

3-1-2010

Beyond Reproach: Has the Doctrine of Arbitral Immunity Been Extended Too Far for Arbitration Sponsoring Firms?

Sara Roitman

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Consumer Protection Law Commons](#), and the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Sara Roitman, *Beyond Reproach: Has the Doctrine of Arbitral Immunity Been Extended Too Far for Arbitration Sponsoring Firms?*, 51 B.C.L. Rev. 557 (2010), <http://lawdigitalcommons.bc.edu/bclr/vol51/iss2/6>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

BEYOND REPROACH: HAS THE DOCTRINE OF ARBITRAL IMMUNITY BEEN EXTENDED TOO FAR FOR ARBITRATION SPONSORING FIRMS?

Abstract: With the increase of mandatory arbitration agreements in consumer contracts, private arbitration firms emerged to administer arbitration proceedings between consumers, credit card companies, financial institutions, and debt-collection entities. Because of the enormous market for consumer arbitration services, firms have strong financial incentives to ensure clients remain satisfied with their services. Despite conflict of interest concerns, lawsuits alleging that firms violated ethical and contractual obligations to provide neutral arbitration proceedings have been largely unsuccessful because firms escape liability under the doctrine of arbitral immunity. After providing a history of arbitral immunity, this Note focuses on a novel approach taken by San Francisco City Attorney Dennis Herrera that challenges a firm's immunity on the grounds that the city is acting in a civil law enforcement capacity and only seeking equitable relief. This Note discusses the merits of San Francisco's approach, its possible replication in other states, and the ultimate need for comprehensive legislative reform.

INTRODUCTION

Anastasiya Komarova was the victim of mistaken identity after her credit card company confused her with a different customer, Anastasia Komorova, and incorrectly assigned the other woman's debt to her account.¹ The company later sold her debt to a third-party collection agency who attempted to collect Anastasia's debt from Anastasiya, despite being informed that the women were two different people living at different addresses.² The agency ultimately issued a claim against Anastasiya and scheduled an arbitration hearing for the matter.³ The company administering the arbitration, National Arbitration Forum ("NAF"), however, failed to notify Anastasiya (or Anastasia) of the hearing.⁴ Consequently, the matter was unopposed and an arbitrator issued

¹ Complaint at 3, *People v. Nat'l Arbitration Forum, Inc.*, No. CGC-08-473569 (Cal. Super. Ct. Mar. 24, 2008).

² *Id.*

³ *Id.*

⁴ *Id.*

a judgment against Anastasiya for \$11,214, \$3,341 more than the original debt purchased by the collection agency from the credit card company.⁵

Elizabeth Marcotte was also unaware of arbitration proceedings against her.⁶ In 2003, Elizabeth notified her credit card company of her new address.⁷ In 2004, her outstanding debt was sold to a third-party collection agency who initiated arbitration proceedings with NAF seeking an award consisting of \$25,798 in credit card debt and \$10,631 in attorney's fees.⁸ NAF sent notice of the hearing to her old address, and as a result, the un-notified Elizabeth failed to appear at the hearing to contest the debt amount and calculation of attorney's fees.⁹ Consequently, the arbitrator issued a final judgment against Elizabeth for the full amount of the debt and attorney's fees, without requiring that the agency account for the substantial fee amount.¹⁰

Despite the serious financial issues at stake, both Elizabeth and Anastasiya were likely required to resolve their credit-related disputes through binding arbitration rather than in traditional court proceedings.¹¹ The women's contracts with their credit card company likely

⁵ *Id.* Following the judgment, Anastasiya filed suit against National Credit Acceptance, Inc. ("NCA"), the debt-collection agency that purchased her credit card debt from MBNA and later initiated the NAF-sponsored arbitration against her. *See Komarova v. Nat'l Credit Acceptance, Inc.*, 95 Cal. Rptr. 3d 880, 884 (Ct. App. 2009). The Court of Appeals upheld a jury verdict in Anastasiya's favor finding that NCA engaged in various forms of debt-collection abuse, although because NAF was not a defendant in the suit, the court did not have to address issues concerning arbitral immunity. *See id.*

⁶ Complaint, *supra* note 1, at 4.

⁷ *See id.* at 3.

⁸ *Id.* at 3–4. Furthermore, the collection agency's claim against Elizabeth was issued on a standard boiler-plate claim form that consisted of only a few pages and did not provide the name or signature of an attorney. *Id.* at 4.

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See* Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUS. WEEK, Jun. 5, 2008, available at http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm. For example, First USA, the nation's second largest credit card company, provides an arbitration agreement in its terms of use for all consumer credit cards that states:

Any claim, dispute, or controversy ("Claim") you have against us or our respective employees, agents, or assigns, or we have against you, arising from or related in any way to these Terms of Use, including claims regarding the application of this arbitration clause or the validity of the entire Agreement, shall be resolved by binding arbitration by the National Arbitration Forum under the Code of Procedure in effect at the time the claim was filed.

contained arbitration clauses that required all disputes be resolved through binding arbitration proceedings.¹²

Although arbitration¹³ has been a form of dispute resolution used in various cultures for centuries,¹⁴ the incorporation of pre-dispute mandatory arbitration clauses in consumer and employment contexts expanded rapidly in recent decades.¹⁵ Starting in the 1990s, financial institutions, credit card companies, major consumer retailers, and employers increasingly incorporated these clauses into consumer contracts as a means of providing a more efficient and economical alternative to litigation.¹⁶ One study determined that at least one-third of the average American consumer's total transactions include some form of mandatory arbitration clause.¹⁷ Despite the ubiquity of these clauses, consumers largely remain unaware of their existence or legal significance, and oftentimes unwittingly waive their privilege to resolve issues in court.¹⁸

Terms of Use, Card Member Services, First USA, https://www.cardmemberservices.com/ccp/index.jsp?pg_name=ccpmapp/cms/shared/page/terms_of_use (last visited Mar. 14, 2010).

¹² See Berner & Grow, *supra* note 11.

¹³ In general terms, arbitration is a form of alternative dispute resolution where a third party, either an individual arbitrator or an arbitration panel, hears arguments from disputing parties, reviews the evidence, and issues a final decision. See Senator Russ D. Feingold, *Mandatory Arbitration: What Due Process Is Due?*, 39 HARV. J. ON LEGIS. 281, 283 (2002); Janet M. Grossnickle, Note, *Allied-Bruce Terminex Cos. v. Dobson: How the Federal Arbitration Act Will Keep Consumers and Corporations out of the Courtroom*, 36 B.C. L. REV. 769, 770 (1995).

¹⁴ See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 70, 71 n.117 (noting that arbitration is believed to have been practiced as far back as ancient Athens and Rome, and in thirteenth-century England).

¹⁵ See Stephen K. Huber & E. Wendy Trachte-Huber, *Top Ten Developments in Arbitration in the 1990s*, 55 DISP. RESOL. J. 26, 30 (2001); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631 (2005); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 934 (1999) (noting that mandatory arbitration clauses frequently appear in banks' contracts for consumer checking and savings accounts, HMO contracts with consumers, and residential and commercial leases that require the tenant and landlord to resolve all disputes through binding mandatory arbitration).

¹⁶ See Huber & Trachte-Huber, *supra* note 15, at 30 (discussing an "explosion" in consumer arbitration in the context of commercial and employment contracts).

¹⁷ Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55, 62–63 (2004) (analyzing the results of a study focusing on the prevalence of arbitration clauses in consumer contracts in a wide range of industries including health care, auto repair, cellular telephones, and banking).

¹⁸ See Sternlight, *supra* note 15, at 1649. For example, major credit card companies such as First USA Bank and American Express include mandatory binding arbitration requirements in tiny print on advertisements or promotions (oftentimes referred to as "bill stuffers") that are stuffed loosely into card holders' monthly billing statements. See Feingold, *supra* note

Despite an enormous increase in the demand for arbitration services among large-scale business entities, only a few private arbitration firms instigate, sponsor, and administer arbitrations.¹⁹ Until recently, the largest consumer arbitration organization was NAF.²⁰ The American Arbitration Association (“AAA”) also sponsors arbitration proceedings, although unlike NAF, AAA’s caseload is not primarily made up of consumer debt-collecting proceedings.²¹ Rather than being merely third-party administrators, arbitration firms significantly impact the process and outcome of arbitration proceedings.²² In many cases, NAF and AAA established the rules, policies, and procedures for the arbitrations, set arbitration and administrative fees, and oversee a roster of arbitrators that the companies assign to individual proceedings.²³

Business for arbitration firms rapidly expanded in recent years.²⁴ For example, the bulk of NAF’s caseload came from major banks, credit card companies, and retailers who contract exclusively with the firms to administer all debt-collection proceedings involving their customers.²⁵ Credit card companies and financial institutions will frequently include

13, at 295–96. Although companies are aware that consumers rarely read them, bill stuffers often stipulate that the consumer, by continuing to use the credit card, consents to resolve any disputes through binding arbitration. *See id.* at 296 (noting that in one case, Bank of America acknowledged that it believed only four percent of its credit card holders read bill stuffers).

¹⁹ Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 449 (2004).

²⁰ *See* Robert Berner, *Big Arbitration Firm Pulls out of Credit Card Business*, BUS. WEEK, Jul. 19, 2009, at 1. In addition, the American Association of Arbitrators handles a small percentage of consumer debt cases. *See id.* For recent changes regarding NAF, *see infra* notes 52–53 and accompanying text.

²¹ *See* Berner & Grow, *supra* note 11, at 2.

²² *See* Weston, *supra* note 19, at 453.

²³ *See generally* NAT’L ARBITRATION FORUM, CODE OF PROCEDURE (2008), <http://www.adrforum.com/main.aspx?itemID=330&hideBar=False&navID=183&news3>; AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES (2007), <http://www.adr.org/sp.asp?id=22440>.

²⁴ *See* Berner & Grow, *supra* note 11, at 2. In 2006, NAF reported a net income of over \$10 million on revenue of approximately \$39 million. *See id.* In 2000, AAA reported its sixth consecutive year of revenue growth, handling nearly 200,000 cases, an almost forty-two percent increase since 1999. *See* AM. ARBITRATION ASS’N, PROUD PAST, BOLD FUTURE: 75TH ANNIVERSARY ANNUAL REPORT 4, 5 (2000), <http://www.adr.org/si.asp?id=3445>.

²⁵ *See* Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 275 (1995). For example, many Bank of California, Marathon Bank, and Zions First National Bank’s contracts include mandatory arbitration clauses requiring that all consumer disputes be administered by AAA and governed by the organization’s own rules. *See id.* In addition, JP Morgan Chase, Bank of America, and financial services giant MBNA also use NAF to handle their collection-arbitration proceedings. *See* Berner & Grow, *supra* note 11, at 1, 4.

a provision in their consumer contracts requiring that any arbitration proceedings be administered by a particular arbitration firm and governed by that firm's internal policies and rules.²⁶

Given the high demand for arbitration services, firms have powerful business and financial incentives to ensure companies remain satisfied with their services.²⁷ Rather than striving to provide neutral arbitration forums, this dynamic raises concerns that arbitration firms develop unfair business methods that favor their creditor clients—credit card companies, financial institutions, and debt-collection entities—over individual consumers.²⁸ As a result, there are growing concerns that possible conflicts of interest between arbitration firms and their corporate clients threaten consumers' ability to obtain a fair hearing.²⁹ In 2007, Public Citizen, a non-profit consumer advocacy organization, analyzed 34,000 California consumer arbitration cases handled by NAF between January 2003 and March 2007, and determined that ninety-four percent of the cases were decided in favor of the credit card companies.³⁰ In one case, a single arbitrator determined sixty-eight cases in one day, an average of one case every seven minutes (assuming

²⁶ See Sternlight, *supra* note 15, at 1650; Weston, *supra* note 19, at 451 n.13.

²⁷ See Sternlight, *supra* note 15, at 1650; Weston, *supra* note 19, at 451 n.13. NAF, for instance, administers approximately 200,000 cases a year and employs a staff of 1700 freelance arbitrators, comprised mostly of lawyers and retired judges. See Berner & Grow, *supra* note 11, at 2.

²⁸ See Transcript of Proceedings Nov. 6, 2009 at 9–10, *Nat'l Arbitration Forum, Inc.*, No. CGC-08-473569.

²⁹ See Sternlight, *supra* note 15, at 1650; Weston, *supra* note 19, at 451 n.13. For example, in July 2008, Harvard Law School Professor Elizabeth Bartholet testified before the Senate Judiciary Committee about her experiences serving as an arbitrator for NAF in 2003 and 2004. See *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations, Hearing Before the Sen. Judiciary Comm.*, 110th Cong. 2, 3 (2008) (statement of Prof. Elizabeth Bartholet). According to Bartholet, after she found in favor of a consumer and awarded \$48,000 in damages, NAF removed her from the eleven remaining cases to which she was assigned. All of those cases involved the company that Bartholet ruled against. See *id.* In particular, Bartholet noted:

My own experience over the past two decades as an arbitrator has led me to conclude that in many instances corporate players are in fact benefitting from a system of purchased justice in both the employment and the consumer credit areas. My experience as an arbitrator for the National Arbitration Forum (NAF) is but one example, although it may be the most telling.

Id. at 2.

³⁰ See Press Release, Public Citizen, Mandatory Arbitration Stacks Decks Against Credit Cardholders, Data Show (Oct. 11, 2007), <http://www.citizen.org/pressroom/release.cfm?ID=2519>. Russ Feingold called the data compiled by Public Citizen "excellent" because it "provide[d] solid evidence of the abuses that take place when consumers are forced into binding mandatory arbitration agreements." *Id.*

an eight-hour day).³¹ That particular arbitrator held in favor of the business in every case and awarded each company the full amount of the money requested.³² According to other statistics released by the *Washington Post*, First USA, the second largest credit card company in the United States—and one that relies heavily on mandatory arbitration clauses in its consumer contracts—reported that it resolved 19,705 disputes via arbitration proceedings over the course of two years.³³ Of those arbitrations, only eighty-seven were decided in favor of the consumer, a 99.6% rate of success for First USA.³⁴ This limited data provides striking evidentiary support for concerns that arbitration firms provide biased services that significantly favor their corporate clients at the expense of individual consumers' ability to resolve disputes before an impartial and independent decisionmaker.³⁵ Despite these concerns, lawsuits alleging that arbitration firms violated ethical and contractual obligations to provide neutral arbitration forums have been largely unsuccessful because the firms are protected from liability under the doctrine of arbitral immunity.³⁶ Originating in the well-established concept of judicial immunity,³⁷ arbitral immunity exempts arbitrators and arbitration firms from liability stemming from actions associated with the arbitration proceedings.³⁸

³¹ *Id.*

³² *Id.*

³³ See Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1.

³⁴ See *id.*

³⁵ See *id.*; see also Berner & Grows, *supra* note 11, at 1, 2.

³⁶ See *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970, 972–73 (N.D. Cal. 1992) (finding that AAA was immune from liability in suit alleging spoliation of evidence, breach of contract, and negligence); *Boraks v. Am. Arbitration Ass'n*, 517 N.W.2d 771, 773 (Mich. App. 1994) (holding that immunity applied against claims that AAA misrepresented the effectiveness of its arbitration proceedings and failed to provide a competent panel of arbitrators).

³⁷ See, e.g., *Jones v. Brown*, 6 N.W. 140, 142 (Iowa 1880) (“[A] judge of any court, whether of limited or general jurisdiction, is not liable in a civil action for acts done in his judicial capacity, and within his jurisdiction, even though it be alleged that the acts complained of were done maliciously and corruptly.”); *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (1884) (“An arbitrator is a quasi-judicial officer. . . . There is much reason in his case for protecting and insuring his impartiality, independence, and freedom from undue influences, as in the case of a judge or juror.”); *Pratt v. Gardner*, 56 Mass. (2 Cush.) 63, 68–69 (1848) (“It is a principle lying at the foundation of all well ordered jurisprudence, that every judge, whether of a higher or lower court, exercising the jurisdiction vested in him by law, and deciding upon the rights of others, should act upon his own free, unbiased convictions, uninfluenced by any apprehension of consequences.”).

³⁸ See *Olson v. Nat'l Ass'n of Secs. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996).

Some degree of immunity for individual arbitrators is clearly necessary in order to preserve their independence and neutrality.³⁹ Courts, however, have significantly extended the doctrine to bar suits against arbitration sponsoring firms facing a range of serious allegations for conduct seemingly separate from the arbitral-adjudicative process.⁴⁰ These allegations include: companies violating their own internal rules and procedures,⁴¹ allowing arbitrators to decide cases without the consent of both parties,⁴² failing to properly notify parties of the arbitration hearing,⁴³ and improperly staffing arbitration panels with purportedly biased decisionmakers.⁴⁴ By extending arbitral immunity to arbitration firms in almost all cases, courts are essentially placing arbitration firms above the law.⁴⁵

Because of the enormous annual caseload of arbitration-sponsoring firms, allowing them to conduct business seemingly beyond the reach of judicial oversight has a potentially staggering impact on the hundreds of thousands of consumers who are obligated to resolve critical disputes through binding arbitration each year.⁴⁶ For the most part, legislative and judicial action regarding consumer arbitrations has focused on the need for greater limitations on mandatory pre-dispute arbitration clauses.⁴⁷ Although important, restrictions on these types of clauses primarily impact the credit card companies, financial institutions, and na-

³⁹ See *Hoosac*, 137 Mass. at 426.

⁴⁰ See, e.g., *N.E. Cleaning Servs. v. Am. Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir. 1999); *Austern v. Chicago Bd. Options Exch.*, 898 F.2d 882, 886 (2d Cir. 1990).

⁴¹ See *Austern*, 898 F.2d at 884, 886.

⁴² See *N.E. Cleaning Servs.*, 199 F.3d at 545, 546.

⁴³ See *Austern*, 898 F.2d at 884, 886.

⁴⁴ See *Olson*, 85 F.3d at 382, 383.

⁴⁵ See, e.g., *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982); *Cort*, 795 F. Supp. at 972.

⁴⁶ See *Berner & Grow*, *supra* note 11, at 2; *Mayer*, *supra* note 33; see also *Carrie Menkel-Meadow, Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers Responsibilities*, 38 S. TEX. L. REV. 407, 419 (1997) (commenting that because "third-party neutrals," such as sponsoring organizations, are "granted immunity because they are either servicing the judicial system or acting in 'quasi-judicial' capacities, some worry that there will be no way to monitor competence or quality and our legal system will not only fail to produce publicly declared precedents, but will produce 'bad' private justice").

⁴⁷ See *Consumer Financial Protection Act of 2009*, H.R. 3126, 111th Cong. § 125 (2009) (authorizing the agency to limit or restrict the use of mandatory pre-dispute arbitration clauses in consumer contracts); *Arbitration Fairness Act of 2009*, H.R. 1020, 111th Cong. (2009); *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1268 (2009) (holding that in some circumstances consumers can challenge mandatory pre-dispute arbitration clauses by bringing suits in federal court); *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1218 (9th Cir. 2008) (finding that a mandatory pre-dispute arbitration clauses was unenforceable under Washington law).

tional retailers who incorporate them into their consumer contacts.⁴⁸ Therefore, without also regulating arbitration firms, consumers will continue to be denied an impartial forum because arbitration firms' questionable business practices remain unchecked and protected by arbitral immunity.⁴⁹ Accordingly, national or state legislative action is likely the most effective means to placing limits on arbitral immunity as applied to arbitral sponsoring firms.⁵⁰

This need for comprehensive legislative reform has only become more evident in recent months.⁵¹ In July 2009, Minnesota Attorney General Lori Swanson filed a lawsuit against NAF alleging that the company failed to disclose financial ties to a debt-collecting entity and worked privately with financial institutions to convince them to use NAF exclusively as their arbitration provider.⁵² Four days later, NAF reached a settlement with the Attorney General's office whereupon it denied any wrongdoing but agreed to permanently refrain from administering any future consumer debt disputes.⁵³

For years, NAF was the main organization sponsoring consumer arbitrations; and with an annual caseload of over 200,000 cases, its departure from the field creates a significant void.⁵⁴ The demand for arbitration services is unlikely to decrease and it is highly foreseeable that

⁴⁸ See *supra* notes 15–17 and accompanying text (discussing the prevalence of mandatory pre-dispute arbitration clauses in consumer contracts).

⁴⁹ See *infra* notes 301–310 and accompanying text (regarding the need for national legislative action).

⁵⁰ See *infra* notes 301–310 and accompanying text. In July 2008, Representative Dennis Kucinich held a hearing regarding NAF's purported mass-production of consumer arbitrations; the issue of arbitral immunity, however, was not discussed. See *Arbitration or 'Arbitrary': The Misuse of Arbitration to Collect Consumer Debts: Hearing Before the Domestic Policy Subcomm., 111th Cong. (2009)*; STAFF OF THE DOMESTIC POLICY SUBCOMM. MAJORITY STAFF OVERSIGHT AND GOV'T REFORM COMM., 111TH CONG., STAFF REPORT: ARBITRATION ABUSE: AN EXAMINATION OF CLAIMS FILES OF THE NATIONAL ARBITRATION FORUM (Chairman Dennis Kucinich) (July 21, 2009).

⁵¹ See *infra* notes 52–59 and accompanying text.

⁵² See Complaint at 2, *Minnesota v. Nat'l Arbitration Forum, Inc.*, No. 27-CV-09-18550 (Minn. Dist. Ct., July 14, 2009). In particular, the complaint alleged that between 2006 and 2007, Accretive, LLC, a collection of hedge funds, purchased a controlling share in NAF. Around the same time, Accretive, LLC also obtained a controlling share in Mann Bracken, LLC, one of the country's largest debt collection law firms. See *id.* According to the complaint, in 2006, NAF processed 241,000 consumer debt cases, nearly sixty percent of which were handled by the debt collection law firm partially controlled by Accretive, LLC. See *id.*

⁵³ See Consent Decree at 2, *Nat'l Arbitration Forum, Inc.*, No. 27-CV-09-18550. The consent decree does not preclude NAF from overseeing arbitrations involving internet domain name disputes or arbitrations that are supervised by a government agency. See *id.* Furthermore, NAF may continue to oversee its existing roster of consumer arbitration cases. See *id.*

⁵⁴ Berner & Grow, *supra* note 11, at 2.

another arbitration sponsoring firm will emerge to provide services similar to NAF.⁵⁵ Although the exact timing of this will depend on market conditions, it is also unlikely that NAF's dissolution alone will bring systemic reform to the field of consumer arbitrations.⁵⁶ First, NAF's settlement did not require the firm to admit any wrongdoing regarding its internal procedures or its close ties to businesses and debt-collecting institutions.⁵⁷ Second, because the settlement occurred only four days after the complaint was filed, a court did not have an opportunity to consider whether arbitral immunity protected NAF from the suit and, if not, whether NAF's practices violated its ethical and legal obligations to provide consumers with a neutral and fair arbitration forum.⁵⁸ As a result, inherent concerns regarding the fairness of arbitration proceedings remain and any future firms will likely continue to enjoy broad freedom to engage in questionable ethical and legal practices because they are protected by the seemingly limitless application of arbitral immunity.⁵⁹

If comprehensive reform does not occur before a new organization emerges to replace NAF, a recent lawsuit filed by San Francisco City Attorney Dennis J. Herrera⁶⁰ offers a novel approach to challenging sponsoring organizations' seemingly impenetrable immunity.⁶¹ Filed in March 2008 against NAF, San Francisco alleges that NAF systematically engaged in biased and unfair business practices in its capac-

⁵⁵ See *supra* notes 15–17 and accompanying text (discussing the increased use of mandatory pre-dispute arbitration clauses in consumer contracts). In particular, there is some indication that AAA, which has expressed interest in expanding its consumer credit card business, may attempt to replace NAF's share of consumer debt-collection proceedings. See Berner, *supra* note 20, at 1.

⁵⁶ See *infra* notes 57–59 and accompanying text.

⁵⁷ See Consent Decree, *supra* note 53, at 2.

⁵⁸ See *id.* at 1.

⁵⁹ See *supra* notes 56–58 and accompanying text.

⁶⁰ In recent years, the San Francisco City Attorney's Office has been at the forefront of actions championing various civil liberties and consumer protection issues. See, e.g., *Planned Parenthood v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *rev'd*, *Gonzales v. Carhart*, 550 U.S. 124 (2007); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). For example, in 2002, it was the first government agency to challenge the constitutionality of laws restricting homosexuals from marrying. Press Release, Office of the City Att'y, California Supreme Court Grants Review in Same-Sex Marriage Case (Dec. 20, 2006), http://www.sfgov.org/site/city_attorney_page.asp?id=99179. Additionally, in 2003 the San Francisco City Attorney joined the Planned Parenthood Federation of America as a party in a suit challenging the constitutionality of the 2003 Partial-Birth Abortion Ban. *Planned Parenthood*, 320 F. Supp. 2d at 957.

⁶¹ See Complaint, *supra* note 1; see also People of the State of California's Opposition to Demurrer by Defendant National Arbitration Forum, Inc. at 4–9, *Nat'l Arbitration Forum, Inc.*, No. CGC-08-473569 [hereinafter San Francisco, Opp'n].

ity as a purportedly neutral administrator of consumer arbitrations.⁶² The San Francisco City Attorney argues that its claims are not barred by arbitral immunity because it is a civil law enforcement agency acting on behalf of the people, and because it only seeks equitable and injunctive relief.⁶³ Analogous to “piercing the corporate veil,”⁶⁴ San Francisco’s approach provides a practical and immediate mechanism that would enable states to limit the reach of arbitral immunity for sponsoring organizations, thereby ensuring their citizens’ legal rights and financial lives are not compromised just because they are required to resolve disputes through binding arbitration.⁶⁵

This Note begins with a brief overview of arbitration in the United States.⁶⁶ Part I offers an examination of the doctrine of arbitral immunity from its origins in judicial immunity, to its later extension to arbitral sponsoring organizations.⁶⁷ Part II provides an overview of the current status of arbitral immunity in the United States, including a survey of its adoption at state and federal law and the limited exceptions to the doctrine’s otherwise broad applicability.⁶⁸ Finally, Part III details the novel approach developed by the San Francisco City Attorney’s Office that challenges the applicability of arbitral immunity as a civil law enforcement agency seeking only prospective injunctive relief.⁶⁹ Part III analyzes the merits of San Francisco’s litigation strategy and its potential application in other states.⁷⁰ Part III concludes by discussing why comprehensive legislative reform will likely provide the most effective remedy to the myriad of issues stemming from the over-extension of arbitral immunity for sponsoring organizations.⁷¹

⁶² See San Francisco, Opp’n, *supra* note 61, at 1.

⁶³ See *id.*

⁶⁴ See Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1036 (1991). As a general principle, piercing the corporate veil is when a corporation’s shareholders, officers, or directors are held personally liable for the corporation’s actions. See *id.* Piercing the corporate veil is a judicially-imposed exception to the general rule that a corporation is a separate legal entity and its officers, shareholders, or directors are not legally responsible for its wrongful conduct. See *id.* at 1039. Judges grant an exception to the general policy of limited liability in cases where courts consider that a corporation’s officers, shareholders, or directors used the corporation for wrongful, fraudulent, or illegitimate purposes. See *id.* at 1041.

⁶⁵ See *infra* notes 234–284 and accompanying text.

⁶⁶ See *infra* notes 77–87 and accompanying text.

⁶⁷ See *infra* notes 72–141 and accompanying text.

⁶⁸ See *infra* notes 156–209 and accompanying text.

⁶⁹ See *infra* notes 213–213 and accompanying text.

⁷⁰ See *infra* notes 228–300 and accompanying text.

⁷¹ See *infra* notes 301–310 and accompanying text.

I. THE HISTORICAL DEVELOPMENT OF ARBITRAL IMMUNITY

Arbitral immunity was one of the by-products of a national increase in the use of arbitration which began in the 1920s.⁷² The doctrine largely developed through federal and state common law as courts analogized arbitrators to judges⁷³ and concluded that because of arbitrators' "quasi-judicial" status, they also deserved immunity from civil liability.⁷⁴ This Part outlines the history of arbitral immunity and its later application to arbitral sponsoring firms.⁷⁵ The discussion begins with a history of judicial immunity and the narrow exception to the doctrine for actions seeking only equitable relief.⁷⁶

A. *The Growth of Arbitration and Arbitral Immunity*

Historically, arbitration agreements primarily involved parties of relatively equal bargaining power who voluntarily chose to resolve disputes out of court.⁷⁷ In recent years, however, the rapid increase in binding pre-dispute arbitration clauses caused arbitration proceedings

⁷² See *infra* notes 77–86 and accompanying text.

⁷³ Obvious differences, however, exist between judges and arbitrators. *Baar v. Tigerman*, 211 Cal. Rptr. 426, 428 (Ct. App. 1983). For example: (1) judges receive their authority from the U.S. Constitution, and are bound by statutes and common-law, whereas arbitrators' authority is purely contractually based; (2) trials are public and arbitration is private; (3) arbitrators' decisions have little, if any, precedential value; and (4) arbitrators lack the authority to impact the rights and responsibilities of any individuals not party to the specific proceedings. See *id.* Furthermore, in *E.C. Ernst, Inc. v. Manhattan Construction Company of Texas*, the court provided a detailed account of the differences between judges and arbitrators:

The arbitrator's "quasi-judicial" immunity arises from his resemblance to a judge. The scope of his immunity should be no broader than this resemblance. The arbitrator serves as a private vehicle for the ordering of economic relationships. He is a creature of contract, paid by the parties to perform a duty, and his decision binds the parties because they make a specific, private decision to be bound. His decision is not socially momentous except to those who pay him to decide. The judge, however, is an official governmental instrumentality for resolving societal disputes. The parties submit their disputes to him through the structure of the judicial system, at mostly public expense. His decisions may be glossed with public policy considerations and fraught with the consequences of *stare decisis*. When in discharging his function the arbitrator resembles a judge, we protect the integrity of his decisionmaking by guarding against his fear of being mulcted in damages. But he should be immune from liability only to the extent that his action is functionally judge-like. Otherwise we become mesmerized by words.

551 F.2d 1026, 1033 (5th Cir. 1977) (citations omitted).

⁷⁴ See *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (1884).

⁷⁵ See *infra* notes 77–155 and accompanying text.

⁷⁶ See *infra* notes 94–110 and accompanying text.

⁷⁷ See *Weston*, *supra* note 19, at 449.

to often involve parties of vastly unequal economic resources and legal sophistication.⁷⁸

The shift towards pre-dispute mandatory arbitration agreements resulted from a variety of factors.⁷⁹ First, litigants became increasingly dissatisfied with the delay and expense associated with litigation.⁸⁰ Second, arbitration enabled parties to pre-select particular arbitrators to hear a case, in contrast to being randomly assigned a judge in court proceedings.⁸¹ Finally, in contrast to traditional litigation proceedings that offer an opportunity for further judicial review, binding arbitration awards are, by definition, final, with extremely limited grounds for judicial review of an arbitrator's findings of law or fact.⁸² Accordingly, parties favored arbitration as a faster, less expensive, and more reliable alternative to traditional court proceedings.⁸³

The initial increase in the use of arbitration is attributable primarily to the Federal Arbitration Act ("FAA").⁸⁴ Congress passed the FAA in 1924 to encourage the use of arbitration by requiring that all arbitration agreements be treated exactly the same as other contracts.⁸⁵ The FAA also included an exceptionally limited basis for judicial review of arbitrators' rulings, and typically only allowed review in situations where an arbitrator engaged in fraud, corruption, or serious procedural violations.⁸⁶

Although the FAA offered an enthusiastic endorsement of arbitration, it did not address whether arbitrators or sponsoring organizations are immune from civil suits stemming from their arbitral duties.⁸⁷ Instead, the doctrine of arbitral immunity developed organically through federal and state common law as courts drew parallels between arbitrators and judges, and extended judicial immunity to arbitrators.⁸⁸

Arbitral immunity serves three important functions.⁸⁹ First, as with judges, immunity ensures arbitrators remain independent and neutral decisionmakers who are uninfluenced by the threat of legal reprisal from

⁷⁸ See Feingold, *supra* note 13, at 284.

⁷⁹ See Demaine & Hensler, *supra* note 17, at 55.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See Weston, *supra* note 19, at 452.

⁸³ See *id.*

⁸⁴ See *id.* at 461.

⁸⁵ See Feingold, *supra* note 13, at 284–85.

⁸⁶ See Stone, *supra* note 15, at 949.

⁸⁷ See 9 U.S.C. §§ 1–16 (2006).

⁸⁸ See *Hoosac*, 137 Mass. at 426.

⁸⁹ See *infra* notes 90–93 and accompanying text.

their decisional acts.⁹⁰ Second, it shields arbitrators from collateral attack on behalf of disgruntled parties who seek to challenge the arbitration awards.⁹¹ Finally, immunity incentivizes individuals to serve as arbitrators,⁹² thereby promoting the general policy in favor of arbitration.⁹³

1. The Origins in Judicial Immunity

Long established as a central tenet of our legal system,⁹⁴ judicial immunity is a critical mechanism for ensuring judicial independence, neutrality, and the fair administration of justice.⁹⁵ As a general principle, judicial immunity bars civil suits against judges brought by parties disgruntled with the adjudicative proceedings.⁹⁶

Courts largely interpret the reach of judicial immunity broadly and recognize only two limitations to the doctrine's applicability: the judge must be performing a judicial act, and must have subject-matter juris-

⁹⁰ See *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1211 (6th Cir. 1982) ("The functional comparability of the arbitrators' decision-making process and judgments to those of judges and agency hearing examiners generates the same need for independent judgment, free from the threat of lawsuits.").

⁹¹ See *Olson v. Nat'l Ass'n of Secs. Dealers*, 85 F.3d 381, 382 (8th Cir. 1996) (holding that arbitral immunity "is necessary to protect decision makers from undue influence, and the decision-making process from attack by dissatisfied litigants").

⁹² See *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970, 973 (N.D. Cal. 1992) (describing that one of the goals of arbitration is to "ensure that there are a body of individuals to perform the service").

⁹³ See *Corey*, 691 F.2d at 1211 (reasoning that because federal policy, as articulated by the FAA and case law, encourages arbitration, arbitrators deserve immunity when acting in their decision-making capacity).

⁹⁴ See *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967) ("Few doctrines were more solidly established at common law than the immunity for judges from liability for damages for acts committed within their judicial jurisdiction . . ."); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). *Bradley* involved a civil suit brought by Joseph H. Bradley, the criminal defense attorney representing John Suratt in the murder trial of President Abraham Lincoln, against Judge George Fisher, one of the justices hearing the case. See 80 U.S. at 336–37. During the trial, Attorney Bradley became enraged, threatened Judge Fisher and was subsequently removed from the roster of attorneys able to practice before the court. See *id.* at 337. Dismissing Bradley's claim against Judge Fisher, the Court expanded the doctrine of judicial immunity by finding that "[j]udges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Id.* at 336.

⁹⁵ See *Jones v. Brown*, 6 N.W. 140, 142 (Iowa 1880) (quoting *Pratt v. Gardner*, 56 Mass. 63, 68–69 (1848)).

⁹⁶ See J. Randolph Block, *Stump v. Sparkman and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 879.

diction over the case.⁹⁷ In rare instances, courts have also denied immunity to judges who act outside their judicial capacity and engage in acts characterized as administrative or ministerial.⁹⁸ For example, in 1880 the U.S. Supreme Court in *Ex Parte Virginia* denied immunity to a county court judge who faced civil liability for improperly excluding male African Americans from jury lists because the act of creating jury lists qualified as a ministerial rather than a judicial task.⁹⁹ The Supreme Court again addressed the distinction between administrative and judicial tasks in 1988 in *Forrester v. White*, when it denied immunity to a state court judge facing a § 1983 claim that she discriminated against an employee on the basis of sex.¹⁰⁰ As in *Ex Parte Virginia*, the *Forrester* Court examined the purpose of the judge's activities, and concluded that employment decisions qualified as administrative non-judicial acts, irrespective of the actor's identity.¹⁰¹

2. Equitable Claims as an Exception to Judicial Immunity

In addition to the limitations posed by the judicial act and subject-matter jurisdiction requirements, immunity does not extend to judges in suits that seek only prospective injunctive relief.¹⁰² In accordance with similar decisions by a number of circuit courts, in 1970, in *Pulliam v. Allen*, the U.S. Supreme Court first recognized the "equity" exception

⁹⁷ See *Stump v. Sparkman*, 435 U.S. 349, 355–56, 362 (1978) (defining "judicial acts" as an act "normally performed by a judge" with an expectation on behalf of the parties that they were dealing with the judge in his judicial capacity).

⁹⁸ See *Ex parte Virginia*, 100 U.S. 339, 348 (1880).

⁹⁹ See *id.* (noting that "[w]hether the act . . . was judicial or not is to be determined by its character, and not the character of the agent").

¹⁰⁰ See 484 U.S. 219, 229 (1988).

¹⁰¹ See *id.*; see also *Weston*, *supra* note 19, at 480.

¹⁰² See, e.g., *Henriksen v. Bentley*, 644 F.2d 852, 855 (10th Cir. 1981) (noting that the U.S. Supreme Court held in the 1980 case *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719 (1980), that common-law legislative immunity does not bar injunctive relief, and therefore, that "immunity from liability in damages may not bar prospective relief, injunction, for example, against a judge"); *Browning v. Vernon*, 874 F. Supp. 1112, 1124 (D. Idaho 1994), *aff'd*, 44 F.3d 818 (9th Cir. 1995) ("Judicial immunity is an immunity from damages; it is not an immunity from declaratory or injunctive relief."). This exception, however, has not been endorsed by all courts. See *Coleman v. Court of Appeals*, 550 F. Supp. 681, 684 (W.D. Okla. 1980) (noting that although "[t]here is a split of authority concerning whether judicial immunity shields judges from actions seeking only injunctive relief," immunity applied because the purposes of judicial immunity are not served by allowing injunctive relief); *Zimmerman v. Spears*, 428 F. Supp. 759, 761 (W.D. Tex. 1977) ("The doctrine of judicial immunity applies to a proceeding in which injunctive or other equitable relief is sought, as well as to suits for money damages."), *aff'd*, 565 F.2d 310 (5th Cir. 1977).

to judicial immunity.¹⁰³ *Pulliam* involved a § 1983 action that sought injunctive and declaratory relief against a magistrate judge's practice of detaining defendants while they awaited trial for non-incarcerable offenses.¹⁰⁴ The district court determined that the magistrate's actions violated criminal defendants' due process and equal protection rights and, therefore, awarded costs and attorney fees.¹⁰⁵ The magistrate appealed on the ground that as a judicial officer, she was immune from having to pay the attorney fees.¹⁰⁶

Before considering whether attorney fees were appropriate, the Court focused on the broader issue of whether judges were immune from suits seeking equitable relief.¹⁰⁷ The Court first looked to English common law—the origins of judicial immunity—and concluded that although injunctions against judges did not specifically exist at common law, an injunction is analogous to common law's practice of allowing higher courts to exercise control and oversight over inferior courts.¹⁰⁸ The Court therefore concluded that carving out an exception for suits seeking equitable relief was compatible with the underlying policies of judicial immunity because immunity was intended to shield judges from collateral attacks on behalf of disgruntled litigants, not to protect them from review by higher courts.¹⁰⁹ Accordingly, because of the high threshold requirements for equitable relief, including a showing of an inadequate remedy at law and a serious risk of irreparable harm, the Court held that it was unlikely that judges would be subjected to the same threat of harassment and intimidation attributed to parties seeking monetary damages.¹¹⁰

¹⁰³ See 466 U.S. 522, 541–43 (1970). Writing for the majority, Justice Blackmun noted: “Although injunctive relief against a judge rarely is awarded, the U.S. Courts of Appeals that have faced the issue are in agreement that judicial immunity does not bar such relief.” *Id.* at 528.

¹⁰⁴ See *id.* at 525.

¹⁰⁵ *Id.* at 526.

¹⁰⁶ *Id.* at 527.

¹⁰⁷ See *id.* at 528.

¹⁰⁸ *Id.* at 533 (noting that that in medieval England, “a judge of the King’s Bench, by issuing a writ of prohibition at the request of a party before an inferior or rival court, enjoined that court from proceeding with a trial or from committing a perceived error during the course of that trial”).

¹⁰⁹ See *Pulliam*, 466 U.S. at 537.

¹¹⁰ See *id.* at 538–39. *Pulliam* is not universally accepted among courts. Compare *Guerin v. Riley*, 573 F. Supp. 110, 111 (D.C. N.J., 1983) (holding that judicial immunity does not bar equitable relief), and *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975) (recognizing equitable exception to judicial immunity), with *Chief Admin. Justice of Trial Ct. v. Labor Relations Comm’n*, 533 N.E.2d 1313, 1317 n.4 (Mass. 1989) (“We have never accepted . . . the distinction made in the *Pulliam* case between a judge’s absolute immunity

B. *Development of Arbitral Immunity*

Although the U.S. Supreme Court has yet to recognize arbitral immunity,¹¹¹ the doctrine emerged in the United States as early as 1880 in the Iowa Supreme Court decision in *Jones v. Brown*.¹¹² Arbitral immunity is firmly rooted in its judicial counterpart and based on the fundamental premise that arbitrators are functionally equivalent to judges.¹¹³ Consequently, in order to ensure arbitrators remain neutral and independent decisionmakers, they also deserve immunity from civil suit arising from their arbitral acts.¹¹⁴ In *Jones*, an arbitrator was hired along with two other arbitrators to resolve a dispute between two parties.¹¹⁵ The arbitrator filed suit against one of the parties alleging that he failed to pay the \$240 arbitration fee.¹¹⁶ In response, the defendant filed a counter-claim alleging that the arbitrator and his co-arbitrator intentionally excluded the third arbitrator and conspired together to find in favor of the opposing party for \$41,000.¹¹⁷ The Court rejected the defendant's argument that the determination of an arbitration award is merely ministerial, and thus without immunity protection,¹¹⁸ and concluded that arbitrators clearly act in a judicial capacity when retained to adjudicate an arbitral proceeding.¹¹⁹

C. *Expansion to Arbitral Sponsoring Organizations*

Although arbitrators receive immunity because they perform quasi-judicial functions, courts also extend immunity to private for-profit sponsoring organizations, such as the NAF¹²⁰ and the non-profit

from liability for damages when acting in a judicial capacity and a judge's lack of absolute immunity in an action for injunctive relief . . ."), and Thomas J. Noto III, Note, Pulliam v. Allen: *Delineating the Immunity of Judges From Prospective Relief*, 34 CATH. U. L. REV. 829, 834 (1984) ("[T]he Court's decision in *Pulliam v. Allen* . . . may impose upon state judges a burden that the common law doctrine was designed to prevent.").

¹¹¹ See Weston, *supra* note 19, at 476 ("The United States Supreme Court has never specifically endorsed arbitrator immunity . . .").

¹¹² See 6 N.W. at 143.

¹¹³ See *Hoosac*, 137 Mass. at 426.

¹¹⁴ See *id.*

¹¹⁵ See 6 N.W. at 141.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 143.

¹²⁰ See *Ross v. MBNA Bank*, No. 3:04-CV-607, 2005 WL 2334297, at *3 (E.D. Tenn. Sept. 23, 2005).

AAA.¹²¹ Because these organizations fill non-adjudicative roles in the arbitration process, courts justify immunity primarily due to the organizations' relationship to the arbitrator, and a desire to support the public policy underlying the general immunity doctrine.¹²² In essence, by limiting immunity only to arbitrators, courts hold that the entire doctrine would be "illusionary" as disgruntled parties would merely shift liability from the arbitrator to the sponsoring organization.¹²³

In 1982, the U.S. Court of Appeals for the Sixth Circuit was the first court to articulate this principle in *Corey v. New York Stock Exchange*.¹²⁴ In that case, an investor brought an action against an investment firm after his portfolio sustained significant losses.¹²⁵ As allowed under the New York Stock Exchange ("NYSE") Constitution, in lieu of his remedies at law, the investor requested that the dispute be resolved by an arbitration panel.¹²⁶ NYSE sponsored the arbitration, appointed the panel members, scheduled the hearing date, and provided written notice of the final decision.¹²⁷ The investor appeared without counsel, and upon deliberation the panel ultimately held in favor of the investment firm.¹²⁸ Shortly thereafter, the investor filed suit against the investment firm and NYSE alleging that they conspired to deprive him of a fair hearing.¹²⁹

Focusing on the fundamental principles of arbitral immunity, the court quickly dismissed the investor's allegations and emphasized two important issues.¹³⁰ First, because the parties had mutually agreed to

¹²¹ See *Cort*, 795 F. Supp. at 973; *Am. Arbitration Ass'n. v. Superior Court of L.A. County*, 8 Cal. App. 4th 1131, 1134 (1992).

¹²² See, e.g., *Corey*, 691 F.2d at 1209 (holding that the decision to extend immunity to a sponsoring organization is supported by the general policy of judicial and quasi-judicial immunity for judges and arbitrators); *Thiele v. RML Realty Partners*, 18 Cal. Rptr. 2d 416, 419 (Ct. App. 1993); see also Susan D. Franck, *The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 1, 25 (2000).

¹²³ See, e.g., *Olson*, 85 F.3d at 382; *Austern v. Chi. Bd. of Options Exch., Inc.*, 898 F.2d 886, 886 (2d Cir. 1990); *Corey*, 691 F.2d at 1211.

¹²⁴ See 691 F.2d at 1211.

¹²⁵ *Id.* at 1207.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1208.

¹²⁸ *Id.*

¹²⁹ See *id.* (noting that the arbitrators were not individually named as defendants). In particular, *Corey* asserted that the arbitration panel had violated NYSE's internal rules and that his procedural rights because he had been prevented from submitting evidence, the proceedings had been delayed over his objections, and the arbitrators "dominate[d] the proceedings with the purpose of defeating his claims." See *id.*

¹³⁰ See *Corey*, 691 F.2d at 1209, 1211.

resolve the dispute through arbitration, immunity was necessary in order to prevent the investor from collaterally attacking the arbitration award, and therefore undermining the parties' freedom to agree to binding arbitration.¹³¹ Second, immunity also extended upwards to NYSE, because otherwise immunity for arbitrators would be meaningless as disgruntled parties could merely shift liability from the arbitrator to the sponsoring organization.¹³²

Following *Corey*, courts also granted immunity to organizations facing allegations that they had improperly engaged in more administrative-like acts, such as improperly staffing arbitration panels,¹³³ violating their own internal procedures,¹³⁴ and providing improper notice.¹³⁵ Although ostensibly a departure from the "judicial act" requirement of judicial immunity, courts justified immunity on the grounds that the acts in question were integrally related to the overall arbitration process, irrespective of whether they qualified as administrative or decisional.¹³⁶

This rationale is exemplified in the U.S. Court of Appeals for the Second Circuit's reasoning in 1980 in *Austern v. Chicago Board Options Exchange*.¹³⁷ In *Austern*, investors and their trading company mutually agreed to settle their disputes through arbitration proceedings that would be administered by the Chicago Board Options Exchange ("CBOE").¹³⁸ The CBOE's internal policies governed the proceedings and required that: (1) at least one member of the five person arbitration panel come from outside the securities industry, and (2) that notice of the proceedings be given to all parties at least eight days prior to the hearing date.¹³⁹ CBOE violated both of these requirements, and because the investors did not receive notice, they did not attend the hearing where the panel found in favor of the trading company for \$158,000.¹⁴⁰ Vacating the judgment on the grounds of improper notice, a district court judge denied the company's motion for confirmation of the arbitration award.¹⁴¹

¹³¹ *Id.* at 1211.

¹³² *Id.*

¹³³ See *Olson*, 85 F.3d at 383.

¹³⁴ See *Austern*, 898 F.2d at 886.

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ *Id.* at 884.

¹³⁹ *Id.*

¹⁴⁰ *Austern*, 898 F.2d at 884.

¹⁴¹ *Id.*

Shortly thereafter, the investors brought an action against CBOE seeking damages as a result of the organization's negligence in improperly selecting the arbitration panel and failing to provide adequate notice.¹⁴² Although the court acknowledged that CBOE's violation of its internal policies qualified as an administrative action, it granted immunity on the basis that the acts were sufficiently related to the arbitral process.¹⁴³ According to the court, the critical inquiry into whether immunity is appropriate involves analyzing the *functions* of the acts rather than labeling them as ministerial or decisional.¹⁴⁴ Thus, the court found that the selection of arbitrators and giving of notice was part of the overall adjudicative process, and therefore immunity applied.¹⁴⁵

The U.S. Court of Appeals for the Eighth Circuit applied similar reasoning in 1990, in *Olson v. National Association of Securities Dealers*, granting immunity to a sponsoring organization in a suit alleging that the organization improperly selected an arbitration panel.¹⁴⁶ In *Olson*, an employee, as required by his employment contract, brought an age discrimination claim against his former employer before an arbitration panel sponsored by the National Association of Securities Dealers ("NASD").¹⁴⁷ Shortly after the panel found in favor of the employer, the employee learned that his employer had ongoing business relations with one of the arbitrators.¹⁴⁸ Agreeing that the arbitrator's failure to disclose the relationship was evidence of partiality, an appellate court vacated the judgment.¹⁴⁹ The employee then filed suit against NASD claiming that immunity did not apply because the appointment of individual arbitrators occurs before the decision-making process begins.¹⁵⁰ The court rejected the suggestion that the arbitration process could be separated into distinct stages for the purposes of assigning liability and held that immunity was appropriate because staffing arbitrators was a requisite part of the overall arbitration process.¹⁵¹

¹⁴² *See id.*

¹⁴³ *Id.* at 886.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ 85 F.3d at 383.

¹⁴⁷ *See id.* at 382.

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 382, 383.

¹⁵¹ *See id.* at 383.

Similar to judicial immunity, courts have also been reluctant to deny immunity to organizations based on a lack of jurisdiction.¹⁵² For example, in 1999 the U.S. Court of Appeals for the First Circuit in *New England Cleaning Services, v. American Arbitration Ass'n*, extended immunity to an arbitration organization that continued to arbitrate a dispute even after being notified that one of the parties had terminated the agreement that consented to the arbitration.¹⁵³ Dismissing the plaintiff's assertion that the arbitration organization lacked jurisdiction to hear the case, the court held that because there was a dispute as to whether the agreement was properly terminated, there was not a "clear absence" of jurisdiction.¹⁵⁴ Thus, sufficient jurisdiction existed and the organization was immune from any liability.¹⁵⁵

II. THE CURRENT STATUS OF ARBITRAL IMMUNITY IN THE UNITED STATES

Immunity for arbitrators and sponsoring organizations is well established in both federal and state law.¹⁵⁶ With the increased pace of the doctrine expansion, some narrowly tailored exceptions have emerged to provide minimal limitations on the doctrine's otherwise broad applicability.¹⁵⁷

A. A Federal and State Survey of Arbitral Immunity

Although neither Congress nor the U.S. Supreme Court have officially recognized immunity for sponsoring organizations, ten federal circuits have extended protection to sponsoring organizations, causing the doctrine to become firmly rooted in federal law.¹⁵⁸

¹⁵² See *N.E. Cleaning Serv. Inc., v. Am. Arbitration Ass'n*, 199 F.3d 542, 546 (1st Cir. 1999).

¹⁵³ *See id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See *infra* notes 144–176 and accompanying text.

¹⁵⁷ See *infra* notes 177–209 and accompanying text.

¹⁵⁸ See, e.g., *Pfannenstiel v. Merrill Lynch*, 477 F.3d 1155, 1160 (10th Cir. 2007) (noting that the 4th Circuit has also recognized the doctrine); *Hutchins v. Am. Arbitration Ass'n*, 108 F. App'x 647, 648 (1st Cir. 2004); *Int'l Med. Group, Inc. v. Am. Arbitration Ass'n*, 312 F.3d 833, 844 (7th Cir. 2002); *Honn v. Nat'l Ass'n of Secs. Dealers, Inc.*, 182 F.3d 1014, 1017 (8th Cir. 1999); *Hawkins v. Nat'l Ass'n of Secs. Dealers, Inc.*, 149 F.3d 330, 332 (5th Cir. 1998); *Austern v. Chicago Bd. of Options Exch., Inc.*, 898 F.2d 886, 887 (2d Cir. 1990); *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987); *Corey v. N.Y. Stock Exch., Inc.*, 691 F.2d 1205, 1211 (6th Cir. 1982); *Cahn v. Int'l Ladies Garment Union*, 311 F.2d 113, 114–15 (3d Cir. 1962).

The Uniform Arbitration Act (“UAA”), introduced by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) in 1956, was the state law equivalent to the Federal Arbitration Act (“FAA”).¹⁵⁹ The UAA and FAA were very similar, with the UAA also providing a broad endorsement of arbitration and a limited basis for judicial review of arbitration awards.¹⁶⁰ The UAA gained significant state support and was ultimately adopted, albeit sometimes in a modified form, in forty-nine states.¹⁶¹ In response to the enormous growth and increased complexity of arbitration proceedings, the NCCUSL introduced the Revised Uniform Arbitration Act (“RUAA”) in 2000, which included twelve new sections and four modified sections.¹⁶²

One of the additions to the RUAA was a section on arbitral immunity, an issue not addressed in either the original UAA or the FAA.¹⁶³ Relying on past case law for precedential support,¹⁶⁴ § 14 of the RUAA expressly grants civil immunity to arbitrators to the same extent as judges acting in a judicial capacity.¹⁶⁵ In addition, the RUAA also grants immunity to sponsoring organizations:

¹⁵⁹ See UNIFORM ARBITRATION ACT §§ 1–33 (2000), available at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.pdf>. In 2000, the Uniform Arbitration Act was replaced by the Revised Uniform Arbitration Act. See UNIF. ARBITRATION ACT Prefatory Note, 7 U.L.A. 2 (2000), available at <http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm>.

¹⁶⁰ See Weston, *supra* note 19, at 473; UNIF. ARBITRATION ACT Prefatory Note, 7 U.L.A. at 3.

¹⁶¹ See UNIF. ARBITRATION ACT Prefatory Note, 7 U.L.A. at 3. In particular, thirty-five states formally adopted the UAA, and fourteen other states enacted legislation modeled after the UAA. See *id.* Alabama remains the only state that has not adopted the UAA. See William H. Hardie, Jr., *Judicial Review of Arbitration Awards in Alabama Courts*, 69 ALA. LAW. 434, 442 (2008).

¹⁶² UNIF. ARBITRATION ACT Prefatory Note §§ 1–33, 7 U.L.A. at 3. The new sections concerned issues such as proper notice of arbitration proceedings, provisional remedies, the judicial enforcement of pre-award arbitral rulings, and e-commerce issues. See *id.* §§ 2, 8, 18, 30, respectively. In contrast, the FAA has not been amended or revised in nearly 83 years. 9 U.S.C. §§ 1–16 (2006).

¹⁶³ 9 U.S.C. § 14(a)–(c).

¹⁶⁴ *Id.* § 14 cmt. 2 (listing federal and state caselaw that provided immunity to arbitration organizations).

¹⁶⁵ *Id.* § 14(a). The full text of the section reads:

(a) An arbitrator or an arbitration organization acting in that capacity is immune from civil liability to the same extent as a judge of a court of this State acting in a judicial capacity.

(b) The immunity afforded by this section supplements any immunity under other law.

(c) The failure of an arbitrator to make a disclosure required by Section 12 does not cause any loss of immunity under this section.

Id. § 14(a)–(c).

To the extent that they are acting “in certain roles and with certain responsibilities” that are comparable to those of a judge. This immunity to neutral arbitration organization is appropriate because the duties that they perform in administering the arbitration process are the functional equivalent of the roles and responsibilities of judges administering the adjudication process in a court of law.¹⁶⁶

The NCCUL recommended that the RUAA be enacted in all fifty states.¹⁶⁷ Currently, however, only twelve states have incorporated § 14’s extension of immunity for arbitrators and arbitral organizations into law.¹⁶⁸ Additionally, another nine states—Arizona,¹⁶⁹ California,¹⁷⁰ Florida,¹⁷¹ Maryland,¹⁷² Montana,¹⁷³ New Hampshire,¹⁷⁴ Pennsylvania,¹⁷⁵ Wisconsin,¹⁷⁶ and Washington D.C.¹⁷⁷—have codified some version of common law immunity for arbitrators only, without reference to sponsoring organizations.

Although not formally adopting a version of the RUAA, seven other states have recognized immunity for arbitration sponsoring organizations at common law: Georgia,¹⁷⁸ Kentucky,¹⁷⁹ Massachusetts,¹⁸⁰ Michi-

¹⁶⁶ *Id.* § 14(a) cmt. 2 (quoting *Corey v. N.Y. Stock. Exch.*, 691 F.2d 1205, 1209 (6th Cir. 1982)).

¹⁶⁷ See UNIF. ARBITRATION ACT Cover Page §§ 1–33.

¹⁶⁸ The states are: Alaska, ALASKA STAT. § 09.43.410 (2008); Colorado, COLO. REV. STAT. § 13-22-214 (2006); Hawaii, HAW. REV. STAT. § 658A-14 (2007); Nevada, NEV. REV. STAT. § 38.229 (2006); New Jersey, N.J. STAT. ANN. § 2A:23B-14 (West Supp. 2008); New Mexico, N.M. STAT. § 44-7A-15 (2001); North Carolina, N.C. GEN. STAT. § 1-569.14 (2007); North Dakota, N.D. CENT. CODE § 32-29.3-14 (West Supp. 1996); Oklahoma, OKLA. STAT. tit. 12, § 1865 (West Supp. 1993); Oregon, OR. REV. STAT. § 36.660 (2007); Utah, UTAH CODE ANN. § 78B-11-115 (2008); and Washington, WASH. REV. CODE § 7.04A.140 (2007).

¹⁶⁹ ARIZ. REV. STAT. ANN. § 12-133(J) (2007).

¹⁷⁰ CAL. CIV. PROC. CODE § 1297.119 (2007).

¹⁷¹ FLA. STAT. § 44.107(1) (2004).

¹⁷² MD. CODE ANN. CTS. & JUD. PROC. § 5-615 (2004) (granting immunity to arbitrators who conduct alternative dispute resolution hearings in health care malpractice claims).

¹⁷³ MONT. CONST. art. 7, § 2, cl. 9.2.

¹⁷⁴ N.H. REV. STAT. ANN. § 490-E:5 (West Supp. 1997) (recognizing arbitral immunity unless arbitrator acts willfully).

¹⁷⁵ 63 PA. STAT. ANN. § 818.11 (West 1996).

¹⁷⁶ WIS. STAT. §§ 93.50(2)(c) (1990) (granting immunity to arbitrators involved in farm mediation and arbitration), 218-0138 (2001) (granting immunity for arbitrators hearing disputes between motor vehicle dealers, salespersons or sales finance companies).

¹⁷⁷ D.C. CODE § 16-4414 (2001).

¹⁷⁸ See *Southwire Co. v. Am. Arbitration Ass’n*, 545 S.E.2d 681, 685 (Ga. Ct. App. 2001).

¹⁷⁹ See *Higdon v. Constr. Arbitration Ass’n*, 71 S.W.3d 131, 132 (Ky. Ct. App. 2002).

¹⁸⁰ See *Bishay v. Am. Arbitration Ass’n*, No. 06-P-778, 2007 WL 1266071, at *1 (Mass. App. Ct. May 1, 2007).

gan,¹⁸¹ New York,¹⁸² and Ohio.¹⁸³ Finally, the following states have recognized some type of common law immunity for arbitrators *only*: Connecticut,¹⁸⁴ Illinois,¹⁸⁵ Iowa,¹⁸⁶ Maine,¹⁸⁷ Minnesota,¹⁸⁸ Rhode Island,¹⁸⁹ and Texas.¹⁹⁰

B. *Exceptions to Arbitral Immunity*

Because of its origins in judicial immunity, both state and federal courts only recognize very limited exceptions to arbitral immunity's applicability.¹⁹¹ Courts have found a grant of immunity improper in the rare instances when the arbitrator fails to render a timely judgment.¹⁹² In addition, courts are divided as to whether the equitable exception to judicial immunity also applies to arbitral immunity.¹⁹³ In 1986, in

¹⁸¹ See *Boraks v. Am. Arbitration Ass'n*, 517 N.W.2d 771, 773 (Mich. Ct. App. 1994).

¹⁸² See *Rubenstein v. Otterbourg*, 357 N.Y.S.2d 62, 63–64 (N.Y.C. Civ. Ct. 1973).

¹⁸³ See *Buyer's First Realty, Inc. v. Cleveland Area Bd. of Realtors*, 745 N.E.2d 1069, 1081 (Ohio Ct. App. 2000).

¹⁸⁴ See *JLM Mktg. v. Bloomer*, No. FSTCV044000720S, 2005 WL 2082914, at *3 (Conn. Super. Aug. 8, 2005).

¹⁸⁵ See *Grane v. Grane*, 493 N.E.2d 1112, 1118, 1119 (Ill. App. 1986) (recognizing the doctrine of arbitral immunity, yet holding that immunity did not extend to an arbitrator who frequently induced parties to consent to binding arbitration because the arbitrator had an interest in the outcome of the arbitration).

¹⁸⁶ See *Bever v. Brown*, 9 N.W. 911, 913 (Iowa 1881).

¹⁸⁷ See *Hutchins v. Merrill*, 89 A. 412, 415 (Me. 1912).

¹⁸⁸ See *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W. 2d 372, 377 (Minn. 1989) (extending immunity to an arbitrator for failing to disclose a possible conflict of interest resulting from a prior business contact with one of the parties to the arbitration).

¹⁸⁹ See *Hurley v. Providence Teachers Union Local 958*, No. C.A. 79-987, 1979 WL 196029, at *1 (R.I. Super. July 12, 1979).

¹⁹⁰ See *Blue Cross Blue Shield of Tex. v. Juneau*, 114 S.W.3d 126, 133 (Tex. Ct. App. 2003).

¹⁹¹ See *E.C. Ernst v. Manhattan Constr. Co.*, 551 F.2d 1026, 1033 (5th Cir. 1977) (denying immunity to arbitrator who failed to issue a timely decision); *Trans World Airlines, Inc. v. Sinicropi*, No. 93 CIV. 3094 (CSH), 1994 WL 132233, at *2 (S.D.N.Y. Apr. 14, 1994), *aff'd* 84 F.3d 116 (2d Cir. 1996) (holding that arbitral immunity does not bar claims for equitable relief).

¹⁹² See *Ernst*, 551 F.2d at 1033 (finding that arbitral immunity did not apply because “the arbitrator has a duty . . . to make reasonably expeditious decisions” and when an arbitrator fails to render a timely decision, “he loses his claim to immunity because he loses his resemblance to a judge” and “has simply defaulted on a contractual duty to both parties”); *Morgan Phillips, Inc., v. JAMS/Endispute*, 40 Cal. App. 4th 795, 802 (Ct. App. 2006) (noting that under California law, arbitral immunity does not apply when an arbitrator refuses to issue an award because that failure is as a breach of contract that is not “integral to the arbitration process [but] rather, a breakdown of that process”).

¹⁹³ Compare *Kemner v. Dist. Council of Painting and Allied Trades No. 36*, 768 F.2d 1115, 1119–20 (9th Cir. 1985) (holding that immunity is not applicable in suits seeking

Kemner v. District Council of Painting & Allied Trades No.36, the U.S. Court of Appeals for the Ninth Circuit confronted the issue of whether immunity only applies to monetary claims.¹⁹⁴ In *Kemner*, a painting contractor filed suit against his labor union and two arbitration committees.¹⁹⁵ After a financial audit indicated that the contractor failed to pay trust fund taxes in violation of the union contract, the union submitted the dispute to arbitration committees to render a judgment.¹⁹⁶ After the committees found the contractor liable for failing to pay the contributions, he filed suit seeking to vacate the award on the grounds that the arbitration committees had exceeded their authority under the union contract.¹⁹⁷ The Ninth Circuit ultimately held that because the contractor only sought equitable relief, immunity was not appropriate because the case did not raise the policy concerns underlying the doctrine of judicial and arbitral immunity.¹⁹⁸

A similar decision was reached by the U.S. District Court for the Southern District of New York in 1994 in *Trans World Airlines, Inc. v. Sinicropi*.¹⁹⁹ The case involved a dispute arising from Trans World Airline's ("TWA") claims that a retirement board improperly awarded benefits to one of its former employees.²⁰⁰ Because a panel comprised of four board members was initially deadlocked regarding the employee's claim, a fifth arbitrator joined to help reach a determination.²⁰¹ After the fifth member sided in favor of the employee, TWA brought suit against the board seeking injunctive and declaratory relief on the grounds that the board exceeded its authority under the Employee Retirement Income Security Act ("ERISA").²⁰² In response to the suit, one of the arbitrators claimed that his role was functionally equivalent to a judge, and that therefore, he deserved the protections of arbitral immunity.²⁰³ The court relied heavily on common law precedent denying immunity to judges in equitable suits, and concluded that because arbitral immunity derives exclusively from judicial immunity,

non-monetary damages), *with* *Tamari v. Conrad*, 552 F.2d 778, 780 (7th Cir. 1977) (finding that immunity did extend to arbitrator in cases involving monetary and injunctive relief).

¹⁹⁴ See 768 F.2d at 1115.

¹⁹⁵ See *id.* at 1117.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* at 1118.

¹⁹⁸ *Id.* at 1119–20.

¹⁹⁹ See 1994 WL 132233, at *2.

²⁰⁰ *Id.* at *1.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

protecting arbitrators from injunctive equitable relief was beyond the scope of arbitral immunity.²⁰⁴

In contrast, in 1977, in *Tamari v. Conrad*, the U.S. Court of Appeals for the Seventh Circuit found that arbitral immunity did apply in a case where petitioners sought monetary and injunctive relief on the grounds that an arbitration panel was improperly selected and therefore lacked authority to hear the case.²⁰⁵ The petitioners argued that the arbitrators were not protected by arbitral immunity because they were unauthorized to hear the case in the first place.²⁰⁶ Although the court recognized that the petitioners sought both monetary and equitable relief, it held that immunity barred the entire action.²⁰⁷ The court's reasoning was primarily based on a concern that individuals would be reluctant to serve as arbitrators if they were to face potential suits challenging their general authority to hear the dispute.²⁰⁸ This reasoning differed from the general principles underlying arbitral immunity—principally, that it is necessary in order to ensure arbitral neutrality and impartiality.²⁰⁹

III. A SUCCESSFUL SOLUTION? SAN FRANCISCO PROPOSES A NEW CHALLENGE TO ARBITRAL IMMUNITY

In its suit against the NAF, the San Francisco City Attorney's Office argues that arbitral immunity does not bar claims against arbitral sponsoring organizations that are filed on behalf of the people and seek only equitable relief.²¹⁰ The approach presents a new framework to consider the proper scope of arbitral immunity, and can serve as a possible model for similar litigation in other states.²¹¹ Ultimately, however, legislative action on a state or national level will likely produce the most comprehensive reform.²¹²

²⁰⁴ See *id.* at *2.

²⁰⁵ See 552 F.2d at 780.

²⁰⁶ See *id.*

²⁰⁷ See *id.*

²⁰⁸ See *id.* at 781 (noting that the plaintiff's claims against the arbitrator were analogous to a disgruntled litigant suing members of the jury, "seeking to obtain a declaration that the jury's verdict was void on the ground that the selection of the jury was improper" and noting that "[s]uch a suit would not be permitted to go forward because it would place an unfair burden on the individual jurors and would discourage other citizens from becoming jurors").

²⁰⁹ See *id.* at 780 (noting the inapplicability of some of the policy underlying arbitral immunity, for example, "that an arbitrator cannot impartially resolve a dispute unless [he or she] is free from the fear of reprisal by a dissatisfied litigant is inapplicable here").

²¹⁰ See San Francisco, Opp'n, *supra* note 61, at 4–9.

²¹¹ See *infra* notes 222–300 and accompanying text.

²¹² See *infra* notes 301–310 and accompanying text.

A. *San Francisco's Strategy*

In March 2008, San Francisco City Attorney Dennis J. Herrera filed suit against the NAF in California state court seeking civil penalties and injunctive relief.²¹³ The complaint alleged that NAF engaged in systematically unfair and unlawful practices in its capacity as a supposedly neutral sponsor of arbitration in consumer credit card collection cases in California.²¹⁴ Specifically, the suit alleged that NAF deprived California residents of a fair hearing to resolve their disputes because NAF administered the arbitration process in a manner that heavily favored credit card companies.²¹⁵ The challenged practices included creating incentives for arbitrators to favor company collectors over individual consumers and encouraging arbitrators to decide matters with only minimal, if any, review.²¹⁶ In particular, the complaint alleged that NAF provided arbitrators with pre-printed arbitration award forms that were already made out in favor of the debt collectors, and terminated arbitrators who decided in favor of individual consumers.²¹⁷ The claim also alleged that NAF systematically failed to provide consumers with proper notice of the hearings (instead of sending notice via certified mail or private delivery service), failed to relay consumers' defenses to the arbitrator, and failed to comply with NAF's own internal rules.²¹⁸

To support the City's claims, the City Attorney cited statistics provided by NAF²¹⁹ regarding its California arbitrations from 2003 through the beginning of 2007.²²⁰ Of the 18,075 consumer arbitration matters resolved through hearings, less than 0.2% of the cases were decided in favor of the consumer.²²¹ Furthermore, of that 0.2%, all involved actions brought *by* the consumer *against* a business entity.²²² Analyzing only hearings where business entities brought actions against individual

²¹³ See Complaint, *supra* note 1, at 2, 27.

²¹⁴ See *id.* at 2.

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See San Francisco, Opp'n, *supra* note 61, at 2–3.

²¹⁸ *Id.* at 3. Regarding NAF's failure to comply with its own internal rules, the complaint alleges that although NAF has a rule against accepting late filings from either the debtor or the debt-collecting companies, NAF oftentimes allows the companies to submit late filings without granting similar allowances to debtors. See *id.*

²¹⁹ California is the only state that requires sponsoring organizations to report information concerning the arbitrations they administer, including the results of each proceeding. CAL. CIV. PROC. § 1281.96 (2007); see also Press Release, Public Citizen, *supra* note 30, at 2.

²²⁰ See San Francisco, Opp'n, *supra* note 61, at 2.

²²¹ *Id.*

²²² *Id.* (emphasis added).

consumers, every case was decided in favor of the business—a one hundred percent success rate.²²³

In response to NAF's defense that the suit was uniformly barred by arbitral immunity,²²⁴ the City Attorney referred to the common law practice of allowing claims seeking prospective equitable relief against judges.²²⁵ Therefore, according to the City, because arbitral immunity only extends as far as its judicial counterpart, its action seeking civil penalties and injunctive relief was valid and not barred by the doctrine of arbitral immunity.²²⁶ Furthermore, the City Attorney argued that arbitral immunity did not protect NAF from suits filed on behalf of the people by civil law enforcement agencies, in contrast to suits filed by unsatisfied litigants who were parties to the arbitration.²²⁷

The case is still pending in the California Superior Court, although so far, the court seems to be responsive to San Francisco's arguments.²²⁸ After NAF refused to answer San Francisco's repeated discovery requests, the City filed a motion to compel discovery.²²⁹ In defense, NAF claimed that arbitrary immunity also extended to the discovery process, and therefore it was not required to produce any discovery information.²³⁰ At a hearing on the motion, the court rejected this argument on the grounds that immunity, in the narrowest sense, does not apply for the purposes of fact gathering in the discovery process.²³¹ The court further noted that as a tentative matter, it did not believe that immunity applied in this case because arbitral immunity was designed to protect the confidentiality and autonomy of individual arbitrators, whereas here, San Francisco was challenging NAF's larger

²²³ *Id.*

²²⁴ *Id.* at 4.

²²⁵ *See id.*

²²⁶ *See* San Francisco, Opp'n, *supra* note 61, at 4.

²²⁷ *See id.*

²²⁸ *See* People v. Nat'l Arbitration Forum, Inc., No. CGC-08-473569 (Cal. Super. Ct. Mar. 24, 2008). At a hearing on July 31, 2008, the court rejected NAF's motion to dismiss San Francisco's complaint on the grounds that the claim is barred by arbitral immunity and that the FAA preempts any California state law relating to arbitration. *See* Transcript of Proceedings July 31, 2008 at 41, People v. Nat'l Arbitration Forum, Inc., No. CGC-08-473569 (Cal. Super. Ct., Mar. 24, 2008). Following arguments from all parties, the court overruled the demurrers and denied defendants' motion to strike. *See id.*; *see also* Notice of Hearing on Demand to Complaint by National Arbitration Forum, Inc. at 2, *Nat'l Arbitration Forum, Inc.*, No. CGC-08-473569.

²²⁹ *See* People's Notice of Motion and Motion to Compel, *Nat'l Arbitration Forum, Inc.*, No. CGC-08-473569.

²³⁰ *See id.* at 1, 3.

²³¹ *See* Transcript of Proceedings July 10, 2009 at 10, *Nat'l Arbitration Forum, Inc.*, No. CGC-08-473569.

business practices and methods.²³² After the court's ruling, the parties started the discovery process and a trial date has yet to be set.²³³

B. The Merits of San Francisco's Approach

The San Francisco City Attorney's claim is unique in two principal ways.²³⁴ First, it argues that arbitral immunity does not bar claims for prospective equitable relief.²³⁵ Second, the City Attorney argues that irrespective of the type of relief it seeks, arbitral immunity does not bar suits brought by civil law enforcement agencies acting on behalf of the people.²³⁶ This section discusses the merits of these two claims.²³⁷

1. Equitable Relief

Although courts remain divided as to whether arbitral immunity applies to claims seeking non-monetary relief,²³⁸ because judicial immunity typically does not bar such claims, the San Francisco City Attorney raises interesting issues regarding the proper scope of arbitral immunity.²³⁹

Arbitrators are immune from suits arising from their arbitral decisions because they perform roles that are analogous to judges.²⁴⁰ Accordingly, they deserve similar protections to ensure that they remain independent decisionmakers who are uninfluenced by external pressures.²⁴¹ It follows logically, therefore, that the protections granted to arbitrators should only be as broad as those granted to judges.²⁴² In the City Attorney's suit against NAF, it seeks only equitable relief in the form of civil penalties and permanent injunctive relief prohibiting NAF from engaging in unfair competition and deceptive advertising practices in California.²⁴³ Presuming a different scenario, if the City Attor-

²³² See *id.* at 4–5.

²³³ See Complaint, *supra* note 1.

²³⁴ See San Francisco, Opp'n, *supra* note 61, at 5–9.

²³⁵ See *id.* at 8.

²³⁶ See *id.* at 5.

²³⁷ See *infra* notes 222–310 and accompanying text.

²³⁸ See *supra* notes 193–209 and accompanying text.

²³⁹ See *infra* notes 224–258 and accompanying text.

²⁴⁰ See *Hoosac Tunnel Dock & Elevator Co. v. O'Brien*, 137 Mass. 424, 426 (1884).

²⁴¹ See *id.*

²⁴² See, e.g., *E.C. Ernst v. Manhattan Constr. Co.*, 551 F.2d 1026, 1033 (5th Cir. 1977); *Int'l Med. Group, Inc. v. Am. Arbitration Ass'n*, 149 F. Supp. 2d 615, 628 (S.D. Ind. 2001), *aff'd*, 312 F.3d 833, 840 (7th Cir. 2002) (“Courts have . . . analogiz[ed] to the principal of judicial immunity to shape the contours of arbitral immunity to suit.”).

²⁴³ See Complaint, *supra* note 1, at 27.

ney sought injunctive relief against California judges, arguably judicial immunity would not bar the case.²⁴⁴

Additionally, the policy concerns highlighted by the court in *Tamari v. Conrad* are also inapplicable in this context.²⁴⁵ In *Tamari*, the court was concerned that the threat of legal liability, even from non-monetary claims, would disincentivize individuals from serving as arbitrators.²⁴⁶ Because San Francisco's claim focuses only on NAF's actions, rather than on the actions of individual arbitrators, the potentially negative impact on future arbitrators is significantly less.²⁴⁷ Conversely, the City Attorney alleges that NAF pressures arbitrators to find in favor of the debtor-companies—in some cases, even firing arbitrators who found in favor of the consumer.²⁴⁸ Therefore, an injunction that prevents NAF from engaging in these particular types of biased pressure may serve as an *incentive* for future arbitrators who can be assured that they can freely decide cases on the merits without exterior influence or pressure from the arbitration firms.²⁴⁹

Consequently, although courts are split as to whether arbitral immunity applies to cases seeking non-monetary relief, given the clear limitations on the doctrine's applicability as applied to judges and the inapplicability of additional concerns raised by the court in *Tamari*, it is reasonable that a California court could find that immunity does not bar, per se, the City Attorney's claims for equitable relief.²⁵⁰

2. Actions Brought by Civil Law Enforcement Agencies

In addition to claiming that immunity is inapplicable due to the type of relief sought, the City Attorney also argues that its claim is unique because: (1) arbitral immunity does not apply to actions by civil

²⁴⁴ See *Pulliam v. Allen*, 466 U.S. 522, 536 (1984) (noting that “[w]e never have had a rule of absolute judicial immunity from prospective relief, and there is no evidence that the absence of that immunity has had a chilling effect on judicial independence”).

²⁴⁵ See 552 F.2d 778, 780–81 (7th Cir. 1977).

²⁴⁶ See *id.* at 781.

²⁴⁷ See Complaint, *supra* note 1, at 7–8.

²⁴⁸ See San Francisco, Opp'n, *supra* note 61, at 5–8.

²⁴⁹ See *id.*; see also *Tamari*, 552 F.2d at 781.

²⁵⁰ See *Pulliam*, 466 U.S. at 541–42 (holding that judicial immunity was not a bar to suits seeking only equitable relief); *Tamari*, 552 F.2d at 781 (stressing a concern that allowing suits for monetary and equitable relief would discourage individuals from volunteering to serve as arbitrators). This argument assumes that the City Attorney can successfully show that injunctive relief is necessary because there is an inadequate remedy at law. See *Nollet v. Justices of Trial Court of Com. of Mass.*, 83 F. Supp. 2d 204, 210 (D. Mass. 2000), *aff'd*, 248 F.3d 1127 (1st Cir. 2000).

law enforcement agencies acting on behalf of the people and (2) it was not a party to any individual arbitration.²⁵¹

a. *Arbitral Immunity Does Not Bar Actions by Civil Law Enforcement Agencies*

Historically, civil law enforcement agencies such as state attorney general offices were granted broad authority to act on behalf of the people in protecting the public good.²⁵² Accordingly, these agencies typically had broad discretion to prosecute, defend, and enforce laws in the name of the larger public interest.²⁵³ This duty to serve the public is particularly acute when officials such as the Attorney General or the San Francisco City Attorney are elected by the people.²⁵⁴ Although all public officials are obligated to serve the public interest, an elected official is specifically selected by the people to represent and defend their rights, and therefore, arguably has a special obligation to use the most effective mechanisms to achieve that goal.²⁵⁵

In their role as advocates for the people, state attorneys general and local governments are sometimes granted greater freedom to pursue civil actions against parties who engage in conduct that is counter to the public interest.²⁵⁶ For example, it is long established that civil suits filed by a state attorney generally are not barred by statute of limi-

²⁵¹ See San Francisco, *Opp'n*, *supra* note 61, at 5–9.

²⁵² See *State of Fla. v. Exxon Corp.*, 526 F.2d 266, 268–69 n.6 (5th Cir. 1976) (detailing the common law origins of the office of the attorney general dating back to sixteenth-century England).

²⁵³ See *id.*

²⁵⁴ See *id.* at 269 n.6. The U.S. Court of Appeals for the Fifth Circuit noted:

The Attorney General is elected by the people; he is entrusted by them with the common law power to legally represent them or some of them in matters deemed by him to affect the public interest. . . . Regardless of the effectiveness of his efforts in particular public legal situations, at least the people have the continuing satisfaction of knowing that their elected Attorney General has the right to exercise his conscientious official discretion to enter into those legal matters deemed by him to involve the public interest. . . .

Id. (quoting *State ex rel. Shevin v. Yarborough*, 93 P.U.R.3d 401, 895 (Fla. 1972) (Ervin, J., concurring) (citations omitted)).

²⁵⁵ See *id.*; *State ex rel. Davis v. Love*, 126 So. 374, 376 (Fla. 1930) (“The Attorney-General is the attorney and legal guardian of the people. . . . His duties pertain to the Executive Department of the State, and it is his duty to use means most effectual to the enforcement of the laws, and the protection of the people”) (quoting *State v. Gleason*, 12 Fla. 190, 212 (1868)).

²⁵⁶ See *City of Colo. Springs v. Timberline Assoc.*, 824 P.2d 776, 778 (Co. 1992) (noting that “a majority of states, when filing lawsuits in the posture of plaintiffs, are immune from statutes of limitations”).

tations requirements.²⁵⁷ This exemption is justified on the grounds that a state's interest in protecting the public good outweighs any procedural errors that were caused by government officials' failure to initiate timely action.²⁵⁸ Some states have also expanded the doctrine to include actions initiated by local governments and municipalities acting on behalf of the people in public or government capacity, instead of in a private or corporate role.²⁵⁹

Additionally, civil defendants typically cannot assert the affirmative defense of equitable estoppel²⁶⁰ against actions filed by state and local governments.²⁶¹ This exception is justified because the public interest is significantly threatened when a government cannot enforce its own laws because conduct by individual government officials gave rise to an estoppel.²⁶² Finally, some state statutes carve out special exceptions for actions brought on behalf of the people by the Attorney General or other government attorneys.²⁶³ For example, a New York statute dic-

²⁵⁷ See *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1937) (discussing the historical doctrine of "*quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations" the Court notes that the origins of the contemporary *nullum tempus* doctrine is "the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers").

²⁵⁸ See *City of Colo. Springs*, 824 P.2d at 779–80 (noting that the policy behind exempting actions brought on behalf of the people by local governments and municipalities from statute of limitations requirements is that "[t]he local government will be viewed as seeking to protect public rights, and limitations will not run because public rights stand paramount and should not suffer, no matter how lax or negligent a local government may be in asserting them").

²⁵⁹ Compare *Laramie County Sch. Dist. No. One v. Muir*, 808 P.2d 797, 802 (1991) ("If a local agency is carrying on a function of protecting public rights . . . the statute of limitations preclusion should be available."), with *City of Colo. Springs*, 824 P.2d at 782 (holding that statute of limitations does run on actions brought on behalf of the public by local governmental entities).

²⁶⁰ Estoppel is an equitable doctrine applied in order to prevent greater injustice. See *Heckler v. Cmty. Health Servs. Inc.*, 467 U.S. 51, 59 (1984). In particular, "[e]quitable estoppel operates to prevent a party from asserting legal rights that, in equity and good conscience, they should not be allowed to assert because of their conduct." *Nev. State Bank v. Jamison Family P'ship*, 801 P.2d 1377, 1382 (1990) (citations omitted).

²⁶¹ See *Heckler*, 467 U.S. at 60 ("[I]t is well settled that the Government may not be estopped on the same terms as any other litigant.").

²⁶² See *id.* ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.").

²⁶³ See N.Y. CORRECT. LAW § 24 (2007), *invalidated by* *Haywood v. Drown*, 129 S. Ct. 2108, 2110 (2009) (stripping state courts' jurisdiction to hear civil claims against correctional officers in their personal capacity, except for actions by the attorney general on behalf of the state); N.Y. EXEC. LAW § 259(g) (2005) (exempting employees of the State Division of the Parole Board from civil liability except in actions brought by the attorney general). The U.S.

tates that, *except* for actions taken by the Attorney General, employees working for the Department of Correctional Service or the State Board of Parole cannot be held personally liable for civil rights violations arising out of conduct within the scope of employment.²⁶⁴ As these examples indicate, in some circumstances, granting special exceptions for civil law enforcement entities is justified because the collective interests of the public outweigh a defendant's rights to assert defenses that would otherwise be available in a suit between two private parties.²⁶⁵

In the City of San Francisco's case against NAF, there is a persuasive argument that arbitral immunity should be waived, at least in order for a court to consider the merits of its claims because it is initiating a consumer-protection action on behalf of the public.²⁶⁶ The potential threat to consumers' legal rights and financial lives seems to outweigh the harm that NAF, a multi-million dollar company, suffers from defending the City's allegations.²⁶⁷ Additionally, because no individual arbitrators are named as defendants, the suit does not raise the policy concerns underlying the doctrine of arbitral immunity.²⁶⁸ Finally, because the claim is brought on behalf of the people, it is contrary to fundamental public policy to allow NAF to use arbitral immunity to escape all liability against allegations that it systematically violated California state law at the expense of consumers.²⁶⁹

Supreme Court held that N.Y. CORRECT. LAW § 24 violated the Supremacy Clause because it was not a neutral jurisdictional rule, and therefore, not a valid excuse for refusing to hear a federal cause of action. *Haywood*, 129 S. Ct. at 2110.

²⁶⁴ See N.Y. CORRECT. LAW § 24. The statute reads in part:

No civil action shall be brought in any court of the state, except by the attorney general on behalf of the state, against any officer or employee of the department, in his personal capacity, for damages arising out of any act done or the failure to perform any act within the scope of the employment and in the discharge of the duties by such officer or employee.

Id. On December 3, 2008, the U.S. Supreme Court heard oral arguments in *Haywood v. Drown*, that challenged the constitutionality of N.Y. CORRECT. LAW § 24. See *Haywood v. Drown*, 881 N.E.2d 180, 185 (N.Y. App. 2007) *cert. granted*, 76 U.S.L.W. 3649 (U.S. Jun. 16, 2008) (No. 07-10374).

²⁶⁵ See *Heckler*, 467 U.S. at 60; *Laramie*, 808 P.2d at 802.

²⁶⁶ *Cf. Heckler*, 467 U.S. at 60; *Laramie*, 808 P.2d at 802.

²⁶⁷ *Cf. Heckler*, 467 U.S. at 60; *Laramie*, 808 P.2d at 802.

²⁶⁸ See *Olson v. Nat'l Ass'n of Secs.*, 85 F.3d 381, 382 (8th Cir. 1996); *Cort v. Am. Arbitration Ass'n*, 795 F. Supp. 970, 973 (N.D. Cal. 1992); *supra* notes 96–97, 103–106 and accompanying text.

²⁶⁹ See *San Francisco, Opp'n*, *supra* note at 61, at 4; *cf. Heckler*, 467 U.S. at 60.

b. *The City Attorney Was Not a Party to Any NAF Arbitration*

In addition to claiming that immunity is inapplicable because it is a civil law enforcement agency, San Francisco also argued that it is unique from other plaintiffs who have challenged arbitral immunity because it was not an actual party to an individual arbitration.²⁷⁰

Although arbitral immunity is firmly rooted in state and federal law, including California law, all previous cases, at the core, involved a party to the arbitration attempting to challenge the arbitration award by attacking the arbitrator's or sponsoring organization's conduct.²⁷¹ Consequently, these cases triggered the fundamental policy concerns underlying judicial and arbitral immunity: that protecting decision-makers from these types of collateral attacks is vital to ensure their independence and neutrality.²⁷² As the California Court of Appeals noted in 2004 in *Stasz v. Schwab*, arbitral immunity applies in cases *where a party to the arbitration* files suit to challenge the arbitration award based on the arbitrators or sponsoring organizations alleged biasness.²⁷³ In contrast, in San Francisco's case, the City Attorney challenges NAF's actions on consumer protection grounds in its role as an advocate for the citizens of San Francisco.²⁷⁴ Therefore, the City Attorney's role as a protectorate for the public good is distinguishable from an unsatisfied litigant who seeks to challenge the outcome of arbitration proceedings for their own personal or financial gain.²⁷⁵ Accordingly, the City Attorney's suit does not threaten to jeopardize arbitrators' independence or expose them to harassing and costly litigation.²⁷⁶ As a result, because the policy concerns underlying judicial and arbitral immunity do not apply, protecting NAF from legal liability is not necessary.²⁷⁷

²⁷⁰ See San Francisco, Opp'n, *supra* note at 61, at 5–8.

²⁷¹ See, e.g., *Olson*, 85 F.3d at 382; *Stasz v. Schwab*, 17 Cal. Rptr. 3d 116, 118 (Ct. App. 2004).

²⁷² See *Hoosac*, 137 Mass. at 426.

²⁷³ 17 Cal. Rptr. 3d at 133 (“In short, California and other jurisdictions recognize that arbitral immunity applies *where one of the parties to the arbitration* seeks to impose liability based on the alleged bias of the arbitrator or the sponsoring organization”); *Baar v. Tigerman*, 211 Cal. Rptr. 426, 428 (Ct. App. 1983) (“Cases in which courts have clothed arbitrators with immunity have involved *disgruntled litigants* who sought to hold an arbitrator liable for *alleged misconduct in arriving at a decision*.”).

²⁷⁴ See San Francisco, Opp'n, *supra* note 61, at 6.

²⁷⁵ See *id.* (“Unlike private actions brought by disgruntled litigants, ‘an action filed by the People seeking injunctive relief and civil penalties is . . . designed to protect the public and not to benefit private parties.’”) (quoting *People v. Pacific Land Research Co.*, 20 Cal.3d 10, 17 (2007)).

²⁷⁶ See *Hoosac*, 137 Mass. at 426.

²⁷⁷ Cf. *Stasz*, 17 Cal. Rptr. 3d at 125 (citations omitted); *Baar*, 211 Cal. Rptr. at 428.

C. *A Promising Strategy, Yet Challenges Remain*

San Francisco's approach raises compelling and creative arguments that distinguish it from previous cases where courts applied immunity expansively to cover arbitrators and arbitral sponsoring organizations.²⁷⁸ In the event, however, that the court determines that immunity is still appropriate, the City's claim faces serious challenges in light of the strong precedential support for a broad application of arbitral immunity.²⁷⁹

In its complaint, the City Attorney raises a number of factual allegations regarding NAF's unfair business practices in its role as a sponsor of consumer arbitration proceedings.²⁸⁰ In general, the allegations against NAF involve activities that are more administrative rather than adjudicative in nature: favoring debt-collecting companies over debtor-consumers, failing to provide consumers with adequate notice of upcoming hearings, and violating the company's own internal rules and policies.²⁸¹ Therefore, it would appear that the City's claim does not raise the same policy concerns as cases that challenge individual arbitrators' factual or legal findings.²⁸² Nonetheless, courts generally do apply arbitral and judicial immunity regardless of whether the conduct is categorized as ministerial and decisional.²⁸³ For example, courts have held that even administrative-like actions, such as providing notice and staffing arbitration panels, are protected because they are part of the larger arbitration process.²⁸⁴ Furthermore, courts have even extended this rationale to apply immunity in cases where an arbitrator's actions appear to be corrupt or biased in favor of one of the parties.²⁸⁵ As a result, if the court finds that San Francisco's claim does not qualify for an exception to arbitral immunity, it is likely that the court would conclude that the allegations are barred because they qualify as part of the larger arbitration process, irrespective of their administrative character.²⁸⁶

²⁷⁸ See *supra* notes 218–258 and accompanying text.

²⁷⁹ See *supra* notes 111–155 and accompanying text.

²⁸⁰ See San Francisco, Opp'n, *supra* note 61, at 2–4.

²⁸¹ See *id.* at 2–3.

²⁸² See *Olson*, 85 F.3d at 382.

²⁸³ See, e.g., *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990); *Thiele v. RML Realty Partners*, 14 Cal. App. 4th 1526, 1530 (1993).

²⁸⁴ See *Austern*, 898 F.2d at 886.

²⁸⁵ See *Olson*, 85 F.3d at 383.

²⁸⁶ See, e.g., *Olson*, 85 F.3d at 383; *Austern*, 898 F.2d at 886; *Thiele*, 14 Cal. App. 4th at 1526.

D. *Beyond San Francisco: Possible Action in Other States and the Need for Comprehensive Legislative Reform*

Even if the San Francisco City Attorney is ultimately unsuccessful in defeating NAF's broad immunity protections, the case remains relevant.²⁸⁷ Principally, it provides an instructive model for action in other states and will ideally encourage state or national legislative action that establishes clear limits on the doctrine's applicability to arbitration sponsoring organizations.²⁸⁸

I. Possible Replication in Other States

The San Francisco litigation against NAF can potentially serve as a model for civil law enforcement action in other states.²⁸⁹ Although San Francisco relies on California case law to argue that arbitral immunity is no broader than judicial immunity,²⁹⁰ and only applies to suits brought by disgruntled litigants,²⁹¹ the U.S. Supreme Court has held that judicial immunity does not bar suits for injunctive relief.²⁹² Thus, even if San Francisco's approach is ultimately rejected, other state courts may interpret Supreme Court precedent and their own common law differently and decide that a waiver to immunity is required.²⁹³ The likelihood of successfully challenging a sponsoring organization's immunity is stronger in states, such as New Jersey²⁹⁴ and Illinois,²⁹⁵ where state courts have interpreted a narrower view of arbitral immunity, or jurisdictions that hold that judicial immunity does not apply to suits seeking only injunctive relief.²⁹⁶

Nonetheless, because of strong state law precedent in favor of broad immunity for sponsoring organizations, any litigation will likely

²⁸⁷ See *infra* notes 288–300 and accompanying text.

²⁸⁸ See *infra* notes 288–310 and accompanying text.

²⁸⁹ See *infra* notes 290–300 and accompanying text.

²⁹⁰ See San Francisco, Opp'n, *supra* note 61, at 5.

²⁹¹ See *id.* at 5–7 (citing California cases).

²⁹² See *Pulliam*, 466 U.S. at 541–542.

²⁹³ *Cf.*, *Grane v. Grane*, 493 N.E.2d 1112, 1119 (Ill. App. 1986) (holding that immunity did not extend to an arbitrator who frequently induced parties to consent to binding arbitration because the arbitrator had an interest in the outcome of the arbitration); *Levine v. Wiss & Co.*, 478 A.2d 397, 401 (N.J. 1984) (noting that arbitral immunity extends only as far as judicial immunity in order to protect an arbitrator's independence and neutrality).

²⁹⁴ See *Levine*, 478 A.2d at 401.

²⁹⁵ See *Grane*, 493 N.E.2d at 1119.

²⁹⁶ See *Timmerman v. Brown*, 528 F.2d 811, 814 (4th Cir. 1975); *Guerin v. Riley*, 573 F. Supp. 110, 111 (D.C.N.J. 1983) (holding that a judge was not entitled to immunity in a case seeking injunctive relief associated with § 1983 claims).

face the same hurdles as the San Francisco approach.²⁹⁷ In particular, many states have adopted a very narrow reading of the 1984 U.S. Supreme Court decision *Pulliam v. Allen* as only a barring suits that seek attorney damages in § 1983 claims against judges.²⁹⁸

In addition, perhaps the greatest challenge to action by other states is that California currently is the only state that requires arbitration firms to disclose information regarding the outcome of consumer-related arbitrations.²⁹⁹ Therefore, without concrete statistics, any subsequent litigation would face additional problems regarding producing evidence that corroborates allegations of bias and partiality on the part of arbitration companies.³⁰⁰

2. Legislative Action: The Best Response

Although San Francisco's approach may encourage similar litigation in other states, ideally, it will also spur state and national legislative action that examines the correct scope of arbitral immunity.³⁰¹ As arbitration in the United States becomes increasingly commercialized and largely controlled by enormous for-profit sponsoring organizations,³⁰² the legislature, rather than the judicial system, is better equipped to examine the doctrine in its entirety and impose real limits on arbitral immunity as applied to sponsoring organizations.³⁰³ In particular, through legislative hearings, expert testimony, and investigations, state governments or Congress can determine when immunity is necessary in order to preserve individual arbitrators' autonomy in the decision-making process, and when it is being applied unjustly to exempt sponsoring organizations from any degree of judicial liability or review.³⁰⁴

²⁹⁷ See *supra* notes 111–155 and accompanying text.

²⁹⁸ See *Amato v. Office of La. Comm'r of Secs.*, 644 So. 2d 412, 418 (La. Ct. App. 1994); *Peterson v. Ballard*, 679 A.2d 657, 663 (N.J. Super. Ct. App. Div. 1996).

²⁹⁹ See CAL. CIV. PROC. § 1281.9 (2007).

³⁰⁰ See Complaint, *supra* note 1, at 2, 9 (citing statistics released by NAF that San Francisco argues provide objective support for its claims regarding biasness in regards to NAF's administering of consumer arbitration hearings).

³⁰¹ See *infra* notes 302–310 and accompanying text; see also Peter Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 155–56 (2004) (highlighting the need for reform within the field of arbitral immunity due to the increase of consumer-related arbitrations).

³⁰² See Weston, *supra* note 19, at 459.

³⁰³ See Rutledge, *supra* note 301, at 155–56.

³⁰⁴ See Weston, *supra* note 19, at 509–10 (advocating for a type of qualified immunity for arbitrators and sponsoring organizations that distinguishes between actions related to an arbitrator's decision-making responsibilities and administrative-like actions that should not be afforded immunity protection).

Although clarifying boundaries for individual arbitrator's immunity is necessary,³⁰⁵ because of the enormous control and influence sponsoring organizations have on tens of thousands of consumer arbitrations each year, setting guidelines for sponsoring organizations' liability is a priority.³⁰⁶ Clearly some type of limited liability or qualified immunity is required for sponsoring organizations.³⁰⁷ The San Francisco City Attorney makes a persuasive argument that any statute providing immunity for sponsoring organizations should include an exemption for actions by the Attorney General or municipal governments acting on behalf of the people.³⁰⁸ As discussed, because actions filed by civil law enforcement agencies do not involve parties to the arbitration seeking to invalidate an arbitration award, it does not trigger the concerns for collateral litigation or harassment of arbitrators that arbitral immunity seeks to prevent.³⁰⁹ Furthermore, just as judicial immunity historically did not apply to acts that are purely administrative, the legislature must create guidelines for courts to apply to determine when immunity is inappropriate because a sponsoring organization's actions are largely non-judicial, even if they could qualify as part of the larger arbitration process.³¹⁰

³⁰⁵ For a discussion by a number of scholars suggesting various forms of qualified or limited immunity for arbitrators and sponsoring organizations, see Franck, *supra* note 122, at 1 (proposing broad immunity except in cases of arbitrators' nonfeasance or intentional acts of misconduct); Andrew T. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1279 (2000) (suggesting that arbitrators be liable when they violate mandatory legal rules); Rutledge, *supra* note 301, at 156 (recommending a market-driven approach to arbitral immunity where parties may contractually consent to arbitral immunity); Weston, *supra* note 19, at 510 (proposing qualified immunity for arbitrators that is limited to "arbitral decisional acts on the merits of the substantive dispute upon which evidence was presented").

³⁰⁶ See Mayer, *supra* note 33; Press Release, Public Citizen, *supra* note 30, at 1 (providing statistics regarding the widespread use of arbitration agreements in various consumer contexts).

³⁰⁷ See Weston, *supra* note 19, at 509 (proposing limiting sponsoring organizations' immunity only to instances where they are "a surrogate for the arbitrator's decision-making acts").

³⁰⁸ See San Francisco, Opp'n, *supra* note 61, at 4–9; see also *supra* notes 252–269 and accompanying text.

³⁰⁹ See *supra* notes 270–277 and accompanying text.

³¹⁰ See *Forrester v. White*, 484 U.S. 212, 221 (1988); see also Weston *supra* note 19, at 509–10 ("[W]hen arbitral providers are alleged to have violated their own internal rules, failed to fulfill their contractual obligations with the parties, or improperly performed duties with respect to the administration and oversight of the arbitral process, immunity for arbitral institutions exceeds the level of immunity the Supreme Court has recognized for judges or other public officials. The result is an unjustified abdication of contractual responsibilities to parties who relied upon the provider's promised services.").

CONCLUSION

As a basic premise, immunity for individual arbitrators is necessary in order to ensure that the arbitration process is fair and unbiased for all parties. In granting immunity to arbitrators, courts and legislatures recognize that the benefit of having independent and neutral decisionmakers outweighs the potential harm that results from removing a particular group from the reach of legal liability. Nonetheless, as arbitration becomes a highly commercialized venture that involves parties of vastly different financial and legal resources, clear limits on arbitral immunity are necessary in order to provide a check on for-profit arbitration sponsoring organizations that have otherwise unbridled influence over the arbitration process.

Although arbitral immunity is intended to ensure fairness in the arbitration process, by allowing sponsoring organizations to operate essentially above the law, arbitral immunity is actually *enabling* them to continue administering hearings in a systematically unfair and biased manner. The dissolution of NAF is unlikely to bring about systemic reform because powerful financial incentives still exist for arbitration firms to develop business strategies that favor their creditor clients over individual consumers. Therefore, unless the inherent problems underlying the entire system of arbitration are resolved, consumers will continue to be forced to resolve their disputes in heavily biased forums that statistics show are stacked against them from the start.

The importance of reforming the present landscape of arbitration in America is critical. The San Francisco City Attorney offers a creative and novel approach to challenging the sweeping cloak of immunity that has allowed sponsoring organizations to systematically violate consumer-protection laws designed to protect consumers' legal and financial rights.

Nonetheless, despite the merits of San Francisco's approach, ultimately, legislative action may be the most effective mechanism for true reform given the complexity of the issues. Through hearings and investigations, the legislature is likely better equipped to consider the correct scope of the doctrine as it is applied to sponsoring organizations. In crafting limits, mechanisms must be put in place to determine when immunity is appropriate to prevent collateral attacks on arbitration awards, and when it is being used merely to shield sponsoring firms from being required to provide truly unbiased and fair services at the expense of millions of consumers.

SARA ROITMAN