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BOLSTERING THE FOUNDATION OF FUNDAMENTAL FAIRNESS: THE NINTH CIRCUIT DECLARES EQUITABLE TOLLING NOW APPLIES TO THE FEDERAL ARBITRATION ACT

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BOLSTERING THE FOUNDATION OF FUNDAMENTAL FAIRNESS: THE NINTH CIRCUIT
DECLARES EQUITABLE TOLLING NOW APPLIES TO THE FEDERAL ARBITRATION ACT

By

Matthew E. Selmasska*

I. INTRODUCTION

In *Move, Inc. v. Citigroup Global Markets, Inc.* the Ninth Circuit Court of Appeals held that the doctrine of equitable tolling applies to the Federal Arbitration Act, (“FAA”).¹ The Court further held that Move, Inc. (“Move”) did not receive a fundamentally fair arbitration hearing because a non-attorney who falsified his credentials chaired the arbitration panel.² The court reasoned that none of the textual factors set out by the Supreme Court in *Holland v. Florida*, 560 U.S. 631 (2010), which are used to determine whether the doctrine of equitable tolling does not apply to a statute, weighed against applying equitable tolling to the FAA.³ The court also stated that the structure of the FAA is compatible with equitable tolling, and that equitable tolling would not undermine the FAA’s basic purpose.⁴ Furthermore, the court held that by falsifying his credentials and lying to the Financial Industry Regulatory Authority (“FINRA”), the very presence of the chairman of the three-member arbitration panel denied Move a fundamentally fair hearing.⁵ As such, the court declared that Move was entitled to vacatur of the arbitration award under § 10(a)(3) of the FAA.⁶ This decision is significant because the Ninth Circuit is only the second federal circuit to answer this question in the affirmative.⁷ Additionally, because multiple federal circuits have avoided answering this question,⁸ this decision could represent a bold shift in momentum favoring equitable tolling with respect to the FAA. While the decision potentially broadens the scope of Section 12 of the FAA and its three-month challenge requirement,⁹ the decision

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¹ *Move, Inc. v. Citigroup Global Markets, Inc.*, 840 F.3d 1152, 1159 (9th Cir. 2016); 9 U.S.C. § 1 et seq.

² *Move, Inc.*, 840 F.3d at 1159.

³ *Id.* at 1157.

⁴ *Id.*

⁵ *Id.* at 1158.

⁶ *Id.* at 1159.

⁷ *Move, Inc.*, 840 F.3d at 1156.

⁸ *Id.*

⁹ “Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.S.C. § 12 et seq.

nevertheless bolsters the foundation of fundamental fairness upon which the U.S. law of arbitration rests.

II. BACKGROUND

Move operates the Move Network of real estate websites for consumers and real estate professionals, and maintained an investment account with Defendant Citigroup Global Markets, Inc. (“Citigroup”).¹⁰ Regarding its investments with Citigroup, Move entered into a Client Agreement with Citigroup, which contained an effective arbitration clause.¹¹ The Client Agreement stated “that ‘all claims or controversies [between the parties arising out of this Agreement] shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which Citigroup is a member.’”¹² In September of 2008, Move alleged that Citigroup mismanaged approximately \$131 million of its funds by investing in speculative auction rate securities.¹³ Thus, Move initiated arbitration proceedings against Citigroup before a three-member panel of FINRA.¹⁴

Prior to the commencement of the arbitration proceedings, FINRA required Move and Citigroup to sign a Uniform Submission Agreement.¹⁵ The Uniform Submission Agreement stated that the dispute between the parties would be submitted to arbitration “in accordance with the Constitution, By-Laws, Rules, Regulations, and/or *Code of Arbitration Procedure for Customer Disputes*,” which is embedded in FINRA Rules 12000-12905.¹⁶ FINRA’s *Code of Arbitration Procedure for Customer Disputes* includes Rule 12401(c), which required Move’s claims to be arbitrated by a panel of three FINRA arbitrators.¹⁷ In accordance with Rule 12403, FINRA furnished to both Move and Citigroup a list of thirty proposed arbitrators, which contained employment histories for each prospective arbitrator on the list.¹⁸ FINRA also provided both parties with a shorter list of ten proposed arbitrators from its chairperson roster.¹⁹ It was paramount to Move

¹⁰ Move, Inc., 840 F.3d at 1154.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Move, Inc., 840 F.3d at 1154.

¹⁶ *Id.*

¹⁷ *Id.* at 1154-55.

¹⁸ *Id.*

¹⁹ *Id.* at 1155.

that the chairperson selected be an experienced attorney, particularly because this dispute involved a complex securities issue.²⁰

Among the list of names on the FINRA chairperson roster was James H. Frank, who, according to an accompanying disclosure report, received a law degree in 1975 from Southwestern University and was licensed to practice law in New York, California, and Florida.²¹ Move indicated that Mr. Frank was its top choice to chair the three-member arbitration panel.²² Pursuant to certain rules and regulations of FINRA, prospective arbitrators on the lists must affirm that the information on their Arbitrator Disclosure Report is accurate and up to date.²³ Pursuant to FINRA policies, all prospective arbitrators know that the failure to disclose material information in the Arbitrator Disclosure Report and arbitrator profile may result in their permanent disqualification.²⁴ The arbitration panel to decide the parties' dispute was ultimately comprised of Mr. Frank as chairperson, Arthur T. Berggren, who was a licensed attorney, and Daniel R. Brush, a Certified Public Accountant and Certified Financial Planner.²⁵ The entire arbitration of the dispute consisted of six pre-hearing conferences and twenty hearing sessions.²⁶ Ultimately, on December 8, 2009, the three-member panel issued a unanimous award in favor of Citigroup and denied Move's claims.²⁷

Over four years after the rendition of the arbitral award, in March of 2014, Move discovered an article in *The AmLaw Litigation Daily*, which detailed how Mr. Frank had falsified his credentials with FINRA and lied about being a licensed attorney.²⁸ Mr. Frank's full name is "James Hamilton Hardy Frank," and he successfully impersonated a retired California attorney by the name of "James Hamilton Frank."²⁹ Thereafter, FINRA confirmed that Mr. Frank falsified his information on the Arbitrator Disclosure Report, and lied about his qualifications.³⁰ FINRA subsequently removed him from all existing cases and from their roster.³¹

²⁰ Move, Inc., 840 F.3d at 1155.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Move, Inc., 840 F.3d at 1155.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Move, Inc., 840 F.3d at 1155.

³¹ *Id.*

In June of 2014, Move filed a complaint and a motion for vacatur in the United States District Court for the Central District of California, arguing that vacatur of the arbitration award was warranted under Sections 10(a)(3) and 10(a)(4) of the FAA due to Mr. Frank's misrepresentations.³² While Section 12 of the FAA mandates that a notice of motion to vacate an arbitration award must be served no later than three months after an award is rendered, given the circumstances here, Move argued that the statutory deadline should be equitably tolled.³³ Citigroup responded to the motion by filing a motion to dismiss, and argued that equitable tolling was not available under the FAA, and even if it were, Move failed to demonstrate that equitable tolling was justified on the merits.³⁴ The district court granted Citigroup's motion and denied Move's motion to vacate.³⁵ Specifically, the court ruled that equitable tolling did apply to the FAA, but Move nonetheless failed to demonstrate an adequate ground for vacatur under the FAA.³⁶ The district court further summarized that:

Mr. Frank's misbehavior did not prejudice Move's rights to a fundamentally fair hearing as required by § 10(a)(3) [of the FAA]; and the panel did not exceed its powers in violation of § 10(a)(4) because Mr. Frank's deceit, if cognizable at all under that section, did not violate Move's contractual rights under its Client Agreement with Citigroup.³⁷

Move then timely appealed the district court's ruling.³⁸

III. COURT'S ANALYSIS

The Ninth Circuit began its analysis by declaring the *de novo* standard of review it uses in reviewing a district court's refusal to vacate an award.³⁹ The Ninth Circuit also uses a *de novo* standard of review in hearing an appeal of a district court dismissing a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).⁴⁰

³² Move, Inc., 840 F.3d at 1155.

³³ *Id.* Equitable tolling is a legal doctrine by which the statute of limitations is paused, or "tolled." It is employed primarily "when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action[.]" See *Lozano v. Montoya Alvarez*, 134 S.Ct. 1224, 1231-32 (2014).

³⁴ Move, Inc., 840 F.3d at 1155.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Move, Inc., 840 F.3d at 1155.

⁴⁰ *Id.*

The Court then reiterated that Section 12 of the FAA requires that a motion to vacate an arbitration award be served within three months after the award is either filed or delivered.⁴¹ Due to the fact that Move's motion was filed over four years after the Section 12 statutory window had closed, the first question the Ninth Circuit had to address was whether the doctrine of equitable tolling applies to the FAA.⁴²

A. *The Three-Month Statutory Period to Challenge an Arbitration Award in Section 12 of the FAA May be Equitably Tolled.*

The question of whether equitable tolling applies to the FAA was one of first impression for the Ninth Circuit.⁴³ Unfortunately, the case law from other circuits on this issue was conflicting and split, with most circuit courts of appeal declining to definitively rule one way or the other with regard to whether equitable tolling is applicable to the FAA.⁴⁴ The Ninth Circuit immediately invoked the U.S. Supreme Court's decision in *Young v. United States*, in which the Court stated, "It is hornbook law that limitations periods are customarily subject to equitable tolling . . . unless tolling would be inconsistent with the text of the relevant statute."⁴⁵ Accordingly, the Court explained that, presumably, Congress drafts these statutory limitations in light of that overarching principle.⁴⁶ Furthermore, the Court stated that a "rebuttable presumption that limitations

⁴¹ Move, Inc., 840 F.3d at 1156.

⁴² *Id.*

⁴³ *Id.* The Ninth Circuit did note that the closest the court came to deciding this question came in *Lafarge Conseils Et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334 (9th Cir. 1986). In *Lafarge*, the Court was presented with the question of whether a party could "revive an unsuccessful motion to vacate an arbitration award 'by way of a Rule 60(b) motion with a claim of newly discovered evidence.'" Move, Inc., 840 F.3d at 1156. The Court declined to rule in the affirmative and stated that, "the three-month notice requirement of Section 12 . . . would be meaningless if a party to the arbitration proceeding could bring an *independent* action asserting such claims outside of the statutory time period provided in Section 12." *Id.* (emphasis in original). Most importantly, equitable tolling was neither raised nor specifically discussed in *Lafarge. Id.*

⁴⁴ Move, Inc., 840 F.3d at 1156. The Ninth Circuit declined to decide this issue in *Garrett v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 882, 883 (9th Cir. 1993), where the petitioner asked the court to accept his late petition pursuant to the doctrine of equitable tolling. Because the Ninth Circuit found that the district court correctly dismissed the action on a jurisdictional basis, it never reached the issue. *Id.* Additionally, the First Circuit, the Fourth Circuit, and the Eighth Circuit have all declined to decide whether equitable tolling applies under the FAA. See *Fradella v. Petricca*, 183 F.3d 17, 21 (1st Cir. 1999); *Taylor v. Nelson*, 788 F.2d 220, 225-26 (4th Cir. 1986); *Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 601 (8th Cir. 1981). The Tenth Circuit decided that equitable tolling would suspend the running of a statute of limitations period if Congress did not provide to the contrary. *Pfannenstiel v. Merrill Lynch, Pierce, Fenner & Smith*, 447 F.3d 1155, 1158 (10th Cir. 2007). Lastly, the Fifth Circuit explicitly held that equitable tolling does apply to the FAA. See *Cigna Ins. Co. v. Huddleston*, No. 92-1252, 1993 U.S. App. LEXIS 40575 at *11 (5th Cir. 1993).

⁴⁵ Move, Inc., 840 F.3d at 1156 (quoting *Young v. United States*, 535 U.S. 43, at 49 (2002)).

⁴⁶ Move, Inc., 840 F.3d at 1156 (quoting *Young*, 535 U.S. at 49-50).

periods are subject to equitable tolling must be overcome by the text or purpose of the statute.”⁴⁷

Put another way, federal statutes of limitations are typically “subject to a ‘rebuttable presumption’ in favor ‘of equitable tolling[.]’” and the Supreme Court has instructed lower courts to apply multiple textual factors to federal statutes in order to determine whether equitable tolling should be precluded.⁴⁸ These factors include: whether the limitations period is established in “unusually emphatic form;” is “unusually generous;” whether it uses “highly detailed” and “technical language;” and “whether the statute reiterated the limitations period several times in several different ways.”⁴⁹ Because equitable tolling is an equitable remedy, a court typically will not construe any statute to “displace courts’ traditional equitable authority absent the clearest command[.]” so satisfaction of one or more of these factors could prevent the application of equitable tolling.⁵⁰ The Ninth Circuit was convinced that none of these *Holland* factors weighed in favor of precluding the application of equitable tolling to the FAA.⁵¹ As the Court explained, “. . . the FAA’s instruction that notice of a motion to vacate ‘must be served’ within three months is neither ‘unusually generous’ nor ‘unusually emphatic.’”⁵² Furthermore, the FAA’s limitations period is neither detailed nor technical and is not reiterated elsewhere in the statute. Accordingly, the text of the statute does not preclude equitable tolling.⁵³

Citigroup made an unsuccessful comparison to *Hall Street Associates v. Mattel*, and argued that the instant action should be governed by that U.S. Supreme Court decision. There, the Court explained that Section 9 of the FAA, which commands that a court “must grant” a motion to confirm an arbitral award within one year after the award is made, “carries no hint of flexibility.”⁵⁴ This argument ultimately failed, however, because equitable tolling was not at issue in *Hall Street Associates*.⁵⁵ There, the issue was whether a court possessed the discretion to set aside an award on any grounds not enumerated in Sections 10 or 11 of the FAA.⁵⁶

⁴⁷ *Move, Inc.*, 840 F.3d at 1156-57 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 at 95-96 (1990); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 at 138 (2008)).

⁴⁸ *Move, Inc.*, 840 F.3d at 1157; *Holland v. Florida*, 560 U.S. 631, 645-46 (2010).

⁴⁹ *Move, Inc.*, 840 F.3d at 1157 (citing *Holland*, 560 U.S. at 646-47).

⁵⁰ *Holland*, 560 U.S. at 646.

⁵¹ *Move, Inc.*, 840 F.3d at 1157.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Move, Inc.*, 840 F.3d at 1157 n.1.

⁵⁵ *Id.* at 1157.

⁵⁶ *Id.*

Next, the Ninth Circuit concluded that the structure of the FAA would not be upset by the doctrine of equitable tolling.⁵⁷ Citigroup again argued unsuccessfully that because of Section 9's "one year" provision, allowing a court to vacate an award beyond one year would upset the entire statutory scheme of the FAA.⁵⁸ The Ninth Circuit was unconvinced, and instead stated that, "a moving party would still need to meet the heavy burden of establishing its entitlement to equitable tolling for a court to vacate an award, and it would only be the rare case in which the three-month deadline for a motion to vacate would not apply."⁵⁹

Lastly, the Ninth Circuit explained that equitable tolling would not undermine the basic purpose of the FAA.⁶⁰ The Court reiterated that while the FAA supports the "emphatic federal policy favoring arbitration"⁶¹ and provides for very limited review, that pro-arbitration policy rests upon the assumption of a fair forum.⁶² The Court explicitly stated that there "cannot [be] special deference to arbitration outcomes in the face of a colorable claim that the forum was unfair in a particular case."⁶³ Therefore, in balancing both the finality of arbitration awards and concerns for due process, the Court insisted that arbitration would not be harmed if parties are permitted to reach the "high bar of equitable tolling in limited circumstances."⁶⁴ Thus, holding that equitable tolling applies to the FAA, the Ninth Circuit then had to decide the merits of Move's motion for vacatur to see whether significant grounds existed per Section 10(a)(3).⁶⁵

B. Move, Inc. Entitled to Vacatur Under §10(a)(3) of the FAA

The Ninth Circuit declared that Section 10(a)(3) of the FAA enables courts to "vacate an arbitration award upon finding that 'the arbitrators were guilty of . . . any . . . misbehavior by which the rights of any party have been prejudiced.'"⁶⁶ The Court simply could not accept the district court's conclusion that Move's rights were not prejudiced by the arbitrator's fraudulent misrepresentations. The question asked in

⁵⁷ Move, Inc., 840 F.3d at 1157.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

⁶² Move, Inc., 840 F.3d at 1157-58.

⁶³ *Id.* at 1158.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

determining whether an arbitrator's misbehavior adversely impacted the rights of the arbitrating parties was whether those parties received a fundamentally fair hearing.⁶⁷ The Court stated that vacatur of an arbitral award could be proper where an arbitrator received ex parte evidence that influenced the result of the arbitration proceedings, or "where an arbitrator's post-hearing consultation with an outside expert 'tainted' the panel's decision."⁶⁸ While the Ninth Circuit acknowledged that there had never been a similar factual situation to the instant case, where an arbitrator's selection was based upon his lies and deceit, the Court concluded that such behavior is sufficient for vacatur under Section 10(a)(3) and that Move was denied a fundamentally fair hearing.⁶⁹

The Court articulated how important it was for Move to receive an actual attorney to chair the arbitration panel, given that the claim involved a complex securities issue.⁷⁰ In fact, Move had disqualified many potential attorneys from the proposed FINRA list because it wanted a highly experienced chairperson.⁷¹ Relying on Mr. Frank's falsified background information, Move ranked him first on the FINRA candidate list.⁷² Citigroup argued that Mr. Frank's inclusion on the arbitration panel did not necessarily mean that Move's rights were prejudiced.⁷³ Citigroup further argued that there was no evidence that Mr. Frank's participation affected the ultimate outcome of the arbitral proceedings.⁷⁴ However, the Ninth Circuit declared that there was simply no way to know whether prejudice had occurred.⁷⁵ The Court stated, "Particularly on a small board, . . . it is difficult if not impossible to measure the impact that one member's views have on the process of collective deliberation. Each member contributes not only his vote but his voice to the deliberative process."⁷⁶

The Court then revealed that under FINRA's own policies, the deceit that Mr. Frank perpetuated would have resulted in his permanent disqualification from serving as a FINRA arbitrator, and that he was indeed banished from the FINRA roster upon the

⁶⁷ Move, Inc., 840 F.3d at 1158; U.S. Life Ins. Co. v. Superior Nat. Ins. Co., 591 F.3d 1167, 1177 (9th Cir. 2010).

⁶⁸ Move, Inc., 840 F.3d at 1158 (citing Totem Marine Tug & Barge, Inc. v. N. Am. Towing, Inc., 607 F.2d 649, 653 (5th Cir. 1979); M&A Elec. Power Co-op. v. Local Union No. 702, Int'l Bhd. of Elec. Workers, AFL-CIO, 977 F.2d 1235, 1237-38 (8th Cir. 1992)).

⁶⁹ Move, Inc., 840 F.3d at 1158.

⁷⁰ *Id.* at 1158-59.

⁷¹ *Id.* at 1159.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Move, Inc., 840 F.3d at 1159.

⁷⁵ *Id.*

⁷⁶ *Id.* (citing Stivers v. Pierce, 71 F.3d 732, 747 (9th Cir. 1995)).

revelation of his fraudulent misrepresentations.⁷⁷ Thus, the Ninth Circuit concluded that Move’s rights were prejudiced by Mr. Frank’s participation, because Move was denied a fundamentally fair hearing.⁷⁸ As such, the Court reiterated that Move was entitled to vacatur of the arbitration award under Section 10(a)(3).⁷⁹ The Court then reversed the district court’s judgment in part and remanded the action to the district court for entry of judgment in favor of Move.⁸⁰

On January 5, 2017, Citigroup petitioned the Ninth Circuit and sought a rehearing on the vacatur of its arbitration award.⁸¹ Citigroup argued that its “award should be reinstated because the panel’s allowance of equitable tolling to challenge awards beyond the three-month statutory window could open the floodgates for broad attacks against all arbitration awards”⁸² The Ninth Circuit panel was not convinced, however, and upheld its earlier decision vacating the award.⁸³

IV. SIGNIFICANCE

The Ninth Circuit’s holding represents an important change in the nature of challenging arbitration awards.⁸⁴ Its decision in this action is the most definitive ruling on this issue from any federal circuit.⁸⁵ As the Court discussed in the opinion, other federal circuit court rulings on this particular issue have been unharmonious and inconsistent.⁸⁶ Three federal circuits—the First, Fourth, and Eighth—have all explicitly declined to answer whether equitable tolling could be applied to the FAA.⁸⁷ Before the Ninth Circuit’s decision in *Move, Inc. v. Citigroup Global Markets, Inc.*, the Fifth Circuit Court

⁷⁷ *Move, Inc.*, 840 F.3d at 1159.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Cara Mannion, *9th Circ. Stands By Citigroup Ruling Over Fake FINRA Atty*, LAW 360 (Jan. 5, 2017), https://www.law360.com/appellate/articles/877936?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Move, Inc.*, 840 F.3d at 1156 (holding that FAA Section 12’s three-month challenge requirement is not absolute, in light of the application of equitable tolling).

⁸⁵ *Id.* (acknowledging the conflicting case law from other federal circuits on this issue).

⁸⁶ *Move, Inc.*, 840 F.3d at 1156.

⁸⁷ *Id.* (citing *Fradella v. Petricca*, 183 F.3d 17, 21 (1st Cir. 1991); *Taylor v. Nelson*, 788 F.2d 220, 225-26 (4th Cir. 1986); *Piccolo v. Dain, Kalman & Quail, Inc.*, 641 F.2d 598, 601 (8th Cir. 1991)).

of Appeals was the only federal circuit to answer the question in the affirmative.⁸⁸ With two federal circuits now expressly answering this question in the affirmative, it appears that momentum may move nationally for federal courts to hold that the FAA is subject to equitable tolling, particularly in circumstances in which parties' rights are prejudiced and are thus confronted with a lack of fundamental fairness. This momentum is also likely to move in favor of equitable tolling because no federal circuit has expressly refused to apply equitable tolling to the FAA, but rather just opted to decline to answer the question. More importantly, the decisions of those circuits to decline to answer the question of whether to equitably toll the statute of limitations in the FAA were rendered more than twenty-five years ago. Therefore, should the First, Fourth, and Eighth Circuits be presented with the specific question again, the national momentum would indeed compel a holding in the affirmative, depending on the factual scenario of a prospective case.

This decision also shows practitioners how federal circuit courts will approach the general question of applying equitable tolling to federal statutes.⁸⁹ The Supreme Court's decision in *Young v. United States* emerges as the clear starting point in analyzing how equitable tolling may apply to federal statutory limitation periods.⁹⁰ As a general rule, the Supreme Court stated:

This Court has permitted equitable tolling in situations 'where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.' We have acknowledged, however, that tolling might be appropriate in other cases . . . and this, we believe, is one.⁹¹

The Supreme Court made clear in *Young* that there is no limit to certain factual scenarios where equitable tolling could apply, so long as a party has been "induced or tricked by his adversary's misconduct" ⁹² Here though, it is important to note that Move's relief did not ultimately spawn from its adversary's misconduct, but from the misconduct of the arbitral chairperson himself.⁹³ Therefore, practitioners should be on notice, especially those in the Ninth Circuit, that the liberal application of equitable tolling could be triggered with the presence of any substantial misconduct or fraud, irrespective of the origin of such misconduct.

At the heart of the case was the Ninth Circuit's determination that the misconduct by the imposter arbitrator prevented Move from participating in fundamentally fair

⁸⁸ *Cigna Ins. Co. v. Huddleston*, No. 92-1252, 1993 U.S. App. LEXIS 40575 at *11 (5th Cir. 1993).

⁸⁹ *Move, Inc.*, 840 F.3d at 1156.

⁹⁰ *See Young*, 535 U.S. at 43.

⁹¹ *Id.* at 50 (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

⁹² *Id.*

⁹³ *Move, Inc.*, 840 F.3d at 1159.

proceedings.⁹⁴ This decision makes clear that if fundamental fairness is implicated to the point where a party's rights are prejudiced, courts will be encouraged to apply equitable tolling. Indeed, Move did nothing wrong, and were it not for the fortuitous disclosure of Mr. Frank's fraud in a legal publication four years after the rendition of the award, Move may have never been apprised of the totality of the fraud. Thus, the Ninth Circuit heeded the Supreme Court's most recent guidance to allow for equitable tolling in extraordinary circumstances. Judge Nelson wrote, "time bars in suits between *private* parties are presumptively subject to equitable tolling. That means a court usually may pause the running of a limitations statute in private litigation when a party 'has pursued his rights diligently but some extraordinary circumstance' prevents him from meeting a deadline."⁹⁵

V. COMMENTARY

Even though this decision from the Ninth Circuit resulted in the broadening of the potential scope of Section 12 of the FAA—by allowing the statutory limitations to be equitably tolled—and ultimately led to the vacatur of the arbitral award, the decision nevertheless continues to support the emphatic federal policy favoring arbitration.⁹⁶ It does so by bolstering the assumption of fundamental fairness, upon which that emphatic federal policy must rest.⁹⁷ Indeed, if the foundation for the policy favoring arbitration did not rest upon a foundation that was just, equitable, and fundamentally fair, it would be akin to the foolish man building his house on the sand. It has long been recognized that "a foolish man . . . built his house on sand. The rain fell, and the floods came, and the winds blew and beat against that house, and it fell—and great was its fall!"⁹⁸ The emphatic federal policy would not command respect nor due regard from either practitioners or courts were it not grounded in a foundation of fundamental fairness. If this policy favoring arbitration is to be sustained, it is paramount that its foundation remains uncompromised. Thus, principles of equity commanded the Ninth Circuit here to not only recognize the applicability of equitable tolling to Section 12 of the FAA, but also to acknowledge that the arbitrating party's rights were unfairly prejudiced at the hands of the arbitrator-imposter. The Court's bold decision here is proper, as it is an effort to guard and maintain the fundamentally fair foundation upon which the emphatic federal arbitration policy rests. Hence, the Ninth Circuit also showed that it was not afraid to use equitable measures to remedy the prejudiced rights of arbitrating parties.

⁹⁴ Move, Inc., 840 F.3d at 1159.

⁹⁵ United States v. Kwai Fun Wong, 135 S.Ct. 1625, 1630-31 (2015) (emphasis in original).

⁹⁶ Move, Inc., 840 F.3d at 1157-58 (insisting that the federal pro-arbitration policy must rest upon fundamental fairness).

⁹⁷ Move, Inc., 840 F.3d at 1157-58.

⁹⁸ *Matthew* 7:26-27.

The Ninth Circuit appropriately explained why Citigroup's comparison of the instant case to the Supreme Court's decision in *Hall Street Associates* was inapposite. *Hall Street Associates* cannot be used as a blunt instrument against disputes challenging the enforceability of arbitration awards. Rather, the Ninth Circuit reminds litigants that *Hall Street Associates* stands for the proposition that only the enumerated instances of vacatur in Sections 10 and 11 of the FAA are available to challenge the viability and enforceability of arbitration awards.⁹⁹ The Court in *Hall Street Associates* was clear:

Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process, and bring arbitration theory to grief in [the] postarbitration process.¹⁰⁰

The Ninth's Circuit's decision in the instant case properly tracks the Supreme Court's rationale for only providing review and possible vacatur of awards for the enumerated list of reasons set out in Sections 10 and 11 of the FAA. Not surprisingly, the egregious conduct of the parties' chief arbitrator certainly was enough to rise to the level of fraud, corruption, and misconduct set out in Section 10(a)(3) of the FAA.¹⁰¹ This is good news. If the Court found that Move's rights were not prejudiced by an arbitrator falsifying his credentials and lying about his identity, it is difficult to imagine what sort of greater egregious conduct would be necessary to trigger the protections of Section 10(a)(3). While this was certainly a unique case, it provides practitioners with yet another example of instances likely to result in vacatur of an arbitral award.

VI. CONCLUSION

Move, Inc. was denied a fundamentally fair arbitration hearing because an imposter chaired the hearing.¹⁰² Unfortunately, the fraud did not surface until over four years after the rendering of the award, and Move was almost left with no relief to challenge the award.¹⁰³ In light of the extraordinary circumstances of this case, the Ninth

⁹⁹ See *Hall Street Associates, LLC v. Mattel, Inc.*, 552 U.S. 576 (2008).

¹⁰⁰ *Id.* at 588 (citing *Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 998 (9th Cir. 2003); *Ethyl Corp. v. United Steelworkers of America*, 768 F.2d 180, 184 (7th Cir. 1985)).

¹⁰¹ *Move, Inc.*, 840 F.3d at 1158.

¹⁰² *Id.* at 1159.

¹⁰³ *Id.* at 1155, 1159.

Circuit rectified the fraud by the imposition of equitable tolling.¹⁰⁴ The decision by the Ninth Circuit demonstrates the lengths federal courts of appeal are willing to go to in order to ensure that the arbitration process remains fundamentally fair, and that the rights of arbitrating parties are protected. The decision to apply equitable tolling to the FAA is precedential in the Ninth Circuit, and will likely lead to other federal circuits following suit if given a justified opportunity. Here, the application of equitable tolling serves to polish the veneer of the emphatic federal policy favoring arbitration agreements and enforcement. It also ensures that the rights of arbitrating parties will not be hampered or trampled upon by an unchecked desire for confirmation at all costs.

¹⁰⁴ *Move, Inc.*, 840 F.3d at 1158.