

# ADR MONITOR

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## National Arbitration Forum Adds Veteran California Construction Neutral Ross R. Hart

### *Hart to Speak at West Coast Casualty's Upcoming Construction Defect Seminar*

The National Arbitration Forum (FORUM) has added the mediation practice of California construction mediator Ross R. Hart. Mr. Hart is a recognized expert in construction dispute resolution and, specifically, in construction defect claim mediation.

As an experienced attorney and neutral, he has served as a mediator, arbitrator, and special master in complex, multi-party construction, commercial real estate, environmental, and insurance coverage cases. Mr. Hart has dedicated his practice to ADR full time since 1994.

Prior to joining the FORUM's construction mediation practice, Mr. Hart conducted intensive mediation training for its neutrals who will mediate construction defect disputes arising under California's "right to repair" statute (SB 800) and other construction matters.



ROSS R. HART

This partnership reinforces FORUM's commitment to developing and strengthening its ADR service offerings in the construction industry. For further information about out-of-court dispute resolution offerings for construction disputes, visit [www.adrforum.com/focus/construction](http://www.adrforum.com/focus/construction).

### UPCOMING INDUSTRY EVENTS

- We will exhibit and Ross Hart will speak at the May 18th and 19th Construction Defect Seminar sponsored by West Coast Casualty. Mr. Hart's presentation is a part of the seminar's "The Mediators Speak" panel. Billed as America's largest construction defect seminar, the event takes place in Anaheim, California and program information is available at [www.westcoastcasualty.com/events.cfm](http://www.westcoastcasualty.com/events.cfm).
- We are a sponsor and exhibitor at the upcoming ABA Forum on the Construction Industry Annual Meeting in San Diego also on May 18th and 19th. This year's program is entitled "Litigating the Construction Case and More." Program information is available at [www.abanet.org/forums/construction/featured\\_program](http://www.abanet.org/forums/construction/featured_program).

## Supreme Court Reaffirms Two Key Arbitration Holdings

Whether brought in federal or state court, a challenge to the validity of a contract as a whole, rather than just to the arbitration clause, must be referred to arbitration, according to the Supreme Court of the United States.

In *Buckeye Check Cashing, Inc. v. Cardegna*, No. 04-1264 (Feb. 21, 2006), Cardegna brought a putative class action alleging that Buckeye charged usurious interest rates in connection with check cashing loans, and that Buckeye's loan agreements violated Florida lending and consumer protection laws.

Buckeye moved to compel arbitration based upon the arbitration clause contained in the loan agreements. Cardegna argued that the entire contract was void for illegality, and that the arbitration clause was therefore also void.

The Florida Supreme Court sided with Cardegna, holding that enforcing agreements to arbitrate in a contract challenged

as unlawful "could breathe life into a contract that not only violates state law, but also is criminal in nature."

The Supreme Court of the United States reversed, holding that Cardegna's challenge to the contract "must go to the arbitrator." Writing for a seven justice majority, Justice Scalia reaffirmed *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984), noting that those decisions established three propositions.

First, an arbitration provision is severable from the rest of the contract. Second, unless the challenge is to the arbitration clause itself, the validity of a contract is for the arbitrator to

decide. And finally, substantive federal arbitration law applies in both state and federal courts.

Scalia rejected the Florida court's distinction between void and voidable contracts. Under Florida law, parts of a contract cannot be severed from a void contract. But the Supreme Court concluded that, because *Prima Paint* rejected the application of state severability rules to arbitration agreements, Florida state law was irrelevant.

The Court distinguished contract validity challenges, which are now clearly reserved for the arbitrator, from arguments that the agreement was never concluded. Only the latter are the types of "gateway" issues appropriate for court decision. Justice

Scalia listed lack of a contract signature, insufficient agent authority to bind a principle, and signor mental capacity as examples.

In this way,

*Buckeye* replaces a murky arbitrability doctrine potentially reliant on relatively arbitrary distinctions from contract validity law with a bright-line test based upon contract formation. After *Buckeye*, validity questions go to arbitration and formation questions are for the court.

In addition to reaffirming the core arbitration holdings in *Prima Paint* and *Southland*, the case should also be seen as a continuation of the recent Supreme Court trend of respecting and expanding arbitrator authority.

For example, *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401 (2003) held that arbitrators, rather than courts, have the power to determine the meaning of contractual damages

provisions. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003) emphasized that matters of contract interpretation "should be for the arbitrator, not the courts, to decide."

Reading *Buckeye* in this context further strengthens its message: whether heard in state or federal court, challenges to a contract's validity must go to the arbitrator.

### Did You Know?

The Federal Arbitration Act (FAA):

- governs a vast collection of arbitration agreements in contracts "involving commerce,"<sup>1</sup>
- applies to contracts fitting within the "broadest permissible exercise"<sup>2</sup> of Congress' Commerce Clause Power, and
- creates a federal law duty to enforce arbitration agreements and confirm arbitration awards as written.

However, the FAA does not, in itself, create federal question jurisdiction allowing parties to compel arbitration or confirm awards in federal court. In this regard, it is "something of an anomaly in the field of federal-court jurisdiction."<sup>3</sup> Instead, the transaction underlying the arbitration agreement or award must independently qualify for federal subject matter jurisdiction either on diversity or federal question grounds for an action to be heard in federal court.

The rights conferred by the FAA are fully enforceable in state as well as federal court.<sup>4</sup>

<sup>1</sup> 9 U.S.C. § 2.

<sup>2</sup> *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003).

<sup>3</sup> *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 26, n.32 (1983).

<sup>4</sup> *Id.* at 24.

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## Mississippi Arbitration Awards Can Be Confirmed in Less Than 90 Days

Courts can confirm arbitration awards governed by Mississippi construction arbitration law before the end of the ninety-day period provided for challenging an award based on statutorily provided grounds.

In *Johnson Land Co. v. C.E. Frazier Construction Co., Inc.*, No. 2004-CA-00924-SCT (Miss. Jan 26, 2006), prime contractor Frazier subcontracted with Johnson to perform dirt work for the construction of a new elementary school. After a dispute arose, Johnson filed suit. The parties subsequently entered into a separate arbitration agreement stating that the circuit court would retain jurisdiction “to enter judgment on the arbitrator’s award.”

The arbitrator found against Johnson, awarding Frazier \$150,209.72 on

November 26, 2002. Frazier filed a motion to confirm the award on December 11, 2002. By January 17, 2003, the parties had reviewed and approved the Agreed Order Confirming Arbitration Award, and final judgment was entered.

Johnson later appealed, arguing that, according to Sections 11-15-125 and -135 of the Mississippi Code, it should have been allowed ninety days to challenge the arbitrator’s award before a court could confirm the award, and that it was not provided the full ninety days to raise such a challenge.

The Supreme Court disagreed. The Court noted that the statutes at issue in fact provide that “*within* ninety days after receipt [of] a copy of the award, the court *shall* confirm an award if

none of the statutory grounds for challenging the award are asserted within the respected time limits” (emphasis in original). The Court reasoned that ninety days was merely the outside limit on the time allowed for a court to confirm an award.

The Court held that Johnson had an adequate opportunity to assert a statutory challenge in its response to Frazier’s motion to confirm the award. Having been afforded the opportunity to raise a challenge, requiring the court to wait ninety days before confirming an award would defeat a “prime objective of arbitration law [which] is to permit a just and expeditious result with a minimum of judicial interference,” and was not a reasonable interpretation of the statute.

## Unambiguous Invocation of the FAA Preempts State Arbitration Law

When ruling on a motion to compel arbitration, courts must first look to the arbitration agreement to determine whether the Federal Arbitration Act (FAA) or state arbitration law applies, the California Court of Appeal has determined. If the parties expressly state that the FAA applies, state law is preempted.

In *Rodriguez v. American Technologies, Inc.*, 39 Cal. Rptr. 3d 437 (Cal. Ct. App. 2006), Rodriguez sued contractor ATI for professional negligence and several insurance companies for breach of contract in connection with repair work done on his home after he filed an insurance claim.

Rodriguez and ATI were bound to arbitrate, but the insurance companies were not. The agreement stated that “pursuant to the Federal Arbitration Act,” the parties would arbitrate all claims arising from their contract.

ATI moved to compel arbitration and to stay the proceedings. Under the FAA, ATI argued, the court was required to compel arbitration regardless of whether the lawsuit involved other parties.

Rodriguez argued that the FAA did not apply to the agreement, and that California law gave the court discretion to refuse to compel arbitration. The United States Supreme Court has held that the FAA does not

preempt when the parties agree California law would apply. *Volt Info. Sciences v. Bd. of Trustees*, 489 U.S. 468, 479 (1989). Because several sections of the contract referred to California law, the trial court applied California law and denied ATI’s motion.

On appeal, the court stated that parties to an agreement can explicitly choose to have their agreement governed by the FAA rather than California arbitration law. The Court held that by stating in the agreement that all disputes would be decided “pursuant to the Federal Arbitration Act,” the parties in this case did exactly that.

In deciding that the agreement contemplated the application of the FAA to the exclusion of California arbitration law, the court applied the plain meaning of the term “pursuant,” i.e., “in conformance to or agreement with.” The Court also noted that the contract contained no language limiting the FAA’s application and did not mention applying California arbitration law to the dispute.

Under these circumstances, the court found no ambiguity in the agreement and determined that the FAA governed all aspects of the arbitration. Because the FAA does not allow judges to refuse to compel arbitration in the face of a valid arbitration agreement, the court ordered Rodriguez to arbitration.

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## Court Refuses to Stay Action That Does Not Fall Within Scope of Arbitration Agreement

The Ohio Court of Appeals recently denied a party's motion to stay litigation pending arbitration where the parties' agreement stated that the arbitrators lacked authority to decide claims exceeding \$100,000, and the plaintiff sought over \$200,000 in damages.

In *Baywest Construction Group, Inc. v. Premcar Co.*, No. 86253 (Ohio Ct. App. Feb 02, 2006), Baywest sued Premcar for \$266,186 in connection with a contract for the construction of an office building.

Premcar counterclaimed, alleging damages of \$145,000, but later voluntarily dismissed the counterclaim. Premcar then moved to stay the proceedings pending arbitration pursuant to an arbitration clause in the construction contract.

On appeal, the court denied Premcar's motion to stay. Ohio law presumes that a dispute is arbitrable unless it can be determined with "positive assurance" that the arbitration clause cannot be interpreted to cover the dispute.

The court found that the agreement explicitly excluded any dispute with an amount in controversy over \$100,000 from arbitration. Since both sides alleged damages exceeding that amount, the court concluded that an arbitrator would "lack jurisdiction" over the dispute.

Courts are generally deferential to arbitration agreements and will generously interpret their scope. However, where explicit language limits arbitral issues or claim size courts are careful to enforce the arbitration agreement as written.

### NATIONAL ARBITRATION FORUM

The National Arbitration Forum is a leading provider of dispute resolution services, with over 1,500 legally-trained mediators and arbitrators located in all 50 states and 29 countries. We offer a full range of construction dispute resolution services, including arbitration and mediation programs tailored to satisfy state statutory construction dispute resolution requirements.

To receive more information about us, or for information about our national panel of construction mediators, simply complete the enclosed reply card or contact us at 877-655-7755, x6425.