefit. Thus, where a party asked for an award of costs in an arbitration, the court was unsympathetic to that party's later complaint that the arbitrator exceeded his authority by awarding costs to the opponent.[85] The notion that a party cannot complain about relief it request-

> "...judges generally are not receptive when a party complains that an arbitrator or panel exercised authority that the party requested for its own benefit."

ed for itself applies with even greater force when the party actually receives the relief but later wishes otherwise. For example, in *FleetBoston v. Alt*,[86] a group of employees demanded arbitration against their employer and other respondents, including a related corporation, Robertson Stephens Group, Inc. ("RSGI"). RSGI and others sued seeking a judgment declaring they had no obligation to arbitrate. The employees continued to press their claims in the arbitration against RSGI and others, but they also filed counterclaims in the litigation. The court stayed the litigation pending the arbitration. The employees collectively sought $140 million in damages, but the arbitrators awarded only $14 million to a subset of the employees and nothing to the rest. Dissatisfied with the award, the employees pursued their counterclaims in the litigation in hopes of obtaining additional compensation. Having been forced to arbitrate, RSGI maintained that the arbitral award collaterally estopped the claimants from litigating their counterclaims. The employees asserted that collateral estoppel was inapplicable because RSGI was not actually a party to the arbitration. The district court and First Circuit rejected this argument as contrary to the position the employees successfully took in the arbitration. Not only had the employees identified RSGI as one of the respondents in the arbitration demand, "[b]efore the panel, [the employees] insisted that RSGI be considered a party."[87] The employees could not press RGSI to arbitrate and, when the award proved to be disappointing, turn around and challenge the arbitrators' authority to include RGSI in the proceedings.[88]

How does the invited error doctrine apply when a party first straddles, by arguing for and against the same ruling, and later contends that the award should be vacated because the arbitrators adopted the wrong alternative? In *Jenks v. DLA Piper*,[89] a former associate pursued claims against a law firm that fired him. Among other things, the associate alleged he was deprived of benefits under short- and long-term disability plans. In identifying the source of his claims – state law, the federal Employee Retirement Income Security Act ("ERISA"),[90] or the applicable employee benefit plans themselves – the former associate took inconsistent positions. In addition, he incongruously suggested "that his ERISA claims might not be subject to arbitration, yet he submitted those claims to the arbitrator, asked her to rule on them, and never asked her to rule that they were not arbitrable."[91] After the arbitrator awarded $93,635.67 to the former associate, the law firm confirmed the award in California state court. The former associate went to federal court, seeking "to confirm the parts of the award favorable to him and vacate the parts with which he disagree[d]."[92] The federal court dismissed the petition with prejudice, noting that the state court had already confirmed the award and that "[t]o the extent the arbitrator committed errors, in many instances it is likely Jenks invited them."[93] Thus, the former associate's approach of taking inconsistent positions made it easier for the court to reject his petition and find that he likely invited the arbitrator to make the purported errors.

The invited error doctrine may also solve the potential problem that might arise when the arbitration agreement calls for a reasoned award, but the arbitrator renders one without reasons. *Newell v. Providence Health*,[94] concerned a dispute between a hospital ("Swedish") and a doctor ("Newell") whom the hospital terminated. The arbitrator issued a barebones award in which he granted Newell $17.5 million in damages and stated "I find in favor of [Newell] on the following causes of action: breach of contract; breach of implied covenant of good faith and fair dealing; and retaliation in violation of [the Washington Law Against Discrimination]."[95] In seeking to vacate, Swedish argued that the arbitrator exceeded his authority, because the award did not "contain a brief statement of the claim(s) determined and the award made on each claim."[96] The court rejected this challenge on several grounds, including that Swedish had submitted a proposed award that also lacked reasoning to support the requested outcome. Thus, Swedish had induced the alleged error by suggesting through its own proposed form of award that supporting reasons were unnecessary.[97]

A similar challenge to an arbitral award for lacking reasoning also failed in an arbitration between the Nebraska Department of Health and Human Services ("DHHS") and the Public Employees Union.[98] The parties' dispute concerned a new dress code that DHSS sought to institute for its employees (business casual except on Casual Fridays). After losing the arbitration, DHHS petitioned to vacate the award for the arbitrator's failure to set out findings of fact and conclusions of law. Unlike the *Newell* case, DHHS had not submitted a proposed form of award that lacked reasons. Nevertheless, the fact that DHHS failed to alert the arbitrator to the need for a reasoned award was sufficient to find an invited error:

> DHHS did not prepare and submit any proposed findings to the arbitrator, made no specific request

> of the arbitrator for findings, and did not note an objection. Instead, DHHS filed an application to vacate the arbitrator's award 32 days after he delivered it. Whatever insufficiency exists in the findings of fact and conclusions of law, DHHS was instrumental in bringing about that insufficiency.[99]

Accordingly, the Nebraska Supreme Court affirmed the lower court's rejection of the DHHS's attempt to vacate the award. Thereafter, every day at DHHS was Casual Friday.

On their own, the statistics regarding the low success rate of petitions to vacate arbitral awards should discourage any party from relying on the tactic of inducing the arbitrator or panel to err.[100] Moreover, the prospect that a court will look to see whether the petitioner has requested or acquiesced in the claimed error makes this tactic even more questionable. Indeed, to avoid this doctrine, the invitation to err would need to be undetectable. Perhaps reverse psychology might work?

Tactic: When all else fails, destroy everything!

Desperate times call for desperate measures – that's what some arbitrants and their counsel seem to believe. When all else appears to have failed, some arbitrants and counsel have employed the nuclear option of attacking the arbitrators in hopes of forcing resignations and destroying the existing proceeding. These guerilla tactics may include threatening to sue or actually suing an arbitrator or arbitrators. Arbitral immunity exists to nullify the threat of litigation and "protect [the] decision-makers from undue influence and protect the decision-making process from reprisals by dissatisfied litigants."[101] Arbitrators may find themselves in need of this protection when cheaters conclude that destroying the arbitration is the only way to avoid defeat.

> "Arbitral immunity exists to nullify the threat of litigation and 'protect [the] decision-makers from undue influence and protect the decision-making process from reprisals by dissatisfied litigants.'[101]"

Claims that arbitrators have acted improperly or are partial are not self-verifying. Thus, a party cannot accuse an arbitrator of being biased and then justify a demand for recusal by asserting a claimed fear that the arbitrator will retaliate.[102] What if an arbitrator unwittingly helps to support the attack? Parties may threaten or even initiate litigation in hopes of provoking an arbitrator to overreact and thereby supply evidence of bias. Courts are leery of this tactic because parties have tried this same gambit against judges. As one court observed: "If merely filing a lawsuit against the arbitrators were enough to create an actual bias, it would give every client . . . carte blanche in creating bias by the arbitrators."[103] Furthermore, when an arbitrator responds to criticism or provocation by expressing frustration or even extreme frustration, that reaction will not necessarily suffice to establish disqualifying bias: "[f]eeling that frustration is a natural part of the job; it is not evidence that the decision-maker cannot fulfill his oath and duty to be fair."[104] Nevertheless, some parties have elected to go after arbitrators and, on occasion, they have succeeded.

During the *Northwestern-Insco* arbitration discussed above,[105] Insco's counsel sent a lengthy letter demanding that all the arbitrators resign.[106] The letter came roughly one year after the organizational meeting and only three

days before oral argument was slated to occur on Northwestern's motion for summary adjudication. The letter accused Northwestern's party-appointed arbitrator of a litany of "transgressions" including failing to make required disclosures, withholding information, and being evidently partial. The letter likewise accused the umpire of, among other things, having "aided" and "protect[ed]" Northwestern's party-arbitrator, having cut off Insco's inquiries into the allegedly inadequate disclosures by Northwestern's arbitrator, and being partial to Northwestern.[107] The letter cited specific interim orders that Insco claimed were highly partial toward Northwestern and unfair to Insco. The letter added that Insco's party-arbitrator had "communicated to Insco his strong belief that Insco cannot get a fair hearing before this Panel, and his intention to resign as a result."[108] The letter ended by indicating that, if all panel members did not voluntarily step down, Insco would "take this matter to court."[109] In response, Northwestern implored the panel not to resign and to "stand up to these threats and bullying tactics."[110] Only Insco's party-appointed arbitrator resigned. Insco reiterated its demand that the other arbitrators resign and informed them that the matter could not proceed without a panel of three.[111] Two days later, Northwestern petitioned the New York federal court to appoint a replacement arbitrator for Insco. Before the court acted, Insco appointed a replacement party-arbitrator and then used that fact to oppose Northwestern's request. Insco argued that (a) the court did not need to appoint a new arbitrator, because Insco had named one; and (b) the arbitration clause supported Insco's right to appoint a replacement arbitrator. In a letter to the judge, Insco also requested permission to proceed with a cross-motion to disqualify Northwestern's party-arbitrator for bias. The District Judge strongly discouraged Insco from filing the proposed cross-motion, expressing skepticism about whether a court had any authority to entertain a pre-award challenge for bias. In no uncertain terms, the court referred to the proposed cross-motion as "inappropriate," "frivolous," and "can't be won."[112] After commenting further that she "did not buy" the cross-motion at all and that she thought Insco should forego it, the judge warned: "if you proceed, you proceed at your peril . . . deeply at your peril."[113] Insco apparently received the message, because it did not to file a cross-motion to disqualify Northwestern's party-arbitrator. The court ultimately agreed with Insco's right to appoint the replacement arbitrator and denied Northwestern's request.[114] As discussed above, Northwestern later returned to court and successfully moved to disqualify Insco's counsel for obtaining access to deliberative emails.[115] Thus, Insco failed in its frontal attack on the entire panel, and it ended up having to replace its counsel for other reasons.

In another arbitration, investors also failed in their attempt to force an arbitration panel to resign.[116] The investors proceeded against Citigroup Global Marketing ("CGMI"), among others, in an arbitration conducted under the auspices of the Financial Industry Regulatory Authority ("FINRA"). In addition to their claims on the merits, the investors made a litany of complaints about the arbitration process and a related mediation. Among other things, the investors contended that CGMI refused to mediate in good faith yet was allowed to attend the mediation and learn confidential information from discussions and negotiations the investors had with the other respondents. Relying on claims of bad faith negotiation, the investors moved to disqualify CGMI's counsel in the arbitration. In response, CGMI obtained a sworn affirmation from the mediator "declaring that CGMI did not refuse to mediate, was never asked to leave the mediation, and acted in good faith."[117] The investors then accused the mediator of "perjury" and complained further that the chair of the arbitration panel had concealed his personal relationship with the mediator, which according to the investors created a conflict of interest. When the arbitrators refused to disqualify CGMI's counsel, the investors went nuclear: They demanded that all the arbitrators resign so that a new panel, not "tainted by [the mediator's] false assertions," could be appointed.[118] The arbitrators, nevertheless, remained in place. Approximately two weeks before the start of the arbitration hearing, the investors sued CGMI and one of its employees, as well as FINRA and the mediator. In the complaint, the investors sought among other things to enjoin the "current panel of FINRA arbitrators from conducting the August 21 through 24 arbitration hearings and any further proceedings in this matter."[119] The court denied the investors' requests for injunctive relief, and the arbitration proceeded. After the investors lost, they moved to vacate the award, claiming the "arbitration panel behaved improperly in that it demanded 'voluminous' and irrelevant discovery from them . . ., did not permit sufficient discovery of CGMI's documents, exhibited partiality towards CGMI, and 'refused to resign' at the Goldmans' request."[120] The Pennsylvania federal court determined that it lacked subject matter jurisdiction because the plaintiff's claims did

not implicate federal question jurisdiction.[121] The Third Circuit agreed that subject matter jurisdiction was lacking and affirmed the dismissal,[122] and the U.S. Supreme Court denied the investors' petition for a writ of certiorari.[123] Thus, not only did the investors fail in their efforts to force the arbitrators to resign, they also never obtained any judicial review of the arbitral award.

For those who would romanticize the civility of days past, when parties and counsel behaved with decorum and accorded arbitrators the respect they deserve, the proceedings in *Stef Shipping v. Norris Grain Company* paint a different picture.[124] The *Stef Shipping* arbitration began on November 14, 1961 and followed a rocky path forward. The court described that disruptive proceeding in part as follows:

> It appears that relations between the parties became more acrimonious as the hearings progressed, with counsel for each side accusing his opponent's arbitrator of misconduct. Finally, on February 14, 1962, . . . [the umpire] called a meeting at which he strongly urged all parties concerned to refrain from their attacks on the arbitrators. There is some dispute as to the exact phraseology of [the umpire's] remarks, but they were apparently to the effect that **if such attacks did not cease the arbitrators might or would be constrained to resign**. He also recommended that the parties attempt to settle the entire matter during the next week.[125]

The threat the panel might resign did not prevent the respondent's attorney from renewing his attacks on the petitioner's arbitrator for alleged partiality. In response, the petitioner's arbitrator resigned, but the other two arbitrators did not. The umpire and respondent's arbitrator presided over the remainder of the proceeding and awarded the petitioner only $154.08 on an original claim for almost $3,000. In seeking to vacate the award, the petitioner claimed that that either all the arbitrators should have resigned, as the umpire suggested they would, or that the two arbitrators should not have proceeded on their own. The court disagreed. The court made the following observations about the umpire's comments about resignation:

> [E]ven assuming, arguendo, that [the umpire] did positively state at the February 14th meeting that the entire panel would resign if the attacks were renewed, **this was not the type of binding commitment which required the resignation of all the arbitrators in the event of further attacks**. To the contrary, it seems to be a statement made during an informal meeting which was meant to emphasize [the umpire's] intentions to proceed with the hearings with a minimum of recriminations and controversy.[126]

The court also noted that the petitioner's arbitrator unilaterally chose to resign without requesting a meeting of the entire panel. The court concluded that the majority engaged in no misconduct either by failing to resign or by rendering an award. From a historical perspective, the case shows that, even in the halcyon days of yore, some parties not only attacked arbitrators but ignored panels' pleas for reduced hostilities. And in this case, this strategy seemed to have worked in the respondent's favor.

> "What happens if the nuclear option succeeds in derailing the process?"

What happens if the nuclear option succeeds in derailing the process? In *Schorr v. American Arbitration Association*,[127] the claimant ("Schorr") sought emergency relief to prevent the sale of certain property by a 50% co-owner of a limited liability company. The AAA appointed an emergency arbitrator, whom the respondent ("Doggart") sought unsuccessfully to recuse. The emergency arbitrator enjoined the sale and ordered Doggart to pay 50% of the arbitral costs, subject to reallocation in the final award. The AAA appointed a new arbitrator to handle the balance of the proceedings. In subsequent notices, the AAA advised the parties that they owed money for a deposit and for fees owing for the arbitrator. Schorr ended up paying all these amounts on her own; Doggart made no payments. Schorr sought to convert Doggart's non-payment into a default, arguing

that an "Inquest Clause" in an operating agreement allowed the arbitrator to preclude Doggart from asserting any defense or counterclaim. Schorr also alleged that Doggart acted atrociously in the arbitration, including engaging in intimidation and anti-Semitic behavior aimed at the emergency arbitrator and the new arbitrator:

> Doggart . . . allegedly falsely claimed that his nonprofit organization was investigating the emergency arbitrator and his law firm for "gross overbilling and attorney misconduct," and sought to recuse the emergency arbitrator, describing him and Schorr's attorneys as "two rich, Jewish, American attorneys." . . . . The AAA-ICDR denied the request. . . . Doggart also, according to Schorr, "repeatedly threatened and abused the [new] arbitrator" who succeeded the emergency arbitrator, including, at every telephonic appearance, purposely "mispronounc[ing] the Arbitrator's Jewish-sounding last name to make it sound 'more' Jewish-sounding."[128]

Doggart likewise accused Schorr and especially Schorr's counsel (her son) of misbehavior during the arbitration, including bullying and cajoling the AAA/ICDR's staff and arbitrators and threatening or calling for their removal when counsel did not get the decisions he wanted.[129] The AAA sent an email notifying both sides that the failure to abide by the AAA-ICDR Standards of Conduct "may result in the AAA declining to further administer a particular case or caseload."[130] Despite this warning, Doggart subsequently sent the arbitrator a five-page letter replete with various accusations and threatening comments. Among other things, Doggart:

> warned the arbitrator to "consider [his] position very carefully," threatened the AAA-ICDR with "unspecified consequences" if the arbitration were completed, and accused the arbitrator of bias, committing fraud and ethics violations, and turning the AAA into a "kangaroo court." . . . Doggart [also] claimed that the proceedings had caused him "Legal Abuse Syndrome (LAS), a form of post-traumatic stress disorder."[131]

Less than two weeks later, the AAA-ICDR sent a letter advising the parties that it had "'administratively' terminated the arbitration due to 'our employees and the arbitrator hav[ing] been subjected to continued violations of the Standards.'"[132] Thus, the AAA called an end to the arbitration for bad behavior.

The claimant, Schorr, asked the General Counsel of AAA-ICDR to restart the arbitration or refund the $46,795.66 she had advanced. The General Counsel refused both requests. Schorr then sued the AAA-ICDR and Doggart, but the court dismissed that suit primarily based on AAA Commercial Rule 52(d), which releases the AAA-ICDR and its arbitrators from liability. Schorr later petitioned to confirm the order by the emergency arbitrator that had provisionally required Doggart to pay one-half of the arbitral fees. Subsequently, however, Schorr dismissed that litigation without prejudice.[133] Although we are loath to declare misconduct the winner, this unusual case appears to be an example of an arbitration in which threats and challenges to the arbitrators prevented a ruling on the merits of the parties' disputes, which is precisely what the nuclear option aims to accomplish.

Anyone considering the tactic of attacking the arbitrators to destroy everything must be mindful of Emerson's admonition: "When you strike at a king, you must kill him."[134] Most jurisdictions recognize that arbitrators have the inherent authority to sanction parties and, in some jurisdictions, the lawyers who appear before them.[135] For example, in *Polin v. Kellwood*, the court upheld an award ordering the claimant's attorney to pay one-half of the costs of the arbitration because he had scurrilously attacked the umpire in a letter to the AAA in what the respondent's attorney described as an attempt "to destroy this arbitration."[136] The attacks in that case failed to derail the

> "...a "destroy everything" strategy may work on rare occasions, but it may also result in self-destruction."

arbitration or deter the arbitrators, who proceeded to rule in favor of the respondent and issue the sanctions order against the claimant's counsel.[137] Thus, a "destroy everything" strategy may work on rare occasions, but it may also result in self-destruction.

Conclusion

In three articles, we have explored a pathological side to arbitration: cheating. We have not covered exhaustively all aspects of this topic and have not attempted to identify all the tricks that cheaters employ. Instead, we have highlighted and explored some of the tactics that participants have plied to game the system.

Our personal experience suggests that cheating in arbitration is not rampant: most participants act honorably in most proceedings. It would be naïve, however, to think that cheating never happens or that cheaters never prosper. In self-administered arbitrations – like most insurance and reinsurance proceedings – the integrity of the process rests largely, if not entirely, on the participants: how they conduct themselves and how discerning they are in respect of the behavior of others. If awareness helps to dispel cheating, then these articles may be of some service.

After 43 years, Dan FitzMaurice retired from Day Pitney LLP and the practice of law as of January 1, 2025. He remains a member of ARIAS·U.S. and is open to serving as a consultant, arbitrator, or mediator in matters involving insurance, reinsurance, or commercial disputes.

Joseph Scully, an experienced litigator, primarily represents insurance companies in insurance coverage actions and reinsurance disputes. He has litigated coverage disputes in state and federal courts, including disputes arising from asbestos and other product liability claims, environmental losses, fire and other property damage, construction defects, and equipment breakdown claims. Scully also has handled and tried disputes involving reinsurance claims before arbitration panels and in state and federal courts.

Scully has tried complex civil disputes in courts throughout New England, as well as Delaware, Maryland, New York, Ohio and Texas. Clients seek out his experience taking matters to trial in state and federal courts and litigating numerous arbitrations through final hearings. He is also sought out for his handling of appeals before courts, including the First Circuit Court of Appeals and state appellate courts in Connecticut, Massachusetts, New York and Rhode Island.

Scully has been published and quoted on insurance and reinsurance topics in a number of publications, including Law360 and the Connecticut Law Tribune. He is a former member of the Board of Editors of Connecticut Supreme Court History, the journal of the Connecticut Supreme Court Historical Society. He currently serves on the Board of the Greater Hartford Legal Aid Foundation.

Endnotes

1 In 1870, roughly three thousand years after the Trojan War, Heinrich Schliemann re-discovered Ancient Troy in modern day Turkey. *Archaeological Site of Troy*, UNESCO, https://whc.unesco.org/en/list/849/#:~:text=The%20first%20excavations%20at%20the,Anatolia%20and%20the%20Mediterranean%20world (last visited Oct. 11, 2024).

2 It has been suggested by some that this is an example of a failed arbitration because Zeus altered the terms of the goddesses' agreement to arbitrate by not deciding the issue himself and instead delegating to Paris. Van Zyl, Claudette, *The MJDR and the Myth of Persephone*, McGill Journal of Dispute Resolution, https://mjdr-rrdm.ca/the-mjdr-and-the-myth-of-persephone/. The goddesses, however, waived any objection to Paris' qualifications as an arbitrator by failing to raise such objection before his decision. *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 674 (5th Cir. 2002) ("objections to the composition of arbitration panels must be raised 'at the time of the hearing'") (quoting *Bernstein Seawell & Kove v. Bosarge*, 813 F.2d 726, 732 (5th Cir. 1987)). Incidentally, upon his birth, Paris' parents, Priam and Hecuba, had received a prophecy that their next child would be the downfall of Troy. Unable to kill the child themselves, Priam gave him to his chief shepherd, Agelaus, with orders to kill the baby Paris. Agelaus left Paris exposed on Mount Ida to die but found him still alive after nine days. Agelaus could not bring himself to kill the baby and raised him as his own. The rest is history (or mythology). Together with the story of Oedipus, the lesson is that shepherds are not reliable co-conspirators in infanticide.

3 David McCullough, *John Adams* 52 (Simon & Schuster 2001).

4 *Seagate Tech., LLC v. W. Digit. Corp.*, 854 N.W.2d 750, 754-56 (Minn. 2014).

5 *Seagate Tech., LLC v. W. Digit. Corp.*, No. A15-0760, 2016 WL 281218, at *4-5 (Minn. Ct. App. Jan. 25, 2016).

6 *Marjam Supply Co., Inc. v. Am. Contractors of New Jersey, LLC*, No. A-0838-21, 2023 WL 3012375, at *1-2 (N.J. Super. Ct. App. Div. Apr. 20, 2023), cert. denied, 256 N.J. 127 (2024).

7 *Nuvasive, Inc. v. Absolute Med., LLC*, 642 F. Supp. 3d 1320, 1331 (M.D. Fla. 2022),

aff'd, 71 F.4th 861 (11th Cir. 2023).

8 9 U.S.C. § 12 (providing that "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered").

9 *Zastrow v. Houston Auto Imports Greenway Ltd.*, 789 F.3d 553 (5th Cir. 2015).

10 *Id.* at 558.

11 The dealer certainly fought Zastrow's claim, including filing two appeals to the U.S. Court of Appeals for the Fifth Circuit and an unsuccessful petition for certiorari to the U.S. Supreme Court.

12 Efforts to alter or suppress evidence, of course, can predate an arbitration. Football and alleged cheating factored into an arbitration involving the NFL and Tom Brady, formerly of the New England Patriots. *Nat'l Football League Mgmt. Council v. Nat'l Football League Players Ass'n*, 125 F. Supp. 3d 449 (S.D.N.Y. 2015), rev'd, 820 F.3d 527 (2d Cir. 2016). In 2015, the NFL retained a prominent law firm to investigate whether the Patriots intentionally deflated the footballs used in the AFC Championship Game against the Indianapolis Colts (held on January 18, 2015). The law firm concluded that tampering took place. The NFL imposed sanctions on the Patriots and a four-game suspension on Tom Brady. The Patriots did not contest their sanctions, but Brady appealed the suspension by filing a grievance arbitration. In contrast to Zeus, the NFL Commissioner, Roger Goodell, appointed himself as the arbitrator and affirmed the suspension. He concluded that "Mr. Brady knew about, approved of, consented to, and provided inducements and rewards in support of a scheme by which . . . [Patriot's personnel] tampered with the game balls." *Id.* at 461 (quotation marks omitted). Goodell identified the following circumstances as warranting sanctions: when cooperating in a workplace investigation "is not forthcoming, when evidence is hidden, fabricated, destroyed, when witnesses are intimidated or not produced upon reasonable request, or when individuals do not provide truthful information." *Id.* (quotation marks omitted). Goodell concluded that Brady not only participated in the scheme to tamper with the footballs but "willfully obstructed the investigation by, among other things, affirmatively arranging for destruction of his cellphone knowing that it contained potentially relevant information that had been requested by the investigators." *Id.* at 462 (quotation marks omitted). The NFL moved to confirm the arbitral award, and Brady moved to vacate it. The District Court granted the motion to vacate, but the Second Circuit, in a two-to-one decision, reversed. Whatever one might believe about the "Deflategate" scandal, the win on this occasion went to the arbitrator.

13 *France v. Bernstein*, 43 F.4th 367, 370 (3d Cir. 2022).

14 *Id.* at 374-75.

15 *Id.* at 380.

16 *Id.* at 378-82 (referring repeatedly to France's "perjury" and observing that "[p]erhaps the easiest conclusion in this case, even under a clear-and-convincing-evidence standard, is that France committed fraud").

17 Order, *France v. Bernstein*, No. 1:20-cv-01443 (M.D. Pa. Feb. 3, 2023), ECF No. 79 (vacating arbitration award in accordance with the Judgment and Mandate of the United States Court of Appeals for the Third Circuit). The litigation that Bernstein and his company, Clarity Sports, filed against CAA and the autograph-event organizers remains open as of this writing. In March of 2024, a U.S. Magistrate Judge commented on that hard-fought lawsuit: "[T]he degree of enmity and antipathy in this litigation is aptly illustrated by the fact that this dispute regarding [the wide receiver's] 2019 representation contract has now outlived [the wide receiver's] actual NFL career." *Clarity Sports Int'l, LLC v. CAA Sports, LLC*, No. 1:19-CV-00305, 2024 WL 3749897, at *1 (M.D. Pa. Mar. 8, 2024), *report & recommendation adopted sub nom. Clarity Sports Int'l LLC v. Redland Sports*, 2024 WL 3743680 (M.D. Pa. Aug. 9, 2024); *see also id.* at *3 ("In the course of this disputatious discovery, the court, Schwab, M.J., was compelled to issue a half dozen amended case management orders and on multiple occasions was required to address discovery disputes between the parties. . .. The court also sanctioned CAA's prior counsel on one occasion for their obstreperous conduct in the course of depositions.").

18 Opinion & Award in Arbitration between Jason Bernstein & Todd France, *France v. Bernstein*, No. 1:24-cv-00448, at *16, 19-20 (E.D. Va. Mar. 21, 2024), ECF No. 1-1 (emphasis added).

19 Chris Deubert, *NFL Agent Todd France Hit with Unprecedented Damages Award*, Forbes (Apr. 8, 2024), https://www.forbes.com/sites/chrisdeubert/2024/04/08/nfl-agent-todd-france-hit-with-unprecedented-damages-award/.

20 Plaintiff-Petitioner's Reply Memorandum in Support of Motion to Vacate or Modify Arbitration Award, *France v. Bernstein*, No. 1:24-cv-00448, at *1 (E.D. Va. May 6, 2024), ECF No. 43.

21 Perjury is a form of fraud in the arbitration. In at least some jurisdictions, perjury on an issue in dispute in the arbitration will not warrant vacatur of an arbitral award, because it is a form of "intrinsic fraud," rather than "extrinsic fraud." *See, e.g., Low v. Minichino*, 267 P.3d 683, 690 (Haw. Ct. App. 2011) (discussing the distinction between extrinsic and intrinsic fraud in relation to perjury, while rejecting the rule that exists in certain jurisdictions that limits vacatur of an arbitral award to extrinsic fraud).

22 *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, 758 F.3d 1051, 1054-56 (8th Cir. 2014).

23 *Id.* at 1055.

24 *Fed. Republic of Nigeria v. Process & Indus. Devs. Ltd.* [2023] EWHC 2638 (Comm).

25 *See, e.g., Am. Transit Ins. Co. v. Pierre*, No. 1:24-cv-00360, 2024 WL 2214525, at *1 (E.D.N.Y. May 16, 2024) (granting preliminary injunction against medical providers for filing no-fault arbitrations and state court lawsuits to prevent ineligible or claims based on false statements and billings); *Gov't Emps. Ins. Co. v. Granovsky*, No. 1:19-cv-06048, 2022 WL 1810727, at *2 (E.D.N.Y. June 2, 2022) (describing allegations that GEICO had received thousands of potentially fraudulent claims for reimbursements from a medical device supplier, certain medical clinics, and doctors.); *State Farm Mut. Auto. Ins. Co. v. Herschel Kotkes, M.D., P.C.*, No. 1:22-cv-03611, 2023 WL 4532460, at *13 (E.D.N.Y. July 13, 2023) (staying all pending suits and arbitrations and enjoining a doctor from filing any new actions pending resolution of pending action); *Allstate Ins. Co. v. Pierre*, No. 1:23-cv-06572, 2024 WL 85088, at *1 (E.D.N.Y. Jan. 8, 2024); *Gov't Emps. Ins. Co. v. Patel*, No. 1:23-cv-02835, 2024 WL 84139, at *2 (E.D.N.Y. Jan. 8, 2024); *State Farm Mut. Auto. Ins. Co. v. Metro Pain Spe-*

cialists P.C., No. 1:21-cv-05523, 2022 WL 1606523, at *2 (E.D.N.Y. May 20, 2022); *Gov't Emps. Ins. Co. v. Gerling*, No. 1:23-cv-07693, 2024 WL 779276, at *1 (E.D.N.Y. Feb. 26, 2024); *Gov't Emps. Ins. Co. v. Relief Med., P.C.*, 554 F. Supp. 3d 482, 489-90 (E.D.N.Y. 2021); *Liberty Mut. Ins. Co. v. Raia Med. Health, P.C.*, 140 A.D.3d 1029, 1030 (2d Dep't 2016).

26 In some of the cases discussed in this article, forensic evidence from computer systems and metadata were instrumental in showing the provenance of disputed evidence. Similar evidence proved to be valuable in *McCumbee v. M Pizza, Inc.*, No. 3:22-CV-00128, 2023 WL 2725991, at *4 (N.D.W. Va. Mar. 30, 2023). In that case, the plaintiff, a delivery driver for Dominoes, denied that he ever agreed to arbitrate. The defendant, however, produced "electronic evidence and metadata" that the Court found to be "particularly enlightening" in establishing that the plaintiff had consented to arbitrate by affixing an electronic signature to an arbitration agreement.

27 Cal. Civ. Proc. Code § 1281.85 (West).

28 Cal. Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Standard 11 (emphasis added).

29 *See, e.g., In Re Guo*, 965 F.3d 96, 107 (2d Cir. 2020), as amended (July 9, 2020) (identifying bribery of the arbitrators as a ground for vacating an award under both Chinese law and the Federal Arbitration Act); *Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995) (identifying issuance of an award based on bribery as "equivalent to [the] arbitrator dispensing his own brand of industrial justice" (quotation marks omitted)); *Liberty Sec. Corp. v. Fetcho*, 114 F. Supp. 2d 1319, 1321-22 (S.D. Fla. 2000) (interpreting "[u]ndue means" in 9 U.S.C. § 10(a)(1) as including "measures equal in gravity to bribery, corruption, or physical threat to an arbitrator"); *Pitts v. Nat'l R.R. Passenger Corp.*, 603 F. Supp. 1509, 1517 (N.D. Ill. 1985) (identifying payment of a board member of a type of extrinsic fraud warranting vacatur because the outcome would not be determined based on the merits).

30 In *Laverpool v. New York City Transit Authority*, 835 F. Supp. 1440, 1461-62 (E.D.N.Y. 1993), *aff'd*, 41 F.3d 1501 (2d Cir. 1994), the Court concluded that the plaintiff's allegation that the Transit Authority violated the federal racketeering statute was not viable: the alleged predicate act of offering a bribe to a labor arbitrator did not violate New York State's anti-bribery statute, because the arbitrator was not a public official. *Schlesinger v. Schlesinger*, No. 2:05-cv-05016, 2007 WL 9706976, at *9 (E.D.N.Y. Feb. 8, 2007) reached the same outcome for the same reason in rejecting alleged RICO violations based on claims the defendant bribed a member of a rabbinical tribunal, because the alleged recipient of the bribe was a rabbi, not a public official.

31 *See, e.g.*, W. Va. Code Ann. § 61-5-7 (West):

> Any person who gives or offers, directly or through any other person or persons, or promises, directly or indirectly, to give any money or other thing of value to a . . . arbitrator, umpire . . . with intent to bias his opinion or influence his decision in relation to any matter in which he is acting or is to act; and any such . . . arbitrator, umpire . . . who corruptly takes or receives such money or other thing of value, or who agrees to take such money or other thing of value to bias or influence his opinion or action or both, shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years, and fined in addition thereto not exceeding five thousand dollars.

Similarly, Va. Code Ann. § 18.2-441 (West) provides:

> If any person give, offer or promise to give any money or other thing of value to a commissioner appointed by a court, auditor, arbitrator, umpire or juror (although not impaneled), with intent to bias his opinion or influence his decision in relation to any matter in which he is acting or is to act, or if any such commissioner, auditor, arbitrator, umpire or juror corruptly take or receive such money or other thing, he shall be guilty of a Class 4 felony.

32 *Kaufman v. Joseph*, No. 1:16-cv-11961, 2017 WL 2407258 (D. Mass. June 1, 2017).

33 *Id.* at *4.

34 *Bletas v. Deluca*, No. 1:11-CV-01777, 2011 WL 13130879, at *11 (S.D.N.Y. Nov. 15, 2011) (commenting that "[i]f it were not sanctionable for plaintiffs to allege bribery here, then any losing litigant would have a reasonable basis for making such a contention").

35 *RZS Holdings AVV v. PDVSA Petroleos S.A.*, 598 F. Supp. 2d 762, 771 (E.D. Va. 2009), *aff'd sub nom. RZS Holdings AVV v. PDVSA Petroleo S.A.*, 383 F. App'x 281 (4th Cir. 2010).

36 *Dawson v. Wells Fargo Bank Nat'l Ass'n*, No. 09-15-00035-CV, 2015 WL 9311676, at *4 (Tex. Ct. App. Dec. 23, 2015).

37 *United Transp. Union v. BNSF Ry. Co.*, 710 F.3d 915 (9th Cir. 2013).

38 The National Mediation Board is established under the Railway Labor Act, 45 U.S.C. § 153(q).

39 *BNSF Ry. Co.*, 710 F.3d at 918.

40 *United Transp. Union v. Burlington N. Santa Fe Ry. Co.*, 708 F. App'x 330, 331 (9th Cir. 2017).

41 *Asmar Constr. Co. v. Afr Enters., Inc.*, No. 350488, 2021 WL 940963, at *4 (Mich. Ct. App. Mar. 11, 2021), *denying appeal*, 511 Mich. 967 (2023).

42 *See, e.g., Owens v. Am. Arb. Ass'n, Inc.*, 670 F. App'x 441, 443 (8th Cir. 2016) (noting that "[c]ourts extend immunity to arbitrators to protect them from undue influence and the arbitration process from attack by dissatisfied litigants" (quotation marks omitted)); *Sacks v. Dietrich*, 663 F.3d 1065, 1069 (9th Cir. 2011) ("The doctrine of arbitral immunity provides that arbitrators are immune from civil liability for acts within their jurisdiction arising out of their arbitral functions in contractually agreed upon arbitration hearings." (quotation marks omitted)); Restatement (Third) U.S. Law of Int'l Comm. Arb. § 3.10 TD (2018) ("International arbitrators are, to the same extent as judges, immune from civil liability for acts or omissions within the scope of their duties.").

43 *Lanza v. Fin. Indus. Regul. Auth.*, 953 F.3d 159, 164 (1st Cir. 2020) (commenting about arbitral immunity, "we doubt that such immunity would afford shelter to an arbitrator who, say, decided a matter after accepting a bribe").

44 *See, e.g. Trump v. United States*, 144 S. Ct. 2312, 2341 n.3 (2024) (construing presidential immunity broadly and prohibiting the admission of evidence of official acts to probe the president's conduct); *id*. at 2355 (Barrett, J. concurring in part) (raising concern that, in a case attempting to hold a president accountable for bribery, "excluding from trial any mention of the

official act connected to the bribe would hamstring the prosecution"); *Dennis v. Sparks*, 449 U.S. 24, 29, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) (confirming that a judge who issued an injunction allegedly because he accepted a bribe, was immune from civil liability, while noting that criminal liability remained possible if the allegations were proven).).

45 *See, e.g., Gulf Petro Trading Co., Inc. v. Nigerian Nat'l Petrol. Corp.*, 512 F.3d 742, 745-46, 750-52 (5th Cir. 2008) (dismissing racketeering claims that alleged the defendant paid a $25 million bribe to secure an arbitration award in Switzerland because (a) any effort to vacate the award had to be pursued in Switzerland and (b) the plaintiff could not use civil litigation to collaterally attack the arbitral award).

46 In *AmTrust Fin. Servs., Inc. v. Lacchini*, 260 F. Supp. 3d 316, 323-24, 326-27 (S.D.N.Y. 2017), an international insurance company sued an Italian arbitrator for allegedly agreeing to accept a bribe – 10% of the proceeds of a yet-to-be issued award likely worth hundreds of millions of dollars. The arbitrator resided in Milan (where the arbitration was seated), and the Court dismissed the claim for lack of personal jurisdiction.

47 *Gallagher v. Dirs. Guild of Am., Inc.*, 144 A.D.2d 261, 262 (1st Dep't 1988).

48 *Velez Org. v. J.C. Contracting Corp.*, 289 A.D.2d 105, 106 (1st Dep't 2001).

49 *Id.*

50 *See, e.g.*, John C. Shepherd & Jordan B. Cherrick, *Advocacy and Emotion*, 138 F.R.D. 619, 621 (N.D. Tex. 1991) ("An advocate needs to know the audience before emotion can be used effectively as a tool of persuasion."); Chris Malburg, *The Art of Persuasive Communication*, Practical Lawyer, Oct. 2007, at 25, 26 (listing knowing what the audience wants as first among the elements of persuasion); Douglas Lavine, 75 Wisconsin Lawyer 12, 29 (Dec. 1, 2002) (reviewing Mark S. Brown, *Cardinal Rules of Advocacy: Understanding and Mastering Fundamental Principles of Persuasion* (National Institute of Trial Advocacy 2002)) (listing "know your audience(s)" as first among nine cardinal rules of advocacy); Meng Li, *The Science of Persuasion: Know Your Audience*, Ohio State University (Feb. 19, 2019), https://fisher.osu.edu/blogs/leadreadtoday/blog/the-science-of-persuasion-know-your-audience.

51 Canon VI to the ARIAS·U.S. Code of Conduct does provide an exception to the ban on disclosing deliberations:

> Notwithstanding the previous sentence, an arbitrator may put such deliberations or communications on the record in the proceedings (whether as a dissent or in a communication to all parties and panel members) to the extent (but only to the extent) reasonably necessary to expose serious wrongdoing on the part of one or more panel members, including actions that are contemplated by Section 10(a) of the Federal Arbitration Act.

52 JAMS Arbitrator Ethics Guidelines, Guideline IV.D., https://www.jamsadr.com/arbitrators-ethics/.

53 *Nw. Nat'l Ins. Co. v. Insco, Ltd.*, No. 1:11-CV-01124, 2011 WL 4552997, at *1-*3 (S.D.N.Y. Oct. 3, 2011). By way of disclosure, one of the authors of this article played an ancillary role in this litigation (and no part in the arbitration). After Insco produced the e-mail communications among panel members, Northwestern's counsel in the arbitration recognized that, if they reviewed these materials, they would be exposed to deliberative information and, thus, arguably subject to disqualification. Accordingly, Northwestern retained Day Pitney to examine the email communications and compile a chart showing the time, sender, recipient(s), and a high-level summary or description of the subject, without revealing any panel deliberations. *Id.* at *3.

54 *Id.* at *9-10.

55 *Id.*

56 *Id.* at *3 (quotation marks omitted).

57 Id. at *6-7 (quotation marks omitted).

58 *Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.3d 815, 817-20 (8th Cir. 2001).

59 *Id.* at 819 (quotation marks omitted).

60 *Id*. at 819, n.3 (quotation marks omitted).

61 *Id.* at 823.

62 *Insco, Ltd.*, 2011 WL 4552997, at *9 (describing some of the communications at issue as follows: "e-mails 64–67 involved communications between [reinsurer's counsel] and [party arbitrator] in which [counsel] provided [the arbitrator] with a one-sided view of certain discovery issues which [the arbitrator] then forwarded to the full panel").

63 Dan FitzMaurice & Joseph Scully, *How to Cheat in Arbitration – Allegedly: Part II*, ARIAS Quarterly (2d Q. 2024) at 7-17.

64 *Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d 457, 484 n.36 (S.D.N.Y. 2016), *amended*, No. 1:15-cv-01165, 2016 WL 3144057 (S.D.N.Y. Apr. 14, 2016), *aff'd sub nom. Nat'l Indem. Co. v. IRB Brasil Reseguros S.A.*, 675 F. App'x 89 (2d Cir. 2017), *enforcement granted*, No. 1:15-cv-03975, 2018 WL 739450 (S.D.N.Y. Jan. 23, 2018), *vacated*, 767 F. App'x 154 (2d Cir. 2019).

65 *Id.* at 472.

66 *Id.* (identifying the umpire as Daniel E. Schmidt, IV); *see also* Mark S. Gurevitz & T. Richard Kennedy, *ARIAS·U.S.: Its Growth and Importance in the Process of Resolving Insurance and Reinsurance Disputes*, ARIAS Quarterly (2d Q. 2002) at 5 (identifying the "founding members of the Board of Directors (and their affiliations at the time)" as including "Daniel E. Schmidt, IV, Sorema N.A. Reinsurance Company").

67 *IRB Brasil Resseguros S.A.*, 164 F. Supp. 3d at 472 (emphasis added) (quotation marks omitted).

68 Memorandum in Support of Petition to Confirm the Arbitration Awards, *Nat'l Indem. Co. v. IRB Brasil Resseguros S.A.*, No. 1:15-cv-03975, 2015 WL 13123767, at 17, n.13 (S.D.N.Y. July 14, 2015) (noting that "[t]he Panel and the parties decided at the first organizational meeting that there would be no *ex parte* communications with the party arbitrators after motions were fully briefed and after the submission of pre-hearing briefs.") (citation omitted).

69 *Id.*

70 Merriam-Webster's Online Dictionary defines "ghostwrite" as follows: "to write (a speech, a book, etc.) for another who is the presumed or credited author." *Ghostwrite*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/ghostwrite (last visited Oct. 16, 2024).

71 *In re Romanzi*, 31 F.4th 367, 371-74 (6th Cir. 2022), *rehearing en banc denied*, No. 20-2278, 2022 WL 1618048 (6th Cir. May 18, 2022).

72 *Id.* at 371 n.1.

73 *Id.* at 378 (emphasis added) (quotation

marks omitted).

74 *Id.*

75 *Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n*, 38 F. Supp. 2d 1202, 1205 (D. Or. 1999), *rev'd and remanded sub nom. Portland Gen. Elec. Co. v. U.S. Bank Tr. Nat'l Ass'n as Tr. for Tr. No. 1*, 218 F.3d 1085 (9th Cir. 2000).

76 *Id.* at 1209.

77 In *Portland General Electric Co. v. U.S. Bank Trust National Ass'n as Trust for Trust No. 1*, 218 F.3d 1085, 1086 (9th Cir. 2000), the Ninth Circuit concluded that the District Court erred by applying the Federal Arbitration Act ("FAA") in confirming the appraisal award. An earlier Ninth Circuit case, *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987), had held that state law determines whether an alternative dispute resolution process constitutes an "arbitration" within the meaning of the FAA. In the *Portland* case, the Ninth Circuit panel openly questioned the applicability of state law but nevertheless felt bound by *Wasyl* and looked to Oregon state law in concluding that the appraisal process was not an "arbitration" subject to the limited review of the FAA. Subsequent decisions in other U.S. Circuit Courts have uniformly held that federal, rather than state, law determines the meaning of "arbitration" within the meaning of the FAA. *See, e.g., Milligan v. CCC Info. Servs. Inc.*, 920 F.3d 146, 151 (2d Cir. 2019); *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693 (6th Cir. 2012); *Salt Lake Trib. Publ'g Co., LLC v. Mgmt. Plan., Inc.*, 390 F.3d 684, 689 (10th Cir. 2004); *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6–7 (1st Cir. 2004).

78 *See, e.g., Garcia-Ascanio v. Spring Indep. Sch. Dist.*, 74 F.4th 305, 310 (5th Cir. 2023) ("[U]nder the invited error doctrine, '[a] party cannot complain on appeal of errors which he himself induced the district court to commit.'" (quoting *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 476 (5th Cir. 2015)); *United States v. Sullivan*, Nos. 23-6559, 23-6608, 23-6609, 23-7875, 23-7882, 23-7887, 24-91, 2024 WL 4095659, at *16 (2d Cir. Sept. 6, 2024) (stating a party cannot "deliberately provoke[] a procedural irregularity" and then "complain of an error that they themselves invited" (alteration and quotation marks omitted)); *United States v. Glasgow*, No. 22-6963, 2023 WL 4075155, at *1 (4th Cir. June 20, 2023) ("[T]he invited error doctrine recognizes that a court cannot be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request." (quotation marks omitted)); *United States v. Deberry*, 430 F.3d 1294, 1302 (10th Cir. 2005) (commenting that "the doctrine of invited error 'is based on reliance interests similar to those that support the doctrines of equitable and promissory estoppel'" (quoting *Fryman v. Fed. Crop Ins. Corp.*, 936 F.2d 244, 249 (6th Cir.1991))).

79 *Fostoria v. Ohio Patrolmen's Benevolent Ass'n.*, 106 Ohio St. 3d 194, 2005-Ohio-4558, 833 N.E.2d 720 (2005), *opinion modified on reconsideration*, 107 Ohio St. 3d 1426, 2005-Ohio-6124, 837 N.E.2d 1210 (2005).

80 *Fostoria*, 2005-Ohio-4558, ¶ 27, 106 Ohio St. 3d 194, 199, 833 N.E.2d 720, 725.

81 *In re Arb. Between Wells Fargo Bank, N.A. & WMR e-PIN*, No. 0:08-05472, 2009 WL 10678607, at *4 (D. Minn. June 22, 2009), *report & recommendation adopted*, 2009 WL 2461518 (D. Minn. Aug. 10, 2009), *aff'd*, 653 F.3d 702 (8th Cir. 2011) (noting that "[i]f a party willingly and without reservation allows an issue to be submitted to arbitration, he cannot await the outcome and then later argue that the arbitrator lacked authority to decide the matter" (quotation marks omitted)).

82 *Id.*

83 *Thomas C. Turner, Inc. v. Layton*, Nos. B241809, B246400, 2013 WL 6859873, at *1 (Cal. Ct. App. Dec. 31, 2013).

84 *Id.* at *2 (quotation marks omitted).

85 *See, e.g., Superior Healthplan, Inc. v. Legacy Home Health Agency, Inc.*, No. 13-20-00160-CV, 2022 WL 868530, at *3 (Tex. Ct. App. Mar. 24, 2022) (noting that "whether Superior's conduct amounted to a judicial admission, an invited error, or implicated some other equitable principle, we agree with Legacy that it would be unfair to allow Superior to raise this point on appeal after Superior itself requested an award of costs").

86 *FleetBoston Fin. Corp. v. Alt*, 638 F.3d 70, 72 (1st Cir. 2011).

87 *FleetBoston Fin. Corp.*, 638 F.3d at 77.

88 *Id.*

89 *Jenks v. DLA Piper (US) LLP*, No. 3:13-cv-05381, 2014 WL 3381947, at *1 (N.D. Cal. July 10, 2014).

90 Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1101-1114 (2024).

91 *Jenks*, 2014 WL 3381947, at *8.

92 *Id.* at *1.

93 *Id.* at *8.

94 *Newell v. Providence Health & Servs.*, 9 Wash. App. 2d 1038, at *1 (2019) (unpublished opinion).

95 *Id.* at *1.

96 *Id.* at *3 (quotation marks omitted).

97 *Id.*

98 *Dep't of Health & Hum. Servs. v. Neb. Ass'n of Pub. Emps.*, 313 Neb. 259, 261-66 (2023)

99 *Id.* at 277-78.

100 Kermit L. Kendrick and Julie W. Pittman, *Dreaming the Nearly Impossible Dream: Vacatur of Arbitration Awards in Commercial Arbitration*, The Brief (Winter 2014) at 35 & n. 2 (observing that "[o]nly about 10 percent of petitions filed actually result in vacatur or serious modifications of an arbitration decision."); *Oleo-X LLC v. Saint Paul Commodities, Inc.*, No. 1:24-CV-04706-CM, 2024 WL 4277531, at *5 (S.D.N.Y. Sept. 24, 2024) (observing that "given the paucity of reasons an arbitration award may be vacated, the odds that it will be confirmed are high . . . .").

101 *Lanza v. Fin. Indus. Regul. Auth.*, 953 F.3d 159, 163 (1st Cir. 2020) (quoting *New Eng. Cleaning Servs., Inc. v. Am. Arb. Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999)).

102 *Riley v. QuantumScape Corp.*, No. 5:22-cv-03871, 2023 WL 1475092, at *13 (N.D. Cal. Feb. 2, 2023) (noting that the party's claims of bias were based only on the party's own allegations against the arbitrator and fear of the arbitrator's reactions to those allegations), *aff'd*, No. 23-15277, 2024 WL 885034 (9th Cir. Mar. 1, 2024); *Brightstar LLC v. Jordan*, 2024 COA 39, ¶ 89, 552 P.3d 1133, 1152 (Colo. App. 2024) (observing that a party "can't create evidence of bias by submitting complaints about alleged bias . . . and then suggesting the arbitrator may have been upset by their complaints").

103 *Dang v. Lynch*, No. 3:11-cv-03724, 2012 WL 12919625, at *3 (N.D. Cal. Mar. 12, 2012).

104 *Amerisure Mut. Ins. Co. v. Everest Reinsurance Co.*, 109 F. Supp. 3d 969, 990 (E.D.

Mich. 2015).

105 *Nw. Nat'l Ins. Co.*, 2011 WL 4552997.

106 Declaration of Robin C. Dusek in Opposition re: 14 Response to Petition to Appoint Arbitrator, *Nw. Nat'l Ins. Co. v. Insco, Ltd.*, No. 1:11-cv-01124 (S.D.N.Y. Mar. 4, 2011), ECF No. 15-5.

107 *Id.* at *1.

108 *Id.* at *2.

109 *Id.* at *15.

110 Declaration of Matthew C. Ferlazzo, *Nw. Nat'l Ins. Co. v. Insco, Ltd.*, No. 1:11-cv-01124, at *8 (S.D.N.Y. Feb. 18, 2011), ECF No. 5.

111 Declaration of Robin C. Dusek in Opposition re: 14 Response to Petition to Appoint Arbitrator, *Nw. Nat'l Ins. Co. v. Insco, Ltd.*, No. 1:11-cv-01124, at *1 (S.D.N.Y. Mar. 4, 2011), ECF No. 15-3.

112 Declaration of Matthew C. Ferlazzo in Support re: 22 Motion to Reopen Case and Disqualify Insco's Counsel, *Nw. Nat'l Ins. Co. v. Insco, Ltd.*, No. 1:11-cv-01124, at *8 (S.D.N.Y. July 21, 2011), ECF No. 25-6.

113 *Id.* at *9.

114 *Nw. Nat'l Ins. Co.*, 2011 WL 1833303, at *3.

115 Motion to Reopen Case and Disqualify Insco's Counsel, *Nw. Nat'l Ins. Co. v. Insco, Ltd.*, No. 1:11-cv-01124, at *1 (S.D.N.Y. July 21, 2011), ECF No. 22.

116 *Goldman v. Citigroup Glob. Mkts. Inc.*, 834 F.3d 242 (3d Cir. 2016).

117 *Id.* at 247.

118 *Goldman v. Citigroup Glob. Mkts., Inc.*, No. 2:12-CV-04469, 2013 WL 12249488, at *1 (E.D. Pa. Jan. 31, 2013).

119 *Goldman v. Citigroup Global Mkts., Inc.*, No. 2:12-CV-04469, 2012 WL 6066336, at *4 (E.D. Pa. Aug. 7, 2012).

120 *Goldman*, 834 F.3d at 248.

121 *Goldman v. Citigroup Glob. Mkts. Inc.*, No. 12-4469, 2015 WL 2377962, at *3 (E.D. Pa. May 19, 2015), *aff'd*, 834 F.3d 242 (3d Cir. 2016).

122 *Goldman*, 834 F.3d at 259.

123 *Goldman v. Citigroup Glob. Mkts. Inc.*, 581 U.S. 992, 992 (2017).

124 *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249 (S.D.N.Y. 1962).

125 *Id.* at 251–52 (emphasis added).

126 *Id.* at 252 (emphasis added).

127 *Schorr v. Am. Arb. Ass'n Inc.*, No. 1:21-CV-05569, 2022 WL 17965413 (S.D.N.Y. Dec. 27, 2022).

128 *Schorr*, 2022 WL 17965413, at *5 (describing allegations in Schorr's second amended complaint).

129 *See* Defendant Sebastian Doggart's Response to the Plaintiff's Second Amended Complaint & the AAA/ICDR's Motion to Dismiss, *Schorr v. Am. Arb. Ass'n Inc.*, No. 1:21-CV-05569, at *7 (S.D.N.Y. Apr. 22, 2022), ECF No. 52.

130 *Schorr*, 2022 WL 17965413, at *5 (quoting allegations in the Second Amended Complaint regarding an email from the AAA dated October 21, 2020).

131 *Id.* at *6 (quoting allegations in the Second Amended Complaint); *see also* Declaration of David E. Schorr in Opposition re: 53 Motion to Dismiss, *Schorr v. Am. Arb. Ass'n Inc.*, No. 1:21-CV-05569, at *4-5 (S.D.N.Y. May 12, 2022), ECF No. 57-3.

132 *Id.* at *6 (quoting allegations in the Second Amended Complaint).

133 Memo Endorsement, *Schorr v. Doggart*, No. 1:23-CV-01862, at *1 (S.D.N.Y. June 8, 2023), ECF No. 12.

134 *Saitta v. Melody Rae Motors, Inc.*, No. 1:08-cv-05018, 2009 WL 3462173, at *2 n.1 (N.D. Ill. Oct. 23, 2009) (quoting Ralph Keyes, *The Quote Verifier* at 56 (2006)).

135 *See, e.g., Torres v. Morgan Stanley Smith Barney, LLC*, 839 F. App'x 328, 333 (11th Cir. 2020) (stating arbitrators did not exceed their authority under FINRA rules by awarding $3 million sanction against respondent for repeatedly failing to comply with discovery orders); *Piston v. Transamerica Cap., Inc.*, 823 F. App'x 553, 557 (10th Cir. 2020) (stating FINRA panel did not exceed its authority by issuing sanction of dismissing the claim because of the claimant's non-compliance with discovery orders); *Morgan Stanley Smith Barney, LLC v. Shefer*, No. 1:22-CV-21542, 2022 WL 17583726, at *5 (S.D. Fla. Sept. 29, 2022) (denying motion to vacate award dismissing counterclaim under FINRA rules, because of respondent's failures to comply with panel orders), *opinion clarified*, 2022 WL 17583731 (S.D. Fla. Nov. 14, 2022), *report & recommendation adopted*, 2022 WL 17662905 (S.D. Fla. Dec. 14, 2022), *aff'd*, No. 23-10232, 2024 WL 2271631 (11th Cir. May 20, 2024); *Williams L. Grp. PLLC v. Pravati Credit Fund III, LP*, No. 2:21-CV-00149, 2022 WL 345010, at *6 (D. Ariz. Feb. 5, 2022) (stating that under AAA rules, arbitrator did not exceed his authority by issuing sanctions against a party for failing to comply with arbitral orders), *appeal dismissed sub nom. Williams L. Grp., PLLC v. Am. Arb. Ass'n*, No. 22-15364, 2022 WL 2070287 (9th Cir. May 27, 2022); *Herrera v. Santangelo Law Offs., P.C.*, 2022 COA 93, ¶¶ 32-40, 520 P.3d 698, 705-07 (Colo. App. 2022) (concluding that, under Colorado law, the arbitrator exceeded his authority in issuing a monetary sanction against counsel); *Polin v. Kellwood Co.*, 103 F. Supp. 2d 238, 266 (S.D.N.Y. 2000) (upholding sanction order requiring counsel to pay one-half of the arbitral costs), *aff'd*, 34 F. App'x 406 (2d Cir. 2002); *see, generally, 1 Alternative Dispute Resolution Practice Guide* § 5:5 (2024).

136 *Polin*, 103 F. Supp. 2d at 266.

137 The *Restatement (Third) U.S. Law of Int'l Comm. Arb.* § 3.9(d) (Am. L. Inst. 2024 update) recognizes that "Courts may refer to the arbitral tribunal issues regarding . . . alleged misconduct that occurs within or is directly related to the merits or procedures of an arbitral proceeding."

Social Inflation is Here to Stay – *Part I*

An Analysis of the Key Underlying Drivers of Social Inflation

By: Frank DeMento, Bryan McCarthy, and Howard Freeman

Social inflation has become a familiar expression within the insurance industry. Use of the phrase can be traced back to Warren Buffett who, over 45 years ago, described social inflation to Berkshire Hathaway shareholders as "a broadening definition by society and juries of what is covered by insurance policies."[1] Darren Pain of The Geneva Association stated that "social inflation refers to all ways in which insurers' claims costs rise over and above general economic inflation, including shifts in societal preferences over who is best placed to absorb risk."[2]

Social inflation has been a major contributor to increasing liability claim costs over the past decade. It now exceeds economic inflation as the key driver of increasing liability claim costs.[3] For commercial auto liability claims, Morgan Stanley estimates that social inflation resulted in 7-14% of total industry losses from 2013-2022 ($13.3-$24.5 billion).[4] For all liability losses it is estimated that social inflation resulted in 6.5%-10.6% of total industry losses from 2014 to 2023 ($27.0-$44.1 billion).[5] Social inflation includes many specific factors contributing to the rapid and unexpected increase in costs of claims on liability policies. This paper will examine some of the key components comprising the current social inflation phenomenon and offer thoughts on how to best navigate the current environment. At the end of the day, insureds, insurers, and reinsurers must recognize that social inflation is very

real and shows no signs of slowing down. Rather, some of the key drivers of social inflation continue to accelerate.

Figure above - Results of a nationwide poll by Magna Legal Services[6]

Declining Trust in Corporations/Institutions

The decline in Americans' faith in their institutions has reached unprecedented levels.[7] Distrust of large corporations has been in the public consciousness for some time—tracing back at least to the Ford Pinto jury award in 1978.[8] However, it has never been more pronounced than it is today. According to a nationwide survey, polled jurors indicated that they believe that 76% of corporate executives engage in lies and cover ups.[9] Government has also seen a rapid decline in public trust. In the pre- Watergate era, public trust in government reached a high of nearly 80% approval.[10] By way of contrast, in recent times we've seen approval ratings for Congress fall as low as 7%! The federal and state governments are not the only institutions that have greatly lost the trust of the American public. These institutions also include large corporations, small business, churches, schools, and civic service organizations. For many of these organizations, there is an expectation that utmost trust and care should be given to their parishioners, members, and students. This is especially the case for minors entrusted to the care of these organizations. Instead, the public has now witnessed decades of headlines and stories detailing tragic breaches of this trust--including sexual and physical abuse brought to light via the MeToo movement as well as the proliferation of reviver statute sexual abuse litigation. Juries are sending a strong financial message to these institutions to punish this type of breach of trust. Regardless of political allegiance, jurors are now quicker to assume the worst – by questioning corporate/institutional motives and integrity.

Americans' trust in major institutions reaches a new low.

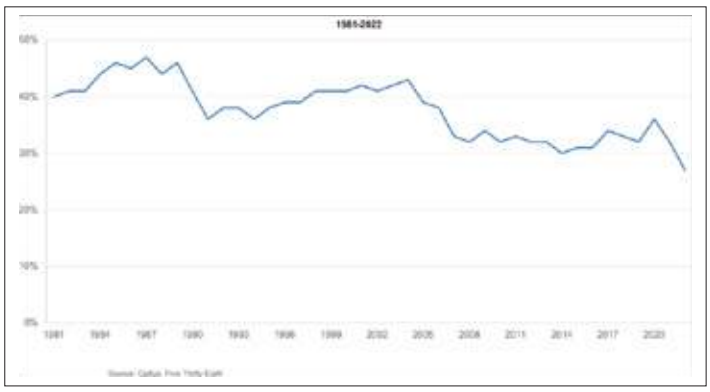


Figure above - The chart above shows the average share of Americans who have a "great deal" or "quite a lot" of confidence in 14 major institutions.[11]

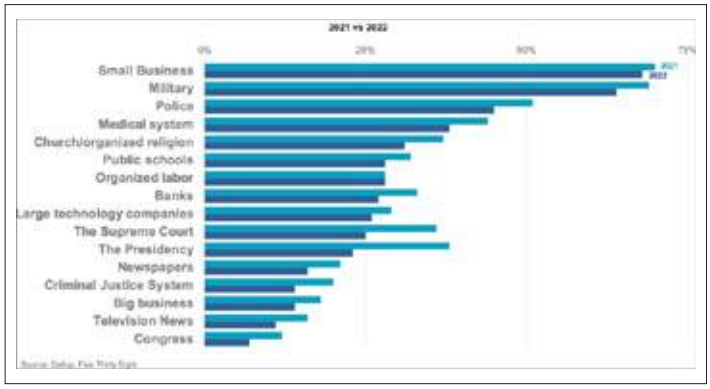


Figure above – Average share of Americans who have a "great deal" or "quite a lot" of confidence in 14 major institutions.[12]

The public's negative opinion of corporate and organizational responsibility and social inequity is on full display in the tort system where plaintiffs and lawyers base the severity of their claims on the perception that large corporations or organizations (especially if a jury knows that there is available insurance) have very deep pockets.

Shifting Demographics/Attitudes

Fewer than half of Americans are "very satisfied" with their personal lives.[13] These same, generally dissatisfied people enter American courtrooms every day, both as litigants and as jurors. As American juries are more often than ever comprised of individuals who are angry, dissatisfied with their own personal lives, worried about economic inflation, and

distrustful of traditional institutions, the impact of this on trial verdicts cannot be overstated.

Today's jurors reflect our more polarized society – with more firmly held beliefs on politics, social causes, and perceived injustices than in the past.[14] Today's jurors are also younger, with an influx of Millennials (born between the early 1980's and early 1990's) and Gen Z'ers (born between 1997 and 2012). In fact, Gen Z (26 years old and younger) is serving on juries in higher numbers than ever before while, jury service from more senior generations is in decline. There is a cascading effect whereby jurors of older generations are more and more being replaced by the younger ones. Younger generations are also involved in activism related to social trends and may use jury duty to challenge certain behaviors or actions.[15] Millennials and Gen Z jurors are less trusting of companies and more pro-plaintiff.[16] They have also been disproportionately affected by cost-of-living concerns, leading to negative perceptions towards organizations perceived to have deep pockets.[17] Ultimately, they are more likely to deliver nuclear verdicts (verdicts of $10M or more). To them, jury duty is an unmatched opportunity to vent and ultimately make a statement against perceived injustice. It also allows them a chance to punish perceived misconduct and to directly redistribute wealth in a manner they feel is most appropriate. Modern juries are so motivated by their desire to correct perceived injustice, that 71% of potential jurors believe there should be no caps whatsoever on jury awards, and 45% believe it is acceptable to ignore the judge's instructions to arrive at their own desired outcome.[18]

"Today's jurors reflect our more polarized society – with more firmly held beliefs on politics, social causes, and perceived injustices than in the past.[14]"

Plaintiffs' Attorney Tactics

The Reptile Theory is used to target the emotions of jurors to obtain higher awards based on a perceived threat to the juror and society as a whole rather than the evidence at trial.[19] Plaintiff attorneys seek to anger jurors and convince them to "send a message" and punish defendants for their actions rather than focusing on the facts of the case and applicable law. An example of reptilian tactics can be seen in the *Ford Motor Co. v. Hill* case, a Georgia wrongful death case in which it was alleged that the deaths were caused by defective roofs on Ford's pickup trucks.[20] Although the plaintiff lawyers were permitted to show the jury evidence from almost 80 other severe rollovers of Ford vehicles, they did not establish similarities between the accidents or roof design.[21] Plaintiffs' lawyers then asked the jury to "stop the maiming of innocent citizens."[22] The jury awarded Plaintiffs $1.7B in punitive damages and over $24 million in compensatory damages.[23] These awards were vacated on appeal.[24]

Another tactic used by plaintiff's attorneys is "anchoring" whereby, during the course of the trial, they repeatedly request or suggest a monetary award or method of calculating damages that is typically arbitrary.[25] The amount awarded is influenced by the amount requested.[26] After the plaintiff suggests a number, jurors typically accept the number or make some adjustments (up or down) using the anchor as a reference point.[27] Anchoring is primarily used for non-economic damages, such as pain and suffering, since these are subjective. "Studies show that both use of a specific sum or a mathematical formula lead juries to reach awards that are double

or quadruple the amount they would have awarded if left to determine a just and reasonable award on their own."[28]

Third-Party Litigation Funding (TPLF)

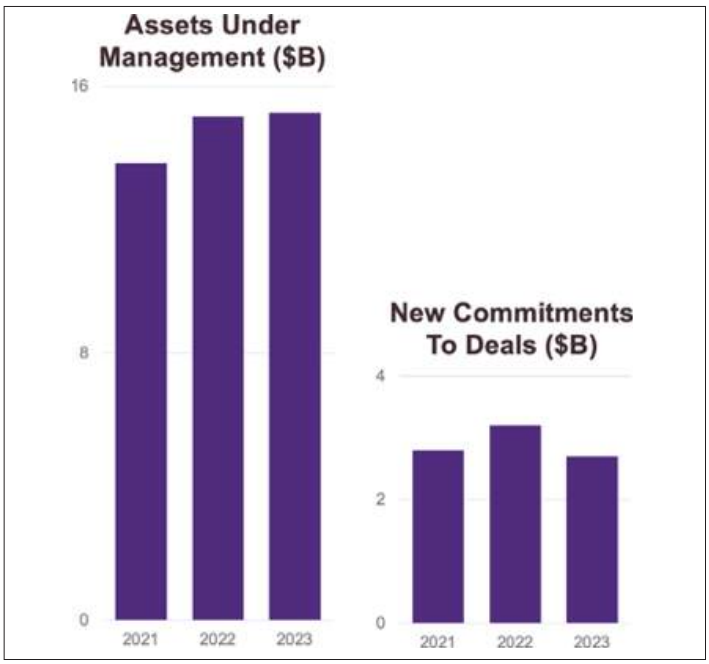
TPLF contributes to social inflation by incentivizing litigious behavior, extending case timelines, and desensitizing the public to mega-verdicts. Plaintiff lawyers often use outside funds to enable expensive appeals or to launch publicity campaigns that normalize excessive payouts and attract new clientele.

TPLF is a financial agreement in which the funder, such as a hedge fund, who is not a party to the lawsuit, provides money to a litigant, either the plaintiff or plaintiff's law firm, in exchange for a portion of the recovery obtained in the litigation.[29] The TPLF industry primarily focuses on commercial litigation, rather than individual plaintiffs, however public data on funders and funding agreements is limited.[30] TPLF is a multi-billion-dollar industry. There were $15.2B of assets under management (June 30, 2023) of third-party litigation funders who finance US commercial lawsuits.[31] It is estimated that TPLF global annual investments could grow to $31B by 2028.[32]

It is extremely rare that the details of TPLF funding agreements are disclosed during litigation since plaintiffs typically oppose their disclosure and courts generally do not compel production.[33] However, there is an effort by some federal district courts, individual judges, and states to make TPLF agreements more transparent. While some states require disclosure, the majority do not.

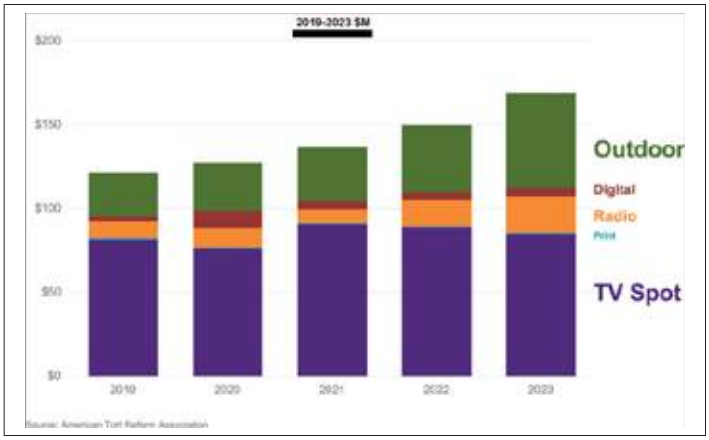
Industry Size & Recent Trends[34]

Growth of Industry[35]



TPLF provides funds for law firms to undertake mass advertising "bombarding the public with lawsuit ads that can mislead and desensitize viewers about nuclear verdicts."[36] These advertisements suggest it is normal for plaintiffs to receive nuclear verdicts and generate clients looking for those nuclear verdicts. It is estimated that in 2023 spending on local legal services television, radio, print ads or billboards across the United States increased by more than 5% from 2022 to $2.4B.[37] In Georgia, one of the top-ranked judicial hellholes in the country, plaintiff lawyers spend millions on legal advertising as they try to solicit clients to bring lawsuits.[38] For example, overall spending on local legal services ads in Georgia increased by over 38% since 2019.[39]

Ad Spending in Georgia[40]

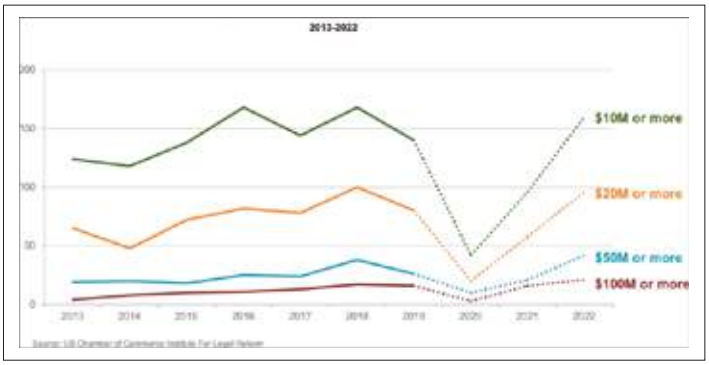


Additionally, cases with TPLF result in longer case timelines.[41] The more time and money that is spent in discovery and pushing the case through the litigation process can increase both the expense of litigation and the size of awards.[42] Finally, third party litigation funding leads to a breakdown in the settlement process. As a result, more cases are brought to trial. At those trials, plaintiffs' attorneys seek higher verdicts because either their client or their firm will be splitting verdicts with the litigation funder.[43]

The Rise and Normalization of Nuclear Verdicts/Settlements

Nuclear verdicts are verdicts of $10M or more.[44] Between 2010-2019, the median nuclear verdict increased by 27.5%, outpacing inflation by more than 10%.[45] The US Chamber of Commerce Institute for Legal Reform reviewed 1,288 nuclear verdicts in personal injury and wrongful death cases between January 2013 and December 2022 and found that although nuclear verdicts dropped during the Covid-19 pandemic, they rebounded to near their prior levels by Q3 2021.[46] Additionally, excluding the pandemic years, there was an upward trend in the frequency of nuclear verdicts during the 10-year period.[47]

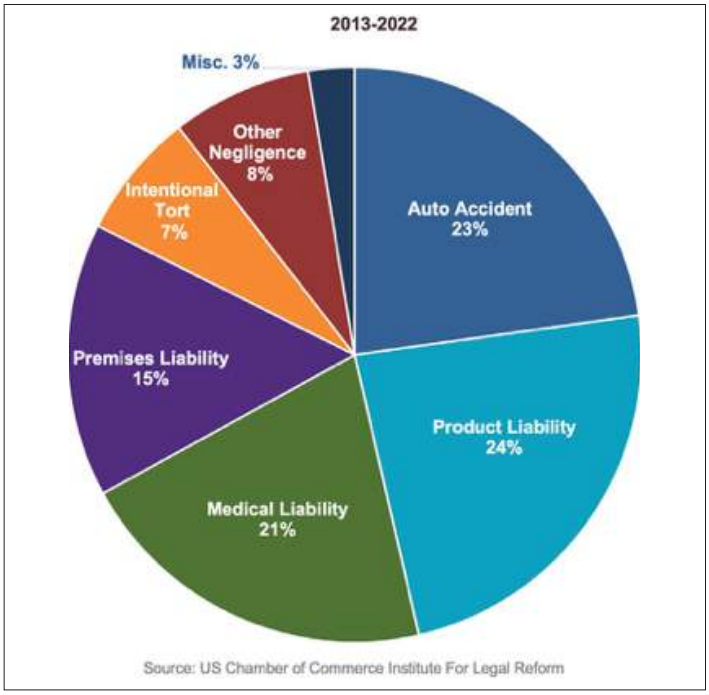
Number of Reported Nuclear Verdicts, 2013-2022[48]



Nuclear verdicts are both a cause and effect of Social Inflation. As nuclear verdicts become more common and are displayed to the public and potential jurors, via news reports and advertisements, they take on a more mainstream feeling.[49] According to one survey, 30% of respondents thought it takes "billions" to send a message to a corporation.[50] While the public hears about the full verdict amount, they rarely find out whether that amount has been reduced via appeal or settlement. The juror pool becomes numb to the numbers, leading to desensitization to the value of money which in turns drives up jury awards on future cases.[51]

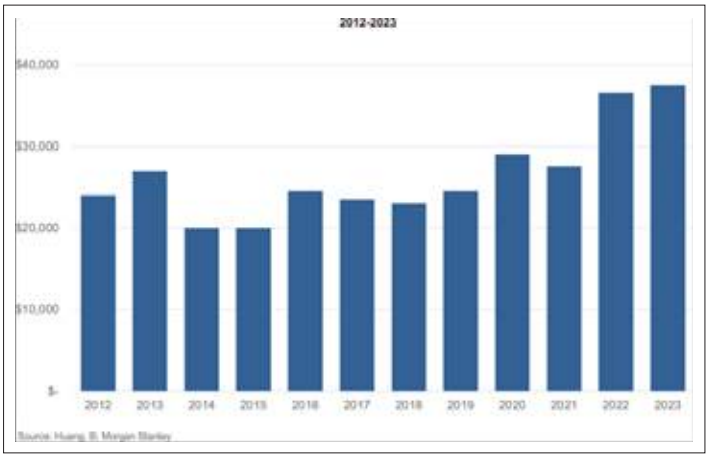
Per the US Chamber of Commerce's study, 2/3 of nuclear verdicts in personal injury and wrongful death cases were made up of product liability (23.3%), auto accident (23.2%) and medical liability (20.3%) claims.[52]

Nuclear Verdicts by Case Type, 2013-2022[53]



Nuclear verdicts have also driven up settlement values. Although settlement data is typically limited and confidential, available settlement data shows that average and median settlement values increased by approximately 65% in the decade ending in 2022.[54] These settled cases, where the risk of a nuclear verdict has been factored in, happen so frequently that they have their own name, "nuclear settlements."[55] The unpredictability of nuclear verdicts has made it difficult for carriers to evaluate claims—as they are seeing wildly inconsistent outcomes in cases that are very factually similar. This leads to inaccurate reserving and outsized settlements. Carriers are not only more likely to make nuclear settlements to avoid nuclear verdicts, they are more likely to settle questionable claims rather than risk the unpredictability of a nuclear verdict.

Increase in Settlement Amounts[56]



Threat of Bad Faith – ECO/XPL Awards

The increased risk and the uncertainty of Excess of Policy Limits ("XPL") & Extra-Contractual Obligations ("ECO") damages are causing many carriers to choose to settle cases they may have previously elected to take to trial and have caused a gradual rise in the cost to defend claims and the settlement values of claims due to the weaponization of XPL and ECO. Insurers are reporting an increasing number of policy limit demands and bad faith allegations. Often these allegations amount to mere "bluster", but they all do require some level of the coordinated response involving additional staffing to assist with the claim and respond to the demand or allegations. Outside coverage counsel is also often retained resulting in increased costs.

Plaintiff attorneys are also using Artificial Intelligence tools such as "EvenUp Law" to more rapidly generate policy limit demands to issue to insurance companies as a matter of course.[57] This tool and others like it are able to quickly turn medical documents and case files into AI-driven demand packages for plaintiff attorneys. With tools like this, attorneys can tailor and issue limit demands with minimal effort and time. A flurry of limit demands can have the overall effect of putting increased stress on an insurance carrier's claims department, making it more likely that a demand time deadline can be inadvertently missed.

Many carriers have adapted to the rising risks of social inflation by decreasing their participation in a particular tower of insurance. For example, it may have been more common ten or fifteen years ago for an insurance carrier to offer a $25M stand-alone umbrella or excess policy to an insured. Today, it is more likely that multiple carriers will shoulder that $25M risk. A single carrier with a $25M limit will behave differently than five carriers each with a $5M limit on a given claim. When factoring in the risk of ECO/XPL in this context, each of the carriers is more likely to make their individual limits available for settlement. Each underlying carrier tendering limits creates more pressure on the carrier above them to do so as well. No carrier wants to be the one viewed as obstructing the settlement process and potentially causing an ECO/XPL award.

When you combine the increase of internal and external costs for insurance carriers as well as the risk of a verdict beyond the objective merits of the underlying case or the policy limits, the practical reality is that many insurers are now settling cases based upon the threat of an ECO/XPL verdict. This is yet another factor in the overall rise of settlement amounts.[58]

Conclusion

Part I of our series focused mainly on the underlying drivers of Social Inflation. Our next instalment will detail the impact Social Inflation is having on the insurance industry. Lastly, Part III of this series will explore strategies to mitigate the impact of Social Inflation.

Frank DeMento has more than 25 years' experience in insurance and reinsurance claims across all property and casualty lines of business. Currently, he is Senior Vice President and Claims Manager at TransRe. In addition, Frank serves on the IRUA education and claims committee and the association governance committee.

Frank served on the board of ROM Reinsurance Management Company for six years, including as Chairman, and is a previous board member of the Association of Insurance and Reinsurance Run-off Companies, serving as chairman of the education committee. A member of ARIAS since 2001, Frank is co-chair of its technology committee, and has been an ARIAS certified arbitrator since 2014.

Prior to joining TransRe, Frank was Senior Counsel in Crowell and Moring LLP's re/insurance practice, managed XL Reinsurance America, Inc.'s run-off and retroceded claims units and was in-house claims counsel. He was also a partner in Mendes and Mount, LLP's insurance and reinsurance litigation group. Frank Also was elected and served as Mayor of the Incorporated Village of Munsey Park from 2013-2019.

Frank holds the following designations: Associate in Reinsurance; Chartered Property Casualty Underwriter; and Certified Legacy Insurance Professional. Frank graduated from Washington and Lee University and has a Juris Doctor degree from St. John's University School of Law.

Bryan McCarthy is a Senior Complex Claims Examiner at TransRe. He is a member of the U.S. Custom Claim Team in New York. Previously, Bryan worked for a commercial insurance carrier in claims management and claims adjusting roles since 2008. He has experience in managing and adjusting complex direct claim and reinsurance claim matters throughout the United States—including matters with disputed coverage, mass tort actions, Coverage B claims, Illinois BIPA claims, opioid claims, PFAS claims, commercial auto claims and environmental and toxic tort claims. Bryan earned a JD, MBA, and undergraduate degree from Seton Hall University and currently maintains a New Jersey Bar License.

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Are Greenhouse Gases "Pollutants" for Insurance Purposes?

By: Robert M. Hall

I. Introduction

Aloha Petroleum Ltd. v. National Union Fire Insurance Co. of Pittsburgh, Pa., No. SCCQ-23-0000515, (Haw., Oct. 7, 2024), was decided by the Supreme Court of Hawaii and involved two questions certified by the federal district court, one of which involved the impact of "greenhouse gases" (GHG) produced by the oil industry on the environment. More specifically, the issue was whether GHGs were "pollutants," which were excluded from coverage under the oil companies' CGL policies. This case presents a threshold question of whether insurers will be liable to defend oil companies against a growing wave of GHG lawsuits by environmental activists.

II. Definition of "Pollutants"

While there were a number of variations in the language of the relevant pollution exclusions, the court found that the differences were immaterial and applied the following definition:

> Pollutants are defined as any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

III. Two Divisions of Interpretation and the Result

The court noted that some courts read the language of the pollution clause literally while others limited it so "traditional environmental pollution." The court agreed that pollution exclusions cannot be read literally as it would sweep too broadly. Nonetheless, the court found that the release of GHGs fell well within the ambit of "traditional environmental pollution." The court further found that neither the legal uncertainty rule nor the reasonable expectations of the insureds required the insurer to provide a defense.

> "The court agreed that pollution exclusions cannot be read literally as it would sweep too broadly."

Robert M. Hall is an attorney, a former law firm partner, a former insurance and reinsurance executive and acts as an arbitrator and expert witness with respect to disputes involving self-insurers. He is a veteran of more than 200 arbitration panels and is certified as an arbitrator and umpire by ARIAS·US. Hall has authored more than 100 articles, and they may be viewed at his website: robertmhalladr.com. The views expressed in this article are those of the author and do not reflect the views of his clients. Copyright by the author 2025.

Court Tackles Federal Arbitration Act

In *Smith v. Spizzirri*, the Supreme Court of the United States held that the Federal Arbitration Act ("FAA") requires federal courts, upon finding that a dispute is subject to arbitration, and a party has requested a stay of the court proceeding pending arbitration pursuant to Section 3 of the FAA, to stay, as opposed to dismiss, the proceeding. By so holding, the Supreme Court resolved a Circuit split.

Petitioners — current and former employees of Respondents, who owned and operated an on-demand delivery service — originally filed suit in Arizona state court asserting violations of federal and state employment laws. Following removal to the United States District Court for the District of Arizona, Respondents moved to compel arbitration under the FAA and to dismiss the suit. While Petitioners conceded that their claims were arbitrable, they argued that Section 3 of the FAA compelled the court to stay the action rather than dismiss it pending arbitration. Respondents countered that the court's "inherent authority" permitted it to dismiss the suit in its entirety. Despite the plain language of Section 3, which provides that the court "shall . . . stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement," the district court granted Respondents' motion to compel arbitration and dismissed the suit. Petitioners appealed to the Ninth Circuit, which affirmed the district court's ruling while agreeing that its ruling ran contrary to the plain language of the FAA. In a concurring opinion, two of the Judges urged the Supreme Court to grant certiorari to settle the existing split of authority among the Circuit Courts.

The Supreme Court granted certiorari, and in a unanimous opinion authored by Justice Sotomayor, held that federal courts lack discretion to dismiss a suit pending arbitration. The Court reasoned that the FAA's text, structure, and purpose compelled federal courts to stay a proceeding pending arbitration when a party requested it and the claims were arbitrable.

First, the Court examined the plain language of Section 3. The statute explicitly provides that when a dispute is subject to arbitration, the court "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." The Court explained that the use of the word "shall" obliges the court to "stay" the proceeding and rejected Respondents' argument that a "stay" could be read to allow dismissal, citing the "long-established legal meaning of the word 'stay' as a 'temporary suspension' of legal proceedings." The Court then cited its own precedent from *Degen v. United States*, in which it held that "the inherent powers of the courts may be controlled or overridden by statute or rule," to further dispel Respondents' argument.

Next, the Court turned to the FAA's structure and purpose. In contrast to Section 16(a)(1)(C), which permits an immediate interlocutory appeal upon the denial of a motion to compel arbitration, the Court explained that Section 16(b) does not authorize an immediate appeal of an order compelling arbitration, absent certification of a controlling question of law. The Court noted that this scheme is consistent with the Congressional purpose of enacting the FAA, which aims to transfer arbitrable disputes from the judicial system as promptly and efficiently as possible.

Finally, the Court determined that its holding is in line with the supervisory role the FAA envisioned for the courts in providing that they may appoint arbitrators, enforce subpoenas issued by arbitrators to compel testimony or produce evidence, and facilitate recovery of an arbitral award. Staying a proceeding is logical in view of the court's potential ongoing role and avoids the further costs that may result from requiring that a party file a new suit under the FAA.

The Court ultimately reversed and remanded the matter for proceedings consistent with its opinion.

Case: *Smith v. Spizzirri*, 601 U.S. 472 (2024)

Issue Discussed: Whether federal courts, upon finding that a dispute is arbitrable under the FAA may dismiss, as opposed to stay, a legal proceeding?

Court: Supreme Court of the United States

Submitted By: Michele L. Jacobson and Haley Schlinger, Steptoe LLP

Court Looks at Marine Insurance Policy Breaches

Case: *Great Lakes Insurance SE v. Chartered Yachts Miami LLC*, 676 F.Supp.3d 1251 (2023)

Issue Discussed: Impact of an insured's misrepresentation of material facts on a marine insurance policy application and breach of policy warranties on coverage.

Court: United States District Court for the Southern District of Florida

Submitted By: Michele L. Jacobson and Haley Schlinger, Steptoe LLP

Plaintiff Great Lakes Insurance SE ("Great Lakes") brought a declaratory judgment action against its insured, Chartered Yachts Miami LLC ("CYM"), seeking a declaration that the marine hull and machinery insurance policy Great Lakes issued to CYM (the "Policy") provided no coverage for CYM regarding losses it incurred when water entered the CYM-owned boat's stern (the "Incident").

Great Lakes moved for summary judgment on four counts for CYM's alleged breaches of: the warranty of seaworthiness, the Policy by misrepresenting material facts, the survey compliance warranty, and the legal and regulatory compliance warranty. The salient facts considered by the court are as follows:

In March 2019, CYM submitted an application for insurance signed by Greg Pack ("Pack"), a beneficial owner of the boat involved in the Incident. The application inquired about the vessel owner's boating qualifications, to which Pack responded "USCG 100 ton – Had a USCG 200 ton." Great Lakes ultimately agreed to issue CYM a hull and machinery policy covering the boat. Approximately one year later, CYM submitted a renewal questionnaire, again signed by Pack, that stated "USCG 100 Ton license" in response to the same question concerning Pack's boating qualifications.

In support of the application on the renewal policy, CYM submitted two Letters of Survey Recommendations Compliance ("LOCs") and a survey performed by Global International Marine Surveyors ("Global Survey"). The LOCs referred directly to the Global Survey, which cited the boat's "safety deficiencies" and "deficiencies requiring immediate attention." The LOCs provided that all recommended safety and maintenance issues raised in the Global Survey were to be rectified in April 2020. Ultimately, Great Lakes issued the Policy, which provided $725,000 of coverage for the boat for a one-year period beginning on March 8, 2020. In November 2020, the Incident occurred.

Great Lakes conducted a post-Incident investigation concluding the LOCs had falsely represented that the repairs would be completed in April 2020. The investigation found only one lifeboat, with expired tags, and found neither handheld flares nor an EPIRB aboard the boat. CYM disputed these findings stating that the investigator did not ask for the flares and that the EPIRB and second life raft had been aboard but were washed out during the Incident. It was undisputed that Pack did not hold a valid United States Coast Guard ("USCG") boating license at the time of the initial application, renewal questionnaire, or the Incident.

First, the Court considered whether Pack's answers in the application and renewal questionnaire concerning his boating qualifications constituted material misrepresentations in violation of federal admiralty law and the Policy. The Court found that the marine insurance doctrine of *uberrimae fide*i, or utmost good faith, requires insurance applicants to "voluntarily and accurately disclose . . . all facts which might have a bearing on the insurer's decision to accept or reject the risk." A fact is material when it could "possibly influence the mind of a prudent and intelligent insurer" in deciding whether to accept the risk. The court noted that pursuant to the doctrine of *uberrimae fidei*, a material misrepresentation by the insured in an application constitutes grounds for voiding the policy, even if the application is completed by an agent of the insured.

On the first issue, whether the answers concerning Pack's boating qualifications constituted a misrepresentation, the court, citing Pack's deposition testimony, found that the application and

renewal questionnaire provided clear evidence of CYM's misrepresentation that Pack held a USCG 100-ton license.

Discussion of the second element, materiality, was more in depth. Great Lakes made two independent arguments in support of the materiality of CYM's misrepresentation. The insurer first asserted that its inclusion of the question concerning the vessel owner's boating qualifications in the application and renewal questionnaire presumes the materiality of the fact. Alternatively, Great Lakes argued that the undisputed affidavit of its underwriter, Beric Usher, established materiality in stating that the Policy's terms would have differed had CYM accurately disclosed Pack's lack of a boating license. In his affidavit, Usher explained that the Policy was a "Named Operator polic[y]" that warranted the boat would be operated only by individuals disclosed to and approved by Great Lakes; an underwriter "could never" provide coverage for illegal chartering in violation of USCG regulations, which could expose the underwriter to financial or criminal penalties. Finally, Usher explained that had CYM disclosed that Pack lacked a valid USCG boating license, the Policy would have either included an additional warranty requiring a licensed captain be onboard during any charter or charged a higher premium for chartering without a licensed captain, so-called "bareboat chartering."

The court, after considering CYM's arguments against materiality, found that Usher's unrebutted affidavit established the materiality of a misrepresented fact, which constituted grounds for Great Lakes to void the Policy *ab initio*.

The court then turned to the allegation of breach of the Policy's survey compliance warranty for failure to have the boat's life raft inspected and tagged. Under New York governing law, the breach of an express warranty works a forfeiture of rights under a policy regardless of materiality or causality of the loss. Accordingly, New York law required CYM to strictly comply with the Policy provision that "[i]f the survey makes any recommendations with respect to the Scheduled Vessel, then it is warranted that all such recommendations are completed prior to any loss giving rise to a claim hereunder[.]" Furthermore, the Policy specified that any breach of a warranty would void the Policy from its inception. Acknowledging CYM's dispute of the investigation's findings, the Court held that, nonetheless, CYM had offered no evidence to refute that the tag on the one life raft aboard the vessel during the investigation was expired. CYM's failure to inspect and tag the life raft annually as expressly required by the Global Survey and the Policy constituted breach of the survey compliance warranty under New York law. Accordingly, the court held in favor of Great Lakes finding the breach voided the Policy *ab initio*.

Finally, the Court considered whether CYM breached the Policy's legal and regulatory compliance warranty. The Policy "warranted that covered persons must at all times comply with all laws and regulations, governing the use and or operation of the Scheduled Vessel." USCG regulations require life rafts to be inspected, maintained, and tested by an approved facility annually. Finding no dispute that the life raft's tag had expired in January 2018, the Court held that CYM breached the legal and regulatory compliance warranty and voided the Policy *ab initio*.

Finding no genuine issue of material fact existed as to the above three counts, the court granted summary judgment in favor of Great Lakes.

ARIAS U.S.

UPCOMING WORKSHOP

March Regional Workshop

This Quarter Century: *An Industry Appraisal of Conflict, Continuity & Change*

March 13, 2025

12:30 pm – 5:00 pm

Choate Hall & Stewart LLP
2 International Pl, Boston, MA 02110

Dale C. Crawford Thanks ARIAS·US Members for Years of Comradery

Editor's Note: The following is a letter from Dale C. Crawford to the Officers and Directors of ARIAS-US. It was written in November 2024.

After considerable deliberation and much thought, I have made the decision to forego renewing my certification effective at the end of 2024.

The timing has a bit of irony — I was one of the attendees at the original conference in 1994 and have maintained active status all these years. Missing the tribute to that original group makes it even tougher to forego being there.

Retiring from active status as an arbitrator is hardly worthy of formal notification — the real purpose here is to say thank you.

For all of you — and your predecessors over the many years — the time and talent you have contributed to making ARIAS the organization it is today has been incalculably valuable. From knowing many of you over the years, it is very apparent how much work and extensive service to the members is required.

Your efforts have provided me with professional opportunities and credibility that would never have been possible without the Society and the credentials it conveys. Regardless of my certification status, having been a part of the organization will always be a distinction.

I will certainly miss sharing a cocktail with many of you at future events; yet this easing into retirement doesn't close any doors. Not only are the members colleagues, but I also consider many of you good friends and would hope to continue to stay in touch.

Best wishes to all of you; have a great conference with the tribute to the 30-year members and may ARIAS-US continue to provide an honorable and valuable service to the insurance and reinsurance industries.

Sincerely,
Dale C. Crawford

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Jane Downey

ARIAS is saddened to report the untimely passing of ARIAS member and Certified Arbitrator Jane Downey on December 9, 2024.

2024 Fall Conference Recap November 14-15, 2024

On November 14-15, 2024, the members of ARIAS once again descended upon Midtown Manhattan for the 2024 Fall Conference—this time to continue commemorating 30 years of ARIAS! We had excellent attendance of over 285 at the conference, which kicked off with a Keynote address by Frank Nutter, the recently retired and rehired President of the Reinsurance Association of America, the perfect speaker to reflect on industry changes over the last three decades of ARIAS, as well as future challenges.

Keynote – Frank Nutter, President of the RAA

Frank's address was followed by an anniversary presentation of ARIAS through the decades, featuring photos new and old of many dedicated members. After remarks by outgoing Chair Marc Abrams, we kicked off the first general session, an ARIAS-US 30th Anniversary Panel featuring John Nonna as moderator, with arbitrators Mark Gurevitz, Debra Hall, Susan Mack and Dan Schmidt providing their perspectives on where ARIAS began and where it is now. The panel offered thought-provoking views on ARIAS through the years through the lens of colleagues who have seen the organization change and grow firsthand.

Chair Marc Abrams

30th Anniversary Slide Show

30th Anniversary Panel, Dan Schmidt, Debra Hall, Susan Mack, John Nonna, and Mark Gurevitz

The next general session was a discussion on "two sides of the Life Re coin" with David Attisani of Choate Hall & Stewart LLP, Michael Harwood of Harwood Actuarial, Ronald Klein of Obtutus Advisory and Amy Woltman of Prudential. The speakers sought to explain and de-mystify Life Re principles and address head on issues commonly disputed in current life reinsurance arbitration practice.

David Attisani, Michael Harwood, Amy Woltman and Ronnie Klein

Following the networking lunch, which included the Member Services Committee Ambassador program lunch, the attendees split up for a series of dynamic and diverse break-out sessions.

First, Amy J. Kallal of Mound Cotton, Dan Raccuia of The Hartford and arbitrator Jeff Rubin discussed emerging claims stemming from social media use, video-gaming, unauthorized use of AI data and exposure to lead-covered phone cables, to name a few. The panel also discussed the rise of public nuisance claims to gain coverage for large environmental and non-environmental claims, such as opioids, vaping, talc and climate change. The session ended with a discussion of direct and reinsurance claims handling issues that may arise in connection with these claims.

Amy Kallal, Jeff Rubin and Dan Raccuia

We also were treated to a presentation by Peter Steffen of Smith Gambrell & Russell regarding the latest developments in California lapse litigation following the California Supreme Court's 2021 decision in *McHugh v. Protective Life Insurance Company*. Peter gave us the latest on important pending decisions involving lapse notification and grace period laws that life insurers and reinsurers are closely monitoring.

Peter Steffen

Next, we explored the topic of bias in reinsurance and insurance arbitrations with a panel moderated by Dan Torpey of MBD Capital. Panelists Jennifer Cavill of Chubb, Deirdre Johnson of Mintz Levin and Peter Rosen of JAMS discussed common biases that may be present when resolving insurance claims, as well as examples of bias in actual insurance disputes. The panel concluded with an open discussion on selecting unbiased arbitration panels.

Deirdre Johnson, Peter Rosen, Jennifer Cavell and Dan Torpey

Leslie Davis and Michael Robles

The fourth breakout was a helpful and informative discussion by Tim Curley of Allianz Re, Frank Demento and Mike Kurtis of TransRe, and Michael Menapace of Wiggin and Dana LP on navigating the ARIAS website, updating arbitrator profiles, and protecting personally identifiable information online.

Tim Curley, Frank DeMento, Mike Kurtis and Michael Menapace

Last, but not least, Leslie Davis of Troutman Pepper and Michael Robles of Husch Blackwell led a Members Services Committee targeted networking session to tackle the challenges of developing connections with new members by offering an opportunity to build and diversify members' networks in a fun and relaxed environment.

After the first round of breakouts, we continued September's Ethics Town Hall meetings with participants dividing into member constituency-based groups, including arbitrators, corporate representatives and outside counsel. These constituencies engaged in focused and spirited discussions of key ethical issues articulated at prior town halls, as well as a discussion of potential changes to the Code of Conduct regarding code enforcement issues. The Ethics Committee will take these suggestions under consideration. Michael Goldstein, Mark Gurevitz and Susan Mack led the arbitrators' session; Joy Langford of Partner Re, Stacey Schwartz of Swiss Re and Alysa Wakin of Odyssey Re led the corporate representatives' session; and Neal Moglin of Foley & Lardner and Teresa Snider of Porter Wright Morris & Arthur LLP led the outside counsel session. Thanks to all for your vital input.

Alysa Wakin and Neal Moglin – Ethics Town Halls 2.0 Opening Session

Stacey Schwartz and Alysa Wakin – Company Representatives

Neal Moglin and Teresa Snider – Law Firm Representatives

Susan Mack, Marc Gurevitz and Michael Goldstein - Arbitrators

On Thursday afternoon, ARIAS held its annual meeting and election. ARIAS said goodbye to retiring Board members Mark Abrams, Peter Gentile, Alysa Wakin and Jonathan Rosen, who were given engraved crystal clocks to remind them of their Board service. A quorum was certified and the members elected new Board members Frank DeMento from TransRe as a Reinsurer Representative, Cia Moss from Chaffetz Lindsey as a Law Firm Representative, and Paul Dassenko and Susan Claflin as Arbitrator Representatives, each for three-year terms.

On Friday, after some early morning committee meetings, attendees reconvened for the first general session of the day, a live demonstration of the latest generative AI tools available to the arbitration community. Panelists Elaine Caprio, John Cashin, Thomas Kinney of Troutman Pepper and David Charles McLauchlan of McLauchlan Law Group then discussed how various arbitral tribunals are managing the use of generative AI by both lawyers and arbitrators in arbitrations. The Panel also provided its insights on the responsible use of generative AI in arbitration, including proposed ARIAS·US rules for consideration.

John Cashin, Elaine Caprio, David McLauchlan and Thomas Kinney

Next, Fred Karlinsky gave a lively presentation of reinsurance challenges facing the property and casualty market in the United States, including proposed interventions by state and federal governments. Fred also explored the current public narrative surrounding reinsurance and how public policymakers are responding.

Fred Karlinsky

Steve Rosenstein, Patricia Santelle, Charlie Scibetta and Alan Lipkin

Finally, Steve Rosenstein of AIG moderated the last general session of the conference. Panelists Alan Lipkin and Charlie Scibetta of Chaffetz Lindsey were joined by Patricia Santelle of White and Williams to provide a roundup on mass tort claims that are or may soon be landing on desks, including emerging issues related to allocation, exclusions, and identifying occurrences with the latest risks. Panelists also discussed how bankruptcy issues can impact matters related to the insurance and reinsurance of these claims.

After closing remarks from new Chair, Josh Schwartz, the conference concluded.

All in all, the 30th Anniversary Fall Conference was a great success. We look forward to seeing you for the 2025 Spring Conference April 30–May 2, 2025, at The Biltmore in Coral Gables, Florida.

Newly Certified Arbitrator

Anne Kevlin

After more than 30 years practicing law within the P&C insurance industry, Anne Kevlin opened Kevlin Mediation PLLC where she mediates and arbitrates disputes involving insurance.

In addition to her certification with ARIAS-US, Kevlin is a Florida Supreme Court Certified Circuit Civil mediator; a qualified Florida arbitrator; and an arbitrator on the panel of the American Arbitration Association.

Kevlin has practiced law and held executive litigation management roles for insurance entities since 1992. She has held roles with The Hartford, Beazley, American Integrity Insurance Company, and she served as managing partner for the Florida offices of Clausen Miller until 2021. Kevlin also is a member of the National Academy of Distinguished Neutrals (NADN).

Kevlin is a graduate of the University of Iowa College of Law, where she served on the Iowa Law Review and the Trial Advocacy Board. In addition to Florida, Kevlin is licensed to practice law in Massachusetts.

Newly Certified Mediator

Jeff Rubin

Jeff Rubin provides insurance, reinsurance, and commercial arbitration, mediation and consulting services and serves as an Umpire, Arbitrator, Mediator, and Expert Witness in industry proceedings. Rubin is an ARIAS·U.S. certified arbitrator, FINRA (Financial Services Industry) arbitrator, and NFA (National Futures Association) arbitrator.

Formerly, Rubin served as Senior Vice President, Director of Global Claims, of Odyssey Reinsurance Company (Odyssey Re) for eighteen years and as Senior Vice President, Senior Claims Counsel, of Odyssey Re for three years.

Before joining Odyssey Re, Rubin was General Counsel, Member of the Board of Directors, Director of Litigation, and Reinsurance Work-Out Specialist at The Resolution Group (TRG), now known as Riverstone Resources.

Prior to joining TRG, Rubin practiced law in Chicago for sixteen years where he was a partner at Phelan Pope & John, Ltd., Of Counsel at Lovell's, and an Associate at Abramson & Fox.

Rubin received his J.D. from Cornell University and his B.A. from the State University of New York, Oneonta College. He is presently a member of the ARIAS·U.S. Strategic Planning and Finance Committees. Rubin previously served on the Board of ARIAS·U.S. and as Chairman, President and Vice President of ARIAS·U.S.

In his capacity as a senior industry executive and outside counsel, Rubin has negotiated many significant settlements and participated in medications through-out the United States and in the United Kingdom. With his broad base of experience from the senior corporate executive, in house counsel, and outside counsel perspectives, Rubin can readily understand and appreciate the objectives, risks, and drivers that underlie many disputes and which may provide an opportunity to achieve an amicable resolution. As a highly skilled negotiator, Rubin can work with the parties and their counsel to explore in depth all potential avenues to reaching a settlement.


ARIAS
U.S.
2025
SPRING
CONFERENCE
April 30 - May 2, 2025
The Biltmore
Coral Gables, FL

UPCOMING EVENTS

Spring Conference

April 30, 2025 – May 02, 2025

The Biltmore
Miami-Coral Gables, FL

UPCOMING WORKSHOPS

March Regional Workshop

This Quarter Century: *An Industry Appraisal of Conflict, Continuity & Change*

March 13, 2025

12:30 pm – 5:00 pm

Choate Hall & Stewart LLP
2 International Pl
Boston, MA 02110

Intensive Arbitrator Workshop

April 29, 2025

9:00 am – 5:00 pm

The Biltmore
Miami-Coral Gables, FL

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