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Court Decisions

Four Arbitration Questions that Shouldn't Continue to Be Passed Over

BY MATTHEW H. ADLER

This year, I have a secular Four Questions in addition to the ones my family and I discuss at Passover. As with the Passover Questions, they all begin with the same opening. Not "Mah Nishtanah … Why is this night different from all other nights?" but rather, "Why hasn't the Supreme Court decided [fill in the open arbitration subject] yet?"

It's an annual lament that grows worse each year, for two reasons. One, by definition, each year that goes with one of these key issues undecided is another year of legal uncertainty.

Two, the reason for the Court's lack of decision is decidedly *not* an overly crowded docket. True that, as we all know, certiorari is difficult to obtain in any case, and the Roberts court averages a mere 70 to 80 cases per year out of around 7,000 to 8,000 petitions for review. Kelsey Dallas and Nora Collins, SCOTUStoday for Tuesday, February 10, *SCOTUSBlog* (Feb. 10, 2026) (available at https://bit.ly/4c6VcET).

But each year, and sometimes (as in the past several) more than once in a particular term, the Court manages to issue at least one decision on arbitration. We're now waiting on two 2025-2026 term cases argued the week this issue of *Alternatives* is published. Which is maddening, because it is very much the thesis of this screed that the Court is deciding *the wrong cases*.

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Don't believe me? Here is a short list (see the page 85 chart for all U.S. Supreme Court arbitration cases since 2000) of the burning issues the Supreme Court has decided for the guidance of the arbitration practitioner:

Whether the "wholly groundless" exception can be decided by the judge or the arbitrator. *Henry Schein Inc. v. Archer and White Sales Inc.*, 586 U.S. 63 (2019) (available at https://bit.ly/4cEDFE2).

Whether the *contra proferentem* maxim of contract interpretation can be used to decide whether an arbitration agreement should be interpreted to allow for class action arbitration. *Lamps Plus, Inc. v. Varela*, 587 U.S. 176 (2019) (available at https://bit.ly/47EkhAS).

Whether, where there are two agreements, one with and one without an arbitration clause, a court or an arbitrator should decide which agreement applies. *Coinbase Inc. v. Suski*, 602 U.S. 143 (2024) (available at https://bit.ly/4b2LgLr).

Whether airline ramp workers qualify for Federal Arbitration Act Sec, 1's exemption from arbitration. *Southwest Airlines Co. v. Saxon*, 596 U.S. 450 (2022) (available at https://bit.ly/4tuG621).

And 2026 promises answers to examine more "hot" topics as noted above, and including yet another Section 1 case, *Flowers Foods Inc. v. Brock*, 142 S.Ct. 327 (2025) (granting cert).

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ADR Providers

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governments to deliver," *Bruegel* (Feb. 25, 2025) (available at https://bit.ly/4aOZVIM).

For arbitral institutions, this evolving landscape might underscore the importance of developing procedural tools and institutional policies for following green principles. Thus, first of all, central governments and international organizations should support green initiatives. Ultimately, the path toward greener arbitration will require coordinated effort, bold leadership, and persistent innovation from all stakeholders to ensure that dispute resolution becomes a true driver for a sustainable future.

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The law (almost) always benefits from clarification, and so these are welcome decisions. It was good for the Court to draw a bead on the reach of the FAA Sec. 1 exception for transportation workers, even when it is "the second time in two years that the company is in the nation's top Court for help enforcing its employment arbitration agreements." Sasha Hill, "A Review: Supreme Court Considers Another FAA Sec. 1 Arbitration Exemption, *CPR Speaks* (Sept. 22, 2025) (available at https://bit.ly/3OEWbCj) (discussing *Flowers Foods v. Brock*'s current case, and referring to the previous Flowers Foods case, *Bissonnette v. LePage Bakeries Park St. LLC*, 601 U.S. 23 (2024) (available at https://bit.ly/4avulyl).

Now we know. Repeatedly.

Here is a brief list—and readers may have their own *bete noire*—of what we do *not* know:

1. Is manifest disregard a standard for an arbitration award's vacatur? Or not?
2. In a large and indeed mega-firm world, what is the present reach of the FAA Sec. 10(a)(2) vacatur standard for "evident partiality or corruption in the arbitrators"?
3. Can non-party witnesses be compelled to produce documents in arbitral discovery and show up for depositions?
4. What is the permissible scope of a mass arbitration clause?

Coming soon may be a fifth concern—where the parties' contract calls for arbitration and the plaintiff brings a complaint with a sexual harassment count mixed with other, non-employment-related counts, must the entire case be stayed under 2022's Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act?

But let's give the Court a break on that one since EFAA jurisprudence is still making its way through the lower courts. The time will shortly come where there are conflicting circuit court decisions on whether the sprinkling in of a sexual harassment litigation is enough to take the entire case to court or whether the EFAA's provisions are limited only to barring arbitration of that one count. See David Horton, "The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act and Textualism," *94 George Washington L. Rev.* (forthcoming 2026) (available at https://bit.ly/4avU50i); Catherine Dirksen, "9th Circuit Weighs Limits of the Ending Forced Arbitration of Sexual Assault & Sexual Harassment Act," *CPR Speaks* (Feb. 19) (available at https://bit.ly/4tV3YMK), and Catherine Dirksen, "Second Circuit Examines Application of Arbitration Limits in Sexual Assault and Harassment Cases," *CPR Speaks* (Feb. 6) (available at https://bit.ly/4rWidiq).

There is no such excuse for the remaining four categories above. Each has featured lower court decisions all over the place. Each involves an area of arbitration practice that comes up routinely. There is no question that they are important. There is no question that they have resulted in circuit splits. In at least one of these cases, the Supreme Court itself has seemed to mock its own lack of resolution, speculating that "maybe" its precedents stand for one result, "maybe" another. *Hall St. Assocs. L.L.C. v. Mattel Inc.*, 552 U.S. 576, 585 (2008) (available at http://bit.ly/38ELtSU).

Meanwhile, the bar struggles on. The Four Questions are, in greater detail:

Scotus's Open ADR Issues

The gaps: Four Passover questions that the U.S. Supreme Court has seen but left un- or under-addressed.

The lead-in: The Court has been meticulous in pursuing Federal Arbitration Act refinement. It's welcome.

But what about ... Manifest disregard? Evident partiality? Non-party evidence/discovery? Mass arbitration?

1. Is Manifest Disregard Alive, Dead, or a Gloss?

We begin with what this writer submits is the Court's most glaring miss: The consistent failure to clarify whether the manifest disregard standard is a basis for vacatur of an arbitration award.

The "most" label fits because every non-settled arbitration has a winner and a loser. Thus, every case has a lawyer at least considering whether to advise their client to place a bet on the already admittedly long odds of vacatur. Should one try to craft a petition based on the four enumerated bases for vacatur in FAA Sec. 10?

Or is there another, a hidden fifth, like the secret menu at In-N-Out Burger? Jason Hildago, "Mastering the In-N-Out Burger secret menu: How to order like a pro," *Reno Gazette J.* (Jan. 21, 2025) (available at https://bit.ly/4kNaPnf).

We all know that none of the four bases for vacatur listed in Section 10 are based on legal error by the arbitrator. We all know that arbitrators are not required to get the law correctly. We are already familiar with Justice Elena Kagan's dictum in *Oxford Health Plans LLC v.* Sutter, 569 U.S. 564, 573 (2013)

(available at https://bit.ly/4s2o5GG), that as long as the arbitrator *considers* the contract—not necessarily correctly, just looks at it—that decision will be upheld, be it "good, bad or ugly."

In two cases, however, the Court referenced, without defining it completely much less adopting it, a standard called "manifest disregard of the law." Best described, the standard would seem to subject to vacatur a decision by the arbitrator who acknowledged what the law is, and then chose affirmatively not to apply that law. That is, any way you look at it, legal error on the merits. And it is, any way you look at it, not a basis for Sec. 10 vacatur.

The Court considered applying manifest disregard in *Hall St*. It backed away from doing so completely, however, stating only "maybe" manifest disregard "was meant to name a new ground for review," or "maybe" it was "shorthand for § 10(a)(3) or § 10(a)(4)." *Hall St.*, at 585. Content with this brief and confusing foray, the Court said no more on the subject.

Remarkably, it did so again just a few years later, in *Stolt-Nielsen v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010) (available at https://bit.ly/4qUjkOt). The Court, given a golden opportunity to clarify the "maybe," chose to leave it in place. Id. at 672 n.3 ("We do not decide whether 'manifest disregard' survives our decision in *Hall Street* … as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10.").

Then, the Court gave an example of when manifest disregard might apply *if* it existed, explaining that "[a]ssuming, arguendo, that such a standard applies, we find it satisfied for the reasons that follow." Id.

The result is a deeply entrenched circuit split, which the Court continues to decline to clarify, despite repeated cert petitions presenting ample opportunity. See *Zeidman v. Lindell Mgmt. LLC*, —- S.Ct. ——, 2026 WL 79757 (Jan. 12, 2026) (denying petition for writ of certiorari that requested the Court to clarify manifest disregard); *The Visionary, Books + Cafe LLC v. Bank OZK*, —- S.Ct. ——, 2026 WL 490838 (Feb. 23, 2026) (denying petition for writ of certiorari that, while involving Section 10(a)(4), may have raised manifest disregard issues, though in this author's opinion the manifest disregard point is not as clearly presented as in *Zeidman*).

Zeidman concerned the MyPillow owner's "contest" offering $5 million in prize money to anyone who could disprove his theory of Chinese interference with the 2020 Presidential election. See Ali Watkins, "MyPillow Founder Will Not Pay Winnings for Election Challenge, Court Rules," *N.Y. Times* (July 24, 2025) (available at https://bit.ly/4kV5udE). The facts were interesting, the use of manifest disregard was central to the case, and the cert petition appropriately referenced the circuit court split.

This article is not the place to consider the pluses and minuses of the manifest disregard doctrine, nor to comment on whether it is already in place in Section 10 or, opposite position, whether it has no place and should be banished to the legal darkness. We leave that to the commentators. (See "*Hall*'s Haters" box at right.)

And, one can only hope, to the Supreme Court. Rather, the point of this article is to demonstrate The Chaos of Maybe: as a consequence of the uncertainty regarding manifest disregard, the federal circuit courts divide into at least three camps.

Some say that *Hall Street Assocs.* killed manifest disregard. Some draw the opposite conclusion and believe that "maybe" breathed it life. A third group comes down in the Maybe Middle, stating that the standard survives but only as a "gloss" (you decide what that means as to merits review) on the existing four vacatur standards. And this is to not even deal with the confusion that the manifest disregard standard caused in New York state courts in the well-known and highly followed decision in *Daesang v. NutraSweet*, 167 A.D.3d 1, 85 N.Y.S.3d 6 (N.Y. App. Div. 1st Dept. 2018) (available at https://bit.ly/4s2p7Tb), where after a lower court adopted it, there was such concern that this would hurt New York's competitive marketplace as a seat for international arbitration that the New York City Bar Association wrote an amicus brief on appeal, arguing, ultimately successfully, for reversal (brief available at https://bit.ly/4auxp0m).

The decisions were closely followed in the arbitration press. See, e.g., David Waslowsky, "U.S.: New York appellate court reverses decision overturning an international arbitration award for manifest disregard of the law," *Glob. Arb. News* (Dec. 13, 2018) (available at https://bit.ly/4rwJ5Wx); Jeremy Heep, "NY Appellate Court Weakens 'Manifest Disregard' Exception to Arbitration Enforcement," *JDSupra* (Oct. 22, 2018) (available at https://bit.ly/40t1A1W).

As a consequence of the Supreme Court's mixed signals and failure to clarify, the division in the circuits on this issue is manifest. There are a variety of conflicting standards. For an excellent chart on the manifest disregard positions in 12 of the federal circuit courts, see Joshua Daniel Jones & Elizabeth C. Wheeler, "Manifest Disregard as Grounds for Vacatur after *Hall Street*," Am. Bar Assn. (March 28, 2025) (available at https://bit.ly/4aMmpu7).

In his Supreme Court cert petition in the *Zeidman* MyPillow case, former State Department Legal Adviser and former New York Southern U.S. District Judge Abraham D. Sofaer describes this as "doctrinal disorder that undermines federal arbitration law." Brief for Hon. Abraham D.

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Hall's Haters

Commentary shows that the author is not alone in his disdain for the confusion sowed by the U.S. Supreme Court's decisions on manifest disregard.

Writers vie with one another for catchy titles that conveyed their mockery of the state of the law, with my favorite being the riff on Hill St. Blues. See, e.g., Hiro N. Aragaki, "The Mess of Manifest Disregard," 119 *Yale L.J. Online* 1 (2009) (available at https://bit.ly/4ca97Ko); Jill I. Gross, "*Hall Street* Blues: The Uncertain Future of Manifest Disregard," 37 *Sec. Reg. L.J.* 232 (2009) (available at https://bit.ly/4kNiphH); Matthew Wolper, "'Manifest Disregard': Not Yet Entirely Disregarded," 86 *Fla. Bar J.* 8 (2012); David Allgeyer, "Disregarding Manifest Disregard—Again," Allgeyer ADR LLC (Oct. 27, 2022) (available at https://bit.ly/4rDJJBG). For a more contemporary and less brittle analysis, see Joshua Daniel Jones & Elizabeth C. Wheeler, "Manifest Disregard as Grounds for Vacatur after *Hall Street*," Am. Bar Assn. (March 28, 2025) (available at https://bit.ly/4aMmpu7).

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Sofaer as Amicus Curiae Supporting Petitioner, *Zeidman v. Lindell Mgmt. LLC*, No. 25-204 (2025) (available at https://bit.ly/4s5glnw).

Will the Court clarify this so that a party who believes sincerely that the award gets the law affirmatively and willfully wrong can use the standard to move to vacate? Maybe.

2. Arbitrator Conflict: What is the Definition of Evident Partiality or Corruption?

This is an oldie but goodie.

To be fair to the Court, unlike with manifest disregard, where the Court teased an answer, or third-party discovery, where, as shown below, the Court has allowed a circuit court split to fester for more than a decade, here the Court *has* acted.

The problem is that action came in 1967. That was pre-*Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (available at https://bit.ly/472rn4I)—pre-arbitration explosion, and pre-development of the mega firm, where one does not know most of one's partners, let alone is able to ferret out conflicts of interest based on contacts with arbitrators.

In that long-ago and different world, the Court took a shot, and did an admirable job. In *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968) (available at https://bit.ly/4aNw8jY), and more important in the concurring opinion of Justice Byron White, the Court held that an arbitrator was not subject to the same disclosure standards as a judge, and so "arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial."

The concurring opinion has emerged as the guiding principle for federal courts in the half-century-plus since 1967. But in that time there has been a regrettable tendency to substitute the lack of disclosure for the presence of partiality. See *Rosenhaus v. Jackson*, No. CV-14-3154, 2016 WL 4592180, at *5, *7 (C.D. Cal. Feb. 26, 2016) (explaining that the party moving for vacatur "failed to demonstrate actual impartiality or bias" but met "the 'easier' standard applied to nondisclosure cases."), and *Positive Software Sols., Inc. v. New Century Mortg. Corp.*, 337 F. Supp. 2d 862, 878 (N.D. Tex. 2004) (holding that the failure to disclose itself was grounds for vacatur, precluding any need for the court to "reach that question" of whether there was actual bias).

Rather than focus on whether or not the actual relationship between, say, arbitrator and party, or arbitrator and counsel, would rise to the raised-eyebrow-or-worse level, courts have focused on the far more objective factor of whether any such relationship was even disclosed.

Where it has not been, courts have found an FAA Sec. 10(a)(2) violation. See, e.g., *Tenaska Energy Inc. v. Ponderosa Pine Energy LLC*, 437 S.W.3d 518 (Texas 2014). The *Tenaska* court took pains to observe that the issue on which the arbitrator failed to disclose was not one on which it passed ethical judgment. It was the simple failure to disclose that caused vacatur.

In this manner, the failure to further develop the law on what relationships and knowledge might actually constitute corruption has relatively stagnated. Meanwhile, with the multiplicity of arbitrations; the rise of the frequently-engaged-by-one-party arbitrator (addressed at length in the United Kingdom in the *Haliburton* cases (see *Halliburton Co. v. Chubb Bermuda Ins. Ltd.*, [2018] UKSC 0100 (available at https://bit.ly/4qULp8C)), and the growth of law firms to the point where one cannot open one's office door without tripping on a conflict, the Court has not developed the law an iota since *Commonwealth*.

It has fallen to others—particularly *Alternatives*' publisher, the International Institute for Conflict Prevention and Resolution (see Guidelines for Arbitrator Disclosure, CPR Disp. Resol. Servs. (Aug. 2024) (available at https://bit.ly/3ZQjGuM)), and in the International Bar Association's admirable color-coded list of white/black/orange circumstances (See International Bar Association, IBA Guidelines on Conflicts of Interest in International Arbitration (May 25, 2024) (available at https://bit.ly/4s3UQDu))—to fill that gap.

But that emphasizes all the more the begging of the question as to our domestic arbitration law.

3. Can Non-Party Witnesses Be Compelled to Produce Documents Pre-Hearing and Appear at Depositions?

Who might you expect to have greater credibility with an arbitrator: a party witness or a witness with no dog in the hunt? Who might you expect to produce documents with less of a concern for shielding unfavorable evidence? Who might speak more freely and perhaps without days of "preparation" by counsel?

The answer to all of the above questions is the third-party witness. Nor was this unanticipated by the Federal Arbitration Act drafters, who provided in Section 7 that any witness (thus including third parties) could be compelled to attend the arbitration hearing itself. From the beginning, arbitration has been understood to provide some form of compulsory process over non-parties.

The problem is that the FAA was passed in 1925 while the Federal Rules of Civil Procedure were not promulgated until 1938. Discovery certainly existed at the time that the FAA became law but nothing like what it bloomed into once the FRCP established baseline rules and processes.

Nor were there federal rules about pretrial process such as motions to dismiss and summary judgment, much less the development of this law as has emerged in the *Twombly* decision on motions to dismiss (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (available at https://bit.ly/4b4ndMb)) and the *Anderson/Celotex* cases on summary judgment. See, respectively, *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986) (available at https://bit.ly/46QSMXk); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (available at https://bit.ly/3Owc0v9).

Into this gap stepped then-Third Circuit Judge, and future Supreme Court Justice, Samuel Alito. In 2004, writing for the majority in a case called *Hay Group*, Circuit Judge Alito considered the legality of a pre-hearing subpoena served on a party's former—and distinct *non*-party— employer. *Hay Group Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004) (available at https://bit.ly/4kM5tse). That party protested that there was no basis for requiring it to produce documents in an arbitration.

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U.S. Supreme Court Arbitration Decisions Since 2000

Case	Year	Holding
Cortez Byrd Chips Inc. v. Bill Harbert Constr. Co.	2000	FAA venue provisions are permissive so award can be enforced in any proper district.
E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17	2000	Public policy considerations involving enforcement of arbitration award against employer.
Green Tree Fin. Corp.-Ala. v. Randolph	2000	Order referring parties to arbitration is 'final' under Section 16(a)(3), and therefore appealable.
Circuit City Stores Inc. v. Adams	2001	FAA Sec. 1's exemption is confined to transportation workers.
C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.	2001	Indian tribe can consent to the enforcement of arbitral awards in a state court.
E.E.O.C. v. Waffle House Inc.	2002	FAA does not bar EEOC from pursuing victim-specific judicial relief in an ADA enforcement action.
Howsam v. Dean Witter Reynolds	2002	Arguable time bar was not a 'question of arbitrability.'
PacifiCare Health Sys. Inc. v. Book	2003	RICO claims are arbitrable even if arbitrator's power to award damages is curtailed by arbitration agreement.
Citizens Bank v. Alafabco Inc.	2003	The parties' debt-restructuring agreement had a sufficient nexus with interstate commerce to make an arbitration provision in the agreement enforceable under the FAA.
Green Tree Fin. Corp. v. Bazzle	2003	The FAA does not prohibit class-wide arbitration hearings under state law.
Buckeye Check Cashing Inc. v. Cardegna	2006	A challenge to the validity of a contract as a whole, and not specifically to the arbitration agreement within it, must go to the arbitrator, not the court.
Preston v. Ferrer	2008	When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum.
Hall Street Assocs. LLC v. Mattel Inc.	2008	The FAA's grounds for vacatur and modification of awards are exclusive.
Vaden v. Discover Bank	2009	In assessing whether arbitration is based on a federal question, courts may 'look through' a Federal Arbitration Act Section 4 petition but not a counterclaim.
14 Penn Plaza LLC v. Pyett	2009	Collective bargaining agreement's mandate of arbitration of ADEA claims is enforceable.
Arthur Andersen LLP v. Carlisle	2009	Section 16(a)(1)(A) entitles any litigant asking for a Section 3 stay to an immediate appeal from that motion's denial.
Stolt-Nielsen v. AnimalFeeds Int'l Corp.	2010	Imposing class arbitration on parties who have not agreed to authorize class arbitration is inconsistent with the FAA.
Rent-A-Center, W. Inc. v. Jackson	2010	Extends severability doctrine to a challenge to the delegation clause.
Granite Rock Co. v. Int'l Broth. of Teamsters	2010	The parties' dispute over the collective-bargaining agreement's ratification date was a matter for the court, not the arbitrator.
AT&T Mobility LLC v. Concepcion	2011	The FAA preempts California's *Discover Bank* rule, which provided that class waivers in consumer arbitration agreements are unconscionable.
KPMG LLP v. Cocchi	2011	'Piecemeal litigation' is an acceptable price to pay when some claims belong in arbitration and some in litigation.
CompuCredit Corp. v. Greenwood	2012	Disputes under the Credit Repair Organizations Act (CROA) are arbitrable notwithstanding silence of CROA itself.
Marmet Health Care Ctr. v. Brown	2012	West Virginia could not take nursing home disputes out of arbitration as a matter of public policy where the nursing home had arbitration clauses in its contract with plaintiffs.
Nitro-Lift Techs L.L.C. v. Howard	2012	The state supreme court's ruling that noncompetition agreements in employment contracts were null and void violated the FAA because enforceability was a question for the arbitrator.
Oxford Health Plans v. Sutter	2013	The arbitrator's ruling that the relevant contract allows for class-wide arbitration did not exceed his powers under Section 10(a)(4).
Am. Express Co. v. Italian Colors Rest.	2013	The effective vindication doctrine cannot be used to invalidate the parties' choice of bilateral arbitration, and so the inability to afford an expert absent a collective action does not render a class arbitration waiver invalid.
BG Grp. PLC v. Argentina	2014	The issue of whether a procedural condition precedent to arbitration has been satisfied was a question for the arbitrator, not the court.
DIRECTTV Inc. v. Imburgia	2015	Parties could not contract around *AT&T Mobility LLC v. Concepcion*.
Kindred Nursing Ctrs. Ltd. P'Ship v. Clark	2017	The Kentucky Supreme Court's ruling that an arbitration agreement requires an explicit statement to bind a principal to arbitration violates the FAA because it treats arbitration agreements differently than other contracts.
Epic Systems Corp. v. Lewis	2018	The FAA requires enforcement of arbitration agreements providing for individualized arbitration proceedings.
Henry Schein Inc. v. Archer and White Sales Inc.	2019	Where parties delegate arbitrability to the arbitrator, it is inappropriate for a court to determine whether the argument that the claim is arbitrable is "wholly groundless."
New Prime Inc. v. Oliveria	2019	Whether the FAA Section 1 exemption applies is a question for the court to determine before compelling arbitration.
Lamps Plus Inc. v. Varela	2019	Where an arbitration agreement is ambiguous, a court cannot conclude the parties agreed to submit to class-wide arbitration.
GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC	2020	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not conflict with domestic equitable estoppel doctrines that permit the enforcement of arbitration agreements by nonsignatories.
Badgerow v. Walters	2022	A federal court may not 'look through' an FAA Section 9 or 10 petition to determine federal jurisdiction.
Morgan v. Sundance Inc.	2022	Waiver of arbitration rights must be analyzed like waiver of any other contractual right, without imposition of an extra 'prejudice' element.
Sw. Airlines Co. v. Saxon	2022	Airline ramp workers qualify for FAA Section 1's transportation worker exemption.
ZF Auto. US, Inc. v. Luxshare, Ltd.	2022	Only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under 28 U.S.C. § 1782.
Viking River Cruises v. Moriana	2022	The FAA preempts a California rule that held unenforceable any arbitration agreement waiving the right to bring a state-law representative action.
Coinbase v. Bielski	2023	A district court must stay proceedings during the interlocutory appeal of the question of arbitrability.
Bissonnette v. LePage Bakeries Park St. LLC	2024	A transportation worker does not need to work in the transportation industry to qualify for FAA Section 1's exemption.
Smith v. Spizzirri	2024	FAA Section 3 requires the district court to stay proceedings when it has found the dispute is arbitrable and a party has requested a stay pending arbitration.
Coinbase Inc. v. Suski	2024	Where parties have agreed to different contracts with conflicting arbitration provisions, the court must decide which contract governs.
CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.	2025	Under the Foreign Sovereign Immunities Act (FSIA), personal jurisdiction exists when an immunity exception applies and service is proper, allowing a district court to confirm an international arbitration award.
Flowers Foods Inc. v. Brock	2026	Do workers who do not travel across state lines but deliver goods that do qualify for FAA Section 1's exemption?
Jules v. Andre Balazs Props.	2026	Do federal courts have jurisdiction to confirm or vacate awards if the case was stayed under FAA Section 3, even without an independent basis for federal jurisdiction?

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This was not federal court. There was no nationwide subpoena rule like Fed. R. Civ. P. 45. Id. at 407–08. There was only FAA Sec. 7 and that language was, again, addressed only to the "hearing." See 9 U.S.C. § 7 (emphasis added) ("The arbitrators … may summon in writing any person to attend before them … *and* in a proper case *to bring with him or them* any book, record, document or paper which may be deemed material as evidence in the case.").

Alito was literalist in *Hay Group*. He declined the invitation to expand Section 7's coverage in keeping with what one might argue is a contemporary demand for a more flexible, dare one say "liberal," approach to Section 7. He instead reinforced that, at least as far as the Third Circuit was concerned, there could be no required disclosures by a non-party other than at the hearing. Id. at 407-08.

Not all circuits agreed. The Eighth Circuit, for example, allows for precisely the loose, pre-hearing allowed, serving-of-discovery requests on third parties as Circuit Judge Alito declined. See *Sec. Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865 (8th Cir. 2000). And another sector of circuits adopts the concurring opinion of then-Circuit Judge Michael Chertoff in *Hay* itself (see *Hay Group*, 360 F.3d at 413–14 (Chertoff, J., concurring)): that the arbitrator(s), or even just one of them in a multi-arbitration panel, can convene a sort of "mini hearing" at which the witness can be questioned and must produce documents. See *Stolt-Nielsen Transp. Grp. Inc. v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005). Not perfect, and no lawyer likes trying out deposition questions and themes in the presence of the ultimate decisionmaker, but perhaps better than *Hay Group* nothing.

The chart thus looks as depicted below.

This is not for lack of outcry. The *Hay Group* circuit split has been the subject of a forest full of articles, papers, and conference topics. See, e.g., Alan Scott Rau, "Evidence and Discovery in American Arbitration: The Problem of Third Parties," 19 *Am. Rev. Int'l Arb.* 1 (2009) (available at https://bit.ly/4kS3v9F); Peter Jacobus, "Third Party Discovery Subpoenas in Arbitration: The Growing Circuit Court Split," *JDSupra* (March 21, 2019) (available at https://bit.ly/4sazULl), and Maya Rashid, Uncompelled: Circuits Split Over The Pre-Hearing Discovery Powers of Arbitrator, 15 Arb. L. Rev. 74 (2024) (available at https://bit.ly/4cbndLo).

The circuit split here is particularly problematic because the very nature of the third party witness itself presents choice-of-law questions which can implicate the circuit court split. An entire subset of third-party witness cases in arbitration concerns itself with which law governs: that of the witness or that of the arbitral seat? (See, e.g., *Black v. Emerson*, No. 25-cv-1035, 2025 WL 2391499, at *4 (D. Colo Aug. 18, 2025) ("[T]he vast majority of federal courts to have considered precisely this issue [ ] have concluded that they lacked authority to enforce arbitral summons that compelled compliance at a one-time hearing within their district, when the seat of the arbitration was located elsewhere."); *Campaign Registry Inc. v. Tarone*, No. 24-cv-2314, 2024 WL 3105524, at *7 (S.D.N.Y. June 24, 2024) ("In sum, as the seat of the arbitration is Delaware, not in New York … Delaware and only Delaware is where the parties can obtain enforcement of these particular subpoenas. I happen to consider that an unfortunate result and I am undoubtedly not the first judge to urge Congress to close this ridiculous loophole."); see also Matthew H. Adler & Benjamin J. Eichel, "When, Where and Whether: The Confusing Law of Third-Party Evidence," 37 *Alternatives* 49 (April 2019) (available on *Westlaw*); Tamar Meshel, "Closing the Enforcement Gap: Third-Party Discovery Under the FAA and the Federal Rules of Civil Procedure," 70 *Kansas L. Rev.* 1 (2021) (available at https://bit.ly/4s1KB2t).)

And what is the impact of choice of law on increasingly popular virtual hearings? With each year, the questions grow, clients spend money on a procedural issue that ought to be clarified, and the Court remains silent.

Expansive Pre-Hearing Discovery

- **Sixth Circuit:** *Television and Radio Artists v. WJGK-TV*, 164 F.3d 1004 (6th Cir. 1999).
- **Eighth Circuit:** *Sec. Life Ins. Co. of Am. v. Duncanson & Holt*, 228 F.3d 865 (8th Cir. 2000).

Pre-Hearing Discovery 'Middle Ground'

- **Second Circuit.** *Stolt-Nielsen Transp. Grp., Inc. v. Celanese AG*, 430 F.3d 567 (2d Cir. 2005) ('mini-hearing' with at least one arbitrator present).
- **Fourth Circuit.** *COMSAT Corp. v. Nat'l Sci. Found.*, 190 F.3d 269, 275 (4th Cir. 1999) (presumption against third-party discovery absent 'unusual circumstances' or 'showing of special need or hardship').

No Pre-Hearing Discovery

- **Third Circuit:** *Hay Group Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).
- **Ninth Circuit:** *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703 (9th Cir. 2017).

4. What are the Permissible Limitations on Mass Arbitration Filings?

If the Court's failure to clarify and refine its 1967 decision in *Commonwealth Coatings* is an oldie but goodie, then the emerging confusion about mass arbitration clauses is the new kid on the block.

We may not quite be at the implosion stage of conflicting circuit court law. But the stakes here are such that clarification is needed much sooner rather than later. Mass arbitration clauses are drafted daily without anyone really knowing if they will stand or not.

Here again the literature is massive, and it is not the intent of this article to engage in an exhaustive survey, or to advocate for a specific result. Suffice to say that, faced with almost a generation of Supreme Court and other cases striking down multiple forms of class or multi-party arbitration, the plaintiff's bar adopted an altogether different approach: instead of bringing one arbitration with a thousand claimants, it brought one thousand arbitrations.

The defense bar, facing a "careful what you wish for" scenario, responded in the same way that

it formerly (and still) attempts to deal with class action arbitrations: with clauses banning or at least seeking to control such "mass arbitrations."

Clauses started to require similar cases to wait in line until a sample, called a "bellwether," were determined. Cases featuring a similar lawyer or law firms were "batched" together. Entire cases were put on hold and, one might say ironically, treated in a mass rather than individualized form.

At least one court has held that this is a due process violation. *Heckman v. Live Nation Ent. Inc.*, 120 F.4th 670, 684–85 (9th Cir. 2024). Clause drafters have gone back to the drawing board with less militant but still aggressive clauses in play for "similar" cases.

The leading arbitration institutions have issued their own sets of rules. See American Arbitration Association, Mass Arbitration Supplementary Rules (available at https://bit.ly/4ax4QiO); JAMS, Mass Arbitration Procedures, and Guidelines (available at https://bit.ly/3OypEhl), and the CPR Employment-Related Mass Claims Protocol (available at https://bit.ly/4rCbjz8).

Commentary again is rampant, including by this author. Matthew H. Adler, "Mass Arbitration Clauses: How Have They Fared So Far?" 42 *Alternatives* 175 (2025) (available on *Westlaw*); J. Maria Glover, "Mass Arbitration," 74 *Stanford L. Rev.* 1283 (2022) (available at https://bit.ly/4aJx60n); Richard Frankel, "Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act," 78 *Vanderbilt L. Rev.* 133 (2025) (available at https://bit.ly/4aS7oHi).

One cert petition has gone to the Supreme Court—the *Live Nation v. Heckman* case—but has been denied. It is, again, not the point of this article to advocate for one versus another "acceptable" approach. But as drafting continues to track this or that lower court decision on mass arbitration clauses, and as the plaintiff and defense bars are locked once more in what now seems like an eternal struggle over arbitration and mass cases, clarity is needed more than ever.

We can pray.

ADR Brief

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Other Guidance

While California is not the only state that has considered the risks of generative AI, it is the first to expressly consider AI use in alternative dispute resolution. Most AI-related regulations have focused on general consumer protection or attorney ethical obligations, rather than a bill targeting AI usage in arbitration.

For example, the American Bar Association, in a July 29, 2024, opinion, Formal Opinion 512—Generative Artificial Intelligence Tools, opined that lawyers "must fully consider their applicable ethical obligations" to clients while using artificial intelligence. The ABA acknowledged that AI-based technologies

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