



REVIEW OF RECENT CASES:
Move, Inc. v. Citigroup Global Markets, Inc.

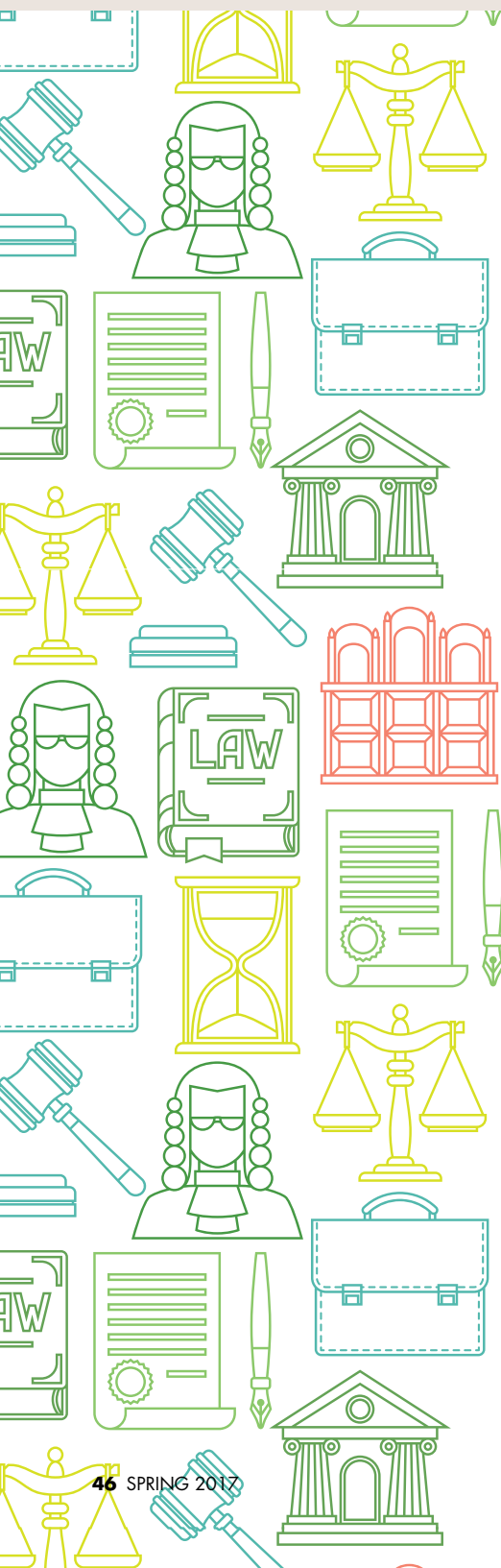
CAN A DISTRICT COURT VACATE ARBITRATION AWARDS WHENEVER IT FINDS ARBITRATORS LIED ABOUT THEIR QUALIFICATIONS?

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Litigation can be expensive and time consuming. To control these risks, parties often seek alternative dispute resolution such as arbitration. The Federal Arbitration Act (FAA) reflects national policy favoring arbitration with limited review to maintain finality. Under FAA, a motion to vacate an arbitration award must be served within three months after the award was filed or delivered. 9 U.S.C. § 12. The “pro-arbitration policy relies on the assumption that the forum is fair” and due process is preserved. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Berry*, 92 Fed.Appx. 243, 246 (6th Cir. 2004) (unpublished). So vacatur is available if an arbitrator is guilty of any “misbehavior by which the rights of any party have been prejudiced.” 9 U.S.C. § 10(a)(3).

What happens when a party finds out an arbitrator lied about his or her qualifications more than three months after an award was made? Can a district court still vacate the award? The US Court of Appeals for the Ninth Circuit recently answered this question in *Move, Inc. v. Citigroup Global Markets, Inc.* 840 F.3d 1152, 1154 (9th Cir. 2016).

Move, Inc., had an investment account with Citigroup Global Markets, Inc. Move claimed Citigroup mismanaged



\$131 million of Move’s funds by investing in speculative auction rate securities. Move began proceedings to arbitrate its case against Citigroup before a three-member panel from the Financial Industry Regulatory Authority (FINRA). FINRA gave the parties rosters of proposed arbitrators including chairpersons. FINRA requires its arbitrators to disclose all material information to parties and permanently disqualifies any arbitrator who fails to do so. Although it is not necessary to be an attorney to serve as an arbitrator or serve on FINRA’s roster, it was important to Move that the chairperson be an experienced attorney because the case involved a complex security issue. Move chose James H. Frank because, according to his disclosure, he had been a lawyer since 1975 and was licensed to practice in California and New York. Frank served as chairperson, and the panel returned a unanimous award denying Move’s claim.

Over four years later, Move learned Frank had lied about being a licensed attorney. FINRA confirmed this and removed Frank from its roster. Move filed a complaint and motion to vacate the arbitration award in district court because of Frank’s misrepresentation, arguing the deadline for the motion should be equitably tolled. Citigroup moved to dismiss. The court denied Move’s motion to vacate and granted Citigroup’s motion to dismiss. “Noting that equitable tolling under the FAA presented an ‘unsettled question of law’ in this circuit, the court ruled that equitable tolling is available, but that Move failed to demonstrate an adequate ground for vacatur under the FAA.” *Id.* at 1155.

The Ninth Circuit reversed and held Move was entitled to vacate the arbitration award.

THE FEDERAL ARBITRATION ACT IS SUBJECT TO EQUITABLE TOLLING

Addressing this issue of first impression on de novo review, the Ninth Circuit held “the FAA is subject to the established doctrine of equitable tolling.” *Id.* at 1158. In a unanimous

opinion, Senior Circuit Judge Dorothy W. Nelson acknowledged other circuits have conflicting case law and most circuits—including the Ninth—have previously declined to rule definitively on whether equitable tolling applies to the FAA. But there is a “rebuttable presumption that limitations periods are subject to equitable tolling periods,” which can be only “overcome by the text or purpose of a statute.” *Id.* at 1156–57. And “[n]either the text, nor the structure, nor the purpose of the FAA is inconsistent with equitable tolling.” *Id.* at 1157. The court explained “[b]alancing the needs for both finality and due process, the arbitral process will not be disrupted if parties are permitted to satisfy the high bar of equitable tolling in limited circumstances. More importantly, permitting equitable tolling will enhance both the accuracy and fairness of arbitral outcomes.” *Id.* at 1158.

VACATUR IS APPROPRIATE IF AN ARBITRATOR’S DECEPTION IS MATERIAL

Addressing another issue of first impression on de novo review, the Ninth Circuit held “vacatur is proper where an arbitrator’s purposeful and material deception resulted in his selection as the chairperson of a panel.” *Id.* The court acknowledged no circuit has previously addressed this issue. *Id.* But the court explained that, to determine whether an arbitrator’s misbehavior prejudiced a party and requires vacatur, the court asks “whether the parties received a fundamentally fair hearing.” *Id.* The court found it is fundamentally unfair when an arbitrator lies about a qualification that is relied on as a criterion for selection or when the lie is enough to get the arbitrator removed from the roster and permanently disqualified.

TIPS FOR PARTIES TO AN ARBITRATION AWARD

A district court may vacate an arbitration award whenever it finds an arbitrator lied about his or her qualifications if

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the arbitrator's deception prejudiced a party, and if the party moves to vacate the award within three months of the award or the party meets the requirements of equitable tolling. On the issue of prejudice, the party should argue the lie was material. For example, the deceit was enough to disqualify the arbitrator from the roster; or but for the lie the party would have chosen a different arbitrator. Notably, a party does not necessarily have to show a different arbitrator or panel would have reached a different result because "there is simply no way to determine whether that was the case." *Id.* at 1159. Moreover, as in *Move*, a party does not have to show the arbitrator lied about a requirement to serve as an arbitrator. On the issue of equitable tolling, the party should argue, among other things, it acted with diligence and justifiably relied on the arbitrator's proffered qualifications, and tolling would not prejudice the opposing party.

A party seeking to avoid vacatur should of course try to take the opposite position of the arguments laid out above. In addition, the party should argue the opinion in *Move* is distinguishable as a narrow holding made "under the unique set of facts of [that] case." *Id.*

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