

# Arbitral Immunity\*

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*A party who receives an adverse arbitration award may be tempted to involve the arbitrator in legal challenges to the award, either by naming the arbitrator as a defendant or by attempting to compel the arbitrator's testimony. Arbitrators usually respond by asserting the doctrine of arbitral immunity. In this Article, Professor Nolan and Dean Abrams examine that doctrine's origins, theory, and legal status. They conclude that arbitral immunity from suits and subpoenas serves the parties' interests by protecting the award's finality and the arbitrator's neutrality. They recommend that courts continue to recognize a broad immunity and urge arbitrators to seek sanctions against those who file frivolous actions against them.*

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## INTRODUCTION

As recipients of bad news are inclined to blame the messenger, so many a losing party in an arbitration will blame the arbitrator. Some take their anger so far as to sue the arbitrator for breach of contract or for any of a number of torts. Others, seeking to overturn the adverse award or to recover damages from the opposing party, may try to compel the arbitrator to testify in a deposition or at trial. Suits and subpoenas against arbitrators threaten to undermine the nation's most successful form of alternative dispute resolution. The possibility of damages or compelled testimony and the burden of resisting them may even deter some people from serving as arbitrators and cause others to avoid potentially controversial rulings.

Over the last century American courts have responded to actions brought against arbitrators by developing a doctrine of arbitral immunity. With very few exceptions that doctrine protects arbitrators both from personal liability for their actions and from compelled involvement in postaward legal proceedings.<sup>1</sup> The doctrine is not absolute, however. There are some recognized exceptions and some aberrant cases. Surprisingly little has been written about arbitral immunity; thus its proper scope and limitations, and the theory underlying it, remain unexamined.

This Article does three things: first, it explores the origins and theory of arbitral immunity; second, it describes the doctrine's legal status; and third, it evaluates possible responses by arbitrators to suits and subpoenas. Our primary conclusions are that the courts can best encourage private dispute resolution by severely limiting the participation of arbitrators in postaward legal proceedings; that the surest way for an arbitrator to avoid personal liability is to render an award—*any* award—to prevent a claim of nonfeasance; and that the strongest defense for arbitrators facing the possibility of suit or subpoena is an aggressive response, not insurance or legislative action.

## I

## ORIGIN AND THEORY OF ARBITRAL IMMUNITY

*A. Origin*

Arbitral immunity stems from judicial immunity. Judicial immunity dates back at least to two early seventeenth century English cases, *Floyd v. Barker*<sup>2</sup> and *The Marshalsea*,<sup>3</sup> in which Lord Coke announced the rule of judicial immunity, stated its purposes, and specified its limita-

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1. Rubin, *Arbitrators' Immunity from Damage Claims*, 39 PROC. NAT'L. ACAD. ARB. 19 (1987).

2. 77 Eng. Rep. 1305 (1607).

3. 77 Eng. Rep. 1027 (1612).

tions. In brief, the rule is that judges of courts of record are not liable for damages for their decisions. The rule's purposes are to ensure finality of judicial decisions, preserve judicial independence, and maintain confidence in the judicial system. Judicial immunity's limits are that it applies only to the judge's judicial acts (the "judicial acts" requirement) in cases over which he had some jurisdiction (the "jurisdictional" requirement).<sup>4</sup> In other words, a judge is not immune from the consequences of his administrative, legislative, or personal acts, nor from the consequences of any acts performed in the complete absence of jurisdiction.

American courts adopted and expanded the English understanding of judicial immunity.<sup>5</sup> The United States Supreme Court expressed the doctrine of judicial immunity most forcefully in the 1871 case of *Bradley v. Fisher*: "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, or are alleged to have been done maliciously or corruptly."<sup>6</sup> The Supreme Court has adhered strictly to this rule ever since,<sup>7</sup> even to the point of taking an extraordinarily broad view of the "judicial acts" protected by immunity. An act is judicial, said the Court in *Stump v. Sparkman* in 1978, if it is one "normally performed by a judge" and if the parties "dealt with the judge in his judicial capacity."<sup>8</sup> The Court takes an equally broad view of the "jurisdiction" within which judicial acts are immunized: "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'"<sup>9</sup>

*Stump* provides a startling illustration of how broad judicial immunity is. Stump, an Indiana circuit court judge, granted a woman's petition to have her minor daughter sterilized. He acted without even the rudiments of due process: there were no litigants, no adversarial process, no notice to the daughter, no possibility of appeal once the sterilization had been completed, and "not even the pretext of principled decision-

4. The importance of Lord Coke's third limit, that immunity applied only to a judge sitting on a court of record, faded in importance as the distinction between judicial and nonjudicial acts sharpened; in time the immunity came to protect all those performing judicial acts, in whatever court the acts took place.

5. See generally Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879; Feinman & Cohen, *Suing Judges: History and Theory*, 31 S.C.L. REV. 201 (1980).

6. 80 U.S. (13 Wall.) 335, 351 (1872). Justice Field's opinion even cited the same reasons for judicial immunity as Coke's opinions had, finality and judicial independence. *Id.* at 347-49. Three years earlier, in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1869), the Supreme Court had first accepted the principle of judicial immunity, albeit in more guarded language than in *Bradley*.

7. *E.g.*, *Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967).

8. 435 U.S. 349 (1978). See generally Note, *What Constitutes a Judicial Act for Purposes of Judicial Immunity?*, 53 FORDHAM L. REV. 1503 (1985).

9. *Stump*, 435 U.S. at 356-57 (quoting *Bradley*, 80 U.S. at 351).

making.”<sup>10</sup> Nevertheless, according to the Court’s majority, immunity applied because the judicial act and jurisdictional requirements were satisfied. The mother dealt with Stump “in his judicial capacity,” and he did not lack “clear absence of all jurisdiction” to issue an injunction.

Judicial immunity has always had its critics, but the callousness of Judge Stump’s ruling, and the severity and irremediability of its consequences, outraged many of those who read the Supreme Court’s decision. Several critics attacked both the decision and the doctrine.<sup>11</sup> The Court’s interpretation of the jurisdictional requirement drew especially harsh criticism. One author thought that the Court had effectively eliminated the jurisdictional requirement for judges who sat on courts of general jurisdiction.<sup>12</sup> A second described the jurisdictional standard itself as “an anachronism that fosters nothing but confusion,” and argued that it should be eliminated; it served some purpose when applied to administrative functions, he said, but it is no longer useful when applied “to judicial functions in a modern legal system.”<sup>13</sup>

The same critics blasted the judicial act requirement. Traditionally only an act performed as part of decisionmaking in an adversarial setting was “judicial,”<sup>14</sup> and appeals could correct erroneous judicial acts. Judge Stump’s ruling failed the traditional test because he made it without any adversarial proceeding and with no practical appeal once the sterilization took place. It satisfied the Supreme Court’s new judicial act test, however, because granting petitions is a function “normally performed by a judge” and because the petitioning mother “dealt with the judge in his judicial capacity.” Indeed, once a judge has subject matter jurisdiction, almost any official act will be “judicial” in this sense.

The new test suffers because the majority used the concept of a judicial act without considering its origin—without, in other words, understanding that not all “normal” acts of judges are “judicial.” Had the Court retained the traditional distinction between judicial and administrative acts—that only those acts performed in the course of adversarial decisionmaking are truly judicial—it could have permitted recovery without posing a threat for other judges. Strangely, just three months after *Stump*, the Court reiterated the factors that made judicial immunity tolerable, and mentioned among them the adversarial process and reviewability.<sup>15</sup> Had it considered the absence of these factors in *Stump*, it

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10. 435 U.S. at 368-69 (Stewart, J., dissenting).

11. In addition to Block, *supra* note 5, and Feinman & Cohen, *supra* note 5, see Nagel, *Judicial Immunity and Sovereignty*, 6 HASTINGS CONST. L.Q. 237 (1978); Rosenberg, *Stump v. Sparkman: The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833 (1978).

12. Rosenberg, *supra* note 11, at 836-44.

13. Block, *supra* note 5, at 921.

14. *Id.* at 892.

15. *Butz v. Economou*, 438 U.S. 478, 512 (1978).

might have reached a very different result.

Despite these criticisms, the Court has since permitted only the narrowest of exceptions in the doctrine of judicial immunity. Those involve injunctive relief and recovery of attorney's fees in Section 1983 and 1985<sup>16</sup> actions for violation of constitutional rights under color of state law.<sup>17</sup> A judge is also liable for his nonjudicial acts—that is, those that are administrative, legislative, or executive. The Supreme Court uses a functional approach to distinguish judicial from nonjudicial acts: “Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.”<sup>18</sup> The Court has also indicated that a judge might be required to testify in certain instances,<sup>19</sup> and of course a judge has no immunity from criminal prosecution.<sup>20</sup>

If judicial immunity existed simply to protect those individuals holding judicial office, there would be no reason to extend it to others. Judicial immunity exists for a broader purpose, however: to protect litigants and the litigation process by ensuring judicial independence and decisional finality. It is a means to an end, not an end in itself. That purpose requires that all who perform judge-like functions be protected from liability even if they are not true judges. A variety of decisionmakers, in both the public and private spheres, “adjudicate” disputes. They, like judges, must be free from fear of liability or harassment in order to exercise their responsibilities with complete impartiality.

Recognizing this principle, courts have extended a quasi-judicial immunity to the quasi-judicial acts of those serving as neutrals between disputing parties. The closer an individual's role and tasks are to those of a judge, the easier the extension of immunity. Jurors, for example, fill a role closely analogous to that of a judge and must be absolutely immune from liability “lest they should be biased with the fear of being harassed by a vicious suit for acting according to their consciences.”<sup>21</sup> Referees and masters perform judicial tasks and possess a similar immunity.<sup>22</sup> Hearing examiners and administrative law judges, although employees of

16. 42 U.S.C. §§ 1983 & 1985 (1982).

17. *Pulliam v. Allen*, 466 U.S. 522 (1984); *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 735 (1980) (involving judges' administrative acts but suggesting in dicta that the same remedies would be available even in the case of judicial acts).

18. *Forrester v. White*, 108 S.Ct. 538, 544 (1988) (emphasis in original). In that case the Court denied *absolute* immunity to a judge sued for sex discrimination in the administrative acts of demoting and firing a probation officer, but suggested in dicta that judges might nevertheless possess a *qualified* immunity even as to their employment decisions. *Id.* at 545.

19. *Dennis v. Sparks*, 449 U.S. 24, 30-31 (1980).

20. *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974).

21. 1 HAWKINS, PLEAS OF THE CROWN 349 (6th ed. 1787), quoted in *Yaselli v. Goff*, 12 F.2d 396, 403 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927); see also *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976).

22. *McCormack & Kirkpatrick, Immunities of State Officials Under Section 1983*, 8 RUT.-

the executive branch, are also absolutely immune, "not because of their particular location within the Government but because of the special nature of their responsibilities."<sup>23</sup>

The key factor in each of these cases is what the Supreme Court has termed the "functional comparability" between the decisionmaker and a judge.<sup>24</sup> Although these early extensions of judicial immunity involved agents of the judicial and executive branches, functional comparability does not stop at the end of a government paycheck. Many disputes are resolved by private individuals who act as judges but without that title—individuals whose impartiality might suffer if they feared a suit from a disgruntled party. The disputants themselves would suffer most of all from any lessening of the neutral's impartiality. Understandably, then, courts have readily granted immunity to privately selected neutrals such as engineers and architects in construction disputes,<sup>25</sup> a surveyor whose appraisal bound parties to a contract,<sup>26</sup> an appraiser who resolved a disputed asset evaluation,<sup>27</sup> bipartite labor grievance committees,<sup>28</sup> Railway Labor Act boards of adjustment,<sup>29</sup> and stock exchange arbitrators.<sup>30</sup> In each case, the extension of immunity rests, explicitly or implicitly, upon some judgment of functional comparability between the decisionmaker and a judge. This is especially true of arbitrators, described by the Supreme Court over a century ago as "judges chosen by the parties to decide the matters submitted to them."<sup>31</sup>

Functional comparability is not the only factor relevant to the extension of judicial immunity to quasi-judicial officers. Another reason why the Supreme Court willingly recognizes judicial immunity is that "the safeguards built into the judicial process tend to reduce the need for

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CAM. L.J. 65, 78-79 (1976); *accord*, *Fath v. Koeppel*, 72 Wis. 289, 39 N.W. 539 (1888) (city fish inspector's duties are judicial).

23. *Butz v. Economou*, 438 U.S. 478, 511 (1978).

24. *Id.* at 512 (1978) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976)).

25. *E.g.*, *Lundgren v. Freeman*, 307 F.2d 104 (9th Cir. 1962); *Wilder v. Crook*, 250 Ala. 424, 34 So. 2d 832 (1948); *Craviolini v. Scholer & Fuller Assoc. Architects*, 89 Ariz. 24, 357 P.2d 611 (1960); *Meer Corp. v. Farmella Trading Corp.*, 14 Misc. 2d 242, 178 N.Y.S.2d 784 (1958).

26. *Hutchins v. Merrill*, 109 Me. 313, 84 A. 412 (1912).

27. *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987).

28. *Larry v. Penn Truck Aids, Inc.*, 567 F. Supp. 1410 (E.D. Pa. 1983); *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708 (E.D. Pa. 1982); *Goodwin v. Teamsters Local 150*, 113 L.R.R.M. (BNA) 3029 (E.D. Cal. 1982); *Shropshire v. International Bhd. of Teamsters Local 957*, 102 L.R.R.M. (BNA) 2751 (S.D. Ohio 1979); *DeVries v. Interstate Motor Freight Sys.*, 91 L.R.R.M. (BNA) 2764 (N.D. Ohio 1976), *aff'd without opinion sub nom. De Vries v. International Bhd. of Teamsters*, 620 F.2d 302 (6th Cir. 1980). *But see Warner v. McLean Trucking Co.*, 574 F. Supp. 291 (S.D. Ohio 1983) (bipartite committee might be liable for "legislative" actions, breach of the duty of fair representation, or actions outside its jurisdiction or in bad faith).

29. *E.g.*, *Merchants Despatch Transp. Corp. v. Systems Fed'n No. One*, 444 F. Supp. 75 (N.D. Ill. 1977); *Fong v. American Airlines*, 431 F. Supp. 1340 (N.D. Cal. 1977).

30. *Corey v. New York Stock Exch.*, 691 F.2d 1205 (6th Cir. 1982); *Melady v. South St. Paul Live Stock Exch.*, 142 Minn. 194, 171 N.W. 806 (1919).

31. *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1855).

private damages actions as a means of controlling unconstitutional conduct," safeguards such as "insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal."<sup>32</sup> Where those safeguards are lacking, immunity is less appropriate regardless of the degree of functional comparability. An arbitrator's decisionmaking in a contract dispute is, without doubt, functionally comparable to that of a judge. Like a judge, an arbitrator must render an impartial decision based on evidence and applicable interpretive principles.

The analogy is not perfect, however. An arbitrator need not follow precedent, and the parties cannot easily correct an erroneous arbitration award on appeal. Moreover, some have argued that selection by the parties makes the arbitrator subject to the very "political influence" that worried the Supreme Court.<sup>33</sup>

On balance, though, arbitration contains ample safeguards to justify an immunity for the arbitrator at least as broad as a judge's. First, unlike the judicial system, arbitration is voluntary. Only those who wish to will use the procedure, and those who do so presumably know the risks.<sup>34</sup> Second, selection by the parties actually eases "political" pressures: neither buyer nor seller, contractor nor owner, labor nor management could be comfortable with an arbitrator who tailors awards according to the power of a party. Both sides would refrain from selecting such a person in the future<sup>35</sup> and would in all probability spread the word to other users of arbitrators' services. A "political" decision, in other words, would threaten severe harm to the arbitrator's career. Third, precedent (in the form of generally accepted rules) is used extensively in labor arbitration,<sup>36</sup> and most other types of arbitration use arbitrators who are themselves participants in the industry and are therefore familiar with its practices and ethical codes. Fourth, arbitration, like litigation, is an adversarial process with appropriate procedural protections. Finally, arbitration awards, like court decisions, *are* subject to judicial review, albeit on far more limited grounds.<sup>37</sup>

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32. *Butz v. Economou*, 438 U.S. 478, 512 (1978).

33. See, e.g., P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* (1966) (*passim*).

34. See *Austin Mun. Sec. Inc. v. National Ass'n of Sec. Dealers*, 757 F.2d 676, 691 (5th Cir. 1985); *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1210 (6th Cir. 1982).

35. Wallen, Book Review, 81 *HARV. L. REV.* 507, 510-11 (1967).

36. Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, 14 *U.C. DAVIS L. REV.* 551 (1981).

37. The United States Arbitration Act provides for confirmation, vacation, or modification of arbitration awards. 9 U.S.C. §§ 9-11 (1982). The grounds for overturning arbitration awards are narrow, but, as a federal district court said about another arbitration statute, "[A]lthough the standard of review may in form differ slightly, the same protection present in judicial review of lower court decisions is nevertheless present in judicial review" of arbitration decisions. *Morales v. Vega*, 483 F. Supp. 1057, 1062 (D.P.R. 1979); see also *Austin Mun. Sec. Inc. v. National Ass'n of Sec.*

Arbitral immunity cases follow two policy strands, one common to both judges and arbitrators (finality and independence), the other peculiar to arbitrators (which for lack of a better term we call "recruitment"). Typical of the first strand is *Fong v. American Airlines*: "the integrity of the arbitral process is best preserved by recognizing the arbitrators as independent decision-makers who have no obligation to defend themselves in a reviewing court."<sup>38</sup>

The second strand reflects significant distinctions between arbitrators and judges. A risk of liability in extreme circumstances would not deter many applicants for the judiciary, but it might well limit the number of those willing to serve as arbitrators. Many arbitrators serve for little or no pay, others serve only part time, and few gain job security or social prestige from their work as neutrals. Judges, in contrast, typically have security, prestige, and a steady salary. In the words of one federal appeals court, "individuals . . . cannot be expected to volunteer to arbitrate disputes if they can be caught up in the struggle between the litigants and saddled with the burdens of defending a lawsuit."<sup>39</sup>

For one or both of these policy reasons, American courts have for more than a century afforded arbitrators a quasi-judicial immunity. The 1880 Iowa decision of *Jones v. Brown*<sup>40</sup> is most frequently cited as the first case on point. In *Jones*, the losing party charged that the arbitrator had conspired to defraud him. The court simply noted the arbitrator's immunity for his judicial acts and dismissed the action.<sup>41</sup> First Massachusetts and later New York followed Iowa's lead.<sup>42</sup> Since then arbitral

*Dealers*, 757 F.2d 676, 691 (5th Cir. 1985); *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1210 (6th Cir. 1982).

38. 431 F. Supp. 1340, 1343-44 (N.D. Cal. 1977); *accord*, *Goodwin v. Teamsters Local 150*, 113 L.R.R.M. (BNA) 3029 (E.D. Cal. 1982); *Merchants Despatch Transp. Corp. v. Systems Fed'n No. One*, 444 F. Supp. 75 (N.D. Ill. 1977); *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (1884) ("There is as much reason . . . for protecting and insuring [the arbitrator's] impartiality, independence, and freedom from undue influences, as in the case of a judge or juror. The same considerations of public policy apply, and . . . the same immunity extends to him.") (citing *Jones v. Brown*, 54 Iowa 74, 6 N.W. 140 (1880), discussed *infra* at notes 40-41 and accompanying text).

39. *Tamari v. Conrad*, 552 F.2d 778, 781 (7th Cir. 1977); *accord*, *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157, 159 (2d Cir. 1979), *cert. denied*, 449 U.S. 854 (1980); *Brotherhood of Locomotive Eng'rs v. New York Dock R.R.*, 94 Lab. Cas. (CCH) ¶ 13,704 (E.D.N.Y. 1981) ("recruitment of qualified arbitrators would be severely hindered if [they] were subject to lawsuits by dissatisfied carriers or employees").

40. 54 Iowa 74, 6 N.W. 140 (1880). *Jones* was not, in fact, the first American case on arbitral immunity. The defendant in *Shiver v. Ross*, 3 S.C.L. (1 Brev.) 293 (1803), sought leave to examine an arbitrator about an alleged error. The district court refused the request, stating that only the voluntary statements of a majority of the arbitrators could be used to impeach an award, and the South Carolina Constitutional Court affirmed. Arbitral immunity was applied but without use of the term.

41. The arbitrator was not allowed to recover his fee, however. *Bever v. Brown*, 56 Iowa 565, 569, 9 N.W. 911, 913 (1881).

42. *Hoosac Tunnell Dock & Elevator Co. v. O'Brien*, 137 Mass. 424 (1884); *Babylon Milk &*



immunity has been the almost unquestioned rule in commercial and labor arbitration.<sup>43</sup>

Although arbitral immunity first arose in commercial arbitration cases, neutrals in labor arbitration deserve even more protection because of their critical role in national labor policy, a role recognized by Congress and the Supreme Court. Congress endorsed arbitration in 1947 as "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."<sup>44</sup> In the *Lincoln Mills*<sup>45</sup> case of 1957 and again in the *Steelworkers Trilogy*<sup>46</sup> of 1960, the Supreme Court committed the federal courts to the support of labor arbitration.<sup>47</sup> In the Court's view, national labor policy demanded that the courts enforce arbitration agreements against recalcitrant parties and refrain from second-guessing an arbitrator's interpretation of the collective bargaining agreement. Labor arbitration's special role requires that its arbitrators possess at least as much immunity as other arbitrators, and perhaps even more. As a federal district court in Ohio said in 1987:

If national policy encourages arbitration and if arbitrators are indispensable agencies in furtherance of that policy, then it follows that the common law rule protecting arbitrators from suit ought not only to be affirmed, but, if need be, expanded. The immunity rule was sound when announced by two state supreme courts over eighty years ago; it is still sound today.<sup>48</sup>

Consequently, federal and state courts alike have almost without exception dismissed suits against labor arbitrators.<sup>49</sup>

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*Ice Cream Co. v. Horvitz*, 151 N.Y.S.2d 221 (Sup. Ct. 1956), *aff'd mem.*, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957).

43. M. DOMKE, COMMERCIAL ARBITRATION § 23.01 (rev. ed. 1984 & supp. 1988); F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 143 (4th ed. 1985).

44. Labor-Management Relations Act § 203(d), 29 U.S.C. § 173(d) (1982); see Nolan & Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 582-84 (1983). The statute does not expressly refer to arbitration, but arbitration is the normal type of "[f]inal adjustment by a method agreed upon by the parties."

45. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

46. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

47. See Nolan & Abrams, *supra* note 44, at 584-91.

48. *Hill v. Aro Corp.*, 263 F. Supp. 324, 326 (N.D. Ohio 1967); see also *I. & F. Corp. v. International Ass'n of Heat & Frost Insulators, Local 8*, 493 F. Supp. 147, 150 (S.D. Ohio 1980).

49. In addition to *Hill* and *I. & F. Corp.*, see *Cahn v. International Ladies' Garment Workers Union*, 311 F.2d 113 (3d. Cir. 1962) (per curiam); *Goodwin v. Teamsters Local 150*, 113 L.R.R.M. (BNA) 3029 (E.D. Cal. 1982); *Calzarano v. Liebowitz*, 550 F. Supp. 1389 (S.D.N.Y. 1982); *Babylon Milk & Ice Cream Co. v. Horvitz*, 151 N.Y.S.2d 221 (Sup. Ct. 1956), *aff'd mem.*, 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957).

### B. Theory

Before exploring arbitral immunity's scope and limits, we should summarize the core of the doctrine. Because arbitral immunity stems from the same pressures giving rise to judicial immunity, the doctrines are quite similar. It is important to note that arbitral immunity exists for the parties and the public, not for the arbitrators themselves. Without it, arbitration awards would lack finality, arbitrators would lose some the independence necessary for complete neutrality, and the parties might find it more difficult to persuade competent people to serve as arbitrators. Arbitral immunity thus rests on the following bases:

(1) Some quasi-judicial immunity for arbitrators is essential to guarantee finality to their awards, to protect their independence and impartiality, and to encourage their recruitment.

(2) This immunity applies only to an arbitrator's quasi-judicial, or "arbitral," acts. "Arbitral acts" are as broad as judicial acts; that is, to paraphrase *Stump v. Sparkman*,<sup>50</sup> an act is arbitral if it is one normally performed by an arbitrator and if the parties dealt with the arbitrator in his arbitral capacity during an adversarial proceeding. Ruling on a grievance, to take a clear example, is certainly an arbitral act,<sup>51</sup> and the arbitrator is absolutely immune if the plaintiff's only complaint is the arbitrator's award.

(3) Arbitral immunity extends only to acts performed in the course of a dispute over which the arbitrator arguably has jurisdiction.<sup>52</sup> The jurisdictional requirement is the one that has caused the courts the most difficulty in dealing with the scope of arbitral immunity. Rather than following the guidance of the Supreme Court, which has repeatedly stated that judicial immunity extends even to acts in excess of the judge's jurisdiction, so long as they are not done in the "clear absence of all jurisdiction,"<sup>53</sup> a few lower courts have demanded a higher standard of arbitrators. In *Kemner v. District Council of Painters and Allied Trades No. 36*,<sup>54</sup> for example, the court suggested in a brief discussion that arbitration committees were not immune from a suit seeking relief from acts allegedly in excess of their jurisdiction.<sup>55</sup> The *Kemner* court seemed to confuse an action to vacate an award *brought against the other party* with

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50. 435 U.S. 349 (1978).

51. *Richter v. Rydzynski*, No. 85-1462E (W.D.N.Y. Feb. 17, 1987) (1987 Westlaw 6777).

52. Until there is a valid arbitration agreement, the would-be arbitrator has no jurisdiction. He can therefore claim no immunity for his preagreement conduct. *Grane v. Grane*, 143 Ill. App. 3d 979, 479 N.E.2d 1112 (1986).

53. *Stump*, 435 U.S. at 356-57 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872)).

54. 768 F.2d 1115 (9th Cir. 1985).

55. *Id.* at 1119-20; see also *Warner v. McLean Trucking Co.*, 574 F. Supp. 291 (S.D. Ohio 1983) (denying motion to dismiss a complaint alleging actions in excess of the arbitration committee's jurisdiction or in bad faith).

an action brought against the arbitrator. The allegations were sufficient to state a cause of action against the other party, but not against the arbitrator. More thoughtful courts will interpret the jurisdictional requirement in the same fashion for arbitrators and judges.

(4) The arbitrator's immunity varies with the nature of the case. As will be seen, it applies most powerfully to suits for damages resulting from an arbitrator's decision, in which the arbitrator is absolutely immune, less powerfully to suits for injunctive relief and to demands for testimony, and not at all to criminal prosecutions.

## II

### LEGAL STATUS OF ARBITRAL IMMUNITY

#### A. *The General Rule*

The general rule of arbitral immunity is that neutral arbitrators are absolutely immune from liability for their arbitral acts in cases over which they have some jurisdiction. The scope and limits of arbitral immunity depend on the degree of "functional comparability" between the arbitrator's role in the given case and that of a judge. In short, where the arbitrator functions in a way comparable to a judge, the arbitrator's immunity will extend as far as a judge's. Where the arbitrator functions in a fashion different from judges, different rules apply. Subpoenas and depositions pose special problems requiring separate discussion.

Before we explore the scope and limits of the general rule, we should clarify what we mean when we refer to "arbitrators." We speak only of neutrals, because settlement by the interested parties themselves is negotiation, not arbitration. Although for other purposes the Supreme Court has treated joint grievance committees as a form of arbitration, there are sound reasons for not doing so,<sup>56</sup> especially when it comes to immunity. If the members of those committees do not engage in arbitration, they are not arbitrators, and thus they are not entitled to the arbitral immunity some courts have given them.<sup>57</sup>

Party-appointed members of tripartite arbitration boards present a much more difficult question. In much commercial arbitration all arbitrators, however chosen, are supposed to act as neutrals. Thus it is almost unheard of for a party to appoint one of its own agents as an arbitrator. Accordingly, party-appointed commercial arbitrators are en-

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56. See, for example, the thoughtful papers on this subject delivered by David Feller and Clyde Summers to the National Academy of Arbitrators in 1984: Feller, *Arbitration Without Neutrals: The Legal Background*, 37 PROC. NAT'L. ACAD. ARB. 106 (1985); Summers, *Teamster Joint Grievance Committees: Grievance Disposal Without Adjudication*, 37 PROC. NAT'L. ACAD. ARB. 130 (1985).

57. See, e.g., *supra* cases cited at note 28. However, policy considerations may justify a more limited immunity for negotiators.

titled to, and have received, the full protection of arbitral immunity.<sup>58</sup>

In most labor arbitration and in some other types of arbitration, however, party-appointed arbitrators are understood to serve primarily as representatives of their appointers. The typical appointee is a union officer or a company supervisor, or an attorney retained by one of the parties. Only in a few relationships are these arbitrators expected—or even allowed—to act independently. They are, in a near-oxymoron, “partisan arbitrators,” not just “party-appointed arbitrators.” Despite the awkwardness of the concept, there is nothing illegal or unethical in the open use of partisan arbitrators.<sup>59</sup>

One of the primary reasons for arbitral immunity, preservation of arbitral independence, obviously does not apply to partisan arbitrators. A second reason, recruitment, probably does not apply with the same strength. Only the third reason, decisional finality, applies equally to neutral and partisan arbitrators.

Arbitrators appointed by a single party are not equally partisan. Those “party-appointed” arbitrators expected to exercise independent judgment should have the same protection in labor arbitration they possess in other types of arbitration. Truly “partisan” arbitrators, on the other hand, should not be immune *as arbitrators*. Their immunity, if any, should stem from their true functions as agents of the appointing party. The difficulty, of course, is determining the category in which a given arbitrator belongs. The key to classification is the degree of independence the arbitrator possesses. An employee of the appointing party bound by order, rule, or custom to uphold that party’s position will be a “partisan” arbitrator with no arbitral immunity; a nonemployee who is free to exercise his own judgment will be a “party-appointed” arbitrator with full immunity. Obviously the judge should investigate the circumstances of the case before extending immunity to one who is not indisputably neutral.

### *B. Scope and Limits of Arbitral Immunity*

It is worth remembering at this point that both types of immunity, judicial and arbitral, apply only to situations meeting the “jurisdictional” and “judicial act” tests. Judicial immunity applies unless the judge acts in the “clear absence” of jurisdiction, and arbitral immunity is as broad.<sup>60</sup> Similarly, the determination of which acts are “arbitral” or

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58. Indeed, most of the law of arbitral immunity has arisen in cases involving such arbitrators.

59. *Cf.* *Petition of Dover S.S. Co.*, 143 F. Supp. 738 (S.D.N.Y. 1956).

60. *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708, 724 (E.D. Pa. 1982); *Raitport v. Provident Nat'l Bank*, 451 F. Supp. 522, 527 (E.D. Pa. 1978); *cf.* *Hill v. Aro Corp.*, 263 F. Supp. 324, 326 (N.D. Ohio 1967) (“If national policy encourages arbitration and if arbitrators are indispensable agencies in furtherance of that policy, then it follows that the common law rule protecting arbitrators from suit ought not only to be affirmed, but, if need be, expanded.”).

"quasi-judicial" should be at least as generous as the determination of which are "judicial." Too narrow a view of "arbitral" acts negates the very immunity the test exists to facilitate.<sup>61</sup>

Only actions outside the context of a case, or in the "clear absence" of an arbitrator's jurisdiction, fall beyond the scope of arbitral immunity. For instance, in *Cahn v. International Ladies' Garment Workers Union*,<sup>62</sup> the plaintiffs charged the arbitrator with harassment, but their complaint mentioned no actions other than the arbitrator's decisions. The district court proposed to dismiss the complaint unless the plaintiff amended it to specify a type of "harassment" not protected by the arbitrator's immunity, and the circuit court of appeals affirmed.<sup>63</sup> It is hard to imagine what sort of arbitral conduct is so far removed from the case at hand as to be beyond the scope of the immunity, unless it be "courtroom fist-cuffs," as one writer suggested about judicial immunity.<sup>64</sup> Of course arbitrators, like judges, are subject to punishment for crimes whether committed within or without their jurisdiction. Some states have even adopted statutes punishing certain arbitral misconduct.<sup>65</sup>

In order to escape the general rule of arbitral immunity, plaintiffs' lawyers have explored at least seven different lines of attack.

(1) The first type of action is a challenge to the arbitrator's jurisdiction. The leading case on point is *Tamari v. Conrad*,<sup>66</sup> in which a brokerage house customer who had signed an arbitration agreement sued the arbitrators to challenge the composition of the arbitration panel. The district court dismissed the suit and the court of appeals affirmed. Holding that arbitral immunity extended to challenges to the arbitrator's authority, the appeals court noted that risk of involvement in litigation might discourage potential arbitrators; furthermore, it said, the plaintiff should not have forced people with no interest in the outcome of the case to become parties to it.<sup>67</sup> Although *Tamari* is one of the very few reported cases involving a preaward challenge to the arbitrator's jurisdiction, other authority recognizing immunity from a postaward

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61. Thus the suggestion in Note, Baar v. Tigerman: *An Attack on Absolute Immunity for Arbitrators!*, 21 CAL. W.L. REV. 564, 585 (1985), that arbitrators' prehearing acts are nonarbitral is unduly restrictive. Just as a judge's acts outside the courthouse can be judicial, *Holloway v. Walker*, 765 F.2d 517, 524-25 (5th Cir.), cert. denied, 474 U.S. 1037 (1985), so an arbitrator's acts before the hearing can be arbitral.

62. 203 F. Supp. 191 (E.D. Pa.), aff'd per curiam, 311 F.2d 113 (3d Cir. 1962).

63. *Id.* at 194-95; cf. *Warner v. McLean Trucking Co.*, 574 F. Supp. 291, 298-300 (S.D. Ohio 1983) (refusing to grant immunity to a grievance committee from an action for damages in which plaintiffs alleged the committee exercised legislative rather than arbitral functions, exceeded its jurisdiction, and acted in bad faith).

64. Rosenberg, *supra* note 11, at 845.

65. See Roberts, *Judicial Review of "Misconduct" Cases*, in 25 PROC. NAT'L ACAD. ARB. 150, 154-55 (1973).

66. 552 F.2d 778 (7th Cir. 1977).

67. *Id.* at 781.

jurisdictional challenge supports the *Tamari* holding.<sup>68</sup>

There is one necessary qualification to *Tamari*. An arbitrator's jurisdiction, and thus his immunity, rest on a valid arbitration agreement. A person is not an "arbitrator" until appointed pursuant to a valid agreement. Accordingly, there is no immunity for one's preappointment conduct. Thus in *Grane v. Grane*,<sup>69</sup> an Illinois court properly refused to dismiss a putative arbitrator from a suit charging that he had fraudulently induced the plaintiff to sign the arbitration agreement.

At first glance, *Tamari's* ban on preaward jurisdictional challenges against an arbitrator places the potential plaintiff in something of a bind, because participation in the arbitration hearing may amount to a recognition of the arbitrator's jurisdiction.<sup>70</sup> The dilemma is easily resolved. The party doubting the arbitrator's jurisdiction can raise the jurisdictional issue in a suit brought before the hearing *against the other party*. The arbitrator has no legal interest in the dispute, is not an essential party, and should therefore have no role in such a suit. With no question of immunity present, the court can resolve the jurisdiction question before the reluctant party faces the arbitrator.

*Tamari* reaches the correct result, but it creates an apparent logical fallacy. The court allows the defendant arbitrator to claim immunity as an arbitrator when the very question at issue is whether he is in fact an arbitrator! This conundrum caused some difficulty for the one court to notice it. In *Greenfield & Montague Transportation Area v. Donovan*,<sup>71</sup> plaintiffs sought to enjoin the Secretary of Labor from acting as an arbitrator in a certain labor dispute. The Secretary moved to dismiss the action, arguing, among other things, that as an arbitrator he was immune from suit. The district court granted the motion to dismiss on other grounds, but rejected the claim of immunity. "The thrust of plaintiffs' arguments is that the Secretary lacks the statutory authority to set himself up as an arbitrator in the first place. To say that plaintiffs cannot present this argument because the Secretary is an arbitrator avoids the real question the case poses."<sup>72</sup>

The Secretary's claim of immunity did beg the question, but even so the court should have accepted it. Arbitral immunity exists to protect arbitrators from the burdens and risks of suit in order to preserve their independent judgment and assure their availability. So long as the poten-

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68. See, e.g., *Krecun v. Bakery Workers Local 734 (IBT)*, 586 F. Supp. 545, 550 (N.D. Ill. 1984). One court even granted an arbitrator immunity for acts outside his jurisdiction. *Raitport v. Provident Nat'l Bank*, 451 F. Supp. 522, 527 (E.D. Pa. 1978).

69. 143 Ill. App. 3d 979, 493 N.E.2d 1112 (1986).

70. *Durden v. Lockheed-Georgia Co.*, 123 L.R.R.M. (BNA) 2262 (N.D. Ga. 1985).

71. No. 83-0467-F (D. Mass. June 25, 1984) (LEXIS, Genfed library, Dist file), *aff'd on other grounds*, 758 F.2d 22 (1st Cir. 1985).

72. *Id.*, LEXIS file at 3.

tial plaintiff has other means to test his jurisdictional claim, these policy objectives require that he not involve the arbitrator in his suit. In both *Tamari* and *Greenfield*, for instance, the plaintiffs could have made the same points in a suit against the other party to the arbitration agreement. Neither side needed the arbitrator as a party, and the arbitrator had no legal interest in the issue. Whether or not the Secretary begged the question in *Greenfield*, therefore, he should have been dismissed from the action because of arbitral immunity.

(2) The second and perhaps most numerous class of actions against arbitrators consists of collateral attacks on the arbitrator's award. Occasionally a losing party seeking to challenge an award in court names the arbitrator as a defendant along with the other party. This is improper. Once the arbitrator renders an award, his role is finished. The proper challenge to an award is an action to vacate it brought against the other party, the real adversary, not against the arbitrator. As in jurisdictional challenges, the arbitrator is not a proper party in a suit over the award<sup>73</sup> and has no interest in the dispute once the award is rendered.<sup>74</sup> Given this lack of interest, judicial economy requires dismissal of the unnecessary party.<sup>75</sup> Dragging arbitrators into subsequent litigation would drastically interfere with their recruitment and independence.<sup>76</sup>

Only one published decision departs from this application of arbitral immunity. In *I. & F. Corp. v. International Association of Heat & Frost Insulators*,<sup>77</sup> the plaintiff filed an action to vacate the award of a joint trade board and named both the union and the board as defendants. Among the plaintiff's allegations were charges of partiality and misconduct on the part of the board. Without much explanation, the district court held that the allegations, if true, "would vitiate the cloak of immunity which surrounds the activities of an arbitrator" and thus were sufficient to withstand a motion to dismiss.<sup>78</sup>

If one treats the joint board members as arbitrators, the court's decision cannot be explained within the confines of immunity doctrine. Not only do many of the cases establishing judicial and arbitral immunity involve similar charges of misconduct, the nature of the problem also

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73. *Corey v. New York Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982). Most cases finding arbitrators not to be proper parties involve adjustment boards under the Railway Labor Act, 45 U.S.C. § 151 (1982). See *Skidmore v. Consolidated Rail Corp.*, 619 F.2d 157 (2d Cir. 1979); *Brotherhood of Locomotive Eng'rs v. New York Dock Rail Road*, 94 Lab. Cas. (CCH) ¶ 13,704 (E.D.N.Y. 1981); *Merchants Despatch Transp. Corp. v. Systems Fed'n No. One*, 444 F. Supp. 75 (N.D. Ill. 1977); *Fong v. American Airlines*, 431 F. Supp. 1340 (N.D. Cal. 1977); *Systems Fed'n No. 30 v. Braidwood*, 284 F. Supp. 607 (N.D. Ill. 1968).

74. E.g., *Corey*, 691 F.2d at 1211; *Skidmore*, 619 F.2d at 159 (quoting *Braidwood*, 284 F. Supp. at 610-11); *Fong*, 431 F. Supp. at 1343.

75. *Fong*, 431 F. Supp. at 1341.

76. *Corey*, 691 F.2d at 1211; *Fong*, 431 F. Supp. at 1343-44.

77. 493 F. Supp. 147 (S.D. Ohio 1980).

78. *Id.* at 152.

guarantees that such charges will be the most common. A party challenging an award needs to advance some reason for overturning it; acceptable reasons are quite limited and misconduct is one of the likely possibilities. To say, as the *I. & F.* court seems to, that an arbitrator must defend himself whenever a party alleges misconduct would nullify arbitral immunity.

The most plausible explanation for this aberrational decision is that the court simply confused the grounds for vacating an award with the grounds for suit against an arbitrator. Thus, the court properly denied the defendant union's motion to dismiss the suit because the allegations, if true, were sufficient to overturn the award. If the court viewed the board members as arbitrators, it should have granted their motion to dismiss on the basis of arbitral immunity. An alternative rationale for the *I. & F.* decision, unfortunately overlooked by the court, would have been that the board members were partisan negotiators, not arbitrators, and thus were not entitled to arbitral immunity.<sup>79</sup>

(3) The third class of actions against arbitrators involves alleged torts. Disappointed parties have mined the entire tort quarry to discover theories to breach arbitral immunity. Apart from a few cases involving an arbitrator's *inaction*, which will be discussed separately, courts readily dismiss tort actions of every stripe. Among the unsuccessful tort actions are ones alleging negligence,<sup>80</sup> tortious interference with contractual rights,<sup>81</sup> and collusion and conspiracy to defraud.<sup>82</sup> Other decisions strongly suggest that arbitrators are immune as well from defamation actions.<sup>83</sup>

Other plaintiffs have asserted a miscellany of vaguely stated torts with equal lack of success. In one early case, for example, the plaintiffs charged the arbitrator with "wanton, malicious and willful" action.<sup>84</sup> In the first federal case on a labor arbitrator's immunity, the plaintiffs al-

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79. See *supra* text accompanying notes 56-57.

80. *Bullock v. Dolnick*, No. 80 C 4694 (N.D. Ill. December 3, 1980) (LEXIS, Genfed library, Dist. file); *Wilder v. Crook*, 250 Ala. 424, 34 So. 2d 832 (1948); *Hutchins v. Merrill*, 109 Me. 313, 84 A. 412 (1912).

81. *Larry v. Penn Truck Aids, Inc.*, 94 F.R.D. 708 (E.D. Pa. 1982).

82. *Cahn v. International Ladies' Garment Union*, 3111 F.2d 113 (3rd Cir.) (*per curiam*), *aff'g* 203 F. Supp. 191 (E.D. Pa. 1962); *Jones v. Brown*, 54 Iowa 74, 6 N.W. 140 (1880); *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424 (1884); *Babylon Milk & Ice Cream Co. v. Horvitz*, 151 N.Y.S.2d 221 (Sup. Ct. 1956), *aff'd mem.* 4 A.D.2d 777, 165 N.Y.S.2d 717 (1957).

Corrupt conduct may well be grounds for denying the arbitrator the promised fee, however, as the arbitrator involved in *Jones* discovered. *Bever v. Brown*, 56 Iowa 565, 569, 9 N.W. 911, 913 (1881) ("We think that the rule of judicial immunity goes far enough when it protects the arbitrators from an action for damages, without allowing them compensation for an act rendered useless by their willful misconduct."). Immunity, to put it another way, is a shield, not a sword.

83. *Corbin v. Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393 (D.S.C.), *aff'd*, 398 F.2d 543 (4th Cir. 1968) (*per curiam*); *Sturdivant v. Seaboard Serv. Sys., Ltd.*, 459 A.2d 1058 (D.C. 1983).

84. *Melady v. South St. Paul Live Stock Exch.*, 142 Minn. 194, 171 N.W. 806 (1919).



leged that the arbitrator "unlawfully and improperly" harassed them.<sup>85</sup> In the next federal case on point the plaintiff charged the arbitrator with a number of acts inconsistent with his duties; the charges, said the court, "are petty and none need be dignified by repetition here."<sup>86</sup> In each case, the court relied on arbitral immunity to dismiss the cases.

(4) The fourth class of cases includes constitutional and statutory claims. Seldom will an arbitrator exercise the "state action" necessary to raise a charge of violation of constitutional rights. Arguably a labor arbitrator in a public sector case shares in the public employer's authority,<sup>87</sup> but even in such cases the arbitrator is really only a third party filling an office created by a contract. He may find a public employer's decision (for example, a decision to discharge an employee) consistent with the contract and thus approve something later challenged as unconstitutional. When he does so, however, he merely renders an interpretation. He does not serve as a government agent and neither makes nor implements a governmental act. The employer's action may be unconstitutional, but the arbitrator's cannot be. Accordingly, even though the arbitrator's decision may be overturned as inconsistent with constitutional provisions, the arbitrator will not personally have violated the constitution.

*Calzarano v. Liebowitz*<sup>88</sup> seems to be the only reported case against an arbitrator which cited a specific provision of the Constitution. The plaintiff charged, apparently without much elaboration, that the arbitrator's decision constituted cruel and unusual punishment. The court dismissed the complaint because the eighth amendment applies only to criminal punishment and because immunity protected the arbitrator.<sup>89</sup> Another federal district court dismissed on immunity grounds a suit alleging violation of unspecified federal and state constitutional rights.<sup>90</sup>

Civil rights cases appeal to some of the same rights upon which constitutional plaintiffs rely, but they may have the additional force of a statute authorizing private suits. Even so, courts often dismiss these charges

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85. *Cahn v. International Ladies Garment Workers Union*, 203 F. Supp. 191, 193 (E.D. Pa.), *aff'd*, 311 F.2d 113 (3d Cir. 1962) (per curiam).

86. *Hill v. Aro Corp.*, 263 F. Supp. 324, 325 (N.D. Ohio 1967).

87. See *Abrams, The Integrity of the Arbitral Process*, 76 MICH. L. REV. 231, 261 n.135 (1977) ("When a state delegates public functions to private parties, the private parties must act in a manner consistent with constitutional principles."). For example, *Holodnak v. Avco Corp.*, 381 F. Supp. 191 (D. Conn. 1974), *aff'd in relevant part*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975), held that a defense contractor violated an employee's first amendment rights when it discharged him for publishing an article critical of the company and the union. Although the arbitrator who sustained the discharge was not a party to the case, he could be said to have acted as an agent of the parties, at least one of whom (the employer) acted as an agent of the United States Government.

88. 550 F. Supp. 1389 (S.D.N.Y. 1982).

89. *Id.* at 1390.

90. *Hill v. Aro Corp.*, 263 F. Supp. 324 (N.D. Ohio 1967).

as frivolous.<sup>91</sup> Occasionally the charges are more substantial, but to date no court has held an arbitrator liable for damages under a civil rights statute. Three cases brought under the Civil Rights Act of 1871, more commonly known as Sections 1983 and 1985,<sup>92</sup> illustrate the point. *Raitport v. Provident National Bank*<sup>93</sup> involved a contract claim, *Morales v. Vega*<sup>94</sup> the discharge of a government employee, and *Richter v. Rydzynski*<sup>95</sup> the discharge of a private sector employee. Each plaintiff sued the arbitrator who ruled against him, and each court dismissed the suit on immunity grounds. Cases brought under other statutes have fared no better.<sup>96</sup>

(5) In light of the Supreme Court's recent approval of some injunction actions against judges,<sup>97</sup> future plaintiffs might be inclined to forego damages and sue arbitrators for equitable relief and an award of attorney's fees. This could constitute a fifth class of actions against arbitrators, but it is a very small class indeed. Most such actions are really only challenges to the arbitrator's authority or to the award; if so, the court should dismiss the arbitrator as an unnecessary party. Moreover, injunctive and declaratory relief are prospective remedies of little concern to ad hoc arbitrators.<sup>98</sup> Finally, the most likely authorities for injunction actions are Sections 1983 and 1985; those laws apply only to an arbitrator acting under color of state law, a very rare situation. In short, although arbitrators, like judges, are theoretically subject to injunctive or declaratory relief, the risk is virtually zero.

(6) The sixth type of action against arbitrators alleges breach of contract. Again excepting suits involving an arbitrator's inaction, a matter discussed below, these cases too have been completely unsuccessful.

Analysis of these cases requires more than a simple incantation of "judicial immunity" because the arbitrator in such a situation is not "functionally comparable" to a judge. Because judges are not under contract to litigants, they are obviously not subject to a breach of contract claim. Arbitrators are not so fortunate.

The initial hurdle for a party suing an arbitrator on contract

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91. *E.g.*, *Bullock v. Dolnick*, No. 80 C 4694 (N.D. Ill. December 3, 1980) (mem.) (LEXIS, Genfed Library, Dist. file); *Hill*, 263 F. Supp. 324.

92. 42 U.S.C. §§ 1983 & 1985 (1982).

93. 451 F. Supp. 522 (E.D. Pa. 1978).

94. 483 F. Supp. 1057 (D.P.R. 1979).

95. No. 85-1462E (W.D.N.Y. Feb. 17, 1987) (1987 Westlaw 6777).

96. *E.g.*, *International UAW v. Greyhound Lines, Inc.*, 701 F.2d 1181 (6th Cir. 1983) (pension); *Cahn v. International Ladies' Garment Workers Union*, 203 F. Supp. 191 (E.D. Pa.), *aff'd*, 311 F.2d 113 (3d Cir. 1982) (per curiam) (antitrust).

97. *Pulliam v. Allen*, 466 U.S. 522 (1984).

98. The sole reported exception to this statement is *Graphic Arts Int'l Union, Local 508 v. Standard Register Co.*, 103 L.R.R.M. (BNA) 2212 (S.D. Ohio 1979), discussed *infra* at text accompanying notes 105-08, in which the court enjoined the arbitrator "from collecting any fee for service rendered," surely a matter of considerable concern to the arbitrator.

grounds is to demonstrate the existence of the contract the arbitrator allegedly breached. The simplest position, of course, claims that the arbitrator breached an employment contract with the parties, a contract that is more commonly implied than express. If one party refused to pay its share of the arbitrator's bill, for example, the arbitrator could sue for breach of an express or implied contract, and the parties are certainly free to enforce the same contract against a breaching arbitrator.

As will be seen, that position has some merit when the arbitrator fails to perform at all. When the arbitrator has rendered an award, though, proving a breach of the employment contract becomes much more difficult. Success in such a suit requires proof that the quality of the award fell significantly below the expectations of the parties—and since the arbitrator's implied contract usually consists only of an engagement to hear and decide a case for a certain fee, it might not be possible to provide that proof. Furthermore, this sort of suit strikes at the very essence of the immunity doctrine: the claimed breach amounts to no more than disagreement with the award, and if the arbitrator is liable whenever a reviewing judge or jury disagreed with the decision, he has no immunity at all. Perhaps this problem is so obvious that no one has made such a claim; in any event there are no reported cases of successful suits charging that an arbitrator's actions violated an employment contract.

The necessity of finding a contract in order to sue an arbitrator for breach has led to some creative lawyering. In *Hill v. Aro Corp.*,<sup>99</sup> for example, the plaintiff claimed to be a third party beneficiary of the arbitrator's implied agreement with the Federal Mediation and Conciliation Service requiring the arbitrator to comply with its regulations. The court did not dignify the plaintiff's claim with a direct reply; it simply dismissed the entire suit because of the arbitrator's immunity.

One law review note argued that a plaintiff's contractual claim against an arbitrator would be stronger if the arbitration were conducted under the auspices of the American Arbitration Association ("AAA") than if it were under the Federal Mediation and Conciliation Service ("FMCS") because the AAA's rules governing the arbitrator's conduct are more precise.<sup>100</sup> However, that argument rests on a faulty premise. FMCS rules incorporate the *Code of Professional Responsibility for Arbitrators of Labor Management Disputes* (1974)<sup>101</sup> which is even more detailed than the AAA rules. Regardless of the precision of the applicable rules, and however the arbitrator is selected, the result should be the same. Whether sounding in tort or contract, a suit for damages based on

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99. 263 F. Supp. 324 (N.D. Ohio 1967).

100. Note, *supra* note 61, at 585.

101. 29 C.F.R. § 1404.4(b) (1988); 28 PROC. NAT'L. ACAD. ARB 217 (1975).

an arbitrator's decision is precisely what arbitral immunity exists to prevent. If the doctrine is to have any force at all, it must bar these contractual cases which amount to no more than a disagreement with the arbitrator's decision.

Other plaintiffs have claimed a statutory basis for a direct contract action against the arbitrator for breach of the collective bargaining agreement. Section 301(a) of the Labor Management Relations Act allows "[s]uits for violation of contracts between an employer and a labor organization,"<sup>102</sup> but the quoted phrase is ambiguous. It could refer to any suit *arising out of* a contract between an employer and a labor organization, in which case an arbitrator conceivably could sue or be sued in federal court for breach of the collective agreement, or it could refer more narrowly to "suits . . . between" an employer and a labor organization, in which case an arbitrator is not to be a proper party.

Federal courts have not been receptive to Section 301 suits against arbitrators, but seldom have they explained their reluctance. Two district courts have apparently read Section 301(a) in the more narrow way, holding that since an arbitrator is neither an "employer" nor a "labor organization" he could not be a party to a Section 301 suit.<sup>103</sup> Both sentence structure and legislative intent support this reading of Section 301. The simplest reading of the language is that it authorizes federal courts to hear cases between employers and unions, and that simple reading accurately reflects the section's purpose. Giving the section a broader reading just to provide a remedy against an arbitrator unnecessarily and undesirably distorts the statute. Other courts have dismissed Section 301 cases simply because of arbitral immunity.<sup>104</sup> Both reasons protect the arbitrator's immunity, but, in light of the possible breadth of Section 301(a), dismissal on the basis of immunity is the sounder course.

In other cases, the plaintiff has caused a great deal of confusion by failing to specify the contract allegedly breached by the arbitrator. The confusion caused in these cases stands out most clearly in *Graphic Arts International Union, Local 508 v. Standard Register Co.*<sup>105</sup> When an arbitrator failed to render his award *three years* after briefs were filed, the union sought the company's agreement to replace the arbitrator. The company refused, and the union then sued both the arbitrator and the

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102. 29 U.S.C. § 185(a) (1982).

103. *Goodwin v. Teamsters Local 150*, 113 L.R.R.M. (BNA) 3029, 3032 (E.D. Cal. 1982); *Shropshire v. International Bhd. of Teamsters Local 957*, 102 L.R.R.M. (BNA) 2751, 2752 (S.D. Ohio 1979); *see also Franklin v. Sandra Greer Real Estate, Inc.*, 89 L.R.R.M. (BNA) 2575 (S.D.N.Y. 1975).

104. *Krecun v. Bakery Workers Local 734 (IBT)*, 586 F. Supp. 545, 550 (N.D. Ill. 1984); *Yates v. Yellow Freight Sys.*, 501 F. Supp. 101, 105 (S.D. Ohio 1980); *DeVries v. Interstate Motor Freight Sys.*, 91 L.R.R.M. (BNA) 2764, 2769 (N.D. Ohio 1976), *aff'd without opinion sub nom. DeVries v. Teamsters*, 620 F.2d 302 (6th Cir. 1980).

105. 103 L.R.R.M. (BNA) 2212 (S.D. Ohio 1979).

company for breach of contract, seeking compensatory and punitive damages and injunctive relief.

Finally, in 1979, some six years after the arbitrator closed the record in the case, the district court found in favor of the union, fired the arbitrator, and prohibited him from collecting his fee. Plainly, the arbitrator breached only his own employment contract with the parties, not the collective bargaining agreement, yet the court left the question of damages against him to the arbitrator's successor because "all of these damages grow out of the collective bargaining agreement" and thus "are also properly subject to arbitration."<sup>106</sup> A new arbitrator could only interpret the collective bargaining agreement, however, not levy damages for breach of some other contract. Had the court distinguished between the two contracts at issue, it could have sent the original grievance and the union's claim against the company for breach of the collective bargaining agreement to the new arbitrator, while awarding damages against the first arbitrator for breach of his employment contract on its own authority.<sup>107</sup> (When the defendants later reminded the judge that the only matters before him were their motions to dismiss, he set aside his original order.<sup>108</sup>)

(7) One last possible attack on arbitral immunity should be mentioned, even though it has not yet been fully tested, because it has caused much discussion among arbitrators. We refer to the potential treatment of arbitrators as "fiduciaries" under federal statutes regulating pension plans.

Congress has long encouraged or required arbitration of pension plan disputes. Section 302(c)(5) of the Labor Management Relations Act of 1947,<sup>109</sup> for example, exempts jointly administered pension and welfare trust funds from a prohibition on employer payments to employee representatives only if deadlocked disputes are subject to arbitration. The Employee Retirement Income Security Act of 1974 ("ERISA") requires that every benefits plan contain a claim and appeal procedure such as arbitration.<sup>110</sup> Finally, the Multi-Employer Pension Plan Amendments Act of 1980 ("MPPAA") mandates arbitration of disputes over

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106. *Id.* at 2214. The court implicitly recognized the existence of the arbitrator's separate contract of employment when it enjoined him from collecting a fee from either party.

107. Assuming, that is, that the court had pendant or diversity jurisdiction over the arbitrator's employment contract. If not, only a state court could grant damages. In either case the new arbitrator had no authority over the old.

108. *Graphic Arts Int'l Union, Local 580 v. Standard Register Co.*, 103 L.R.R.M. (BNA) 2214 (S.D. Ohio 1979) (reconsideration of *Graphic Arts*, 103 L.R.R.M. 2212). After the union lost the second arbitration, the court dismissed its action against the company but it never resolved the action against the arbitrator. Telephone conversation between the company's counsel, William F. Ford, and Dennis R. Nolan, April 10, 1987.

109. 29 U.S.C. § 186 (c)(5) (1982).

110. ERISA § 503, 29 U.S.C. § 1133 (1982).

the liability of employers withdrawing from a plan.<sup>111</sup>

Pension laws impose enormous potential liability on fiduciaries,<sup>112</sup> and define "fiduciary" quite broadly, perhaps even broadly enough to include arbitrators.<sup>113</sup> Consequently these provisions may authorize suit against an arbitrator for damages arising out of a decision.

Neither ERISA nor its legislative history refers to arbitrators as fiduciaries,<sup>114</sup> but the Department of Labor has taken the position that one who performs any of the defined functions of a fiduciary *is* a fiduciary.<sup>115</sup> The Department's position rests on the arbitrator's purported discretionary authority over the pension plan. That position has been roundly criticized by scholars, arbitrators, and arbitration organizations.<sup>116</sup> Their objections are both legal and practical. As a legal matter, an arbitrator's role is quasi-judicial, not managerial or administrative; it involves interpretation, not discretionary authority.<sup>117</sup> Moreover, there is absolutely no indication that Congress intended ERISA to abrogate arbitral immunity. As a practical matter, arbitrators simply will not risk the enormous potential liability that fiduciary status entails:

An arbitrator cannot be expected to decide disputes if he may be saddled with the burden of defending his decision in a law suit. Arbitrators, especially the most experienced and knowledgeable ones, will not accept appointment in such cases. Their refusal will deprive trustees and plan beneficiaries of their valuable expertise and will thwart the congressional intent . . . that deadlocks be broken to avoid paralyzing the administration of trusts.<sup>118</sup>

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111. ERISA § 4221, 29 U.S.C. § 1401 (1982). We concentrate on ERISA rather than MPPAA because the role of arbitration is severely limited under MPPAA. See Scheinholtz & Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration*, 40 ARB. J. (June, 1985) 55, 65-66. The same principles apply to both laws, however. On MPPAA arbitration, see Gilman & Gilman, *The Arbitration of Disputes Involving ERISA and MPPAA*, 12 PROC. ANN. CONF. SOC'Y OF PROFESSIONALS IN DISPUTE RESOLUTION 184, 192-203 (1984).

112. ERISA § 409(a), 29 U.S.C. § 1109(a) (1982).

113. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) (1982):

[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

114. Dobranski, *The Arbitrator as a Fiduciary Under the Employee Retirement Income Security Act of 1974: A Misguided Approach*, 32 AM. U. L. REV. 65, 70 (1982).

115. Pens. & Welfare Benefit Programs Op. Letter 81-50A, 2 Pens. Plan Guide (CCH) ¶ 5606.155 (June 4, 1981); Pens. & Welfare Benefit Programs Op. Letter 79-66A, 4 Pens. & Profit Sharing (P-H) ¶¶ 120,122 & 120,123 (Sept. 14, 1979); Labor Dep't Advisory Op. Letter 78-14A, 4 Pens. & Profit Sharing (P-H) ¶ 120,116 (July 27, 1978). See generally Dobranski, *supra* note 114; Scheinholtz & Miscimarra, *supra* note 111, at 64-66.

116. Dobranski, *supra* note 114, at 75.

117. *Id.* at 78-79.

118. *Id.* at 84 (footnote omitted).

The issue of the arbitrator's personal immunity under ERISA, in the words of two experienced practitioners, "has not yet been widely addressed and remains somewhat uncertain."<sup>119</sup> Nevertheless, the one case on point affirmed that arbitrators were immune from ERISA suits. In *UAW Locals 656 & 985 v. Greyhound Lines*,<sup>120</sup> the employer refused to comply with an arbitration award and added the arbitrator as a cross-defendant in an enforcement action because, it argued, the arbitrator had not complied with ERISA's bonding requirements for fiduciaries. The court held that Congress had not intended in ERISA to abrogate arbitral immunity.<sup>121</sup> While not deciding whether arbitrators were "fiduciaries" within the Act, the court said that an arbitrator is immune from damages even for those arbitral acts falling within the definition of a fiduciary. The court seemed comforted in this conclusion by the availability of other defendants subject to the plaintiff's suit.<sup>122</sup>

*Greyhound* is not so strong an extension of arbitral immunity to pension plan arbitrators as it might appear. One of the three panel members opposed reaching the immunity issue,<sup>123</sup> and even the majority reserved the question of whether a plaintiff could maintain an action against an arbitrator for equitable relief, as opposed to damages.<sup>124</sup> Moreover, MP-PAA poses a separate problem. Congress enacted that law after the *Greyhound* decision, so was presumably aware of the potential for arbitral liability. Rather than confirming or rejecting arbitral immunity, or simply remaining silent in the face of *Greyhound's* assertion of immunity, Congress chose to include an off-hand reference to insurance: "The plan sponsor may purchase insurance to cover potential liability of the arbitrator."<sup>125</sup>

One plausible interpretation of the insurance provision is that Congress regarded arbitrators as subject to suit under MPPAA and wanted to authorize expenditure of plan funds for insurance to protect them, just as under ERISA employers and unions may purchase insurance to cover fiduciaries.<sup>126</sup> Another interpretation is that the provision represents a compromise between those who wanted to define arbitrators as fiduciaries and those who did not. The legislative history provides no basis for any interpretation.

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119. Scheinholtz & Miscimarra, *supra* note 111, at 65.

120. 701 F.2d 1181 (6th Cir. 1983).

121. *Id.* at 1187 (citing *Pierson v. Ray*, 386 U.S. 547 (1967)).

122. *Id.* at 1187-88. Even if the arbitrator is a fiduciary, an erroneous but good faith interpretation of the plan does not violate the Act. *Challenger v. Local 1, Int'l Bridge, Structural & Ornamental Ironworkers*, 619 F.2d 645, 648-49 (7th Cir. 1980). This protection arises not from immunity, but from a narrow view of conduct violating fiduciary duty.

123. 701 F.2d at 1189 (Neese, J., concurring).

124. *Id.* at 1187 n.10.

125. 29 U.S.C. § 1401(a)(2) (1982).

126. 29 U.S.C. § 1110(b)(3) (1982).

These explanations are tempting, but they read far too much into the provision. In light of the *Greyhound* decision, if Congress wished to subject arbitrators to suit, it surely would have said so directly. If it wished to make them immune, on the other hand, it need only have remained silent. It is a far more reasonable interpretation to conclude that Congress did nothing in MPPAA to lessen arbitral immunity, but simply provided a way of dealing with the consequences of liability if the courts ever changed the law. Considering Congress's repeated preference for arbitration of pension disputes, it is almost inconceivable that it would silently strike down an immunity essential to that system of dispute resolution.

The next court to deal with the question should more clearly recognize the applicability of arbitral immunity to ERISA and MPPAA disputes. Extension of arbitral immunity is fully consistent with decisions in cases brought under other statutes. The policy bases of the arbitral immunity doctrine—finality, independence, and recruitment—weigh as powerfully against liability in pension cases as in others. Moreover, the plaintiff loses nothing by the extension of immunity because other defendants, the real adversaries, remain subject to suit.<sup>127</sup> Until the matter is clarified, however, pension plan arbitrators are well advised to purchase insurance and pass the cost onto the parties.

### C. *The Exception: Nonperformance*

Every good legal rule has its exception. Arbitral immunity's exception is the nonperforming arbitrator, one guilty of nonfeasance rather than misfeasance. In three significant cases, courts have refused to protect arbitrators who failed to render *any* award.

The earliest of these was *E.C. Ernst, Inc. v. Manhattan Construction Co.*,<sup>128</sup> decided by the Fifth Circuit in 1977. As in many construction contracts, the owner's architect had certain quasi-arbitral functions such as evaluation of equipment for compliance with contractual specifications. Because architects are immune from liability for their actions in an arbitral capacity, the plaintiff in this case sued the architectural firm for *failure* to act—that is, for serious delays in performing its tasks—and included in its complaint both contract and tort causes of action. The district court found for the plaintiff without indicating whether it accepted the contract theory, the tort theory, or both.<sup>129</sup> The court of appeals found the arbitrator liable for negligence, but did not decide the contract claim.<sup>130</sup> The Fifth Circuit properly focused on functional com-

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127. Dobranski, *supra* note 114, at 86-87.

128. 387 F. Supp. 1001 (S.D. Ala. 1974), *remanded on other grounds*, 551 F.2d 1026, *reh'g granted in part*, 559 F.2d 268 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978).

129. *Id.* at 1028, 1033.

130. *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 551 F.2d 1026, 1031-32, *reh'g granted in part*,



parability as the critical factor in evaluating an immunity defense and concluded that the nonperforming arbitrator is not comparable to a judge: "where his action, or inaction, can fairly be characterized as delay or failure to decide rather than timely decision-making (good or bad), he loses his claim to immunity because he loses his resemblance to a judge."<sup>131</sup>

The second decision on nonfeasance was the *Standard Register* case discussed above.<sup>132</sup> For all its confusion, the *Standard Register* court clearly regarded the arbitrator as liable under *some* contract for the harm he caused by his nonperformance.

The clearest and most recent case involving an arbitrator's inaction is *Baar v. Tigerman*.<sup>133</sup> The parties selected Tigerman as an arbitrator through the American Arbitration Association to resolve a dispute under a limited partnership agreement. From 1976 to 1980 he held fifty-three days of hearings. The parties submitted final briefs by July 18, 1980 and under AAA rules the award was due thirty days later. The month passed without an award, and the parties gave Tigerman an extension until November 30, 1980. When he failed to produce his award several months after the new deadline, the parties revoked his authority and sued Tigerman and the AAA for negligence and breach of contract. Apparently the contract at issue was that for arbitral services between the parties to the dispute on one side and the arbitrator and the AAA on the other. Although the trial court dismissed the complaints on the ground of arbitral immunity, the California court of appeals reversed.

The appellate court observed that cases establishing arbitral immunity concerned "*alleged misconduct in arriving at a decision*" and thus did not control a case involving "*failure to make an award*."<sup>134</sup> The court emphasized the contractual basis of arbitration and stated that it had to uphold the arbitrator's contractual obligations while protecting an arbitrator who acted in a quasi-judicial capacity. Arbitration is preferable to litigation because of its speed and certainty, said the court, but granting immunity for failure to make an award runs "directly counter to these policy considerations."<sup>135</sup> It therefore reversed the trial court's ruling and remanded for further proceedings.<sup>136</sup> The court did not ex-

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559 F.2d 268 (5th Cir. 1977), *cert. denied*, 434 U.S. 1067 (1978). The court of appeals remanded for further proceedings. On remand the district court entered judgment against the architect. Letter from Louis E. Braswell, counsel for the plaintiff, to Dennis R. Nolan (September 16, 1985).

131. *Id.* at 1033.

132. *Graphic Arts Int'l Union, Local 508 v. Standard Register Co.*, 103 L.R.R.M. (BNA) 2212 (S.D. Ohio 1979); *see supra* text at notes 105-08.

133. 140 Cal. App. 3d 979, 211 Cal. Rptr. 426 (1983).

134. *Id.* at 983, 211 Cal. Rptr. at 428 (emphasis in original).

135. *Id.* at 985, 211 Cal. Rptr. at 430.

136. The parties settled before trial. Letter from Timothy D. McCollum, counsel for one of the plaintiffs, to Dennis R. Nolan (September 18, 1985).

pressly say so, but its analysis suggests that it viewed inaction as something other than a quasi-judicial action.

As ominous as any breach in immunity may appear to arbitrators, even in such a clear-cut case as *Baar*, it is hard to construct an argument for protecting the nonperforming arbitrator. Nonfeasance is the only type of claim which justifies a departure from arbitral immunity because it is the only situation in which the functional comparability test does not work. Litigants have some remedies when a judge fails to act, such as the administrative authority of the chief judge of the court<sup>137</sup> or a writ of mandamus from a higher court.<sup>138</sup> Parties to an arbitration lack these remedies and may have more need for a tort or contract action against the nonperforming arbitrator. Because arbitral nonfeasance causes substantial harm to the parties while nonfeasance suits pose no serious threat to the arbitration system, the parties' interests, in such cases, outweigh the concerns behind arbitral immunity.

An arbitrator should not expect to be immune from liability for failure to perform. Immunity exists for the parties and the public, not for the arbitrator. Surely the parties receive no benefit from extending immunity to nonperforming arbitrators: immunity for nonfeasance neither enhances the arbitration system nor preserves the arbitrator's independence. If liability for nonperformance deters recruitment of arbitrators (and there is no evidence that it does), it deters only those who fear they will not perform, and they would not be missed. An immunity is by definition an exception to the general rule of liability and all such exceptions should be soundly based. The nonperforming arbitrator hardly provides a sound basis for this exception. As long as liability is limited to nonfeasance and not extended to misfeasance, few arbitrators (or potential arbitrators) will be in any danger. Any reputable arbitrator may realistically fear a suit by a party upset with a decision; that he might fail to render *any* decision, and be sued for that failure, would not enter his head.

The distinction between misfeasance and nonfeasance might require different results in *E.C. Ernst* and *Baar*, however. Although the reported decisions do not clearly state the details of the pleadings, it appears that *E.C. Ernst* involved only delays in making decisions while *Baar* involved a complete failure to perform. Delay is a form of misfeasance of which any arbitrator might some day be guilty. It is no more serious than, and should stand on the same legal footing as, doing one's job poorly. Immunity thus should extend to arbitrators who are merely tardy as well as to those who are otherwise negligent; it should not protect the arbitrator

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137. Cf. 28 U.S.C. § 137 (1982).

138. Cf. FED. R. CIV. P. 23; *Linning v. Duncan*, 169 So. 2d 862 (Fla. D. Ct. App. 1964) (writ of mandamus proper for judge's failure to perform ministerial tasks).

who completely fails to do his job. If the facts in those cases were as we interpret them, a tort or contract remedy against the arbitrator might be justified in *Baar* but not in *E.C. Ernst*.

Courts should be cautious about interpreting a missed deadline as nonfeasance, of course. Liability is appropriate only if the delay is so long as to demonstrate convincingly that performance is unlikely.

#### D. *The Special Problem of Subpoenas and Depositions*<sup>139</sup>

Even when arbitrators are not sued, they may encounter problems by being subpoenaed or deposed in legal proceedings arising out of their awards. As a strict matter of terminology, arbitrators are not "immune" from subpoenas. They must accept and respond to subpoenas just as every other citizen must. They do possess a "testimonial privilege" to refrain from testifying about certain matters, however; since that privilege usually makes it pointless to subpoena the arbitrator, it has much the same effect as, and may properly be regarded as an aspect of, arbitral immunity. Like other privileges, of course, the arbitrator's testimonial privilege must be asserted in a timely fashion to be effective. Failure to object to a subpoena may constitute a waiver of the privilege.

Some unguarded language in a 1980 Supreme Court opinion on judicial immunity threw this testimonial privilege into doubt, from which it has fortunately emerged unscathed. In *Dennis v. Sparks*<sup>140</sup> the Court rejected the argument of certain defendants that a Section 1983 action against them should be dismissed lest the judge with whom they allegedly conspired be forced to testify about and defend his conduct. Citing *United States v. Nixon*, the Court said in dicta that it knew of no rule exempting a judge from testifying in a criminal or civil proceeding.<sup>141</sup> The Court apparently reasoned that if the President of the United States is not protected from a subpoena, then a judge is not. Nor, we might conclude, is an arbitrator.

The matter is not so simple. For one thing, the Court's statement is only dicta; it does not directly address or decide whether a judge (or an arbitrator) must testify about a decision. For another, it arose in a peculiar context, a civil action seeking a remedy for criminal conduct. Thus the Court found that the "not insubstantial" concerns about judicial involvement were outweighed only by the need for providing a remedy against the other conspirators.<sup>142</sup> Finally, there is in fact an old and sound rule protecting judges from compelled testimony about their deci-

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139. In the interest of full disclosure, we should note that Professor Nolan was the successful respondent in *Liggett Group, Inc. v. Bakery Workers Int'l Union, Local 176-T*, No. M-85-2-68-(MJP) (D.S.C. April 14, 1986), discussed in this Section.

140. 449 U.S. 24 (1980).

141. *Id.* at 31 (citing *United States v. Nixon*, 418 U.S. 683, 705-07 (1974)).

142. *Id.* at 31-32.

sions in all but the most extreme circumstances.<sup>143</sup>

The *Dennis* Court correctly noted that the possible harm to a judge from testifying in a collateral proceeding was not "of the same order of magnitude" as the prospect of defending an action for damages,<sup>144</sup> but the burden of compelled testimony should not be underestimated. While a subpoena may not at first glance seem to be a serious infringement of judicial or arbitral independence, further reflection reveals its dangers. First, deposing the decisionmaker enables a dissatisfied party to fish for evidence with which to challenge the decision. No decision would be final if a litigant could cross-examine the decisionmaker in hope of finding imperfections in the decisional process.<sup>145</sup> Second, responding to a subpoena imposes serious monetary and personal costs on the arbitrator. An arbitrator wishing to assert a privilege not to respond to some or all potential questions will need a lawyer, and lawyers do not come free. Moreover, depositions and trials take time, and an arbitrator's time is as valuable as anyone else's. Testimony also subjects the witness to harassment, as examiners and cross-examiners seek to defend their positions.

Cost and inconvenience to arbitrators do not provide a compelling reason for granting them protection from required testimony, of course, but the parties' own interests do require that arbitrators have some protection. As we have emphasized, arbitral immunity exists to guarantee decisional finality, to protect arbitral independence, and to facilitate the recruitment of arbitrators. Compelling arbitrators to testify interferes with each of those objectives. For these reasons, most courts have held that arbitrators may not be forced to testify in court or in a deposition. Many have gone further, holding that an arbitrator's testimony, even completely voluntary testimony, is inadmissible to impeach, support, or clarify an award.<sup>146</sup>

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143. In a case involving a quasi-judicial proceeding before the Secretary of Agriculture, the Supreme Court said that "[s]uch an examination of a judge would be destructive of judicial responsibility. . . . Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected." *United States v. Morgan*, 313 U.S. 409, 422 (1940) (citations omitted). See also *Chicago, B. & Q. Ry. v. Babcock*, 204 U.S. 585 (1907). Describing the examination of members of a state assessing board as "improper," the Court said:

All the often repeated reasons for the rule [against examining jurors as to their motives] . . . apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law.

*Id.* at 593; see also *United States v. Dowdy*, 440 F. Supp. 894 (W.D. Va. 1977); cf. *Fayerweather v. Ritch*, 195 U.S. 276, 306-07 (1904) (it is impermissible to introduce the testimony of a judge about matters he considered).

144. *Dennis*, 449 U.S. at 31.

145. *Babcock*, 204 U.S. at 593.

146. *Id.* (dicta); *Fukaya Trading Co. S.A. v. Eastern Marine Corp.*, 322 F. Supp. 278 (E.D. La. 1971); *Grudem Bros. v. Great W. Piping Corp.*, 297 Minn. 313, 213 N.W.2d 920 (1973); *Gianapulos v. Pappas*, 80 Utah 442, 15 P.2d 353 (1932). In the words of one judge, the practice of interviewing arbitrators after an award to find a flaw in the decision "is to be deplored both as an

The first reported American case on point, *Shiver v. Ross*,<sup>147</sup> dates back almost two centuries. It involved a motion for leave to examine an arbitrator to explain and impeach an award. The state district court denied the motion and the South Carolina Constitutional Court affirmed. A later decision, now the leading case on the question, *Gramling v. Food Machinery & Chemical Corp.*,<sup>148</sup> also involved a losing party's attempt to set aside an arbitration award. The defendant tendered the affidavits of two arbitrators and sought an order requiring all the arbitrators to testify in court. The district court denied the order, and flatly refused to consider the proffered affidavits. Judge Wyche stressed how forced testimony damages the arbitration system:

In my opinion, it would be most unfair to the arbitrators to order them to come into court to be subjected to grueling examinations by the attorneys for the disappointed party and to afford the disappointed party a "fishing expedition" in an attempt to set aside the award. To do this would neutralize and negate the strong judicial admonitions that a party who has accepted this form of adjudication must be content with the results . . . .

I cannot, therefore, consider the affidavits of two of the Arbitrators tendered by defendant in support of its motion. I will not require the Arbitrators to appear for the purpose of testifying in regard to their deliberations.<sup>149</sup>

Many other cases, both before and after *Gramling*, take the same position.<sup>150</sup> In short, and notwithstanding the Supreme Court's dicta in *Dennis v. Sparks*, both federal and state courts recognize that an arbitra-

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unwholesome practice and because the results of such endeavors have no efficacy as a matter of law." *Big-W Constr. Corp. v. Horowitz*, 24 Misc. 2d 145, 156, 192 N.Y.S.2d 721, 733-734 (Sup. Ct. 1959), *aff'd*, 14 A.D.2d 817, 218 N.Y.S.2d 530 (1961). See generally Annot., *Admissibility of Affidavit or Testimony of Arbitrator to Impeach or Explain Award*, 80 A.L.R.3d 155 (1977 & Supp. 1988). For the ways in which an arbitrator's testimony may be used, see 5 AM. JUR. 2D, ARBITRATION AND AWARDS § 187 (1962 & Supp. 1988).

The leading treatise on evidence says at one point that although "[i]t was at one time thought that an arbitrator had some such [broad testimonial privilege . . . this notion was unfounded." 8 WIGMORE, EVIDENCE § 2372(d)(4) (McNaughton rev. 1961). At another point, the same treatise recognizes "[t]he evidence and the facts forming the grounds for the award . . . cannot be used to invalidate the award," but bases this on the parol evidence rule. *Id.* § 2358 (emphasis in original); *cf. id.* § 2376 (privileged communication). Wigmore does not directly address policies or cases discussed in this paper and thus is of limited utility.

147. 3 S.C.L. (1 Brev.) 293 (1803).

148. 151 F. Supp. 853 (W.D.S.C. 1957).

149. *Id.* at 861.

150. *E.g.*, *Andros Compania Maritima S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978); *Wood v. General Teamsters Union, Local 406*, 583 F. Supp. 1471, 1474 (W.D. Mich. 1984); *Brownko Int'l, Inc. v. Ogden Steel Co.*, 585 F. Supp. 1432, 1435 (S.D.N.Y. 1983); *Sidarma Societa Italiani di Armamento Spa v. Holt Marine Indus., Inc.*, 515 F. Supp. 1302 (S.D.N.Y.), *aff'd without opinion*, 681 F.2d 802 (2d Cir. 1981); *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F. Supp. 1276, 1286 (S.D.N.Y. 1979) ("'Post-verdict' examinations of a judicial or quasi-judicial officer, be he judge, juror, or arbitrator, for the purpose of impeaching his decision, are inherently

tor's quasi-judicial immunity provides a privilege not to testify about the award. The practical effect is that most courts will refuse to enforce a subpoena against an arbitrator.

Like other legal rules this one has its exceptions, but they are quite limited. One exception is that arbitral testimony may be required to facilitate some remedy for a dissatisfied party other than suit against the arbitrator. In other words, requiring the arbitrator's testimony may occasionally be a lesser evil than either depriving an injured party of all recourse or subjecting the arbitrator to litigation. A few examples will illustrate the point:

(1) A person seeking to vacate an arbitration award may be required to show the scope of the issue submitted to the arbitrator, and the arbitrator himself may be the only person able to provide that information. If so, providing it facilitates the plaintiff's remedy with no harm to the arbitrator, and courts may order the arbitrator to comply with the request.<sup>151</sup>

(2) If a court (or, in the federal sector, the Federal Labor Relations Authority) needs to examine the exhibits or the transcript in a case, there is no reason why the arbitrator should not provide them. Although the better practice is for the plaintiff to obtain them from one of the parties, the records do not belong to the arbitrator and he has no right to refuse a lawful request for them. In contrast, the arbitrator's own notes or drafts belong to the arbitrator and relate to the decisional process. No court should require that they be turned over to a party.

(3) If a prosecutor seeks evidence as to an incriminating statement made by a witness during an arbitration hearing, the arbitrator has no "confessional privilege" to refuse the information.<sup>152</sup> The testimony can be provided and the prosecutor's needs satisfied without trenching on the arbitrator's independence. If there is a recording or transcript of the hearing, however, the arbitrator's testimony is irrelevant and less relia-

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suspect, indeed, roundly condemned, in our system of jurisprudence . . ."); *Fukaya Trading Co., S.A. v. Eastern Marine Corp.*, 322 F. Supp. 278 (E.D. La. 1971).

All the state courts that have addressed this issue have taken similar positions. *E.g.*, *Arco Alaska, Inc. v. Superior Court*, 168 Cal. App. 3d 139, 148, 214 Cal. Rptr. 51, 57 (1985) ("This postaward discovery, if allowed, would authorize a fishing expedition into waters stilled by the decision of the arbitrators."); *In re Martin Weiner Co.*, 2 A.D.2d 341, 342, 155 N.Y.S.2d 802, 805 (1956) ("Inquisition of an arbitrator for the purpose of determining the processes by which he arrives at an award, finds no sanction in law.") *aff'd*, 3 N.Y.2d 806, 166 N.Y.S.2d 7, 144 N.E.2d 647 (1957); *New York City Omnibus Corp. v. Quill*, 189 Misc. 892, 73 N.Y.S.2d 289 (Sup. Ct.), *modified on other grounds*, 272 A.D. 1015, 74 N.Y.S.2d 925 (1947), *aff'd*, 297 N.Y. 832, 78 N.E.2d 859 (1948).

151. *Duke of Buccleuch v. Metropolitan Bd. of Works*, 5 L.R.-E. & I. App. 418 (1872). See generally 5 AM. JUR. 2D § 187 (1962 & Supp. 1988); 8 WIGMORE, *supra* note 146, § 2358. Documents relating to the deliberations of the arbitrators, in contrast, are not subject to discovery. *Arco*, 168 Cal. App. 3d at 149, 214 Cal. Rptr. at 57-58.

152. Douglas, *The Scope of Arbitrator Immunity*, 36 ARB. J. 35 (June 1981) (criminal trials).

ble; in such a case there is no reason to permit the prosecutor to invade the arbitrator's traditional immunity.

(4) If, as in *Bliznik v. International Harvester*,<sup>153</sup> a grievant sues the union for breach of its duty of fair representation because of the representative's conduct at the hearing, the arbitrator may be required to testify as to what the union representative did and did not do. As the *Bliznik* court stressed, such an inquiry presents no threat to the arbitrator's independence. Moreover, the arbitrator in that case possessed "directly relevant and probative evidence"<sup>154</sup> and was the only impartial witness to the union's conduct. If the arbitrator remained silent, the merits of the plaintiff's claim could never be resolved. To make sure that the deposition did not threaten the arbitrator, the court wisely and carefully limited the scope of the permitted questioning.<sup>155</sup> The *Bliznik* decision reasonably balances conflicting interests in a case lacking a better alternative. Had the hearing been recorded or transcribed, however, or had there been another impartial witness, the court should have used that evidence of the proceedings rather than burdening the arbitrator.<sup>156</sup>

Most attempts to compel an arbitrator's testimony are not of these ancillary sorts, but rather seek to inquire into the basis of the decision. The appropriate distinction is between requests for information about the arbitrator's *decisional process* and those for information extraneous to that process.<sup>157</sup> A litigant seeking to inquire about the decision's basis is really only fishing for evidence to attack the decision or the arbitrator. Courts should deny such requests as soon as an objection is raised. With one exception to be discussed in a moment, this should be true even of requests seeking to explore an arbitrator's alleged misconduct. If a bare allegation of misconduct could vitiate the arbitrator's immunity, anyone desiring to question an arbitrator would simply allege misconduct and then proceed as if there were no immunity. The arbitrator would suffer all the burden that immunity exists to prevent, even if the inquiring party is never able to prove the alleged misconduct. The harm, in other words, is in the questioning itself, regardless of the answers given—and thus the courts should refuse to compel the arbitrator's testimony, no matter how serious the allegations of misconduct.

On the other hand, one who wants to find out what someone other than the arbitrator did should be able to question the arbitrator—but

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153. 87 F.R.D. 490 (N.D. Ill. 1980).

154. *Id.* at 491-92.

155. *Id.* at 493.

156. *Id.* at 492 (dicta); *Wood v. General Teamsters Union, Local 406*, 583 F. Supp. 1471, 1473 n.4 (W.D. Mich. 1984) ("In the instant case, a transcript of the hearing exists and it therefore is not necessary to question the arbitrator for this purpose.").

157. The distinction was firmly announced a century ago in *Duke of Buccleuch v. Metropolitan Board of Works*, 5 L.R.-E. & I. App. 418 (1872).

only if the arbitrator is the sole source for the needed information. Questioning unrelated to the decisional process is occasionally appropriate, but courts should strive to avoid even that kind of questioning if a less obtrusive means of obtaining the information (such as a transcript) is available.

The one exception to the "decisional process" distinction concerns asserted arbitral misconduct. The most careful statement of this exception was made by the North Carolina Supreme Court in its 1976 decision, *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*.<sup>158</sup> The arbitrators had on their own examined the premises that were the subject of the arbitration. The losing party learned of that *ex parte* conduct in the course of deposing the arbitrators; when it then sought to use the depositions in an action to vacate or correct the award, the prevailing party moved to suppress the depositions. The North Carolina Supreme Court recognized the important considerations behind the *Gramling* rule excluding an arbitrator's testimony, but held that those considerations did not prevent admission of the arbitrators' depositions establishing their own misconduct. Its qualified its decision in an extremely important fashion, however: "[a]n arbitrator's deposition of misconduct may be allowed in evidence *only when some objective basis exists for a reasonable belief that misconduct has occurred*."<sup>159</sup> Later the court reiterated this qualification while summarizing its holding: "Accordingly, we hold that *where an objective basis exists for a reasonable belief that misconduct has occurred*, parties to the arbitration may depose the arbitrators relative to that misconduct; and such depositions are admissible in a proceeding . . . to vacate an award."<sup>160</sup>

The North Carolina court clearly intended its "objective basis" requirement to filter out baseless charges and so protect arbitrators from harassment and their awards from fishing expeditions. As one commentator explained shortly after the *Gunter* decision:

By demanding that an objective basis be shown, frivolous, unfounded claims of misconduct of fraud will not provide the claimant with grounds for deposing or cross-examining arbitrators . . . .

The objective basis test allows the court to delve into the mechanics of an openly defective arbitration award without having to disturb one which appears valid on its face. In this way the *Gunter* test protects arbitrators and their awards from attacks based upon grounds of fraud or misconduct when the disappointed party has no objective basis for his claim.<sup>161</sup>

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158. 291 N.C. 208, 230 S.E.2d 380 (1976).

159. *Id.* at 218, 230 S.E.2d at 387 (emphasis in original).

160. *Id.* at 219, 230 S.E.2d at 388 (emphasis added); *cf.* *Fukaya Trading Co., S.A. v. Eastern Marine Corp.*, 322 F. Supp. 278 (E.D. La. 1971) (dicta).

161. Note, *Arbitration and Award—Admission of Arbitrator's Depositions and Testimony to Prove Misconduct or Fraud*, 13 WAKE FOREST L. REV. 803, 809 (1977).



Many other courts before and since have recognized the arbitral misconduct exception to the arbitrator's normal immunity from subpoena, but each, like the North Carolina Supreme Court, required a prior showing of serious misconduct before enforcing the subpoena. When the moving party makes such a showing, the court will compel the arbitrator's testimony;<sup>162</sup> when the moving party is unable or unwilling to make such a showing, the court will not compel the arbitrator's testimony.<sup>163</sup>

The impact of the "prior showing" requirement is apparent in one of the most recent cases on point, *Liggett Group, Inc. v. Bakery Workers International Union, Local 176-T*.<sup>164</sup> Liggett, the losing party to an arbitration,<sup>165</sup> filed suit to set aside the award. In addition to the usual charges that the award exceeded the arbitrator's authority and failed to draw its essence from the collective bargaining agreement, Liggett charged that the union obtained the award by "undue means." Liggett subpoenaed the arbitrator to appear at a deposition. The arbitrator challenged the subpoena, citing the company's failure to make the necessary prior showing of misconduct, and the district court denied Liggett's motion on precisely that ground.<sup>166</sup>

### E. Recapitulation

This review of the scope and limits of arbitral immunity reveals that the doctrine is alive and well. The only limitations on immunity are these:

- (1) Arbitrators, like all other citizens, are liable for any crimes they commit;
- (2) Arbitrators are liable for negligence or breach of contract if they totally fail to perform their obligations;
- (3) Arbitrators who violate a person's constitutional or civil rights, an unlikely event, might be subject to injunctive or declaratory relief; and
- (4) Arbitrators might be compelled to testify or produce documents (a) when they fail to make a timely assertion of their testimonial

162. *Kauffman v. Haas*, 113 Mich. App. 816, 318 N.W.2d 572 (1982); *In re Davis & Eiskoff*, 105 Misc. 2d 955, 430 N.Y.S.2d 208 (Sup. Ct. 1980); see *Continental Materials Corp. v. Gaddis Mining Co.*, 306 F.2d 952 (10th Cir. 1962).

163. *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 702 (2d Cir. 1978); *Sperry Int'l Trade, Inc. v. Government of Israel*, 602 F. Supp. 1440, 1443-44 (S.D.N.Y. 1985); *Sidarma Societa Italiana di Armamento Spa v. Holt Marine Indus., Inc.*, 515 F. Supp. 1302, 1309 (S.D.N.Y.), *aff'd without opinion* 631 F.2d 802 (2d Cir. 1981); *Reichman v. Creative Real Estate Consultants*, 476 F. Supp. 1276 (S.D.N.Y. 1979); *DeFrayne v. Miller Brewing Co.*, 444 F. Supp. 130 (E.D. Mich. 1978); *Fukaya Trading Co., S.A. v. Eastern Marine Corp.*, 322 F. Supp. 278, 279-80 (E.D. La. 1971); *In re Temporary Comm'n of Investigation v. French*, 68 A.D.2d 681, 418 N.Y.S.2d 774 (1979); *Turner v. Nicholson Properties, Inc.*, 80 N.C. App. 208, 341 S.E. 2d 42 (1986).

164. No. M-85-2-68-(MJP) (D.S.C. April 14, 1986).

165. *Liggett Group, Inc.*, 85-1 Lab. Arb. Awards (CCH) ¶ 8190 (1984) (Nolan, Arb.).

166. *Liggett Group*, Slip op. at 8-10.

privilege; (b) when the request does not pertain to the arbitrator's decisional process, for example, if it involves only formal information about the scope of the submission, the evidence introduced, or the conduct of other persons; or (c) when the request involves the arbitrator's own misconduct and the moving party has previously demonstrated an "objective basis" for a "reasonable belief" that the asserted misconduct actually occurred.

### III

#### RESPONSES TO SUITS AND SUBPOENAS

As clear as the law of arbitral immunity is, parties continue to sue and subpoena arbitrators. How can arbitrators respond? There are just four options.<sup>167</sup> The first is to surrender, either by paying damages or by complying with subpoenas. The arbitrator who chooses this option would be well advised to buy malpractice insurance. But as bad as this option promises to be for the individual arbitrator, it poses far more harm to the arbitration system. Like paying ransom, submission to litigation will only encourage more demands; in time it would become routine to sue the arbitrator, either to gain an immediate objective or to create an atmosphere for future gains. By surrendering to suits and subpoenas, the arbitrator makes life more difficult for other arbitrators. Moreover, damages and insurance costs would eventually increase arbitrators' fees, and thus the cost to the parties.

The second response is to seek legislative protection. The National Academy of Arbitrators' Board of Governors voted to support the concept of statutory immunity in 1986, for example,<sup>168</sup> and the Section on Labor and Employment Law of the American Bar Association recently considered whether to sponsor federal legislation on arbitral immunity without reaching a consensus.<sup>169</sup> Legislative action may seem to be the perfect answer to potential liability because it might codify and clarify the arbitrator's common law immunity. In fact it would be anything but a solution. To the contrary, a statute is likely to add nothing to the common law protection; at worst, a statute (or a failed attempt to obtain one) might leave arbitrators with less protection than they enjoy under the common law.

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167. We pass without comment a possible fifth option, that of anonymity. One union that sought to keep secret the arbitrators it used to resolve certain "theatrical credit" disputes was forced to disclose their names in *Writers Guild v. Superior Court*, 200 Cal. App. 3d 109, 245 Cal. Rptr. 827, *review denied and official opinion depublished* (Cal. June 30, 1988) (1988 Cal. LEXIS 129).

168. Letters to Dennis R. Nolan from William P. Murphy, President of the National Academy of Arbitrators (January 8, 1987) and from Professor David E. Feller (December 1, 1986).

169. Letter from Allan L. Bioff, Chairman of the ABA Labor and Employment Law Section, to William P. Murphy, President of the National Academy of Arbitrators, April 24, 1987.

In the wake of *Baar v. Tigerman*,<sup>170</sup> for example, the California legislature in 1985 sought to protect arbitrators with a simple statute:

An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract.

This section shall remain in effect only until January 1, 1991, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1991, deletes or extends that date.<sup>171</sup>

The statute sounds comforting but is practically useless. It protects neither those in Arbitrator Tigerman's situation nor any other arbitrator not already protected by the common law. Even before the statute, arbitrators had the same immunity as judges, and *Baar v. Tigerman* involved a situation no judge has to face, a suit for breach of contract. Thus the law is, in Professor Reginald Alleyne's pithy phrase, "a zero effect statute."<sup>172</sup>

Legislative action could even make matters worse. Suppose that a movement to gain an immunity statute failed, or that a statute like California's lapsed. The strong message to the courts would be that the legislature chose *not* to grant or renew arbitral immunity—that is, that arbitrators should not be immune in that jurisdiction. Or suppose that during legislative debate critics of immunity cited real or hypothetical abuses of arbitral authority and obtained qualifications, for example, a grant of immunity "except for malicious actions." The resulting law could expose arbitrators to more suits (and more potential liability) than would legislative silence. Finally, no law, however well drafted, can prevent a person from filing a suit. Even the most protective statute only provides a basis for dismissing the suit and that would still require the arbitrator to retain an attorney to seek dismissal, exactly the same burden the arbitrator faces under the common law. The one potential benefit to statutory protection is that a law might discourage some suits and make it easier for the arbitrator to obtain sanctions against the moving party. As important as this result might be, the potential benefit pales in comparison with the risks of legislative action.

One more problem with legislative action concerns the level and statutory site of legislative protection. Action at the state level might undercut arbitral immunity in neighboring states without legislation. If a federal law is to be enacted, other questions arise. Should it be an amendment to Section 301 of the Labor Management Relations Act?<sup>173</sup> If so, it will do no good for arbitrators in nonlabor cases because Section 301 applies only to suits over collective bargaining agreements. Indeed,

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170. 140 Cal. App. 3d 979, 211 Cal. Rptr. 426 (1983).

171. CAL. CIV. PROC. CODE § 1280.1 (West Supp. 1988).

172. Letter from Reginald Alleyne to Dennis R. Nolan (October 13, 1986).

173. 29 U.S.C. § 185 (1982).

it might not even help labor arbitrators because the courts have already determined that arbitrators cannot be sued under Section 301. Should it be an amendment to the United States Arbitration Act?<sup>174</sup> That might benefit commercial arbitrators, but, since that statute does not apply to "contracts of employment" of workers engaged in interstate commerce, it may not help the labor arbitrators who are the prime force behind the push for legislative protection.<sup>175</sup> Indeed, by protecting only commercial arbitrators it might suggest that labor arbitrators have *less* protection.

In short, legislative action is no panacea. To the contrary, users of arbitration should be extremely cautious about endorsing an immunity statute until all of these problems have been considered and resolved.

The third option is to resist, to hire a lawyer and fight suits and subpoenas. As a matter of principle, arbitrators should resist incursions on their immunity. The Code of Professional Responsibility almost commands resistance by stating that "[i]n view of the professional and confidential nature of the arbitrator relationship, an arbitrator should not voluntarily participate in legal enforcement proceedings."<sup>176</sup> The law provides a sound basis for resisting these actions. Although trial courts may not initially respect the arbitrator's immunity, the arbitrator may immediately appeal a negative decision.<sup>177</sup> The trouble with standing on principle is that it has its costs—in this case, it results in time-consuming, emotionally draining, expensive litigation.

The "hassle factor" cannot be avoided, but there are ways to minimize legal expenses. For example, the American Arbitration Association provides advice and information to arbitrators and their attorneys in such cases, and the National Academy of Arbitrator's Legal Representation Program and Fund will reimburse members for their attorney's fees up to \$2,500.<sup>178</sup> These are palliatives at best. The AAA ordinarily does not represent individual arbitrators in court; the Academy will reimburse only Academy members; and reimbursement may not cover all costs.

The last and best option for arbitrators, the one we recommend, is to take an aggressive defense. By this we mean that arbitrators should not only resist suits and subpoenas but should also seek sanctions, including attorney's fees and other expenses, against the moving party. Although the so-called "American rule" normally requires each litigant to bear its own costs, courts have long shifted the costs when a party has committed

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174. 9 U.S.C. §§ 1-14 (1982).

175. *Id.* § 1. On the question of whether the United States Arbitration Act applies to labor arbitration, see Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373, 416-17 (1983).

176. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes § 6.E.2 (1974), reprinted in 28 PROC. NAT'L. ACAD. ARB. 217, 236 (1975).

177. Rubin, *supra* note 1, at 23.

178. National Academy of Arbitrators, *Legal Representation Program and Fund Policy Statement Adopted by the Board of Governors* (May 22, 1984).

misconduct in the litigation.<sup>179</sup> Courts traditionally used this inherent power only against those who litigated in "bad faith,"<sup>180</sup> a subjective test that is notoriously difficult to prove. In 1983, however, several sections of the Federal Rules of Civil Procedure were amended to substitute an objective test much easier to meet. The amendments have made it possible for victims of unjustified suits or discovery motions to be compensated for their expenses, including their attorney's fees.

Amended Rule 11,<sup>181</sup> for example, requires an attorney to certify on every "pleading, motion, and other paper" presented to a court that he believes, after reasonable inquiry, that it is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, reversal of existing law" and is not filed for any improper purpose. If a paper is signed in violation of the rule, the court "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee."<sup>182</sup> Rule 26(g)<sup>183</sup> contains virtually identical language applying to discovery requests, responses, and objections. Rule 37(a)(4)<sup>184</sup> provides the most help to the subpoenaed arbitrator. It specifies that, if a court denies a motion for an order compelling discovery (for example, if an arbitrator successfully asserts arbitral immunity in resisting a subpoena), the party opposing the motion is entitled to its expenses, including attorney's fees, unless the court finds the motion "substantially justified" or holds that "other circumstances" make an award of expenses "unjust." Finally, Rule 38 of the Federal Rules of Appellate Procedure<sup>185</sup> provides for an award of "just damages and single or double costs" to one harmed by a frivolous appeal. Although phrased in terms of a frivolous "appeal," Appellate Procedure Rule 38 is interpreted in light of Civil Procedure Rule 11; it thus permits sanctions even when only a part of the appeal is frivolous.<sup>186</sup>

Few arbitrators (and perhaps few parties) appreciate how common it has become for courts to impose sanctions in arbitration cases.<sup>187</sup> The cited rules have virtually abolished any remaining judicial hesitation to

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179. See Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 441-44.

180. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980).

181. FED. R. CIV. P. 11.

182. *Id.*

183. FED. R. CIV. P. 26(g).

184. FED. R. CIV. P. 37(a)(4).

185. FED. R. APP. P. 38.

186. *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1200-01 (7th Cir. 1987).

187. The cases not relying on the amended Federal Rules are collected in Annot., *Labor Arbitration: Recoverability of Attorney's Fees in Action to Compel Arbitration or to Enforce or Vacate Award*, 80 A.L.R. FED. 302 (1986).

award sanctions. Some courts, notably the United States Court of Appeals for the Seventh Circuit, now award them with a vengeance. In *Dreis & Krump Mfg. Co. v. IAM District 8*,<sup>188</sup> Judge Posner (who is becoming one of labor arbitration's strongest advocates on the federal bench) awarded sanctions against a company that filed an untimely and frivolous action to set aside an arbitration award. Rules to discourage groundless litigation, he warned, "are being and will continue to be enforced in this circuit to the hilt. . . . Lawyers practicing in the Seventh Circuit, take heed!"<sup>189</sup> Another of Judge Posner's decisions reflected absolute outrage at a partially frivolous appeal, and awarded sanctions on the court's own motion:

Hill's counsel wasted our time and his adversary's money unpardonably by misrepresenting the standard of federal judicial review of arbitration decisions. The appeal as a whole is not frivolous. . . . [b]ut most of Hill's brief is devoted to frivolous argumentation. Rule 38 authorizes sanctions for the filing of a frivolous appeal . . . and we have held that the rule authorizes the imposition of sanctions for the part of an appeal that is frivolous even if the presence of a colorable ground prevents the entire appeal from being adjudged frivolous. . . . It would be strange if by the happenstance of including one colorable (though losing) claim amidst an ocean of frivolous ones, a litigant could ward off all sanctions.

. . . .  
 . . . It is immaterial that the defendant did not request an award of sanctions. We frequently impose sanctions on our own initiative . . . . The appeal has "required members of this court and its staff to expend a good deal of time and attention which could have been used elsewhere. The United States pays the salaries of the judges of this court and its staff. In wasting their time, [Hill] also wasted the government's money."<sup>190</sup>

Although the leading cases imposing sanctions in arbitration arose in federal courts, the same principles apply to state court actions.<sup>191</sup> And while the successful claimants in those leading cases were unions and

188. 802 F.2d 247 (7th Cir. 1986).

189. *Id.* at 255-56; see also *Thomas C. Baer, Inc. v. Architectural & Ornamental Iron Workers Local 580*, 813 F.2d 562 (2d Cir. 1987) (using the authority of 28 U.S.C. § 1927 (1982) and FED. R. APP. P. 38 to award double costs and attorney fees for a frivolous appeal of an arbitration board decision); *Plumbers Local 32 v. Lockheed Shipbuilding Co.*, 124 L.R.R.M. (BNA) 2552 (W.D. Wash. 1986). Requests for Rule 11 sanctions themselves must be soundly based, of course. An unwarranted request would itself merit imposition of sanctions. *Local 106, Serv. Employees Int'l Union v. Homewood Memorial Gardens, Inc.*, 838 F.2d 958 (7th Cir. 1988).

190. *Hill*, 814 F.2d at 1200 (quoting *United States v. Stillwell*, 810 F.2d 135, 136 (7th Cir. 1987) (per curiam)) (citations omitted).

191. Georgia, for example, has a new statute providing for recovery of attorney's fees and expenses incurred because of abusive or frivolous conduct. GA. CODE ANN. § 9-15-14 (Cum. Supp. 1986). The Georgia Supreme Court has recognized the right to recover damages for the new tort of "abusive litigation." *Yost v. Torok*, 256 Ga. 92, 344 S.E. 2d 414 (1986); see also *Northern Cal. Dist. Council of Laborers v. Robles Concrete Co.*, 100 Lab. Cas. (CCH) ¶ 10,943 (Cal. Ct. App. 1984).

employers, the same principles apply to arbitrators and make possible the aggressive defense we urge. Two recent federal district court decisions awarded attorneys' fees and costs to arbitrators who had successfully asserted their immunity from discovery motions.<sup>192</sup> Faced with a similar situation, every court should reach the same result.

#### CONCLUSION

We can close this Article on an optimistic note. Arbitral immunity is alive and well in the state and federal courts. Courts should and do foster private dispute resolution mechanisms by discouraging the involvement of arbitrators in postaward litigation. The arbitrator who performs his job need have no fear of damages and need not even testify against his will except in the rarest cases. Better yet, it is now quite possible for the assertive arbitrator to shift the costs of litigating these cases onto those attempting to breach arbitral immunity, which is where those costs belong.

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192. *Liggett Group, Inc. v. Bakery Workers Int'l Union, Local 176-T*, No. M-85-2-68-(MJP), slip op. at 10-13 (D.S.C. April 14, 1986); *Dugger v. National Elevator Indus.*, No. 86 C 740 (N.D. Ill. Jan. 6, 1987) (1987 WESTLAW 5227) (1987 U.S. Dist. LEXIS 79).