

**“WORKPLACE FAIRNESS: HAS THE SUPREME
COURT BEEN MISINTERPRETING LAWS DE-
SIGN TO PROTECT AMERICAN WORKERS
FROM DISCRIMINATION?”**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED ELEVENTH CONGRESS
FIRST SESSION

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“WORKPLACE FAIRNESS: HAS THE SUPREME COURT BEEN MISINTERPRETING LAWS DESIGNED TO PROTECT AMERICAN WORKERS FROM DISCRIMINATION?”

WEDNESDAY, OCTOBER 7, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, Pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Specter, Franken, Sessions, and Grassley.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. This week the U.S. Supreme Court met to officially begin its new term. While I talked about this yesterday at another Committee I thought we would have this hearing to highlight how decisions of the Supreme Court affect the everyday lives of Americans. And what we see on the headlines about a U.S. Supreme Court decision may look one way, but with the average Americans it can have quite an effect.

Our hearing will focus on how a bare majority of the Supreme Court has overridden statutory protections to make it more difficult to prove age discrimination in the workplace. In two narrowly divided 5/4 decisions the conservative majority of the court threatens to eliminate more of America's civil rights in the workplace. Just as it eliminated Lilly Ledbetter's claim to equal pay, basically said a woman does not have to be paid the same as a man until Congress stepped in to set the law right.

It is difficult that we have these laws on the books. For some time it worked very well to protect Americans and then time and time again, the very, very activist, Supreme Court, overturns them. Their recent decisions make it more difficult for victims of employment discrimination to seek relief in court, more difficult for those victims to get their day in court to vindicate their rights.

For anyone that doubts that there is this activism in our courts and the effect it is having, they need to look no further than the decisions that are affecting two of our witnesses, Jamie Leigh Jones and Jack Gross.

The Supreme Court's misinterpretation of the Federal Arbitration Act in the Circuit City case threatens to undermine the effective enforcement of our Civil Rights laws.

When Congress passed the Arbitration Act, passed by a bipartisan majority, it intended to provide sophisticated businesses an alternative venue to resolve their disputes. That is what was intended.

I know what was not intended. Congress never intended the law to become a hammer for corporations to use against their employees. But in Circuit City the Supreme Court allowed for just that.

Now, after the Circuit City decision, employers are able to unilaterally strip their employees of their Civil Rights by including arbitration clauses in every employment contract they draft. Some have estimated that at least 30 million workers have unknowingly waived their constitutional and guaranteed right to have Civil Rights claims resolved by a jury by accepting employment which necessarily meant signing a contract that included such a clause in the fine print.

There is no rule of law in arbitration. There are no juries, there are no independent judges in the arbitration industry. There is no appellate review. There is no transparency. And we are going to hear from Jamie Leigh Jones today, there is no justice.

We will also hear from Mr. Gross. His case shows that for those employees who are able to preliminarily open the courtroom doors, the Supreme Court then placed additional obstacles on the path to justice.

Let me just tell you a little bit about it. After spending 32 years working for an Iowa subsidiary of a major financial company, Jack Gross was demoted, and his job duties were reassigned to a younger worker who was significantly less qualified.

In his lawsuit under the Age Discrimination Act, a jury concluded that age had been the motivating factor in his demotion and they awarded him nearly \$50,000 in lost compensation. But a slim, activist, conservative majority of the Supreme Court overturned the jury verdict and decided to rewrite the law. The five justices adopted a standard that the Supreme Court itself had rejected in a prior case and the Congress had rejected when we enacted by bipartisan majority the Civil Rights Act of 1991.

So I am concerned that the Gross decision will allow employers to discriminate on the basis of age with impunity as long as they "get other reasons." I fear in the wake of Gross, few, if any, of these victims of age discrimination will achieve justice.

The worst part about it, the lower courts have been applying the rationale endorsed in this case to weaken other anti-discrimination statutes as well.

When President Obama signed the Lilly Ledbetter Fair Pay Restoration Act into law earlier this year, he reminded us of the real world impact of Supreme Court decisions on workplace rights. He said that economic justice isn't about some abstract legal theory or footnote in a casebook. It is about how our laws affect the daily reality of people's lives, their ability to make a living and care for their families, achieve their goals. He also reminded us of making our economy work. That means making sure it works for everyone. In that case he was saying that women should be paid the same as men, contrary to what the Supreme Court has said.

Senator Sessions.

**STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM
THE STATE OF ALABAMA**

Senator SESSIONS. Thank you, Chairman Leahy. I look forward to this panel. We are talking about some important issues. Fairness in courts is essential for justice in America. It is what people expect. The small person, the individual, should have clear protections and rights that they can assert in an employment case. We all believe in that.

But we do set up rules. And employers do, on occasion, have to reduce work forces, no matter how painful that might be. And it causes pain for people who lose their jobs and often they assert whatever rights they believe they have to maintain their employment.

So I think those are things that are just inevitable in our business community today. Having clarity, having appropriate principles to guide employers and the courts in deciding these matters is important.

So this kind of discussion, I believe, is worthwhile, Mr. Chairman. I just do not believe that we should see every decision on termination of employment or other business-related matters as somehow necessarily a discrimination. It's just a choice of how to go forward.

I also would object to a view that arbitration is not a healthy way to handle many of these cases. One survey by the American Arbitration Association showed that employees won 63 percent of the cases in arbitration and that same year only 14 percent of the employees bringing claims in Federal court prevailed. The results of arbitration are similar to jury verdicts in terms of value to the employee and also can be less expensive for the employee and the legal fees can be less in sizeable than the employee.

So I think the idea that is assumed that arbitration automatically is a disadvantage to an employee is not true. And, in fact, the opposite may well be the case. So the Supreme Court has affirmed arbitration and I hope that as we move forward we do not undevelop ideas and strategies and legislation that undermines something that is important.

If every employment dispute, employee/employer dispute, ends up in Federal court, I would just note parenthetically, we are really going to have a problem with the case loads in Federal court. And that is really not what Federal courts are for, to settle every employment dispute that exists out there, and there are so many of them.

So, Mr. Chairman, I look forward to this panel.

Senator Grassley has got a meeting he has to go to in a few minutes and I believe he would like to introduce one of the panelists early on in this process if you could do that.

I would note that I am going to have to slip out in a little bit because Alabama will be adding to the Statuary Hall a statue of Helen Keller, the person who has done more, I think, than any other person in history throughout her life to highlight the abilities of the disabled. So it is an exciting day for us today and we will do that at 11. I will need to get over there a few minutes early.

So I thank you for that. And you know as we review her life and that great movie and all that developed out of her life story, you

really do realize that persons who may not be able to do everything can do so many things exceedingly well. And, they can contribute so fabulously to our National productivity. The Disabilities Act that many of you worked on to pass has really given so many employees a right to full participation in the American economy.

So, thank you, Mr. Chairman, I look forward to the hearing.

Chairman LEAHY. I appreciate that and you should be there. I walked through the Rotunda late last night and it is all set up for that statue.

I would say, as a child I sometimes, as a child will, felt badly because I had been born blind in one eye. Then I saw the Helen Keller story and I realized how greatly advantaged I was, but also what she did for all the rest of us.

Senator Grassley, you wanted to introduce the panel. Please, go ahead, sir.

Senator GRASSLEY. If I could. I will not take any time to discuss policy because we will have a chance to review the testimony of all the witnesses. But one of the witnesses is a constituent with a famous political name in Iowa, even though he is not politically inclined, maybe himself. But Mr. Gross is with us today. So I wanted to say a couple words because of him and show him the courtesy. I will also be meeting with him in my office this afternoon at my appointment schedule.

Jack Gross now lives in Creston, Iowa, and he is here today to testify about his case before the Supreme Court last year. He is still living in the part of the state he was born in. He was born near the community of Material. Ayr, Iowa. Mr. Gross is a graduate of Drake University and was employed by the Iowa Farm Bureau for over 30 years.

His great uncle happened to be Hiram R. Gross. Your first 2 years in the Senate would have been Mr. Gross' 25th and 26th year in the U.S. House of Representatives. Then he retired and I took his place in the House of Representatives.

Mr. Gross is here today to testify about his experience in litigating the age discrimination employment case from Iowa Federal District Court to the Eighth Circuit Court and then to the U.S. Supreme Court just very recently. Unfortunately, because of Finance Committee work, I won't be able to be here beyond about 10:27. But I look forward to either hearing his testimony or else reading about it and visiting with him in the afternoon to find out firsthand how he has been impacted by his employer and by the courts.

Chairman LEAHY. Thank you.

Senator GRASSLEY. And thank you, Mr. Chairman.

Chairman LEAHY. I know I enjoyed meeting both Mr. and Mrs. Gross yesterday.

Our first witness will be Jamie Leigh Jones, the founder and CEO of the Jamie Leigh Jones—is it Lee or Leigh?

Ms. Jones. Leigh.

Chairman LEAHY. Leigh Jones—Jamie Leigh Jones Foundation. It is a nonprofit "organization" wanted dedicated to helping Americans who are victims of crime while working abroad for government contractors and subcontractors.

Ms. Jones currently teaches math, science, and social studies to middle school children.

My children are all grown up and now I have at least one grandchild and soon a second one in that. I know how important the middle school is.

So, please, Ms. Jones, go ahead.

STATEMENT OF JAMIE LEIGH JONES FOUNDER/CHIEF EXECUTIVE OFFICER THE JAMIE LEIGH FOUNDATION SPRING, TEXAS

Ms. JONES. Chairman Leahy, Ranking Member Sessions, distinguished members of the committee, thank you for the opportunity to testify before you today. I am here today to share with you a personal tragedy. I do this to bring awareness to legislation—the Arbitration Fairness Act—introduced by Senator Feingold, which is designed to ensure that no American will be deprived of their constitutionally guaranteed right to the fair administration of justice.

At an age barely old enough to vote I took a job in Iraq with Halliburton. When hired I signed an employment contract. Days later I was sent to Camp Hope in the Green Zone in Baghdad, Iraq to support Operation Iraqi Freedom. Before my deployment Halliburton showed me photographs of the trailer I would live in, a suite with one other woman and a shared bathroom.

Upon arrival I was assigned to a barracks which was predominantly male. I found myself subject to repeated catcalls and partially dressed men while I was walking to the restroom. I complained to Halliburton managers about these living conditions and asked them to move me into the quarters that I had been promised. My requests were not only ignored, they were mocked.

On the fourth day in Iraq I was socializing outside the barracks with several other contractors Halliburton had sent to the Green Zone. The men known only to me as Halliburton firefighters offered me an alcoholic drink which I took. I remember nothing after taking a couple of sips.

When I awoke in my room, I was naked, sore, bruised, and bleeding. As the grogginess wore off, and I returned from the bathroom—where evidence that I had been raped was abundantly clear to me—I found a naked firefighter still laying in the bunk bed. I was shocked. How could he have raped me like that and not even bothered to leave.

I know now that this is because he knew there would not likely be punishment for his crime. There had never been before.

After reporting the rape to KBR operations coordinator I was taken to the Army CASH where a rape kit confirmed that I had been assaulted both vaginally and anally by multiple perpetrators. The Army doctor then handed my rape kit to KBR security personnel.

I was then taken to a container where I was held captive by two armed guards. I requested a phone from KBR officials who denied me this request.

Eventually one of the guards gave in to my pleading and allowed me to use his cell phone. I called my father who then contacted Congressman Ted Poe. Congressman Poe dispatched the State Department officials to ensure my release and safe return to the United States.

Prior to my return to the U.S. Halliburton management told me that I could either stay and get over it or go home with no guarantee of a job in Houston or Iraq.

The severity of my physical injuries necessitated my decision and I went home in the face of threats of termination, which later proved to be true.

When I returned home the pains in my chest continued and I sought medical help. It was confirmed that my breasts were disfigured and my pectoral muscles had been turned. Reconstructive surgery was required.

After I filed a complaint with the Equal Employment Opportunity Commission they conducted an investigation and concluded that I had been sexually assaulted, that the physical trauma was evident, that Halliburton's investigation and response had been inadequate.

I turned to the civil court system for justice when the criminal justice system was slow to respond. When my lawyers filed the suit they were met with Halliburton's response that all of my claims were to be decided in arbitration because I had signed away my right to a trial by jury at such an early age. Halliburton said that my employment contract included a pre-dispute, binding arbitration clause that required me to submit all my claims in mandatory, secret arbitration. I didn't even know that I had signed such a clause. But even if I had known, I would never have guessed that it would cover claims of sexual assault and false imprisonment.

Also, I had no choice but to sign this contract because I needed this job. I had no idea that the clause was part of the contract, what the clause actually meant, or that I would eventually end up in this horrible situation.

I fought the forced arbitration clause and just last month after almost 4 years of litigation, the Fifth Circuit ruled that my—that four of my claims against Halliburton relating to the rape were not covered by the clause in my employment contract. The rest of my claims, including my discrimination claims under Title V—Title VII, sorry, had been forced into binding arbitration. Just yesterday Halliburton filed an appeal to this decision.

The problem of forcing claims like mine into a secret system of binding arbitration goes well beyond me. Numerous other women who were assaulted or raped then retaliated against for reporting those attacks and forced into secret arbitration have contacted me for help through the Jamie Leigh Foundation. Even when victims pursue their claims in arbitration, the information is sealed and kept confidential. The system of arbitration keeps this evidence from ever coming to public light and allows companies like Halliburton to continue to allow the abuse of their employees without repercussion or public scrutiny.

Distinguished members of the committee, you have the power to stop these abuses that hide behind the veil of arbitration. And I hope that you take this opportunity to protect employees and stop this practice from continuing.

Thank you for your time.

Chairman LEAHY. Thank you. And we will go through each of the witnesses and then back to questions. And I will have some about obviously Halliburton acting as a government and law unto itself,

something they did in a number of areas, as we have known, in Iraq.

Mr. Gross, you have already been introduced by Senator Grassley. I had the opportunity of meeting you and your wife yesterday. Please, go ahead, sir.

STATEMENT OF JACK GROSS DES MOINES, IOWA

Mr. GROSS. Thank you, Senator or Chairman Leahy. I really appreciate the opportunity to be here. Thank you, Senator Grassley for your remarks. I join many Iowans in saying how proud we have been to have you as our Senator for a great many years.

Mr. Franken, I appreciated your remarks about my case during the Sotomayor debate. I was very impressed with the detailed knowledge that you exhibited in such a short time about what had happened.

Mr. Sessions, I appreciate your comments also. I kind of come from the white, corporate world and was asked a question during our trial if I didn't really think that corporate management should have the right to make decisions that affected the bottom line for their shareholders and their employees. And my answer was, absolutely, I believe that; as long as they stay within the confines of the law. And that was why we were there.

I wanted to participate in the process. I feel like I'm a little bit of an unlikely candidate simply because mine is not the face that is normally associated with discrimination. But age is discrimination in its own right.

I certainly never imagined that my case would end up here when it all started nearly 7 years ago. That's when my employer, Farm Bureau Insurance, or FBL merged with the Kansas Farm Bureau. Apparently not wanting to add any more older workers to their workforce, when Kansas came on board, they bought out all the Kansas employees, claims employees who were over 50 years of age. At the same time, in the Iowa Farm Bureau and the other original states they simply demoted every one of us who were over 50 and had a supervisory level or above. A pretty clear signal to all of us that if you are over 50 they would kind of like to get us out of there.

I was 54 at the time and I was swept out with the whole thing. Even though I had 13 consecutive years of performance reviews in the top 5 percent of the company, and had dedicated my working life to making Farm Bureau a better company.

My contributions were very well documented including I had just completed the development of taking all of our policies, combining them into one unique policy, a package policy. It's a policy that Farm Bureau is now using to base all of their future growth upon.

My position was, as stated, given to a much younger and newer employee with far less experience and education. Age was the obvious reason that I filed a complaint and two years later a Federal jury spent an entire week listening to all the testimony, seeing all the evidence, being instructed on the law, the ADEA, and they were even admonished to rule against me and in favor of Farm Bureau if they could find any reason, other than age, for Farm Bureau's actions. Still the verdict came back in my favor and I thought in 2005 that my ordeal was over.

Then it started getting lawyered to death. Eventually ending up in at the Supreme Court in March of this year over one single issue in the jury instruction. And that was whether direct evidence was required in a mixed motive context. That's what—that's the question that the Supreme Court accepted *sui juris* on, the one that we expected to get addressed.

However, instead of addressing that one issue, the court broke with its own protocol and precedent to literally hijack my case and use it as a vehicle to water down the law written by the branch of government closest to the people, yourselves.

We came here in March believing in the rule of law and its consistent application to all areas of discrimination. We were disappointed and I was personally disillusioned by a lot of what I observed at the court level.

We believe that this issue does transcend partisan politics and presents an opportunity for both parties to come together to protect their aging constituents back home in the workforce.

On a personal level, this has been a rough ride. But what is becoming even harder is watching the collateral damage being inflicted by older workers on the courts by this ruling. Because of their decision my legacy to working Americans will be having my name associated with pain and injustice inflicted on older workers because it will be nearly impossible to provide the level of proof now ascribed to this one type of employment discrimination.

That is a heavy burden to place on one guy who simply sought to right one act of discrimination. I wasn't the one who changed the law, five justices did. I can only urge Congress to step up, like they did in the Ledbetter case and restore the ADEA to its original intent.

Thank you very much.

Chairman LEAHY. Thank you very much, Mr. Gross.

Mark de Benardo is a partner at Jackson Lewis here in Washington, am I correct on that?

Mr. de Bernardo. That's right.

Chairman LEAHY. And he served as Director of Labor Law for the U.S. Chamber of Commerce. Please go ahead.

STATEMENT OF MARK A. DE BERNARDO PARTNER, JACKSON LEWIS, LLP WASHINGTON, DC

Mr. DE BERNARDO. Thank you, Mr. Chairman. Thank you, members of the committee, and Ranking Minority Sessions.

I am pleased to be here today to testify in strong support of the use of mediation and arbitration as an adjunct to our jurisprudence system in America, in support of ADR in employment, in support of the Supreme Court's decision in *Circuit City v. Adams*, and in opposition to S. 931.

The reason that we oppose S. 931 is that if this legislation were enacted, effectively arbitration in employment in America and in other contexts would end. That is the net effect.

It is my firm and unequivocal belief that the use of ADR is both pro employer and pro employee. And when implemented appropriately, it's a tremendous asset to both employee relations and our system of justice.

Jackson Lewis has a long and proud record of support for effective and equitable ADR programs as an alternative to costly, time-consuming, deleterious, and relationship destructive litigation.

I want to underscore that the reality is, again, that S. 931, if it were enacted, effectively would end arbitration in America, would abolish this practice in the non-union sector. Organized labor has long embraced binding arbitration as a foundation of union representation. And my law firm and the organization I represent agree in that context.

The seminal question is, should employers and employees be able to engage in mediation and mandatory, binding arbitration for employment disputes as alternatives to litigation. The seminal answer is, absolutely. ADR in employment programs are flourishing. When implemented appropriately they are decisively in employees' best interests, and yes—and yet S. 931 would effectively deny this option to employers and employees.

Given the costs, delays, and divisiveness of employment litigation the more sensible and conciliatory options preferable for employers and for their employees, the net result of the use of ADR is more employee complaints resolved and addressed.

As many as 20 times, if you take a look at the experience in ADR programs, dispute resolution programs across the country, what you have is many more complaints that are raised by employees, grievances that are addressed, they are addressed in a much more civil fashion, they are addressed much more comprehensively, and are resolved on a much quicker basis. Thus, again, complaints addressed sooner with less tension, less turnover.

What you have is that litigation is a job destroyer. Arbitration is a job preserver. In the typical situation as discussed in the testimony at length, arbitrations take 104 days. Litigation in the Southern District of New York if you have an employment law case, typically takes 2.8 years for that case to be heard. The backlog in the Federal court system is huge. One-third of the backlog in the Federal court system are employment law cases.

The old adage that "justice delayed is justice denied" certainly is true in this case. So you have many more employee grievances that are addressed, as many as 20 times as many addressed much sooner and addressed in a context which is much more amicable and more likely to resolve the situation and preserve the job.

It improved morale; 83 percent of employees support ADR in the workplace. It is a popular concept for those employers who have adopted it and adopted it appropriately. It provides for more effective communication.

Chairman LEAHY. In your comments——

Mr. DE BERNARDO. Sure.

Chairman LEAHY.—you also tell how arbitration would be helpful to somebody like Ms. Jones when her employer Halliburton, in effect, said that rape and sexual assault has to just be considered part of the job.

Mr. DE BERNARDO. There are literally millions of employees that are covered by ADR programs in the United States. There are 160 million workers in the United States. I understand the situation alleged by Ms. Jones is awful, tragic. I agree with her that it was a tragedy that she alleged. This is a terrible situation. This is an

assault. I think those that are engaged in rape or heinous crimes such as rape should be punished——

And, in fact, there is recourse. I am not here representing anyone involved in that case, I am not involved in that case. Like Mr. Gross, Ms. Jones has had her day in court and maybe more than she wanted, it goes on and on and on, I understand that.

What we are talking about is the concept of Alternate Dispute Resolution programs overall. In that regards what you have is a concept that is fully entrenched in the American workplace and is popular across the board with almost all constituencies; employers, employees, parties to arbitration. You know, more than 70 percent of those surveyed—as discussed in the testimony, Mr. Chairman—more than 70 percent of those who have engaged in employment arbitration favor the system and nearly two-thirds say that they would do it again.

So, you know, it has a very positive role to play. The facts of one incident and one individual incident, as terrible as they may be, don't necessarily reflect on whether or not as a concept in America today we should embrace or withdraw from the concept of arbitration in employment.

And this was my final point that I was saying in this one section is that ADR in employment results in better work places. It's an early warning system to employers on what may be bothersome in the workplace. Typically the types of complaints that come in, employees have a situation where they are concerned, you have informal mediation, formal mediation, if necessary, arbitration, those issues are resolved. Employers might end up being better employers and addressing and correcting situations that need to be addressed and corrected.

Circuit City, I know we are going to talk about that. But Circuit City was a decision that was wholly consistent with past precedent. It was wholly consistent with all of the other Circuits except for the Ninth Circuit decision and appropriately decided.

And I mentioned how litigation results in——

Chairman LEAHY. I know I interrupted your testimony. So I've given you two extra minutes.

Mr. DE BERNARDO. OK. Thank you, Mr. Chairman.

Chairman LEAHY. Your whole statement will, of course, be made a part of the record.

Mr. DE BERNARDO. I appreciate that.

Chairman LEAHY. Michael Fox is an attorney in the Austin Branch of the firm of Ogletree, Deakins, Nash, Smoak, and Stewart in Texas. Mr. Fox, it is good to have you here.

STATEMENT OF MICHAEL W. FOX, SHAREHOLDER, OGLETREE, DEAKINS, NASH, SMOAK, & STEWART, P.C., AUSTIN, TEXAS

Mr. FOX. Thank you, Chairman Leahy, Ranking Member Sessions, and members of the committee, I am pleased and honored to be here today.

I am a trial lawyer from Texas.

Chairman LEAHY. Mr. Fox, is your microphone on?

Mr. FOX. Sorry about that. Chairman Leahy, thanks for the invitation. I am honored to be here.

I am a trial lawyer from Texas. For more than 30 years I have represented employers in labor and employment law matters. I have handled discrimination claims against employers in jury trials and non-jury proceedings. A distinction that I think is important and one reason I strongly believe that reversing the *Gross v. FBL Services* case would be a tragic mistake.

I have had a ring-side seat to the changing American workplace. There is no question that it is not only changed, but is significantly better particularly for women and minorities than when I was licensed to practice law in 1975.

There is also no question that the Civil Rights Act of 1964 and the other Federal legislation that followed have been significant and positive factors in that change.

More germane to today's discussion there should also be no question that the law which has provided the base for the improved workplace has developed and flourished under the interpretation and guidance of the Supreme Court.

Turning to the *Gross* decision and the proposed legislative remedy, there has been much written about the Supreme Court's holding that age discrimination plaintiffs are not entitled to a mixed motive instruction. But almost all of the criticism fails to acknowledge the significance of the difference between the ADEA and Title VII and the spotty history of the mixed motive theory.

More importantly, none makes the distinction between a theory that was developed for cases that were to be tried by judges and is now being applied to cases that are tried before juries.

I have covered it more extensively in my written testimony, but briefly, the mixed motive analysis was first introduced in *Price Waterhouse v. Hopkins*, at a time when Title VII cases were non-jury.

Two years later Congress codified it for Title VII, but did not include the Age Act in that section of the amendment. Congress also provided, for the first time ever, that Title VII cases would now be tried to juries, not to judges. The end result is, that when the *Gross* case came before the court this past summer, it had the advantage of seeing how a theory that was developed for cases to be tried by judges had worked in the real world of jury trials and adopted a more common-sense rule that actually does little to alter the real world of age discrimination litigation.

One reason why I say the court adopted a common-sense rule is because of the difficulties the courts have had in trying to adjust the mixed motive analysis to jury trials. From my experience in the courtroom, the most important thing for the effective enforcement of anti-discrimination laws through jury trials is a method of instructing the jury which is simple, not complex; practical, not theoretical. The mixed motive instruction is the opposite. It focuses attention on legal theories, not the facts, and is both complex and theoretical. In short, it is the antithesis of what makes for an effective jury instruction.

The net result is that the mixed motive analysis created for a non-jury system which is applicable to Title VII does not work for jury trials. In the real world the courts have had significant difficulty in applying it. It is not widely used by plaintiffs and may not really be needed.

According to one plaintiff's lawyer who does still advocate the legislative overturning of Gross, as far as the loss of getting a mixed motive instruction in an age discrimination case, most plaintiffs' lawyers don't care. It's too confusing to the jury.

In closing, before using Gross as a reason to expand the use of the mixed motive analysis, which the proposed legislation introduced yesterday, would do to the entirety of Federal employment laws, not just age discrimination, I would respectfully suggest that all those interested in the enforcement of the anti-discrimination laws, which includes people on both sides of the docket would be better served by a closer examination of how successful and necessary the concept of a mixed motive instruction created in a non-jury world has actually worked in the real world of jury trials, the one that we actually have, before taking any action to extend this concept to the entire body of Federal employment law.

I would also say that having participated in arbitration I totally support the testimony of Mr. de Bernardo about its good impact on the workplace.

Chairman LEAHY. Thank you very much. And with everybody, the whole statement, of course, will be part of the record.

Our last witness is Professor Michael Foreman who is the Director of the Civil Rights Clinic at Penn State's Dickinson School of Law. I understand, Professor, you teach a course on employment discrimination there; is that correct?

Mr. FOREMAN. Yes, I teach advanced employment discrimination law.

Chairman LEAHY. Thank you very, very much.
Please go ahead, sir.

**STATEMENT OF PROFESSOR MICHAEL FOREMAN, DIRECTOR,
CIVIL RIGHTS APPELLATE CLINIC, DICKINSON SCHOOL OF
LAW, PENNSYLVANIA STATE UNIVERSITY, UNIVERSITY
PARK, PENNSYLVANIA**

Mr. FOREMAN. Chairman Leahy, Ranking Member Sessions, and members of the committee, I welcome this opportunity to address these important issues and particularly the Gross decision and the Pyett decision and that line of cases that deal with pre-dispute binding arbitration. And particularly with an eye to has the court been misinterpreting Congressional intent and the meaning of these statutes? In my view that's a resounding yes in these cases they misinterpreted Congressional intent and they distort the purposes of these laws.

I want to turn first to Gross. And I would be remiss if I don't point out that in Gross the majority of the Supreme Court took on an issue that was not before them. It was not in the petition for cert. It was not briefed. It was not briefed by either side. And, indeed, it was exactly opposite of what the Federal Government and the Solicitors Office recommended that they do.

Despite all that, they chose to take on this case. And they sent, I think, a very important message to the Senate that if you want specific protections against discrimination in the workplace you, Congress, have to be very, very specific.

And many of us believe you have been specific. But for this majority they say, no, not specific enough. It is very clear that Con-

gress did not intend age discrimination to be treated differently from any of the other types of discrimination. But despite that, the majority concluded, in Gross, that you could no longer prove that age was a motivating factor. That is not enough any more in an age context.

And in Mr. Gross' case he proved this was not discrimination in the area—in the air. He proved that this was a motivating factor and the jury made that conclusion. So contrary to my colleague's belief, the jury can deal with these issues and they deal with them every day. They had dealt with them.

This is a standard that the Supreme Court rejected in Price Waterhouse, that Congress rejected in the Civil Rights Act of 1991 and indeed they rejected almost 45 years ago when the Title VII and they rejected it solely because of language.

Now, Chairman, you indicated one of the things we are trying to sort through is how do we sort the difference between what the headlines say and the reality. Well, the headlines were very clear, "Gross makes it much more difficult for Plaintiffs to prevail in age discrimination cases." Another, "Supreme Court majority makes it harder to prove discrimination." Another quote, "The plaintiffs' job in court will be much more difficult."

Now, how do these headlines match reality? Well, the court cases following that match perfectly. A case out of the Sixth Circuit which I have cited in my materials, "In the Wake of Gross" and this is a quote, "it is not enough to show that age was a motivating factor." Another court quote, "This court interprets Gross as elevating the quantum of causation required under the ADA."

So it is very clear that what we heard about raising the burden of proof is in fact what happened. And it is leading to very strange, nonsensical results. I will cite just two quick cases. Because many courts are taking what the Supreme Court said and now saying, it must be the sole factor.

In the Culver case where a person alleged discrimination because they were over 40 years old and race, the court says, well, you cannot win your age claim because you've pled another claim over here. You were out of court at the get-go. There is another line of cases that follow that line of cases.

The third thing it does is it calls into question the jurisprudence under hundreds of discrimination statutes in Federal law and state law that used the term "because of". They had been interpreted consistently to mean, if the protected classification infecting the decision was a motivating factor, that is a violation of law, we will fight about damages. After Gross that is no longer the case.

Turning quickly to the pre-dispute binding arbitration issue, this Congress worked for decades to come up with discrimination laws that provided open-forum, jury trials damages. You've also recognized that pre-dispute—that arbitration may have a role when you passed the Civil Rights Act. But I don't believe Congress ever envisioned that role to be pre-dispute, binding arbitration agreements placed in employee handbooks, in applications for employment, and basically shoved down employees' throats with no—no—and I stress that—consent.

I want to address, very quickly, some of the statistics that I know my colleagues laid out about the importance of binding arbi-

tration and how it is good for employees. Those studies deal with situations where a dispute has arisen and the person voluntarily enters into the agreement. And in those cases it is usually senior managers that have done this. They find arbitration to be good, but they have a dispute and they have volunteered to do it. That is not the case for most blue-collar workers. They have no choice. They have to give up a paycheck. In today's economy, they may have to choose between having a job and not having health care because they won't get the job if they refuse to sign a binding arbitration agreement.

In this area, also, the court has sent a message to Congress that we are going to force people into employment binding arbitration unless you, Congress, tell us differently. They said that explicitly in the Pyett case. And to paraphrase Justice Ginsberg from the Ledbetter case, when you get that challenge thrown down, "the ball is in Congress' court."

I stand here ready to answer any questions on either the binding arbitration or on the Gross decision. And I thank you for the opportunity to address the committee.

Chairman LEAHY. Thank you very much, Professor. You echoed a point I had made earlier and actually made yesterday and actually made a number of times on the Gross case that the Supreme Court seemed to be looking for an ability to come out with law that they wanted to make. I'm not trying to put words in your mouth, but, don't you find it unusual that a CERT was granted on a different reason, the sides did not argue this issue, it was not part of the debate, the Solicitor General did not, and yet they reached the decision they did. Is that a typical thing in the Supreme Court?

Mr. FOREMAN. That is extremely atypical to the extent that the majority dropped a footnote to try to explain why they were talking away from this and they were called to task appropriately by the dissent in that case. That the Supreme Court grants CERT on a very specific issue. The issue was—I don't want to say, "a no brainer" but the issue that they granted CERT on was this whole issue on the age context. You need direct evidence in order to get a mixed motive instruction to the jury. That was what they granted CERT on. That's what—there were probably 40 briefs filed. That's what everyone briefed. No one saw this decision coming. And a five-person majority walked out of their way to take this on and change the burden of proof in all age cases and change possibly the burden of proof on all employment discrimination cases where you have not specifically said there is a motivating factor standard of proof.

Chairman LEAHY. I know at the time I was pretty surprised with such an activist court. And it acting as a legislative body and a judicial body all at once.

And I guess maybe as a Vermonter I am somewhat old fashioned. I think of the judiciary acting as a judiciary, the legislative body acting as a legislative body, the executive is the executive body and not have the judiciary become the legislative body too. It makes it—having argued an awful lot of appellate cases in the Second Circuit in the Vermont Supreme Court, I would find myself at somewhat of a disadvantage if court decided that, gosh you have a nice case. We know what you are supposed to talk about, but we've de-

cided to do something entirely different. It puts both sides pretty much at a disadvantage unless they have already made up their mind to rule for one side.

Mr. FOREMAN. And, if I may, it raises this other issue that—and I need to be delicate because I'm talking to the Senate, but by the same token, that the court, the majority specifically says, you did not say in 1991 that this would be the causation standard in the age context. Therefore we are not going to adopt what virtually every court had said the standard was. We are going to ignore what the meaning of the 1991 law is.

Chairman LEAHY. Of course that—don't worry about being delicate with the Senate.

[Laughter.]

Chairman LEAHY. The hundred of us certainly aren't with each other at all.

[Laughter.]

Chairman LEAHY. You should sit in on some of our private meetings.

Mr. FOREMAN. Well, they took you to task and said, go ahead and move forward and change the law if you don't like what we've done.

Chairman LEAHY. But they also overruled the precedent of every other court including some of their own decisions. I had never had any problem with the law as written. I mean, this came out of the blue. It overturned a whole lot of cases. Everybody else seemed to understand what the—as did four of the nine members of the Supreme Court what the law was. Am I correct?

Mr. FOREMAN. Yes, you are correct in a point. But I don't want us to lose sight of the tentacles of the Gross decision because they reach very deep. And I don't want to get bogged down on legalese but there is a case—

Chairman LEAHY. I just have a—

[Simultaneous conversation.]

Mr. FOX. Mr. Chairman—

Chairman LEAHY. If I wasn't worried about the tentacles of the case, we wouldn't be holding this hearing today.

Mr. FOX. Mr. Chairman.

Mr. FOREMAN. There's a case called *McDonnell Douglas v. Greene* that has been cited thousands, tens of thousands, it is a standard way to prove discrimination cases, age, race, sex, we teach it in law school every day. The Supreme Court dropped a footnote and said, we don't acknowledge whether the McDonnell Douglas standard even applies to these age cases. And the lower courts are now taking that and running with it and putting a different burden on age discrimination cases and ignoring the McDonnell Douglas. It is so deep that the Congress really must act to fix it.

Chairman LEAHY. Mr. Fox, you wanted to say something?

Mr. FOX. Yes. It is not really my role to defend the Supreme Court. I think they can do it capably themselves. But I would point out that if they had answered the question that they granted CERT on, that would have presumed the answer to the question that they ultimately answered in the reverse. Since they decided that it was not a proper instruction for age cases, it made no sense to decide under what standard you would give that instruction. So their really only choice was to either rule as they did or to say that writ was

improvidently—writ was improvidently granted and that would have then just delayed the inevitable.

Also, the issue was raised in the respondent's brief when they asked that Price Waterhouse be overruled, if necessary. And with respect to the McDonnell Douglas test, although that is in the footnote, I don't think there is any question that the McDonnell Douglas standard remains the same. And, in fact, that is what I would say 99 percent of all cases including age cases are tried under.

The mixed motive analysis is not used in the real world. And when it is used, it causes complexity and complication and ends up with situations like happened to Mr. Gross. If he had gone in with a straightforward instruction I have no doubt he would have won the trial, just as he did. But what would have been avoided were two appeals and now the possibility of having to retry it again.

Chairman LEAHY. We could differ on that. We'll get back to that later. But I want to go to—and I will—and I appreciate you stepping forward. But I will let you and Mr. Foreman speak to this again.

Ms. Jones, the Fifth Circuit recently ruled that you actually could pursue some of your claims before a jury. Those are the claims related to sexual assault.

I was a prosecutor and proud to be. The people involved in that I couldn't help but think I would be charging them with numerous kinds of assault. And I have to feel that if convicted our courts in Vermont would send them to prison for a long time. But your former employer KBR or Halliburton argued the brutal sexual assault was somehow related to your employment and therefore had to be handled in arbitration tends to defy common sense. That's the argument they took, you had to appeal to the Fifth Circuit. And now they are actually moving to rehear. What kind of a signal does this send to women in the workplace?

Ms. JONES. Well, first of all, corporations do this by—

Chairman LEAHY. Is your—

Ms. JONES. It is very apparent to me through working with the Foundation and working with other women and my past experience, that corporations can adopt arbitration as a way to wipe clean the record of all disputes that have arisen. And if women before me that had been sexually assaulted working overseas in Iraq or Afghanistan or anyplace that we were deployed, if they were able to go and sit in front of a trial by jury, that would have been public record. I would have known before going to Iraq what I was getting into and likely this would have never occurred.

I feel like this sends a clear message that the corporations are able to have more power than the individual. And I don't think it's right. And I think that it's important for people to be aware of such practices that arbitration has cast upon the workers.

Chairman LEAHY. Considering the position that Halliburton has taken on this, is it safe to say you would much rather the decision of how you might be treated would be done by an impartial court and jury rather than an arbitration system they might have helped set up?

Ms. JONES. Well, Halliburton would hire my arbitrator. And they are taking the position that a sexual assault is part of employment. Why would I ever want to walk into an arbitration knowing that

they hired the arbitrator and knowing that that's how they feel about sexual assault? Do you think I'm going to win? And if I win, do you think I'll win much? Or do you think I will win just to be quiet?

Chairman LEAHY. We are agreeing with each other, Ms. Jones.

Ms. JONES. Exactly.

[Laughter.]

Chairman LEAHY. And if we weren't, I wouldn't be holding this hearing.

[Laughter.]

Chairman LEAHY. And Mr. Gross, Senator Franken has had to go vote another Committee and I was going to ask you one more question and then I'm going to have to step out for a moment, myself and turn the gavel over to Senator Franken, but I'll be right back.

Do you think it's fair to ask victims of discrimination to prove that age was the decisive factor for discrimination; especially when they often lack access to necessary records that employers possess that might help them prove their case?

Mr. GROSS. Senator Leahy, I don't think there is anything particularly complicated about the jury instruction. My fellow Iowans who served on the jury, I believe, understood the rule of law perfectly and came to the sound understanding, especially with the final thing they heard was that if you can find any reason other than age for their actions, you have to find in favor of Farm Bureau.

Now, that's pretty clear. To me that just eliminates everything else. I had made the prima facie case. There was age discrimination, they could find no other reason after a week of testimony evidence. They boiled it down to this, there is one sole cause for what happened here. And as Justice Souter said during the hearings, a lot of times, juries are just smarter than judges. And I tend to believe that was the case.

They knew that age was not only a motivating factor, they knew that—actually, I think if we had to go back and try this, and it's been 7 years already, 10 percent of my life is invested in this. I really don't want to start over. But if we had to start over, even under this new one, I'm confident that we would win. However, that does not mean that it was a good decision.

I was terribly disillusioned about how they broke with their own protocol to come to their conclusion. As has already been mentioned, they almost ignored the issue that the CERT was granted on. They allowed new evidence—a new argument to be introduced right at the last minute. I don't think that—well, there's just a number of things that I think broke with protocol.

As the claims guy, I taught a lot of adjusters over the years, and the first thing I taught them and the most important thing was to never do anything that could create any appearance of impropriety or self-conflict. And I expected no less than that from the highest court in the land. And I thought I saw a lot of things that just plain disillusioned me about how our Supreme Court system functioned in my case.

Chairman LEAHY. I am glad of the comment by my fellow New Englander, Justice Souter.

But let's go back to the Midwest, Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. Thank you, for calling this hearing. Thank you to all the witnesses.

I am sorry I had to make a vote on another Committee so I missed Mr. Fox and Mr. Foreman.

First, I just want to say something to Ms. Jones.

Yesterday we had an amendment to the Department of Defense Appropriations and we passed the bill, quite handily, saying that we are not going to hire contractors who do mandatory, binding arbitration on things like sexual assault.

Ms. JONES. Uh-huh.

Senator FRANKEN. We had a little press thing afterwards and I talked about your courage and your persistence. One thing I left out is your strength, and I want to thank you for that.

Ms. JONES. Thanks.

Senator FRANKEN. You are an amazing young woman.

Ms. JONES. Thank you.

Senator FRANKEN. Mr. de Bernardo said that you have had your day in court.

Ms. JONES. He did say that.

Senator FRANKEN. Isn't it true that what you have been in court doing is trying to get your day in court?

Ms. JONES. Exactly. I wanted to quote him, actually, justice denied is—wait, “justice delayed is justice denied.”

Senator FRANKEN. He did say that in his testimony.

Ms. JONES. I totally agree with that. I have been fighting arbitration for 4 years. I have been wanting my day in front of a trial by jury for 4 years. I don't believe that claims like this should ever be in front an arbitrator. They need to be public knowledge. They don't need to be private, discrete, and binding.

So I feel that what Bernardo said was accurate about justice delayed is justice denied. But those of us that need this as public knowledge need to not go in front of a secret arbitrator.

I was also curious if Bernardo represents individuals or corporations. And also if the polled employees represented likely include people who have gone through the process or have not gone through the process.

Senator FRANKEN. Well—

Ms. JONES. So I was kind of curious about that.

Senator FRANKEN.—I'll ask the questions here, Ms. Jones.

[Laughter.]

Senator FRANKEN. And I do have a question for Mr. Bernardo.

[Laughter.]

Senator FRANKEN. You put in your written—

Mr. DE BERNARDO. It's de Bernardo.

Senator FRANKEN. Oh, I'm sorry, Mr. de Bernardo. Excuse me.

You said in your written testimony—you write in your written testimony you cite something which, by the way in the footnotes I can't—you cite essentially page 30 of a 10-page report. That employees have a 63 percent chance of prevailing in arbitration and a 43 percent chance of prevailing in employment litigation, forgetting the fact that the Committee couldn't actually look that up.

Would you consider if Jamie Leigh had gotten a settlement of \$50 that she would have prevailed under this definition?

Mr. DE BERNARDO. Senator Franken——

Senator FRANKEN. Please answer yes or no, sir.

Mr. DE BERNARDO. Not yes or no, let me just say——

Senator FRANKEN. Please answer yes or no, sir. Are you saying no?

Mr. DE BERNARDO. I say no.

Senator FRANKEN. So, in other words, if the statistics on who prevailed and who didn't prevail, what would she have needed to have gotten? \$100? Would she have prevailed if she had gotten \$100?

Mr. DE BERNARDO. You know, I think this is a distinction without a difference. What we are talking about——

Senator FRANKEN. Answer yes or no, please, sir.

Mr. DE BERNARDO. The question is, what is the number that counts as prevailing?

Senator FRANKEN. I think that is sort of the question; isn't it?

Mr. DE BERNARDO. You know, what I am looking at is the research that's been done, the studies that have been done on who prevails in——

Senator FRANKEN. Yeah. And I'm saying, what's prevailing?

Mr. DE BERNARDO. I don't know what their definition is going to be.

Senator FRANKEN. So you don't know what their definition is. So when you said, "no" you didn't know whether that was true or not, did you?

Mr. DE BERNARDO. Well——

Senator FRANKEN. Did you?

Mr. DE BERNARDO.—Senator, if we are talking about an assault or a sexual assault or assault and battery or false imprisonment, that is not what I am here to address. What I am here to address——

Senator FRANKEN. That's what this case was about, sir.

[Simultaneous conversation.]

Senator FRANKEN. And the company——sir, please.

The company asserted that it had the right to arbitrate. In fact, she's been in court 4 years because this—and, by the way, they are appealing again.

So you write something that you didn't know about, that 63 percent of the time the employees prevail. So, presumably if they, as far as you know, if she had gotten \$50, that would have counted under your 63 percent.

And would she also have prevailed if she got \$50 and that the price of that was her silence?

Mr. DE BERNARDO. You know, Senator, I would like to respond, not in yes or no, but a little bit more broadly.

Senator FRANKEN. Go ahead.

Mr. DE BERNARDO. And the answer is we go to the research that is out there. We go to the statistics that are available. They're reliable statistics from credible, neutral sources. As for prevailing, this is an awful set of facts that Ms. Jones alleges——

Senator FRANKEN. I just asked you a question, would that be considered onerous to say that she prevailed? Because that seems to be part of your case that this is better for employees. That's your

case. So I am asking, what do those statistics mean? And you don't seem to know what they mean.

Mr. DE BERNARDO. Well, I do know what they mean——

Senator FRANKEN. OK. For example——

Mr. DE BERNARDO.—because the overwhelming majority of times, 99.9999 percent of the time the facts aren't going to be anything near what we are talking about here. It's not going to——

Senator FRANKEN. But here they are the facts here and she's been in court for 4 years, sir.

Mr. DE BERNARDO. There's a criminal situation, there's a civil action that——

Senator FRANKEN. She had no criminal—this took place in Iraq. So at that time she had no recourse, sir.

Mr. DE BERNARDO. All right.

Senator FRANKEN. She has not had her day in court, sir. She has litigated to have her day in court, sir, Mr. de Bernardo.

Mr. DE BERNARDO. I would like to address that issue.

I would like to address that issue in terms——

Senator FRANKEN. No. No, please answer my question, sir.

Mr. DE BERNARDO. OK.

Senator FRANKEN. I read some of your testimony to Ms. Jones. You said, "the net result of the use of arbitration is better work places."

Mr. DE BERNARDO. Correct.

Senator FRANKEN. Better work places.

Mr. DE BERNARDO. Correct.

Senator FRANKEN. She was housed with 400 men. She told KBR twice that she was being sexually harassed. She was drugged by men that the KBR employment people knew did this kind of thing. She was raped, gang raped. She had to have reconstructive surgery, sir.

They had this arbitration. Now, if that created a better work place. And then she was locked in a shipping container with an armed guard.

Now, my question to you is, if that's a better work place, what was the work place like before? That's a rhetorical question. I am not really asking that question.

They had binding arbitration at KBR. And because of that, and they asserted it on cases like this.

Ms. Jones, in your foundation, you have heard from other women who were raped; is that not true?

Ms. JONES. Yes, sir, I have.

Senator FRANKEN. And women who under arbitration——

Ms. JONES. Yes, sir.

Senator FRANKEN.—were told to keep silent; is that right?

Ms. JONES. Exactly.

Senator FRANKEN. And because of that silence you didn't know about anything like this, did you?

Ms. JONES. Exactly. I didn't know. It was not public knowledge, unfortunately. I think it was a very big injustice for it not to be public knowledge. It was an injustice for me and all future mothers, wives, daughters, sisters, who want to go to Iraq that don't know about all of the crimes that have occurred overseas. Because it's been in secret arbitration, it's a big injustice.

Senator FRANKEN. And when Mr. de Bernardo said that you had your day in court, what was your reaction?

Ms. JONES. I was livid, sir. Four years to fight to get in court is not a day in court.

Senator FRANKEN. I was livid too.

This is the result of your binding, mandatory arbitration, Mr. de Bernardo.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Mr. de Bernardo, you wanted to say more and I don't want to cut you off. Obviously I'll give you a chance to do that. But let me ask you this question.

Mr. DE BERNARDO. I do want to say more when we have a chance.

Chairman LEAHY. I'll give you that. But when you do it could you also answer this. If arbitration is cheaper for both sides, it's fair for both sides, it's easier for both sides, then why not have voluntary arbitration?

Mr. DE BERNARDO. OK. Should I make my comment or respond to that first?

Chairman LEAHY. Do both. Whatever you—

Mr. DE BERNARDO. I guess I'll start with your question, Mr. Chairman, which is, this is the issue of pre-dispute versus post-dispute. And there is the option of doing post-dispute now, but it is not used. Because as a practical matter, once you've gone through the process by which an individual approaches a plaintiff's lawyer, secures a plaintiff's lawyer, and they accept less than 5 percent of the people who go in who wish for representation, they're convinced—that plaintiff's lawyer is convinced that this case has a significant enough chance of receiving either a settlement or damages that would entice them to carry it forward and work on this case. We all have limited time and resources, I understand that.

A complaint has been filed and either the lawsuit or the charge has been filed. And, in effect, the individual has reconciled to this point that they're—mentally that they're going to do battle with their employer. You know, it's too late at that point post-dispute arbitration as a practical matter doesn't occur. It's very, very rare in the United States now when there is the option for that.

Chairman LEAHY. But, it would be—

Mr. DE BERNARDO. Of course it would be rare later—

Chairman LEAHY. If there's no option it's a moot point. That's my question. I mean, why not give the alternative? You've testified, if I understand your testimony correctly, in favor of these arbitrary arbitration clauses—

Mr. DE BERNARDO. Correct.

Chairman LEAHY.—like the one that Ms. Jones faced. And I would be one of the first to agree that there are many, many times arbitration makes a great deal of sense.

In private practice, I was involved at different times in arbitration and it made a lot of sense. But, shouldn't that be something where each of the parties has that option? Not that requirement, but that option?

Mr. DE BERNARDO. Well, if it is a post-dispute vis-a-vis pre-dispute, it hasn't been used and it's not going to be used. So, you

know, should it be an option? As a practical matter it wouldn't be an option that would be in use. That's the bottom line. That's why I say that this legislation, the Arbitration Fairness Act, if it were enacted, would end arbitration employment in the United States. Effectively it would abolish it because the overwhelming majority of arbitrations which occur are based on pre-dispute agreements.

Chairman LEAHY. Now, you wanted to say something further to—

Mr. DE BERNARDO. Well, yeah, you know—

Chairman LEAHY.—Senator Franken—

Mr. DE BERNARDO.—we're not a court of law. We are not here to—I am not familiar with many, most, the entire record in terms of the situation involving Ms. Jones. I have said how I thought that this is a terrible situation with terrible facts.

What I do want to say is, if we're talking about justice in the United States and who has access to justice, arbitration provides a means by which employees, most specifically employees, have tremendous access that they otherwise would not have. If S. 931 were enacted, those 95 percent plus of employees who now have their issues addressed and resolved would not have that option. Because, you know, the first threshold that I talk about is the fact that the plaintiffs' bar is only going to accept less than 5 percent of the cases that are brought to them.

The second thing is, the motions practice, there was some reference to that earlier, and as cited in the testimony a study by the National Work Rights Institute, 3,400 cases, 60 percent of those were decided by pre-trial motions, motions for summary judgment, motions for dismissal. And in 98 percent of the time the employers prevailed. So you can't get that threshold to get to court. If you get to court it's likely you are going to have it dismissed. Even if it goes to—you know, 1.3 percent of the cases in the Federal court system go to trial. The vast majority of those are not jury trials. So, you know, this idea that everybody has their day—

Chairman LEAHY. Of course, a great number of them are settled too.

Mr. DE BERNARDO. What's that?

Chairman LEAHY. A great number of them are settled.

Mr. DE BERNARDO. Correct.

Chairman LEAHY. OK.

Senator Franken.

Senator FRANKEN. I just want to—

Chairman LEAHY. We can be a little more flexible on the time because there is only the two of us here because there are so many other committees meeting.

Senator FRANKEN. So does this 5 percent include the ones that have been settled or not?

Here's my—I guess then I have a bigger—larger question.

Mr. DE BERNARDO. OK.

Senator FRANKEN. In the statistics you cite in your written testimony and in your present testimony, are these things that you are actually familiar with?

Mr. DE BERNARDO. Yes, I would say—

Senator FRANKEN. Well, you weren't familiar with the other statistic and what 67 percent prevailing meant.

Mr. DE BERNARDO. Sixty-three percent.

Senator FRANKEN. Now, I'm asking you another question and you seem stymied.

Does the 5 percent include those that have been settled?

Mr. DE BERNARDO. You know, I have many, many statistics that are cited in many footnotes. And I will say, if that's from the National Work Rights Institute instant survey, many of these statistics are from the National Work Rights Institute. That is headed up by the former head of—

Senator FRANKEN. I just want to know what the statistic—

[Simultaneous conversation.]

Mr. DE BERNARDO.—the employee rights—

Senator FRANKEN.—means.

[Simultaneous conversation.]

Senator FRANKEN. I want to know if—

Mr. DE BERNARDO.—reliable statistic, Senator, yes, I do.

Senator FRANKEN. That's not what I asked. I didn't ask if it was a reliable statistic. Reliable about what? That's what I'm asking, what is it reliable about? You're talking about—you're saying that employees don't have access to hearing their case because only 5 percent get heard. And I'm asking what that means? What that 5 percent means and you don't seem to know.

Mr. DE BERNARDO. No, what it means is that plaintiffs' attorneys are not going to take every case that comes into their offices—

Senator FRANKEN. I want to know what the 5 percent statistic means, sir. If you don't know, just say you don't know. Could you do that, at least?

Mr. DE BERNARDO. Well, I do know. There's a survey that says that less than 5 percent of the time plaintiffs' attorneys are going to accept the cases that come to them. The plaintiffs' bar, the plaintiffs' attorneys that I deal with would readily admit that. There are many, many cases that come in and they're going to say no unless they're convinced that—

Senator FRANKEN. What if you went to 20 attorneys, would that mean 100 percent of the cases are taken?

Mr. DE BERNARDO. You know—

Senator FRANKEN. Let me—let me—

Mr. DE BERNARDO.—100 percent of the grievances—Senator, if I could respond? One hundred percent of the grievances that are filed in arbitration programs and dispute resolution programs are addressed.

Senator FRANKEN. Yeah, and you told me that—

Mr. DE BERNARDO. Less than 5 percent of litigation—

[Simultaneous conversation.]

Senator FRANKEN.—that you don't know if \$50 to Ms. Jones would be considered in your statistic of whether that would be her prevailing. So you don't really know too much about your statistics.

Mr. DE BERNARDO. There are two studies—

Senator FRANKEN. Here's another statistic, sir, from the National Work Rights Institute.

Mr. DE BERNARDO. Senator, could I respond?

Senator FRANKEN. No, give me a second here.

Mr. DE BERNARDO. OK.

Senator FRANKEN. Found that the mean damages awarded by arbitrations was 49,000, the mean damages awarded by district courts is \$530,000. That seems to be more beneficial to the employee; doesn't it?

Mr. DE BERNARDO. Sure. Those numbers would be more beneficial to the employee.

Senator FRANKEN. Thank you, sir.

Chairman LEAHY. Thank you.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. DE BERNARDO. I would respond, if I can?

Chairman LEAHY. Go ahead.

Mr. DE BERNARDO. That there are two surveys that I am familiar with. I am not familiar with that survey. The two surveys that are detailed and discussed and cited in my testimony both found that the median or the mean or the average awards given in arbitration in fact either exceed or are just slightly less than what happens in litigation.

And, in fact, in the vast majority of times, if you are talking about arbitration, you also don't have the 33 to 40 percent that has to go to the plaintiffs' attorney plus expenses as well. So in fact the net—

Chairman LEAHY. Mr. de Bernardo—

Mr. DE BERNARDO.—I'm talking about for the average employee.

Chairman LEAHY. Those studies—

Mr. DE BERNARDO. The average situation, the average employee, they are more likely to get their issue addressed. They are more likely to prevail and they are more likely to receive a larger return if they go to arbitration than if they go to litigation.

Chairman LEAHY. And those statistics are in your testimony?

Mr. DE BERNARDO. They are, Senator.

Chairman LEAHY. Thank you. So they will be before the Committee. Appreciate that.

Mr. DE BERNARDO. Thank you, Senator.

Chairman LEAHY. Professor Foreman, Circuit City and Gross, do these make it more difficult for victims of employment discrimination to seek relief in the court and does it—and if you do get into court, does it put further obstacles in your path in going before a jury?

Mr. FOREMAN. I mean, without a doubt. And I think there is a consensus opinion that Gross makes it harder for people to prove age discrimination. The courts have all said that, the media have said that, the academic literature said that. There is no debate. It is harder if you are a victim of age discrimination after Gross to prove your burden.

And on the binding arbitration, Circuit City opened the doors for arbitration of employment discrimination claims and what happened is employers en masse adopted these. Almost 30 percent of employers now have some type of pre-dispute binding arbitration. And I really want the Committee to focus on what we heard from the employment community today. And what this Committee was told was, well, you couldn't give the employee a choice because they would choose not to go into binding arbitration. When arbitration works is when we put it in employee applications and handbooks where they don't really see it, they don't have any ability to react.

But the comment was made once they know their rights, once they get an attorney, then maybe they will choose not to go into binding arbitration because they know there is not as much discovery, they don't have as many appeal rights, and sort of combining the two issues there's limited discovery in arbitration.

Under the Gross decision the plaintiff has the burden of proof and they have the burden of proving by some courts that age was the sole motive. Well, with limited discovery and a higher burden, how does a plaintiff ever win in these claim cases?

And a bit on the statistics and Senator Franken, I think you covered the prevailing party issue. I am not going to touch on that at all.

Senator FRANKEN. Please.

[Laughter.]

Mr. FOREMAN. But the statistics that the employment community relies on are those bargained-for exchanges. They are not pre-dispute binding arbitration by blue-collar workers. If you want statistics that have done that analysis, they're cited in footnote 50 of my materials. They are not my statistics, they are not a think tank's statistics, they are an analysis and it comes out two ways.

One, plaintiffs win less in arbitrations, and they win less money in arbitrations across the board. And I think that's what this Senate needs to deal with is how do you do this balance to allow employees to have a free choice. After a dispute has arisen is a different category than in pre-dispute binding arbitration where there is no agreement.

And I think, Senator Franken, you raise a very good point in the bill that you've introduced. Is it a time to revisit Circuit City and determine whether when Congress passes these very meaningful statutes, freedom from discrimination based on race and sex, they should be subject to binding arbitration at all.

Chairman LEAHY. Well, I'm going to have to be leaving, but Senator Specter is here. I am going over to him to ask questions. So that nobody will feel that they have been in any way cutoff, any one of you, I will keep the record open for 1 week for you to add to any statement you have made or wish to add to this so the record will be complete. I have found this to be a very good and very worthwhile hearing.

Senator Specter, I will yield to you.

Senator SPECTER. Thank you, Mr. Chairman. I came to meet with you and I will stay around for that. I am going to ask just one question. I came in late, but I have been very deeply involved in this issue as it's been percolating for a long time.

As you professionals know, there has been a lot of talk about the arbitration provision in the Employee Free Choice Act. And my question is for you, Mr. de Bernardo. I heard your last response to Senator Franken's question. The business interests have been very much opposed to any kind of arbitration in the Employee Free Choice Act even last best offer, which very sharply restricts the arbitrator's choice. Of the arguments which you have made, I heard the tail end, of the advantages of arbitration and how much you are pushing it, obviously in the context as an alternative to litigation. But in the context of all of the virtues you extol as to arbitration, doesn't that pretty much cut out the efficacy or weight of busi-

ness' opposition to arbitration in the context in the Employee Free Choice Act proposals?

Mr. DE BERNARDO. Senator, I think we are talking about apples and oranges. I would say no as my response.

One is arbitration—

Senator SPECTER. I am not surprised at your response. Now tell me why?

Mr. DE BERNARDO. One is arbitration in lieu of litigation the other is arbitration in lieu of collective bargaining. They are totally different situations.

What is analogous in a union sector to what happens in the non-union sector in terms of employment arbitration is the arbitrations that occur when there is a collective bargaining agreement for employee disputes which are common, and is sacrosanct to the labor movement. When the labor movement, has tried to—when they've tried to export unionization to Mexico, Central America, and South America, they call for arbitration of employment disputes. So in an organized labor setting, arbitration of employment disputes is in fact as entrenched as it is in our jurisprudence system in the non-union sector.

In EFCA, the Employee Free Choice Act, what we are talking about there is arbitration in lieu of collective bargaining, a totally different situation whereby you would have very, very little incentive or no incentive for the union representative to reach agreement with the employer because they would rather go to an arbitrator on a very expedited, quicky basis and have a third party make a decision in terms of what the terms and conditions of employment are long term including wages, benefits, and a whole host of other terms and conditions of employment. They are really not analogous situations.

Senator SPECTER. Just a concluding comment, I am aware of that distinction. I am aware of that argument.

Mr. DE BERNARDO. I am sure you are, Senator. Appreciate that.

Senator SPECTER. The consequence of collective bargaining has been unsuccessful about half of the cases where there is no first contract and a year passes and then a move is made for decertification and sometimes better resourced employers are able to outweigh the union. So what the Congress has to decide is whether you need a little push on collective bargaining. And if there is arbitration even limited to the last best offer, which restricts the arbitrator's discretion, that isn't an appropriate conclusion to implement collective bargaining with the thought that if there is that end product that people will be a lot more anxious to come to agreements without even having the limited last best offer.

But these are weighty issues and I compliment the Chairman and the Committee for taking it up and we will be spending a lot of attention.

Mr. DE BERNARDO. Sir, if I could respond just briefly, I would say that EFCA doesn't represent a little push, it's a huge push, it's a knock-down, drag-out push. So, you know, if there are problems that need to be addressed that is an over response, frankly, analogous to what I think is with S. 931, which is an over response to—you know, are there reforms that are necessary? Certainly that's a possibility. Are there reforms that I would support? Yes, there are.

But it is not to completely abolish arbitration in employment in America today.

Senator SPECTER. I will use the prerogative of the chair to have the last word. You say there are possibly reforms. I look at Mr. Gross and Ms. Jones I'd say that's a good possibility. Thank you. We stand in recess.

[Whereupon, at 11:38 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses by Mark de Bernardo to Questions For the Record of the 10-7-09 Hearing before the U.S. Senate Committee on the Judiciary

Question # 1.a.

Binding, pre-dispute arbitration is common – even sacrosanct - in the unionized sector. Non-union companies have borrowed many of the procedures adopted in the unionized sector, but S. 931 would restrict those efforts by non-union companies.

When the labor movement has tried to export unionization to Mexico, Central America, and South America, they call for arbitration of employment disputes.

Thus, in an organized labor setting, arbitration of employment disputes is in fact as entrenched as it is in our jurisprudence in the non-union sector.

Procedures for selecting arbitrators, conducting pre-hearing discovery, conducting the final arbitration hearing, issuing a written opinion, and assuring the availability of judicial review are the products of a bargain in both the union and non-union contexts. These procedures can vary marginally but are effectively the same in both the union and non-union contexts.

Question #1.b.

Because many of the procedures are similar in both union and non-union contexts, the two are both fair if properly drafted. Case law confirms that, established properly, employees are treated fairly. Indeed, many employees find that the pre-dispute arbitration system is more "fair" than litigation.

Question #1.c.

Eliminating pre-dispute bargains for binding arbitration in only private employment contracts and not collective bargaining agreements would be patently inequitable and unfair.

This inequitable result is indeed the intent of Senator Franken's Amendment #2588 in inserting Sec. 8104(b) which states, "The prohibition in subsection (a) does not apply with respect to employment contracts that may not be enforced in a court of the United States."

The effect of Senator Franken's legislative language is to create a loophole FOR UNIONS to avoid the elimination of pre-dispute arbitration agreements. The language accomplishes this effect because collective bargaining agreements are enforced by the United States National Labor Relations Board rather than a court of the United States.

Question #2.

"The notion that ordinary people want black-robed judges, well-dressed lawyers and fine courtrooms as settings to resolve their issues is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible..." [Emphasis added.]

Warren E. Burger, Former Chief Justice, United States Supreme Court

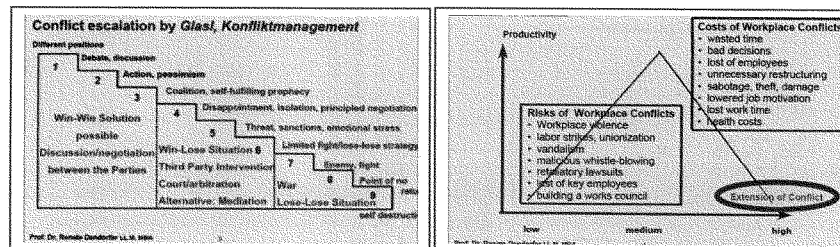
When problems fester, emotions escalate and feelings harden. The quicker an issue can be addressed, the more likely it is to be resolved and the less pain it will inflict. The duration of a problem also correlates with an increase in the costs involved, be the costs emotional, physical, financial, or otherwise. "Arbitration allows employees' claims to be heard in a timely fashion, and it allows employees to move on with their lives more quickly."¹

Without pre-dispute arbitration agreements, increased adversity and decreased productivity result.

The American Arbitration Association reports that:

The mean length of all civil cases that reach a jury trial is just over two and one-half years, according to a study of state courts of general jurisdiction in 45 of the nation's 75 most populated counties. According to the Federal Judicial Center, it is almost 2 years from the time the average employment discrimination case is filed in federal district court until the time it is resolved. . . . [In comparison,] [t]he average arbitration case is resolved in 8.6 months. An external study of AAA employment cases terminated in 1999-2000 showed the average length of time to [arbitrate a case] was 8.2 months.²

The following two charts³ cited by Dr. Renate Dendorfer shows an evaluation of the stages of conflict escalation and the assessment that the longer a conflict endures, the lower productivity goes.



"What little empirical data we have suggests that properly designed employment arbitration systems can out-perform court-based litigation systems. There seems little dispute that because arbitration proceedings tend to be informal (and quicker), they require less lawyer time and resources.¹⁴ Median time from filing to disposition is also lower for arbitration over court litigation..."¹⁴ [Emphasis added.]

"[U]nlike litigation where resolutions often come too late and the process itself is so divisive that reinstatement is rarely practicable, arbitration holds out the promise of a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement."¹⁵ [Emphasis added.]

"[A]t a Nov. 7 [, 2009,] session of the American Bar Association Section of Labor & Employment Law's annual meeting ... [Neutral arbitrator Michael Lewis of IAMS] said that one advantage of employment arbitration is speed in decisionmaking. He said IAMS requires arbitrators write awards in 30 days, while some 'judges sit on decisions for ever and ever.' He also said speed in the arbitration process overall is of value to employees, some of whom wait many years for a resolution to their dispute."⁶ [Emphasis added.]

The use of Alternative Dispute Resolution in employment is common and increasing as a means of avoiding litigation, addressing *more* employee issues, and resolving *more* amicably these concerns. Given the comparably bad costs⁷, delays⁸, and divisiveness of employment litigation, a more sensible and conciliatory option is preferable for employers *and their employees*. The net result of the use of ADR is:

- (1) More employee complaints received *and* resolved;
- (2) Employee complaints resolved sooner and with less tension;
- (3) Less turnover/more likely and more favorable preservation of employment relationships;
- (4) Improved morale;
- (5) More effective communication, and enhanced constructive input by employees into their companies; and
- (6) Better workplaces.

ADR helps "diffuse" employee issues and concerns – *before* they heat up and "come to a boil." With earlier intervention and correction, small problems do not build into big problems, and there is less psychological "wear and tear" all the way around.

One of the key advantages of ADR is the vastly increased chances for amicable resolution of an employment problem – the goal is to keep the employee in his or her job, and to do so in a way that the employee is happier and more productive. Litigation is very much a destroyer of the employment relationship; ADR is a preserver of the employment relationship.

Question #3.a.

Without pre-dispute arbitration, the courts would undoubtedly be more clogged, both at the federal and state levels.

Delays in having employment discrimination cases heard would result.

More judges and courtrooms and taxpayers' dollars would be needed.

Pointedly, more trial lawyers would be needed, and the increased demand would provide upward pressure on the prices these trial lawyers charge. This fact has not gone unnoticed—rather it is an incentive for the trial lawyers in the American Association for Justice (formerly the American Trial Lawyers Association) and in the National Employment Lawyers Association to push for the elimination of pre-dispute arbitration agreements.

Interestingly, it is not a zero sum game for employees—the loss of arbitration would not equal the increase in the courts' caseloads. Here's why.

Consider the hypothetical of 1000 employees with grievances. All 1,000 employees could have their grievances heard by an arbitrator. An employee who goes to binding arbitration will not be dismissed. Any arbitration fees are quite low and often paid by the employer.^{9, 10, 11} Lawyers are not needed because arbitration is a simpler, more focused, more confidential, and more dignified process. The employee's case will be heard and will reach a final decision on the merits.

Were arbitration unavailable, these same 1,000 employees would be forced to seek access to the court system. Upon seeking a trial lawyer for representation, these 1,000 employees are in for a rude awakening.

Employees who do not have the type of very large claims that can attract a plaintiffs' lawyer are often effectively barred from the courtroom, and forced to abandon their cases. A survey of the plaintiffs' bar found that they agree to provide representation to only five percent of the individuals who seek their help.¹² Therefore, the door is slammed shut on 95 percent of potential plaintiffs in litigation at the outset.

In addition, plaintiffs' attorneys require a minimum of \$60,000 provable damages, commonly request a retainer up front, and typically require a payment of a contingency fee of between 33 and 40 percent.¹³

"In addition, arbitration provides an affordable alternative to litigation. The cost of litigation shuts many people out of the court system, thus making the benefits inaccessible. In light of the controversy surrounding the issue of fee sharing and the AAA rules for employment cases, many employees can afford to arbitrate their discrimination claims. The employee's forum costs, i.e., administrative fees and compensation for the arbitrator, are currently capped at \$125 under the AAA rules for employment cases arising from employer-promulgated dispute resolution plans. Even before the AAA fee cap went into effect, a study of randomly chosen awards from AAA employment arbitration decisions showed that "32% of employees arbitrating under employer-promulgated ADR plans paid nothing at all for their AAA arbitrations, and that 61% paid no forum fees," i.e., filing, hearing, or arbitrator's fees. In addition, the study found that arbitrators often reallocated the forum fees entirely to the employer. AAA employment arbitrators exercised their discretion to reallocate arbitrator's fees to the employer in 70.25% of the cases, hearing fees in 71.3% of the cases, and filing fees in 85.12% of the cases."¹⁴ [Internal citations omitted.]

In arbitration, nobody is shut out – 100 percent of those who file grievances in ADR programs have their complaints addressed and resolved. In fact, the National Workrights Institute found that in those arbitration cases with a stated demand, the majority (54 percent)

were for a stated demand that was less than \$75,000. More than a quarter involved demands for less than \$25,000.¹⁵ Those demands wouldn't meet the minimum of \$60,000 provable damages.

As one legal analysis in the employment context recently concluded, without arbitration "[e]mployers will wait out most smaller claims, assuming employees will not be able to pursue them in court."¹⁶

Furthermore, nearly one-quarter (24.9 percent) of the employment cases arbitrated by the American Arbitration Association would not survive Motions for Summary Judgment, based on those arbitrations which do go to trial and are dismissed.¹⁷

The bottom line is that *many* more employees can access the arbitration system than can access the court system because of the dollar threshold of their claims alone.

After 950 of the 1000 employees are thwarted in their attempts to access the courts because no plaintiffs' attorney will take the case, there are 50 left to pursue their day in court.

Those 50 employees with claims large enough to attract an attorney will be unlikely to spare defendants the often exorbitant expense of litigation – and the attendant pressure for a large settlement – once their relationship becomes adversarial. Several other prominent academic commentators in the field fully support this assessment.¹⁸

Yet of those who do go to court, a number will fail on motions to dismiss and motions for summary judgment.

Only a small fraction of the original 1000 thus remain to see their case through to a jury.

In the final analysis, yes, the courts – state and federal – would see an increased caseload if pre-dispute arbitration agreements were eliminated, but it would not be as many as one might think at first blush.

The even greater travesty would be the loss of employees' ability to have their grievances addressed.

For the sake of bigger awards for trial lawyers and a bigger threat of expensive litigation with which to bludgeon employers, trial lawyers would sacrifice access to justice for "the little guy."

Question #3.b.

Empirically, employers that have implemented ADR programs have seen markedly decreased total costs to address employees' grievances even as markedly more grievances are addressed.

Without pre-dispute arbitration agreements, these legal costs would rise.

Additionally, the improved morale produced by having more grievances rapidly addressed would dissipate. Dissipated morale would mean disgruntled employees and higher employee turnover.

Thus, without pre-dispute arbitration agreements, human resources costs would also rise.

Increased legal and HR budgets would have to come out of the companies' bottom line. That financial hit could manifest itself in many ways, none of which are desirable in this fragile economy. Employers could raise prices which would deflate sales.

Employers could cut salaries.

Employers could cut benefits.

And yes, employers could downsize employees.

Question #4.a.

Beyond the low success rate of plaintiffs in court decisions, *most* plaintiffs' claims are dismissed on motions. "Many employment discrimination claims are lost at the summary judgment stage of litigation. Although an arbitrator may award summary judgment, such awards are rare. As a result, employees who are hesitant to bring a claim in the litigation forum because of the threat of summary judgment may feel confident to bring a claim in arbitration."¹⁹ [Internal citations omitted.] Lewis Maltby's study²⁰ of more than 3,400 employment discrimination cases in federal courts in which a definitive judgment was reached found that 60 percent were dispensed of by pre-trial motions.

Question #4.b.

Lewis Maltby's study²¹ of more than 3,400 employment discrimination cases in federal courts in which a definitive judgment was reached found that employers were the victors in 98 percent of those decisions.

Undoubtedly those plaintiffs are worse off than they would have been with only a smaller award in arbitration.

Question #4.c.

The evidence of differences between compensations from arbitration awards and jury awards is not uniform, as Theodore Eisenberg and Elizabeth Hill review²²,

"A central question bearing on both arbitration policy and on the long-term struggle over adjudicatory authority between lay persons and professionals is whether arbitrated outcomes materially differ from litigated outcomes. Allegations that arbitration leads to unfair employee losses and to unfairly lower awards are of particular concern. Some simply use anecdotal horror stories about arbitration to support restrictions on arbitration,¹⁹ but supply no systematic evidence that arbitration is inferior to in-court adjudication. One study reports that jury trial awards in employment discrimination cases are at least three times higher than arbitration awards.²⁰ But the evidence is not uniform. Maltby reports that employees prevailed in 63% of arbitrations compared to 14.9% of court cases and finds mixed results on sizes of awards.²¹ But he compares arbitrated disputes, which are not dominated by employment discrimination claims,²² with litigated disputes that are limited to employment discrimination claims.²³ These sets of disputes are not readily comparable.²⁴

Arbitrator-juror comparisons in non-employment contexts provide no empirical evidence of systematic juror-arbitrator differences. Vidmar and Rice, in an experiment using professional arbitrators and jury-eligible citizens, asked the two groups to determine the level of noneconomic damages to be awarded for past pain and suffering and for disfigurement in a medical negligence case.²⁵ The median arbitrator award was \$57,000 and

the median was about \$50,000. The median mock juror award was \$49,000 and the mean was \$52,000. Statistical tests on the arbitrator and juror samples yielded no statistically significant difference in the medians or means.²⁶ Wittman studied juror and arbitrator outcomes in actual California automobile accident cases and found little evidence of significant differences.²⁷

²⁶ William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 *Disp. Resol. J.* 40, 45 (Oct.-Dec. 1995).

²⁷ Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 *Colum. Hum. Rts. L. Rev.* 29, 31 (1998), at 49.

²⁸ Elizabeth Hill, *Due Process at Low Cost*, 18 *Ohio St. J. Disp. Res.* (2003), reprinted in NYU's 53rd Annual Conference on Labor (Samuel Estreicher ed. 2003) (7% of AAA arbitrations involve civil rights claims).

²⁹ Maltby, *supra* note [21], at 46 (reporting use of federal court database as source of employee success rates).

³⁰ Hill, *supra* note [22].

³¹ Neil Vidmar & Jeffrey J. Rice, *Assessments of Non-economic Damage Awards in Medical Negligence: A Comparison of Juries with Legal Professionals*, 78 *Iowa L. Rev.* 883 (1993).

³² *Id.* at 892-93. The samples were of modest size, twenty-one arbitrators and fewer than 100 jurors, *id.* at 890-91, so one might expect only dramatic differences to be observed at statistically significant levels.

³³ Donald Wittman, *Lay Juries Versus Professional Arbitrators and the Arbitrator Selection Hypothesis*.

Eisenberg and Hill summarize their findings,

For the class of higher paid employees, we find little evidence that arbitrated outcomes materially differ from trial outcomes. Employee win rates in both forums exceed 55% of disputes pressed to termination and median awards in both forums exceed \$65,000.

We find no statistically significant differences between arbitration and litigation in employee win rates or in median or mean award levels for higher pay employees.

The litigation data do not allow a similar comparison of litigation and arbitration results for lower paid employees. Studies indicate that lower paid employees may lack ready access to court, and one simply may not observe substantial numbers of their cases in court.³⁰ Indeed, our results are consistent with a systematic absence of lower pay employees from realistic access to court in non-civil rights disputes. We also find evidence that arbitrated disputes conclude more quickly than litigated disputes.

³⁰ William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 *Disp. Resol. J.* 40, 45 (Oct.-Dec. 1995).

It is entirely true that recoveries in court are offset, in whole or in part, by the costs of litigation. In addition, plaintiffs' attorneys require a minimum of \$60,000 provable damages, commonly request a retainer up front, and typically require a payment of a contingency fee of between 33 and 40 percent.²³

Question #5.

Eisenberg and Hill²⁴ examine this very hypothesis – that the majority of plaintiffs litigating employment discrimination cases in the federal courts were professional or managerial employees, probably because plaintiffs’ attorneys only take cases with greater potential damages awards – and use empirical data to show it to be true:

“In developing hypotheses, an important distinction between groups of employees in arbitration should be made. Low and medium income employees, who overwhelmingly are subject to arbitration imposed as a condition of employment, should be distinguished from more highly paid employees, for whom arbitration may be an individually negotiated contractual term.⁴⁹ We report results separately for highly paid employees (“higher pay employees”) in contrast to low and medium paid employees (“lower pay employees”).

Lower pay employees are those who are estimated to earn up to \$60,000 per year.⁵⁰

Our first hypothesis is that higher pay employees are probably the class of employees most represented in court.⁵¹ The stakes of lower pay employee cases may simply be too low to attract counsel on a widespread basis.⁵² William Howard, in his 1995 article, “*Arbitrating Claims of Employment Discrimination*,” reported the results of a survey of 321 members of the National Employment Lawyers Association. The survey showed that they would accept only 5% of the employment discrimination claims brought to them by prospective clients due to the attorneys’ minimum requirements for provable damages.⁵³ In 1993, the Secretaries of Labor and Commerce established the Commission on the Future of Worker-Management Relations, better known as the Dunlop Commission.

It reported in 1994 that most employment discrimination cases are brought by managers and professionals, rather than lower-level workers.⁵⁴ William Howard, in his 1995 article, “*Arbitrating Claims of Employment Discrimination*,” reported the results of his survey of 321 members of the National Employment Lawyers Association.⁵⁵ He found that plaintiffs’ counsel accepted only those employment discrimination cases in which employees could demonstrate, on average, provable damages of \$60,000 or more.⁵⁶ Since provable damages are rooted in an employee’s salary,⁵⁷ this survey indicates that highly compensated employees tend to be the ones who generate damages sufficient to attract an attorney to represent them in court. Accepting these two research results, it appears that highly compensated employees dominate among those who have access to the court system in employment discrimination cases.⁵⁸

If relatively few middle and lower income employees have access to the courts for employment discrimination claims, then

even fewer have access to the courts for other employment-related claims. Damages for other employment-related claims, like damages for employment discrimination claims, are correlated with salary, and middle and lower income employees will have difficulty meeting plaintiffs' counsels' minimum provable damages requirements. Furthermore, non-discrimination claims usually do not provide a statutory basis for attorney's fees.⁵⁹ Thus, a non-civil rights claim for the same amount of provable damages as a civil rights claim likely will be less attractive to plaintiffs' counsel than the civil rights claim.

These considerations suggest that litigated employment disputes should be more dominated by higher pay employee claims.

...

If the economics of obtaining counsel effectively exclude most lower pay employees from litigation,⁶⁰ then the court claimants are more analogous to the higher pay arbitration employees. If that is so, then it is noteworthy that we find no evidence of a significant difference ($p = .252$) between higher pay arbitration outcomes and litigated outcomes. The employee success rate in state-court litigation, 82 of 145 cases (56.6%), is similar to the 65% success rate in higher pay employee arbitrations. More importantly, the employee success rate in arbitration is in fact *higher* than the employee trial win rate. The direction of the difference in employee success is opposite to that of those concerned about the fairness of arbitration to employees.

In panel B, which focuses on civil rights claims, we again find no evidence of a significant difference ($p = .999$) between higher pay employee arbitrations and litigated outcomes. The employee success rate in litigation, 70 of 160 cases (43.8%), is similar to the 40% success rate in higher pay employee arbitrations but the number of arbitrations, five, is obviously too small to support firm conclusions.

Note also that the success rate in lower pay employee arbitrations, 24.3% is significantly lower ($p = .040$) than the trial success rate. This low success rate in civil rights arbitrations is consistent with reports based on another small sample.⁶¹ The results are again consistent with the view that low-paid employees cannot readily gain access to court.

⁵⁹ Howard, *supra* note 20, at 45 ("as evidenced by the survey responses, plaintiffs' lawyers accept only one in 20 [employment discrimination] cases they are offered which typically consist of those where there are high provable damages and the client is financially capable of advancing a retainer").

⁶⁰ The Dunlop Commission on the Future of Worker-Management Relations: Final Report (1993-94), available at http://ilr.cornell.edu/library/e_archive/gov_reports/dunlop/DunlopFinalReport.pdf. For evidence of the prevalence of low-wage workers in sexual harassment cases that lead to reported opinions, see Ann Juliano & Stewart J. Schwab, The

Sweep of Sexual Harassment Cases, 86 Cornell L. Rev. 548, 561 (2001) (“Somewhat surprisingly, the bulk of the plaintiffs are clerical or blue collar, rather than workers in higher status occupations. One might hypothesize that high-status victims have more resources to bring a federal lawsuit, and thus professional women should comprise a higher fraction of all plaintiffs in comparison to their representation in the workforce.”).

⁵⁵ Howard, *supra* note 20, at 45.

⁵⁶ Id. By “provable” damages, plaintiffs’ counsel mean damages related to compensation and exclude damages for emotional distress and other intangible damages available under Title VII and the Americans with Disabilities Act. *Id.*

⁵⁷ Hill, *supra* note 10.

⁵⁸ Id.

⁵⁹ Id. Illustrative employment discrimination attorney fee statutes are 42 U.S.C. 2000e-5(k) (Title VII); 42 U.S.C. 12205 (Americans with Disabilities Act).

⁶⁰ Hill, *supra* note 10.

⁶¹ Id.

⁶² Id.

⁶³ Paul Burstein & Kathleen Monaghan, Equal Opportunity and the Mobilization of Law, 20 L. & Soc. Rev. 356, 358 (1986) (reporting low employee success rate, 16.8%, in published Fair Employment Practice Case published by the Bureau of National Affairs); Kevin M. Clermont & Theodore Eisenberg, Plaintiffphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments, 2002 Illinois L. Rev. (forthcoming) (showing low success in appealed cases); Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1175 (1992) (hereinafter “Judge & Jury”) (showing low trial success rate in employment discrimination cases).

...

⁷⁰ Maltby, *supra* note 10, at 49-50 (reporting employee success in one of thirteen 1996 discrimination disputes). ”

Question #6.a. & 6.b.

The premise that bench trials would be a politically viable alternative is fallacious. For the trial lawyers of the National Employment Law Association and the American Association for Justice (formerly the American Trial Lawyers Association) as well as the House and Senate sponsors of the Arbitration Fairness Act, the Constitutional right to a jury trial is sacrosanct. A bench trial would not satisfy these prime movers.

Importantly too, to implement bench trials in lieu of arbitration is to throw out a long and firmly settled legislative and judicial history supporting arbitration. Beginning in 1925 with the Federal Arbitration Act, Congress has supported arbitration for nearly 85 years in a series of bills. Likewise, the federal courts have just as many years of case history, including numerous United States Supreme Court decisions. These Supreme Court decisions have shown progressive, increasing support for the use of arbitration.

If we as a nation suddenly switched away from binding arbitration to bench trials today, we would make it nowhere near 85 years before those insisting on jury trials cited horror stories of bench trials, decried the elimination of Constitutional rights, filed bills to ban bench trials, held press conferences about how unaccountable judges were undermining the Civil Rights Act, created political pressure from without and within the EEOC against contractual waivers of jury trial rights, and the like.

In theory, jury waivers leading to bench trials are available now, but they have not enjoyed widespread usage. "Pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial for their Title VII claims are uncommon in federal employment law, but do exist."²⁵

Several reasons may account for their distant-second status.

First, the judiciary has supported arbitration. Warren E. Burger, Former Chief Justice, United States Supreme Court famously stated, "The notion that ordinary people want black-robed judges, well-dressed lawyers and fine courtrooms as settings to resolve their issues is not correct. People with problems, like people with pain, want relief, and they want it as quickly and inexpensively as possible..." [Emphasis added.]

The Majority opinion in *Circuit City Stores, Inc. v. Adams* states "We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. ... "[T]here are real benefits to the enforcement of arbitration provisions."²⁶

One reason for the judiciary's support of arbitration is that it takes some of the overwhelming burden and backlog off of their backs. Bench trials would take up the time of judges in a way that arbitrations do not.

Another reason people prefer binding arbitration over bench trials is precisely because there are no appeals on the merits of the issues. Whereas Ms. LaRocca has considered this fact a drawback, many and indeed most see this prohibition of appeals as a benefit of binding arbitration over bench trials.

The finality of a binding arbitration decision ends the conflict, giving a catharsis so that the parties can move beyond the conflict and get on with their lives.

The finality of a binding arbitration decision saves the time and expense of an appeal, thus restoring productivity.

Caselaw regarding contractual waivers of a jury trial right are not as legislatively grounded as arbitration with its Federal Arbitration Act. Thus such waivers are more intensely scrutinized. A presumption against the waiver of a jury trial exists²⁷ whereas a

presumption in favor of arbitration exists.²⁸ The relative bargaining power of the parties is more scrutinized for jury trial waivers than for binding arbitration²⁹. Additional criteria apply for waivers of jury trials, such as the business acumen of the party opposing waiver and whether counsel for the party opposing waiver had an opportunity to review the agreement, *et cetera*.³⁰

All of that is to say that waivers of jury trials would be more litigated for procedural questions than arbitration is now. That's simply asking for more trouble than we have now.

Furthermore, waivers of jury trial rights, because they don't have a federal statute targeted to their particular implementation and enforcement, must comply with other federal and state statutes. "For example, agreements covering claims under the Age Discrimination in Employment Act ("ADEA") must comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA")."³¹ "The OWBPA requires that in order for an individual to release an age claim under the ADEA, the waiver must specifically mention the ADEA, the individual must be given additional consideration, and the individual must be advised to consult an attorney prior to signing the release."³² "In addition, the Act requires that the individual must be informed that he or she may take twenty-one days to consider the offer and has seven days after the signing of the agreement to change his or her mind and revoke the agreement."³³ Those provisions constitute substantial additional restriction.

Those points made, it would be excellent if the procedural unconscionability and substantive unconscionability objections to binding arbitrations were alleviated as they are for bench trials.

Ms. LaRocca treats the fact that bench trials are slower, less private, and more costly than arbitrations as an advantage to employers because "fewer employees may choose to bring discrimination claims,"³⁴ "employers will not be pressured to bear the full cost of the procedure,"³⁵ and "In addition, because judges have the power to grant summary judgment, hesitant employees may not bring complaints."³⁶ While some may like slow, costly, public, intimidating procedures, and indeed slow, costly, public, and intimidating are veritably hallmarks of—even definitional of—government, these are not desirable goals in and of themselves. Employees do not seek what Ms. LaRocca is offering, as stated by an employees' representative at the American Bar Association on November 7, 2009.³⁷

Finally, Ms. LaRocca lauds that fact that bench trials place the costs on the taxpayer rather than keeping the costs between the parties to the conflict. Especially in this economy when people have enough financial hardship of their own, the last thing people want to spend money on is other people's problems.

If a bill regarding arbitral procedural fairness, not unlike Senator Sessions' Fair Arbitration Act of 2007 (S. 1135), were to move through Congress, guarantees of freedom from procedural and substantive unconscionability and from lack of contract claims should be included for parties who voluntarily comply with the standards set forth in the bill.

¹ Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 (2005), citing Norman Brand, *Putting it Together I: A Note on the Economics of Imposed Employment Arbitration Agreements*, in HOW ADR WORKS 99, 102 (Norman Brand ed., 2002); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19, 20, 22.

² AM. ARBITRATION ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 16 (Jan. 2003);

³ Dr. Renate Dendorfer, Aspects of Mediation in the Workplace and for Employment Law, Slides 5 and 6, Seminar at the LANDWELL conference, Barcelona, September 29&30, 2003, online at <http://www.steinbeis-law.de/pdf/LandwellVortrag.pdf>

⁴ Samuel Estricher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. Disp. Resol. 559, 564 (2000-2001)

⁵ Id.

⁶ BNA Daily Labor Report, 216 DLR C-2 (11/12/2009), online at http://news.bna.com/dlLn/DLNLNB/split_display.adp?fedfid=15742396&vname=dlmotalissues&fn=15742396&jd=a0c1j2a3p4&split=0

⁷ AM. ARBITRATION ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 16 (Jan. 2003); HOW ARBITRATION WORKS 2-3 (Edward P. Goggin & Alan Miles Rubin eds., 5th ed. Supp. 1999); Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 95, 98-99 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19, 20, 22; *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1673 (1996).

⁸ HENRY S. KRAMER, ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE § 9.01, at 9-3 (2004); AM. ARBITRATION ASS'N, *supra* note 11, at 16; HOW ARBITRATION WORKS, *supra* note 11, at 2-3; Bingham & Chachere, *supra* note 11, at 98-99; Oppenheimer & Johnstone, *supra* note 11, at 20, 22; *Developments in the Law*, *supra* note 11, at 1673.

⁹ “Rule 31. Fees

(c) If an arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an employee may be required to pay is the initial JAMS Case Management Fee.” JAMS Employment Arbitration Rules & Procedures, Effective July 15, 2009, online at <http://www.jamsadr.com/rules-employment-arbitration/#thirty-one>.

¹⁰ “For Disputes Arising Out of Employer-Promulgated Plans*: ... The employer shall pay the arbitrator’s compensation unless the employee, post dispute, voluntarily elects to pay a portion of the arbitrator’s compensation.” American Arbitration Association, Employment Arbitration Rules, Amended and Effective June 1, 2009, online at <http://www.adr.org/si.asp?id=5380>

¹¹ In California, for disputes arising out of employer-promulgated plans, employees with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. California Code of Civil Procedure, Section 1284.3

¹² Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003). See also *Employment Arbitration: What Does the Data Show?* The National Workrights Institute, available at <http://www.workrights.org/current/cd-arbitration.html>.

¹³ Id.

¹⁴ Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 (2005), citing Norman Brand, *Putting it Together I: A Note on the Economics of Imposed Employment Arbitration Agreements*, in HOW ADR WORKS 99, 102 (Norman Brand ed., 2002); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 24, 35 n. 100.

¹⁵ Lewis L. Maltby, *Arbitrating Employment Disputes: The Promise and the Peril in Arbitration and Employment Disputes*, 530. (Daniel P. O’Meara ed., 2005).

¹⁶ Theodore J. St. Antoine, *Mandatory Arbitration: Why It’s Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790 (2008).

¹⁷ Theodore Eisenberg and Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, 2003 Pub. H. & Legal Theory Res. Paper Series I, 14 available at http://papers.ssrn.com/col3/papers.cfm?abstract_id=389780.

¹⁸ See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567-68 (2001); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 57 (2003); Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314 (2003).

¹⁹ Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 (2005), citing Norman Brand, *Putting it Together I: A Note on the Economics of Imposed Employment Arbitration Agreements*, in HOW ADR WORKS 99, 102 (Norman Brand ed., 2002); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19, 20, 22.

²⁰ *Employment Arbitration: Is It Really Second-Class Justice?*, Dispute Resolution Magazine, 23-24 (Fall 1999)

²¹ *Id.*

²² See Eisenberg and Hill, note 12, at page 3

²³ Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003). See also *Employment Arbitration: What Does the Data Show?* The National Workrights Institute, available at <http://www.workrights.org/current/cd-arbitration.html>.

²⁴ See Eisenberg and Hill, note 12, at page 9, 13.

²⁵ "I was only able to find two cases that analyzed a jury trial waiver provision in the Title VII context: *Brown v. Cushman & Wakefield, Inc.*, 235 F. Supp. 2d 291 (S.D.N.Y. 2002), discussed above, and *Schappert v. Bedford, Freeman & Worth Publ'g Group, LLC*, No. 03 Civ. 0058(RMB)(D.), 2004 U.S. Dist. LXXIS 14153 (S.D.N.Y. 2004) (finding jury waiver provision enforceable)", Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 (2005)

²⁶ 121 S. Ct. 1302, at 1312 (2001) [citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984)]

²⁷ *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

²⁸ "The presumption in the Federal Arbitration Act (FAA) is that arbitration agreements will be "valid, irrevocable, and enforceable" unless a generally applicable, state law contract defense would apply." Thomas W.H. Barlow, *The Enforceability of Class Action Waivers in Arbitration Clauses*, Dispute Resolution Journal, vol. 64, no. 3 (Aug.-Oct. 2009),

²⁹ *Whirlpool Fin. Corp. v. Sevaux*, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

³⁰ *Id.*

³¹ Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. § 626(f) (2000)); see *Hammaker v. Brown & Brown, Inc.*, 214 F. Supp. 2d 575, 578-79 (E.D. Va. 2002)

³² See 29 U.S.C. § 626(f)(1).

³³ *Id.*

³⁴ Dianne LaRocca, *The Bench Trial: A More Beneficial Alternative to Arbitration of Title VII Claims*, Chicago-Kent Law Review, Vol. 80: 933 at 954 (2005)

³⁵ *Id.*

³⁶ *Id.*

³⁷ "Pearl Zuchlewski, who represents employees in her firm of Kraus & Zuchlewski, pointed to some advantages of arbitration for her clients. Zuchlewski said some of her clients prefer the privacy of arbitration. She also noted that there is some control over who serves as the factfinder, since the two parties mutually select the arbitrator rather than have a judge selected by lottery. In addition, the employee can actually keep the award, she said, since arbitrations are rarely appealable." ABA Conference Report - Alternative Dispute Resolution: Panelists Agree Employment Arbitration Neither 'Panacea' Nor 'Horror Story', Daily Labor Report, 216 DLR C-2, 11/12/2009, online at http://news.bna.com/dlLn/DLNLNB/split_display.adp?fedfid=15742396&vname=dlrnotallissues&fn=15742396&jd=a0c1j2a3p4&split=0



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October 30, 2009

Via Federal Express Mail

Kelsey Kobelt
Senate Judiciary Committee
224 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Re: Written Questions from Committee Members

Dear Ms. Kobelt:

I am enclosing answers to the additional questions that were submitted by Senator Sessions.

I am also enclosing an edited copy of the transcript of the hearing pursuant to Senator Leahy's request.

If there is anything else that I can do to assist the Committee, please let me know.

Very truly yours,

Michael W. Fox

MWF/mtr
Enclosures

5220764.1

Arlene • Austin • Birmingham • Bloomfield Hills • Charleston • Charlotte • Chicago • Cleveland • Columbia • Dallas • Greensboro • Greenville • Houston • Indianapolis • Jackson • Kansas City
Los Angeles • Memphis • Miami • Morristown • Nashville • Philadelphia • Phoenix • Pittsburgh • Raleigh • St. Louis • St. Thomas • San Antonio • San Francisco • Tampa • Torrance • Tucson • Washington

Follow-Up Questions for Mr. Fox

1. The question the Court granted Certiorari on in *Gross v. FBL Financial Services, Inc.* was “whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the Age Discrimination in Employment Act of 1967.”¹ Mr. Gross’s Certiorari Petition presented this question: “Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?”² Supreme Court Rule 14.1(a) states that “[t]he statement of any question presented [in a petition for certiorari] will be deemed to comprise every subsidiary question fairly included therein.”
 - (a) Given the question presented in Mr. Gross’s Certiorari Petition, would you say that the question actually decided by the Court in *Gross* was a “subsidiary question fairly included therein?”

ANSWER:

The issue actually decided by the Court was clearly a “subsidiary question fairly included” in the statement of the question presented to the Court. The Court was asked to opine on the evidentiary standard necessary for a mixed-motive instruction in an age discrimination case. Before that question could be answered, it was necessary to determine whether such an instruction is ever appropriate. In other words, there was no way for the Court to answer the question presented without resolving the issue of whether a mixed-motive instruction was ever available under the Age Discrimination in Employment Act. Having concluded the answer to the foundational question was no, it was unnecessary (and would have been inappropriate) to issue an opinion on what evidentiary standard would require such an instruction.

- (b) If you answered question 1(a) in the affirmative, would you say that Mr. Gross’s Certiorari Petition did, although perhaps unwittingly, ask the Court to answer the question it answered?

ANSWER:

Yes.

2. In your written testimony and at the hearing, you testified that the mixed-motive theory, which was addressed in *Gross*, is seldom used and is confusing to juries. You explained that the theory was developed at a time when Title VII claims were only tried to the bench, and was, therefore, poorly adapted to be an effective jury instruction.

¹ 129 S. Ct. 2343, 2346 (2009).

² Petition for Writ of Certiorari, *Gross*, 129 S.Ct.2343 (No. 08-411), 2008 WL 4462099.

- (a) Do you think the mixed-motive theory developed in *Price Waterhouse v. Hopkins* was necessary and helpful when Title VII claims were tried only to a judge?

ANSWER:

In *Price Waterhouse v. Hopkins*, and cases which preceded it, the mixed motive language had been used by the court as a way of explaining the rationale which allowed it to reach its decision in a bench trial. As such, it was certainly helpful as a way of explaining a court's decision. However, that does not mean that it should be transformed into a mechanism that a jury is required to follow in reaching a decision, which is what the legislative proposal would do.

- (b) Given the increasingly complex nature of evidence presented in employment litigation, do you think it is likely juries were, in practice, applying the simple "but-for" causation approach to cases presented to them on a mixed-motive theory, even before *Gross*?

ANSWER:

First, it should be emphasized that in only a very, very small percentage of cases does a plaintiff actually ask for a mixed motive instruction. In that respect, the argument that *Gross v. FBL Services* seriously hampers age discrimination plaintiffs is much less than has been portrayed by many who advocate that it should be legislatively overturned. In any event, I do believe it is quite likely that juries do in fact apply a common sense, straight forward approach of determining whether or not age, or any other protected category, was the determining factor when they decide these cases.

3. In his written testimony, Mr. Foreman said the following:

In formulating public policy, we must not divorce ourselves from the reality of life for many Americans: If a blue-collar worker refuses to sign a job application containing a pre-dispute mandatory arbitration clause, or a separate arbitration agreement included in a stack of documents piled before them on their first day of the job, do you honestly think the employee would get the job? We all know what would happen, especially in today's economy: the employer would just go on to the next applicant who signed the arbitration agreement, regardless of whether that worker knew he or she was agreeing to submit his or her civil rights claims to mandatory arbitration or what that really meant.

Mr. Foreman seems to present pre-dispute binding arbitration clauses as universal contracts of adhesion, such that all workers have to choose between signing an arbitration agreement or being unemployed.

- (a) As a trial lawyer who represents employers in labor and employment law matters, would you agree with that characterization?

ANSWER:

No.

- (b) If you answered part 1(a) in the negative, would you say that a number of your clients, or other employers you have encountered in your practice, refrain from using arbitration clauses in all or some of their employment contracts or application for employment?

ANSWER:

In my experience it is a minority of employers who require employees to agree to resolve any employment related claims through binding arbitration as a condition of employment.

5220511.1 (PERSONAL)

SUBMISSIONS FOR THE RECORD

WAFFLING CIRCUITS: WORKPLACE ADR AFTER *CIRCUIT CITY* AND *WAFFLE HOUSE*

By FRANCIS T. COLEMAN*

From a legal standpoint, alternate dispute resolution ("ADR") agreements in the workplace have exhilarated HR and employment law. During the last decade, more and more employers have added ADR to their workplace lexicons. Employers of all sizes and descriptions seek alternatives to the high costs of litigation, and many have chosen the ADR approach as their answer.

Two recent United States Supreme Court cases, *Circuit City* and *Waffle House*, may seem, on their faces, to send muddled signals as to whether courts will enforce such agreements. Now that the dust has settled, however, a clear answer is emerging. Yes, courts will enforce mandatory ADR agreements in the workplace, so long as they meet minimum standards of fairness and due process.

This article first defines workplace ADR. Second, the article describes the decisions by which the United States Supreme Court has communicated its overall willingness to enforce mandatory ADR agreements. Third, the article describes minimum standards required for such judicial enforcement. Fourth, the article examines pros and cons of adopting an ADR policy in the employment context, given the current judicial landscape. Finally, the article concludes that, for 2003 and beyond, ADR fits the needs of most organizations. The Circuits are no longer waffling.

I. A Definition of Workplace ADR

Before tackling the legalities and enforceability of ADR choices, one must first grasp the basics. What is workplace ADR, and how does it work? Workplace ADR arises out of contractual agreements whereby prospective and/or current employees agree to resolve specified workplace-related disputes (including disputes arising from the termination of employment) by arbitration, mediation or other non-judicial methods, rather than by litigation. Typically, employers make such agreements a condition of employment for applicants, and many employers also make them apply to current employees.

Not everyone is in love with these agreements. In fact, the Equal Employment Opportunity Commission ("EEOC"), plaintiff trial lawyers and civil rights groups have mobilized in opposing them, thus making ADR not only one of the most important developments of the last ten years but also one of the most controversial. This struggle between proponents and detractors has produced a long and hotly contested series of court battles as to the agreements' legality and enforceability. Although the United States Supreme Court has not yet resolved all issues surrounding ADR in the workplace, proponents appear, at least for now, to have succeeded in their defense of these agreements, provided they do not overplay their hand.

II. Recent Supreme Court and Other Decisions Permitting Workplace ADR

Supreme Court decisions dating back to the 1960's expressed pro-arbitration preferences. In *Prima Paint Corp. v.*

Flood & Conklin Mfg. Co.,¹ for example, the Court held that, under the United States Arbitration Act, arbitrators under an arbitration clause had power to hear even a claim of fraud inducing the contract itself. Also in the early 1960's, the high Court issued its famous trilogy of decisions supporting the arbitrability of workplace disputes.² Within the past year, the Supreme Court has shed new light on the subject, even if some have not yet seen that light, or if, having seen it, they have emphasized only the new shadows it casts. Two important decisions have defined the scope of ADR agreements and their enforceability in the workplace.

A. Supreme Court's Decision in *Circuit City* (Part I)

In keeping with the pro-arbitration line of cases, the Supreme Court on March 22, 2001 upheld the enforceability, under the Federal Arbitration Act ("FAA"), of employment agreements requiring arbitration of workplace disputes as a substitute for employment litigation.³ The *Circuit City I* decision upheld the majority of federal Courts of Appeal that had previously ruled on the issue. In essence, the Court held that both the public policy favoring arbitration and the language of the FAA itself required a narrow construction of the statute's exclusion of employment contracts. In reaching this conclusion, the Court held that the statute's excepting from its scope "contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce" excluded from arbitration only those employees actually transporting goods in interstate commerce.⁴ Thus, concluded the Court, the statute covered all other employment contracts, and they were therefore enforceable under its provisions.

Members of Congress on both sides of the aisle jockeyed legislatively both in anticipation of and reaction to the holding of *Circuit City I*. On March 1, 2001, for example, three weeks before the decision, Congressman Robert E. Andrews (D—NJ) introduced a bill that would amend 9 U.S.C. to let employees, within 60 days of initiating an employment controversy, reject the use of arbitration, notwithstanding a mandatory ADR agreement.⁵ Even earlier, on January 24, 2001, Senators Russ Feingold (D—WI), Patrick Leahy (D—VT), Edward M. Kennedy (D—MA) and Robert G. Torricelli (D—NJ) had introduced a bill that would amend certain federal civil rights statutes to prevent involuntary arbitration of claims arising from unlawful employment discrimination.⁶

Then came *Circuit City I*. Just two weeks later, on April 4, 2001, Congressman Edward J. Markey (D—MA) introduced a House version of the Feingold bill.⁷ On September 18, 2001, Congressman Dennis J. Kucinich (D—OH) introduced a bill that would amend 9 U.S.C. to exclude all employment contracts from the arbitration provisions of chapter one of that title.⁸ Senators Kennedy and Feingold introduced a Senate version of Kucinich's bill on May 5, 2002.⁹ And on October 1, 2002, Senator Jeff Sessions (R—AL) introduced a bill that would amend the first chapter of 9

U.S.C. to provide for greater fairness in the arbitration process.¹⁰

Despite all this legislative posturing, and although the Court's vote was close (5 to 4), arbitration proponents celebrated victory after *Circuit City I*. Employers saw *Circuit City I* as a green light for making employees sign an ADR agreement as a condition of employment, provided such agreements met minimum standards of fairness and due process.

B. Supreme Court's Decision in *Waffle House*

Proponents of workplace ADR did not savor their victory for long, however, before the Supreme Court issued another major decision addressing ADR agreements. The *Waffle House* decision¹¹ considered the EEOC's authority to seek relief on behalf of individuals who had previously signed enforceable ADR agreements. On January 15, 2002, the Supreme Court in a 6-3 decision ruled that an arbitration agreement made by a South Carolina restaurant employee and his employer did not prevent the EEOC from pursuing—on the employee's behalf—victim-specific judicial relief based on an Americans with Disabilities Act ("ADA") claim.

Writing for the majority in reversing a decision by the U.S. Court of Appeals for the Fourth Circuit, Justice John Paul Stevens stated that, despite the FAA's preference for arbitration, once a charge is filed with the EEOC the Commission "is in command of the process."¹² Private arbitration agreements to which the EEOC was not a party, he wrote, did not bind it.¹³ It was therefore entitled to seek even victim-specific relief—i.e., reinstatement, backpay, injunctive relief and punitive damages.¹⁴

In reaching its decision, the Court left open the question of whether a private settlement by the parties or a prior arbitration award would affect the scope of the EEOC's claim or the relief requested. The Court also left open the question of whether it could halt an ongoing arbitration while the EEOC litigated the employee's claim.

Naturally, the *Waffle House* decision received different receptions from ADR's proponents and detractors. Expectedly and understandably, the decision thrilled the EEOC. EEOC Chair Cari M. Dominguez stated that the decision "reaffirms the significance of the EEOC's public enforcement role" and observed that the EEOC, as the agency responsible for enforcing antidiscrimination laws, "is not constrained in any way by a private arbitration agreement to which EEOC is not a party."

ADR proponents, on the other hand, downplayed the decision, observing that it would have little impact because the EEOC initiated litigation only infrequently. Given its budgetary and staff limitations, the EEOC litigates only major cases, involving major employers, novel issues, large class-action matters or charges of systemic discrimination. New York University Professor Samuel Estreicher observed that the decision allowed the EEOC to continue "creating nuisance" when arbitration agreements existed, without providing significant relief for most people who brought charges. Continuing, Professor Estreicher noted that, "The decision injects an element of legal uncertainty for employers using arbitration agreements and could prevent arbitra-

tors from reaching decisions because of concerns EEOC may become involved."

Although, as Professor Estreicher notes, the *Waffle House* decision does inject an element of uncertainty as to the finality of any arbitration proceeding under an ADR agreement or settlements reached as a result thereof, an ADR agreement still remains, in the author's opinion, an attractive alternative to litigation. The small number of EEOC-initiated lawsuits bolsters this assessment. For example, during FY 2000, the EEOC filed a total of only 327 lawsuits, a very small percentage of the charges filed with the Commission. This pattern of prosecutorial restraint will probably continue in 2003 and beyond, as the Bush administration will not likely add to the Commission's limited litigation budget.

The Department of Labor has exercised similar restraint in the wake of *Waffle House*. On August 9, 2002, a directive issued by Solicitor of Labor Eugene Scalia welcomed the case's "affirmation of the government's litigation authority." The directive also, however, acknowledged "a tradition of federal employment agencies deferring to arbitration in appropriate circumstances" and listed factors that agency attorneys must consider when deciding whether to litigate a matter subject to an ADR agreement. These factors included: the dispute's relationship to the Labor Department's mission; the agreement's validity; the arbitration's costs; the arbitrator's qualifications, selection, and procedural and substantive authority; and the arbitration's procedural posture.

In short, the U.S. government seems inclined to leave arbitration agreements, where they exist, as the controlling method for resolving most workplace claims covered by ADR. While employers rightly view the *Waffle House* decision as a step backwards, it appears to be a tiny step backwards and should not deter such agreements in the future.

C. Ninth Circuit's Decision in *Circuit City (Part II)*

On June 3, 2002, in *Circuit City II*, decided on remand from the Supreme Court's *Circuit City I* decision above, the U.S. Court of Appeals for the Ninth Circuit held that a contract of adhesion offered on a take-it-or-leave-it basis is unconscionable under California law.¹⁵ Although *Circuit City I* had overruled the Ninth Circuit's position that the FAA does not apply to employment contracts generally, the Ninth Circuit once again refused to enforce *Circuit City*'s ADR agreement. This time the Ninth Circuit reasoned that the ADR agreement was a contract of adhesion, offered on a take-it-or-leave-it basis between parties of highly unequal bargaining power. State law therefore rendered the agreement both procedurally and substantively unconscionable.

In considering the agreement's procedural unconscionability, the Ninth Circuit focused on the disequilibrium of bargaining power between the parties, the non-negotiability of its terms, and the extent to which the contract did not clearly disclose what rights the employee was relinquishing. The Ninth Circuit ultimately concluded that the company's

pre-employment ADR agreement “function[ed] as a thumb on Circuit City’s side of the scale.” Additionally, the Court noted that while all of the *employee’s* employment-related claims were subject to arbitration, the *employer’s* claims were not bound by the same requirements. The court also observed that the agreement limited the available injunctive and other types of statutory relief—thus contrasting with the relief a plaintiff might get in a civil suit for the same causes of action. Finally, the agreement required the employee to split the arbitrator’s fees with Circuit City. This fee allocation scheme alone, the court stated, made the agreement unenforceable.

Plaintiffs have frequently raised the contract-of-adhesion defense in other jurisdictions, and, as was the case with the Ninth Circuit’s position on the applicability of the FAA, a great majority of courts that have ruled on the issue have rejected it. Nonetheless, this case does underscore the necessity of reviewing the law in the applicable jurisdiction before drafting and adopting an ADR agreement.

D. Other Decisions Finding Mandatory ADR Agreements Enforceable

Since the Supreme Court’s decisions in *Circuit City I* and *Waffle House*, other courts, including the Ninth Circuit, have endorsed the enforceability of mandatory ADR agreements between employers and employees.

In *EEOC v. Luce*, from September 2002, the Ninth Circuit Court of Appeals, though divided, finally joined the great majority of the other federal Courts of Appeal, upholding the enforceability of mandatory arbitration of Title VII discrimination claims.¹⁶ Reversing an earlier decision, the *Luce* court held that, in view of *Circuit City I*, a firm previously enjoined from making employees arbitrate Title VII claims could now make employees sign ADR agreements as a condition of employment and could enforce those agreements against current employees. In reaching its decision, the *Luce* court concluded that the Supreme Court’s decision in *Circuit City I* “decimated” any inference that Congress intended to preclude compulsory arbitration of Title VII claims. *Luce* is an important decision, because the Ninth Circuit was one of the last federal appellate holdouts in opposing the green light for mandatory arbitration agreements in the workplace. Now, all federal Circuits and many state supreme courts have approved such agreements, with greater or fewer restrictions.

In *Adkins v. Labor Ready, Inc.*, for example, the U.S. Court of Appeals for the Fourth Circuit held that the plaintiff’s ADR agreement with a temporary employment-agency barred him from bringing any FLSA suit alleging faulty payroll procedures, because the FLSA did not pre-empt the FAA.¹⁷ In *Tinder v. Pinkerton Security*, the U.S. Court of Appeals for the Seventh Circuit ordered an at-will employee to submit her sex discrimination and retaliation claims to arbitration, because her continued employment and the company’s promise to arbitrate constituted valid consideration, even though she began working before the company’s ADR plan existed.¹⁸ In *Brown v. Illinois Central Railroad Co.*, the same circuit held that the Railway Labor Act’s mandatory ADR provision barred a railroad employee from litigating an ADA claim, because resolving the ADA accommodation issue involved

interpreting the seniority provisions of a collective bargaining agreement.¹⁹ In *Weeks v. Harden Manufacturing Corp.*, the U.S. Court of Appeals for the Eleventh Circuit permitted an employer to terminate four employees who refused to sign a mandatory ADR provision covering all Title VII, ADA and ADEA claims, because the employees could not reasonably have believed the provision to be illegal, even if a court were later to find it unenforceable.²⁰ In *Martindale v. Sandvik Inc.*, a divided New Jersey Supreme Court held that an ADR agreement contained in a job application form did not constitute a contract of adhesion, because the prospective employee was an experienced benefits administrator.²¹ In *In re Halliburton Co.*, the Supreme Court of Texas held that, by continuing to work after an employer had sent notice of its new ADR program, an at-will employee accepted the program, for which the employer’s promise to arbitrate disputes constituted adequate consideration.²² And in *Barnica v. Kenai Peninsula Borough School District*, a divided Alaska Supreme Court held that the ADR clause in a collective bargaining agreement covered a former employee’s sex discrimination claim under state law, because the discrimination statute’s legislative history did not show an intent to prevent an employee from waiving her judicial remedy.²³

In each instance, courts enforced carefully crafted ADR agreements in the workplace.

III. Minimal Standards Required for Judicial Enforcement

Although various courts have sent mixed signals regarding the enforceability of mandatory ADR agreements, the courts are slowly beginning to establish criteria that, if followed, will ensure legality and enforceability. Indeed, the majority of reviewing courts have enforced workplace ADR agreements and in the process have laid down guidelines for the enforceability of such agreements. These requirements may vary from jurisdiction to jurisdiction, so the language and conditions set forth in ADR agreements must meet the judicial requirements of the applicable jurisdiction(s). Furthermore, the law of workplace ADR continues to evolve, and the U.S. Supreme Court has not finally resolved all possible issues. Nonetheless, at this writing, the courts have consistently examined certain areas to determine whether challenged ADR agreements meet minimal standards of fairness and due process. Some of the most frequently imposed restrictions appear below.

As a general rule, courts enforcing mandatory arbitration agreements have required that such agreements:

A. Be in Writing and Clearly Set Forth the Terms of the Agreement

The New Jersey case of *Garfinkel v. Morristown Obstetrics and Gynecology Associates* illustrates this point.²⁴ The plaintiff, a physician formerly associated with an obstetrics and gynecology practice, claimed that the practice unlawfully discharged him because he was a male. Before joining the practice, the plaintiff signed a written employment agreement which stated that “any controversy arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration.” The plaintiff filed suit in the

New Jersey Superior Court under the New Jersey Law Against Discrimination (LAD). The Court upheld the plaintiff's right to sue in court despite his written agreement to arbitrate. The plaintiff, the Court found, had not clearly and unambiguously waived his rights under the LAD. In reaching its conclusion the Court stated, "The Court will not assume that employees intend to waive those rights unless their agreements so provide in unambiguous terms." The Court further stated that a waiver-of-rights provision "should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., work place discrimination claims."

Similarly, in *Dumais v. American Golf Corp.*, the U.S. Court of Appeals for the Tenth Circuit found illusory and unenforceable a mandatory ADR agreement with conflicting provisions, because the employee handbook arguably empowered the employer to change the agreement without notice.²⁵

B. Provide Employees Same Relief Available In Court

Courts generally require that arbitration agreements provide the arbitrator with the authority to award the employees the same relief that would have been available to them had they gone to court to pursue their claims under various federal, state or local laws. Such relief might include backpay, compensatory and punitive damages, injunctive relief, reinstatement, attorney fees, expert witness fees, etc. In short, the agreement should give the arbitrator authority to fashion any remedy s/he feels appropriate: as one opinion put it, to award "all the types of relief that would otherwise be available."²⁶

C. Provide Procedural Fairness By Allowing Pre-hearing Discovery Rights

One safe course would be to authorize what the Revised Uniform Arbitration Act calls "adequate" discovery or discovery "appropriate in the circumstances," which the arbitrator would determine.²⁷ In *Bailey v. Ameriquist Mortgage Co.*, the U.S. District Court for the District of Minnesota refused to stay a discovery order pending the defendant's appeal of the court's decision not to compel arbitration.²⁸ Although the plaintiffs had signed a mandatory ADR agreement, the court reasoned, discovery would cause the defendant to suffer little, if any, prejudice.²⁹ In *Blair v. Scott Specialty Gases*, the U.S. Court of Appeals for the Third Circuit held, first, that the ADR provision in an employee handbook was enforceable, because the company's promise to arbitrate constituted adequate consideration, even though the employer could unilaterally amend the agreement and the employee would have to split arbitration's costs.³⁰ The *Blair* court also held, however, that the plaintiff was entitled to discovery on costs, because only thus could she test her claim that the fee-splitting provision made the agreement unenforceable.³¹

D. Provide Limited Judicial Review of Arbitrator's Decision

Such a provision ensures that the arbitrator's decision is in accordance with the law and that the arbitrator

acted within the scope of his or her authority. Reviewing courts generally will overturn an arbitration decision only where the arbitrator has exceeded the scope of his or her authority, where fraud has occurred, or where the decision itself reveals a "manifest disregard of the law."

E. Do Not Impose Undue Financial Burden On Employee For Pursuing Arbitration Process

Many courts have refused to enforce agreements containing provisions that make employees pay for mandatory arbitration, because such provisions arguably discourage pursuit of genuine disputes. In *Cole v. Burns International Security Service*, for example, the U.S. Court of Appeals for the District of Columbia held that the employer must pay the entire cost of the arbitrator's fee, because had the matter been litigated the employee would not have been required to pay any fees other than minimal court costs.³² In *Bond v. Twin Cities Carpenters Pension Fund*, a divided U.S. Court of Appeals for the Eighth Circuit ruled that a pension plan's requiring a participant to share the costs of mandatory ADR violated ERISA, because the provision discouraged pursuit of legitimate claims.³³ In *Ferguson v. Countrywide Credit Industries*, the U.S. Court of Appeals for the Ninth Circuit found an ADR agreement procedurally and substantively unconscionable and unenforceable under California law, because the agreement tried to split fees, limit discovery and exclude certain types of claim.³⁴ In *Gambardella v. Pentec, Inc.*, the U.S. District Court for the District of Connecticut held, first, that a former employee's Title VII claims against fellow employees were subject to arbitration, because these claims arose out of the employer-former employee relationship, even though fellow employees did not sign the employer's-former employee's ADR agreement.³⁵ Second, the *Gambardella* court held that a clause making each party pay its own legal fees rendered the agreement unenforceable.³⁶ And in *Perez v. Globe Airport Security Service, Inc.*, the U.S. Court of Appeals for the Eleventh Circuit initially held that the plaintiff did not have to arbitrate her gender-discrimination claim, because the employer's ADR agreement would split fees in all situations, whereas Title VII shifted fees when a plaintiff prevailed.³⁷ (Nine months later, however, the court vacated its opinion, when the parties moved jointly to dismiss the appeal with prejudice.³⁸) All these cases preach a single lesson. To be judicially enforceable, a mandatory ADR agreement must not burden the employee with costs that would make pursuing arbitration financially prohibitive.

In determining what would be a fair cost to impose on the employee, however, other courts have examined the employee's ability to pay. In *Green Tree Financial Corp.-Ala v. Randolph*, for example, the U.S. Supreme Court found that an arbitration agreement's not mentioning arbitration costs and fees did not render it unenforceable per se because it had failed affirmatively to protect a party from potentially steep arbitration costs.³⁹ Similarly, in *Goodman v. ESPE Am. Inc.*, the U.S. District Court for the Eastern District of Pennsylvania held that the "loser pays" provision in a mandatory

ADR agreement was enforceable and did not deny Plaintiff an effective and accessible forum, because the provision by its terms made the plaintiff not liable for *any* costs at *any* time if the plaintiff's claim succeeded.⁴⁰

F. Comply With State Law

On September 30, 2002, California Governor Gray Davis vetoed a bill that would have prohibited an employer's mandatory ADR agreement from requiring an employee to waive rights that the state's fair-employment-and-housing statute guaranteed. Employers must heed such legislative developments to ensure that their ADR agreements meet all statutory requirements under the law governing the transaction.

IV. Evaluating Workplace ADR: Criteria for Employers and Employees Alike

Assuming that one *can* craft an enforceable workplace ADR agreement, *should* one? This author's answer is a qualified "yes, but he concedes that in certain situations his answer may be otherwise. For example, arbitration is probably inappropriate where either party needs or desires a definitive or authoritative resolution of the matter for its precedential value or to maintain established norms and especially important policies. Similarly, if one case significantly affects persons who are not parties to the proceeding, arbitration may not fully resolve the dispute. Sometimes, employers and employees require a full public record of the proceeding.

The following advantages and disadvantages potentially attend workplace ADR, depending on the situation.

A. Advantages

Let us consider first the advantages, because in most instances they are more numerous. A well-conceived and well-executed workplace ADR program ordinarily:

1. Saves money.

Arbitration usually costs far less than litigation, for both employer and employee. This is true even if the employer pays all or substantially all of the costs associated with arbitration. Attorneys' fees for litigating an employment-related lawsuit frequently run into six figures. On the other hand, legal representation at an arbitration proceeding, except in complex and unusual cases, averages between \$10,000 and \$15,000, sometimes even less. A recent ADR survey of 20 Fortune 500 companies found that the cost of handling cases that went to arbitration was less than one-half the average cost of defending lawsuits that had previously been litigated. This difference occurs, primarily, because the costs associated with pre-trial discovery—depositions, interrogatories, various pre-trial motions, etc.—do not accompany the arbitration process or occur only on a more limited basis.

From an employee's perspective, too, ADR saves money, because it takes less time. Moreover, these reduced expenditures may make it easier for employees to obtain legal representation, and so to pursue their claims, since a plaintiff attorney will not need to commit nearly the amount of time and resources that would be required if the employee/plaintiff had litigated the claim.

2. Resolves disputes more quickly.

Once an arbitrator is selected, a hearing can be quickly scheduled and a decision rendered shortly thereafter. In many cases, a decision can be rendered in three to six months after the parties select the arbitrator to hear the dispute. This compares to a year or more (often much more) to bring employment-related matters to trial. Thus, employees can resolve their claims expeditiously, enabling them to put such cases behind them and get on with their careers, without the aggravations associated with prolonged litigation.

3. Takes away plaintiff lawyers' leverage in negotiations.

Plaintiff lawyers have less power during ADR because defending an arbitrated claim costs much less than defending a litigated one and because the prospect of a run-away financial award lessens with an arbitrator as opposed to a jury.

4. Avoids the uncertainty associated with jury trials.

Many, if not most, of today's employment-related lawsuits qualify for trial by jury. Because of the "sympathy factor" and the uncertainty associated with jury trials, most employers hesitate to have their cases go to a jury. The substantial jury verdicts, with often totally outlandish punitive damage awards, provide a sound basis for this reluctance on the part of employers.

5. Avoids the publicity and media attention that frequently accompany litigation.

The parties can, and frequently do, agree to keep workplace ADR proceedings confidential. This privacy benefits both the employer and the employee, by preventing each from airing the other's "dirty linen" in public. Employers naturally worry about public perception of the company. But employees, too, worry. A terminated employee who has undergone ADR can pursue other career opportunities without the threat that negative publicity, arising from a dispute with a previous employer, will be "aired publicly," thus deterring prospective employers from considering the employee's candidacy.

B. Disadvantages

With workplace ADR's advantages, though, come disadvantages—many of the potential weaknesses being inseparable from ADR's strengths. Even a well-conceived and well-executed workplace ADR program involves risks, though the advantages usually outweigh them. Therefore, both when workplace ADR succeeds and when it fails, it possibly:

1. Increases contested employment-related issues.

By making ADR readily available, an employer can appear to invite employment-related claims. However, most employers who have adopted ADR programs have not experienced an increase in workplace complaints that require third-party resolution.

2. Limits the parties' right to judicial review.

Judicial proceedings and decisions at the trial level are subject to challenge on appeal. Rulings the trial judge makes on discovery issues, admissibility, motions, jury instructions, etc. can be overturned if a higher court deter-

mines that the judge has ruled incorrectly. Arbitration, on the other hand, circumscribes review of an arbitrator's decision-making. On appeal, the question is not whether the arbitrator's decision was right or wrong, but whether the arbitrator had the authority to make the decision rendered.

Note, however, one exception. Most courts will subject an arbitrator's legal interpretation of public laws to limited judicial review. That is, courts will ask whether the award reflects a manifest disregard for the law. If it did not, the arbitrator's decision will stand.

3. Makes employees fear that employers have stolen something from them.

Certain employees may believe that they are forfeiting their statutory right to litigate their claims. This is true. However, it can be creditably argued that the positive aspects of arbitration counterbalance the loss. As indicated above, the process can serve employees' best interests by resolving their claim without the cost, delay, aggravations and publicity attendant litigation.

4. Creates uncertainty over an agreement's enforceability and the possibility of being forced to litigate this issue.

Although the overwhelming number of courts that have ruled on mandatory arbitration agreements have upheld their enforceability, dissenting court decisions exist, particularly in California and the Ninth Circuit. Questions will remain until the U.S. Supreme Court resolves all issues regarding workplace ADR or Congress passes legislation on this subject. Employers may therefore still need to litigate the issue of whether a mandatory ADR agreement is enforceable.

Thus, paradoxically, even if such employers ultimately stay out of court with regard to the substantive employment claim, the effort to stay out of court will itself have dragged them into court over the enforceability issue. In the pre-*Waffle House* case of *Borg-Warner Protective Services Corp. v. EEOC*, for example, the U.S. Court of Appeals for the District of Columbia refused to enjoin the EEOC from issuing policy statements that all arbitration agreements violated Title VII, because the employer, having suffered no legally cognizable injury, lacked standing.⁴¹ Similarly, in the post-*Waffle House* case of *Rivera v. Solomon Smith Barney Inc.*, the U.S. District Court for the Southern District of New York dismissed a former employee's suit for a declaratory judgment on whether the employer's ADR agreement would apply to a hypothetical civil rights claim, because no "actual controversy" existed.⁴² In both cases, uncertainty frustrated employers and employees alike, because they could not avoid preliminary litigation aimed at answering merely whether one could litigate a future claim, and even after the initial litigation ended, neither side knew whether future litigation was possible.

Ultimately, neither party can avoid uncertainty about some issues, given the inevitable imprecision of contract language. That is, court cases have sometimes been necessary simply to determine what a given mandatory ADR agreement means, with regard to its own scope. In

International Brotherhood of Electrical Workers v. Balmoral Racing Club, Inc., for example, the U.S. Court of Appeals for the Seventh Circuit held that an employer must arbitrate with a union a dispute involving workers employed only briefly, because the union's collective bargaining agreement with the employer made unreviewable the union president's formal determination that the agreement covered those workers.⁴³ On the other hand, in *Birch v. Pepsi Bottling Group Inc.*, the U.S. District Court for the District of Maryland held that an employee's ADA claim did not fall within the scope of her collectively-bargained-for agreement to arbitrate all employment-related disputes, because the agreement did not clearly and unmistakably refer to the ADA.⁴⁴ Again, the mandatory ADR agreement incited litigation, instead of quashing it.

V. Conclusion

On the whole, resolving employment-related claims and other workplace disputes through the arbitration process makes good sense. Those groups opposing mandatory arbitration of employment disputes argue that the system should be an option and not a required condition of employment. Why? So long as the system adopted is fair, impartial, open to judicial review, and able to provide the same relief as would the judicial process, no good reason exists for barring mandatory arbitration and thereby clogging our court system with proliferating workplace claims. The number of discrimination cases filed annually in federal courts between 1990 and 1999 increased from 8,413 to 22,412. However, this trend may be reversing itself, according to the annual report of the Administrative Office of the United States. Perhaps the adoption of ADR agreements by employers is reducing the judicial glut of employment cases, most particularly discrimination cases.

Mandatory arbitration of employment disputes has worked well in the union setting, where almost every collective bargaining agreement includes a grievance provision culminating in arbitration. This process can be equally effective in resolving disputes in the non-union setting, provided the safeguards referred to earlier are in place.

The objective of Title VII and similar civil rights statutes is to eliminate discrimination in the workplace. There is no reason to believe that employers who have mandatory arbitration agreements with their employees are more likely consciously to discriminate against their employees than those employers who do not. Nor is there any reason to believe that, when discrimination does occur, the arbitration process cannot adequately remedy it. Indeed, given the relative speed of arbitration, any remedy that an arbitrator imposes will probably cause a more worthwhile effect than one that the courts provide only after long years of litigation.

In summary, therefore, a legally sufficient ADR agreement benefits all concerned parties: employees, employers and the courts whose dockets will lighten as more companies adopt mandatory mediation/arbitration procedures. The only parties left complaining are plaintiff trial

lawyers, civil rights groups and the EEOC. The first group stands to lose the leverage that a threat of lengthy, expensive litigation gives it in settlement negotiations. The latter groups fear losing the power to portray themselves as exclusive vindicators of employee rights. These fears, however, dwindle in view of the Supreme Court's *Waffle House* decision, whereby the EEOC retains the right to seek individual relief in certain cases and to pursue cutting-edge discrimination law issues.

In short, in most instances, ADR workplace agreements present a win-win situation for employees and employers alike, without depriving the EEOC of its statutory right to seek relief, create new law and protect employee interests in appropriate cases.

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Footnotes

- ¹ 388 U.S. 395, 404 (1967).
- ² See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960) (defining standard that federal court must apply when determining whether to submit grievance to arbitration); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) (same); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (defining standard that court must apply when winning party seeks to enforce arbitral award); see also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (establishing enforceability of collective bargaining agreement in federal courts).
- ³ See *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001).
- ⁴ See *id.*, 532 U.S. at 119; interpreting 9 U.S.C. § 1 (1994).
- ⁵ See H.R. 815 (referred on March 9, 2001, to the House Subcommittee on Commercial and Administrative Law).
- ⁶ See S. 163, "Civil Rights Procedures Protection Act of 2001" (referred that day to the Senate Committee on Health, Education, Labor and Pensions).
- ⁷ See H.R. 1489 (referred that day to the House Committee on Education in the Workforce and the House Committee on the Judiciary).
- ⁸ See H.R. 2282, "Preservation of Civil Rights Protections Act of 2002" (referred on September 18, 2001, to the House Subcommittee on Employer-Employee Relations).
- ⁹ See S. 2435 (referred that day to the Senate Committee on Health, Education, Labor and Pensions).
- ¹⁰ See S. 3026, "Arbitration Fairness Act of 2002" (referred that day to the Senate Committee on the Judiciary).
- ¹¹ See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).
- ¹² *Id.*, 534 U.S. at 291.
- ¹³ See *id.*, 534 U.S. 294.
- ¹⁴ See 534 U.S. at 297-98.
- ¹⁵ See *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-94 (9th Cir. Feb. 4, 2002), *cert. denied*, 122 S.Ct. 2329 (June 3, 2002).
- ¹⁶ See *EEOC v. Luce*, 303 F.3d 994, 1004 (9th Cir. Sept. 3, 2002).
- ¹⁷ See *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. August 30, 2002).
- ¹⁸ See *Tinderv. Pinkerton Security*, 305 F.3d 728, 736 (7th Cir. Sept. 17, 2002).
- ¹⁹ See *Brown v. Illinois Central Railroad Co.*, 254 F.3d 654, 660-61 (7th Cir. June 20, 2001), *cert. denied*, 122 S.Ct. 616 (November 11, 2001).
- ²⁰ See *Weeks v. Harden Manufacturing Corp.*, 291 F.3d 1307, 1312-16 (11th Cir. May 22, 2002).
- ²¹ See *Martindale v. Sandvik Inc.*, 800 A.2d 872, 881 (N.J. July 17, 2002).
- ²² See *In re Halliburton Co.*, 80 S.W.3d 566, 572-73 (Tex. May 30, 2002).

- ²³ See *Barnica v. Kenai Peninsula Borough School District*, 46 P.3d 974, 977 (Alaska May 3, 2002).
- ²⁴ See *Garfunkel v. Morristown Obstetrics and Gynecology Associates*, 773 A.2d 665, 672 (N.J. June 13, 2001).
- ²⁵ See *Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. Aug. 15, 2002).
- ²⁶ *Cole v. Burns Int'l Security Services*, 105 F. 3d. 1465, 1482 (D.C. Cir. 1997).
- ²⁷ See Revised Uniform Arbitration Act (www.law.upenn.edu/bll/ulc/ulc_frame.htm).
- ²⁸ See *Bailey v. Ameriquist Mortgage Co.*, No CIV.01-545 (JRT/FLN), 2002 WL 1835642 at *1 (D. Minn. Aug. 5, 2002).
- ²⁹ See *id.*
- ³⁰ See *Blair v. Scott Specialty Gases*, 283 F.3d 595, 603-04 (3d Cir. March 13, 2002).
- ³¹ See *id.*, 283 F.3d at 604-10.
- ³² See *Cole v. Burns Int'l Security Services*, 105 F. 3d. 1465, 1482 (D.C. Cir. 1997).
- ³³ See *Bond v. Twin Cities Carpenters Pension Fund*, 307 F.3d 704, 706 (8th Cir. Oct. 8, 2002).
- ³⁴ See *Ferguson v. Countrywide Credit Industries*, 298 F.3d 778, 787 (9th Cir. July 23, 2002).
- ³⁵ See *Gambardella v. Pentec, Inc.*, 218 F.Supp.2d 237, 241-42 (D. Conn. July 11, 2002).
- ³⁶ See *id.*, 218 F.Supp.2d at 247.
- ³⁷ See *Perez v. Globe Airport Security Service, Inc.*, 253 F.3d 1280, 1285-87 (11th Cir. June 12, 2001).
- ³⁸ See *id.*, 294 F.3d 1275, 1275 (11th Cir. March 22, 2002).
- ³⁹ See *Green Tree Financial Corp.- Ala v. Randolph*, 531 U.S. 79, 92 (Dec. 11, 2000).
- ⁴⁰ See *Goodman v. ESPE Am. Inc.*, No. 00-CV-862, 2001 WL 64749 at *4 (E.D. Pa. Jan. 19, 2001).
- ⁴¹ See *Borg-Warner Protective Services Corp. v. EEOC*, 245 F.3d 831, 836-38 (D.C. Cir. April 17, 2001).
- ⁴² See *Rivera v. Solomon Smith Barney Inc.*, No. 01 Civ. 9282 (RWS), 2002 WL 31106418 at *2 (S.D.N.Y. Sept. 20, 2002).
- ⁴³ See *International Brotherhood of Electrical Workers v. Balmoral Racing Club, Inc.*, 293 F.3d 402, 406-08 (7th Cir. June 13, 2002).
- ⁴⁴ See *Birch v. Pepsi Bottling Group Inc.*, 207 F.Supp.2d 376, 383-85 (D. Md. May 2, 2002).

LABOR AND EMPLOYMENT LAW

DEBUNKING THE MYTH OF A PRO-EMPLOYER SUPREME COURT

By Daniel J. Davis

By any measure, the Court's recently completed term included a number of victories for employees. Among other decisions, the Court adopted a broad view of a discrimination charge and reduced procedural hurdles employees may face in seeking assistance from the EEOC (*Federal Express v. Holowecki*); determined that trial courts have discretion to admit "me, too" evidence of non-parties alleging discrimination by persons who played no role in the challenged adverse employment action (*Sprint v. Mendelsohn*); allowed a participant in an ERISA plan to bring an action to recover losses attributable to an individual account in a defined contribution plan (*LaRue v. DeWolff*); and recognized a retaliation claim both for Section 1981 actions and under the ADEA's provision regarding federal employees (*CBOCS v. Humphries* and *Gomez-Perez v. Potter*, respectively). The Court heard more employment cases than usual and many of those decisions were favorable to the employee.

A number of news sources, however, indicated that these victories for employees should be considered a surprise. "The term... included some *unanticipated* developments, like a string of victories for employees in workplace discrimination cases."¹ "The U.S. Supreme Court this year made a number of key rulings on workplace discrimination which, *unusually for the conservative court*, mostly favored workers over their bosses."²

These articles suggest that the current composition of the Supreme Court would automatically lead to a strong bias in favor of employers, resulting in a lopsided number of pro-employer rulings. Indeed, as victories in favor of the employee occurred during the course of the term, they were depicted as an aberration. "The Supreme Court during recent terms has relied on cramped legal analysis to deny fairness to workers and criminal defendants in several notable cases. Yesterday, the justices issued a decision remarkable for the fact that it was unanimous in handing victory to the proverbial 'little guy.'"³ "The Supreme Court ruled last week that a group of employees suing for age discrimination should get their day in court even though they filed their complaint on the wrong form. The decision is noteworthy because it suggests that this court could be pulling back from what has often seemed like a knee-jerk inclination to rule for corporations over workers and consumers."⁴ "Voters in this election year do not appear to favor the blind deference to corporate power that has been a theme of the last seven years."⁵

These sources present an entirely cramped and, as this article will seek to demonstrate, inaccurate view of the Court, especially in the area of employment law. This article will suggest that the notion that the current Court is pro-employer in employment cases does not withstand scrutiny. To do so, this article reviews a number of cases from the Court's employment discrimination jurisprudence over the past ten years, primarily

cases under Title VII of the Civil Rights Act of 1964.

A review of those cases shows several trends. First, a significant number of cases reach a result that should be considered favorable to the employee. Second, a number of times the Court reversed a circuit court's pro-employer position or decided a case in favor of an employee against the majority view of the circuit courts that have ruled on the issue. These cases strongly refute the implication that the Court is generally pro-employer.

These cases instead demonstrate that an approach focused upon the text of the statute and, in some cases, *stare decisis* does not necessarily lead to results that generally favor the employer. The Court has indeed used these traditional jurisprudential tools on several occasions to overrule the courts of appeals and make significant rulings that favor the employee. A review of these cases does not necessarily mean, however, that the Court should be considered pro-employee. Instead, these cases demonstrate that, at least in employment cases involving statutory interpretation, the Court tends to focus on traditional legal tools instead of policy arguments regarding a particular outcome. Such a focus improves the Court's credibility and the legal grounding of its employment decisions. In some circumstances, that focus has led the Court to make rulings that provide significant certainty to both employer and employee regarding the meaning of a particular provision.

This article will describe particular cases in the Court's employment jurisprudence over the past ten years and in the process elaborate on the ways these cases refute the characterization of the Court as pro-employer.

I. TITLE VII CASES

Title VII of the Civil Rights Act of 1964 generally prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁶ Several Supreme Court cases over the past decade have given an expansive view of Title VII's provisions in favor of the employee bringing the suit.

Burlington Northern v. White. In June 2006, the Supreme Court rendered a significant decision regarding the scope of Title VII's anti-retaliation provision in *Burlington Northern and Santa Fe Railway Co. v. White*.⁷ The anti-retaliation provision makes it "an unlawful employment practice" for an employer "to discriminate against any individual... because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."⁸

The relevant facts of *Burlington Northern* are straightforward. The plaintiff, Sheila White, alleged that her employer violated the anti-retaliation provision after she had brought a complaint against her supervisor by (1) changing her job responsibilities from forklift duty to the allegedly less desirable position of

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Four courts of appeals had ruled that direct evidence was required to demonstrate discrimination in a mixed-motive case and that circumstantial evidence was insufficient.³⁰ These cases relied primarily on Justice O'Connor's concurring opinion

Although *Morgan* cannot be characterized as a complete win for employees, it shows a commitment to text-based principles of interpretation in employment discrimination

cases and it did assist those employees bringing hostile work environment claims. The courts of appeals had adopted various tests for resolving the question, including determining whether the incidents "represent an ongoing unlawful employment practice"³³ or a multifactor test looking to whether the acts are recurring, of the same type, and have sufficient permanency put an employee on notice of the need to file a claim.³⁴ The Court did not adopt any of these tests, noting that although "the lower courts have offered reasonable, albeit divergent, solutions, none are compelled by the text of the statute."³⁵ The Court, looking to the key terms of the statute—"shall," "after... occurred," and "unlawful employment practice"—developed the test that created different results for claims based on discrete retaliatory acts versus hostile work environment claims.³⁶ *Morgan* therefore made the law clearer regarding the scope of Title VII's timeliness and provision—hence reducing the need for litigation over the meaning of the Court's holding—and easier for employees bringing hostile work environment claims within the time limits of Title VII.

Faragher v. City of Boca Raton/*Burlington Industries v. Ellerth*, *Burlington Industries, Inc. v. Ellerth*³⁷ and *Faragher v. City of Boca Raton*³⁸ were decided on the same day and both considered the circumstances under which an employer would be subject to vicarious liability for the harassing actions of supervisor pursuant to Title VII. The courts of appeals had adopted various strategies, all primarily based upon a statement in *Meritor Savings Bank, FSB v. Vinson*³⁹ that agency principles controlled the question regarding an employer's vicarious liability.⁴⁰

The Eleventh Circuit in the 7-5 en banc decision under review in *Faragher*, held that "an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate."⁴¹ The Seventh Circuit's en banc decision under review in *Ellerth* had produced eight separate opinions with no controlling rationale.⁴² The other courts of appeals had similarly produced a wide range of standards regarding vicarious liability.⁴³

The Court, in two 7-2 decisions,⁴⁴ produced a far simpler and employee-friendly standard regarding an employer's vicarious liability by adopting a general blanket rule in favor of vicarious liability: "An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee."⁴⁵ The Court ruled that an employer would have an affirmative defense to vicarious liability, but only when no "tangible employment action"—such as firing or failing to promote—was taken against the employee. The defense consists of two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."⁴⁶ The dissent would have required the employee to show that the employer was negligent

in allowing the supervisor's conduct to occur.⁴⁷

Faragher and *Ellerth* are different in kind from other Title VII decisions discussed in this article because those decisions did not rely on the statutory text. Rather, those cases considered a question for which the text provided little guidance and the Court therefore turned to agency principles to resolve an area that had generated a wide variety of opinions from the courts of appeals. The Court's holdings did not require an employee to show that a supervisor was acting within the scope of employment, or that there was an agency relationship between the supervisor and the employer. The Court also provided only a limited affirmative defense when the employee had not suffered a tangible employment action. The willingness of the Court to adopt a rule relatively favorable to the employee in a context with little statutory guidance and in which the courts of appeals had generally placed more burdens on the employee certainly does not appear to be the actions of a pro-employer Court.

Oncale v. Sundowner Offshore Services. The Court in *Oncale v. Sundowner Offshore Services, Inc.*⁴⁸ addressed whether Title VII allowed a cause of action for sex discrimination based upon same-sex sexual harassment.⁴⁹ Justice Scalia, writing for a unanimous Court, found that, because same-sex sexual harassment was "discrimin[ation]... because of... sex," 42 U.S.C. § 2000e-2(a)(1), it was actionable under Title VII.⁵⁰

The decision, once again, went against the view of the majority of courts of appeals to consider the question. The Fifth Circuit had held that same-sex sexual harassment was never actionable under Title VII and the Fourth Circuit held that such claims were actionable only when a plaintiff can prove that the harasser was homosexual.⁵¹ The Seventh Circuit had adopted a position similar to the Court in *Oncale*.⁵² And, once again, the Court relied on the plain meaning of the text of the statute in reaching its decision. *Oncale* put forward a straightforward, easy-to-apply standard that expanded the scope of Title VII to same-sex discrimination.

Other Title VII Cases. The Court has ruled for the employee in a number of other Title VII cases as well. In *Arbaugh v. Y & H Co.*,⁵³ for example, the Court, in an 8-0 decision, found that Title VII's requirement that the Act to only employers with fifteen or more employees was not jurisdictional in nature.⁵⁴ The decision reversed the Fifth Circuit and removed a potential jurisdictional hurdle for some employees bringing Title VII claims. In *Edelman v. Lynchburg College*,⁵⁵ the Court, in a 7-0 decision reversing the Fourth Circuit, upheld the EEOC's relation-back provision,⁵⁶ which allowed a timely filer of a charge to verify the basis for a charge after the time for filing a charge had expired. Such a decision makes it easier for employees to be found to have filed timely charges. In *Swierkiewicz v. Sorema*,⁵⁷ a unanimous Court reversed the Second Circuit in holding that an employment discrimination complaint need not contain specific facts establishing a prima facie case of discrimination; rather, the complaint must contain a short and plain statement of the claim that the pleader is entitled to relief. The Court has also held that the EEOC has authority under Title VII to award compensatory against federal agencies in employment discrimination cases.⁵⁸ All of these cases can simplify an employee's ability to bring a successful Title VII claim.

II. NON-TITLE VII CASES

Pro-employee decisions are not found solely in the Court's Title VII docket. Cases brought under other discrimination statutes, such as the Age Discrimination in Employment Act (ADEA), have led to pro-employee holdings.

Federal Express v. Holowecki. The ADEA requires that "[n]o civil action... be commenced... until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]."⁵⁹ The Court in *Federal Express Corp. v. Holowecki*⁶⁰ considered what the definition of "charge" meant under the statute. In *Holowecki*, the employee filed an intake questionnaire with the EEOC and attached with it a signed affidavit describing the alleged discriminatory employment practices. In a 7-2 decision, the Court found that a "charge"—as opposed to merely a request for information by an employee—must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee, adopting the position taken by the EEOC in internal directives regarding what constitutes a charge. The Court viewed the "agency's interpretive position—the need-to-act requirement—[as] provid[ing] a reasonable alternative that is consistent with the statutory framework."⁶¹

The Court's decision in *Holowecki* lessened a procedural hurdle for employees to have their claims heard in court. As Justice Thomas noted in dissent, the form sent by *Holowecki* to the EEOC said it was for "pre-charge" counseling, strongly implying that the form should not be construed as a "charge" under the ADEA. Indeed, the EEOC did not consider *Holowecki*'s submission a charge nor did it assign a charge number or encourage the parties to engage in conciliation, as the EEOC is required to do when it receives a charge.⁶² Notwithstanding those deficiencies, the Court granted the EEOC, and in turn, the employee, significant procedural leeway in complying with the "charge" requirement. In so doing, the Court simplified the employee's task in invoking the assistance of both the EEOC and the courts in discrimination disputes.

Reeves v. Sanderson Plumbing Products. The Court considered in *Reeves v. Sanderson Plumbing Products, Inc.*⁶³ whether, under the ADEA, a jury could consider (1) a prima facie case and (2) evidence that the employer's proffered reason for engaging in the employment action against the employee was pretext would be sufficient for a finding of a violation of the ADEA, even if no independent evidence of discrimination was presented. Four of the courts of appeals had found that independent evidence of discrimination was necessary to create a jury issue, while seven courts of appeals had adopted a less stringent standard.⁶⁴ In reviewing the text and purpose of the statute, a unanimous Court rejected the minority view of the four courts of appeals and found that a prima facie case and evidence that the reason offered by the employer was pretext *could* be sufficient for a finding of intentional discrimination under the ADEA.⁶⁵ Once again, the Court's holding simplifies the task of the employee trying to prove discrimination, as a subset of employees will be able to prove only that the employer's proffered reason was pretext but not be able to prove that the employer had a discriminatory motive.

Oubre v. Entergy Operations. An employee is allowed to waive any claims under the ADEA, but only if the waiver is knowing and voluntary. The Older Workers Benefits Protection Act (OWBPA) provides a number of minimum requirements an ADEA waiver must contain in order to be knowing and voluntary.⁶⁶ Under common law principles, a faulty contract, though voidable, may be ratified as acceptable if, after the innocent party learns of the defect in the contract, the party refuses to tender back the consideration received from the contract. The question in *Oubre v. Entergy Operations, Inc.*⁶⁷ was whether a release that was defective under the OWBPA could be rendered operable by the departed employee's failure to tender back the consideration received as part of the release of claims. In a 6-3 decision reversing the court of appeals, the Court ruled for the employee, finding that "[t]he statutory comment is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements."⁶⁸ Therefore, an employee who received consideration for signing a release may nevertheless sue the employer if one of the terms of the release did not meet the OWBPA's requirements.⁶⁹

III. DISCUSSION

A simple recitation of these cases should dispel the view that the Court has a knee-jerk reaction to rule for the employer. In a variety of cases and contexts, the Court has looked to the text, structure, and purpose of the statutory provision in question and has in many instances found that the analysis led to a result advanced by the employee. Even in cases in which the text of the statute invited a wide degree of latitude, such as *Faragher* and *Ellerth*, the Court's resolution went in favor of the employee. Also, a view that the Court favors employers does not square with the several significant cases—such as *Burlington Northern*, *Desert Palace*, *Faragher*, *Ellerth*, *Oncale*, and *Reeves*—in which the Court went against the prevailing, pro-employer view adopted by the courts of appeals.

The Court's employment docket, of course, is not entirely populated with rulings that favor the employee. A number of decisions have been to the benefit of the employer as well or have been mixed in its implications. *Morgan*, for example, had one holding that favored employers (discrete discriminatory acts must fall within the filing time period to state a claim) and another holding that favored employees (a hostile work environment claim is timely if an act that constituted the hostile work environment claim fell within the filing period). In another case, the Court reversed the Ninth Circuit in a per curiam decision, finding that no reasonable person could believe that a single incident—in which a single remark was made in response to a sexually explicit comment on an application—constituted a sexual harassment claim, precluding a retaliation claim based upon the employee's complaints against the incident.⁷⁰ Several of the Court's decisions regarding the Americans with Disabilities Act adopted holdings regarding the text of that statute that favored the employer by adopting a narrow view of disability under the statute.⁷¹

Nor does the Court always adopt the minority view of courts of appeals in favor of the employee. Last term, the Court held that the later effects of past discrimination do not restart the clock for filing an EEOC charge.⁷² Because the clock does not restart, a female employee's claim that she had

received significantly less pay over the course of her career because successive pay increases were less than those of her male colleagues was time barred.⁷³ The 5-4 decision reversed the Eleventh Circuit, which had taken the minority view among the courts of appeals regarding that question.⁷⁴

The Court's body of work over the past ten years in employment discrimination cases, however, does not support the view that the Court has a knee-jerk reaction in favor of the employer. Indeed, several of the key cases have relied on the text and other tools of statutory interpretation to reach a conclusion that turned out to be favorable to the employee and went against the majority of courts of appeals to consider the issue. Any characterization of the Court as in the pocket of the employers therefore seems wholly inaccurate.

The view of the Court as pro-employer and of the most recent term's pro-employer decisions as an aberration does not withstand scrutiny. Instead, a more thorough review of the Court's employment discrimination jurisprudence over the past ten years reveals a Court that is perfectly willing to take the text and structure of the statute in a direction that favors the employee and not the employer. It may just be the case that, when the Court is considering an employment discrimination matter, the notions of a decision being pro-employee or pro-employer are the furthest things from the justices' minds.

The public may be better served if commentators on the Court's workings would refrain from using the labels of "pro-employee" or "pro-employer" and instead focus on the unique and difficult issues that can arise in the Court's cases. For example, *CBOCS West, Inc. v. Humphries*⁷⁵ involved two conflicting notions of statutory interpretation: whether the Court should either following the plain meaning of the text of the statute or adopt, on stare decisis grounds, the same interpretation of a similar statute. Neither of these approaches to statutory interpretation is inherently pro-employer or pro-employee.

In *CBOCS*, the Court considered these two principles in considering whether 42 U.S.C. § 1981, which gives "[a]ll persons... the same right... to make and enforce contracts... as is enjoyed by white persons," allows for a claim of retaliation. In a 7-2 decision, the Court held that Section 1981 included claims of retaliation, notwithstanding the admission "that the statute's language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his §1981 rights."⁷⁶ Instead, the Court relied on two points: (1) Section 1981 and Section 1982 (which states that "[a]ll citizens... shall have the same right... as is enjoyed by white citizens... to inherit, purchase, lease, sell, hold, and convey real and personal property") had consistently been interpreted in a similar manner because of the provisions' common language, origin, and purposes; and (2) the Court had previously interpreted Section 1982 to include a retaliation claim.⁷⁷ Justice Thomas's dissent took the view that the lack of a textual basis for a retaliation claim in Section 1981, notwithstanding the stare decisis concerns going the other way, should have carried the day.⁷⁸

Although *CBOCS* is a pro-employee decision because it gives employers another statute that includes a retaliation claim,

the more useful analysis for the public would be how the case shows a resistance by the Court to jettison former statutory interpretation cases in light of a renewed emphasis on textual analysis. The public and attorneys in general would be better suited if these cases were thought of in terms of their impact on legal analysis of statutory interpretation questions rather than the simple notion whether the Court is trending more pro-employee or pro-employer.

CONCLUSION

The Court has always been difficult to classify. All labels of the Court have their shortcomings, and the designation of the Court as "pro-employee" or "pro-employer" is no exception. The portrayal of the Court as having a knee-jerk reaction in favor of the employer, however, is particularly weak given the Court's employment discrimination jurisprudence over the past ten years. The Court has consistently been willing to refute the prevailing pro-employer view of the courts of appeals when the text and structure of the statute so required. That many of the Court's opinions in the employment context rely primarily on the text and structure of the statutory provision in question should be a welcome development and one that should be conveyed to the public more often.

Endnotes

1 Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made The Boldest Mark*, N.Y. TIMES (June 29, 2008) (emphasis added).

2 Fanny Carrier, *Workers' Rights Boosted By US Supreme Court*, YAHOO NEWS (June 25, 2008) (emphasis added).

3 WASH. POST, *A Victory for Workers: The Supreme Court Allows Employees To Sue Their Retirement Plans*, A14 (February 21, 2008) (describing *LaRue v. DeWolff, Boberg & Associates, Inc.*, which held that Section 502(a)(2) of ERISA allows for recovery of fiduciary breaches that impair the value of plan assets in a participant's account).

4 N.Y. TIMES, *A Verdict For Workers, For A Change* (March 2, 2008) (describing *Federal Express v. Holowecki*).

5 *Id.*

6 42 U.S.C. § 2000e-2(a)(1).

7 548 U.S. 53 (2006).

8 42 U.S.C. § 2000e-3(a).

9 *Burlington Northern*, 548 U.S. at 58-59.

10 *Id.* at 60.

11 *Id.* at 67.

12 *Id.* at 61-64.

13 *Id.* at 68.

14 *Id.* at 71-73.

15 *See id.* at 60 (citing *White v. Burlington Northern and Santa Fe Railway Co.*, 364 F.3d 789, 795 (6th Cir. 2004) (en banc); *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001); *Robinson v. Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997)).

16 *Burlington Northern*, 548 U.S. at 60 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997)).

17 539 U.S. 90.

18 42 U.S.C. § 2000e-2(m) (emphasis added). An employer may limit the remedies available to an employee in a mixed-motive case if it demonstrates that it would have "taken the same action in the absence of the motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B).

- 19 539 U.S. at 92.
- 20 *Id.* at 95 (citing *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (8th Cir. 2002); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999); *Trotter v. Board of Trustees of Univ. of Alab.*, 91 F.3d 1449, 1453-54 (11th Cir. 1996); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995)).
- 21 490 U.S. 228 (1989).
- 22 *Id.* at 276.
- 23 *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 853-54 (9th Cir. 2002) (en banc).
- 24 *Desert Palace*, 539 U.S. at 96.
- 25 *Id.* at 98-99.
- 26 *Id.* at 102.
- 27 536 U.S. 101 (2002).
- 28 42 U.S.C. § 2000e-5(e)(1). A charge must be filed 300 days after an unlawful employment practice occurred when an employee initiates proceedings before a state or local agency that can grant relief from an unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1).
- 29 536 U.S. at 104.
- 30 *Id.* at 113.
- 31 *Id.* at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)).
- 32 *Morgan*, 536 U.S. at 118.
- 33 *Morgan v. Amtrak*, 232 F.3d 1008, 1014 (9th Cir. 2000).
- 34 *See Berry v. Board of Supervisors*, 715 F.2d 971, 981 (5th Cir. 1983).
- 35 *Morgan*, 536 U.S. at 108.
- 36 *Id.* at 109-10.
- 37 524 U.S. 742 (1998).
- 38 524 U.S. 775 (1998).
- 39 477 U.S. 57 (1986).
- 40 *Id.* at 72.
- 41 111 F.3d 1530, 1534-35 (1997).
- 42 *See Ellerth*, 524 U.S. at 749-51 (describing the en banc decision).
- 43 *See Faragher*, 524 U.S. at 785-86 (listing decisions).
- 44 Justice Thomas and Justice Scalia dissented in both *Faragher* and *Ellerth*, while Justice Ginsburg concurred in the judgment in *Ellerth*.
- 45 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.
- 46 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.
- 47 *See Ellerth*, 524 U.S. at 767 (Thomas, J., dissenting).
- 48 523 U.S. 75 (1998).
- 49 *Id.* at 76.
- 50 *Id.* at 82.
- 51 *Id.* at 79 (citing *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-52 (5th Cir. 1994); *McWilliams v. Fairfax County Board of Supervisors*, 72 F.3d 1191 (4th Cir. 1996); *Wightson v. Pizza Hut of America*, 99 F.3d 138 (4th Cir. 1996)).
- 52 *Doe v. Belleville*, 119 F.3d 563 (7th Cir. 1997).
- 53 546 U.S. 500 (2006).
- 54 *Id.* at 516.
- 55 535 U.S. 106 (2002).
- 56 42 U.S.C. § 2000e-5.
- 57 534 U.S. 506 (2002).
- 58 *West v. Gibson*, 527 U.S. 212 (1999).
- 59 29 U.S.C. § 626(d) (emphasis added).
- 60 128 S. Ct. 1147 (2008).
- 61 *Id.* at 1157.
- 62 29 U.S.C. § 626(d).
- 63 530 U.S. 133 (2000).
- 64 *Id.* at 140-41 (identifying circuit split).
- 65 *Id.* at 143.
- 66 29 U.S.C. § 626(f).
- 67 522 U.S. 422 (1998).
- 68 *Id.* at 426-27.
- 69 The contract violated the OWBPA because it (1) gave the employee only 14 days (instead of 45) to consider the release; (2) did not give the employee 7 days to revoke the release; and (3) the release did not specifically mention the ADEA. *Id.* at 424-25.
- 70 *Clark County School District v. Breeden*, 532 U.S. 268 (2001).
- 71 *See, e.g., Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. UPS*, 527 U.S. 516 (1999).
- 72 *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).
- 73 *Id.* at 2177-78.
- 74 *Id.*
- 75 128 S. Ct. 1951 (2008).
- 76 *Id.* at 1958.
- 77 *Id.* at 1958 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005)).
- 78 *CBOCS*, 128 S. Ct. at 1961-62.

October 2008

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TESTIMONY
in support of
ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT
and the
U.S. SUPREME COURT'S DECISION IN CIRCUIT CITY v. ADAMS
and in opposition to
S. 931, "THE ARBITRATION FAIRNESS ACT"
before the
COMMITTEE ON THE JUDICIARY
of the
UNITED STATES SENATE
on behalf of
THE COUNCIL FOR EMPLOYMENT LAW EQUITY
by
Mark A. de Bernardo
Executive Director and President
October 7, 2009

I. Statement of Interest

Chairman Leahy, Ranking Minority Member Sessions, and members of the Committee on the Judiciary, thank you for this opportunity to testify *in strong support of* the use of Alternative Dispute Resolution (“ADR”) in employment, the use of mediation and arbitration as effective alternatives to litigation, and the U.S. Supreme Court’s decision in Circuit City Stores, Inc. v. Adams,¹ and *in strong opposition to* S. 931, “The Arbitration Fairness Act,” a bill which would virtually eliminate all ADR-in-employment agreements in this country.

My name is Mark A. de Bernardo, and I am the Executive Director and President of the Council for Employment Law Equity (“CELE”), as well as a Partner at the national employment law firm of Jackson Lewis. Among other activities on the ADR issue, I have authored four *amicus curiae* briefs in support of ADR – including in the Circuit City case – and have drafted ADR policies, conducted audits of ADR programs, testified before Senate and House committees and subcommittees in support of ADR, and advised employers on ADR issues for more than 20 years.

It is my firm and unequivocal belief that the use of ADR is both pro-employer *and pro-employee* and – when implemented appropriately – is a tremendous asset to both employee relations and our system of jurisprudence.

The Council for Employment Law Equity is a non-profit coalition of major employers committed to the highest standards of fair, effective, and appropriate employment practices. The CELE advocates such employment practices to the employer community; before the judicial, legislative, and executive branches of government; and to the public at-large.

Among other activities, the Council for Employment Law Equity has filed *amicus curiae* briefs on numerous occasions to the U.S. Supreme Court, including twice on ADR issues, and to other federal and state courts and the National Labor Relations Board; has filed comments during rule-making to the U.S. Department of Labor, the Department of Health and Human Services, the Office of Management and Budget, and the General Services Administration; and has been active on policy-making issues before the American Bar Association’s House of Delegates.

The CELE regularly attempts to positively and constructively influence the consideration of national policy issues of importance to the employer community. ADR is one such issue.

Jackson Lewis also has a long and proud record of support for effective and equitable ADR programs as an alternative to costly, time-consuming, deleterious, and relationship-destructive litigation. Like organized labor, which has long embraced binding arbitration as a foundation of union representation, my law firm is highly supportive of ADR – and its impacts of less litigation and smaller legal fees. This is because it is what is best for many of our clients – *and for their employees* – and because it is the right thing to do.

Jackson Lewis is a national law firm of more than 565 lawyers in 43 offices, *all* of whom are dedicated exclusively to the practice of labor and employment law. No law firm has had as extensive or

¹ 532 U.S. 105 (2001).

prominent a labor practice as has Jackson Lewis over the past 50 years, and it is highly unlikely that any law firm has as much experience or expertise on ADR issues. In addition, Jackson Lewis has the highest concentration of employment lawyers in such major markets as the New York, Washington, and Los Angeles metropolitan areas.

Clearly, the CELE in particular, and the employer community in general, has a *very* strong interest in any initiative, such as S. 931, which would so drastically undermine the use of Alternative Dispute Resolution programs in employment. I am here today to provide real-world context, and to underscore that the reality is that if S. 931 were enacted, arbitration in employment effectively would be abolished in the United States in the non-union sector. Such a draconian action would be *highly* detrimental to employee relations, our judicial system, and our society overall.

ADR is an effective tool for both management and employees. The opponents of arbitration have simply not demonstrated that the drastic, sweeping changes they seek to enact are necessary and/or appropriate. To the contrary, for the average employee, the elimination of arbitration will do more harm than good.

On behalf of the CELE, I can assure you that we are *equally* committed to helping ensure true fairness in our arbitration and ADR systems for employees and employers alike as those who support S. 931 and oppose the Circuit City decision.

II. Summary of Position

The seminal question is: Should employers and employees be able to engage in mediation and mandatory binding arbitration of employment disputes as an alternative to litigation?

The seminal answer is: Absolutely. ADR in employment programs are flourishing, and when implemented appropriately, are decisively in *employees'* best interests... and yet S. 931 would effectively *deny* this option to employers and employees.

It is hard to imagine a more sweeping – and devastating – blow to mandatory binding arbitration than S. 931's language:

- (b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of –
 - (1) an employment, consumer, or franchise dispute....²

Despite the refusal of some proponents of S. 931 to acknowledge the sweep of their proposal, this language would, in effect, spell the end of *all* employment arbitration in America. That is because *post*-dispute arbitration agreements are extremely rare. Once a legal claim is filed, it is very difficult for the parties to reach agreement on *anything* – even on a matter like arbitration that would benefit them both. In virtually all cases, one side or the other will find it advantageous to force the other into the more expensive realm of litigation.

² Section 4(4)(b)(1) of S. 931 – “Validity and enforceability.”

As one legal analysis in the employment context recently concluded, without arbitration “[e]mployers will wait out most smaller claims, assuming employees will not be able to pursue them in court.”³ Conversely, plaintiffs with claims large enough to attract an attorney will be unlikely to spare defendants the often exorbitant expense of litigation – and the attendant pressure for a large settlement – once their relationship becomes adversarial. Several other prominent academic commentators in the field fully support this assessment.⁴

S. 931 would effectively *end* arbitration in America in both employment – *and* in other contexts.

ADR – a common, useful, positive, pro-active, timely, effective *and* cost-effective tool for turning employers into *better* employers and giving employees favorable resolution of their workplace problems – would essentially be eliminated from the American employment landscape after more than 80 years of sustained growth and success.⁵ *Many* would lose if S. 931 were enacted; *very few* would gain.

Why is preservation of ADR in employment critically important?

The use of Alternative Dispute Resolution in employment is common and increasing as a means of avoiding litigation, addressing *more* employee issues, and resolving these concerns *more* amicably.

Given the costs, delays, and divisiveness of employment litigation, a more sensible and conciliatory option is preferable for employers *and for their employees*. The net result of the use of ADR is:

- (1) More employee complaints received *and* resolved;
- (2) Employee complaints resolved sooner and with less tension;
- (3) Less turnover/more likely and more favorable preservation of employment relationships;
- (4) Improved morale;
- (5) More effective communication, and enhanced constructive input by employees into their companies; and

³ Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 790 (2008).

⁴ See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567-68 (2001); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 57 (2003); Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314 (2003).

⁵ The Federal Arbitration Act (Chapter 1, Title 9, United States Code) was enacted by Congress in 1925 to promote arbitration as an alternative to litigation, and to “avoid the expense and delay of litigation” S. Rep. No. 68-536, at 3 (1924).

(6) *Better* workplaces.

Appropriate ADR-in-employment programs – as they are *currently* in use – are fair, do have the requisite safeguards, and are not commonly subject to abuse.

However, *if* there are reforms which are necessary and appropriate, certainly they should be considered, and the CELE would support and welcome such reforms.

For example, an administrative approach to ensure fair and equitable application of dispute-resolution mechanisms would be appropriate. One of the hallmarks of the CELE – and of my law firm, Jackson Lewis, and many other management-side firms – is that we advise employers on the “best practices” in employment law, including on ADR.

Do it right, or not at all is our common creed. We advise management, train managers and supervisors, put on seminars, and draft policies that *are* fair, will invite manager and employee support (after all, ADR programs apply to managers as well as to rank-and-file employees – in fact it is *more* common that ADR programs apply to management, including senior management, through provisions in employment agreements), are credible, and therefore will be more fully utilized by employees, and will withstand legal challenge. We *want* employers to be fair. In the overwhelming majority of cases, they are... as they should be... and as we advise them to be.

In fact, those employers who embrace ADR programs are amongst the most sophisticated, far-sighted, and fair-minded employers in the country – they are committed to saving jobs, resolving conflicts, and ensuring better working environments and higher employee morale.

Moreover, they are consistently succeeding in this regard. Employees at companies who have ADR programs overwhelmingly support these policies and programs, as do employees overall.⁶

We advise employers to use best practices, including the use of arbitrators from the American Arbitration Association (“AAA”) and/or the Judicial Arbitration and Mediation Services (“JAMS”). In fact, one appropriate approach for Congress to take on arbitration would be to simply codify the AAA Employment Due Process Protocol and/or the JAMS Minimum Standards of Procedural Fairness so as to ensure that those who choose to engage in arbitration do so to the highest standards of judicial and administrative fairness.⁷

⁶ 83 percent of employees favor arbitration. See Princeton Survey Research Associates, *Worker Representation and Participation Survey Focus Group Report*, Princeton, NJ (April 1994).

⁷ Another approach worth considering is to ensure that the *costs* of arbitration are assumed by the employer – in whole or in large part, with some safeguards to avoid abuse of process. AAA’s protocols limit the employee’s financial contribution in arbitration to a maximum of \$150; JAMS’ procedures call for the employee to pay only an initial filing fee. The employer pays *all* other arbitration costs. In many programs, the employer pays *all* arbitration costs – period. Many of our clients even offer to pay the reasonable attorneys’ fees of the individual should they wish to be represented by an attorney (and agree to forego their own representation by an attorney unless the individual first chooses legal representation).

What is *not* needed is the wholesale and retroactive dismantling of common, effective, and widespread ADR programs that work... and work well. The cost to employees and employers, and to the interests of justice and sound employee relations, would be enormous *and* extremely destructive.

III. The Circuit City Decision

This hearing is entitled: "Has the Supreme Court Been Misinterpreting Laws Designed to Protect Workers from Discrimination?"

Whatever the answer is to this question regarding Title VII and other anti-discrimination laws – and quite possibly that answer is "no" since overall there generally are at least as many U.S. Supreme Court decisions against employers as for them, and perhaps rightfully so given that the Court normally considers matters of controversy in which there is a significant split in the lower courts – the answer in regards to arbitration in employment most certainly is "no" – the U.S. Supreme Court has *not* misinterpreted the laws designed to protect workers from discrimination.

First of all, the Congressional purpose of the Federal Arbitration Act ("FAA") is *not* to protect workers from discrimination – it is to elevate arbitration agreements to the same status as "other contracts,"⁸ and to promote arbitration and discourage litigation⁹ (both of which, in fact, the FAA *has* accomplished).

Has the FAA had a detrimental impact on the enforcement of anti-discrimination laws?

It is hard to conclude that a process that allows as many as 20 times more employee complaints to be addressed and resolved, provides an early-warning system to employers regarding conduct or policies in the workplace that need to be corrected, and improves employee morale and fosters greater workforce stability (i.e., fewer terminations, less voluntary attrition, less confrontation) somehow has a discriminatory impact on employees.

Second, assuming the question is valid vis-à-vis arbitration in employment, a more appropriate question would be: Has the U.S. Supreme Court over many years, and all Circuit Courts of Appeal (including the Ninth Circuit once reversed and remanded), and scores of U.S. District Courts, numerous federal agencies, and Congress itself in several enactments *all* relating to arbitration in employment over more than 80 years been consistently misinterpreting laws designed to protect workers from discrimination?

⁸ "By enacting Section 2, Congress sought to place arbitration agreements 'upon the same footing as other contracts, where [they] belong.' H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)." Congressional Research Service Report for Congress *The Federal Arbitration Act: Background and Recent Developments*, August 15, 2003, page 2.

⁹ "While Congress' primary motivation for drafting the FAA reflected its interest in recognizing arbitration agreements as being just as valid as other contract provisions, it also understood the potential benefits that would be provided by enactment of the FAA: It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable. H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) at 2." Congressional Research Service Report for Congress *The Federal Arbitration Act: Background and Recent Developments*, August 15, 2003, page 3.

I don't think so. Arbitration in employment has a *long* history of acceptance, encouragement, adoption, and support from all three branches of the federal government. It works, and it works well. It is sound national policy. The Court decision in Circuit City was simply one of the latest manifestations of this principle.

What has changed to justify gutting 80-plus years of a widely accepted and endorsed national policy favoring resolution of employment disputes by mediation and arbitration – to supplant it with the long, knockdown, drag-out wars of attrition in the courtroom? How can binding arbitration, *pre-dispute* binding arbitration, so sacrosanct to the labor movement, be so cordially embraced in a union setting, and so indiscriminately jilted in the non-union sector? If S. 931 were enacted and/or Circuit City were legislatively “reversed,” what policy would justify the hundreds of thousands of employees covered by arbitration-in-employment agreements in the federal public sector (discussed later in this testimony), while their private-sector counterparts are forced to dismantle such agreements (and what of the hypocrisy of such a double standard)?

We cannot afford *this* dramatic a reversal in national policy. Circuit City was narrowly – and correctly – decided, consistent with long-standing and widespread precedent, and consistent with Congressional intent.

In Circuit City, the U.S. Supreme Court built on several of its precedents, particularly Gilmer v. Interstate/Johnson Lane Corp.,¹⁰ a 1991 decision that an agreement to arbitrate individual employment disputes is enforceable as to federal statutory discrimination claims.

In a 7-2 decision, the U.S. Supreme Court concluded that agreements to arbitrate Age Discrimination in Employment Act (“ADEA”) claims are as enforceable under the Federal Arbitration Act as any other arbitration agreement. The Court said, “[h]aving made the bargain to arbitrate, the party should be held to it.”¹¹

The FAA exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” from the FAA’s mandate.¹²

¹⁰ 500 U.S. 20 (1991).

¹¹ *Id.* at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler/Plymouth, Inc., 473 U.S. 614 (1985)). The Court explained that “the burden is on Gilmer [as the party opposing arbitration] to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes.” The Court found no such intention.

¹² 9 U.S.C. §1. In Circuit City, the U.S. Supreme Court held that the FAA is available for enforcement of most arbitration agreements in the workplace and that the Act’s exclusion is limited to interstate transportation workers. Thus, when Adams applied for employment, he signed an agreement to arbitrate any claims arising out of his employment and was hired. After Adams was discharged, he brought suit in state court claiming discrimination under the California Fair Employment and Housing Act and state tort claims. In federal court, Circuit City filed an FAA §4 Motion to Compel Arbitration and stay the state court proceedings. The United States District Court granted the petition and ordered Adams to arbitrate. The Ninth Circuit – the Circuit most commonly reversed by the U.S. Supreme Court *by a very wide margin* – stood alone among all Circuits in finding that the FAA was inapplicable and reversed for want of jurisdiction, based upon a broad reading of the exclusion contained in FAA §1: “[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”

The U.S. Supreme Court in Gilmer did *not* resolve the question of how broadly or narrowly this exception should be construed, since Gilmer's arbitration agreement was in a securities industry registration form rather than a "contract of employment."¹³ Accordingly, after Gilmer, it technically was still an open issue as to whether an arbitration agreement in an employment contract could be enforced under the FAA.

All but one of the federal Circuit Courts of Appeal construed this FAA exemption narrowly, limiting it to contracts of employment of workers who actually move goods in interstate commerce. In cases both before and after Gilmer, many courts ruled that the FAA requires enforcement of arbitration agreements in any employment contract except for those covering workers who transport goods across state lines – in other words, workers in the transportation industry. The Ninth Circuit,¹⁴ however, took the opposite, broad view of the exemption, ruling that the FAA can never be used to enforce an arbitration agreement in *any* employment contract.¹⁵

In 2001, the Court reversed the Ninth Circuit in Circuit City, holding that the broad view of the FAA exemption to all employment contracts was contrary to Congressional intent, the language of the FAA, national policy, and established practice and policy.¹⁶

Applying established rules of statutory construction, the Court ruled that the way Congress had phrased the FAA exemption gave it a narrow scope, covering only the employment contracts of

Subsequently, the U.S. Supreme Court reversed the Ninth Circuit once again, holding that the exclusion contained in Section 1 must be read narrowly, with the result that the exclusion is limited to employment contracts of individuals who are engaged in interstate transportation of goods in the same way that seamen and railroad employees are so engaged. Adams, a sales clerk in a store, was not so employed, thus Circuit City (and the vast majority of employers) are entitled to rely upon the FAA to enforce agreements to arbitrate disputes arising out of employment. The Court noted:

[F]or parties to employment contracts... there are real benefits to the enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts... [If we were to adopt the position advanced by Adams, it] would call into doubt the efficacy of alternative dispute resolution procedures adopted by many of the nation's employers, in the process undermining the FAA's proarbitration purposes and breeding litigation from a statute that seeks to avoid it. The Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of Congressional enactments giving employees specific protection against discrimination prohibited by federal law. 532 U.S. at 122.

¹³ *Supra*, note 8, at 25, n.2.

¹⁴ The Ninth Circuit hears appeals from federal trial courts in Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, the Northern Mariana Islands, Oregon, and Washington.

¹⁵ Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1998), *amended by* 79 Fair Empl. Prac. Cas. (BNA) 1508 (9th Cir. 1999) (*per curiam*). At the same time, the California Supreme Court rejected the Ninth Circuit's approach, choosing instead to follow the majority rule. Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000).

¹⁶ *Supra*, note 1.

transportation workers rather than all employment contracts.¹⁷ Under the established rules of interpreting statutory language, where a statute contains a list of items followed by a catchall phrase, the catchall phrase is understood to mean, “or things like the things on the list.” If the catchall phrase were read to mean “all contracts of employment,” stated Justice Kennedy, writing for the majority, there would have been no need for Congress to include a reference to specific types of workers. Accordingly, the Court’s opinion concludes, “Section 1 exempts from the FAA only contracts of employment of transportation workers.”¹⁸

Gilmer, reinforced by Circuit City, lay to rest the general notion that arbitration is not an adequate forum for resolving questions of federal statutory rights. These decisions leave open the possibility, however, that a particular arbitration agreement might not be enforceable.

For example, citing the FAA, the Court in Gilmer observed that an arbitration agreement is only as enforceable as any other contract – meaning that it can be challenged on the same grounds as other contracts. While finding that arbitration generally provides an adequate forum for resolving statutory claims, the Court also noted the possibility that a particular arrangement might not do so, stating that “claim[s] of procedural inadequacies... [and] unequal bargaining power [are] best left for resolution in specific cases.”¹⁹

Thus, the very concern expressed by some proponents of S. 931, and its House counterpart H.R. 1020 – that the parties to ADR agreements in employment have unequal bargaining power – *already* has been recognized and addressed by the U.S. Supreme Court – and *remains* a valid and viable cause of action by plaintiff employees.²⁰

Therefore, arbitration agreements, like all other contracts, *are* subject to legal challenge regarding their enforceability based on such legal principles of contract law as whether the agreement was knowingly and willingly entered into, understood, and/or subject to undue disparate bargaining power. Plaintiffs can – *and do* – make these claims. That door already is open, and employees – as well as the plaintiffs’ bar – already go through it *without* the “benefit” of Congress throwing out 85 years of precedent and hundreds of thousands of valid, appropriate, and accepted arbitration agreements.

Moreover, what of those employees who *like* their ADR agreements, who see how fair they are and how effective they can be, and who recognize that it is not in their interests to have nuisance lawsuits filed against their employer or protracted litigation economically hemorrhaging the company they own stock in, and rely on for bonuses and/or profit participation? Their rights would be trampled,

¹⁷ The U.S. Supreme Court held, in Circuit City, that the broad Ninth Circuit reading of the FAA §1 language runs into “an insurmountable textual obstacle” that: “any other class of workers engaged in... commerce” constitute a residual phrase, following in the same sentence, explicit reference to “seamen” and “railroad employees.” The wording thus calls for application of the maxim *ejusdem generis*, under which the residual clause should be read to give effect to the terms “seamen” and “railroad employees,” and should be controlled and defined by reference to those terms. See, e.g., Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129.

¹⁸ *Supra*, note 1, at 119.

¹⁹ *Supra*, note 8, at 33.

²⁰ *Id.*

their knowing and voluntary contractual agreement would be invalidated, they would have “big brother” in Washington dramatically altering the employment landscape that they may have benefitted from and supported for their 10, 20, even 30 years of employment with a company that has an ADR policy.

The fact that they could voluntarily enter into *post*-dispute arbitration is of little consequence if others would not, and the process that had worked so well so long was invalidated. The costs of litigation to their employer could dramatically escalate – and for what? The workplace very likely would be no better – in fact, most likely would be worse because so many employees would be disenfranchised from the process and so many employee issues would go unaddressed and unresolved.

Arbitration in employment needs to be protected and preserved.

IV. Pre-Dispute Arbitration Agreements

Some opponents of ADR in employment claim that they do not want to prohibit arbitration of employment disputes, they simply want to prohibit it from being mandatory and pre-dispute. In other words, employees (or ex-employees) could voluntarily enter into an agreement to arbitrate after a legal claim already has been filed.

This is a canard.

There would be very, *very* few such instances where this would occur – just as there are very, *very* few instances in which it occurs now.²¹

Why? Because once a legal complaint has been filed, it is tantamount to a professional divorce – the employee does *not* want reinstatement (regardless of what his or her plaintiffs’ lawyer claims), and the employer does *not* want him or her back. The filing of a lawsuit – or a charge – is in effect a declaration of war. At that point, the dispute is about money. Will the plaintiff get money, and how much?

That is why, as discussed, litigation is a job destroyer, while arbitration is a job preserver. Arbitration, with early intervention, less confrontation, faster and more amicable proceedings, and an orientation toward a favorable resolution *saves* jobs.

Once an individual has found a plaintiffs’ lawyer, that lawyer is convinced that a sizeable settlement or damages can be extracted on an expedited basis, a complaint has been drafted and filed, and the individual is reconciled to doing battle with his or her employer, he or she is *not* about to reverse course and retreat to an arbitration forum where the plaintiffs’ attorney’s role may be diminished and the possibility of a runaway jury verdict is nil.

Post-dispute arbitration agreements do occur, but they are relatively rare, and if Circuit City is legislatively reversed and/or S. 931 is enacted, the practice of arbitration in employment will be effectively vanquished.

²¹ *Supra*, note 3.

V. Summary of Advantages of ADR for Employees

The most effective – and utilized – Alternative Dispute Resolution programs are the ones in which employees “buy into” the program and recognize the distinct advantages to the individual. The advantages of ADR – for employees – include:

- (1) **A faster resolution of problems** – Justice delayed *is* justice denied, and employment-related litigation now takes, on average, more than two years to resolve;²²
- (2) **A simpler, more focused, more confidential, and more dignified process** – Modern litigation is an extremely adversarial process. In employment disputes, the ideal solution is for the employee and employer to resolve their dispute so that the employee may remain as a productive member of the employer’s organization. That concern is even more critical in today’s economy with such a high rate of unemployment. Litigation is war, and who wants to go to war, particularly with the outcome so uncertain?;
- (3) **Less disruption to career and personal life** – One of the advantages of ADR is the vastly increased chances for amicable resolution of an employment problem – the goal is to keep the employee in his or her job, and to do so in a way that the employee is happier and more productive. As mentioned earlier, litigation is a destroyer of the employment relationship; ADR is a preserver of the employment relationship;
- (4) **Peace of mind** – ADR helps employers address and resolve employee issues and concerns – *before* they heat up and “come to a boil.” With earlier intervention and correction, small problems do not build into big problems, and there is less psychological “wear and tear” all the way around;
- (5) **The same range of remedies and higher awards** – ADR provides the very same remedies to an aggrieved employee as litigation, and monetary damages are not only awarded to the employee faster than in litigation, they are awarded on just as broad a basis and at higher levels than in litigation.²³ No financial remedy is waived by participation in the ADR process;

²² For example, the average time to resolve civil cases in *state* courts was 24.2 months in 2001, according to the U.S. Department of Justice, *Civil Trial Cases and Verdicts in Large Counties, 2001* at 8, available at <http://www.ojp.usdoj.gov/bjs/abstract/civcylc01.htm>. The backlog and delay in the *federal* courts for civil cases is even greater. In fiscal year 2007 alone, more than 265,000 civil cases were pending in U.S. District Courts, continuing the trend upward. U.S. Courts, 2007 Judicial Facts and Figures, Table 4.1, *U.S. District Courts. Civil Cases Filed, Terminated, and Pending*, available at <http://www.uscourts.gov/judicialfactsfigures/2007/Table401.pdf>.

²³ The median award for employees who prevail in arbitration and in court is very similar – \$63,120 for arbitrations and \$68,737 for trials. See Theodore Eisenberg and Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, 2003 Pub. H. & Legal Theory Res. Paper Series 1, 14 available at http://papers.ssrn.com/col3/papers.cfm?abstract_id=389780. In fact, given that in all but the relatively few *pro se* cases, the employee must subtract attorneys’ fees

- (6) **The same decision-making process** – Formal arbitration under an ADR program has essentially the same decision-making process as traditional litigation. The arbitrator is neutral, trained, and experienced, unaffiliated with either party, and acts very much like a judge.²⁴ Moreover, the decisions of the arbitrator are final and binding on *both* parties;
- (7) **A far greater chance of having claims heard** – Employees who do not have the type of very large claims that can attract a plaintiffs' lawyer are often effectively barred from the courtroom, and forced to abandon their cases. A survey of the plaintiffs' bar found that they agree to provide representation to only five percent of the individuals who seek their help.²⁵ In addition, plaintiffs' attorneys require a minimum of \$60,000 provable damages, commonly request a retainer up front, and typically require a payment of a contingency fee of between 33 and 40 percent.²⁶ Therefore, the door is slammed shut on 95 percent of potential plaintiffs in litigation.
- In arbitration, that number is virtually zero. In fact, the National Workrights Institute found that in those arbitration cases with a stated demand, the majority (54 percent) were for a stated demand that was less than \$75,000. More than a quarter involved demands for less than \$25,000.²⁷ The bottom line is that more than twice as many employees can access the arbitration system than can access the court system because of the dollar threshold of their claims alone.
- (8) **A better chance of prevailing** – Employees have a 63-percent chance of prevailing in employment arbitration, but only a 43-percent chance of prevailing in employment litigation.²⁸ Thus, employees have nearly a 50-percent *better* chance in arbitration than in court. This includes employment cases dismissed on Motions for Summary Judgment. Even excluding those cases dismissed, employees are more likely to prevail in arbitration than trials that are litigated to

(capped at one-third in many jurisdictions) and costs from his or her award in litigation, *most* employees in employment arbitrations actually fare *much* better financially than in court.

²⁴ In fact, based on my legal practice as an employment lawyer for more than 30 years and experience as a senior Partner at a major law firm, I have absolutely no doubt that arbitrators are, in general, much *more* consistently and predictably neutral and balanced than judges are. Is there a difference between a Reagan-appointed judge and a Clinton-appointed judge? Yes, there is. The range of judicial philosophies is even greater at the state level. Going to court is the real crap shoot; going to arbitration is much more likely to achieve a fair and unbiased resolution.

²⁵ Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003). See also *Employment Arbitration: What Does the Data Show?* The National Workrights Institute, available at <http://www.workrights.org/current/cd-arbitration.html>.

²⁶ *Id.*

²⁷ Lewis L. Maltby, *Arbitrating Employment Disputes: The Promise and the Peril in Arbitration and Employment Disputes*, 530. (Daniel P. O'Meara ed., 2005).

²⁸ *Supra*, note 20.

decision – 63-to-57 percent.²⁹ Furthermore, nearly one-quarter (24.9 percent) of the employment cases arbitrated by the American Arbitration Association would not survive Motions for Summary Judgment, based on those arbitrations which do go to trial and are dismissed.³⁰ Thus, if you are an employee with a grievance, you have a better chance of winning,³¹ virtually no chance of being dismissed,³² and a higher median award³³ if you go to binding arbitration than litigation – and, in most cases, you do not have to split that award with a plaintiffs' lawyer; and

- (9) **More problems raised and resolved** – An effective ADR program significantly *increases* the number of employee complaints, and that is better for everyone. More problems raised, addressed, and resolved – quickly, efficiently, and cost-effectively – means better employer-employee relations, higher morale, higher employee retention, and a more productive and enthusiastic workforce.

VI. **Summary of Advantages of ADR Programs Overall**

Alternative Dispute Resolution programs in employment have multiple, substantial benefits to both employers and employees:

- **Issues are resolved sooner** – The delays of litigation – motions, discovery, appeals, and an overall backlogged and cumbersome legal process – are avoided in favor of a short, simple, streamlined process which yields final determinations with a quick turnaround;
- **More grievances are addressed** – Given the option of an easily accessible, less confrontational, less time-consuming, and relatively cost-free means of raising

²⁹ *Id.*

³⁰ *Id.*

³¹ In fact, beyond the low success rate of plaintiffs in court decisions, *most* plaintiffs' claims are dismissed on motions. One study of more than 3,400 employment discrimination cases in federal courts in which a definitive judgment was reached found that 60 percent were dispensed of by pre-trial motions, with employers the victors in 98 percent of those decisions. Lewis L. Maltby, *Employment Arbitration: Is It Really Second-Class Justice?*, *Dispute Resolution Magazine*, 23-24 (Fall 1999).

³² *Id.* Typically, employers win on the motions practice in litigation, an avenue which is not open in arbitration. In fact, beyond the low success rate of plaintiffs in court decisions, *most* plaintiffs' claims are dismissed on motions. One study of more than 3,400 employment discrimination cases in federal courts in which a definitive judgment was reached found that 60 percent were dispensed of by pre-trial motions, with employers the victors in 98 percent of those decisions. Lewis L. Maltby, *Employment Arbitration: Is It Really Second-Class Justice?*, *Dispute Resolution Magazine*, 23-24 (Fall 1999). One very current example is that, an arbitrator – who is a former judge – told one of my colleagues *last week* here in D.C. that if he were still on the bench, he would have issued a Summary Judgment, but was prevented from doing so because we were in arbitration.

³³ This is further confirmed by research by the National Workrights Institute which found that, consistent with the Eisenberg study *supra*, note 20, employment arbitration provides *higher* median awards than employment litigation – \$100,000 for arbitration; \$95,554 for litigation. *Employment Arbitration: What Does the Data Show?* The National Workrights Institute, available at http://www.workrights.org/current/cd_arbitration.html.

workplace grievances, employees are *more* likely to raise issues at a company with an ADR program than they would in litigation – if they even *could* (the overwhelming majority of employment issues addressed in arbitration would *never* be litigated because of the relative inaccessibility of the legal process, the reluctance of plaintiffs’ attorneys³⁴ to take on cases for which only modest recovery would be “best-case” foreseeable, courts’ procedural rules disqualifying matters of relatively minor controversy, and/or employers’ high success rate for prevailing on Motions to Dismiss and Motions for Summary Judgment;

- **Inappropriate workplace practices are more likely to be corrected** – With issue determinations being made by credible and objective third parties who are trained in arbitration, knowledgeable about the legal process, and carefully selected because of their expertise in the issues and their lack of bias, intervention into – and correction of – employment practices and/or manager misconduct which may be inappropriate is achieved more frequently, effectively, and expeditiously;
- **ADR is less disruptive and distracting than litigation** – Since issues get resolved in a timely and decisive manner,³⁵ with a minimum commitment of time and resources, and ADR process is infinitely *less* disruptive and distracting vis-à-vis the more formal, costly, protracted, and combative legal process in our courts;
- **ADR is more cost-effective than litigation** – The most effective Alternative Dispute Resolution programs are mandatory and are binding on all parties. No long, drawn-out legal battles. No litigation. No appeals. No excessive litigation costs and legal fees.³⁶ By achieving a fair, final, and early resolution, ADR is cost-effective; and
- **ADR is adjudicated by qualified and objective professionals** – Arbitrators certified by the American Arbitration Association (“AAA”) and the Judicial

³⁴ *Supra*, note 26.

³⁵ One study found that arbitrations lasted an average of 116 days, with a median of 104 days. Kirk D. Jensen, *Summaries of Empirical Studies and Survey Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L. Q. REP. 631 (2006), citing California Dispute Resolution Institute, *Consumer and Employment Arbitration in California: A Review of Website Posted Data Pursuant to Section 1281.96 of the Code of Civil Procedure* (August 2004), available at http://www.mediate.com/cdri/cdri_print_Aug_6.pdf. By contrast, the lifespan of an average employment case, according to the Federal Judiciary Center, is almost two years (679.5 days) from the time of filing until the date of resolution. Evan J. Spelfogel, *Pre-Dispute ADR Agreements Can Protect Rights of Parties and Reduce Burden on Judicial System*, 71 New York State Bar Journal No. 7, 22 (1999).

³⁶ Another study found that civil cases lasted between two-and-a-half and eight years to resolve depending on the nature of the case and the jurisdiction involved. *Evaluating and Using Employer Instituted Arbitration Rules and Agreements in Employment Discrimination and Civil Rights Actions in Federal and State Courts* (ADLI-ABA Course of Study, April 28-30) 875, 894 (1994). The backlog in the federal courts is significant – over 23,000 cases had been pending in U.S. District Courts for two-to-three years in 2007, and over 62,000 more had been pending between one and two years, and this does not, of course, include appeals and remands. *U.S. District Courts: Civil Cases Pending by Length of Time Pending* tbl.4.11, available at <http://www.uscourts.gov/judicialfactsfigures/2006/Table411.pdf>.

Arbitration & Mediation Services (“JAMS”) are highly qualified professionals experienced in the legal process, with an established record of objectivity, and subject-matter expertise. They are reliable, credible, committed, and readily available through a highly developed and highly respected existing network. These organizations have the capacity to create, and experience in creating, specialized panels to address specific forms of arbitration – in this case, neutral arbitrators with specific knowledge and/or expertise in employment issues.

VII. Elements of an Effective ADR Program

The CELE, and the employer community as a whole, trust that Congress will recognize what we believe to be undeniable: Arbitration is a vital and necessary component of our civil-justice system.

If S. 931 is enacted, that civil-justice system will be catapulted into chaos: hundreds of thousands of arbitrations a year will be replaced by tens of thousands of new court cases;³⁷ any redress for the vast majority of individuals currently using the arbitration process will be rendered impossible as their claims will be abandoned and left homeless in the new judicial order;³⁸ the already overburdened and significantly backlogged court system will be swamped by a tidal wave of new cases; and millions of employees (and consumers) and thousands of companies now subject to contracts they voluntarily entered into that call for mediation and arbitration of disputes will have those contracts *retroactively* voided – a legal nightmare.

To the extent that there are any valid concerns about ADR and the use of mandatory binding arbitration to address and resolve employment (and other) disputes, and should these concerns warrant Congress taking action, the most appropriate course of legislative action would be – as discussed earlier – to require procedural reforms, *not* to recklessly dictate that “predispute arbitration” will not be “valid or enforceable” (as stated in S. 931).

One option is to look at what CELE, and many other informed professionals in the field, commonly consider the elements of an effective ADR program, and incorporate these concepts, as appropriate, into a bill as ADR “safeguards.”

The following are common components of model ADR-in-employment programs. With ADR – like most employment policies – “one size” does *not* fit all. Employers typically and appropriately tailor their ADR programs to their own company’s needs, priorities, and employee-relations culture.

Nonetheless, some common elements of successful ADR-in-employment programs are:

³⁷ In 2002, the American Arbitration Association *alone* handled more than 200,000 arbitrations. Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165, 167 n. 11 (2003) (citing data from 2002). If S. 931 becomes law, the overwhelming majority of arbitrations currently being conducted in the United States would not occur. Many of these would be foisted on our court system. Just the AAA arbitrations – 200,000 – represent nearly 80 percent of the 259,000 cases filed in U.S. District Courts in 2006. If only five percent of these AAA cases were litigated, that’s 10,000 *more* civil court cases (and 190,000 individuals left out in the cold with no legal recourse).

³⁸ *Supra*, note 24.

- (1) **An “open-door” policy** for employees to bring concerns to their supervisors and managers;
- (2) **Designation of a company executive** to serve as a confidential advisor – or “ombudsman” – should employees not want to bring a concern to their direct supervisors or managers. Ideally, the designated advisor should have some background and training in human resources and/or dispute resolution, should be available at a designated “employee hotline” telephone number, and should have credibility with employees as a fair and reasonable person;
- (3) **Informal mediations** should be used to address concerns *before* they grow into problems;
- (4) **Peer-review panels** also can be effective because the participation of co-workers in the process adds credibility to the evaluation and suggested resolution of employee problems;
- (5) **Management-review boards** sometimes serve as a “check-and-balance” to ensure that employees are being treated fairly and consistently;
- (6) **Binding arbitration** is the seminal component of a successful ADR program. The parties avoid litigation – with its inaccessibility, delays, costs, divisiveness, and unpredictability – by achieving internal resolution by a neutral arbitrator which is *binding* on both parties;
- (7) **Legal assistance** sometimes is offered by employers to their employees as well. We recommend that employers consider paying for the employee’s legal representation – up to, for example, a \$2,500 limit per employee per year;
- (8) **The use of qualified arbitrators** is vital. Typically, ADR programs use independent, professional arbitrators from the American Arbitration Association and/or the Judicial Arbitration & Mediation Services;
- (9) **The maintenance of employee confidentiality**, when requested by the employee, is critically important. Employees have to trust the ADR program to use it, and company misuse undermines the program’s credibility, decreases its use, and thereby helps defeat its purpose; and
- (10) **A “no-retaliation” policy** also is helpful in this regard. Employees must know and expect that their forwarding of a complaint will *not* result in retaliation, and that managers who do retaliate will be disciplined.

These are the types of safeguards which the CELE – and Jackson Lewis – recommend to employers to enhance their ADR programs and to ensure employee acceptance and cooperation.

What would be most appropriate would be legislation that would provide incentives (such as tax credits) to employers to voluntarily implement ADR programs with the type of safeguards and “best practices” listed above.

What would be least appropriate would be legislation, such as S. 931, that would impose a death penalty on ADR as an employment practice.

VIII. Existing Protections For Employees In Arbitration

Under Section 2 of the Federal Arbitration Act, federal and state courts already provide effective, *case-by-case review* of individual arbitration agreements to ensure that they are fair to employees.

Courts routinely exercise their existing authority to invalidate arbitration provisions that are unfair to employees.³⁹

The courts have stepped in aggressively to ensure that arbitration provisions do not impose high costs or burdensome travel, limit attorneys' fees or other statutory rights and remedies to which an individual is entitled, or create a biased process.

As described earlier, most employers have responsibly crafted ADR programs that offer benefits far beyond the baseline standards required by the courts. However, in all cases, existing law ensures that employees will be afforded due process and fairness in arbitrating their claims.

IX. Who Loses If S. 931 Is Enacted

If the "Arbitration Fairness Act of 2009" were enacted, the sun would still come up. However, for *millions* of Americans, their lives would be worse:

- (1) Consumers – Consumers would be less likely to get *their* grievances addressed once they are denied the option of arbitration because, as discussed earlier, *most* plaintiffs' attorneys are unlikely to accept litigation with only a modest expectation of damages;⁴⁰
- (2) Employees – No mediation or arbitration means *less* accessibility to the legal process, *fewer* issues being addressed, *less* likelihood of meaningful redress/correction/improvement, *more* likelihood of the employment relationship being terminated, *less* employee communication/input into workplace policies and practices, *more* confrontations if they do pursue their claims in litigation; and – bottom line: *worse* workplaces. In addition, because the overall transaction costs in arbitration are far lower than in litigation, employers with ADR programs are currently able to pass those savings along in the form of better wages and benefits, job growth or retention, and/or investment in the company's future. Those benefits would be lost or diminished without arbitration;
- (3) Employers – More cost, more litigation, more confrontation, less timely identification of workplace problems, less opportunity for early intervention,

³⁹ See, e.g., *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003); *Armendariz v. Foundation Health Psychcare Servs.*, 6 P. 3d 669 (Cal. 2000); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

⁴⁰ *Supra*, note 25.

more turnover, worse employee relations, destruction of ADR systems that have been long-standing and well-accepted – *and that work well*. The costs – both in human and financial resources – would be enormous;

- (4) **The Court System** – More litigation, more backlog, more delays, less resolution, dismemberment of an alternative legal process that promotes timely and less acrimonious resolution and reduces the ever-growing pressure on our judicial system. If arbitration were effectively banned, *most* of those claims would never be addressed, but *many* would shift to the court system – a burden which no one, save the plaintiffs' bar, could afford or would appreciate;
- (5) **Deserving Plaintiffs** – Nothing prevents an individual from pursuing his or her claims of employment discrimination with the Equal Employment Opportunity Commission, comparable state or local agencies, or in court. Even when subject to mandatory binding arbitration agreements, that right cannot be waived before or after the ADR process has been exhausted. However, without the possibility of mediation and arbitration, the courts would get further clogged, the delays would increase, the period from time of filing to time of decision would be lengthened, and the entire process would work less efficiently, less effectively, and less fairly – even for the most deserving plaintiffs;
- (6) **Taxpayers** – Substantially more of a burden on our court system would require more judges, more staff, more facilities, more cost. Who would bear the cost? We would; and
- (7) **The Interests of Justice** – As mentioned earlier, the maxim “justice delayed is justice denied” would be underscored. No quick and painless resolutions in ADR programs. No resolution at all in most cases. Resolution in a much longer time period through litigation, no matter how deserving, and more delays, confrontation, disruption of the employment relationship, uncertainty, and investment of time and resources. Is the destruction of ADR *really* in employees' interests? No, it is not.

X. Who Wins If S. 931 Is Enacted?

The obvious answer is: the plaintiffs' bar.

The American Association for Justice, formerly the American Trial Lawyers Association, *hates* arbitration – because it involves less litigation, less confrontation, lesser likelihood of runaway juries, and – *most of all* – lower attorneys' fees.

So the “trial lawyers” (plaintiffs' lawyers) would win if S. 931 became law – less harmony in the workplace, more *former* employees (rather than *current* employees) with issues, more opportunities for one-third-plus-expenses of the verdict or settlement. In short, while the trial lawyers claim to speak for employees, in reality they are proposing a measure that will force many employees with modest claims to abandon their claims, in order that the trial lawyers may seek “lotto” awards for a chosen few.

All the rest of us? *We lose.* S. 931 – and the betrayal and abandonment of ADR it represents – would be bad public policy and harmful to American justice and American society.

XI. Supporters of ADR

(1) The Judiciary Favors ADR

There can be no doubt that employment cases historically have created an unnecessary strain on the limited resources of our judicial system.

Private employment suits grew at an astronomical rate in the 1990s. In January of 1999, the Bureau of Justice Statistic published a study showing that from 1990 through 1998, private employment-related civil rights cases nearly tripled.⁴¹ Private employment-related complaints accounted for approximately 65 percent of the overall increase in cases that flooded the U.S. District Courts in this period.⁴²

The torrent of employment-related lawsuits coupled with the delays in case processing evinced a need for more effective case management. Arbitration is well-suited to meet this need.

The federal judiciary and Congress agreed. In response to this explosive growth in employment litigation, the Alternative Dispute Resolution Act of 1998⁴³ was passed and signed into law in October 1999 – exactly one decade ago – to promote the use of ADR in the federal court system. This law mandates that U.S. District Courts establish their own ADR programs and authorizes the use of at least one form of ADR.

Clearly, the intent of promoting ADR methods within the court system is to lighten the federal court docket.

S. 931 stands in opposition to this worthwhile goal. S. 931 would prohibit hundreds of thousands of arbitrations of employment and consumer disputes and transfer many of them to our courts, leaving litigation as the only resort – if obtainable – and exacerbating an already clogged and overburdened court system.

(2) Practicing Lawyers Favor ADR

A 2006 survey by the American Bar Association (“ABA”) of the membership of the General Practice and Solo and Small Firm Division of the ABA found that 86.2 percent felt that “their clients’ best interests are sometimes best served by offering ADR solutions,” and nearly two-thirds (63.2 percent) thought that “offering clients ADR

⁴¹ Marika F.X. Litras, “Civil Rights Complaints in U.S. District Court, 2000” (NCJ-193979). Employment discrimination cases increased from 8,413 filings in 1990 to a peak of 23,796 in 1997 and diminished to 21,032 in 2000 after enactment of the Alternative Dispute Resolution Act of 1998.

⁴² *Id.*

⁴³ Pub. L. No. 105-315.

solutions is an ethical obligation as a practitioner.”⁴⁴ Nearly two-thirds (66.2 percent) also predicted that “ADR use will increase in the future.”⁴⁵

(3) **Employees Favor ADR**

It is hard to recognize just who needs to be “protected” when it comes to ADR in employment... *not* employers, who increasingly are using ADR programs, and enthusiastically so⁴⁶... and *not* employees – as mentioned earlier, a public opinion poll found that 83 percent of employees *favor* arbitration.⁴⁷

(4) **Parties to Arbitration Favor ADR**

In a survey of more than 600 adults who had participated in binding arbitration, more than 70 percent were satisfied with the fairness of the process and the outcome, including many who had lost their arbitrations. Arbitration was viewed as faster (74 percent), simpler (63 percent), and cheaper (51 percent) than going to court, and two-thirds (66 percent) said they would be likely to use arbitration again (48 percent said they were *extremely* likely to use arbitration again).⁴⁸

In addition, as discussed in the next section of this statement, the *Federal Government* favors ADR as well.

XII. Our Well-Established National Labor Policy Strongly Supports the Use of Arbitration Agreements in Employee Relations

It is clear that Congress’s intent in enacting the Federal Arbitration Act was to encourage the use of arbitration.⁴⁹ Since its enactment in 1925,⁵⁰ and codification in 1947,⁵¹ the use of arbitration in the private and public sectors has flourished.

⁴⁴ *ADR Preference and Wage Report*, National Arbitration Forum, 2006 (data collected by Surveys and Ballots Inc. Available at http://www.adrforum.com/users/nafr/resources/GPSoloADRPreferenceandusage_report.pdf).

⁴⁵ *Id.*

⁴⁶ In a survey of more than 530 corporations in the Fortune 1000, more than 23 percent of respondents reported that they use ADR for non-union dispute resolution. Lipsky, Dawd and R. Seeber, *The Use of ADR in U.S. Corporations: Executive Summary* (1997). The survey was conducted by Price Waterhouse and Cornell University’s PERC Institute on Conflict Resolution. Obviously, the percentage has trended up since then.

⁴⁷ See Princeton Survey Research Associates, *supra*, note 4.

⁴⁸ *Arbitration: Simpler, Cheaper, and Faster than Litigation*, U.S. Chamber Institute for Legal Reform (2005) (survey conducted by Harris Interactive) (www.instituteforlegalreform.org/resources/arbitrationstudy/final.pdf).

⁴⁹ See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (“[the FAA’s] purpose was to reverse the long-standing judicial hostility to arbitration agreements... and to place arbitration agreements upon the same footing as other contracts.”).

⁵⁰ 43 Stat. 883.

A number of recent legislative and executive branch initiatives have reaffirmed our nation's commitment to, and acceptance of, ADR. Such measures include the Civil Rights Act of 1991 ("CRA"),⁵² in which Congress specifically endorsed the arbitration of Title VII⁵³ cases. Section 118 of the CRA provides that "where appropriate and to the extent authorized by law, the use of alternative dispute resolution, including... arbitration, is encouraged to resolve disputes arising under [Title VII]."⁵⁴ Additionally, the Administrative Dispute Resolution Act ("ADRA") – passed in 1990 and subsequently amended and permanently reauthorized in 1996, and amended again in 1998 – mandates that federal agencies create internal ADR programs. The 1998 amendments to the ADRA⁵⁵ require each U.S. District Court to adopt local rules regarding the use of ADR. The ADRA's Findings and Declaration of Policy notes that:

Alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.⁵⁶

Additionally, many government agencies have implemented ADR programs governing their own employees. The United States Department of Agriculture's ADR program, for example, has an overall resolution rate of 82 percent, and the time from request for ADR to actual mediation averages 24 days.⁵⁷ The Federal Election Commission resolved all 26 employee complaints brought to the agency's Equal Employment Opportunity director in a recent three-year period.⁵⁸ Other government agencies to benefit from ADR programs include the Department of Labor, Department of Treasury, United States Mint, Army Corps of Engineers, Navy, Air Force, Postal Service, Department of State, and Department of Veterans Affairs.

That the federal government is so widely committed to the use of ADR for its own employees emphatically underscores the appropriateness of ADR use in private-sector employment.

⁵¹ 9 U.S.A. §1 (1994).

⁵² Pub. L. No. 102-166.

⁵³ 42 U.S.C. §§2000e *et seq.*

⁵⁴ 105 Stat. at 1081, *reprinted in* notes to 42 U.S.C. § 1981.

⁵⁵ Pub. L. No. 105-315.

⁵⁶ Pub. L. No. 105-315, §2(1).

⁵⁷ John Ford, *Workplace ADR: Facts and Figures from the Federal Sector*, published at <http://www.conflict-resolution.net/articles/Ford3.cfm>.

⁵⁸ *Id.*

XIII. Conclusion

If you want justice in America today... my advice is to go to arbitration, *not* to court.

Arbitration is more predictable and consistently fair, balanced, efficient, responsive, final, and cost-effective.

Litigation is *none* of those things: vis-à-vis arbitration, the outcome of litigation is hard to predict, the process is slow, unwieldy, and protracted, resolution often takes a great deal of time, resolution often is *not* final (with remands and appeals on technical issues common), and the process is long and expensive – and therefore cost-*ineffective*. Arbitration is more focused on the merits of the positions; litigation can be decided by who has the better lawyers. Arbitrators consistently fall into the middle of the philosophical spectrum; judges can be all over the map philosophically and politically.

Alternative Dispute Resolution is a positive, necessary, and highly appropriate component of our judicial system. ADR is increasing in use, and the *need* for ADR is increasing as well. Mandatory binding arbitration in employment is entrenched as a useful, fair, and productive fixture on our American employment landscape. It is both pro-employer *and* pro-employee.

As discussed earlier, employees are more likely to have their employment issues addressed by their increased accessibility to arbitration vis-à-vis litigation, and are more likely to prevail and to receive higher median awards in employment arbitration than in employment litigation.

To abandon this practice, to suddenly and retroactively render its use void and unenforceable, as S. 931 would do, would have far-reaching and disastrous impacts on American jurisprudence and American society.

S. 931 is a mandatory litigation bill. *That* is not the way to go.

On behalf of the Council for Employment Law Equity, and the employer community at-large, I respectfully urge you to preserve the rights of employers and employees to engage in Alternative Dispute Resolution, and to support the necessary and appropriate practice of mandatory binding arbitration in employment.

I thank you for the opportunity to express the views of the Council for Employment Law Equity here today, and I would welcome any questions which you may have and the opportunity to work together to help ensure that there is – and continues to be – fairness in arbitration in America.



**TESTIMONY OF PROFESSOR MICHAEL FOREMAN
DIRECTOR, CIVIL RIGHTS APPELLATE CLINIC
DICKINSON SCHOOL OF LAW
PENNSYLVANIA STATE UNIVERSITY**

**BEFORE THE SENATE JUDICIARY COMMITTEE
ON
WORKPLACE FAIRNESS: HAS THE SUPREME COURT BEEN
MISINTERPRETING LAWS DESIGNATED TO PROTECT AMERICAN WORKERS
FROM DISCRIMINATION?**

**WEDNESDAY, OCTOBER 7, 2009
SENATE DIRKSEN OFFICE BUILDING ROOM 226
10:00 A.M.**

Chairman Leahy, Ranking Member Sessions and members of the Committee. Thank you for convening this hearing, which will scrutinize several of the Supreme Court's recent interpretation of laws designed to protect American workers from discrimination.

My name is Michael Foreman. I am the Director of the Civil Rights Appellate Clinic at the Pennsylvania State University Dickinson School of Law where I also teach an advanced employment discrimination course. I have handled employment matters through all phases of their processing from the administrative filing, at trial and through appeal and have represented both employers and employees. It is from this broad perspective that I provide my testimony.¹

My testimony will focus on two issues which the Supreme Court recently addressed. In *Gross v. FBL Financial Services, Inc.*, the Court undermined Congress's legislative intent and narrowed the interpretations of the Age Discrimination in Employment Act in a way that makes it harder for older workers to prove age claims, while potentially impacting many other federal antidiscrimination laws.² The five-member *Gross* majority decision prompted the four justices in dissent to note that the majority was unconcerned that the "question it chooses to answer has not been briefed by the parties or interested *amici curiae*," and that the majority's "failure to consider the views of the United States, which represents the agency charged with administering the ADEA [was] especially irresponsible."³ In *14 Penn Plaza LLC v. Pyett*, the Court upheld a pre-dispute mandatory arbitration clause in a collective bargaining agreement. The decision restricts employees who never personally agreed to binding arbitration and their ability to bring discrimination claims in court, long before any disputes actually arise.⁴ In these decisions, the majority chastises Congress for not being more specific as to its intent and appears to challenge Congress to act if it desires a different outcome in these types of cases.⁵

Gross and *Pyett* reflect a disturbing trend by a narrow Supreme Court majority that seems willing to ignore Congress's clear intent, thus significantly narrowing the protections afforded by civil rights laws.⁶ This is not a new issue for Congress, as just last year Congress reversed the same majority's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*⁷ by passing the Lilly Ledbetter Fair Pay Act.⁸

¹ A copy of my biography is attached.

² 129 S. Ct. 2343 (2009).

³ *Id.* at 2353 (Stevens, J., dissenting).

⁴ 129 S. Ct. 1456 (2009). *Gross*, 129 S. Ct. at 2349 n.3 (majority opinion).

⁵ Referring to a broader interpretation of the ADEA, the *Gross* majority said, "[T]hat is a decision for Congress to make." *Gross*, 129 S. Ct. at 2349 n.3. In upholding the pre-dispute arbitration clause in *Pyett*, the majority noted that "Congress is fully equipped to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Pyett*, 129 S. Ct. at 1472 (internal quotation omitted). In both cases, the five justices in the majority hung their hat on what they deemed was Congress's failure to act.

⁶ One area of discrimination law where the Court has been protective of employees' rights is under the anti-retaliation protections designed to insure employees do not suffer because they exercise their rights under the various employment discrimination laws. See *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009); *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008); *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008); *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

⁷ 550 U.S. 618 (2007).

⁸ In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Court held that "an employee wishing to bring a Title VII lawsuit must first file an EEOC charge within . . . 180 days 'after the alleged unlawful employment practice occurred,'" and that new violations did not occur because of non-discriminatory acts (here, the issuing of paychecks). 550 U.S. 618, 621 (2007). The *Ledbetter* dissent specifically called upon Congress to act to correct the "Court's parsimonious

I. The Supreme Court's Decision In *Gross* Sends A Message To Congress – If You Want Us To Provide Protections Against Discrimination, Be Specific.

The prohibitions against age discrimination in the workplace have never been viewed as providing less protection for older workers, or stated alternatively, as allowing more discrimination against older workers than the protections under Title VII of the Civil Rights Act of 1964. Yet this is effectively *Gross*'s outcome. The majority's decision has made it significantly more difficult to bring an age discrimination claim and requires employees who are victims of age discrimination to meet a higher burden of proof than someone alleging discrimination based upon race, color, religion, sex, or national origin under Title VII. This result runs contrary to our national commitment to equality. Congress should thus take positive steps to ensure that our civil rights and employment laws protect all American workers.

A. Congress Did Not Intend For Age Discrimination To Be Treated Differently Than Other Types Of Discrimination.

In *Gross* the five-member majority held that a plaintiff cannot bring a mixed-motive age discrimination claim under the ADEA⁹ and must prove "but-for" causation.¹⁰ Thus, the Court concluded that even though age was a "motivating" factor for the adverse employment action, as the jury determined in Mr. Gross's case, this is not enough to prove a violation of the ADEA.¹¹ This interpretation ignored Court precedent and the unmistakable intent of Congress, increasing the burden on older employees, creating confusion in the lower courts, and increasing litigation costs.

The majority based its holding on the notion that the prohibitions against discrimination in the ADEA and Title VII need not be treated consistently unless Congress states this explicitly.¹² Because of identical language in both statutes, the majority requires an employee claiming age discrimination to prove more: they must now prove "but-for" causation. This standard was rejected by the Court in *Price Waterhouse v. Hopkins*,¹³ as well as by Congress in the 1991 Amendments to the Civil Rights Act. The majority's decision ignores a significant line of cases holding that the language of both statutes should be interpreted consistently and applied with equal force.¹⁴

Congress has never said or implied that age discrimination is any less pernicious than discrimination against Title VII-protected groups, or that age discrimination should be harder to

reading of Title VII." *Id.* at 661 (Ginsburg, J., dissenting). Congress indeed responded by passing the Lilly Ledbetter Fair Pay Act, which clarified that the 180-day statute of limitations resets each time "a discriminatory compensation decision . . . occurs" Pub. L. No. 111-2, 123 Stat. 5 (2009).

⁹ 129 S. Ct. at 2351.

¹⁰ *Id.* at 2346.

¹¹ *Id.* at 2347.

¹² *Id.* at 2350.

¹³ 490 U.S. 228, 249-50 (1989) (plurality opinion); *id.* at 259-60 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment).

¹⁴ 129 S. Ct. at 2354-55 & n.5 (Stevens, J., dissenting) (citing numerous circuit court opinions applying *Price Waterhouse* to ADEA claims).

prove. Congress has been unequivocal about its desire to eliminate *all* discrimination in the workplace—including age discrimination.¹⁵ Likewise, Congress modeled the ADEA on Title VII.¹⁶ *Gross* ignores the long-standing interpretation of the ADEA and the fundamental relationship that exists between the statutes. The resulting difficulties require Congress to act to ensure that the ADEA is not stripped of all its intended power, and to ensure that employees continue to have this fundamental right that Congress has worked tirelessly to protect.

B. Gross Increases The Burden Of Proof For Older Employees.

The impact of *Gross*—that older workers attempting to prove unlawful discrimination have a much higher burden—was immediately recognized:

- “The ‘but-for’ causation standard . . . makes it *much more* difficult for plaintiffs to prevail in age discrimination cases . . . [I]t is not enough to show that age may have influenced the employer’s decision.” “[A] significant victory for employers.”¹⁷
- “Supreme Court Majority Makes It Harder for Plaintiffs to Prove Age Discrimination Under the ADEA”¹⁸
- Without the “traditional ‘mixed motive analysis,’ . . . [plaintiffs’] job in court [will be] much more difficult.”¹⁹
- A “sea change in current law [which] might even indicate a seismic shift in the Supreme Court’s interpretation of statutes that deal with employment.”²⁰

This was not simply a “sky is falling” reaction by the media. Courts immediately understood *Gross*’s importance, and that it significantly changed the rules of the game for those attempting to prove age discrimination:

- “In the wake of [*Gross*] it’s not enough to show that age was *a* motivating factor. The Plaintiff must prove that, but for his age, the adverse action would not have occurred.”²¹

¹⁵ In *McKennon v. Nashville Banner Publ’g Co.*, the majority stated, “The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide.” 513 U.S. 352, 357 (1995).

¹⁶ *Lorillard v. Pons*, 434 US 575, 584 (1978).

¹⁷ *Supreme Court EEO Decisions Present Mixed Results for Employers*, 25 No. 7 TERMINATION OF EMP. BULL. 1 (July 2009) (emphasis added).

¹⁸ *Supreme Court Majority Makes It Harder for Plaintiffs to Prove Age Discrimination Under the ADEA*, 23 No. 6 EMP. L. UPDATE 1 (June 2009).

¹⁹ Timothy D. Edwards, *Supreme Court Rejects Mixed-Motive Jury Instruction in Age Discrimination Case*, 18 No. 8 WIS. EMP. L. LETTER 4 (Aug. 2009).

²⁰ Michael Newman & Faith Isenhath, *Supreme Court Gives Mixed-Motive Analysis a Mixed Review*, 56 FED. LAW. 16 (Aug. 2009).

²¹ *Martino v. MCI Commc’ns Servs., Inc.*, 574 F.3d 447, 454 (7th Cir. 2009).

- “The ‘burden of persuasion does not shift to the employer to show that they would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.’”²²
- “[T]his Court interprets *Gross* as elevating the quantum of causation required under the ADEA. After *Gross*, it is no longer sufficient for Plaintiff to show that age was a motivating factor in Defendant's decision to terminate him.”²³
- The burden of persuasion does not shift to the employer “even when plaintiff has produced some evidence that age was one motivating factor in that decision.”²⁴

Under the increased burdens imposed by the “but for” standard, courts are already dismissing age claims for failure of proof based upon *Gross*.²⁵

C. Some Courts Are Even Reading *Gross* As Requiring Age To Be The Sole Cause, Leading To Nonsensical Results.

Courts are consistent in holding that *Gross* narrows the ways that age discrimination can be proven under the ADEA. Their varied applications, however, have resulted in confusing decisions, which stand congressional intent on its head.

In *Culver v. Birmingham Board of Education*, the plaintiff brought Title VII and ADEA claims. The court dismissed his ADEA claim, holding that “*Gross* holds for the first time that a plaintiff who invokes the ADEA has the burden of proving that the fact he is over 40 years old was the *only* or the ‘*but for*’ reason for the alleged adverse employment action. The only logical inference to be drawn from *Gross* is that an employee cannot claim that age is a motive for the employer's adverse conduct and simultaneously claim that there was *any* other proscribed motive involved.”²⁶ In other words, a plaintiff can never plead a mixed-motive claim. To do so would admit that another motive was at play which, under this court's interpretation of *Gross*, would foreclose the age claim. Similarly, in *Love v. TVA Board of Directors*, the plaintiff alleged that he was fired because of his race and age.²⁷ The trial court found that *Gross* imposed a new standard, and that while under his race claim he could prove a violation under the traditional methods of proof, for his age claim he must prove “that his age was *the* reason for his nonselection.” Accordingly, the court dismissed his ADEA claim, reasoning that since race had been a factor, he could not prove that, under *Gross*, age was the sole factor.²⁸ In *Wardlaw v. City*

²² *Geiger v. Tower Automotive*, No. 08-1314, 2009 WL 2836538, at *4 (6th Cir. Sept. 4, 2009).

²³ *Fuller v. Seagate Technology*, No. 08-665, 2009 WL 2568557, at *14 (D. Colo. Aug. 19, 2009).

²⁴ *Woehl v. Hy-Vee, Inc.* No. 08-19, 2009 WL 2105480, at *4 (S.D. Iowa, July 10, 2009).

²⁵ In *Wellesley v. Debevoise & Plimpton, LLP*, a Second Circuit panel cited *Gross* and held that since the plaintiff did not provide evidence of “but-for” age discrimination, her claims should be dismissed. No. 08-1360, 2009 WL 3004102, at *1 (2d Cir. Sept. 21, 2009). Similarly, in *Guerro v. Preston*, the court cited *Gross* and dismissed the plaintiff's claims because she failed to satisfy “but-for” causation. No. 08-2412, 2009 WL 2581569, at *6 (S.D. Tex. Aug. 18, 2009). Finally, in *Fuller v. Seagate Technology*, the court dismissed a plaintiff's ADEA claim, because he failed to prove direct causation. No. 08-665, 2009 WL 2568557, at *14 (D. Colo. Aug. 19, 2009).

²⁶ No. 08-31, 2009 WL 2568325, at *1 (N.D. Ala. Aug. 17, 2009).

²⁷ No. 06-754, 2009 WL 2254922 (M.D. Tenn. July 28, 2009).

²⁸ *Id.* at *9-10.

of *Philadelphia Streets Department*, the court dismissed the plaintiff's claims of gender, disability, age, and race discrimination. The disturbing aspect of the case is that the court dismissed the age claim because she alleged discrimination on other protected bases; thus, according to the court, she could not show that age was the sole factor.²⁹

D. The Gross Ruling Threatens To Impact The Burdens Of Proof Under Other Laws Prohibiting Discrimination In Employment.

There are hundreds of federal and state laws prohibiting discrimination in employment. Many use the "because of" standard codified in Title VII and the ADEA. Under *Gross*, this language does not need to be applied consistently across these statutes. The result will be confusion and increased litigation over the burdens of proof under all of these statutes unless Congress acts to stem this tide.

A recent Third Circuit decision under 42 U.S.C. § 1981 exemplifies the confusion the courts will be confronting. While the majority in *Brown v. J. Kaz, Inc.* did not believe that *Gross* had any impact on the litigation of Section 1981 claims,³⁰ the concurring opinion pointed out that simply continuing to use Title VII analysis for Section 1981 mixed-motive claims "ignores the fundamental instruction in *Gross* that analytical constructs are not to be simply transposed from one statute to another without a thorough and thoughtful analysis."³¹ *Gross* has opened the door for increased litigation over the appropriate burden of proof under many of these statutes. Congress should step in to clarify the very important issue.

As the cases mentioned show, the results of the *Gross* decision are proving to be a harsh reality for older workers who, prior to *Gross*, would have had an opportunity to show that age was a consideration in the employment decision. That includes Mr. Gross, whose jury had returned a verdict finding discrimination and awarding him lost compensation.³² What these cases also make clear is that *Gross* has ramifications far beyond the ADEA and that it is having an immediate and detrimental effect on plaintiffs bringing non-age-based employment discrimination claims. Unless Congress acts to specifically express its intent, the courts will continue to narrowly construe the ADEA in a way that enables workplace discrimination.

²⁹ Nos. 05-3387, 07-160, 2009 WL 2461890, at *7 (E.D. Pa. Aug. 11, 2009). Some courts even question whether the *McDonnell-Douglas* burden-shifting framework still applies to the ADEA or, if it does apply, whether a heightened standard is required." See, e.g., *Bell v. Raytheon Co.*, No. 08-702, 2009 WL 2365454, at *4 (N.D. Texas July 31, 2009) (citing *Gross*, 129 S. Ct. at 2349 n.2) ("Recently, however, the United States Supreme Court issued a decision that questions whether the *McDonnell-Douglas* approach should be applied in ADEA cases."); *Holowecki v. Fed. Express Corp.*, No. 02 Civ. 3355, 2009 WL 2251662, at *10 (S.D.N.Y. July 29, 2009) (citing *Gross*, 129 S. Ct. at 2349 n.2) ("Whether *Gross*, by implication, also eliminates the *McDonnell-Douglas* burden-shifting framework in ADEA cases was left open by the Court . . .").

³⁰ No. 08-2713, 2009 WL 2902248, at *8 (3d Cir. Pa. Sept. 11, 2009).

³¹ *Id.* at *9 (Jordan, J., concurring).

³² *Gross*, 129 S.Ct. at 2347.

II. The Impact Of The Supreme Court's Decisions To Allow Pre-Dispute Arbitration Agreements In The Employment Context.

The second issue that I will address today is the impact of mandatory arbitration of employment claims arising under the federal laws prohibiting unlawful discrimination. At its core, this issue is about how much we, as a society, value the civil rights of our workers. Pre-dispute mandatory arbitration is an issue that is not only timely, but critical as we, as a nation, continue to struggle to ensure equal employment opportunities for all. It is important to recognize at the outset that pre-dispute mandatory arbitration is not just an employment issue or a civil rights issue; it is an issue that cuts to the core of this country's ideals of equality and due process.

For over half of a century, our society and this Congress has struggled with issues concerning equal employment opportunities and attacked the problem of employment discrimination through significant legislation including Title VII, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Equal Pay Act, to name a few. In keeping with our national commitment to equality, Congress created a framework for enforcing these rights through individual lawsuits, litigation by the Attorney General, and the efforts of federal agencies, like the Equal Employment Opportunity Commission, tasked with enforcing laws against employment discrimination. In doing so, Congress established a plan for combating discrimination through an open, fair process governed by the rule of law and administered by impartial judges and juries that allowed for public accountability. In fact, as recently as 1991, Congress acted to protect employees by codifying their right to a jury trial in Title VII cases.

Congress has also recognized that permitting parties to use alternative dispute resolution is an important tool in the enforcement of federal antidiscrimination laws.³³ Indeed, Section 118 of the Civil Rights Act of 1991 encourages the use of various types of alternative dispute resolution in the employment context. However, it is hard to imagine that Congress, when it recognized a role for the voluntary resolution of employment disputes, envisioned a system that allows employees to be deprived of the very rights Congress has worked tirelessly to protect. Pre-dispute mandatory arbitration clauses hidden in employment applications and employee handbooks are being implemented by employers in a manner that leaves employees no real choice, forcing them to arbitrate their claims. If this result is not what Congress intended, then according to the Supreme Court, Congress needs to clarify how arbitration should be used in the adjudication of employment disputes.

Ignoring the very real impact that pre-dispute mandatory arbitration has on workers, a five-justice majority of the Supreme Court in a recent line of cases has allowed employers to unilaterally implement these agreements. These rulings effectively deprive employees of their federally protected rights and distort the role Congress intended alternative dispute resolution to

³³ Section 118 of the Civil Rights Act of 1991 provides "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution including ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." 42 U.S.C. § 12212.

play in the employment context. In its most recent ruling, this slim majority³⁴ made it clear that it will continue down this path unless Congress directs otherwise.

A. In Recent Cases, The Supreme Court Has Misinterpreted The Role Arbitration Should Play Under The Federal Laws Prohibiting Discrimination In Employment.

The Court's view towards arbitration of civil rights claims has changed dramatically since the landmark decision in *Alexander v. Gardner-Denver*. There, the Court recognized that "there can be no prospective waiver of an employee's rights under Title VII."³⁵ In the years since *Gardner-Denver*, the Court has handed down several decisions that have incrementally eroded employees' rights to litigate their discrimination claims in a federal forum. Beginning with *Gilmer v. Interstate/Johnson Lane Corp.*, the Court ruled that a plaintiff's ADEA claim was properly the subject of arbitration.³⁶ The *Gilmer* Court discussed many of the differences between arbitration and federal litigation including potential arbitrator bias, limited discovery, lack of written opinions, and disparity in bargaining power. The Court concluded, however, that in this case the NYSE rules governing the arbitration provided sufficient protection of the individual's rights.

In *Circuit City Stores, Inc., v. Adams*, the Supreme Court held that the scope of the exemption from coverage enunciated by the residual clause of Section 1 of the Federal Arbitration Act extends solely to transportation workers, and not to all employees engaged in commerce.³⁷ This allowed all employment contracts, except for those of transportation workers, to be subject to the Federal Arbitration Act.³⁸ While seemingly a technical decision with limited impact, this decision opened the gates for the use of mandatory arbitration agreements and allowed employers to adopt them *en masse*.

Last term, in *14 Penn Plaza LLC v. Pyett*, the Court, by a five-to-four majority, extended the reasoning in *Circuit City* and *Gilmer*. At issue in *Pyett* was whether a union could permissibly include in its collective bargaining agreement a requirement that all ADEA claims be brought to binding arbitration. The Court concluded that collective bargaining agreements can mandate binding arbitration.³⁹ This decision allows unions to collectively bargain away an

³⁴ The majority in *Pyett* is the same as the majority in *Gross*, and in *Ledbetter v. Goodyear Tire & Rubber Co.*, see *supra* note 8.

³⁵ *Alexander v. Gardner-Denver*, 415 U.S. 36, 51 (1974).

³⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)

³⁷ *Circuit City Stores v. Adams*, 532 U.S. 105, 119 (2000).

³⁸ Justice Stevens's dissent highlights the "extensive and well-documented" legislative history of the Federal Arbitration Act that the majority opinion does not address. *Circuit City*, 532 U.S. 105, 125 (2000) (Stevens, J., dissenting). This history explains that the original text of the FAA bill, which did not have an employment exemption provision, was opposed by representatives of organized labor because of their fear that employment contracts might be subjected to arbitration. *Id.* at 126-27. The drafters responded to this objection by amending the bill to exempt all employment contracts. *Id.* Justice Stevens explained that "another supporter of the bill, then Secretary of Commerce Herbert Hoover, suggested that 'if objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating 'but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.'" *Id.* at 127. Four justices agreed with Justice Stevens's reading of the FAA.

³⁹ 129 S.Ct. at 1466.

individual employee's right to pursue their federally protected anti-age discrimination claim in federal court, even when there is no individual consent by the employee.

Mr. Pyett worked for 14 Penn Plaza in various positions and had been effectively demoted, resulting in decreased wages, and other harms. The union decided that it could not represent Mr. Pyett in these grievances because they had consented to the changes that resulted in his demotion. Mr. Pyett filed a complaint with the EEOC, and finally filed suit in federal district court. Defendants filed a motion to compel arbitration, which the district court denied, and the Second Circuit affirmed. The Second Circuit followed *Gardner-Denver*, which mandates that there be no prospective waiver of an employee's claims under Title VII. The Second Circuit held that a union could not bargain for pre-dispute binding arbitration clauses in its contracts, even though an individual employee could do so.⁴⁰

The Supreme Court reversed, holding that a union could bargain for pre-dispute binding arbitration clauses that covered employment discrimination claims.⁴¹ As a result, a union can now force its members to arbitrate their civil rights claims. The Court in *Pyett* effectively overruled the *Gardner-Denver* line of cases, even if it stated that it was doing otherwise.⁴² More importantly, the Court declared that is up to Congress to decide if the ADEA should forbid pre-dispute arbitration in the resolution of claims.⁴³ Clearly, this trend of forcing employees into arbitration without any real consent will continue unless Congress expressly mandates a better course.

B. Many Employees Have No Choice In Whether To Submit Their Civil Rights Claims To Pre-Dispute Mandatory Arbitration.

Seeing a way to minimize the costs associated with violating civil rights laws, employers are increasingly turning to pre-dispute mandatory arbitration. In 1979, only a small percentage of employers used arbitration for employment disputes. According to most recent estimates, arbitration instead of litigation is the primary means used to resolve disputes for at least one-third of nonunion employees.⁴⁴ Additionally, around 15% to 25% of employers nationally have adopted mandatory employment arbitration procedures.⁴⁵ The stark reality is that all too often in today's economy, employees have no choice but to surrender their rights and accept mandatory arbitration. Many employees do not have the luxury of choosing when, and under what

⁴⁰ *Id.* at 1461.

⁴¹ *Id.* at 1474.

⁴² A four-justice dissent pointed out that the majority's decision effectively overruled *Gardner-Denver*. Justice Stevens explained that "[b]ecause the purposes and relevant provisions of Title VII and the ADEA are not meaningfully distinguishable, it is only by reexamining the statutory questions resolved in *Gardner-Denver* through the lens of the policy favoring arbitration that the majority now reaches a different result." *Pyett*, 129 S.Ct. 1456, 1475 (2009) (Stevens, J., dissenting).

⁴³ *Id.* at 1472.

⁴⁴ Alexander Colvin, *Conflict at Work in the Individual Rights Era: An Examination of Employment Arbitration* 1 (January 4, 2009) (Presented at Labor & Employment Relations Association 61st Annual Meeting; available from author).

⁴⁵ See Alexander Colvin *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?* 11 EMP. RTS. & EMP. POL'Y J. 405, 411 (2007). Describing it as a conservative estimate, Professor Colvin extrapolates the 25% figure from his 2003 finding that 23% of the non-union telecommunications workforce was covered by mandatory arbitration programs.

conditions, to submit to arbitration, because employers often make such agreements a job requirement. Employees who refuse to sign a mandatory arbitration agreement could lose their current jobs or be denied a new position. Additionally, employers add binding arbitration clauses to employee handbooks or existing employment contracts, requiring all employees to accept these new agreements or resign.

In formulating public policy we must not divorce ourselves from the reality of life for many Americans: if a blue-collar worker refuses to sign a job application containing a pre-dispute mandatory arbitration clause, or a separate arbitration agreement included in a stack of documents piled before them on their first day of the job, do you honestly think the employee would get the job?⁴⁶ We all know what would happen, especially in today's economy: the employer would just go on to the next applicant who signed the arbitration agreement, regardless of whether that worker knew he or she was agreeing to submit his or her civil rights claims to mandatory arbitration or what that really meant.

For many employees, the only real choices they face are ones like:

- Passing up a paycheck that would help put food on the table or signing a job application stating that one's signature constitutes an agreement to binding arbitration of any dispute;
- Risking foreclosure from unpaid mortgage bills or agreeing to submit their supposedly federally guaranteed civil rights to mandatory arbitration; or
- Giving up the chance to finally get health care benefits or signing away their right to a jury trial.

These employees do not really have a choice at all. Lacking any other option but to accept mandatory arbitration, many employees are stuck trying to enforce their federally protected civil rights in a system selected and dominated by their employer.

One example of this trend can be found in the recent decision of *Ellerbee v. GameStop, Inc.*⁴⁷ After several years of employment, the plaintiff, Mr. Ellerbee, received notice that GameStop was implementing new procedures for dispute resolution. The company provided each employee with a copy of the new rules and required them to sign a form acknowledging its receipt. Mr. Ellerbee refused to sign, and informed his supervisor of his desire to consult his attorney. Mr. Ellerbee's supervisor warned him that continued employment would constitute express agreement with the terms, and would require arbitration of all covered claims. A month later, Mr. Ellerbee was fired for alleged insubordination and filed a Title VII claim in federal

⁴⁶ This assumes that the applicant is actually aware of the pre-dispute mandatory arbitration requirement. Even if some employees would object to unfair and burdensome pre-dispute mandatory arbitration clauses, such clauses are often deeply buried in the small print of lengthy employment contracts, and can be so unclear that most employees do not truly understand the consequences of signing the agreement.

⁴⁷ 604 F. Supp. 2d 349 (D. Mass. 2009).

court alleging discrimination based on race. The court dismissed the complaint, and ordered the parties to proceed with arbitration.⁴⁸

Jamie Leigh Jones' case is another eye-opening example of the injustice in pre-dispute arbitration agreements for employees. In *Jones v. Halliburton Co.*,⁴⁹ Ms. Jones, who has testified here today, was working for Halliburton in the "green zone" in Baghdad, Iraq, and living in employer-provided housing. She was brutally raped and beaten by men living alongside her in the barracks. In her employment contract with a subsidiary of Halliburton, she had signed an arbitration agreement that took away her right to file a federal claim against her employer for disputes related to her employment. The effect of the arbitration clause was to first bring into question her ability to bring any claim, state or federal, before a judge, and absolutely blocked her ability to bring a federal sexual harassment claim against Halliburton in the federal courts. Additionally, the arbitration clause limited her ability to conduct a meaningful investigation for the purpose of bringing her attackers to justice and preventing these events from happening again.

Even for Ms. Jones, there may be disputes that arise in the employment context that she would prefer to have arbitrated rather than submit to a court. But this brutal attack by her co-workers was not one of those cases. At the very least, employees like Ms. Jones are entitled to a meaningful choice as to which forum is best for resolving their claims.

C. Pre-Dispute Arbitration Agreements Have A Real Impact On An Employee's Substantive Right To Be Free From Discrimination.

Employees should have a real choice in whether or not they want to submit their claims to arbitration because of the significant differences between arbitration and federal litigation. By insuring a meaningful choice, Congress gives meaning to the substantive and procedural protections it worked so hard to include in the laws prohibiting workplace discrimination, while still allowing for the appropriate use of alternate dispute resolution.

Congress intended to grant employees the right to litigate federal anti-discrimination laws before an impartial jury. This intention was reinforced by the passage of the 1991 Amendments to the Civil Rights Act, and provided for additional remedies to deter unlawful harassment and intentional discrimination. Congress recognized that there is value in vindicating anti-discrimination rights in a public forum to ensure accountability and to maximize the deterrent function of those laws. In the 1991 Amendments, Congress encouraged the use of alternative dispute resolution in employment discrimination cases, but Congress clearly intended only to supplement lawsuits in federal court in appropriate circumstances, not supplant them.

Employees' right to choose for themselves the appropriate forum to adjudicate their claims should be protected because mandatory arbitration agreements can lack the safeguards,

⁴⁸ See also *Seawright v. Am. General Fin. Servs., Inc.*, 507 F.3d 967, 973 (6th Cir. 2007) (finding that continued employment constitutes assent to arbitration agreement); *Hardin v. First Cash Fin. Servs., Inc.*, 465 F.3d 470, 476 (10th Cir. 2006) (same).

⁴⁹ *Jones v. Halliburton Co.*, 2009 WL 29400061 (5th Cir. Sept. 15, 2009).

accountability, and impartiality of the system Congress created, allowing employers to bypass some of the most important protections built into anti-discrimination legislation.

- Serious questions remain about the fairness to employees under the arbitration process. Private arbitrators, who are selected by the employer, depend on the employer for repeat business, and thus have an incentive to rule in favor of the employer. In fact, despite the clear conflict of interest that arises, employers sometimes finance the arbitration. In such cases, the arbitrator may feel obliged to rule in favor of the party that is paying the bill.⁵⁰
- Mandatory arbitration agreements deny employees their day in court before an impartial judge and a jury of their peers. Mandatory arbitration forces employees to forego the traditional court system and present their claims before arbitrators who are not required to know or follow established civil rights and employment law.
- The limited right to appeal arbitration decisions is a critical difference between arbitration and civil litigation. Courts are permitted to overturn such decisions only under extreme circumstances and even the existence of clear errors of law or fact in an arbitrator's decision does not provide grounds for appeal.
- The lack of meaningful discovery in arbitration makes it difficult for plaintiffs to compile evidence of discrimination. This provides employers a distinct advantage as employees bear the burden of proof, and as discussed above, after the *Gross* decision in some cases the burden is to show the discriminatory reason was the *sole* reason for the adverse action.
- Arbitration narrows the remedies available to employees that prevail on their discrimination claims. Unlike a federal court, arbitration does not provide for injunctive relief and rarely allows punitive damage awards.
- Arbitration also imposes stringent filing requirements, which gives employees less time to prepare and build their case than they would have in an identical claim brought in federal court.
- An employee's right to bring a class action lawsuit in arbitration, which is an efficient and useful tool to combat wide-ranging discrimination, is not guaranteed. Employers often force their employees to sign mandatory arbitration agreements that include prospective waivers of their right to bring a class action.

⁵⁰ See Alexander Colvin, *Conflict at Work in the Individual Rights Era: An Examination of Employment Arbitration* 15 (Jan. 4, 2009) (discussing the concerns of employees that arbitrators will favor employers during arbitration in hopes of securing future business). The available data supports this concern. For example, between January 1, 2003 and March 31, 2007, AAA's public records show that AAA held 62 arbitrations for Pfizer, of which 29 reached a decision. Of these 29 cases, the arbitrator found for the employer 28 times—a decision rate of 97 percent for the employer. Similarly, Halliburton's win rate was 32 out of 39 cases that went to decision—an 82 percent win rate for the employer. See *Hearing on H.R. 3010, The Arbitration Fairness Act of 2007 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. (2007)* (Testimony of Ms. Cathy Ventrell-Monsees, Esq.).

- Arbitrations are almost always held in private settings, and most decisions are not publicly available. This spares employers from the negative publicity that otherwise would provide a strong incentive to proactively address discrimination and harassment.

Allowing an employee to choose between arbitration and federal litigation after a dispute arises provides them the ability to bargain for the safeguards they deem integral to the process. Guaranteed arbitrator impartiality, full discovery, and articulated remedies can all be negotiated to ensure that employees' civil rights are protected. It is one thing to permit employees to willingly and knowingly agree to resolve an existing dispute through arbitration. It is quite another to allow vulnerable employees to be forced by their circumstances to rely on mandatory arbitration to enforce their civil rights and maintain our nation's commitment to equality.

III. The Supreme Court Has Made Clear That If Congress Intends A Different Result, They Need To Address It Through Legislation.

Both *Pyett* and *Gross* demonstrate how a slim majority of the Court has narrowly construe federal antidiscrimination laws. In the *Pyett* majority's view, Congress has failed to explicitly and clearly express its will.⁵¹ As Justice Ginsburg noted in the *Ledbetter* decision, "Once again, the ball is in Congress' court."⁵²

The Court's decisions have detrimentally affected plaintiffs' ability to access the courts and to obtain relief for employment discrimination. If Congress wishes to secure the rights it thought it guaranteed in the civil rights laws, it must act to clarify that intent. As the Supreme Court has said, "It is for the Congress, not the courts, to consult political forces and then decide how best to resolve conflicts in the course of writing the objective embodiments of law we know as statutes."⁵³

⁵¹ *Gross*, 129 S. Ct. at 2349 ("We cannot ignore Congress' recent decision to amend Title VII's relevant provisions but not make similar changes to the ADEA.")

⁵² 550 U.S. at 661 (Ginsburg, J., dissenting).

⁵³ *Circuit City*, 532 U.S. at 120.

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Professor Michael Foreman is the Director of the new Civil Rights Appellate Clinic at Penn State's Dickinson School of Law. He also teaches an advanced employment discrimination course. Immediately prior to joining Penn State Law he served as the deputy director of Legal Programs for the Lawyers' Committee for Civil Rights Under Law, where he was responsible for supervising all litigation in employment discrimination, housing, education, voting rights, and environmental justice.

Professor Foreman's professional and scholarly focus has centered primarily on civil rights issues and employment discrimination. Prior to his role with the Lawyers' Committee, Professor Foreman was the acting deputy general counsel for the U.S. Commission on Civil Rights. He previously served as a clinical supervisor in the Southern Methodist University School of Law Civil Clinic and was a partner in the Baltimore, Maryland, law firm Kaplan, Heyman, Greenberg, Engelman & Belgrad, P.A., where he led the firm's Employment Law Group. Prior to his work with the law firm, Professor Foreman was general counsel for the Maryland Commission on Human Relations and was an appellate attorney with the Equal Employment Opportunity Commission.

In 1998, Shippensburg University honored Professor Foreman with the Jesse S. Heiges Distinguished Alumnus Award. He also has been awarded the Carnegie Medal for Outstanding Heroism, and last year was selected as a Wasserstein Fellow by Harvard Law School, which recognizes dedicated service in the public interest.

Recent Presentations:

July 15, 2009, a panelist on the ALI-ABA Teleseminar "Supreme Court Employment Law Update 2009"

June 24, 2009, a panelist at the National Employment Lawyers Association's 20th Annual Convention, presented "Retaliation Redux," discussing the Supreme Court's recent decisions on retaliation in the workplace.

March 27, 2009, presented "Title IX: What's Hot, What's Not and How We Got There" presented as part of Penn State Women's History Month: A Celebration of Penn State Women's Athletics.

March 4, 2009, a panelist in a legal roundtable at the 2009 Higher Education Symposium held at the Southern Methodist University in Dallas, Texas, discussing the Supreme Court Employment Docket

An Equal Opportunity University

Testimony of Michael W. Fox
Shareholder, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

Before the
Judiciary Committee
of the
United States Senate

Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws
Designed to Protect Workers from Employment Discrimination?

Chairman Leahy, Ranking Member Sessions and Members of the Committee, I am pleased and honored to be here today. Thank you for your kind invitation.

By way of introduction, unlike many witnesses who appear before Congressional committees, I am truly from outside the Beltway. I am a trial lawyer from Texas. For more than 30 years I have represented employers in labor and employment law matters. In my career I have handled thousands of adversarial disputes between employees and employers, including a substantial number which were not resolved until they had been tried to a jury verdict, an arbitrator's ruling or a judge's decision after a bench trial. Many, in fact most, of those actions have involved discrimination claims under both federal and state law.

I am a Fellow in the College of Labor and Employment Lawyers, and have been listed for many years in the Best Lawyers in America in Labor and Employment Law. I have been Board certified in Labor and Employment Law by the Texas Board of Legal Specialization for more than 25 years and have been selected as a "Super Lawyer" in employment litigation by the Texas Monthly. Finally, I have been honored to be selected as one of America's Leading Lawyers for Business by Chambers, U.S.A. Since 2002, I have been the author of Jottings By an Employer's Lawyer, the first labor and employment law-related blog where I comment on employment law-related matters.

I am fortunate to be a member of one of the largest firms in the United States that devotes its practice to labor and employment law matters. Ogletree, Deakins has more than 450 lawyers in 35 offices, from Los Angeles to Miami. We are honored to represent a broad range of America's diverse employers in their labor and employment law matters, from small family businesses to over one-half the Fortune 50.

I would like to acknowledge the assistance of one of my colleagues, Richard L. Hurford, of the Bloomington Hills, Michigan office of Ogletree, Deakins who prepared the section of this written testimony dealing with *Circuit City v. Adams* and the arbitration of employment matters.

My professional career has provided me a ring side seat to the changing American work place. There is no question that the work place has not only changed, but is significantly better, particularly for women and minorities than it was when I was licensed to practice law in 1975. There also can be no question that the Civil Rights Act of 1964, passed by Congress and signed by my fellow Texan, President Johnson, and the other federal legislation that followed have been significant and positive factors in that change. More germane to today's discussion, there should also be no question that the law which has provided the base for the improved workplace has developed and flourished under the interpretation and guidance of the Supreme Court, in its many combinations that have existed since the first Title VII case, *Griggs v. Duke Energy* was decided in 1971.

Answering the question posed by today's hearing topic —Has the Supreme Court Been Misinterpreting Laws Designed to Protect Workers from Employment Discrimination? — my answer is, clearly not. The judicial branch, headed by the Supreme Court, has been faced with a monumental challenge, ensuring that Congress' purpose as set forth in Title VII, the Age Discrimination in Employment Act and the Americans with Disabilities Act to ensure a

workplace free of discrimination because of an employees' race, color, national origin, religion, sex, age or disability, is met. Doing so requires a careful balancing act of congressional intent, the facts of the case, and the legitimate rights of business to run its business in compliance with all applicable laws. There must be forceful actions to ensure compliance, while being careful to avoid unnecessarily and improperly interfere with the myriad of lawful personnel decisions that must be made by all employers to ensure a successful business. Courts have repeatedly, and wisely, disclaimed any desire to serve as "super HR departments." It should also be remembered that there are three constituencies affected by the interpretation of these laws. Not only are there employees who claim that their rights under federal law have been violated and their employers as an entity, but there are also those individuals, supervisors and managers in businesses of all sizes, who may feel that they have been wrongfully accused of intentional racial, sexual or some other form of prohibited discrimination. Fairness requires that all their interests must be protected.

Finding the proper balance is no easy task For the courts or the Congress. Much as the common law develops over time, through experimentation and adjustment, the law of the workplace has been and continues to develop under the direction given by the courts, in the context of the framework created by Congress. Interference with that incremental process by legislative actions, which once made will, realistically, not be changed, should come only after a convincing case that such a correction is necessary for the overall good, rather than in response to one seemingly "wrong" outcome or anecdotal evidence of abuse. It is the overall trajectory that should dictate legislative action, not one decision. To do otherwise endangers the experimentation and natural development of the very complex organism that is today's system of workplace regulation.

In my view, two recent actions of Congress illustrate the difference of approach. Regardless of one's view on the merits of the Supreme Court's decisions interpreting the Americans with Disabilities Act, it is clear that a substantial difference of opinion existed between Congress and the Court over the proper course. The Court's opinions had drawn a narrower view of the reach of legislation than that of Congress. It was not one opinion by the Court, but a number of cases highlighted by a trio of decisions in June, 1999¹ and the 2002 decision in *Toyota Motor Manufacturing*². Still, before acting Congress had not only the Supreme Court's interpretation but the subsequent actions of the lower courts in applying those decisions, before enacting major statutory changes late last year. Although it is too soon to predict exactly how those amendments will play out, it is at least fair to say that Congress did not act precipitously to amend the statute.

By contrast, the Lilly Ledbetter Fair Pay Act, taken up as a perceived political football in this past year's Presidential campaign and passed within the first weeks of this Congressional term, was a response and reaction to one decision.³ Rather than adopting more limited measures, some of which were even suggested by the Supreme Court itself, Congress has revived claims made for the first time of alleged discrimination that occurred many years ago, claims that are likely to be far beyond the ability of many employers to even know the full circumstances in which such discrimination was alleged to have occurred based on an absence of records and personnel. Although as with the ADA amendments it is still too soon to determine the outcome, already claims have been raised which not only test the supposed limits of the statute but raise the specter of stale charges.

¹ *Sutton v. United Air Lines*, 527 U.S. 471 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999).

² *Toyota Motor Manufacturing v. Williams*, 534 U.S. 184 (2002).

³ *Ledbetter v. Goodyear Tire & Rubber Co.* 550 U.S. 618 (2007).

Before turning to the two specific decisions that are central to today's hearing, I think it is important to consider the role the Supreme Court has played in the development of Title VII and other non-discrimination laws.

- I. The Supreme Court has been a positive force for employment law and protecting the rights of employees.

The very wording of today's hearing topic could be seen as implying the Supreme Court has been biased in its approach to discrimination cases. If any one or two decisions are viewed through that prism, it could lead to a very different conclusion as to the need for legislative action. However, if the Supreme Court's record on discrimination cases as a whole is fairly considered, a much different conclusion is required. In my view, from its very first decision interpreting Title VII, where it recognized that discrimination could occur through disparate impact as well as disparate treatment, the Supreme Court has used its powers to constructively shape the development of workplace discrimination law and implement Congressional intent. Although undoubtedly the better workplace I earlier described is unlikely to have developed if Congress had not passed Title VII and other non-discrimination laws, it is equally true that it would not have done so, if the judiciary, led by the Supreme Court had not taken an active role in shaping the employment law system that exists today.

Given that traditionally the Supreme Court takes a very small number of employment cases for review each year, just a brief summary of some of the Court's decisions over its last ten terms dispels any argument that the Supreme Court is an unfavorable forum for employees, including those bringing claims of discrimination.

Among the decisions which have advanced the rights of employees are:

- *Arbaugh v. Y & H Corp., d/b/a The Moonlight Café*, 546 U.S. 500 (2006).

The 15 employee requirement of Title VII is not jurisdictional.

- *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006). Reversed a decision affirming summary judgment for the employer in a racial discrimination case involving racial comments, holding that the standard used was improper.
- *Burlington Northern Railway v. White*, 548 U.S. 53 (2006). Lowered the standard for retaliation claims.
- *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008). Found an implied cause of action for retaliation under 42 USC § 1981.
- *Crawford v. Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009). Held that participation even in an internal sexual harassment investigation is engaging in protected activity under the participation provision of Title VII.
- *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Held direct evidence is not required in order to obtain a mixed motive instruction.
- *Edelman v. Lynchburg College*, 535 U.S. 106 (2002). Upheld the Equal Employment Opportunity Commission's long standing rule that a later verified charge relates back to perfect an otherwise untimely charge.
- *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). Held that an arbitration agreement between an employer and an employee is not binding on the Equal Employment Opportunity Commission.
- *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008). Held that submitting an "intake questionnaire" and a detailed affidavit to the Equal Employment Opportunity Commission is equivalent to filing a charge for

purposes of the exhaustion of administrative remedies requirement under the ADEA.

- *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008). Held that federal employees who claim age discrimination are also protected against retaliation.
- *IBP, Inc. v. Alvarez, et al*, 546 U.S. 21 (2005) and *Barber Foods, Inc. v. Tum*, 543 U.S. 1146 (2005). Held that doffing and donning safety equipment was compensable and all time after that activity was begun was compensable under the continuous workday rule.
- *Jackson v. Birmingham Board of Education* 544 U.S. 167 (2005). Held that there was an implied cause of action for retaliation in Title IX.
- *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). Adopted a standard four year period of limitations for § 1981 claims.
- *LaRue v. DeWolff, Boberg & Associates, Inc., et al*, 552 U.S. 248 (2008). Disagreed with the Fourth Circuit Court of Appeals' decision that a participant in a 401(k) plan is prohibited from using Section 502(a)(2) of ERISA to recover losses allegedly caused by his employer's failure to carry out investment instructions.
- *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001). Held that front pay damages are not compensatory damages and are thus not subject to the damage caps of Title VII.

- *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005). Held that disparate impact cases are available under the Age Discrimination in Employment Act.
- *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Rejected a lower court holding that there was a heightened pleading requirement for civil rights cases.

Clearly, in the same period there have also been cases where a view of the law arguably favorable to the employer has been the decision of the Court. Rather than cause for alarm, the Court's approach has been even handed, consistent with Congressional intent, and what one would expect of a court that is considering each case on its own merit, as opposed to a court where an outcome based on a one-sided view was pre-ordained or "result" oriented.

Even beyond its even handed approach, which should disabuse any fair minded observer of the view that the Supreme Court is biased against enforcement of anti-discrimination laws, the Court has been sensitive and astute in trying to improve the workplace. A prime example were the decisions in the two sexual harassment cases that created the Faragher/Elleerth affirmative defense.⁴ Although the approach of those two cases could be viewed as a compromise between advocates for plaintiffs who wanted strict liability for employers and those who argued for a negligence standard, the real import of the decision was to influence the behavior of both employers and employees in ways that would work toward the elimination of harassment in the workplace, clearly in keeping with the desire of Congress. In cases where hostile environment was coupled with a tangible employment action, employers would be strictly liable. However, in those cases where there was no tangible employment action, the Court created an affirmative defense for employers charged with hostile environments caused by supervisor behavior. The

⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Elleerth*, 524 U.S. 742 (1998).

defense provided incentives for employers to implement comprehensive anti-harassment policies and for employees who had been harassed to take advantage of those policies. The goal, not just to set standards for sorting out blame after an event, but to incentivize behaviors to change with the hope of actually lessening the likelihood that harassment will occur.

Even if one were unconvinced the Supreme Court had been an unbiased forum for the development of employment law, including enforcing statutes prohibiting discrimination as reflected by the above, clearly the Court's action as a leader in enforcing retaliation laws should make that role clear. The Court has taken the lead in protecting employee rights by vigorously enforcing retaliation provisions of various discrimination statutes. In today's world of employment litigation, retaliation cases have become even more prominent than discrimination claims. In this area, the Supreme Court can clearly be said to be a champion of employee rights and Congressional intent.

In *Jackson v. Birmingham Board of Education* 544 U.S. 167 (2005), most observers were surprised when the Court created a cause of action for retaliation in an employment case brought under Title IX, although there is no statutory provision. But in strong language, the Court wrote: "[w]e agree with the United States that [these objectives] "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." If recipients were permitted to retaliate freely, individuals who witness discrimination would be loathe to report it, and all manner of Title IX violations might go unremedied as a result." Three years later, the Court did the same when it again found that protection against retaliation was implied, this time under 42 U.S.C. § 1981, *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008). In *Burlington Northern Railway v. White*, 548 U.S. 53 (2006), the Court not only lowered the generally applied standard for what constituted an adverse

employment action, but also went to great pains to indicate that retaliation was not limited to actions taken in the workplace. Just last term, the Court unanimously extended protection against retaliation to individuals who are participants in an internal investigation, even though they had not independently asserted any personal claims.. *Crawford v. Metropolitan Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846 (2009).

- II. *Gross v. FBL Financial Services, Inc.* was properly decided and Congress should not take action to reverse it.

Although much has been written about the Supreme Court's holding this summer that there is no mixed motive instruction available in cases brought under the Age Discrimination in Employment Act, almost all of the criticism fails to acknowledge the significance of the differences between ADEA and Title VII and the spotty history of the mixed motive theory.. Setting that context is important to understand why the Court decided the way it did and why it is unnecessary and unwise for Congress to take any action to reverse it.

When Congress enacted the Age Discrimination in Employment Act, rather than include age as a protected category under Title VII, the ADEA was passed as an amendment to the Fair Labor Standards Act of 1938. Among other things, that Congressional decision based in part on the conclusion that the problems addressed by the two statutes were not identical, meant from the beginning the enforcement mechanisms of the two statutes were dramatically different.

Although some differences have been resolved over the years, others intended by Congress remain. For example, Title VII has a capped system of damages, that allows a successful plaintiff to recover not only back pay, but compensatory and punitive damages up to a certain level determined by the employer's size. Successful plaintiffs under the ADEA, however, are not entitled to compensatory and punitive damages. Instead if they establish that a violation is willful, age discrimination plaintiffs are entitled to liquidated damages in the amount equal to the

loss that they have established. In yet another difference, a group action under Title VII is governed by Rule 23 of the Federal Rules of Civil Procedure while such actions under the ADEA are collective actions, that rely on an opt-in rather than opt-out method. In short, that there should be a difference between the way Title VII plaintiffs and ADEA plaintiffs are treated not only occurs with some frequency, but is mandated by the initial Congressional choice.

The possibility of a mixed motive method for proving discrimination first received Supreme Court recognition in the context of a Title VII decision, *Price Waterhouse v. Hopkins*⁵. The facts of *Price Waterhouse* raised the issue of what happens where an employer has both legitimate and improper reasons for an employment decision. When Hopkins was considered for admission into a professional partnership some of the partners who voted on her membership expressed views about her admission that were seen as business related and appropriate, while others who also participated in the decision had views tainted with sexual stereotyping that were not appropriate under Title VII. Faced with that unique situation, the Court issued four opinions, with no majority opinion, although Justice O'Connor's opinion has generally been considered the opinion of the Court. Out of this muddled circumstance the mixed motive method of proving discrimination was 'adopted.'

As perceived by Justice O'Connor, the mixed motive analysis would be available only in those supposedly rare cases where a plaintiff could provide both direct and substantial evidence that an improper motive had played a role in the employer's decision. In that limited case, the burden of persuasion would, for the first time in a discrimination case, pass to the employer. The employer could still prevail even where an improper motive was a part of the decision, if it could show that it would have taken the same action notwithstanding that the employee was a member

⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

of a protected group. Under *Price Waterhouse*, if the employer successfully carried its burden of establishing the affirmative defense, it prevailed entirely.

In hindsight, the most discerning members of the *Price Waterhouse* Court were those who wrote in dissent foreseeing the problems of implementation that would follow the introduction of the mixed motive method. Justice Kennedy wrote, "[t]oday the Court manipulates existing and complex rules for employment discrimination cases in a way certain to result in confusion. Continued adherence to the evidentiary scheme established in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248 (1981), is a wiser course than creation of more disarray in an area of the law already difficult for the bench and bar, and so I must dissent,"; while Justice Blackmun succinctly summed up: "I do not believe the minor refinement in Title VII procedures accomplished by today's holding can justify the difficulties that will accompany it."

Even if there had been nothing other than *Price Waterhouse* it is certain there would have been considerable difficulty in implementing the mixed motive method of discrimination analysis. Normally a new judicial interpretation would be viewed and applied in a broad variety of contexts, including through the crucible that is the trial process, which inevitably produces refinements and subtle adjustments to make the principle more workable. In the case of the mixed motive analysis that process was truncated by Congress' action two years later in adopting the Civil Rights Act of 1991, which unfortunately resulted not in simplification, but further complexity.

Even more problematic, when the mixed motive analysis was adopted, Title VII trials were all non-jury, so that such technical areas as the burden of proof, sub-divided into the burden of production versus the burden of persuasion, and the times in which each would shift, while

difficult, were at least the province of trained jurists. With the passage of the Civil Rights Act of 1991 that would of course change, making the warnings of the dissenting judges of the difficulties in adopting the mixed motive analysis that would be visited upon the lower courts even more compelling.

Not only did the fact finder change, but Congress also changed the affirmative defense itself. According to the leading employment discrimination treatise Congress "partly clarified, partly affirmed and partly overruled *Price Waterhouse*."⁶ Congress codified the creation of the mixed motive method of establishing discrimination but clarified a point that could not be agreed to by a majority of the Court, setting the burden plaintiff must meet to qualify for a mixed motive application as a *motivating factor*, affirming that there was an affirmative defense that shifted the burden of persuasion to the employer, but significantly modifying the effect of the defense for the employer. Under Congress' mandate if the employer were able to meet the burden of persuasion on the affirmative defense, the employee would still be entitled to declaratory relief and attorneys fees, but no damages could be awarded.

Significantly, although in the Civil Rights Act of 1991 which included the *Price Waterhouse* revisions Congress specifically amended the ADEA in other ways, it did not include it in the section adopting the mixed motive method or affirmative defense.

The real world consequences of the confusing amalgam created in this two year period were mooted by a dozen years of strict observance by the courts to the admonition in Justice O'Connor's opinion that a mixed motive analysis was only applicable in cases of direct evidence. Still, enough issues were presented to prove just how prescient the dissenting Justices in *Price Waterhouse* were in predicting difficulties on behalf of the courts in applying the mixed motive analysis.

⁶ B. Lindemann & P. Grossman, *Employment Discrimination Law* 99 (4th ed. 2007)

Just one footnote⁷ in Respondent's Brief in *Gross* amply points out the concerns that the Circuit Courts have had in providing guidance on the application of the mixed motive instruction in the context of a jury trial:

See, e.g., Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 220 (3d Cir. 2000) (recognizing the challenge of trying to instruct jurors on the mixed-motive instruction while noting it would be uncommon for a plaintiff to make the demonstration demanded under Justice O'Connor's *Price Waterhouse* concurrence); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 186 (2d Cir. 1992) (discussion of confusion *Price Waterhouse* caused in the ADEA jury trial context because *Price Waterhouse* involved a bench trial under Title VII); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992) (describing the task of devising a *Price Waterhouse* jury instruction as "the murky water" of shifting burden in discrimination cases); *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting) ("As Justice Kennedy observed in his *Price Waterhouse* dissent, formulating a jury instruction that explains the burden shifting analysis applicable to mixed motive cases in the wake of that decision is no mean feat.").

And of course problems for the district court judges, those actually charged with converting such theories into practical instructions to be read to actual juries are even more acute.

One reason that problems did not multiply even more was that the mixed motive analysis was not only difficult for courts to apply, but was not seen as necessarily beneficial by employment plaintiffs' attorneys. For example, while still arguing that the *Gross* case was wrongly decided and advocating that it be overturned legislatively, one plaintiff's employment lawyer noted the limits of its real world impact:

- As far as the loss of getting a mixed motive instruction in an age discrimination case, most plaintiff's lawyers don't care. It's too confusing to the jury. So until it's fixed legislatively, it really doesn't matter;
- Most experienced employment lawyers know that the "but for" language will have little effect on a jury; and

⁷ Brief for Respondent, Footnote 25 at pp.33-34, *Gross v. FBL Financial Group, Inc.* __ U.S. __ (2009).

- Age discrimination plaintiffs will still have the opportunity, through the use of direct and circumstantial evidence, to prove that they were discriminated against because of their age — and this decision does not change that fact.⁸

Such feelings reflect my experience, where lawyers representing plaintiffs rely much more on established pretext doctrines under *McDonnell Douglas*, rather than try for a mixed motive analysis. In short, in many respects the dispute engendered by *Gross* is more academic than real world.

When, in its 2003 decision in *Desert Palace v. Costa*, the Supreme Court refused to infer Justice O'Connor's judicial gloss that the mixed motive analysis was available only upon the showing of direct evidence onto the wording of Congress, the stage was set for even more concerns and issues to be raised.

One issue that now demanded an answer was what standard was to be applied to non-Title VII cases. That issue with respect to the ADEA was squarely presented in *Gross v. FBL Services*. The Court addressing the above history and taking into account both Congressional action which had modified its initial decision in *Price Waterhouse* in substantial ways and specifically not changed the ADEA, had only three general options:

1. apply *Price Waterhouse*, a plurality opinion which left many unanswered questions, garnered much justifiable criticism and been substantially modified by Congress;

⁸ Ellen Simon, *New Supreme Court Age Discrimination Decision Will Be Gone In A Flash*, Employee Rights Post, <http://www.employeerightspost.com/2009/06/articles/supreme-court/new-supreme-court-age-discrimination-decision-will-be-gone-in-a-flash/> (June 22, 2009).

2. apply the Congressional modification, notwithstanding the differences between the ADEA and Title VII and Congress' specific failure to include the ADEA within the amendment adopting the mixed motive analysis for Title VII cases, or
3. adopt a more common sense rule, that in reality does little to alter the real world of age discrimination litigation.

Fortunately, the Supreme Court chose the last course by adopting a common sense rule.

In doing so, the Supreme Court brought certainty out of confusion. It also resolved questions posed by the mixed motive analysis about the propriety of undermining the traditional notion underlying all civil litigation that plaintiffs should always have the burden of persuasion. Congressional action to reverse *Gross*, particularly without waiting to determine if in fact there is any real world impact would be short sighted And potentially provide a "cure" with adverse consequences that would far outweigh the alleged evils being remedied.

Although the Supreme Court's efforts in *Price Waterhouse v. Hopkins* are certainly not a model of clarity or an example that should be highlighted for providing clear cut direction on procedural matters which are important in litigation, as a whole the courts are much better suited to resolving such questions than Congress. And in fairness to the Supreme Court, without the Congressional intervention that took the development of the mixed motive doctrine largely out of its hands, it is quite possible that in time, the Supreme Court itself would have self-corrected and brought order to the issue.⁹ It is the ability to see how its guidance plays out in actual cases that provides the inherent advantage to the courts in providing the detailed guidance on the precise legal details.

Congressional action should only be invoked when over a period of time the path that the Court has taken proves to be different from the direction Congress intended. It should also be

⁹ In fact that is what the Court did in its *Gross* decision.

done with the knowledge that Congressional actions are much more unlikely to be undone than court decisions. I am not aware of any Congressional action that could be construed as rolling back a pro-employee action since the passage in 1947 of the Taft-Hartley Act and the Portal to Portal Act, more than sixty years ago. While it may take time for the judiciary to self-correct a problem, its ability to do so is much more robust than that of Congress. The *Gross* decision alone is far from sufficient to justify such an action.

III. *Circuit City v. Adams* Was Correctly Decided and It Is Important to Maintain Arbitration Agreements for the Just, Speedy and Inexpensive Resolution of Employment Disputes

A. Introduction

The most significant criticism of the Court's decision in *Circuit City v. Adams*¹⁰ has not focused on whether it was correctly decided but rather the feared adverse impact the decision would have on the enforcement of Title VII and other federal anti-discrimination statutes.¹¹ These criticisms have not been based upon empirical data but rather the visceral reactions of interest groups and how they might have interpreted the law to reach their own sense of "correct public policy." Thus, rather than an esoteric discussion of the *Circuit City* decision and whether it was a correct interpretation and application of the Federal Arbitration Act (which the authors believe it was), it may be more instructive to evaluate the longer term policy implications of that decision and how it is most consistent with the continued trajectory discussed above. The authors submit the potential congressional reaction to this decision, in the form of the Arbitration Fairness Act of 2009, underscores the concerns that result from a narrow reaction to a specific decision that, if interfered with, will have potential adverse consequences on the desired

¹⁰ 532 U.S. 105 (2001).

¹¹ See, e.g., *Circuit City v. Adams*: Making the Foxes the Guardians of the Chickens, 24 Berkeley J. Emp. 7 Lab. L. (2003).

trajectory of continuous improvement in the work place that is beneficial for both employees and employers.

The prime directive for any dispute resolution mechanism should ideally be that required by the Federal Rules of Civil Procedure. Fed. Rule Civ. Pro. 1 mandates all the Rules of Civil Procedure should be “construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” The ultimate question, therefore, is whether the use of alternative dispute resolution mechanisms, such as agreements to arbitrate employment disputes (whether promulgated plans, pre-dispute, post-dispute, or otherwise), are inherently susceptible to greater abuse or frustration of this prime directive than recourse to traditional litigation in state and federal courts. Even without regard to the question of whether or not alternative dispute resolution mechanisms are inherently laudable, maintain the data and other objective evidence do not support a claim that arbitration frustrates the goal of securing the just, speedy, and inexpensive resolution of disputes whether these disputes implicate Title VII or other statutory protections. To the contrary, the data and objective evidence endorses the continued use of all forms of arbitration in the employment context as a viable supplement to the protections afforded by state and federal courts in the enforcement of civil rights. The wholesale prohibition of particular forms of arbitrations, as one mechanism in the dispute resolution arsenal, will in all likelihood have undesirable consequences and a detrimental impact upon the administration of justice for both employees and employers, as well as the economic business climate in the United States.

We have nothing but the utmost respect for the quality and integrity of the dispute resolution systems provided by state and federal courts. That is not to suggest, however, these dispute resolution systems, like others, cannot be improved. For example, it is not controversial

to claim certain aspects of the state and federal court legal system are perceived by business decision makers both nationally and internationally as an impediment to investment, innovation, predictability, and profitability.

The literature is replete with examples and analyses documenting the increasingly burdensome cost of traditional litigation and risk in the United States and the fact those costs are much greater than in other countries. For example, even a cursory review of the literature and supporting studies underscore the very real issues that commend appropriate evaluation, potential reform, and fine tuning. In the current environment no dispute resolution system is immune from principles of continuous improvement:

- The U.S. tort system costs every man, woman and child in the U.S. a yearly “tax” of \$835 – that is \$3,340 for a family of four.¹²
- American litigation costs the nation almost 2% of gross domestic product annually.¹³
- In the past 50 years, direct U.S. litigation costs have risen more than 100-fold while population has not doubled and economic output has risen only 37-fold.¹⁴
- Litigation costs amount to about \$589,000,000,000.00 -- equivalent to a 7% tax on consumption or a 10% tax on wages.¹⁵
- A majority of senior attorneys (63%) report that the litigation environment in a state is likely to impact important business decisions.¹⁶

¹² The 2008 Update on U.S. Tort Cost Trends, Tillinghast-Tower Perrin, December 2008.

¹³ The 2008 Update on U.S. Tort Cost Trends, Tillinghast-Tower Perrin, December 2008.

¹⁴ U.S. Tort Liability Index 2008 Report, Pacific Research Institute, 2008.

¹⁵ U.S. Tort Liability Index 2008 Report, Pacific Research Institute, 2008.

¹⁶ State Liability Systems Ranking Survey, Harris Interactive, March 19, 2008.

- Fear of litigation is among the top issues listed by senior executives who manage internationally owned U.S. businesses whereas U.S. owned companies that operate in other advanced economies do not express a similar concern.¹⁷
- There is the perception that, at least in some contexts, other countries' legal systems are more predictable and that the legal costs of doing business are substantially less. These perceptions exist even though the overall quality of the U.S. legal system is otherwise well recognized internationally.¹⁸
- Small businesses bear 69% of business liability costs but take in only 19% of business revenues.¹⁹
- The cost of the traditional judicial litigation system to individual small business is \$20 per \$1,000 of revenues. A small company with \$1,000,000 in revenues will pay, on average, \$20,000 in annual litigation related costs.²⁰
- Very small businesses, those with less than \$1,000,000 in revenues, pay \$31,000,000,000 in litigation costs, but take in only 6% of business revenues.²¹
- Small businesses are responsible for 75% of all new jobs created in the U.S. economy. More employee benefits could be provided or jobs created

¹⁷ The U.S. Litigation Environment and Foreign Direct Investment, U.S. Department of Commerce, October 28, 2008.

¹⁸ The U.S. Litigation Environment and Foreign Direct Investment, U.S. Department of Commerce, October 28, 2008.

¹⁹ Tort Liability Costs for Small Business, Institute for Legal Reform, May 17, 2007.

²⁰ Tort Liability Costs for Small Business, Institute for Legal Reform, May 17, 2007.

²¹ Tort Liability Costs for Small Business, Institute for Legal Reform, May 17, 2007.

if the average small business did not have to spend over \$17,000 per year for litigation costs.²²

- Lawsuits and liability insurance cost American business an estimated \$128,800,000,000 each year. It is estimated the approximate 4.4 million of small businesses pay more than half of these costs but account for only 25% of all business revenues. These small businesses pay on average 44% of tort liability costs out of their own pocket.²³
- Foreign companies are shunning the United States in large part due to the U.S. culture of litigation. A survey of chief executive officers cited in a study by McKinsey and Company found that fully 85% of chief executives preferred the litigation environment in London to New York.²⁴
- Litigation and tort costs have reportedly increased in relation to the U.S. gross domestic product (GDP) three fold since 1950 (0.62 percent to 1.87 percent).²⁵
- Interestingly, this mirrors information that U.S. costs as a percentage of GDP are triple that of France and the United Kingdom and at least double that of Germany, Japan, and Switzerland.²⁶

Certainly the spiraling litigation costs in the United States, of which employment related litigation is not an insignificant portion, are perceived as an impediment to attracting business investment and conducting business in the United States. This fact is well documented and

²² ILR/NERA Report "Tort Liability Costs for Small Business," June, 2004.

²³ ILR/NERA Report "Tort Liability Costs for Small Business," June, 2004.

²⁴ "Blocking Markets," New York Sun, April 19, 2007; "Litigation Puts Wall Street's World Status at Tipping Point," Financial Times, April 6, 2007.

²⁵ Tillinghast Insurance Consulting, "2007 Update on U.S. Tort Cost Trends," Towers Perrin, Stamford, Conn., p. 5

²⁶ Tillinghast Insurance Consulting, "2007 Update on U.S. Tort Cost Trends," Towers Perrin, Stamford, Conn., p. 12.

evaluated in a study commissioned by the U.S. Department of Commerce entitled “The U.S. Litigation Environment and Foreign Direct Investment; Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty.” This study reaches two critical conclusions: foreign business investment in the United States is decreasing and a significant factor in this decrease is the cost and uncertainty of the traditional U.S. court system.

Some commentators also claim “the current system for adjudicating work place disputes is so...inefficient [and] expensive...that it is unfair to both employers and employees.”²⁷ The arguments of these commentators include the fact that before an employee may file a discrimination lawsuit against an employer, an employee must first file a charge of discrimination with the Equal Employment Opportunity Commission. The agency will then investigate and attempt to resolve the charge. By establishing these procedures, Congress was attempting “to develop a system that would [curb] employment discrimination by providing...an agency that would investigate and resolve charges, no matter the potential amount of damages, without exposing employers to the high costs of litigation.”²⁸ Instead, these commentators maintain what has actually developed is a system where “employee claims are not investigated in a thorough or timely manner and employers accused of discrimination face increasing and unjustified defense costs.”²⁹ Moreover, a reduced workforce and an increasing backlog of pending cases is posing a challenge for the EEOC to accomplish its mission of promoting equal opportunity in the work force and enforcing the Federal laws prohibiting unlawful discrimination.³⁰ At the end of 2006, the EEOC faced a backlog of nearly 40,000 private-sector

²⁷ See David Sherwyn, Mandatory Arbitration: Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims, 6 CHR Reports 4, p.7 (July 2006).

²⁸ Id. at 7-8.

²⁹ Id. at 8.

³⁰ Office of Inspector General Semiannual Report to Congress April 1, 2007—September 30, 2007, Agents Igniting Change and Fostering Accountability, Effectiveness, and Efficiency in Government available at www.eeoc.gov/about/eeoc/plan/oig/oig-4-2007.

charges, an approximate 19% increase over the previous year and this trend would continue.³¹ This prediction has, in fact, been realized in spite of the increasing efforts of the EEOC to address this backlog.

Of course, we are not suggesting this research, data, or for that matter anecdotal stories that bemoan the failure of the state and federal judicial systems to deliver just, speedy and inexpensive results in particular egregious circumstances, form the basis for any rational argument that the court systems in the United States should be dismantled or that certain types of disputes should not be within the domain of these courts. No dispute resolution system is perfect, or will necessarily be perceived as perfect by all parties who participate as long as there are “winners” and “losers.” Similarly, any defect that may exist with arbitration, or other alternative dispute resolutions systems, do not suggest the efficacy of those dispute resolution processes should be totally abandoned or deemed unlawful without compelling supporting data. The consequences of such an approach, as the dismantling of any fair, efficient and inexpensive dispute resolution system, would have inappropriate, undesirable and unintended consequences.

B. Are Arbitrations Just; the Data and Due Process Protections Indicate Yes

1. Arbitrations is not a “Lesser Form” of Dispute Resolution System

Congress enacted the Federal Arbitration Act in 1925 with the specific intent of establishing that “arbitration agreements [are] on the same legal footing as other contracts.”³² The Federal Arbitration Act required the judicial enforcement of arbitration agreements in any contracts involving commerce and arbitration became a frequently used method to resolve business disputes.

³¹ Id.

³² Employment Arbitration a Closer Look, 64 J. Mo. B. 173 (August 2008).

The FAA did not immediately lead to the widespread use of arbitration for employment disputes. This was because, prior to 1991, the risks and costs of employment litigation were generally viewed as great; there was uncertainty as to whether arbitration agreements were enforceable for statutory claims; and there was uncertainty whether the FAA even applied to most employment relationships.

In 1991, Congress and the U.S. Supreme Court sent a clear message that arbitration was not a “lesser form” of dispute resolution when compared to the courts in vindicating the civil rights of employees. In *Gilmer v. Interstate/Johnson Lane*³³ the Supreme Court endorsed the use of binding arbitration for employment claims, including statutory employment discrimination claims and, in many respects, the Court’s decision in *Circuit City v. Adams* only continued the trajectory of the *Gilmer* decision. Second Congress passed the Civil Rights Act of 1991, which gave plaintiffs the right to jury trials in employment discrimination cases and increased the potential damages available. In the Civil Rights Act Congress also endorsed the use of alternative dispute resolution mechanisms, including arbitration, to resolve employment disputes arising under the Act and the federal law amended by the Act.

The next step in the evolution occurred in the Supreme Court’s decision in *Circuit City Stores v. Adams*³⁴ where the Court held the FAA does apply “to contracts signed by most employees, and excluded from its coverage only the employment contracts of seamen, railroad workers, or other transportation workers.” The Court also continued to endorse the congressional intent and public policy underpinnings of the FAA by praising the “real benefits” that arbitration provides including the avoidance of litigation costs—a real benefit of particular importance in employment litigation. Thus, as of 2001, arbitration was recognized as a valid

³³ 500 U.S. 20 (1991).

³⁴ 532 U.S. 105 (2001).

forum for the adjudication of employment statutory claims that effectively supplemented the courts in the just, speedy, and inexpensive administration of justice. The focus of the courts then focused on whether arbitration agreements provided procedural and substantive due process and were fair and balanced to the contracting parties.

2. Substantive and Procedural Due Process

Over the past 80 years since the passage of the F.A.A., and the adoption of the Uniform Arbitration Act in some form by every state legislature, a significant body of law has developed in the state and federal courts that ensure not every arbitration agreement will be enforced.³⁵ Since 2001, these courts have developed a significant body of case law dealing with issues of when and under what circumstances these agreements will be enforced in the employment context.³⁶ Only those agreements that are in writing, and meet the panoply of substantive and procedural due process requirements, will be enforced by the courts.³⁷ Thus, whether the arbitration agreement is contained within a promulgated plan, pre-dispute agreements, post dispute agreements, or otherwise, only those agreements that meet certain fairness requirements, i.e., substantive and procedural due process, will be enforced by the courts. We know of no empirical studies that suggest the courts have failed to address these concerns in an appropriate fashion.

One could argue that an implicit message in the Arbitration Fairness Act of 2009 is that the state and federal courts have so failed to ensure procedural and substantive due process in the enforcement of arbitration agreements, an ironic comment as these very same courts are the only forum that would be permitted to ensure substantive and procedural due process and fairness in

³⁵ See generally, *Alternative Dispute Resolution in the Workplace*, ADR Work § 3.05 (Law Journal Press 2009)

³⁶ While a survey of all the cases that address the mandatory substantive and due process requirements these agreements must satisfy is beyond the scope of this presentation, an illustrative example can be found in *Armendarez v. Foundation Health Psychare Services, Inc.*, 24 Cal 4th 83 (2000).

³⁷ *Id.*

the resolution of employment disputes. Clearly such a message would be suspect at best particularly if there is minimal or no objective supporting data or studies to suggest the courts have failed in their essential mission: ensuring only those arbitration agreements that meet substantive and due process requirements are enforced.

The body of case law requiring substantive and procedural due process is so well developed, that virtually all third party administrators of promulgated plans have developed their own rules to ensure the fairness of these plans. Examples of third party administrators that have issued mandatory due process protocols as a condition precedent to the administration of promulgated plans are JAMS³⁸ and the American Arbitration Association.³⁹

Indeed, one of the most comprehensive empirical studies known to the authors concluded that arbitrations provided due process at a low cost.⁴⁰ As stated, we know of no comparable empirical studies that substantiate a different conclusion.

3. Results: What Does the Data Show

While perceptions can become their own reality, suffice it to state the Arbitration Fairness Act of 2009 is very controversial and has numerous detractors and advocates. Proponents of the Act suggest that arbitrations are “stacked” against the employee and that arbitrators are generally “biased” in favor of employers. The National Employment Lawyers Association (an organization for attorneys who represent plaintiffs’ in employment law matters) compares employment arbitration to the kangaroo courts of the Soviet Union. The Equal Employment Advisory Council (an employer group) calls employment arbitration fair, efficient and less costly. In this controversial context, perceptions, anecdotal “evidence,” and the like can give rise to unfounded hyperbole and argument. Regardless of whether one is an advocate for or

³⁸ The due process protocol of JAMS can be found at www.jamsadr.com/employment-minimum-standards/

³⁹ The due process protocol of the American Arbitration Association can be found at www.adr.org/sp.asp?id

⁴⁰ See Due Process at Low Cost, 18 Ohio St. J. on Disp. Resol. 777 (2003).

against the Act, one should attempt to objectively identify and evaluate the data that would tend to provide statistical verification of these disparate perceptions.

Very few studies in this area are perfect and without flaws. However, there exist well conceived studies that suggest there is no significant statistical difference in the percentage of cases that result in a favorable decision for employees regardless of whether the forum is court or arbitration.⁴¹ In fact, based upon these studies an argument exists that arbitration is a friendlier forum for the adjudication of employment disputes in general, and Title VII rights in particular, especially those involving lower income earning employees. As stated in one newspaper article, one empirical study indicated that individuals who resolve legal disputes through arbitration fare better in terms of monetary awards and time-savings than individuals who go to federal court, according to a recently-published study. The research studied outcomes from 125 employment discrimination cases filed in the Southern District of New York federal court versus 186 employment arbitrations in the securities industry between 1997 and 2001 and concluded there was “no statistical support” of bias against individual claimants in arbitration resulting from pre-dispute agreements when compared to federal courts. The study was conducted by Professor Morris Kleiner from the University of Minnesota and attorney Michael Delikat. Prof. Kleiner is the AFL-CIO Professor of Labor Policy and director of the Humphrey Institute’s Center for Labor Policy at the University of Minnesota.

Highlights of the analysis comparing arbitration to federal lawsuits:

⁴¹See, e.g., *Employment Arbitration and Litigation: An Empirical Comparison* (2003) (available at papers.ssrn.com/sol3/folders.cpr?abstract=The+Myth+of+Second-Class+Justice:+Resolving+Employment+Disputes+in+Arbitration,+How+ADR+Works 915 (Norman Brand, 2002) *Employment Arbitration and Workplace Justice*, 38 U.S.F.L. Rev. 105 (2003); *Arbitrating Claims of Employment Discrimination*, Dis. Resol. J. (Oct. 1995); *Due Process at Low Cost*, 18 Ohio St. J. on Disp. Res. 777 b(2003); Northwestern University, Searle Civil Justice Institute Study (March 2005), executive summary at www.searlearbitration.org/report/exec_summary.php

- Claimants/Plaintiffs prevailed 46% of the time in arbitration versus 34% in court;
- Median monetary awards for successful claimants/plaintiffs were approximately the same:
 - \$100,000 in arbitration versus \$95,554 in litigation;
- Arbitration results were 33% faster than litigation. The median time from filing to judgment was 16.5 months in arbitration while lawsuits took 25 months to conclude;
- Few individual ever get a jury trial in federal court. Only 3.8% of the federal court cases were concluded by a jury trial, proving a significant counter point to the critique that arbitration keeps individuals from having their claims resolved by a jury.⁴²

It would be most difficult, given current data and studies, to objectively maintain that arbitrations are not “just” or “as just” as proceedings in state and federal courts. If nothing else, the current data suggests that advocates of any position to the contrary must support this claim with objective data and empirical studies. To date, we are not aware of any such studies.

C. Arbitrations are Speedy

Following the delay in the processing of charges filed with the Equal Employment Opportunity Commission, court cases typically take years rather than months to wind through the court system to a trial. Arbitration on the other hand, is usually completed within a matter of months. Of course, there can be protracted arbitration where, for example, the parties agree to an

⁴² Insurance/Times, Vol. XXIII (April 29, 2003). See also, The Metropolitan Corporate Counsel, The Same Results as In Court, More Efficiently: Comparing Arbitration and Court Outcomes (July 1, 2006).

arbitrator with limited availability.⁴³ However, on average, the studies support that arbitration is speedier than the courts in resolving disputes. For example, in one study the average duration of an arbitrated claim was 8.6 months compared to 2.5 years in litigation.⁴⁴

D. Arbitrations are Comparatively Less Expensive

A study by the Institute for Civil Justice of the Rand Corporation concluded that arbitration resulted in a 20% cost savings to the parties in transactional costs.⁴⁵ In employment cases the cost savings may be even more dramatic than indicated by the Rand Study. Arbitration often results in a 50% reduction of litigation costs. The defense costs for a typical employment case can range from \$75,000 to \$200,000 while the average cost of arbitrating an employment case is much less.⁴⁶ Clearly, there are no broad based studies that demonstrate arbitration is a more expensive form than the courts in the resolution of rights protected by anti-discrimination statutes.

E. Potential Adverse and Unintended Consequences of the Arbitration Fairness Act of 2009

1. Confusion and Litigation Regarding the Meaning and Impact of the Proposed Amendments to Chapter 1 of the FAA

Since its enactment in 1925, Chapter 1 of the Federal Arbitration Act has provided a stable and consistent legal framework for arbitration in the United States. Chapter 1 has benefitted from judicial construction, scholarly analysis, and practical application and sets out the United States' fundamental policy regarding arbitration. The courts have consistently reaffirmed a strong national policy under Chapter 1 that favors arbitration to resolve disputes, and this policy could be diluted with the insertion of carve-outs in Chapter 1 such as that

⁴³ Shea, *id.*; see also n. 31, above.

⁴⁴ *Id.* Insurance/Times.

⁴⁵ Garry G. Mathiason, Achieving Workplace Justice Through Binding Arbitration, SHRM Legal Report (Spring 1994) available at www.shrm.org/hrresources report

⁴⁶ Shea, *id.*

contemplated by the Arbitration Fairness Act of 2009. Altering that Chapter, with the adoption of the Arbitration Fairness Act, has the potential to unravel the reliability and predictability of arbitration in this country and to create confusion and unnecessary litigation regarding the interpretation of the FAA. Moreover, when presented to a court, the legislative findings that now preface the Arbitration Fairness Act could undermine the rationale and deference accorded to arbitration generally and could be argued in a way that calls into questions the underpinning of established judicial precedents for all arbitrations.⁴⁷

Under well accepted current law, courts determine whether there is an enforceable agreement to arbitrate (i.e., substantive and procedural due process requirements are met), and arbitrators determine if a specific dispute falls within the scope of the arbitration agreement. Section 2 c of the Act could turn this entire body of case law on its head in all arbitration contexts by mandating “the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such an agreement.” As this section encompasses all agreements to arbitrate, even business to business arbitration agreements, international agreements, etc., the proposed legislation could be viewed as an invitation to interminable litigation over issues that had previously been within the sole province of the arbitrator. Thus, all arbitration proceedings would have to come to a halt if any party to the arbitration claimed the arbitration agreement was invalid or unenforceable for any reason. Such reasons could clearly include the parties did not intend to arbitrate the specific dispute that is subject matter of the arbitration. Such a result would frustrate the public policy set forth in the Federal Rules of Civil Procedure: the just, speedy and inexpensive resolution of disputes.

⁴⁷ See, for example, 56 May Fed. Law. 48, p. 49 (May, 2009).

2. The Prohibition in Chapter 1 is Subject to Expansion that May Be Far Too Broad

It is not uncommon for highly compensated and sophisticated individuals to execute employment agreements prior to hire that contain arbitration agreements; it is not unusual for companies, which acquire closely held businesses, to require the business owners of the selling businesses to execute employment agreements with pre-dispute arbitration agreements; employers who hire highly sophisticated and specialized foreign workers, and fund the entire cost of the visa and relocation process, often enter into employment agreements that contain arbitration agreements; most companies and independent contractors enter into agreements at the outset of their relationship that require the resolution of disputes by arbitration; most franchise agreements, in an attempt to contain the cost of the franchise and reduce risk, call upon arbitration to be the mechanism for resolving any disputes; many companies provide severance programs to employees that provide substantial severance benefits in return for a release and the resolution of all future disputes through binding arbitration; businesses, both domestic and international, will often enter into joint venture, as well as a whole host of other types of agreements, that call for the arbitration of all disputes; partnership and closely held family businesses will typically require the resolution of disputes through binding arbitration. All such agreements, and a whole host of others, would now be deemed unenforceable as a matter of law particularly if they arguably implicated the resolution of any "civil right" (which is undefined in the statute). The potential negative impact of such far sweeping legislation is virtually impossible to predict. It will be dependent, in part, on how a court might define a "civil right" and whether a "civil right" is defined by recourse to state, federal, international, or the law of a

foreign jurisdiction.⁴⁸ Moreover, we have been unable to identify any competent data that quantifies the evils the proposed legislation will remedy and provides any cost-benefit analysis that quantifies the negative consequences of the proposed legislation and compares how those negative consequences will be outweighed by the benefits that will be realized through the passage of the Arbitration Fairness Act.

3. The Act Could Disadvantage the Ability of Lower Compensated Employees to Seek Redress for a Violation of Their Rights

The United States Department of Labor and Commerce Commission on the Future of Worker-Management Relations, better known as the Dunlop Commission, found that it is primarily highly-compensated employees that pursue employment discrimination claims in the courts. Commission on the Future of Worker-Management Relations at p. 50. A survey by William Howard of plaintiff's lawyers' standards for accepting employment discrimination cases shows that it is probably only highly compensated employees who are able to obtain counsel to pursue employment discrimination claims in court. William Howard, *Arbitrating Claims of Employment Discrimination*, Disp. Resol. J. (Oct., 1995) p. 40. The same survey indicated that it is probable that only highly-compensated employees pursue all other employment-related claims in the courts, as well.

The survey of 321 plaintiff's attorneys found that these lawyers accepted only 5% of the employment discrimination cases offered to them by prospective plaintiffs. The results of the survey also described the minimum parameters of an acceptable employment discrimination case. Lawyers required, on average, provable damages of \$60,000.00 to \$65,000.00, a retainer of \$3,000.00 to \$3,600.00 and a 35% contingency fee.

⁴⁸ Some commentators have suggested the Arbitration Fairness Act of 2009 will result in the violation of U.S. Treaty Obligations. See, e.g., 56 May Fed. Law. 48, p. 51 (May 2009).

Other employment-related claims would arguably be less attractive to the plaintiff's bar. The minimum parameters would most likely be higher for non-discrimination cases because discrimination statutes typically provide for an award of the plaintiff's attorney's fees to plaintiff's counsel in the event the plaintiff wins the case. Thus, an employment discrimination case intrinsically offers plaintiff's attorneys greater rewards. Since "provable damages" in an employment-related case are correlated with salary, higher minimum provable damages usually require plaintiffs of higher incomes.

Thus, a dispute resolution system that is faster and less expensive for plaintiff's counsel to prosecute, particularly if the promulgated plan has a first step mediation,⁴⁹ would clearly result in a lowering of the "provable damages" bar. While there is no empirical data that directly supports the conclusion that passage of the Arbitration Fairness Act would disadvantage middle and lower income employees, there is sufficient data and empirical evidence to suggest this could well be an unintended consequence. Certainly, the potential is worthy of further evaluation prior to the passage of the Act.

4. The Act Could be Viewed as Inherently Inconsistent and Disadvantageous to Employers in Union Campaigns

It is clear that the mandatory pre-dispute arbitration agreements found in virtually all collective bargaining agreements are exempt from the substantive and procedural due process requirements imposed by state and federal courts on non-collectively bargained for plans. Yet, the proposed legislation would exempt arbitration agreements found in collective bargaining agreements and sanction the use of this dispute resolution mechanism in the union setting. We know of no empirical or objective data that suggests pre-dispute arbitration agreements contained

⁴⁹ Increasingly, promulgated plans require a two step process: mediation and, if unsuccessful, binding arbitration. The mediation is typically conducted with a trained facilitative mediator whose goal is to resolve the dispute on terms that are acceptable to both parties.

in collective bargaining agreements are any more just, speedy or inexpensive than promulgated plans developed for non-unionized employees. In fact, one could fashion an argument that such agreements for non-unionized employees are far less expensive for those employees as they do not come with the cost of union dues.⁵⁰ In addition, one could argue that promulgated plans provide the employee with a whole host of substantive and procedural due process safeguards that cannot be negotiated away during the collective bargaining process. Based upon these facts, one might argue the proposed legislation is inherently inconsistent and imposes an inappropriate and unjustified double standard. So there is no confusion, we are not suggesting that mandatory, pre-dispute arbitration agreements found in collective bargaining agreements also be prohibited by the Arbitration Fairness Act of 2009. We are simply unaware of any studies or data that suggest there should be any difference in the treatment of the two types of arbitration. That is, there is no data that suggests there is any difference between the justice, speed, or expense provided by these two different types of arbitration agreements.

In most organizing campaigns, unions assert that one of the benefits of unionization to employees is that unions protect employees by securing cost effective, speedy and fair resolution of disputes. The dispute resolution provision found in virtually all collective bargaining agreements culminate in final and binding arbitration. Most employers, who have developed promulgated plans that are fair and satisfy the substantive and procedural due process requirements of state and federal courts, use these promulgated plans to counter the claimed benefits relied upon by union organizers.⁵¹ The Arbitration Fairness Act of 2009 would

⁵⁰ In fact, to meet the requirements of substantive due process developed by the courts, the employee under these plans cannot be required to bear any of the administrative costs in the resolution of the dispute. These are costs the employer must solely bear.

⁵¹ Certainly, if the promulgated plan is not fair or fails to satisfy the substantive and procedural due process requirements imposed by the courts, that fact is used against the employer during the organizing campaign.

obviously deprive employers of using such promulgated plans in organizing campaigns. While we are not suggesting the proposed legislation is intentionally pro-union, one of the unintended consequences of the Act will be to disadvantage businesses that desire to implement promulgated plans that are fair and provide procedural and substantive due process.

5. Arbitration as a Dispute Resolution Mechanism will be Drastically Reduced and the Courts will be Increasingly Burdened and Forum Shopping will Exacerbate this Burden for the Federal Judiciary

Some proponents of the Arbitration Fairness Act of 2009 have no criticism of the salutary effect of arbitration in resolving workplace disputes and, in fact, view arbitrations as a necessary dispute resolution mechanism in reducing the work load of an already over burdened judiciary. The main thrust of the position of these proponents is that the parties are free to enter into agreements to arbitrate after the dispute has arisen. Presumably, the belief of these proponents is that pre-dispute agreements are in some manner inherently unfair.⁵² The unintended consequence of the Act will, in all likelihood, be to significantly reduce the number or matters that are arbitrated. As a result, there will be a significant increase in the dockets of an already over burdened judiciary and forum shopping will exacerbate this burden on the federal courts⁵³.

Promulgated plans of all forms have grown significantly over the years. As of 2007 it was estimated that 15% to 25% of non unionized employers nationally have adopted some form of mandatory arbitration procedures. Out of a non-union work force of 121 million employees, more than 30 million employees are covered by such procedures. Thus, there are a very

⁵² We are at somewhat of a loss to fully understand this position as the due process requirements, both substantive and procedural, imposed by the courts are identical whether the agreement to arbitrate is based upon a promulgated plan or is pre or post dispute. Moreover, we are not aware of any empirical studies that suggest there is any difference in the terms of pre-dispute and post-dispute arbitration agreements or that post-dispute arbitration agreements result in more just, speedy or inexpensive dispute resolution than pre-dispute agreements or promulgated plans.

⁵³ Data Points: Prevalence of Mandatory Arbitration Systems Imposed on Employees, NELA, October 2007.

significant number of cases in arbitration that would otherwise be in court in the absence of these plans.

Moreover, in our experience it is not realistic to expect that any significant number of these cases will be diverted into arbitration by post-dispute agreements.⁵⁴ The dynamics, the analyses, and the motivations are very different for the employer, the employee, and their attorneys post dispute than pre-dispute.

From the employer's perspective, the incentives regarding an unknown dispute and a present dispute are quite different. When considering future disputes, the employer must consider a wide range of financial risks that are difficult to quantify and often times unpredictable. In this context, many employers are willing to participate in promulgated plans. From the employee's perspective, there is little down side risk to voluntarily entering into a promulgated plan. The employee is not anticipating any dispute with the employer, and, in most instances, the plan may be perceived as a significant benefit as a quick, easy and effective way of resolving any dispute that might arise in the future. That is particularly true where the promulgated plan contains progressive steps in the resolution of disputes such as informal discussions, mediation, and ultimately arbitration. Finally, speed and cost efficiency may not be prime motivators for some plaintiffs' counsel who, under anti-discrimination statutes, are entitled to the payment of attorney fees if the plaintiff ultimately prevails on the merits of the case. One might argue that plaintiffs counsel have a financial stake in escalating the costs of a discrimination action.

⁵⁴ See generally, Lewis L. Malby, Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreement, 30 WM. Mitchell, L. Rev. 313 (2003).

After the dispute arises, the dynamics are entirely different. From the employer's perspective, the nature of the dispute is now known and the exposure can be quantified with the assistance of competent counsel. If the employee is not highly compensated, consideration may be given to the "staying power" of the employee and the tactical advantages that can be gained in litigating in courts. Also, defense counsel may not strenuously advocate the use of arbitration due to issues involving economic self interest.

From the employee's perspective, there is now a dispute and emotions are running high, and counsel for the employee will typically not be motivated to recommend alternative dispute resolution mechanisms at the outset of the case. There is a perception by many in the plaintiffs' employment bar that the likelihood of a "runaway" jury award is far greater than the likelihood of a "runaway" arbitrator's award. Also, there is a perception among the plaintiffs' bar that the "settlement value" of a case, regardless of the merits of the case, may be higher in a judicial rather than an arbitration forum. Defense costs in the form of attorney fees are unquestionably greater in court than in arbitration. There is little doubt that the exposures to defense costs increasingly drive settlement decisions.

Given the above, it is not realistic to expect that any significant percentage of the disputes involving the approximately 30,000,000 employees subject to promulgated plans will find their way into arbitration following the passage of the Arbitration Fairness Act of 2009. That will result in a significant burden to the courts and the federal courts in particular.

If an employee is subject to the terms of a promulgated plan, and the Arbitration Fairness Act is passed in its present form, the attorney for that employee will confront a choice. Either assert a claim under state law and proceed with the pursuit of that claim in accordance with the terms of the promulgated plan, or assert a federal claim and bypass the plan altogether. For the

reason described above, the outcome of this forum shopping is self evident. The federal courts will receive the brunt of the increased work load as it is unlikely that all the states will pass comparable legislation outlawing promulgated plans for the processing of state employment claims.

6. The Right to Jury Trial

Critics of promulgated plans and pre-dispute arbitration agreements maintain these dispute resolution mechanisms deprive individuals of one of the most sacred of constitutional rights: a trial by jury. Such a position, however, assumes the right to a jury trial by jury cannot be intelligently and strategically waived (which under current law is not the case) and also assumes that all other interests (such as the right to a “just, speedy and inexpensive” dispute resolution system) are subordinate to the right to a jury trial.

Regardless of whether an employment lawsuit is filed in state or federal court, the data is quite clear: on average less than 2% of those cases are resolved by a jury trial. The vast majority of cases are disposed of by summary disposition or voluntary settlement. If, in fact, the goal of the civil justice system is to protect the right to jury trial above all else, one might argue the current judicial system is not effectively achieving its prime objective. Certainly, there are no studies or empirical data to suggest the passage of the Arbitration Fairness Act of 2009 will result in an increase in the percentage of jury trials in the United States. Indeed, some commentators suggest the passage of the Act, with the increase in court dockets, will actually reduce the amount of time for courts to preside over jury trials. Other commentators note that more cases go to a contested hearing in the arbitration context than in the courts.

Certainly, if the advocates of the Act believe doing so will in some manner increase the number of jury trials, although there is no empirical data that will support such a cause and effect, there are certainly more direct ways of accomplishing this objective. For example, the

Fed. Rules of Civil Procedure, could easily be amended to either limit or eliminate the ability of federal judges to grant summary disposition. Similarly, and in the context that you become what you incentivize, an increase in jury trials could be expected if legal fees were limited or capped (to 10% or less of any settlement) while contingency fees of 30% or more could be realized if a case proceeded to trial. Similar caps and incentives would also be placed on counsel for defendants. Such an action would certainly provide incentives for defense and plaintiff counsel to proceed to a jury trial and, in all likelihood, result in more jury trials than the passage of the Arbitration Fairness Act ever would.

While these suggestions may appear to be tongue in cheek, they do focus attention on the law of unintended consequences. Adopting the measures suggested above (to simply increase the number of jury trials) would certainly have short term and long term consequences that would far outweigh the benefits of increasing the number of jury trials. Thus, as is true with the law of physics, any action will give rise to reactions. The issue is whether there are unintended consequences that will result from the action (here the passage of the Act) that will far outweigh any benefits that might be derived from the passage of the Act. As the discussion above suggests, there may not be sufficient empirical data to support the intended benefits will be achieved. As discussed below, we suggest that the unanticipated adverse consequences of this action should also be evaluated to ensure there is not a net decrease in the “just, speedy, and inexpensive” resolution of disputes.

7. Impact on Investment

As indicated in the Introduction, there is ample empirical data to support the conclusion that aspects of the U. S. civil justice system have had an adverse impact upon investment in the United States. One aspect is clearly the perception among potential business investors that the “cost” of justice is escalating at a significant pace. Clearly, any legislation that is perceived or

has the impact of increasing those costs would be counterproductive in the attraction of business investment in the United States. While this adverse impact would be justified, as long as a greater public good is being served (i.e., an overall increase in the just, speedy and inexpensive resolution of disputes), the data does not support the conclusion the Arbitration Fairness Act will result in an increase in justice, speed or cost savings in the resolution of disputes. Indeed, the empirical data suggests the contrary.

IV. Conclusion on Arbitration Agreements as a Method of "Just, Speedy and Inexpensive" Resolution of Employment Disputes.

If there is agreement that the U. S. civil system should achieve certain objectives, evaluating and generating the necessary empirical data to determine the steps and reforms best designed to achieve those goals would be most appropriate. We would suggest there is very little disagreement as to the ultimate goal: the civil justice system should provide for the just, speedy and inexpensive resolution of disputes. Any steps or reforms that result in a diminishment of justice, increased delays, and added expense would be inimical to the attainment of the desired goals.

For example, the discovery process is certainly perceived as assisting courts in the laudable goal of providing "just" results. However, there are ample studies that have demonstrated that discovery can be abused by counsel to needlessly escalate the cost and delays of litigation and can undermine the goals of the civil justice system.⁵⁵ As stated in one highly respected report:

[T]here are serious problems in the civil justice system generally and that the discovery system, though not broken, is badly in need of attention.... From the outside, the system is often perceived as cumbersome and inefficient. The

⁵⁵ Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System (March 11, 2009)

emergence of various forms of alternative dispute resolution emphasized this point.⁵⁶

As no commentators are seriously suggesting the total elimination of discovery to address the flaws in the current discovery process, before there is the wholesale elimination of any forms of alternative dispute resolution (which have arisen in part to ameliorate the barriers to justice caused by the increase in expense associated with traditional litigation), there needs to be an evaluation of the impact of such an action on the goal of achieving the just, speedy, and inexpensive dispute resolution. The data suggests that passage of the Arbitration Fairness Act of 2009 may potentially be a step backward rather than a step forward in the attainment of the ultimate goal.

As stated by one respected commentator, increased congressional attention to consumer and employment arbitration can be valuable for it promotes discussion and study about this valuable dispute resolution tool; it can also be dangerous if the terms of the debate focus too much on anecdote and too little on systemic study.⁵⁷ We welcome the opportunity to participate in this very important discussion and systemic study.

Conclusion

Rather than being adverse to employee interests, the Supreme Court even in its most recent configuration has been a supporter of Congress's goal in ensuring as much as possible a workplace free of discrimination. Any view that either of the two decisions under study were a result of some bias is unfounded. Reversal by Congressional action of either of the two decisions is neither warranted and would ultimately work to the detriment of the law of the workplace.

I look forward to answering the Committee's questions and again appreciate the opportunity to participate in this important discussion.

⁵⁶ *Id.* at 2.

⁵⁷ Peter B. Rutledge, *Whither Arbitration?*, 6 Geo.J.L.Pub. Pol. 549 2008.

TO: United States Congress
RE: Jack Gross vs. FBL Supreme Court decision

Thank you for allowing me to tell my story and state my position regarding the outcome of the Supreme Court decision in my case.

I was born in 1948 in Creston, Iowa, and lived in Chariton Iowa until first grade, when we moved to Mt. Ayr, Iowa. My father was an Iowa Highway Patrolman and my mother was a third grade teacher. Mt. Ayr is a small town in southern Iowa of about 1,700. (My dad always said the population never changed because whenever a baby was born, some guy sneaked out of town!) Mt. Ayr is in Ringgold County, which was always called the "poverty" county because it traditionally had the lowest per capita income in Iowa. The nearest "city" was Creston, population about 7,000, which was 30 miles away. Growing up in a small town in the 50's was like living in a Norman Rockwell painting. It's farm country.

I spent most of my summers when I was young working on my grandpa's farm, and was fortunate to have my dad, both grandfathers and many others as mentors and role models. One of the lessons I learned from all of them was to always find the hardest working person wherever I went, and make sure I worked 10% harder than that person. It's the same advice I passed on to my son.

I developed chronic ulcerated colitis at age five, and spent 25 years in constant chronic pain. I was kept alive for many years by heavy daily doses of cortisone. However, I learned how to deal with the pain at an early age and function at a very high level. For instance, my last two summers in high school, I started my days at 5 a.m. to take papers to nearby towns, came home and did chores (I always rented pastures and raised sheep and horses), then went to work for the county scooping gravel on roads all day until 5, when I headed to the hay fields to pick up hay bales until dark. During the school year, I delivered the papers, did chores, and then was a janitor for the vocational agriculture building before and after school. I was also president of the FFA (the largest chapter in the state), on the student council, editor of the paper, etc. On Sundays, I had rural paper routes that I started at 3:00 a.m. My sophomore year, I had a bad accident with my horse and missed an entire semester with a badly broken leg. I made up for that semester during the second semester.

I started going with my wife, Marlene, the week before our junior prom in 1965, and we've been together ever since. We were engaged to be married soon after high school graduation and one year later were married after I completed my freshman year

of college at Drake University in Des Moines, Iowa. During my freshman year, in addition to a part-time job, I was class president, editor of the school paper, member of the student council and other organizations. I did not ask for nor accept a single cent of help from my parents in getting my college degree. They were very lean years for a young married couple.

By the time I graduated, we had our two children. I spent the last two years of college working more than full-time in a factory, and we got student loans for the amount I couldn't earn. I worked every spare minute to take care of my family and get my education, in spite of my bad health. I weighed 87 pounds when I graduated from Drake University with a B.S. degree in Personnel Management.

Upon graduation, I went to work as an adjuster for Farm Bureau (FBL). I had always had old "junkie" cars that I kept pieced together and running the best I could, and was attracted by the company car.

We moved to a rented farm house in southeast Iowa, and were there for about five years when Farm Bureau had an opening for a Regional Manager on the Federation side of the organization in southwest Iowa, closer to my home town. I took that job, and Marlene became a district sales manager with Avon, so we both had company cars and life was finally comfortable, financially. I still had my strong work ethic, and excelled at this quasi-political job until 1978, when I was approached by a seed corn company with an offer to be a sales manager for Nebraska and Southwest Iowa.

The family-owned seed corn company sold out to British Petroleum in the eighties, and most of the sales managers and I declined to go with them. I applied to Farm Bureau to come back as an adjuster, and was hired again in 1987.

Once I had all of my professional designations, (CPCU, CLU, ChFC, AIC and AU) I also began teaching several classes to newer adjusters. To make a long story short, I kept adding value to the company and coming up with successful proposals and implementing them until I became Claims Administration Vice President. In 1997, I was asked to rewrite all of Farm Bureau's policies and combine them into a totally unique package policy. I did that in record time (working extremely long hours) and created the modular package policy they are now using as their exclusive product. In addition, I was writing a quarterly newsletter that was being circulated around the country and was managing the subrogation and call center departments (which I proposed and developed from scratch), the property claims area, the physical damage claims area, the work comp area, the medical

claims review area, the claims information technology area, etc. all of which were functioning at extremely high levels.

My high performance and contributions were reflected in my annual reviews, which were in the top 3% of the company for 13 consecutive years. That was my status with the company at the time of my first demotion in 2000, which also affected several others.

In 2003, all claims department employees with a title of supervisor and above were demoted on the same day. In my case, I was replaced with a person I had hired who was in her early forties, but who did not have the required skills for the position as stated on the company job description, nor did she have my breadth of experience.

Recently, they have been giving me clerical work after six years of my complaining about having literally nothing to do. For most of that time, I have not even had access to any of the computer systems.

I've learned that some of the platitudes I've heard over the years are true. One of those is that "justice delayed is justice denied". We are approaching seven years since the mass demotions that started my case. That is a long time to go to an office every day knowing that I will endure retaliation for exercising a legal right. This all began in January of 2003, in a much different economic environment. My employer merged with the Kansas Farm Bureau. However, they did not want to add any more employees who were over the age of 50, and offered all the Kansas employees who were over 50 with a certain number of years of employment a buyout, which most of them accepted. At the same time, in Iowa and the other states of operation, they demoted virtually everyone who was over 50 and was a supervisor or above. They claimed that this was not discrimination, but simply a reorganization.

Now, if I may, I want to put my case and life in context for what is the much larger and broader issue of age discrimination.

My family, on both sides, has always been very conservative, in lifestyle and politically. My great-uncle was H.R. Gross, congressman from Iowa's third district from 1948-1968. His moniker was "watchdog of the treasury". Prior to that, he was the news broadcaster for WHO radio in Des Moines, Iowa at the same time as Ronald Reagan.

I am a hard-working, patriotic 61 year old, as are my friends. I did not pursue this case just for myself. I watched FBL get by with pushing the envelope of what they could get by with

further and further. Most people are simply just not in a position to fight back, financially, emotionally or intellectually. I was in that position, and I was raised to always stand up to bullies. Many of my friends are also farm or small town "kids" who now feel like they are the forgotten minority. Many of them have been forcibly retired or laid off. Some have been aggressively looking for work for months, only to find doors closed when they reveal the year they graduated. Others have accepted janitor jobs in spite of successful careers and college educations. They all know that age discrimination is very real and pervasive. They are coloring their hair and doing everything possible to look young enough to get an interview. This fight has become more about them than it is for me. I am just one person in this fight, but I know that what happens here will affect many more people than just me. That is what this is about, making the protection of the law for older people no less than the protection for people of color, for women, or for people of different faiths.

One of the things I have always counted on was the rule of law. I have always believed it was consistent, it was blind, and it applied to all equally. If the rule of law had been applied to my case, I would have won at the Supreme Court level. Instead, they threw out 20 years of case law precedent and gutted the clear intent of congress and the ADEA. The jury in my case heard the law as written, listened to a week of testimony from both sides, and applied the law to the evidence. They didn't parse each word like the attorneys and judges tend to do, they just measured the law as stated against the evidence. As Souter said during the oral arguments, "juries are smarter than judges".

Age discrimination suits, I've learned, are very hard to win under any rule of law, and only a small percentage of them prevail. And, the process is onerous and not well known to anyone but lawyers who specialize in that area of practice. For instance, if a complaint is not filed with the Civil Rights Commission within three-hundred days and a Right to Sue letter is not issued, the claim is statutorily estopped. That process eliminates frivolous lawsuits not only because the short time frame is not well known, but also because the Commission will not grant a Right to Sue letter unless a prima facie case is shown. Once I received the Right to Sue Letter, it took two years to get to a jury trial. After a jury of my peers heard the evidence and the law and decided in my favor, the appeals process began four years ago. We are now facing the prospect that we could be starting all over with a new trial under a new set of rules. While we are confident that our evidence will meet even the new higher standard, a new trial and new round of appeals could end up with this litigation consuming 20 percent

of my life instead of the 10 percent it has already exacted. That, in itself, is unjust and extremely stressful.

I feel like my case has been hijacked by the high court for the sole purpose of rewriting both the letter and the spirit of the ADEA. I am against activist judges, from either party, who use their personal ideology to misinterpret the law as intended. I am especially mortified when the only people (judges) who are immune from age discrimination vis-a-vis their lifetime appointments, can rewrite laws that are designed to protect people in the "real" world.

As our former Iowa Lieutenant Governor recently stated in an editorial, the party of Abraham Lincoln is against discrimination in all its forms. She (Joy Corning) happens to be a Republican, but this should be a non-partisan issue. The branch of government closest to the people long ago recognized that age discrimination was a problem, and they legislated against it. I relied on that legislation. Now, it appears, the Supreme Court has decided that age discrimination is not like all the other forms of discrimination and should have it's own set of (much tougher) rules. To accomplish this outcome, the Court had to disregard its own rules. They did not address the single issue upon which certiorari was granted, and they allowed the opposing side to introduce for the first time an entirely new argument that had not been previously raised nor briefed. This was clearly motivated by ideology, much like it was in the Lily Ledbetter case. In both instances, the Court seemed to be directly challenging Congress to write new and tighter legislation if they don't want 5 lifetime appointees to circumvent their clear intent. I don't know Lily Ledbetter, but I think all citizens owe both her and Congress a "thank you" for correcting a clearly unjust ruling. It is my understanding, however, that while Ms. Ledbetter got an act named after her, she still did not receive justice in the way of an award. That was unfair both to her and to her attorneys who, judging from my own experience put in countless hours fighting for her and for a common sense ruling.

My own attorneys, Beth Townsend and Mike Carroll from Des Moines, Iowa, have likewise been fighting tirelessly on my behalf for nearly seven years without a dime of compensation. They took this case on a contingency basis because they believe in me, in the evidence, and now in the need to get some essential corrective action from our elected representatives. This case has become much larger in scope than we ever imagined, and thus much more expensive. I have personally spent over \$30,000 in costs and expenses. That is money that was intended to help my grandchildren get a college education so they wouldn't have to starve their way through like I did.

I am encouraged by the comments made about my case during the Sotomayor hearings by Senators Harkin and Franken, and by the public statements made by Senator Leahy and others. However, I am also keenly aware of the current agenda faced by congress, especially in the health care reform arena. I am hopeful that each of you will recognize that this also needs immediate attention. Headline after headline have proclaimed that it is now easier for employers to discriminate based on age, following the decision in my case. I am not at all comfortable with having my name associated with a decision that is now causing pain to other employees in my age bracket simply because I took a stand seven years ago. And, as expected, my employer is pushing for a new trial as quickly as possible to take advantage of the new court-made law before it can be corrected. For both reasons, I urge corrective legislation be taken as soon as possible.

I hope my story puts a real and human face on this issue for you. In short, my life is characterized by a history of hard work and playing by the rules. My wife and I raised two wonderful children. And we have cared for our parents in their later years as well. Marlene helps our son and his wife by taking care of our little granddaughters, ages 3 and 5, every day. Those two little girls are what keep my life in perspective now that I have been set aside and ignored at the office. What you do here, how you change the law may or may not help me, but I know for sure you are in the position to help those who come after me.

Sincerely and Respectfully,

Jack Gross, CPCU, CLU, ChFC, AIC, AU

AAA Employment Arbitration: A Fair Forum at Low Cost

The debate over whether mandatory employment arbitration forces employees to give up civil rights has raged for more than a decade virtually without empirical support on either side. Elizabeth Hill recently completed a statistical study of employment arbitration under the auspices of the American Arbitration Association. Her results indicate that mandatory employment arbitration is not biased in favor of employers and that it is fair and affordable to lower-income employees. The author summarizes the major findings of her study in this article.

BY ELIZABETH HILL

The debate over "mandatory" employment arbitration is one of the most important issues in arbitration and employment relations today. It has been the subject of three major Supreme Court decisions in the past decade, including a 2001 decision which held that "mandatory" arbitration

agreements are generally enforceable.¹ Mandatory employment arbitration has also been the subject of a vigorous national lobbying effort aimed at limiting its use.² Surprisingly, the debate over the propriety of mandatory employment arbitration has been waged for a decade largely without the benefit of hard data describing it. Both critics and advocates of mandatory employment arbitration acknowledge the dearth in empirical research and agree that there is a need to fill the gap.³ This article describes my recent attempt to begin to fill that gap with a study of 200 employment arbitration cases, which were decided under the auspices of the American Arbitration Association (AAA), the largest independent provider of arbitration services in the United States. My research was not intended to prove a hypothesis, but to provide a comprehensive statistical description of AAA employment arbitration based on the data derived from the 200 individual awards. At the end of the day, my findings, which are detailed below, indicate that AAA employment arbitration is affordable and substantially fair to employees, including those employees at the lower end of the income scale.⁴

The Controversy Over "Mandatory" Employment Arbitration

What are commonly known as mandatory arbitration agreements are found in arbitration clauses in employment agreements or employment applications or in the arbitration policy of an employee handbook. A person who is seeking employment is required to sign an arbitration agreement, or an express acknowledgment of an arbitration policy in an employee handbook, before being hired. In this way, a prospective employee gives up the right to take employment-related disputes to court and agrees instead to arbitrate these claims with the employer. Consequently, once an employee is hired, disputes must be arbitrated, if they are not settled first. Most often, the arbitration agreement provides that the arbitrator's decision is final and binding. Thus, it is enforceable in the courts and there is limited appeal.

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The use of private employment arbitration has grown dramatically over the past decade. The percentage of employers in the private sector using employment arbitration increased from 3.6% in 1991 to 19% in 1997.¹ Studies indicate that by 1998, 62% of large corporations had used employment arbitration on at least one occasion.² Further, in just four years between 1997 and 2001, the number of employees covered by employment arbitration plans administered by the AAA grew from 3 to 6 million.³

Just as strong as the growth in private employment arbitration has been the opposition to it. Employees' advocates, civil rights' advocates and the plaintiff's bar strongly oppose the practice as unfair. In their view, employers unfairly take advantage of superior economic power to force prospective employees to sign away their constitutional rights to due process and trial by jury—hence the term mandatory employment arbitration.⁴

Employers have maintained that employees have sufficient economic power to voluntarily negotiate the terms of their employment. Moreover, employers believe that arbitration provides employees with a generally fair forum at relatively low cost, because most employees cannot afford to take their cases to court due to the high cost of an attorney.⁵ For the most part, both sides of the argument have remained unproven.

However, two studies do indicate that, in fact, lower-income employees cannot access the courts with employment-related claims. While the studies concern only employment discrimination claims, their findings are applicable to all employment-related claims.

The Dunlop Commission, an investigatory commission created by the U.S. Departments of Labor and Commerce in the early 1990s, determined that the majority of employees litigating employment discrimination claims in the courts were professional or managerial—i.e., from the higher end of the income scale.⁶

A second study of employment discrimination claims also indicated that lower-income employees are excluded from the courts. This study, conducted in 1991 by William Howard, involved

a survey of 321 plaintiff's counsel.¹¹ It revealed that plaintiff's counsel would not take an employment discrimination case unless the case involved, on average, \$60,000 in provable damages. Provable damages are damages that are tangible and will definitely be collected if liability is established. For example, lost wages are provable damages,

but damages for emotional distress are not. Howard's survey further established that once \$60,000 in provable damages was established, plaintiff's attorneys would accept a case with a contingency fee of, on average, 35%.

A lower-income employee would have difficulty meeting this standard for representation because provable damages in an employment discrimination case, indeed in any employment-related case, are based on earnings. Tangible damages are usually lost earnings. The lost earnings of an employee earning less than \$60,000 annually do not amount to \$60,000 until that employee has been out of work for more than one year. By the time such an employee has been out of work for a year, he or she might not be able to afford to pay the lawyer's expenses.

Even lawyers who represent employees on a contingency basis usually require that their expenses be paid up front. (Expenses might include such charges as the costs of travel, a stenographer's bill for creating a deposition transcript, the cost of copying documents, and phone bills.)

While the two studies discussed above concern only employment discrimination cases, they also indicate that lower-income employees cannot afford to take other employment-related claims to court. Provable damages for these claims are also rooted in earnings, making it difficult for lower-income employees to attract plaintiff's counsel. Moreover, other employment-related claims do not offer plaintiff's counsel the added attraction of recovering their attorney's fees from a defeated employer. Most statutes prohibiting employment discrimination permit a prevailing plaintiff to collect attorney's fees from the defendant-employer.¹² Consequently, lower-income employees are even less likely to access the courts if their employment-related claims are not based on discrimination.

Elizabeth Hill holds an L.L.M. in Labor and Employment Law (N.Y.U.) and is a Research Fellow at the Center for Labor & Employment Law at New York University School of Law. Ms. Hill has completed two empirical studies of mandatory employment arbitration. The second study, "Employment Arbitration and Litigation: An Empirical Comparison," written with Prof. Theodore Eisenberg of Cornell University School of Law, will be published by the Institute for Judicial Administration at NYU School of Law. Ms. Hill previously practiced litigation in New York City.

Thus, these studies substantiate the belief that lower-income employees generally do not have access to the courts. During my research, I discovered, however, that more than three-quarters of the employees arbitrating claims pursuant to mandatory arbitration agreements earned less than \$60,000 per year, *i.e.*, were of lower-income by the standard applied above.¹³ Thus, as a practical matter, when they agree to mandatory arbitration, they do not waive their right to trial. They cannot afford counsel. Since a trial is beyond their reach, arbitration may be the sole forum for their claims. Accordingly, this study of AAA cases focused on findings regarding these lower-income employees.

The Method of Research

The study was based on 200 awards randomly selected from a pool of 356 AAA employment dispute awards. The cases were initiated in 1999 and 2000 and decided between Jan. 1, 1999, and Nov. 5, 2000. The arbitration hearings took place in 35 states. One hundred and ninety-one cases involved a single arbitrator and the remaining nine cases involved a panel of three arbitrators. In three cases, the parties submitted a settlement agreement for the imprimatur of the arbitrator. These cases were considered to be employee wins because they provided for payments to the employees in settlement of their claims. Where there was an award on both the claim and counterclaim, the party with the larger award was considered the winner and the award amount was considered to be the difference between the two awards. Awards of equitable relief were considered to be wins for the recipients. If some equitable relief was granted to both parties, the recipient of the most relief was recorded as the winner, but awards were entered for both parties. The value of the relief was based on a common-sense assessment of the award. Monetary awards that did not describe the relief in dollars (*e.g.*, "pension benefits calculated pursuant to formula B in the 401(k) Plan") were also entered as wins, though the relief was not entered in dollars.

The AAA database separates cases concerning employees arbitrating pursuant to mandatory arbitration agreements from those concerning employees arbitrating pursuant to arbitration agreements that were not initiated as a condition of hiring. Sixty percent of the cases involved employees arbitrating pursuant to mandatory arbitration agreements. Seventy-two percent of those employees arbitrating pursuant to mandatory arbitration agreements earned less than \$60,000.¹⁴ Accordingly, I used the AAA's category of mandatory arbitration cases as a proxy for

cases concerning employees earning less than \$60,000. I refer to this group of employees as "lower-income employees."

Arbitration Costs to Lower-Income Employees

The results of my study support the belief that arbitration can be affordable, even to lower-income employees. The following are my findings as to the cost of AAA arbitration for lower-income employees during 1999 and 2000.

The potential costs of AAA arbitration during 1999 and 2000 were the filing fee, hearing fees, the arbitrator's fees, and attorney's fees. I refer to the filing, hearing and arbitrator's fees, collectively, as "forum fees" because they comprise the cost of the arbitration forum, whereas attorney's fees are the cost of counsel.

I found that 32% of lower-income employees paid nothing for arbitration. This group of employees paid no forum fees because the arbitrator reallocated their fees to the employer at the end of the arbitration hearing. They paid no attorney's fees because they proceeded *pro se*, or because they were awarded attorney's fees by the arbitrator.

Twenty-nine percent of lower-income employees paid only attorney's fees for arbitration. All of their forum fees were reallocated to the employer by the arbitrator. The average attorney's fee, based on all 200 cases, was \$6,776. This figure is the best estimate of their cost of arbitration. This figure needs further research, however, as there were only 12 awards of attorney's fees to lower-income employees in the 200 case sample.

Considering the 32% group and 29% group above, we can see that the forum fees for both groups were entirely reallocated to the employer. Thus, a total of 61% of lower-income employees paid no forum-fees. The 32% group did not then pay for counsel, while the 29% group did pay for counsel.

An additional 13% of lower-income employees paid no attorney's fees, but did pay some or all of the forum fees in the case. In order to estimate the cost of arbitration to these employees, I calculated the average amounts of the filing, hearing and arbitrator's fees based on all 200 cases. The total of these average fees was \$2,292. This is a good estimate of the most that this 13% of lower-income employees paid for arbitration.

The final 26% of lower-income employees paid all of their attorney's fees, as well as some or all of the forum fees for the case. Only 2% of this 26% group paid all of their forum fees, while the remaining 24% paid only a part of their forum fees. For the 2% group, the total cost of arbitration was \$8,540, based on the average attorney's

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fees and forum fees for the 200 case sample. For the remaining 24%, the average cost of arbitration was between \$6,776 and \$7,954.

Based on these figures, 55% of lower-income employees had average total arbitration costs between \$6,776 and \$8,540. This 55% is comprised of the 29% and 26% groups discussed above. Nevertheless, the costs of arbitration appear to be affordable to employees earning less than \$60,000 per year, assuming that they have been working during the pendency of the arbitration. These arbitration costs are affordable because most lower-income employees have agreed to representation on a contingency basis. Thus, attorney's fees should generally be affordable to lower-income employees. The remaining costs of arbitration—forum fees—averaged only \$2,292. Presumably, even lower-income employees can afford to pay them.¹⁵

Shortly after release of the results of this research, the AAA announced amendments of its rules of procedure, effective Nov. 1, 2002, to include reduction of employees' forum fees under mandatory arbitration agreements to a total of \$125.¹⁶ Going forward, there should be no more issue of affordability of forum fees for arbitration under the auspices of the AAA.

Civil Rights Cases: A Red Herring

A frequent criticism of employment arbitration has been that arbitrators are not competent to enforce federal statutory rights when claims of employment discrimination are made in arbitration. Studies indicate that this focus on civil rights cases is misplaced. Employment discrimination cases have not comprised more than 7% of the total pool of employment cases in any study of AAA employment arbitrations.¹⁷ In the instant study, only 7% (14 cases) of the 200 cases involved civil rights claims.¹⁸ Cases filed with the securities industry's self-regulatory organizations show similar results. An average of just 21 employment discrimination claims per year were filed with the combined arbitration forums of the New York Stock Exchange and the National Association of Securities Dealers between 1989 and 2001.¹⁹ The small number of civil rights cases that are arbitrated strongly suggests that this type of claim should not be the focus of opposition to employment arbitration.

Findings regarding the 14 civil rights cases in this sample are based on numbers too small to be statistically significant. Nevertheless, the awards generally appear to have been properly adjudicated. The majority of arbitrators properly applied the governing statutes and case law. In the three cases in which the claimants won, the arbitrators considered all of the statutory categories of damages. They awarded attorney's fees against the employers pursuant to statute, and considered, but ultimately rejected, awarding punitive damages.

Fairness of AAA Employment Arbitration

The plaintiff's bar and employees' and civil rights' advocates have long charged that employment arbitration is biased in favor of employers.²⁰

More recently, one critic alleged that the process is also biased against lower-paid employees.²¹ In order to evaluate these alleged biases, this study examined the rates at which the parties won their cases, compared the amounts of the parties' awards to the amounts of damages claimed, and looked at the rates at

which the arbitrators allocated forum fees and attorney's fees to the different parties. The results refute the allegations that employment arbitration is unfair to lower-income employees or to employees in general.

Employee Win Rates

In this study, employees won 43% of the cases, while employers won 57% of them. Just as this 7% difference in win rates is not great evidence of unfairness, neither are the number of cases underlying it. Employees won 86 cases and employers won 114. Only 14 cases comprise the difference.

These statistics, however, are not conclusive. We must take a closer look because employees cannot be considered as a uniform group. Sixty percent of employees were lower-income employees and 40% were higher-income employees.

At first blush, it appears that there is evidence of arbitrator prejudice against lower-income employees, but not against higher-income employees. Higher-income employees won 57% of their cases, while lower-income employees won 34% of their cases. A closer look at the lower-income employee cases, however, dispels the apparent evidence of bias.

Studies show that lower-income employees have no real access to trial, with the result that arbitration may be the sole forum for their claims.

As previously noted, 60% of the sample were lower-income employee cases. Fifty-five percent of those cases, however, presented claims that were inherently likely to be dismissed, regardless of any possible prejudices of the arbitrator. Approximately two-thirds of these inherently flawed cases involved "wrongful discharge" claims. In these cases, the law generally does not permit the employee to win. In 51 states, the law is that an employer may discharge an employee for any reason or no reason at all.²² Thus, an arbitrator should not permit an employee to win such a case, regardless of any personal bias.

The remaining third of the inherently flawed cases involved what I have named the "appellate effect." The appellate effect is an above-average win rate for an employer, caused by the effective functioning of the employer's in-house dispute resolution program. The program isolates and resolves claims with merit in-house, leaving meritless claims for final appeal to external arbitration with the AAA. The result is an AAA docket of meritless claims against that company, virtually all of which end up being dismissed. The cases in this sample that were subject to the appellate effect had little or no merit. There was no room for arbitrator prejudice to play a role in their dismissal.

If one removes the inherently flawed cases from the pool of cases involving lower-income employees, 45% of the original pool remains. There was no evidence of arbitrator bias in these remaining cases. Lower-income employees won 49% of these cases.

Employee Award Amounts

The award data indicated no arbitrator bias against lower-income employees or employees as a whole. If anything, the award data indicated a bias in favor of lower-income employees.

The average amount of damages awarded to an employer was \$54,960, while the average amount of damages awarded to an employee was \$172,690. Clearly, these statistics do not indicate bias against employees. These figures, however, also do not accurately access bias between employers and employees. The awards to employers must be compared to higher-income and lower-income employees separately. Moreover, the awards must be evaluated in comparison to the amount of damages that were initially demanded by the party. The ratio of the average award to the average demand is the real measure of a party's success and an arbitrator's attitude. It is not possible, however, to compare arbitrators' attitudes toward employers and the two groups of employees because there were not enough data in the sample regarding employers' demands.

Accordingly, I compared arbitrators' attitudes toward higher-income and lower-income employees only.

The \$242,038 average award to higher-income employees substantially exceeded the \$29,503 average award to lower-income employees. The relative sizes of the awards reflect the relative sizes of the demands made by the two groups. The average demand by high-income employees was \$505,763, while the average demand of lower income employees was \$50,593. (The difference in demands is correlated to the difference in the two groups' incomes. Employees can only demand the income that they have lost.)

The accurate measure of bias is the award-to-demand ratio and it reveals no bias against lower-income employees. The award-to-demand ratio for lower-income employees was .58. The award-to-demand ratio for higher-income employees was .48. Arbitrators awarded lower-income employees a higher percentage of their demands than higher-income employees, indicating, if anything, a bias in favor of lower-income employees.

Allocation of Forum Fees

The AAA rules that were in effect in 1999 and 2000 provided that the claimant (usually the employee) should pay the filing fee, and that the hearing and arbitrator's fees should be split between the parties.²³ The rules also provided that the arbitrator had discretion to reallocate forum fees, which is what the majority of arbitrators did in this sample. The reallocation of forum fees in lower-income employee cases shows a decided bias in favor of lower-income employees.

Arbitrators reallocated all forum fees to the employer in 61% of the lower-income employee cases. They reallocated all or some part of the filing fee to employers in 85% of the cases, all of the hearing fees to employers in 71% of the cases and all of the arbitrator's fees to employers in 70% of the cases. Moreover, arbitrators did not make reallocation dependent on the lower-income employee winning the case. Success of the employee increased the likelihood of reallocation by only 14%.

By reallocating forum fees to employers in the majority of the cases, arbitrators demonstrated a substantial bias in favor of lower-income employees and reduced the cost of arbitration. Many believe that employees should have to pay some part of the cost of arbitration in order to deter frivolous claims. On the other hand, there is the view that costs should not discourage a viable claim. The arbitrators in this sample straddled the two viewpoints by reallocating costs that the employee must originally have expected to pay.

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Attorney's Fees

In litigation and arbitration, the prevailing party frequently seeks an award of attorney's fees from the adversary. They usually succeed where an award of attorney's fees is contemplated by a contract between the parties or by a statute governing the dispute, or where the judge or arbitrator determines that the adversary has misbehaved. Indeed, the arbitrators in this sample tended to award attorney's fees in cases alleging breach of contract or a violation of civil or other statutory rights. Therefore, in order to determine whether the arbitrators were biased in making awards of attorney's fees, I looked at the frequency of attorney's fee awards in cases alleging statutory and contract claims, rather than the frequency of these awards in all cases. The frequency of awards in these cases did not indicate any bias in favor of employers, but it did seem to indicate a bias in favor of higher-income employees.

Employers were awarded attorney's fees in 20% of their cases alleging contract or statutory claims. Higher-income employees were awarded attorney's fees in 42% of their cases alleging such claims. But lower-income employees were awarded attorney's fees in only 19% of the cases in which they alleged contract or statutory claims.

The disparity between the lower and higher-income employees' results, however, may have another explanation than arbitrator bias. It may be that it is easier to collect attorney's fees pursuant to an express contractual provision than pursuant to statute. If so, then it is notable that 60% of the mix of higher-income employees' contract and statutory claims were contract claims, whereas only 34% of lower-income employees' contract and statutory claims were contract claims.

The "Repeat Player Effect"

Critics of employment arbitration have relied heavily on the "repeat player effect," the sole empirically proven example of what appeared to be arbitrator bias against employees in arbitration. The effect, originally noted in a sample of AAA cases, occurs when employers who arbitrate more than once win more frequently than those who arbitrate only once.²⁴ The effect was present in this sample. The cause of the repeat player effect has never been established. Yet it is the cause that determines whether the effect is the symptom of a

fair or unfair process.

The repeat player effect is most commonly believed to be explained by the "repeat arbitrator theory." This theory is the belief that a repeat player employer chooses the same arbitrator for several arbitration cases, building a relationship with the arbitrator that causes the arbitrator to render biased rulings in favor of the repeat player employer.²⁵ In fact, the repeat arbitrator theory has no empirical support.

There is no support for the repeat arbitrator theory in this study either. There were only two cases in 200 that involved a second meeting between the same arbitrator and employer, or indeed, between any two entities attending or represented at the arbitration. Two cases is not a statistically significant incidence in a sample of 200 cases.

The Appellate Effect

This study supports an explanation of the repeat player effect which I have named the "appellate effect." Repeat player employers isolate and resolve large numbers of meritorious employee claims through in-house dispute resolution programs, leaving only relatively meritless cases for appeal to AAA arbitration. The result is a AAA docket of meritless cases against that employer, which leads to an above-average win rate for that employer. In other words, the repeat player effect is caused, not by a lack of due process, but by a fair in-house process.

The following data support the "appellate effect" theory. In this study, 34 cases involved a repeat player employer. Most of these repeat players were employers with nationally known names—large companies likely to process a relatively large number of cases. The employers in 74% of those cases (25 cases) maintained an in-house dispute resolution program culminating in AAA arbitration. The win-loss ratio for this 74% of cases was 3.2, a full 190% higher than the 1.3 win-loss ratio for employers overall. On the other hand, the remaining 26% of repeat employer cases (nine cases) involved employers who did not maintain in-house dispute resolution programs. Their win-loss ratio was only 1.25, just slightly below the 1.3 win-loss ratio for employers overall. In short, the repeat player effect does not exist where the repeat player does not maintain an in-house dispute resolution program. Thus, the effect appears to be the result of the selection processes of large employers' in-house dispute resolution programs, not merely the by-product of large employers' repeat appearances at arbitration.

The appellate effect theory is further confirmed by a reading of the 25 individual cases

which do manifest the repeat player effect. They are indeed, of little or no merit.

Proceeding *Pro Se*

One-third of the lower-income employees in this study prosecuted their cases without legal representation. The data indicated that the arbitral forum was successfully navigated by these employees.

The win-loss ratio for both lower-income employees with representation and those who proceeded *pro se* was .50. Moreover, the employees *pro se* did not face less substantial opponents than the employees with counsel. The lower-income employees *pro se* defeated employers represented by 33 attorneys, six human resources representatives, and one corporate representative.

As to damages awarded and damages demanded, lower-income employees *pro se* fared as well as lower-income employees with counsel. Although the data on demands and awards was limited, both groups obtained 100% of the monetary damages they originally demanded. The fact that the \$67,174 average demand by the *pro se* group was less than the \$93,448 average demand by the group with counsel may indicate that lower-income employees made a decision to retain counsel when larger amounts of money were at stake.

In sum, these findings demonstrate that employees proceeding *pro se* understood their cases and the AAA arbitration procedure. They also indicate that the AAA rules were accessible to lay people.

The Speed of Arbitration

Arbitration is commonly believed to be a relatively speedy means of dispute resolution. The average length of arbitration, measured from the filing of the demand for arbitration to the date of

the award, was 8.2 months, based on this sample. However, an accurate measure of the length of arbitration cannot be based on this sample alone. As of Nov. 5, 2000, the termination date for the lengthiest arbitration in our sample, there were many cases initiated in 1999 and 2000 which had not yet terminated. Therefore, 8.2 months does not represent the true average length for all cases initiated in those years ending in awards. We must consider all cases which terminated in awards.

The AAA supplied me with data concerning all cases initiated in 1999 and 2000 which had terminated as of September 2002, whether by award or otherwise. Based on that data, I was able to estimate the average length of all cases initiated in 1999 and 2000 ending in an award. The average length was 16.5 months, or 494.6 days.²⁶

Length of the Hearing

The hearings ranged in length from one to 12 days and averaged two days. Eighty-nine percent of the arbitrators complied with AAA Rule 34, which requires that the arbitrator provides "written reasons" for the award.

Conclusion

Opposition to employer-sponsored employment arbitration is widespread, strong and based on the belief that it robs employees of the right to trial and supplants it with a kangaroo court dominated by employers' interests. However, research shows that lower-income employees have no real access to trial and that employment arbitration offers an affordable, fair, alternative adjudicative forum. Perhaps the results of this study will help move the debate away from the propriety of employment arbitration and toward the creation of better employment dispute resolution. ■

ENDNOTES

¹ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (predispute employment arbitration agreements are enforceable under the Federal Arbitration Act); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) ("mandatory" arbitration agreements are generally enforceable); *EEOC v. Waffle House*, 534 U.S. 279 (2002) (predispute employment arbitration agreement did not bar the EEOC from bringing suit where the EEOC acted pursuant to a charge, and no arbitration or private lawsuit had been initiated).

² Recently passed California legislation requires substantially increased disclosure by arbitrators. See Calif. Code

Civ. Proc. §§ 1281.85, 1281.9. And proposed federal legislation would render all employment arbitration agreements unenforceable. See Section 3(a) of S. 2435, 107th Cong., 2d Sess. (May 1, 2002) and of H.R. 2282, 107th Cong., 1st Sess. (June 21, 2001) which states, "Any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable."

³ See, e.g., Lisa Bingham & Denise Chachere, "Dispute Resolution in Employment: The Need for Research," *Employment Dispute Resolution and Workers Rights*, ch. 4 in A.E. Eaton &

J.H. Keefe, eds., *Employment Dispute Resolution and Worker Rights in a Changing Work Place*, Industrial Relations Research Ass'n 1999); Samuel Estreicher, "Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements," *Ohio State Journal on Dispute Resolution*, vol. 16 (2001) pp. 559, 564, 566 (hereafter "Saturns"); David Lewin, "Dispute Resolution in Non-union Organizations: Key Empirical Findings," in Samuel Estreicher, ed., *N.Y.U.'s 53rd Annual Conference on Labor* (Aspen Publishers 2003) (hereafter Estreicher); Deborah Hensler, "ADR Research at the Crossroads," *Journal of Dispute Resolution*

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(2000), p. 71.

* The complete results of this research project are to be published this April by the *Ohio State Journal of Dispute Resolution*, vol. 18, no. 3 (2003). They will also be published in Estreicher, *supra* n. 3.

¹ Peter Feuille & Denise Chachere, "Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces," *Journal of Management*, vol. 21 (1995), pp. 27-42; U.S. General Accounting Office, "Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace," GAO/ GGD-97-157 *ADR in the Workplace*, (1997)(GAO found 19% of employers surveyed were using arbitration to resolve employment disputes).

² David Lipsky & Ronald Seeber, "In Search of Control: The Corporate Embrace of ADR," *University of Pennsylvania Journal of Labor & Employment Law*, vol. 1, no. 1 (1998), pp. 133-159; see also *The Appropriate Resolution of Corporate Disputes: A Report on the Growing Use of ADR by U.S. Corporations* (Cornell PERC Institute on Conflict Resolution, Cornell University); see also "Patterns of ADR Use in Corporate Disputes," *Dispute Resolution Journal*, vol. 5, no. 1, (1999), 66-71.

³ American Arbitration Association (AAA), National Rules for the Resolution of Employment Disputes (eff. June 1, 1997) at 1; Author's interview with Robert Meade, AAA senior vice president, in New York City, on Jan. 14, 2002.

⁴ See, e.g., Jean Sternlight, "Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration," *Washington University Law Quarterly*, vol. 74 (1996), p. 637; Reynolds Holding, "Private Justice," *San Francisco Chronicle*, Oct. 8, 2001, at A15, 2001 WL 3416493; Reginald Alleyne, "Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum," *Hofstra Labor Law Journal*, vol. 13 (1996), pp. 381, 403, 426; Bryant Garthy, "Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution," *Yale Law Journal*, vol. 88 (1979), pp. 916, 929-930; Robert Gorman, "The Gorman Decision and the Private Arbitration of Public-Law Disputes," *University of Illinois Law Review* (1995), pp. 635, 669; Lewis L. Malby, "Private Justice: Employment Arbitration and Civil Rights," *Columbia Human Rights Law Review*, vol. 30 (1998), p. 29, 49-50.

⁵ See, e.g., "Saturns," *supra* n. 3.

⁶ U.S. Dept. of Labor Report, *Report and Recommendations: Commission*

on the Future of Worker-Management Relations (December 1994).

⁷ William Howard, "Arbitrating Claims of Employment Discrimination," *Dispute Resolution Journal*, vol. 49 (Oct-Dec. 1995), p. 40.

⁸ See, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(k)), Americans with Disabilities Act of 1990 (42 U.S.C. § 12117), Age Discrimination in Employment Act of 1967 (29 U.S.C. § 626) and Equal Pay Act of 1963 (29 U.S.C. § 216(b)).

⁹ See *infra* n. 14.

¹⁰ It was possible to extrapolate employees' income from the content of the awards. Some awards included information about wages or salary. Other awards provided information about the employee's occupation, which was matched with the national average wage for that occupation provided by the Bureau of Labor Statistics' National Employment and Wage Data from the Occupational Employment Statistics Survey by Occupation, 2000.

¹¹ It bears mention that since the conclusion of this study, the AAA has amended its employment rules to limit the forum fees payable by employees arbitrating pursuant to mandatory arbitration agreements to \$125. This rule change eliminates any question of high cost of forum fees for AAA arbitration.

¹² American Arbitration Association, National Rules for the Resolution of Employment Disputes (eff. Nov. 1, 2002).

¹³ See Lisa Bingham, "Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases," *Labor Law Journal*, vol. 47 (1996), p. 108, 115 (only 1.8% of a pool of AAA cases filed in 1993 contained civil rights claims); Lewis Malby, *supra* n. 8, at 49-50 (only 13 of all the AAA cases filed in 1996 alleged employment discrimination).

¹⁴ Fourteen is the number of viable civil rights claims. In addition to these 14 claims, there were 19 cases that alleged a civil rights claim but did not allege a single fact in support of the claim. There were also three civil rights claims that were time barred.

¹⁵ Michael Delikat & Morris Kleiner, "An Empirical Study of Dispute Resolution Mechanisms for Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?" in Estreicher, *supra* n. 3.

¹⁶ See *supra* n. 8.

¹⁷ Lisa Bingham, "Employment Arbitration: The Repeat Player Effect," *Employee Rights & Employment Policy Journal*, vol. 1 (1997), p. 189.

¹⁸ At-will employment is no longer the law in Montana. Mont. Code Ann. §. 39-2-901 *et. seq.*

¹⁹ AAA National Rules for the Resolution of Employment Disputes (eff. Jan. 1, 1999), Rule 39.

²⁰ See *supra* n. 21.

²¹ *Id.*

²² I estimated the average time from demand to award by estimating the length of the individual cases which might have been included in a sample of all awards initiated in 1999 and 2000, assuming all cases initiated in 1999 and 2000 were completed. The average time from demand to award in my pool of 200 awards was 246.97 days, or 8.2 months. My 200 awards represented the pool of 356 awards rendered from the total pool of cases initiated in 1999 and 2000 on or before Nov. 5, 2000. Between Nov. 5, 2000, and Sept. 1, 2002, an additional 429 awards were rendered. Imagine that my sample were expanded to include a sample of these 429 awards. The original 200 awards comprised 56% of the 356-award pool. Therefore, the additional sample of the 429 awards would be 56% of 429, or 240 additional awards. The additional sample of 240 awards would be divided into two groups of 120 each, because I estimate that approximately half of them would have been initiated in each of 1999 and 2000. I make this estimate because 1,340 cases of the total pool were initiated in 1999 and 1,372 cases were initiated in 2000. I don't know when during each year these 240 cases would have been initiated, so I estimate that the initiation dates would average at the mid-points: June 1, 1999, and June 1, 2000. I don't know when these cases would have ended in awards, but I know that the awards were rendered sometime after Nov. 5, 2000, and on or before Sept. 1, 2002. So I chose an approximate mid-point of Nov. 1, 2001. Therefore, I added two groups of estimated individual awards to my sample. Group one consisted of 120 cases initiated on June 1, 1999, and terminated in an award on Nov. 1, 2001. Group two consisted of 120 cases initiated on June 1, 2000, and terminated in an award on Nov. 1, 2001.

Averaging these two groups of estimated additional awards and my original sample, the average time from demand to award was 16.5 months, or 494.6 days. As of Sept. 1, 2002, there were only 103 cases initiated in 1999 and 2000 that were still pending. Of the 2,613 cases which were terminated as of Sept. 1, 2002, only 34%, or 885, ended in an award. Assuming that only 34% of the pending 103 cases resulted in an award, there were only 35 awards outstanding. Thirty-five awards comprise less than 8% of the 440 awards supporting my estimate. Accordingly, the estimate is sound.

MAY/JULY 2003



THE RESOLUTION EXPERTS™

Arbitrators Less Prone to Grant Dispositive Motions Than Courts

June 26, 2009

For over two decades, grants of dispositive motions in courts and in arbitrations have been moving in two very different directions.

In 1986, the U.S. Supreme Court issued a trilogy of now-famous decisions—*Matsushita Electric Industrial Company v. Zenith Radio Corporation*, *Anderson v. Liberty Lobby Inc.*, and *Celotex Corporation v. Catrett*—that led federal courts to begin to view summary judgment as an important way to dispose of cases before trial. Empirical studies have also shown that the percentage of federal cases resolved by summary judgment has increased over time.

In addition, two years ago, in *Bell Atlantic Corporation v. Twombly*, the Court introduced a new standard for when courts should grant a motion to dismiss a complaint, which makes it easier for defendants to win the motion. Fifty years earlier, in *Conley v. Gibson*, the Court had stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Yet in *Twombly*, the Court held that "this famous observation has earned its retirement"⁸ and plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face."

Moreover, just this term, the Supreme Court strongly reaffirmed *Twombly* in *Ashcroft v. Iqbal* and stated that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." The Court also made it clear that this holding applies to all civil actions.

In contrast, arbitrators are generally much more reluctant than courts to grant dispositive motions—whether they are motions to dismiss a complaint or arbitration demand, or motions for summary judgment. Indeed, the rules of most major arbitration providers are silent about whether an arbitrator may entertain dispositive motions.

While courts have held that arbitrators have the inherent power to grant dispositive motions, the lack of explicit rules on the issue reflects the hesitance that most arbitrators feel in granting dispositive motions without a fact hearing. Indeed, at the beginning of 2009, the Financial Industry Regulatory Authority (FINRA), the largest non-governmental regulator for securities firms, announced new rules "narrowing significantly" the grounds for granting motions to dismiss in its arbitrations.

These rules do not distinguish between "motions to dismiss complaints" and "summary judgment motions," but apply to any pre-hearing motion to dispose of the case.

Under the new rules, a FINRA arbitration panel can only grant a motion to dismiss for one or more of these three reasons: (1) the parties have a written settlement; (2) the complaint involves a "factual impossibility"—for example, the claimant sued the wrong company or person; or (3) the six-year eligibility rule for claims has expired. The new rule also requires that the arbitrators conduct an in-person or telephonic prehearing conference on the motion, and that a decision to grant the dispositive motion be unanimous. The panel also is required to issue a written explanation of a decision to grant

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dismissal. Finally, a losing movant is responsible for the forum fees for the review of the motion, and if the panel finds that a motion under this rule was frivolous, it must award reasonable costs and attorney's fees to any party that opposed the motion.

While the FINRA rule has struck some attorneys who are not familiar with arbitrations as severe, those with experience litigating claims at FINRA—and, more generally, in arbitration—have recognized that "the rule change may just institutionalize an already accepted practice." After the rule was finalized, FINRA Dispute Resolution President Linda Fienberg issued the following statement:

"Although arbitrators rarely grant such motions, it is costly and time-consuming for parties to defend motions to dismiss."

According to the College of Commercial Arbitrators, a national professional association of individuals who primarily conduct arbitrations of business-related disputes, "Commercial arbitration generally reflects a strong proclivity to avoid court-like motion practice to refine pleadings or to dismiss a matter for failure to state a claim properly." Moreover, the odds that an arbitrator will grant a summary judgment motion are only slightly higher than the odds he or she will grant a motion to dismiss.

Why are dispositive motions being treated so differently by arbitrators, as compared to judges? There are at least three institutional reasons, which also highlight some of the advantages of arbitration.

Review of Decisions

First, while every litigant is entitled to appeal the grant of a dispositive motion in federal or state court, a final decision in arbitration is subject to far less review. Moreover, appellate court review of such a grant is *de novo*, with the allegations or evidence, as the case may be, read in the light most favorable to the plaintiff. In addition, to the extent that the trial court has interpreted the law, the reviewing court is free to interpret and apply the law differently.

In contrast, the grounds for a court's vacating an arbitrator's award are very narrow—even when the award is based upon the grant of a motion to dismiss that was made prior to discovery and resolved without a hearing. Generally speaking, a court will not vacate an arbitrator's award unless it finds the result to be completely irrational or to demonstrate a manifest disregard for the law, or unless there is evidence of affirmative misconduct in the arbitral process such as corruption or fraud or evident partiality on the part of the arbitrator.

Moreover, over the last two decades, various decisions by the U.S. Supreme Court have made arbitration proceedings harder to review. While both the federal and state courts have recognized the possibility of vacatur if there was "manifest disregard of the law" by the arbitrators, that somewhat broader standard of review is not nationally applicable and has been questioned. In addition, just last term the U.S. Supreme Court held in *Hill Street Associates, LLC v. Mattel Inc.*¹⁹ that parties cannot agree to expand the grounds for vacatur under the Federal Arbitration Act.

The arbitration agreement in that case stated that a district court asked to enter judgment on any award "shall vacate, modify, or correct any award: (i) where the arbitrator's findings of fact are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous." The Supreme Court held that the "statutory grounds for prompt vacatur and modification" referenced above could not "be supplemented by contract."

Arbitrators are thus well aware of the finality of their decisions and the narrow standard of review that courts apply. This awareness, in turn, partly explains why arbitrators are more reluctant than a court typically would be to grant a motion to dismiss.²² In addition, it is also worth noting that arbitrators are sensitive to the fact that one of the grounds for vacatur under the Federal Arbitration Act is the arbitrator's refusing to hear evidence that is pertinent and

material to the controversy at issue. Sensitivity to this ground for vacatur frequently leads arbitrators to admit even arguably duplicative or irrelevant evidence at a hearing, and causes them to be all the more concerned about deciding a case without any kind of evidentiary hearing.

Discovery and Caseloads

The second difference between courts and arbitrators that explains why courts are more likely to grant motions to dismiss is a differing level of concern about discovery. In the U.S. Supreme Court's recent decision in *Twombly*, for instance, "the Court placed heavy emphasis on the 'sprawling, costly, and hugely time-consuming' discovery that would ensue in permitting a bare allegation of an antitrust conspiracy to survive a motion to dismiss, and expressed concern that such discovery 'will push cost-conscious defendants to settle even anemic cases.'"

Discovery is much more limited in arbitrations and, thus, a denial of a motion to dismiss is less likely to result in such extensive discovery. As the Supreme Court stated in *Gilmer v. Interstate/Johnson Lane Corporation*, when a party objected to the fact that "the discovery allowed in arbitration is more limited than in the federal courts," the reason for the difference is that "by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality and expedition of arbitration.'"

Finally, some commentators and judges have noted that the pressure of the increasing caseload that federal and state courts have seen over the last two decades makes the courts more tempted to dispose of cases on a motion, instead of after a trial on the merits. As Judge Richard A. Posner, of the U.S. Court of Appeals for the Seventh Circuit, stated in one opinion, "The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal circuits. But it must be resisted unless and until Rule 56 is modified."

In other words, according to Judge Posner and others, courts have increased the use of summary judgment in order to decrease the number of cases pending on their dockets. Ironically, although FINRA is currently facing growing caseloads as a result of the current market crisis, it has reacted in precisely the opposite way—by constricting, not expanding, the use of dispositive motions. Indeed, some arbitrators now require that a party seeking to file a dispositive motion describe the grounds for the motion—either orally or in a letter—before it is filed as a way of winnowing out those that have little likelihood of being granted.

Implications

What does this reluctance to grant a dispositive motion mean for the lawyer who is involved in arbitration? The short answer is that the attorney should give serious thought before filing a motion to dismiss or a motion for summary judgment, since doing so can impose a significant cost on the client without advancing the litigation—particularly now in the FINRA context, but also in other arbitration fora. Moreover, to the extent that a litigator wants to use a motion as a way to "educate the arbitrator" regarding his or her case before the hearing, an alternative method—such as a pre-hearing brief—may be far preferable.

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Employment ADR Clauses

JAMS Guide to Dispute Resolution for Employment Programs and Sample Clause Language

Effective August 2002

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Introduction

Employment law is one of the fastest developing areas of law in the United States today. Claims involving allegations of harassment and discrimination have changed the practices of most companies and their policies regarding employee relations. The cost, publicity, delay and disruption that result from litigation have sharply increased the use of alternative methods for identifying and resolving potentially harmful disputes.

Many disputes in the workplace can be resolved in their early stages by companies designing and implementing employee dispute resolution programs. Such programs typically establish sequential processes progressing from non-binding to binding steps.

JAMS, the Resolution Experts, has been a leader in alternative dispute resolution (ADR) for over twenty years. JAMS is dedicated to ensuring that both our administrative and professional practices are sensitive to all parties' needs, and meet fairness standards established under applicable law. To that end, any employment matter referred to JAMS as a result of a mandatory pre-dispute clause must first be reviewed by our employment experts before administration begins to ensure compliance with JAMS Minimum Standards of Procedural Fairness. If an arbitration clause or procedure does not comply, JAMS will notify the employer that the arbitration demand will not be accepted unless there is full compliance with JAMS' Minimum Standards.

For more information, the following materials are posted on the JAMS website at www.jamsadr.com: JAMS Employment Arbitration Rules & Procedures; JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness.

What to Consider When Drafting an Employment Dispute Resolution Program

The outline below is provided as a basic guide for companies considering an employment dispute resolution program. At the end of the outline are two sample clauses. This information is not comprehensive and should not be construed as legal advice or a legal opinion regarding the use of alternative dispute resolution in a particular employment dispute or program. We recommend that you consult experienced counsel for advice.

Step One: INTERNAL MECHANISMS

Consider the internal mechanisms for resolving conflict in the workplace that are consistent with your company's culture, resources and needs. Such mechanisms may include:

- **Corporate Ombudsperson**
- **Peer Review Board** made up of fellow employees, facilitated by neutral management, HR person or other professional
- **Employee Hotline**
- **Open Door Policy**
- **Progressive Management Review** at successive levels within the organization until the problem is resolved
- **Progressive Joint Management/Employee Review** at successive levels within the organization until the problem is resolved

Properly communicated and administered, internal mechanisms can be very effective in resolving disputes at an

early stage.

Step Two: EXTERNAL MECHANISMS

Consider the external mechanisms for resolving conflict in the workplace that are consistent with your company. Those may include:

- **External Ombudsperson:** A process in which a trained mediator who is neither a retired judge nor a lawyer facilitates communication between employee and management or HR representative.
- **Neutral Fact Finding:** An independent investigation conducted by a neutral, outside resource who can provide a written report of findings which may include recommendations regarding the situation under investigation.
- **Mediation:** A process in which the parties are assisted by a neutral mediator who helps them to negotiate resolution of their dispute. Mediation is a non-binding procedure. However, once an agreement has been reached and documented, it is binding on the parties and can be enforced.
- **Early Neutral Evaluation (ENE):** A process in which both parties present the facts of their case to a neutral for a non-binding written evaluation and recommendation.
- **Arbitration*:** A process in which a neutral third party arbitrator hears parties' arguments and issues a written award which can be entered as an enforceable judgment. In the employment arena, some companies allow the employee to decide whether the arbitrator's award will be binding on the parties. (i.e., if the employee chooses to accept the arbitrator's award, it is then binding on both parties. If the employee chooses not to accept the award, the award will not bind either of the parties and the employee is free to seek resolution through the court system.)

* State and Federal laws may affect the use of arbitration in pre-dispute employment programs/contracts. It is recommended that you consult experienced counsel for advice.

JAMS encourages the use of mediation and of voluntary arbitration that is not a condition of initial or continued employment. JAMS does not take a position on the enforceability of condition-of-employment arbitration clauses. If courts rule definitively that such clauses are unenforceable, or if laws or regulations proscribe their use, JAMS will comply with the rulings or laws in the applicable cases or jurisdiction. Absent such proscriptions, JAMS accepts arbitration assignments based on condition-of-employment clauses provided the Minimum Standards are met, but does not encourage the use of such clauses.

Step Three: DESIGN

1. Consider who should be involved in the design, implementation and communication of the program to ensure success and appropriate use of the program: Employees, Management, Human Resource Professionals, General Counsel, outside counsel, outside neutral consultants, etc.
 - Consider who will finalize and approve the program (e.g., Senior Management, CEO, COO, CFO, General Counsel, Committee of all including employees, etc.)
2. Consider which employees should be covered by the program and whether the program should be mandatory or voluntary.
3. Consider which disputes should be included or excluded at any internal or external step of the program. Define the timeline between all internal and external steps of the program.
4. Consider whether a Pilot Program should be used to test the program. If so, determine:
 - Duration of Pilot
 - Location of Pilot
 - How results will be evaluated

Step Four: IMPLEMENTATION

1. Decide on an institutional dispute resolution services provider (e.g., JAMS) for the external steps to the dispute resolution program. Many companies name more than one provider and allow the employee to choose the institution at the time the external step is necessary. If arbitration is to be included in the program, it is recommended that the company specify which arbitration rules and procedures will apply. Naming the institutional service provider ensures that the external steps are self-executing.
2. Once the program is finalized, determine the date the program will go into effect and how the program will be tracked and administered for both the internal and external steps. Consider how the fees for the external steps should be allocated between employee and employer and explain this in the program

description. (See JAMS Minimum Standards of Procedural Fairness.)

3. Consider the procedures by which the program will be communicated to the employees (memorandum, employee handbook, etc.). The program should be fully described and the procedures for accessing the program should be clearly articulated in a step-by-step guide to both employees and management including forms, phone numbers and who to contact with questions, etc. Consider including Evaluation Forms at each internal and external step so that the effectiveness of the program and the individual steps can be monitored and modified, if necessary.
4. Conflict management training and an overview of all ADR processes should be considered for all levels of management

Sample Clauses for Use in Employment Dispute Resolution Programs and Contracts

The following are basic sample clauses providing for mediation or arbitration in an employment contract. A variety of issues may affect the enforceability or effectiveness of these sample clauses, therefore it is recommended that you review applicable law in your jurisdiction and consult experienced counsel for advice. The information contained herein should not be considered legal advice or legal opinion. For information about setting a case, call your local JAMS office at 1-800-352-5267.

Sample clause for mediation only:

Any controversy, dispute or claim arising out of or relating to this [contract] or breach thereof shall first be settled through good faith negotiation [OR company employment program] [other]. If the dispute cannot be settled through negotiation [OR company employment program] [other], the parties agree to attempt in good faith to settle the dispute by mediation administered by JAMS.

Sample clause for mediation and arbitration:

Any controversy, dispute or claim arising out of or relating to this [contract] or breach thereof shall first be settled through good faith negotiation [OR company employment program] [other]. If the dispute cannot be settled through negotiation [OR company employment program] [other], the parties agree to attempt in good faith to settle the dispute by mediation administered by JAMS. If the parties are unsuccessful at resolving the dispute through mediation, the parties agree to [binding] arbitration administered by JAMS pursuant to its Employment Arbitration Rules & Procedures and subject to JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness. Judgment on the Award may be entered in any court having jurisdiction.

Optional Additional Provisions For Employment Clauses:

Mediation

- Define Process for Mediator Selection
- Mediator Qualifications
- Define Timeline by which parties must agree to a Mediator
- Define default mechanism and timeline by which Mediator will be appointed if parties cannot agree
- Confidentiality
- Location of Mediation
- Written Submission of Briefs or Position Statements

Arbitration

- Define Process for Arbitrator Selection
- Number of Arbitrators
- Party-Appointed Arbitrators
- Arbitrator Qualifications
- Binding/Non-binding or Split (Binding on the company, non-binding on the employee)
- Location of Arbitration Proceeding
- Timelines
- Confidentiality
- Fee Allocation

JAMS, THE RESOLUTION EXPERTS
**POLICY ON
EMPLOYMENT ARBITRATION
MINIMUM STANDARDS OF
PROCEDURAL FAIRNESS**

*EFFECTIVE
JULY 15, 2009*

JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS

This document presents the principles and policies of JAMS on the use of arbitration for resolving employment-related disputes. These policies include the "Minimum Standards of Procedural Fairness," which apply to arbitrations based on pre-dispute agreements that are required as a condition of employment. JAMS will administer mandatory arbitrations in employment cases only if the arbitration provision complies with JAMS Minimum Standards.

JAMS continues to urge employers and employees to use, at the earliest point possible, mediation and other ADR processes that encourage consensual resolution of disputes in a fair, affordable, and efficient manner. We also recommend that employers consult with counsel when considering, drafting, or implementing pre-dispute arbitration clauses that relate to statutory employment claims.



THE RESOLUTION EXPERTS®

JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS

A. Preference for Mediation and Voluntary Arbitration

JAMS encourages the use of mediation and of voluntary arbitration that is not a condition of initial or continued employment. JAMS does not take a position on the enforceability of condition-of-employment arbitration clauses, but it monitors developments in courts, legislatures and regulatory agencies concerning the enforceability of the clauses. If courts rule definitively that such clauses are unenforceable, or if laws or regulations proscribe their use, JAMS will comply with the rulings or laws in the applicable cases or jurisdictions. Absent such proscriptions, JAMS accepts arbitration assignments based on condition-of-employment clauses (provided the Minimum Standards are met), but does not encourage the use of such clauses.

B. Minimum Standards of Procedural Fairness

If an arbitration is based on a clause or agreement that is required as a condition of employment, JAMS will accept the assignment only if the proceeding complies with the "Minimum Standards of Procedural Fairness for Employment Arbitration."

Standard No. 1: All remedies available.

All remedies that would be available under the applicable law in a court proceeding, including attorneys fees and exemplary damages, as well as statutes of limitations, must remain available in the arbitration. Post-arbitration remedies, if any, must remain available to an employee.

Comment: This standard does not make any change in the remedies available. Its purpose is to ensure that the remedies available in arbitrations and court proceedings are the same. JAMS does not object if an employer chooses to limit its own post-arbitration remedies.

Standard No. 2: Arbitrator Neutrality.

The arbitrator(s) must be neutral, and an employee must have the right to participate in the selection of the arbitrator(s).

Standard No. 3: Representation by Counsel.

The agreement or clause must provide that an employee has the right to be represented by counsel. Nothing in the clause or procedures may discourage the use of counsel.

Standard No. 4: Access to Information/Discovery.

The procedures must provide for an exchange of core information prior to the arbitration.

Comment: Generally this discovery should include at least (a) exchange of relevant documents, (b) identification of witnesses, and (c) one deposition for each side, i.e., of the employee and of a supervisor or other decision-maker of the employer. Other discovery should be available at the arbitrator's discretion.

Standard No. 5: Presentation of Evidence.

At the arbitration hearing, both the employee and the employer must have the right to (a) present proof, through testimony and documentary evidence, and (b) to cross-examine witnesses.

Standard No. 6: Costs and Location Must Not Preclude Access to Arbitration.

An employee's access to arbitration must not be precluded by the employee's inability to pay any costs or by the location of the arbitration. The only fee that an employee may be required to pay is JAMS' initial Case Management Fee. All other costs must be borne by the company, including any additional JAMS Case Management Fee and all professional fees for the arbitrator's services. In California, the arbitration provision may not require an employee who does not prevail to pay the fees and costs incurred by the opposing party.

Comment: JAMS does not preclude an employee from contributing to administrative and arbitrator fees and expenses.

**Standard No. 7:
Mutuality.**

JAMS will not administer arbitrations pursuant to clauses that lack mutuality. Both the employer and the employee must have the same obligation (either to arbitrate or go to court) with respect to the same kinds of claims.

**Standard No. 8:
Written Awards.**

An arbitration award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, awarded as to each claim. The Arbitrator will also provide a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the award is based.

* * *

If JAMS becomes aware that an arbitration clause or procedure does not comply with the Minimum Standards, it will notify the employer of the Minimum Standards and inform the employer that the arbitration demand will not be accepted unless there is full compliance with those standards. In assessing whether the standards are met and whether to accept the arbitration assignment, JAMS, as the ADR provider, will limit its inquiry to a facial review of the clause or procedure. If a factual inquiry is required, for example, to determine compliance with Minimum Standards, it must be conducted by an arbitrator or court.

**C. Questions About Enforcement
and Arbitrability**

If a party contests the enforceability of a pre-dispute arbitration agreement that was required as a condition of employment, and if compliance with the Minimum Standards is in question, JAMS will, if given notice of the dispute, defer administering the arbitration for a reasonable period of time to allow the contesting party to seek a judicial ruling on the issue. JAMS will comply with that judicial determination. If there is no judicial determination within a reasonable period of time, JAMS will resolve questions of arbitrability under the applicable JAMS Arbitration Rules & Procedures for Employment Disputes.

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D. Other

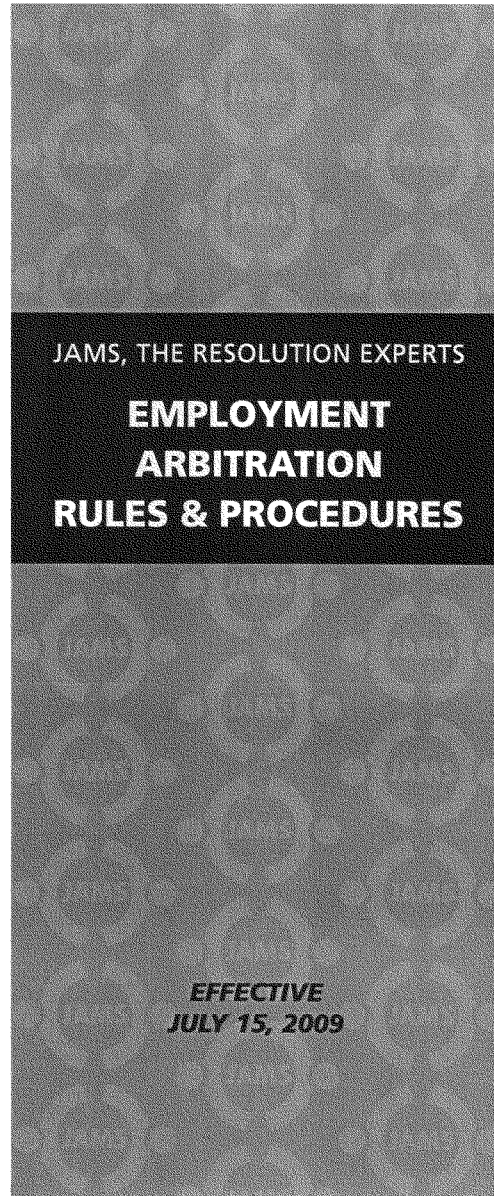
Parties to an employment arbitration may choose to follow the Arbitration Rules & Procedures for Employment Disputes that were developed by JAMS. These Rules & Procedures exceed the Minimum Standards by providing further procedural protections, including additional discovery and an optional appeal process, to all parties in an employment arbitration.

JAMS supports the application of the "Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out Of The Employment Relationship" to arbitrations based on condition-of-employment clauses. Announced in May 1995, the Protocol was developed by a diverse task force of representatives of (a) committees of the American Bar Association, including those addressing employer interests, (b) the National Academy of Arbitrators, and (c) the National Employment Lawyers Association. JAMS Arbitration Rules & Procedures for Employment Disputes are consistent with the Due Process Protocol.

JAMS is committed to ensuring that all staff who work on employment-related dispute resolution issues are aware of these principles and policies. Internal controls are used to ensure knowledge and compliance by the staff, and to ensure that the company's marketing activities in the employment area do not give rise to any actual or perceived conflict of interest on the part of JAMS or its neutrals.

Note: These Minimum Standards do not apply if the agreement to arbitrate was individually negotiated by the employee and employer or the employee was represented or advised by counsel during the negotiations.

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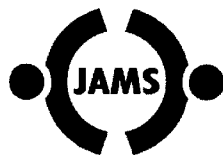


JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES

JAMS provides arbitration and mediation services from Resolution Centers located throughout the United States. Its arbitrators and mediators hear and resolve some of the nation's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained and experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Parties wishing to write a pre-dispute JAMS arbitration clause into their agreement should review the sample arbitration clauses on Page 4. These clauses may be modified to tailor the arbitration process to meet the parties' individual needs.



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Sample Clauses for Use in Employment Dispute Resolution Programs and Contracts

The following are basic sample clauses providing for mediation or arbitration in an employment contract. A variety of issues may affect the enforceability or effectiveness of these sample clauses, therefore it is recommended that you review applicable law in your jurisdiction and consult experienced counsel for advice. The information contained herein should not be considered legal advice or legal opinion. For information about setting a case, call your local JAMS office at 1-800-352-5267.

Sample Clause for Mediation Only:

Any controversy, dispute or claim arising out of or relating to this [contract] or breach thereof shall first be settled through good faith negotiation [OR company employment program] [other]. If the dispute cannot be settled through negotiation [OR company employment program] [other], the parties agree to attempt in good faith to settle the dispute by mediation administered by JAMS.

Sample Clause for Mediation and Arbitration:

Any controversy, dispute or claim arising out of or relating to this [contract] or breach thereof shall first be settled through good faith negotiation [OR company employment program] [other]. If the dispute cannot be settled through negotiation [OR company employment program] [other], the parties agree to attempt in good faith to settle the dispute by mediation administered by JAMS. If the parties are unsuccessful at resolving the dispute through mediation, the parties agree to [binding] arbitration administered by JAMS pursuant to its Employment Arbitration Rules & Procedures and subject to JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness. Judgment on the Award may be entered in any court having jurisdiction.

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Case Management Fees

JAMS charges a nominal Case Management Fee for cases. For arbitrations the Case Management Fee is:

Hearing Length	Fee
1 to 3 days	\$400 per party, per day (1 day is defined as 10 hours of professional time)
Time in excess of initial 30 hours	10% of professional fees

JAMS neutrals set their own hourly, partial and full day rates. For information on individual neutral's rates and the Case Management Fee, please contact JAMS at 800-352-JAMS. The Case Management Fee structure is subject to change.

For arbitrations arising out of employer-promulgated plans, the only fee than an employee may be required to pay is the \$400 per party fee for a one-day case. The employer must bear the employee's share of any increased CMF. Any questions or disagreements about whether a matter arises out of an employer-promulgated plan or an individually negotiated agreement or contract will be determined by JAMS, whose determination shall be final.

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JAMS Employment Arbitration Rules & Procedures

NOTICE: These Rules are the copyrighted property of JAMS. They cannot be copied, reprinted or used in any way without permission of JAMS, unless they are being used by the parties to an arbitration as the rules for that arbitration. If they are being used as the rules for an arbitration, proper attribution must be given to JAMS. If you wish to obtain permission to use our copyrighted materials, please contact JAMS at 949-224-1810.

Rule 1. Scope of Rules

- (a) The JAMS Employment Arbitration Rules & Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, the disputes or claims are employment-related, unless other Rules are prescribed.
- (b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Employment Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.
- (c) The authority and duties of JAMS are prescribed in the Agreement of the Parties and in these Rules, and may be carried out through such representatives as it may direct.
- (d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.
- (e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.
- (f) "Electronic filing" (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents via e-JAMS to a party, attorney or representative under these Rules.

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Rule 2. Party-Agreed Procedures

The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies including, without limitation, the JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, and Rules 15(i), 30 and 31. The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed on by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

Rule 5. Commencing an Arbitration

- (a) The Arbitration is deemed commenced when JAMS confirms in a Commencement Letter its receipt of one of the following:
 - (i) A post-dispute Arbitration agreement fully executed by all Parties and that specifies JAMS administration or use of any JAMS Rules; or
 - (ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the employment dispute or claim and which specifies JAMS administration or use of any JAMS Rules or which the Parties agree shall be administered by JAMS; or
 - (iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or
 - (iv) A copy of a court order compelling Arbitration at JAMS.
- (b) The Commencement Letter shall confirm which one of the above requirements for commencement has been met, that JAMS has received all payments required under the applicable fee schedule, and that the claimant has

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provided JAMS with contact information for all Parties along with evidence that the Demand has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate and, pursuant to Rule 19, the Arbitrator, once appointed, shall schedule, and provide appropriate notice of a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter, but it is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period, or claims notice requirements. The term "commencement" as used in this Rule is intended only to pertain to the operation of this and other rules (such as Rule 3, 9(a), 9(c), 13(a), 17(a), 31(a).)

Rule 6. Preliminary and Administrative Matters

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the Parties and witnesses and the relative resources of the Parties shall be considered, but in no event will the Hearing be scheduled in a location that precludes attendance by the Employee.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

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(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within 30 days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for 30 days following the conclusion of the Arbitration.

(e) Unless the Parties' agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into ac-

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count all circumstances the Arbitrator deems relevant and applicable.

Rule 7. Number of Arbitrators and Appointment of Chairperson

(a) The Arbitration shall be conducted by one neutral Arbitrator unless all Parties agree otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator the Parties shall agree on, or in the absence of agreement JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral.

Rule 8. Service

(a) The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, useable and live email address for the receipt of all documents filed through e-JAMS. Any document filed electronically shall be considered as filed with JAMS when the transmission to e-JAMS is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, e-JAMS shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

(b) Every document filed with e-JAMS shall be deemed to have been signed by the Arbitrator, Case Manager, attorney or declarant who submits the document to e-JAMS, and shall bear the typed name, address, telephone number, and Bar number of a signing attorney. Documents containing signatures of third-parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper-format.

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(c) Delivery of e-service documents through e-JAMS to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through e-JAMS. E-service shall be deemed complete when the party initiating e-service completes the transmission of the electronic document(s) to e-JAMS for e-filing and e-service. Upon actual or constructive receipt of the electronic document(s) by the party to be served, a Certificate of Electronic Service shall be issued by e-JAMS to the party initiating e-service and that Certificate shall serve as proof of service. Any party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to e-JAMS.

(d) If an electronic filing or service does not occur because of (1) an error in the transmission of the document to e-JAMS or served Party which was unknown to the sending Party, (2) a failure to process the electronic document when received by e-JAMS, (3) the Party was erroneously excluded from the service list, or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may for good cause shown permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document. Service by electronic mail or facsimile transmission is considered effective upon transmission, but only if followed within one week of delivery by service of an appropriate number of copies and originals by one of the other service methods.

In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. Mail, three (3) calendar days shall be added to the prescribed period.

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Rule 9. Notice of Claims

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim, or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Within fourteen (14) calendar days after the commencement of an Arbitration, Claimant shall submit to JAMS and serve on the other Parties a notice of its claim and remedies sought. Such notice shall consist of either a Demand for Arbitration or a copy of a Complaint previously filed with a court. (In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.)

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) or counterclaims it may have.

(d) Within fourteen (14) calendar days of service of a counterclaim, a claimant may submit to JAMS and serve on other Parties a response to such counterclaim and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

Rule 10. Changes of Claims

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third Party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted except with the Arbitrator's approval. A Party may request a Hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(d).

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Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Whenever in these Rules a matter is to be determined by "JAMS" (such as in Rules 6; 11 (d); 15(d), (f), (g) or (i)), such determination shall be made in accordance with JAMS administrative procedures.

(c) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. Unless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(d) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(e) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rules 22(i) or 24.

Rule 12. Representation

(a) The Parties may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone and fax numbers, and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers, and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

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Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5) except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and on the Arbitrator. However, the opposing Parties may, within fourteen (14) calendar days of service of notice of the withdrawal of the claim or counterclaim, request that the Arbitrator order that the withdrawal be with prejudice. If such a request is made, it shall be determined by the Arbitrator.

Rule 14. Ex Parte Communications

(a) No Party may have any *ex parte* communication with a neutral Arbitrator jointly selected by the Parties. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written correspondence, so long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence of conflicts and in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral Arbitrator. More extensive communications with a non-neutral arbitrator may also be permitted by applicable law and rules of ethics.

Rule 15. Arbitrator Selection and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and ten (10) Arbitrator candidates in the case of a tripartite panel.

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JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service by the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

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(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties who may respond within seven (7) days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the party who did not appoint that Arbitrator.

Rule 16. Preliminary Conference

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

- (a) The exchange of information in accordance with Rule 17 or otherwise;
- (b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;
- (c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;
- (d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;
- (e) The attendance of witnesses as contemplated by Rule 21;

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(f) The scheduling of any dispositive motion pursuant to Rule 18;

(g) The premarking of exhibits; preparation of joint exhibit lists and the resolution of the admissibility of exhibits;

(h) The form of the Award; and

(i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

Rule 17. Exchange of Information

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which they rely in support of their positions, names of individuals whom they may call as witnesses at the Arbitration Hearing, and names of all experts who may be called to testify at the Arbitration Hearing, together with each expert's report that may be introduced at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take at least one deposition of an opposing Party or an individual under the control of the opposing Party. The Parties shall attempt to agree on the number, time, location, and duration of the deposition(s). Absent agreement, the Arbitrator shall determine these issues including whether to grant a request for additional depositions, based upon the reasonable need for the requested information, the availability of other discovery, and the burdensomeness of the request on the opposing Parties and witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide

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relevant, non-privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause. (d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

Rule 18. Summary Disposition of a Claim or Issue

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the motion.

Rule 19. Scheduling and Location of Hearing

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, and the Arbitrator reasonably believes that the Party will not participate in the Hearing, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date unless the law of the relevant jurisdiction allows for or the Parties have agreed to shorter notice.

(c) The Arbitrator, in order to hear a third party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third party witness.

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Rule 20. Pre-Hearing Submissions

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts, (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony, and (3) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other a copy of any such exhibits to the extent that it has not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit concise written statements of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties, at least seven (7) calendar days before the Hearing date. Rebuttal statements or other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

Rule 21. Securing Witnesses and Documents for the Arbitration Hearing

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

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Rule 22. The Arbitration Hearing

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so. It is expected that the Employee will attend the Arbitration Hearing, as will any other individual Party with information about a significant issue.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise in the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as the Arbitrator deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing or any portion thereof may be conducted telephonically with the agreement of the Parties or in the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date agreed upon by the Arbitrator and the Parties, to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted, or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, re-open the Hearing. If the Hearing is re-opened and the re-opening prevents the rendering of the Award within the time limits specified by these Rules, the time limits will be extended until the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) (i) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost, the stenographic record may not be provided to the Arbitrator and may not be used in the proceeding unless the Party arranging for the stenographic record either agrees to provide access to the stenographic record at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to an Optional Arbitration Appeal Procedure (see Rule 34), they shall ensure that a stenographic or other record is made of the Hearing.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

Rule 23. Waiver of Hearing

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

Rule 24. Awards

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing as defined in Rule 22(h) or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (i) by the agreement of the Parties, (ii) upon good cause for an extension of time to render the Award, or (iii) as provided in Rule 22(i). The Arbitrator shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator will be guided by the law or the rules of law that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including but not limited to specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim Award,

and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties' agreement or by applicable law. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c)).

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' agreement or allowed by applicable law.

(h) The Award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. The Award shall also contain a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the award is based. The Parties may agree to any other form of award, unless the arbitration is based on an arbitration agreement that is required as a condition of employment.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. Mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of the Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate correction to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after the Arbitrator's proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award

shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either an Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of a corrected Award.

Rule 25. Enforcement of the Award

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 et seq. or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

Rule 26. Confidentiality and Privacy

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

Rule 27. Waiver

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made

promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

Rule 28. Settlement and Consent Award

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

Rule 29. Sanctions

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses, any other costs occasioned by the actionable conduct including reasonable attorney's fees, exclusion of certain evidence, drawing adverse inferences, or in extreme cases determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

Rule 30. Disqualification of the Arbitrator As a Witness or Party and Exclusion of Liability

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside Parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, Case Manager nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, Case Manager nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including but not limited to any disqualification of or recusal by the Arbitrator.

Rule 31. Fees

(a) Except as provided in paragraph (c) below, unless the Parties have agreed to a different allocation, each Party shall pay its pro-rata share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration. To the extent possible, the allocation of such fees and expenses shall not be disclosed to the Arbitrator. JAMS agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration prior to the Hearing and the Arbitrator may preclude a Party that has failed to deposit its pro-rata or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing. (c) If an arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an employee may be required to pay is the initial JAMS Case Management Fee. JAMS does not

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preclude an employee from contributing to administrative and arbitrator fees and expenses. If an arbitration is not based on a clause or agreement that is required as a condition of employment, the Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of JAMS assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

Rule 32. Bracketed (or High-Low) Arbitration Option

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS, and provide to JAMS a copy of their written agreement setting forth the agreed-upon maximum and minimum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

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**Rule 33. Final Offer (or Baseball)
Arbitration Option**

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide a copy of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing, the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals, and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

**Rule 34. Optional Arbitration
Appeal Procedure**

At any time before the Award becomes final pursuant to Rule 24, the Parties may agree to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.

Testimony of
Jamie Leigh Jones
Founder/Chief Executive Officer
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Senate Committee on the Judiciary
hearing regarding
“Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws
Designed to Protect American Workers from Discrimination?”

October 7, 2009

Chairman Leahy, Ranking Member Sessions, Distinguished Members of the Committee:

Thank you for the opportunity to testify before you today. I am here today to share with you a personal tragedy. I do this to bring awareness to legislation—the Arbitration Fairness Act—which is designed to ensure that no American will be deprived of the constitutionally guaranteed right to the fair administration of justice before a jury of their peers and a judge skilled in the law.

In 2005, at the age of 20, I applied for and was offered a job with Halliburton. When hired, I signed an employment contract. Days later I was sent to Camp Hope, in the “Green Zone” in Baghdad, Iraq to support Operation Iraqi Freedom. Before my deployment, Halliburton showed me photographs of the trailer that I would live in with one other woman and a shared bathroom.

This is an actual photograph I was shown prior to leaving Texas:



Upon arrival at Camp Hope, I was assigned to a barracks which was predominantly male (according to documents provided by Halliburton/KBR in response to my EEOC complaint, there were approximately 25 women to more than 400 men). Personally, however, I never saw a woman at that barracks. I found myself subject to repeated “cat-calls” and partially dressed men in their underwear while I was walking to the restroom, which was located on a separate floor from my bedroom. (Following an independent investigation, the EEOC credited my testimony with respect to this matter. That Determination Letter is attached to this statement as an Exhibit.)

Almost immediately after I moved into the barracks, I complained to Halliburton management and human resources department about the living conditions and asked to move into the quarters I had been promised. My requests were not only ignored, they were mocked: I was told to "go to the spa."

On my fourth day in Iraq, I was socializing outside the barracks with several of the other contractors Halliburton had sent to the Green Zone. The men, identified to me only as Halliburton firefighters, offered me an alcoholic drink, stating that I should not worry, because he "saved all his ruffies for Dubai."

I would later learn that the antics of these men (and so many others in this lawless environment), were well known to the Human Resource personnel and upper management at Halliburton and KBR. On the other hand, those facts were not (at least then) well known to me or to the general public. I naively took the drink. I remember nothing after taking a couple of sips.

When I awoke in my room the next morning, I was naked, I was sore, I was bruised, and I was bleeding. I was extremely sore between my legs and in my chest. I was groggy and confused, but did not know why - at that time. I went to the restroom, where I realized that I had bruises between my legs and on my wrists. I also realized that I was bleeding severely between my legs. At that point in time, I suspected I had been raped. As the grogginess wore off, and I returned from the bathroom I found a naked firefighter still lying in a bunk bed in my room. I was shocked. How could he have raped me like that and not even bother to leave? I now know he stayed because he already understood that there would likely be no punishment for his crime. After all, there never had been before. Halliburton and KBR had no reason to punish its employees when they could simply bury their atrocities in an arbitration designed to keep it secret.

After reporting my rape to a KBR Operations Coordinator, I was taken to the Army CASH (Combat Army Support Hospital) where a rape kit made it apparent that I had been assaulted both vaginally and anally by multiple perpetrators. After the rape kit was completed, the Army doctor turned it over to KBR security personnel.

I was then taken by KBR personnel to a trailer and locked in with two armed guards stationed outside my door. I was not allowed to leave. I asked for a phone to contact my father, and was denied. I was not provided food or drink until after I had been there for quite some time. The exact amount is difficult to know, given my state of mind at the time.

After much pleading, one of the guards eventually allowed me to use his cell phone. I called my father, who then contacted Congressman Ted Poe. Congressman Poe dispatched State Department officials to ensure my release and safe return to the U.S.

Once State Department officials (Matthew McCormick and Heidi McMichael) saved me from my imprisonment in the container, I was taken to the cafeteria because I was hungry and thirsty. I was feeling very ill from the effects of the drug. I was going to be put into a "safe" trailer, and I requested that Ms. McMichael stay with me. She did.

The following day, Ms. McMichael took me to meet with a psychiatrist. I was also later interviewed by Halliburton/KBR supervisors, and I was told that I had essentially two choices: (1) "stay and get over it," or (2) go home with "no guarantee of a job," either in Iraq or back in Houston. The severity of my physical injuries necessitated my decision to return home in the face of the threats of termination, which were later carried out.

Once home, I sought medical attention, both psychiatric and physical. I was originally sent to a psychiatrist chosen (for reasons that only now are obvious to me) by Halliburton. The first question asked by this "health-care provider" was "are you going to sue Halliburton?" so my mother and I walked out.

The pains in my chest continued, and I sought medical help. It was confirmed that my breasts were disfigured and that my pectoral muscles had been torn. Reconstructive surgery was required. I also saw a therapist and was diagnosed with Post Traumatic Stress Disorder.

I filed a complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC in turn conducted an investigation and concluded that I had been sexually assaulted, that physical trauma was evident, and that Halliburton's investigation and response had been "inadequate."

I also pressed criminal and civil charges, but after finding the criminal system non-responsive and frustrating, I relied on the civil court system for justice. I knew that I had been harmed – not only by the rapists, but by the huge corporation that enabled and ratified their actions for so long. Halliburton not only tolerated the lawless environment that existed in the Green Zone, but created and promoted it through its practices there.

When I filed my civil suit, it was met with Halliburton's response that *all* of my claims were to be decided in forced arbitration because, they said, when I signed my employment contract I had also signed away my right to a jury trial. Halliburton said that my employment contract included a mandatory binding arbitration clause that required me to submit all of my claims to forced, secret, and binding, arbitration. I didn't even know that I had signed such a clause, but even if I had known, I would never have guessed that it would prevent me from bringing my claims to court after being brutally sexually harassed and assaulted. I have since learned that other women who were brutalized at the hands of Halliburton and KBR were forced into arbitration and silenced by its provisions. This is a simple denial of justice. Also, I had no choice but to sign the contract because I needed the job. Like so many other employees, I had no idea that the clause was part of the contract, what the clause actually meant, or that I would eventually end up in this horrible situation.

Through its pre-dispute, mandatory, confidential, binding arbitration clause Halliburton contends that rape, false imprisonment, corporate ratification of criminal behavior, and intentional tortuous activity are claims that should not be heard by a neutral judge and jury. Halliburton believes that the fact that they have been systematically exploiting and abusing

women on a consistent basis is something that should be kept secret and never be made in public.

I fought the forced arbitration clause and just last month, after years of litigation, the Fifth Circuit ruled that four of my claims against Halliburton relating to my rape were not covered by the clause in my employment contract. The rest of my claims, including my discrimination claims under Title VII, have been forced into the arbitration proceeding – not because I want it, but because at the time I signed the contract, I didn't know it existed, and certainly didn't understand it. I was 20 years old with a high school education. The contract was lengthy and drafted by experienced corporate lawyers bent on protecting a huge corporation from the arms of justice when they did what they had been doing for years – exploiting women.

The problem of forcing claims like mine into the secret system of pre-dispute, mandatory, confidential, binding arbitration goes well beyond just me. Through the Jamie Leigh Foundation, I have learned that numerous other women who were assaulted or raped were then retaliated against for reporting those attacks and forced into secret arbitration if they mustered the courage to stand up for themselves at all. As indicated by the affidavit of Letty Surman (attached to this testimony), an HR representative from Halliburton, it is clear that sexual harassment was an overwhelming problem in Iraq, and this was known to Halliburton and KBR – although they did not inform unsuspecting victims like myself.

The system of pre-dispute, mandatory, confidential, binding arbitration keeps this evidence from ever coming to public light and allows companies like Halliburton to continue to allow the abuse of their employees without repercussion. Even where individuals pursue their claims in arbitration, all of this information is sealed and kept confidential.

Arbitration has a place, but only when it is voluntary, consented to after a dispute arises, negotiated by parties with equal bargaining power, and both sides know exactly what they are signing up for. It is clearly immoral and should not be legal for a large multi-billion dollar corporation to force this secret process on a person who needs a job to survive and doesn't understand what the process involves.

Pre-dispute, mandatory, confidential, binding arbitration has made corporate entities in this country above the law. It allows employers to violate state and federal civil rights and anti-discrimination laws with impunity. Likewise, through confidential arbitration the public is denied the ability to learn about such discrimination because the proceedings are kept secret and there is not even a requirement that a written record be kept.

Distinguished Members of the Committee, you have the power to stop the abuses that hide behind the veil of arbitration and hold corporate America accountable to the people, the people whom you are sworn to serve.

Thank you for your time.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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330-2006-00968

Charge Number

Jamie Leigh Jones
 15596 IH 45 South 3004
 Conroe, TX 77384

Charging Party

Kellogg Brown & Root ("KBR")
 4100 Clinton Drive
 Houston, TX 77020
 Attn: Celia Balli, Attorney
 Legal Department

Respondent

LETTER OF DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act of 1964, as amended ("Title VII").

All requirements for coverage have been met. On January 24, 2006, Charging Party Jamie Leigh Jones filed a charge of discrimination alleging sexual harassment. Charging Party alleges that upon her arrival in Baghdad, Iraq she was assigned to all male living quarters and subsequently was drugged and sexually assaulted by several employees of Respondent.

Respondent denies Charging Party was assigned to an all male barracks and contends that those barracks were co-ed, and there were approximately 25 other females assigned to the same barracks with Ms. Jones. Respondent asserts that the alleged assailant claims Charging Party consented to have sex with him. Respondent also maintains that its efforts to investigate the alleged assault was halted by the U.S. State Department officials telling Respondent they were taking over the investigation.

The investigation revealed that Charging Party was in Baghdad, Iraq for less than one week when the attack allegedly occurred. According to Charging Party's credible testimony, she reported the attack and sought medical attention. Respondent provided medical assistance, placed her in a secure location, and transported her back to the United States. The investigation credits Charging Party's testimony that she was indeed sexually assaulted by one or more of Respondent employees and physical trauma was apparent. Respondent's investigation was inadequate and did not effect an adequate remedy.



AFFIDAVIT OF LETTY SURMAN

STATE OF TEXAS §
COUNTY OF HARRIS §

On this day, Letty Surman, appeared before me, the undersigned notary public and after I administered an oath to him/her, upon his/her oath, he/she said:

"My name is Letty Surman. I am over the age of 18 and capable of making this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct.

I was employed by Halliburton/KBR in Kuwait and Iraq from May of 2004 until September of 2006. I was the Human Resources (HR) supervisor in Kuwait from May of 2004 until late-2005 and in the Baghdad Headquarters in Iraq from late-2005 until my return to the United States in September of 2006. I again worked for Halliburton in Houston from January until August of 2007, when I was laid off.

During most of my time in Kuwait, I was the key contact person for HR issues arising out of Basra, Iraq. This was because there was no HR person in Basra. There was a saying with regard to personnel and employee issues that 'what happened in Basra stayed in Basra.' As an example, Halliburton pushed for an HR representative in every camp, large or small, in Iraq, with the exception of Basra. I often thought this was suspicious.

It was concerning to me that, although I was trained in HR, there were a number of HR personnel that were not trained, and were simply no longer capable of performing their primary duties. For instance, I worked closely with a diesel mechanic who had been relabeled as an HR representative, with absolutely no training. This was a disaster waiting to happen.

I know that Craig Grabien was the project lead in Basra, and that alcohol was widely used at that camp – despite the fact that this was not permitted there. In fact, it was widely known that Craig Grabien's successor, Charles English, was intoxicated the night that Basra was bombed, when he announced the need for firemen to perform a HazMat analysis in a slurred voice from the radio system in the bunker. Two visiting Army officials even complained that Charles English was drunk in the bunker.

During my time as an HR supervisor, I was aware that a lot of sexual harassment went on- it was our major complaint. I observed that sexual harassment was worse when I first arrived, and seemed to get a little better towards the end of my stay in Iraq.



I know that the Employee Relations (ER) branch of Halliburton tracked sexual harassment complaints, as this was a primary function of that department. However, I am aware that Halliburton has a policy of sweeping problems under the rug.

I have personally been the subject of sexual harassment while I was in Iraq. There were comments about my breasts shaking when I was doing something in the kitchen facility, and Michael Van Kirk, a project manager, attempting to kiss me – which was unwanted. I did not report these incidents because it would not have accomplished anything, and because of the high likelihood of retaliation that permeated the environment in Iraq. Often, there would be heckling of people who reported incidents of this nature, or they would be sent to another, more remote, camp. Furthermore, the confidential nature of these reports was purely at the discretion of the project managers, and not well enforced.

At one point, there was a company blog, on which any Halliburton employee could anonymously post their complaints about sexual harassment and other camp conditions. Halliburton took this down because it was embarrassing to them.

I know that pornography was known to be displayed in the workspaces in Basra as a result of the reports of the drivers and other employees who would travel through the Kuwait after having been in Basra. Craig Grabien had a reputation for sexually harassing the women in Basra.

In 2005, KBR came out with “supervisor training.” This training included topics such as dignity and respect, sexual harassment and other topics. Prior to that, sexual harassment had not really been discussed with managers or supervisors. This training was insufficient, lacking in substance, and thought by many to be a “joke.”

I recall the aftermath of the reporting of the Jamie Jones rape incident. I had been friends with the fire chief, Marshall Fiedler, and remember him commenting to me that “I don’t know what I’m going to do with these guys.” Several of the firefighters were very young, and known to do wild things.

I also recall that a number of people were very angry because the incident involving Jamie caused the rules to change so that drinking was no longer allowed. Prior to that reporting, drinking was allowed in the off-duty hours, and in the non-work spaces.

Part of the problem with managers such as Craig Grabien is that they have family connections in the Halliburton/KBR system. In fact, this “good ‘ol boy” network is so rampant that the employees have nicknamed the company: Kinfolk, Brothers &



LHS

Relatives (rather than Kellogg, Brown & Root). The entire company is simply rife with nepotism. The same rules do not apply to all Halliburton employees – it simply depends on their connections.

I am very familiar with Halliburton's DRP program, but certainly did not think that a rape or sexual assault would ever be subject to the program. I know that the DRP prides itself on preventing most cases from ever even reaching arbitration. The DRP office is housed in the same headquarters area as KBR, in the same building as the ER offices. I believe this to be a huge conflict of interest. Simply put, I do not think that a person can get justice in the DRP. I personally do not trust the arbitration provisions of KBR, nor do many of the co-workers I know. In fact the practices of Halliburton KBR make it clear that it was there intent to circle the wagons to protect their financial interests, rather than fairly treat their employees.


KBR has utilized the DRP arbitration provision to permit, excuse and/or encourage a sexually lawless environment to exist, and to escape liability and accountability for that environment. It also keeps its findings secretly so that the public does not know about it."

Further affiant sayeth not


 Letty Surman
 AFFIANT

SWORN TO AND SUBSCRIBED before me on the 10th day of October, 2007




 NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS
 (SEAL)


 LHS

**Statement of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "Workplace Fairness: Has The Supreme Court Misinterpreted Laws Designed
To Protect American Workers"
October 7, 2009**

This week, the United States Supreme Court met to officially begin its new term. We are here today at another hearing highlighting how decisions of the Supreme Court affect the everyday lives of Americans.

Today's hearing will focus on how a bare majority of the Supreme Court has overridden statutory protections to make it more difficult to prove age discrimination in the workplace. In two narrowly divided 5-4 decisions, the majority of the Court threatens to eliminate more of Americans' civil rights in the workplace, just as it eliminated Lilly Ledbetter's claim to equal pay, until Congress stepped in this year to set the law right.

Congress has worked to enact civil rights laws to eliminate discrimination in the workplace. In 1967, Congress passed the Age Discrimination and Employment Act with the intent to extend protections against workplace discrimination to older workers. We strengthened these protections in the Civil Rights Act of 1991, which passed in the Senate 93 to five.

The Supreme Court's recent decisions make it more difficult for victims of employment discrimination to seek relief in court, and more difficult for those victims who get their day in court to vindicate their rights. These decisions will encourage corporations to mistreat American workers in a still recovering economy. For anyone who doubts that there is conservative activism in our courts and the effects it is having, they need look no further than the decisions affecting two of our witnesses, Jamie Leigh Jones and Jack Gross.

The Supreme Court's misinterpretation of the Federal Arbitration Act in the *Circuit City* case threatens to undermine the effective enforcement of our civil rights laws. When Congress passed the arbitration act, it intended to provide sophisticated businesses an alternative venue to resolve their disputes. The arbitration act made arbitration agreements between businesses enforceable and directed courts to dismiss any claims governed by such agreements.

Congress never intended this law to become a hammer for corporations to use against their employees. But in *Circuit City*, the Supreme Court allowed for just that when it extended the scope and force of the arbitration act by judicial fiat, so as to make employment contract arbitration provisions enforceable.

Now, after the *Circuit City* decision, employers are able to unilaterally strip employees of their civil rights by including arbitration clauses in every employment contract they draft. Countless large corporations have done so. Some have estimated that at least 30 million workers have unknowingly "waived" their constitutionally guaranteed right to have their civil rights claims resolved by a jury by accepting employment, which necessarily meant signing a contract that included such a clause in the fine print.

There is no rule of law in arbitration. There are no juries or independent judges in the arbitration industry. There is no appellate review. There is no transparency. And, as we will hear today from Jamie Leigh Jones, there is no justice.

Today we will also hear from Mr. Gross, whose case shows that for those employees who are able to pry open the courtroom doors, the Supreme Court has placed additional obstacles on the path to justice.

After spending 32 years working for an Iowa subsidiary of a major financial company, Mr. Gross was demoted, and his job duties were reassigned to a younger worker who was significantly less qualified. In his lawsuit under the Age Discrimination Act, a jury concluded that age had been a motivating factor in his demotion and awarded him nearly \$50,000 in lost compensation.

A slim conservative majority of the Supreme Court, however, overturned the jury verdict and decided to rewrite the law. The five justices adopted a standard that the Supreme Court had itself rejected in a prior case and that Congress had rejected when enacting the Civil Rights Act of 1991. It is no wonder why Justice Stevens' dissent in *Gross* called the decision "an unabashed display of judicial lawmaking." It is the very definition of judicial activism when a court imposes a rule of decision rejected by its own precedent and rejected by Congress. Mr. Gross' justice was taken away when the Supreme Court decided that age discrimination had to be not only a motivating factor but the only factor.

I am concerned that the *Gross* decision will allow employers to discriminate on the basis of age with impunity so long as they cloak it with other reasons. As we will hear today from Mr. Gross, age discrimination too often victimizes workers who have dedicated decades of service to their employers. Older workers, who make up nearly 50 percent of the American workforce, are particularly vulnerable to discrimination during difficult economic times. In fact, age discrimination complaints filed with the Equal Employment Opportunity Commission (EEOC) jumped nearly 30 percent last year. I fear that in the wake of *Gross* few, if any, of these victims will achieve justice. And lower courts have been applying the rationale endorsed in the *Gross* case to weaken *other* anti-discrimination statutes, as well.

When President Obama signed the *Lilly Ledbetter Fair Pay Restoration Act* into law earlier this year, he reminded us of the real world impact of Supreme Court decisions on workplace rights. He said that "[economic] justice isn't about some abstract legal theory, or footnote in a casebook -- it's about how our laws affect the daily realities of people's lives: their ability to make a living and care for their families and achieve their goals." He also reminded us that "making our economy work means making sure it works for everyone."

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LENGTH: 10865 words**ARTICLE:** PREDISPUTE AGREEMENTS TO ARBITRATE STATUTORY EMPLOYMENT CLAIMS**NAME:** Samuel Estreicher ***BIO:**

* Professor of Law and Director, Center for Labor and Employment Law, New York University; Counsel, Cahill Gordon & Reindel. A.B., 1970, Columbia University; M.S. (Industrial Relations), 1974, Cornell University; J.D., 1975, Columbia University. An early version of these remarks was presented at the American Arbitration Association's "National Employment Enclave - The Faces of Conflict in the Workplace: The Future of Employment ADR," Sept. 22-23, 1995, and appeared in Proceedings of New York University 49th Annual Conference on Labor 93-121 (Samuel Estreicher ed., 1997). The author also filed an amicus brief on behalf of the California Employment Law Council in *Duffield v. Robertson Stephens & Co.*, No. C95-0109 (N.D. Cal. filed Jan. 11, 1995), appeal docketed, No. 97-15698 (9th Cir. Apr. 23, 1997). The views expressed here are the author's and should not be attributed to any organization. The research assistance of Matthew Kramer and Jeffrey Hirsch of the NYU School of Law (Class of 1998) is gratefully acknowledged.

SUMMARY:

... Once disputes have arisen, plaintiffs may enter into "knowing and voluntary" waiver agreements in which they trade potential claims under federal laws like the ADEA, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act of 1990 (ADA) for monetary or other consideration. ... litigation, that the EEOC has no authority to seek monetary relief for an employee who has agreed to arbitrate his employment dispute, the agencies retain authority to pursue injunctive relief where appropriate and sue on behalf of employees who have not agreed to submit disputes to arbitration. ... It is not clear why most job applicants or employees cannot make a rational decision whether they prefer to preserve rights to sue in court in the event of an employment dispute rather than work for an employer that requires arbitration of such disputes. ... Because in *Gilmer* the arbitration agreement was part of a registration process with the New York Stock Exchange, rather than a contract of employment directly between *Gilmer* and his former employer, the Court was able to avoid construing the reach of the exclusion in 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." ... This Article addresses some of the policy and legal questions concerning predispute agreements between employers and employees to arbitrate future disputes, whether they arise as a matter of contract or under employment discrimination statutes or other employment laws.

TEXT:

[*1344]

Over the last decade, the Supreme Court, through its interpretation of the Federal Arbitration Act of 1925 (FAA), has expanded the role of arbitration in the resolution of legal disputes, including disputes arising under federal and state statutes. Recently, much debate has arisen over the issue of whether the FAA applies to employment contracts, and

whether employees can enter into binding predispute agreements to arbitrate statutory employment claims. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that under the FAA, employees could in fact enter into such predispute agreements. Because the agreement in *Gilmer* was not part of an employment contract, however, the Supreme Court left open a critical question, namely the scope of the FAA exclusion of employment contracts for certain employees engaged in foreign or interstate commerce. In this Article, Professor Estreicher first addresses the various public policy arguments raised by opponents of predispute agreements to arbitrate statutory employment claims. Addressing each one in turn, he concludes that where certain procedural safeguards are implemented, arbitration is indeed a proper forum for the resolution of statutory employment claims, and that predispute agreements to arbitrate provide valuable benefits for both employers and employees. Turning to the issue left open by the Court in *Gilmer*, Professor Estreicher explores the confusion surrounding the scope of the FAA exclusion of employment contracts, which in large part stems from an uncertain legislative history, and suggests that, given recent Court decisions and the policies underlying them, a narrow interpretation of the exclusion by the Supreme Court is probable. Professor Estreicher concludes by stressing that a proper arbitration system can advance the public policies contained in federal and state employment statutes.

Introduction

The Supreme Court held in its 1991 ruling in *Gilmer v. Interstate/Johnson Lane Corp.* n1 that, in view of the strong federal policy in favor [*1345] of arbitration embodied in the Federal Arbitration Act of 1925 n2 (FAA), employees could enter into binding predispute arbitration agreements encompassing claims they have against their employers under the Age Discrimination in Employment Act of 1967 n3 (ADEA) and, by extension, other federal and state employment laws. Because in *Gilmer* the arbitration agreement was part of a registration process with the New York Stock Exchange, rather than a contract of employment directly between *Gilmer* and his former employer, the Court was able to avoid construing the reach of the exclusion in 1 of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." n4

Since, in the absence of FAA compulsion, predispute arbitration agreements covering statutory employment claims generally will be denied enforcement, the scope of the FAA 1 exclusion will have important practical implications for the future of employment law arbitration. In post-*Gilmer* rulings to date, the District of Columbia, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits n5 have read the exclusion narrowly as limited to seamen, railroad workers, and other workers directly "engaged in" interstate commerce. Despite the clear trend of post-*Gilmer* decisions, however, there remains a good deal of uncertainty and controversy over whether predispute agreements to arbitrate statutory employment claims will or should be enforced.

This Article addresses some of the policy and legal questions concerning predispute agreements between employers and employees to [*1346] arbitrate future disputes, whether they arise as a matter of contract or under employment discrimination statutes or other employment laws. Policy considerations are considered at the outset because they are likely to influence heavily how the legal issues raised by *Gilmer* ultimately will be resolved.

I

The Controversy over Predispute Arbitration Agreements

Postdispute agreements to arbitrate existing disputes, most would agree, do not raise especially difficult questions. At least since the Supreme Court's *Alexander v. Gardner-Denver Co.* n6 decision, the law on postdispute waivers has been relatively clear. Once disputes have arisen, plaintiffs may enter into "knowing and voluntary" waiver agreements in which they trade potential claims under federal laws like the ADEA, n7 Title VII of the Civil Rights Act of 1964, n8 and the Americans with Disabilities Act of 1990 n9 (ADA) for monetary or other consideration. If claims can be traded for money, it should not be beyond the realm of contract for the parties to negotiate a fair postdispute adjudicative process. n10 [*1347]

Predispute agreements to arbitrate claims arising under individual employment contracts also would seem relatively noncontroversial. If we put aside for the moment questions concerning the enforceability of such agreements under the FAA, state law would ordinarily be available to compel the parties to a contract to honor the dispute mechanism set out in the very instrument that creates the underlying substantive claim. There may be, however, cases at the margin

where - because of problems of illusory promise or contracts of adhesion - generally applicable principles of state contract law preclude enforcement. n11 Also, the public policies of some states, as expressed in their arbitration statutes, may allow either party to an employment contract to disregard executory arbitration promises. n12

However, a controversy is raging over the validity of predispute agreements to arbitrate statutory employment claims. It is here that distinguished plaintiffs' lawyers like New York's Judith Vladeck [*1348] charge that the law is sanctioning a new form of "yellow dog" contract. n13 Or, as San Francisco's Cliff Palefsky puts it, "an intellectual and legal scandal... is occurring in broad daylight." n14 Notably, opposition from the plaintiff's bar, civil rights groups, and advocacy groups led the Dunlop Commission on the Future of Worker-Management Relations (Dunlop Commission) to scuttle, at the eleventh hour, a recommendation that predispute agreements meeting certain quality standards should be enforced under existing law. n15 With mixed success, plaintiffs' lawyer groups have been pressuring organizations like J.A.M.S./Endispute and the American Arbitration Association (AAA) to decline the processing of predispute agreements. n16 [*1349]

II

The Case for Facilitating Predispute Agreements Conforming to Certain Adjudicative Quality Safeguards

I do not share the position of these critics. In my view, arbitration of employment disputes should be encouraged as an alternative, supplementary mechanism - in addition to administrative agencies and courts - for resolving claims arising under public laws as well as contracts. It is an alternative that offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy. Private arbitration will never, and should not, entirely supplant agency or court adjudication. But if properly designed, private arbitration can complement public enforcement and, at the same time, satisfy the public interest objectives of the various statutes governing the employment relationship.

Admittedly, arbitration of public law disputes is not the same thing as arbitration of contractual disputes. The public policies behind the laws require that certain adjudicative quality standards be met. But these standards can be provided without turning arbitral proceedings into full fledged civil trials. The essential safeguards (drawing largely from the Dunlop Commission's report n17) include:

- . no restriction on the right to file charges with the appropriate administrative agencies;
- . a reasonable place for the holding of the arbitration; n18
- . a competent arbitrator who knows the laws in question; n19
- . a fair and simple method for exchange of information; [*1350]
- . a fair method of cost sharing to ensure affordable access to the system for all employees; n20
- . the right to independent representation if sought by the employee;
- . a range of remedies equal to those available through litigation;
- . a written award explaining the arbitrator's rationale for the result; n21 and
- . limited judicial review sufficient to ensure that the result is consistent with applicable law. n22 [*1351]

Not all companies will be willing to subject their supervisory decisions to a neutral outside arbitrator under these conditions, even if by doing so they could avoid the risks and expense of jury trials. The limitations of arbitration are reciprocal; many companies and employees may be reluctant to submit to final, binding determinations with only limited opportunity for correction by the courts. n23

But where companies are willing to establish programs conforming to these quality safeguards, the question is whether the law should facilitate or obstruct their establishment. Consider the controversy over workers' compensation

laws earlier in this century. n24 From an ex post perspective - after an accident has occurred - workers with serious injuries able to command the attention of competent trial lawyers have a better chance at substantial recoveries before a jury rather than under an administrative system. Yet from an ex ante perspective - before an accident has occurred - the workers' compensation system offers systematic advantages over tort suits, whether the objective is delivering compensation or promoting workplace safety, for both workers and their employers. Of course, the tradeoff in the con- [*1352] text of arbitration of employment disputes is different because arbitration will not proceed on a no-fault basis. Nevertheless, employment arbitration also offers systematic advantages over lawsuits for both workers and their employers. The policy question is this: are workers (and firms) generally better off - is the overall system of rights and remedies for employment disputes enhanced - if the law permits companies to establish binding predispute employment dispute systems that satisfy adjudicative quality safeguards?

III

Objections to Predispute Arbitration Agreements

Admittedly, people disagree passionately here. Some of the objections that have been raised include the following.

A. A New Form of "Yellow Dog" Contract?

One source of criticism is suggested by Judy Vladeck's reference to "yellow dog" contracts, n25 a phrase conjuring the image of powerless workers forced to sell their industrial birthright in order to meet the bare necessities of life. The imagery is vivid but does not quite fit the facts. What was wrong with "yellow dog" contracts in our earlier labor history was that they were used by employers as purely strategic devices to blunt unionization. These agreements served no interest of employers other than that of thwarting the associational freedom of their employees. Employers sought by these clauses to lay a predicate for obtaining injunctions against labor unions which, by the mere act of attempting, even peacefully, to organize their workforce, could be found to have engaged in tortious inducement of breach of contract. Once public policy evolved in support of the right of workers to form independent organizations - or, as of the enactment of the Norris-LaGuardia Act of 1932, n26 the right at least to be free of court injunctions in the peaceful pursuit of organizing objectives - these clauses were properly deemed to serve no legitimate interest of employers.

By contrast, predispute arbitration, if properly designed, can offer ex ante advantages for both parties to the contract. Moreover, such [*1353] arbitration involves a change in the forum only - from the courts to a jointly selected neutral decisionmaker. It does not involve the waiver of substantive rights. n27 When a contract provides for arbitration of statutory claims, the arbitrator must be empowered to apply statutory standards and, if a violation is found, to award statutory remedies. n28

A variant of the "yellow dog" theme is that workers cannot meaningfully enter into binding arbitration agreements because of an inherent inequality of bargaining power. Professor Grodin argues the following, for example:

Before a dispute arises, it is impossible for a party to assess precisely what is being waived and the probable effect of the waiver - even if his or her attention is focused on the issue. In the employment context this is especially a problem for the employee; while the employer can take into account statistical probabilities affecting all its employees, the employee's ability to predict what may happen to him or her individually is beyond the scope of such analysis. Moreover, while a post-dispute agreement to arbitrate is likely to be the product of true negotiations against the backdrop of threatened litigation, pre-dispute agreements to arbitrate are far more likely to be part of a package of provisions imposed by the employer on a take-it-or-leave-it basis. n29

It is not clear why most job applicants or employees cannot make a rational decision whether they prefer to preserve rights to sue in [*1354] court in the event of an employment dispute rather than work for an employer that requires arbitration of such disputes. n30 Neither the fact that the rights given up may not seem particularly valuable to the employee in view of the low probability attached to the eventuality of a dispute, n31 nor that some employers will insist on arbitration as a precondition, seems a compelling reason to negate an agreement in the joint interests of both parties. n32

In several areas our laws do stipulate minimum conditions that are nonwaivable features of the employment bargain. ⁿ³³ Employees have rights to organize independent unions, to be paid statutorily declared minimum wages, to be free of discrimination on account of race, sex, national origin, age, and disability, and so forth. But in many other areas of vital importance to employees - such as the basic economic terms of the relationship, whether it be compensation, benefits, or job security - the law allows the parties to negotiate a contract that meets their joint objectives.

The pertinent question is whether, in the overall mix, the nature of the forum for future disputes is a subject that may be determined by contract or whether this term belongs to the nonwaivable, nonmodifiable category and, hence, is outside of the realm of contract. The answer cannot be supplied simply by speaking in terms of a nonwaivable "right" to go to court, for that in a sense begs the question. Rights are created by statute or decision and are the result of policy judgments. A judgment has to be made on the merits whether the benefits of allowing the parties to shape their own dispute resolution mechanism outweigh the attendant costs to the parties and to the public policy objectives of the statutes in question.

B. Procedural Adequacy: Fresh Apples Versus Spoiled Oranges?

A second source of criticism points up the supposed deficiencies of arbitration: that the process is supposed to be informal, with scant opportunity for prehearing discovery and little adherence to evidentiary scruples. The suggestion is that arbitration is a kind of second-class justice system.

Much of this criticism, too, is overdrawn. To some extent, apples are being compared not with oranges but with spoiled fruit. On the one hand, we are offered a picture of private litigation under ideal conditions (a world of substantial monetary claims warranting the attention of able advocates like Vladeck and Palefsky, quick and cheap access to the courts, and hefty jury awards). On the other hand, arbitration is depicted at its worst (claimants without lawyers confronting their former employers in skewed industry panels ⁿ³⁴ and proceedings rife with bias). This is good rhetoric but, analytically, a mistake. We should be assessing the relative merits of litigation and arbitration under the real-world conditions that most employees and employers will face.

The assertion is often made, for example, that under arbitration employers enjoy systematic advantages as "repeat players" that would not be available in civil litigation. Although having some force in the context of industry panels, the point is considerably overstated if arbitration is conducted, as is likely, before arbitrators chosen by the parties on an ad hoc basis. An employer may be a repeat player in the sense that it likely will be arbitrating disputes with more than one employee (or former employee), but arbitrators chosen on prior occasions are unlikely to be deemed acceptable by claimant representatives. Moreover, the real repeat players will be the lawyers for both defense and plaintiff bars in the area - such as the members of the National Employment Lawyers Association, a plaintiff group - who can be counted on to share information within their group about the track records of proposed arbitrators. [*1356]

There are, of course, some important issues of procedural design that have to be considered. How extensive should the opportunity for discovery be in order to provide a meaningful hearing without at the same time replicating the costs and delay of a court action? Can we provide a mechanism for publication of awards, so that representatives of employers and employees can monitor the performance and impartiality of arbitrators, while still preserving the benefits to both parties of low visibility, informal claims resolution? Can the standard for judicial review of awards be modified to ensure adherence to statutory requirements without converting arbitrators into administrative law judges writing detailed opinions? These questions should be addressed; they do not, however, present insurmountable barriers.

C. Private Law

Opponents also assume a world dominated by private arbitration of statutory claims in which no public law, no guidance from prior decisions, is generated. ⁿ³⁵ Mandatory publication of awards is a close question, for such a requirement would diminish an important benefit of the arbitration alternative. But the private law objection plainly overshoots the mark. As with private postdispute settlement agreements, which also preempt a publicly accessible decision on the merits - and are clearly lawful at present - there would remain under any realistic scenario plenty of claims for the civil courts. Indeed, precisely because arbitration reduces access costs for claimants in addition to other costs faced by employers, many firms will be reluctant to promulgate arbitration policies. In any event, even if the unimaginable were to occur, and all private claimants were confined to arbitration, ⁿ³⁶ surely this would free up the resources of administrative agencies to pursue systemic litigation.

D. Absence of Jury Trials

A fourth objection highlights the absence of jury trials. Jury trials indeed play, and will continue to play, an important role in the overall system. But consider the following:

First, civil litigation resulting in substantial jury awards is a realistic prospect for relatively few claimants. For the vast majority, a private lawyer cannot be secured and their claims will be addressed, if at [*1357] all, by overworked, understaffed administrative agencies. These agencies - after considerable delay - typically offer little more than a perfunctory investigation.

Second, while some individuals with substantial claims - often white senior managers with age discrimination grievances n37 or, if they work in California, Michigan, and a few other places, wrongful dismissal allegations - may lose access to jury trials, the jury trial is a relatively recent innovation in employment law (introduced as late as 1991 for Title VII and ADA lawsuits).

We should not assume that jury trials are an essential feature of the employment law landscape. Major strides were made in the discrimination field for over twenty-five years without resort to juries. Our basic labor laws do not provide for jury trials. n38 European countries with wrongful dismissal laws rely on specialized labor tribunals (essentially tripartite arbitration boards), with well-defined, scheduled recoveries; there is no access to the ordinary civil courts, let alone civil juries, for such disputes. n39

Jury trials have their downside. They inject an element of uncertainty because of the unpredictability of juries and the risk that, in certain cases, jurors will dispense their own view of social justice rather than make appropriate findings of fact in accordance with the law. This specter of liability undermines society's interest in enabling firms to make sound personnel decisions and, as RAND Institute studies n40 suggest, may have negative effects on the willingness of firms to hire additional workers. In short, we have a system in which a few individuals in protected classes win a lottery of sorts, while others queue up in the administrative agencies and face reduced employment opportunities. [*1358]

E.

"Voluntary" Agreements?

Some have suggested that predispute arbitration agreements should be enforceable only when truly "voluntary"; presumably, any evidence of insistence by employers would taint the validity of such agreements. n41 There is certainly a justification for requiring a "knowing" waiver for ensuring that arbitration clauses make it clear if their intended scope encompasses statutory employment claims. n42 Moreover, arbitration clauses should be invalidated if they fail to satisfy general principles of contract law, in the absence of other circumstances indicating that the employee understood what he was waiving. But to go further and insist that these clauses will be upheld only if they satisfy some vague test for "voluntariness" is problematic.

What will be deemed a "voluntary" agreement will be subject to the vagaries of after-the-fact litigation. It is unclear, for instance, whether under this standard applicants could be required to agree to an arbitration clause as a condition of employment, whether improvements in benefits could be exchanged for agreements to submit future disputes to arbitration, or whether voluntary agreements would ever be found except for a narrow category of high level executives. A "voluntariness" test injects an additional element of uncertainty - on top of the doubts under existing law over whether these agreements are binding. This additional layer of uncertainty will have the effect of discouraging such agreements.

A voluntariness standard also detracts from the desired uniformity of internal dispute resolution programs if predispute agreements will be upheld for some employees but not others who are similarly [*1359] situated in a particular workforce. A dispute resolution system, like a pension plan, is what economists call a "collective" or "public" good. It is efficiently provided, if at all, on a collective basis. This is because the costs of such a program (an in-house claims processing office, ombudsmen, possible mediators, etc.), even when justified by the collective benefits to the affected employees, typically exceed the benefits to individual employees. Piecemeal application of a dispute resolution program could threaten to unravel the program for all other similarly situated employees.

We should face up to the policy question of whether, in the overall mix, predispute arbitration, if conducted under the right standards, is socially desirable, rather than introduce a voluntariness standard that seeks indirectly to achieve the same outcome as a flat prohibition of such agreements.

IV

The Supreme Court's Gilmer Decision

The Supreme Court, in a number of rulings over the last decade, has interpreted the FAA as a broad statement of congressional policy in favor of agreements to arbitrate both existing and future statutory and contractual claims. The Court's recognition of a strong federal presumption of arbitrability culminated in the 7-2 ruling in 1991 in *Gilmer v. Interstate/Johnson Lane Corp.* n43

Robert Gilmer was hired by Interstate as a Manager of Financial Services in 1981. As a condition of his employment, he was required to register as a securities representative with several stock exchanges, including the New York Stock Exchange (NYSE). The NYSE required an agreement to arbitrate "any dispute, claim or controversy" arising between him and Interstate. n44 The NYSE's Rule 347 expressly required arbitration of any dispute "arising out of the employment or termination of employment of such registered representative." n45 Discharged six years later at age sixty-two, Gilmer filed an age discrimination charge with the EEOC and then brought suit under the ADEA in the federal district court in North Carolina. Interstate then filed a motion to compel arbitration under the FAA. The district court denied the motion. n46 It cited the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*, n47 which held that union-represented employees who pursued arbitration under collective bargaining [*1360] agreements could not be precluded from bringing suits on their independent statutory claims. n48 The Court of Appeals reversed, finding nothing in the text, legislative history, or purposes of the ADEA to prevent arbitration of age bias claims. n49 Writing for himself and six others, Justice White agreed that arbitration could be compelled. n50

V

Legal Challenges Foreclosed by Gilmer

Gilmer left certain issues open, but others were clearly resolved. In all likelihood, registered representatives in the securities industry - who are now required by third party registration organizations to enter into predispute arbitration agreements over claims arising out of their employment - will have to pursue their statutory employment (and other) claims in arbitration. n51 [*1361]

There is also no persuasive basis for treating Title VII, the ADA, the Family and Medical Leave Act, n52 or laws like the Employee Polygraph Protection Act n53 differently than the ADEA n54 - particularly in view of the Supreme Court's statement that the party opposing arbitration bears the heavy burden of showing that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." n55 And, not surprisingly, the courts of appeals have so ruled. n56

After *Gilmer*, if the FAA is held to apply, broad arguments based on the supposed inferiority of arbitration as a mechanism for adjudicating statutory claims or on the inherent inequality of bargaining power between the parties - despite Justice White's characterization of Gilmer as "an experienced businessman" n57 - will be unavailing. Nor is there any probability of success in pressing the view, in the absence of clear statutory language precluding or limiting arbitration, that policies against prospective waivers of rights and remedies in the federal statute in question override the FAA's presumption of arbitrability. These arguments were expressly rejected in *Gilmer*. n58 The Court reaffirmed that a no-waiver policy in a statute ordinarily refers to substantive rights and not the right to a judicial forum, and that arbitration is strongly presumed to be as competent as a civil court or administrative agency in adjudicating statutory rights. Thus, the Fifth Circuit has ruled that the safeguards Congress enacted for waivers of "any" rights under the ADEA in the Older Workers Benefit Protection Act of 1990 n59 (OWBPA) refer only to waivers of substantive rights and do not apply to predispute waivers of a judicial forum. n60

VI

The Critical Open Question:

The Scope of the 1 Exclusionary Clause

Gilmer did leave open one very important issue for our purposes - the applicability of the exclusion in 1 of the FAA. This provision states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." n61 Justice White noted for the Court that the 1 issue had not been raised below. n62 In any event, he added, the arbitration promise in this case was not contained in an employment agreement between Gilmer and his former employer. Rather, "the arbitration clause at

issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate." n63

Justice White's reasoning leaves room for improvement. It could be argued that the securities registration was tantamount to an employment agreement; since Gilmer did not otherwise have an employment agreement, he had to sign the registration statement as a condition of employment, and the arbitration clause included disputes arising out of his employment with Interstate. Moreover, Interstate is a member organization of the exchanges that require execution of the registration statement. (Also, Justice White's citations to lower court decisions did not support his reading of what constitutes a "contract of employment" for purposes of the 1 exclusion. n64) Perhaps this [*1364] proves nothing more than that the Supreme Court is infallible because it is final, not the other way around.

A. Arbitration Required by Third Party Organizations

If the Supreme Court ultimately resolves the issue it left open by holding that predispute agreements to arbitrate statutory employment claims are enforceable only when those agreements are required by third party registration organizations, the reach of the Gilmer decision effectively will be limited to registered representatives in the securities field. n65 The Court is not likely to accept agreements among employers to establish third party organizations whose only purpose is to secure arbitration promises from employees of the participating employers. n66 Such arrangements, in all likelihood, will be viewed as subterfuges. Few, if any, industries are like the securities industry in maintaining self-regulatory organizations with licensure and other functions that operate under the sanction of federal law and with the imprimatur of a federal regulatory agency.

B. Arbitration Pursuant to State Statutes

It has been urged that, whatever the scope of the 1 exclusion, state arbitration statutes - many of which do not contain a similar exclusionary clause n67 - are available to enforce predispute arbitration [*1365] clauses. n68 The FAA by itself would not preempt state laws enforcing arbitration agreements excluded from its reach. n69 These state laws thus could be invoked to compel compliance with promises to arbitrate claims arising under state common law and employment statutes. It is unclear, however, whether they provide a basis for requiring arbitration of claims under federal statutes that by their terms contemplate judicial remedies for violations. Gilmer and its antecedents relied on a federal presumption of arbitrability based on the FAA, requiring evidence that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." n70 Presumably, that presumption would be unavailable if the arbitration agreement falls within the 1 exclusion. The issue would then turn on whether - without regard to a federal presumption of arbitrability - the particular federal law precludes binding predispute arbitration agreements.

C. Alternative Readings of 1

On the FAA's applicability, two different textual readings of the 1 exclusion are available. One position argues that "employment contracts," in ordinary parlance, means all employment contracts, and that the phrase "workers engaged in foreign or interstate commerce" should be taken to embrace all workers in industries that are subject to the reach of the commerce power of Congress. On this view, as Justice Stevens urged in his Gilmer dissent, 1 reflects Congress's central purpose in the FAA to enforce "commercial" contracts among merchants, not agreements between employers and employees. n71 [*1366]

The alternative reading - embraced in virtually all of the post-Gilmer decisions in the lower courts - maintains that Congress used limiting language in 1 to exclude only contracts of employment for "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." n72 On this account, the reference to seamen and railroad employees suggests that Congress intended to exclude only employment contracts of classes of workers directly engaged in interstate transportation rather than of all workers in industries "affecting" commerce. Moreover, in view of Supreme Court decisions from the period, Congress might have understood the term "engaged in foreign or interstate commerce" to connote only workers "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." n73 Thus, the Sixth Circuit stated in *Asplundh Tree Expert Co. v. Bates*: n74

We conclude that the exclusionary clause of 1 of the Arbitration Act should be narrowly construed to apply to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of

goods in interstate commerce in the same way that seamen and railroad workers are. We believe this interpretation comports with the actual language of the statute and the apparent intent of the Congress which enacted it. The meaning of the phrase "workers engaged in foreign or interstate commerce" is illustrated by the context in which it is used, particularly the two specific examples given, seamen and railroad employees, those being two classes of employees engaged in the movement of goods in commerce. n75

The post-Gilmer decisions also rely on precedents originating in the 1950s n76 that considered the FAA's applicability to disputes arising [*1367] under collective bargaining agreements prior to the Supreme Court's 1957 decision in *Textile Workers Union of America v. Lincoln Mills of Alabama*. n77 Fearful that the anti-arbitration premises of state common law would undermine labor arbitration, the courts in these cases strove mightily to preserve some role for the FAA in enforcing arbitration promises in collective agreements. n78 They did so by reading 1 either as inapplicable to collective bargaining agreements altogether or as limited to employees in particular transportation industries. The Supreme Court's tour de force in *Lincoln Mills* - recognizing a federal common law of collective bargaining contracts under section 301 of the Labor Management Relations Act n79 - essentially removed the need for such creative readings.

Despite its pedigree, the "transportation industry only" reading of 1 suffers from at least two problems. It requires, as the Sixth Circuit noted (by way of dicta) in *Willis v. Dean Witter Reynolds, Inc.*, n80 that the term "commerce" in 1 be read narrowly while construing expansively the "transaction involving commerce" language in [*1368] 2, which defines the FAA's substantive reach. n81 Indeed, the Supreme Court in *Allied-Bruce Terminix Cos., Inc. v. Dobson* n82 held that the language of 2 should be read broadly as coextensive with the reach of the Commerce Clause - even though the pre-New Deal Congress that passed the Act in 1925 was working with a narrower conception of the commerce power. n83

Another difficulty with the "transportation industry only" reading is the absence of evidence that such a limitation reflects a discernible purpose of Congress. While it is hard to assume Congress would have any purpose to exclude arbitration agreements signed by highly-placed executives, it is no less difficult to attribute to Congress some purpose for excluding individual employment contracts of seamen, railroad employees, and others directly engaged in interstate shipment of goods while covering individual employment contracts of all others who work for firms subject to its commerce power. In a 1953 ruling, the Third Circuit attempted to justify such line drawing by noting that Congress had provided grievance machinery for seamen and railroad workers and presumably sought to exclude from the FAA workers "as to whom special procedure for the adjustment of disputes had previously been provided." n84 [*1369]

Both readings of the 1 exclusion are hampered by a murky legislative history. What evidence there is suggests only that the exclusionary clause was inserted in response to objections from organized labor - principally voiced by Andrew Furuseth, then-head of the Seafarers' Union - that the FAA would somehow operate as a "compulsory labor" measure. The original bill, introduced in 1922, did not contain the exclusionary clause. n85 In the congressional hearings, representatives of the American Bar Association (ABA), which had been actively involved in the drafting process, urged that labor's concern was misplaced:

It was not the intention of this bill to make an industrial arbitration in any sense; and so I suggest that... if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, "but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce." It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. n86 [*1370]

When the bill was reintroduced in December 1923, it contained the exclusionary clause. n87 Apparently, organized labor was satisfied because it played no role in the subsequent hearings.

Based on a review of the internal proceedings of the American Federation of Labor and the Seafarer's Union, the argument has been offered that labor's objections were misstated by the ABA representatives. n88 On this account, the unions' principal concern was not that the FAA would mandate "industrial arbitration" of labor disputes but rather

that ship masters would be able to foist arbitration and compulsory service on seamen who were required by federal law to have individual contracts of hire. Accordingly, the 1 exclusion should be read as a response to broad-based concerns over the inherent inequality of individual workers' bargaining power. n89

There is, unfortunately, little, if any, evidence that Congress in 1925 shared this understanding when it enacted the FAA. n90 If the is- [*1371] sue of interpretation turns on the specific intent of Congress at the time, the most that can be said is that Congress intended to exclude disputes involving collective bargaining agreements from the reach of the FAA. n91 Yet the language that Congress used in the exclusionary clause cannot easily be made to fit an exclusion limited to labor disputes, even if this were Congress's principal focus in 1925.

The Supreme Court will have to choose between two alternatives. One interpretation of the exclusionary clause essentially reads the FAA out of the picture for all employment disputes outside of the security industry. The second offers a narrow reading of the clause that seeks to preserve a substantial role for the FAA in this area.

Although prediction is a hazardous enterprise - especially when dealing with the Supreme Court - a broad interpretation of the exclusion is improbable. The Court would have to reject the essential thrust not only of *Gilmer* but also its prior ruling in *Perry v. Thomas*, n92 [*1372] which likewise involved statutory employment claims. Moreover, although one can say that the Court simply would be interpreting the scope of the 1 exclusion - an issue not squarely resolved in any prior ruling - the underlying policy justification that would be attributed to Congress for such a broad reading clashes with much of the reasoning that undergirds the Court's FAA jurisprudence. The Justices would be, in a sense, disowning their earlier pronouncements of arbitral competence - that arbitration is not a disfavored institution for resolving statutory claims and that generalized concerns over inequality of bargaining power cannot be raised to prevent arbitration (unless the federal statute in question evinces a clearly stated policy against arbitration or the contract would be invalid under the state's general law of contracts). n93 In addition to the obstacles created by prior rulings, the caseload and "litigation explosion" considerations that implicitly prompted the Court in the first place to find in the FAA a broadly preemptive pro-arbitration sword argue against a broad reading of the exclusion which is compelled neither by text nor available legislative history.

VII

Role of Public Policy Considerations

It is important to remember, however, that, irrespective of the scope of the exclusionary clause, the federal agencies enforcing the employment statutes have an important role to play in the process of ensuring that arbitration of statutory claims broadly conforms to the public policies contained in those laws.

A. Anti-Retaliation Provisions

If we decide as a policy matter that predispute agreements are enforceable, even if insisted upon as a condition of employment, that determination should foreclose use of the anti-retaliation provisions of the employment laws n94 to attack, without more, such insistence on [*1373] the agreement itself. These provisions should not be used as a back-door vehicle for relitigating the policy judgment already made. If an employer has a right under the FAA to insist on a predispute arbitration clause, the refusal to hire a job applicant who declines to agree to such a clause cannot be actionable retaliation under the discrimination laws.

There would, however, be some role for the anti-retaliation provisions. As the *EEOC v. River Oaks Imaging and Diagnostic* n95 litigation in Texas makes clear, employers should not be able to use arbitration agreements as a club to retaliate against employees who have filed charges with the EEOC. n96

B. Right to File Charges with the EEOC

A more productive route for regulatory oversight is provided by the right of claimants to file charges with the EEOC and other enforcement agencies even when they have signed predispute arbitration agreements. Under current law, employees may not waive, and employers cannot require waiver of, the right to initiate a proceeding with the EEOC and other agencies. n97 The filing of a charge gives the [*1374] agency an important window of opportunity to monitor employer practices (including the fairness and integrity of arbitration procedures) and to decide whether to file a lawsuit. Even if the courts ultimately hold, as Judge Sprizzo did in the *EEOC v. Kidder, Peabody & Co.* n98 litigation, that the EEOC has no authority to seek monetary relief for an employee who has agreed to arbitrate his employ-

ment dispute, the agencies retain authority to pursue injunctive relief where appropriate and sue on behalf of employees who have not agreed to submit disputes to arbitration. n99

C. Promulgation of Quality Standards by Agency Rulemaking

Another route would be for the EEOC and other agencies to use their rulemaking authority (if they have it), or at least to issue regulatory guidance (if they do not), to set the quality standards that should govern arbitration of statutory employment claims. One step they could readily take is to endorse the model procedures of dispute resolution organizations like the AAA n100 and the Center for Public Resources n101 (and those suggested by the Dunlop Commission and the Due Process Protocol). "Moral suasion," to use a term favored by Felix Frankfurter, would go a long way to improve the process. n102 [*1375]

Conclusion

A well-designed private arbitration alternative for employment claims is in the public interest and is achievable. The law should encourage, rather than hinder, arbitration of employment disputes that are conducted in a manner that satisfies the standards for a fair hearing before a neutral arbiter empowered to apply the law and, where warranted, to award statutory remedies.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative Law Agency Adjudication Alternative Dispute Resolution Civil Procedure Alternative Dispute Resolution Arbitrations General Overview Labor & Employment Law Employment Relationships Employment Contracts Conditions & Terms General Overview

FOOTNOTES:

n1. 500 U.S. 20 (1991).

n2. 9 U.S.C. 1-16 (1994).

n3. 29 U.S.C. 621-634 (1994).

n4. 9 U.S.C. 1 (1994).

n5. See *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 276 (4th Cir. 1997) (compelling arbitration of claim under federal Family and Medical Leave Act (FMLA), 29 U.S.C. 2601 (1994 & Supp. 1995)); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835-37 (8th Cir. 1997) (affirming dismissal by district court of hospital medical technician's action against former employer alleging violations of Title VII and state antidiscrimination law); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 226-27 (3d Cir.) (affirming order of district court compelling arbitration of mortgage consultant's claims against employer pursuant to state sexual harassment law), cert. denied, 1997 U.S. LEXIS 6057 (Oct. 14, 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470-72 (D.C. Cir. 1997) (affirming district court order compelling arbitration of discharged security guard's claims against former employer alleging racial discrimination and harassment in violation of Title VII and intentional infliction of emotional distress in violation of state law); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996) (affirming dismissal by district court of disc jockey's action against former employer alleging sexual harassment in violation of Title VII); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53 n.3 (7th Cir. 1995) (reversing denial by district court of employer's motion to compel arbitration of former employee's ADEA and state law fraudulent inducement claims); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596-602 (6th Cir. 1995) (affirming district court order compelling arbitration of contract claims brought by chief executive officer against company which purchased his employer).

n6. 415 U.S. 36 (1974).

n7. The Older Workers Benefit Protection Act, Pub. L. No. 101-433, 201, 104 Stat. 978, 983-84 (1990) (codified as amended at 29 U.S.C. 626(f)(1) (1994)), sets certain minimum standards for postdispute substantive waivers of ADEA claims.

n8. 42 U.S.C. 2000e to 2000e-17 (1994).

n9. Title I of the Americans with Disabilities Act (ADA), containing the employment provisions, is codified at 42 U.S.C. 12101-12117 (1994).

n10. This is the premise of the voluntary postdispute arbitration experiments of the EEOC and state agencies. See EEOC Policy Statement on Alternative Dispute Resolution, 3 EEOC Compliance Manual (BNA) N:3055 (July 17, 1995) (establishing EEOC commitment to Alternative Dispute Resolution (ADR) and setting guidelines for use); Agency is Committed to ADR But Questions Remain, Miller Says, Daily Lab. Rep. (BNA), Jan. 24, 1995, available in LEXIS, BNA Library, DLABRT File (describing ADR pilot program in which four EEOC districts offered mediation in selective discharge cases resulting in 52% settlement rate). For experience under the voluntary arbitration alternative authorized by New York's Human Rights Law, *N.Y. Exec. Law* 297, subd. 4, par. A, subpar. ii (McKinney 1993), see Peter A. Prosper & Joel M. Douglas, The Arbitration of Human Rights Complaints: The New York Experience, *Arb. J.*, Dec. 1992, at 26 (describing New York's program); Peter Blackman, Claimants Wanted: Project Tries to Convince Employees to Arbitrate, *N.Y. L.J.*, May 26, 1994, at 5 (reporting that program is wanting for claimants because of minimal promotion and because in arbitration plaintiffs pay counsel, whereas when case is before administrative law judge, plaintiffs have access to free government counsel). For a discussion of the virtues of postdispute mediation, see Dwight Golann, *Employment Disputes in Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators* (1996); Matthew W. Daus, *Mediating Disability Employment Discrimination Claims*, *Disp. Resol. J.*, Jan. 1997, at 16, 17-19. For a model of postdispute procedures the author had a hand in drafting, see Center for Public Resources, Inc., *Model ADR Procedures: Employment Termination Dispute Resolution Agreement and Procedure* (1990).

n11. Compare *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126 (7th Cir. 1997) (holding that arbitration clause was not enforceable because of lack of consideration in form of any reciprocal employer promise), and *Heurtebise v. Reliable Bus. Computers, Inc.*, 550 N.W.2d 243, 247, 258 (Mich. 1996) (holding that there is no enforceable obligation under Michigan law to submit sex discrimination claim to arbitration where management reserved right to change employee handbook containing arbitration clause and handbook stated that it should not be construed as binding contract; three justices also found violation of state public policy), cert. denied, 117 S. Ct. 1311 (1997), with *Lang v. Burlington N. R.R.*, 835 F. Supp. 1104, 1106 (D. Minn. 1993) (holding that mandatory arbitration policy added to employee handbook 26 years after plaintiff was hired constituted offer accepted by plaintiff through his continued employment and barred post-termination lawsuit, and finding no evidence that provision resulted from fraud or was "inherently unfair"), and *Fregara v. Jet Aviation Bus. Jets*, 764 F. Supp. 940, 952 (D.N.J. 1991) (finding that grievance and arbitration procedures spelled out in employee handbook providing for appeal to supervisor and then to company's board of adjustment, with provision for selection of impartial referee if board was deadlocked, must be exhausted before fired employee can sue for breach of contract, and stating that "there is nothing futile or illusory about this process"). See generally Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 *Chi.-Kent L. Rev.* 753 (1990); Alfred G. Fellu, *Legal Consequences of Nonunion Dispute-Resolution Systems*, 13 *Employee Rel. L.J.* 83 (1987).

n12. Some state arbitration statutes exclude arbitration agreements contained in employment contracts or made a condition of employment. See, e.g., *Ariz. Rev. Stat. Ann.* 12-1517 (West 1994); *Iowa Code Ann.* 679.1(2)(b) (West 1987); *Kan. Stat. Ann.* 5-401(c)(2) (Supp. 1996); *Ky. Rev. Stat. Ann.* 417.050 (Michie 1992); *S.C. Code Ann.* 15-48-10 (Law. Co-op. 1976 & Supp. 1997). These state law exclusions become material to the issue of arbitrability of employment claims only if the FAA is held not to apply to arbitration agreements contained in most employment contracts. For example, as the Supreme Court of Hawaii recently ruled in *Brown v.*

KFC Nat'l Management Co., 921 P.2d 146 (Haw. 1996), reconsideration denied, 922 P.2d 973 (Haw. 1996), even where the state arbitration statute requires that the arbitration clause be in a written employment contract, "the FAA merely requires that the arbitration provision, but not necessarily the contract out of which the controversy arises, be in writing." *Id.* at 159. Hence, where the FAA applies, the limitations of state arbitration law have no practical effect.

n13. See Judith P. Vladeck, 'Yellow Dog Contracts' Revisited, N.Y. L.J., July 24, 1995, at 7. Professor Stone adopts similar rhetoric in Katherine Van Wezel Stone, Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s, 73 *Denv. U. L. Rev.* 1017 (1996).

n14. Joyce E. Cutler, Arbitration: Suits Challenge Mandatory Arbitration as Depriving Employees of Their Rights, *Daily Lab. Rep.* (BNA), Mar. 3, 1995, available in LEXIS, BNA Library, DLABRT File (quoting Cliff Palefsky of McGuinn, Hillsman & Palefsky). Mr. Palefsky represents plaintiffs in the pending challenges in *Duffield v. Robertson Stephens & Co.*, No. C95-0109 (N.D. Cal. filed Jan. 11, 1995) (order compelling arbitration), appeal docketed, No. 97-15698 (9th Cir. Apr. 23, 1997); *Burton v. A.F.M. Servs.*, No. 965632 (Cal. Super. Ct. filed Dec. 6, 1994), appeal docketed, No. A073922 (Cal. Ct. App. Apr. 18, 1996).

n15. For the author's testimony before the Dunlop Commission, see Statement by Professor Samuel Estreicher to the Commission on the Future of Worker-Management Relations Panel on Private Dispute Resolution Alternatives, reprinted in *Daily Lab. Rep.* (BNA), Sep. 30, 1994, available in LEXIS, BNA Library, DLABRT File. His views on the Dunlop Commission's report are set out in Samuel Estreicher, The Dunlop Report and the Future of Labor Law Reform, 12 *Lab. Law.* 117 (1996), earlier versions of which were published, all under the same title, in *Contemporary Issues in Labor and Employment Law: Proceedings of New York University 48th Annual National Conference on Labor 291-311* (Bruno Stein ed., 1996); *Regulation*, Mar. 1995, at 28; and *Daily Lab. Rep.* (BNA), June 5, 1995, available in LEXIS, BNA Library, DLABRT File.

n16. Several plaintiffs' bar and union representatives participated in Due Process Protocol for Mediation and Arbitration of Statutory Arbitration Disputes, in 9A *Lab. Rel. Rep.* (BNA) No. 142, at 534:401 (May 9, 1995) [hereinafter Due Process Protocol]. However, this group could not reach consensus on whether predispute agreements to arbitrate statutory employment claims could be required as a condition of employment. See *id.* In July 1997, the EEOC restated its long-standing opposition to "agreements that mandate binding arbitration of discrimination claims as a condition of employment." EEOC Policy Statement on Mandatory Arbitration, reprinted in *Daily Lab. Rep.* (BNA) No. 133, at E-4 (July 11, 1997). Two months earlier, the National Academy of Arbitrators had adopted a similar position. See National Academy of Arbitrators' Statement and Guidelines Adopted May 21, 1997, *Daily Lab. Rep.* (BNA) No. 103, at E-1 (May 29, 1997).

Effective June 1, 1996, the American Arbitration Association (AAA) issued new national rules for the resolution of employment disputes. See American Arbitration Ass'n, National Rules for the Resolution of Employment Disputes (1996) [hereinafter AAA 1996 Rules]. The Association's policy is to "administer dispute resolution programs which meet the due process standards as outlined in these rules and the Due Process Protocol. This includes pre-dispute, mandatory arbitration programs, as a condition of employment." *Id.* at 3-4. The AAA rules were recently amended "to address technical issues." See American Arbitration Ass'n, National Rules for the Resolution of Employment Disputes (Including Mediation and Arbitration Rules) 4 (1997) [hereinafter AAA 1997 Rules]. Similarly, J.A.M.S./Endispute, while expressing concern "when a company requires all of its employees to arbitrate all employment disputes as an exclusive remedy," apparently will process disputes arising under such programs if a "minimum set of procedures or standards of procedural fairness" are met. These standards are set out in the organization's policy on employment arbitration. See J.A.M.S./Endispute Arbitration Policy, in 9A *Lab. Rel. Rep.* (BNA), Mar. 26, 1996, at 534:521.

n17. See U.S. Dep't of Commerce and Labor, Commission on the Future of Worker-Management Relations, Report and Recommendations 31 (Dec. 1994).

n18. Although this item is not mentioned in the Dunlop report, employers should not be able by means of an arbitration clause to compel claimants to litigate in a distant, inconvenient forum in circumstances where an express choice of forum clause having the same effect would be unenforceable. See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 *Sup. Ct. Rev.* 331, 385-88 (criticizing Supreme Court's failure to address forum location issue, which was not briefed, in *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996)).

n19. Rule 11(a)(i) of the AAA 1997 Rules requires that "arbitrators serving under these rules shall be experienced in the field of employment law." AAA 1997 Rules, note 16, at 15.

n20. For example, Brown & Root, a maintenance, construction, and temporary staffing company, pays the costs of the arbitration, except for the expenses of witnesses produced by the employee and a \$ 50 fee paid by the employee (or former employee) if the proceeding is initiated by the employee or the result of a demand served on the company by the employee. See Brown & Root, Inc., Dispute Resolution Plan and Rules 17 (1994) (on file with the New York University Law Review). This company also established a benefit plan to reimburse 90% of attorney's fees incurred up to an annual cap of \$ 2500 per year, with a \$ 25 deductible paid by the employee. See Brown & Root, Inc., Employment Legal Consultation Plan 4-5 (1994) (on file with the New York University Law Review). In *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1996), Chief Judge Edwards held for the court that, where the predispute agreement is silent or ambiguous on this question and arbitration "occurs only at the option of the employer," the court would interpret the agreement to require the employer to assume the arbitrator's fees and expenses. The court stated:

Cole could not be required to arbitrate his public law claims as a condition of employment if the arbitration agreement required him to pay all or part of the arbitrator's fees and expenses. In light of this holding, we find that the arbitration agreement in this case is valid and enforceable. We do so because we interpret the agreement as requiring Burns Security to pay all of the arbitrator's fees necessary for a full and fair resolution of Cole's statutory claims.

Id.

n21. Rule 32 of the AAA 1997 Rules departs from the Association's customary no-opinion approach in commercial arbitrations and requires that "the award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise." AAA 1997 Rules, *supra* note 16, at 24. The Association's Guide for Employment Arbitrators (effective for cases filed on or after June 1, 1997) further states, "The award must include a statement regarding the disposition of any statutory claims." American Arbitration Ass'n, Guide for Employment Arbitrators 16 (1997).

n22. The Supreme Court's *Gilmer* decision states: "Although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 232 (1987)).

The appropriate standard for review of arbitration of public law disputes remains an important unresolved issue. Some lower courts have recognized a "manifest disregard" standard, a judicially created addition to the statutory grounds for vacating an award set forth in the FAA. See, e.g., *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1986) (applying manifest disregard standard in arbitration to determine value of stock held by shareholder). The "manifest disregard" standard requires a showing that "the arbitrator understood and correctly stated the law but proceeded to ignore it." *Id.* at 893 (quoting *Bell Aerospace Co. v. Local 516*, 356 F. Supp. 354, 356 (W.D.N.Y. 1973), *rev'd* on other grounds, 500 F.2d 921 (2d Cir. 1974)). The Second Circuit has left open the question of whether the "manifest disregard" standard is appropriate for arbitration of certain federal statutory claims. See *DiRussa v. Dean Witter Reynolds Inc.*, No. 96-9068, 1997 U.S. App. LEXIS 20505, at

*6-*10 (2d Cir. Aug. 5, 1997) (noting that "manifest disregard" doctrine is "severely limited"); cf. *Chisolm v. Kidder Peabody Asset Management, Inc.*, 966 F. Supp. 218, 222-27 (S.D.N.Y. 1997) (applying, though questioning suitability of, "manifest disregard" standard for such claims).

Framed for contractual disputes, the "manifest disregard" standard may be too deferential for arbitration of public law claims. By analogy to the National Labor Relations Board's policy of deferring to labor arbitration awards that resolve statutory issues, a preferable approach would be to require that arbitrators give reasons for their disposition of statutory claims and to confirm awards only if they are not "clearly repugnant to the purposes and policies of the Act." *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955). (In 1984, the Board softened its own test: "Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible of an interpretation consistent with the Act, we will defer." *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984) (footnote omitted)). The D.C. Circuit's *Cole* decision stated (in dictum): "Arbitration of statutory claims [is] valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." *Cole*, 105 F.3d at 1487.

n23. For a survey of employer practices, see U.S. General Accounting Office, Pub. No. GAO/HEHS-95-150, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution* (Report to Congressional Requesters) (July 5, 1995). The 1995 survey found that 10% of firms used arbitration as a dispute resolution mechanism for their nonunion employees, and in one-fourth to one-half of those firms, arbitration was mandatory. See *id.* at 7. In 1997, the GAO updated its survey, finding that, of firms reporting the use of ADR for employment disputes, 19% used arbitration. See U.S. General Accounting Office, Pub. No. GAO/GGD-97-157, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace 2* (Aug. 1997).

n24. See generally Lawrence M. Friedman, *A History of American Law*, 587-88 (1973); Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775 (1982).

n25. The "yellow dog" label has a long industrial history. It also has entered political lore. William Safire reminds us of the story about Tom Heflin, a senator from Alabama (and uncle of Howell Heflin), who tried to discourage southern Democrats from bolting the party when it nominated Al Smith, a Catholic, a wet, and (worst of all) a New Yorker. Heflin is reputed to have said, "I'd vote for a yellow dog if he ran on the Democratic ticket." See William Safire, *On Language: Blue Dog Demo*, N.Y. Times, Apr. 23, 1995, 6, at 20. In short, it is not the label but the substance that counts.

n26. Norris-LaGuardia Act, ch. 90, 72 Stat. 70 (1932) (codified as amended at 29 U.S.C. 101-115 (1994)).

n27. As the Supreme Court stated in *Gilmer*, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

n28. But see *DeGaetano v. Smith Barney Inc.*, No. 95 Civ. 1613, 1996 U.S. Dist. LEXIS 1140, at *18 (S.D.N.Y. Feb. 5, 1996) (holding that although arbitration procedure did not allow arbitrator to award injunctive relief, attorney's fees, or punitive damages, "the mere fact that these statutory remedies may be unavailable in the arbitral forum does not in itself establish that Title VII claims must be resolved in a court of law"). It is unclear whether this ruling is consistent with the Supreme Court's approach in the *Gilmer* decision. See *supra* note 27 and accompanying text. Conceivably, the failure to award attorney's fees or punitive damages in an appropriate case still would be grounds for vacating the award. Cf. *DiRusso v. Dean Witter Reynolds, Inc.*, No. 96-9068, 1997 U.S. App. LEXIS 20505, at *10-*14 (2d Cir. Aug. 5, 1997) (declining to vacate award in plaintiff's favor that did not provide attorney's fees because plaintiff had failed to make clear to arbitrators that attorney's fees were mandatory award for prevailing plaintiffs under ADEA); Amicus Brief of California Employment Law Council at 20-24, *Duffield v. Robertson Stephens & Co.*, No. C95-0109 (N.D. Cal. filed Jan. 11, 1995), appeal

docketed, No. 97-15698 (9th Cir. Apr. 23, 1997) (arguing that, in view of 4 of FAA, procedural adequacy of arbitration should be resolved through judicial review rather than at motion to compel arbitration stage).

n29. Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L.J. 1, 29 (1996). Professors Carrington and Haagen adopt a similar view in Carrington & Haagen, *supra* note 18, at 87-88.

n30. Where all employers in a given industry require predispute arbitration agreements as a condition of employment, the employee's practical ability to shop for employers that will not require arbitration is substantially diminished. The Duffield litigation, see *supra* note 14, raises this issue in the securities industry context, where all registered representatives for now, see *infra* note 34, must agree to arbitration of employment claims as a condition of employment in that industry. See Plaintiff-Appellant's Opening Brief at 54-59, *Duffield v. Robertson Stephens & Co.*, No. C95-0109 (N.D. Cal. filed Jan. 11, 1995), appeal docketed, No. 97-15698 (9th Cir. Apr. 23, 1997) (arguing that industry-wide requirement of predispute arbitration agreements forced upon plaintiff the "Hobson's choice" of forfeiting constitutional rights or forfeiting employment in securities industry).

n31. See Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 *Emory L.J.* 1097, 1105-07 (1989) (discussing "perceptual distortion" argument for mandating "just cause" termination rules).

n32. Again, at the margin there may be situations where, under the jurisdiction's general law of contracts, the conditions for a valid, enforceable agreement are not met. The question here is whether, as Professors Grodin, see Grodin, *supra* note 29, at 20-28, and Carrington and Haagen, see Carrington & Haagen, *supra* note 18, at 401, suggest, we should assume that all predispute arbitration agreements insisted upon by employers as a condition of employment are unenforceable contracts of adhesion.

n33. For a critical view of such regulations, see Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 *Stan. L. Rev.* 87 (1993).

n34. In May 1997, the National Association of Securities Dealers (NASD) formed a special panel to consider whether the NASD should continue to require predispute agreements to arbitrate employment discrimination claims. See Patrick McGeehan, *Bias Panel Is Formed by NASD*, Wall St. J., May 29, 1997, at C1. Three months later, the NASD proposed eliminating from its U-4 registration form any requirement that registered representatives must agree to arbitrate their statutory employment discrimination claims. See George Gunset, *Securities Group Yields on Suits*, Chi. Trib., Aug. 8, 1997, 3, at 1.

n35. See, e.g., Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1089-90 (1984) (criticizing those advocating emphasis on settlement rather than adjudication because settlement fails to fulfill essential public law function).

n36. Widespread resort to private arbitration of statutory employment claims, however, would change the calculus and support an argument for mandatory publication of awards.

n37. See, e.g., Michael Schuster & Christopher S. Miller, *An Empirical Assessment of the Age Discrimination in Employment Act*, 38 *Ind. & Lab. Rel. Rev.* 64, 68 (1984) (indicating that majority of complaints under the ADEA are filed by male professionals and managers, and inferring from indirect evidence that most such plaintiffs are white).

n38. See, e.g., National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. 151-169 (1994)); Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. 151-188 (1994)).

n39. See Samuel Estreicher, Unjust Dismissal Laws: Some Cautionary Notes, 33 Am. J. Comp. L. 310, 313, 315, 316 (1985) (describing use of specialized boards and tribunals to adjudicate such matters in Britain, Germany, and France).

n40. See James N. Dertouzos & Lynn A. Karoly, RAND Inst. No. R-3989-ICJ, Labor-Market Responses to Employer Liability 46-61 (1992) (arguing that state adoption of wrongful termination doctrine reduces aggregate employment); see also James N. Dertouzos, Elaine Holland & Patricia Ebener, RAND Inst. No. R-3602-ICJ, The Legal and Economic Consequences of Wrongful Termination 48 (1988).

n41. See, e.g., Lewis Maltby, Paradise Lost - How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights, 12 N.Y.L. Sch. J. Hum. Rts. 1, 10 (1994) (arguing that best approach is to allow only "knowing and voluntary" waivers of statutory rights); Lewis L. Maltby, American Civil Liberties Union, Statement of the American Civil Liberties Union Submitted to the Commission on the Future of Worker-Management Relations 4 (Apr. 6, 1994) (on file with the New York University Law Review) (insisting that ADR programs are only acceptable if truly "voluntary").

n42. The Ninth Circuit, in *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), held that a waiver of the judicial forum must be a knowing one, and because the NASD rules at the time did not expressly refer to arbitration of employment claims, there was no knowing waiver in that case. See *id.* at 1304-05. On October 1, 1993, the Securities and Exchange Commission amended its NASD rules to provide "for the arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of [NASD] or arising out of the employment or termination of employment of associated person(s) with any member." *Kuehn-er v. Dickinson & Co.*, 84 F.3d 316, 320-21 (9th Cir. 1996) (enforcing arbitration under new rule); see *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 658 (5th Cir. 1995) (quoting amended NASD rule). See *supra* note 34 for discussion of subsequent proposal by NASD to eliminate from its registration forms any requirement that registered representatives agree to arbitrate statutory employment discrimination claims.

n43. 500 U.S. 20 (1991).

n44. *Id.* at 23.

n45. *Id.*

n46. See *id.* at 24.

n47. 415 U.S. 36 (1974).

n48. See *Gilmer*, 500 U.S. at 24 (citing *Gardner-Denver*). The courts of appeals are presently divided over whether *Gilmer* requires a reconsideration of *Gardner-Denver*'s holding, at least in a case where the collective bargaining agreement authorizes the arbitrator expressly to consider statutory claims and the individual employee to pursue arbitration irrespective of the union's wishes. Compare, e.g., *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997) (arbitration clause does not bar ADA lawsuit where employee has not "agreed individually to the contract containing the arbitration clause"; the agreement does not "authorize the arbitrator to resolve federal statutory claims"; and the agreement does not "give the employee the right to insist on arbitration if the federal statutory claim is not resolved to his satisfaction in any grievance process"), and *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997) (labor arbitration does not prec-

lude lawsuit of Title VII and ADA claims unless employee "consents to have them arbitrated"), with *Martin v. Dana Corp.*, 114 F.3d 421 (3d Cir. 1997) (requiring arbitration of Title VII claim where collective agreement authorizes arbitrator to resolve statutory claim and employee can insist on arbitration), vacated & reh'g en banc granted, No. 96-1746, 1997 WL 368629 (3d Cir. July 1, 1997), and *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879 (4th Cir.), cert. denied, 117 S. Ct. 432 (1996) (requiring arbitration of Title VII and ADA claims where collective agreement requires that employer comply with "all laws preventing discrimination").

For an alternative to Gardner-Denver in the union-represented sector, see Committee on Labor and Employment Law of the Association of the Bar of the City of New York, *Arbitration of Statutory Discrimination Claims Under Collective Bargaining Agreements: Comments to the Secretary of Labor on the Report and Recommendations of the Commission on the Future of Worker-Management Relations*, 51 Record of N.Y.C.B.A. 154 (Mar. 1996) (offering interesting "election of remedies" proposal).

n49. See *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990).

n50. See *Gilmer*, 500 U.S. at 23.

n51. If the NASD proposal to eliminate mandatory arbitration of discrimination claims, see supra note 34, is ultimately approved by the SEC, registered representatives who are required by their employers to agree to pre-dispute arbitration clauses will be treated the same as employees in other industries subject to the FAA. Note should also be taken of the Duffield litigation, see supra note 14, where plaintiff argued that *Gilmer* involved only a rejection of facial challenge to securities industry arbitration in a context where the record was bare regarding procedural deficiencies of arbitration under NASD or NYSE auspices. See Plaintiff-Appellant's Opening Brief at 38-39, *Duffield v. Robertson Stephens & Co.*, No. C95-0109 (N.D. Cal. filed Jan. 11, 1995), appeal docketed, No. 97-15698 (9th Cir. Apr. 23, 1997).

Moreover, in a recent pair of rulings authored by Judge Reinhardt, panels of the Ninth Circuit appear to have extended the *Lai* requirement of a "knowing waiver" to require that "the employee must explicitly agree to waive the specific right in question." *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 760-62 (9th Cir. 1997) (employee handbook required that new employee "read and understand" its contents but did not explicitly require that employee agree to its contents); *Renteria v. Prudential Ins. Co. of Am.*, 113 F.3d 1104, 1106-08 (9th Cir. 1997) (registered representative did not make "knowing waiver" because she signed U-4 agreement prior to October 1, 1993 amendment of NASD Code, even though document bound plaintiff to arbitrate all disputes listed in NASD Code "as may be amended from time to time"). Other courts are likely to find a "knowing waiver" if the arbitration agreement expressly refers to employment disputes, whether or not the specific statute that is the basis for a later claim is explicitly listed. See, e.g., *Mugnano-Bornstein v. Crowell*, 677 N.E.2d 242 (Mass. App. Ct. 1997) (finding employee, by signing arbitration agreement specifically referring to employment disputes, to have agreed to submit sexual harassment and gender discrimination claims to arbitration).

n52. 29 U.S.C. 2601-2653 (1994).

n53. 29 U.S.C. 2001-2009 (1994).

n54. For an attempt to distinguish claims under Title VII from claims under ADEA for arbitrability purposes, see Patrick O. Gudridge, *Title VII Arbitration*, 16 Berkeley J. Emp. & Lab. L. 209 (1995).

Hortatory language endorsing alternative dispute resolution in provisions of the Civil Rights Act of 1991, Pub. L. No. 102-166, 118, 105 Stat. 1071, 1081 (1991) (codified at 42 U.S.C. 12212 (1994)), cannot fairly be read to change preexisting law with respect to predispute arbitration. Because Congress did not amend Title VII to restrict arbitration - indeed, section 118 is, if anything, supportive of arbitration "where appropriate and to the extent authorized by law" - statements such as those contained in the conference committee report on the pre-Gilmer 1990 version of the 1991 law do not resolve the arbitrability issue:

The Conferees emphasize... that the use of alternative dispute resolution mechanisms is intended to supplement not supplant, the remedies provided by Title VII. Thus, for example, the Conferees believe that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver*... The Conferees do not intend this section to be used to preclude rights and remedies that would otherwise be available.

Conf. Rep. on S. 2104, Civil Rights Act of 1990, reprinted in 136 Cong. Rec. H8050 (daily ed. Sept. 26, 1990) (submitted by Rep. Hawkins) (emphasis added). In the debates over the 1991 law, some legislators were supportive of Gilmer. See 137 Cong. Rec. H9548 (daily ed. Nov. 7, 1991) (remarks of Rep. Hyde); 137 Cong. Rec. S15,478 (daily ed. Oct. 30, 1991) (remarks of Sen. Dole). Others were disapproving. See 137 Cong. Rec. H9530 (daily ed. Nov. 7, 1991) (remarks of Rep. Edwards); Stephen Breyer, *On the Uses of Legislative History in the Interpretation of Statutes*, 65 S. Cal. L. Rev. 845, 845-46 (1992) (quoting Judge Harold Leventhal's observation that legislative history of this type is akin to "looking over a crowd and picking out your friends").

n55. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

n56. See, e.g., *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997) (requiring arbitration of Title VII and state law discrimination claims; finding support in section 118 of the Civil Rights Act of 1991); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir.) (requiring arbitration of claim brought under New Jersey Law Against Discrimination), cert. denied, 1997 U.S. LEXIS 6057 (Oct. 14, 1997); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 7 F.3d 1110 (3d Cir. 1993) (requiring arbitration of claims under Employee Retirement Income Security Act); *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877 (9th Cir. 1992) (requiring arbitration of claim of retaliation for refusal to take lie detector test allegedly in violation of Employee Polygraph Protection Act); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (requiring arbitration of claims under Title VII); see also *McNulty v. Prudential-Bache Sec. Inc.*, 871 F. Supp. 567 (E.D.N.Y. 1994) (requiring arbitration of sales representative's claim that he was demoted for failure to meet production quota on account of time out for jury service allegedly in violation of federal Jury Systems Improvement Act, 28 U.S.C. 1875 (1994)).

n57. *Gilmer*, 500 U.S. at 33. Although Justice White's opinion appears to leave open some room, the context makes clear that challenges to arbitration agreements covered by the FAA are confined to the narrow straits of 2 of the statute:

The FAA's purpose was to place arbitration agreements on the same footing as other contracts. Thus, arbitration agreements are enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for revocation of any contract. There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.

Id. (internal quotes and citations omitted). States can apply customary contract doctrines such as fraud and unconscionability. However, as the Court reaffirmed in *Doctor's Assocs., Inc. v. Casarotto*, 116 S. Ct. 1652, 1656-57 (1996), the FAA preempts any state law that targets arbitration agreements for different regulatory treatment than other contracts. See *infra* note 93. For a survey of state law contract defenses, see Jonathan E.

Breckenridge, Note, Bargaining Unfairness and Agreements to Arbitrate: Judicial and Legislative Application of Contract Defenses to Arbitration Agreements, 1991 *Ann. Surv. Am. L.* 925, 973-81.

n58. 500 U.S. at 26.

n59. 29 U.S.C. 626(f)(1) (1994).

n60. See *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995).

n61. 9 U.S.C. 1 (1994).

n62. See *Gilmer*, 500 U.S. at 25 n.2.

n63. *Id.*

n64. See *id.* (citing *Dickstein v. duPont*, 443 F.2d 783 (1st Cir. 1971)); *Malison v. Prudential-Bache Securities, Inc.*, 654 F. Supp. 101 (W.D.N.C. 1987); *Legg, Mason & Co. v. Mackall & Coe, Inc.*, 351 F. Supp. 1367 (D.D.C. 1972); *Tonetti v. Shirley*, 219 Cal. Rptr. 616 (Ct. App. 1985). These decisions acknowledged that employment contracts were involved, but read the exclusionary clause as limited to employees in transportation industries. See *Estreicher*, *supra* note 11, at 753-54.

n65. But cf. *supra* note 34.

n66. For example, Garry Ritzky is a risk and human resources manager for Turner Brothers Trucking Inc., a company that participates in a peer review adjudication program maintained by Employment Dispute Resolution, Inc. (EDR), an alternative dispute resolution firm based in Atlanta. Ritzky writes:

This company operates as a third-party entity that contracts with employees and employers separately to provide binding arbitration of all employment-related disputes, including personal injury, age, race, sex, disability and religion. The concept is based on the third-party arrangement used by stockbrokers... and all investors who use their services.

Garry M. Ritzky, Reducing Employment-Related Litigation Risks, Risk Mgmt., Aug. 1994, at 49, 50 (discussing benefits of employment dispute resolution). The program comes complete with a defense fund shared by participating employers and involves training of employees who become adjudicators available for other companies. EDR provides a list of three trained nonexempt employees from other companies, three trained management employees from other companies, and three retired judges/attorneys. EDR, founded by Lynn Laughlin (formerly counsel with the Jackson Lewis firm), is reported to have a half dozen companies as clients in addition to Turner. See Wade Lambert, Employee Pacts to Arbitrate Sought by Firms, *Wall St. J.*, Oct. 22, 1992, at B1; see also Stephanie Overman, Why Grapple with the Cloudy Elephant?: Alternative Dispute Resolution, *HR Magazine*, Mar. 1993, at 60.

n67. See *supra* note 12.

n68. See, e.g., Todd H. Thomas, Using Arbitration to Avoid Litigation, 44 *Lab. L.J.* 3, 13-14 & n.58 (1993).

n69. As the Court noted in *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989), the FAA "contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." *Id.* at 477. Volt held that parties to an arbitration agreement covered by the FAA could elect to be governed by a state arbitration statute because such choice of law clauses did not conflict with the pro-arbitration policy of federal law. See *id.* at 479.

n70. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

n71. See *id.* at 39 (Stevens, J., dissenting). In his dissent, Justice Stevens also quoted a portion of the hearings on the proposed bill:

The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. Take an insurance policy; there is a blank in it. You can take that or you can leave it. The agent has no power at all to decide it. Either you can make that contract or you can not make any contract. It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.

Id. (emphasis added) (quoting Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 9 (1923) (statement of Sen. Walsh)).

n72. 9 U.S.C. 1 (1994).

n73. *Shanks v. Delaware, Lackawanna, & W. R.R. Co.*, 239 U.S. 556, 558 (1916) (construing Federal Employers' Liability Act of 1908).

n74. 71 F.3d 592 (6th Cir. 1995).

n75. *Id.* at 600-01.

n76. See *Signal-Stat Corp. v. Local 475, United Elec. Radio & Mach. Workers of Am.*, 235 F.2d 298, 302 (2d Cir. 1956) (determining that employees of automotive electrical equipment manufacturers were not involved in interstate commerce and hence not within 1 exclusion); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 452-53 (3d Cir. 1953) (holding that employees engaged in production of goods for subsequent sale in interstate commerce were not exempt under 1).

These rulings were reaffirmed in later cases. See, e.g., *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162 (7th Cir. 1984) (explaining that 1 exclusion applied only to workers in transportation industries); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (holding exclusionary language of 1 not to apply to contract of professional basketball player); *Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) (explaining that 1 exemption applied only to employees involved in, or closely related to, actual movement of goods in interstate commerce).

n77. 353 U.S. 448 (1957).

n78. The union in Lincoln Mills offered the FAA as an alternative basis for enforcing the employer's executory promise to arbitrate. See David E. Feller, *End of the Trilogy: The Declining State of Labor Arbitration*, Arb. J., Sept. 1993, at 18, 19 (discussing union reliance primarily on section 301 of the Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136, 156-57 (codified as amended at 29 U.S.C. 185 (1994)), "because of the hostility of the courts to arbitration under the FAA. As a back-up [the union] also argued that the exclusion in Section 1 of the FAA of contracts of employment applied only to individual contracts and was inapplicable to collective bargaining agreements."). The union also relied, in the alternative, on the "transportation industry only" reading of 1:

[If] the Court should find that the exemption of contracts of employment contained in Section 1 of the Act was intended to exempt all labor arbitration because those who drafted it would not have recognized the distinction... between collective agreements and contracts of hire, then, on the same principles, the exemption should be read as covering only what it was intended to cover, that is, contracts of seamen, railroad employees, and other workers engaged directly in foreign or interstate commerce. It cannot simultaneously be urged that the 1925 exemption should be read as it would have been read in 1925, but that the class of workers affected by the exemption should not be limited to the class of workers intended to be covered by the 1925 language. The workers in this case are not engaged in interstate commerce. They are engaged in industry affecting interstate commerce...

Petitioner's Brief at 58-59, Lincoln Mills (No. 211).

n79. 29 U.S.C. 185 (1994).

n80. 948 F.2d 305 (6th Cir. 1991).

n81. See *id.* at 310-11. Section 2 makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. 2 (1994).

n82. 513 U.S. 265 (1995).

n83. See *id.* at 275. Thus, Professor Finkin argues:

In 1925, Congress had no power to legislate regarding contracts of employment of accountants or secretaries even if they worked for railroads or steamship companies, or of deliverymen if they did not cross state lines. It was irrelevant whether or not the statute dealt with employees "in" interstate commerce, "engaged in" interstate commerce, or who were "involved in" interstate commerce, for however the statute was phrased, these employees were wholly outside the power of Congress to regulate at the time, and Congress could not have intended to include them. It should follow that as the Court expanded the scope of the commerce power to reach all these employees, the scope of the exemption expanded as well, leaving their status just as Congress contemplated, i.e., as not reached by the arbitration act.

Matthew W. Finkin, *Employment Contracts Under the FAA - Reconsidered*, 48 Lab. L.J. 329, 333 (June 1997).

A somewhat different argument for excluding FAA coverage is suggested by *Rushton v. Meijer, Inc.*, No. 199684, 1997 WL 476366, at *9 (Mich. App. Aug. 19, 1997) (arguing that store's floor detective's duties "did not facilitate, affect, or arise out of interstate or foreign commerce"). The suggestion cannot be squared, however, with the Supreme Court's *Dobson* ruling.

n84. *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers of Am.*, 207 F.2d 450, 452 (3d Cir. 1953). As the court stated in *Tenney*:

Seamen constitute a class of workers as to whom Congress had long provided machinery for arbitration. In exempting them the draftsmen excluded also railroad employees, another class of workers as to whom special procedure for the adjustment of disputes had previously been provided. Both these classes of workers were engaged directly in interstate or foreign commerce. To these the draftsmen of the Act added "any other class of workers engaged in foreign or interstate commerce." We think that the intent of the latter language was, under the rule of *ejusdem generis*, to include only those other classes of workers who are likewise engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it. The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.

Id. at 452-53. The Sixth Circuit quoted this passage with approval in *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 598 (6th Cir. 1995).

Chief Judge Edwards of the D.C. Circuit and Chief Judge Posner of the Seventh Circuit take a similar view in, respectively, *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1471 (D.C. Cir. 1997) (upholding parties' arbitration agreement and supporting narrow reading of exclusionary clause based in part on reasoning of *Tenney*) and *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997) (finding that legislative history supports narrow reading of exclusionary clause).

n85. See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before a Subcomm. of the Senate Comm. on the Judiciary, 67th Cong. 9 (1923) (statement of W.H.H. Piatt, chairman of the Committee of Commerce, Trade, and Commercial Law of the American Bar Association).

n86. *Id.* (emphasis added).

n87. See Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary, 68th Cong. 2 (1924) (including recitation of bill text that contained exclusionary clause).

n88. See Matthew W. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 Berkeley J. of Emp. & Lab. L. 282, 295-96 (1996).

n89. Consider Judge Posner's reaction to Professor Finkin's essay in *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), cert. denied, 1997 WL 275009 (Oct. 14, 1997):

Professor Finkin argues that the prevailing view, which limits the exclusion in section 1 to employment contracts in transportation, is wrong. His review of the legislative history... has persuaded him that Congress's intention was to exclude all employment contracts. Yet, as he acknowledges, the impetus for the exclusion came entirely from the seafarers union, concerned that arbitrators would be less favorably inclined toward seamen's claims than judges were. Judges favored such claims, the union thought, in part because of a tradition that seamen were "wards in admiralty," in part because of peculiarities of maritime law that would make it easy to slip an arbitration clause into a maritime employment contract without the seaman's noticing it, and in part because the maritime employment relation was already heavily regulated by federal law. It was soon noticed that the railroad industry's labor relations were also heavily regulated - by a statute (the Railway Labor Act) that in-

cluded provisions for compulsory arbitration of many disputes. Motor carriers were not yet comprehensively regulated, but it may have seemed (and was) only a matter of time before they would be; hence the expansion of the exclusion from seamen to railroad to other transportation workers. It seems to us, as it did to the Third Circuit [in the Tenney decision], that this history supports rather than undermines limiting "engaged in foreign or interstate commerce" to transportation.

Id. at 358.

n90. Professor Finkin acknowledges:

No "paper trail" has been left of the history of the exemption. A search of the files of the Commerce Department, the Senate Judiciary Committee, then Secretary Hoover, Senator Walsh (who left a voluminous archive), the legislative files of the AF of L, and Victor Olander (for the files of the [International Seamen's Union]) yielded a scanty record bearing upon the Act and no record whatsoever concerning the exemption.

Finkin, *supra* note 88, at 295 n.61 (emphasis added). For Senator Walsh's statement, see *supra* note 71.

n91. See *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987) (quoting 1 exclusion and observing that "the federal courts have often looked to the [FAA] for guidance in labor arbitration cases"). The clear implication is that 1 excludes collective bargaining agreements.

Consider also the Fourth Circuit's assessment of the legislative purpose in *United Elec. Radio & Mach. Workers of Am. v. Miller Metal Prods.*, 215 F.2d 221 (4th Cir. 1954):

It appears that the exclusion clause of the Arbitration Act was introduced into the statute to meet an objection of the Seafarers International Union; and certainly such objection was directed at including collective bargaining agreements rather than individual contracts of employment under the provisions of the statute. The terms of the collective bargaining agreement become terms of the individual contracts of hiring made subject to its provisions and the controversies as to which arbitration would be appropriate arise in almost all instances, not with respect to the individual contracts of hiring, but with respect to the terms engrafted on them by the collective bargaining agreement. It is with respect to the latter that objection arises to the compulsory submission to arbitration which the Arbitration Act envisages. No one would have serious objection to submitting to arbitration the matters covered by the individual contracts of hiring divorced from the provisions grafted on them by the collective bargaining agreements.

Id. at 224 (emphasis added) (quoted with approval in *Kropf v. Snap-Tools Corp.*, 859 F. Supp. 952, 957 (D. Md. 1994)).

On the other hand, the Court in *Miller Metal Products* was "[not] impressed by the argument that the excepting clause of the statute should be construed as not applying to employees engaged in the production of goods for interstate commerce as distinguished from workers engaged in transportation in interstate commerce, as held by the majority in *Tenney*..." *Miller Metal Products*, 215 F.2d at 224. Attempting to qualify this language, the district court in *Kropf v. Snap-on Tools Corp.*, 859 F. Supp. 952 (D. Md. 1994), suggested, "that statement was made in the context of arbitration agreements contained in collective bargaining agreements." *Id.* at 957 n.11.

n92. 482 U.S. 483 (1987) (holding that FAA preempted anti-arbitration provision of California wage payment law so as to compel arbitration).

n93. In *Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652 (1996), the Supreme Court examined a Montana statute that declared arbitration clauses unenforceable unless they contained a prominent notice on the first page of the agreement stating that the contract was subject to arbitration. The Court held (8-1) that the statute was preempted by 2 of the FAA, 9 U.S.C. 2 (1994), because it singled out arbitration for regulation not applicable to contracts generally. See *id.* at 1656-57.

n94. Section 704(a) of Title VII provides in pertinent part that an employer may not discriminate against the employee (or former employee) "because he has opposed any practice made an unlawful employment practice by this subchapter [so-called opposition clause], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [so-called participation clause]." 42 U.S.C. 2000e-3(a) (1994). The legal issue would be whether an employer's insistence on a predispute arbitration clause, or in its adherence once a dispute has arisen, violates either the "opposition" or "participation" clause.

n95. *Civ. A. No. H-95-755*, 67 Fair Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. Apr. 19, 1995) (granting preliminary injunction preventing employer from requiring employees to agree to dispute resolution procedure that interferes with employees' right to file complaints with EEOC).

n96. Consider, however, some of the decisions rejecting an "election of remedies" approach for union-represented employees. See, e.g., *EEOC v. Board of Governors of State Colleges and Univs.*, 957 F.2d 424 (7th Cir. 1992) (holding that collective bargaining agreement prohibiting grievances from proceeding to arbitration if employee filed lawsuit or age-bias charge with EEOC violated ADEA); *EEOC v. General Motors Corp.*, 826 F. Supp. 1122 (N.D. Ill. 1993) (determining that employer violated anti-retaliation provisions of Title VII and ADEA by withdrawing access to internal dispute resolution procedure when employees filed charges with EEOC). Employers (and unions) should be prevented from withholding contractual processes simply because employees have filed charges with the EEOC or other enforcement agencies. But query whether the anti-retaliation provisions should bar the parties to a collective bargaining relationship from establishing a program for internal resolution of disputes that, if invoked by employees, forecloses any later court suit, provided that the arbitrator has the authority to consider statutory issues and award statutory remedies for violations. For a related proposal, see *supra* note 48.

n97. See Older Workers Benefit Protection Act, 29 U.S.C. 626(f)(4) (1994) (stating that "No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the [EEOC]"); *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987) (holding employee waiver of right to file charge with EEOC void as against public policy). The validity of post-dispute settlement agreements that preclude the filing of charges with the EEOC is the subject of *EEOC v. Astra U.S.A., Inc.*, 929 F. Supp. 512 (D. Mass. 1996) (issuing preliminary injunction restraining employer from enforcing settlement agreements prohibiting employees from assisting EEOC in its investigation of sexual harassment charges), *aff'd in part and vacated in part*, 94 F.3d 738 (1st Cir. 1996) (dissolving injunction but affirming that nonassistance covenants prohibiting employee communication with EEOC are void as against public policy).

n98. *No. 92 Civ. 9243*, 1997 WL 620809 (S.D.N.Y. Oct. 6, 1997) (holding that EEOC may not seek only monetary relief on behalf of individual employees who have signed binding predispute arbitration agreements); accord *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500 (E.D. Mich. 1997).

n99. The Supreme Court in *Gilmer* stated that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), but did not resolve whether such agreements could preempt an EEOC action seeking monetary relief

on behalf of individual employees who had agreed to arbitration. Cf. *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1290-92 (7th Cir. 1993) (holding that prior ADEA judgment precluded subsequent EEOC action seeking individual relief for employee, as opposed to injunctive relief against further violation). Because in the Kidder, Peabody litigation the employer had gone out of business, and no theory of successor liability was pursued against the purchaser of its assets, the EEOC conceded that it lacked any basis for seeking injunctive or other prospective relief. See *EEOC v. Kidder, Peabody & Co.*, No. 92 Civ. 9243, 1997 WL 620809 (S.D.N.Y. Oct. 6, 1997).

n100. See *supra* note 16.

n101. See Center for Public Resources, Institute for Dispute Resolution, *Employment ADR: A Dispute Resolution Program for Corporate Employers* (1995).

n102. Rather than play this leadership role in prodding companies to develop arbitration systems meeting essential adjudicative quality standards, the EEOC is content to rail against the prevailing winds and state its implacable opposition to predispute arbitration of employment discrimination claims. See EEOC Policy Statement on Mandatory Binding Arbitration, reprinted in *Daily Lab. Rep. (BNA)* No. 133, at E-4 (July 11, 1997) (setting forth position that agreements mandating binding arbitration of discrimination claims as condition of employment are contrary to the policy of the employment discrimination laws).



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ARTICLE: Private Justice: Employment Arbitration and Civil Rights

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SUMMARY:

... While data on arbitration results is scarce, knowledgeable experts agree that employees who take their grievances to arbitration are successful about fifty percent of the time. ... Of these, thirty-three percent have used arbitration to resolve personal injury disputes and twenty-four percent have used arbitration in product liability cases. ... Under the protocol, however, the arbitrator has the authority to award attorneys' fees "in the interests of justice," even if the employee has not prevailed in her claim. ... One such area is discovery, which is obviously important to the fair resolution of any dispute. ... A study by Baxter found that the EEOC won only twenty-four percent of its employment cases, whereas individual employees in arbitration won fifty-one percent of the time. ... In another study based on cases from January 1993 to December 1995, Bingham found that the mean damages awarded by arbitrators was \$ 49,030. ... This evidence suggests that the high cost of litigation is the principal reason so few employees have access to justice. ... At its worst, private arbitration threatens to usher in a dark age in which employers roll back all the gains in equal employment opportunity for which the civil rights movement has fought so long and hard -- a nightmare in which employees are forced to take their discrimination complaints into employer-controlled systems that are little better than kangaroo courts.

HIGHLIGHT: *Let's look at the record.*

-- Alfred E. Smith,
Presidential Candidate (1928)

TEXT:

[*29] I. INTRODUCTION

These are difficult times for civil rights. Affirmative action is under siege and losing ground. The Equal Employment Opportunity Commission (EEOC) has been forced onto a starvation diet by a hostile Congress. Some of the most venerable civil rights institutions are in a state of disarray.

But among all the serious and visible threats to civil rights is possibly an even greater danger that has gone almost unnoticed. This is the privatization of civil justice. Thousands of employers are abandoning the civil justice system, establishing their own systems of resolving disputes, and requiring employees to use them. n1

The implications of this trend could not be more important. One of the most profound lessons of the civil rights struggle is that rights without remedies are meaningless. Title VII and our other civil rights laws have been reasonably effective because the judiciary has generally been willing to enforce them. But if employers are able to establish private court systems under employer control, equal employment opportunity laws may become completely unenforceable.

Paradoxically, the trend toward private justice may have potential benefits for employees. The cost of public civil justice has grown [*30] dramatically in recent years. Many people with legitimate claims against their employers never receive justice because they are unable to afford lawyers. Private dispute resolution, which relies on mediation and arbitration, is generally much less expensive than litigation, and may bring justice within the reach of many to whom it is currently denied. n2

While the need for the civil rights community to respond to this development is obvious, the correct response is anything but clear. We know very little about private dispute resolution, how it works, or how its results compare to those of the civil justice system. In this Article, I examine the empirical evidence with the goal of producing an accurate picture of this important development, and providing a framework for the development of a coherent response.

I begin by describing the dramatic growth in employment arbitration and the reasons for that growth. I then introduce the due process issues raised by private civil justice and examine how the courts, employers, and the dispute resolution industry have dealt with these issues to date. The heart of the Article analyzes the quality of justice provided by arbitration and how it compares with the justice provided by civil courts in employment cases. I close with suggestions drawn from this analysis concerning the civil rights community's best response to this development.

II. THE GROWTH OF ALTERNATIVE DISPUTE RESOLUTION

Private systems for resolving employment disputes are not a recent development. For decades, private arbitration has been the vehicle of choice for unions, and it has worked well in this context. Although unions are free to withdraw from arbitration, it is virtually unheard of for a union to do so. While data on arbitration results is scarce, knowledgeable experts agree that employees who take their grievances to arbitration are successful about fifty percent of the time. n3 Private dispute resolution by non-union employers has traditionally been very rare. n4 While a handful of employers, such as Northrup Corporation, has used arbitration for decades, the [*31] corporate community in general has ignored it until very recently. n5 In a study conducted in 1979, the Bureau of National Affairs found that only two out of 128 employers surveyed used outside arbitration for employment disputes. n6 In the late 1980s, however, many employers turned away from the civil justice system, and established private arbitration systems. By 1995, another survey conducted by the United States General Accounting Office (GAO) found that ten percent of employers were using arbitration for employment disputes, and 8.4% were considering establishing such a system. n7 In 1997, the GAO found that nineteen percent of employers surveyed were using arbitration for employment disputes -- an increase of almost ninety percent in only two years. n8 Presently, the American Arbitration Association (AAA) alone administers plans covering over three million employees. n9 The AAA's employment dispute caseload more than doubled between 1993 and 1996. n10 At this rate of increase, the majority of employers will have established private justice systems within the near future.

The primary motivation of employers for creating such systems appears to be reducing legal expenses. The Rand Institute estimated in 1988 that defense costs in wrongful discharge actions averaged over \$ 80,000. n11 By 1994, costs were estimated to have increased to \$ 124,000. n12 In one recent survey by Bickner, Ver Ploeg, and Feigenbaum of employers who adopted alternate dispute resolution systems, the number one reason employers gave for this decision was the desire to reduce defense costs in [*32] employment cases. n13 Employers responding to the GAO surveys also indicated that reducing litigation costs was their primary reason for turning to arbitration. n14

There is certainly room for a healthy dose of skepticism concerning the accuracy of such reports. One would hardly expect an employer whose motive was to create a more favorable captive forum to say so even if only the aggregate results were published. There are indications, however, that employers' self-reported motivation is accurate. First, according to the Conference Board, the desire to minimize the involvement of unions is the second most common motivating factor in the development of complaint systems. n15 The reporting of this less flattering motive is some indication of candor. Second, employers are turning to arbitration to resolve other disputes as well. For example, Cornell University's Institute on Conflict Resolution recently reported that seventy-nine percent of America's 1,000 largest cor-

porations have used arbitration in the last three years. n16 Of these, thirty-three percent have used arbitration to resolve personal injury disputes and twenty-four percent have used arbitration in product liability cases. n17 The AAA reports that its caseload of disputes between corporations grew twenty-five percent in the last three years. n18 The growing use of arbitration in contexts where the employer cannot shape the procedure to its advantage suggests that the temptation to use arbitration because it is a more easily controlled forum is a factor but that it is not the primary motivation.

III. DUE PROCESS ISSUES

Whatever the employer's motivation, the potential due process problems arising from private justice are staggering. Unlike collective bargaining arbitration, in which the union must agree to all aspects of the system, non-union employment arbitration is an exercise in which one party to a dispute has the unilateral ability to shape the resolution system. [*33] Without the union's institutional strength to provide a proper balance, the employer has enormous temptation to design the system to its own advantage.

The most direct manner in which an employer can stack the deck in its favor is by controlling the choice of arbitrator. Rather than giving both parties an equal voice in selecting the arbitrator and requiring that the person selected be neutral, the employer can design a system in which it unilaterally chooses the arbitrator. In the worst possible case, the employer could choose an arbitrator with whom it has an economic relationship. Even if this is avoided, the employer could select someone whose views on the issue predispose him or her to rule in the employer's favor. An employer could also bend the system to its advantage by specifying the substantive law the arbitrator must apply, or by denying the arbitrator the ability to award remedies which would be available in a court of law.

There are also options that, while officially neutral, would greatly disadvantage employee-plaintiffs. For example, the arbitration rules could provide that neither side will be represented by counsel. This would be a great handicap to most employees, who have little familiarity with employment law. But most employers have human resource professionals who, while not attorneys, have knowledge and experience in this area. Another "neutral" provision is to limit discovery. While this can be presented as a way of simplifying the process that affects both parties equally, the reality is quite different. The employee has the burden of proof and needs discovery to obtain the information necessary to meet this burden. The employer, by contrast, already has the relevant employment records and access to the key witnesses, who are generally other employees.

Even if the employer scrupulously avoids all of these temptations, there is still the potential for great unfairness. One of the great dangers to employee-plaintiffs is the "repeat player syndrome." In the traditional labor arbitration context, the arbitrators know that they will receive future business only if both the union and management believe they are fair. An arbitrator who always rules for one side will not prosper. But when the union and its institutional memory are removed, the arbitrator's incentives change dramatically. There is no need to satisfy the employee, who is highly unlikely to have another opportunity to choose an arbitrator. The employer, however, is likely to be a repeat player, with the opportunity to reject arbitrators whose previous rulings displeased it. The arbitrator thus has a financial incentive to rule in favor of the employer. Professor Lisa [*34] Bingham of Indiana University recently examined the results of employment arbitrations in which the employer was a repeat player, and found that employees fared very poorly in such situations. n19

These problems would be severe enough even if employees were theoretically free to accept or reject their employer's arbitration system. But where the employer's system is a condition of employment, and employees must "agree" to use it or lose their jobs, the potential for abuse is multiplied. Unfortunately, this is the approach most employers have elected to take. In the Bickner survey, approximately seventy-five percent of employers with arbitration systems made their use a condition of employment for new hires. n20 Many experts believe the number is even higher, perhaps exceeding ninety percent. n21

IV. LEGAL STATUS OF PRIVATE ARBITRATION

The courts have turned a blind eye to the potential problems raised by private arbitration. Invoking freedom of contract language seldom heard since *Lochner v. New York*, n22 the judiciary has approved the use of arbitration, even when the "agreement" to arbitrate is a condition of employment.

The most prominent example of this trend is the recent Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.* n23 In *Gilmer*, the Court rejected a challenge to the enforceability of an agreement to resolve all future disputes through the New York Stock Exchange's private arbitration system, even though the plaintiff would have been denied a legally-required license if he refused to sign the agreement. n24 Justice White's opinion maintained that this

result was compelled by the Federal Arbitration Act's requirement that agreements to arbitrate be enforced except where they involve "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." n25

[*35] While some commentators found room for optimism in the fact that Mr. Gilmer's agreement was not technically a "contract of employment," these hopes were soon dashed. In cases such as *Asplundh Tree Expert Co. v. Bates*, n26 lower federal courts took the view that the interstate commerce exception applied only to employees involved in the physical movement of goods. n27 The hope that courts would confine the holding in *Gilmer* to the Age Discrimination in Employment Act (ADEA) was similarly disappointed as employees were forced to arbitrate claims under other statutes as well. n28

There have been a handful of cases in which courts have refused to enforce "agreements" to arbitrate employment disputes. For example, in *Prudential Ins. Co. v. Lai*, the Ninth Circuit refused to enforce an agreement which was a condition of employment. n29 The basis for this decision, however, was quite narrow. The employer did not notify its employees that the document they were being asked to sign contained an arbitration clause; instead, the agreement to arbitrate was simply included as part of a larger document. Moreover, the employer misrepresented the nature of the document, omitting any indication that it contained an agreement to arbitrate and instructing the employees to sign the document without giving them the opportunity to read it. The court concluded that under these circumstances, the plaintiffs had not knowingly waived their right to litigate. n30 While this is an important decision, it in no way [*36] diminishes an employer's ability to make "agreeing" to arbitrate a condition of employment, so long as employees have knowledge of the "agreement." n31

The other major case that is sometimes mentioned as an exception to the judiciary's rush to embrace alternative dispute resolution (ADR) is *Cole v. Burns International Security Services*. n32 In *Cole*, the D.C. Circuit conditioned the enforceability of an arbitration agreement to arbitrate on the employer's paying the arbitrator's fee and costs in their entirety. While this is clearly a step in the right direction, especially for employees of limited means, it does not prevent an employer from making an "agreement" to arbitrate a condition of employment. *Cole* merely requires that an employer must itself cover the costs if it forces its employees to arbitrate.

Only in one case, *Duffield v. Robertson Stephens*, n33 has a federal appellate court held unenforceable an agreement to arbitrate that was a condition of employment. In *Duffield*, the Ninth Circuit examined the legislative history of Title VII and determined that Congress did not intend rights under this statute to be subject to mandatory arbitration. While this case is clearly important, the Ninth Circuit stands alone on this issue. Moreover, the analysis in *Duffield* necessarily rests upon the specific legislative history of Title VII. Whether even the Ninth Circuit will find condition of employment arbitration unenforceable where other statutes are concerned is very much an open question.

These developments have not occurred without protest. The EEOC has condemned arbitration as a condition of employment in the strongest possible terms, n34 as have the American Civil Liberties Union n35 and the [*37] National Employment Lawyers' Association. n36 The EEOC has gone so far as to issue a formal statement challenging the Court's position, and instructing its field offices to ignore agreements to arbitrate that are a condition of employment when they make charge-processing decisions. n37 None of these protests, however, has had any perceptible effect upon judicial decisions.

Today, there is very little doubt that an employer can require its employees to surrender their right to take a future employment dispute to court, even if that dispute involves a violation of the employee's civil rights. n38 It is hard to overstate the injustice of such a rule. The right to trial by jury in a public court is among our most important rights as American citizens. While parties ought to be free to settle their disputes privately if they choose, no one should be forced to give up his or her right of access to the courts as a condition of getting a job.

The *Gilmer* case also represents a departure from well-established rules regarding the waiver of fundamental rights. For years, such waivers have been enforceable only when they represent a person's knowing and voluntary choice. n39 Where access to the courts is concerned, the waiver must also be clear and unambiguous. Where the wording of the waiver leaves doubt as to the party's intention to waive his right to judicial adjudication, the waiver is invalid. n40 These fundamental rules against compelled waiver of rights have been ignored by the judiciary in its rush to embrace private arbitration.

Allowing employers to make arbitration a condition of employment is not only wrong in principle, it undermines due process as well. If employees had the right to choose or reject arbitration, employers would have to convince them that the system was fair. Employers whose systems were not demonstrably fair would find their private courtrooms

empty. [*38] Eliminating this market discipline greatly diminishes the incentive for employers to make their systems fair.

There remains, however, the possibility that the courts will insure fairness by conditioning their deference on the observance of due process in private arbitration. Although it fails to provide any guidance as to what the requirements might be, Justice White's opinion in *Gilmer* indicates that due process is required. n41 Some courts have taken this requirement seriously. For example, in *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith*, a Massachusetts district court held plaintiff's agreement to arbitrate unenforceable because the New York Stock Exchange's arbitration system did not provide due process. n42 In this system, the Chairman of the Board of the NYSE appoints the pool from which the arbitrators are chosen, and the Director of Arbitration (NYSE employee) selects the arbitrators from that pool for individual cases. Even though the majority of the arbitrators in employment cases must be public arbitrators from outside the securities industry, the Court found that such employer domination of the selection process denied employees the right to a neutral and independent arbitrator. Recently in *Hooters of America v. Phillips*, n43 the court held unenforceable an agreement to use an arbitration system that did not provide a neutral arbitrator. n44 If these decisions survive appellate review, they could mark the beginning of a trend to insist upon due process as a condition of judicial deference.

The EEOC's position is that agreements to arbitrate which are a condition of employment are unenforceable. However, courts have declined to adopt this position. Justice White's opinion in *Gilmer* states unequivocally that due process is required in the arbitration of statutory claims. If the EEOC were to develop due process standards and condition agency deference upon compliance with them, the courts might support it.

[*39] V. PROTOCOL

Although it is not clear that courts will require private arbitration systems to provide due process, much progress has been made privately on due process standards. In October 1994, the American Bar Association assembled a national blue ribbon panel of experts on arbitration. This task force included representatives of the American Civil Liberties Union and the National Employment Lawyer's Association, as well as the AFL-CIO. In May 1995, the task force issued a unanimous protocol on arbitral due process. n45 The protocol has been adopted by both the AAA and JAMS/Endispute, by far the largest providers of arbitration services. This protocol includes the following recommendations: (a) a neutral and unbiased arbitrator; (b) right of the employee to an equal role in selecting the arbitrator; (c) right to counsel; (d) right to reasonable discovery; (e) identical remedies to those available in court; and (f) a written opinion. n46

In one respect, the rights provided by the protocol are superior to those available to a litigant in court. Employee-plaintiffs must generally pay their own attorneys' fees. The only exceptions to this rule are the provisions for attorneys' fees under Title VII and other federal civil rights statutes. n47 Even in these situations, however, the plaintiff must prevail before she is entitled to attorneys' fees. An employee who does not prevail cannot receive attorneys' fees, even if the judge determines that she brought the case in good faith in the reasonable belief that her rights were violated. Under the protocol, however, the arbitrator has the authority to award attorneys' fees "in the interests of justice," even if the employee has not prevailed in her claim. n48

This provision is extremely important. The financial obstacles faced by an employee who wants to bring a civil action against her employer are enormous. Few employees can afford to pay an attorney on an hourly basis. While the right of successful plaintiffs to receive attorneys' fees is beneficial, attorneys must be very confident that they will prevail before they can afford to take a case on this basis. Would-be plaintiffs whose cases are meritorious, but not a sure victory, are often unable to [*40] obtain counsel and never get their day in court. By contrast, to award counsel fees, an arbitrator under the protocol need only determine that a case was brought in good faith and with reasonable belief that it was meritorious. This makes it financially possible for counsel to accept many cases which, under civil law, they would be forced to turn down.

Another area in which employee-plaintiffs might fare better in arbitration is in the selection of the individuals who decide cases. The protocol requires that the roster of available arbitrators must be "established on a non-discriminatory basis, diverse by gender, ethnicity, background, and experience." n49 This is far more than a conflict-of-interest rule. It requires that the pool of arbitrators be established in a manner that does not favor either employers or employees. Few established rosters of arbitrators would meet this requirement. The original roster of the AAA, for example, was not truly diverse. It contained a disproportionate number of older white males, generally with management backgrounds. n50 Shortly after adopting the protocol, however, the AAA created a new roster of available arbitrators. n51 In doing so, it solicited recommendations from the plaintiffs' bar and civil rights organizations. Moreover, all prospective mem-

bers of the roster were reviewed by a panel of advisors which included civil rights and plaintiffs' lawyers, as well as management. Only those candidates who were considered fair and impartial by all parties were included on the roster. While precise measurement in this area is impossible, it is hard to imagine that the present roster of the federal judiciary, most of whom were appointed in the Reagan and Bush administrations, would survive this process. n52

There are some areas, however, in which employee-plaintiffs might be worse off in arbitration, even under the protocol, than in litigation. One such area is discovery, which is obviously important to the fair resolution of any dispute. Discovery is especially important to employees. They are generally the plaintiffs in employment disputes, and as such have the [*41] burden of proof. Without discovery, it is generally difficult for employees to meet this burden, however, since the employer controls most of the relevant evidence, including key documents and witnesses. For these reasons, the protocol rejects any restrictions on discovery. The arbitrator is authorized to require the production of any information that he or she considers reasonably relevant to the arbitration of the claim. n53 The scope of discovery in civil litigation, however, is even broader. Under *Federal Rule of Civil Procedure 26*, parties can obtain not only any information that would be admissible, but also information that is reasonably calculated to lead to the discovery of admissible evidence. n54 The amount of additional information this broader discovery makes available, and its value to employees, is difficult to determine.

Employees are also arguably worse off under the protocol because they have limited rights of appeal. The protocol provides that "the arbitrator's award should be final and binding and the scope of review should be limited." n55 This standard is obviously far from precise. It is clear, however, that it does not eliminate judicial review of substantive legal errors. Even under the *Steelworkers Trilogy*, n56 which contains the most restrictive set of standards for judicial review, arbitration awards must be judicially overturned where they are based on erroneous interpretations of substantive law. n57 By comparison, the scope of appellate review under the protocol, while imprecise, is clearly broader than the *Steelworkers* standard. Thus, even though employee-plaintiffs would not be able to challenge every mistake an arbitrator might make, arbitrators operating under the protocol would not be free to rewrite Title VII or other civil rights laws.

It could be argued that any restriction on judicial review is an injustice to employees. It is far from obvious, however, that expanded appellate rights would improve their position. While a greater scope of review would help those employees who wanted judicial review of an arbitrator's error, it would also open the door to more appeals by employers. In some cases, employers would use an appeal to gain bargaining leverage over a successful, but financially exhausted, [*42] employee -- an everyday occurrence in civil litigation. Some insight into this dynamic can be gained by examining labor arbitration, the contours of which have been shaped by unions. Most collective bargaining agreements provide for a level of finality that is even more restrictive than the protocol. Organized labor has maintained this system for decades because it has found that appeals favor the party with the deeper pockets. If unions, with their collective financial strength, have found that appeals generally do more harm than good, then it is even more likely that individual employees would not benefit from broad appellate rights.

The other major concern raised about civil rights under the protocol is decreased public knowledge. Litigation results, of course, are a matter of public record, and the fear of adverse publicity can be a powerful incentive for employers to avoid discrimination. Arbitration, by contrast, is usually private, eliminating the fear of adverse publicity.

Employers, however, are not completely safe from public exposure under the protocol. Parties and their counsel are entitled to the name and address of counsel for the parties in recent cases decided by prospective arbitrators as part of the selection process. n58 Nothing in the protocol precludes them from sharing the information they gain from the ensuing discussions with other interested parties. More importantly, the protocol does not require confidentiality in arbitration procedures but leaves it to the agreement of the parties. n59 If the employees believe that the public should know about their employer's conduct, they are free to condition their agreement to arbitrate upon having the arbitration and its record open to the public. n60 However, the employers could avoid an open record by providing for a private record in a system whose use was a condition of employment. The protocol does not authorize such a step, but it does not prohibit it.

While these provisions will allow some degree of public scrutiny, they will not produce the same degree of openness found in the court system. This, however, is not all bad. Employees, too, have their privacy [*43] concerns. Many employment cases involve matters which are highly sensitive to the employee-plaintiff. If both employer and employee prefer to resolve these disputes privately, justice is better served by allowing them to do so.

There is also one important issue which the protocol does not discuss: the timing of the agreement to arbitrate. Since the most common employer practice is to contractually impose adhesion agreements to arbitrate at the time of employment, timing is often viewed as identical to the issue of voluntariness. But voluntariness and timing are actually

distinct issues. An employer could, at the time employment begins, offer its employees a voluntary agreement to arbitrate any future disputes, or, after a dispute arises, force employees to "agree" to arbitrate as a condition of continued employment.

It has been argued that an employee should only be able to make a binding choice to use arbitration after the dispute has arisen. That way, the employee knows the nature and specifics of the case before she decides on a forum. However, although it would be ideal for an employee to choose a forum only after evaluating her case, the argument that only post-dispute agreements should be enforceable contains a generally unrecognized assumption that when the employee offers to arbitrate, the employer will agree.

In most cases, the employer will not agree. Employees will generally offer to arbitrate only after speaking to an attorney and learning that the attorney will not take the case on a contingency basis because it is not economically feasible. n61 The employer's attorney can conduct the same economic analysis and determine that the employee is offering to arbitrate because she is unable to get an attorney to litigate the dispute. The employer will then realize that if it refuses to arbitrate there will literally be no case to defend. If pre-dispute agreements to arbitrate are unenforceable, the result will be that many employees will be denied their day in court. In an analogous setting, corporations frequently agree at the time they enter into a relationship to arbitrate all future disputes because they know that one of the parties will have tactical reasons for refusing to arbitrate once the specific dispute has arisen. Each party agrees to give up the right to choose its forum for future disputes in order to induce the other party to do the same. The same logic may well apply to the resolution of employment disputes.

[*44] The spotty nature of due process protection in existing employer arbitration systems highlights the need for established standards. The GAO examined twenty-six such systems, and compared their due process protections to those recommended by the Commission on the Future of Worker-Management Relations. n62 The Commission found that the following provisions were needed for arbitral fairness: (a) a neutral arbitrator; (b) employee access to necessary information; (c) a fair method of cost sharing; (d) the right to independent representation; (e) legal remedies equal to those available through representation; (f) a written opinion; and (g) adequate judicial review. n63

The GAO found that the arbitration systems they examined did not uniformly meet these standards. n64 For example, while twenty-two systems provided for both employer and employee to be involved in the selection of arbitrators, in one system the employer unilaterally chose the arbitrator and in three systems the method of arbitrator selection was not specified. In only three of the systems were discovery rules discussed, and two of these contained specific limitations on the amount of discovery available. Four of the policies did not address the issue of representation, and one policy specifically denied employees the right to be represented by counsel. Of the eight policies that specified remedies, seven provided that the arbitrator could use any remedy available at law. The other prohibited the arbitrator from assessing damages beyond those required to compensate for actual losses. Only sixteen of the twenty-six systems provided for a written decision, and even these policies varied greatly. n65 Drawing conclusions from this report is difficult because the GAO does not specify which plans met which requirements. It appears that most of the systems met many of the Commission's requirements. But, in the words of the GAO, "if expected to conform to the criteria for fairness recently proposed by the Commission on the future of Worker-Management Relations, most would not do so." n66 [*45] This is especially discouraging in light of the fact that the Commission's requirements set out minimum standards, not a model system.

A more recent survey published in the *Dispute Resolution Journal* discloses similar due process problems. The authors found that only fifty percent of these private arbitration systems expressly permit the arbitrator to award punitive damages. n67 Only sixty-seven percent provide for discovery. n68 And only eighty-five percent provide for joint selection of arbitrators. n69 The precise interpretation of this data is somewhat unclear. Many plans are simply silent on such issues. When a plan says nothing about who is to select the arbitrator, does that mean that selection is the employer's prerogative, or that it is a mutual choice? We cannot automatically assume that the fifteen percent of plans which do not call for joint selection allow unilateral selection by employers, or that the fifty percent that do not authorize punitive damages prohibit them. However, when the percentage of plans that do not clearly provide critical protections is so high, it is virtually impossible to conclude that these plans consistently meet due process standards.

VI. RESULTS OF PRIVATE ARBITRATION

The ultimate test of private arbitration is whether it provides justice to the employees who use it. Do employees who take their cases to arbitration receive the same justice they would have received had their cases gone to court?

The most exhaustive analysis of arbitration results has been conducted by Professor Lisa Bingham. n70 Professor Bingham's first study analyzed the results of all employment arbitrations conducted by the AAA in 1992. She found that employees won seventy-three percent of the cases they filed, and sixty-four percent of all cases. n71 While this finding is useful, comparative data is needed. It is not enough to know that employees often win in arbitration. The ultimate question is whether they win as frequently in arbitration as they do in court.

[*46] Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court. For example, an AAA survey of employment arbitration results from 1993-95 shows that employees who arbitrated their claims won sixty-three percent of the time. n72 In comparison, according to federal district court records for 1994, only 14.9% of the employees who took their claims to court won their cases. n73

Other studies have also found fewer employees prevailing in litigation than arbitration. Burstein and Monaghan surveyed all EEOC trials published in Fair Employment Practice Cases (Bureau of National Affairs) between 1974 and 1983. n74 In these cases, employee-plaintiffs won only 16.8% of the time. n75

Even when the plaintiff is the federal government rather than an individual employee, the pattern does not change -- the EEOC prevails far less often in litigation than do plaintiffs in arbitration. A study by Baxter found that the EEOC won only twenty-four percent of its employment cases, whereas individual employees in arbitration won fifty-one percent of the time. n76 This distinction is impressive considering the relatively superior resources of the EEOC. The EEOC is very selective in the cases it litigates, and the EEOC also has far greater resources than an individual plaintiff to prepare and present a case. In addition, the EEOC brings the credibility and prestige of the federal government to the case. One explanation for the EEOC's low success rate in litigation may be that the EEOC brings a higher percentage of "test" cases which are designed to expand the law using new theories than the private bar, and that this artificially depresses its success rate relative to private arbitration. There is probably some truth to this explanation. However, even if one looked only at EEOC cases that are not test cases, the EEOC's success rate in court would fall short of that which is achieved in private arbitration.

[*47] The infrequency with which employee-plaintiffs prevail in the civil justice system is surprising. The common perception is that juries are extremely sympathetic to employees. This perception is not entirely accurate. For example, employee-plaintiffs won only forty-four percent of jury verdicts in employment civil rights cases in 1994. n77 Far more important, however, is the number of cases that never reach the jury. Of the 3,419 employment discrimination cases in 1994 in which the federal courts made a definitive judgment, sixty percent were disposed of by pre-trial motion. n78 Employers won virtually all of these decisions (ninety-eight percent). n79 Taken together, these figures present a civil justice system far less sympathetic to employees than is commonly believed.

Scattered information from the arbitration systems of individual companies presents similar results. Hughes Aircraft Corporation established a binding arbitration program in 1993. During the first year of operation, 235 cases were closed. Of these, the employees won 141, a success rate of sixty percent. n80

It is not sufficient, however, to look at how often employees win in arbitration. Justice requires not merely that employees who have been wronged receive some compensation, but that they receive the amount of compensation they deserve. An employee who has suffered great financial loss and emotional injury because of employer discrimination is denied justice if the arbitrator rules in her favor but makes an award far less than her loss.

To examine this aspect of justice, one must compare the relative size of the awards rendered by arbitrators and courts. In another study based on cases from January 1993 to December 1995, Bingham found that the mean damages awarded by arbitrators was \$ 49,030. n81 The mean damages awarded by district courts was \$ 530,611. n82 A direct comparison of these results would be meaningful if the actual harm to the plaintiffs in these two groups were comparable. This, however, is not the case. The [*48] district court cases all involved statutory civil rights claims for which the law provides emotional distress and punitive damages (and have facts which will often cause a court to award such damages). Many of the AAA cases, by contrast, were contract claims with only economic damages.

To construct a more meaningful comparison, one can compare the mean damages awarded in arbitration and litigation as a percentage of the damages demanded. The mean damages received in arbitration were approximately twenty-five percent of the amount demanded. n83 The mean received in court was seventy percent of the amount demanded. n84 Thus, even using this rough comparison of the numbers, employee-plaintiffs are far more likely to win in arbitration than if they go to court, but employees who win in court receive higher awards than those who prevail in arbitration.

These findings do not answer the ultimate question of whether employees fare better in arbitration or litigation. A comparison of the total adjusted outcomes of arbitration and litigation is instructive. The "adjusted outcome" is the total amount received by all plaintiffs in arbitration or in court -- not merely those who were successful -- as a percentage of their demands. This "adjusted outcome" for arbitration-plaintiffs is eighteen percent (i.e., plaintiffs as a whole in arbitration received eighteen percent of their demands). For plaintiffs in litigation, the adjusted outcome is only 10.4%.

[*49] TABLE 1 - COMPARISON OF UNADJUSTED AND ADJUSTED OUTCOMES

	AAA 1993-5 EMPLOYMENT ARBITRATIONS n85	1994 FEDERAL DISTRICT COURT CASES n86
EMPLOYEE WIN PERCENTAGE	63%	14.9%
MEAN DEMAND	\$ 165,128	\$ 756,738
MEAN DAMAGES AWARDED	\$ 49,030	\$ 530,611
UNADJUSTED OUTCOMES (% OF DEMAND AWARDED TO SUCCESSFUL PLAINTIFFS)	25%	70%
ADJUSTED OUTCOME (% OF DEMAND AWARDED TO ALL PLAINTIFFS)	18%	10.4%

William M. Howard conducted a similar analysis of arbitration and litigation. n87 He analyzed AAA results for 1993-94 and compared them to the results of federal employment litigation for 1992-94. Howard also found that plaintiffs prevailed more often in arbitration. Plaintiffs won sixty-eight percent of their cases in arbitration. n88 Plaintiffs in litigation won only twenty-eight percent of their cases. n89

The only set of available arbitration data in which employees did not fare well is a set of thirteen discrimination cases from the 1996 [*50] caseload of the AAA. Employees won only one of these cases. n90 The sample is so small, however, that it is difficult to attribute great significance to this report.

Even arbitration systems that provide inadequate due process have relatively high rates of employee success. The securities industry is one of the major industries with an established arbitration system. Its system has been highly criticized for its lack of impartiality. n91 The roster of arbitrators for the securities industry's arbitration system is dominated by elderly white males, many of whom are former securities industry executives. n92 Worst of all, the system does nothing to eliminate the repeat player problem.

Even in such a flawed system, employees did reasonably well. In the earliest study of this system, Bompey and Pappas found that employees prevailed in forty-three percent of the cases between 1989 and 1992. n93 In a slightly more recent study, the GAO found that employees won fifty-five percent of their cases. n94 While these results are predictably lower than the success rates in the more fair AAA system, even this flawed version of arbitration has higher employee success rates than the courts.

Another set of data regarding the performance of private arbitration comes from Michael Reese Hospital in Chicago, one of the nation's largest private hospitals. n95 Since 1978, the hospital has maintained an internal dispute resolution system, which culminates in binding arbitration. Of the 320 complaints filed in the first ten years of operation, fifty-three (seventeen percent) went to arbitration. n96 Of the cases that went to [*51] arbitration, employees won twenty-one, a success rate of forty percent. n97 The apparent explanation for the lower rate of employee success lies in the fact that complaints go to arbitration only when the employee is dissatisfied with the outcome of the previous stages in the process. For example, twenty-two percent of all complaints are sustained (in whole or in part) at the stage prior to arbitration. n98 Thus, the actual rate of employee success is much higher, perhaps exceeding that of employees in the AAA process.

The fairness of arbitration can also be tested by statistical analysis. Professor Bingham's 1997 study included a series of analyses to determine if arbitrators were biased in favor of employers. n99 Bingham's first analysis compared

how often employees won arbitration cases they filed against their employer with the rate at which employers won when they filed charges against the employee. n100 If arbitrators are biased in favor of employers, one would expect employers to win more often. Bingham found, however, that employers won slightly less often. Employees won seventy-three percent of the cases they filed. Employers won only sixty-four percent of the cases they initiated. n101

Bingham also examined the size of awards for evidence of employer bias. n102 She examined the amount of damages employees received when they prevailed as a percentage of the amount demanded and compared the results to similar figures for employers. If arbitrators were biased in favor of employers, one would expect employers to receive a higher percentage of their demands. Again, however, employers fared slightly worse. Employees received forty-nine percent of their demands. Employers received only thirty-four percent. n103

One can also gain some insight into the fairness of employer arbitration systems through the reactions of the affected employees. While there has been no comprehensive survey of employee satisfaction with employer justice systems, there have been a few reported studies of employee satisfaction regarding the internal dispute resolution systems of [*52] individual companies. David Lewin of UCLA conducted a study of employee perceptions of the internal dispute resolution system at a large, private delivery company. Lewin quantitatively measured employee beliefs about the extent to which the grievance procedure provided an independent fact-gathering procedure. n104 On a scale of one to ten, with ten being a very effective system, the employees who had used the system rated this factor to be 6.28. n105 Similarly, after two years of experience, Polaroid Corporation surveyed its employees and found that two-thirds believed the dispute resolution program to be "somewhat" to "extremely" effective. n106 Brown & Root, an international engineering and construction company with 27,000 employees, reported that it conducted anonymous surveys of the users of its four-year old arbitration system, and found that they were satisfied with the manner in which their complaints were handled. n107 Similar reports have been made by Hughes Electronic Corporation and Rockwell International. n108

Such reports are obviously entitled to skepticism. With one exception, these surveys were not taken by independent researchers, but by the companies themselves. The concerns this raises might be successfully addressed if the complete study and its methodology were published so they could be examined by independent experts. To date, however, the reports remain private.

A more reliable indication of employee satisfaction with their employers' justice systems is the employees' actions. How often do employees appeal the results of their employers' systems when given the opportunity? Again, we have no systematic data, but several employers have published their experiences. Perhaps the clearest indication of these is the report by TRW, Inc. TRW's 33,000 worldwide employees are subject to a dispute resolution system in which private arbitration is the final step. The arbitrator's decision is binding on the employer, but not on the employee. Employees have the right to take their dispute to court if they are [*53] dissatisfied with the arbitrator's decision. n109 Of the three cases decided by arbitrators to date, none has been appealed. n110

While a sample of three cases is too small to be significant, an examination of the rest of TRW's employment disputes discloses a similar pattern. Of the seventy-eight disputes that reached the level where the legal department became involved, fifty were resolved through mediation or other steps short of arbitration. n111 The percentage of disputes resolved to the employees' satisfaction would be even higher if the disputes resolved prior to the legal department's involvement were included. Thus, TRW's employees' actions indicate that they find the results of the company's justice system to be acceptable.

Employee actions at Polaroid are comparable. None of the fifteen employees who took their disputes to arbitration elected to litigate after the arbitration was concluded. n112 While this is also a small sample, the overall dispute resolution results reveal a similar pattern. Prior to arbitration, disputes are heard by peer resolution panels. Of the approximately 140 disputes disposed of by these panels, ninety percent of the results were acceptable to the employee. n113

Brown & Root's experience in this area also provides useful guidance. Because there is no right of appeal, it is difficult to assess employee satisfaction with arbitrators' decisions *per se*. Employee responses to lower level resolution steps, however, show that eighty-eight percent of the 1,600 disputes handled between June 1993 and December 1996 were resolved without reaching mediation or arbitration. n114

Some data is also available regarding the attitude of employees generally toward employer dispute resolution systems. In their Worker Representation and Participation Survey, Princeton Survey Research Associates found that eighty-three percent of employees thought arbitration [*54] was "good" or "very good." n115 The majority of employees (sixty-two percent) thought arbitrators would resolve disputes more fairly than courts: seventy-one percent

thought it would be easier for an employee to get a fair hearing; and seventy-three percent thought employees would be better off. n116 They overwhelmingly rejected, however, forcing employees to submit cases to arbitration: seventy-eight percent believed that arbitration should be the choice of both parties. n117 A survey of employees by the Dispute Resolution Times found even greater acceptance of arbitration; eighty-three percent favored using arbitration instead of the courts, only eight percent said it was a bad idea. n118

Thus, the data furnishes little support for the idea that arbitration shortchanges employees. All of the studies find that employees prevail more often in arbitration than they do in court. And while successful plaintiffs receive less in arbitration than in court, plaintiffs as a whole recover more. There is no evidence of arbitral bias against employees -- employee-plaintiffs win more often, and receive a higher percentage of their demands than employer-plaintiffs. In addition, employees seldom appeal arbitrators' decisions, even when they have the right to. Moreover, employee response to employer dispute resolution systems as a whole indicates a substantial amount of satisfaction. This does not mean that private arbitration is always fair. There are many ways in which employers can and do structure arbitration systems to deny justice to employees. It does mean, however, that private arbitration is not inherently unfair to employees, and that arbitration often does a good job of providing workplace justice. In some cases, arbitration does a better job than the civil courts. n119

While there is not yet systematic data on this subject, it is likely that legal fees in arbitration may be far lower than in civil cases. One analysis suggests that legal fees in arbitration could run as little as [*55] \$ 3,000. n120 The GAO also found that legal fees among its respondents were generally lower in arbitration. n121 Since the one area in which the civil courts outperformed private arbitration was in the size of the awards to successful litigants, to the extent that employees in arbitration have to spend less of their awards on legal fees, this advantage would be considerably reduced.

VII. SPEEDY TRIAL

A comparison of arbitration and litigation must also consider the length of time required for an injured person to obtain justice. This is especially important in employment cases, where someone's livelihood is at stake.

Our courts are notoriously slow at delivering justice. It has been conservatively estimated that the average civil case takes two and a half years to resolve. n122 In many cases, the delay is considerably longer. Some civil cases have taken up to eight years to resolve. n123 This delay grows as the number of civil cases filed each year continues its upward spiral. n124 The harm that such delays cause to an employee who has been illegally fired and to his or her family is enormous.

Employment civil rights cases are subject to these same delays. According to the Federal Judicial Center, it is almost two years (679.5 days) from the time the average employment discrimination case is filed in federal district court until the time it is resolved. n125 Arbitration results, however, are reached relatively quickly. The average case in arbitration is resolved in 8.6 months, less than half of the time required for civil litigation. n126

[*56] VIII. ACCESS TO JUSTICE

The greatest issue in workplace justice today, however, is not the quality of justice rendered by our civil courts, or the speed with which it is provided, but the ability of workers to gain access to the justice system.

Many people believe that the civil justice system adequately protects the rights of workers, and that the situation is getting better over time. The sources of this perception are not difficult to discover. Newspapers and television carry a continual stream of stories about multimillion dollar jury verdicts against employers. Every session of Congress produces new laws improving the legal rights of employees, even when opponents of employment rights are in power. n127 Best-selling books by pro-management authors claim that employee rights have risen to the level where management's rights have been eclipsed. n128

The painful reality, however, is that the civil justice system has failed American employees. It has failed, not by unfairly resolving the cases it handles, but by denying most workers access to the system entirely. The economic hurdles facing an employee who seeks justice in court are staggering. The cost of litigating an employment dispute is at least \$ 10,000, even if the case is resolved without trial. n129 If a trial is required, the cost increases to at least \$ 50,000. n130 Costs of this magnitude represent several years' pay for most employees and far exceed their ability to pay under the best of circumstances. n131

Most employment disputes do not arise under the best of circumstances. The majority of employment disputes arises when the [*57] employee has been terminated. n132 It is nearly impossible for a worker to raise thousands of dollars for an attorney when she is struggling to support herself and his dependents without an income. The vast majority of employment law cases is handled on a contingent fee basis. However, the requirements for an attorney to accept a case on this basis are demanding. Since he will not be paid unless he wins, an attorney takes a case on contingency only if the probability of winning is extremely high. In civil rights cases in particular, the amount of time an attorney must invest is substantial. Attorneys who believe prospective clients have a legitimate case, but are not confident they will prevail at trial, will generally be forced to turn down the case.

A high probability of success is not enough. The amount of recovery must be sufficiently large that the attorney's share, which is generally one-third, will adequately compensate him for the substantial amount of time and out-of-pocket expense he will have to invest. Even if the client has clearly been wronged and is virtually certain to prevail in court, the attorney will be forced to turn down the case unless there are substantial damages. A survey of plaintiff employment lawyers found that a prospective plaintiff needed to have a minimum of \$ 60,000 in provable damages -- not including pain and suffering or other intangible damages -- before an attorney would take the case. n133

Even this, however, does not exhaust the financial obstacles an employee must overcome to secure representation. In light of their risk of losing such cases, many plaintiffs' attorneys require a prospective client to pay a retainer, typically about \$ 3,000. n134 Others require clients to pay out-of-pocket expenses of the case as they are incurred. Expenses in employment discrimination cases can be substantial. Donohue and Siegelman found that expenses in Title VII cases are at least \$ 10,000 and can reach as high as \$ 25,000. n135 Finally, some plaintiffs' attorneys now require a consultation fee, generally \$ 200-\$ 300, just to discuss their situation with a potential client.

[*58] The result of these formidable hurdles is that most people with claims against their employer are unable to obtain counsel, and thus never receive justice. Paul Tobias, founder of the National Employment Lawyer's Association, has testified that ninety-five percent of those who seek help from the private bar with an employment matter do not obtain counsel. n136 Howard's survey of plaintiffs' lawyers produced the same result. n137 A Detroit firm reported that only one of eighty-seven employees who came to them seeking representation was accepted as a client. n138

The number of people denied access to justice can also be seen in statistics on wrongful discharge litigation. At least two million people are fired every year from non civil-service, non-union jobs. n139 Of these, it is estimated that the number who are wrongfully fired every year is as high as 290,000. n140 Of this army of wrongfully terminated people, only a small percentage even gains access to the civil justice system. For example, in 1987 only 25,000 wrongful discharge cases were pending in our civil courts. n141 Financial obstacles are not the only reason so few people are able to obtain access to lawyers. The lack of substantive legal protections is also a significant factor. Under the doctrine of at-will employment, employers can terminate an employee arbitrarily, or for an illegitimate reason, without liability. n142 While there has been much heated discussion of the few recently created exceptions to this rule, the number of wrongfully discharged people who meet the requirements of these exceptions is [*59] minuscule. n143 One study found that even in California, the most favorable jurisdiction for employee wrongful discharge suits, only six percent of those wrongfully discharged receive any compensation from the civil justice system. n144 When the law provides so few employees with remedies, the lack of access to justice cannot be attributed solely to economic obstacles.

While the relative size of obstacles created by inadequate legal protection and financial hurdles cannot be measured with precision, some insight can be gained by comparing the success of managers in wrongful discharge litigation with that of rank-and-file employees. Managers must contend with the same substantive legal restrictions as all employees, but generally have the financial resources to afford access to the justice system. If the lack of legal protection against unjust discharge were the principal limitation on wrongful discharge suits, one would expect managers to fare little better than the rank and file. This, however, is not the case. Not surprisingly, therefore, managers receive the majority of the compensation received by plaintiffs in wrongful discharge cases, even though they represent only a small fraction of all employees. n145 This evidence suggests that the high cost of litigation is the principal reason so few employees have access to justice. n146

The denial of access to justice can be seen even more clearly in the area of employment discrimination. In that area it is not necessary to attempt to separate the impediment of financial obstacles from that of lack of substantive legal protection. Under Title VII, the (ADEA), the ADA, and other federal laws, almost every form of employment discrimination is [*60] illegal. n147 Thus, discrimination victims who file a complaint with the EEOC generally have

substantive rights. But, even with substantive rights, they generally fail to gain access to the civil justice system. Of those who receive a right-to-sue letter from the EEOC, only ten percent ever succeed in filing a civil complaint. n148

Even this overstates the actual availability of justice. In a complex adversarial system such as ours, only those who are represented by an attorney have any reasonable expectation of success. Pro se plaintiffs have not truly gained access to this system; they have no more chance of success in a hostile arena than the early Christians who were pitted against lions in Rome's coliseum. n149 Discounting the twenty-five percent of those civil rights claimants who are forced to file pro se, only 7.5% of those who receive a right to sue letter gain genuine access to the courts. n150

But the financial challenge is still not over. Access to justice means more than getting through the front door of the courthouse; it means having your case resolved on its merits. Data from the Federal Judicial Center shows that thirty percent of the employment discrimination cases filed from 1992-1994 were dismissed for reasons other than settlement or pre-trial motion. n151 Although the Center does not provide additional detail, the most likely reason for plaintiffs who have gone to the trouble and expense of filing a federal lawsuit to drop the case without receiving a settlement is that they have exhausted their financial resources and cannot afford to continue the litigation. If this is the case, the number of employees who receive right-to-sue letters who actually receive a judgment on the merits could be as little as 5.2%.

The situation is little better if victims of discrimination turn to federal agencies for help. As of 1996, the EEOC now has a backlog of 74,541 cases. n152 This represents almost a nine-month workload. n153 Sometimes it [*61] takes the EEOC even longer to begin investigating a case, up to two years in some cases. n154 The average number of days required for the EEOC to process a case is slightly more than a year (379 days). n155 In other words, a victim of employment discrimination who files a complaint with the EEOC must wait almost a year before the Commission even looks at her case, and almost two years until the internal processing is complete.

Even when the EEOC finally responds to a complaint, the results are sadly disappointing. To begin with, the EEOC does not investigate every complaint. In April 1995, the Commission rescinded its "full investigation" policy, and now "taking into account the EEOC's resources," investigates selectively. n156 A discrimination victim may wait nearly a year for her complaint to be examined, only to have the EEOC decline to even look into the charges.

When the EEOC does investigate, it is often painfully superficial. EEOC investigators normally conduct the entire investigation from their desks. This restricts them to reviewing the documents provided by the parties, and interviewing the witnesses whom the parties identify. These interviews are generally conducted over the telephone because investigators are too busy to conduct face-to-face interviews. In essence, there is no investigation -- employees must investigate the claim themselves and present the case to the EEOC, which merely reviews the employee's presentation. If we posit that most of those who complain to the EEOC are relatively unsophisticated people, without legal training, and without the assistance of counsel, the magnitude of the problem becomes apparent. The EEOC dismisses eighty-three percent of the complaints it receives with a right-to-sue letter. n157 Even where the Commission takes action on behalf of a discrimination victim, the result is often inadequate. The EEOC has rescinded its original policy of requiring full relief where discrimination has been established. Current policy is that "settlements are encouraged and the Commission may accept settlements providing substantial relief when evidence indicates a violation." n158

[*62] The EEOC rarely litigates to obtain justice for discrimination victims. In 1994, the Commission filed 425 lawsuits in response to the 173,465 complaints it received. n159 These numbers show that only a small portion of those who go to the EEOC for help will ever see the inside of a courtroom. The sad reality is that most people who have been legally wronged by their employer will never receive justice, either through the private bar or through government agencies.

IX. PROSPECTS FOR THE FUTURE

As bad as the current situation is, the future is likely to be even worse. The cost of employment suits, like all litigation, continues to escalate at a rate much faster than inflation. The Rand Institute found that the cost of employment litigation is increasing at a rate of fifteen-twenty-four percent per year. n160 As the cost of access to justice rises, the number of employees who are denied justice will also rise.

There is no reason to believe that this trend will reverse or even slow. Although the problem has been well known for many years, there have been virtually no significant changes in the civil justice system to make justice more affordable. Nor are any such reforms being seriously considered. The only change in the civil justice system likely to emerge from the present Congress is "reform" of product liability law designed to make it easier for manufacturers to defeat claims. There is not even an organized constituency pressing to make justice more affordable.

There is little prospect for better access to justice through government agencies. Presently, the EEOC has no prospect of better funding. But even when the political pendulum swings and Capitol Hill becomes more supportive of civil rights, the change is not likely to be dramatic. We live in an age of diminished resources. Both the public and private sectors are under increasing pressure to accomplish their responsibilities with fewer resources. Even in the best of circumstances, it is unlikely that the EEOC will again have the resources that it had in its heyday.

And even if the EEOC were to magically receive a one hundred percent increase in its budget, it would not be able to take every case. If the [*63] agency's backlog were cut in half, victims of discrimination would still have to wait over four months before their cases were investigated, and almost a year before they were resolved. If the agency went to court twice as often as it does now, only one in 100 of those complaining of discrimination would ever see a courtroom.

In short, there is little reason to believe that access to justice will be any better in the future, and it may be even worse. The vast majority of employees with legitimate claims against their employers will continue to be denied justice unless new opportunities are made available.

X. CONCLUSION

The trend toward arbitration of employment disputes can be either a blessing or a curse for civil rights. At its worst, private arbitration threatens to usher in a dark age in which employers roll back all the gains in equal employment opportunity for which the civil rights movement has fought so long and hard -- a nightmare in which employees are forced to take their discrimination complaints into employer-controlled systems that are little better than kangaroo courts.

At its best, however, arbitration holds the potential to make workplace justice truly available to rank-and-file employees for the first time in our history. Our civil justice system has failed at making workplace justice affordable. By reducing the costs, private arbitration holds the potential for bringing justice to many to whom it is currently denied.

This need not be second-class justice. Analysis of the available data shows that employee-plaintiffs generally fare as well in arbitration as they do in court, even though most of the experience it reflects took place before the establishment of the due process standards that currently exist. The quality of justice employees receive in arbitrations under these standards should be even better.

Under these circumstances, it would be a serious mistake for the civil rights community to attempt to stop the trend to employment arbitration. The forces behind this trend may well be irresistible, and trying to stop them may leave us like King Canute, vainly ordering the tide not to come in. More importantly, even if we were to succeed, our "success" would mean leaving rank-and-file employees in a world in which they have little hope of receiving justice.

[*64] The better course is to have the wisdom and the courage to recognize that the current system is inadequate, and to seize the opportunity to use arbitration to make it better. This does not mean accepting arbitration as it is unilaterally developed by employers. Arbitration should never be a condition of employment. And even when it is freely chosen, arbitration must provide due process. Instead, our opportunity is to become involved in the development of private arbitration and shape its development so that it becomes a blessing rather than a curse.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil Procedure
Alternative Dispute Resolution
Arbitrations
General Overview
Contracts Law
Contract Conditions & Provisions
Arbitration Clauses
Labor & Employment Law
Employment Relationships
Employment Contracts
Conditions & Terms
General Overview

FOOTNOTES:

n1 See *infra* notes 6-8 and accompanying text.

n2 See *infra* notes 128-130 and accompanying text.

n3 See Lewis L. Maltby, *The Projected Impact of the Model Employment Termination Act*, 536 Annals Am. Acad. Pol. & Soc. Sci. 103, 112 (1994).

n4 For example, a study done by the Educational Fund for Individual Rights in 1979 revealed that only 10-12% of large employers used a formal arbitration system. See Alan F. Westin & Alfred G. Feliu, *Resolving Employment Disputes Without Litigation* 4-5 (1988).

n5 Since 1946, Northrup, one of the nation's leading defense contractors, has made binding arbitration available to any employee who feels he or she has been unfairly terminated, or otherwise not treated in accordance with company policy. See *id.* at 114-121.

n6 Bureau of National Affairs, Personnel Policies Forum Survey No. 125, Policies for Unorganized Employees (Apr. 1979).

n7 U.S. General Accounting Office, *Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution* 7 (1995).

n8 U.S. General Accounting Office, *Alternate Dispute Resolution: Employers' Experiences with ADR in the Workplace* 2 (1997). The surveys done by the GAO in 1995 and 1997 did not specify whether the same employers participated in both surveys, making verification of the 90% increase difficult.

n9 Interview with Robert Meade, Senior Vice President, American Arbitration Association, in New York, NY (May 15, 1998).

n10 *Id.*

n11 See James Dertouzous et al., *The Legal and Economic Consequences of Wrongful Termination*, at viii (1988).

n12 See Maltby, *supra* note 3, at 107.

n13 Mei Bickner et al., *Developments in Employment Arbitration*, 52 Dispute Resol. J. 10, 78-79 (1997).

n14 U.S. General Accounting Office, *supra* note 7, at 5.

n15 R. Berenbeim, Conference Board, Report No. 770, *Nonunion Complaint Systems: A Corporate Appraisal* 3 (1980).

n16 Cornell/Perc Institute on Conflict Resolution, *The Use of ADR in U.S. Corporations* 3 (1997).

n17 *Id.*

n18 Interview with Robert Meade, *supra* note 9.

n19 Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Employment Pol. J. 189, 209-210 (1997).

n20 Bickner et al., *supra* note 13, at 8, 78.

n21 Interview with Robert Meade, Senior Vice President of the AAA, in New York, NY (June 10, 1997).

n22 198 U.S. 45 (1905).

n23 500 U.S. 20 (1991).

n24 *Id.* at 30-32.

n25 *Id.* at 25 n.2, quoting Federal Arbitration Act, 9 U.S.C. § 1 (1991).

n26 71 F.3d 592 (6th Cir. 1995).

n27 This interpretation of the scope of interstate commerce is strikingly inconsistent with previous judicial interpretations of this term. For example, in *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Supreme Court held that restaurants are engaged in interstate commerce, even if they serve no out-of-state customers, merely because they obtain supplies from out of state. Even activity that involves no interstate transportation or communication has been held to constitute interstate commerce. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court found that the consumption of homegrown wheat involved interstate commerce because the individuals involved would have purchased wheat on the open market had they not grown their own.

n28 See, e.g., *Hurst v. Prudential Securities, Inc.*, 21 F.3d 1113 (9th Cir. 1994) (Equal Pay Act); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (Title VII); *Scott v. Merrill Lynch, Pierce, Fenner, & Smith*, 1992 U.S. Dist. LEXIS 13749 (S.D.N.Y. 1992) (42 U.S.C. § 1981); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (Title VII); *Bird v. Shearson Lehman American Express*, 926 F.2d 116 (2nd Cir. 1991) (ERISA); *Fabian Financial Services v. Kurt H. Volk, Inc.*, 768 F. Supp. 728 (C.D. Cal 1991) (ERISA).

n29 42 F.3d 1299 (9th Cir. 1994).

n30 *Id.* at 1304.

n31 Even this knowledge requirement is far from clear, as other courts on similar facts have reached the opposite result. See *Gateson v. ASLK-Bank, No. 94-5849*, 1995 WL 387720 (S.D.N.Y. June 29, 1995); *Hall v. Metlife Resources*, 1995 WL 258061 (S.D.N.Y. May 3, 1995); *Brown v. Merrill Lynch Life Agency, Inc.*, No. 957526 (Cal. Sup. Ct. Jan. 25, 1995).

n32 105 F.3d 1465 (D.C. Cir. 1997).

n33 144 F.3d 1182 (9th Cir. 1998).

n34 See *ADR Services Say They Will Continue to Hear Compulsory Arbitration Cases*, 22 Pens. & Ben. Rep. (BNA) 2486, 2487 (Nov. 13, 1995).

n35 See *Alternative Dispute Resolution, 1994: Testimony Before the Commission on the Future of Worker-Management Relations*, Apr. 6, 1994 (statement of Lewis L. Maltby, Director of the National Task Force on

Civil Liberties in the Workplace, American Civil Liberties Union) (stating that ADR is not acceptable unless the employee's decision is voluntary).

n36 See William K. Slate, *Out of Court Resolution of Employment Disputes*, N.Y.L.J., Jan. 11, 1996, at 3 (reporting that NELA threatened to boycott AAA and Jams/ENDISPUTE if they continued to permit mandatory employment arbitrations).

n37 EEOC Notice Number 915.002 (July 10, 1997).

n38 Fortunately, it appears that the courts will not allow employers to deny employees access to the EEOC and other federal agencies. The Supreme Court opinion in *Gilmer* contained strong dicta to this effect, which has been respected by the lower courts. See *Gilmer*, 500 U.S. at 28. See also *EEOC v. Houston River Oaks Imaging and Diagnostic*, 1995 U.S. Dist. LEXIS 6140 (S.D. Tex. 1995).

n39 *Brady v. United States*, 397 U.S. 742 (1970).

n40 *Fuentes v. Shevin*, 407 U.S. 67 (1972).

n41 *Gilmer*, 500 U.S. at 28.

n42 995 F. Supp. 190 (D. Mass. 1998).

n43 1998 WL 558736 (D.S.C. Mar. 12, 1998).

n44 Section 8-2 of the Hooters arbitration plan provides that all arbitrators must be chosen from a list established unilaterally by the employer using whatever criteria it chooses. *Id.* at * 10.

n45 *Prototype Agreement on Job Bias Dispute Resolution*, 1995 Daily Lab. Rep. (BNA) No. 91, at D-34 (May 11, 1995) [hereinafter *Prototype Agreement*].

n46 *Id.*

n47 See, e.g., 42 U.S.C. § 1988(b) (1998).

n48 *Prototype Agreement*, *supra* note 45, at B(2).

n49 *Id.* at C(1).

n50 While the AAA did not maintain detailed demographic information on its roster, AAA officials acknowledged the need for greater diversity of those involved in the process of creating its new roster of employment arbitrators.

n51 For a description of the AAA selection procedures for arbitrators, see AAA's National Roster of Arbitrators and Mediators (last modified Nov. 6, 1997) (on file with author).

n52 The role of the jury -- arguably more pro-employee than either arbitrators or judges -- complicates this equation still more.

n53 *Prototype Agreement*, *supra* note 45, at B(3).

n54 *Fed. R. Civ. P. 26(b)(1)*.

n55 *Prototype Agreement*, *supra* note 45, at D.

n56 *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

n57 *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987).

n58 *Prototype Agreement*, *supra* note 45, at C(3).

n59 *Id.* at C(5).

n60 The ability to exercise this right under the protocol is complicated by the existence of confidentiality provisions in the rules of most arbitration services. For example, AAA rule 16 provides that hearings shall be confidential. While this would clearly allow an arbitrator to close the hearing room to outsiders, it does not appear to restrict the parties' ability to discuss the case with the public, nor does it prohibit the disclosure of the arbitrator's award. Moreover, arbitrators, lacking the power to cite for contempt, would have little ability to enforce rules that restricted the parties' conduct outside the hearing room.

n61 *See* discussion *infra* Part VIII.

n62 The Clinton Administration established the Commission in 1993 under the direction of former Secretary of Labor John Dunlop to investigate what changes in labor-management practice and its legal framework might be needed to improve labor-management cooperation and productivity.

n63 Commission on the Future of Worker-Management Relations, Report and Recommendations 32 (1994).

n64 U.S. General Accounting Office, *supra* note 7, at 3.

n65 *Id.* at 12-15.

n66 *Id.* at 15.

n67 Bickner et al., *supra* note 13, at 81.

n68 *Id.* at 80.

n69 *Id.*

N70 Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 Int'l J. Conflict Mgmt. 369 (1995).

n71 *Id.* at 378. Employers filed 38 of the 171 cases in Bingham's sample.

n72 See Bingham, *supra* note 19, at 210-213 (1997).

n73 Search of Inter-University Consortium for Political and Social Research Database, case category 442 jobs (July 11, 1997) (on file with author) [hereinafter Search of Inter-University Database].

n74 Paul Burstein & Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 L. & Soc. Rev. 356, 358 (1986).

n75 *Id.* at 373-74.

n76 Gregory W. Baxter, *Arbitration or Litigation for Employment Civil Rights?*, 2 Volume of Individual Employment Rights 19 (1993-1994).

n77 Search of Inter-University Database, *supra* note 73.

n78 *Id.*

n79 *Id.*

n80 Corporate Counsel's Guide, Alternative Dispute Resolution in the Employment Context 18.008 (1996).

n81 Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, in 50th IRRA Proceedings (forthcoming 1999).

n82 Search of Inter-University Database, *supra* note 73.

n83 Bingham, *supra* note 81, at 6.

n84 This figure is calculated from the mean demand in court cases for 1994 (\$ 756,738), and the mean damages awarded in these cases (\$ 530,611). See Search of Inter-University Database, *supra* note 73.

n85 Bingham, *supra* note 19 (providing the 63% figure). Bingham, *supra* note 81, at 6 (providing the rest of the figures used in the arbitrations column of the table).

n86 Search of Inter-University Database, *supra* note 73.

n87 William M. Howard, *Arbitrating Claims of Employment Discrimination*, Dis. Resol. J., Oct.-Dec. 1995, at 40 [hereinafter Howard, *Arbitrating Claims*]. See also William M. Howard, *Mandatory Arbitration of Employment Discrimination Disputes* (1995) (unpublished Ph.D. dissertation, Arizona State University) [hereinafter Howard, *Mandatory Arbitration*].

n88 Howard, *Arbitrating Claims*, *supra* note 87, at 43.

n89 *Id.* at 42.

n90 Memorandum from Robert Meade, Senior Vice President of the AAA (Aug. 5, 1997) (on file with author).

n91 See Lewis L. Maltby, *Paradise Lost -- How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. Sch. J. Hum. Rts. 1, 5 (1994).

n92 U.S. General Accounting Office, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, Pub. No. GAO/HEHS-99-97, 2 (1994) (reporting that 89% of the New York-based NYSE arbitrators were white males with an average age of 60).

n93 Stuart Bompey & Michael Pappas, *Is There a Better Way? Compulsory Arbitration of Employment Claims after Gilmer*, 19 Employee Relations L.J., 197, 208 (1993-94).

n94 U.S. General Accounting Office, *supra* note 92, at 2.

n95 Jerry Sideman, *The Journal Complaint and Appeal Procedure at Michael Reese Hospital and Medical Center*, in Westin & Feliu, *supra* note 4, at 113.

n96 *Id.*

n97 *Id.*

n98 *Id.*

n99 Bingham, *supra* note 19.

n100 *Id.* at 378. Cases in which the employer brings an action against the employee are generally contract cases, most commonly alleging violation of restrictive covenants on competition with former employers.

n101 *Id.*

n102 *Id.* at 379.

n103 *Id.*

n104 David Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 Chi.-Kent L. Rev. 823, 829 (1990).

n105 *Id.* at 830.

n106 U.S. General Accounting Office, *supra* note 8, at 48.

n107 *Id.* at 40.

n108 *Id.* at 42, 49.

n109 *Id.* at 53.

n110 Interview with Jonathan Boxer, Senior Counsel for Labor and Employment Law at TRW, Inc. (Dec. 10, 1997).

n111 *Id.* The remainder of the cases is currently in arbitration or otherwise pending.

n112 U.S. General Accounting Office, *supra* note 8, at 48. Under the Polaroid program, employees who are dissatisfied with the arbitrator's ruling may file a complaint in court and have their dispute reconsidered *de novo*. They do not need to seek judicial review of the arbitrator's decision under a restrictive standard of appellate review.

n113 *Id.* at 47.

n114 *Id.* at 40.

n115 Princeton Survey Research Associates, *Worker Representation and Participation Survey* (on file with author) [hereinafter Princeton Survey]. *See also* Howard, *Arbitrating Claims*, *supra* note 87, at 46.

n116 Princeton Survey, *supra* note 14.

n117 *Id.*

n118 *See* Howard, *Arbitrating Claims*, *supra* note 87 (quoting Dispute Resolution Times survey (1985)).

n119 Arbitration might look even more favorable for employee-plaintiffs if attorneys' fees were considered. Attorneys in employment cases generally receive at least a third of any recovery as a contingent fee. *See* Howard, *Arbitrating Claims*, *supra* note 87, at 44.

n120 Maltby, *supra* note 3, at 117.

n121 U.S. General Accounting Office, *supra* note 8, at 19.

n122 Maltby, *supra* note 3, at 105 (citing B. Mahoney et al., Implementing Delay Reduction and Delay Prevention Programs in Urban Trial Courts: Preliminary Findings, vol. 8 (1985)).

n123 Gary G. Mathiason & Pavneet S. Uppal, *Evaluating and Using Employer-Initiated Arbitration Rules and Agreements*, in *Employment Discrimination and Civil Rights Actions in Federal and State Courts* (ALI-ABA Course of Study, Apr. 28-30) 875, 894 (1994).

n124 The total civil caseload more than doubled from 1971 to 1991, and employment cases increased by 430%. Commission on the Future of Worker-Management Relations, *supra* note 63.

n125 Search of Inter-University Database, *supra* note 73.

n126 Mathiason & Uppal, *supra* note 123.

n127 For example, the Bush Administration, which generally opposed expansion of employment rights, enacted the Civil Rights Act of 1991 and the Americans with Disabilities Act (ADA). The 104th and 105th Congresses, even more adamantly opposed to employee rights, passed an increase in the minimum wage and the Kennedy-Kassebaum health care portability act.

n128 *See, e.g.,* Walter Olson, *The Excuse Factory: How Employment Law is Paralyzing the American Workplace* (1997).

n129 Fay, *Age Discrimination: A Legal and Practical Guide for Employers* (1989), *in* Baxter, *supra* note 76, at 23.

n130 *Id.*

n131 In 1993, the average weekly earnings of American employees was \$ 374. Bureau of Labor Statistics, *Monthly Labor Review*, at 75 (Feb. 1994).

n132 The EEOC reports, for example, that the number of complaints alleging discriminatory dismissals is six times the number of complaints involving hiring. *See* Olson, *supra* note 128, at 61.

n133 *See* Howard, *Arbitrating Claims*, *supra* note 87, at 44.

n134 *See id.*

n135 John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *Stan. L. Rev.* 983, 1025 (1991).

n136 *Alternative Dispute Resolution, 1994: Testimony Before the Commission on the Future of Worker-Management Relation* (Statement of Paul Tobias, founder of NELA) (1994).

n137 Howard, *Arbitrating Claims*, *supra* note 87, at 44 (reporting that according to a survey of NELA lawyers, "Nineteen out of every 20 employees who feel they have an employment discrimination claim against an employer are unable to obtain the representation of an attorney to pursue that claim in court.").

n138 *Proceedings of the Annual Meeting, Association of American Law Schools, reported in Employee Rights and Employment Policy Journal* 291 (Fall 1997).

n139 Jack Steiber & Robert Rogers, *Discharge for Cause: History and Development in the United States*, 536 *Annals Am. Acad. Pol. & Soc. Science* 70, 78 (1994).

n140 *Id.*

n141 I. Shepard et al., *Without Just Cause: An Employer's Practical and Legal Guide on Wrongful Discharge* 20-21 (1989).

n142 See generally Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va. L. Rev. 481 (1976).

n143 For a detailed discussion of judicially created exceptions to employment at will, see Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads for Full Flower*, 67 U. Neb. L. Rev. 56 (1988).

n144 Lewis L. Maltby, *The Decline of Employment at Will -- A Quantitative Analysis*, 41 Lab. L. J. 51(1990).

n145 David J. Jung & Richard Harkness, *Life After Foley: The Bottom Line*, 5 Lab Law 667 (1989).

n146 It is possible that the greater success rate of high ranking employees might be due to an increased frequency with which they have written employment contracts providing for other than at-will employment. Very senior managers do sometimes receive such contracts, and a plaintiff armed with such a contract is clearly in a superior position to one who must meet the requirements of a common law exception to employment at will. It does not appear, however, that such contracts are frequent enough to explain the vastly greater success of managers in wrongful discharge litigation.

n147 See generally Bingham, *supra* note 70.

n148 Baxter, *supra* note 76, at 23.

n149 For a discussion of the nearly insurmountable hurdles facing pro se litigants in federal civil actions, see Julie M. Bradlow, Note, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. Chi. L. Rev. 659 (1988).

n150 Washington Lawyer's Committee for Civil Rights and Urban Affairs, *Annual Report* (1993).

n151 Howard, *Mandatory Arbitration*, *supra* note 86.

n152 Equal Employment Opportunity Commission, *Summary of Enforcement Data and Budget and Staffing Information*, FY 1991-1996.

n153 *Id.*

n154 Lamont E. Stallworth & Linda K. Stroh, *Who is Seeking to Use ADR?*, Disp. Resol. J., Jan.-Mar. 1996, at 30.

n155 Equal Employment Opportunity Commission, *supra* note 151.

n156 EEOC *Adopts Charge-Priority System*, Daily Lab. Rep. No. 76, at D-3 (Apr. 20, 1995).

n157 Baxter, *supra* note 76, at 19.

30 Colum. Human Rights L. Rev. 29, *

n158 *EEOC Adopts Charge-Priority System*, *supra* note 156.

n159 Equal Employment Opportunity Commission, Annual Report (1994).

n160 *See Dertouzos et al.*, *supra* note 11, at viii.



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ARTICLE: Arbitration and Unconscionability

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SUMMARY:

... "Generalized attacks on arbitration that 'rest on the suspicion of arbitration as a method of weakening the protections afforded in the substantive law,'" such as those made by Professor Carrington, "are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" ... The court in Johnson explained that "while arbitrating claims that might have been pursued as part of class actions potentially reduces the number of plaintiffs seeking to enforce the TILA against creditors, arbitration does not eliminate plaintiff incentives to assert rights under the Act." ... In fact, "corrupt arbitrators will not survive long in the business" because businesses are interested in keeping down dispute resolution costs, and because biased arbitrators increase those costs. ... Arbitration Can Provide The Same Remedies as Litigation Professor Carrington also asserts that pre-dispute arbitration agreements are unconscionable because they deprive individuals of exemplary or treble damages, attorneys' fees, and provisional remedies such as preliminary injunctions and attachments. ... Lawyers who advise businesses on dispute resolution issues can and should not only advise clients that pre-dispute arbitration provisions are valid and enforceable under law, but also identify the concerns raised by critics of arbitration and seek to address them.

TEXT:

[*761] INTRODUCTION

In *Unconscionable Lawyers*, Professor Carrington argues that lawyers who encourage or enable their business clients to incorporate arbitration provisions in their contracts with individuals violate the law and the ethics of the profession, and are worthy of contempt. n1 These serious charges are seriously wrong. As a matter of fact, arbitration is fair to individuals and provides benefits unavailable in traditional litigation. n2 As a matter of federal law, arbitration agreements are as valid and enforceable as any contract. n3 As a matter of legal ethics, lawyers not only act ethically when they advise clients regarding arbitration provisions, but would be remiss if they failed to do so. n4

Finally, we strongly disagree with Professor Carrington on one other, overarching issue. The current debate over arbitration is an important one, as it involves the very structure of how we as a society resolve disputes. Such a debate

can and should improve arbitration and litigation alike. Each system of dispute resolution illuminates the other's strengths and weaknesses, and thereby suggests ways each system might be improved, or how each might be optimal for certain [*762] types of disputes. Vilifying those who use arbitration provisions is a poor way to further this important discussion. We propose that lawyers who disagree on this issue search for common ground rather than claim the moral high ground for themselves.

Part I of this article describes the benefits of arbitration to individuals and compares this method of dispute resolution to traditional litigation. Part II demonstrates that arbitration provisions are favored by federal law and that unconscionable provisions in arbitration agreements are already unenforceable, just as in any contract. Part III addresses the relationship of legal ethics and the fairness of arbitration provisions. Finally, this article concludes that members of the legal community should work together to improve arbitration as well as the traditional litigation system so that both forms of dispute resolution are beneficial to individuals and businesses alike.

I. THE BENEFITS OF ARBITRATION TO INDIVIDUALS

A. Arbitration Is Fair and Provides Benefits to Individuals

Professor Carrington's argument relies upon a caricature of arbitration, which is painted by citing a few selected examples of unfair arbitration clauses--most of which have been struck down by the courts. n5 These anecdotes are no substitute for analysis. First, such examples are hardly evidence of the need for reform since the courts seem to be able to identify and invalidate unconscionable arbitration agreements. Second, arbitration--like litigation--is too multifaceted to warrant such casual condemnation. n6 Third, there are [*763] ample examples of clauses that are plainly fair to individuals and therefore fairly enforced. n7 But most importantly, the available empirical evidence shows that arbitration is fair to individuals.

Too few studies rigorously compare arbitration and litigation results. However, those that exist find that arbitration can help individuals who seek to bring businesses to justice. n8 In the employment context, for example, one study found that of all employment arbitrations conducted by the American Arbitration Association (AAA), employees won 73% of the arbitration cases they filed and 64% of all arbitration cases. n9 These results show that individuals fared dramatically better in arbitration than they would have in litigation. A related study found that 63% of employees won in arbitration, while only 15% of employees won in federal court [*764] during the same period. n10 Another study found that individual employees won 51% of arbitrations, while the Equal Employment Opportunity Commission (EEOC) won only 24% of cases it litigated in court, despite its superior experience, resources, and case-screening procedures. n11 Additional studies have reached the same conclusions. n12 Not only do employees win more often in arbitration, but they also win a higher percentage of the amount they demand: 18% of the amount demanded in arbitration, but only 10.4% of the amount demanded in litigation. n13 As Lewis Maltby, the Director of the ACLU National Taskforce on Civil Liberties in the Workplace, concluded, "it would be a serious mistake for the civil rights community to attempt to stop the trend to employment arbitration." n14

Additional studies have shown that individuals have also fared well in arbitration in contexts other than employment disputes. The National Arbitration Forum (NAF), for example, reports that individual plaintiffs win 71% of claims brought against corporate entities before the NAF. n15 In comparison, between 1987 and 1994, [*765] individuals won only 54.5% of claims brought in federal court under original diversity jurisdiction, and only about 30% of claims under removal jurisdiction. n16 Indeed, even in cases brought before National Association of Securities Dealers (NASD) arbitrators, a system that critics characterized as "providing inadequate due process," n17 individuals win more often in arbitration than in court. n18 Furthermore, a recent survey revealed that more than 93% of parties believed that the NASD arbitrators handled their cases "fairly and without bias." n19

Not only do individuals fare better in arbitration than they do in court, but arbitration can provide several benefits to individuals that are unavailable in traditional litigation. Congress recognized these benefits, which flow to all parties in an arbitration, when it passed the Federal Arbitration Act (FAA) nearly eighty years ago. n20 As Congress explained, "by avoiding 'the delay and expense of litigation,' [FAA] will appeal 'to big business and little business alike, . . . corporate interests [and] . . . individuals.'" n21 Decades later, Congress continued to acknowledge the manifold benefits of arbitration, stating that "the advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and [*766] places of hearings and discovery devices" n22 Consumer advocates likewise have noted that arbitration provides a fast, fair and affordable alternative to litigation. n23

Arbitration is more convenient than litigation. Parties may participate in person (as in litigation), but arbitration hearings may also take place over the telephone or online. n24 Consequently, an individual can take part in an arbitration hearing without leaving home or taking a day off from work. Such conveniences simply are not available in litigation. Furthermore, individuals do not have to hire a lawyer in arbitration, although they may do so if they wish. n25

Arbitration is also faster than litigation. A study that compared employment claims filed with AAA with similar claims filed in federal court found that, on average, arbitration resolved cases in about half the time of litigation. n26 Similarly, in March 2001, the average total turnaround time for NASD arbitrations was 12.9 months. n27 The average turnaround time for the previous year was 12.8 months. n28 In comparison, median turnaround time for civil cases in federal district courts during these same periods was more [*767] than 20 months. n29 Although the length of an arbitration "depends on a number of factors, including the types of claims being brought, the number of parties involved, and the ability to work with the schedules of the parties and their attorneys," the NAF asserts that "most arbitrations can be completed within three to six months." n30 These facts have led many commentators to the conclusion that "for smaller, simpler, more routine cases, it is hard to beat administered arbitration." n31

Arbitration is also less expensive than litigation. As the Supreme Court has held, the reduced expense of arbitration is "helpful to individuals . . . who need a less expensive alternative to litigation." n32 For example, for disputes of less than \$ 2,500, the NAF filing fee is only \$ 25. n33 It is also possible to recover fees or obtain fee waivers in arbitration. n34 Moreover, some arbitration agreements provide that arbitration fees will be equivalent to what a court would charge in a similar case. n35 Indeed, in her dissent in *Green Tree Fin. Corp.-Ala. v. Randolph*, n36 Justice Ginsberg wrote favorably of the fee systems used by major arbitration administrators: "Under the AAA's Consumer Arbitration Rules, consumers in small-claims arbitration incur no filing fee and pay only \$ 125 of the total fees charged by the arbitrator. All other fees and costs are to be paid by the business [*768] party." n37 She also noted that "other national arbitration organizations have developed similar models for fair cost and fee allocation." n38 The greatest savings come from simple and informal procedures that allow an individual to pursue a small claim without having to retain a lawyer. n39 In this way, arbitration substantially benefits consumers with claims under \$ 20,000 because lawyers rarely agree to pursue such cases. n40 Thus, it is not surprising that only one in three Americans agrees that taking a case to court is affordable and "nearly nine of ten [people] point to the costs of legal representation as the main barrier" to the adjudication of claims. n41 Moreover, class actions are not an effective remedy for these high litigation costs because the strict standards for class certification result in most actions being pursued on an individual basis, where arbitration can be most helpful. n42

[*769] At a minimum, these studies and authorities demonstrate that arbitration is a reasonable alternative to litigation. In this light, a contract that calls for arbitration instead of litigation is not "oppressive and unfair" and does not "shock the conscience." n43 Accordingly, notwithstanding Professor Carrington's charges, lawyers who encourage or enable their clients to include such terms in their contracts with consumers do not act unconscionably.

B. Litigation Is an Imperfect Dispute Resolution Mechanism

While opponents of arbitration flyspeck the way it works, they rarely confront the problems with our civil justice system. Lawsuits are slow, expensive, and complicated. n44 These factors favor large businesses over individuals. Large businesses, after all, have the time to wait, the money to fight, and the experience to handle the complexities of litigation, particularly class action litigation.

Litigation is slow. Between September 30, 2000 and September 30, 2001, the median total turnaround time for civil cases in federal district courts was 21.6 months. n45 For the previous year, the median turnaround time for civil cases was 20.0 months. n46 As of September [*770] 30, 2001, a full 14% of civil cases in federal district courts were over three years old. n47 These statistics are unlikely to improve. The Administrative Office of the United States Courts has noted that "the workload of the federal Judiciary has increased dramatically . . . and all indications are that . . . future caseloads will be larger and the demands on judicial resources even greater in the years to come." n48 As discussed above, turnaround times in arbitration are usually much faster than in traditional litigation. n49

Litigation is expensive--mostly because it requires lawyers. n50 The contingent fee device does not solve this problem because many disputes do not involve enough money to make a contingent fee enticing. n51 The class action device likewise does not solve this problem because many disputes do not qualify for class treatment. n52 *Rule 23 of the Federal Rules of Civil Procedure* and most state rules permit class treatment only if the plaintiffs can establish each of the [*771] prerequisites of numerosity, commonality, typicality, and adequacy of representation. n53 If the particular facts surrounding the dispute prevent an individual from establishing that he or she is typical of other putative

class members, for example, that individual's claim is ineligible for class treatment. Additionally, even if an individual's claim is one that allows for class treatment, those individuals who are not class representatives (1) do not meet the lawyer representing the class; (2) have no control over the case; n54 and (3) may not receive meaningful relief from the litigation. n55 Indeed, in a recent study, the Rand Institute for Civil Justice showed class members receive as little as 20% of the total recovery. n56 In fact, class counsel occasionally "receive[s] more than class members receive[] altogether." n57

[*772] In sum, civil litigation has substantial weaknesses as a system of dispute resolution. Arbitration addresses many of those weaknesses. Accordingly, it is perfectly reasonable for parties to choose arbitration even before they know what sort of dispute will divide them. In the rhetoric of critics of arbitration, such a choice is a "mandatory arbitration clause." This phrase offers more heat than light, however, since it is redundant to refer to a *contract* provision as mandatory. Similarly, the fact that the choice is made prior to the dispute is of no particular significance. n58 Of course, parties whose contract lacks an arbitration clause may later jointly choose arbitration. But parties who have an arbitration clause may later jointly choose litigation—a point routinely missed by critics of arbitration. The existence or absence of an arbitration provision merely establishes how the parties will resolve disputes in the *absence* of a post-dispute agreement on how to resolve disputes. Criticisms of arbitration provisions for being mandatory or preceding the dispute are justified only if being required to arbitrate a dispute is somehow inferior to being required to litigate a dispute. As explained above, the right to arbitrate is in fact often more valuable than the right to litigate. Predispute agreements that require arbitration therefore benefit, rather than harm, individuals.

II. ARBITRATION PROVISIONS ARE FAVORED BY FEDERAL LAW

Attacks on arbitration routinely ignore the fact that federal law and policy favor the enforcement of arbitration agreements. For example, Professor Carrington cites a number of sources to support his position that the arbitration agreements signed prior to a dispute should be unenforceable. n59 Many of these sources, however, predate Congress' [*773] enactment of the FAA in 1925. n60 Section 2 of the FAA, unchanged from the original 1925 version, n61 provides that arbitration agreements are "valid, irrevocable, and enforceable" whether agreed to before or after the dispute to be resolved. n62 The Supreme Court has repeatedly stated that Section 2 of the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . within the coverage of the Act." n63 "Generalized attacks on arbitration [that] 'rest on [the] suspicion of arbitration as a method of weakening the protections afforded in the substantive law,'" such as those made by Professor Carrington, "are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" n64 For example, the Supreme Court has refused to "indulge the presumption that the parties and arbitral body [*774] conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." n65

A. Pre-Dispute Arbitration Provisions Are Not Unconscionable

Professor Carrington and others have argued that pre-dispute arbitration agreements that waive a trial by jury and a public hearing are unenforceable. n66 Because "the loss of the right to a jury trial is a necessary and fairly obvious consequence of an agreement to arbitrate," n67 Professor Carrington is really arguing that all pre-dispute arbitration agreements are unenforceable. Federal law refutes this claim. First, as mentioned above, Section 2 of the FAA makes both pre-dispute and post-dispute arbitration provisions enforceable. n68 Congress, surely well aware that the tactical dynamics of pre-dispute arbitration agreements are different than those of post-dispute agreements, specifically made pre-dispute agreements enforceable. The Supreme Court has confirmed this reading of Section 2, holding that the FAA preempts any state law making pre-dispute arbitration agreements invalid and unenforceable. In *Allied-Bruce Terminix Cos. v. Dobson*, n69 the Alabama Supreme Court held that Section 2 of the FAA did not preempt an Alabama law that made written, predispute arbitration agreements invalid and unenforceable. n70 The United States Supreme Court reversed, holding that Section 2 preempted the Alabama anti-arbitration provision. n71 Thus, under the FAA, pre-dispute arbitration agreements are neither invalid nor unenforceable. Professor Carrington's objections to pre-dispute arbitration agreements are sharply at odds with federal law.

[*775] B. Pre-Dispute Waivers of Class Treatment of Claims Are Not Unconscionable

Courts have largely rejected the assertion that pre-dispute arbitration agreements that waive class treatment of disputes are unconscionable. n72 Many other courts have enforced arbitration provisions that implicitly, rather than expressly, preclude class actions. n73 In fact, the majority of courts have held that where arbitration agreements are silent on the issue of class treatment, the default rule is that class treatment is unavailable. n74 A contract [*776] provi-

sion cannot be deemed unconscionable when that provision yields the same result as the default rule endorsed by many courts. n75

The key issue in an unconscionability analysis should not be whether the procedural device of a class action is available, but whether individuals can vindicate their substantive rights through [*777] arbitration. "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." n76 Arbitration affords parties an opportunity to enforce statutory rights because, as with the class action device, arbitration is merely a procedural tool for vindicating substantive rights. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." n77 Courts have repeatedly found that statutory rights may be vindicated in arbitration, even though the class action device is unavailable. n78

The same analysis applies when statutory rights, such as those granted under the Truth In Lending Act (TILA), are at stake, even if the monetary value of such claims is small. Three federal appellate courts and many federal district courts have upheld arbitration of TILA claims, even though TILA specifically provides for class actions as well as special damages for class actions. n79 The Third Circuit in *Johnson v. West Suburban Bank*, n80 upholding the waiver of class-action procedures in an arbitration provision, set forth principles equally relevant here. The court in *Johnson* explained that "while arbitrating claims that might have been pursued as part of [*778] class actions potentially reduces the number of plaintiffs seeking to enforce the TILA against creditors, arbitration does not eliminate plaintiff incentives to assert rights under the Act." n81 The court set forth two reasons for its conclusion. First, a plaintiff's individual recovery is the same whether a case is brought as a class action or as an individual suit; the "sums available in recovery to individual plaintiffs are not automatically increased by use of the class forum." n82 Second, arbitration would not "necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors" because "attorney's fees are recoverable under the TILA . . . and would therefore appear to be recoverable in arbitration." n83 For these reasons, the Third Circuit held that, even though "pursuing individual claims in arbitration may well be less attractive than pursuing a class action in the courts," the arbitration clause did not defeat "TILA's goal of encouraging private actions to deter violations of the Act." n84

The Eleventh Circuit reached the same result in *Randolph v. Green Tree Fin. Corp.*, n85 concluding that the plaintiff failed to "establish that Congress intended to preclude the arbitration of TILA claims, even where arbitration would prevent the claims from being brought in the form of a class action." n86 despite the Eleventh Circuit's previous holding that Randolph's claim would be for a "small sum." n87 The Court held that "the public policy goals of TILA can be vindicated through arbitration." n88 The court explained that other incentives such as attorneys fees, would allow plaintiffs to bring TILA claims in arbitration. n89 The Eleventh Circuit thus agreed with the Third Circuit that "Congress did not intend to preclude parties [*779] from contracting away their ability to seek class action relief under the TILA." n90

The Fourth Circuit in *Snowden v. CheckPoint Check Cashing* n91 also agreed that TILA rights can be vindicated through arbitration. n92 The court rejected Snowden's claim that she would be "unable to maintain her legal representation given the small amount of her individual damages." n93 The court explained that the fact that attorney's fees are recoverable in arbitration enables individuals to vindicate TILA rights through individual arbitration. n94 Indeed, the court held that there is "no violation of public policy relating to consumer protection" in requiring consumers to arbitrate claims on an individual basis. n95

C. Parties Retain Their Right to an Impartial Decision Maker in Arbitration

Professor Carrington suggests that some pre-dispute arbitration agreements seek to deprive individuals of the right to an impartial decision maker. n96 It is unclear from his assertion whether he objects only to those unusual arbitration provisions designed to secure a biased decision maker, or whether he is making a broader claim that all pre-dispute arbitration agreements deprive individuals of access to an impartial decision maker. Whichever assertion he is making, federal law already protects individuals from biased arbitrators.

To the extent that an arbitration provision actually provides for a biased decision maker, courts may refuse to enforce such a provision. For example, in *Hooters of America v. Phillips*, n97 the Fourth Circuit [*780] refused to enforce Hooters' arbitration agreement. n98 The agreement provided that Hooters and the employee would each select one arbitrator, and that those arbitrators would select the third member of the arbitration panel. n99 However, the agreement required that all arbitrators be selected from a list compiled by Hooters. n100 The Fourth Circuit refused to

enforce this agreement in part because the court concluded that the arbitration agreement was designed to provide for arbitrators who were biased in favor of Hooters. n101

The fact that some pre-dispute arbitration agreements might provide for biased decision makers does not justify disallowing all such agreements. Under this logic, the occasional unfairness of some contracts would be grounds for forbidding contracts altogether. A better solution is to root out unfairness by identifying it when it occurs. In the case of arbitration, the Supreme Court has stated that it would not "indulge in the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." n102 In the unusual case that an arbitrator is biased in favor of one of the parties, the FAA authorizes the aggrieved party to challenge the arbitration award in court. n103

Indeed, fairness in arbitration furthers the self-interest of both businesses and individual arbitrators. Because the FAA specifically allows federal court challenges to arbitration awards where the arbitrator was not impartial, any actual or apparent bias leads to costly litigation--the very result both parties are seeking to avoid. n104 An arbitration award tainted by evident partiality will be overturned in post-award litigation, further increasing dispute resolution costs to [*781] the parties. These additional costs and the risk of overturning an award provide additional incentives for arbitrators to decide cases fairly. n105 In fact, "corrupt arbitrators will not survive long in the business" because businesses are interested in keeping down dispute resolution costs, and because biased arbitrators increase those costs. n106

In addition, many form arbitration agreements now offer consumers a choice among several national arbitration administrators. n107 Such provisions not only serve the interests of the individuals who have such a choice, but also ensure that all arbitration administrators named in such agreements have a financial interest in being seen by individuals (who choose among them) as impartial. This interest in being known for impartiality promotes fairness generally, even if the same administrators occasionally represent the only option in a particular agreement.

Moreover, perceived unfairness in arbitration increases both the threat of courts refusing to enforce awards and the likelihood of increased federal regulation of the arbitration process. While such regulation could take a variety of forms, it would likely "pose a serious threat to the business of arbitration institutions." n108 For these reasons, it is in the financial self-interest of arbitration administrators to provide neutral, unbiased arbitrators.

[*782] *D. Arbitration Can Provide The Same Remedies as Litigation*

Professor Carrington also asserts that pre-dispute arbitration agreements are unconscionable because they deprive individuals of exemplary or treble damages, attorneys' fees, and provisional remedies such as preliminary injunctions and attachments. n109 We agree that such limitations of remedies are problematic. Again, however, the answer is not to invalidate arbitration clauses altogether, but to allow such limitations to factor into a court's unconscionability analysis of a particular agreement. n110 As a factual matter, arbitration agreements often do not limit the availability of equitable remedies. Numerous courts have held that arbitrators can award exemplary damages and attorneys' fees. n111 Arbitrators may also provide a wide array of equitable relief, n112 including provisional remedies such as preliminary injunctions. n113 Furthermore, individuals may enforce in court equitable remedies awarded by an arbitrator. n114

E. Courts Refuse to Enforce Unconscionable Provisions in Arbitration Agreements

Finally, the FAA itself has already addressed the problem of unconscionable provisions in arbitration agreements by authorizing courts to refuse to enforce any provisions of arbitration agreements that are truly unconscionable. Section 2 of the FAA provides that [*783] arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." n115 Courts have interpreted this language as incorporating common defenses to the enforceability of contracts, such as unconscionability. n116 Thus, any terms that are truly unconscionable are already unenforceable. n117

[*784] Indeed, the three cases cited by Professor Carrington demonstrate that courts can and do refuse to enforce arbitration provisions that they believe are unconscionable. n118 These cases also demonstrate that unconscionable arbitration provisions spawn costly litigation. As discussed above, businesses adopt arbitration provisions to reduce--not increase--the cost of resolving disputes. n119 Just as conscionable arbitration provisions can benefit all parties, unconscionable arbitration provisions undermine the interests of consumers and businesses.

III. ARBITRATION AND LEGAL ETHICS

Finally, because Professor Carrington's description of arbitration and applicable law is flawed, so too is his conclusion regarding legal ethics. As discussed above, Professor Carrington's depiction of arbitration is inaccurate: arbitration provides many benefits to both businesses and individuals that are often unavailable in litigation. n120 His description of applicable law is also incorrect: many of the details of arbitration provisions that he criticizes as "bells and whistles" are not only fair and reasonable, they are routinely upheld by courts. n121 Because arbitration provisions are generally fair, legal, and fully enforceable, Professor Carrington is incorrect in suggesting [*785] that lawyers who encourage or enable clients to incorporate arbitration provisions in their contracts act unethically.

The rules of legal ethics require lawyers to protect their clients' interests by zealously employing those means permitted by law. For example, the Rules of Professional Conduct for the District of Columbia require that "[a] lawyer shall represent a client zealously and diligently within the bounds of the law." n122 The ethics rules also require that lawyers seek the lawful objectives of a client through "reasonably available means permitted by law." n123 Other jurisdictions have similar rules. n124 In the context of arbitration, where arbitration generally is both beneficial to businesses and individuals and arbitration agreements are legal, valid, and enforceable, a lawyer would be ethically remiss not to recommend that their clients incorporate arbitration provisions in their agreements.

The basis for Professor Carrington's ethical attack is, in part, his assertion that businesses are using pre-dispute arbitration agreements in an attempt to "self-deregulate." n125 To support this accusation, he cites no authority other than himself. n126 This argument ignores a simpler explanation for the proliferation of arbitration agreements: the abuse of the class action device. It is no secret that litigation--particularly class action litigation--is subject to abuse by plaintiffs and their attorneys. n127 The certification of a class, even where claims are weak or frivolous, creates tremendous pressure on businesses to settle to avoid a potential verdict that, although unlikely, might [*786] threaten the company's very existence. the Supreme Court has noted that "certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." n128 Businesses legitimately seek to protect themselves from such abuses of the judicial system. Lawyers are ethically obligated to counsel with their clients in pursuing these legitimate interests. n129

CONCLUSION

Professor Carrington argues that lawyers should not draft arbitration provisions that are unconscionable or deprive individuals of substantive rights. We wholeheartedly agree. But we part company with Professor Carrington when he suggests--contrary to the facts and the law--that arbitration is routinely unconscionable.

We propose a more measured approach. Arbitration is imperfect, and so is litigation. Lawyers who advise businesses on dispute resolution issues can and should not only advise clients that pre-dispute arbitration provisions are valid and enforceable under law, [*787] but also identify the concerns raised by critics of arbitration and seek to address them. Critics of arbitration should recognize the flaws in our civil justice system that make alternatives to it appealing, and work toward addressing them. The course suggested by Professor Carrington--that critics of arbitration provisions sue the lawyers who draft them--is almost certain to fail, not only as a tactic, but as an effort to improve arbitration provisions. It will certainly poison any hope for meaningful discussion of the issue. Our hope is that members of the legal community will instead work together in an effort to reach some agreement on best practices regarding such important issues as the procedures to be used in notifying individuals of arbitration provisions, the location and identity of arbitration forums, forum rules, arbitration fees, and the availability of discovery and appeals. In doing so, however, we should aim not to make arbitration just like litigation, but to ensure that it continues to be an alternative to litigation that benefits individuals and businesses alike.

Legal Topics:

For related research and practice materials, see the following legal topics:

Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawDefensesUnconscionabilityArbitration Agreements

FOOTNOTES:

n1 Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361 (2003).

n2 See *infra* Part I.

n3 See *infra* Part II.

n4 See *infra* Part III.

n5 See Carrington, *supra* note 1, at 373-77.

n6 One would think that plaintiffs' advocates would be particularly sensitive to the flaws of criticism by anecdote as their work is often criticized by reference to unusual and frivolous cases. See Deborah L. Rhode, *Where Does Justice Come In?*, STAN. LAW., Fall 1999 ("The public hears endless accounts of cases that are too big for courts, cases that are too small, and cases that never should have been cases at all. A 25-year-old victim of 'improper parenting' seeks damages from his mother and father. A suitor, who is fed up when stood up, sues his date. A customer having a 'bad hair day' wants the beautician to pay. A woman tries to dry her poodle in a microwave following a shampoo and demands compensation from the manufacturer for the unhappy outcome. Such cases receive disproportionate media attention . . .") Just as such examples do not necessarily prove that the plaintiffs' bar is out of control, the handful of unfair arbitration clauses cited by Professor Carrington does not prove that there is "a raging epidemic" of such provisions in standard form contracts. See Carrington, *supra* note 1, at 363.

Furthermore, no system of justice is perfect. Suppose, for example, that in a certain dispute resolution system, a litigant was required to take his case before a panel, the majority of which was appointed by the opponent's father and his father's business partner. Most people likely would agree that it would be unfair to require this litigant to present his or her case before such a panel. Yet that is what happened in the Supreme Court case of *Bush v. Gore*, 531 U.S. 98 (2000).

n7 For example, some arbitration agreements permit individuals to choose among different arbitration administrators. See, e.g., *Roe v. Gray*, 165 F. Supp. 2d 1164, 1167 (D. Colo. 2001) (discussing an arbitration agreement permitting claimant to select administrator from three specified administrators); *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278, at *2 (D. Del. Sept. 28, 2001) (discussing an arbitration agreement permitting claimant to select from two designated administrators). Other agreements call for the business to pay most fees. See, e.g., *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 712 (5th Cir. 2002) (upholding an arbitration agreement that required the consumer to pay a \$ 125 filing fee, provided that the lender would pay "all other arbitration fees and expense costs for up to one day (eight hours) of proceedings," and required that the non-prevailing party pay other costs); see also *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1483 (D.C. Cir. 1997) (noting that New York Stock Exchange (NYSE) and National Association of Securities and Dealers (NASD) arbitration rules required employer to pay all arbitration fees in employment dispute).

n8 See, e.g., Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695 (reviewing franchise agreements and reporting that "unfair" pre-dispute arbitration agreements are less prevalent than arbitration critics suggest).

n9 Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369, 378 (1995). Employers filed 38 of the 171 cases in Professor Bingham's sample.

n10 Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46-48 (1998). Maltby compared the results of employment arbitration before the AAA from 1993-95 with data from federal district courts for 1994. See Bingham, *supra* note 9, at 210-13. Maltby also reported that pre-trial motions led to dismissal of roughly 60% of the 3,419 employment discrimination cases brought in 1994. See Maltby, *supra*, at 46-48.

n11 Gregory W. Baxter, *Arbitration or Litigation for Employment Civil Rights?*, 2 VOL. OF INDIVIDUAL EMP. RTS. 19 (1993-94).

n12 See, e.g., Paul Burstein & Kathleen Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 L. & SOC'Y. REV. 355, 373-74 (1986) (surveying all EEOC trials published in Fair Employment Practice Cases (BNA) between 1974 and 1983 and finding that employee-plaintiffs won only 16.8% of cases); William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct.-Dec. 1995, at 40-43 (reporting that plaintiffs won 68% of cases in AAA arbitrations but only 28% in litigation).

n13 Maltby, *supra* note 10, at 48. Maltby further concluded that, although the average awards received by employees are lower in arbitration than in litigation, the combination of higher win-rates and lower procedural costs in arbitration result in a higher adjusted outcome in arbitration than in litigation. *Id.* at 54-55. Making the same observation, Professor Samuel Estreicher explains that litigation gives Cadillacs to a few and rickshaws to the many, while arbitration can give Saturns to everyone. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001).

n14 *Id.* at 63.

n15 National Arbitration Forum, *Millennial Issues Regarding Arbitration Fairness: An Administrator's View*, at 3, at <http://arb-forum.com/arbitration/NAF/forms/millennialArticle.pdf> (Jan. 7, 2000). NAF reports that consumers win an even greater percentage (80%) of arbitrations. *Id.*

n16 Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 605 & table 1 (1998).

n17 Maltby, *supra* note 10, at 49.

n18 See National Association of Securities Dealers, Dispute Resolution Statistics, at <http://www.nasdaq.com/statistics.asp#graph7> (showing that customers obtained damage awards in 3,968 of 6,979 (57%) of cases from 1997 to 2001).

n19 Gary Tidwell et al., Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations 2-5 (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business), available at http://www.nasdaq.com/pdf-text/arb_eval99.pdf; see also Louis Lavelle, *Poll Shows Most See Broker-Client Arbitration Process as Fair*, KNIGHT-RIDDER TRIB. BUS. NEWS, Aug. 6, 1999, available at 1999 WL 22004429.

n20 See S. REP. NO. 68-536 at 3 (1924).

n21 *Id.*, quoted by *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995).

n22 H.R. REP. NO. 97-542, at 13 (1982); see also *Allied-Bruce Terminix Cos.*, 513 U.S. at 280.

n23 See, e.g., Washington Center for Consumer Law, *Access to Affordable Justice*, at <http://consumerrights.net/theissues.html> (last visited June 21, 2002) (explaining that arbitration is fair, fast, affordable, and "endorsed by attorneys and judges statewide," including the Washington State Trial Lawyers Association).

n24 See, e.g., NATIONAL ARBITRATION FORUM, CODE OF PROCEDURE R. 26, available at http://www.arb-forum.com/arbitration/NAF/Code_linked/code.htm [hereinafter NAF CODE] (providing for participatory hearings in person, by telephone, or online); see also AMERICAN ARBITRATION ASSOCIATION, SUPPLEMENTARY PROCEDURES FOR CONSUMER-RELATED DISPUTES R. C-6, available at <http://www.adr.org/upload/LIVESITE/focusArea/consumer/Consumer.pdf> [hereinafter AAA CONSUMER-RELATED DISPUTES] (providing for hearings in person or by telephone); JAMS, STREAMLINED ARBITRATION RULES AND PROCEDURES R. 17(g), available at http://www.jamsadr.com/streamlined_arb_rules-2002.asp. [hereinafter JAMS RULES].

n25 See, e.g., NAF CODE, *supra* note 24, R.3A; JAMS RULES, *supra* note 24, R.9.

n26 See Maltby, *supra* note 10, at 55.

n27 National Association of Securities Dealers, *Dispute Resolution Statistics*, at <http://www.nasdaq.com/statistics.asp> (Sept. 25, 2002). In 2001, the NASD reports that "Hearing Decisions" had an average total turnaround time of 16.6 months, while "Simplified Decisions" had an average turnaround time of 9.2 months. *Id.*

n28 *Id.* In 2000, "Hearing Decisions" had an average total turnaround time of 16.7 months, while "Simplified Decisions" had an average turnaround time of 10.2 months. *Id.*

n29 See *Judicial Caseload Profile Report*, at <http://www.uscourts.gov/cgi-bin/cmsd2001.pl> (Oct. 12, 2002).

n30 National Arbitration Forum, *Frequently Asked Questions about the Forum*, at <http://www.arbforum.com/about/questions.asp#28> (Oct. 12, 2002).

n31 See, e.g., BERTHOLD H. HOENIGER, *COMMERCIAL ARBITRATION HANDBOOK* § 3.10 (1st ed. 1990, rev. 1 1991).

n32 *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 280 (1995).

n33 NAF CODE, *supra* note 24, app. C, available at http://www.arbforum.com/arbitration/NAF/Code_linked/apdx_c.htm.

n34 See, e.g., *id.* R.45; AAA CONSUMER-RELATED DISPUTES, *supra* note 24, R.C-8; see also *Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8th Cir. 1999) (noting that AAA permits the waiving of fees in hardship cases and holding that plaintiff should seek the waiver before objecting in court to arbitration fees).

n35 Cf. *Drahozal*, *supra* note 8, at 755 (noting that "both the National Arbitration Forum and the American Arbitration Association now offer low-cost consumer arbitration, with fees that are roughly the same as court filing fees").

n36 531 U.S. 79 (2000) (Ginsburg, J., dissenting).

n37 *Id.* at 95 (citation omitted).

n38 *Id.* Justice Ginsburg cited as examples NAF's "provisions that limit small-claims consumer costs to between \$ 49 and \$ 175" and the National Consumer Disputes Advisory Committee's protocol, which recom-

mends "that consumer costs be limited to a reasonable amount." *Id.* at 95 n.2 (citing NAF Code, *supra* note 23, app. C, Fee Sched.(July 1, 2000); National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, Prin. 6, Cmt. (Apr. 17, 1998).

n39 See, e.g., Maltby, *supra* note 10, at 55, 56-57; see also Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 633 (2001) (comparing procedures employed in arbitration and litigation and concluding that arbitration provides "real advantages" to individuals).

n40 See Jill Schachner Chanen, *Pumping Up Small Claims*, A.B.A. J., Dec. 1998, at 18. Employees as a group fare even worse. A survey of plaintiff employment lawyers showed that prospective plaintiff employees must have a claim with minimum damages of \$ 60,000--excluding intangible damages--for an attorney to consider taking the case. Maltby, *supra* note 10, at 57 (citing William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 44). As a result of this and other hurdles, only 5% of those who seek help from lawyers succeed in retaining legal counsel. *Id.* (citing *Alternative Dispute Resolution: Testimony Before the Commission on the Future of Worker-Management Relation* (1994) (statement of Paul Tobias, Founder, National Employment Lawyer's Association)).

n41 Frank A. Bennack, Jr., *A Report on the National Survey*, in NATIONAL CENTER FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 1, 2 (1999), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf.

n42 See, e.g., DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN - EXECUTIVE SUMMARY 5, 5 (RAND Institute for Civil Justice 1999) [hereinafter HENSLER ET AL., EXECUTIVE SUMMARY], available at <http://www.rand.org/publications/MR/MR969.1/MR969.1.pdf> (finding that a large number of "cases in which class action status is sought are dropped when the plaintiff attorney concludes that the case cannot be certified or settled for money").

n43 See RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981) (defining unconscionability); U.C.C. § 2-302 (2001)(same); see, e.g., *Croote-Fluno v. Fluno*, 734 N.Y.S.2d 298, 299-300 (N.Y.A.D. 2001) (looking to whether contract shocked the conscience when making unconscionability determination); *Coast Plaza Doctors Hosp. v. Blue Cross of Cal.*, 83 Cal. App. 4th 677, 689 (2000) (same); *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 315 (Wash. 2000) (same); *Woodhaven Apartments v. Washington*, 942 P.2d 918, 925 (Utah 1997) (same); *Aves By and Through Aves v. Shah*, 906 P.2d 642, 653 (Kan. 1995) (same).

n44 See, e.g., Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 9 (1984).

In many ways, contemporary federal litigation is analogous to the dance marathon contests of yesteryear. The object of the exercise is to select a partner from across the 'v,' get out on the dance floor, hang on to one's client, and then drift aimlessly and endlessly to the litigation music for as long as possible, hoping that everyone else will collapse from exhaustion.

Id.

n45 *Judicial Caseload Profile Report*, at <http://www.uscourts.gov/cgi-bin/cmsd2001.pl> (providing median times from filing to trial for civil cases). Even for those cases that do not reach trial, the median turnaround time from filing to disposition in civil cases during this period was 8.7 months. *Id.*

n46 *Id.* Median turnaround time from filing to disposition for civil cases during this period was 8.2 months.

n47 *Id.*

n48 News Release, *Retrospective Shows Federal Caseload Increasing*, Administrative Office of the United States Courts (Dec. 9, 1998), available at http://www.uscourts.gov/Press_Releases/5yr.htm (internal quotation marks omitted).

n49 See *supra* notes 26-29 and accompanying text.

n50 The consumer advocacy organization Public Citizen presented a report purporting to show that arbitration is more costly than litigation. See Public Citizen, *The Costs of Arbitration*, Public Citizen Congress Watch, Apr. 2002, at <http://www.citizen.org/documents/ACF110A.pdf>. Public Citizen's report fails to consider, however, the costs of legal representation in its analysis--costs that are often substantial. In criticizing Public Citizen's report, Professor Stephen J. Ware explains:

The most glaring half-truth from Public Citizen is that courts charge lower fees than arbitration organizations. That, of course, is because courts are subsidized by taxpayers while arbitration is not. The most important point, however, is that fees charged by courts and arbitration organizations are only a tiny part of the total cost that a claimant faces. Any honest comparison of arbitration and litigation must include the cost of legal fees, discovery and delay. Those costs are generally lower in arbitration, and Public Citizen offers no persuasive evidence to the contrary.

News Release, Cato Institute, *Public Citizen Arbitration Study Contains Errors, Half-Truths and Exaggerations*, *Scholar Says*, May 3, 2002 (quoting Prof. Stephen J. Ware), available at <http://www.cato.org/new/05-02/05-03-02r-2.html>; accord Samuel Estreicher & Matt Ballard, *Affordable Justice Through Arbitration: A Critique of Public Citizen's Jeremiad on the "Costs of Arbitration"*, DISP. RESOL. J., at 8-14 (Nov. 2002 - Jan. 2003); *Defenders and Proponents Square Off on New Report* 20 ALTERNATIVES TO HIGH COST LITIG. 91, 105 (May 2002) ("The problem with the Public Citizen report is that it implies that the total cost of arbitration is higher than the cost of going to court. That implication isn't true--and the report doesn't support it." (quoting Lewis L. Maltby)).

n51 See, e.g., Chanen, *supra* note 40, at 18; Maltby, *supra* note 10, at 57.

n52 See, e.g., HENSLER ET AL., EXECUTIVE SUMMARY, *supra* note 42, at 5.

n53 *FED. R. CIV. P. 23(a)*; *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 613 (1997). Class actions brought under Rule 23(b)(3) must satisfy the additional requirements of predominance of common issues and superiority of class treatment. See *FED. R. CIV. P. 23(b)(3)*; *Amchem Prods. Inc.*, 521 U.S. at 614-15. The burden of establishing these requirements rests on the party seeking certification. See, e.g., *Sikes v. Teledyne, Inc.*, 281 F.3d 1350, 1359 (11th Cir. 2002); *Stirman v. Exxon Corp.*, 280 F.3d 554, 562 (5th Cir. 2002); *Lienhart v. Dryvit Systems, Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).

n54 Professor Carrington appears to acknowledge the importance to litigants of the ability to control the resolution of one's own dispute: "It is of course in the interest of any litigant to control the resolution of all these features of conventional American civil procedure." Carrington, *supra* note 1, at 362.

n55 Indeed, in some cases the resolution of class action litigation enriches the plaintiffs' lawyers while class members receive only a coupon. See, e.g., Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991 (2002) (demonstrating that

coupons issued in coupon-based settlements are increasingly being structured to resemble promotional coupons, "making the settlement worthless to many (and sometimes most) class members"); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 *DePAUL L. REV.* 315, 327 (2001) ("In a number of consumer fraud class actions, the lawyers negotiated deals, which some courts approved, in which class members received coupons of little real economic value, and the plaintiffs' lawyers received millions of dollars calculated based on the purely nominal value of the coupons."); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 *WM. & MARY L. REV.* 1, 34 (2000) ("The 'coupon' class actions have become symbolic of this concern, with class members receiving a few coupons toward the purchase of a new car, airline ticket, or dog food, while class attorneys reap large fees.").

n56 DEBORAH R. HENSLEY ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 445 (2000).

n57 HENSLEY ET AL., EXECUTIVE SUMMARY, *supra* note 42, at 21 (reporting that in three of the ten cases studied, class counsel received more than the total amount received by the class).

n58 Indeed, the FAA explicitly makes pre-dispute agreements enforceable. 9 U.S.C. § 2 (2000); *infra* Introduction.

n59 Carrington, *supra* note 1, at 363 n.1 ("As late as 1924, both the National Conference of Commissioners on Uniform State Laws and the American Bar Association took positions firmly in opposition to what was perceived by some to be an idiosyncrasy of New York law, *i.e.*, the enforcement of arbitration clauses contained in printed contracts.") Professor Carrington further supports his argument against the enforceability of pre-dispute arbitration agreements by arguing that most form contracts "are not really contracts in the moral and classical legal sense of that term." *Id.* at 365. One of the authorities he cites to support this assertion is section 211, comment b of the *Restatement (Second) of Contracts*, which he quotes to support the proposition that parties who use standard form agreements do not ordinarily expect customers to understand or read the terms of those contracts. *Id.* at 365 n.5. This same comment, however, states that—even in the context of a form contract—parties who do not read the standard terms "understand that they are assenting to terms not read or not understood, subject to such limitations as the law may impose." *RESTATEMENT (SECOND) OF CONTRACTS* § 211 cmt.b (1981).

n60 See, e.g., Carrington, *supra* note 1 at 363 (citing *Parsons v. Ambros*, 48 S.E. 696 (Ga. 1904); *Cocalis v. Nazlides*, 139 N.E. 95 (Ill. 1923)).

n61 Compare 9 U.S.C. § 2 (2000), with Act of Feb. 12, 1925, Pub. L. No. 68-401, 43 Stat. 883, See also Pub. L. 80-282, 61 Stat. 670 (codifying Title 9 of the U.S. Code).

n62 9 U.S.C. § 2 (2000). Section 2 provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. (emphasis added).

n63 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); accord *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 762 (2002) (stating that FAA Sections 3 and 4 also evidence the liberal federal policy in favor of arbitration); see also *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 591 (2002) (noting that the Supreme Court has "long recognized and enforced a liberal federal policy favoring arbitration agreements" (internal quotation marks omitted)).

n64 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) (citation omitted).

n65 *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985).

n66 Carrington, *supra* note 1, at 363; see also Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001).

n67 *Syndor v. Conesco Fin. Servs. Corp.*, 252 F.3d 302, 307 (4th Cir. 2001) (quoting *Pierson v. Dean, Witter, Reynolds, Inc.*, 712 F.2d 334, 339 (7th Cir. 1984)); see also *Stout v. Byrider*, 228 F.3d 709 (6th Cir. 2000).

n68 See *supra* note 62 and accompanying text.

n69 628 So. 2d 354 (Ala. 1993).

n70 *Id.* at 354; see also ALA. CODE § 8-1-41(3) (1993).

n71 *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995).

n72 See, e.g., *Snowden v. CheckPoint Check Cashing*, 270 F.3d 631, 638-39 (4th Cir. 2002); *Pick v. Discover Fin. Servs.*, 2001 WL 1180278, at *5 (D. Del. Sept. 28, 2001) ("It is generally accepted that arbitration clauses are not unconscionable because they preclude class actions."); *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 578-79 (W.D.N.C. 2000); *Zawikowski v. Beneficial Nat'l Bank*, 1999 WL 35304, at *2 (N.D. Ill. Jan. 11, 1999); *Edelist v. MBNA America Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001).

n73 See, e.g., *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374-75 (3d Cir. 2000), cert. denied 531 U.S. 1145 (2001); *McIntyre v. Household Bank*, 216 F. Supp. 2d 719, 724 (N.D. Ill. 2002); *Vigil v. Sears Nat'l Bank*, 2002 WL 987412, at *4-5 (E.D. La. May 10, 2002); *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1195 (S.D. Cal. 2001); *Hale v. First USA Bank, N.A.*, No. 00CIV5406JGK, 2001 WL 687371, at *6 (S.D.N.Y. June 19, 2001); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 922-23 (N.D. Tex. 2000); *Frerichs v. Credential Servs. Int'l*, 98 C 3684 (N.D. Ill. Sept. 30, 1999); *Howard v. Klynveld Peat Marwick Goerderier*, 977 F. Supp. 654, 665 n.7 (S.D.N.Y. 1997), *aff'd*, 173 F.3d 844 (2d Cir. 1999); *Doctor's Assocs., Inc. v. Hollingsworth*, 949 F. Supp. 77, 80-81 (D. Conn. 1996); *McCarthy v. Providential Corp.*, 1994 WL 387852, at *8-9 (N.D. Cal. July 19, 1994); *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9, 20 (Ala. 1998); *Stein v. Geonerco, Inc.*, 17 P.3d 1266, 1271 (Wash. App. 2001); see also *Caudle v. Am. Arbitration Ass'n*, 230 F.3d 920, 921 (7th Cir. 2000) (holding that the procedural device of a class action suit does not entitle a party to be in litigation and, thus, a party that has promised to arbitrate disagreements cannot avoid arbitration on the ground that he or she is pursuing class relief and the arbitrator does not conduct class-wide arbitrations).

n74 See, e.g., *Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720, 728-29 (8th Cir. 2001); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 275 (7th Cir. 1995); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1108-09 (C.D. Cal. 2002); *Gray v. Conesco, Inc.*, No. SACV000322DOCEEX, 2001 WL 1081347, at *3 (C.D.

Cal. Sept. 6, 2001); *McCarthy*, 1994 WL 387852, at *8-9; *Gammara v. Thorp Consumer Disc. Co.*, 828 F. Supp. 673, 674 (D. Minn. 1993).

In a closely analogous context, the majority of federal appellate courts have held that the FAA prevents courts from consolidating the claims of even two parties in arbitration when the agreement is silent on the issue. See *Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada*, 210 F.3d 771, 774 (7th Cir. 2000); *Gov't of U.K. of Gr. Brit. v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *Am. Centennial Ins. Co. v. Nat'l Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991); *Baessler v. Cont'l Grain Co.*, 900 F.2d 1193, 1194-95 (8th Cir. 1990); *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 149-50 (5th Cir. 1987); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984).

n75 Although a small number of courts have held that preclusion of class-wide dispute resolution contributed to a finding that an arbitration provision was unconscionable on balance, other aspects of those arbitration provisions contributed to the courts' findings of unconscionability. See *Ting v. AT&T*, 182 F. Supp. 2d 902, 930-35 (N.D. Cal. 2002) (holding that arbitration provision was unconscionable because it limited AT&T's liability, shortened the limitations period, required confidentiality, and imposed excessive costs in addition to precluding class-wide dispute resolution), *appeal filed* No. 02-15416 (9th Cir. 2002); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087, 1104-05 (W.D. Mich. 2000) (holding that arbitration provision was unconscionable because it precluded injunctive and declaratory relief in addition to precluding class-wide dispute resolution); *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100-01 (Cal. App. 2002) (same); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 277-81 (W. Va. 2002) (holding that arbitration provision was unconscionable because it limited damages in addition to precluding class-wide dispute resolution); *Powertel, Inc. v. Bexley*, 743 So.2d 570, 574-77 (Fla. Dist. Ct. App. 1999) (same). Because other aspects of the arbitration provisions contributed to the courts' findings of unconscionability, it is unclear whether each court would have reached the same conclusion considering only a preclusion of class-wide dispute resolution. See, e.g., *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1076-77 (C.D. Cal. 2002) (enforcing arbitration clause that precluded class actions, and distinguishing *Szetela* because the *Szetela* court also based its holding on the preclusion of injunctive and declaratory relief); *Bischoff v. DirecTV Inc.*, 180 F. Supp. 2d 1097, 1108 (C.D. Cal. 2002) (enforcing arbitration provision that effectively precluded class actions, and distinguishing *Powertel* because "this Court is not convinced that the *Powertel* court would have made the finding of unconscionability on the class action prohibition alone"). At the time of this writing, California is the only jurisdiction of which we are aware that has found an arbitration provision unconscionable based solely on a preclusion of class treatment of claims. See *Mandel v. Household Bank (Nevada), N.A.*, 129 Cal. Rptr. 2d 380 (Cal. App.) (relying on *Szetela*), *review granted*, 132 Cal. Rptr. 2d 525 (Cal. 2003). California courts, however, are split on the issue. See *Discover Bank v. Superior Court*, No. B161305, 2003 WL 116143, at *8-*12 & n.12 (Cal. App. Jan. 14, 2003) (*Boehr*) (rejecting both *Szetela* and *Mandel* as wrongly decided and holding that the FAA preempts both legislative and judicial law limiting the enforceability of class action waivers in arbitration agreements), *review granted*, 132 Cal. Rptr. 2d 526 (Cal. 2003). The California Supreme Court has granted review of both *Mandel* and *Boehr*.

The reliability of some of these decisions is also in doubt. For example, "*Lozada* is no longer reliable law, as it based its holding largely on a case which was subsequently reversed by the Third Circuit." *Bischoff*, 180 F. Supp. 2d at 1108 (citing *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000)). Additionally, the *Szetela* court fails to cite any authority to support its finding of unconscionability, or to explain why it was shocked at a practice that has been endorsed by courts nationwide. See *Szetela*, 97 Cal. App. 4th at 1099-102. The *Szetela* court also fails to cite California precedent supporting the validity and enforceability of arbitration agreements that expressly preclude class-wide dispute resolution. See *id.* For example, in *Blue Cross of Cal. v. Superior Ct. of L.A. County*, 67 Cal. App. 4th 42 (Cal. App. 1998), the court held that class arbitration is available only "in the absence of an express agreement not to proceed to arbitration on a class-wide dispute resolution would be permissible and certainly not shocking.

n76 *Mitsubishi Motors v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

n77 *Id.* at 628.

n78 See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (enforcing the ADEA); *Snowden v. CheckPoint Check Cashing*, 390 F.3d 631, 638-39 (4th Cir. 2002), (enforcing TILA and RICO); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Horenstein v. Mortgage Mkt., Inc.*, 2001 WL 502010, at *1 (9th Cir. May 10, 2001) (enforcing the Fair Labor Standards Act); *Johnson v. West Suburban Bank*, 225 F.3d 366, 378-79 (3d Cir. 2000) (enforcing TILA and Electronic Fund Transfer Act).

n79 See *Snowden*, 290 F.3d at 638-39; *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000); *McIntyre*, 216 F. Supp. 2d at 724; *Hale*, 2001 WL 687371, at *7; *Gray v. Conesco, Inc.* 2000 WL 1480273, at *6 (C.D. Cal., Sept. 29, 2000); *Marsh*, 103 F. Supp. 2d at 922-24; *Brown v. Sur. Fin. Servs., Inc.*, 2000 WL 528631, at *2-4 (N.D. Ill. Mar. 24, 2000); *Thompson v. Ill. Title Loans, Inc.*, 2000 WL 45493, at *3-4 (N.D. Ill. Jan. 11, 2000); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627, 631-32 (D. Del. 1999); *Lopez v. Plaza Fin. Co.*, 1996 WL 210073, at *2-3 (N.D. Ill. Apr. 25, 1996); *Gammara*, 828 F. Supp. at 674; *Meyers v. Univest Home Loan, Inc.*, 1993 WL 307747, at *4-*5 (N.D. Cal. Aug. 4, 1993).

n80 225 F.3d 366 (3d Cir. 2000).

n81 *Id.* at 374.

n82 *Id.*

n83 *Id.*

n84 *Id.* at 374-75.

n85 244 F.3d 814 (11th Cir. 2001).

n86 *Id.* at 818.

n87 *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999), *rev'd in part, aff'd in part*, 531 U.S. 79 (2000).

n88 *Randolph*, 244 F.3d at 818.

n89 *Id.*

n90 *Id.*

n91 290 F.3d 631 (4th Cir. 2002).

n92 *Id.* at 639.

n93 *Id.* at 638.

n94 *Id.*

n95 *Id.* at 639.

n96 Carrington, *supra* note 1, at 362.

n97 173 F.3d 933 (4th Cir. 1999).

n98 *Id.* at 935.

n99 *Id.* at 938.

n100 *Id.* at 938-39.

n101 *Id.*

n102 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991).

n103 9 U.S.C. § 10 (2000).

n104 See, e.g., *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (noting that wise corporate entities "should see no benefit in currying the favor of corrupt arbitrators, because this will simply invite increased judicial review of arbitral judgments").

n105 See Drahozal, *supra* note 8, at 769-70 ("Arbitration institutions have a strong incentive to enhance the fairness of the process in order to assure that their arbitration awards will be enforceable."); Eric A. Posner, *Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi*, 39 VA. J. INT'L L. 647, 663-65 (arguing that arbitrators "care about whether courts enforce their awards or not").

n106 *Cole*, 105 F.3d at 1485.

n107 See, e.g., *Roe v. Gray*, 165 F. Supp. 2d 1164, 1167 (D. Colo. 2001) (discussing arbitration agreement permitting claimant to select administrator from three specified administrators); *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278, at *2 (D. Del. Sept. 28, 2001) (noting choice of two designated administrators). An arbitration administrator, such as AAA or NAF, is an organization that provides parties with neutral arbitrators.

n108 Drahozal, *supra* note 8, at 769; see also *id.* ("As often happens, the threat of government regulation can spur the industry to self-regulate in an attempt to head off restrictive legislation.").

n109 Carrington, *supra* note 1, at 362

n110 See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 895 (9th Cir. 2002) (finding that an arbitration agreement was unconscionable in part because it limited the remedies available).

n111 See, e.g., *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002) (holding that TILA rights may be effectively vindicated through arbitration because attorneys' fees are available through arbitration); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001) (awarding statutory damages and attorneys' fees); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) (same).

n112 See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (discussing arbitrator's power to fashion equitable relief); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 939 (10th Cir. 2001) (noting that arbitrators may have broad equity powers).

n113 See, e.g., *GATX Mgmt. Servs., LLC v. Weakland*, 171 F. Supp. 2d 1159, 1167 (D. Colo. 2001) (holding that a motion for preliminary injunction was arbitrable).

n114 See, e.g., *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 864 (Pa. Super. 1991).

n115 9 U.S.C. § 2 (2000).

n116 See, e.g., *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

n117 In fact, courts are not only able to invalidate provisions they consider unconscionable, but some courts have extended the doctrine of unconscionability to impose special requirements on arbitration agreements--in direct contravention of the FAA. The FAA explicitly limits judicial review of arbitration provisions to grounds on which "any contract" may be revoked. 9 U.S.C. § 2 (2000). The Supreme Court has made clear that this language precludes state legislatures from imposing special standards on arbitration provisions. See *Doctor's Assocs., Inc.*, 517 U.S. at 688 (holding Montana's limitation provisions aimed specifically and solely at arbitration provisions in conflict with and thus preempted by the FAA); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (stating that the FAA "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements." (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984))). The same language precludes courts from inventing standards for arbitration agreements that could not be applied to "any contract." See *Doctor's Assocs., Inc.*, 517 U.S. at 687 ("Courts may not, however, invalidate arbitration agreements under state laws applicable only to arbitration provisions." (emphasis in original)); *id.* (holding that "generally applicable contract defenses" may be applied to arbitration agreements without contravening section 2 of the FAA (emphasis added)); *Perry*, 482 U.S. at 492 n.9 (asserting that only state law that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally" may be applied to arbitration agreements under section 2 (emphasis added)). Notwithstanding this prohibition, some courts recently have invented such standards while purporting to apply the doctrine of unconscionability. See, e.g., *supra* note 75 and cases cited therein. For example, a California court recently ruled that an arbitration provision was unconscionable, in part, because it expressly precluded the class-wide resolution of disputes. See *Szetela v. Discover Bank*, 97 Cal. App. 4th 1094, 1100-01 (Cal. App. 2002). *Contra Discover Bank v. Superior Court*, No. B161305, 2003 WL 116143, at *8-*12 (Cal. App. Jan. 14, 2003) (*Boehr*) (rejecting *Szetela* as wrongly decided and holding that the FAA preempts judicial law and finds express preclusion of class treatment of claims to be unconscionable and unenforceable), *review granted*, 132 Cal. Rptr. 2d 526 (Cal. 2003). See also, *supra*, note 75. However, the California Court of Appeals has already held that class-wide arbitration is available in the absence of a provision expressly precluding it. See *Blue Cross of Cal. v. Superior Ct. of L.A. County*, 67 Cal. App. 4th 42 (Cal. App. 1998). Because class-wide arbitration is available in California unless expressly precluded, and because *Szetela* holds that the express preclusion of class-wide arbitration is unconscionable, *Szetela* and *Blue Cross*, read together, create a requirement under California law that all arbitration agreements provide for class-wide arbitration. However, California does not require contracts without arbitration provisions to provide for class-wide arbitration. Thus, *Szetela*--in the guise of unconscionability analysis--has produced new substantive law that applies only to arbitration agreements. There is no reason why a court should be able to accomplish such an end when a state legislature cannot. See *Boehr*, 2003 WL 116143, at *11 (holding that "state law, whether of legislative or judicial origin," is preempted by the FAA if it did not arise "to govern issues concerning the validity, revocability, and enforceability of contracts generally" (emphasis added)). It appears that the Supreme Court will be required to make such a ruling to prevent courts from refusing to uphold arbitration agreements on grounds other than those that "exist at law or in equity for the revocation of any contract." See 9 U.S.C. § 2 (2000). Indeed, the Supreme Court has recently granted certiorari to review the South Carolina Supreme Court's decision in *Bazzle v. Green Tree Financial Corp.*, in which the South Carolina court held that class arbitration is available when the parties' agreement is silent on the issue. See 569 S.E.2d 349 (S.C. 2002), *cert. granted sub nom. Green Tree Fin. Corp. v. Bazzle*, 71 U.S.L.W. 3320 (U.S. Jan. 10, 2003) (No. 02-634). In reviewing *Bazzle*, the United States Supreme Court, direct-

ly or indirectly, may address the issue of courts using unconscionability as a guise to impose limitations on arbitration agreements, such as prohibiting parties from agreeing expressly to arbitrate their claims on an individual basis.

n118 Carrington, *supra* note 1, at 374-75 (citing *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931 (9th Cir. 2001); *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002)).

n119 See *supra* notes 103-106 and accompanying text.

n120 See *supra* Part II. C.

n121 Compare Carrington, *supra* note 1, at 374-78, with Parts II.A-E *supra*.

n122 D.C. RULES OF PROF. CONDUCT, R. 1.3(a).

n123 *Id.* R. 1.3(b)(1).

n124 See, e.g., IOWA CODE OF PROF. RESP. DR 7-101; MASS. RULE OF PROF. CONDUCT 1.2; NEB. CODE OF PROF. RESP. DR 7-101; OR. CODE OF PROF. RESP. DR 7-101; TENN. CODE OF PROF. RESP. DR 7-101.

n125 Carrington, *supra* note 1, at 370.

n126 *Id.* at 370 n.26 (citing Paul D. Carrington, *Self-Deregulation: A National Policy of the Supreme Court*, 2 NEV. L. REV. (Forthcoming 2002)).

n127 See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1255 (2002) (noting that the settlement pressure created by class certification makes the class action device "attractive to plaintiffs with frivolous and weak claims").

n128 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); see also *Newton v. Merrill Lynch*, 259 F.3d 154, 164 (3d Cir. 2001) (noting that "class certification places inordinate or hydraulic pressure on defendants to settle"); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (noting that class certification may require defendants to "stake their companies on [the] outcome of a single jury trial"); Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator? Banks Can Use Arbitration Clause as a Defense*, BUS. L. TODAY, May-June 1998, at 24.

All of the dangers inherent in an individual consumer lawsuit--the threats of costly and drawn-out litigation, runaway juries, gargantuan punitive damages awards and adverse publicity--are magnified exponentially when a class of hundreds or thousands of consumers is certified. Faced with these threats, companies often feel pressured to pay substantial amounts in settlement for reasons having nothing to do with the actual merits of the dispute.

Id.; see also Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499 (1991)

[A] significant and identifiable class of settlements is in reality neither voluntary nor accurate. These settlements are not voluntary in that trial is not regarded by the parties as a practically

19 Ga. St. U.L. Rev. 761, *

available alternative for resolving the dispute, and they are not accurate in that the strength of the case on the merits has little or nothing to do with determining the amount of the settlement.

Id.

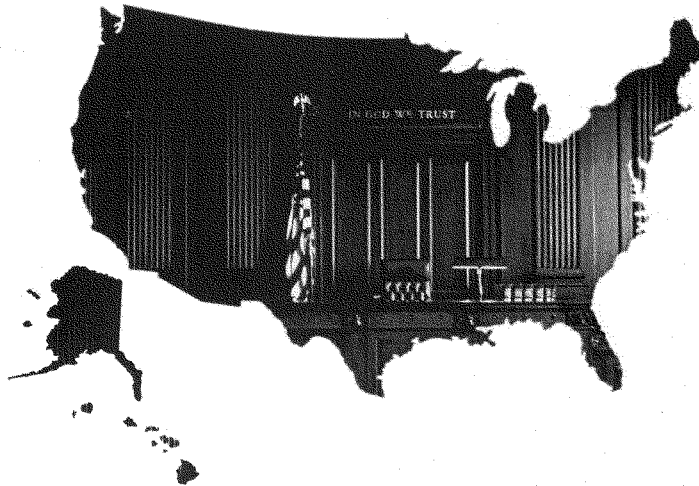
n129 *See supra* notes 122-124 and accompanying text.



State Court Enforcement of Arbitration Agreements

By John M. Townsend

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**STATE COURT ENFORCEMENT OF ARBITRATION AGREEMENTS: A REPORT TO
THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM**

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INTRODUCTION

Congress passed the Federal Arbitration Act (FAA) in 1925 to overcome judicial hostility to arbitration agreements.¹ Broadly speaking, if a contract dealing with interstate commerce contains an agreement to arbitrate, the FAA requires that the arbitration agreement be enforced, unless generally applicable contract principles render the agreement unenforceable.² The FAA thus forbids courts called upon to enforce agreements to arbitrate from imposing special burdens on arbitration agreements, but permits courts to hold those agreements to the same standards that all contracts must meet.

In 1984, the Supreme Court held that the FAA's mandates apply not only to federal courts, but also to state courts.³ The reaction of state courts varied, but many clung to their traditional hostility towards arbitration. The stiff resistance to application of the FAA in state courts came to a head in 1994, when the attorneys general of twenty states filed amicus briefs asking the Supreme Court to overturn its 1984 decision and to permit the states to enforce state anti-arbitration statutes.⁴ The Supreme Court declined to do so, and took the opportunity to spell out the obligations of the states with regard to arbitration clauses:

"States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit) but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress's intent."⁵

¹ The Federal Arbitration Act was intended to "reverse centuries of judicial hostility to arbitration agreements." *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). It is codified at 9 U.S.C. § 1 et seq.

² 9 U.S.C. §2.

³ *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

⁴ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995).

⁵ *Id.* at 281 (citations omitted).

As the Supreme Court put it the following year, state rules that “undermine the goals and policies of the FAA” are preempted by that statute.⁶

PURPOSE AND FINDINGS OF THIS STUDY

The U.S. Chamber’s Institute for Legal Reform commissioned this study to inquire whether the mandate of the FAA and the Supreme Court decisions implementing it have now been fully accepted by the state courts. The good news is that, for the most part and in most states, courts have understood the message, and overt judicial hostility to arbitration has generally been overcome. We identified only two states—Alabama and California—in which the sheer number of decisions refusing enforcement might reasonably be thought to have been influenced by a lingering hostility to arbitration, and even in those states, resistance is far more circumspect than it was twenty years ago. Thus, while courts in those states appear somewhat readier to find reasons not to enforce arbitration agreements than courts in other states, they express themselves in terms of disapproval of particular features of arbitration agreements rather than in terms of hostility to arbitration itself. Indeed, the types of clauses that tend to arouse judicial hostility in Alabama and California are often met with suspicion by the courts of other states.

Broadly stated, the types of arbitration agreements most likely to encounter resistance from state courts are those that arise in the context of a perceived imbalance of bargaining power and that contain terms that appear to take advantage of that imbalance to achieve a procedural or substantive advantage. Arbitration clauses have become common in consumer and employee agreements in recent years, and these are contexts in which courts most readily perceive disparities in bargaining power. In such contexts, where the distinction between the stronger and the weaker party is clearest, the drafters of some arbitration clauses have included provisions that require the weaker parties not simply to arbitrate, but to arbitrate on unfavorable terms. It is this type of arbitration agreement that has, understandably, met with the greatest resistance from state courts.

Many of the arbitration clauses deemed unenforceable by state courts can only be described as overreaching. The benefits of arbitration may thus be lost or jeopardized if a party in a position to dictate the terms of a contract succumbs to the temptation to use the arbitration clause as an opportunity to tilt the scales in that party’s favor. That temptation can manifest itself in terms that favor the stronger party procedurally—such as allowing the stronger party to select the arbitrator or the rules unilaterally, imposing high costs on a party wishing to initiate arbitration, or forcing one party to arbitrate while giving the other party the option of a judicial forum. Or the contract may seek to favor the stronger party substantively—for example, by

⁶ *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (“Montana’s § 27-5-114(4) directly conflicts with § 2 of the FAA because the State’s law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally.”).

limiting the remedies available to the weaker party.⁷ While some courts have attempted to correct one-sided clauses by simply removing the offending provision, others have refused to enforce arbitration clauses containing such provisions in their entirety. In either case, such decisions often appear to be motivated more by resistance to the perceived unfairness of the terms than by an underlying hostility to arbitration.

The balance of this report focuses on some of the contexts in which state courts—sometimes even in states otherwise friendly to arbitration—have been most inclined to scrutinize arbitration agreements closely.⁸ These pockets of resistance are the areas of: consumer disputes, homeowner disputes, employment disputes, health care disputes, and class actions. The lesson throughout is that those wishing to enjoy the benefits of arbitration in any of these contexts should be careful to craft arbitration agreements that avoid the types of terms that state courts have perceived as overreaching and unenforceable. Precisely what terms may be perceived as problematic will vary with context and by state, as discussed below.

THE POCKETS OF RESISTANCE TO ARBITRATION

The Supreme Court has made it clear that the FAA requires state courts to hold arbitration agreements to no more restrictive a standard than that to which they hold other contract provisions. On the one hand, the clarity of this rule has largely eliminated overt hostility to arbitration as a basis upon which state courts invalidate arbitration agreements. On the other hand, state courts inclined to resist presumptive enforcement of arbitration agreements may still employ a familiar arsenal of state contract law doctrines to mount such resistance.⁹ The weapon upon which state courts draw most often in invalidating arbitration agreements is the contract-law doctrine of unconscionability.

Different states have developed differing standards for determining when a contract or term will be deemed unconscionable and, therefore, unenforceable. In articulating the majority approach, the Restatement sets forth a flexible, context-sensitive standard that treats each of two factors—inequality of bargaining power and terms unreasonably favoring one party—as probative, but not dispositive, of unconscionability.¹⁰ Many states characterize these two factors as, respectively, procedural unconscionability and substantive unconscionability, and weigh their

⁷ An egregious example of a party's exploiting an imbalance to gain procedural and substantive advantages is described in *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999).

⁸ The information on which this paper is based was obtained by searching legal databases for state court decisions published between 2000 and mid-2006 discussing the enforcement of arbitration agreements. Generally, only decisions of the highest court in the state and some intermediate appellate decisions are published, so trial court decisions that were not appealed would often not have been examined.

⁹ See *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) ("generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements").

¹⁰ Restatement (Second) of Contracts § 208, cmt. d; see also U.C.C. § 2-302.

significance on a sliding scale—the more procedurally oppressive a contract, the less substantive oppression must be shown to support a finding of unconscionability, and vice versa.¹¹

When state courts measure arbitration agreements against this sliding scale of procedural and substantive unconscionability, certain classes or contexts of arbitration agreements face heightened scrutiny. In particular, because arbitration agreements in the consumer, homeowner, employment, and health care areas may be more likely to arise out of a context of unequal bargaining power (so-called procedural unconscionability), some state courts have shown a propensity to look closely at those agreements for terms that appear unreasonably favorable to one side (so-called substantive unconscionability). In these contexts, arbitration clauses containing elements such as limitations on statutory remedies, provisions for shifting costs to the weaker party, or requirements applicable to only one of the parties run the risk of being deemed unenforceable. In addition, courts that place particularly high value on the class action mechanism tend to resist enforcement of arbitration clauses that waive resort to that procedure.

Ultimately, the pattern of recent state court refusals to enforce arbitration agreements suggests a straightforward approach for businesses seeking to craft enforceable agreements to arbitrate. When drafting an agreement governing a relationship that courts may view as giving rise to a disparity in bargaining power, businesses should avoid any temptation to use the arbitration clause as a vehicle for creating substantive or procedural imbalances that could be perceived as unfair. The American Arbitration Association (AAA) has issued “due process protocols” that provide guidelines for fairness in the areas in which courts are most likely to scrutinize agreements to arbitrate.¹² Drafting arbitration clauses to conform to the AAA’s due process protocols is probably the most effective precaution that can be taken to shield arbitration agreements from state court hostility and thereby to preserve the benefits of resolving disputes in an arbitral forum.

Consumer Disputes

Consumer agreements often typify adhesion contracts, as they are usually offered on a “take it or leave it” basis, with little or no room for negotiation between the parties. Although such contracts are not per se unconscionable, the fact that they almost necessarily entail some degree of what is characterized as “procedural unconscionability” means that consumer agreements containing one-sided terms may be vulnerable. Arbitration clauses in consumer agreements will often face scrutiny for substantive bias. Courts may refuse to enforce arbitration clauses that reflect a purpose and effect beyond simply mandating that consumer disputes be resolved through arbitration, and that instead appear to stack the deck against the consumer.

¹¹ See, e.g., *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 2006 WL 2273448, at *6 (N.J. Aug. 9, 2006); *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 24 Cal. 4th 83, 113 (2000); *Cheshire Mortg. Serv., Inc. v. Montes*, 612 A.2d 1130, 1135 (Conn. 1992).

¹² *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship, Consumer Due Process Protocol, and Health Care Due Process Protocol*, available at <http://www.adr.org/Protocols>.

Recent decisions reflect the reluctance of state courts to enforce arbitration agreements that shift or increase the burden of pursuing arbitration to the consumer, attempt to limit available remedies under the contract, or make arbitration mandatory for only the consumer.

a. Cost Shifting Provisions

Several recent decisions reflect reluctance by courts to enforce consumer arbitration agreements that have the effect of deterring aggrieved consumers from pursuing claims. Courts have found such deterrent effects in a number of arbitration clauses that provide for shifting the costs of arbitration or increasing the financial burden of pursuing a claim in arbitration to the consumer-plaintiff. Finding support in the Supreme Court's consideration (albeit inconclusive) of a "prohibitive costs" defense, several state courts have declared unconscionable or otherwise unenforceable arbitration clauses that create cost barriers to consumer claims.¹³ Decisions from Pennsylvania and Washington illustrate the context-sensitive analysis applied by courts refusing enforcement of cost-shifting arbitration agreements.

In *McNulty v. H&R Block*,¹⁴ a Pennsylvania Superior Court affirmed a lower court's refusal to enforce arbitration agreements against customers of H&R Block who sought to recover fees paid (\$34 or \$37) for electronic filing of their tax returns. In addition to affirming the lower court's determination that the agreements did not govern the dispute, the Superior Court noted that the unconscionability of the arbitration agreements provided alternative grounds for affirming. The arbitration agreements required a party wishing to make a claim to pay a filing fee of \$50 as well as any costs exceeding \$1,500. The court acknowledged that these terms did not, on their face, unreasonably favor either party. However, considered in the context of the relief sought by the claims at issue (less than \$40), the court concluded that cost-shifting provisions effectively precluded the individual presentation of claims.¹⁵ Accordingly, the court concluded that the arbitration agreements could not be enforced.¹⁶

The decision by a Washington appellate court in *Medez v. Palm Harbor Homes, Inc.*¹⁷ demonstrates that provisions that have the effect of shifting costs may be subject to scrutiny even when the shifting of costs is neither explicit nor for a fixed amount. In *Medez*, the retail installment contract signed in connection with a consumer's purchase of a mobile home provided for arbitration by a three-member panel appointed by the American Arbitration Association (AAA).¹⁸ Although the agreement did not specify how costs would be allocated, the consumer-

¹³ See *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 121 (2000).

¹⁴ 843 A.2d 1267 (Pa. Super. Ct. 2004).

¹⁵ *Id.* at 1273.

¹⁶ *Id.*

¹⁷ 45 P.3d 594 (Wash. Ct. App. 2002).

¹⁸ *Id.* at 598.

plaintiff submitted an affidavit to the court that the AAA would require him to pay a \$2,000 filing fee to initiate arbitration by a three-arbitrator panel. Taking into account other costs associated with commencing arbitration, the court found that the consumer-plaintiff “would have been required to spend up front well over \$2,000 to try to vindicate his rights under a contract to buy a \$12,000 item in order to resolve a potential \$1,500 dispute.”¹⁹ While recognizing the laudable goals served by arbitration, the court refused to enforce the arbitration agreement based on the reasoning that “avoiding the public court system in a way that effectively denies citizens access to resolving everyday societal disputes is unconscionable.”²⁰

Together, *McNulty* and *Medez* demonstrate the willingness of some state courts to scrutinize and decline enforcement of consumer arbitration agreements that shift costs of access to arbitration to the consumer. Such scrutiny may arise even when the costs allocated to the consumer are facially negligible or when the costs are not explicitly defined by the agreement.

b. Provisions Limiting Remedies

Just as financial barriers to consumer commencement of arbitration are greeted with suspicion by some state courts, barriers to consumers’ full recovery in arbitration are also likely to elicit scrutiny. Generally the provisions that run afoul of state unconscionability law impose limitations on the relief an arbitrator may award or seek to waive particular remedies available in litigation or under a statute. Recent decisions in Alabama and Ohio exemplify the sometimes aggressive analysis applied by state courts that start from the premise that it is unconscionable to require a weaker party to forgo substantive remedies and conclude that any limits on remedies render an arbitration clause unenforceable.

In *American General Finance*, the Alabama Supreme Court reviewed an arbitration clause in a loan agreement that expressly limited the arbitrator’s ability to award punitive or other damages to five times “the economic loss suffered by the party.”²¹ The court determined that the provision not only limited the availability of punitive damages, but also limited the availability of all non-economic losses (*i.e.*, mental anguish) that would otherwise be recoverable in litigation.²² Finding the provision unconscionable because it “so grossly favored the lender,” the court stated, “[u]nder these contracts, the arbitrator cannot award the full panoply of relief available in state courts under Alabama law.”²³ The Alabama Supreme Court refused to enforce

¹⁹ *Id.* at 605.

²⁰ *Id.*

²¹ *Am. Gen. Finance v. Branch*, 793 So. 2d 738, 741 (Ala. 2000).

²² *Id.* at 749.

²³ *Id.* at 749 (internal quotation omitted).

the arbitration agreement and suggested that any agreement restricting the range of relief available to a consumer claimant would meet the same fate.²⁴

The decision of an Ohio appellate court to invalidate an arbitration provision in *O'Donoghue v. Smythe, Cramer Co.* suggests the confluence of the two issues of cost shifting and limitations on available relief.²⁵ The Ohio court assessed the validity of a provision in a home inspection contract limiting the inspector's liability to the cost of the inspection (\$256). Considering the costs of arbitration (filing fees and arbitrator fees), in addition to the requirement to pursue arbitration of all claims under the contract, the court determined that the contract was unconscionable.²⁶ Specifically, the court concluded that the limitation on remedies effectively denied the plaintiff any meaningful redress or incentive to pursue her claim, especially since the cost of filing for arbitration exceeded the amount recoverable.²⁷

These decisions illustrate the hostility that arbitration agreements that attempt to limit the substantive relief available to consumer claimants are likely to encounter. Agreements that simply specify an arbitral forum, without attempting to influence what can be recovered in an arbitration, should avoid such hostility.

c. Provisions Reserving Unilateral Control Over The Dispute-Resolution Process

State courts frequently exhibit hostility to arbitration agreements in the consumer context that assign unilateral control over the process to the corporate party, or which allow only that party access to the courts. The strong form of that hostility is exemplified by the pronouncement of a Pennsylvania court that reservation in a consumer arbitration agreement of one party's access to the courts creates a presumption of unconscionability.²⁸ Decisions from courts in California, Alabama, Wisconsin, and Tennessee illustrate varying degrees of hostility to arbitration agreements that provide for one-sided control of the dispute-resolution process.

A recent decision from the Wisconsin Supreme Court exemplifies the type of analysis that courts may apply to arbitration agreements that compel the consumer to arbitrate, but reserve to the other party the right of access to the courts. In *Wisconsin Auto Title Loans, Inc. v. Jones*, the court refused to compel arbitration under a loan agreement containing language reserving

²⁴ *Id.*

²⁵ *O'Donoghue v. Smythe, Cramer Co.*, No. 80453, 2002 Ohio App. LEXIS 3571, at *1 (Ohio Ct. App. July 3, 2002).

²⁶ *Id.* at *6-7.

²⁷ *Id.* at *6-7, *14-15.

²⁸ See *Lytle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 665 (Pa. Super. 2002). The *Lytle* court noted that some courts in other jurisdictions disagreed with this approach. *Id.* at 665 n.13.

access to a judicial forum for the defending loan company only.²⁹ Pursuant to the terms of the loan agreement, any claims or disputes arising between the borrower and lender were to be resolved by binding arbitration.³⁰ However, the agreement reserved to the lender the right to enforce the borrower's obligations under the contract through the judicial system.³¹ Evaluating the validity of the provision, the court stated, "[t]he doctrine of substantive unconscionability limits the extent to which a stronger party to a contract may impose arbitration on the weaker party without accepting the arbitration forum for itself."³² The court found that the clause excused the lender (the stronger party) from arbitrating claims against the borrower, reserving to itself "full access to the courts, free of arbitration," while requiring the borrower (the weaker party) to arbitrate any and all claims against the lender.³³ The court found this to render the clause unconscionable, because of the perceived benefit to the lender and disadvantage to the borrower.³⁴ Courts in California, Alabama, and Tennessee have similarly found such one-sided clauses unconscionable.³⁵

Another situation in which state courts have struck down provisions reserving one party's access to the courts is when the stronger party attempts to delineate specific causes of action subject to arbitration and those that are exempt. In *Armendariz v. Foundation Health Psychcare Services, Inc.*, a frequently cited decision by the Supreme Court of California, the court concluded, in the context of an employment agreement, that "[a]n agreement may be unfairly one-sided if it compels arbitration of the claims more likely to be brought by the weaker party but exempts from arbitration the types of claims that are most likely to be brought by the stronger party."³⁶ In *Flores v. Transamerica Homefirst, Inc.*, a California appellate court applied the principle stated in *Armendariz*.³⁷ The parties to a mortgage contract disputed the enforceability of the arbitration provision. The provision provided that all disputes arising from

²⁹ 714 N.W.2d 155 (Wis. 2006).

³⁰ *Id.* at 160-161.

³¹ *Id.* at 161.

³² *Id.* at 173.

³³ *Id.* at 172.

³⁴ *Id.* at 176.

³⁵ See *Taylor v. Butler*, 142 S.W.3d 277 (Tenn. 2004) (invalidating arbitration clause as unconscionable when the seller retained the choice to pursue a claim against the buyer through litigation, while the buyer was required to adhere to arbitration); *Rocha v. Central Valley RV Outlet, Inc.*, No. F046584, 2005 Cal. App. Unpub. LEXIS 11152 (Cal. Ct. App. Dec. 1, 2005) (similar grounds for finding clause unconscionable); *Am. Gen. Finance, Inc. v. Branch*, 793 So. 2d 738 (Ala. 2000) (finding unconscionable a provision exempting a lender from arbitration of claims against a borrower, but requiring the borrower to arbitrate all claims against the lender).

³⁶ 6 P.3d 669 (Cal. 2000).

³⁷ 93 Cal. App. 4th 846 (Cal. Ct. App. 2001).

the agreement were subject to arbitration *except* an action to foreclose on the property, and went on to reserve additional remedies to the lender.³⁸ The court stated that it was unconscionable for a party to “impose the arbitration forum on the weaker party without accepting that forum for itself.”³⁹ Further, the “unilateral obligation to arbitrate is so one-sided as to be substantively unconscionable.”⁴⁰

In addition to rejecting one-sided requirements to arbitrate, some state courts have expressed hostility to contract terms granting one side disproportionate control over the process once it begins. Unilateral arbitrator selection is one example of such a term. In *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, the Alabama Supreme Court refused to enforce a clause in a mobile home sales agreement that gave the seller the sole right to select an arbitrator to decide potential disputes under the agreement, as long as the arbitrator had not provided legal services for the seller at any previous time.⁴¹ Despite the seller's attempt to provide for an unbiased arbitrator, the Alabama Supreme Court found the clause unconscionable and severed it from the contract.⁴² The Court sent the dispute to arbitration, but before a court-appointed arbitrator.⁴³ Chief Justice Moore dissented in part, believing that the court should have refused to enforce the entire arbitration clause.⁴⁴

These decisions seem to arise primarily from judicial concern about perceived overreaching in dealings with consumers. Starting from the presumption that all consumer adhesion contracts are procedurally unconscionable, courts will hold terms of arbitration agreements to an exacting standard if they appear to be unduly restrictive of a consumer's ability to bring or recover on claims. When dealing with form contracts as to which consumers have little or no bargaining power, businesses wishing to secure the benefits of an arbitral forum for disputes should avoid the temptation to craft arbitration clauses that appear to tilt the process against the consumer.

³⁸ *Id.* at 849.

³⁹ *Id.* at 854 (quoting *Armendariz* at 118).

⁴⁰ *Id.* at 855.

⁴¹ 825 So. 2d 779 (Ala. 2002).

⁴² *Id.* at 785.

⁴³ *Id.* at 785.

⁴⁴ *Id.* at 786.

Homeowner Disputes

Homeowner contracts are perceived by the courts as closely akin to consumer contracts.⁴⁵ Courts recognize that contracts concerning home ownership—including home-building, home-purchase, and home-inspection contracts—often arise in situations of unequal bargaining power. Homeowner contracts are not, however, necessarily subject to the same presumptions of procedural unconscionability as are consumer product and service contracts; evaluation of arbitration clauses in homeowner agreements tends to involve more use of the sliding scale of bargaining power and fairness of terms. A number of state courts have nevertheless demonstrated a bias towards construing arbitration agreements in homeowner contracts narrowly, to avoid extending them to disputes not expressly contemplated by the terms of the agreements, and two states—California and New York—have enacted statutes that disfavor arbitration agreements in the homeowner context.

a. Unconscionability

The unconscionability analysis applied by state courts to arbitration agreements in the homeowner context largely mirrors their approach in the consumer context. In recent decisions, courts in several states have found provisions unenforceable because they unilaterally reserved access to the judicial system while requiring another party to arbitrate all claims under the contract,⁴⁶ or limited liability and recovery,⁴⁷ or permitted unilateral selection of the arbitrator,⁴⁸ or unreasonably shifted the costs of arbitration.⁴⁹ In addition, in applying the sliding-scale unconscionability analysis, courts may find inadequate notice of the terms of an arbitration agreement suggestive of procedural unconscionability, thereby reducing the showing of substantive unconscionability required to hold the agreement unenforceable.⁵⁰

⁴⁵ The AAA's *Consumer Due Process Protocol* extends to homeowner disputes. See <http://www.adr.org/sp.asp?id=22019>.

⁴⁶ See *Harlamert v. Fischer Attached Homes, Ltd.*, No. C-020462, 2003 Ohio App. LEXIS 641 (Ohio Ct. App. Feb. 14, 2004) (refusing to enforce an arbitration clause in a homebuilding contract when the builder reserved the right to file suit, but required the purchasers to arbitrate).

⁴⁷ See *O'Donoghue*, 2002 Ohio App. LEXIS 3571 (refusing to enforce arbitration clause limiting home inspector's liability to the cost of the contract); *Davidson v. Robinson Orchards, Inc.*, No. H-99-020, 2000 Ohio App. LEXIS 1624 (Ohio Ct. App. April 14, 2000) (refusing to enforce arbitration clause limiting arbitration award in home warranty agreement).

⁴⁸ See *State ex rel. Vincent v. Schneider*, 194 S.W.3d 853 (Mo. 2006) (severing provisions in home building contract permitting the president of the Home Builder's Association to select the arbitrator and shifting the fees to the weaker party due to unconscionability); *Burch v. Kosach*, 49 P.3d 647 (Nev. 2002) (finding home buyer's warranty unconscionable because it permitted the builder's insurer to select the arbitrator).

⁴⁹ See *Vincent*, 194 S.W.3d at 860.

⁵⁰ See *Burch*, 49 P.3d 647 (finding buyers did not have a meaningful opportunity to accept the terms of the home builder's warranty, including the arbitration provision).

In *Vincent*, the Missouri Supreme Court reviewed a contract between a homebuilder and purchasers that included an arbitration agreement permitting the president of the Home Builder's Association to select the arbitrator and requiring all costs of arbitration to be born by the purchasers.⁵¹ The court held the cost-shifting provision unenforceable because, "[i]t is unconscionable to have a provision in an arbitration clause that puts all fees for arbitration on the consumer. This is particularly true when the cost-shifting terms could work to grant one party immunity from legitimate claims on the contract."⁵² Additionally, the court found the arbitrator selection clause to be unconscionable, because of the potential for bias in the selection.⁵³ However, instead of invalidating the agreement to arbitrate altogether, the court chose to sever the objectionable provisions and compelled arbitration, pursuant to the remaining contract terms.⁵⁴

The interplay between procedural and substantive unconscionability in the homeowner context is demonstrated by the Nevada Supreme Court's reasoning in *Burch*.⁵⁵ The court found that the contract in question, a home buyer's warranty signed in connection with the purchase of a newly constructed home, was a contract of adhesion, because it was offered on a "take it or leave it" basis.⁵⁶ In concluding that the warranty presented a strong case of procedural unconscionability, the court was heavily influenced by the inconspicuous placement of the arbitration clause on the sixth page of the agreement and by the complexity of the language.⁵⁷ Accordingly, the court held that "[b]ecause the procedural unconscionability of this case is so great, less evidence of substantive unconscionability is required to establish unconscionability."⁵⁸ Finding the arbitration clause's reservation to the homebuilder's insurer of the exclusive right to select both the rules and the arbitrator, the court held the agreement unenforceable.

An example of a refusal to enforce a one-sided term in an arbitration clause contained in a home buyer's warranty is the Ohio appellate court decision in *Davidson*.⁵⁹ The arbitration clause in that warranty limited available recovery to the lesser of the home's value, \$1 million, or such lesser amount as the warranty company might, with *or without* the homebuyer's knowledge,

⁵¹ *Vincent*, 194 S.W.3d at 859

⁵² *Id.* at 860.

⁵³ *Id.* at 859.

⁵⁴ *Id.* at 860.

⁵⁵ 49 P.3d at 650.

⁵⁶ *Id.* at 649.

⁵⁷ *Id.* at 650.

⁵⁸ *Id.*

⁵⁹ 2000 Ohio App. LEXIS 1624, at *1.

have communicated to the builder.⁶⁰ The effect of the provision was to potentially limit recovery to an amount below what the homebuyer could expect and which the arbitrator could otherwise award.⁶¹ Accordingly, the court held the agreement unenforceable. A similar approach was taken in *Carll v. Terminix International Company, L.P.*, in which a Pennsylvania court found a provision in an extermination contract requiring arbitration of all claims, but prohibiting special, incidental, consequential, exemplary or punitive damages, to be against public policy in a personal injury case.⁶²

The cases applying unconscionability analysis in the homeowner context support conclusions similar to those reached in the consumer context. The types of arbitration provisions most likely to encounter judicial resistance are those that have the purpose or effect of placing the homeowner at a disadvantage.

b. Narrow Construction

State courts may also avoid enforcing arbitration agreements in the homeowner context by construing the agreements narrowly to confine them to a limited set of disputes. This approach essentially stops enforcement at the threshold, because a court may determine whether or not a valid agreement to arbitrate the dispute exists without first determining whether such an agreement would be enforceable.⁶³

Strictly interpreting the language of the arbitration clause, a Washington appellate court refused to enforce an arbitration agreement between a homebuilder and a buyer when the buyer sued, among other things, for personal injuries allegedly caused by defective construction.⁶⁴ The court concluded that the personal injury claim was outside the scope of the arbitration agreement, which stated that someone with “working knowledge of residential construction” would decide the issues presented in arbitration.⁶⁵ Furthermore, the court determined that the language of the clause was inconsistent and ambiguous because it limited arbitration to construction disputes in one sentence and in a second sentence broadened the application of the arbitration clause to all disputes under the contract.⁶⁶ In light of the ambiguity and the specific language of the

⁶⁰ *Id.* at *3.

⁶¹ *Id.*

⁶² 793 A.2d 921 (Pa. Super. Ct. 2002).

⁶³ See, e.g., *Woodhaven Homes, Inc. v. Alford*, 143 S.W.3d 202 (Tex. App. 2004); *Burgess v. Jim Walter Homes, Inc.*, 588 S.E.2d 575 (N.C. Ct. App. 2003).

⁶⁴ *Pearson v. Adair Homes, Inc.*, 128 Wash. App. 1045 (Wash. Ct. App. 2005).

⁶⁵ *Id.*

⁶⁶ *Id.*

agreement, the court determined that the parties had not agreed to arbitrate personal injury claims.⁶⁷

Another variation on the narrow construction approach can be found in two similar recent decisions from Texas and North Carolina, where the courts carefully parsed contracts potentially governing the dispute to determine if the parties were bound to arbitrate.⁶⁸ Both courts found that while one agreement between the homebuilder and the buyers contained an arbitration clause, a second agreement failed to mention binding arbitration.⁶⁹ The courts construed the agreement containing the arbitration clause narrowly and the second contract broadly and thereby concluded that the claims arose under the second contract and were thus not subject to arbitration.

c. California and New York Statutory Resistance to Homeowner Arbitration Agreements

In the context of homeowner disputes, courts in California and New York have recently relied on statutes that effectively create hurdles to enforcing agreements providing for mandatory arbitration of such disputes.⁷⁰ Whereas California has imposed heightened requirements for enforcement of mandatory arbitration provisions in the homeowner context, New York has taken a more aggressive approach, effectively creating a presumption that such provisions will not be enforced. Courts in both states characterized the types of homebuilding contracts covered by their statutes as not involving interstate commerce, in order to counter the argument that the statutes were preempted by the FAA.⁷¹

Section 7191 of California's Business and Professions Code imposes mandatory disclosure and formatting requirements for arbitration provisions in contracts involving work on residential property of one to four units. Invoking this statute, a California appellate court recently refused to enforce an arbitration award, because the applicable agreement failed to provide adequate notice to the consumer that she was waiving her right to resolve her dispute in court according to the requirements of the statute.⁷²

⁶⁷ *Id.*

⁶⁸ *Woodhaven Homes, Inc.*, 143 S.W.3d at 204; *Burgess*, 588 S.E.2d at 492.

⁶⁹ 143 S.W.3d at 204; 588 S.E.2d at 493.

⁷⁰ See *Ragucci v. Professional Construction Servs.*, 25 A.D.3d 43 (N.Y. App. Div. 2005); *Baronoff v. Kean Development Co., Inc.*, 818 N.Y.S.2d 421 (N.Y. Sup. Ct. 2006); *Woolls v. Superior Court of Los Angeles County*, 127 Cal. App. 4th 197, 205 (Cal. Ct. App. 2005).

⁷¹ See *Baronoff v. Kean Development Co., Inc.*, 818 N.Y.S.2d 421 (N.Y. Sup. Ct. 2006); *Woolls*, 127 Cal. App. 4th at 213.

⁷² *Woolls*, 127 Cal. App. 4th at 200.

Section 399-c of New York's General Business Law forbids contracts for the sale or purchase of consumer goods from incorporating mandatory arbitration clauses. Although this statute has not often been invoked, New York courts have recently determined that contracts for services related to home construction are consumer contracts subject to the terms of the statute.⁷³

In *Ragucci*, a 2005 case of first impression, a New York appellate court refused to compel the arbitration of a home construction dispute between a homeowner and an architectural firm.⁷⁴ The court determined that the services provided by the defendant firm in connection with the plaintiff's home fell within the meaning of consumer goods as defined by General Business Law §399-c. Specifically, the court determined that statute's broad definition of consumer goods, which included "services purchased or paid for by a customer, the intended use or benefit of which is intended for the personal, family or household purposes of such consumer," covered the services provided by the architectural firm to the homeowner.⁷⁵ The arbitration clause was therefore held invalid and void under the statute.⁷⁶ The *Ragucci* court explained that the law "was 'designed to prevent sales contracts from including clauses pre-committing consumers to arbitrate disputes rather than resort[ing] to ... other remedies.'" ⁷⁷ The court also interpreted the statute to provide that "no contract 'should deprive a consumer of the right to take the dispute further and seek judicial redress' ... as well as 'the ability to choose between arbitration or judicial resolution of their disputes after the time when a dispute arises.'" ⁷⁸

Employment Disputes

The U.S. Supreme Court has made it clear that the FAA applies to employment contracts in businesses in interstate commerce, and that the statute generally requires courts to enforce arbitration clauses in such contracts.⁷⁹ As arbitration clauses in employment contracts and employee policy handbooks become increasingly common, state courts must contend with an increasing number of challenges to their enforceability.⁸⁰ Arbitration clauses in employment

⁷³ See *Ragucci*, 25 A.D.3d at 48; *Baronoff*, 818 N.Y.S.2d at 425.

⁷⁴ 25 A.D.3d 43 (2005).

⁷⁵ *Id.* at 48.

⁷⁶ *Id.* at 50.

⁷⁷ *Id.* at 46.

⁷⁸ *Id.* at 46-47.

⁷⁹ E.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28 (1991). See also *Adler v. Fred Lind Manor*, 103 P.3d 773, 779 (Wash. 2004).

⁸⁰ Arbitration agreements in the collective bargaining context are primarily governed by the Labor Management Relations Act, 29 U.S.C. §185(a), rather than by the FAA, see 9 U.S.C. §1, and will not be discussed here.

agreements are generally enforced, but certain elements can place enforcement of the agreement or a resulting award in doubt.

Arbitration clauses in employment agreements tend to be subject to scrutiny under an unconscionability analysis. The likelihood that a court will find inequality of bargaining power to support the procedural unconscionability of an employment arbitration agreement means that most of the analysis focuses on substantive unconscionability.⁸¹ In addition, agreements to arbitrate employment disputes are also subjected to scrutiny based on public policy concerns.

a. Unconscionability

Much as with consumer disputes, the courts scrutinize arbitration agreements for provisions that favor the employer to the disadvantage of the employee. Employment arbitration agreements that limit an employee's remedies, require shifting or sharing the cost of arbitration, unilaterally restrict judicial access, or otherwise appear to limit the scope of arbitration unfairly have been deemed by state courts to be unconscionable or otherwise unenforceable.

In addition to these indicia of substantive unconscionability, employment arbitration agreements may also be called into question if they unreasonably impair an employee's ability to vindicate a statutory right. This emphasis on statutory rights finds its most widely cited expression in the decision of the California Supreme Court in *Armendariz v. Foundation Health Psychcare Services, Inc.*⁸² In *Armendariz*, employees sued their employer for wrongful termination under the California Fair Employment and Housing Act. The employer claimed that the dispute was subject to arbitration pursuant to the terms of a pre-employment application and employment contract signed by the parties. The arbitration agreement in each contract contained clauses that (a) limited recoverable damages to back pay, (b) allowed only the employer to go to court, (c) required sharing the costs of arbitration, and (d) restricted the scope of discovery.⁸³ The employees argued that the terms of the agreement were unconscionable.

Analyzing the terms of the agreement, the court emphasized the importance of protecting an employee's ability to vindicate his or her statutory claims in an arbitral forum.⁸⁴ The court "held that California courts must perform a separate analysis in addition to the unconscionability analysis to determine if the arbitration agreement satisfies specific minimum requirements."⁸⁵

⁸¹ See, e.g., *Wilson v. Bally Total Fitness Corporation, Inc.*, D039355, 2003 Cal. App. Unpub. LEXIS 5892, at *1, *10 (Cal. Ct. App. June 18, 2003) ("The fact the Agreement is an adhesion contract is sufficient to establish that the Agreement is procedurally unconscionable....").

⁸² 6 P.3d 669 (Cal. 2000).

⁸³ *Id.* at 675.

⁸⁴ *Id.* at 681.

⁸⁵ *Id.*; see *Abramson v. Juniper Networks, Inc.*, 115 Cal. App. 4th 638, 652 (Cal. Ct. App. 2004).

Pursuant to this separate analysis, now known as an *Armendariz* analysis, California courts will not compel employees to arbitrate their claims if the arbitration agreement does not (1) provide for adequate discovery, (2) require a written decision subject to limited judicial review, (3) permit the types of relief available in court, (4) limit the employee's forum costs and (5) provide for a neutral arbitrator.⁸⁶

Applying this analysis, the *Armendariz* court found the terms of the agreement before it to be unconscionable and unenforceable, because the provisions (a) compelled the employees to arbitrate statutory claims "without affording the full range of statutory remedies, including punitive damages and attorneys fees...available under the [California Act],"⁸⁷ (b) required the employees to bear expenses not applicable in courts,⁸⁸ and (c) required the employees, but not employer, to arbitrate.⁸⁹

In the wake of the *Armendariz* decision, California and Washington courts have struck down similar terms in other employment contracts. In *Abramson*, an employee claiming wrongful termination challenged terms in his employment agreement requiring him to pay half of the arbitration fees and excluding claims by the employer from arbitration (unilaterally reserving access to the courts), while requiring all claims by the employee to be submitted to arbitration.⁹⁰ Finding the terms unconscionable and unenforceable, the appellate court relied on the principle that an arbitration agreement may not present obstacles to the vindication of claims involving statutory or non-statutory public rights.⁹¹

Similarly, in *Gonlugur v. Circuit City Stores, Inc.*, an employee disputing statutory overtime payments claimed that his employment contract was unenforceable because it imposed a unilateral obligation to arbitrate, reserved to the employer access to the courts, shortened the statute of limitations, required fee shifting, and barred class actions.⁹² The appellate court agreed, concluding that the employment agreement lacked mutuality and fairness, and effectively deprived the employee of the full range of benefits provided by the state statute.⁹³

⁸⁶ See *Armendariz*, 6 P.3d at 682.

⁸⁷ *Id.* at 683.

⁸⁸ *Id.* at 678.

⁸⁹ *Id.* at 694.

⁹⁰ *Abramson*, 115 Cal. App. 4th at 665.

⁹¹ See *id.* at 653.

⁹² *Gonlugur v. Circuit City Stores, Inc.*, No. G033351, 2004 Cal. App. Unpub. LEXIS 8140, at *1 (Cal. Ct. App. Sept. 2, 2004).

⁹³ *Id.* at *8-14. See also *Wilson v. Bally Total Fitness Corp.*, D039355, 2003 Cal. App. Unpub. LEXIS 5892, at *10 (Cal. Ct. App. June 18, 2003) (California courts must ensure "fairness in arbitration so that employees subject to mandatory arbitration agreements can vindicate their public rights in an arbitral forum").

The decision in *O'Hare v. Municipal Resource Consultants* illustrates the effect of the *Armendariz* standard on features of arbitration clauses that might not, in other contexts, support a finding of unconscionability.⁹⁴ There, a California appellate court invalidated an arbitration agreement in an employment contract that required an employee to pay an equal share of the expenses of arbitration. The court ruled that arbitration agreements "imposing mandatory arbitration as a condition of employment...cannot generally require the employee to bear any type of expense" they would not incur in a court action.⁹⁵ Additionally, despite the employer's offer to pay the costs of arbitration in an effort to cure the problem, the court refused to sever the offending clause, stating that the term's "unconscionability permeate[d] the arbitration provision."⁹⁶ The California courts now generally find provisions requiring employees to share the costs of arbitration unenforceable.⁹⁷

Finally, in *Fitz v. NCR Corporation*, a California appellate court considered an employee dispute resolution policy that listed several types of disputes between employers and employees that were subject to arbitration, and others that were not.⁹⁸ The court found that the disputes subject to arbitration were solely of the type that employees would bring against employers, but not the reverse. Finding the provision unlawful for lack of mutuality, the court refused to enforce the arbitration clause, stating "[the provisions] indicate a systematic effort to impose arbitration on an employee not ... as an alternative to litigation, but as an inferior forum that works to the employer's advantage."⁹⁹

Washington state courts have adopted much of the reasoning of the *Armendariz* decision. In *Zuver v. Airtouch Communications, Inc.*, the Supreme Court of Washington decided the enforceability of a provision in an employment agreement requiring the waiver and release "of all rights to recover punitive or exemplary damages in connection with common law claims, including claims arising in tort or contract..."¹⁰⁰ The court held the provision unconscionable because it "blatantly and excessively favor[ed] the employer" and did not allow the employee any significant recourse while permitting the employer full access to the remedies.¹⁰¹

⁹⁴ 107 Cal. App. 4th 267 (Cal. Ct. App. 2003).

⁹⁵ *Id.* at 279.

⁹⁶ *Id.* at 282.

⁹⁷ See, e.g., *Abramson*, 115 Cal. App. 4th 638; *Wilson*, 2003 Cal. App. Unpub. LEXIS 5892.

⁹⁸ 118 Cal. App. 4th 702, 725 (Cal. Ct. App. 2004).

⁹⁹ *Id.* at 727. See also *Wilson*, 2003 Cal. App. Unpub. LEXIS 5892 (exempting certain employer claims from arbitration found unconscionable).

¹⁰⁰ 103 P.3d 753, 767 (Wash. 2004). The provision did not preclude the employer from seeking these remedies in an action against the employee.

¹⁰¹ *Id.*

In *Adler v. Fred Lind Manor*, another Supreme Court of Washington decision, the court severed provisions of an arbitration agreement requiring parties to pay their own attorneys fees and prescribing a shorter statute of limitations when arbitrating state statutory employment discrimination claims, finding the provisions unconscionable.¹⁰² The court determined that the provisions undermined the protections provided in the statute to the disadvantage of the employee and were thus not enforceable.

The *Armendariz* line of cases illustrates the determination of some state courts to apply heightened scrutiny to arbitration agreements in the employment context. Courts following this type of analysis are more likely to conclude that even modest indicia of substantive unconscionability are enough to defeat enforcement of an arbitration agreement. At the same time, these cases do not create a *per se* rule against employment arbitration. As in other contexts, those wishing to avoid invalidation of an agreement to arbitrate in the employment context will do well to avoid including terms that could be viewed by a court as one-sided. Once again, the AAA has provided guidelines in the form of due process protocols to help employers avoid the pitfalls of enforcing agreements to arbitrate employment disputes.¹⁰³

b. Public Policy

Public policy is sometimes treated by courts as an independent standard against which to evaluate agreements to arbitrate employment disputes and has also been employed in considering enforcement of arbitral awards. While courts are generally not permitted to disturb arbitral awards except on narrow statutory grounds, the U.S. Supreme Court has authorized some judicial review, at least of labor arbitration awards, on public policy grounds.¹⁰⁴ Of the states that have relied on public policy considerations to decline enforcement of arbitral awards, Connecticut has taken the most aggressive approach and has done so primarily in the area of arbitral awards reinstating public employees.

In *Board of Police Commissioners of the City of Ansonia v. Stanley*, a city police officer appealed the lower court's decision to vacate an arbitration award reinstating him with the city's police force.¹⁰⁵ The officer had been terminated for making false statements during an internal investigation into complaints about the harassment and sexual intimidation of four women.¹⁰⁶ At the conclusion of arbitration, despite finding the claims substantiated, the arbitrator ruled that the

¹⁰² 103 P.3d 773 (Wash. 2004).

¹⁰³ See <http://www.adr.org/sp.asp?id=28535>.

¹⁰⁴ *W.R. Grace & Co. v. Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766 (1983). The statutory grounds are set forth in 9 U.S.C. §10.

¹⁰⁵ 887 A.2d 394 (Conn. App. Ct. 2005).

¹⁰⁶ *Id.* at 398-400.

City lacked just cause to terminate the officer and called for his reinstatement.¹⁰⁷ The City moved to vacate the award.

In order to vacate an arbitration award on the grounds of a public policy violation, the court had to identify “well defined and dominant [public policy], as is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests,” and determine whether or not the award violates the expressed policy.¹⁰⁸ The court stated, “[a]rbitrators exceed their authority if their award orders a party to engage in conduct that is ... in clear violation of public policy.”¹⁰⁹ Finding that expressed state and federal law prohibited the behavior of the officer,¹¹⁰ the court vacated the award reinstating the officer as against public policy, because it appeared to signify endorsement of his behavior by the City.¹¹¹

Similar cases in which state courts have refused to enforce an arbitration award on public policy grounds include *City of Torrington v. AFSCME Council 4 Local 1579*, where a Connecticut court vacated an arbitration award reinstating a state building inspector suspected of taking bribes while on duty and falsifying his employment application.¹¹² The court stated, “[t]he public has a right to expect honesty, good faith and fair dealing from its government employees...a truism that is obvious and grounded in common sense...[and] may, in and of itself, constitute a public policy.”¹¹³ Based on this interpretation of public policy, the court vacated the award.

In *State v. AFSCME, Council 4, Local 2663, AFL-CIO*, the court vacated an arbitration award reinstating a driver for the Department of Children and Families who was terminated after a conviction of possession of drugs with the intent to sell.¹¹⁴ Relying on state policy concerning the state’s duty to protect and nurture children, the court found that the arbitrators’ award conflicted with the public policy.¹¹⁵ Specifically, the court stated, “[c]ommon sense commands that it is utterly inappropriate to place potentially troubled children in daily contact with a convicted drug offender. An arbitrator’s award that undermines the department’s responsibility

¹⁰⁷ *Id.* at 400-401.

¹⁰⁸ *Id.* at 404; see also *United Paperworks Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987).

¹⁰⁹ 887 A.2d at 406.

¹¹⁰ *Id.* at 405.

¹¹¹ *Id.* at 406-07.

¹¹² No. CV000083909S, 2002 Conn. Super. LEXIS 2290, at *1 (Conn. Super. Ct. July 11, 2002).

¹¹³ *Id.* at *34.

¹¹⁴ 758 A.2d 387 (Conn. Ct. App. 2000).

¹¹⁵ *Id.* at 390.

to protect children in such a dramatic way violates a compelling public policy, and we will not allow it to stand.”¹¹⁶

These cases do not suggest a broad trend or often-used basis for invalidating arbitral awards, nor do they suggest that courts will wield public policy as a weapon to invalidate pro-employer awards (indeed, the opposite appears to be the case in Connecticut). However, weighing arbitral awards against public policy may not always yield predictable results, especially if the trend moves from the collective bargaining context into other employment disputes.

Health Care Disputes

In the area of health care disputes, as in the employment context, state courts appear inclined to scrutinize agreements that appear to impair statutory rights. Public policy favoring protection of those placed at a disadvantage by illness tends to play a significant role in the analysis of agreements to arbitrate health care disputes. Various terms in arbitration agreements have been determined to violate state public policy in this field.

First, courts have found provisions limiting remedies under health care agreements to be unenforceable as violations of state public policy, especially if they attempt to alter statutorily guaranteed protections. The courts tend to reject these alterations based on the principle, articulated by the U.S. Supreme Court, that an agreement to arbitrate statutory claims incorporates all provisions of the statute, substantive and remedial.¹¹⁷ Accordingly, provisions that seek to limit the protections of a statute are considered contrary to public policy and unenforceable.

In *Blankfield v. Richmond Health Care, Inc.*, the parties disputed whether or not the nursing home had violated the deceased’s rights under a state statute and had negligently cared for her while she was alive. The parties had signed a nursing home admission agreement containing an arbitration clause that required arbitration under the rules of the National Health Lawyers Association, which precluded awarding damages absent proof to a clear and convincing standard.¹¹⁸ The Florida court determined that the clear and convincing standard effectively eliminated recovery for negligence, and was contrary to the state’s Nursing Home Residents Act,

¹¹⁶ *Id.* at 395. See *Chicago Firefighters Union Local No 2 v. City of Chicago*, 751 N.E.2d 1169, 1174 (Ill. App. Ct. 2001) (vacating an award reinstating a firefighter found drinking alcohol while on duty and responding to a call, because it was contrary to public policy).

¹¹⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985); see also, e.g., *Armendariz*, 6 P.3d at 682.

¹¹⁸ 902 So. 2d 296 (Fla. Dist. Ct. App. 2005). Pursuant to the NHLA arbitration rules, an arbitrator is prevented from awarding consequential, exemplary, incidental, punitive or special damages absent “clear and convincing evidence that ...[a party]...is guilty of conduct evincing an intentional or reckless disregard for the rights of another party.” *Id.* at 298.

which provided for a preponderance of the evidence standard.¹¹⁹ The damages clause in the agreement “defeated the remedial provisions of the statute” and was therefore found to be a violation of public policy.¹²⁰

Other circumstances that tend to lead courts to refuse to enforce an arbitration agreement include failing to provide notice of the arbitration clause in a health care contract. A recent decision from a Tennessee appellate court considered not only whether the parties were alerted to the existence of an arbitration clause in a contract, but also whether the circumstances under which the clause was bargained for were reasonable. In *Howell v. NHC Healthcare-Fort Sanders, Inc.*, the court refused to enforce a clause, in spite of the nursing home having explained it to the patient.¹²¹ The court found that the nursing home representative failed to explain the meaning and implications of the arbitration clause, because she failed to explain that the signatory waived his right to a jury trial, and it was clear that the signatory had a limited education.¹²² Furthermore considering the urgency of the admission to the nursing home, and the “take it or leave it” basis under which the patient was admitted, the court determined that the parties did not mutually agree to arbitrate.¹²³

Some states have codified an arbitration notice requirement. As a general matter, states are prohibited from adopting legislation or other policies that restrict the enforcement of arbitration agreements based on criteria not applicable to other contracts—including notice and formatting requirements. In *Doctor’s Associates, Inc. v. Casarotto*, the U.S Supreme Court struck down a Montana statute requiring special formatting requirements for arbitration agreements.¹²⁴ The Montana statute required contracts to give notice that they contained arbitration clauses in “underlined capital letters on the first page of the contract.”¹²⁵ The Supreme Court found that the statute undermined the goals of the FAA—to put arbitration agreements on equal footing with other contracts—and held that the Montana statute was preempted by the federal Act.¹²⁶ The Court stated, “[c]ourts may not...invalidate arbitration agreements under state laws applicable only to arbitration agreements,” nor may they condition

¹¹⁹ *Id.* at 298.

¹²⁰ *Id.* at 299. See also *Flyer Printing Co. v. Hill*, 805 So. 2d 829 (Fl. Dist. Ct. App. 2001) (arbitration clause limiting remedies available under Title VII unenforceable).

¹²¹ 109 S.W.3d 731 (Tenn. Ct. App. 2003).

¹²² *Id.* at 733.

¹²³ *Id.* at 735.

¹²⁴ 517 U.S. 681 (1996).

¹²⁵ *Id.* at 684.

¹²⁶ *Id.* at 687.

“the enforceability of arbitration agreements on compliance with a special notice requirements not applicable to contracts generally.”¹²⁷

Overall, states seem to be complying with the *Casarotto* rule. However, California and Colorado courts have struck down arbitration clauses under state statutes dictating formatting and disclosure requirements in insurance agreements.¹²⁸ The viability of such statutes is premised on the theory that the McCarran-Ferguson Act “reverse preempts” the FAA by reserving to the states the power to regulate terms in insurance contracts.¹²⁹ Pursuant to this exemption, these states created legislation requiring health care contracts containing arbitration clauses to meet specific formatting and disclosure requirements.

Class Actions

In its 2003 decision in the *Bazze* case, the Supreme Court held that it is for an arbitrator to decide whether a claimant may pursue a claim on a class basis if the claim is governed by an arbitration clause that is silent on the subject.¹³⁰ Since then, arbitration clauses in consumer and employment contracts have become less silent, and many now contain explicit waivers of the right to proceed on a class basis. State courts have differed as to the enforceability of such class action waivers, and the Supreme Court recently declined an opportunity to clarify the law in this area when it denied *certiorari* in a case in which the California courts had held such waivers to be unconscionable in consumer agreements.¹³¹

The typical argument against class action waivers is that such clauses prevent potential plaintiffs with financially insignificant individual claims from joining together to pursue their claims on a class basis. Courts adopting this argument reason that, without the benefit of class actions, cases that do not offer the potential financial gains needed to attract a lawyer could not be pursued, with the result that conduct that harms society in the aggregate could go unchecked.¹³² Courts following this line of reasoning perceive class action waivers as impermissibly one-sided, because it is defendants who benefit from the reduced threat of

¹²⁷ *Id.*

¹²⁸ *E.g., Robertson v. Health Net of California, Inc.*, 132 Cal. App. 4th 1419 (Cal. Ct. App. 2005); *Imbler v. Pacificare of California, Inc.*, 103 Cal. App. 4th 567 (Cal. Ct. App. 2002); *Smith v. Pacificare Behavioral Health of California, Inc.*, 93 Cal. App. 4th 139 (Cal. Ct. App. 2001); *Allen v. Pacheco*, 71 P.3d 375 (Colo. 2003).

¹²⁹ The McCarran-Ferguson Act is codified at 15 U.S.C. §1012(b). *See Allen*, 71 P.3d at 382.

¹³⁰ *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444 (2003).

¹³¹ *Cingular Wireless v. Mendoza*, 126 U.S. 2353 (2006), denying a writ of certiorari to review *Parrish v. Cingular Wireless*, No. A105518, 2005 Cal. App. LEXIS 978 (Cal. Ct. App. June 17, 2005).

¹³² *See, e.g., Lyle v. CitiFinancial Servs., Inc.*, 810 A.2d 643, 665 (Pa. Super. Ct. 2002).

aggregate action. Accordingly, many courts view these waivers as unconscionably restrictive both of a claimant's ability to redress wrongdoing and of her or his right to vindicate a claim.¹³³

In the last five years, courts in Alabama, California, Illinois, Missouri, New Jersey, North Carolina and West Virginia have struck down arbitration clauses incorporating class action waivers. In Alabama, the Supreme Court voided the entire arbitration agreement in a home inspection contract on grounds of unconscionability for precluding class actions.¹³⁴ The court concluded that the agreement was unconscionable because it "restrict[ed] [the plaintiffs] to a forum where the expense of pursuing their claim far exceed[ed] the amount in controversy...by foreclosing...an attempt to seek practical redress through a class action and restricting them to...individual arbitration."¹³⁵

New Jersey state courts have also refused to give effect to arbitration agreements containing class action waivers. In *Discover Bank v. Shea*, a New Jersey trial court refused to compel arbitration upon finding the class action waiver clause in a credit card agreement to be unconscionable.¹³⁶ The court explained its disapproval of the clause: "Discover can use the provision to preclude class actions and therefore, effectively immunize itself completely from small claims, [while] individual cardholders gain nothing, and in fact, are effectively deprived of their small individual claims."¹³⁷ The New Jersey Supreme Court recently adopted this reasoning in *Muhammad v. County Bank of Rehoboth Beach, Delaware*, declaring that a class-arbitration waiver found in a consumer contract involving a "predictably small amount of damages" was unconscionable.¹³⁸

In 2005, in another action challenging the validity of an arbitration agreement forbidding class wide arbitration involving Discover Bank, California's Supreme Court found prohibitions on class actions unconscionable.¹³⁹ The court held that, in the face of the one-sidedness and effective insulation from "liability otherwise imposed under California law," class action waivers "are generally unconscionable."¹⁴⁰ As did the New Jersey court, the California court narrowly tailored its holding to apply only to consumer contracts of adhesion involving potentially small

¹³³ *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005).

¹³⁴ *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529 (Ala. 2002).

¹³⁵ *Id.* at 539.

¹³⁶ 827 A.2d 358 (N.J. Super. Ct. 2001).

¹³⁷ *Id.* at 366.

¹³⁸ 2006 WL 2273448, at *9-10 (N.J. Aug. 9, 2006).

¹³⁹ *Discover Bank v. Sup. Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005).

¹⁴⁰ *Id.* at 1109.

amounts of damages.¹⁴¹ In the months following that decision, a California court of appeals followed the state supreme court's lead and invalidated an arbitration clause in a credit card contract containing a class action waiver. In *Klussman v. Cross Country Bank*, the court stressed that *Discover Bank* did not hold that all class action waivers are unconscionable, but rather that the facts in *Klussman* fit the narrowly defined circumstances presented by the California Supreme Court.¹⁴²

On remand from the California Supreme Court's *Discover Bank* decision, however, the court of appeals conceded that California law was more demanding on this subject than the law of other states.¹⁴³ Concluding that the agreement in question was governed by Delaware law, the court found that class action waivers in credit card agreements were enforceable under that state's law, while noting that class action waivers had been found unconscionable in eight other states. The court enforced the arbitration clause containing the waiver, because the class that the plaintiff sought to certify was not limited to California consumers.

Courts in Missouri and West Virginia have also nullified arbitration agreements with class action waivers, but each court relied on additional provisions to support its determination of unconscionability. In *Dunlap v. Berger*, the West Virginia Supreme Court of Appeals, reviewing a consumer contract, held that the FAA did not prohibit the state from considering whether or not clauses that limit a party's ability to enforce their rights or obtain relief under state law can be held unconscionable.¹⁴⁴ The court went on to refuse to enforce an arbitration clause containing provisions waiving class actions and limiting remedies, finding that the clauses significantly limited a party's remedial rights.¹⁴⁵ The Missouri Court of Appeals applied similar reasoning in refusing to enforce an agreement with a similar class action waiver and fee shifting provision.¹⁴⁶

Most recently, the Illinois Supreme Court declared unconscionable a class action waiver in a cellular telephone service agreement's arbitration clause.¹⁴⁷ Starting from the premise that class action waivers in arbitration clauses are not *per se* unconscionable, the court surveyed decisions from other jurisdictions to distill a pattern to the circumstances in which such waivers

¹⁴¹ "When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money...the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud, or willful injury to the person or property of another." *Discover Bank*, 113 P.3d at 1110.

¹⁴² 134 Cal. App. 4th 1283, 1297 (Cal. Ct. App. 2005).

¹⁴³ 134 Cal. App. 4th 886 (Cal. Ct. App. 2005).

¹⁴⁴ 211 W. Va. 549, 564 (W. Va. 2002).

¹⁴⁵ *Id.* at 564.

¹⁴⁶ *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. Ct. App. 2005).

¹⁴⁷ *Kinkel v. Cingular Wireless LLC*, No. 100925, 2006 WL 2828664 (Ill. Oct. 5, 2006).

will be enforced.¹⁴⁸ The court found that “a class action waiver will not be found unconscionable if the plaintiff had a meaningful opportunity to reject the contract term or if the agreement containing the waiver is not burdened by other features limiting the ability of the plaintiff to obtain a remedy for the particular claim being asserted in a cost-effective manner.”¹⁴⁹ Because the class action waiver was contained in an adhesion contract that did not explicitly set forth the costs associated with arbitration, the court concluded that the plaintiff lacked a meaningful opportunity to reject the term.¹⁵⁰ Similarly, because the plaintiff’s claim—that a \$150 early termination fee operated as an illegal penalty—could not result in individual recovery exceeding the costs of arbitration, the court found that the class action waiver limited the plaintiff’s ability to vindicate her claim.¹⁵¹ The court refused to enforce the class action waiver, but held that the remainder of the agreement to arbitrate could be severed and enforced.¹⁵²

Another recent state court decision discussing class waivers offers a slightly different analysis. A North Carolina court of appeals held, in *Tillman v. Commercial Credit Loans, Inc.*, that contracts that require parties to waive their rights to bring class actions may be enforceable if the agreement provides for the recovery of attorney’s fees.¹⁵³ According to the court, the general apprehension that class action waivers would make it impossible to obtain legal representation becomes inapplicable when the arbitration agreement contains language stating that the parties continue to be entitled to the remedies provided by law, because the consumer protection statute under which the claim was made expressly provided for the recovery of a plaintiff’s costs.¹⁵⁴ Therefore, the plaintiffs’ argument “that without the ability to join claims, they [were] deterred from bringing lawsuits against defendants due to the amount of money at stake being too small to justify an attorney’s involvement” was rejected.¹⁵⁵

The enforceability of class action waivers in arbitration agreements remains a live issue, as the law continues to be defined and interpreted in the courts. Most of the decisions do not find that a class action waiver renders an arbitration agreement *per se* unconscionable, and a number of courts have upheld such waivers.¹⁵⁶ Nonetheless, such waivers carry a risk that they will not

¹⁴⁸ *Id.* at *18-19.

¹⁴⁹ *Id.* at *20.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at *23.

¹⁵³ 629 S.E. 2d 865 (N.C. Ct. App. 2006).

¹⁵⁴ *Id.* at 872-73.

¹⁵⁵ *Id.* at 872.

¹⁵⁶ *E.g., Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886 (Ill. App. Ct. 2003) (Arizona law) (“Because the arbitration provision in this case provides financial protections to card holders with the burden of costs falling

(Footnote continued on next page)

only be rejected, but also that they will take the entire arbitration agreement out with them. As with other terms that may jeopardize the enforceability of an arbitration agreement, the benefits of including a class action waiver must be weighed against the risk that such a provision will lead to a finding that the agreement is unenforceable.

The AAA has again provided a possible middle position, by adopting *Supplementary Rules for Class Arbitrations*.¹⁵⁷ Those rules are not designed to tilt the playing field for or against class actions or class action waivers, but rather to provide an alternative for those who may wish to provide for resolution of disputes on a class basis within the framework of arbitration, rather than in competition with it.

CONCLUSION

Twenty-two years after the Supreme Court held that the FAA applies in and must be enforced by state courts, parties who have agreed to resolve disputes between them by arbitration can generally depend on those agreements being enforced in state court. Overt judicial hostility to arbitration now represents the exception rather than the rule, and it is rare for an agreement that simply provides for arbitration to be refused enforcement.

Difficulties arise, however, when parties add provisions to arbitration agreements that go beyond providing for arbitration. Courts in many states feel that they have an obligation to scrutinize closely contracts between parties of unequal bargaining power, especially take-it-or-leave-it contracts between large corporate entities and consumers, employees, homeowners, and users of health care services. Federal law may require that arbitration clauses in such contracts be enforced, but it also allows a state judge to refuse enforcement on grounds applicable to contracts in general, such as unconscionability. Terms in arbitration clauses that appear to a state judge to be unfair to a party perceived to be weaker may well be refused enforcement, particularly if the terms appear designed to tilt the outcome or to limit access to remedies provided by statute. As long as the party drafting the arbitration clause takes care to keep the process fair, it should be able to enforce the agreement to arbitrate.

A special problem is presented when an arbitration clause contains a waiver of the right to proceed on a class basis. Such waivers affect the economics of the dispute resolution process, and are treated by some state courts as unconscionable if they appear to make it impossible for

(Footnote continued from previous page)

primarily on SNB, we do not find the no-class-action provision to be so one-sided or oppressive as to render the agreement unconscionable."); *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865 (N.C. Ct. App. 2006) (N.C. law); *Spann v. American Express Travel Related Services Co., Inc.*, No. M2004-02786-COA-R3-CV, 2006 Tenn. App. LEXIS 582 (Tenn. Ct. App. Aug. 30, 2006) (Utah law); *Delta Funding Corp. v. Harris*, No. A-44, 2006 N.J. LEXIS 1155 (N.J. Aug. 9, 2006) (N.J. law) (class arbitration waiver enforceable under facts of the case, in which plaintiff was seeking more than \$100,000 in damages and was not seeking class certification).

¹⁵⁷ See <http://www.adr.org/Classarbitrationpolicy>.

an individual to pursue a claim. If care is taken to address that concern, by providing other mechanisms to make pursuit of small claims possible (such as fee shifting, or payment of the costs of arbitration by the stronger party, or class arbitration), this is an obstacle that can be dealt with in many states by careful drafting. In some states, however, the class waiver issue represents the last bastion of determined resistance to arbitration, and the enforceability of such waivers will probably remain a state-by-state question until the Supreme Court decides to resolve it.



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U.S. DISTRICT COURT - JUDICIAL CASELOAD PROFILE

ALL DISTRICT COURTS

	2008	2007	2006	2005	2004	2003	U.S. Rank	Circuit Rank
Overall Filings	349,969	335,655	335,868	330,721	358,983	328,520		
Overall Term	317,056	317,277	350,807	347,196	324,532	323,399		
Overall Per	358,303	324,673	309,006	323,914	341,785	312,223		
Last Year % Change in		4.3				-		-
% Change in Filings			4.2	5.8	-2.5	6.5		-
Number of	678	678	678	678	679	680		
Vacant Judges	397.9	424.7	399.3	309.2	291.4	444.8		
Per Judge	516	495	495	488	528	483	-	-
Per Judge	394	380	383	374	414	372	-	-
Per Judge	91	85	84	87	88	87	-	-
Per Judge	31	30	28	27	26	24	-	-
Per Judge	528	479	456	478	503	459	-	-
Per Judge	472	477	464	489	529	498	-	-
Per Judge	468	468	517	512	478	476	-	-
Per Judge	20	20	19	19	19	19	-	-
Median Time	7.3	7.6	7.6	7.3	6.9	6.7	-	-
Median Time	8.1	8.6	8.3	9.5	8.5	9.3	-	-
Median Time	24.8	24.6	23.2	22.5	22.6	22.5	-	-
Number of	21,820	17,446	27,574	39,600	35,965	34,067		
Percent of	7.3	6.6	1.1	14.9	12.6	13	-	-
Avg. Felony	1.3	1.4	1.4	1.4	1.4	1.4		
Jurors Present	48.81	49.32	49.61	47.36	46.33	47.81		
Juror % No	37.4	37.3	38.1	36.7	36.8	40		
Type of	TOTAL	A	B	C	D	E	F	G
Civil	267257	13138	52110	54786	3782	5072	16788	34172
Criminal	61026	3606	11010	21190	7980	7036	1991	2660

167

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19901	9592	32132	1318	24466
706	1293	910	894	1750

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The Louis Jackson National Student Writing Competition

*933 THE BENCH TRIAL: A MORE BENEFICIAL ALTERNATIVE TO ARBITRATION OF TITLE VII CLAIMS

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Introduction

Today, an increasing percentage of the United States workforce is covered by pre-dispute mandatory arbitration agreements through which employees waive their right to bring suit under Title VII of the Civil Rights *934 Act ("CRA") of 1964, as amended. A recent study conducted under the auspices of the American Arbitration Association ("AAA") found that by 1997, 19% of private sector employers were using arbitration, up from 3.6% in 1991. [FN1] By 2001, the number of employees covered by employment arbitration plans administered by the AAA had grown to 6 million, up from 3 million in 1997. [FN2] In addition, almost 90% of employers that had more than one hundred employees and had filed Equal Employment Opportunity ("EEO") reports with the Equal Employment Opportunity Commission ("EEOC") in 1992 had used at least one alternative dispute resolution ("ADR") approach to resolve discrimination complaints. [FN3] Ten percent of these employers used arbitration, and arbitration was mandatory for between one-fourth and one-half of employers using this approach. [FN4]

Although it appears clear that pre-dispute mandatory arbitration agreements are an increasingly important avenue for resolving disputes between employers and employees in the United States, these agreements can be unsatisfactory. In this paper, I will explore whether pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial of their Title VII claims are a better alternative to arbitration. First, I will describe the advantages and disadvantages of arbitration agreements for employers and employees. Second, I will introduce jury waiver provisions and analyze their enforceability in the Title VII context. Finally, I will argue that jury waiver provisions are a solution to the problem of unenforceable arbitration agreements, that jury waiver provisions avoid the disadvantages of arbitration agree-

ments, and that jury waiver provisions have the same advantages as arbitration agreements.

I. Advantages and Disadvantages of Arbitration Agreements

Since the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*, [FN5] courts have made it clear that employers may require employees to waive their right to bring suit under Title VII of the CRA of 1964, as amended. However, over time, these agreements have proved unsatisfactory. For both employers and employees, pre-dispute mandatory arbitration agreements are a double-edged sword, providing advantages and disadvantages when compared to litigation.

*935 A. Advantages for Employers

Employers turned to ADR as a means to avoid more formal dispute resolution processes, particularly litigation. The use of ADR was spurred in the early 1990s by a dramatic increase in the number of discrimination complaints, along with the costs, time, and frustration involved in attempting to resolve them. [FN6] In the private sector, the number of discrimination complaints filed with the EEOC grew by 43%, from 63,898 to 91,189, between fiscal years 1991 and 1994. [FN7] The increase in discrimination complaints in the early 1990s can be attributed to several factors, one of which is the CRA of 1991. [FN8] While monetary damages had previously been available to private sector complainants, the CRA of 1991 made available compensatory and punitive damages. [FN9] The Act also provided for jury trials, in which a plaintiff has a greater chance of prevailing and receiving a higher award. [FN10]

Many employers decided to implement pre-dispute mandatory arbitration agreements as a means to avoid many of the disadvantages of litigating before a jury. The advantages of pre-dispute mandatory arbitration agreements include reduced costs, faster resolutions, greater privacy, no jury, and increased predictability.

Arbitration is usually a more efficient means of resolving discrimination claims. Compared to litigation, arbitration typically costs less [FN11] and offers faster resolutions of employment disputes. [FN12] The time lapse in litigation, from the time of the events giving rise to a claim and the time of final *936 determination including appeals, can be measured in years or sometimes the substantial portion of a decade. [FN13] The AAA reports that:

The mean length of all civil cases that reach a jury trial is just over two and one-half years, according to a study of state courts of general jurisdiction in 45 of the nation's 75 most populated counties. According to the Federal Judicial Center, it is almost 2 years from the time the average employment discrimination case is filed in federal district court until the time it is resolved. . . . [In comparison,] [t]he average arbitration case is resolved in 8.6 months. An external study of AAA employment cases terminated in 1999-2000 showed the average length of time to [arbitrate a case] was 8.2 months. [FN14]

Although there is a certain degree of obligation to report an arbitration award to the public, arbitration offers a greater potential for privacy than the public courtroom. Traditional litigation is often highly publicized, depending on the nature of the dispute and the parties involved. In contrast, arbitration is significantly more private and focused. [FN15]

Arbitration affords greater potential for a fairer resolution of discrimination claims. The jury is a prominent feature of employment discrimination litigation in the United States. Juries generally have a very good understanding of workplace issues. However, a jury often identifies very closely with the employee-plaintiff precisely because most jurors are employees. [FN16] Consequently, shifting the decision making to a professional arbitrator who likely has substantial experience in studying workplace disputes will yield a fairer resolution. [FN17]

In addition, many arbitrators have proven track records. An arbitrator's decisions in prior, analogous disputes can provide insight into how he or she will decide a case. Many sources of arbitration decisions exist, including the Labor Arbitration Reports, the Labor Arbitration Awards, and the Labor Arbitration Index. Before an arbitration proceeding commences, the AAA rules require the arbitrator to disclose to each party the names of prior or pending cases in which the arbitrator served or is serving and the results of each case. [FN18] The ability to review previous arbitration decisions increases predictability in the

decision-making process. [FN19] In comparison, *937 there is very little predictability with a jury; it is typically impossible to determine with certainty how a jury may resolve a dispute.

B. Advantages for Employees

Unlike employers, most employees do not take part in the formation of pre-dispute mandatory arbitration agreements. Typically, such agreements are presented to employees on a "take it or leave it" basis. However, pre-dispute mandatory arbitration agreements provide advantages to employees. These advantages include faster resolution, greater privacy, rarity of summary judgment, and increased access to justice.

As compared to traditional litigation, arbitration offers faster resolution of employment disputes [FN20] and a greater potential for privacy than the public courtroom. [FN21] As a result, many employees find themselves willing to go forward with arbitration. Arbitration allows employees' claims to be heard in a timely fashion, and it allows employees to move on with their lives more quickly. [FN22] In addition, because there will be no public airing of the plaintiff's psychological, emotional, or sexual history, many employees who would be otherwise reluctant to bring claims of emotional distress in litigation will bring such claims in the arbitral forum. [FN23]

Many employment discrimination claims are lost at the summary judgment stage of litigation. Although an arbitrator may award summary judgment, such awards are rare. [FN24] As a result, employees who are hesitant to bring a claim in the litigation forum because of the threat of summary judgment may feel confident to bring a claim in arbitration.

Arbitration increases employee access to dispute resolution systems. [FN25] Arbitration affords justice to relatively small claims that would likely be rejected by attorneys who only consider litigation. According to one study, "19 of every 20 employees who feel that they have an employment discrimination claim against an employer are unable to obtain the representation of an attorney to pursue that claim in court." [FN26] Thus, only the larger employment cases get litigated. A survey of plaintiffs' lawyers indicated *938 that they often require a retainer of \$3,000-\$3,600, a 35% contingent fee, and minimum provable damages of \$60,000-\$65,000 before they will undertake a claim. [FN27]

In addition, arbitration provides an affordable alternative to litigation. The cost of litigation shuts many people out of the court system, thus making the benefits inaccessible. In light of the controversy surrounding the issue of fee sharing [FN28] and the AAA rules for employment cases, many employees can afford to arbitrate their discrimination claims. The employee's forum costs, i.e., administrative fees and compensation for the arbitrator, are currently capped at \$125 under the AAA rules for employment cases arising from employer-promulgated dispute resolution plans. [FN29] Even before the AAA fee cap went into effect, a study of randomly chosen awards from AAA employment arbitration decisions showed that "32% of employees arbitrating under employer-promulgated ADR plans paid nothing at all for their AAA arbitrations, and that 61% paid no forum fees," i.e., filing, hearing, or arbitrator's fees. [FN30] In addition, the study found that arbitrators often reallocated the forum fees entirely to the employer. [FN31] AAA employment arbitrators exercised their discretion to reallocate arbitrator's fees to the employer in 70.25% of the cases, hearing fees in 71.3% of the cases, and filing fees in 85.12% of the cases. [FN32]

C. Disadvantages for Employers

With the increased number of discrimination complaints and the passage of the CRA of 1991, many employers have adopted pre-dispute mandatory arbitration agreements. Although these agreements avoid many of the disadvantages of litigating in court, arbitration carries its own disadvantages. These disadvantages include a greater number of discrimination claims, significant expenses, no guarantee of arbitrator expertise, and reduced appellate rights.

Although pre-dispute mandatory arbitration agreements may reduce the number of discrimination complaints that an employer litigates, arbitration may increase the total number of discrimination complaints against which the employer must defend. [FN33] Because arbitration is a faster, more *939 private, and less costly means through which employees can bring their discrimination complaints, employees may utilize arbitration more frequently. In addition, because arbitrators rarely grant

summary judgment, [FN34] not only will employees who are hesitant to bring complaints in litigation feel confident to bring complaints in arbitration, the employer will have to defend against many discrimination complaints that a court may have found meritless. [FN35]

Although arbitration typically costs less than litigation, arbitration is expensive for employers. [FN36] Because the issue of fee sharing remains controversial, [FN37] employers are cautious when writing pre-dispute mandatory arbitration agreements. To ensure the enforceability of agreements, employers offer to pay some, if not most, of the arbitration costs. [FN38] These costs include the location cost, the arbitrator's fee for preparing and conducting the arbitration, which can be between \$300 and \$500 per hour for a seasoned arbitrator's services, [FN39] and the arbitrator's fee for studying and deciding discovery disputes or law and motion proceedings. [FN40] In a court proceeding, these costs are publicly funded. [FN41] In addition to the direct costs of the arbitration procedure, controversy over arbitration agreements' enforceability and applicability to certain disputes has led to an increase in the types of claims being made in court against employers. [FN42] The litigation surrounding these claims could potentially double costs for employers.

*940 Limited appellate review is problematic for employers. [FN43] A court can overturn an arbitration award only where the award was procured by corruption, fraud, or undue means; where there was evidence of partiality or corruption in the arbitrator; where the arbitrator was guilty of misbehavior by which the rights of any party were prejudiced; where the arbitrator exceeded his power; or where the arbitrator imperfectly executed his power. [FN44] In 1953, the Supreme Court stated that arbitrators' interpretations of law were not subject to vacatur under the FAA unless they displayed a "manifest disregard" for the law. [FN45] Subsequently, courts have interpreted "manifest disregard" to mean that the arbitrator knew the law but chose to disregard it. [FN46] These standards ensure a high degree of judicial deference to arbitrators.

This high degree of judicial deference is troublesome because there is no guarantee that the arbitrator will be well-versed in employment law. [FN47] An arbitrator may be unfamiliar with employment discrimination statutes, particularly the elements of discrimination and burdens of proof. In addition, because arbitrators have the discretion to decide a case based on broad principles of equity and justice, some have the tendency to grant broad equitable relief. [FN48] If the employer disagrees with the arbitrator's legal analysis or the outcome of the case, the high degree of judicial deference to arbitrators means there is a limited basis on which such awards can be challenged.

D. Disadvantages for Employees

Because most employees do not take part in the formation of pre-dispute mandatory arbitration agreements, and because such agreements are presented to employees on a "take it or leave it" basis, employees often find themselves accepting pre-dispute mandatory arbitration agreements that fail to include the due process protections one would expect from a court. The enforceability of these agreements has been subject to significant litigation. In light of decisions such as *Gilmer v. Interstate/Johnson Lane Corp.*, [FN49] *Cole v. Burns International Security Services*, [FN50] and Circuit *941 *City Stores, Inc. v. Adams*, [FN51] most courts will require the procedural elements of pre-dispute mandatory arbitration agreements to be sufficient to preserve and enforce the substantive rights created by the applicable statutes. [FN52] However, because courts have not agreed on what constitutes sufficiency, employees that sign pre-dispute mandatory arbitration agreements are not guaranteed that their due process rights will be fully protected.

In most pre-dispute mandatory arbitration agreements, the time allowed for employees to file their discrimination claims is shorter than the statute of limitations applicable under the various discrimination laws. [FN53] The shorter statute of limitations provided in most pre-dispute mandatory arbitration agreements prohibits employees, who might otherwise have access to the court, access to arbitration.

Arbitration agreements differ in their provisions for the selection of arbitrators, the payment of arbitrators, and the payment of arbitration fees. While some agreements allow both the employer and employee to select the arbitrator, others allow only the employer to select the arbitrator. [FN54] Allowing only the employer to select the arbitrator establishes arbitrator bias or the appearance of arbitrator bias. Wide variation exists in the handling of the arbitrator's compensation [FN55] and the payment of

arbitration fees. [FN56] Agreements may require the parties to split the compensation and fees 50/50, 75/25, or 100/0. Requiring complaining employees to contribute to the compensation and fees is expensive; however, employer-only payment creates arbitrator bias or at least the appearance of arbitrator bias.

Arbitration agreements' provisions regarding employee counsel differ from agreement to agreement. Although most agreements allow employees to be represented by counsel, few fund the cost of employee counsel. [FN57] Employee-funded counsel is cost burdensome, particularly for lower-level *942 employees. Some agreements even preclude employees from being represented by counsel. [FN58] Requiring complaining employees to present their complaints without counsel places the employees at an unfair disadvantage because the employer most likely will be represented by counsel or a human resources representative.

Limited judicial review of arbitration awards is a disadvantage for employees, as it is for employers. [FN59]

Because many employers decide to implement pre-dispute mandatory arbitration agreements as a means to avoid large jury awards, many pre-dispute mandatory arbitration agreements place limits on the amount of damages an arbitrator may award. [FN60] Unlike the remedies provided by the CRA of 1964, as amended, [FN61] many agreements specify that arbitrators cannot award punitive damages, compensatory damages, or interest on back pay awards. [FN62]

II. Bench Trial as an Alternative

In this Part, I will explore whether pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial of their Title VII claims are a more beneficial alternative to mandatory arbitration. Although jury waiver provisions are commonplace, not much discussion of this idea has emanated in the employment law field. The literature that does exist urges employers to consider using jury waiver provisions instead of mandatory arbitration. [FN63] However, this literature fails to examine in depth whether jury waiver provisions are enforceable in the Title VII context. Nor do they ask whether jury trial waivers are a solution to the problem of unenforceable arbitration agreements. In this Part, I will examine these subjects as well as discuss whether jury waiver provisions are a means to overcome the disadvantages of arbitration agreements at the same time as they maintain the advantages of arbitration agreements.

*943 A. Enforceability of the Jury Waiver Provision

The parties to a contract may waive the right to a jury trial through a prior written agreement that is entered into knowingly and voluntarily. [FN64] Such agreements are neither illegal nor contrary to public policy. [FN65] Although contractual waiver of the right to jury trial is not illegal, the jury trial right is fundamental and a presumption against its waiver exists. [FN66] Therefore, contract provisions waiving this right are strictly and narrowly construed. [FN67] In addition, the requirement of knowing, voluntary, and intentional waivers is strictly applied. [FN68]

*944 Factors to be considered in determining whether a contractual waiver of a jury trial right was entered into knowingly and voluntarily include: (1) negotiability of contract terms and negotiations between the parties concerning the waiver provision, (2) conspicuousness of the provision in the contract, (3) the relative bargaining power of the parties, (4) business acumen of the party opposing waiver, and (5) whether counsel for the party opposing waiver had an opportunity to review the agreement. [FN69] When the criteria outlined above have been met, courts have found jury waiver provisions enforceable. [FN70]

*945 B. Enforceability of the Jury Waiver Provision in the Title VII Context

Pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial for their Title VII claims are uncommon in federal employment law, but do exist. [FN71] In *Brown v. Cushman & Wakefield, Inc.*, [FN72] the plaintiff signed an employment agreement on May 3, 1999, specifically stating that she and her employer "hereby do waive a trial by jury in any action, proceeding or counterclaim brought or asserted by either of the parties hereto against the other on any matters whatsoever arising out of this Agreement." [FN73] After *Brown* was terminated on January 3, 2000, she

filed a complaint alleging that she had been terminated because of her "sex, pregnancy and childbirth." [FN74] She also claimed that the employer had breached her employment contract. [FN75] The employer denied the allegations, filed a counterclaim against Brown for payments made to her during her maternity leave, and sought to strike Brown's demand for a jury trial. [FN76]

In discussing the employer's effort to strike Brown's demand for a jury trial, the court cited precedent holding that parties to a contract may choose to waive their right to a jury trial. [FN77] In addition, the court recognized that an agreement to waive the right to a jury trial must be "knowing and voluntary." [FN78] To determine whether the waiver was knowing and voluntary, the court looked to the following factors: "(1) the negotiability of contract terms and negotiations between the parties concerning the waiver provision; (2) the conspicuousness of the waiver provision in the contract; (3) the relative bargaining power of the parties; and (4) the business acumen of the party opposing the waiver." [FN79]

Although Brown claimed that she did not knowingly waive her right to a jury trial, the court disagreed. [FN80] The court found that the waiver was *946 sufficiently conspicuous in the agreement. [FN81] Moreover, the court found Brown to be well-educated. Brown had obtained a Harvard M.B.A. and had worked as an investment banker. [FN82] The court dismissed Brown's claim that she did not read the particular provision as a having "no merit." [FN83] The court concluded that the contractual waiver of a jury trial applied to all of Brown's claims, "including those arising under federal and state discrimination statutes." [FN84]

The enforceability of jury waiver provisions outside the employment law context, combined with the holding in Brown, creates a strong argument that jury waiver provisions are enforceable in the Title VII context as long as such provisions are entered into knowingly and voluntarily. The argument in favor of enforceability is supported by cases holding pre-dispute mandatory arbitration agreements in the employment context enforceable. [FN85] If an employer can require its employees to agree to waive their right to a jury trial and to have all disputes resolved by an arbitrator, there seems to be no reason why an employer cannot require such a jury trial waiver, but keep the dispute in court before a judge. "This analogy is especially appropriate . . . because submission of a case to arbitration involves a greater compromise of procedural protections than does the waiver of the right to trial by jury." [FN86]

C. Considerations in Drafting the Jury Waiver Provision

Outside the employment law context, to determine whether a jury waiver provision meets the knowing and voluntary burden, courts balance the following factors: the negotiability of contract terms, whether negotiations between the parties concerning the waiver provision took place, the conspicuousness of the provision in the contract, the relative bargaining power of the parties, the business acumen of the party opposing waiver, and whether counsel for the party opposing waiver had an opportunity to review the agreement. [FN87] Assuming courts will follow Brown and continue to apply the same type of balancing test in the employment law context, an employer seeking to enforce a jury waiver provision can meet the knowing and voluntary burden by satisfying the criteria articulated by the courts in *947 cases outside the employment law context. Because these criteria mirror the standards of procedural conscionability required for the enforceability of arbitration agreements, [FN88] they seem appropriate for the employment law context.

Employers should ensure negotiability of contract terms. Outside the employment law context, courts have found negotiability in situations where contract provisions, other than the waiver provision, have been negotiated or altered. [FN89] As long as there is no indication that an employee's contract terms are nonnegotiable, the court will most likely find negotiability. [FN90]

Employers should present the provision conspicuously in the contract. [FN91] The provision should be prominently placed in the employment *948 application. The language should be in a type size at least a bit larger and bolder than the language used in the rest of the application.

Although employers must ensure that the bargaining power between the parties is not unequal, employers need not ensure

that the bargaining power between the parties is exactly equal. To invalidate a waiver provision, the bargaining difference must be the kind of "extreme bargaining disadvantage" or "gross disparity in bargaining position" that occurs only in certain exceptional situations. [FN92] While employers should not write one-sided jury waiver provisions, [FN93] "take it or leave it" contracts are not automatically unenforceable. [FN94] In addition, the court will most likely not find unequal bargaining power if the employee can refuse to sign the contract and search for a job elsewhere. [FN95]

Any inequality in bargaining power that exists can be counterbalanced by an employee's sophistication and retention of counsel to oversee the transaction. Although a formal education is not necessary for the court to find an employee "sophisticated," it does constitute evidence of sophistication. [FN96] As long as an employee is sufficiently sophisticated to understand *949 the jury waiver provision, the court should find that the employee knowingly waived his right to a jury.

To ensure employees understand the jury waiver provision, an employer should write the provision in such a manner that the average person can understand exactly what he or she is signing. The scope of the agreement, in terms of parties and claims, should be clearly delineated. Moreover, the agreement should expressly reference the types of employees that it will cover. Examples include all employees not covered by collective bargaining agreements; certain divisions, departments, or workgroups; specific categories of employees such as executives, supervisors, or professionals; independent contractors; and new hires. Additionally, the agreement should expressly reference the employment disputes that it will cover. Examples include termination, benefits, statutory claims, sexual harassment, wages and compensation, and performance evaluations.

In determining whether the employee is sufficiently sophisticated to understand the jury waiver provision, courts also consider whether counsel for the party opposing waiver had an opportunity to review the contract. [FN97] Although representation and review of the provision is not necessary to find the provision knowingly and voluntarily waived, [FN98] to ensure knowing and voluntary waiver employers should give employees the opportunity for counsel to review the contract. [FN99]

In addition to meeting the criteria articulated by courts outside the employment law context, employers should ensure that the jury waiver *950 provision complies with other federal and state laws. For example, agreements covering claims under the Age Discrimination in Employment Act ("ADEA") must comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA"). [FN100] The OWBPA requires that in order for an individual to release an age claim under the ADEA, the waiver must specifically mention the ADEA, the individual must be given additional consideration, and the individual must be advised to consult an attorney prior to signing the release. [FN101] In addition, the Act requires that the individual must be informed that he or she may take twenty-one days to consider the offer and has seven days after the signing of the agreement to change his or her mind and revoke the agreement. [FN102]

D. Jury Trial Waivers as a Solution to the Problem of Unenforceable Arbitration Agreements

Although courts have made clear that employers may require employees to waive their right to bring suit under Title VII of the CRA of 1964, as amended, the parties are not guaranteed that the pre-dispute mandatory arbitration agreements will be enforced. [FN103] And, if the agreements are found enforceable, the parties are not guaranteed that particular provisions of their agreements will be preserved.

Pursuant to Section 2 of the Federal Arbitration Act ("FAA"),

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [FN104] This language permits courts to inquire into whether the elements traditionally required to conclude that a contract has been entered into are present. In addition, this language provides the basis for courts to inquire into whether the employer utilized impermissible tactics to obtain an employee's acquiescence to submit disputes to arbitration, so-called procedural unconscionability. This language has also resulted in courts examining arbitration procedures to determine whether particular procedures*951 were too heavily weighted in the employer's favor, so-called substantive unconscionability.

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court stated that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” [FN105] The Court then added a caveat, noting that “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’” [FN106] The Court also indicated that the arbitration procedures at issue must be sufficient to preserve and enforce the substantive rights created by the relevant statute. [FN107]

The elements needed for an enforceable program have been the subject of significant litigation. In *Cole v. Burns International Security Services*, the U.S. Court of Appeals for the D.C. Circuit indicated some of the procedural elements it would require for an enforceable arbitration agreement. [FN108] The court referred to five factors of the agreement at issue that fulfilled *Gilmer*’s requirement that employee substantive rights provided by the relevant statute not be violated. In *Cole* there was: (1) a neutral arbitrator, (2) more than minimal discovery, (3) a written award, (4) all relief otherwise available in court, and (5) no requirement to pay unreasonable costs or arbitrator’s fees or expenses. [FN109]

Following remand from the U.S. Supreme Court, the Ninth Circuit, in *Circuit City Stores, Inc. v. Adams*, [FN110] used California state law to employ a slightly different test. The court ruled that the arbitration agreement is unenforceable only if it is both procedurally and substantively unconscionable. [FN111] When assessing procedural unconscionability, the court examined the comparative bargaining power of the parties to the arbitration agreement and whether the agreement was clear in its requirements. [FN112] When assessing substantive unconscionability, the court examined whether the terms of the contract were unduly harsh or oppressive. [FN113] The court found the agreement procedurally and substantively unconscionable. [FN114] The court ruled *952 that the arbitration agreement was procedurally unconscionable because it was a contract of adhesion. [FN115] It found the arbitration agreement to be substantively unconscionable because the employer reserved the right to sue the employee in court, the employer limited the amounts of recoverable pay and damages as well as the statute of limitations, and the agreement required the employee to split the arbitration fees. [FN116]

To determine whether bench trials are a solution to the problem of enforceable pre-dispute mandatory arbitration agreements, I analyzed the federal court cases since the Supreme Court’s decision in *Circuit City Stores, Inc.* that found arbitration agreement provisions unenforceable in the context of Title VII claims. I divided the courts’ rationales for finding provisions unenforceable into three main categories: no contract, procedural unconscionability, and substantive unconscionability. The no contract category includes inadequate consideration, inadequacy of waiver, and claimed defect in the contract formation process. The substantive unconscionability category includes problems with fairness of the system’s administration and process, cost allocations, discovery limitations, short statutes of limitations, restrictions on punitive damages and other remedies, and attorneys’ fees.

Through my research, I discovered thirty-five federal court cases since the Supreme Court’s decision in *Circuit City Stores, Inc.* that found arbitration agreement provisions unenforceable in the context of Title VII claims. [FN117] In these cases, there were seventy-two rationales given for finding*953 provisions unenforceable. Fifteen of these reasons fell into the no contract category, seven into the procedural unconscionability category, and fifty into the substantive unconscionability category. The distribution within these categories is illustrated below:

TABLE 1 Rationales Given by Courts for Finding Arbitration Agreement Provisions Unenforceable

	Number of Reasons	Percentage
NO CONTRACT	15	20.83%
Inadequate consideration	5	6.94%

Inadequacy of waiver	4	5.56%
Claimed defects in contract formation process	6	8.33%
PROCEDURAL UNCONSCIONABILITY	7	9.7%
SUBSTANTIVE UNCONSCIONABILITY	50	69.44%
Fairness of the system's administration and process	14	19.44%
Cost allocations	13	18.06%
Discovery limitations	2	2.78%
Short statute of limitations	5	6.94%
Restrictions on punitive damages and other remedies	6	8.33%
Attorneys' fees	10	13.89%

Because the bench trial alternative will be a pre-dispute mandatory agreement, courts will inquire whether the contract is unconscionable. Because the criteria required for a knowing and voluntary waiver of the right to a jury trial mirror the standards of procedural unconscionability, the bench trial alternative will not pose procedural unconscionability problems. In addition, unlike pre-dispute mandatory arbitration agreements, the bench trial alternative does not pose the substantive unconscionability problems illustrated above. The parties to the contract have no control over the selection*954 of the judge. [FN118] Title VII dictates the cost allocations, [FN119] statute of limitations, [FN120] punitive damages, [FN121] other remedies, [FN122] and attorneys' fees. [FN123] The Federal Rules of Civil Procedure dictate the discovery limitations. [FN124] As a result, the bench trial alternative is a solution to the problem of unenforceable arbitration agreements as long as an employer ensures that a valid contract has been created.

E. Jury trial waivers allow employers and employees to avoid the disadvantages of arbitration agreements.

1. Avoidance of the Disadvantages of Arbitration Agreements for Employers

A jury waiver provision avoids the disadvantages of arbitration agreements for employers. [FN125] With a jury waiver provision, fewer discrimination claims will be brought, the employer will be guaranteed judicial expertise, and the employer will possess full appellate rights. In addition, although a bench trial will be expensive, employers will not be pressured to bear the full cost of the procedure.

Because bench trials are typically slower, less private, and more costly than arbitration, fewer employees may choose to bring discrimination claims. In addition, because judges have the power to grant summary judgment, hesitant employees may not bring complaints. Thus, the employer will not have to defend against as many discrimination complaints.

A judge, unlike some arbitrators, will be well-versed in employment law. And, in the event an employer disagrees with a judge's legal analysis or the outcome of the case, typical judicial review exists. The appeals court will review findings of fact under the clearly erroneous standard [FN126] and conclusions of law under the de novo standard. [FN127]

*955 Although arbitration may be less costly than litigation, arbitration is nonetheless expensive for employers. [FN128] With a bench trial, employers are not pressured to pay the additional costs for location and employment of the decision maker because these costs are publicly funded. In addition, if jury waiver provisions are found enforceable, employers will not be subject to the additional costs of litigating controversies over an agreement's enforceability or applicability to certain disputes.

2. Avoidance of the Disadvantages of Arbitration Agreements for Employees

A jury waiver provision avoids the disadvantages of arbitration agreements for employees as well. [FN129] Because a judge is bound by Title VII and the Federal Rules of Civil Procedure, employees are guaranteed appropriate statutes of limitations, unbiased selection of the decision maker, appropriate cost allocations, judicial expertise, full appellate rights, appropriate punitive damages, and appropriate remedies.

The statute of limitations provided by Title VII allows employees full access to the court. The statute provides:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. [FN130]

The parties to a jury waiver provision have no control over the selection of the judge. Title VII provides:

It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, *956 shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case. [FN131] Thus, bias or the appearance of bias is eliminated.

Although a complaining employee is required to pay fees, the fees are minimal and waiveable at the court's discretion. Title VII provides, "[u]pon application by the complainant and in such circumstances as the court may deem just, the court . . . may authorize the commencement of the action without the payment of fees, costs, or security." [FN132] In addition, there is no cost

for the employment of the judge.

Unlike some arbitration agreements, employees have access to counsel in a bench trial. In addition, pursuant to Title VII, the court has the discretion to appoint counsel for a complaining employee. The statute provides, "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant." [FN133] The appointed counsel costs the complaining employee nothing.

Like employers, employees benefit from judicial expertise and full appellate review. [FN134]

Employees are entitled to the damages and remedies provided by Title VII. The statute provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. [FN135] The CRA of 1991 amended Title VII and provided for additional compensatory damages [FN136] and punitive damages. The statute states:

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices *957 with malice or with reckless indifference to the federally protected rights of an aggrieved individual. [FN137] The sum of compensatory and punitive damages allowed by the CRA of 1991 is limited based on the size of the employer. [FN138]

F. Bench trials have the same advantages as arbitration agreements.

If found enforceable in the Title VII context, a jury waiver provision maintains most of the advantages of arbitration agreements for employers [FN139] and some of the advantages of arbitration agreements for employees. [FN140]

Like arbitration, a bench trial costs less and offers faster resolutions compared to a jury trial. [FN141] Before litigation begins in a jury trial, lawyers typically select jurors and make trial motions to remove the case, or selected issues of the case, from the jury's authority. These pre-trial activities are time consuming and costly for both parties. During litigation, the presence of a jury makes the trial cumbersome and lengthy for both parties; judge-counsel conferences and evidentiary hearings outside of the jury's presence become necessary. In addition, instructing the jury is often tedious and time consuming because counsel and the judge often debate the precise wording of each part of the charge. After the jury instruction is given, the jury must deliberate, which can take hours or days, and there is no guarantee that the jury will reach a verdict. One study demonstrated that the average federal jury trial lasted more than twice as long as the average bench trial. [FN142] Another study, comparing jury and non-jury trials in nine state court jurisdictions, found that the median length of both civil and criminal jury trials was roughly three times that of non-jury trials. [FN143]

A jury waiver provision avoids a jury and increases the predictability of outcome, which benefits employers. As described in Part I.A, eliminating *958 a jury results in a fairer resolution of employment disputes. Like an arbitrator's previous decisions, parties can study the case law promulgated by a particular judge, which provides increased predictability of a claim's outcome.

Conclusion

Although pre-dispute mandatory arbitration agreements are an important avenue for the resolution of disputes between employers and employees, these agreements have proved unsatisfactory. Pre-dispute mandatory arbitration agreements are a double-edged sword providing advantages and disadvantages to employers and employees. In addition, although the courts have made clear that employers may require employees to waive their right to bring suit under Title VII of the CRA of 1964, as

amended, the parties are guaranteed neither that the pre-dispute mandatory arbitration agreements nor particular provisions of the agreements will be enforced.

Given the disadvantages and questionable enforceability of pre-dispute mandatory arbitration agreements, Part II explored whether pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial of their Title VII claims are a more beneficial alternative. As discussed in Parts II.A and II.B, given the enforceability of jury waiver provisions in other contexts, the Southern District of New York's decision in *Brown*, and cases holding pre-dispute mandatory arbitration agreements in the employment context enforceable, jury waiver provisions should be held enforceable in the Title VII context.

As discussed in Part II.D, jury waiver provisions solve the problem of unenforceable arbitration agreements. Because the criteria required for a knowing and voluntary waiver of the jury trial right mirror the standards of procedural conscionability, the bench trial alternative will not pose procedural unconscionability problems. In addition, the bench trial alternative does not pose the substantive unconscionability problems prevalent in arbitration agreements. Thus, jury waiver provisions should be found conscionable under applicable state law.

*959 As discussed in Part II.E, the bench trial alternative avoids the disadvantages pre-dispute mandatory arbitration agreements pose for both employers and employees. For employers, as compared to arbitration agreements, a jury waiver provision will reduce the number of discrimination claims, decrease expense, guarantee decision-maker expertise, and maintain appellate rights. For employees, as compared to arbitration agreements, a jury waiver provision will protect employees' procedural and substantive rights under Title VII.

In addition, as discussed in Part II.F, the bench trial alternative maintains most of the advantages of arbitration agreements. For both employers and employees, as compared to a jury trial, a bench trial is less costly and offers faster resolution of claims as compared to a jury trial. For employers, a bench trial avoids a jury and increases the predictability of outcome.

Thus, it seems that pre-dispute mandatory agreements through which employees waive their right to a jury trial and agree to a bench trial for their Title VII claims present a more beneficial alternative for employers and employees. Moreover, as long as employers create valid pre-dispute mandatory agreements through which employees knowingly, voluntarily, and intentionally waive their rights, the agreements should be upheld.

[FN1]. Associate, DLA Piper Rudnick Gray Cary US LLP; J.D., Harvard Law School, 2004; B.S., Cornell University, School of Industrial and Labor Relations, 2001. Thanks to Richard J. Hafets. Special thanks to Christine M. Jolls for her comments on earlier versions of this paper.

[FN1]. Elizabeth Hill, AAA Employment Arbitration: A Fair Forum at Low Cost, *Disp. Resol. J.*, May-July 2003, at 10.

[FN2]. *Id.*

[FN3]. U.S. Gen. Accounting Office, GAO/HEHS-95-150, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution 7* (1995).

[FN4]. *Id.*

[FN5]. 532 U.S. 105 (2001).

[FN6]. U.S. Gen. Accounting Office, GAO/GCD-97-157, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace 9* (1997).

[FN7]. *Id.*

[FN8]. *Id.*

[FN9]. *Id.*

[FN10]. *Id.* at 10.

[FN11]. Am. Arbitration Ass'n, *Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration* 16 (Jan. 2003); *How Arbitration Works* 2-3 (Edward P. Goggin & Alan Miles Rubin eds., 5th ed. Supp. 1999); Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research, in Employment Dispute Resolution and Worker Rights in the Changing Workplace* 95, 98-99 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999); Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements Are an Effective Alternative to Employment Litigation*, *Disp. Resol. J.*, Fall 1997, at 19, 20, 22; *Developments in the Law--Employment Discrimination*, 109 *Harv. L. Rev.* 1568, 1673 (1996).

[FN12]. Henry S. Kramer, *Alternative Dispute Resolution in the Workplace* §9.01, at 9-3 (2004); Am. Arbitration Ass'n, *supra* note 11, at 16; *How Arbitration Works*, *supra* note 11, at 2-3; Bingham & Chachere, *supra* note 11, at 98-99; Oppenheimer & Johnstone, *supra* note 11, at 20, 22; *Developments in the Law*, *supra* note 11, at 1673.

[FN13]. Kramer, *supra* note 12, §11.02, at 11-6.

[FN14]. Am. Arbitration Ass'n, *supra* note 11, at 18.

[FN15]. *Id.* at 16; Kramer *supra* note 12, §9.01, at 9-3; Bingham & Chachere, *supra* note 11, at 98-99; Oppenheimer & Johnstone, *supra* note 11, at 20; *Developments in the Law*, *supra* note 11, at 1673.

[FN16]. Kramer, *supra* note 12, §9.01, at 9-3.

[FN17]. Oppenheimer & Johnstone, *supra* note 11, at 20.

[FN18]. Am. Arbitration Ass'n, *National Rules for the Resolution of Employment Disputes*, Rule 11(b) (Nov. 1, 2002).

[FN19]. *Developments in the Law*, *supra* note 11, at 1673.

[FN20]. See discussion *supra* Part I.A.

[FN21]. See discussion *supra* Part I.A.

[FN22]. Norman Brand, *Putting it Together I: A Note on the Economics of Imposed Employment Arbitration Agreements*, in *How ADR Works* 99, 102 (Norman Brand ed., 2002); Oppenheimer & Johnstone, *supra* note 11, at 20.

[FN23]. Brand, *supra* note 22, at 102.

[FN24]. *Id.* at 102-03.

[FN25]. *How Arbitration Works*, *supra* note 11, at 2-3; Oppenheimer & Johnstone, *supra* note 11, at 22; *Developments in the Law*, *supra* note 11, at 1673.

[FN26]. Am. Arbitration Ass'n, *supra* note 11, at 22-23.

[FN27]. *Id.* at 22.

[FN28]. See discussion *infra* Part I.C.

[FN29]. Am. Arbitration Ass'n, *supra* note 11, at 24, 35.

[FN30]. *Id.* at 24.

[FN31]. *Id.* at 35 n.100.

[FN32]. *Id.*

[FN33]. See, e.g., Kramer, *supra* note 12, §9.01, at 9-2.

[FN34]. Brand, *supra* note 22, at 102-03.

[FN35]. See John-Paul Motley, Compulsory Arbitration Agreements in Employment Contracts from Gardner-Denver to Austin: The Legal Uncertainty and Why Employers Should Choose Not to Use Preemployment Arbitration Agreements, 51 *Vand. L. Rev.* 687, 714 n.183 (1998).

[FN36]. See Bingham & Chachere, *supra* note 11, at 99. Some commentators argue that arbitration is more expensive for employers than traditional litigation. See, e.g., Big Awards Debunk Myths of Arbitration, *N.Y. Law.*, Aug. 22, 2002, available at <http://www.nylawyer.com/news/02/08/082202e.html>; Michael Z. Green, Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims, 31 *Rutgers L.J.* 399, 401, 421-24 (2000); Motley, *supra* note 35, at 714-15.

[FN37]. See *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). Some courts have struck down arbitration agreements in their entirety where employers have attempted to shift some or all of the burden of the cost of arbitration to employees. See, e.g., *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002); *Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). Other courts have held that the mere possibility that a plaintiff may be required to pay arbitration fees is not, by itself, a sufficient reason to invalidate an agreement to arbitrate civil rights or other employment-based claims. See *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001); *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999); *Rosenberg v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999).

[FN38]. See discussion *supra* Part I.C.

[FN39]. Harold M. Brody & Anthony J. Oncidi, *Careful What You Wish For: Is Arbitration the Employer's Panacea? Perhaps There Is a Better Alternative*, *HR Advisor*, Nov./Dec. 2003, at 8.

[FN40]. *Id.*

[FN41]. *Id.* at 9.

[FN42]. See Motley, *supra* note 35, at 714-18.

[FN43]. Kramer, *supra* note 12, §9.01, at 9-2.

[FN44]. 9 U.S.C. §10 (2000).

[FN45]. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953).

[FN46]. See, e.g., *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir. 1992).

[FN47]. How Arbitration Works, *supra* note 11, at 3; Developments in the Law, *supra* note 11, at 1680-81.

[FN48]. Bingham & Chachere, *supra* note 11, at 99.

[FN49]. 500 U.S. 20 (1991).

[FN50]. 105 F.3d 1465 (D.C. Cir. 1997).

[FN51]. 532 U.S. 105 (2001).

[FN52]. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

[FN53]. See, e.g., John T. Dunlop & Arnold M. Zack, *Mediation and Arbitration of Employment Disputes* 84 (1997).

[FN54]. See, e.g., Katherine V.W. Stone, *Employment Arbitration Under the Federal Arbitration Act*, in *Employment Dispute Resolution and Worker Rights in the Changing Workplace*, *supra* note 11, at 27, 52. While arbitration agreements differ in their provisions for the selection of arbitrators, many provisions allowing only the employer to select the arbitrator have been found unenforceable. See, e.g., *McMullen v. Meijer, Inc.*, 337 F.3d 697 (6th Cir. 2003); *Murray v. United Food & Commercial Workers Int'l Union, Local 400*, 289 F.3d 297 (4th Cir. 2002).

[FN55]. Dunlop & Zack, *supra* note 53, at 83.

[FN56]. Stone, *supra* note 54, at 52.

[FN57]. Dunlop & Zack, *supra* note 53, at 100.

[FN58]. *Id.*; Stone, *supra* note 54, at 52.

[FN59]. See discussion *supra* Part I.C.

[FN60]. See, e.g., Dunlop & Zack, *supra* note 53, at 86; Kramer, *supra* note 12, §9.01, at 9-2; Stone, *supra* note 54, at 34, 52.

[FN61]. 42 U.S.C. §1981a(b) (2000).

[FN62]. Dunlop & Zack, *supra* note 53, at 86.

[FN63]. See, e.g., Brody & Oncidi, *supra* note 39; Stephen F. Fink, *Insist on Bench Trials*, Nat'l L.J. Jan. 13, 2003, at A17; Richard J. Hafets & Linda Boyd, *An Alternative to Alternative Dispute Resolution*, Employee Rel. L.J., Winter 2003, at 73; Terence M. O'Neil & Mark N. Reinhartz, *How to Avoid a "Runaway Jury": Voluntary Waivers of Jury Trials: An Alternative to Mandatory Arbitration of Employment Disputes*, Emp. L. Strategist, Apr. 2003, at 1.

[FN64]. See, e.g., Herman Miller, Inc. v. Thom Rock Realty Co., L.P., 46 F.3d 183, 189 (2d Cir. 1995) (enforcing the jury waiver provision of a commercial lease); Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) (finding that the right to a jury trial can be knowingly and intentionally waived by contract); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755 (6th Cir. 1985) (finding that parties to a contract may waive right to a jury trial); N.W. Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 373 F.2d 136, 142 (8th Cir. 1967) (finding that parties to a labor contract, which provided that an arbitration board determine minor disputes, waived the right to a jury trial); RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 813 (N.D. Tex. 2002) (stating that a "waiver must be made knowingly and voluntarily, and courts will indulge every reasonable presumption against a waiver of that right"); In re Balsam Corp., 185 B.R. 54, 59 (E.D. Mo. 1995) (finding that a purchaser of debtor's assets waived the right to a jury trial by including language in a sale agreement that all disputes would be resolved in bankruptcy court); Conn. Nat'l Bank v. Smith, 826 F. Supp. 57, 59 (D.R.I. 1993) (stating that the Seventh Amendment guarantees the right to a jury trial in many civil cases; nonetheless, "it is axiomatic that, if done so knowingly, intentionally, and voluntarily, parties to a contract can waive this fundamental right"); Okura & Co., Inc. v. Careau Group, 783 F. Supp. 482, 488-89 (C.D. Cal. 1991) (finding that the waiver provisions contained in loan documents were valid when they had been negotiated by the parties and were an essential aspect of the bargain); In re Reggie Packing Co., Inc. v. Lazere Fin. Corp., 671 F. Supp. 571, 573 (N.D. Ill. 1987) (finding that a jury trial may be waived by contract); Analytical Sys., Inc. v. ITT Commercial Fin. Corp., 696 F. Supp. 1469, 1479 (N.D. Ga. 1986) (finding that the parties contractually waived the right to a jury trial); N. Feldman & Son, Ltd. v. Checker Motors Corp., 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (upholding the contractual waiver of a jury trial); Seligson v. Plum Tree, Inc., 361 F. Supp. 748, 758 (E.D. Pa. 1973) (finding that an argument that waiver was invalid because the contract between the parties violated the antitrust laws was "clearly specious," because that was the issue to be tried).

[FN65]. See, e.g., Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 837 (10th Cir. 1988) (stating that agreements waiving a jury trial are not contrary to public policy); Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc., 56 F. Supp. 2d 694, 706 (E.D. La. 1999) (finding that "[a]greements waiving the right to trial by jury are neither illegal nor contrary to public policy"); Coop. Fin. Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1171 (N.D. Iowa 1995) (finding that contractual waivers of a jury trial are "neither illegal nor contrary to public policy"); Phoenix Leasing, Inc. v. Sure Broad., Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994) (stating that no abstract public policy disfavors nor limits contractual waiver of the right to jury trial in civil cases); Conn. Nat'l Bank, 826 F. Supp. at 59 (stating that contractual agreements waiving the right to jury trial are "neither illegal nor contrary to any abstract public policy"); Okura & Co., 783 F. Supp. at 488 (finding no abstract public policy against waiving a jury trial).

[FN66]. Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

[FN67]. See, e.g., Hulsey v. West, 966 F.2d 579, 581-82 (10th Cir. 1992) (finding that the guarantor of a loan agreement was not bound by a jury waiver provision in an amendment to the agreement, even though he had executed the agreement as president of borrower, he did not sign in his individual capacity, and the amendment was made four years after his personal guaranty was executed); Rodenbur v. Kaufmann, 320 F.2d 679, 683-84 (D.C. Cir. 1963) (finding a jury waiver clause in an apartment lease applied only to issues relating to terms of the lease, not to an accident on the premises); Phoenix Leasing, Inc., 843 F. Supp. at 1388 (stating that jury waivers are to be "narrowly construed, and any ambiguity is to be decided against the waiver"); Okura & Co., 783 F. Supp. at 489 (finding that causes of action stemming from a separate purchase agreement, or from an oral reimbursement agreement predating the main contract, would be triable by a jury); Nat'l Acceptance Co. v. Myca Prods., Inc., 381 F. Supp. 269, 270 (W.D. Pa. 1974) (deeming the waiver clause in a loan agreement inapplicable with regard to the borrower's counterclaim for breach of an antecedent oral agreement). But see, e.g., Telum, Inc., 859 F.2d at 837-38 (upholding the waiver clause although an entire oil rig lease was challenged on grounds of fraud in the inducement); Efficient Solutions, Inc. v. Meiners' Country Mart, Inc., 56 F. Supp. 2d 982, 984 (W.D. Tenn. 1999) (finding that a contractual jury waiver provision applied to defendant's counterclaims for fraud in inducement and negligent misrepresentation because defendant's tort claims arose out of and related to contract negotiations that led to the contract); Nat'l Westminster Bank, U.S.A. v.

Ross, 130 B.R. 656, 667-68 (S.D.N.Y. 1991) (finding that the jury waiver clause in a guarantee, providing that guarantor waived jury trial right in any litigation with bank, applied to guarantor's counterclaims, whether or not relating to the guaranty); Analytical Sys., Inc., 696 F. Supp. at 1479 (while the subject of the action was property not covered by security agreements, and it was argued that the defendant's alleged tortious conduct fell outside the relationship of the secured parties and thus could not have been contemplated by the jury waiver clause, the deprivation of property occurred in the context of the creditor's efforts to protect its collateral; defendant's actions may have been tortious, but they were taken in accordance with its understanding of its status under the security agreement).

[FN68]. See, e.g., K.M.C. Co., 757 F.2d at 755-58 (finding waiver is neither knowing nor voluntary where the defendant's representatives had assured the plaintiff that the waiver provisions would not be enforced absent fraud); Nat'l Equip. Rental v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (finding that the inequality in bargaining power suggested the waiver was neither intentional nor knowing where the waiver clause was set deeply and inconspicuously in the contract, and the defendant had no choice but to accept the conditions to obtain badly needed funds); RDO Fin. Servs. Co., 191 F. Supp. 2d at 813 (stating "waiver must be made knowingly and voluntarily, and courts will indulge every reasonable presumption against" waiver); Coop. Fin. Ass'n, Inc., 871 F. Supp. at 1171 (stating "for a waiver to be effective, the party waiving the right must do so 'voluntarily' and 'knowingly'"); Phoenix Leasing, Inc., 843 F. Supp. at 1384 (stating that the court must decide the waiver was "knowing, voluntary and intelligent"); Conn. Nat'l Bank, 826 F. Supp. at 59 (stating that "[a]ll courts agree that a contractual jury waiver provision is enforceable only if it was entered into 'knowingly and intentionally' or 'knowingly and voluntarily'"); In re Reggie Packing Co., 671 F. Supp. at 573 (finding the validity of a waiver depends on voluntary and knowing consent); N. Feldman & Son, Ltd., 572 F. Supp. at 313 (stating "[w]hen the purported waiver exists in a contract signed prior to the contemplation of litigation, the party seeking to enforce it must demonstrate that the consent was both voluntary and informed"); Dreiling v. Peugeot Motors of Am., Inc., 539 F. Supp. 402, 403 (D. Colo. 1982) (stating that "[a] constitutional guarantee so fundamental as the right to jury trial cannot be waived unknowingly").

[FN69]. Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

[FN70]. See, e.g., Telum, Inc., 859 F.2d at 837-38; Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986); West-side-Marrero Jeep Eagle, Inc., 56 F. Supp. 2d at 707-09; Coop. Fin. Ass'n, Inc., 871 F. Supp. at 1172-73; Phoenix Leasing, Inc., 843 F. Supp. at 1384-85; Conn. Nat'l Bank, 826 F. Supp. at 60-61; Gurfein v. Sovereign Group, 826 F. Supp. 890, 921 (E.D. Pa. 1993); Okura & Co., 783 F. Supp. at 489; Smyly v. Hyundai Motor Am., 762 F. Supp. 428, 430 (D. Mass. 1991); Nat'l Westminster Bank, U.S.A., 130 B.R. at 667; Bonfield v. Aamco Transmissions, Inc., 717 F. Supp. 589, 595-96 (N.D. Ill. 1989); Standard Wire & Cable Co. v. Ameritrust Corp., 697 F. Supp. 368, 375 (C.D. Cal. 1988); In re Reggie Packing Co., 671 F. Supp. at 573-74; N. Feldman & Son, Ltd., 572 F. Supp. at 313. But see, e.g., Nat'l Equip. Rental, 565 F.2d at 258; RDO Fin. Servs. Co., 191 F. Supp. 2d at 813-14; First Union Nat'l Bank v. United States, 164 F. Supp. 2d 660, 665 (E.D. Pa. 2001); Sullivan v. Ajax Navigation Corp., 881 F. Supp. 906, 911 (S.D.N.Y. 1995); Dreiling, 539 F. Supp. at 403.

[FN71]. I was only able to find two cases that analyzed a jury trial waiver provision in the Title VII context: Brown v. Cushman & Wakefield, Inc., 235 F. Supp. 2d 291 (S.D.N.Y. 2002), discussed above, and Schappert v. Bedford, Freeman & Worth Publ'g Group, LLC, No. 03 Civ. 0058(RMB)(D.), 2004 U.S. Dist. LXiS 14153 (S.D.N.Y. 2004) (finding jury waiver provision enforceable).

[FN72]. *Id.*

[FN73]. *Id.* at 293 (emphasis in original).

[FN74]. *Id.* at 292.

[FN75]. *Id.*

[FN76]. *Id.*

[FN77]. *Id.* at 293.

[FN78]. *Id.*

[FN79]. *Id.* at 293-94 n.5 (internal quotation marks and citation omitted).

[FN80]. *Id.* at 293-94.

[FN81]. *Id.* at 294.

[FN82]. *Id.*

[FN83]. *Id.*

[FN84]. *Id.* (internal quotation marks omitted).

[FN85]. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) and its progeny.

[FN86]. Telum, Inc. v. E.F. Hutton Credit Corp., 859 F.2d 835, 838 (10th Cir. 1988) (discussing in dicta, allegations of fraud in inducement of jury trial waiver provisions).

[FN87]. See Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

[FN88]. See discussion *infra* Part II.D.

[FN89]. See, e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) (finding negotiability where negotiations of a lease agreement were protracted and several changes were made to the document before signing); Phoenix Leasing, Inc. v. Sure Broad, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994) (finding negotiability where borrower negotiated and altered some terms of the agreement); Nat'l Westminster Bank, U.S.A. v. Ross, 130 B.R. 656, 667 (S.D.N.Y. 1991) (finding negotiability where guarantor, with the assistance of counsel, revised the agreement); Standard Wire & Cable Co. v. AmeriTrust Corp., 697 F. Supp. 368, 375 (C.D. Cal. 1988) (finding negotiability where counsel made revisions to parts of the documents); In re Reggie Packing Co., v. Lazere Fin. Corp., 671 F. Supp. 571, 573 (N.D. Ill. 1987) (finding negotiability where the plaintiff had the opportunity to negotiate provisions and had altered two provisions).

[FN90]. See, e.g., In re S. Indus. Mech. Corp., 266 B.R. 827, 832 (W.D. Tenn. 2001) (finding negotiability where there was no evidence supporting the allegation that debtor had no opportunity to modify the contract terms); Westside-Marrero Jeep Eagle, Inc. v. Chrysler Corp., Inc., 56 F. Supp. 2d 694, 707 (E.D. La. 1999) (finding negotiability where, "[a]lthough the terms of the contracts were not negotiated, there [was] no indication that the terms were not negotiable"); Coop. Fin. Ass'n, Inc. v. Garst, 871 F. Supp. 1168, 1172 (N.D. Iowa 1995) (finding negotiability where there was no suggestion that borrower could not negotiate contract provisions).

[FN91]. See, e.g., Leasing Serv. Corp., 804 F.2d at 833 (finding conspicuousness where lease agreement was only two pages long); In re S. Indus. Mech. Corp., 266 B.R. at 832-33 (finding conspicuousness where each promissory note was more than three pages long, jury waiver provision consistently was located in the paragraph above the signature block, and the jury waiver provision was written in clear language); First Union Nat'l Bank v. United States, 164 F. Supp. 2d 660, 665 (E.D. Pa. 2001) (finding conspicuousness where provision was written entirely in capital letters under the heading "Waiver of Jury Trial"); Westside-Marrero Jeep Eagle, Inc., 56 F. Supp. 2d at 708 (finding conspicuousness where "the relevant clauses were clearly written, in most instances in block print, just above the signature line"); Coop. Fin. Ass'n, Inc., 871 F. Supp. at 1172 (finding

conspicuousness where the terms were clear and comprehensive and the provision was set off in its own paragraph just above the signature block with a warning to read the entire document); Phoenix Leasing, Inc., 843 F. Supp. at 1384 (finding conspicuousness where clause was printed in capital letters above the signature line); Conn. Nat'l Bank v. Smith, 826 F. Supp. 57, 60-61 (D.R.I. 1993) (finding conspicuousness where the guarantees "were only four pages long and contained only three pages of text; the language of the jury waiver clauses was clear and definite; the jury waiver clauses were located at the end of a paragraph, only two inches above the guarantors' signatures;" and the clauses were entirely legible and were the same size text as every other clause in the contract); Gurfein v. Sovereign Group, 826 F. Supp. 890, 921 (E.D. Pa. 1993) (finding that the jury waiver provisions in the agreement were clear and conspicuous); Smyly v. Hyundai Motor Am., 762 F. Supp. 428, 430 (D. Mass. 1991) (finding conspicuousness where jury waiver provision was set out plainly and was foretold in capital letters in an introductory table of contents); Nat'l Westminster Bank, U.S.A., 130 B.R. at 667 (finding conspicuousness where provision was set off in its own paragraph two inches above the signature line, and the provision was printed in small but entirely legible text, like the balance of the guaranty); Bonfield v. Aamco Transmissions, Inc., 717 F. Supp. 589, 595 (N.D. Ill. 1989) (finding conspicuousness where the agreement contained boldface caption stating "Jury Trial Waived"); In re Reggie Packing Co., 671 F. Supp. at 574 (finding conspicuousness where contract only three pages long and the waiver clause was located at the end of a paragraph just two inches above the signature line and in the same print type as every other contract clause); N. Feldman & Son, Ltd. v. Checker Motors Corp., 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (finding conspicuousness where the waiver provision was clearly visible, and located directly above the signatures of the parties). But cf. Nat'l Equip. Rental v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (finding the jury waiver provision inconspicuous where the clause was buried in the eleventh paragraph of a fine print, sixteen clause agreement); RDO Fin. Servs. Co. v. Powell, 191 F. Supp. 2d 811, 814 (N.D. Tex. 2002) (finding the jury waiver provision inconspicuous where the waiver was printed in very small font, buried in the middle of a lengthy paragraph entitled "Guarantor's Waivers," and not set off from the text); Whirlpool Fin. Corp., 866 F. Supp. at 1106 (finding the jury waiver provision inconspicuous, even though the provision was printed in capital letters, and it constituted three lines in a six page form loan agreement); Dreiling v. Peugeot Motors of Am., Inc., 539 F. Supp. 402, 403 (D. Colo. 1982) (finding a jury waiver provision inconspicuous where the waiver was inserted inconspicuously on the twentieth page of a twenty-two page standardized form contract).

[FN92]. See Westside-Marrero Jeep Eagle, Inc., 56 F. Supp. 2d at 709; Phoenix Leasing, Inc., 843 F. Supp. at 1385; Conn. Nat'l Bank, 826 F. Supp. at 60; In re Reggie Packing Co., 671 F. Supp. at 573.

[FN93]. See, e.g., RDO Fin. Servs. Co., 191 F. Supp. 2d at 814 (finding that a one-sided waiver of the right to a jury trial was unenforceable).

[FN94]. See, e.g., Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1564-65 (Fed. Cir. 1990) (finding that the bare fact that the contracts in question were "take it or leave it" offers by the government was not controlling); Smyly, 762 F. Supp. at 429-30 (finding a "take it or leave it" contract that included a jury waiver provision was enforceable).

[FN95]. See, e.g., In re S. Indus. Mech. Corp., 266 B.R. at 832 (finding that a waiver was enforceable where there was no evidence that the debtors could not have taken their business elsewhere); Coop. Fin. Ass'n, Inc., 871 F. Supp. at 1172 (finding a waiver enforceable where there was no evidence that the borrower could not have sought financing elsewhere if he objected to the terms of the loan).

[FN96]. Compare Conn. Nat'l Bank, 826 F. Supp. at 60 (finding that the defendants were sophisticated where the signatory graduated from Yale Law School, served as a law clerk, had been a practicing attorney in a variety of business fields for many years, was President and CEO of a number of substantial corporations, and had participated in complex financial loan transactions on behalf of these companies); Nat'l Westminster Bank, U.S.A., 130 B.R. at 667 (finding that a guarantor was sophisticated where he had received a bachelor's degree in political science from San Francisco State University and subsequently attended Harvard Business School where he earned an MBA, guarantor was CEO and major shareholder of a corporation, and guarantor had at least six years experience negotiating complex financial transactions); with Leasing Serv. Corp., 804 F.2d at 833 (finding that the lessees were "manifestly shrewd businessmen" despite their lack of formal education); In re S. Indus. Mech. Corp., 266 B.R. at 832 (finding that debtors were sophisticated businesspeople without discussing formal education); Coop. Fin. Ass'n, Inc., 871 F. Supp. at 1172 (finding that the borrower was a sophisticated and experienced businessman).

without discussing formal education); Phoenix Leasing, Inc., 843 F. Supp. at 1385 (finding that the defendant was experienced professional, and sophisticated in business dealings without discussing formal education); Smyly, 762 F. Supp. at 430 (finding that the dealer was a sophisticated businessman without discussing formal education); Bonfield, 717 F. Supp. at 595 (finding that the franchisee was an experienced businessman without discussing formal education).

[FN97]. Whirlpool Fin. Corp. v. Sevaux, 866 F. Supp. 1102, 1105 (N.D. Ill. 1994).

[FN98]. See, e.g., Bonfield, 717 F. Supp. at 595 (upholding waiver provision even though franchisee chose not to have his lawyer review the agreement); N. Feldman & Son, Ltd. v. Checker Motors Corp., 572 F. Supp. 310, 313 (S.D.N.Y. 1983) (upholding the waiver provision even though the buyer was unrepresented).

[FN99]. See, e.g., Phoenix Leasing, Inc., 843 F. Supp. at 1385; Conn. Nat'l Bank, 826 F. Supp. at 60; Nat'l Westminster Bank U.S.A., 130 B.R. at 667; Standard Wire & Cable Co. v. Ameritrust Corp., 697 F. Supp. 368, 375 (C.D. Cal. 1988).

[FN100]. Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §626(f) (2000)); see Hammaker v. Brown & Brown, Inc., 214 F. Supp. 2d 575, 578-79 (E.D. Va. 2002).

[FN101]. See 29 U.S.C. §626(f)(1).

[FN102]. *Id.*

[FN103]. See Brown v. Cushman & Wakefield, Inc., 235 F. Supp. 2d 291 (S.D.N.Y. 2002).

[FN104]. 9 U.S.C. §2 (2000).

[FN105]. 500 U.S. 20, 33 (1991).

[FN106]. *Id.* (quoting Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).

[FN107]. *Id.* at 26 (quoting Mitsubishi, 473 U.S. at 628).

[FN108]. 105 F.3d 1465 (D.C. Cir. 1997).

[FN109]. *Id.* at 1482.

[FN110]. 279 F.3d 889 (9th Cir. 2002).

[FN111]. *Id.* at 893.

[FN112]. *Id.*

[FN113]. *Id.*

[FN114]. *Id.* at 893-95.

[FN115]. *Id.* at 893.

[FN116]. *Id.* at 893-95.

[FN117]. *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269 (3d Cir. 2004); *McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004); *Lee v. Red Lobster Inns of Am., Inc.*, No. 02-5188, 2004 U.S. App. LEXIS 1375 (6th Cir. Jan. 27, 2004); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024 (11th Cir. 2003); *Zimmer v. Cooperneff Advisors, Inc.*, Civil Action No. 04-3816, 2004 U.S. Dist. LEXIS 25465 (E.D. Pa. Dec. 20, 2004); *Kai v. Asia Source, Inc.*, No. Civ. A. 304CV1188M, 2004 U.S. Dist. LEXIS 22598 (N.D. Tex. Nov. 4, 2004); *Plebani v. Bucks County Rescue Emergency Med. Servs.*, No. Civ. A. 03-6225, 2004 U.S. Dist. LEXIS 20332 (E.D. Pa. Oct. 1, 2004); *Hill v. Peoplesoft USA, Inc.*, 333 F. Supp. 2d 398 (D. Md. 2004); *Gaines v. Mr. Formal, Inc.*, No. 04-588-KI, 2004 U.S. Dist. LEXIS 15290 (D. Or. July 30, 2004); *Smith v. Devlin Partners, LLC*, No. Civ.A.03-2380-KHV, 2004 U.S. Dist. LEXIS 12407 (D. Kan. July 2, 2004); *Booker v. Robert Half Int'l, Inc.*, 315 F. Supp. 2d 94 (D.D.C. 2004); *Scovill v. WSXY/ABC*, 312 F. Supp. 2d 955 (S.D. Oh. 2004); *Sapiro v. Verisign*, 310 F. Supp. 2d 208 (D.D.C. 2004); *Minter v. Freeway Food, Inc.*, No. 103CV00882, 2004 U.S. Dist. LEXIS 5709 (M.D.N.C. Apr. 2, 2004); *Taylor v. Ash Grove Cement Co.*, No. CV 03-1509-ST, 2004 U.S. Dist. LEXIS 11956 (D. Or. June 22, 2004); *Rogue v. Applied Materials, Inc.*, No. CV 03-1564-ST, 2004 U.S. Dist. LEXIS 10477 (D. Or. Feb. 20, 2004); *DeOrnellas v. Aspen Square Mgmt., Inc.*, 295 F. Supp. 2d 753 (E.D. Mich. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *McMullen v. Meijer, Inc.*, 337 F.3d 697 (6th Cir. 2003); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003); *Murray v. United Food & Commercial Workers Int'l Union, Local 400*, 289 F.3d 297 (4th Cir. 2002); *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778 (9th Cir. 2002); *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002); *Perez v. Globe Airport Sec. Servs.*, 253 F.3d 1280 (11th Cir. 2001); *Plaskett v. Bechtel Int'l, Inc.*, 243 F. Supp. 2d 334 (D.V.I. 2003); *Cooper v. MRM Inv. Co.*, 199 F. Supp. 2d 771 (M.D. Tenn. 2002); *Brennan v. Bally Total Fitness*, 198 F. Supp. 2d 377 (S.D.N.Y. 2002); *Phox v. Atriums Mgmt. Co., Inc.*, 230 F. Supp. 2d 1279 (D. Kan. 2002); *Gambardella v. Pentec, Inc.*, 218 F. Supp. 2d 237 (D. Conn. 2002); *Ball v. SFX Broad., Inc.*, 165 F. Supp. 2d 230 (N.D.N.Y. 2001); *Gourley v. Yellow Transp., LLC*, 178 F. Supp. 2d 1196 (D. Colo. 2001); *LeLouis v. W. Directory Co.*, 230 F. Supp. 2d 1214 (D. Or. 2001); *Dumais v. Am. Golf Corp.*, 150 F. Supp. 2d 1182 (D.N.M. 2001); *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985 (S.D. Ind. 2001).

[FN118]. 42 U.S.C. §2000e-5(f)(4) (2000).

[FN119]. *Id.* §2000e-5(f)(1).

[FN120]. *Id.* §2000e-5(e)(1).

[FN121]. *Id.* §1981a(b).

[FN122]. *Id.* §2000e-5(g).

[FN123]. *Id.* §2000e-5(k).

[FN124]. Fed. R. Civ. P. 26-27.

[FN125]. See *supra* Part I.C.

[FN126]. Fed. R. Civ. P. 52(a); see *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) ("Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous.").

[FN127]. See *Williams v. New Orleans Steamship Ass'n*, 688 F.2d 412, 414 (5th Cir. 1982) ("[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis."); *Johnson v. Uncle Ben's, Inc.*, 628 F.2d 419, 422 (5th Cir. 1980). The Johnson court noted:

The clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of controlling legal principles. The district court's findings based on its misunderstanding of this legal standard are entitled to no deference. We must undertake an independent analysis of the record before us in light of the correct legal standards.

Id.

[FN128]. See discussion *supra* Part I.C.

[FN129]. See *supra* Part I.D.

[FN130]. 42 U.S.C. §2000e-5(e)(1) (2000).

[FN131]. Id. §2000e-5(f)(4).

[FN132]. Id. §2000e-5(f)(1).

[FN133]. Id.

[FN134]. See *supra* Part II.E.1.

[FN135]. 42 U.S.C. §2000e-5(g)(1).

[FN136]. §1981a(b)(2).

[FN137]. §1981a(b)(1).

[FN138]. §1981a(b)(3).

[FN139]. See *supra* Part I.A.

[FN140]. See *supra* Part I.B.

[FN141]. See, e.g., Graham C. Lilly, *The Decline of the American Jury*, 72 U. Colo. L. Rev. 53, 57-58 (2001); Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 Am. U. L. Rev. 625, 663 (1997); *Developments in the Law--The Civil Jury*, 110 Harv. L. Rev. 1408, 1424 (1997); see also Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process-- The Case for the Fact Verdict*, 59 U. Cin. L. Rev. 15, 110 (1990).

[FN142]. Lilly, *supra* note 141, at 58 (citing Richard A. Posner, *The Federal Courts: Challenge and Reform 193-94* n.1 (2d ed. 1996) (citing *Administrative Office of the U.S. Courts, Judicial Business of the United States Courts: Annual Report of the Director 19 A1-284, A1-287* (1993))).

[FN143]. Id. (citing National Center for State Courts, *On Trial: The Length of Civil and Criminal Trials* 8-9 (1998)).

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