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MANDATORY ARBITRATION PROVISIONS INVOLVING TALENT AND STUDIOS AND PROPOSED AREAS FOR IMPROVEMENT**I. INTRODUCTION**

We have litigated many cases in Superior Court where a prominent television show creator/showrunner sued a major television studio ¹ for his or her share of the profits and/or to vindicate some other contractual right in a television series. Lawsuits in public courthouses between talent and major studios, however, are becoming increasingly rare as more and more contracts include mandatory arbitration clauses. As we have learned from our own litigation practice and from transactional lawyers on the talent side, major television studios are increasingly insisting that their new contracts with talent include a mandatory arbitration provision and that one particular arbitration provider, JAMS, ² be the forum that will arbitrate all disputes. Major studios are taking the position that these two provisions are non-negotiable and that talent has no option but to assent to the studios' insistence on them. Furthermore, since nearly all of the major studios now insist on these provisions, there is no opportunity to negotiate a different position at another major studio. In effect, the talent's real world choice is limited to agreeing to these provisions or not working for a major studio.

Much has been written about the perceived unfairness of large companies increasingly insisting on mandatory arbitration in their contracts with consumers and employees. ³ This subject, however, has received less attention in the context of talent *234 versus studio litigation. While talent, often wealthy and well represented individuals, are a far cry from the classic consumer/employee, who is not represented and may not even be aware of the presence of an arbitration provision in the boilerplate of a contract he or she is signing, there is concern among many on the talent side as to “repeat provider bias” and “repeat player bias” in talent versus major studio arbitrations:

Arbitration critics frequently discuss a phenomenon known as the “repeat provider” problem Obviously, once [an arbitration] company is named as the provider, financial benefits accrue to that company Thus, charge the critics, providers have a financial incentive to make sure that the company is pleased with the results in arbitration. If the [disputant company that effectively chooses the arbitration provider] is displeased with the results secured through a particular provider it may well switch providers. Needless to say, providers and arbitrators vehemently deny the charge that they are biased. Providers urge that they have no direct influence over their arbitrators. Yet, critics maintain that, consciously or unconsciously, arbitrators may slant the result in companies' favor.

A related purported phenomenon is known as the “repeat player” bias. Whereas a given [disputant] company will tend to arbitrate many consumer disputes, a given consumer will typically arbitrate, at most, one. Thus, the companies have far greater experience with and exposure to the arbitration process than

do the consumers. There is some limited empirical evidence that the repeat player does somewhat better in arbitration than the non-repeat player.⁴

Similarly, Professor Schwartz of the University of Wisconsin Law School wrote:

[T]he repeat player studies seem to miss the broader point that arbitration is a service sold by arbitration vendors to putative defendants. That means the “aim to please” comes not only from individual arbitrators, but also from vendors--like AAA--who compile the panels of potential arbitrators from which the parties choose. AAA, for example, not only maintains an accredited list of arbitrators, but in a given case, will send the parties a short list from which the arbitrator in that case will be selected. In other words, arbitration vendors play a significant role in arbitrator selection; individual arbitrators have to be responsive to the vendors who keep them on “the list,” and vendors must be responsive to their customer-defendants. Repeat player analysis, then, should give way to a more holistic customer bias analysis that looks more carefully at such factors as the size of the defendant company, and the process of arbitrator selection--for example, scrutinizing the relationship between an arbitrator's award-making behavior and the frequency with which that arbitrator is nominated for short lists by the vendor.⁵

There is also considerable academic research on hidden or subconscious biases of which a person, such as an arbitrator, are not even consciously aware.⁶ Even the *235 most fair minded arbitrators can at least subconsciously be aware that if he or she rules against a major studio, particularly in a large dollar value case, he or she will not be picked by at least that major studio in the future. In contrast, a public judge does not face these same economic pressures and realities.

Transactional lawyers and litigators who represent talent have become increasingly concerned about repeat provider/player bias in talent versus major studio arbitrations. These concerns are based in part on anecdotal stories of arbitrator bias in favor of the major studios as well as economic reasons arbitrators have to favor repeat studio player over non-repeat player talent. Indeed, many on the talent side believe that the choice of arbitrating versus litigating in a public courtroom is the single most important factor--perhaps even more important than the merits--in determining the outcome. This concern is heightened in large dollar value arbitrations since there is less perceived risk that an arbitrator will unduly favor a major studio in a small dollar value arbitration.⁷ Simply, losing a small dollar value arbitration may be tolerable and viewed as a cost of doing business to the studios; losing a case worth tens or hundreds of millions of dollars is not similarly tolerable to the studios.

It is certainly the arbitration providers' and major studios' position that there is no repeat provider/player bias and that arbitrators in each case rule solely on the merits.⁸ The providers also point to both their arbitrators' reputations as neutrals and the institutional safeguards in their own rules, including talents' participation in the arbitration selection process, as factors that counter any potential repeat provider/player bias. Joel Grossman, a well-respected JAMS neutral, stated:

“Individuals and smaller companies may have this idea about some arbitrator, ‘He's pretty smart, he knows where his bread is buttered, and he knows he'll have maybe 100 cases from Paramount, for example, and he wants that repeat business,’” he said. “I think it's just something people tell themselves when they lose cases.”⁹

While there are two competing narratives, neither side's belief can be tested since talent versus studio arbitrations are invariably covered by confidentiality provisions and arbitration providers do not report the results of the arbitrations in this area. Thus, there is no way to determine whether the major studios have won 90%, or say, only 30% of talent versus studio arbitrations before a particular provider or a particular arbitrator.

***236** We also agree that the generalizations that can be made from anecdotal experiences are imperfect because they involve confidential arbitrations where outside parties cannot independently determine if the arbitrator(s) were biased and ruled correctly. We submit, however, that whether or not the providers and their arbitrators are, in fact, influenced by repeat provider/player bias, the perception of such bias b' many on the talent side is real. It is therefore in the providers and their neutrals interest to address this perception on the merits.

In the sections that follow, we discuss the trend towards designating arbitration in talent-major studio contracts, the fact that JAMS has become the major studios' almost exclusive provider of choice, and how the arbitrator selection process can favor the studios. Further, we examine the California legislatures and Congress' response to the repeat provider/player issue, including why many, if not most, talent versus studio arbitrations should be considered “consumer arbitrations” where enhanced disclosures must be made. Finally, we explain why litigation challenges to arbitration provisions in talent-studio agreements are challenging at best under the current case law and propose improvements to the current system for the benefit of all.

We welcome responses to this article. It is our hope that this article will catalyze a real sharing of information and a dialogue in which the providers, arbitrators, the major studios and talent can participate. We hope the system will improve for everyone as a result.

II. JAMS IS THE STUDIOS' CURRENT PROVIDER OF CHOICE

In 2013, we asked several talent lawyers to send us dispute resolution provisions from recent contracts between their talent clients and the major television studios. We received dispute resolution provisions from 26 contracts entered into between 2011 and 2013. This set included at least four contracts from each of the six major studios.

Of the 26 provisions we reviewed, 22 of them required mandatory arbitration, with 21 of the 22 designating JAMS as the provider. Of the four provisions that did not require mandatory arbitration, two required a confidential non-jury reference to a retired federal or state judge¹⁰ and two allowed for litigation in the public court system. We analyzed the provisions for each major studio and found:

1. Five dispute resolution provisions in contracts involving CBS/Paramount and their affiliates. All of these contracts have mandatory JAMS arbitration provisions.
2. Four dispute resolution provisions in contracts involving Disney/ABC and their affiliates. Of the two that were entered into in 2012, one had a mandatory ***237** American Arbitration Association (“AAA”)¹¹ arbitration provision and the other had no mandatory arbitration provision. The two entered into in 2013 required a confidential non-jury reference to a retired judge.
3. Four dispute resolution provisions in contracts involving Fox and its affiliates. Three of these contracts have mandatory JAMS' arbitration provisions. One agreement had no mandatory arbitration provision.
4. Five dispute resolution provisions in contracts involving NBC/Universal and their affiliates. All of these contracts have mandatory JAMS' arbitration provisions.

5. Four dispute resolution provisions in contracts involving Sony and its affiliates. All of these contracts have mandatory JAMS' arbitration provisions.

6. Four dispute resolution provisions in contracts involving Warner Bros. and its affiliates. All of these contracts have mandatory JAMS' arbitration provisions.

JAMS has stated that it is surprised by the fact that the studios are almost all now uniformly designating it as the provider in their contracts. JAMS Practice Development Manager Theresa DeLoach stated:

“We're always shocked and surprised when we see that we're in a certain studio's clause, because we don't make that kind of effort, especially in the entertainment context I think it's really driven by the marketplace.”¹²

This article particularly focuses on JAMS because it now has a controlling position as the provider in talent-major studio contracts--not because it and its neutrals are inherently more prone to repeat provider/player bias than other providers and/or neutrals. Similar complaints have been made against other providers when they held a controlling position in other areas or industries.¹³

Representatives from other providers including ADR Services, Inc. (“ADR”)¹⁴ and AAA, the latter of which was previously the provider most often written into the arbitration clauses of talent-studio contracts, have told us that they want to become more significant players in the talent-versus-studio arbitration space. We think greater competition among providers, with no one provider holding a controlling position--particularly one whose controlling position is dictated by the studios--would be a welcomed change. But the bottom line, as discussed further herein, is that greater transparency and other reforms are the only way to restore confidence in the arbitration system in this area.

*238 III. TREND TOWARDS ARBITRATION IN GENERAL

We know from our own experience that until about fifteen years ago, the studios rarely included mandatory arbitration provisions in their talent contracts. The situation has dramatically changed since then.

The studios' increasing insistence on mandatory arbitration is directly related to the sunset of the Network Financial Interest and Syndication Rules (“Fin-Syn”) in the 1990s, which prohibited broadcast networks from owning their primetime programming.¹⁵ The repeal of the Fin-Syn Rules in 1995 led to the beefing up of in-house television studios of the major studios and the vertical integration of their broadcast networks, cable networks, and studios. As a result, talent brought numerous lawsuits alleging that the vertically integrated networks and studios agreed on license fees that were below fair market value, which hurt the profit participants and was a breach of the studios' contract with them.¹⁶ The studios suffered losses, or are reputed to have settled for substantial amounts,¹⁷ in a number of these cases that were litigated in public courtrooms.¹⁸

These negative experiences caused many on the studio side to conclude that juries tend to favor individual talent over big corporate studios. Additionally, studios were convinced that juries were often unfairly influenced by claims of creative “Hollywood accounting”:

“[s]tudio lawyers argue the clauses actually eliminated conditions favoring talent. Echoing the sentiments of many lawyers who regularly defend studios in court, the former studio lawyer argued that jurors often

favor talent. It's easy to be won over by their 'star power,' the lawyer said, whereas private arbitration can level that playing field.”¹⁹

The studios also cite the delays, costs, and the public nature of court proceedings as reasons why they insist on mandatory arbitration.²⁰

Not surprisingly, the talent side has a different perspective. The talent believes the public court system--including judges and juries who are not beholden to the *239 studios for repeat business--is a more fair forum for talent versus studio disputes.²¹ In contrast to the public court system, the talent fears that there is a repeat provider/player bias in arbitration that works in the studios' favor. These fears are exacerbated by both the lack of transparency as to the results of prior arbitrations, as well as anecdotal stories of arbitrators favoring the repeat major studios.

IV. TREND TOWARDS SELECTING JAMS IN PARTICULAR

As discussed above, major studios almost uniformly now designate JAMS as the provider in their contracts. The reasons studios most commonly give for this selection are that JAMS has well-developed rules and procedures,²² JAMS' neutrals, many of whom are retired judges, have excellent reputations, and many of JAMS' neutrals have particular expertise in these types of disputes.²³ Indeed, in a dispute between talent and a major studio, JAMS will select arbitrators from its Entertainment and Sports Group, which it formed in early 2010.²⁴ This group currently consists of 37 experienced neutrals throughout the United States, including fourteen in Los Angeles County.²⁵

Many on the talent side believe there is more to the major studios' preference for JAMS than the reasons they provide. Michael Plonsker, a prominent talent side litigator, asked: “Why would studios insist upon a specific tribunal [JAMS] unless they feel they gain an advantage?”²⁶ The talent sides skepticism about the repeated designation of JAMS stems from their fear of repeat provider/player bias, due to anecdotal stories of bad results for talent in talent versus studio JAMS' arbitrations, the fact that major television studios dictate JAMS as the provider and appear to be acting nearly uniformly in doing so, and the reality that JAMS depends on the major studios for repeat business in this area.²⁷

JAMS does seem to be sensitive about being chosen as the provider in contracts written by large repeat player corporations, such as the major studios. It was *240 reported in 2005 that JAMS reversed its previous policy of refusing to enforce arbitration provisions that prohibited all consumer and employee class actions:

After nearly four months of loud complaints from general counsel and defense attorneys, the arbitration service JAMS has reversed its policy of refusing to enforce contract clauses that prohibit consumer and employee class actions.

At least one large client, Citibank, wrote JAMS out of its contracts in response to the policy, [a JAMS spokesperson] confirmed. Discover Card also wrote out JAMS, according to the ADR Institute, which is sponsored by the National Arbitration Forum. Both plaintiff and defense attorneys said they knew other companies that had dropped JAMS, but they declined to name names

The decision infuriated plaintiff attorneys who had earlier applauded the JAMS policy.

‘If you're not capable of withstanding the pressure and doing what you think is right, you shouldn't be doing arbitrations,’ said Cliff Palefsky, a partner with McGuinn, Hillsman & Palefsky in San Francisco and a longtime opponent of mandatory ADR

In addition to public griping, he said, JAMS was also pressured by corporate clients' decision to use arbitration services that would honor class action preclusions. ‘I do have clients who have written JAMS out of their contracts,’ said Kaplinsky, who declined to name them.²⁸

JAMS' reported behavior in at least this one instance is not surprising- JAMS' conduct is the predictable action of any business that depends on repeat customers, here large companies, that choose to designate JAMS as the provider in its contracts. Similarly if the major studios begin to write JAMS out of their contracts, JAMS' business in the entertainment area, and the business of its neutrals in that area, would decline.

V. OUR ATTEMPTED STUDY

We began our study by soliciting the views of two prominent and well-respected members of the JAMS' Entertainment Group in Los Angeles: Richard Chernick,²⁹ who also serves as a Vice President of JAMS and is the Managing Director of the JAMS Arbitration Practice, and Joel Grossman,³⁰ also a respected JAMS neutral. They were both cooperative and helpful in these discussions.

Second, we talked to several arbitrators/mediators not affiliated with JAMS, as well as several practitioners in the field about (1) whether they perceive any repeat provider/player bias in talent versus studio arbitrations and (2) if so, ways the current *241 system can be improved. Many of the people we talked to provided helpful suggestions, many of which are incorporated in this article.

Third, in May 2013, we sent a questionnaire to JAMS in the hopes that we could move beyond anecdotal stories and personal beliefs.³¹ The questionnaire asked for information about arbitrations that have taken place in any of JAMS' Los Angeles area offices and/or any of the neutrals in JAMS' Entertainment Group, since January 1, 2008 where a “major studio” (as defined above) was a party. Specifically, for each arbitration, JAMS was asked to provide (1) the name of the studio parties, (2) if the non-studio parties could not be named for confidentiality reasons, a general description of who they were, e.g., individual talent and his/her loan out companies or some other class of person/entity, (3) the name of the counsel for each party, (4) the name of the arbitrator(s), (5) the general nature of the claim, (6) the date the claim commenced, (7) the results, including whether the case settled and/or the date of arbitration award, if any, (8) identification of the prevailing party (studio or talent) and (9) the amount of monetary damages awarded, if any.

The information we sought from JAMS was inspired by the California consumer arbitration regulatory scheme, discussed in Section H below, which provides for increased disclosures by the provider organization as a whole, and not just the selected arbitrator, in cases where the “consumer rules” apply.³² As also discussed in Section H, a strong argument can be made that the consumer arbitration rules apply in many, if not most, talent versus studio arbitrations.

Further, the questionnaire also sought (1) similar information for non-arbitration services, e.g., mediation, discovery referees and references, rendered in any of JAMS' Los Angeles area offices where a major studio was a party, (2) information concerning the fees collected by JAMS and its arbitrators in Los Angeles for matters involving the major

studios, (3) how JAMS' arbitrators are compensated, (4) whether JAMS currently makes or did make attempts to cause the major television studios to designate JAMS as the provider in their contracts, (5) JAMS' response to the talent side's repeat provider/player concerns and (6) suggestions on ways to improve the system.

Unfortunately, we were unable to get any of the information we sought from JAMS. In July 2013, Mr. Chernick responded on behalf of JAMS, stating: "Unable to get consensus to gather requested data only some of which exists. Looks like you should proceed without JAMS stats."³³ Moreover, because JAMS arbitrations in this area are invariably subject to contractual confidentiality provisions, we were largely unable to otherwise collect the requested data.

In fairness to JAMS and other providers, even if the data were available and revealed that the studios won a high percentage of talent versus major studio arbitrations, this does not necessarily mean there was repeat player/provider bias or that the *242 cases were not correctly decided on the merits. Several law professors wrote about the lack of data in the analogous consumer arbitration context, concluding that even if the data were available, it would not be easy to draw conclusions from it:

Given the fierce controversy over mandatory consumer arbitration, one would hope that empirical studies could be used to evaluate the process. Unfortunately, researchers have found it very difficult to evaluate mandatory arbitration, for a number of reasons. First, to a large extent researchers cannot obtain access to the data they need to perform good studies. As we have seen, one of the fundamental traits of arbitration is that it is typically private. Thus, researchers can only obtain data on arbitration to the extent that disputants or arbitration providers make the data available, which they often do not. A second problem researchers face is that even if they had data regarding results of claims filed in arbitration and in court, it would be difficult to know how to compare that data. After all, the same case is never brought in both processes, and one cannot simply assume that claims brought in arbitration were otherwise identical to those brought in litigation.³⁴

We believe, however, that more information and transparency, even if it is not dispositive, is better than the current system, in which there is virtually no information or transparency.

VI. RECOMMENDED ARBITRATION PROVISIONS, IMPORTANCE OF MAJOR STUDIOS AND ARBITRATOR COMPENSATION

JAMS, like other providers, offers sample arbitration provisions, which are directed at those who write the arbitration clauses into their contracts, such as the major studios. JAMS' Clause Workbook states:

Planning is the key to avoiding the adverse effects of litigation. The optimal time for businesses to implement strategies for avoidance of those adverse effects is before any dispute arises. We at JAMS recommend, therefore, that whenever you negotiate or enter into a contract, you should carefully consider and decide on the procedures that will govern the resolution of any disputes that may arise in the course of the contractual relationship

JAMS offers sample dispute resolution clauses that may be inserted into a contract prior to any dispute ever arising. These sample dispute resolution clauses are set forth and, in some cases, briefly discussed inside.³⁵

The standard arbitration clause for domestic commercial contracts in JAMS' Clause Workbook states:

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach termination enforcement interpretation or validity thereof including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant *243 to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS' Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.³⁶

This provision provides that JAMS, and not a court, will decide a dispute over arbitrability, namely whether the dispute should be submitted to arbitration, including a talent side challenge to JAMS and/or a particular JAMS arbitrator based on a claim of repeat provider/player bias. It is a change from the general rule that unless the parties have “clearly and unmistakably” provided otherwise in the arbitration agreement, the question of arbitrability is an issue for a court to decide.³⁷

This provision also expressly incorporates JAMS' Rules and Procedures which, similar to other providers, allow far narrower discovery than is allowed in the public court system.³⁸ For example, the JAMS Rules limit each side to one deposition; while the arbitrator has discretion to allow more, the presumption is that it be limited to one.³⁹ This is almost always to the benefit of the studios, as there are usually only a few potential percipient witnesses on the talent side to depose (the artist, his or her lawyer and his or her agent), while there may potentially be dozens on the studio side (multiple business affairs, contracts, production, distribution and accounting personnel spread across sometimes multiple companies within the vertically integrated enterprise). In our experience, depositions of such witnesses in public court proceedings have profoundly and positively impacted the results in those cases in favor of the talent side.

Further, the JAMS Clause Workbook includes clauses providing for confidentiality in the arbitration proceedings. The result of such a provision is that talent can find out very little as to how JAMS as a whole, and specific JAMS neutrals as individuals, have ruled in prior similar arbitrations. The selected arbitrator must disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”⁴⁰ This includes prospective employment, service as a dispute resolution neutral e.g., mediator, within the past two years involving the “parties” in that arbitration,⁴¹ and service as an arbitrator within the past five years involving the “parties” in that arbitration.⁴² *244 The required disclosures, however, will often be limited to the precise parties before the selected arbitrator; it will not include the many affiliates of a particular studio. This is because under one set of disclosures that apply to California arbitrators, a “party” is defined to include the “parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.”⁴³ Therefore, only if a particular affiliate of the party studio was involved in the underlying dispute would disclosures need to be made for that affiliate. The disclosures under the Ethics Standards For Neutral Arbitrators In Contractual Arbitration define “party” narrowly and do not encompass affiliates or subsidiaries.⁴⁴

For example, if a Warner Bros. studio is a party to an arbitration and the selected JAMS arbitrator has not had an arbitration involving that particular Warner Bros. entity in the past five years, nothing needs to be disclosed, even if that arbitrator has ruled in the favor of other Warner Bros, affiliates, such as The CW Television Network or HBO, not involved in the underlying dispute, in nine out of ten prior arbitrations. Similarly, nothing needs to be disclosed by the provider (unless the consumer arbitration rules discussed in Section H apply) if other arbitrators in the JAMS Entertainment Group have had ten arbitrations involving the said Warner Bros. studio or any other Warner Bros. entities

in the past five years and ruled for the studio in nine of them. Certainly, nothing needs to be disclosed by the arbitrator or the provider for arbitrations involving non Warner Bros. entities, e.g., if the selected arbitrator or other arbitrators affiliated with the provider ruled for NBC, CBS, Disney and Sony entities in nineteen out of twenty prior arbitrations. Obviously, this is all information that talent would want to know.

The JAMS Clause Workbook also includes provisions that prohibit punitive damages.⁴⁵ Though most talent versus major studio cases only involve breach of contract claims, sometimes talent allege fraud, intentional interference with contract, and other intentional torts where punitive damages are potentially available.⁴⁶ An arbitration clause taking away the possibility of punitive damages certainly favors the studio in these types of cases.

While JAMS declined to answer our written questions as to how lucrative its business with the major studios has been, and how it and its neutrals are compensated, we were able to determine some of this information from other sources. The *245 major studios, including their vertically integrated sister companies, are among the largest employers in the Los Angeles area where most of these disputes are litigated. The Walt Disney Co., Warner Bros. Entertainment, Inc. and Sony Pictures Entertainment were all in the list of top twenty-five largest private-sector employers in Los Angeles County in 2011; NBCUniversal and Paramount Pictures were in the top fifty.⁴⁷ As such, the major studios enter into literally thousands of contracts with talent and others each year.⁴⁸ Talent versus major studio disputes concerning successful television series often involve tens of millions, if not hundreds of millions, of dollars in dispute.

Another potential factor in considering the repeat provider/player bias issue is how a provider and its neutrals are compensated and the fees they receive. The neutrals in JAMS' Entertainment Group charge fees ranging from \$500 to \$900 per hour or \$5,000 to \$9,000 per day.⁴⁹ Each arbitrator has his or her own arrangement with JAMS as to the sharing of the neutral's fee between JAMS and the neutral.⁵⁰ We are advised that each neutral, depending on his or her agreement with JAMS, receives between 40-70% of the amount paid.⁵¹ JAMS, as the provider organization, also charges an administrative fee of 10% of the neutral's fee.⁵²

Many JAMS neutrals are also “owners” of JAMS. To our knowledge, JAMS is the only major provider where many of its neutrals are also owners who have a profit interest in matters handled by other JAMS' neutrals. As such, the “owners” receive not only a share of their own fees in the proceedings they act as neutral in, but also a share of JAMS' overall profits.⁵³

VII. JAMS' ARBITRATOR SELECTION PROCESS

JAMS' rules specify that if a contract provides for a JAMS arbitration and the parties have not agreed on a particular arbitrator, JAMS will send the parties a list of at least five arbitrator candidates where the contract calls for a single arbitrator, and at least ten arbitrator candidates where the contract calls for three arbitrators.⁵⁴ If the arbitration involves a dispute between talent and a studio, the list will include *246 arbitrators from its Entertainment Group.⁵⁵ No disclosures are made by the candidate arbitrators at this stage. Each side can then strike up to two names in the case of a single arbitrator arbitration, and three names in the case of a three arbitrator panel. This leaves at least one remaining name in the case of a single arbitrator arbitration and four remaining names in the case of a three arbitrator panel.⁵⁶

JAMS then chooses the arbitrator(s) from the remaining names. Once the arbitrator(s) is selected, the arbitrator(s) then makes the disclosures required by law.⁵⁷ A neutral arbitrator is required to disclose “all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”⁵⁸ The specific disclosures include any matter that would disqualify a public courtroom judge, including

prospective employment or service as a dispute resolution neutral within the past two years involving a party in the arbitration.⁵⁹ The Ethics Standards For Neutral Arbitrators In Contractual Arbitration require additional disclosures for the selected arbitrator(s), including (1) significant personal relationships with the parties involved in the arbitration, (2) prior arbitrations within the past five years involving the parties and (3) acting as a neutral in mediations or other non-arbitration proceedings involving the parties within the past two years.⁶⁰ Unless the consumer arbitration rules apply, no disclosures are made by the provider.

JAMS believes that the above described arbitrator selection process provides adequate protections to talent and helps ensure the neutrality of the selected arbitrator(s).⁶¹ Indeed, several courts have relied on this process to help ensure the integrity of the proceeding.⁶² We submit, however, that this selection process (and those of other providers) lends less protection than it appears, and that it can be improved.

First, as Professor Malin of the Chicago-Kent College of Law discusses, there are ways a provider can slant the arbitrator selection process in favor of repeat players if it wishes to do so:

[R]eform should focus on the arbitrator appointing agencies and the arbitrator selection process. The employer unilaterally selects the arbitrator appointing agency when it designs the arbitration system The enormous importance of the identity and impartiality of the arbitrator appointing agency is obvious. AAA *247 and other arbitration service providers actively market their services to employers. The desire to attract and retain employer business can have a negative effect on the way in which the arbitration appointing agency administers the arbitration system. For example, in the early development of the AAA Employment Disputes Panel, employers believed that labor arbitrators would favor employees and expressed strong preferences for excluding them from the panel. The initial AAA Employment Disputes Panel excluded most labor arbitrators. To its credit, AAA no longer does this, but more recently JAMS abandoned its refusal to administer arbitration agreements with class action waivers because of pressure from its business clients.

There are two ways in which an arbitrator appointing agency can slant the process to favor employers. First, the agency decides who it will list on its roster of arbitrators

The second way in which an agency can slant the process to favor employers is by controlling the composition of the specific panel of arbitrators given to the parties in a specific dispute. The desire for repeat business can be a powerful incentive for agencies to give their customers what the agencies think the customers want. In labor cases, for example, AAA tailors its panels in an effort to meet the needs of the parties in light of the particular dispute. Such tailoring may be appropriate where the agency has been selected mutually by the union and the employer. Like an arbitrator, the agency must curry favor with both adversaries to ensure their repeat business. Such tailoring is entirely inappropriate where the employer is the only party that controls whether the agency will see repeat business.

Random selection from the overall roster is a method of composing a specific panel that reduces a repeat player's ability to select the same arbitrator for multiple cases.⁶³

We have been told that the selection of the arbitrator candidates by JAMS and other providers is not necessarily random and is often influenced by subjective factors, including the expertise of the neutrals and even who the provider owes guarantees to.⁶⁴ The fear on the talent side is that the selection may also be influenced, particularly in big dollar disputes, by a provider's desire to offer candidates the studios will be happy with. Certainly, if enough individual neutrals affiliated with a particular provider rule against the studios, the provider has to know that there is at least a substantial risk that the studios will not continue to designate it as the provider in their contracts. If the number of arbitrators affiliated with a particular provider willing to rule against the major studios ever gets beyond the number of strikes the studios have, e.g., two strikes in a one arbitrator JAMS' arbitration, the studios will presumably stop their current practice of designating that provider at the contract negotiation phase. Again, this would not be good for the provider's business.

***248** Talent also has concerns about the incentives and pressures faced by individual neutrals. Unlike a public judge, a private neutral, particularly one in JAMS' Entertainment Group who seeks future business involving the major studios, has an economic incentive to keep the major studios happy or risk losing future business from them. While a neutral may state that he or she can rise above and ignore this economic reality, this reality, and the dangers of hidden or subconscious biases, are nonetheless still present.

Given the importance of the major television studios and their affiliates to the Los Angeles area economy, it is presumably important to JAMS, and particularly to its Entertainment Group neutrals, to keep the studio business. If a JAMS' Entertainment Group neutral wants to be picked in future arbitrations involving individual artists and major studios, the neutral has to know--at least in the back of his or her mind--that if he or she rules against the studio, the studio might never again pick the arbitrator or his or her affiliated provider. Moreover, if word gets around within the small major studio legal community, other major studios and their affiliated companies might not also select that arbitrator or provider in future disputes.

JAMS maintains that if a neutral is perceived to be "pro studio," the neutral's perceived bias will become known, and that neutral will not be picked by talent in future cases. We submit this is often not the case, and even when it is, not picking a particular neutral is not a real solution to the underlying problem. First, due to the confidentiality provisions that govern talent versus studio arbitrations, the individual talent, who are not repeat players, have access to far less information about individual arbitrators than do the major studios. Furthermore, the disclosures JAMS provides at the arbitration selection stage have significant gaps, and JAMS does not currently provide information that directly addresses the repeat provider/player bias issues. The transactional attorneys and litigators for the talent also often come from smaller boutique firms with less access to information than the large law firms commonly retained by the major studios.⁶⁵

Second, if the talent side is worried about repeat player bias and has concerns about more than two of the five arbitrator candidates proposed in a single arbitrator arbitration, the ability to strike two of them is hardly a solution. The problem is further compounded by the fact, as discussed above, that each JAMS' Entertainment Group neutral must know, at least subconsciously, that if he or she rules against a major studio, particularly in a large dollar value case, that studio and its affiliated entities will almost certainly strike him or her from future arbitrations. The option to strike therefore has the potential adverse effect of chilling individual arbitrators from ruling against the major studios. Similarly, JAMS, which has its own institutional and financial interests to protect, would face pressures to stop putting such neutrals on its lists of potential arbitrators.

***249** Third, although the selected arbitrator's disclosures that are mandated by law reveal a fair amount of information concerning the selected arbitrator,⁶⁶ such disclosures do not include significant information that is of critical interest to talent. In the previously discussed example, where the studio party is a Warner Bros. entity, the selected arbitrator may not need to disclose prior arbitrations with other Warner Bros. entities, let alone non-Warner Bros. major studio

entities. In addition, unless the arbitration is deemed a consumer arbitration, which is discussed in the next section the disclosures are limited to the selected arbitrator and do not extend to the provider organization and its other neutrals.

VIII. MANY, IF NOT MOST, TALENT V. STUDIO ARBITRATIONS SHOULD BE CONSIDERED CONSUMER ARBITRATIONS

A. California Consumer Arbitration Regulatory Scheme

In 2004, California enacted legislation providing for disclosures by providers in the case of “consumer arbitrations.”⁶⁷ The consumer arbitration rules apply to all arbitrations where (1) “[t]he contract is with a consumer party,” (2) it “was drafted by or on behalf of the nonconsumer party,” and (3) “[t]he consumer party was required to accept the arbitration provision in the contract.”⁶⁸ Furthermore, the term “consumer” is defined broadly to include “all employees,” including highly compensated employees.⁶⁹

The consumer arbitration rules were amended and strengthened in 2014 to add additional disclosure requirements, which are in italics below.⁷⁰ The consumer arbitration rules require providers to publish the following information for each consumer arbitration on its website in a “searchable format” each quarter:

(1) Whether arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering private arbitration company.

(2) The name of the nonconsumer party, if the nonconsumer party is a corporation or other business entity, and whether the nonconsumer party was the initiating party or the responding party, if known.

(3) The nature of the dispute

(4) Whether the consumer or nonconsumer party was the prevailing party. As used in this section, “prevailing party” includes the party with a net monetary recovery or an award of injunctive relief.

(5) The total number of occasions, if any, the nonconsumer party has previously been a party in an arbitration administered by the private arbitration company.

***250** *(6) The total number of occasions, if any, the nonconsumer party has previously been a party in a mediation administered by the private arbitration company.*

* * *

(9) The type of disposition of the dispute, if known, identified as one of the following: withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without

hearing. *If a case was administered in a hearing, indicate whether the hearing was conducted in person, by telephone or video conference, or by documents only.*

(10) The amount of the claim, *whether equitable relief was requested or awarded*, the amount of any monetary award, *the amount of any attorney's fees awarded*, and any other relief granted, if any.

(11) The name of the arbitrator, his or her total fees for the case, the percentage of the arbitrator's fee allocated to each party, *whether a waiver of any fees was granted, and, if so, the amount of the waiver.*⁷¹

A strong argument can be made that many, if not most, talent versus studio arbitrations are “consumer arbitrations,” and that the enhanced provider disclosures must be made. Specifically, as to the elements triggering application of the consumer arbitration rules, (1) the talent is often an “employee” of the studio, (2) the arbitration clause was drafted by the major studio and (3) the talent was required to accept it.

As to the first “employee” element, while older contracts between talent and studios from the 1990s and earlier often expressly characterized talent as an “employee” of the studio, more recent contracts disavow an “employee” relationship and, at most, characterize the artist a “special employee” for worker's compensation purposes.⁷² We are aware of no cases that discuss the issue of whether an individual artist would be considered an “employee” for purposes of applying the “consumer arbitration” rules where the contract disavows an employer-employee relationship. We believe, however, that if a particular artist, e.g., a show runner/executive producer, would be considered an “employee” under the common law test of employment versus independent contractor status,⁷³ he or she should be considered an employee under the consumer arbitration rules.⁷⁴

***251** If talent is considered an “employee” and the consumer rules apply, the provider is obligated to collect and publicly disclose the information listed in the consumer arbitration statute. In addressing the confidentiality provisions in arbitration agreements, the statute further provides: “[a] private arbitration company shall not have any liability for collecting, publishing, or distributing the information required by this section”⁷⁵ In other words, the legislation trumps any conflicting contractual confidentiality provisions.

The legislative history of the recent amendment to the consumer arbitration rules indicates that the authors sought to address the “repeat player” concern:

In 2002, AB 2656 (Corbett, Ch. 1158, Stats. 2002) was introduced in response to skepticism about the fairness of such arbitrations and concerns with the “repeat player” problem in arbitrations, whereby a repeat defendant such as a corporate defendant may, conspicuously or not, receive preferential treatment or rulings from arbitrators who rely on being selected by the corporate defendant to earn a living as an arbitrator. The proponents of AB 2656 argued that, in contrast to public court proceedings, consumer arbitrations are conducted in secret because of arbitration clauses or rules of the designated provider that were designed to impose secrecy--not because there was something inherent in the nature of arbitration or the function of the arbitrator that requires such secrecy. Accordingly, AB 2656 sought to “address these concerns and reduce any bias that may exist in favor of corporate repeat-players in consumer arbitration” by mandating public reporting of certain information by private arbitration companies conducting consumer arbitrations.⁷⁶

Despite those provisions, the author notes that “the longstanding and pervasive issues of arbitration company compliance with the consumer data law appear to persist.”⁷⁷

A subsequent Committee Report states:

The use of mandatory arbitration clauses in consumer contracts has increased immeasurably in recent years and has been highly controversial for a variety of reasons, including issues surrounding concerns of “repeat players” whereby an arbitrator is inclined to rule in favor of corporations that return to them to arbitrate future matters. Concerns are particularly heightened as arbitrators do not have to follow the law, decisions cannot be appealed, and proceedings are often conducted without any opportunity for public scrutiny.⁷⁸

*252 While earlier drafts of the 2014 amendment had several express enforcement mechanisms for violations of the disclosure obligations,⁷⁹ these enforcement mechanisms were dropped from the final legislation.⁸⁰ As discussed in Section I below, we believe, however, that in a talent versus studio arbitration in California, talent should be able to vacate an adverse award if the provider failed to make a disclosure required by the consumer arbitration rules.

We recommend that JAMS and other providers make the provider information set forth in the consumer arbitration rules publicly available in all talent versus studio arbitrations whether or not it is required. Such disclosures will provide greater transparency, improve the arbitrator selection process, and if the facts warrant it, provide evidence for a challenge to the selected provider and/or arbitrator as discussed in Section I below.

B. Proposed Federal Legislation

There is also pending federal legislation that, if passed, would be even more far reaching than the California legislation.⁸¹ Senator Al Franken introduced a bill in 2011 and 2013 that would prohibit all pre-dispute arbitration agreements “if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”⁸² If this legislation passes and talent is considered an “employee,” studios would no longer be able to require pre-dispute arbitration provisions in their talent contracts. Rather, arbitration could only be agreed upon post-dispute. In a letter supporting the legislation, a number of organizations, such as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP), discussing the litigation challenges posed by recent U.S. Supreme Court cases discussed in the next section of this article, stated in pertinent part:

Predispute binding mandatory (or forced) arbitration clauses are proliferating in employment contracts (including minimum wage-workers, whistleblowers, servicemembers, and executives), and in everyday consumer contracts

A series of decisions by the U.S. Supreme Court have broadly interpreted the FAA [Federal Arbitration Act] to allow corporations to insert arbitration clauses in one-sided, non-negotiable contracts. The Court further expanded the FAA's meaning to effectively overcome other federal laws, including those that exhibit *253 a clear congressional intent to preserve consumers' rights, and make it significantly more difficult to challenge even the most abusive forced arbitration clauses

None of the safeguards of our civil justice system are guaranteed for persons attempting to enforce their employment, consumer, antitrust, and civil rights in forced arbitration. There is no impartial judge or jury, but rather arbitrators who rely on major corporations for repeat business. With nearly no oversight or accountability, businesses or their chosen arbitration firms set the rules for the secret proceedings, often limiting the procedural protections and remedies otherwise available to individuals in a court of law

The impact of recent Supreme Court precedent should add urgency for Congress to pass the AFA to enable individuals and small businesses to decide how to resolve disputes, after the dispute arises. The AFA does not seek to eliminate arbitration and other forms of alternative dispute resolution agreed to voluntarily after a dispute arises.⁸³

Business interests, such as the wireless trade group CTIA and the Financial Services Roundtable, an advocacy organization for the U.S. financial services industry, oppose the bill as “a misguided effort to overturn a well-reasoned U.S. Supreme Court decision,”⁸⁴ and the chances that it will be enacted into law anytime soon are considered minimal at best given the current Republican control of Congress.⁸⁵ The bill was sent to a Congressional committee in May 2013, with no reported movement since.⁸⁶

IX. LITIGATION CHALLENGES TO MANDATORY ARBITRATION PROVISIONS

A. *Broad Challenges to Avoid Arbitration Altogether*

As previously discussed, while the major television studios now almost universally insist on mandatory arbitration (regardless of whether they also insist on designating JAMS as the provider), talent almost universally prefers to litigate in court.⁸⁷ Therefore, if there is a mandatory arbitration provision and a dispute develops, litigation counsel for talent should at least explore the possibility of avoiding arbitration altogether.

Contracts between talent and the major studios are subject to the Federal Arbitration Act (“FAA”) because they involve interstate and/or foreign commerce.⁸⁸ The *254 FAA provides that any contract to settle a dispute by arbitration “shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁸⁹ To assure uniform results as to arbitrability of disputes subject to the FAA, conflicting state law is preempted under the Supremacy Clause of the U.S. Constitution⁹⁰

While an arbitration clause can still be invalidated in whole or in part under the FAA on the basis of contractual defenses such as unconscionability, such defenses “cannot justify invalidating an arbitration agreement if the defense applies ‘only to arbitration or [derives its] meaning from the fact that an agreement to arbitrate is at issue.’”⁹¹ This means that the basis for unconscionability cannot be “uniquely applicable” to arbitration.⁹² While it is beyond the scope of this article to discuss in any detail recent decisions upholding arbitration clauses under the FAA, the United States Supreme Court has made clear that this provision reflects both that arbitration is fundamentally a matter of contract, and Congress expressed a “liberal federal policy favoring arbitration.”⁹³ Arbitration agreements, therefore, must be placed on “equal footing with other contracts.”⁹⁴

A contractual clause is unenforceable if it is both procedurally and substantively unconscionable:⁹⁵

“Courts apply a sliding scale: ‘the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.’ Still, ‘both [must] be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.’”⁹⁶

As to the first component, procedural unconscionability:

“‘concerns the manner in which the contract was negotiated and the circumstances of the parties at that time. It focuses on factors of oppression and surprise. The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party.’ ‘The component of surprise arises when the challenged terms are ‘hidden in a prolix printed form drafted by the party seeking to enforce them. Where an adhesive contract is oppressive, surprise need not be shown.’”⁹⁷

As discussed above, in the typical talent-major studio negotiation, the arbitration clause is presented on a non-negotiable, “take it or leave it” basis. Therefore, oppression can *255 often be established. However, because talent is generally represented by counsel and the arbitration clause is not hidden, there is no “surprise.” Nevertheless, if the arbitration clause was non-negotiable, surprise is not needed to establish at least some degree of procedural unconscionability.⁹⁸ Further, talent's ability to negotiate provisions other than the arbitration clause in the contract does not bar a finding of procedural unconscionability if talent had no ability to negotiate the arbitration clause itself.⁹⁹

In contrast to procedural unconscionability, substantive unconscionability “focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience.”¹⁰⁰ Specifically, the fundamental factor in assessing substantive unconscionability is “mutuality”, namely whether the arbitration clause as a whole or in part is “unfairly one-sided.”¹⁰¹

Given the procedural and substantive components of contract unconscionability analysis and the current state of the case law, a frontal challenge to the choice of private arbitration (as opposed to public litigation) will almost certainly fail. While counsel may be able to establish procedural unconscionability, the decision maker on the arbitrability question--whether a judge or an arbitrator--is very unlikely to find that arbitration is in and of itself substantively unconscionable in this context. Simply, such a challenge, which effectively argues that all arbitrations in the talent versus major studio context are inherently bad and “shock the conscience,” is unlikely to succeed especially in the current judicial climate favoring arbitration discussed above. In addition, the challenge also runs the risk of “disproportionately impacting arbitration”¹⁰² since it focuses solely on the arbitration clause.

B. Challenge Limited to the Particular Designated Provider

Since a frontal attack on arbitration itself is almost certain to fail, talent counsel should consider limiting the challenge to the designation of the particular arbitration provider dictated by the studio. Again, talent should be able to establish at least some level of procedural unconscionability if the provider designation was imposed by the studio. In addition, as to substantive unconscionability, as discussed in Section B above, whether acting in concert or not, nearly all of the major television studios are now insisting that JAMS be the provider and this additional fact does arguably tip the balance and “shock the conscience.”

As to whether the designation of a particular provider is substantively unconscionable, courts have held that an arbitration clause is substantively unconscionable *256 where it designates as the arbitrator someone so closely identified with one party that the clause is illusory. In one non-California case, *Nitro Distributing, Inc. v. Alticor*, the court held that defendant company's arbitration agreement, which designated JAMS as the provider, was substantively unconscionable because the procedure to screen, train and hand-pick JAMS arbitrators did “not come close to passing any reasonable test of fairness and neutrality required for a legitimate arbitration proceeding.”¹⁰³ The court also found it telling that with the exception of a few counterclaims, the defendant company never lost in any of its JAMS arbitrations, and that the arbitration process took much longer when the company was defending an arbitration as opposed to when it was the claimant.¹⁰⁴

Further, in *Graham v. Scissors Tail*, a California case, the provider was found to be too closely affiliated with one of the parties.¹⁰⁵ In *Graham*, a contract between a concert promoter and a music artist designated the artist's labor union as the arbitrator. While there was no evidence that the labor union's procedures prevented a party from fairly presenting its position, the court held that the contract that designated the artist's union as arbitrator, which was aligned with its member on the dispute at issue, failed to achieve the “minimum levels of integrity,” and was thus unconscionable.¹⁰⁶

Since JAMS and its neutrals are not formally affiliated with or trained by the major studios, and because JAMS has institutional rules designed to ensure the fairness of its arbitrations, the argument that was successfully made in *Nitro Distributing* and *Graham* will be more difficult to make against JAMS in this context. If there is a repeat provider/player bias, as we suspect, it is much more subtle. California courts have noted, however, that the “repeat player effect” can be a factor in rendering an arbitration provision substantively unconscionable and that various studies have shown that arbitration is “advantageous to employers ... because it reduces the size of the award that an employee is likely to get, particularly if the employer is a ‘repeat player’ in the arbitration system.”¹⁰⁷

The studios, however, have several strong responses to the repeat provider/player argument. First, the studios point to the fact that California courts have held that the “repeat player effect” does not *per se* render an arbitration agreement unconscionable and that “particularized evidence demonstrating” bias must be presented to support the claim.¹⁰⁸ In the talent versus major studio context, the arbitrations are invariably confidential, *257 as dictated by the studios, and the provider typically does not voluntarily (or pursuant to the consumer arbitration rules discussed in Section H) disclose information relevant to the repeat provider/player bias issue. Thus, talent will likely be unable to present the required particularized evidence (even assuming that it exists). Second, the studios will point to both the reputation of JAMS and its neutrals, as well as the institutional safeguards in JAMS' rules--such as talent's participation in the arbitration selection process--as countering any potential repeat provider/player bias.¹⁰⁹

While the studio's arguments are strong, the talent side has valid counters. First, talent will argue that it often has no concrete proof of repeat provider/player bias (or again, in fairness, proof contradicting it) because the studios insist on confidentiality provisions in their arbitration clauses, and because JAMS (and the other providers) do not currently provide the information necessary to establish (or refute) such bias. As one court stated:

“In *Ting v. AT&T*, the Ninth Circuit found a confidentiality clause in an arbitration agreement substantively unconscionable, reasoning as follows: [C]onfidentiality provisions usually favor companies over individuals. In *Cole [v Burns Int'l Sec. Servs.]*, the D.C. Circuit recognized that because companies continually arbitrate the same claims, the arbitration process tends to favor the company. Yet because of plaintiffs' lawyers and arbitration appointing agencies like the [AAA], who can scrutinize arbitration awards and accumulate a body of knowledge on a particular company, the court discounted the likelihood of any

harm occurring from the ‘repeat player’ effect. We conclude, however, that if the company succeeds in imposing a gag order, plaintiffs are unable to mitigate the advantages inherent in being a repeat player.”¹¹⁰

Particularly, if talent asked for the extra disclosures in the contract negotiation stage and/or if JAMS declined to treat the arbitration as a consumer arbitration at the post-dispute stage, the lack of further proof of bias is not the talent's fault. Defenders of mandatory arbitration often state that critics should have the burden of proving repeat provider/player bias.¹¹¹ But because the defenders of mandatory arbitration, namely the providers and the major studios in the talent-major studio arena, control the information necessary to address this issue on an evidentiary, non-anecdotal basis, and have so far refused to provide it, an adverse inference should be drawn against them. Alternatively, defenders of arbitration should have the burden of showing that mandatory arbitration is fair in this context.¹¹²

***258** Second, even without more evidence, the assertion of repeat provider/player bias in the context of a JAMS talent versus studio arbitration rests on more than just theoretical economic incentives. The studios' current near universal designation (whether acting individually or collectively) of JAMS as the provider in their talent contracts, the studios' size and influence in the Los Angeles business community, and the fact that many JAMS neutrals are also “owners” of JAMS are additional facts that suggest JAMS is too closely aligned with the studios. The argument can certainly be made that these facts, and the inferences that can be drawn from them, create at least an appearance of bias that would cause an informed reasonable person to doubt a JAMS' arbitrator's ability to be impartial. The relationship between JAMS and the studios is arguably akin to the relationship between JAMS and the defendant company in *Nitro Distributing*, and the relationship between the music artist and the artist's labor union in *Graham*.

If the provider designation in the arbitration clause is ruled to be unconscionable, what happens next seems to depend on whether the arbitration clause in question provides that in the event the designated provider is stricken, another provider can be appointed in its place. If the clause provides that another provider can be appointed in its place, this alternative method can be followed.¹¹³ In such a case, since the result of a successful challenge will still be an arbitration, albeit one where the provider was not dictated by the studio, such a challenge should not implicate the policies and the recent line of cases favoring and upholding arbitration provisions. Simply, there is no strong federal or state policy favoring one provider or arbitrator over another.

The question on what to do in the case of an unconscionable arbitration provision is more complex if there is no mechanism in the arbitration clause to pick an alternative arbitrator or provider. In a case where AAA was designated as the exclusive provider, but it refused to participate, one court ruled that it had no power ***259** to reform the contract and pick another provider.¹¹⁴ Therefore, the alternative was to publicly litigate the claim in a courthouse.¹¹⁵

C. Challenges to Particular Provisions in Arbitration Clauses

In addition to challenging the designation of a particular provider, talent counsel should determine whether other provisions in the arbitration clause are unconscionable. As previously mentioned, an unconscionable provision is one that lacks mutuality, unduly favors the studios, or is unduly one-sided. If a court or arbitrator deems an unconscionable provision “central” to the arbitration clause, the entire clause will be unenforceable;¹¹⁶ if the unconscionable provision is “collateral,” the provision will be severed, and the rest of the arbitration clause will be enforced.¹¹⁷

While the studio lawyers who invariably draft these provisions are smart lawyers who are aware of the case law and obviously seek to avoid such one-sided provisions, several provisions in historical contracts that we have seen stand out as possibilities for such a challenge. First, many arbitration clauses provide that “arbitrability disputes, including disputes

over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought ... shall be submitted to and ruled on by the Arbitrator.”¹¹⁸ Therefore, if talent claims this delegation is unconscionable, the provider will decide the issue. This commonplace delegation clause, found in JAMS and other providers' rules, and most arbitration clauses we have examined, arguably raises, at minimum, a strong appearance of bias.¹¹⁹ Several California courts have held that such a delegation clause creates a conflict of interest for an arbitrator. For example, one court held that “an arbitrator who finds an arbitration agreement unconscionable would not only have nothing further to arbitrate, but could also reasonably expect to obtain less business in the future, at least from the provider in question.”¹²⁰ A different court expressed a “genuine concern about the potential for the inequitable use of such arbitration provisions in areas, such as employment, where the parties are not at arm's length and do not have equal bargaining power. In these repeat player situations, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable.”¹²¹

Some courts disagree, however. A California appellate court held that the delegation clause at issue in that particular case would no longer be considered unconscionable in light of recently decided United States and California Supreme Court cases:¹²²

*260 “[T]his case raises the issue of whether the application of the unconscionability doctrine to delegation clauses in *Murphy*, *Bruni*, and *Ontiveros* is preempted by the FAA. We are specifically concerned with that part of the analysis of those cases which concluded that delegation clauses are substantively unconscionable due to the financial interest of the arbitrators who would be deciding the delegated issues. That conclusion is based on a belief that an arbitrator would be more likely to rule in favor of enforceability, so that the arbitrator would then be paid to resolve the dispute on the merits. It is further based on a belief that an arbitrator would be more likely to rule on enforceability issues in favor of a “repeat player” who would have further business for an arbitrator who rules that its contract is enforceable. This analysis is nothing more than an expression of a judicial hostility to arbitration, based on the assumption that a paid decisionmaker cannot be unbiased, and it, therefore, is wholly barred by the FAA. Indeed, taken to its logical conclusion, this analysis of bias questions the objectivity of arbitrators as a whole, as the very same argument can be made that an arbitrator will tend to rule *on the merits* in favor of an employer who is a “repeat player,” as opposed to an employee who is not. It is not merely that we disagree with this negative view of arbitrators' ability to set aside their financial interests and resolve cases without bias; the FAA prevents us from accepting that view, *without any evidence that the specific arbitrator to whom the decision making is delegated is biased*. The analysis discriminates against arbitration, putting agreements to arbitrate on a lesser footing than agreements to select any judicial forum for dispute resolution, and it is therefore preempted

The only evidence of procedural unconscionability in the instant case is that the arbitration agreement was in a contract of adhesion. This is some evidence of procedural unconscionability, which must be accompanied by a high showing of substantive unconscionability in order to result in the conclusion that the delegation clause is unenforceable. The only evidence of substantive unconscionability is that the clause is outside the reasonable expectation of the parties. Even if this is true, it is not sufficient to establish unconscionability in the instant case. The delegation clause is not inherently unfair—it is not unilateral; it does not provide for a biased decisionmaker We are simply concerned with a clause which may have been outside the reasonable expectations of the party signing a contract of adhesion. This is not overly harsh or so one-sided as to shock the conscience.”¹²³

Even assuming the validity of this holding, and it is the trend in recently decided cases to overrule or at least criticize earlier cases that were more open to attacks on an arbitration clause,¹²⁴ talent may support an unconscionability claim

by showing potential bias in other ways, including a combination of factors. It is not just that the arbitration clause delegates to the arbitrator to decide disputes concerning arbitrability. As discussed, nearly all studios dictate JAMS as the provider in their contracts. These contracts also include confidentiality provisions,¹²⁵ and JAMS generally refuses *261 to disclose prior results other than the selected arbitrator's cases with the exact studio party (and non-party affiliates involved in the pending dispute) before him or her. Moreover, as discussed in Section F above, the major studios are among the largest employers in Los Angeles, and have a great amount of influence. Talent essentially has no choice but to accept these contracts on the studios' terms. Therefore, the studios collectively dictating JAMS as the provider in light of these circumstances arguably shows one-sidedness, a lack of mutuality, and “shocks the conscience.”

In addition, some courts have held that discovery limitations—even if applied equally—can be unconscionable when one party, such as the studio, has access to the relevant documents and employs many of the witnesses.¹²⁶ Allowing the arbitrator to order further discovery may still not be an “adequate safety valve” to remedy severely restrictive discovery limitations.¹²⁷ Limits on damages, or provisions that unduly shorten the statute of limitations, may also still be unconscionable in certain circumstances.¹²⁸

Such challenges, however, will not be easy to prevail on, as not all instances of a lack of mutuality are substantively unconscionable. Indeed, more recent cases¹²⁹ allow the party with superior bargaining power, the studios here, to impose some degree of lack of mutuality, particularly if it can be justified by legitimate business reasons:

“The *Stirlen* court did not hold that all lack of mutuality in a contract of adhesion was invalid. “We agree a contract can provide a ‘margin of safety’ that provides the party with superior bargaining strength a type of extra protection for which it has a legitimate commercial need without being unconscionable. However, unless the ‘business realities’ that create the special need for such an advantage are explained in the contract itself, which is not the case here, it must be factually established.” The *Stirlen* court found no “business reality” to justify the lack of mutuality, concluding that the terms of the arbitration clause were ““so extreme as to appear unconscionable according to the mores and business practices of the time and place.”¹³⁰

Moreover, courts are starting to hold that case law prior to *ATT Mobility*, which was decided in 2011, may well be preempted by the FAA.¹³¹ Therefore, unconscionability challenges are likely to continue to be an uphill battle for the talent side.

***262 D. Procedural Issues and Who Decides the Challenge**

Talent counsel must bring any litigation challenge to an arbitration clause at the earliest possible time in the proceeding after the basis for the challenge is known.¹³² If talent has “knowledge of facts possibly indicating bias or partiality on the part of an arbitrator,” but remains silent, he or she cannot “later object to the award of the arbitrators on that ground.”¹³³ Thus, failure to raise a challenge may be considered a waiver of the claim.¹³⁴

In addition, talent should file a complaint in a court of competent jurisdiction if talent believes that he or she has a defense to arbitrability and that a court, instead of an arbitrator, should decide that dispute. As previously discussed, the general rule is that defenses that go to the existence of an enforceable arbitration agreement are for the court and not for the arbitrator to decide.¹³⁵ However, if an arbitration clause “clearly and unmistakably” empowers the arbitrator to decide what matters are arbitrable, such a delegation will generally be given effect.¹³⁶ Thus, the studio will generally file a

motion to compel arbitration. Talent counsel may then argue that the arbitration clause is substantively unconscionable; the court must decide whether or not to honor the delegation provision¹³⁷

Regardless of who decides the question of arbitrability, talent counsel should seek discovery on the repeat provider/player bias issues. Courts have ruled that a party must have “particularized evidence” of bias for a challenge on that basis to succeed.¹³⁸ Courts and arbitrators certainly have discretion to allow such discovery before ruling on the bias claim.

E. Judicial Challenges to an Arbitration Award for Failure to Make the Required Disclosures

Under the FAA, an arbitration award may be challenged where “there is evident partiality or corruption in the arbitrators.”¹³⁹ Courts have found “evident partiality” where an arbitrator failed to “disclose to the parties any dealings that might create an impression of possible bias.”¹⁴⁰ Moreover, courts have held that a “reasonable impression *263 of bias sufficiently establishes evident partiality because the integrity of the process by which arbitrators are chosen is at issue in nondisclosure cases.”¹⁴¹ This statutory ground is construed narrowly.¹⁴²

Similarly California law requires that an arbitration award be vacated if an arbitrator fails to “disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware”¹⁴³ Under California law, however, the party challenging the arbitration award does not have to show evident partiality. Instead, the party challenging the arbitration award must only establish that the arbitrator failed to make a required disclosure.¹⁴⁴

The FAA does not preempt California law in this area as the California statutory scheme “seeks to enhance both the appearance and reality of fairness in arbitration proceedings,” which serves the purpose of the FAA by instilling public confidence in arbitration.¹⁴⁵ Therefore, in a talent versus major studio arbitration in California--even under the FAA--talent can vacate an adverse award if the arbitrator did not make a required disclosure, including disclosures under the consumer arbitration rules if they are deemed to apply.¹⁴⁶

X. THE PROVIDERS SHOULD FURTHER ADDRESS THE PERCEPTION OF REPEAT PROVIDER/PLAYER BIAS ON THE MERITS

We submit that the following facts without more, at minimum, create an appearance of bias in the case of a JAMS arbitration of a talent versus major studio dispute: almost all the major studios designate JAMS as the provider in their talent contracts; talent has no real option but to accede to this designation; the studios have great influence in the Los Angeles economy; certain JAMS' neutrals increasingly depend on this business with the creation of its Entertainment Group; JAMS as a for-profit business, including “owner” neutrals, and JAMS' lack of transparency in making available information on the prior results of arbitrations in this area. Some of these facts also apply to ADR, AAA and other providers, but they do not have the same controlling position as the studios' designated provider as does JAMS.

Given the major studios' power at the contract negotiation stage, as well as the current pro-arbitration rulings from the U.S. Supreme Court¹⁴⁷ and other courts *264 following its rulings,¹⁴⁸ it will be difficult for a talent's transactional attorney at the contract negotiation stage and its litigator once a dispute has developed, to avoid mandatory arbitration and/or a particular provider as dictated by the studio. Therefore, at least in the near term, improvements will likely have to come from the providers themselves.

Although JAMS declined to respond to our questionnaire, even where it had the requested information, we respectfully submit that it should reconsider for two key reasons. First, there is a certain responsibility that comes with being the controlling provider in the talent versus major studio arbitration arena. With this responsibility, JAMS as a provider

and its neutrals as individuals should address the repeat provider/player bias concerns by many in the talent community on their merits as opposed to conclusorily dismissing them as sour grapes from the losing side. Second, if JAMS, other providers and neutrals do not address these perceptions on their own, it may get to the point where state or federal legislatures, the courts and/or the marketplace will force JAMS (and other providers) to do so and impose reforms on their own.

We recommend that JAMS and other providers take several voluntary steps to rebut the perception and improve the system. First, greater transparency will go a long way in addressing talents' concerns. Each provider should publish how each of its neutrals, or at least those who regularly handle entertainment cases, have ruled in all prior arbitrations and other contested non-mediation proceedings involving the major studios, and their affiliates, for at least the past five years, which is the time limit provided by law for other required disclosures.¹⁴⁹

Similarly, rather than litigating in each talent versus studio arbitration whether talent is an “employee” of the studio so as to trigger the consumer arbitration disclosure rules, the providers should simply voluntarily treat them as such. This would reduce and potentially eliminate the time and expense of collateral litigation on whether the proper disclosures were made. It would also reduce the risk of the arbitrator making an incorrect determination on the employee issue and the provider not making the required consumer disclosures as a result, which could result in the judicial vacation of the arbitration award.

Our recommendations exist in practice and can be implemented. For example, the International Independent Film & Television Alliance (IFTA) has published summaries and results of all of its arbitration awards since 2007.¹⁵⁰ Providers can also draw upon the experience of Major League Baseball (MLB) and its Basic Agreement which sets the rules for player salary arbitrations.¹⁵¹ While the MLB arbitrators are all drawn from a single provider, currently the AAA labor panel, the process self-corrects for ***265** repeat provider/player bias since all of the awards are publicly disclosed and with this information there is a real ability for each side to strike arbitrators who they believe have demonstrated a bias for one side or the other. The MLB system therefore creates a system and an incentive for the provider and individual arbitrators to play it straight.

Furthermore, while JAMS and other providers may now be bound by the confidentiality provisions in the arbitration provisions of talent-studio contracts, they do not have to be. Providers can stipulate in their rules, as the IFTA does, that “notwithstanding any contrary provision in the parties' contract, the Alliance may in its discretion, but shall not be required to, publicize in publications originating from it, information concerning arbitrations, parties to them, and awards which are made.”¹⁵² Another option is for providers to follow the California consumer arbitration rules, which provide that “[a] private arbitration company shall not have any liability for collecting, publishing, or distributing the information required by this section.”¹⁵³

Even with our transparency recommendations, we believe that some confidentiality can still be maintained. For example, while the disclosures we requested in our questionnaire require the name of the studio party, the questions we asked did not require disclosure of the talent's name or the program in dispute. If the provider would disclose the name of the studio party, the arbitrator(s), counsel for both sides, a brief description of the dispute and claims asserted, and a description of the award, talent would have enough information to intelligently select an arbitrator and make informed preliminary conclusions regarding any repeat provider/player bias concerns. In addition, if the disclosures reveal a factual basis for a bias or other challenge to the provider or selected arbitrator(s), the challenge can be decided based on the evidence and not denied on the basis of an absence of particularized evidence.

We believe that more information and greater transparency will have a significant impact on resolving talents' repeat provider/player concerns. While collecting this information and making these disclosures will admittedly put a greater administrative burden on the providers, even apart from the fact that this collection and disclosure may be required by

the consumer arbitration rules, we submit that the benefits far outweigh the costs. Such disclosures would allow parties to know, and not just speculate, whether a particular provider or arbitrator ruled in favor of the studio parties in a high percentage of prior cases. If the data show that the provider or arbitrator in question has not ruled in favor of the studios in a high percentage of prior cases, talent would have less concern over repeat provider/player bias. Disclosure would also keep the neutrals honest. Each neutral will know that if he or she rules in one sides' favor in a high percentage of cases, he or she will likely be stricken in future arbitrations by the talent side; this will help to level the playing field.

Second, we believe there should be improvements in the arbitrator selection process. Like the public court system, the candidates proposed should be randomly selected among all available candidates affiliated with that provider. Arbitrator *266 selection should not be skewed by subjective selection factors. For example, the National Association of Securities Dealers (NASD) selects arbitrator candidates from a list created at random before allowing the parties to choose.¹⁵⁴ A greater number of candidates than, for example, five for a single party arbitration and ten for a three-party arbitration currently used by JAMS, should be sent to the parties. Unless all the parties agree post-dispute, the candidates should also not be limited to the provider's "entertainment group," whose neutrals may be more influenced by repeat player bias. Generalist judges are the norm in the public court system; we believe that arbitrator selection should more closely resemble the public court system.

The parties should also receive the enhanced disclosures on each arbitrator candidate, so that the parties' strikes can be more intelligently exercised. For example, the disclosures should include how the candidates have ruled in all prior arbitrations involving the major studio party and its affiliates and not just those involving the particular studio party involved in the pending arbitration. Moreover, these disclosures should be made at the arbitrator selection stage and not merely after the selection of the arbitrator, which is currently the case. Indeed, if the information on prior arbitration results is published in advance, as the consumer rules require, the enhanced disclosures are already in the public domain. After the parties exercise their strikes, the providers should choose from the remaining arbitrator candidates at random; the selection should not be skewed by subjective factors.

Third, we believe that JAMS and the other providers should participate in bar and other public forums where these issues are fairly discussed on the merits. For example, panels should be devoted specifically to the issues addressed in this article at the upcoming UCLA and USC Entertainment Law Symposiums where representatives from JAMS, other providers and lawyers from the talent and studio sides can all fairly discuss the issues and possible improvements. Ideally, all participants will have the information on prior arbitration cases we requested in our questionnaire so that the discussion can move beyond anecdotes and the expressions of personal opinions, which the current debate is largely limited to, due to lack of information and transparency.

Fourth, if JAMS and the other providers in the talent versus major studio arbitration space make further disclosures and otherwise engage in the issues discussed in this article, they are not conceding that there is any repeat provider/player bias in the context of these arbitrations. Rather, they are showing concern about the appearance of bias to address these issues on their merits. As Justice Louis D. Brandeis famously wrote: "Sunlight is said to be the best of disinfectants."¹⁵⁵

Footnotes

^{a1} Ron Nessim is a shareholder and Scott Goldman is an associate at Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, RC. in Los Angeles. The views expressed in this article are the authors' alone and should not be attributed to Bird Marella or the other shareholders in the firm.

¹ For purposes of this article, we are considering the major television studios to be CBS/Paramount, Disney/ABC, Fox, NBCUniversal, Sony and Warner Bros.

- 2 “JAMS is the largest private alternative dispute resolution (ADR) provider in the world. With its panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases-- those in which the choice of neutral is crucial.” See JAMS, www.jamsadr.com (last visited Mar. 3, 2015).
- 3 See, e.g., Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008); Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 312-313 (2012); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).
- 4 Sternlight, *supra* note 3, at 1650-51.
- 5 David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1311-12 (2009) (citations omitted).
- 6 See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); see also Nicholas Kristof, *Straight Talk for White Men*, N.Y. TIMES (Feb. 21, 2015), http://www.nytimes.com/2015/02/22/opinion/sunday/nicholas-kristof-straight-talk-for-white-men.html?_r=0 (“[T]he evidence is overwhelming that unconscious bias remains widespread in ways that systematically benefit both whites and men.”).
- 7 This concern comes from our intuition, experience and common sense. It is a “concern” not a proven fact.
- 8 This is the position that Richard Chernick and Joel Grossman, two JAMS neutrals, took in their discussions with us. See notes [29] and [30] and the accompanying text. We have also discussed this position with studio lawyers over the years.
- 9 Erica E. Phillips, *JAMS Leverages History in Hollywood*, DAILY J., (Feb. 16, 2012), <http://www.jamsadr.com/files/Uploads/Documents/Articles/JAMS-leverages-history-Hollywood-2012-02-16.pdf>
- 10 Under [California Code of Civil Procedure Section 638](#), the parties can agree to have disputes decided by a court-appointed judicial reference or “referee,” generally a retired judge. See [CAL. CIV. PROC. CODE § 640 \(2013\)](#) (outlining the procedure for referee selection). While talent still gives up the valuable right to a jury trial, there are advantages to a reference over arbitration. They can include appeal rights, a neutral who must follow the rules of court and make decisions based on the law, and a neutral that is less subject to repeat provider/player bias when he or she is not dependent on referrals from one side, namely the studios, e.g., picked by the parties or the court post-dispute. See [CAL. CIV. PROC. CODE § 645 \(West 2014\)](#); Cal. Rules of Court § 3.904; [CAL. CIV. PROC. CODE § 663 \(West 2014\)](#).
- 11 AAA is a not-for-profit organization that provides alternative dispute resolution services to individuals and organizations who wish to resolve conflicts out of court. See AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org> (last visited Mar. 24, 2015).
- 12 Phillips, *supra* note 9.
- 13 See, e.g., *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns*, FED. TRADE COMMISSION, (Jan. 3, 2013) <http://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>; *Apple Used Monopolistic Methods, Two Suits Claim*, L.A. TIMES, (Oct. 11, 2007), available at 2007 WLNR 19919764; *Microsoft To Amend Monopolistic Practices*, NEWSDAY, (July 17, 1994), available at 1994 WLNR 434316.
- 14 ADR provides neutral mediators, including attorneys and retired judges, to resolves disputes. See ADR SERVICES, INC., <https://www.adrservices.org> (last visited Mar. 31, 2015).
- 15 The Fin-Syn Rules were enacted in 1970 and codified at [47 C.F.R. § 73.658\(j\)](#). The Fin-Syn Rules were modified and amended in 1993 and repealed in 1995. [60 Fed. Reg. 48, 907 \(1995\)](#).
- 16 See RONALD J. NESSIM, *Profit Participation Claims*, in ENTERTAINMENT LAW & LITIGATION 551, 557-58, (Charles J. Harder ed., 2014) (discussing several of these cases).
- 17 For example, in July 2010, a Los Angeles jury awarded \$270 million (plus \$50 million in court-awarded prejudgment interest) against the Walt Disney Company in a dispute over profits from the television program *Who Wants to Be a Millionaire?*.

Matthew Belloni, *Jury Throws Books at Dis: Celador's \$270 Mil Victory Is Latest Defeat for "Hollywood Accounting,"* HOLLYWOOD REPORTER, July 8, 2010; see also [Ladd v. Warner Bros. Entertainment, Inc.](#), 184 Cal. App. 4th 1298 (2010).

18 See Nessim, *supra* note 16, at 558-59 (explaining the economic motives of a vertically integrated entertainment company when it produces a television program and also airs it on its affiliate networks). With increased use of arbitration provisions, and clauses that virtually allow the studios to self-deal and license programs at less than fair market value with related networks, and other pro-studio provisions, this litigation may well have reached its high water mark in recent years. *Id.* at 560-61.

19 Phillips, *supra* note 9.

20 These reasons have been told to us by attorneys for studios and arbitrators in discussions we have had with them in connection with this article and over the years.

21 We have discussed these beliefs and reasons with transactional lawyers and litigators on the talent side in connection with this article and over the years. We also share these beliefs based on our own experiences.

22 JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES (Jul. 1, 2014), available at <http://www.jamsadr.com/rules-comprehensive-arbitration> [hereinafter JAMS RULES & PROCEDURES].

23 These reasons have been told to us by attorneys for studios and arbitrators in discussions we have had with them in connection with this article and over the years.

24 See PRACTICE: ENTERTAINMENT AND SPORTS, NEUTRALS, <http://www.jamsadr.com/services/xpqServiceDetail.aspx?xpST=ServiceDetail&service=474&op=professionals&ajax=no> (last visited Mar. 3, 2015). JAMS describes this Group as follows:

"The JAMS Entertainment and Sports Group consists of the best Entertainment and Sports ADR professionals in the country-- retired federal, state trial and appellate judges and former entertainment litigators." *Id.*

25 *Id.*

26 Phillips, *supra* note 9.

27 We have discussed these beliefs and reasons with transactional lawyers and litigators on the talent side in connection with this article and over the years. We also share these beliefs based on our own experiences.

28 Justin Scheck, *JAMS Reverses Class Action Policy*, THE RECORDER (Mar. 11, 2005), available at <https://advance.lexis.com/document/?pdmfid=1000516&crd=07962b52-8759-4d3f-a44f-d9ed833525c9&pddocfullpath=%2Fshared%2Fdocument%2Flegalnews%2Furn%3AcontentItem%3A53VP-P2R1-DY35-FIT2-00000-00&pddocid=urn%3AcontentItem%3A53VP-P2R1-DY35-FIT2-00000-00&pdcontentcomponentid=7600&comp=knthk&earg=sr6&prid=6b9dbc29-a0f8-40ba-acd2-13363351186a>.

29 See RICHARD CHERNICK, ESQ., <http://www.jamsadr.com/chernick/> (last visited Mar. 25, 2015).

30 See JOEL M. GROSSMAN, ESQ., <http://www.jamsadr.com/grossman/> (last visited Mar. 25, 2015).

31 Letter from Ronald J. Nessim, Principal, Bird Marella, P.C., to Richard Chernick, JAMS (May 31, 2013) (on file with author).




32 See  CAL. CIV. PROC. CODE § 1281.96 (West 2015).

33 Email from Richard Chernick to Ronald Nessim (July 13, 2013) (on file with author).

34 EDWARD BRUNET ET AL., ARBITRATION LAW IN AMERICA 151 (2006).

35 *JAMS Clause Workbook*, JAMS, 1 (2011), available at <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>.

36 *Id.* at 2.

- 37  [Howsam v. Dean Witter Reynolds, Inc.](#), 537 U.S. 79, 83 (2002) (citing [AT&T Techs., Inc. v. Commc'ns. Workers](#), 475 U.S. 643, 649 (1986)).
- 38 JAMS rules are deemed incorporated if JAMS is designated as the provider even if its rules are not expressly incorporated in the arbitration provision: “The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ... whenever they have provided for Arbitration by JAMS under its Comprehensive Rules or for Arbitration by JAMS without specifying any particular JAMS Rules” JAMS RULES & PROCEDURES, *supra* note 22, Rule 1.
- 39 *Id.*
- 40  CAL. CIV. PROC. CODE § 1281.9(a) (West 2003).
- 41 CAL. CIV. PROC. CODE § 170.1(a)(8)(A) (2011).
- 42  CAL. CIV. PROC. CODE § 1281.9(a)(3), (a)(4), (d) (West 2003); *see also* Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Cal. R. Ct. (2002), std. 7(d)(4)(A)-(C), *available at* http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf [hereinafter Ethics Standards].
- 43 CAL. CIV. PROC. CODE § 170.1(a)(8)(B)(ii) (West 2011). A “legal affiliate” of a party to an arbitration “must be involved in the transaction, contract or facts that gave rise to the issues” being arbitrated. [Hayden v. Robertson Stephens, Inc.](#), 150 Cal. App. 4th 360, 363, 366-67 (2007).
- 44 Ethics Standards, *supra* note 42, std. 2(p).
- 45 *See* JAMS Clause Workbook, *supra* note 35, at 4-5.
- 46 In the *Homicide: Life on the Streets* and in the *Will & Grace* cases we litigated in Superior Court, we successfully asserted intentional torts against the studio that survived summary judgment. In the *Homicide* case, the case settled shortly before the start of trial where we would have sought punitive damages. In the *Will & Grace* case, the case settled after a two month jury trial and just before the jury was going to begin the punitive damages phase on the fraud claim we asserted. *See* Nessim, *supra* note 16, at 429-32.
- 47 David Nusbaum, *Largest Private-Sector Employers*, L.A. BUS. J., Sept. 3, 2012, at 19-22.
- 48 Based on contracts we have seen and our discussions with other lawyers who practice in this area, we believe that the major studios insist on mandatory JAMS arbitrations in most of the contracts they enter into; they are not limited to talent contracts.
- 49 We obtained this information by calling JAMS on January 16, 2014 and asking for it.
- 50 *Id.*
- 51 *Id.*
- 52 The administrative fee is \$400 for every 10 hours that the neutral works; after 30 hours, the administrative fee turns to 10%. We received this information, and the information cited in the text, in discussions with an independent neutral and neutrals associated with JAMS, ADR and AAA.
- 53 We have discussed with Messrs. Chernick and Grossman that they and other JAMS neutrals are “owners” of JAMS. We were told by several non-JAMS neutrals that we talked to that JAMS is unique among providers in this regard.
- 54 *See* JAMS RULES & PROCEDURES, *supra* note 22, Rule 15(b).
- 55 *Id.*
- 56 *Id.*

57 *Id.* at 17; [CAL CODE OF CIV. PROC. § 1281.9\(a\)](#) (West 2003).

58 [CAL. CIV. PROC. CODE § 1281.9\(a\)](#) (West 2003); [CAL. CIV. PROC. CODE § 170.1](#) (West 2003).

59 [CAL. CIV. PROC. CODE § 170.1\(8\)\(A\)](#) (West 2003).

60 Ethics Standards, *supra* note 42, std. 3.

61 After receipt of the required disclosures, which must be updated continually throughout the arbitration process, any party may challenge the continued service of an arbitrator “for cause” within 15 calendar days for certain disclosures or at any time before the end of the proceeding on certain other grounds. [CAL. CIV. PROC. CODE § 1281.91](#) (West 2003); [CAL. CIV. PROC. CODE § 170.1](#) (West 2003). “For cause” challenges are limited to an arbitrator’s failure to make the required disclosures or the contents of the disclosures. [CAL. CIV. PROC. CODE § 1281.91\(a-b\)](#) (West 2003). Per JAMS rules, JAMS itself decides whether a “for cause” challenge is valid. JAMS RULES & PROCEDURES, *supra* note 22, Rule 15(i).

62 [Armendariz v. Found. Health Psychcare Servs., Inc.](#), 24 Cal. 4th 83, 111 (2000) (citing [Cole v. Burns Int’l Sec. Servs.](#), 105 F.3d 1465, 1485 (D.C. Cir. 1997)).

63 Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not be an All or Nothing Proposition*, 87 IND. L.J. 289, 312-313 (2012) (footnotes omitted).

64 We received this information, and the information cited in the text, in discussions with independent neutrals and neutrals associated with JAMS, ADR and AAA. We promised these individuals that we would maintain their anonymity.

65 This generalization comes from our knowledge and experience with the transactional lawyers and litigators representing talent and the studios.

66 See notes 40-44 and associated text above.

67 [CAL. CIV. PROC. CODE § 1281.96](#) (West 2003) (amended 2015).

68 Ethics Standards, *supra* note 42, std. 3.

69 *Id.* at 4.

70 [CAL. CIV. PROC. CODE § 1281.96](#) (West 2015).

71 [CAL. CIV. PROC. CODE § 1281.96](#) (West 2015).

72 We have seen newer contracts that have so provided and have been told this by talent transactional lawyers.

73 The common law test of an employment relationship is “whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired” [S.G. Borello & Sons v. Dept. of Ind. Relations](#), 48 Cal. 3d 341, 404 (1989) (citing *Tieberg v. Unempl. Ins. App. Bd.*, 2 Cal. 3d 943, 946 (1970)). *Borello* also recognized secondary factors to be considered including whether the principle had the “right to discharge at will, without cause,” whether the “one performing services is engaged in a distinct occupation or business,” and “whether the principle or the worker supplies the instrumentalities, tools and the place of work” *Id.* See also [Von Beltz v. Stuntman, Inc.](#), 207 Cal. App. 3d 1467, 1489 (1989) (noting that in *Home Box Office v. Directors Guild of Am.*, the court held an entertainment company’s treatment of freelance directors as employees for tax purposes and reporting of their compensation on W-2 forms suggested that directors were employees of the company)(citing [Home Box Office](#), 531 F. Supp. 578, 594 (S.D.N.Y. 1982)).

74

In *Teiberg v. Unempl. Ins. App. Bd.*, 2 Cal. 3d 943, 952-53 (1970), screenwriters for the television show *Lassie* were found to be employees because the “evidence [was] clearly sufficient to show that Lassie [Television] exercised considerable control over the manner and means by which a writer fabricated a teleplay from a story.” Even though several of the secondary factors of the common law test of an employment relationship suggested an independent contractor relationship, the court held such factors may be of “minute consequence” where there is “ample evidence” of the employer’s right to control. *Id.* at 953.

75

 CAL. CIV. PROC. CODE § 1281.96 (West 2015).

76

June 23, 2014, Cal. Comm. Rep., Assemb. B. 802 (Cal. 2014).

77

Id. (citing Jung, et al, Reporting Consumer Arbitration Data in California (Mar. 15, 2013) (*available at* <http://gov.uchastings.edu/public-law/index.php>.)

78

Aug 18, 2014, Cal. Comm. Rep., Assemb. B. 802 (Cal. 2014).

79

May 13, 2013, Cal. Assemb. B. 802 (Cal. 2013).

80

A Committee Report states: As currently drafted, this bill would codify the Legislature’s intent that private arbitration companies comply with all legal obligations of the resulting statute. Even absent that language, all statutes have the force and effect of law and persons subject to statutes must comply with the obligations imposed. This language is intended to operate as a placeholder for an enforcement mechanism which has yet to be agreed upon by the author and stakeholders. Accordingly, the author should continue to work with this Committee during the process of developing an appropriate enforcement mechanism. *Id.* June 23, 2014, Cal. Comm. Rep., Assemb. B. 802 (Cal. 2014).

81

Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013).

82

Id.

83

Letter from the Honorable Patrick J. Leahy, Chairman, and the Honorable Charles Grassley, Ranking Member, Chairman, U.S. Senate Committee on the Judiciary (Dec. 16, 2013).

84

David Lazarus, *Bill Aims To Restore Consumers’ Right to Sue*, L.A. TIMES, Oct. 18, 2011 (opposing the 2011 version of the bill).

85

According to govtrack.us, the bill has a 3% chance of being enacted. Govtrack.us, <https://www.govtrack.us/congress/bills/113/s878> (last visited Oct. 24, 2014).

86

Id.

87

This is based on our knowledge, experience and discussions with talent and studio lawyers over the years, and in connection with the preparation of this article.



88

 9 USC § 1 *et seq.*

89

 9 U.S.C.A. § 2.

90

See, e.g.,  *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109 (2013);  *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

91


 *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 921 (9th Cir. 2013) (citations omitted).

92

Id.

- 93  [AT&T Mobility LLC v. Concepcion](#), 131 S. Ct. 1740, 1742 (2011); *see also*  [Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.](#), 460 U.S. 1, 24 (1983).
- 94  [AT&T Mobility LLC](#), 131 S. Ct. at 1745.
- 95  [Davis v. O'Melveny & Myers](#), 485 F.3d 1066, 1072 (9th Cir. 2007) (citations omitted).
- 96 *Id.*
- 97  [Nyulassy v. Lockheed Martin Corp.](#), 120 Cal. App. 4th 1267, 1281 (2004) (citation omitted).
- 98 *Id.* (holding that when an adhesive contract is oppressive, surprise does not need to be shown); *see also*  [Malone v. Superior Court](#), 226 Cal. App. 4th 1551, 1561 (2014).
- 99  [Graham v. Scissor-Tail, Inc.](#), 28 Cal. 3d 807, 818-19 (1981) (holding the agreement at issue was a “contract of adhesion” because the terms allegedly subject to negotiation were of “relativity minor significance” compared to the terms imposed by the defendant).
- 100  [Nyulassy](#), 120 Cal. App. 4th at 1281 (citations omitted).
- 101 *Id.*
- 102  [Chavarria](#), 733 F.3d at 921 (*citing*  [AT&T Mobility LLC](#), 131 S. Ct. at 1748); *see also*  [Malone v. Superior Court](#), 226 Cal. App. 4th 1551, 1559-71 (2014).
- 103  [Nitro Distrib., Inc. v. Alticor, Inc.](#), 2005 WL 6936246, at * 13 (W.D. Mo. Sept. 16, 2005). The court used the term “Amway” to collectively refer to all three defendant entities: Amway, Alticor and Quixtar
- 104 *Id.*
- 105  [Graham](#), 28 Cal. 3d 807.
- 106  *Id.* at 826-28.
- 107  [Armendariz v. Found. Health Psychcare Servs., Inc.](#), 24 Cal. 4th 83, 115 (2000). *See generally*  [Ovitz v. Schulman](#), 133 Cal. App. 4th 830, 839 (2005)(citation omitted)(citing a report that discussed concern for “bias, or appearance of bias, that may flow from one side in an arbitration being a source or potential source of additional employment, and thus additional income, for the arbitrator”).
- 108  [Malone v. Superior Court](#), 226 Cal. App. 4th 1551, 1569-71 (2014); [Drucker v. Siebel Sys., Inc.](#), 2010 WL 1758883, at *5 (N.D. Cal. Apr. 30, 2010);  [Nagrampa v. MailCoups, Inc.](#), 469 F.3d 1257, 1285 (9th Cir. 2006);  [Engalla v. Permanente Med. Grp., Inc.](#), 15 Cal. 4th 951, 985 (1997) (noting only that the “repeat player effect” did not *per se* render an arbitration agreement unconscionable).
- 109  [Armendariz](#), 24 Cal. 4th at 111 (*citing*  [Cole v. Burns Int'l Sec. Servs.](#), 105 F.3d 1465, 1485 (D.C. Cir. 1997)).
- 110  [Davis v. O'Melveny & Myers](#), 485 F.3d 1066, 1078 (9th Cir. 2007).

- 111 Jean R. Sternlight, *Fixing the Mandatory Arbitration Problem: We Need The Arbitration Fairness Act of 2009*, DISPUTE RESOLUTION MAGAZINE, Fall 2009, at 5 (“Defenders of mandatory arbitration play a rhetorical game when they suggest critics should have the burden of proving the practice is unfair, instead of requiring defenders to prove the practice is fair”).
- 112 See, e.g., Judicial Council of California Civil Jury Instructions (2014), CACI No. 203; CAL. EVID. CODE § 412 (West 1965);  [Largey v. Intrastate Radiotelephone, Inc.](#), 136 Cal. App. 3d 660, 672 (1982) (predecessor of CACI No. 203 was properly given because “[a] jury could well find corporate records concerning the date of a board meeting to be much stronger and more satisfactory than the recollection several years later of persons who attended such meeting.”); CACI No. 204; CAL. EVID. CODE § 413 (West 1965);  [Bihun v. AT&T Info. Sys., Inc.](#), 13 Cal. App. 4th 976, 994 (1993) (in an action against an employer for sexual harassment, trial judge properly instructed jurors that if plaintiff’s personnel file was willfully suppressed, they could draw an inference that it contained something damaging to employer’s case), but see  [Lakin v. Watkins Associated Indus.](#), 6 Cal. 4th 644, 664 (1993) (disapproving of *Bihun* on other grounds);  [Williamson v. Superior Court of LA. Cnty.](#), 21 Cal. 3d 829, 835 fh. 2 (1978) (“A defendant is not under a duty to produce testimony adverse to himself, but if he fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse.”);  [Thomas v. Lusk](#), 27 Cal. App. 4th 1709, 1717 (1994) (“[T]he burden of proving an element of a case is more appropriately borne by the party with greater access to information.”); see also  [Wolf v. Superior Court](#), 107 Cal. App. 4th 25, 36 (2003) (“In cases where the financial records essential to proving the continent compensation owed are in the exclusive control of the defendant, fundamental fairness, the ‘lodestar for analysis under Evidence Code section 500, requires shifting the burden of proof to the defendant.”) (citation omitted).
- 113  [Graham v. Scissor-Tail, Inc.](#), 28 Cal. 3d 807, 831 (1981) (In *Graham*, the agreement did not appear to provide for an alternative method to pick an arbitrator but the court permitted the parties to agree on another arbitrator despite the arbitration provision being held unconscionable.).
- 114  [Martinez v. Master Protection Corp.](#), 118 Cal. App. 4th 107 (2004).
- 115 *Id.*
- 116  [Armendariz](#), 24 Cal. 4th at 124.
- 117 *Id.*
- 118 See JAMS RULES & PROCEDURES, *supra* note 22, Rule 11.
- 119   [Murphy v. Check ‘N Go of Cal., Inc.](#), 156 Cal. App. 4th 138, 145 (2007).
- 120  [Ontiveros v. DHL Express \(USA\), Inc.](#), 164 Cal. App. 4th 494, 506-07 (2008).
- 121  [Ontiveros](#), 164 Cal. App. 4th at 505; see also  [Mercuro v. Superior Court](#), 96 Cal. App. 4th 167, 178 (2002).
- 122  [Malone v. Superior Court](#), 226 Cal. App. 4th 1551 (2014).
- 123  [Malone](#), 226 Cal. App. 4th at 1569-71 (emphasis added)(footnotes omitted).
- 124 See, e.g.,  [Tiri v. Lucky Changes, Inc.](#), 226 Cal. App. 4th 231, 243-250 (2014);  [Tompkins v. 23andMe, Inc.](#), 2014 WL 2903752, at *17 (N.D. Cal. June 25, 2014).
- 125 Almost all of the talent-studio arbitration clauses we examined had strict confidentiality requirements. While a confidentiality provision is not *per se* unconscionable, an overly broad confidentiality provision, even if mutual on its face, can, as discussed above, be substantively unconscionable because one side is precluded from seeking out others to obtain helpful information

and other persons are prevented from building related claims.  [Davis v. O'Melveny & Meyers](#), 485 F.3d 1066, 1078-79 (9th Cir. 2007).





126

See  [Martinez v. Master Protection Corp.](#), 118 Cal. App. 4th 107, 118-19 (2004).

127

 [Fitz v. NCR Corp.](#), 118 Cal. App. 4th 702, 717-18 (2004).

128

See  [Davis](#), 485 F.3d at 1066 (arbitration agreement held unconscionable because it was presented as “take-it or leave-it,” shortened the statute of limitations (one year), contained an overly broad confidentiality provision, lacked mutuality and prohibited administrative claims);  [Armendariz v. Found. Health Psychcare Servs., Inc.](#), 24 Cal. 4th 83, 118 (2000);  [Stirlen v. Supercuts](#), 51 Cal. App. 4th 1519 (1997); [Martinez](#), 118 Cal. App. 4th at 107 (arbitration agreement held unconscionable because it was a condition of employment, lacked mutuality, required parties to split the cost and post fees in advance, and shortened the statute of limitations (6 months));  [Fitz](#), 118 Cal. App. 4th at 702 (arbitration agreement held unconscionable because it was presented as “take-it or leave-it,” lacked mutuality and had overly restricted discovery rights).




129

See, e.g.,  [Teimouri v. Macy's Inc.](#), 2013 WL 2006815, at *30-33 (Cal. Ct. App. May 14, 2013).

130

 [Armendariz](#), 24 Cal. 4th at 117 (internal citation omitted).

131

See  [Malone v. Superior Court](#), 226 Cal. App. 4th 1551, 1568-70 (2014) (relying on  [Sonic-Calabasas A, Inc. v. Moreno](#), 57 Cal. 4th 1109 (2013), *cert. denied*, 134 S. Ct. 2724 (2014);  [AT&T Mobility LLC v. Concepcion](#), 131 S. Ct. 1740 (2011)).

132

 [Health Servs. Mgmt. Corp. v. Hughes](#), 975 F.2d 1253, 1264 (7th Cir. 1992).

133

Id.

134

[PaineWebber Grp., Inc. v. Zinsmeyer Trusts P'ship](#), 187 F.3d 988, 995 (8th Cir. 1999).


135

See  [Buckeye Check Cashing, Inc. v. Cardegna](#), 546 U.S. 440, 444-46 (2006).




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 [Howsam v. Dean Witter Reynolds, Inc.](#), 537 U.S. 79, 83-84 (2002).

137

See  [Ontiveros v. DHL Express \(USA\), Inc.](#), 164 Cal. App. 4th 494, 503-08 (2008).

138

See  [Nagrampa v. MailCoups, Inc.](#), 469 F.3d 1257, 1285 (9th Cir. 2006); [Drucker v. Siebel Sys., Inc.](#), 2010 WL 1758883, at *5 (N.D. Cal. Apr. 30, 2010);  [Engalla v. Permanente Med. Grp., Inc.](#), 15 Cal. 4th 951, 985 (1997) (noting only that the “repeat player effect” did not per se render an arbitration agreement unconscionable);  [Malone v. Superior Court](#), 226 Cal. App. 4th 1551, 1569-71 (2014).

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 9 U.S.C. § 10(a)(2)(2002).

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 [New Regency Prods., Inc. v. Nippon Herald Films, Inc.](#), 501 F.3d 1101, 1105 (9th Cir. 2007).

141

[Woods v. Saturn Distribution Corp.](#), 78 F.3d 424, 427 (9th Cir. 1996).

142

See  [Oxford Health Plans LLC v. Sutter](#), 133 S. Ct. 2064, 2068-69 (2013).

- 143  CAL. CIV. PROC. CODE § 1286.2(a)(6)(A) (West 2002).
- 144 *Id.*
- 145  *Ovitz v. Schulman*, 133 Cal. App. 4th 830, 853 (2005).
- 146  *Gray v. Chiu*, 212 Cal. App. 4th 1355, 1364-66 (2013) (This case involved a consumer arbitration where counsel for the defendant was affiliated with the same provider organization as the arbitrator. The appellate court vacated the award because the arbitrator failed to disclose the relationship between defense counsel and the provider organization as required under the consumer arbitration rules.).
- 147 *See, e.g.*,  *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013);  *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S.Ct. 500 (2012);  *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012);  *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
- 148 *See, e.g.*,  *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013);  *Kilgore v. KeyBank, National Association*, 673 F.3d 947 (9th Cir. 2012).
- 149  CAL. CIV. PROC. CODE § 1281.9(a)(3), (a)(4), (d) (West 2003); *see also* Ethics Standards, *supra* note 42, std. 7(d)(4) (A)-(C).
- 150 Recent Awards, IFTA, <http://www.ifta-online.org/recent-awards> (last visited Feb. 27, 2015).
- 151 *See* MLB Collective Bargaining Agreement, art. VI(E) (2012-2016), *available at* http://mlb.mlb.com/pa/pdf/cba_english.pdf.
- 152 *Rule for Rules for International Arbitration* §16.6, IFTA, <http://www.ifta-online.org/rules-international-arbitration> (last visited Feb. 27, 2015).
- 153  CAL. CIV. PROC. CODE § 1281.96(e) (2015).
- 154 *See* Douglas J. Schultz, *The New NASD Arbitrator Selection Process-- NLSS, Securities, Arbitration Commentator*, <http://www.sacarbitration.com/nasd.htm> (last visited Feb. 27, 2015).
- 155 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Frederick A. Stokes Co. 1932) (1914) (stating “[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman”).

22 UCLAELR 233