The University of Houston

School of Law

Advanced Employment Law Seminar

Arbitration – The Preferred Forum for 21st Century Disputes

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Arbitration: the Preferred Forum for 21st Century Disputes

"Our litigation system is too costly, too painful, too destructive, too inefficient for a truly civilized people."
Warren Burger
Chief Justice
United States Supreme Court

"Delay in justice is injustice."
Walter S. Landar, The Cry for Justice

"Litigation has become a less than ideal method of resolving employees public law claims… Employees bringing public law claims in Court must endure long waiting periods as governing agencies and the over-burdened court system struggle to find time to properly investigate and hear the complaints…"

"Arbitration also offers employees guarantee that there will be a hearing on the merits of their claims; No such guarantee exists in litigation where relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts."
The Commission on the Future of Workers – Management Relations.

I. Introduction

Arbitration is now the preferred dispute resolution method of choice for sophisticated employers and employees throughout the United States. The "debate" over the mandatory use of arbitration in non-union employment disputes is now over. The March 2001 United States Supreme Court decision in Adams v. Circuit City, infra, reversing yet another of the perverse anti-arbitration decisions of the Ninth Circuit Court of Appeal has effectively ended realistic challenges to the arbitration of employment disputes. Almost every Supreme Court and Court of Appeal decision since the Gilmer decision of a decade ago has upheld and enforced properly drafted arbitration provisions requiring the exclusive use of final and binding arbitration for the resolution of all statutory, common law and constitutional claims between employers and employees. Despite the ineffectually shrill protests of the E.E.O.C., the United States Supreme Court and all of the federal courts of appeal except the Ninth Circuit have consistently maintained and enforced the propositions articulated in the Gilmer decision when an employee has knowingly agreed to the arbitration of all disputes with their present or past employers. The Circuit City decision now mandates compliance with the law and jurisprudence even in the Ninth Circuit.

The battle has now shifted to new areas such as the ability of administrative agencies to obtain "make whole" or monetary relief for persons who have agreed to the arbitration of their claims with their employer, workers compensation and potential legislation. Should the U. S. Supreme Court agree with the majority of Circuit Courts which have addressed the issue and limit the agencies to injunctive relief only, then employers will have the ability to choose to reduce the EEOC and its' state analogues to nothing more than irritating nuisances able to do little more than bray and posture. The trend toward ever-broader application of arbitration agreements will increasingly include areas such as workers compensation claims to the potential exclusion of the state compensation authorities. As always, legislation is still noisily introduced by anti-arbitration forces to restore the ancient régime, but with little realistic prospect of success before a conservative Congress and administration. A President who has himself been sued on frivolous employment matters while Governor of

Texas, and who has the example of the misfortunes of his predecessor engendered by an employment suit is unlikely to permit any anti-arbitration legislation to become law.

We as attorneys now have a duty as ethical professionals to insure that we know, understand and properly employ the dispute and risk management tools granted to our clients by the Federal Arbitration Act and contemporary arbitration jurisprudence. Properly used, final and binding arbitration, including mandatory arbitration as a term and condition of employment, can become the most effective way available to American workers for the vindication of their civil and constitutional rights in the employment context. Our clients increasingly know and understand the deficiencies of litigation. They expect and have the right to be advised of all available alternatives to traditional litigation. One law professor of this author's acquaintance recently stated in a public speech that, in his view, any attorney that does not properly explore the opportunities afforded by mediation and arbitration for their client is committing legal malpractice. Consequently, it is essential to know and understand the potential and actual uses of arbitration in the workplace.

II. The Deficiencies of Litigation

Today, everyone knows the serious and numerous defects of the court system. They can be heard in the halls of Congress, the chambers of our courts, in "exposes" in the news media and even in our own offices when consulting with our clients. A few of the most notorious and best known problems of our legal system are:

1. Delay. Court proceedings are slow, cumbersome and often provide no one with an acceptable outcome. Employment disputes frequently require many years of litigation and appeals to obtain a truly final decision.

2. Expense. Litigation is very expensive. Often, both sides in employment litigation spend tens of thousands of dollars in attorneys' fees, expert witness fees, investigators' charges and court costs. A study by the RAND Corporation of employment litigation places the average cost of defending an employment claim in court at over $100,000. This figure does not include the cost of the disruptions to the employees' lives or to the company they are or were employed by, which frequently exceeds the cost of the attorneys' fees!

3. Loss of Privacy. Litigation is public and everyone can watch and learn about your client's problem. Does your client really want everyone to know about his or her personal or business affairs? Do they, or you, really want their affairs permanently recorded in a public record, always on display to every curious person or worse, members of the media? We, as lawyers, often forget that our clients do not share our enthusiasm for public attention.

4. No Day in Court. Employment litigation is frequently decided by courts on technical reasons in a Motion for Summary Judgment. Neither the employee nor the employer ever has a real opportunity to tell their story or to fully present their case. Very few people ever actually get to go into court and try their lawsuit. No one ever achieves true closure. We know that virtually all lawsuits are settled, yet how many of our clients are truly happy with those results? The federal dockets are still extremely congested, and state dockets are becoming almost as slow and technical.

5. Non-specialized Decision-Makers. Courts and juries do not specialize in resolving employment disputes. Yet, for more than 30 years, the United States Supreme Court has encouraged employers and employees to take advantage of arbitrators' expertise in resolving employment disputes.

III. The Advantages of Arbitration

Arbitration offers numerous advantages to both employees and employers. It has many of the same benefits as mediation, but with the difference that the arbitration tribunal will decide the dispute once and for all. The best-known advantages of arbitration are those of:

Speed. Litigation in court, especially federal court, is frequently slow with the proceedings, often lasting from 2 to 5 years. If there is an appeal, that time period can become 5 to 10 years or even longer. An arbitration is usually completed in a period of months, and sophisticated rules, such as those of National Mediation Arbitration, Inc. or the Center for Public Resources, are designed to try to conclude the case within 180 days whenever possible. If an arbitration tribunal decides that any party is entitled to a monetary award, an injunction or any other legal or equitable relief, it will generally be obtained much faster in arbitration than in court. It is very difficult, indeed almost impossible, to appeal the decision of an arbitration tribunal. The law does permit a very limited opportunity to modify or change an arbitral award. However, that process is extraordinarily difficult and usually impossible.

Reduced Cost. Everyone will save money in legal expenses and costs by using arbitration in place of litigation. A study by the Institute for Civil Justice found that arbitration was approximately 20.4% cheaper than litigation. Most arbitrations take considerably less time to complete than a trial to either a court or to a jury. This is because most arbitrators are experts in their field and are able to learn and understand a party's case much faster than a non-specialist judge or jury.

Expert Decision Makers. Many arbitrators specialize in resolving employment disputes and now also increasingly, personal injury disputes. Courts do not. Parties can choose arbitrators who know and understand the law applicable to the cases before them. They are a sophisticated expert tribunal and make their decisions accordingly. They are far less likely than a jury to decide a case based on bias, prejudice or antipathy toward a particular party or statute.

A Full and Fair Hearing. Arbitrators always listen to the case. They will generally not dismiss any claim on technical legal grounds without giving the parties a hearing. The parties arbitration will almost always have an opportunity to present their evidence and position. An arbitration tribunal will rarely prevent your client from telling their story by granting a Motion for Summary Judgment, as is often done in the federal courts. Arbitration tribunals have subpoena power and their subpoenas are enforceable. Parties can compel the production of people, documents and things and even provide for appropriate discovery. Arbitrators will afford your client a fair hearing. Your client may not win, but will have a fair chance to present their case.

Privacy. Arbitrations are conducted with only the parties and counsel present. There is no public record of the proceedings, and even the existence of the arbitration is private unless revealed in an action to enforce the Award. Thus, there is no publicity of the proceeding. Thus the parties can resolve their differences without interference from the media or others without a legitimate interest in the parties' dispute.

Complete Relief. An arbitration tribunal should be designed and empowered to provide the same legal or equitable relief available in a federal court. Arbitration does not waive any substantive rights of any party. It changes the place where those legal rights will be asserted from that of a non-specialist judge or jury trial to that of an expert arbitral tribunal. That tribunal can award the same relief as is available from any court or jury. The arbitrators will hear all claims and give everyone a full and fair opportunity to present their case. They will then render an award which will be binding on all of the parties but without the delays, expenses or risks of an appeal.

IV. The Legal Basis for Arbitration

A. Statutory

a. The Federal Arbitration Act

The Federal Arbitration Act is the primary, and by far the most important, statute governing the use of arbitration in the United States. This statute and the jurisprudence interpreting it are the foundation of all employment arbitration not governed by a collective bargaining agreement. For many years it was essentially dormant. However, beginning in the early 1980's the United States Supreme Court began interpreting the act in an increasingly expansive manner. Those early decisions have been successively construed over the last decade in a series of decisions culminating in the March 2001 Supreme Court decision in Circuit City, infra, to require the enforcement of personal agreements to arbitrate irrespective of any anti-arbitration provisions of state law.

The Federal Arbitration Act has been interpreted by the Supreme Court as essentially establishing complete federal control over arbitration under the provisions of the Supremacy Clause of the United States Constitution. The most critical provisions of the Act are contained in Title 9, Section 2 and Section 1, which provide:

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate:

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.

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "Commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but 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.

These provisions continue to be interpreted as expressing the public policy of the United States to be not merely in favor of, but positively affirming a preference for the expanded use of arbitration. The precise language of portions of these provisions does not seem facially to mandate the conclusions reached by the United States Supreme Court. Yet that language has been construed as possessing an emphatic pro-arbitration meaning elusive to anyone without a clear understanding of the Supreme Court's frequently declared policy of favoring arbitration. In short, the Supreme Court has not, in the past few decades, permitted the precise language of the statute to interfere with its policy of expanding the use and reach of arbitration. The laws and jurisprudence applicable to employment will be examined in detail below.

b. The Civil Rights Act of 1991

i. General Dispute Resolution Provisions

ALTERNATIVE MEANS OF DISPUTE RESOLUTION

Section 118 of Title I of Pub. L. 102-166 provides that:

"Where appropriate and to the extent authorized by law, the use alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Title (enacting section 1981a of this Title and amending this Section, Sections 1988, 2000e, 2000e-1, 2000e-2, 2000e-4, 2000e-5, 2000e-16, 12111, and 12112 of this Title, and Section 626 of Title 29, Labor)."

It is important to note that this language is not restricted to only one particular federal statute. Congress stated its intention to provide these dispute resolution options for use in essentially all federal employment laws. Consequently, the clear language of the Civil Rights Act of 1991 and the federal jurisprudence grant both employers and employees the right to use all of the listed forms of alternative dispute resolution, specifically including arbitration. This language has often been conveniently ignored by the E.E.O.C. for blatant bureaucratic political reasons. Nothing in either the Civil Rights Act or in the Supreme Court jurisprudence supports any restriction on the use of arbitration, including mandatory arbitration required as a term and condition of employment. The E.E.O.C. has made obviously politically inspired policy statements articulating the view it and its liberal political allies wish was the law. However, very strong congressional opposition, knowledgeable of the intense lobbying effort by the plaintiffs' employment bar to generate those views, has generally limited the E.E.O.C. to stating its unhappiness with the law through the filing of amicus briefs. With the exception of the Ninth Circuit decision in Duffield, infra, none of the remaining Courts of Appeal have adopted the E.E.O.C.'s peculiar politically inspired hatred of arbitration. The Supreme Court reversal of the Ninth Circuit in the Circuit City decision should finally convey the message that mandatory arbitration is not only permissible, it is positively encouraged by both the Congress and the United States Supreme Court.

Furthermore, in the very same Civil Rights Act, the United States Senate specifically required the exclusive use of an "arbitration type" procedure for all employment claims against itself and its members or their offices. Indeed, the Senate procedure specifically requires in the appointment of members of its "hearing boards" the consideration of the recommendations of organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. It is noteworthy that at no time can Senate employees assert employment claims in any district court. There are no juries in the Senate process. The Senate employees only access to a federal court is to the court of appeals for review of the decision of the Senate "hearing board". Those "special" procedures are included below for your use and citation, should you be faced with bureaucratic assertions misstating either the actions or intent of Congress in passing the 1991 Civil Rights Act. Certainly Congress would never enact a law depriving ordinary citizens, such as our clients, of the obvious benefits of a procedure specifically designed for the United States Senate?? Unsurprisingly, the E.E.O.C. has been noticeably silent about that particular "arbitration-like" dispute resolution procedure. Quo animo? Res ipsa loquitor.

ii. Special "Arbitration - Like" Provisions for Employees of the U. S. Senate.

TITLE 2 - THE CONGRESS

CHAPTER 23 - GOVERNMENT EMPLOYEE RIGHTS

Sec. 1207. Step III: Formal complaint and hearing

(a) Formal complaint and request for hearing

Not later than 30 days after receipt by the employee of notice from the Office of the end of the mediation period, the Senate employee may file a formal complaint with the Office. No complaint may be filed unless the employee has made a timely request for counseling and has completed the procedures set forth in Sections 1205 and 1206 of this Title.

(b) Hearing board

A board of 3 independent hearing officers (referred to in this Chapter as 'hearing board'), who are not Senators or officers or employees of the Senate, chosen by the Director (one of whom shall be designated by the Director as the presiding hearing officer) shall be assigned to consider each complaint filed under this Section. The Director shall appoint hearing officers after considering any candidates who are recommended to the Director by the Federal Mediation and Conciliation Service, the Administrative Conference of the United States or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. A hearing board shall act by majority vote. (emphasis supplied).

(c) Dismissal of frivolous claims

Prior to a hearing under subsection (d) of this Section, a hearing board may dismiss any claim that it finds to be frivolous.

(d) Hearing

A hearing shall be conducted:

(1) in closed session on the record by a hearing board; and

(2) no later than 30 days after filing of the complaint under Subsection (a) of this Section, except that the Office may, for good cause, extend up to an additional 60 days the time for conducting a hearing; and

(3) except as specifically provided in this chapter and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of Title 5.

(e) Discovery

Reasonable prehearing discovery may be permitted at the discretion of the hearing board.

(f) Subpoena

(1) Authorization

A hearing board may authorize subpoenas, which shall be issued by the presiding hearing officer on behalf of the hearing board, for the attendance of witnesses at proceedings of the hearing board and for the production of correspondence, books, papers, documents and other records.

(2) Objections

If a witness refuses, on the basis of relevance, privilege or other objection, to testify in response to a question or to produce records in connection with the proceedings of a hearing board, the hearing board shall rule on the objection. At the request of the witness, the employee or employing office, or on its own initiative, the hearing board may refer the objection to the Select Committee on Ethics for a ruling.

(3) Enforcement

The Select Committee on Ethics may make to the Senate any recommendations by report or resolution, including recommendations for criminal or civil enforcement by or on behalf of the Office, which the Select Committee on Ethics may consider appropriate with respect to:

(A) the failure or refusal of any person to appear in proceedings under this or to produce records in obedience to a subpoena or order of the hearing board; or (FOOTNOTE 1) So in original. Probably should be 'this section'.

(B) the failure or refusal of any person to answer questions during his or her appearance as a witness in a proceeding under this Section.

For purposes of Section 1365 of Title 28, the Office shall be deemed to be a committee of the Senate.

(g) Decision

The hearing board shall issue a written decision as expeditiously as possible but in no case more than 45 days after the conclusion of the hearing. The written decision shall be transmitted by the Office to the employee and the employing office. The decision shall state the issues raised by the complaint, describe the evidence in the record and contain a determination as to whether a violation has occurred.

(h) Remedies

If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under Section 2000e-5(g) and (k) of Title 42, and may also order the award of such compensatory damages as would be appropriate if awarded under Section 1981 of Title 42 and Section 1981a(a) and (b)(2) of Title 42. In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under Section 633a(c) of Title 29. Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

(i) Precedent and interpretations

Hearing boards shall be guided by judicial decisions under statutes referred to in Section 1202 of this Title and Subsection (h) of this Section, as well as the precedents developed by the Select Committee on Ethics under section 1208 of this Title, and other Senate precedents.
PRE-SOURCE
(Pub. L. 102-166, Title III, Sec. 307, Nov. 21, 1991, 105 Stat. 1091.)

PRE-SEC-REF
SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in Sections 60m, 1203, 1204, 1207a, 1208, 1210, 1211, 1219, 1220 of this Title.

These sections are important in demonstrating congressional intent in passing the 1991 Civil Rights Act. Congress, and specifically the Senate, knew exactly what it intended to enact when it reserved to itself, and its members, immunity from jury trials by expressly mandating and requiring the exclusive use of an "arbitral process" for the resolution of all employment disputes.

c. The Americans with Disabilities Act

The dispute resolution provisions of this Act are contained in Section 12212, which provides:

> "Where appropriate, and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials and arbitration, is encouraged to resolve disputes arising under this chapter."

These provisions are identical with the provisions of the 1991 Civil Rights Act. They serve to again demonstrate that Congress knew, understood and intended to make arbitration (and the other specified forms of alternative dispute resolution) available for resolving every dispute potentially arising under the Americans with Disabilities Act.

d. The Texas General Arbitration Act

The Texas General Arbitration Act was codified by the 1995 Legislature as Civil Practices and Remedies Code Chapter 171. The preamble of the enacting legislation noted that it was merely a non-substantive codification of the preexisting laws concerning statutory arbitration. The Texas law is, in large part, similar to the Federal Arbitration Act. However, it contains a number of provisions very hostile to the use of arbitration for particular categories of disputes. (See Section 171.001 subsections a, b & c for the 'exceptions' to the general application of the statute.) None of those 'exceptions' are contained in (or permitted by) the Federal Arbitration Act, as recently interpreted by the recent United States Supreme Court cases of Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302; 149 L. Ed. 2d 234; 2001 U.S. LEXIS 2459, infra, Green Tree Financial v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373, 2000 U.S. LEXIS 8279, (2001), infra, *Allied Bruce Terminex Companies v. Dobson et al.*, 115 S. Ct. 834; 130 L. Ed 2d 753 (1995), infra, *or Doctor's Associates, Inc. v. Casarotto*, 116 S. Ct. 1652, 134 L. Ed.2d 902, infra. These cases are discussed at length below. Consequently, a prudent drafter of an arbitration agreement or provision should carefully avoid the use of the Texas statute wherever possible. It has been obviously compromised by extensive special interest "lobbying", supposedly in the interests of "consumers" and "injured workers". The Federal Arbitration Act contains none of these defects and is relatively easy to invoke for any "transaction involving commerce". 9 U.S.C. Sec. 2.

B. Jurisprudence--Favorable

1. Federal Cases

a. *Gilmer vs. Interstate/Johnson Lane Corporation,* 111 S. Ct. 1647 (1991)

This was the case that began the entire process of the use of final and binding arbitration for the resolution of employment disputes outside of the terms of a collective bargaining agreement. The United States Supreme Court, for the first time, expressly held that, by agreement, claims under the Age Discrimination in Employment Act could be subjected to compulsory arbitration under the Federal Arbitration Act. The contentions of the parties in this case are highly significant because of the way the Supreme Court disposed of the numerous objections to arbitration advanced by the plaintiff. This decision provided a strong insight into the Supreme Court's analysis of disputes over the effect of arbitration agreements. It began a substantial series of cases that only recently concluded in October 1998.

Mr. Gilmer was a manager of financial services for the Interstate/Johnson Lane Corporation. As such, he was required as a prerequisite to employment to register as a securities representative with several stock exchanges, including the New York Stock Exchange. His registration application (Uniform Application for Securities Industry Registration or Transfer) contained provisions requiring him to "agree to arbitrate any dispute, claim or controversy" arising between him and Interstate "that is required to be arbitrated under the rules, constitution or by-laws of the organizations with which I register." New York Stock Exchange Rule 347 provides for the arbitration of "any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative."

Gilmer was terminated by Interstate in 1987 at age 62. He filed an age discrimination charge with the E.E.O.C., and subsequently brought suit in United States district court, alleging that he had been discharged because of his age in violation of the Age Discrimination in Employment Act. Interstate responded by filing a motion to compel arbitration relying upon the plaintiff's registration application and the Federal Arbitration Act.

The district court denied Interstate's motion to compel arbitration. It concluded that "Congress intended to protect ADEA claimants from the waiver of a judicial forum" It also relied on the Supreme Court decision in *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 94 S. Ct. 1011 (1974). The court of appeals reversed, finding "nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." The United States Supreme Court granted writs to resolve a conflict among the courts of appeals concerning the arbitrability of ADEA claims.

i. The History and Purpose of the Federal Arbitration Act

Significantly, the Supreme Court began its analysis of this case with a review of the history and purpose of the Federal Arbitration Act. The court noted that the intent of that statute was to "reverse the long-standing judicial hostility to arbitration agreements... and to place arbitration agreements on the same footing as other contracts." *Gilmer*, at 1651. The court declared that the primary substantive portions of the Federal Arbitration Act stated that "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... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. Sect. 2. The court also noted that "the FAA also provides for stays of proceedings in federal district courts when an issue in the proceeding is referable to arbitration, Section 3, and for orders compelling arbitration when one party has failed, neglected or refused to comply with an arbitration agreement, Section 4." These provisions were interpreted by the Supreme Court to manifest a "liberal federal policy

favoring arbitration agreements." *citing Moses H. Cone Memorial Hospital v. Mercury Construction Corp*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983).

ii. Arbitration of Statutory Claims Merely a Change of Forum

The Court then addressed the issue of the arbitration of statutory claims and stated that it was now clear that statutory claims may be the subject of an arbitration agreement enforceable under to the FAA. It specifically referenced earlier decisions determining claims arising under the Sherman Act, the Securities Exchange Act and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act were arbitrable. *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S. Ct. 3346 (1985); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2332 (1987*); Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S. Ct. 1917 (1989). The court specifically cited those decisions to reemphasize its holdings that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi,* 473 U.S. at 628, 105 S. Ct. at 3354.

iii. Arbitration Favored Unless Congress Precluded Waiver of a Judicial Forum

The court went on to state that "having made the bargain to arbitrate, the party should be held to its unless Congress itself has evidenced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* Thus, the Court noted "that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." See *McMahon*, 482 U.S. at 227, 107 S. Ct. at 2337--2338. "If such an intention exists, it will be discovered in the text of the ADEA, its legislative history or an 'inherent conflict' between arbitration and the ADEA's underlying purposes. *Id.* Throughout such an inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' *Moses H. Cone*, 460 U.S. at 24, 103 S. Ct. at 941.

iv. Arbitration Does Not Undermine the E.E.O.C

Gilmer was also unsuccessful in persuading the court that the use of arbitration would undermine the role of the E.E.O.C. in enforcing the law. The court noted that "nothing in the ADEA indicates that Congress intended the E.E.O.C. be involved in all employment disputes. Such disputes can be settled, for example, without any E.E.O.C. involvement. The mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." The court was also unpersuaded by Gilmer's argument that compulsory arbitration was improper because it deprived claimants of the judicial forum provided for by the ADEA. The Supreme Court further stated that "if Congress had intended the substantive protection afforded by the ADEA to include protection against the waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history." However, plaintiff's argument ignored the statute's flexible approach to the resolution of claims. The E.E.O.C. itself is directed in the law to pursue "informal methods of conciliation, conference and persuasion", 29 U.S.C. Section 626 b., which the court found suggested that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress. Furthermore, Congress granted concurrent jurisdiction over employment claims to both state and federal courts, which supported Interstate's demand for arbitration. The court recognized that arbitration agreements, like the provisions for concurrent jurisdiction, served to advance the objective of allowing claimants a broader right to select the forum for resolving their disputes, whether that forum was judicial or otherwise. *Rodriguez de Quijas,* 490 U.S. at 483, 109 S. Ct. at 1921.

v. Miscellaneous General Objections to Arbitration Are Insufficient

Gilmer also attempted to avoid arbitration by raising "a host of challenges to the adequacy of arbitration procedures." The court stated that it would only briefly address those arguments, because it viewed such generalized attacks on arbitration to "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainant.s. Those contentions were dismissed as "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Rodriguez de Quijas*, 490 U.S at 481, 109 S. Ct. at 1920. Consequently, the Court barely bothered to address a response to Gilmer's claims that an arbitral forum was inadequate, unfair or biased.

vi. Specific Attacks on the Limited Discovery in Arbitration Were Insufficient

Gilmer also objected to arbitration because the discovery allowed in arbitration is more limited than that available in federal court. The Supreme Court responded by noting that the ADEA claims asserted by Gilmer were unlikely to require more extensive discovery than other statutory claims which the Court had already found to be properly subject to arbitration, such as antitrust and RICO claims. Although the limited discovery procedures available under the NYSE Rules were not as extensive as in the federal courts, the Court determined 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." Indeed, the court specifically noted that "an important counterweight to the reduced discovery in NYSE arbitration is that arbitrators are not bound by the rules of evidence".

vii. Unequal Bargaining Power Will Not Invalidate an Agreement to Arbitrate

Gilmer contended that the unequal bargaining power between employers and employees should operate to invalidate an agreement to arbitrate. However, the court dismissed that assertion stating that "mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." The claim that an arbitration agreement was an adhesion contract was not persuasive to the Court, and in oral argument was harshly attacked by Justice Scalia. He noted that Mr. Gilmer could work someplace other than Interstate if he did not want to agree to the arbitration of disputes with his employer! Attacks on arbitration agreements as contracts of adhesion have consistently failed.

viii. Attacks on Arbitration as Inadequate to Provide Class or Equitable Relief Also Fail

Gilmer also argued that arbitration was an insufficient process because it purportedly could not provide him with equitable relief or the opportunity to conduct a class action. The court specifically refuted his contention regarding the lack of equitable relief by recognizing again the ability of arbitrators to grant equitable relief. In addition, the court recognized that the NYSE rules provided for the possibility of collective proceedings. However, it did not regard that point as important. It found that "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the law provided for the possibility of bringing collective action does not mean that individual attempts at conciliation were intended to be barred." Therefore, Gilmer's concern that he might not be able to bring his claim as a class action would not suffice to enable him to evade his agreement to arbitrate his disputes with his employer.

ix. Collective Bargaining Agreement Cases Distinguished

Finally, Gilmer contended that the *Alexander v. Gardner-Denver Co* line of cases served to preclude the arbitration of employment discrimination claims. That reliance was demonstrated to be inadequate due to the

distinction between those cases in which the arbitrator was empowered by a collective bargaining agreement executed with a labor union rather than the individual agreement of each employee. In the *Alexander* case, the issue was whether a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a collective bargaining agreement was precluded from subsequently bringing a Title VII action based on the conduct that was the subject of the grievance. In finding that the employee retained the individual right to assert his Title VII claim, the court stressed that an employee's contractual rights under a collective bargaining agreement were separate and distinct from that employee's statutory Title VII rights. In addition, the court recognized that a labor arbitrator has authority only to resolve questions of contractual rights. The (labor) arbitrator's "task is to effectuate the intent of the parties," and they do not have the "general authority to invoke public laws that conflict with the bargain between the parties." *Alexander*, 415 U.S. at 53, 94 S. Ct. at 1022.

The Court also bluntly referenced the distinctions between the agreement of the parties in Gilmer and that of the employer and union in *Alexander*. The distinctions were clearly critical in the view of the court for several reasons. First, *Alexander* did not involve the issue of the enforcement of an agreement to arbitrate statutory claims. In fact, there was no agreement between the employee personally and the employer to arbitrate statutory disputes. Since no such agreement existed, the labor arbitrator had not been empowered by the parties to resolve any statutory claim. Second, because the *Alexander* case involved a collective bargaining agreement, the claimant was actually represented in the arbitration by the union. The Supreme Court was openly concerned about "the tension between collective representation and individual statutory rights," which was not an issue in *Gilmer*. Gilmer personally executed the document containing the agreement to arbitrate all disputes with his employer. He was not represented by a union that the court recognized might well have interests conflicting with his own. He represented himself and his own interests and was therefore able to agree to arbitrate his personal statutory claims. These personal agreement to arbitrate have continued to be construed differently than attempts by a labor union to agree to the arbitration of statutory claims. Yet recently, the agreement to arbitrate statutory claims by a labor union on behalf of its' members has been upheld and will be discussed below.

x. Arbitrability Arose Under Different Statutes

The agreement to arbitrate in *Gilmer* was based upon and interpreted under the provisions of the Federal Arbitration Act, not Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. The Federal Arbitration Act was expressly recognized by the court as articulating the strong public policy stated in *Mitsubishi, supra*, which "reflects a liberal federal policy favoring arbitration agreements." *Gilmer*, at 1657; *Mitsubishi*, 473 U.S., at 625, 105 S. Ct., at 3353. That strong policy arising under the Federal Arbitration Act dramatically affected the court's decision and compelled the result of requiring Gilmer to arbitrate his statutory ADEA claims.

The *Gilmer* case firmly established the ability of employers nationwide to establish mandatory enforceable arbitration programs. In recognizing the standard for arbitrability to be that of the "liberal federal policy favoring arbitration," the court gave all of the parties to the employment relationship the unquestioned opportunity to resolve all of their disputes privately through arbitration. The views of the court in *Gilmer* have been widely expanded in the key subsequent cases discussed below.

b. Circuit City Stores Inc. v. Adams, 121 S. Ct. 1302; 149 L. Ed. 2d 234; 2001 U.S. LEXIS 2459

This case finally defeats the last rear guard action of the anti-arbitration forces in their one remaining bastion, the Ninth Circuit Court of Appeals. Consistently evading the clear language of the Federal Arbitration

Act and the Supreme Court jurisprudence, the Ninth Circuit continually invented new rationales for refusing to enforce mandatory agreements to arbitrate employment claims. That "creativity" was finally brought to a halt when United States Supreme Court bluntly reversed a Ninth Circuit decision asserting that the exception in the FAA for contracts of employment of seamen, railroad workers or workers in interstate commerce prohibited the use of the FAA to require the mandatory arbitration of employment disputes.

The facts before the Court established that since 1995 Circuit City Stores, a national retailer of consumer electronics, has had a uniform policy of addressing employment disputes through the use of a mandatory dispute resolution program culminating in final and binding arbitration. All applicants for employment at every Circuit City store agree to resolve all disputes with Circuit City through the program as a mandatory condition of having their applications considered for any possible employment opportunities. (While generally creative for a 1995 document, it did however leave the door ajar to litigation by overreaching through unwise attempts to limit remedies and impose an employer created one year statute of limitations.) In the case before the Court, plaintiff, St Clair Adams had agreed to the arbitration of all of his disputes with his potential future employer when he signed the standard application form seeking employment with Circuit City Stores. That application contained a mandatory arbitration provision stating:

> "I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort."

The application also specifically contained language which recited that it did not form an employment contract with Adams, nor did it alter the "at will" basis of his employment with Circuit City. The Ninth Circuit Court of Appeals, never willing to let inconvenient contrary evidence obstruct its desire to legislate against arbitration, ignored that express language. It found that the dispute resolution agreement was an "employment contract" because it was mandated by the employer as a term and condition of employment. The Ninth Circuit then referred to its unique interpretations of Section 1 of the Federal Arbitration Act which provides: "nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" (9 U.S.C. Section 1). In a 2 to 1 decision in the case of Craft v. Campbell's Soup Company, 177 F.3d 1083 (1999), a panel of the Ninth Circuit had held that Congress intended the federal arbitration act to apply only to commercial contracts. The Court then relied on that unique decision as support for the peculiar determination that the Federal Arbitration Act was "never intended to apply to labor contracts of any sort." It reached this conclusion despite the fact that every other Circuit Court of Appeals in the United States has limited that specific language to workers actually engaged in the physical transport of goods in interstate commerce.

Two years after beginning employment with Circuit City, plaintiff sued his employer in state court alleging various violations of California civil rights laws and tort claims. Circuit City obtained an injunction in U.S. District Court sending plaintiff's claims to arbitration. The Ninth Circuit reversed the District Court holding that the application language constituted a contract of employment for workers in interstate commerce and was therefore covered by the "class of workers engaged in interstate commerce" exception in the Federal Arbitration Act. The relevant provision of the Act provides:

> Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; **"Commerce", as herein defined, means commerce among the several States or with foreign nations**, or in any Territory of the United States or the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation**, but 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.** (emphasis supplied)

Facially, the interpretation of the Ninth Circuit was not completely absurd. However, every other Circuit Court of Appeals in the United States had held that exception was limited to transportation workers. Eschewing plaintiff's suggestion to rely on the Ninth Circuit's purported "history" of the Federal Arbitration Act, the Supreme Court held that the exception provision was limited exclusively to transportation workers. It also declined the invitation of amici curiae supporting plaintiff, such as the National Academy of Arbitrators, to revisit the Court's decision in Southland Corp. v. Keating, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852, which held that Congress intended the FAA to apply in state courts, and to pre-empt state anti-arbitration laws to the contrary. The Court explicitly noted that it declined to overrule Southland in Allied-Bruce, infra, at 272, and that Congress has not moved to overturn Southland in response to its' Allied-Bruce decision. The Court stated that it would not chip away at Southland by indirection. Furthermore, it expressly noted that there are real benefits to arbitration in the employment context, including the avoidance of litigation costs compounded by difficult choice-of-law questions and by the necessity of bifurcating the proceedings where state law precludes arbitration of certain types of employment claims but not others. It concluded by noting that an adoption of the Adams' position would call into doubt the efficacy of many employers' alternative dispute resolution procedures and in the process undermine the FAA's pro-arbitration purposes thus breeding litigation from a statute that seeks to avoid it. Citing Allied-Bruce, infra, at 275.

The Court's analysis is interesting and involved, but effectively restates its' continued support of arbitration, even when imposed by employers as a mandatory term and condition of employment. This case eliminates any reservations that any employer should have about the enforceability of a mandatory arbitration program. In the future the questions will shift towards the points of precisely how far employers will be permitted by the courts to adventure when defining the parameters of a mandatory arbitration program. The Supreme Court has now foreclosed assertions that arbitration cannot be mandated for employment disputes. That battle is over and the pro-arbitration forces have triumphed. However, the extent of the issues subject to arbitration, the discovery, if any, permissible in an arbitration, the effect of employer attempts to shift the costs of arbitration upon claimants, the "qualifications" of the arbitrators and the ability of employers to restrict claimants to any particular limited set of arbitrators remain to be addressed. As the courts become increasingly familiar with arbitration, the critical nature of the method of selecting the arbitrators, the fact that the greatest majority of arbitrators have little or no formal training in arbitration and virtually none have ever stood examination in arbitration law, procedure, practice or ethics, these issues will eventually be addressed.

c. Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373, 2000 U.S. LEXIS 8279

This case is extremely important because it addressed the issue of whether a party may be required to pay

its share of the costs and fees incurred in the arbitration of any dispute, including participation in any form of mandatory arbitration. Stated another way, can a party evade an agreement to arbitrate by claiming that if required to pay their share of the cost of an arbitration, they “might” be dissuaded from asserting their statutory (or constitutional) claims? An ever growing chorus of plaintiff lawyers, class-action specialists and consumer lawyers have been attempting to convince the courts and Congress that their clients should never be required to pay any portion of the fees and costs of an arbitration, even when they are fully capable of doing so. That assertion conveniently ignores the fact that virtually all legitimate arbitration rules explicitly provide for the costs and fees to be shifted away from any party who truly can not afford them. However, it is also expected that those who can afford to pay the costs and fees of the arbitration will continue to be required to do so.

Though cast in the alluring argument of the "open access to the courts" guaranteed by the Constitution, the dispute was essentially only about money. The issue simply put is, who must pay for an arbitration? Can a business enforce the terms of a contract which provides in part that a consumer, customer, employee or other non-business party pay its share of the costs and fees incurred to arbitrate disputes arising out of, or relating to, the parties transaction, contract or relationship? Unsurprisingly, the courts have been far from unanimous in their analysis of this issue.

Though not an employment cases, this decision presented a set of issues with vast implications for the arbitration of employment disputes. The facts established that Ms. Randolph purchased a mobile home under a mobile home financing agreement with the Green Tree Financial institutions. The financing agreement required that Randolph buy insurance to protect petitioners from the costs of her default and also provided that all disputes under the contract would be resolved by binding arbitration. Randolph later sued petitioners alleging that they violated the Truth in Lending Act (TILA) by failing to disclose the insurance requirement as a finance charge and that they violated the Equal Credit Opportunity Act by requiring her to arbitrate her statutory causes of action.

The Court of Appeal concluded that the trial court's order compelling arbitration between respondent purchaser and petitioner financing companies and dismissing respondent's claims was appealable under 9 U.S.C.S. § 16 of the Federal Arbitration Act (FAA), but that the arbitration provision was unenforceable due to potentially prohibitive costs. The appellate court concluded that the trial court's decision ordering arbitration and dismissing respondent's claims for relief was appealable because it was a final decision under 9 U.S.C.S. §16(a)(3) in that it plainly disposed of the entire case on the merits and left no part pending before the trial court. The Supreme Court rejected the independent/embedded proceeding distinction for purposes of determining whether a decision was final within the meaning of § 16(a)(3). However, the Supreme Court also found that the appellate court erred in determining that the arbitration was unenforceable because the record did not contain sufficient information related to respondent's costs if the matter was arbitrated. Consequently, the risk that she would have been saddled with prohibitive costs in enforcing her statutory rights was too speculative to justify invalidating the arbitration agreement.

The Supreme Court specifically addressed the question of whether Randolph's agreement to arbitrate was unenforceable because it said nothing about the costs of arbitration, and thus supposedly failed to provide her protection from potentially substantial costs in pursuing her federal statutory claims in the arbitral forum. Section 2 of the FAA provides that "[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 . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court specifically noted that “In considering whether respondent's agreement to arbitrate is unenforceable, we are mindful of the FAA's purpose "to reverse the longstanding

judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991).

In light of that purpose the Supreme Court reiterated that federal statutory claims can be appropriately resolved through arbitration, and that it had repeatedly enforced agreements to arbitrate that involve such claims. See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989) (Securities Act of 1933); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985) (Sherman Act). It again rejected Randolph's generalized attacks on arbitration that rested on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants." Rodriguez de Quijas, supra, at 481. The cited cases demonstrate that even claims arising under a statute designed to further important social policies may be arbitrated because "'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,'" the statute serves its functions. See Gilmer, supra, at 28 (quoting Mitsubishi, supra, at 637).

The Court repeated its' oft stated direction that in determining whether statutory claims may be subject to arbitration, the first question is whether the parties agreed to submit their claims to arbitration? If they did, then the question becomes whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. See Gilmer, supra, at 26; Mitsubishi, supra, at 628. In the case before the Court it was undisputed that the parties agreed to arbitrate all claims relating to their contract, including claims involving statutory rights. Randolph could not and did not contend that the TILA evinced an intention to preclude a waiver of judicial remedies. Instead her contention was that the arbitration agreement's silence with respect to costs and fees created a "risk" that she would be required to bear prohibitive arbitration costs if she pursued her claims in an arbitral forum. That supposed risk of having to spend money to assert her purported claims thereby might force her to forgo any claims she might have against petitioners. Therefore, she argued, that she was unable to vindicate her statutory rights in arbitration and thus the entire requirement that she honor her agreement to arbitrate her claims should be disregarded and annulled.

The Court recognized that it was possible that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in an arbitral forum. However, the record did not show that Randolph actually would be required to bear such costs if she went to arbitration. In fact, the record contained virtually no information on the issue. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause." 178 F.3d at 1158. The record revealed only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The "risk" that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.

The Court held that to invalidate the agreement on that basis would undermine the "liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hospital, 460 U.S. at 24. It would also conflict with its' prior decisions that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. Gilmer, supra, at 26; McMahon, supra, at 227. The Court noted that it had held that the party seeking to avoid arbitration bears the burden of establishing that Congress specifically intended to preclude arbitration of the statutory claims at issue. Gilmer, supra; McMahon, supra. Similarly, where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs. Randolph did not meet that burden. How detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter unnecessary to the decision as neither during discovery nor when the case was

presented on the merits was there any timely showing at all on the point. The Court of Appeals was held to have therefore erred in deciding that the arbitration agreement's silence with respect to costs and fees rendered it unenforceable.

This case is important in establishing that a party attempting to avoid compliance with an agreement to arbitrate on the purported basis of the expense of arbitration must be prepared to establish both those claimed expenses and their inability to afford to vindicate their claims. An increasing number of courts are now enforcing fee splitting provisions in arbitration agreements. However, there are a number of cases refusing to enforce agreements to arbitrate on precisely that basis. At this time the safest course is to utilize arbitration agreements or rules that specifically provide for a method of determining the issue of a party's purported inability to pay for an arbitration. See Cole v. Burns, infra.

A Partial Revival of the *Alexander v. Gardner-Denver* Doctrine

In a number of cases subsequent to the *Gilmer* decision, the federal courts of appeal and district courts began to seriously erode the inability of arbitrators empowered by a collective bargaining agreements to finally determine statutory employment claims. When a collective bargaining agreement itself had included provisions requiring the employer not to discriminate or to otherwise independently observe the mandates of Title XII as a provision of the collective bargaining agreement, the courts had for a time attempted to require the final and binding arbitration of those claims. That trend was interrupted with the Supreme Court decision of *Wright v. Universal Maritime Services Corp.*, 119 S. Ct. 391; 142 L. Ed. 2d 361; 1998 LEXIS 7270. However, a recent case by the Fourth Circuit is resuming the battle. See Safrit v. Cone Mills Corporation, 248 F.3d 306, 2001 U. S. App. LEXIS 7738, infra.

d. *Wright v. Universal Maritime Service Corp.,*
119 S. Ct. 391; 142 L. Ed. 2d 361(1998).

The United States Supreme Court addressed the issue of use of mandatory arbitration for employment disputes in three important cases during the 1998 - 99 term. The most important of those cases resulted in the issuance of the opinion in *Wright v. Universal Maritime Service Corp*. In general, that decision is favorable to the continued arbitration of statutory employment disputes where properly agreed to, as is examined in detail below. However, the Supreme Court acknowledged the tension between its opinion in *Gilmer v. Interstate Johnson Lane*, and the *Alexander v. Gardner-Denver*, supra, line of cases. While the Supreme Court expressly noted the tension created between those conflicting lines of cases, it declined to enlighten us further. The court continued to provide equally useful guidance by refusing writs of certiorari in two diametrically opposite court of appeals decisions construing the mandatory arbitration of statutory claims based on the same documents. Nevertheless, the mandatory arbitration of employment disputes will be enforced under Federal Arbitration Act everywhere in the United States, in the Texas and California state courts, and now, courtesy of the Circuit City decision, supra, even within the Ninth Circuit.

In *Wright*, the United States Supreme Court examined the issue of whether a union-negotiated provision in a collective bargaining agreement providing in very general language for the arbitration of disputes between employers and employees under Section 301 of the Labor Management Relations Act of 1947 established a presumption of arbitrability governing statutory anti-discrimination claims. The Supreme Court found that there was no presumption of the arbitrability of statutory anti-discrimination claims under the Labor Management Relations Act of 1947. In a decision that was extremely fact dependent, the Supreme Court engaged in an analysis that should engender continued support for the use of mandatory arbitration to resolve all employer

employee disputes including all state and federal statutory claims.

The actual facts of the *Wright* case are essential in understanding the Supreme Court analysis. First, the *Wright* case presented an arbitration arising under the Labor Management Relations Act of 1947 and **NOT** the Federal Arbitration Act. Second, the arbitration provision at issue was part of a collective bargaining agreement negotiated between the labor union Wright was a member of and a coalition of employers. Third, the arbitration provision itself was very general and not specific in the terms describing the particular issues subject to arbitration. Finally, and most critically, Wright himself neither participated in the negotiation of the arbitration provision, nor individually agreed to arbitrate any type of claim or dispute with anyone.

The actual language of the collective bargaining agreement provided as follows:

"The Union agrees that this Agreement is intended to cover all matters affecting wages, hours and other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement. Anything not contained in this Agreement shall not be construed as being part of this Agreement. All past port practices being observed may be reduced to writing in each port."

"It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any federal or state law."

"Any dispute concerning or arising out of the terms and/or conditions of this Agreement, or dispute involving the interpretation or application of this Agreement or dispute arising out of any rule adopted for its implementation shall be referred to the Seniority Board."

Mr. Wright was working for Stevens Shipping and Terminal Company in 1992 when he injured his right heel and back. He obtained compensation for permanent disability from Stevens under the provisions of the Longshore and Harbor Workers Compensation Act in the amount of $ 250,000 and $10,000 in attorneys' fees. He was also awarded Social Security disability benefits. In January 1995, Wright returned to the union hiring hall and asked to be referred for work. Between January 2 and January 11, Wright worked for four stevedoring companies without complaint. Once the stevedoring companies realized that Wright had previously settled a claim for permanent disability, they informed the union that they would no longer except him for employment. The stevedoring association contended that a person certified as permanently disabled (which they regarded Wright to be) is unqualified to perform longshore work under the terms of the collective bargaining agreement. The union responded that the employers misconstrued the collective bargaining agreement and asserted that the Americans With Disabilities Act entitled Wright to return to work if he could perform his duties and that refusing Wright employment would constitute a "lockout" in violation of the collective bargaining agreement.

When Wright learned that the stevedoring companies would no longer accept him for employment, he asked his union how he could return to work. The union told him that instead of filing a grievance, he should obtain counsel and file a claim under the Americans with Disabilities Act. Wright retained counsel and filed discrimination charges with the E.E.O.C. and the South Carolina State Human Affairs Commission alleging that the stevedoring companies and their association violated the Americans with Disabilities Act by refusing him work. Wright obtained his right to sue letter from the E.E.O.C. and filed a complaint against six individual stevedoring companies and their Association in the United States District Court. The defendants asserted various affirmative defenses including Wright's failure to exhaust his remedies under the arbitration provisions of the collective bargaining agreement and the seniority plan. The district court dismissed Wright's case for failure to pursue the grievance arbitration procedure provided by the collective bargaining agreement and the United States Court of Appeals for the Fourth Circuit affirmed relying upon its earlier decision in *Austin vs. Owens-*

Brockway Glass Container Inc. 78 F.3d 875, cert. denied, 519 U.S. 980, 136 L.Ed. 2d 330, 117 S. C. 432 (1996), which in turn relied upon *Gilmer vs. Interstate/Johnson Lane Corp*.

The first appellate analysis of the *Wright* case by the Fourth Circuit concluded that the general arbitration provision in the collective bargaining agreement covering Wright's employment was sufficiently broad to encompass a statutory claim arising under the ADA and that such a provision was enforceable. The United States Supreme Court recognized that such a conclusion brought into question two lines of jurisprudence. The first was represented by *Alexander v. Gardner Denver Co,* which held that an employee does not forfeit his right to a judicial forum for claims discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964 if "he first pursues his grievance to final arbitration under the nondiscrimination clause of collective bargaining agreement." 415 U. S. at 49. The Supreme Court reasoned that a grievance is designed to indicate a contractual right under the collective bargaining agreement, while a lawsuit under Title VII asserts "independent statutory rights afforded by Congress." Thus, the Supreme Court concluded that the statutory cause of action was not waived by the union's agreement to the arbitration provision contained in the collective bargaining agreement. That position is contrasted with the second line of cases implicated in the *Wright* decision. That line of cases, represented by *Gilmer vs. Interstate Johnson Lane Corp*., held claims brought under the Age Discrimination in Employment Act of 1967 could be subject to compulsory arbitration pursuant to an arbitration provision in the securities registration form signed individually by the claimant. Relying upon the federal policy strongly favoring arbitration articulated in the Federal Arbitration Act, 9 U.S.C. Sec. 1 et. seq., the Supreme Court said that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the federal arbitration act." *Gilmer*, 500 U.S. at 26, citing *Rodriguez de Quijas*, 490 U.S. 477; *Shearson-American Express, Inc. v. McMahon*, 482 U.S. 220; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614.

The Supreme Court recognized the fact "there is obviously some tension between these two lines of cases." In *Alexander v. Gardner-Denver*, the court stated that "an employee's rights under Title VII are not susceptible of prospective waiver," 415 U. S. at 51 - 52, while *Gilmer* held that " the right to a federal judicial forum for an ADEA claim could be waived." The court focused upon the distinction between the rights subject to waiver, the parties to the agreements, the statutes under review and the fora at issue. Each of these elements is important in obtaining an understanding of the Supreme Court's analysis.

The respondents in the *Wright* case asserted the existence of an agreement to arbitrate Wright's ADEA claim based upon the Union's agreements to arbitrate disputes arising under the collective bargaining agreement and the presumption of arbitrability the Supreme Court has repeatedly found in Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185; *Steelworkers v. Enterprise Wheel & Car Corp*., 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960); *Steelworkers v. American Mfg. Co*., 363 U.S.564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960); *Steelworkers v. Warrior & Gulf Nav. Co*., 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960). The Supreme Court has consistently stated that in collective bargaining agreements "there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies Inc. vs. Communication Workers*, 475 U.S. 643, 650, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986). That presumption was determined, however, not to extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts to interpret the terms of collective bargaining agreements. That rationale finds support in the very text of the Labor Management Relations Act which announces that "final adjustment by a method agreed-upon by the parties is declared to be the desirable method the settlement of grievance disputes arising *over the application or interpretation of an existing collective bargaining agreement.*" 29 U.S.C. Section 173 (d) (emphasis added by the court). In distinction, the Supreme Court found that the dispute in the *Wright* case "ultimately concerns not the application or interpretation of any collective bargaining agreement, but the meaning of a federal statute. The

cause of action asserted arises not out of the contract but out of the ADA and is distinct from any right conferred by the collective bargaining agreement." *See Gilmer*, 500 U. S. at 34; *Alexander v. Gardner-Denver*, 415 U. S. at 49-50.

The Court further noted that the language employed in the collective bargaining agreement did not incorporate the ADA by reference. Even if it did, and thereby created a contractual right coextensive with the federal statutory right, the ultimate question for the arbitrator would not be with the parties agreed to, but what federal law requires, and that is not a question which should be ***presumed*** to be included within the arbitration requirement. That principal was unaffected by the fact that the collective bargaining agreement in *Wright*, unlike in *Alexander v. Gardner-Denver*, did not expressly limit the arbitrator to interpreting and applying the contract. The Supreme Court specifically noted "the ***presumption*** only extends that far, whether or not the text of the agreement is similarly limited. It may well be that ordinary textual analysis of a collective bargaining agreement will show that matters which go beyond the interpretation and application of contract terms are subject to arbitration; but they will not be ***presumed*** to be so."

The most fascinating portion of the Supreme Court's analysis concerns its statement that "not only is Petitioner's statutory claim not subject to a presumption of arbitrability; we think any collective bargaining agreement requirement to arbitrate it must be particularly clear." The court then quotes portions of its decision in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983). There the court stated that "a union could waive its officers' statutory right under Section 8 (a)(3) of the National Labor Relations Act, 29 U.S.C. Section 158 (a)(3), to be free of antiunion discrimination, but ... such a waiver must be clear and unmistakable." **"We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'. <u>More succinctly, the waiver must be clear and unmistakable</u>." 460 U.S. at 708** (emphasis supplied); *see also Livadas vs. Bradshaw*, 512 U.S. 107, 125, 129 L. Ed. 2d 93, 114 S. Ct. 2068 (1994) (dictum); *Lingle vs. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 409, n. 9, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988) (dictum). The court then stated "we think the same standard applicable to a union-negotiated waiver of employees statutory right to a judicial forum for claims of employment discrimination. Although that is not a substantive right, *see Gilmer*, 500 U.S. at 26, and whether or not Gardner-Denver's seemingly absolute prohibition of union waiver of employees' federal forum rights survived *Gilmer*, Gardner-Denver at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a collective bargaining agreement." The language of the *Wright* collective bargaining agreement did not meet that standard.

The collective bargaining agreement provisions for arbitration in *Wright* were very general. They provided for the arbitration of "matters under dispute" that could be understood to mean matters in dispute under the contract. Additionally, the remainder of the collective bargaining agreement contained no explicit incorporation of any statutory anti-discrimination requirements. Finally, the Wright collective bargaining agreement did not even contain, as did the collective bargaining agreement in Austin, supra, its own specific anti-discrimination provision. Those specific provisions in Austin were held by the Fourth Circuit Court of Appeals to mandate the arbitration of statutory discrimination claims and the United States Supreme Court declined to disturb that decision. However, when it considered Wright, the Fourth Circuit relied upon the fact that the equivalently broad arbitration clause in Gilmer which applied to "any dispute, claim or controversy" was held to embrace federal statutory claims. Critically, and essential to recognizing the courts interpretation of these issues, the Supreme Court then specifically distinguished its holding in Gilmer. The Court expressly noted: "But **<u>Gilmer involved an individual's waiver of his own rights</u>**, rather than a union's waiver of the rights of represented employees -- and **<u>hence the 'clear and unmistakable' standard was not applicable</u>."** (emphasis supplied).

Consequently, the United States Supreme Court continued to endorse the use of mandatory arbitration for statutory claim disputes. Where the agreement is entered into directly by the party, as in Gilmer or Circuit City, even very general language describing the issues subject to arbitration will suffice. Agreements containing an arbitration provision will also be enforced when indirectly negotiated by a party's representatives such as a labor union. However, in that event, the language of the arbitration provision, and especially the language describing the particular issues subject to arbitration, must be "clear and unmistakable". The Fourth Circuit returned for yet another attempt at defining the requisite language in its' April decision in Safrit v. Cone Mills Corporation, 248 F.3d 306, 2001 U.S. App. LEXIS 7738, infra and it would not be surprising to see an attempt by one of the parties to return this issue to the Supreme Court.

e. Writs Granted

The Supreme Court has recently granted certiorari in another case important to the evolution of arbitration and to employment arbitration in particular. That case addresses the particularly critical issue of the effect of an arbitration agreement upon the EEOC (and its' state analogues) and the "relief", if any, they can obtain for signatories to arbitration agreements. That case will be argued in the October Term and we can expect further guidance by this time next year.

i.) EEOC v. Waffle House, Inc. Writ of certiorari granted 149 L. Ed. 2d 344, 121 S. Ct. 1401, 2001 U.S. LEXIS 2688

This case presents a situation where the Fourth Circuit was faced with an employer that sought to enforce its arbitration agreement with its employee against the Equal Employment Opportunity Commission. The EEOC filed suit against the employer to enforce claims by an employee under the Americans with Disabilities Act, 42 U.S.C.S. § 12117(a). The Circuit Court held (1) that the EEOC cannot be compelled, by reason of an arbitration agreement between the charging party and his employer, to arbitrate its claims, but (2) that, to the extent that the EEOC seeks to obtain "make-whole" relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking such relief in a judicial forum. Thus the Circuit Court sought to balance the equally important policies of enforcing arbitration agreements and allowing the EEOC to exercise its power to eradicate discrimination. The Court noted that the circuits are currently split on the proper response to this question, comparing EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998) holding that an arbitration agreement between a charging party and an employer precludes the EEOC from seeking purely monetary relief in federal court on behalf of the charging party, but not from seeking broad injunctive relief, with EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999) holding (contrary to the district court decision) that a private arbitration agreement does not affect the scope of the EEOC's federal court suit at all.

This case has broad implications for both the EEOC and state commissions. If the Supreme Court follows the decisions of the Second and Fourth Circuits, the EEOC and a variety of state agencies will become little more than an irritating nuisance for employers sophisticated enough to mandate arbitration as a term and condition of employment. This case also carries immense implications for workers compensation agencies.

f.) Safrit v. Cone Mills Corporation, 248 F.3d 306 (4th Circuit 2001)

The issue in this case was whether a plaintiff could proceed with a Title VII claim in federal court in the face of a Collective Bargaining Agreement which explicitly stated that Title VII claims would be subject to binding arbitration. In accordance with Fourth Circuit precedent and the Supreme Court's recent reaffirmation of the validity of arbitration for employment disputes, the Court of Appeals affirmed the judgment of the district

court that plaintiff's claim was subject to arbitration. The Court noted that Section XX of the CBA specifically stated that the company and the union "agree that they will not discriminate against any employee with regard to race, color, religion, age, sex, national origin or disability. . . . The parties further agreed that they will abide by all the requirements of Title VII of the Civil Rights Act of 1964." Section XX further noted that, "Unresolved grievances arising under this Section are the proper subjects for arbitration." The employer urged the district court to dismiss the case, arguing that the CBA clearly and unmistakably permitted arbitration as the sole remedy for alleged violations of Title VII.

The district court granted summary judgment for the employer stating that: “the Fourth Circuit allows a Collective Bargaining Agreement negotiated by a union on behalf of an employee to validly waive an employee's statutory rights to a federal forum. See Brown v. ABF Freight Sys., Inc., 183 F.3d 319, 321 (4th Cir. 1999). The district court also noted that the Supreme Court does not preclude a waiver of the right to a federal forum in a collective bargaining agreement if it is done in "clear and unmistakable" language. Wright v. Universal Maritime Serv. Corp., 525 U.S. 70, 80, 142 L. Ed. 2d 361, 119 S. Ct. 391 (1998).

The district court recognized that the Fourth Circuit had previously held that a "clear and unmistakable" waiver could occur in two ways. First, the agreement can contain an explicit arbitration clause in which the parties agree to submit to arbitration all federal causes of action arising out of employment. See Carson v. Giant Food, Inc., 175 F.3d 325, 332 (4th Cir. 1999). Second, a general clause requiring arbitration under the agreement can be coupled with a provision which makes "unmistakably clear that the discrimination statutes at issue are part of the agreement. . . ." Id. “Here, Section XX of the CBA indubitably provides such a clear and unmistakable waiver. Indeed, it is hard to imagine a waiver that would be more definite or absolute.” The parties agreed that they would "abide by all the requirements of Title VII" and that "unresolved grievances arising under this Section are the proper subjects for arbitration."

Plaintiff argued that her good-faith compliance with the grievance provisions of the governing CBA should preserve her right to pursue claims in a federal forum, especially when the grievance process was inadequate to remedy the discriminatory treatment and when she herself had no control over the further processing of the complaint. But Safrit’s complaint ran flat against binding Fourth Circuit jurisprudence on that point. The Circuit Court had already held, post-Wright, that a collectively bargained agreement to arbitrate a statutory discrimination claim was enforceable. See Brown, 183 F.3d at 321; Carson, 175 F.3d at 331. And it noted further that the Supreme Court itself has recently acknowledged the continuing viability of arbitration claims in the employment context. citing Circuit City Stores, Inc. v. Adams, No. 99-1379, 149 L. Ed. 2d 234, 69 U.S.L.W. 4195, 121 S. Ct. 1302 (U.S. Mar. 21, 2001). Thus an agreement to arbitrate statutory claims is part of the natural tradeoff that a union must make in exchange for other benefits. As Judge Widener wrote for the court in Austin v. Owens-Brockway Glass Container, Inc., a "union has the right and duty to bargain for the terms and conditions of employment." Austin, 78 F.3d 875, 885 (4th Cir. 1996). And since the right to arbitrate is a term or condition of employment, the union may bargain for this right as well. citing Textile Workers v. Lincoln Mills, 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957). The collective bargaining process permits unions to waive the right to strike "and other rights protected under the National Labor Relations Act." Id. (citing Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983)). Indeed, no reason exists for distinguishing between "a union bargaining away the right to strike and a union bargaining for the right to arbitrate." Austin, 78 F.3d at 885. In both cases, the union and its members decide that the price of giving up the right to strike or the right to litigate is worth the benefits that they will receive in return. To redact one clause from the CBA would in effect alter the agreement reached during the often-difficult collective bargaining process. And there is no claim that Safrit's union failed to adequately represent its members during the course of negotiations with Cone Mills or during the grievance process. Consequently, the judgment of the district court was affirmed.

g.) Airline Pilots Association International vs. Northwest Airlines Inc., 211 F. 3rd 1312

The Court of Appeals for the Federal Circuit provided a welcome guide for employers throughout America on mandatory arbitration and the union workplace. This en banc decision by the Federal Circuit unanimously held that Northwest Airlines could require individual employees to agree to final and binding arbitration of any claim for discrimination in employment without having first bargained with the union concerning those provisions. This decision is particularly welcome and useful because it now stands for the proposition that an employer may individually bargain with unionized employees to obtain separate and independent contracts requiring the arbitration of statutory discrimination claims.

The underlying facts of this case are helpful in understanding the origin of this rare unanimous decision by the Court of Appeals for the Federal Circuit. Northwest Airlines has for decades required newly hired pilot trainees to sign individual employment contracts called "Conditions of Employment." In 1995 Northwest added several provisions which included a clause by which each trainee agreed to the binding arbitration of any statutory anti-discrimination claims they may have with Northwest Airlines. The union file suit asserting that the carrier violated the Railway Labor Act by requiring the individual pilot trainees to agree to the conditions, including the arbitration provisions, without having first bargained with the union over those provisions. The airline maintained that it had no duty to bargain over the arbitration of individual statutory claims because the Alexander Gardner Denver line of cases established that is not a mandatory subject of collective bargaining. Therefore, Northwest was free to bargain individually with its employees over the arbitration clause. The union contended that the almost interminable negotiation process required by the Railway Labor Act precluded the airline from unilaterally implementing the arbitration provisions.

The Railway Labor Act requires that all matters "directly related to rates of pay, rules, and working conditions" are considered "mandatory subjects of collective bargaining". That phrase has been borrowed by the courts from the jurisprudence interpreting the National Labor Relations Act. When a carrier and a union have a dispute over a proposed change to a mandatory subject of bargaining, the courts have held that the union can get an injunction prohibiting the carrier from unilaterally implementing the change before completing the negotiation process set out in section 6 of the R.L.A.. However, if the dispute is over a nonmandatory subject, then the carrier may unilaterally implement the change unless limited by an existing collective bargaining agreement. Consequently, this dispute provided a perfect opportunity for the courts to determine whether or not an employer could require potential employees to agree to the arbitration of statutory disputes before they became members of an established union.

The Airline Pilots Association has represented the pilots of Northwest Airlines for six decades. When a pilot first begins training he is not represented by the ALPA or any other union. Only upon completion of his training and entry into service as a probationary employee does he become a member of the bargaining unit represented by the ALPA. Since 1966 Northwest Airlines has required that each trainee pilot agree to the "Conditions of Employment" as part of his employment contract. A number of the "Conditions" expressly or implicitly continue to apply as long as a signatory is employed as a pilot with Northwest Airlines and even after the pilot becomes a member of the ALPA. Those "Conditions" have been changed numerous times by Northwest without consulting the ALPA. In 1995 and arbitration clause requiring employees to submit to binding arbitration all claims against Northwest arising from the employment relationship was an added. Critical to the case, the arbitration clause "specifically requires binding arbitration of statutory employment discrimination claims brought under the Minnesota Human Rights Acts, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, or any other state or federal law

prohibiting employment discrimination". Certain other changes were also made but do not relate to the arbitration provisions.

While disputing the termination of a probationary pilot the union objected to the "Conditions" and filed suit in federal court. It sought an injunction and declaratory relief on the grounds that Northwest violated the R.L.A. by unilaterally implementing the "Conditions". One of the key disputes concerned the arbitration clause. Northwest maintained that it had the right to insist on the arbitration of non contract claims as a condition of employment the new hires. Northwest agreed that the arbitration clause did not apply to claims arising out of the collective bargaining agreement between the ALPA and Northwest.

The District Court held that the arbitration clause dealt with a mandatory subject of bargaining and enjoined Northwest from applying the arbitration clause to any pilot represented by the ALPA. The issue presented in the Court of Appeal was: "is the arbitration of statutory discrimination claims a mandatory subject of bargaining?"

Northwest Airlines contended that the arbitration of statutory discrimination claims is not a mandatory subject of bargaining because under the Alexander vs. Gardner Denver line of cases, a union can not waive the right of the employees or represents to bring a statutory discrimination claim in a judicial forum. Therefore, since the ALPA can not agree to such a provision, it cannot be a mandatory subject of bargaining. Thus, Northwest, and by implication every other employer, is free to deal with its employees directly concerning the arbitration of statutory claims.

The union contended that the arbitration of statutory claims is a mandatory subject of bargaining for three independent but related reasons. First the United States Supreme Court decision in Gilmer vs. Interstate/Johnson Lane Corporation, supra, "effectively supersedes Alexander vs. Gardner Denver". In a union may in collective bargaining waive the employees' right to a judicial forum for statutory discrimination claim, the man the arbitration of statutory claims is a mandatory subject of bargaining. Second, even if Alexander Gardner Denver is still effective, it does not control whether or not the arbitration of statutory claims is a mandatory subject of bargaining because he is directly related to "rates of pay, rules, or working conditions". Third, even if waiver of the right to a judicial forum is not a mandatory subject of bargaining because they union can not agree to such a waiver, the procedural rules the arbitration specified in the arbitration clause are mandatory subject of bargaining.

The Supreme Court in Alexander vs. Gardner Denver considered whether an employee who had pursued the arbitration of a racial discrimination claim under a CBA was precluded from judicially asserting a Title 7 claim based upon the same facts. The Court held that "there can be no prospect of waiver of an employee's rights under Title 7." Because Title 7 provides each individual with the right to be free of India's discrimination, "the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title 7". The court was particularly concerned that a union, which ordinarily controls the arbitration of an employee's claim, might, if allowed, compromise the would be Title 7 plaintiff's statutory rights. "In arbitration, as in the collective bargaining process, the rights of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit." Id. at 58 n. 19. The Supreme Court reiterated this viewpoint and Barrentine vs. Arkansas -- Best Freight System, Inc., 450 U.S. 728, infra, when it interpreted employees rights to file suit under the Fair Labor Standards Act after losing the same issue in arbitration. The Court declared the rights granted by statute to be independent of the collective bargaining process. Those rights "devolve on petitioners (employees) as individual workers, not as members of a collective organization." Consequently, the court resolved the tension between collective representation and individual statutory rights in favor of the individual employee exclusively controlling the method of determining their personal statutory rights.

The Circuit Court believes it has discovered a clear rule of law emerging from the Alexander Gardner Denver and Gilmer jurisprudence. That Rule essentially states that unless the Congress has precluded an individual from doing so, he may prospectively waive his own statutory right to a judicial forum, but a union may not prospectively waive that right for him. Absent congressional intent to the contrary, a union may not use the employees' individual statutory right to a judicial forum as a bargaining chip to be exchanged for some benefit to the group. Alexander Gardner Denver, supra, at 51. Consequently, because the Alexander Gardner Denver jurisprudence precluded the union from agreeing to binding arbitration of the individual statutory claims, the court concluded that the arbitration clause was not a mandatory subject of bargaining. Thus, the Court held that "only the individual can determine in what forum he will vindicate he is statutory rights, and its choice should not be burdened by the majoritarian concerns that motivate a union. If a union has a mandatory role in negotiating the terms that will apply to arbitration, then it could also could contrive to discourage the exercise of the employee's right to choose a forum."

This decision reflects the federal courts continued skepticism that a labor union can be safely trusted to vindicate an employees statutory rights. It also holds the promise that it employer may directly, and even unilaterally, contract with each individual employee for the arbitration of statutory rights disputes. Unquestionably, this decision causes great consternation within organized labor. Since an employer may now directly contract with each employee for the arbitration of their statutory rights, the employees will now be able to better evaluate the "value" of the union grievance procedure. Where an astute employer arranges a fair and legitimate forum for the arbitration of those statutory claims, it may well not only avoid a multiplicity of procedures but demonstrate its trustworthiness without union interference. This decision also suggests that a well crafted arbitration agreement can be effectively used to frustrate and defeat union organizing efforts.

h. Brown vs. ITT Consumer Finance Corp, 211 F. 3rd 1217 (11 Cir.- May 2000)

This case presents the issue of whether or not an arbitration agreement is enforceable when the designated arbitration forum is no longer available. Plaintiff attempted to assert a race discrimination case against his former employer. The District Court compelled arbitration and denied plaintiff's motion to vacate the arbitrators decision in favor of the defendant. One of the points plaintiff asserted upon appeal was that the agreed arbitration organization, the National Arbitration Forum, was no longer available. The arbitration clause at issue provided:

"ITT and the employee agree that any dispute between them or claim by either contains the other or any agent or affiliate of the other shall be resolved by binding arbitration under the Code of Procedure of the National Arbitration Forum..."

The key issue in this case was presented by plaintiff as "(3) that any agreement to arbitrate is avoid because the arbitrator and procedure specified no longer exist;" The court found that argument without merit. It noted that section 5 of the FAA provides a mechanism for the appointment of an arbitrator where "for any reason there shall be a lapse in naming of an arbitrator..." Therefore, the unavailability of the National Arbitration Forum does not destroy or invalidate the arbitration clause. Where the chosen forum is unavailable, or has failed for some reason, section 5 applies and a substitute arbitrator may be named. Astra Footwear Industries vs. Harwyn International, Inc. 578 F.2d 1366 (2d Cir. 1978). Only if the choice of forum is an integral part of the agreement to arbitrate, rather the an "ancillary logistical concern" will the failure of the chosen forum preclude arbitration. Thus, even if the parties choose a forum, or by implication a particular arbitrator or set of rules, which subsequently becomes unavailable their ability to arbitrate their dispute should not be compromised.

Consequently, any party which may be concerned about this issue should preserve for itself a copy of the agreed rules and/or list of arbitrators.

i. Merrill Lynch, Pierce, Fenner and Smith, Inc., vs. Nixon, Attorney General, State of Missouri, Missouri Commission on Human Rights, et al. 210 F. 3rd 814 (8th Cir. May 2000)

This case addresses the critically important issue of the proper limits to the activities of administrative bodies such as the EEOC and the Missouri Commission on Human Rights. Originally the employee had agreed to the arbitration of all employment disputes with his employer, Merrill Lynch. Pursuant to that agreement, the employee arbitrated his claims. The arbitrator dismissed all of the employee's claims with prejudice. The employee then filed an administrative complaint with the Missouri Commission on Human Rights. The employer sought to enjoin the Commission from proceeding with its administrative action. The District Court issued an injunction prohibiting the Commission from seeking monetary relief on behalf of the former employee. The Commission appealed. The Court of Appeal found that the case presented a federal question which granted the District Court subject matter jurisdiction. It also determined that the principles of res judicata and collateral estoppel barred the former employee from relitigating the same arbitrated claims, since he had presented all of his statutory claims to the arbitrator and the arbitrators award should have been given its normal preclusive effect.

The Missouri Commission contended that since its administrative action against the employer was only based on state law, no federal question was presented and therefore no federal question jurisdiction existed. Rather, the federal arbitration act only provided the employer with, at most, a federal defense to state law claims. The Court of Appeal bluntly stated that the Missouri Commission position was "off the mark" because "it is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." Citing Shaw vs. Delta Air Lines, Inc. 463 U.S. 85, 96 n. 14. The court perceived the key questions to be whether the federal arbitration statutes create some federal right for the employer and whether the actions of the Commission would interfere with that right. The Court of Appeal determined the answer to both questions to be an emphatic yes.

The Missouri Commission first argued that even if an employee is required to arbitrate his claims under an arbitration agreement, that agreement does not preclude the employee from later raising the same claims in court. The court disagreed stating that and arbitrators award constitutes a final judgment to the purposes of collateral estoppel and res judicata. The employee had a full and fair opportunity to litigate his statutory claims in the arbitrable forum, did so and lost. Under both federal and Missouri law the principles of res judicata and collateral estoppel barred plaintiff from subsequently relitigating the same claims. The Commission maintained those doctrines were inapplicable when statutory rights were issue. The Court of Appeal disagreed noting that the language of section 118 of the 1991 Civil Rights Act states "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including... arbitration, is encouraged to resolve disputes arising under Title VII." Therefore, the court could not see how Congress's explicit endorsement of arbitration could be reasonably read to include a denial of the primary benefit of arbitration, namely, a cost -- effective and binding resolution of the dispute.

The Missouri Commission next argued that even if the employee was barred from personally reasserting his arbitrated claims in court, the Commission was not precluded from proceeding with its administrative action against the employer on the basis of the employee's claims. The Commission explained that distinction on the basis that the lack of identity and lack of common interests between the Commission and the former employee prevent application of the doctrines of res judicata and collateral estoppel. The court recognized that there is some tension between the interest in enforceable arbitration agreements and the independent enforcement of the

anti-discrimination laws by agencies such as the Commission. However, the court agreed with the solution to that problem articulated by the Second Circuit Court of Appeals in Equal Employment Opportunity Commission vs. Kidder, Peabody & Co., 156 F. 3rd 298,302 (1998). There was held in similar circumstances that an arbitration agreement precludes the EEOC from seeking purely monetary relief for a former employee, but does not preclude it from seeking injunctive relief.

When the Commission seeks monetary relief such as back pay it seeks relief highly individual in nature and therefore ask more at a representative for the employee then as a separate entity seeking to vindicate public rights. If the Commission was seeking injunctive relief for a broad class of employees, its efforts would presumably be aimed at a pattern of ongoing discrimination and therefore would involve a matter of greater public interest. The court noted that he recognized that monetary penalties are important component of the enforcement mechanism of the Missouri Human Right Act. Nevertheless, the arbitration clause did not undermine those statutory penalties. The former employee was free to assert all of his statutory claims before the arbitrator and did, albeit unsuccessfully. The Court of Appeal found this issue was resolved by the United States Supreme Court analysis of arbitration in the Gilmer and Mitsubishi cases, supra.

u. Equal Employment Opportunity Commission vs. Waffle House, Inc., 193 F. 3rd 805 (4th Cir. 1999)

This is one of the most important cases in the last decade and as noted above the United States Supreme Court has granted a writ of certiorari. The blatant hostility of the EEOC to arbitration is nationally notorious and it is widely known that the EEOC has engaged in virtually every possible lie, subterfuge or evasion of the Supreme Court's endorsement of arbitration for the resolution of employment disputes. Contrary to the numerous decisions of the United States Supreme Court, every Court of Appeal except the recently reversed Ninth Circuit, and the specific language of the Civil Rights Act of 1991, the EEOC persists in a rearguard action against arbitration. The EEOC still arrogantly attempts to devise new methods to avoid arbitration agreements in the workplace. This decision demonstrates that an increasing number of the nation's courts recognize the EEOC's ulterior motives and are prepared to enforce arbitration agreements despite the EEOC's pontifications about its’ policy proclamations.

The employer here sought to enforce the arbitration agreement it had with its employee against the EEOC which had sued the employer on behalf of an employee asserting rights under the ADA. The court held that the EEOC could not be compelled to arbitrate under the agreement between the employer and the employee. Importantly however, the court found that to the extent the EEOC seeks to obtain "make whole" relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking that relief in a judicial forum. This decision permitted the court to balance policies it found to be equally important, the policy of enforcing arbitration agreements and that of allowing the EEOC to exercise its power to eliminate discrimination.

The Fourth Circuit began its analysis by noting that Congress preserved an individual's private remedies under Title VII even as it empowered to the EEOC to independently sue on a discrimination charge. Thus, even when the EEOC has brought suit the charging party retains their individual right to intervene in a civil action brought by the EEOC if the individual believes that EEOC will not adequately represent his personal interests as it pursues its public objectives. Consequently, an individual retains the right to control his own interests. When that individual and employer agreed to submit employment disputes to arbitration, long-standing federal policy mandates the enforcement of that contract in order to favor the arbitration mechanism for dispute resolution. These competing interests can best be balanced by precluding the EEOC from pursuing relief in court specific to

individuals who have waived their right to to a judicial forum by signing an arbitration agreement, but allowing it to seek injunctive relief to combat discrimination on a societal level.

k. Fuller et al. vs. PEP BOYS -- Maine, Moe & Jack of Delaware, Inc., 88 F. Supp. 2d 1158

Plaintiff sued alleging employment discrimination and the defendant moved to dismiss the action and compel arbitration pursuant to a pre-employment agreement mandating the arbitration of employment disputes. The arbitration agreement required to the parties to share the costs of the arbitration. All parties agreed that the plaintiffs could not afford to do so. However, the agreement also contained a savings clause which provided that if any provision of the agreement was unenforceable, it would not affect the validity of the remainder of the agreement. The court determined that the strong federal policy in favor of arbitration mandated the arbitration of the plaintiffs claims. However, both because of the plaintiffs' inability to pay for access to the arbitral forum and the public policy in favor of the vindication of statutory rights, the portion of the arbitration agreement which required to the plaintiffs to pay in their share of the costs would be stricken. Nevertheless, the invalidity of the cost-sharing provision did not void or nullify the agreement to arbitrate.

l. Jones vs. Fujitsu Network Communications, Inc., 81 F.Supp. 2d 688

Plaintiff claimed that he had been terminated by the defendant from making a request for leave under the Family Medical Leave Act. The employer responded by filing a motion to dismiss and compel arbitration pursuant to an arbitration policy executed by the parties. That arbitration agreement was entered into years after the plaintiff had been working as an at will employee for the defendant. This court, as have most federal courts which have considered this issue, concluded that modification of the employment arrangement was permissible and enforceable. The court determined that the plaintiffs's continued post modification employment constituted acceptance of the modification. However, since the agreement required the parties to split the costs of the arbitration the court found that specific provision of the arbitration agreement was an impermissible restriction on the remedies available to the plaintiff. Therefore, the court struck that particular provision and enforced the remainder of the agreement to arbitrate.

m. Winfree vs. Bridgestone/Firestone, Inc., 1999 U.S. App. LEXIS 33616 (Unpublished 8th Cir. December 1999)

The employer adopted an employee dispute resolution plan covering at will employees. It provided that all at will employees who remained employed after the adoption of the plan would be included in the mandatory arbitration program for employment related disputes. The plaintiff was an at will employee who remained employed after the adoption of the plan. He subsequently filed suit alleging racial discrimination, harassment, and retaliation under Title VII. The employer moved to dismiss the action pursuant to the Federal Arbitration Act and the Dispute Resolution Plan. The motion to dismiss was granted and the plaintiff appealed on the basis that he had never signed an agreement to arbitrate. The Court of Appeal found that the plaintiff's signature was not necessary to demonstrate his agreement to be bound by the arbitration provisions of the dispute resolution plan. His continued employment constituted acceptance of the plan and his Title VII and Section 1981 claims were required to be arbitrated. While this is in unpublished case, it reflects the broadening view that while the federal arbitration act requires agreements to arbitrate to be in writing it does not require them to be signed by any or all parties to be effective.

n. Carson vs. Giant Food, Inc. 175 F.3d 325, (4th Cir. 1999)

The Wright decision has recently been explained in a series of federal and California appellate cases. The Fourth Circuit Court of Appeals in Carson vs. Giant Food, Inc. 175 F.3d 325, reviewed a case in which eleven current and former employees brought individual and class claims of race, age and disability discrimination against their employer, Giant Food, Inc. and individual giant officers and managers. The District Court examined the four collective bargaining agreements between the employees unions and Giant and refused to compel arbitration. The Court of Appeals reviewed the relevant arbitration provisions in each of the collective bargaining agreements and determined them to be insufficiently specific. Most usefully, however, the court explained its view of the meaning of the Wright decision.

The Fourth Circuit Court of Appeals found that the most crucial issue for every analysis is what did the parties actually intend and mean by the terms they chose to employ in their contract. Thus, the issue of what they agreed to arbitrate is to be resolved by the parties expressed intentions. The Court held that union negotiated collective bargaining agreements that require the arbitration of statutory discrimination claims are valid and binding on unionized employees. Austin vs. Owens Brockway Glass Container, Inc., 78 F.3d 875 (Fourth Circuit 1996). Under the Gilmer vs. Interstate Johnson Lane Corp., supra, employees are free to enter into predispute agreements to arbitrate statutory employment claims. There is no reason to preclude enforcement of such agreements when they are entered into as part of a collective bargaining agreement. "A union has the right and duty to bargain for the terms and conditions of employment ... The right to arbitrate is a term or condition of employment, and as such, the union may bargain for this right." 78 F.3d at 885. Agreements to arbitrate statutory claims are "valid because they rest on the premise of fair representation". (quoting Metropolitan Edison Co. vs. NLRB, supra.) Consequently, when a union has properly agreed to arbitrate statutory claims, an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court.

The Fourth Circuit analyzed the Supreme Court's decision as supportive of appropriately drafted arbitration provisions. It wrote "Recently, in Wright vs. Universal Maritime Service Corp., supra, the Supreme Court set forth the test required to determine whether there has been a union-negotiated waiver of a judicial forum. There, the Court held that the normal interpretive rule applicable to collective bargaining agreements, one which presumes a dispute is arbitrable, does not apply to statutory discrimination claims. Wright at 395-96. Instead, collective bargaining agreements to arbitrate these claims, unlike contracts executed by individuals, must be 'clear and unmistakable'." Wright at 396.

"The Supreme Court's opinion in Universal Maritime indicates that the requisite degree of clarity can be achieved by two different approaches. The first is the most straightforward. It simply involves drafting an explicit arbitration clause. Under this approach, the collective bargaining agreement must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment. Such a clear arbitration clause will suffice to bind the parties to arbitrate claims arising under a host of federal statutes, including Title VII, 42 U.S.C. Section 1981, the Age Discrimination in Employment Act and the Americans with Disabilities Act." Carson, supra at 331-32.

"The second approach is applicable when the arbitration clause is not so clear. General arbitration clauses, such as those referring to ‘all disputes’ or ‘all disputes concerning the interpretation of the agreement’, taken alone do not meet the clear and unmistakable requirement of Universal Maritime. When the parties use such broad but nonspecific language in the arbitration clause, they must include an ‘explicit incorporation of statutory anti-discrimination requirements’ elsewhere in the contract. Universal Maritime, 119 S. Ct. at 396. If

another provision, like a nondiscrimination clause, makes it unmistakably clear that if the discrimination statutes at issue are part of the agreement, employees will be bound to arbitrate their federal claims." Carson, supra at 332.

The collective bargaining agreements at issue before the Fourth Circuit failed to follow either approach. The absence of transparency in both the arbitration clause and the non-discrimination clause therefore failed to meet the "clear and unmistakable" standard mandated by Universal Maritime. Nevertheless, the Court noted that its decision did not seek to undermine private choices about how best to resolve industrial disputes. Instead, the case presented two issues which require the parties to use "clear and unmistakable" language expressing a desire to arbitrate. "Clear and unmistakable" does not mean general language that under ordinary principles of contract interpretation might very well be interpreted to require arbitration. Instead, the Fourth Circuit held that a collective bargaining agreement must plainly specify the intent to have an arbitrator decide both the scope of his own jurisdiction and the merits of federal statutory discrimination claims. "If the agreement does so, the judiciary will give full effect to that intent." 175 F.3d at 332.

o. Brown vs. ABF Freight Systems Inc., 183 F.3d 319 (4th Cir. 1999)

In Brown vs. ABF Freight Systems Inc., the Fourth Circuit Court of Appeals again addressed the language necessary to compel the arbitration of an Americans with Disabilities Act claim, 42 U.S.C. Sections 12101 et seq. and the Virginians with Disabilities Act, Virginia Code Sections 51.5 - 40 at seq. under the provisions of a collective bargaining agreement. The parties in that case agreed that the collective bargaining agreement between the International Brotherhood of Teamsters and ABF contained a nondiscrimination clause in Article 37. It provided that:

"Article 37. The employer and the union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individuals race, color, religion, sex, age or national origin nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of race, color, religion, sex, age or national origin or engage in any other discriminatory acts prohibited by law. This Article also covers employees with a qualified disability under the Americans with Disabilities Act."

The collective bargaining agreement further sets out in Article 8 the "National Grievance Procedure" which provides in Section 1 that the scope of arbitral matters shall be:

"Article 8. Section 1. All grievances or questions of interpretation arising under this National Master Freight Agreement or Supplemental Agreements thereto shall be processed as set forth below."

The Fourth Circuit reversed the judgment of the District Court compelling arbitration because the language used in the relevant provisions of the collective bargaining agreement were insufficiently "clear and unmistakable". The Circuit Court noted that the District Court was guided in its analysis of the facts by the Fourth Circuit's holding in Austin vs. Owens-Brockway Glass Container, Inc., supra, that a collective bargaining agreement requiring arbitration of the union member's statutory discrimination claims is enforceable together with the Fourth Circuit’s further explanation in Brown vs. Trans World Airlines, 127 F.3d 337 (4th Cir. 1997) which held that the question of whether a particular collective bargaining agreement requires the arbitration of such disputes is one of contract law.

Appellant employee Brown argued that the collective bargaining agreement between his union and his

employer did not waive his right to a federal forum for his Americans with Disabilities Act claim. He further contended that his union did not have the power to effectuate such a prospective waiver on his behalf. The Circuit Court immediately stated that the latter claim was squarely foreclosed by the existing Circuit jurisprudence. However, the Circuit Court recognized that although the United States Supreme Court in Universal Maritime reserved the question of whether or not a union negotiated waiver of the statutory right to a federal forum can ever be enforceable, it had answered that question both before and after Universal Maritime in the affirmative. Austin, 78 F.3d at 885; Carson, 1999 LEXIS 8191, 175 F.3d 325. Consequently, the task before the court was limited to determining whether the language used in the particular collective bargaining agreement at issue effectuated such a valid waiver.

The question before the court was whether the parties to that collective bargaining agreement agreed to arbitrate discrimination claims arising under the Americans with Disabilities Act or any other federal statutory anti-discrimination law. That, it found, was an issue of contract interpretation. Universal Maritime, 119 S. Ct. at 396. In making that determination, the Court recognized that it did not apply the usual interpretive presumption in favor of arbitration. Rather, under the rule articulated in Universal Maritime, it could not find an intent to arbitrate statutory claims absent a "clear and unmistakable" waiver of an employee's "statutory right to a judicial forum for claims of employment discrimination". The Circuit Court noted that in Carson, it explains that the requirement of off "clear and unmistakable" waiver can be satisfied through two possible means. First, and most obviously, such intent can be demonstrated through the drafting of an "explicit arbitration clause" pursuant to which the union agrees to submit all statutory employment discrimination claims to arbitration. Second, where the arbitration clause is "not so clear", employees might yet be bound to arbitrate their federal claims if "another provision, like a nondiscrimination clause, makes its unmistakably clear that the discrimination statutes at issue are part of the agreement".

Unfortunately, the arbitration clause contained in Article 37 of that collective bargaining agreement was insufficiently explicit to pass muster under the Universal Maritime standard. That clause, like the one in issue in Carson, is a typical general one submitting to arbitration "all grievances or questions of interpretation arising under this Agreement". Because the arbitration clause refers only to grievances arising under the collective bargaining agreement, it can not be read any longer to require arbitration of those grievances arising out of alleged statutory violations. The teaching of Universal Maritime is that where the parties to a collective bargaining agreement intend to waive the employees' right to a federal forum, such "broad but nonspecific language" in a general arbitration clause, standing alone, will not do the trick. Carson, supra.

However, under the second Carson test, even such "broad but non-specific" arbitration language may suffice to require the arbitration of statutory discrimination claims if another provision of the agreement has established with the "requisite degree of clarity" that the "discrimination statutes at issue are part of the agreement". While the language of Article 37 not to discriminate on certain specified bases in certain specified ways may parallel, or even parrot, the language of the federal anti-discrimination statutes and prohibit some of the same conduct, compare, e.g., 42 U.S.C. Section 2000e-2(a), none of those statutes is thereby explicitly incorporated into the agreement by reference or otherwise. As a result, the contractual rights the agreement creates "cannot be said to be congruent with," Brown 127 F.3d 342, “those established by statute or, common law, and an arbitrator in interpreting the scope of those rights pursuant to the general arbitration clause will be bound to interpret the explicit terms of the agreement rather than of any federal statutory anti-discrimination law”. Thus, the court found that there is a significant difference, and to it a legally dispositive difference, between an agreement not to commit discriminatory acts that are prohibited by law and an agreement to incorporate, in toto, the anti-discrimination statutes that prohibit those acts. Unfortunately, the parties did not do so in this case.

p. Stanton v. Prudential Insurance Co. et al., 1999 LEXIS 5547, E.D.Penn. 1999

Interpretation of the Wright case has also been instructively furnished by the United States District Court for the Eastern District of Pennsylvania in Stanton v. Prudential Insurance Co. et al., 1999 LEXIS 5547. There, the Court was presented with a situation where plaintiff, Stanton, as a requirement for employment, personally executed the ubiquitous securities industry Form U-4. Stanton was originally a manager of a Prudential office selling securities but was later demoted to sales agent position. After demotion, he then became a member of a collective bargaining unit. That collective bargaining agreement contains an internal grievance procedure requiring the arbitration of claims regarding "the termination of the services of and Agreement of any regular Prudential Representative". Stanton claims that he filed a grievance but that defendants refused to participate. He thereafter filed federal claims for discrimination based on age, disability, pendent state discrimination claims and state common law claims. Defendants filed a motion to dismiss or stay litigation pending arbitration.

The Court commenced its analysis by determining that plaintiff was subject to a valid Form U-4 arbitration agreement and expressly noting that Form U–4 arbitration agreements are governed by the Federal Arbitration Act (FAA), 9 U.S.C. Sec. 1, et seq., Gilmer, supra, at 25 – 26 & n. 2. It further reiterated that the FAA "embodies a liberal federal policy favoring arbitration agreements". Moses Cohn Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983), " as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration". Id. At 24 – 25. This is substantially the same Form U-4 that the Supreme Court interpreted to require arbitration in Gilmer, supra at 35. This form has been interpreted to mandate the arbitration of numerous statutory claims. Sues v. John Nuveen & Co. Inc., 146 F.3d 175, 182 (3rd Cir. 1998) (Form U-4 requires arbitration of ADEA and Title VII claims), cert. denied 119 S. Ct. 1028 (1999); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 170 F.3d 1, (1st Cir. 1999) (same); Bender v. A. G. Edwards & Sons, inc. 971 F.2d 698, 700 (11th Cir. 1992)(Title VII claims); Willis v. Dean Witter Reynolds, Inc. 948 F.2d 305, 312 (6th Cir. 1991) (Title VII claim); Alford v. Dean Witter Reynolds, Inc. 939 F.2d 229, 230 (5th Cir. 1991) (Title VII claim; arbitration required on Supreme Court remand in light of Gilmer). Consequently, the arbitration agreement contained in the Form U-4 signed by Stanton was valid and enforceable.

Plaintiff further sought to avoid arbitration by asserting that as he was now a member of a collective bargaining unit, and the Form U-4 arbitration agreement he executed was superceded by the collective bargaining agreement and no longer applied to him. Instead, he claimed that only the provisions of the collective bargaining agreement grievance arbitration applied. However, the Court noted that he was still required to be registered and involved in the sale of registered financial products. Thus, his subsequent membership in the collective bargaining unit may have given Stanton additional rights, but it did not nullify the arbitration agreement that he signed.

Stanton then asserted that Wright v. Universal Maritime, supra, forbade the arbitration of his claims under the terms used in his collective bargaining agreement. The Court agreed that if the CBA instead of the Form U-4 applied to Stanton, he would be correct that he could not be forced to arbitrate his federal statutory claims because the CBA did not state clearly that those types of claims must be arbitrated. Stanton at n.4. However, that was not the issue at bar, because the Court found that Gilmer remains authoritative, even after Wright and applied to Stanton through his execution of Form U-4. Specifically, the Court stated "the validity of the arbitration provision in this action is governed by Gilmer rather than by Wright. The arbitration provision defendants seek to compel is contained in a Form U-4**, individually signed by Stanton, as in Gilmer, not a collective bargaining agreement as in Wright."** (emphasis supplied) See Sues, 146 F.3d at 182 (applying Gilmer to determine the arbitrability of a Title VII claim under a Form U-4.) The Wright Court noted that the "clear and unmistakable" standard articulated in Gardner-Denver was inapplicable to the Form U-4 in Gilmer

because Gilmer involved “an individual’s waiver of his own rights, rather than a union’s waiver of the rights of represented employees”. “The arbitration agreement was accepted by Stanton when he executed the Form U-4, and **that agreement is entitled to a presumption of arbitrability.”** (emphasis supplied).

Finally, the Stanton Court instructively disposed of plaintiff’s case by specifically stating that **“There is no legal exception for the arbitration of federal statutory discrimination claims if the employee has made an individual decision agreeing to arbitrate all disputes arising out of his employment.”** (emphasis supplied). Case dismissed. Arbitration required.

q. Lee v. Technology Integration Group, et al., 69 Cal. Rptr. 4th 1549, 79 Fair Empl. Prac. Cas. (BNA) 221

The last case of interest concerning Wright and the mandatory arbitration of employment claims further demonstrates that even the California State Appellate Courts disagree with the peculiar interpretations of the Federal Arbitration Act and federal and state civil rights laws articulated by the Ninth Circuit. As the Sixth Appellate District Court of Appeal recently noted in Lee v. Technology Integration Group, et al., 69 Cal. Rptr. 4th 1549, 79 Fair Empl. Prac. Cas. (BNA) 221, “Where the federal circuits are in conflict, the authority of the Ninth Circuit … is entitled to no greater weight than decisions of other circuits.” “Decisions of the United States Supreme Court are binding not only on all of the lower federal courts, but also on state courts when a federal question is involved. **We agree with those federal cases critical of Prudential, infra, 42 F. 3d 1299 and Duffield v. Robertson Stephens & Co., infra, 144 F 3d 1182. Lee at 1555.”** (emphasis supplied).

r. Mouton v. Metropolitan Life Insurance Company, et al., 147 F.3d 453, (5th Cir. 1998), cert. denied November 9, 1998, 1998 LEXIS 7241.

In this case, the Fifth Circuit addressed a case of first impression (for it) to determine whether a securities dealer who agreed to arbitrate “any claim, dispute or controversy that may arise between himself and his firm” is compelled to arbitrate his Title VII discrimination claim against his employer. It found that he was. Further, it is also important to consider that the writ application in this case was denied only one month after oral argument in Wright and exactly one week before the publication of the Wright decision.

The Fifth Circuit began with an analysis of the scope of the arbitration that Mouton individually agreed to when he executed a Form U-4 to register as a securities representative. Expressly noting that it was siding with the “plain weight of authority”, the Court found that the language of the provision required him to arbitrate all employment related disputes. 147 F. 3d at 455. citing Sues, infra; extensive additional citations omitted. The Court reiterated that under the Federal Arbitration Act, all “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. … The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” 147 F. 3d at 456. Mouton’s claim that the arbitration provision was “ambiguous” was disposed of with the statement “Even if, however, we were to acknowledge that the arbitration provisions at issue were ambiguous, we would nevertheless be compelled to conclude that they covered employment-related disputes. Indeed, to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved in favor of arbitrability.” 147 F. 3d at 456. The Court also reminded us that it had already stated that “an arbitration clause need not speak directly to employment-related disputes for it to mandate arbitration of Title VII claims” citing Rojas v. TK Communications, Inc., 87 F. 3d 745 (5th Cir. 1996). Attempting to rely upon the Ninth Circuit decisions of Lai, infra, and Renteria, infra, Mouton last argued that he could not be compelled to arbitrate his Title VII claim, “because he did not knowingly and voluntarily waive his access to a judicial forum”. The Court disposed of that

contention in three short sentences, dryly noting that it had rejected that very argument in Rojas, as had every other court concluding that the pre-1993 NASD Code mandated arbitration of employment disputes.

The Court concluded by bluntly stating that "Mouton agreed to arbitrate '**any** dispute, claim or controversy that may arise between [himself] and [Metropolitan]'. (emphasis in original) We hold him to that agreement." 147 F. 3d at 457. Thus the mandatory arbitration of all types of employment disputes will continue to be vigorously enforced by the Fifth Circuit. A decision the Supreme Court declined to disturb whilst considering and issuing the Wright decision.

s. Michalski v. Circuit City Stores, Inc., 1999 LEXIS 8512, 79 Fair Empl. Prac. Cas. (BNA) 1160, (7th Cir. No. 98-3023). Rehearing denied June 4, 1999. 1999 LEXIS 11992

The case arose as an appeal by Circuit City of the District Court's denial of its motion to dismiss and compel arbitration of plaintiff's Title VII claims. Plaintiff was an employee of defendant at the time it instituted its Associate Issue Resolution Program (the AIRP). That Program asked all employees to agree to have any employment related disputes, including Title VII discrimination suits decided in binding arbitration instead of litigation. The AIRP automatically applied to all employees unless they sent a special "opt-out" form to Circuit City headquarters within thirty days of signing an acknowledgment form indicating receipt of the AIRP material. Plaintiff did not "opt-out" of the Program.

Plaintiff asserted that she was terminated based on the fact that she was pregnant. She filed suit under Title VII in federal court but, to preserve her rights, she simultaneously filed a request arbitrate on the same day pursuant to the AIRP program. Circuit City moved the District Court to stay the proceeding or dismiss plaintiff's complaint and compel arbitration pursuant to the Federal Arbitration Act and the AIRP. The court denied defendant's motion holding that plaintiff was not bound by the AIRP because, "the agreement to arbitrate failed for want of compliance with basic contract law". Specifically, the District Court reasoned that because Circuit City gave up nothing, and promised to do nothing for plaintiff in exchange for her agreeing to the AIRP, there was no consideration sufficient to support a valid contract. [This decision also ignores basic arbitration law providing that attacks on the contract itself are issues for the arbitration tribunal.]

The Court of Appeal determined that it had jurisdiction under Section 16(a)(1)(C) of the Federal Arbitration Act, which provides that an appeal may be taken from any order denying a motion to compel arbitration. 9 U.S.C. Sec. 16(a)(1)(C). It viewed the case as presenting two issues. First, can employees agree in advance to arbitrate Title VII claims? Second, was any consideration given by Circuit City in exchange for plaintiff's promise to arbitrate?

Plaintiff first opposed arbitration on the ground that the strong federal policy behind Title VII precludes the mandatory arbitration of civil rights claims. However, the Court noted that argument was explicitly rejected in the Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 365 (7th Cir. 1999). There the court held that Congress did not intend Title VII to preclude the enforcement of pre-dispute arbitration agreements such as the one used by Circuit City. In Koveleskie, the plaintiff was a securities industry analyst required as a condition of her employment to sign an agreement to arbitrate all future employment disputes including Title VII discrimination claims. She challenged the enforceability of the pre-dispute arbitration agreement, as applied to employment discrimination claims. The Seventh Circuit found, as have most other circuits, that Congress did not intend to prohibit the use of pre-dispute arbitration agreements for the resolution of Title VII claims. See Seus vs. Nuveen, infra, 146 F.3d 175 at 182 (3rd Cir. 1998); Patterson vs. Tenet Healthcare, Inc., 113 F.3d 832 (8th circuit 1997) (holding that Title VII claims are subject to pre-dispute arbitration agreements under the Federal Arbitration Act); Cole v. Burns International Security Services, Inc., 323 U.S. App. D.C. 133, 105 F.3d 1465

(DC circuit 1997) (affirming an order compelling arbitration of Title VII claims where employees signed a mandatory arbitration agreement as a condition of his employment); numerous additional citations omitted.

The Court of Appeals specifically noted that "what makes plaintiff's case even less compelling is that, unlike the plaintiff in Koveleskie, infra, who was required to sign the arbitration agreement as a condition of her employment, plaintiff here had an "opt-out" provision. She was free not to arbitrate; she was given a choice and she chose -- by not assigning the hot doubt provision -- to be bound by the AIRP. It does not follow that this court would invalidate an arbitration agreement such as this one, when it has previously held that a non-optional, mandatory arbitration agreement is valid." Thus, plaintiff's argument that Title VI precludes arbitration agreements, such as the Circuit City AIRP, fails in the face of binding precedent to the contrary.

Plaintiff's second attack on arbitration was based on the purported lack of consideration. The District Court found inadequate consideration to support Michalski's agreement to arbitrate, because it considered that Circuit City had not promised to give anything up. However, an agreement to arbitrate must be treated like any other contract. "In determining whether a valid agreement arose between the parties, a federal court should look to the state law that ordinarily governs the formation of contract." Koveleskie, 167 F.3d 361, 367 - 8 (7th Cir. 1999). In the case at bar, the court must look to the contract law of Wisconsin, the state where the employment and termination took place. In order for a contract to be enforceable under Wisconsin law, there must be consideration which may be either a detriment to the promisor or a benefit to the promisee.

The District Court considered that the issue was governed by the Seventh Circuit decision in Gibson vs. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130. There, the Court of Appeal held that a lack of consideration rendered an employee's promise to submit claims to arbitration unenforceable. 121 F.3d 1126. There, the plaintiff signed a contract provided by her employer which stated, "I agreed to the grievance and arbitration provisions set forth in the Associates policy manual". The manual, which was not given to the plaintiff at the time she signed a contract, specifically stated that all disputes, including Title VII claims, were subject to arbitration. However, it also stated that "it does not constitute a contract or promise of any kind" on the part of the employer. Thus, the employer was not bound by the Manual terms. The court held that because Gibson was not given a copy of the Manual at the time she signed the contract, and because she never signed the Manual, there was no consideration in the form of a promise by the employer in exchange for Gibson's agreement to arbitrate. Additionally, the court found that Gibson's promise to arbitrate was not supported by consideration in the form of her employers promise to hire her or to continue to employ her. Id. at 1131.

However, the Court of Appeals found the present case was distinguishable from the decision in Gibson because, as Circuit City pointed out, Circuit City's promise to be bound by the arbitration process itself serves as mutual consideration. Although the particular sheet that the employees signed did not state that the employer would be bound by arbitration, other information in the AIRP package provided contemporaneously to the plaintiff clearly indicated such a promise by Circuit City. Similarly, in Koveleskie, the plaintiff challenged the enforcement of the pre-dispute arbitration agreement on the grounds that there was inadequate consideration to support the employees promised arbitrate. 167 F.3d at 366. The court was unpersuaded by plaintiff's claim of inadequate consideration for two reasons. First, it found sufficient consideration from the fact that the plaintiff promised to arbitrate all future disputes in exchange for the company's promise to employ her. Koveleskie at 368. Second, it noted that both parties were bound by the terms of the agreement. Thus, there was adequate consideration to support the contract to arbitrate all future claims between these parties.

t. Koveleskie v. SBC Capital Markets, Inc., 167 F. 3d 361, (7th Cir. 1999)

Originally, this case reached the Circuit Court in a peculiar manner. The District Court denied the defendant's motion to compel arbitration and determined that "discovery was needed before a decision can be reached on the arbitration issue". The Circuit Court found that the District Court order was "clearly meant to foreclose arbitration". Consequently, it took jurisdiction under the Federal Arbitration Act Section 16(a)(1)(c), 9 U.S.C. 16 (a)(1)(C) intended to provide for an appeal when a demand for arbitration was denied.

Plaintiff in this case was also subject to a mandatory arbitration agreement through her execution of a securities industry Form U-4. She challenged the use of mandatory arbitration for the resolution of Title VII and other employment discrimination claims on numerous grounds. First, Koveleskie asserted that Congress intended to preclude Title VII claims from arbitration under the Federal Arbitration Act. Second, the arbitration agreement was unconscionable as a contract of adhesion. Third, the securities industry arbitration procedures are inadequate to protect the rights of civil rights plaintiffs. Last, the agreement violates the "unconstitutional conditions" doctrine.

In short order, the Circuit Court concluded that the FAA provides that pre-dispute arbitration is enforceable and valid. It began by recognizing that it first had to resolve whether Congress intended Title VII to preclude the use of predispute arbitration agreements. If not, the FAA's presumption in favor of arbitrability would apply to Title VII claims. Section 118 of the 1991 Civil Rights Act (the "CRA"), passed on November 21, 1991, 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]." Koveleskie argues that the language and legislative history of the CRA indicate that Congress did not intend to authorize compelled, involuntary arbitration in discrimination cases. However, the weight of authority strongly suggests otherwise.

In Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991), which involved a claim of age discrimination brought under the Age Discrimination in Employment Act ("ADEA"), the Supreme Court held that the FAA required the enforcement of the pre-dispute mandatory enforcement clause in a Form U-4 identical to the one signed by Koveleskie. When his employer sought to compel arbitration of Gilmer's ADEA claims, Gilmer challenged the application of arbitration to statutory civil rights claims. The Court, noting that there was no reason to treat civil rights statutes any differently than other important statutes that may be the subject of enforceable arbitration agreements, held that pre-dispute arbitration clauses should be enforced unless the plaintiff showed that Congress specifically intended to preclude arbitration. Id. at 26.

When it held that statutory discrimination claims could be the subject of enforceable arbitration clauses, the Gilmer Court stated that arbitration of such claims may be limited in three situations. First, if Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue, an arbitration agreement will not be enforced. Thus, the court must determine if the statute at issue precludes arbitration. The party challenging arbitration has the burden of showing that it is precluded. Second, an arbitration agreement may be challenged if there was a defect in contract formation (discussed below). Third, Gilmer left open the possibility that a plaintiff could challenge the adequacy of particular arbitration proceedings.

Courts after Gilmer have routinely endorsed arbitration of discrimination claims, including those brought pursuant to Title VII. In a recent decision, the First Circuit held that Title VII does not, as a matter of law, prohibit pre-dispute arbitration agreements. See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 163 F.3d 53, 1998 WL 880910 at 5 (1st Cir. 1998). Rosenberg held that "neither the language of the statute nor the legislative history demonstrates an intent in the 1991 CRA to preclude pre-dispute arbitration agreements". Id. at 8. Moreover, the Rosenberg court concluded that mandatory arbitration was not at odds with the structure

and purpose of the 1991 CRA, noting that "it is difficult to see why the purposes of Title VII present a stronger case for rejecting arbitration than do the purposes of . . . the ADEA . . ." which was construed by the Supreme Court in Gilmer not to preclude arbitration. Id. at 9.

The Third Circuit has also concluded, in yet another recent case involving a Form U-4 arbitration clause, that § 118 of the CRA endorsed arbitration on its face and that "no amount of commentary from individual legislators or committees would justify a court in reaching the result" urged by the plaintiff in this case. Seus v. John Nuveen & Co., 146 F.3d 175, 182 (3d Cir. 1998). See also Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (holding that Title VII claims were subject to an arbitration clause based on a Form U-4); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) (holding that Title VII claims are subject to pre-dispute arbitration agreements under the FAA); Cole v. Burns International Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465 (D.C. Cir. 1997) (affirming an order compelling arbitration of Title VII claims where an employee signed a mandatory arbitration agreement as a condition of his employment); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (holding that Title VII claims are subject to mandatory arbitration); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (holding that Title VII claims are subject to securities industry compulsory arbitration); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (holding that Title VII claims can be subject to compulsory arbitration).

Plaintiff's major asserted support for her argument that Congress, through the 1991 CRA, intended to preclude arbitration of Title VII claims was the recent Ninth Circuit case, Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998), in which that court refused to enforce a Form U-4 arbitration clause. In Duffield, the court claimed to have found ambiguity in § 118's language that "where appropriate and to the extent authorized by law" arbitration is encouraged. Id. at 1193-94. After examining the legislative history, context and text of the CRA, the Ninth Circuit divined that Congress intended to preclude compulsory arbitration of Title VII claims. Id. We respectfully disagree with the Ninth Circuit on this issue, and instead concur with the majority of circuits that have held that Congress did not intend Title VII to preclude enforcement of pre-dispute arbitration agreements such as the one signed by Koveleskie. Specifically, we conclude, as did the Third Circuit, that "on its face, the text of § 118 evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration", and that, with regard to the "authorized by law" language of the 1991 CRA, "it seems most reasonable to read this clause as a reference to the Federal Arbitration Act". Seus, 146 F.3d at 183.

The plaintiff argues that securities industry arbitration procedures are inadequate because they fail to protect statutory rights and benefits and unfairly disfavor plaintiffs. In Gilmer, where the plaintiff raised the identical issue, the Court noted that "the NYSE arbitration rules . . . provide protections against biased panels", and held that Gilmer had failed to show actual bias. 500 U.S. at 30. However, the Court held that future plaintiffs might be able to demonstrate "procedural inadequacies in specific cases". Id. at 33.

Koveleskie argued that securities industry arbitration is biased in three ways. All three of her challenges to the adequacy of securities industry arbitration procedures have been rejected by the Supreme Court and lower courts. First, she claims that because securities industry arbitrators are not required to follow the law, plaintiffs are deprived of their rights and protections. However, while arbitrators are instructed in their Manual that they are not "strictly bound by case precedent or statutory law", they "are also told that if they manifestly disregard the law, the award may be vacated". Illyes v. John Nuveen & Company, Inc., 949 F. Supp. 580, 584 (N.D. Ill. 1996) (holding that an employee's discrimination claims were subject to mandatory arbitration).

First, the plaintiff argues that the securities industry arbitrators routinely fail to follow Title VII's fee-shifting principle by refusing to award statutory attorneys' fees to prevailing plaintiffs and by charging plaintiffs

expensive forum fees. This argument was explicitly addressed and rejected by the First Circuit in Rosenberg. That arbitrators may sometimes do undesirable things in individual cases does not mean that the arbitral system is inadequate. Second, it does not appear to be the usual situation that a plaintiff is asked to bear forum fees. Third, if unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with the 1991 CRA could be presented by the employee to the reviewing court. 1998 WL 880910 at 15-16. Moreover, the court noted that arbitration is often more affordable to plaintiffs and defendants than litigating a claim in court. Id. at 16. In fact, under NYSE and NASD rules, it is standard practice in the securities industry for employers to pay all of the arbitrators' fees. See Cole v. Burns International Security Services, 323 U.S. App. D.C. 133, 105 F.3d 1465, 1483 (D.C. Cir. 1997) (holding that an agreement to arbitrate applied to statutory discrimination claims but the employer could not require the employee to pay for all or part of the arbitrator's fees). The Cole court also noted that even when employees are required to pay a filing fee, expenses or an administrative fee, these fees are often waived because of hardship. 105 F.3d at 1483-84.

Next, Koveleskie argues that judicial review is not available to provide meaningful oversight of the securities industry arbitration process because arbitration awards, unlike judicial decisions, are not reviewable for statutory error and cannot be reversed on the ground that the arbitrators did not correctly apply Title VII principles. However, Gilmer held that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to insure that arbitrators comply with the requirements of the statute at issue". 500 U.S. at 32. In addressing an identical challenge to the adequacy of judicial review of arbitration decisions, the D.C. Circuit found that "judicial review of arbitration awards is necessarily focused, but that does not mean that meaningful review is unavailable". Cole, 105 F.3d at 1486. The court noted both the text of the FAA, which provides a non-exclusive list of grounds on which an arbitration award may be vacated, and language from the Supreme Court indicating that arbitration awards may be vacated if they are in "manifest disregard of the law". Id. at 1486 (citing First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 131 L. Ed. 2d 985, 115 S. Ct. 1920 (1995). Based on the reasoning of this authority, the Koveleskie court was convinced that judicial review of arbitration awards is sufficient to protect statutory rights.

Gilmer also left open an opportunity for plaintiffs to challenge mandatory arbitration of statutory claims by showing that arbitration system is structurally biased. However, the reviewing court found that Koveleskie failed to show any actual bias in the securities arbitration process.

Koveleskie also argued that because she was required to sign the Form U-4 as a condition of her employment, the arbitration clause created an unconscionable contract of adhesion and should be voided. That argument was rejected by the Circuit Court, as it had been by numerous other courts, including the Supreme Court. Most recently, the First Circuit held in Rosenberg that the mandatory arbitration agreement contained in the Form U-4 does not create an unconscionable contract of adhesion. 1998 WL 880910 at 16.

While it was true that Koveleskie was required by her employer to register with several exchanges, and that by signing the Form U-4 she was bound by the SRO's mandatory arbitration rules, according to the plaintiff, such conditions created a take-it-or-leave-it contract situation, and placed her in a position of reduced bargaining power vis-a-vis her employer. However, an agreement to arbitrate is treated like any other contract "In determining whether a valid agreement arose between the parties, a federal court should look to the state law that ordinarily governs the formation of contracts." Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1130 (7th Cir. 1997). In the present case, we look to the contract law of Illinois, the state where all relevant events in this dispute arose. (citing First Options of Chicago, Inc., 514 U.S. at 944). Illinois law does not void contracts where parties have unequal bargaining power, even if a contract is a so-called "take-it-or-leave-it" deal and consent to [the] agreement is secured because of hard bargaining positions or the pressure of financial circumstances. Rather, the conduct of the party obtaining the advantage must be shown to be tainted

with some degree of fraud or wrongdoing in order to have an agreement invalidated. The mere fact that a person enters into a contract as a result of the pressure of business circumstances . . . is not sufficient. Kewanee Prod. Credit Ass'n v. G. Larson & Sons Farms, 146 Ill. App. 3d 301, 305, 496 N.E.2d 531, 534, 99 Ill. Dec. 838 (3d Dist. 1986). The only alleged wrongdoing here is requiring arbitration as a condition of employment, but, applying Illinois law, this court has noted that driving a hard bargain is not a wrongful act. See Resolution Trust Corp. v. Ruggiero, 977 F.2d 309, 314 (7th Cir. 1992). Nor does "the mere fact that one is in a difficult bargaining position" invalidate a contract. The plaintiff argues that as an individual employee, rather than a business entity, she had no bargaining power. However, "the disparity in the size of the parties entering into the agreement without some wrongful use of that power" is not enough to render an arbitration agreement unenforceable. Alexander v. Standard Oil, 97 Ill. App. 3d 809, 811, 423 N.E.2d 578, 580, 53 Ill. Dec. 194 (5th Dist. 1981). Even if Illinois law considered pre-dispute arbitration agreements unconscionable, the FAA would preempt such law. The FAA makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract", 9 U.S.C. § 2, and the Supreme Court has held that if a state singles out arbitration agreements, either statutorily or judicially, by imposing restrictions separate from its general contract law, that state law is preempted by the FAA. See Doctor's Assocs. v. Casarotto, 517 U.S. 681, 686-88, 134 L. Ed. 2d 902, 116 S. Ct. 1652 (1996).

Thus the Court’s decision on those issues is in accord with other courts that have addressed it. First, in Gilmer, the Supreme Court specifically rejected the argument that the Form U-4 creates an unconscionable contract of adhesion because of the unequal bargaining power between the plaintiff and his employer. 500 U.S. at 33. Similarly, in Seus, the Third Circuit found the Form U-4 to be a valid contract, because "the terms of the Form U-4 that [the plaintiff] signed were not oppressive, unconscionable, or unreasonably favorable to either the NASD or [the defendant]". 146 F.3d at 184. Finally, the First Circuit in Rosenberg held that "absent a showing of fraud or oppressive conduct" the Form U-4 is not unenforceable on the grounds that it is an unconscionable contract of adhesion. 1998 WL 880910 at 17. As there has been no showing of fraud, misconduct or wrongdoing on the part of SBC, there is no reason to invalidate this contract for unconscionability.

The Koveleskie case is distinguishable from the decision in Gibson, which held that a lack of consideration rendered an employee's promise to submit claims to arbitration unenforceable. 121 F.3d 1126. In Gibson, the plaintiff signed a contract provided by her employer which stated "I agree to the grievance and arbitration provisions set forth in the Associates Policy Manual" (the "Manual"). Id. at 1128. The Manual, which was not given to Gibson at the time when she signed the contract, specifically stated that all disputes, including Title VII claims, were subject to arbitration, but also stated that "it does not constitute a contract or promise of any kind" on the part of the employer. Id. at 1128. Thus, the employer was not bound by the Manual's terms. The Court found, applying Indiana law, that because Gibson was not given a copy of the Manual at the time she signed the contract, and because she never signed the Manual, there was no consideration in the form of a promise by the employer in exchange for Gibson's agreement to arbitrate. Furthermore, the Circuit Court found that Gibson's promise to arbitrate was not supported by consideration in the form of her employer's promise to hire her or to continue to employ her. Id. at 1131.

Thus, in the Koveleskie case, the plaintiff's contract with her employer, SBC, was supported by adequate consideration. First, Koveleskie signed the Form U-4 in exchange for SBC's promise to employ her. Second, the Form U-4 at issue here bound both parties to the rules of the designated SROs and allowed arbitration at the insistence of either party. Consequently, there is no inadequacy of consideration for the agreement to arbitrate.

Finally, in the Constitutional argument, Koveleskie argued that mandatory securities industry arbitration under federally-compelled and SEC-approved procedures violated her rights under Article III, the Seventh Amendment and the Fifth Amendment based on the "unconstitutional conditions" doctrine. The unconstitutional

conditions doctrine prohibits a private entity, acting pursuant to governmental mandate, from conditioning a worker's employment upon a waiver of that worker's constitutional rights. Board of County Commissioners v. Umbehr, 518 U.S. 668, 674, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996). This doctrine specifically requires governmental action inducing a waiver of rights. Id. Thus, without state action, there can be no violation.

The alleged state actor here is the SEC, but the SEC required registration with an exchange, not entry into an arbitration agreement. Some, but not all, exchanges require arbitration agreements. n2 The plaintiff registered with exchanges that required her to sign an arbitration agreement, but the SEC certainly did not mandate that she register with those exchanges. Perhaps her employer did, but SBC is not a state actor. Additionally, Koveleskie registered with SROs that required arbitration "at the insistence" or "request" of any party. n3 Thus, disputes between the parties are eligible for arbitration but only if one of the parties to the agreement demands it. Parties are always free to agree not to make a demand, even if they sign a Form U-4. n4 In the case at bar, the defendant, not the government, sought to compel arbitration, so there is no basis to find that Koveleskie was deprived of her rights because of government action.

Even if one were to assume state action here, it is highly unlikely that any constitutional violation occurred. The right to an Article III forum is waivable, and Koveleskie waived this right by signing the Form U-4 and consenting to arbitration. See CFTC v. Schor, 478 U.S. 833, 848-49, 853-54, 106 S. Ct. 3245, 92 L. Ed. 2d 675 (1986). Koveleskie argues that the arbitration agreement violates her Seventh Amendment right to a trial by jury, but the law is clear that there is no constitutional right to a jury trial outside of an Article III forum. Geldermann, Inc. v. CFTC, 836 F.2d 310, 323 (7th Cir. 1988). The plaintiff also argues that the arbitration agreement violates her Fifth Amendment due process and equal protection rights because it denies her the right enjoyed by all other plaintiffs to have Title VII claims decided by a tribunal that is required to apply the statutory standards established by Congress and the courts. This argument relies on the notion that a non-Article III forum is inadequate to protect statutory rights, but that is simply not the case. It is true that "statutory rights require both a substantive protection and access to a neutral forum in which to enforce those protections". Cole, 105 F.3d at 1482. However, we are satisfied, as was the Court in Gilmer, that the arbitral forum adequately protects an employee's statutory rights, both substantively and procedurally. 500 U.S. at 28; see also Cole, 105 F.3d at 1482; Seus, 146 F.3d at 180.

Finally, plaintiff's Equal Pay Act and New York Human Rights Law claims are likewise subject to arbitration. Koveleskie did not argue that the FAA precludes arbitration of those claims because neither the Equal Pay Act nor the New York Human Rights Law are exempted from the FAA. Therefore, these claims must be arbitrated. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) (district court has no discretion not to compel arbitration of claims subject to arbitration). Thus, even if this court had determined that Koveleskie's Title VII claims were precluded from arbitration, her other claims still would be subject to securities industry arbitration.

Thus, under every possible analysis, Koveleskie's claims are subject to arbitration within the arbitration system she agreed with her employer and defendant's right to that was enforced.

u. Miller v. Public Storage Management, Inc., 121 F. 3d 215, (5th Cir. 1997)

This is another of the Fifth Circuit arbitration cases and an important statement by the Circuit. The E.E.O.C., as usual, also filed another politically motivated amicus brief completely misstating the law and jurisprudence with the also usual result of being on the losing side.

Plaintiff had signed an arbitration agreement in the course of and as a requirement of employment. In it, she agreed to a broad form arbitration provision covering all employment disputes. In 1995, Miller was injured at work and after 8 months of leave was terminated when she was unable to return to work. She thereafter filed an ADA charge with E.E.O.C. and eventually a lawsuit alleging violations of the ADA and a (workers compensation) retaliation claim under the Texas Labor Code. Public Storage successfully moved to dismiss plaintiff's complaint and to compel arbitration. The district court found that the arbitration agreement was valid and enforceable. Miller appealed.

The Fifth Circuit correctly affirmed the district court. Plaintiff was represented by very experienced and able counsel who raised every available challenge to the agreement. All to no avail. Plaintiff's most significant assertions were that the Federal Arbitration Act did not apply to claims under the ADA, and that the agreement was somehow unconscionable under the circumstances that surrounded her signing of the arbitration agreement, (she claims that she was given insufficient time to read the agreement), which she contends constituted fraud and that her Texas Labor Code retaliation claims were not arbitrable, because Texas law does not favor the arbitration of personal injury or worker's compensation cases.

The Court quickly disposed of the contention that the FAA did not apply to claims under the ADA, citing the statute, Gilmer and a list of similar consistent cases. More importantly, the Court analyzed plaintiff's allegations of fraud and unconscionability. Those were quickly dismissed with the terse notation that those claims related to the formation of the contract and under the Federal Arbitration Act were to be determined by the arbitration tribunal, not the court. Last, the Texas Labor Code retaliation claim was summarily dismissed with a one-sentence statement. "The Federal Arbitration Act preempts conflicting state anti-arbitration law. Southland v. Keating, 465 U.S. 1, 16, 104 S.Ct. 852, 861, 79 L.Ed.2d 1 (1984)."

That last statement by the Court should prove highly significant. It strongly suggests that when presented with the right case involving a properly drafted "broad form" or National type "universal form" arbitration agreements, the Fifth Circuit will be disposed to compel the mandatory arbitration of all worker's compensation claims under the Federal Arbitration Act. This would provide employers with a rational and non-political alternative to the notoriously inconsistent various state workers compensation procedures. It literally could revolutionize the determination of worker's compensation claims throughout the Fifth Circuit. Watch this issue carefully for further developments.

v. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, (8th Cir. 1997)

This is one of the more regularly cited employment arbitration cases in the United States. Plaintiff was employed as a medical technologist at Columbia Regional Hospital, owned and operated by Tenant. In March of 1993, she received a copy of the Tenant Employee Handbook. That document included reference to and an explanation of the arbitration procedure in the body of the material and also on the last page, which was designed as an "acknowledgement" form. The Handbook provided that "This handbook is not intended to constitute a legal contract with any employees… Employees have access to a grievance procedure described in this document that affords the opportunity to have any employment related disputes submitted to binding arbitration." Page 31 of the Handbook, the "Acknowledgment Form", was a separate page intended to be signed by the employee, then removed and returned to the Employer. It stated in relevant part:

“I understand AMI makes available arbitration for resolution of grievances. I also understand that as a condition of employment and continued employment, I agree to submit any complaints to the published process and agree to abide by and accept the final decision of the Arbitration Panel as ultimate resolution of my complaint(s) for any and all events that arise out of employment or termination of employment.”

In July, 1993, and January, 1994, Plaintiff filed charges with the E.E.O.C. and the Missouri Commission of Human Rights alleging that she had been discriminated against, and subsequently retaliated against, in violation of her employment rights. In December, 1994, she filed a grievance through Tenets Internal Grievance procedure, the “Fair Treatment Procedure”. That grievance proceeded through an investigation and discussion to a hearing before the Fair Treatment Committee. Plaintiff was terminated nine (9) days prior to the hearing and she amended her grievance to include the termination. Her grievance was ultimately denied. Plaintiff did not submit her claim to the final step of the Fair Treatment Procedure of final and binding arbitration. Instead, she filed suit in the United States District Court alleging violations of Title VII of the Civil Rights Act and the Missouri Human Rights Act.

The District Court determined that Patterson had agreed to arbitrate her claims and that the arbitration agreement was governed by the Federal Arbitration Act. The District Court dismissed Patterson’s complaint and on appeal she argued that she did not agree to arbitrate and that the Federal Arbitration Act did not govern her claims. She pointed to the statement on Page 3 of the Handbook that “The Handbook is not intended to constitute a legal contract,” and to the statement on Page 31 that “No written statement or agreement in this Handbook concerning employment is binding”, for the propositions that the Handbook did not create a binding contract. This reasoning was unimpressive to the District Court and to the Court of Appeals.

The Eight Circuit concluded that the arbitration clause was separate from the other provisions of the Handbook, and as such, it independently constituted an enforceable contract. See Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp., 274 F.2d 805, 808-09 (2d Cir. 1960). Without saying so directly, the Court of Appeals applied the American version of the doctrine of Kompetenz-Kompetenz (english translation Competence–Competence). That jurisprudencial doctrine articulates the concept that arbitration provisions, by their very nature, form separate, independent and enforceable contracts within the body of other contracts or obligations. This case is one of the most lucid articulations of that principle, despite the fact that the Court of Appeals never expressly recognized or acknowledged it as such.

Instead, the Court determined that the Arbitration Clause was separate and distinct from the other Handbook provisions. It was set forth on a separate page of the Handbook and introduced by the heading, “Important! Acknowledgement Form.” That page was intended to be, and actually was, removed from the Handbook after the employee signed it. It was stored separately in the employers’ files. Further, the Court found that there was “a marked transition in the language and tone from the paragraph preceding the Arbitration Clause to the Arbitration Clause itself.” The Arbitration Clause “uses contractual terms such as ‘I understand,’ ‘I agree’, ‘agree to abide by and accept’, ‘condition of employment’, ‘final decision’ and ‘ultimate resolution’”. These led the Court to conclude that the differences between the language employed in the Handbook and that used in the Arbitration Clause sufficiently imparted and explained to an employee that the Arbitration Clause stood alone, separate and distinct from the rest of the Handbook. Therefore, the Court ignored the reservation of rights language otherwise articulated in the “Handbook Provisions” relating to employment and determined that the arbitration provisions were separate, distinct, independent and enforceable. Consequently, it affirmed the District Court’s decision and dismissed Plaintiff’s claims requiring her to bring them exclusively within an Arbitration Tribunal.

w. Alford v. Dean Witter Reynolds, Inc., 939 F.2d. 229 (5th Cir. 1991)

This is the first key employment arbitration case in the Fifth Circuit. Plaintiff was terminated as a stockbroker by the Defendant. She filed suit asserting her Title VII claims and was met with a demand to dismiss her case and refer it into final and binding arbitration. The district court refused to dismiss the case or to compel arbitration. That decision was affirmed by the Fifth Circuit prior to the Supreme Court decision in Gilmer. The employer obtained a writ of certiorari. The United States Supreme Court vacated the Court of Appeals decision and remanded the case to the Fifth Circuit for further consideration in light of the decision it had recently issued in Gilmer v. Interstate/Johnson Lane, supra.

The Fifth Circuit Court of Appeals then concluded that the Gilmer decision required it to reverse the district court and compel arbitration. The Circuit Court analyzed the Gilmer decision and the case before it. It determined that "because both the ADEA and Title VII are similar civil rights statutes, and both are enforced by the E.E.O.C., compare 29 U.S.C. Section 626 with 42 U.S.C. Section 2000 e-5, we have little trouble concluding that Title VII claims can be subjected to compulsory arbitration". (italics in the original). Importantly, the Fifth Circuit went much further and specifically stated that "any broad public policy arguments against such a conclusion were necessarily rejected by Gilmer." It also reiterated the Supreme Court's analysis of the major distinctions between arbitration in the context of a collective bargaining agreement and the separately agreed arbitration of statutory claims present in Gilmer and Alford. The Court noted that the Alexander, supra, line of cases relied upon by Alford was forcefully rejected by the Supreme Court, not least because they were not decided under the Federal Arbitration Act which "reflects a liberal Federal policy favoring arbitration agreements".

This decision recognized and disposed of claims that "public policy" precluded the use of mandatory arbitration for the resolution of Title VII claims. The protests of the E.E.O.C. notwithstanding, the "public policy" basis for opposition to the compulsory arbitration of employment claims was quite conclusively disposed of by the Fifth Circuit in Alford. That view has been even further expanded in the decisions subsequently issued by the Fifth Circuit, such as Rojas, infra, and the other federal courts within the Fifth Circuit.

x. Rojas v. TK Communications, Inc. 87 F. 3d 745, (5th Cir. 1996)

Plaintiff was employed as a disc jockey by defendant's radio station in San Antonio. She claimed to have been sexually harassed and retaliated against in violation of her rights under Title VII. While employed, Rojas signed an employment agreement which contained the following arbitration provisions:

"23. Arbitration. Except for breaches or threatened breaches of the provisions of Paragraphs 15 through 18 relating to equitable relief, any action contesting the validity of this Agreement, the enforcement of its financial terms or other disputes shall be submitted to arbitration…."

Ignoring this provision for arbitration, Rojas sued TK, which answered and denied her claims. TK then moved to dismiss the action on the ground that Rojas claims were subject to the mandatory arbitration provision in its contract with her. The District Court granted TK's Motion to Dismiss ruling that Rojas was required to arbitrate her claims against TK. Rojas appealed.

The claimed basis for Rojas' appeal was that: 1.) Title VII claims fell within the "contracts of employment" exclusion of the Federal Arbitration Act; 2.) that even if her agreement was not excluded on that basis, the contract at issue contains a "narrow arbitration clause" which did not apply to her claims; and 3.) that

the employment agreement itself was an "unconscionable contract of adhesion" and therefore unenforceable. None of these contentions withstood analysis.

The Fifth Circuit engaged in a careful analysis of the claimed exclusion of Rojas' contract on the basis that it was a contract of employment for a worker engaged in interstate commerce. It noted that it was not the first Circuit to address the scope of the exclusions contained in Section 1 of the Federal Arbitration Act. Of the numerous courts that had addressed the issue, the recent analysis of the Sixth Circuit was found to be the most persuasive.

The Sixth Circuit stated that, "The exclusionary clause of Section(s) 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 actually are. We believe this interpretation comports with the actual language of the statute and the apparent intent of the Congress that 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."

"If Congress had intended to exclude all contracts of employment from FAA coverage, Congress could simply have used statutory language in Section(s) 1 similar to the following: '… but nothing herein contained shall apply to any contracts of employment.' Congress did not do this. … We agree with the majority of other courts which have addressed this issue and conclude that Section(s) 1 is to be given a narrow reading." Therefore, the district court was correct in finding Rojas employment contract was subject to the requirements of the FAA.

Rojas' second argument was that her claim was not "within the 'narrow' language" of the arbitration provision in her contract. The clause at issue covered "any action contesting the validity of this Agreement, the enforcement of its financial terms, or any other disputes". The Court responded by first noting that whenever the scope of an arbitration clause is in question, the court should construe the clause in favor of arbitration. … "The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." "Contrary to Rojas' attempt to characterize the arbitration clause as 'narrow', … the district court was correct when it found that 'any other disputes' was sufficiently broad to encompass Rojas' Title VII claims." citations omitted.

Rojas' final argument that the employment agreement was an "unconscionable contract of adhesion" was disposed of quickly. The Court dismissed it with the notation that her assertion was actually an attack on the formation of the contract generally and not an attack on the arbitration clause itself. [fn3] "Because her claim relates to the entire agreement, rather than just the arbitration clause, the FAA requires that her claims be heard by an arbitrator." Citing R. M. Perez & Assoc., Inc. v. Welch, 960 F. 2d 534, 538 (5th Cir. 1992).

These decisions are emphatic in supporting the use of arbitration under the Federal Arbitration Act. Their clear and cogent analysis of the intent, scope and reach of the FAA have provided a strong foundation for the now regular attempts to seek sanctions against parties to arbitration agreements who seek to evade them. The jurisprudence in the Fifth Circuit is uniformly and consistently in favor of enforcing arbitration agreements. The issue of sanctions, and especially attorneys' fees, will be addressed in Marshall & Co. v. Duke, infra.

y. Cole v. Burns International Security Serv., 105 F.3d 1465 (D.C. Cir. 1997)

This case is one of the most interesting cases recently decided by a Federal Circuit. It is a fascinating example of a panel hostile to arbitration attempting to examine every remotely plausible way to avoid enforcing a Supreme Court decision the majority clearly loathes. Plaintiff, Cole, sought to overturn a District Court decision dismissing his complaint under Title VII of the Civil Rights Act and compelling the arbitration of his disputes with his employer. Though the employee had plead apparently viable employment discrimination claims under Title VII, the District Court dismissed his statutory claims pursuant to the Federal Arbitration Act as interpreted by Gilmer, supra, and ordered that the matter be arbitrated. Cole attempted to evade the mandatory arbitration by claiming that he was exempt under the portion of Section 1 of the Federal Arbitration Act that excludes the contracts of employment of seamen, etc.

The District Court did not accept that analysis, and upon appeal the Court of Appeal in a very lengthy opinion affirmed the District Court decision referring the dispute to mandatory arbitration. However, this case may become important in the future because two of the three judges on the panel in this opinion prolixly pontificate ad nauseum in attempting to judicially create additional requirements for the arbitration of statutory employment disputes. Their position was quite strongly dissented from by the third judge who, correctly reading the law and jurisprudence, concurred specifically and only in the result of compelling the arbitration. Those interested in a comprehensive review of every law professor, social agitator, professional pontificator and any other person hostile to the use of arbitration will find all of their arguments quoted at length in the majority opinion. The majority went greatly out of its way to try to readdress every philosophical and theoretical opposition to arbitration, whether grounded in reality or not, that it or anyone else possessed of a pen anywhere in America could imagine to object to mandatory arbitration. Nevertheless, the panel grudgingly enforced the arbitration provision.

However, it is worth reviewing portions of this opinion. One of the few reasons that the Panel felt compelled to uphold the arbitration provision was a requirement that the employer pay all costs associated with the arbitration. This point was strongly dissented from, and a review of the jurisprudence through mid-June of 1997 discloses no other Court of Appeal, not even the perennially maverick Ninth Circuit, that has reached a similar result. The major thrust of the theory of the Court of Appeal was basically an articulation of the viewpoint that since the Courts are essentially free, therefore arbitration should also be free to employees. It correctly notes that in arbitrations mandated by collective bargaining agreement, the Union and/or the Employer pay all costs of the arbitration. However, it does not address the fact that unions, where they are paying for part of the arbitration expense, have the power to determine whether or not the case should even be pursued at all. Unions generally make a careful and reasoned determination of the viability of the claim and the likelihood of success in the arbitral forum.

The Majority opines that it is a potential denial of access to justice for an employee or ex-employee to be required to pay the costs of an employment arbitration. In a point of substantial disagreement between the judges, there is a discussion of whether or not there are adequate provisions in the appropriate case for an employee to proceed without the payment of arbitration costs, expenses or filing fees. Most providers of neutrals do have some sort of provision for this in appropriate cases. The National Association for Dispute Resolution, Inc. and the American Arbitration Association both have mechanisms for the waiver and/or reduction of fees and expenses where a party would otherwise qualify to proceed in forma pauperous. The opinion of the Court reveals that it is apparently unaware, as it does not address issues such as those raised by a study from the Institute for Civil Justice, that the total actual cost of arbitration is frequently more than 20% less than the cost of trying a similar case to a jury. In addition, the Court ignores the widely and publicly available information

pointing out that the more selective use of discovery in arbitration accrues a substantial benefit to all parties. This fact alone often more than offsets the total cost of an arbitration proceeding itself.

This decision raises very interesting philosophical issues that may in the future be addressed in the appropriate forum of the Congress. While the Court of Appeal noted its concerns at extensive length, since the employer was willing to pay the cost of the arbitration, the District Court decision referring the Title VII claims to mandatory arbitration was affirmed. A better understanding of the realities of arbitration by the Court of Appeal would have led them to a recognition that a huge portion of the time and energy devoted to writing on the topic of the cost of arbitration was superfluous. All of the studies known to this author clearly show that the numerous benefits of arbitration, the speed of the process, the more carefully tailored discovery, the expertise of the decision makers, the speedier conduct of the arbitration hearings and the confidentiality of the process more than offset the potential economic cost of arbitration. Furthermore, in many advanced sets of rules, the parties can jointly agree to the use of only a single arbitrator who typically can hear an entire case in about 40% of the time the case would otherwise be tried to a jury.

This case is worth reading, but no other Court of Appeal has adopted this line of reasoning. With the possible exception of the perennially maverick Ninth Circuit Court of Appeal, this author believes it unlikely that any others will. Even if other courts accept this peculiar line of reasoning, the clear economic benefits to employers and employees alike, in terms of total cost savings by the use of arbitration rather than traditional litigation still make the use of arbitration, even if completely at the employer's expense, a far more economically attractive proposition than the expensive public vagaries of a jury trial.

z. Austin v. Owens-Brockway Glass Container, 78 F.3d 875 (4th Cir. 1996)

Plaintiff filed suit in the U.S. District Court in Virginia against the Defendant alleging violations of Title VII and the Americans with Disabilities Act. The District Court granted summary judgement in favor of the employer on the basis that Plaintiff had failed to submit her claims to mandatory arbitration under a collective bargaining agreement. Plaintiff appealed, claiming that the District Court improperly required her to arbitrate her statutory claims. The Court of Appeal found no error and affirmed the District Court decision.

This case is extremely interesting for a number of important reasons. First, the E.E.O.C. filed an amicus brief in this matter. It was unpersuasive. Second, this matter involves arbitration under a collective bargaining agreement. That agreement incorporated in its terms numerous provisions prohibiting discrimination on the basis articulated by the Americans with Disabilities Act and Title VII. Nevertheless, the Court, after an extensive analysis, found that Plaintiff was precluded from maintaining an action in the Federal Courts when she had not submitted her claims to the mandatory arbitration required by the collective bargaining agreement.

The collective bargaining agreement at issue specifically provided that claims of gender and disability discrimination were subject to the grievance procedure, including the arbitration procedure. The language of the arbitration provision seemed, in Plaintiff's view, to give her some hope of avoiding arbitration in that it appeared to be permissive rather than mandatory. The language actually provided that "all disputes not settled pursuant to the procedure set forth in Article I (of the CBA) grievance procedure may be referred to arbitration…" (emphasis supplied). However, the agreement also provided in Section V that "the arbitrator's decision shall be final and binding upon both parties". Therefore, the Court had little difficulty in determining that the participation of the employee in arbitration was mandatory and not permissive. Consequently, she was required to submit her claims to arbitration rather than to pursue them in the District Court. Interestingly, the Court of Appeal further noted that at the time of this decision "every case decided in the Courts of Appeal under

Section(s) 118 of the 1991 amendments to the Civil Rights Act has enforced anticipatory agreements to arbitrate claims involving statutory rights". This continues to be true for properly drawn arbitration agreements.

The dissent in this case points out correctly that in Gilmer, supra, the United States Supreme Court distinguished the situation in which an individual employee is subject to arbitration for the resolution of statutory claims with that of an employee subject to the arbitration provisions of a collective bargaining agreement. The courts had previously consistently held, based on the Alexander Gardner-Denver case, supra, that a Union could not prospectively waive an employee's right to attempt to vindicate their statutory claims in the courts by the application of the arbitration provisions contained in a collective bargaining agreement. For reasons discussed elsewhere in this paper, that line of jurisprudence should remain viable.

However, the dissent noted that after the majority listed all of the cases following the holding of Gilmer, supra, it concluded that "the only difference between these…cases and this case is that this case arises in the context of a collective bargaining agreement". The dissent correctly points out that "the only difference makes all the difference. A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim." Nevertheless, this Court of Appeal and a number of District Courts have begun the process of requiring the use of the final and binding arbitration provisions of collective bargaining agreements for statutory claims. The Seventh Circuit Court of Appeals in Pryner v. Tractor Supply Company, 109 F. 3d 354, infra, which was decided on March 20, 1997, reached a contrary result. Eventually, considering the present conflict between the circuits, this issue may be revisited by the United States Supreme Court. However, at the present time there appear to be an increasing number of federal courts that are willing to require the arbitration of statutory claims, even when that arbitration is solely mandated through the provisions of a collective bargaining agreement.

aa. Cremin v. Merril, Lynch, Pierce, Fenner & Smith, Inc., Joseph Gannotti, The New York Stock Exchange and the National Association Of Securities Dealers, 957 F. Supp. 1460, (N. D. Illinois 1997) (Feb. 21, 1997)

This case reflects a very inventive, but ultimately unsuccessful, attempt by a registered securities representative to evade the requirement to arbitrate her gender and pregnancy discrimination claims. The purported basis of this attack was that the exchange mandated arbitration of Title VII claims violated her due process and statutory rights. Plaintiff asserted that the mandatory execution of the required famous Securities Industry Registration "Form U-4" violated her rights under Article III and the Fifth, Seventh and Fourteenth Amendments of the United States Constitution. The Ninth Circuit's favorite evasion of a supposed lack of "knowing consent" to arbitration was also alleged. All to no avail.

Cremin commenced her multitudinous attacks on mandatory arbitration by alleging that the use of compulsory arbitration deprived her of the right to a jury trial under the Seventh Amendment and the 1991 Civil Rights Act. Next, she claimed that mandatory arbitration deprived her of her right to have an Article III court adjudicate her discrimination claims. Further, she asserted that arbitration deprived her of the procedural protections guaranteed by the Fifth Amendment. Additionally, she claimed that mandatory arbitration operated to forfeit statutorily mandated benefits conferred by Title VII, allegedly aggravating the "due process" violations. Finally, and perhaps most importantly, Cremin alleged that the use of mandatory arbitration required her to waive each of these rights and constituted an unconstitutional condition of employment and a violation of the 1991 Civil Rights Act.

The Court immediately concentrated on the heart of Cremin's complaints, which centered on the Fifth Amendment. It correctly recognized that "Since 1883, the Supreme Court has hewed to the principle that only

governmental actors can violate constitutional due process rights." The Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18, 27 L.Ed. 835 (1883); Shelley v. Kraemer, 334 U.S. 1, 13, 68 S. Ct. 836, 842, 92 L. Ed. 1161 (1948); NCAA v. Tarkanian, 488 U.S. 179,191, 109 S. Ct. 454, 461-62, 102 L. Ed.2d 469 (1988). "The due process clauses in the Fifth and Fourteenth Amendments afford no relief from purely private conduct, no matter how unfair or reprehensible." Quoting Tarkanian, 488 U.S. at 190, 109 S. Ct. at 461.

Cremin next attacked arbitration on the basis that the administration of a mandatory arbitration program "assumed a traditionally governmental function–adjudicating discrimination claims". None of those attacks were found persuasive. The Court correctly noted that such assertions have already been disposed of by a number of courts. "Courts have consistently held that private arbitration lacks any element of state action. Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995) (finding securities industry arbitration proceeding did not constitute state action because it was the creature of a voluntary contractual agreement); Elmore v. Chicago & Illinois Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986) "The fact that a private arbitrator denies the procedural safeguards that are encompassed by the term 'due process of law' can not give rise to a constitutional complaint." In refuting Cremin's complaint of her supposed forced waiver of statutory rights, the Court quoted the United States Supreme Court in Mitsubishi, supra. It reiterated again that "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."

The claim that the agreement to arbitrate her claims as a mandatory condition of employment (the Form U-4) was a contract of adhesion merited only one paragraph before dismissal. Noting that every court that has addressed the issue has rejected it, the Court quoted Gilmer, supra., "Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." 500 U.S. at 33-34. Indeed, the choice to become an exchange member is sufficient evidence of consent. O'Brien, supra 64 F.3d at 261. Consequently, the adhesion theory should now finally slumber undisturbed in its coffin.

Plaintiff's final two constitutional claims were the right to an Article III court and to a jury trial under the Seventh Amendment. By enforcing arbitration, those rights were supposedly in jeopardy. The Court found neither in danger. Noting that "rights to an Article III tribunal are waivable" the Court quoted the United States Supreme Court in CFTC v. Schor, 478 U.S. 833, 848, 106 S. Ct. 3245, 3255, 92 L.Ed.2d 675 (1986). "As a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver." The Court had little difficulty in concluding that because plaintiff had voluntarily consented to arbitration through signing the "Form U-4", that she had chosen to forgo a judicial forum. Consequently, she waived any right she may have had to a full trial before an Article III court.

A similar analysis was applied to Cremin's Seventh Amendment jury trial claims. The Seventh Amendment does not confer the right to a trial but only the right to have a jury hear the case once it is determined that the litigation should proceed before a court. "If the claims are properly before an arbitral forum pursuant to an arbitration agreement, the jury trial right vanishes." "In a non-Article III forum the Seventh Amendment simply does not apply." Geldermann, Inc. v. CFTC, 836 F.2d 310, 323 (7th Cir. 1987). Therefore, once the Court found that the plaintiff had consented to arbitration, the Seventh Amendment claims became irrelevant. Consequently, the Court had no difficulty in finding all of Cremin's constitutional claims "to be without merit".

The last new issue determined by the Court was whether Congress has established in Title VII any prerequisites to mandatory arbitration. Must a claimant knowingly waive their right to assert their Title VII claims in court? The court declined to follow the Ninth Circuit opinion in Lai, infra. It found that Lai's

approach was "inconsistent with the Supreme Court's Gilmer decision, as several other courts have recognized. Indeed, the "prevailing view is that Lai is incompatible with the Supreme Court's decision in Gilmer, ignores core principles of contract law and inappropriately used legislative history to contradict plain statutory language". Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091 (E. D. Mich. 1996). One feature of note in this decision is the disclosure that the Ninth Circuit in Lai actually based its opinion, in key part, upon a House Report actually based on the Supreme Court decision of Alexander v. Gardner-Denver, supra, which the Supreme Court actually distinguished in Gilmer! Finally, the Court pointed out the obvious contradiction between Lai's holding that signing an arbitration agreement does not equate to knowledge of its scope, and contract law's rule that one is presumed to know the contents of a signed agreement. The Ninth Circuit continues to remain perversely alone in failing to recognize and accept Form U-4 as an adequate agreement to arbitrate statutory claims. See Renteria v. Prudential Insurance Company of America, 113 F.3d 1104 (9th Cir. May 20, 1997).

While Cremin's efforts were numerous and creative, they were properly and totally unpersuasive. Consequently, the District Court had little difficulty in recognizing that its ruling eliminated Cremin's ability to challenge prospectively the security industry's arbitration procedures.

bb. Kinnebrew v. Gulf Insurance Company, 67 FEP Cases 189 (N. D. Tex. 1994), (CA 3: 94-CV-1517-R)

This case is the next logical extension of the philosophy and views of the Gilmer and Alford decisions. Plaintiff was an administrative claims manager for Gulf. She believed that she was paid substantially less than the male manager who previously held her position. Consequently, she sued defendant for violating the sex discrimination provisions of the Texas Commission on Human Rights Act and violating the Equal Pay Act of 1963. Unfortunately for plaintiff, during her employment, Gulf had instituted a Dispute Resolution Procedure and Arbitration Policy. Gulf mailed a copy of this Arbitration Policy and an explanatory memo to each employee including plaintiff. It also outlined its Arbitration Policy in its Employee Handbook. That Handbook provision stated:

> "If the internal dispute resolution procedure does not resolve the concern, the dispute may be submitted to binding arbitration in accordance with Primerica employment arbitration policy. Arbitration is an essential element of your employment relationship and is a condition of your employment. This policy makes arbitration required, and exclusive, for the resolution of all employment disputes which may arise..."

Defendant also provided certain unusual and potentially detrimental provisions in the Arbitration Policy. It stated that monetary damages were "limited to an amount sufficient to compensate the aggrieved party for such direct injury as the arbitrator determines such party has suffered". It further contained provisions that, unlike the statutory provisions that would control in Court, this defendant's Arbitration Policy did not provide for the award of punitive damages, attorneys' fees and equitable relief.

Rather than submit her claims to arbitration, plaintiff filed claims with the E.E.O.C. and the Texas Commission on Human Rights. Subsequently, she also filed suit against her employer. Gulf sought a stay of Plaintiffs proceedings under the Federal Arbitration Act and an order compelling arbitration. The Court granted the defendant's request and wrote an interesting analysis of contemporary arbitration law.

The Court began by analyzing plaintiff's key contentions. She asserted that the Arbitration Policy was deficient because it deprived her of certain substantive rights. Those substantive rights were enumerated as the

right to punitive damages, attorneys' fees and equitable relief. Plaintiff claimed that the failure of the Policy to provide those remedies purportedly required the Court to deny enforcement of the arbitration agreement. Chief Judge Jerry Buchmeyer disposed of those claims by returning to the basic definition of substantive rights. He stated that "substantive rights" are defined as "a right to equal enjoyment of fundamental rights, privileges and immunities; distinguished from procedural right". The Policy fully protected plaintiff's right to be free from discrimination. She did not forego "substantive rights" when compelled to arbitrate under a more limited remedial scheme. Once she agreed to arbitrate claims arising from her employment, she must honor that agreement "unless Congress itself has evidenced an intention to preclude waiver of judicial remedies for the statutory rights at issue". Gilmer, supra; Mitsubishi, supra. Moreover, the Court stated that "it is plaintiff's burden, therefore, to show that Congress or the Texas Legislature intended to preclude any waiver of judicial remedies..."

Plaintiff also raised the issue of the undisputed fact that she had not signed any agreement that contained an arbitration provision. In fact, she would not execute the available agreement. She argued that because her employer unilaterally distributed the Policy to its employees, without explaining its effect and without seeking their express agreement, an arbitration could not be compelled. The Court found the highly significant fact that plaintiff continued her employment with Gulf after receiving a copy of the Arbitration Policy. Consequently, plaintiff's argument was defective for two reasons. "First, federal courts do not hesitate to find an enforceable agreement to arbitrate when an arbitration policy is instituted during an employee's employment and the employee continues to work for the employer thereafter." Lang v. Burlington Northern Railroad, 835 F.Supp. 1104 (D. Minn. 1993). This position is consistent with the majority national view of an employer's rights in "employment at will" states. A non-union employer is generally free to change the terms and conditions of employment at any time. Likewise, an employee is also free to seek employment with other employers any time they do not like the conditions of employment with their current employer. Of course, this arrangement can be changed by individual contracts or the provisions of a collective bargaining agreement. However, absent those devices, the parties remain free to each define the terms of their employment relationship. The plaintiff chose to continue to be employed by the defendant, therefore she agreed to the modifications imposed on the employment relationship through the Arbitration Policy. She could manifest her disagreement at any time by obtaining employment with another company. Since she did not do so, she would be bound by the terms and conditions of her employment relationship with Gulf which mandated the exclusive use of arbitration to finally resolve all employment disputes.

Finally, plaintiff attempted to avoid the Arbitration Policy by claiming that it was imposed through a "contract of adhesion". She strongly protested the imposition of mandatory arbitration on Gulf's "take it or leave it" basis. This position did not impress the Court, which noted that under the Federal Arbitration Act and the jurisprudence interpreting it that assertion "is an attack on the agreement as a whole and is therefore subject to arbitration itself". R. M. Perez and Associates, 960 F.2d. 534, (5th Cir. 1992); Weston v. ITT-CFC, 8 IER 503 (1992). That conclusion is a completely correct statement of the contemporary law. Thus, the opponent to the arbitration is required to assert that issue to the very Arbitral Tribunal they seek to avoid the judgment of. While potentially difficult, it is intellectually possible and, according to this decision, required by the current jurisprudence.

cc. Reese v. Commercial Credit Corporation, 955 F. Supp. 567, (D. South Carolina 1997) (Feb. 28, 1997)

This case involves two major issues. First, was plaintiff given "notice" sufficient that he was made aware that he was agreeing to arbitrate all of this employment disputes with his employer? Second, did he agree to arbitrate his claims under the FMLA and the ADA? Subsequent to plaintiff's employment with Commercial

Credit, it adopted a mandatory arbitration policy. The Arbitration Policy was mailed to all employees together with a letter explaining it. The Policy provided that it "makes arbitration the required, and exclusive, forum for the resolution of all employment disputes." Considering this method of providing "notice", the Court opined that "It is not too much to ask an employer to provide actual notice before significantly restricting rights created by decades of state and federal legislation." The Court accepted the mailing as actual notice and found the arbitration policy enforceable. Since the "scope of the Arbitration Policy is very broad, … it unquestionably encompasses Reece's FMLA and ADA claims". Consequently, providing individual written notice of a newly adopted arbitration policy was sufficient to require all employees to use it.

dd. Folse v. Richard Wolf Medical Instruments Corp., et al, 56 Fed 3rd 603 (5th Cir. 1995)

This case presents the interesting question of how long must a party wait for an arbitration to be concluded. Plaintiff was a party to a sales representative agreement with the defendant which required any dispute arising from the employment to be resolved through arbitration by the American Arbitration Association. In September, 1991, a dispute arose over the failures of the defendant to pay sales commissions due plaintiff and his failure to return sample medical instruments (inventory) to defendant. In July, 1992, defendant demanded arbitration with the A.A.A. The parties proceeded to the A.A.A. arbitration in February, 1993. Although the A.A.A. was expected to issue an award within 30 days from the hearing, the first "conditional" ruling was issued in September, 1993, which the Court of Appeals noted was more than six months after the hearing. That ruling required plaintiff to return portions of Wolf's inventory and Wolf to provide documentation from which plaintiff could substantiate his commissions. For various reasons neither party complied for over six months. In February, 1994, A.A.A. sent the parties a second "conditional" ruling stating that the parties had acted unreasonably, urging compliance with the first ruling and threatening the parties with the forfeiture of their claims. In April, 1994, for unexplained reasons, A.A.A. reassigned the case to another of its arbitrators. The parties were asked to select another A.A.A. arbitrator from a list A.A.A. provided to them. Defendant wrote A.A.A. requesting the arbitration be held in abeyance for six months so the parties could try to settle the matter themselves. A.A.A. sent that request to plaintiff who responded by filing suit.

Plaintiff's complaint claimed breach of contract and failure of the arbitration process and named the A.A.A., its arbitrator and Wolf as defendants. He claimed that the A.A.A. and its arbitrator had failed to produce a timely result, and he should no longer be forced to endure the arbitration any longer. Wolf sought to compel the parties to return to arbitration and for a stay of the lawsuit. The district court adopted plaintiff's reasoning in his brief in opposition to returning to the A.A.A. arbitration and denied Defendant's motion to compel a return to arbitration.

The Court of Appeals correctly observed that, needless to say, the arbitration of this dispute by the A.A.A. should never have taken this much time (over three and one-half years since the A.A.A. began the arbitration process), nor should it have reached federal court. It was more than unfortunate that the A.A.A. arbitration process, ostensibly designed to resolve disputes in a timely and cost-efficient manner, had clearly failed the expectations of at least one, if not both, of the parties. Nevertheless, the facts of the case and the case law did not permit the intervention of the federal courts until the parties saw their arbitration through to a final award. Consequently, the Court ordered the judgment of the district court reversed and the matter remanded with instructions that the parties be returned to arbitration and that plaintiff's action be stayed. Thus, despite the fact that over three and one half years had elapsed since the A.A.A. began the arbitration and neither side had achieved an award, they would not be heard in federal court to complain of it. Luckily, efficiently administered arbitrations are usually conducted within 180 days. However, if your client has the misfortune to endure this type of arbitration, the federal courts will not intervene and afford them any relief. Of course, proper planning and the selection of the best arbitral administration will eliminate this type of problem.

2. Texas Cases

The Courts of Texas remain supportive of arbitration. Annoyingly, many of the most useful or interesting arbitration decisions have been issued as unpublished opinions, and pursuant to the Texas Rules of Appellate Procedure, may not be cited as authority by counsel or by a court. Consequently, they will not be addressed here. However, those interested in such materials may contact the authors for a discussion of those decisions. Consequently, the cases analyzed below remain the major authority in this area.

a. Prudential Securities Inc. et al v. Marshall, 909 S.W.2nd 896

This decision of the Texas Supreme Court, since amplified by EZ Pawn v. Mancias, infra, reiterated the Court's long-standing policy of favoring the use of arbitration. In this case, a group of stockbrokers previously employed by the Defendant brought various tort (libel and slander) claims against their former employer and several former coworkers. The trial court denied defendants' motions to stay plaintiffs' case and order arbitration. Appeal was made to the Supreme Court on a writ of mandamus. The Supreme Court used this case to articulate a number of important points of Texas arbitration law.

Plaintiffs contended that, although they had signed Uniform Applications for Securities Industry Registration or Transfer (as in Gilmer), they were not required to arbitrate their tort claims. They claimed that the defendants had waived their right to compel arbitration and, essentially, that their claims were outside of the scope of the provisions of their agreement to arbitrate. Neither argument was successful. First, the Court stated again that the "arbitration of disputes is strongly favored under federal and state law" citing Moses H. Cone Memorial Hospital, supra and Brazoria County v. Knutson, 142 Texas 172, 176 SW 2nd 740, at 743 (1943). Indeed, the policy in favor of enforcing arbitration agreements is so compelling that a Court should not deny arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue" quoting Neal v. Hardee's Food Systems Inc., 918 F.2d. 34, at 37 (5th Cir. 1990) quoting Commerce Park at DFW Freeport v. Party Construction Co., 729 F.2d. 334, at 338 (5th Cir. 1984) (emphasis supplied in the original Texas opinion). Second, it determined that "a party does not waive a right to arbitration merely by delay; instead, the party urging waiver must establish that any delay resulted in prejudice". Third, when a party asserts a right to arbitration under the Federal Arbitration Act, the question of whether a dispute is subject to arbitration is determined under federal law. Genesco v. T. Kakiuchi & Co. 815 F.2d. 840, at 845. Finally, the trial court abused its discretion because it misapplied the Federal Arbitration Act to the facts of this case. "A party who is erroneously denied the right to arbitration has no adequate remedy at law because the fundamental purpose of arbitration--to provide a rapid, less expensive alternative to traditional litigation--would be defeated." Consequently, the Courts of the State of Texas must properly employ the standards contained in the Federal Arbitration Act and its interpretation by the federal jurisprudence. The Courts of Texas clearly are now all required to follow federal law when determining the arbitrable nature of claims subject to arbitration under the Federal Arbitration Act or be subject to mandamus to correct any misapplication of that statute.

b. EZ Pawn v. Mancias, 934 S. W. 2d 87 (Texas 1996)

This case is an even stronger and more emphatic statement in favor of arbitration by the Texas Supreme Court. Gonzalez was an employee of EZ Pawn when he entered into an agreement that provided that the parties

agreed to submit any civil disputes between them, including claims of wrongful discharge and employment discrimination, to arbitration. Gonzalez signed the agreement. Subsequently he left EZ Pawn's employ and later sued it for wrongful discharge and discrimination. The Trial Court denied EZ Pawn's motion to compel arbitration and for abatement of Gonzalez' suit. On mandamus and on an interlocutory appeal, the court of appeals affirmed the trial court. The Supreme Court granted writs.

Gonzalez first claimed EZ Pawn had waived its right to arbitration by delay. The Court noted that the Federal Arbitration Act disfavors waiver and that "there is a strong presumption against waiver" citing Moses H. Cone Mem'l Hosp. Mercury Constr. Corp., 460 U. S. 1, 24. See also Willaims v. CIGNA Fin. Advisors, Inc., 56 F.3d 656, 661-62 (5th Cir. 1995). It had absolutely no difficulty disposing of that argument.

The more interesting, indeed astonishing, assertion by Gonzalez was that EZ Pawn could not enforce the arbitration agreement because he had never read it and therefore did not understand its effect! He also claimed that because of the parties' unequal bargaining power, the arbitration agreement violated public policy and was therefore unenforceable. The Supreme Court stated that "We presume a party, like Gonzalez, who has the opportunity to read an arbitration agreement and signs it knows its contents. Cantella & Co., Inc. v. Goodwin, 924 S.W.2d 943, 944 (Texas 1996). Moreover, there is nothing per se unconscionable about arbitration agreements. In fact, historically, Texas law favors settling disputes by arbitration." Furthermore, the Court found that even "assuming that unequal bargaining power between Gonzalez and EZ Pawn exists does not establish grounds for defeating an agreement to arbitrate under the Federal Arbitration Act. Gilmer, supra, at 33, at 1655-56."

Finally, Gonzalez contended that the Texas General Arbitration Act prevails over the Federal Arbitration Act. Therefore, his suit, which alleges personal injuries suffered because of his wrongful discharge, is exempt from arbitration. See Tex. Civ. Prac. & Rem. Code Section 171.001(c) (personal injury suits exempt from Texas Act except upon counsel's advice and upon written agreement). The Court found that "Here the agreement refers to both the Texas Act and the FAA. This is not uncommon. In such cases, we have held that the FAA prevails." [The FAA contains no such provisions hostile to the arbitration of personal injury claims and a plethora of cases have enforced the arbitration of tort claims.] citing Marshall, supra. Consequently, once EZ Pawn established a valid arbitration agreement under the FAA, Gonzalez had the burden to defeat it. Since he was unable to convince the court he could overcome the strong presumption favoring arbitration under the FAA, arbitration was mandated.

c. Burlington R.R. Co. v. Akpan, 943 S.W. 2d 48, (Texas App. Ft. Worth 1996)

This case reiterates the Fort Worth Court of Appeals' acceptance of the strong policy of the Texas Supreme Court in compelling the arbitration of employment disputes. Plaintiff asserted claims for discrimination on the basis of race and national origin under the Texas Commission on Human Rights Act regarding the termination of his employment. See Tex. Lab. Code Ann. Section(s) 21.051 (Vernon 1996). The trial court determined no binding agreement to arbitrate existed and denied Burlington's motion to compel arbitration.

The evidence established that, in 1991, Burlington adopted a policy that required binding arbitration of all disputes relating to the termination of employees or the status of exempt employees. Copies of this policy were sent to all active, exempt employees in January, 1991, and again in February, 1993. Akpan, an exempt employee, admits receiving a copy of this policy in March, 1993. Nevertheless, he continued to work for Burlington until his termination December 15, 1993.

The law in Texas has long established that either party to an employment-at-will relationship may impose modifications to employment terms. Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986). However, the party asserting the modification must prove that it unequivocally notified the other party of definite changes in the employment terms and the other party's acceptance of those changes. Id. When an employer notifies an employee of such changes, the employee must accept the new terms or quit. Id. (emphasis supplied) If the employee continues to work with knowledge of the changes, he has accepted the changes. Id. To have knowledge of the changes, the employee must know the nature of the modifications and the certainty of their imposition. Id.

The Court of Appeals expressly noted that Texas courts strongly favor arbitration and that the courts usually indulge every reasonable presumption in favor of arbitration. See, e.g., Prudential Sec., Inc. v. Marshall, 909 S.W.2d 896, 898 (Tex. 1995) (orig. proceeding); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 268 (Tex. 1992) (orig. proceeding); Brazoria County v. Knutson, 142 Tex. 172, 176 S.W.2d 740, 743 (1943); Sparkman, 921 S.W.2d at 357, Fridl v. Cook, 908 S.W.2d 507, 511 (Tex. App.--El Paso 1995, writ dism'd w.o.j.); Howell Crude Oil v. Tana Oil & Gas, 860 S.W.2d 634, 636 (Tex. App.-- Corpus Christi 1993, no writ); Hearthshire Braeswood Plaza Ltd. v. Bill Kelly Co., 849 S.W.2d 380, 386 (Tex. App.--Houston [14th Dist.] 1993, writ denied). However, since Burlington was the party asserting that the employment-at-will relationship had been modified, it had the burden to prove the modification. Hathaway, 711 S.W.2d at 229.

Burlington presented evidence, by affidavit, that it adopted the following arbitration policy in January, 1991:

“All claims, disputes or issues related to or arising out of the termination of employment or exempt status of an employee of the company shall be submitted for resolution exclusively by arbitration and only after all internal resolution efforts have been exhausted.”

It also presented evidence that this policy was sent to all active, exempt employees by letter from its vice president of human resources and in the form of updated pages to its employee handbook, in January, 1991. That information was sent again in February, 1993, with another employee handbook update.

Plaintiff contended by affidavit that he received no communication from Burlington concerning its arbitration policy. However, he acknowledged that he received a copy of the employee handbook page setting forth the arbitration policy in March, 1993, but received no "instruction or notice" concerning the policy. The copy of the page that he "discovered in [his] records" was attached to Akpan's affidavit. Burlington's policy was preceded by the words "[t]he following policy applies to all new hires and employees effective January 1, 1991". It is followed by the following statement: "No legal action may be filed in any court. All disputes concerning termination of employment or exempt status will be resolved by arbitration." The parties did not dispute that Akpan continued working for Burlington until his termination on December 15, 1993.

Akpan asserted that he offered evidence that he did not receive unequivocal notice of the changes such that he knew the nature of the changes and the certainty of their imposition. However, he admitted he received the amended handbook pages in March, 1993, and attached copies to his affidavit. The language of the page is unequivocal and provides clear direction to Burlington's employees: "The following policy applies to all new hires and employees effective January 1, 1991 . . . . No legal action may be filed in any court. All disputes concerning termination of employment . . . will be resolved by arbitration." In the same affidavit, Akpan testified, that this policy was not "communicated" to him and he received "no instruction or notice." Plaintiff consistently argued that despite his receipt of the document, he had no actual knowledge of it.

Texas law, as that of most other states, has long held that “whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand and which if pursued by the proper inquiry the full truth might have been ascertained”. The Court reiterated that “Actual knowledge embraces those things of which the one sought to be charged has express information, and likewise those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed.” In short, one can not remain intentionally ignorant and seek solace from the consequences of that decision in court.

Accordingly, the Court determined that it could not find that a party's subsequent denial of knowledge of a material fact is any evidence of lack of knowledge. This is particularly true where the party admits receipt of actual notice of the fact then fails to read it or remember it, either by his own negligence or by his conscious choice. The party providing unequivocal notice of changes in employment terms cannot force the other party to assimilate and understand the information in the notification. (emphasis supplied) As one colorful Texas attorney once explained to a rather intellectually challenged witness, “They must give it to you, but they can’t understand it for you.”

Plaintiff also hoped to evade the arbitration on the basis that there was no an agreement (to arbitrate) because it was unsigned. The Texas General Arbitration Act requires only that the terms of the agreement be written; it does not require that it be signed by either party. See Tex. Civ. Prac. & Rem. Code Ann. Section(s) 171.001 (Vernon Pamph. 1997). Accord the Federal Arbitration Act.

The employer clearly set forth the terms of its arbitration policy in its written supplement to its employee handbook. The employees, such as Akpan, accepted the agreement and provided consideration by continuing to work for Burlington. Although an employee handbook is not a contract that will alter the at-will nature of the employment relationship, a provision in an employee manual may create enforceable rights where the provision does not alter the at will nature of the employment relationship. Compare Federal Express Corp. v. Dutschmann, 846 S.W.2d 282, 283-84 (Tex. 1993) (holding an employee manual did not create contract restricting the employment-at will relationship) with E-Z Mart Stores, Inc. v. Hale, 883 S.W.2d 695, 699 (Tex. App.--Texarkana 1994, writ denied) (holding a unilaterally issued employer policy created an enforceable right for at-will employees). Both employers as well as employees may enforce such policies. Consequently, there was a valid agreement to arbitrate and the terms of that agreement were unequivocally set forth in the writing attached to Akpan's affidavit.

In conclusion, Burlington’s mailed notice provided Akpan with unequivocal notice of its policy requiring arbitration of employment termination disputes. Akpan admitted receiving the notice in March, 1993. It was unquestioned that Akpan continued working for Burlington after March, 1993. Consequently, it was established as a matter of law that there was a valid and enforceable agreement to arbitrate the parties’ dispute. Further, the express language of the arbitration policy was sufficiently broad that the claims at issue fell within the scope of that agreement. Consequently, the Court of Appeals reversed and remanded the case to the trial court with instructions to grant Burlington's motion to compel arbitration.

d. Circuit City v. Curry, 946 S.W.2d 486 (Texas App. Ft. Worth 1997)

This case arose out of a dispute over whether an employment dispute was validly subject to arbitration under the Federal Arbitration Act. In March, 1995, Circuit City gave all associates and managers an “Associate Issue Resolution Package” (AIRP), which included an arbitration provision for most employee-employer disputes. The arbitration agreement unusually also included an "opt-out" form that the employee had to sign in

order to not participate in arbitration. Plaintiff, Giacoma, did not return the opt-out form, but he did sign a receipt acknowledging that he received the AIRP. This acknowledgment form stated that by not returning the opt-out form, the employee "will be required to arbitrate all employment-related legal disputes [the employee] may have with Circuit City".

The rules and procedures section of the AIRP specifically provided that the agreement was to be governed by the Federal Arbitration Act:

"The Dispute Resolution Agreement and any award rendered pursuant to it shall be enforceable and subject to the Federal Arbitration Act . . . and the Uniform Arbitration Act of Virginia . . . regardless of the State in which the arbitration is held or the substantive law applied in the arbitration."

The handbook portion of the AIRP stated that "the arbitrator can award monetary damages to compensate you for harm you may have suffered". In the rules and procedures section, the damages that were available were specifically listed. Those included reinstatement, front pay, back pay, compensatory damages, punitive damages and injunctive relief.

Circuit City fired Giacoma on May 15, 1995, for a "security violation". On May 10, 1996, Plaintiff submitted an arbitration request form to Circuit City, alleging that he had been fired for filing a worker's compensation claim. The request form specifically warned and stated that by submitting a request, the employee was agreeing to final and binding arbitration of the dispute:

"I hereby submit the above-described dispute for arbitration. I agree to accept the decision and award of the Arbitrator as final and binding as to all claims relating to my employment relationship with Circuit City or its affiliate which have been or could have been raised under my Arbitration Agreement with Circuit City."

Interestingly, Giacoma also participated in selecting an arbitrator. The arbitrator conducted a preliminary hearing by telephone with both Circuit City and Giacoma. About two weeks later, Giacoma sued Circuit City and Beaufils for retaliatory discharge and told the arbitrator that he would not proceed with arbitration.

The Court of Appeals stated yet again that there is a strong presumption in favor of arbitration which must be applied when construing agreements to arbitrate. See EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 89 (Tex. 1996) (orig. proceeding). "We must resolve any doubts about the agreement in favor of arbitration." See Cantella & Co. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding). "Once a party seeking to compel arbitration establishes that an agreement exists under the FAA and that the claims raised are within the agreement's scope, the trial court must compel arbitration." (emphasis supplied) See id. Plaintiff conceded that his retaliatory discharge claim fell within the agreement's scope. Nevertheless, he maintained that there was no enforceable agreement to arbitrate.

His first argument was that there was no agreement. He asserted that his acknowledgment of receipt, his failure to return the opt-out form, his continuing to work after he got the AIRP and his participation in selecting an arbitrator do not create an agreement. (What, pray tell, would?)

This line of "reasoning" was spectacularly unimpressive to the Court. It stated that the law presumes that because Giacoma received the AIRP package and did not return the opt-out form, he understood all of its contents. See EZ Pawn, 934 S.W.2d at 90. Secondly, Plaintiff's arbitration request, his participation in selecting an arbitrator and his participation in a preliminary hearing show there was an agreement to arbitrate. See Burlington N. R.R., Co. v. Akpan, No. 2-96-236-CV, slip op. at 8 (Tex. App.-Fort Worth, Dec. 5, 1996, no

writ); Holk v. Biard, 920 S.W.2d 803, 807 (Tex. App.-Texarkana 1996, orig. proceeding [leave denied]); Prudential Sec. Inc. v. Banales, 860 S.W.2d 594, 598 n.3 (Tex. App.-Corpus Christi 1993, orig. proceeding); see also Nghiem v. NEC Elecs., Inc., 25 F.3d 1437, 1440 (9th Cir.), cert. denied, 513 U.S. 1044 (1 994). Finally, because Giacoma continued to work after getting the AIRP and decided not to opt out, he accepted the arbitration agreement as a matter of law. See Hathaway v. General Mills, Inc., 71 1 S.W. 2d 227, 229 (Tex. 1986).

Giacoma's second argument was that even if there was an agreement, it was unenforceable because it was fraudulently induced and unconscionable. See 9 U.S.C. [section] 2 (1970); see also Palm Harbor Homes, Inc. v. McCoy, No. 2-97-040-CV, slip op. at 8 (Tex. App.-Fort Worth, Apr. 10, 1 997, orig. proceeding) (holding agreement to arbitrate under the FAA enforceable unless grounds exist at law or equity for revocation of a contract, such as fraud or unconscionability). For Plaintiff to successfully establish fraudulent inducement, he would have had to establish that: (1) Circuit City made a material representation; (2) the representation was false; (3) when Circuit City made the representation, it knew the representation was false; (4) the representation was made with the intention that it should be acted upon by Giacoma; (5) Giacoma acted in reliance upon the representation; and (6) Giacoma suffered injury because of this reliance. See Trenholm v. Ratcliff, 646 S.W.2d 927, 929-30 (Tex. 1983). Giacoma argues that Circuit City made a material misrepresentation when the handbook portion of the AIRP stated that the arbitrator could award monetary damages, but the rules and procedures section specifically listed what damages were available. According to Plaintiff's argument, the handbook language indicated that he could recover any and all damages and the asserted inconsistency supposedly constituted the fraud.

The Court found that those two statements were not misrepresentations. Both the handbook and the rules and procedures were sent as one package, and Giacoma acknowledged that he would carefully read the entire package:

“I will read the materials carefully and call the Associate Line or consult with my local Personnel Manager if I have any questions. I understand that I may consult with an attorney if I have any questions regarding my legal rights.”

Correctly interpreting the current federal and Texas jurisprudence, the Court recognized that even if Giacoma had not read the agreement, he is not excused from arbitration. See EZPawn, 934 S.W.2d at 90, supra. Because Giacoma signed the acknowledgment form and had an opportunity to read it, he was properly presumed to know its entire contents. The Court, in reviewing the language at issue, found that “taken as a whole and read together, the two statements merely inform Giacoma that the arbitrator can award damages and those damages are limited to those listed in the arbitration agreement's rules and procedures”. Consequently, the agreement was not fraudulently induced.

Since Circuit City successfully established a valid arbitration agreement under the Federal Arbitration Act, the burden shifted to Plaintiff to defeat it. See Prudential Sec. Inc. v. Marshall, 909 S.W.2d 896, 898-900 (Tex. 1995) (orig. proceeding), supra. Based on the record before it, the Court held that Giacoma had not overcome the strong presumption favoring arbitration under the FAA. Accordingly, the trial court abused its discretion when it denied Circuit City's motion to compel arbitration. Consequently, the Court conditionally granted a writ of mandamus and directed the trial court to (1) order Giacoma's claims against Circuit City and Beaufils to arbitration, and (2) to stay Giacoma's civil action pending arbitration. The decision of the Court to assess all costs against Giacoma may be the beginning of judicial recognition that the law in this area is now sufficiently clear that sanctions may become available for unwarranted (or unsuccessful) opposition to arbitration agreements.

C. Jurisprudence - Unfavorable

Despite the continuous national trend of the jurisprudence toward enforcing arbitration agreements, some cases remind us that this is still an area for continued caution. Ill-planned and "cute" agreements have been stricken. Aside from the perennially hostile and openly anti-arbitration Ninth Circuit, the Tenth Circuit, in Shankle v. B. G. Maintenance Management of Colorado, Inc., 163 F. 3d 1230, the Eleventh Circuit in Paladino v. Avnet, the Texas Fourteenth Court of Appeals in Houston, Tenet v. Cooper, infra, and very reluctantly, the usually supportive Fourth Circuit in Phillips v. Hooters of America Inc. et al., 173 F. 3d. 933 have also recently issued unfavorable decisions. The results in all of these cases were largely determined by the specific facts in each dispute. They do not appear to hold any serious concerns for properly drafted arbitration agreements in general. However, as the Hooters case demonstrates aggressive arrogance and stupidity can always generate an adverse decision, even from the most pro-arbitration of the Circuit Courts of Appeals.

1. Federal Cases

a. Floss vs. Ryan's Family Steak Houses, Inc., 211 F. 3rd 306 (6th Cir. May 2000)

This appellate case addresses one of the most bizarre and peculiar approaches ever attempted in the jurisprudence of arbitration. For reasons so obscure as to be impossible to divine, the arbitration agreement in these cases was "designed" for execution between the employee and a third party arbitration services provider, Employment Dispute Services, Inc. "EDSI". In the arbitration agreement, EDSI agrees to provide an arbitration forum in exchange for the employee's agreement to submit any dispute with his potential employer to arbitration with EDSI. Strangely, although the employer was not explicitly identified as a party to the arbitration agreement, the agreement states that the employee's potential employer is a third party beneficiary of the employee's agreement to waive a judicial forum and arbitrate all employment related disputes. The "agreement" grants EDSI complete discretion over the arbitration rules and procedures. It also mandates that all arbitration proceedings will be conducted under the "EDSI Rules and Procedures." Finally, as if that were not oppressive enough, the Circuit Court then noted that the agreement "gives EDSI the unlimited right to modify the rules without the employee's consent."

The United States Supreme Court and every Circuit Court of Appeal, except the 9th Cir., have found arbitration to generally be a suitable forum for resolving statutory claims. However, the arbitrable forum must allow for the effective vindication of the statutory claims. "So long as the prospective litigant effectively may vindicate (his or her) statutory cause of action in the arbitrable forum, the statute will continue to serve both its remedial and deterrent function." Mitsubishi, infra, 473 U.S. at 637. The EDSI procedure spectacularly fails to even remotely approach this standard. One of the points expressly noted by the Court of Appeal was that the EDSI procedure created a panel of three "adjudicators" to preside over every arbitration proceeding. EDSI specified that one of the three adjudicators would be drawn from a pool of supervisors or managers of the employer, the second adjudicators would be drawn from a pool of "non-supervisory" employees and the third pool would consist of attorneys, retired judges and "bother competent professional persons" not associated with either party. Facially, the procedure appears to never provide a claimant with even an arguably fair or neutral panel of arbitrators. The potential, indeed the likelihood, that the arbitration tribunal would be biased in favor of the employer or prejudiced against these statutory claims is blatantly obvious. There is only one positive observation extractable from these cases and the EDSI procedure. As a wise Jesuit once observed, "everything on this planet has a purpose, even if only to serve as a bad example." However, for those drafting employment

arbitration procedures and agreements, this case and the other related Ryan's -- EDSI cases are excellent examples of what not to do.

b. Phillips v. Hooters of America Inc. et al., 173 F. 3d. 933, (4th Cir. 1999)

This case is simply amazing and reaffirms our faith in the American judicial system. Few courts in this country are as supportive of arbitration as the Fourth Circuit. Nevertheless, this company managed to get its self-serving, perverted version of arbitration "hooted" out of even this friendly court. As an old Texas saying so aptly puts it, "Pigs get fat. Hogs get slaughtered." Hooters was slaughtered, and it should have been! Though the decision denied enforcement of arbitration, it is legally correct and a tribute to the effective review that courts can exercise over the arbitration process. Now, "through the looking glass."

Plaintiff alleged that she was sexually harassed while working at a Hooters restaurant. After quitting her job, she threatened to sue Hooters in court. Alleging that she agreed to arbitrate employment-related disputes, Hooters preemptively filed suit to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 4. Because Hooters set up a dispute resolution process utterly lacking in the rudiments of even-handedness, the Fourth Circuit held that Hooters breached its agreement to arbitrate. Consequently, it affirmed the district court's refusal to compel arbitration.

The agreement at issue arose in 1994 during the implementation of Hooters' alternative dispute resolution program. As part of that program, the company conditioned eligibility for raises, transfers, and promotions upon an employee signing an "Agreement to arbitrate employment-related disputes". The agreement provided that Hooters and the employee each agreed to arbitrate all disputes arising out of employment, including "any claim of discrimination, sexual harassment, retaliation, or wrongful discharge, whether arising under federal or state law". The agreement further states that the employee and the company agreed to resolve any claims pursuant to the company's rules and procedures for alternative resolution of employment-related disputes, as promulgated by the company from time to time ("the rules"). Company will make available or provide a copy of the rules upon written request of the employee. The employees were initially given a copy of this agreement at an all-staff meeting held on November 20, 1994. Hooters general manager, Gene Fulcher, told the employees to review the agreement for five days and that they would then be asked to accept or reject the agreement. No employee, however, was given a copy of Hooters' arbitration rules and procedures. Phillips signed the agreement on November 25, 1994. When her personnel file was updated in April 1995, Phillips again signed the agreement.

After Phillips quit her job in June of 1996, Hooters sent to her attorney a copy of the Hooters rules then in effect. Phillips refused to arbitrate the dispute. Hooters filed suit in November of 1996 to compel arbitration under 9 U.S.C. § 4. Phillips defended on the grounds that the agreement to arbitrate was unenforceable. Phillips also asserted individual and class counterclaims against Hooters for violations of Title VII and for a declaration that the arbitration agreements were unenforceable against the class. In response, Hooters requested that the district court stay the proceedings on the counterclaims until after arbitration, 9 U.S.C. § 3.

In March of 1998, the district court denied Hooters' motions to compel arbitration and stay proceedings on the counterclaims. The court found that there was no meeting of the minds on all of the material terms of the agreement and even if there were, Hooters' promise to arbitrate was illusory. In addition, the court found that the arbitration agreement was unconscionable and void for reasons of public policy. Hooters an interlocutory appeal, 9 U.S.C. § 16.

The Court first examined the threshold question of whether claims such as Phillips' are even arbitrable. The E.E.O.C. as amicus curiae contends that employees cannot agree to arbitrate Title VII claims in predispute agreements. The Circuit Court pointedly disagreed. It noted that the Supreme Court has made it plain that judicial protection of arbitral agreements extends to agreements to arbitrate statutory discrimination claims. In Gilmer v. Interstate/Johnson Lane Corp., the Court noted that "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". 500 U.S. at 26 (alteration in original) (quoting Mitsubishi Motors, 473 U.S. at 628). Thus, a party must be held to the terms of its bargain unless Congress intends to preclude waiver of a judicial forum for the statutory claims at issue. Such an intent, however, must "be discoverable in the text of the [substantive statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes". Id.

The E.E.O.C. argues that in passing the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, Congress evinced an intent to prohibit predispute agreements to arbitrate claims arising under Title VII. This circuit, however, has already rejected this argument. Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 881-82 (4th Cir. 1996). The Civil Rights Act of 1991 provided that "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII]." Pub. L. No. 102-166, § 118, 105 Stat. at 1081. In Austin, we stated that this language "could not be any more clear in showing Congressional favor towards arbitration". 78 F.3d at 881. We also noted that the legislative history did not establish a contrary intent nor was there an "inherent conflict" between the Civil Rights Act and arbitration. Id. at 881-82. This holding is in step with our sister circuits which have also rejected the E.E.O.C.'s argument. See, e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc., 1999 U.S. App. LEXIS 3441, 1999 WL 80964, at 5-9 (1st Cir. Feb. 24, 1999); Seus v. John Nuveen & Co., 146 F.3d 175, 182-83 (3d Cir. 1998), cert. denied, 143 L. Ed. 2d 38, 119 S. Ct. 1028 (1999); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997). The E.E.O.C.'s position only finds support in the decision in Duffield v. Robertson Stephens & Co., 144 F.3d 1182, 1189-1200 (9th Cir.), cert. denied, 142 L. Ed. 2d 418, 119 S. Ct. 465 (1998).

The Circuit Court specifically stated that: "Predispute agreements to arbitrate Title VII claims are thus valid and enforceable." The question remains whether a binding arbitration agreement between Phillips and Hooters exists and compels Phillips to submit her Title VII claims to arbitration. The FAA provides that agreements "to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "It is for the court, not the arbitrator, to decide in the first instance whether the dispute is to be resolved through arbitration." AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 651, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986); see also A.T. Massey Coal Co. v. International Union, 799 F.2d 142, 146 (4th Cir. 1986) ("Whether there is a contract to arbitrate is undeniably an issue for judicial determination." (quoting AT&T Techs., 475 U.S. at 649)). In so deciding, the Court explained that it would "engage in a limited review to ensure that the dispute is arbitrable -- i.e., that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement". Glass v. Kidder Peabody & Co., 114 F.3d 446, 453 (4th Cir. 1997) (quoting PaineWebber Inc. v. Hartmann, 921 F.2d 507, 511 (3d Cir. 1990)).

Hooters argued that Phillips gave her assent to a bilateral agreement to arbitrate. That contract provided for the resolution by arbitration of all employment-related disputes, including claims arising under Title VII. Hooters claimed the agreement to arbitrate is valid because Phillips twice signed it voluntarily. Thus, it argues the courts are bound to enforce it and compel arbitration.

The Court explained that it was forced to disagree. The judicial inquiry, while highly circumscribed, is not focused solely on an examination for contractual formation defects such as lack of mutual assent and want of consideration. Virginia Carolina Tools, Inc. v. International Tool Supply, Inc., 984 F.2d 113, 118-19 (4th Cir. 1993) (holding that continued existence of arbitration agreement is matter for judicial determination). Courts also can investigate the existence of "such grounds as exist at law or in equity for the revocation of any contract". 9 U.S.C. § 2. However, the grounds for revocation must relate specifically to the arbitration clause and not just to the contract as a whole. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 402-04, 18 L. Ed. 2d 1270, 87 S. Ct. 1801 (1967); see also Wick v. Atlantic Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979). In this case, the challenge went to the validity of the arbitration agreement itself. Hooters materially breached the arbitration agreement by promulgating rules so egregiously unfair as to constitute a complete default of its contractual obligation to draft arbitration rules and to do so in good faith.

Hooters and Phillips agreed to settle any disputes between them not in a judicial forum, but in another neutral forum -- arbitration. Their agreement provided that Hooters was responsible for setting up such a forum by promulgating arbitration rules and procedures. To this end, Hooters instituted a set of rules in July of 1996. Because the case at bar addresses Hooters' performance under the agreement and not contract formation issues, the Court focused exclusively on the details of the 1996 rules.

The Court determined that the deficiencies are manifest when the entire Hooters program is examined. The Hooters rules, when taken as a whole, however, are so one-sided that the Court felt that their only possible purpose is to undermine the neutrality of the proceeding. The rules require the employee to provide the company notice of her claim at the outset, including "the nature of the Claim" and "the specific act(s) or omissions(s) which are the basis of the Claim". Rule 6-2(1), (2). Hooters, on the other hand, is not required to file any responsive pleadings or to notice its defenses. Additionally, at the time of filing this notice, the employee must provide the company with a list of all fact witnesses with a brief summary of the facts known to each. Rule 6-2(5). The company, however, is not required to reciprocate.

The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decision-maker. Rule 8. The employee and Hooters each select an arbitrator and the two arbitrators, in turn, select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters. This gives Hooters control over the entire panel and places no limits whatsoever on whom Hooters can put on the list. Under the rules, Hooters is free to devise lists of partial arbitrators who have existing relationships, financial or familial, with Hooters and its management. In fact, the rules do not even prohibit Hooters from placing its managers themselves on the list. Further, nothing in the rules restricts Hooters from punishing arbitrators who rule against the company by removing them from the list. Given the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision-maker would be a surprising result.

The Court further noted that: “Nor is fairness to be found once the proceedings are begun. Although Hooters may expand the scope of arbitration to any matter, ‘whether related or not to the Employee's Claim’, the employee cannot raise ‘any matter not included in the Notice of Claim’. Rules 4-2, 8-9. Similarly, Hooters is permitted to move for summary dismissal of employee claims before a hearing is held, whereas the employee is not permitted to seek summary judgment. Rule 14-4. Hooters, but not the employee, may record the arbitration hearing "by audio or video taping or by verbatim transcription". Rule 18-1. The rules also grant Hooters the right to bring suit in court to vacate or modify an arbitral award when it can show, by a preponderance of the evidence, that the panel exceeded its authority. Rule 21-4. No such right is granted to the employee.”

In addition, the rules provide that upon 30 days notice, Hooters, but not the employee, may cancel the agreement to arbitrate. Rule 23-1. Moreover, Hooters reserves the right to modify the rules, "in whole or in part, whenever it wishes and without notice" to the employee. Rule 24-1. Nothing in the rules even prohibits Hooters from changing the rules in the middle of an arbitration proceeding. If, by odd chance, the unfairness of these rules were not apparent on their face, leading arbitration experts have decried their one-sidedness. George Friedman, senior vice president of the American Arbitration Association (A.A.A.), testified that the system established by the Hooters rules so deviated from minimum due process standards that the Association would refuse to arbitrate under those rules. George Nicolau, former president of both the National Academy of Arbitrators and the International Society of Professionals in Dispute Resolution, attested that the Hooters rules "are inconsistent with the concept of fair and impartial arbitration". He also testified that he was "certain that reputable designating agencies, such as the A.A.A. and J.A.M.S./Endispute, would refuse to administer a program so unfair and one-sided as this one". Additionally, Dennis Nolan, professor of labor law at the University of South Carolina, declared that the Hooters rules "do not satisfy the minimum requirements of a fair arbitration system". He found that the "most serious flaw" was that the "mechanism [for selecting arbitrators] violates the most fundamental aspect of justice, namely an impartial decision maker". Finally, Lewis Maltby, member of the Board of Directors of the A.A.A., testified that "This is without a doubt the most unfair arbitration program I have ever encountered."

The Court specifically noted and cited the position of two major arbitration associations that had filed amicus briefs with this court. The National Academy of Arbitrators stated that the Hooters rules "violate fundamental concepts of fairness . . . and the integrity of the arbitration process". Likewise, the Society of Professionals in Dispute Resolution noted that "it would be hard to imagine a more unfair method of selecting a panel of arbitrators." It characterized the Hooters arbitration system as "deficient to the point of illegitimacy" and "so one sided, it is hard to believe that it was even intended to be fair".

Consequently, the Circuit Court properly held that the promulgation of so many biased rules - especially the scheme whereby one party to the proceeding so controls the arbitral panel - breaches the contract entered into by the parties. The parties agreed to submit their claims to arbitration - a system whereby disputes are fairly resolved by an impartial third party. Hooters, by contract, took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty. Moreover, Hooters had a duty to perform its obligations in good faith. See Restatement (Second) of Contracts § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."); Virginia Vermiculite, Ltd. v. W.R. Grace & Co., 156 F.3d 535, 542 (4th Cir. 1998) ("The courts could leave all discretion in performance unbridled.. . . No U.S. court now takes this approach. . . . Thus, contractual discretion is presumptively bridled by the law of contracts -- by the covenant of good faith implied in every contract." (quoting Steven J. Burton & Eric G. Anderson, Contractual Good Faith 46-47 (1995))). Good faith "emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party". Restatement (Second) of Contracts § 205 cmt. a. Bad faith includes the "evasion of the spirit of the bargain" and an "abuse of a power to specify terms". Id. § 205 cmt. d. By agreeing to settle disputes in arbitration, Phillips agreed to the prompt and economical resolution of her claims. She could legitimately expect that arbitration would not entail procedures so wholly one-sided as to present a stacked deck. Thus the Court correctly concluded that the Hooters rules also violate the contractual obligation of good faith.

Given Hooters' breaches of the arbitration agreement and Phillips' desire not to be bound by it, the found rescission was the proper remedy. Generally, "rescission will not be granted for a minor or casual breach of a contract, but only for those breaches which defeat the object of the contracting parties". Rogers v. Salisbury Brick Corp., 299 S.C. 141, 382 S.E.2d 915, 917 (S.C. 1989); see also Hogue v. Pellerin Laundry Mach. Sales

Co., 353 F.2d 772, 774 (8th Cir. 1965) (noting rescission is permitted “for any breach of contract of so material and substantial a nature as would constitute a defense to an action brought by the party in default for a refusal to proceed with the contract”. (quoting Williston on Contracts § 1467 (rev. ed.))). As the Court explained, Hooters' breach is by no means insubstantial; its performance under the contract was so egregious that the result was hardly recognizable as arbitration at all. Thus, plaintiff was permitted to cancel the agreement and thus Hooters' suit to compel arbitration failed.

In concluding, the Court went out of its way to reiterate “We respect fully the Supreme Court's pronouncement that ‘questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration’. Moses H. Cone, 460 U.S. at 24. Our decision should not be misread: We are not holding that the agreement before us is unenforceable because the arbitral proceedings are too abbreviated. An arbitral forum need not replicate the judicial forum.” “We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.” Mitsubishi Motors, 473 U.S. at 626-27; see also Gilmer, 500 U.S. at 31-32 (rejecting abbreviated discovery and lack of written opinions as reasons to inhibit arbitration of statutory claims). Nor should our decision be misunderstood as permitting a full-scale assault on the fairness of proceedings before the matter is submitted to arbitration. Generally, objections to the nature of arbitral proceedings are for the arbitrator to decide in the first instance. Only after arbitration may a party then raise such challenges if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award. In the case at bar, the Court only addressed the content of the arbitration rules because their promulgation was the duty of one party under the contract. The material breach of this duty warranting rescission is an issue of substantive arbitrability and thus is reviewable before arbitration. See Glass, 114 F.3d at 453-56. This case, however, is the exception that proves the rule: fairness objections should generally be made to the arbitrator, subject only to limited post-arbitration judicial review as set forth in section 10 of the FAA.

The Court concluded: “By promulgating this system of warped rules, Hooters so skewed the process in its favor that Phillips has been denied arbitration in any meaningful sense of the word. To uphold the promulgation of this aberrational scheme under the heading of arbitration would undermine, not advance, the federal policy favoring alternative dispute resolution. This we refuse to do.”

c. Shankle v. B-G Maintenance Management, Inc., 163 F.3d 1230, 1999 U.S. App. LEXIS 33, 78 Fair Empl. Prac. Cas. (BNA) 1057; 74 Empl. Prac. Dec. (CCH) P45, 690

B-G Maintenance, a private janitorial company, hired Shankle in 1987 as a janitor and later promoted him to shift manager. In 1995, B-G Maintenance distributed an Arbitration Agreement ("the Agreement") to its non-union employees, including Mr. Shankle. Mr. Shankle initially refused to sign the Agreement, but later acquiesced. The Agreement is broad in scope and covers all claims between the parties, including federal discrimination claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981(a); the Americans with Disabilities Act, 42 U.S.C. §§ 12101 to 12213; and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634. n1

When he signed the Agreement, Mr. Shankle agreed that "I will be responsible for one-half of the arbitrator's fees and the company is responsible for the remaining one-half. If I am unable to pay my share, the company will advance the entirety of the arbitrator's fees; however, I will remain liable for my one-half." That portion of the agreement was divined by the Court to be crucial. It stated: “However, we find one issue to be

controlling: Is a mandatory arbitration agreement, which is entered into as a condition of continued of employment, and which requires an employee to pay a portion of the arbitrator's fees, unenforceable under the Federal Arbitration Act? The district court, relying principally on Cole v. Burns Int'l Sec. Serv., 323 U.S. App. D.C. 133, 105 F.3d 1465 (D.C. Cir. 1997), held that such an agreement is not enforceable and we agree."

The Court began by returning to the Gilmer decision, which reaffirmed the Arbitration Act's presumption in favor of enforcing agreements to arbitrate - even where those agreements cover statutory claims. While the Court recognized this presumption, Metz, 39 F.3d at 1487, we conclude that it is not without limits. As Gilmer emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. Gilmer, 500 U.S. at 28. This supposition falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. See Cole, 105 F.3d at 1482-85 (concluding an arbitration agreement cannot force an employee to waive substantive rights provided by statute nor access to a neutral forum in which to enforce those rights); Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1060 (11th Cir. 1998) (holding that arbitration agreement which proscribed award of Title VII damages was unenforceable because it was fundamentally at odds with the purposes of Title VII); Graham Oil Co. v. ARCO Prod. Co., 43 F.3d 1244, 1248-49 (9th Cir. 1994) (striking arbitration clause that compelled parties to surrender important statutorily mandated rights in contravention of the statute), cert. denied, 516 U.S. 907, 133 L. Ed. 2d 195, 116 S. Ct. 275 (1995). Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum. The Court stated in n3 that "The arbitral forum, in most cases, is such an alternative." Gilmer, 500 U.S. at 26-33; Metz, 39 F.3d at 1487. However, when an arbitration agreement is accompanied by a fee-splitting provision like the one at issue in this case, enforceability is called into question.

Shankle signed the Agreement as a condition of continued employment. The Agreement requires him to arbitrate all disputes arising between he and his former employer. In order to invoke the procedure mandated by his employer, however, Shankle had to pay for one-half of the arbitrator's fees. Assuming Shankle's arbitration would have lasted an average length of time, he would have had to pay an arbitrator between $ 1,875 and $5,000 to resolve his claims. Mr. Shankle could not afford such a fee, and it is unlikely other similarly situated employees could either. The Agreement thus placed Mr. Shankle between the proverbial rock and a hard place - it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum. See Cole, 105 F.3d at 1484 (concluding employees would be unable to pursue statutory claims if required to pay for arbitrator fees in addition to the administrative costs and attorney fees, which accompany both arbitration and litigation). Essentially, B-G Maintenance required Shankle to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975) (explaining prophylactic and "make whole" objectives of Title VII); Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976) (noting remedial purposes of the Age Discrimination in Employment Act), aff'd 434 U.S. 99, 54 L. Ed. 2d 270, 98 S. Ct. 600 (1977). Given this deficiency, the Court concluded the Agreement was unenforceable under the Federal Arbitration Act. n6 Gilmer, 500 U.S. at 28; Cole, 105 F.3d at 1484-85.

An analysis of this case clearly demonstrates that so long as the arbitration provisions at issue shift the cost of an arbitration to employers, they will be enforced. However, this case is troubling primarily because it ignores the multitude of expenses attendant to litigation and focuses on the cost to a claimant of a hypothetical arbitration. Nowhere does the Court bother to recognize that the depositions and other discovery, much less the cost of the experts needed in many cases will far exceed the cost of an arbitration. It also ignores the common

knowledge that all of those costs are routinely advanced by plaintiff's counsel, assuming, of course, that the case actually has any merit. Considering that many employers are routinely "taxed" with costs in the neighborhood of $ 10,000 to $ 15,000 just responding to the E.E.O.C. or its local equivalent, why should plaintiff's potential arbitration fees be singled out for special treatment? However, the benefits of arbitration so far outweigh the risks, vagaries and expense of the courts, assuming the cost of arbitration is money very well spent.

d. Paladino v. Avnet Computer Technologies, Inc, F. 3d (11th Cir. 1996)

The Eleventh Circuit in Paladino v. Avnet Computer Technologies, Inc. (No. 96-2341) recently affirmed a district court decision refusing to compel arbitration. The Court found that where the employer tried to restrict the arbitrators by only permitting them to "award damages for breach of contract", it was seeking to evade its obligations under Title VII. The Court perceived the attempt to specify the exclusive limited categories of damages that the arbitrators were limited to awarding as a not very clever subterfuge to effect an impermissible waiver of the employee's Title VII remedies. If the employer had not attempted to get "cute", it appears that it could have successfully required the arbitration of this matter. This decision is consistent with similar decisions concerning the arbitrators' authority on other statutory remedies. It also serves as a clear warning that the entire arbitration agreement is at risk when an organization gives in to the temptation to resort to subterfuge to evade the mandatory provisions of a statute. However, the national award for aggressive arrogance and ignorance unquestionably remains with Hooters.

e. Duffield v. Robertson Stephens & Company, et al., 144 F. 3d 1182, (9th Cir. 1998), cert denied. 119 S. Ct. 445; 42 L.Ed. 2d 399, 1998 LEXIS 7127

This case represents another early attempt by the Ninth Circuit to effectuate its peculiar lonely view of the application of the Federal Arbitration Act to employment disputes. In a decision by two of the regular judges of the appellate court sitting together with an employment and arbitration specialist from the Court of International Trade, this panel issued a decision blatantly adopting almost all of the assertions of every anti-arbitration special interest group in America. Alone among the Courts of Appeal in the United States, this Court purports to divine and discover certain provisions in the history of the 1991 Civil Rights Act that ostensibly preclude the use of final and binding arbitration for Title VII cases and state law equivalents. At the same time, the Court finds that all other state law claims are arbitrable.

This case was on appeal. Due to a direct conflict with the decisions of all of the other courts of appeal in the United States, as well as the June 8, 1998 decision by the Third Circuit Court of Appeal in Seus v. Nuveen, 146 F. 3d 175, cert. denied 143 L.Ed. 2d 38, 119 S. Ct. 1028 (1999) which directly criticizes the Duffield decision, this issue was hoped to be considered by the United States Supreme Court. In many ways, these were wonderful decisions for employers because of the Ninth Circuit's consistent string of reversals by the United States Supreme Court. The issuance of this decision by the Court of Appeal most notorious in the United States for confusing its role with that of the Congress was believed to be very useful to employers throughout the country. Had this decision been rendered by a credible court, it may have been a cause for concern. Unfortunately, the Supreme Court declined to avail itself of the opportunity to afford employers and employees a clear decision requiring the enforcement of the arbitration of employment disputes throughout the United States, even California. However, considering that two of the three writ denials in this area have allowed mandatory arbitration programs to stand enforced, the Supreme Court has had ample opportunity to articulate any displeasure that it might have with them. Fortunately, even the California state courts have joined in the affirmation of arbitration leaving the Ninth Circuit effectively alone in the Twilight Zone it created in Lai, Renteria and Duffield.

f. Renteria v. Prudential Insurance Company of America, 113 F.3d 1104, (9th Cir. 1997)

This is yet another deliberate misreading of the law by the Ninth Circuit. It is essentially a restatement of its decision in Prudential v. Lai, infra. Despite the fact that the NASD modified and amended its documentation to clarify the application of its arbitration program (and that the participants securities representatives are a very sophisticated audience), the new language was insufficient for this panel of the Court to approve or enforce it. If your clients are going to do business in California be very certain that your arbitration language provides a “knowing” waiver understandable by the average challenged three-year-old. Perhaps then, the Ninth Circuit will begin to comprehend the points so obvious to all of the other federal courts in America (or abandon a transparently politically motivated hostility to arbitration).

The purported basis for this decision and Lai, supra, is that the Ninth Circuit has independently created a requirement that “there must be a knowing waiver of the statutory remedies not because we concluded that federal law under the Federal Arbitration Act insufficiently favors arbitration, but rather because we found that in enacting Title VII Congress intended such a result”. The Court openly acknowledges that its decisions “turned instead on the language of the arbitration clauses”. “A knowing waiver does not occur where neither the arbitration clauses nor any other written employment agreement expressly put the plaintiffs ‘on notice that they were bound to arbitrate Title VII claims’.” Clearly, not even the hoary “49 free words” given away by the A.A.A. meet this test. However, the more carefully drafted language of professional A.D.R. organizations, such as that of National Mediation Arbitration, Inc., met this test even before the Ninth Circuit invented it.

These two cases are very useful for pointing out the obvious risk of attempting to draft arbitration language that will satisfy all of the Courts of Appeal.

g. Prudential Insurance Company of America v. Lai, 42 F.3d 1299 (9th Cir. 1994)

This is the primary case that still appears to potentially hold some, though an admittedly remote, hope that an employee can avoid a mandatory arbitration program. Plaintiffs signed the same type of securities documents present in Gilmer and Marshall, supra. However, at that time, and now since modified, the documents did not directly disclose precisely what disputes, claims and causes of action that the plaintiffs agreed to arbitrate. Instead, the agreement referred to other securities industry organization rules and documents that actually were somewhat more specific.

Plaintiffs brought claims for sexual harassment against certain supervisors and their employer. Defendant, Prudential, sought an order compelling arbitration. Plaintiffs asserted that they never knew or understood what they had purportedly agreed to arbitrate, not least due to the inept and obtuse manner in which it was presented to them. After denial of its motion to compel arbitration, Prudential appealed to the Ninth Circuit.

The Ninth Circuit determined the arbitration form to be invalid, accepting the Plaintiffs’ argument that they never knew or understood what they had ostensibly agreed to. This case dramatically points out the dangers of just copying the boilerplate language some organization has given away free! The decision could, and in this author’s opinion would, have been decided very differently, IF the plaintiffs had signed agreements that adequately informed them of what they were agreeing to arbitrate. In short, no careful lawyer in this technical area should ever permit a client to use, much less themselves use a paragraph or two of “standard arbitration language”. Free boilerplate arbitration paragraphs are worth exactly the price paid for them and under this decision are significantly vulnerable.

h. Pryner v. Tractor Supply Company, 109 F. 3d 354 9 (7th Cir. 1997)

This is an excellent opinion explaining the Seventh Circuit's view that the Federal Arbitration Act jurisprudence does not overturn the original Supreme Court jurisprudence articulated by the Alexander v. Gardner-Denver line of cases. This case is very worth reading if your clients are parties to a traditional collective bargaining agreement. Otherwise, know that it exists and now presents the Supreme Court with a clear conflict between the circuits on this issue. This issue now squarely addressed in Wright, supra.

i. U.S. Equal Employment Opportunity Commission v. River Oaks Imaging, C.A. No. H-95-7555

This case stands clearly for a point best and most eloquently made by one of this authors Jesuit instructors, "no one and nothing on this planet is without purpose, for they may at least serve as an excellent "bad example". (This author has a set of the key pleadings in this case and can only express admiration for the heroic and imaginative efforts exerted by defense counsel to save this company from itself. Only direct intervention by the 'gods of perversity' could have caused the E.E.O.C. to lose this one!) You should read this case yourself to see exactly what not to do, or allow a client to attempt to do.

The facts of this case were that, at the beginning, Defendant's floors were already awash with pending E.E.O.C. complaints. Many of those complaints were apparently valid, and all were ably assisted by a case of near terminal stupidity, arrogance and ineptitude on the part of management. One of the managers in question had attended a seminar at which certain "arbitration forms and memos" were given away by J.A.M.S. This manager decided that putting in a mandatory arbitration program was a great way to get rid of the 17 employees with pending E.E.O.C. complaints. The company owners agreed and the employees with pending E.E.O.C. claims were individually approached and requested to execute the arbitration documentation, which included this inspired passage:

> "I further understand that my refusal to sign this acknowledgment shall be deemed a voluntary termination initiated by employee."

This offer was rebuffed by certain of the employees, and after another attempt, they were informed by a manager that they had "voluntarily quit". Subsequently, the manager who attempted to obtain the employees signatures on the arbitration documents was also terminated. He also filed charges with and became a witness for the E.E.O.C. He was able to provide an interesting and uniquely informative insight into the intentions of the owners in adopting an arbitration program. The former manager even quotes one of the defendant's owners as stating: "We have to get rid of the bitches, they want wealth without work, we have to find a way to get rid of them." He also stated that he had been bet $5.00 by one of the owners of the company that the women would not sign the arbitration documentation, and he could use that to fire them (and eliminate his E.E.O.C. complaints).

The E.E.O.C. initiated litigation against River Oaks Imaging and contended that there was no knowing and understanding waiver of the right to file discrimination charges with E.E.O.C. or of a related civil action. The E.E.O.C.'s evidence demonstrated that a purpose, if not the main purpose, for instituting the arbitration program was to use it as a pretext for firing the employees with pending E.E.O.C. complaints. This matter was presented to the District Court for injunctive relief. The E.E.O.C. achieved some relief in the form of an injunction prohibiting the defendant from perverting the arbitration process into a method of terminating employees with E.E.O.C. complaints or otherwise interfering with employees rights to file charges with the E.E.O.C..

The E.E.O.C. periodically talks about the injunction in this case for a variety of its own bureaucratic reasons. However, a review of the phenomenal and incredible record in this peculiar situation reveals it to be little more than the Court granting this employer's desire for self-immolation. It does not stand for any general District Court suspicion of or hostility to the proper use of arbitration in the non-union employment setting.

j. Cate v. Pick-N-Pull et al. C. A. 3-96-CV-1639-R (N. D. Texas 1997) (Unreported)

This case presented the issue of whether the arbitration policy outlined in the Pick-N-Pull Employee Handbook constituted an agreement between the parties requiring the arbitration of Cate's claims of sex discrimination, sex harassment and retaliation. This case was decided and apparently settled about six months before the Eighth Circuit decision in Patterson v. Tenet Healthcare, supra. It also preceded Circuit City v. Curry, supra, by a like time. Had either of those cases been reported, it is very likely that a Judge as perceptive and astute as Magistrate Jane Boyle would quite possibly reach a different conclusion.

The actual language at issue was contained in defendant's Handbook rather than in any independent dispute resolution agreement. It stated:

"You and Pick-N-Pull agree that this arbitration shall be the exclusive means for resolving any dispute arising out of any disciplinary action and/or employment termination and that no other action will be brought by you in any court or other forum. THIS AGREEMENT IS A WAIVER OF ALL RIGHTS TO A CIVIL COURT ACTION. ONLY THE ARBITRATOR, NOT A JUDGE OR JURY, WILL DECIDE THE DISPUTE." (capitalization in the original).

Even as written, this language leaves much to be desired, even were it more providently placed in an independent agreement. However, in an attempt to clarify that the language at issue was in fact binding, the Handbook also further stated that:

"While Pick-N-Pull supports the programs and policies described in this Handbook, with the exception of the Arbitration Agreement, it reserves the right to change or terminate them effective immediately…" (emphasis in the original pleadings).

A review of the fine distinctions in the language employed for general Handbook items, as contrasted with the contractually oriented provisions of the Arbitration Agreement, together with appropriate citations to the American version of the Kompetenz-Kompetenz doctrine, (a la Patterson v. Tenet, supra), or the more searching Circuit City analysis conducted by the Fort Worth Court of Appeals, should have led to the enforcement of the arbitration provisions.

If these cases articulate any essential principles beyond the certainty that inept use of arbitration provisions will help a sharp plaintiffs' lawyer evade them, it should be that the misuse of inappropriate forms and the total failure to obtain separate, independent arbitration agreements consistently risks at least an expensive court challenge and at worst the loss of the arbitral forum. All of which can easily be avoided through the careful planed institution of a well-designed arbitration program.

k. Caldwell v. KFC Corporation, et al., 958 F. Supp. 962 (D. New Jersey 1997)

This final case also involves the loss of arbitration through inept drafting and poor documentation. Plaintiff was an applicant to become a fry cook in Defendant's restaurant and was required to sign an employment application which included the following arbitration agreement:

"If I am offered employment and accept, KFC and I agree to submit to binding arbitration any claims concerning the termination of my employment…"

Plaintiff, shortly after release from prison, was hired and almost immediately subjected to sexual harassment by his male supervisor, an admitted homosexual. After appropriate administrative actions, plaintiff filed suit alleging Title VII, New Jersey Law against Discrimination, common law wrongful termination and battery claims. Defendant sought dismissal of the case and referral into arbitration pursuant to the application arbitration language. Plaintiff resisted on the basis that the arbitration provision in question did not reach to the claims asserted.

The Court began by examining the arbitration language at issue and noting that "Unlike some arbitration clauses (indeed, unlike some KFC arbitration clauses), the arbitration clause plaintiff signed does not purport to encompass all employment related disputes. Rather, it covered only those claims concerning the termination of plaintiff's employment." Thus, the Court determined that by its own chosen language, the clause "excludes a host of potential employment disputes: claims for equal or higher pay, disability, or health benefits; claims regarding promotion or demotions; claims to improve workplace safety; and claims to ameliorate work conditions and workplace harassment." The Court determined that, at least in its view, plaintiff's sexual harassment and battery claims did not concern the termination of his employment since he continued to work following the harassment and battery until fired.

Noting that the arbitration agreement, purporting to encompass "any claims concerning the termination of [one's] employment was 'not a model of clarity or precision'", the Court proceeded to dismantle the arbitration agreement. It even provided suggestions to avoid future deficient drafting, such as, "Indeed, by naming civil rights statutes, either generally or by name, KFC could have placed the coverage of the arbitration clause safely beyond reasonable challenge and at the same time given job applicants meaningful notice that civil rights claims they might have against their future employer could not be brought in a court of law or before a jury."

Indeed, in denying KFC's motion to compel arbitration, the Court expressly noted that, "Only a minimum of thought would have been required to draft a clause which was as inclusive as desired by KFC while still making clear to an applicant for a fry cook's job that statutory civil rights claims would be subject to arbitration." Consequently, despite recognizing the general federal preference favoring arbitration, this Court correctly placed the burden of properly drafting the arbitration provisions where it belongs, on the party actually drafting the language of the arbitration clauses.

2. Texas Cases.

a. Doe v. Saltgrass, Inc. Case No. 01-0389 - Application fro Writ of Mandamus Denied,

In a rare victory for plaintiffs, the Texas Supreme Court recently denied enforcement of a mandatory arbitration program in an employment case. In Doe v. Saltgrass, Inc., Case No. 01-0389, the Texas Supreme Court denied an employer's application for mandamus seeking to reverse the trial and appellate courts denial of the employers request to compel arbitration pursuant to a mandatory arbitration program. Plaintiff was

represented by Frank Hill, Frank Gilstrap, Bob Gammage and Mike Schattman of Hill Gilstrap, in Arlington with Richard Faulkner as special arbitration issues counsel.

Plaintiff was a 15 year old minor who alleged that she was provided drugs by supervisory employees at work and then sexually harassed and exploited by a manager. Defendant has a mandatory arbitration program that requires the participation of all applicants for employment and employees as a specific term and condition of employment. Defendant required both the plaintiff and her father to sign the dispute resolution agreement in order for her to be considered for employment and to be employed.

The Saltgrass "program" appeared to have been drafted by the defendant itself. It was contained in a multiplicity of documents only one of which was actually signed by plaintiffs, but even then not by Saltgrass. However, Saltgrass claimed that it was entitled to compel arbitration because it "informed her that acceptance of and agreement to abide by the Saltgrass, Inc. "dispute resolution program ("DRP" or the "program") was a term and condition of her employment." Neither plaintiff nor her father were ever given copies of the entire program. In fact, even at the time of consideration by the Texas Supreme Court, defendant had yet to produce the entire program, only an incomplete set of propaganda extolling the purported virtues of the American Arbitration Association.

Plaintiff contended that she should not be compelled to arbitrate her claims for a variety of reasons. In addition to the fact that plaintiff is a minor and had revoked her "consent", the Saltgrass "program" had a number of other serious deficiencies. One critical point was that the document stated:

> **"Like all the company's policies, the Program will be reviewed periodically and is subject to change."**

The "Agreement" then states that the consideration for the "Agreement" is as follows:

"In consideration for and as a material condition of my employment and the continuation of my employment with the Company, **I hereby agree**:

> **3. The Agreement does not create a contract of employment for any period of time, and my employment remains at will; and**
>
> **4. This Agreement and the Dispute Resolution Program (including its procedural rules) constitute the entire agreement between me and the Company regarding the resolution of disputes covered under the Program.**

Plaintiff asserted that this language was important for the reason that it did not contain the language of mutuality and did not bind the Company to arbitrate anything. Indeed, the Company expressly stated that the "Program" was merely a Company policy, not any form of mutually binding contract, and at the sole unilateral option of the Company "is subject to change." Thus, plaintiff contended that the purported "promises" of the Company were completely illusory and did not serve as valid consideration for the arbitration "Agreement." These issued could have been addressed in a manner that would have been problematic for these claims of the plaintiff, but for reasons that remain unclear Saltgrass did not do so.

Plaintiff further contended that the reference to "(including its procedural rules)" was particularly important. The Company maintained that the Program included "the procedural rules", which meant that the

entire Program was never presented to either the plaintiff or her father. In fact, the referenced procedural rules constituted some 22 pages or at least twice the information contained in the supposed system and more than 20 times the one-page document provided to plaintiff and her father. Additionally, and critically, those "procedural rules" were only "available" through a cumbersome procedure of requesting them from the Human Resources Department and were themselves also subject to unilateral change by the employer, Saltgrass.

The "program" was also attacked on the basis that it excluded by its' terms application of the arbitration to "criminal claims." Saltgrass attempted to preserve for itself the ability to use the criminal process against employees, but was not careful in drafting the language it employed.

The critical points asserted by plaintiff which were apparently factors in successfully avoiding mandatory arbitration were:

a. Plaintiff was a minor and through her guardian ad litem, expressly disavowed the "agreement."

b. The Saltgrass "Program" consists of multiple parts, only part of which were provided by Saltgrass to plaintiff and her father.

c. The "Agreement" portion of the "Program" expressly reserves solely to Saltgrass the power to unilaterally change or abolish the "Program." The precise language is: ***"Like all the Company's policies, the Program will be reviewed periodically and is subject to change."***

d. The "Program" was drafted by Saltgrass and attempted to bind plaintiff while leaving Saltgrass a unilateral "right" to decide whether or not to arbitrate anything.

e. The Trial Court knew that Saltgrass "Program" was unilaterally amended at least twice. Once on the face of the document where it refers to the "Amended Plan." The second time by judicial admissions in the Saltgrass pleadings.

f. The "entire" "Program", at least as it existed at the discrete moment when it was signed by plaintiff or her father was never provided to either. It could only be obtained from Saltgrass Human Resources.

g. Defendant Saltgrass never signed the purported arbitration agreement.

h. The individual co-employee parties were not a signatory to any agreement to arbitrate with either plaintiff or her father.

i. Claims involving criminal conduct were excluded from the "program."

This decision reminds us that even with the current trend enforcing arbitration it is critical to carefully review these supposed agreements to arbitrate. Most employers either draft their own agreements or use their corporate counsel to draft them. Very often these draftsmen are not familiar with the peculiar arbitration laws and jurisprudence and make errors that may be successfully exploited to avoid arbitration. Indeed, plaintiff's counsel had also developed a very sophisticated strategy to turn the intended arbitration into a procedure far more beneficial to plaintiff than the employer. Happily, those concepts will remain in reserve, … until the next appropriate case. Note: Subsequent to the Supreme Court decision, this case was settled to the satisfaction of all parties.

b. Weber v. Hall, 929 S.W. 2d 138, (Houston Court of Appeals 1996)

This case was issued before EZ Pawn, but it reached the correct result. The arbitration clauses in question were “narrow clauses” and did not properly reach the disputes at issue. This case is worth reading, however, the dominance of the FAA analysis as articulated by the Texas Supreme Court may vary the result in a closer case.

c. Tenet Healthcare, Inc. v. Cooper, __ S.W.2d __ 1997 ,Tex. App. LEXIS 6561

In Tenet, the employer relied upon arbitration provisions that were contained only in an employee handbook provision. Unfortunately, the provisions of the handbook itself generated much of the difficulty in this case by specifically stating that it was not a contract. Tenet’s attempts to distinguish the arbitration procedure as a separate mutual bilateral agreement were unsuccessful. The Court of Appeals essentially based its decision on the point that such language meant that there was a purported “lack of consideration” for the arbitration agreement.

This decision is flatly wrong under the Federal Arbitration Act. Despite the strong efforts of counsel for Tenet to educate the Court of Appeals, it persisted in blatantly ignoring the extensive federal jurisprudence requiring attacks on the contract as a whole to be determined by a the arbitrators, Miller v. Public Storage, supra, as well as the Patterson v. Tenet Healthcare decision of the Eighth Circuit Court of Appeal, supra. This decision also contradicts the long-established view that a bilateral agreement to arbitrate has long been accepted as consideration.

This case again points out the benefits of having independent, freestanding, mutual arbitration agreements signed by both parties to the agreement. It also further confirms the advisability of using the First Options case, supra, to eliminate potential court interference by requiring all issues of arbitrability to be exclusively be determined by the arbitrators.

a. New Issues in Texas

a.) Workers Compensation

1. In Re David’s Supermarkets, Inc., 43 S.W.3d 94; 2001 Tex. App. LEXIS 2368
Court of Appeals of Texas, Tenth District, Waco. April 11, 2001

This case presents the situation of an employee suit for damages sustained in a work-related accident. The employer filed a motion to compel arbitration, pursuant to the company's dispute resolution plan, which the district judge denied. The employer then sought mandamus, which the court of appeals granted. The employer did not maintain workers' compensation insurance, but instead provided compensation under its own benefits program, which included a mandatory arbitration of claims if an employee was denied benefits. The court held that the dispute plan held by the employer was valid and that any public policy expressed by the Texas Legislature in the workers' compensation statutes did not manifest an intent by the United States Congress that claims such as the employee's not be arbitrated. Thus, the district judge erred in denying the motion.

Plaintiff employee filed suit in July, 2000 and his employer responded by filing a motion to compel arbitration. Plaintiff contended in his response that arbitration in this case is against public policy because the benefits provided under David's Benefits Program are significantly less than those provided by the Texas workers' compensation system. The trial court heard David's motion on November 21 and denied the motion by written

order signed December 16. The employer then filed an original proceeding in the Court of Appeals on January 12, 2001. The issue presented was whether claims under the Texas Workers Compensation statute could be compelled to arbitration under the Federal Arbitration Act.

Plaintiff did not dispute the applicability of the FAA to disputes arising under the employers Dispute Resolution Plan. The Court noted that the FAA manifests "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983); accord Cantella & Co., Inc. v. Goodwin, 924 S.W.2d 943, 944 (Tex. 1996) (orig. proceeding). Thus to decide whether a dispute must be arbitrated under the FAA, a court must determine: (1) whether a valid arbitration agreement exists; (2) whether the dispute falls within the scope of that arbitration agreement; and (3) "whether legal constraints external to the parties' agreement foreclose the arbitration of those claims." n6 Webb v. Investacorp, Inc., 89 F.3d 252, 258 (5th Cir. 1996) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 3355, 87 L. Ed. 2d 444 (1985)).

The Court of Appeals explained that in regard to the third step of the analysis, the United States Supreme Court has explained that the only "legal constraints external" to the arbitration agreement which are of significance are those evidencing "a contrary congressional command." Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226, 107 S. Ct. 2332, 2337, 96 L. Ed. 2d 185 (1987); see also Mitsubishi Motors, 473 U.S. at 627-28, 105 S. Ct. at 3354-55; In re Conseco Fin. Servicing Corp., 19 S.W.3d 562, 571 (Tex. App.--Waco 2000, orig. proceeding). Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. However, the burden is on the party opposing arbitration, however, to show that **Congress** (emphasis supplied) intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," or from an inherent conflict between arbitration and the statute's underlying purposes. Shearson/Am. Express, 482 U.S. at 226-27, 107 S. Ct. at 2337-38 (quoting Mitsubishi Motors, 473 U.S. at 628, 105 S. Ct. at 3354) (citations omitted). Because the third step of the inquiry focuses on conflicting federal legislation, a contention that federally-mandated arbitration runs afoul of a state statutory scheme is generally irrelevant. n9 See Swenson v. Management Recruiters Int'l, Inc., 858 F.2d 1304, 1309 (8th Cir. 1988), overruled on other grounds by Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); DeSapio v. Josephthal & Co., Inc., 143 Misc. 2d 611, 616, 540 N.Y.S.2d 932, 936 (N.Y. Sup. Ct. 1989). This is so because the Supremacy Clause of the United States Constitution dictates that the FAA "takes precedence over state attempts, legislative or judicial, to undercut the enforceability of arbitration agreements." In re Turner Bros. Trucking Co., 8 S.W.3d 370, 374 (Tex. App.--Texarkana 1999, orig. proceeding [mand. denied]); accord Perry v. Thomas, 482 U.S. 483, 492 n.9, 107 S. Ct. 2520, 2527 n.9, 96 L. Ed. 2d 426 (1987) (citing Southland Corp. v. Keating, 465 U.S. 1, 10- 11, 104 S. Ct. 852, 858, 79 L. Ed. 2d 1 (1984)); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 271 (Tex. 1992) (orig. proceeding); Conseco Fin. Servicing, 19 S.W.3d at 571. In a footnote, the Court instructively stated: "We note that the Supreme Court has quite recently declined to consider an argument presented by 22 state attorneys general and others in amicus curiae briefs that the FAA should not be permitted to pre-empt state employment laws. See Circuit City Stores, Inc. v. Adams, 149 L. Ed. 2d 234, 532 U.S. , 69 U.S.L.W. 4195, 2001 U.S. LEXIS 2459, at *29-33 (2001).

The Court then stated that the plaintiff does not seriously question the validity of the Dispute Resolution Plan or its applicability to on-the-job injuries. Instead, he contends that Texas public policy as manifested in the workers' compensation statutes prohibits the arbitration of his claims. We construe this as an assertion that "legal constraints external to the parties' agreement foreclose the arbitration of those claims." Mitsubishi Motors, 473 U.S. at 628, 105 S. Ct. at 3355; Webb, 89 F.3d at 258. Thus, "The burden is on the party opposing arbitration,

however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at ssue." Shearson/Am. Express, 482 U.S. at 226-27, 107 S. Ct. at 2337 (emphasis added); see also Conseco Fin. Servicing, 19 S.W.3d at 571; Van Blarcum, 19 S.W.3d at 490. Any public policy expressed by the Texas Legislature in enacting the workers' compensation statutes is irrelevant to this inquiry. n11 See Swenson, 858 F.2d at 1309; DeSapio, 143 Misc. 2d at 616, 540 N.Y.S.2d at 936; see also Perry, 482 U.S. at 492 n.9, 107 S. Ct. at 2527 n.9; Jack B. Anglin Co., 842 S.W.2d at 271; Turner Bros. Trucking, 8 S.W.3d at 374; Conseco Fin. Servicing, 19 S.W.3d at 571.

Consequently, the Court found that David's Dispute Resolution Plan constituted a valid arbitration agreement which expressly covers "on-the-job injuries" sustained by David's employees such as Taylor. Any public policy expressed by the Texas Legislature in the workers' compensation statutes does not manifest an intent by the United States Congress that claims such as Taylor's not be arbitrated. Therefore the district court abused his discretion by denying David's motion to compel arbitration of Taylor's claims. As David's has no adequate remedy at law the writ is conditionally granted.

This case is but one of a number arising throughout the country which are manifesting a willingness by the courts to recognize that all state attempts to restrict arbitration must fail when confronted by a valid demand for arbitration under the Federal Arbitration Act. If this trend continues as expected, then eventually all state statutory schemes and rights will be subject to arbitration under the FAA.

b.) Minors and Arbitration

The increasing employment of minors in the workplace raises a number of issues in conjunction with the enforcement of agreements to arbitrate. The Federal Arbitration Act in relevant portion provides that: “ 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.” The last portion of this language is the key to this issue because it preserves state laws of general application to all contracts. The historical application of laws protecting minors from the effect of contracts, for good or ill, thus remains in effect. Consequently, the great majority of courts throughout the United States that have addressed the issue have held that minors can avoid agreements to arbitrate just as they can avoid any other contract. Doe v. Saltgrass, Inc., supra, Fortune et al. v. Killebrew, 86 Tex. 172; 23 S.W. 976; 1893 Tex. LEXIS 266,Snow v. Walker et al. 42 Tex. 154; 1874 Tex. LEXIS 288 (1874), Chambers v. Ker et al., 6 Tex. Civ. App. 373; 24 S.W. 1118; 1894 Tex. App., LEXIS 457, DICKSON, a minor, by Crum, v. Hoffman and Government Employees Insurance Company, 305 F. Supp. 1040; (D.C.Kansas 1969) 1969 U.S. Dist. LEXIS 10104

D. Jurisprudence - General Arbitration

The general jurisprudence on arbitration provided by or conducted under the provisions of the Federal Arbitration Act has been particularly notable for its continuous expansions of the reach and application of that law. These decisions consistently articulate and reemphasize the strong federal policy in favor of the use of arbitration, irrespective of the provisions or restrictions of otherwise applicable state laws. Considering the fascinating statements by the Fifth Circuit Court of Appeal in the Miller case, supra, this area holds particular promise for developments favorable to the expanded use of arbitration. The following are abbreviated highlights of the key issues determined in these decisions. They are included because of the tendency of the federal courts to look at all of the federal decisions on arbitration, even when determining issues specifically relating to employment arbitrations.

1. Federal Cases

a. Quackenbush v. Allstate Insurance Company, 517 U.S. 706, 116 S. Ct. 1712 (1996)

The Supreme Court noted, in addressing the issue of whether an arbitration agreement in a reinsurance agreement between Allstate and the Commissioner of Insurance of California as receiver of a defunct insurance company, that: "The federal interests in this case are pronounced, as Allstate's motion to compel arbitration under the Federal Arbitration Act implicates a substantial federal concern for the enforcement of arbitration agreements." See Mitsubishi, supra. This represents yet another reaffirmation of the Supreme Court's determination to uphold agreements to arbitrate, even against a state official discharging his statutory duties, wherever the agreements have been validly agreed.

b. Allied Bruce Terminex Companies, Inc., v. Michael Dobson, et al.
513 U.S. 265, 130 L. Ed 2d 753 (1995)

This case held that the applicability of the FAA was determined by whether the transaction at issue may affect interstate commerce. It rejected the view articulated by the Alabama Supreme Court that the FAA only applied to the more limited class of transactions that are intended to or actually do constitute interstate commerce. This case strongly suggests that, if the business attempting to enforce an arbitration agreement is using any of the instruments of interstate commerce, then the FAA will apply. The FAA does not contain any of the language hostile to arbitration, such as that found in the Alabama statute used to deny arbitration. Thus it will be the statute of choice. Now, what did we learn in Constitutional Law about the reach of Congress' powers under the Commerce Clause?

c. Mastrobuono v. Shearson Lehman Hutton, Inc., et al. 514 U.S. 52,
131 L. Ed.2d 76, 115 S. Ct. 1212

Arbitrators empowered under the FAA have the power to award punitive damages, even where state law specifically denies them such powers. This decision puts another nail in the coffin of the device using the combination of the choice of the law of the State of New York and an arbitration clause to insulate a party to a contract from the danger of an award of punitive damages. For Texas cases see Klein v. O'Quinn 874 S.W. 2d 776 (Tex. App.-Houston 14th Dist. 1994).

d. Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 116 S. Ct. 1652, (1996)

This case is the "death knell" for state law attempts to restrict the use of arbitration. Usually described as "consumer protection" legislation it employees such transparent devices as making an arbitration clause effective, if, but only if, the contract containing it met special requirements. Montana required "notice that a contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract". The Supreme Court in an 8 to 1 decision quickly struck the offensive state law as being inconsistent with the pro arbitration policy articulated by the FAA. The Texas statutory limitations on arbitration in our General Arbitration Act, and specifically in the consumer, personal injury and medical malpractice areas have been eviscerated by this decision.

e. Kaplan v. First Options of Chicago, 514 U.S. 938, 115 S. Ct. 1920, (June 1995)

Plaintiffs signed an agreement to arbitrate in a non-personal capacity. Defendants attempted to pursue enforcement of an arbitration award that also purported to bind plaintiffs in their personal capacity. Despite objections, the Arbitration Tribunal issued an award against the Kaplans individually and they resisted the enforcement action. The Courts ultimately determined that the decision of the Arbitration Tribunal about the reach and scope of its jurisdiction, and that it did have personal jurisdiction over the plaintiffs, was reviewable de novo at the appellate level. This decision suggests that very careful attention must be paid by draftsmen if they are going to include every potential party to a dispute in the arbitration. (Ýour malpractice carrier would greatly appreciate it if you would not just use a handy 'form arbitration paragraph'.) In another portion of the decision, the Court observes that the issue of "arbitrability" could have been given to the arbitration tribunal if it had been done properly by the parties at the inception of the agreement. Again, proper draftsmanship is essential to derive the greatest benefit from your arbitration provisions.

f. Marshall & Co. v. Duke, 114 F.3d 188, (11th Cir. 1997)

The issue actually discussed by the Court was the authority of an arbitration Tribunal to assess an award of attorneys' fees against an unsuccessful party. In actuality this case signals more practically the concerns attorneys now must weigh if they advise a client to bring a frivolous, or even questionably non-meritorious, case before an arbitration tribunal. In the original case, the matter was litigated for over 5 years and the record before the Arbitration Tribunal filled 97 volumes. After deciding in favor of the defendants, the Tribunal called for briefs on the attorneys' fee issue. Ultimately, the Tribunal awarded the Defendants attorneys' fees from the plaintiffs of, according to the Wall Street Journal, $633,000.00. Plaintiffs sought to vacate the Award, but it was affirmed by the Federal District Court.

The Eleventh Circuit Court of Appeal affirmed the District Court, and the Arbitration Tribunal, noting in a terse opinion that: "First, the parties agreed to submit the matter of attorneys' fees and expenses to the (Arbitration) Panel, so that an enforceable 'bi-lateral agreement' exists. See Matter of U. S. Offshore, Inc., 753 F. Supp. 86 (S. D. N. Y. 1990). Second, the NASD Rules and the Uniform Submission Agreement executed by the Claimants provide for the submission of all disputes by the parties to arbitration. Third, every judicial and quasi-judicial body has the right to award attorneys' fees under the common law bad faith exception to the 'American Rule'." See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U. S. 240, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975); Dean Witter Reynolds, Inc. v. Bork, 1991 WL 1644651, 991 U. S. Dist. LEXIS 11907 (E. D. Pa. 1991).

This case strongly suggests caution is the appropriate choice in analyzing cases to be pursued in arbitration. Virtually all Civil Rights claims have the potential for an award of attorneys' fees and costs. Furthermore, many advanced sets of arbitration Rules, such as those of the National Association for Dispute Resolution, Inc., the I.C.C., the L.C.I.A. and others based on the UNCITRAL Model law, pose the same risk. Now, arbitration is a forum in which counsel should be careful to only advance claims with an appropriate legal and evidentiary foundation.

g. Hill v. Gateway 2000, 105 F. 3d 1147, (7th Cir. 1997)

This case is presented simply for a review of the latest jurisprudence under the FAA to the effect that an arbitration agreement need not be signed to be effective and binding. A binding arbitration agreement may be validly contained in "form" purchase or software license documents that constitute a contract only by virtue of the fact that the merchandise in question was not returned before expiration of the inspection period. Watch this concept. I predict that this issue will arise repeatedly again as merchants become more educated on this point.

2. Texas Cases

a. Cantella and Company Inc. v. Goodwin, 924 S.W.2nd 943, (Texas 1996)

b. Moore v. Morris, 931 S.W.2d 726, (Austin Court of App. 1996)

c. American Employers' Insurance Company, et al. v. Lanny Aiken, et al. 942 S.W. 2d 156, (Court of App. Ft. Worth 1997)

d. Hardin Construction Group, Inc. v. Strictly Painting, Inc. 945 S.W.2d 308 (Court of App. Ft. Worth 1997)

e. Palm Harbor Homes Inc., et al. v. McCoy, 944 S.W. 2d 718, (Court of App. Ft. Worth 1997)

These cases are key statements of arbitration law in Texas. Considering that the Courts routinely look to general interpretations of the law concerning arbitration, irrespective of the subjects potentially being arbitrated, these cases should be reviewed when researching this arbitration issue. The confines of space in this already lengthy paper preclude further discussion at this time.

V. Issues Subject to Arbitration

A. General

Arbitration is purely a creature of contract. The parties to any agreement may subject as much or as little of the universe of their potential disputes to arbitration as they wish. The differences between the wishes of parties give rise to the two major categories of arbitration clauses, "narrow" and "broad" form arbitration agreements.

B. Arbitrability - Scope of the Agreement to Arbitrate

a. Narrow Form -These are limited scope arbitration provisions. A typical provision would be that of a collective bargaining agreement, which empowers the arbitrators to interpret and declare the parties rights under the contract. However, the Kaplan case demonstrates that the courts are capable of deciding that a particular arbitration agreement is actually less inclusive than at least one of the parties believed it to be or could have been. If the arbitrators "exceed their powers", their award can be successfully attacked.

b. Broad Form - These are the most useful forms of arbitration agreements and provisions. They should never be just the standard antiquated paragraph of "boilerplate". They can, and should, delineate all of the claims potentially arising between the parties, the respective legal basis for each and every potential claim and specifically agree to submit them to final and binding arbitration. Imagine all of the legal theories that an attorney attempting to evade the reach of the arbitration clause might attempt to place into pleadings in the hope of getting at least something to a jury. A well-drafted "broad form" will designate the issues covered accordingly. If you can articulate what you wish to make arbitrable, you can include it in a "broad form" arbitration clause.

c. Universal Form – These are the types of sophisticated arbitration provisions found in the Dispute Resolution Agreements prepared and licensed by dispute resolution professionals, such as the National

Association for Dispute Resolution, Inc., the International Chamber of Commerce - Permanent Court of Arbitration or the World Intellectual Property Organization. They are "light years" beyond the traditional "boilerplate" and are custom designed to ensure that arbitration is actually available, efficiently conducted and confidential.

The following citations will give you appropriate ideas.

C. Jurisdiction. - See Kaplan v. First Options of Chicago, supra; Folse v. Richard Wolf Medical Instruments, Inc., supra.

D. Contract Claims. - See Title 9 U.S.C. for legions of cases.

E. Statutory Claims. - See Gilmer, supra; Alford, supra; G, J and K below.

F. Tort Claims. - See Doctor's Associates, Inc. v. Casarotto, supra,; Klein v. O'Quinn, supra; Cupit v. Waltz, 888 F.Supp. 793, (E.D. Tex. 1995); ITT-CFC v. Wilson, 61 FEP 509.

G. Retaliation Claims. - See Corian Corp. v. Chen, 1991 U.S. Lexis 18395.

H. Venue. - See Ripmaster v. Toyodo Gosei, Co., 824 F. Supp. 116.

I. Time Periods and Delays. - See Folse v. Wolf Instruments, supra.

J. ERISA Claims - See ERISA for special arbitration procedures; and Fabian Financial Services v. Kurth Volk Profit Sharing, 768 F. Supp. 728 and Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952. (Careful! ERISA poses special dangers and opportunities for the use of arbitration, along with peculiar standards of review.)

K. Employee Polygraph Protection Act. - See Saari v. Smith Barney Harris Upham & Co., 968 F. 2d 877.

L. Whistleblower Claims. – See Oldroyd v. Elmira Savings Bank, F.S.B., 956 F. Supp. 393.

M. Family Medical Leave Act. – See Reese v. Commercial Credit Corporation, 955 F. Supp. 567, (D. South Carolina 1997) (Feb. 28, 1997).

VI. Relief and Remedies

A. Interim.

Arbitrators generally have the power, and are often willing, to enter orders and interim awards "preserving the status quo" between the parties. They are almost always willing to act to ensure the efficacy of their awards and orders. They can also order parties to take conservatory or preservatory steps to avoid future or even further damages to property or individuals during the pendency of the arbitral proceedings. It is also possible to obtain preliminary relief from the Courts pending arbitration and often both the Rules and applicable statutes expressly provide for such actions.

B. Final

Arbitration Awards can generally afford parties at least as much, and occasionally more, relief than the Courts. Arbitrators can grant the exact relief available at law, or in equity, and under the FAA are not restricted to only the powers enumerated in any state arbitration acts. Finally, if specially empowered as "amicible compositeurs", an arbitration tribunal can even completely reform and rewrite the agreement between the parties. This technique is best left to arbitration experts and generally limited to international agreements. However, it occasionally used in the United States, but is best known in pure "Civil Law" jurisdictions, like the State of Louisiana, Quebec, Latin America or continental Europe.

VII. Award

A. Contents

There are only minor specific statutory requirements for the contents of an arbitration award under the FAA. However, at a minimum, it should completely dispose of all of the claims and disputes existing between the parties and submitted for resolution to the Tribunal. In general, an Award will identify the parties, acknowledge the receipt of evidence, argument and briefs, identify the issues determined, decide the parties' claims and disputes and identify the venue of the arbitration. It must be in writing, dated and signed by the arbitrators or a majority of them. See Title 9 U.S.C.

B. Reasons

There is no requirement in the FAA that arbitrators issued a "reasoned award". In fact, many arbitrators specifically choose not to specify the reasoning for their decisions with the intent of limiting any opportunity for an appeal. Arbitration is intended to be informal, but "final and binding" Awards are written for the benefit of the parties and not to afford another chance to retry the case. However, in the employment field, some organizations now require in their Rules at least a minimal set of reasons. For example, National's Rules encourage the disclosure of the Tribunal's reasoning but limit it to 1500 words or less. This issue can be determined by the parties if they adopt certain organization's Rules or include appropriate provisions in their agreements.

C. Effect

The effect of an award is to make a full and final determination of the issues between the parties, which they have agreed to submit for resolution to the arbitration tribunal. When rendered, it is generally honored by the parties without any need for enforcement action in court. However, if necessary, an arbitration award can be converted into a district court judgment in a summary proceeding. Thereafter, that judgment is enforceable just like, and to the same extent as, any other judgment. However, it is subject to such circumscribed and limited review as to make it effectively not subject to an appeal. The standards of review on appeal of arbitral awards are beyond the scope of this paper but are extraordinarily restricted.

VIII. Arbitration Considerations for Attorneys

A. A. D. R. Provider Issues.

Three quarters of a century ago, there was essentially only one provider of arbitrators. Its "49 free words" were, like their contemporary "black Model T Ford", the only "choice" for administered arbitration in America. Now, in the new millenium, it has become critical for every attorney to recognize that there are a

number of significantly different Alternative Dispute Resolution organizations. Each has its own philosophy, policies, advantages and disadvantages. This is especially true in the employment field. In the Employment arbitration field, two of the three major providers, the American Arbitration Association and J.A.M.S., have issued Policy statements opposing the use of mandatory arbitration in the workplace! (See the Wall Street Journal of Friday, June 20, 1997, for A.A.A. and the electronic press release carried on Counsel Connect.) If you attempt to institute any mandatory arbitration program using these organizations, you will encounter severe problems, up to and including a REFUSAL to provide arbitrators (A.A.A.) or refusing to proceed with your demand for arbitration until AFTER a Court challenge (J.A.M.S.). You must be aware of these policies, or you may suffer the embarrassment of one Texas attorney, and the risks to her client, who A.A.A. kept waiting for weeks before finally refusing to "accept" their mandatory employment arbitration program. The National Mediation Arbitration, Inc. in Dallas, the Center for Public Resources in New York and independent Neutrals WILL provide arbitrators for disputes within mandatory arbitration programs.

There are numerous other significant differences in terms of available assistance in the implementation of a mandatory program, arbitrator selection, arbitrator powers, discovery management, time management (See the 5th Circuit in Folse v. Richard Wolf Medical Instruments Corp., 56 F.3d 603), case consolidation (generally not available with A.A.A.), attorney fee and cost shifting for frivolous opposition to arbitration rules (National only), customized arbitration agreement language (for Prudential v. Lai and KFC "knowing waiver" issues and mandatory triggering of the Federal Arbitration Act) (National A.D.R. only), party arbitrator rules, confidentiality rules (National and J.A.M.S. only) and "privilege" rules (National only). In short, it is now incumbent upon you as counsel to know and appreciate the significant differences in the various organizations Rules, services and policies. They make a vast difference in both the access to and use of arbitration by your clients!

If, instead of using an integrated custom designed "turn key" Dispute Resolution System such as that of the National Mediation Arbitration, Inc., you are going to attempt to draft a mandatory employment arbitration program for your clients, please obtain and read all of the cases cited in this paper. These programs are a major benefit to both employers and employees, but there are numerous potential pitfalls for the unwary draftsman. Familiar with "functus officio" ? If not, an error can destroy your client's right to an enforceable arbitration award. As a recent National Employment Lawyers Association newsletter stated concerning mandatory employment arbitration, " If you are faced with (arbitration) seek help immediately!"

B. The next critical issue you must address concerns the selection of your counsel and the arbitrator(s). These are potentially the most critical steps in the arbitration process and you must ensure you have the correct people for both. You would never select your attorneys by a blind "strike off system." You should certainly not select your arbitrators that way either! A "strike off" system typically results in saddling the parties with arbitrators whom all agree are not the most qualified, just the least offensive. We suggest you consider the following points.

1. <u>Selection of Counsel</u>. This issue is frequently given far less attention than it deserves. Many, if not most, attorneys have no experience with arbitration. It is unfamiliar and uncomfortable these attorneys and this can lead to significant problems. One author vividly recalls the infuriated reaction of a senior business executive when he learned that the insurance company appointed attorney stood up in open court in South Texas and waived the entire arbitration agreement in a personal injury claim because he preferred to try cases in court! The executive quickly found a new insurer for his businesses and demanded that all of the carrier's lawyers assigned to his cases thereafter have demonstrated expertise in arbitration.

Arbitrations and trials are different, in many respects very different! Representation in arbitrations has for decades been a quiet specialty largely limited to a select group of attorneys in the international, construction and traditional labor fields. In the last few years more commercial attorneys have also become active in arbitration. The strategy and tactics in arbitration are often dramatically different than for court litigation. When was the last time you met with your trial counsel to sit and discuss the qualifications, knowledge and desirable qualities of your trial judge?? Are the attorneys familiar with the applicable arbitration rules, any arbitration rules?? Can they make an analysis of whether you must, should or should not arbitrate that particular case? Do they have any reported case history of acting as counsel on arbitration issues?? Finally and most importantly, what experience do they have serving as an arbitrator, as a judge??

2. Qualifications and Experience of the Arbitrator(s). The issue of the appropriate "qualifications" of arbitrators is a topic that often engenders fierce debate. The nasty little secret of arbitration in the United States is that many arbitrators still have never had any formal classes on arbitration or actually been trained to arbitrate anything. Until recently, the American Arbitration Association did not train its arbitrators. Even after the AAA had the opportunity to observe the sophisticated training methods and courses of England's Chartered Institute of Arbitrators, when the AAA brought them to the U.S. to conduct the original international arbitration training for it in Boston in 1998, the American "training" is still nowhere near as extensive or comprehensive as that required in the United Kingdom. In Europe the arbitrators are not only intensively trained and educated, but are also subject to rigorous written examination. Having experienced those written and oral examinations at Oxford, one of these authors was moved to recall the bar examination fondly. JAMS has neatly sidestepped this issue by using almost exclusively retired judges. Though not well known outside the judiciary, there are numerous judicial training programs, such as the superb National Judicial College. The federal government and various states, such as Texas, have also established excellent mandatory judicial education programs. While not equivalent to the English arbitration training, these programs do teach the participants how to effectively and properly conduct hearings and provide them with a firm foundation in the ethics applicable to neutrals. Considering the serious issues at stake, these authors would not willingly agree to any arbitrators who had not passed examination to obtain at least the Associates' designation with the Chartered Institute of Arbitrators or had significant service as an arbitrator and/or judge. Where available, the selection of arbitrators who are Fellows or Diplomats of the Chartered Institute of Arbitrators would be an even better assurance of technical arbitral competence.

3. Subject Matter Experience or Expertise. Subject matter expertise is always a topic of controversy. An oft-cited major advantage of arbitration is that the decision makers may possess some particular expertise in the topic at issue. This is true. However, the parties should specifically require such expertise in the agreement to arbitrate. The Federal Arbitration Act provides for the arbitration to be conducted in the manner and by arbitrators with the qualifications agreed by the parties. One significant caveat-the stipulated "expertise" should never be couched in the form of membership in or admission to any particular bar. Experienced arbitrators are very used to dealing with the law of a variety of states and are capable of properly applying any agreed choice of law. Use of a particular bar admission or membership requirement may serve to exclude the designation of the most desirable arbitrators.

4. Independence and Neutrality. All arbitrators must be independent of the parties and the controversy at issue. However, the United States is effectively alone in the world in our use of arbitrators who may be favorably disposed toward the party appointing them, the so called "party arbitrator." Thus, those arbitrators are not necessarily "neutral," and are not required to be. The major advantage of using "party arbitrators" is that it ensures that the appointing party's views are understood by that arbitrator, and thus the panel. A talented party arbitrator can often carry the rest of the panel. The negative aspect of that approach is where that arbitrator is too obviously aligned with the appointing party, the Chairman may not trust them and

vote accordingly. On balance, it is very often well worthwhile to use a party designated arbitrators.

5. Administered or Non-administered Arbitration Issues.

a. Administration Issues

The decision to choose an administered or non-administered arbitration revolves around several key issues. The most critical issue is that of the very enforceability and availability of the arbitration. The AAA, alone of all major organizations, asserts a right to control or "veto" all independently drafted dispute resolution procedures or agreements. Anyone drafting a mandatory arbitration program should ensure that they are aware that the AAA in Rule 2 of its National Rules for the Resolution of Employment Disputes demands a right of "notification." The Rule states that "any employer intending to incorporate these rules or to refer to the dispute resolution services of the AAA in an employment ADR plan, shall, at least 30 days prior to the planned effective date of the program: i) notify the Association of its intention to do so, and, ii) provide the Association with a copy of the employment dispute resolution plan.... If employer does not comply with this requirement, "the Association reserves the right to decline its administrative services." Draftsman should be aware that this rule is the product of extensive discussions with the plaintiffs' bar and organized labor, among others. Consequently, anyone drafting a dispute resolution program referring to the AAA may be shocked to find that they do not have an effective arbitration program! You may even end up being returned to the courthouse if the AAA is specified and it declines its administrative services. It may then be effectively impossible to conduct an arbitration. At the very least this will afford an astute plaintiff's attorney an opportunity to attack the arbitration on the grounds that the agreed method of arbitration is impossible to perform according to Section 4 of the Federal Arbitration Act. The risk that a program fully compliant with the law may be lost due to this provision is a very serious consideration. It deserves careful contemplation before any mention of the AAA is made in any mandatory arbitration program. When considering this, one must also factor in the AAA's astonishing statement that, despite the express provisions of Rule 18, it will publish all employment arbitration awards, though with the party names "disguised." This has been done for decades in the international field and virtually all experienced arbitrators and counsel know exactly who the "anonymous" parties are. The plaintiffs' bar and the AAA assert this ensures "quality" decisions. These authors are highly skeptical. Because of this, anyone drafting an arbitration program may wish to avoid the absolutely unnecessary risks associated with referring to or use of the AAA.

b. Membership of Arbitration Panels

Another major issue concerns the membership of the panel of arbitrators. Administering agencies generally attempt to compete on the basis of the purported quality of their panel members. However, most administrative agencies have "closed panels." Consequently, the members of those panels have generally agreed to only work with that administrative agency. This is commonly done by either exclusivity contracts or "loyalty oaths." Interestingly, those arrangements generally only restrict the availability of those arbitrators when an administrative agency is used. The same arbitrators are often individually available at a lower rate when retained personally, rather than if selected through an administrative agency. There are substantial numbers of very talented arbitrators who have refused to sign the loyalty oaths or exclusivity contracts. In addition, there is a large number of very experienced arbitrators who have simply grown tired of the inefficiencies of the administrative agencies and refuse to work with them any longer. A far more sophisticated and advisable approach in determining the selection of

arbitrators is to put the minimum educational and experience requirements into the agreement and require the designation of arbitrators who meet those objective criteria.

c. Arbitration Rules

The third major issue pertains to whatever, if any, rules will be used to conduct the arbitration. This is an important issue because the jurisprudence has generally held that reference to a particular set of rules incorporates the entirety c those rules into the parties' agreement to arbitrate. Where the decision is made to use a non-administered arbitration question arises as to what, if any, sets of rules are provided for in the agreement to arbitrate. There are a number of excellent non-administered arbitration rules such as those from the Center for Public Resources. With suitable adaptation for employment cases, the UNCITRAL rules could also be used. Alternatively, many lawyers will cite to either the JAMS or AAA rules, but expressly prohibit the administration of the arbitration by either of those agencies

d. Administrative Agency Independence

A fourth major issue, especially for non-union businesses, is that of the independence of the arbitral organization. What, if any, "history" or "relationship" do they have with the organized labor, or the National Employment Lawyers Association? Do they have any particular need to keep organized labor or the plaintiffs' bar happy? Is the President of the AFL-CIO on their Board of Directors? Any communication about the AAA with the National Right to Work Foundation or the National Right to Work Committee will probably immolate your telephone lines. If your client or employer is a member of those organizations, or otherwise wary of organized labor, you should know that they have issued several "Alerts," "News Releases" and "Articles" concerning the AAA, such as "New Research Exposes AAA's Big Labor Bias," (July 30, 1997). They also announced "And No Rest for the Wicked" publicizing release of an Issue Briefing Paper entitled "The American Arbitration Association: Preserving Big Labor's Forced Unionism Agenda by Undermining Supreme Court Decisions," which assertedly "details how Big Labor uses the union-boss dominated AAA to stifle workers attempts to cut off the use of their compulsory dues for radical political activities." These are the same organizations which provided the lawyers who represented the non-union workers challenging the union in *Miller v. Airline Pilots Association*, 5L3 U.S. 866, 118 S. Ct. 1761, 1998 U.S. LEXIS 3403, 140 L. Ed. 2d. 1070; 66 U.S.L.W. 4416., which was originally filed as *Miller v. the American Arbitration Association and the Airline Pilots Association*, 323 U.S.App.D.C. 386. In conversations with the Right to Work legal staff, an author was advised that during the deposition of the then President of the AAA, Robert Coulson, it was admitted that over half of the AAA revenues were derived from union-related ADR activities. This may be a very significant factor for non-union employers.

e. Administrative Agency Costs and Fees

The last issue is the problem of the assignment of costs to arbitrations. Administering agencies all charge for their services. There can also be various hidden fees such as day rate surcharges for each day of arbitration scheduled or conducted, time surcharges for the organization assessed in addition to the neutrals' daily fees and room charges. So jurisprudence has specifically conditioned enforcement of the arbitration agreement upon payment of all of the arbitration fees by the employer. *Cole v. Burns International Security Service*, 105 F.3d 1465, (D.C. Cir 1997). Th the issue of cost can be important in determining whether or not an administered arbitration is actually worth the cost the administration fees.

f. Locating Qualified Arbitrators.

There are now numerous directories of arbitrators available. The venerable Martindale Hubbell directory now

has specific books of ADR practitioners for domestic and international cases. Their standard directory on CD ROM can also provide lists of neutrals. The Chartered Institute of Arbitrators also provides a biannual directory. All of these are readily available and eliminate any need to pay for a list from an administrative agency.

IX. Problems and Dangers of Using an Ombudsman

Another popular dispute management and resolution mechanism involves using "Ombudsman". This dispute resolution device was popularized originally in Scandinavia and has been imported in an Americanized form by many governmental entities. It has also seen expanded use in a variety of large organizations, most of which are corporations with the size and budget to justify and incur the expense of maintaining one or more Ombudsman. Because of a recent decision of the Eighth Circuit Court of Appeals explained below, there are now very serious concerns regarding the use of the Ombuds process. The Ombuds process significantly relies on guarantees of confidentiality. These are now very doubtful.

Any organization using or contemplating the use of an "Ombudsman" may wish to review and reconsider its approach in light of the attached excerpts of a recent opinion of the 8th Circuit Court of Appeals. At this time, the "Ombudsman" concept is fraught with danger and can (probably will) produce more litigation concerning the use of Ombudsman. This decision and succeeding jurisprudence suggests that outside mediation, followed where necessary by final and binding arbitration, with a proper set of "Rules" or a legally binding and proper jointly agreed confidentiality contract, would be the safest and most appropriate strategy.

This decision eloquently demonstrates the dangers of using "internal" mediation processes without a full understanding of the inherent legal risks of the mechanism employed. I believe and expect that it will not be long before one or more Ombudsmen, and their employers, are sued because of either actual and/or perceived misstatements or misunderstandings over this (lack of) confidentiality issue. Clearly analyzing this decision and predicting its impact is no place for people not extremely knowledgeable about both Employment Law and the Federal Rules of Evidence. The language of this decision is sufficiently precise and analytical that the key portions are quoted below.

A. Carman v. McDonnell Douglas Corp., 114 F.3d 790 (8th Cir. 1997)

[7] We now turn to the issue of the "ombudsman privilege". In the context of this case, the term "ombudsman" refers to an employee outside of the corporate chain of command whose job is to investigate and mediate workplace disputes. [fn1] The corporate ombudsman is paid by the corporation and lacks the structural independence that characterizes government ombudsmen in some countries and states, where the office of ombudsman is a separate branch of government that handles disputes between citizens and government agencies. Nonetheless, the corporate ombudsman purports to be an independent and neutral party who promises strict confidentiality to all employees and is bound by the Code of Ethics of the Corporate Ombudsman Association, which requires the ombudsman to keep communications confidential. McDonnell Douglas argues for recognition of an evidentiary privilege that would protect corporate ombudsmen from having to disclose relevant employee communications to civil litigants. [fn2]

[8] Federal Rule of Evidence 501 states that federal courts should recognize evidentiary privileges according to "the principles of the common law" interpreted "in the light of reason and experience." The beginning of any analysis under Rule 501 is the principle that "the public has a right to every man's evidence." Hardwicke, L.C.J., quoted in 12 Cobbett's Parliamentary History 675, 693 (1742) (quoted with approval in United States v. Bryan, 339 U.S. 323, 331 (1950)). Accordingly, evidentiary privileges "are not lightly created." United States v. Nixon,

418 U.S. 683, 710 (1974). A party that seeks the creation of a new evidentiary privilege must overcome the significant burden of establishing that "permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

[9] The first important factor for assessing a proposed new evidentiary privilege is the importance of the relationship that the privilege will foster. The defendant argues that ombudsmen help resolve workplace disputes prior to the commencement of expensive and time-consuming litigation. We agree that fair and efficient alternative dispute resolution techniques benefit society and are worthy of encouragement. To the extent that corporate ombudsmen successfully resolve disputes in a fair and efficient manner, they are a welcome and helpful addition to a society that is weary of lawsuits.

[10] Nonetheless, far more is required to justify the creation of a new evidentiary privilege. First, McDonnell Douglas has failed to present any evidence, and indeed has not even argued, that the ombudsman method is more successful at resolving workplace disputes than other forms of alternative dispute resolution, nor has it even pointed to any evidence establishing that its own ombudsman is especially successful at resolving workplace disputes prior to the commencement of litigation. In recognizing a privilege for the McDonnell Douglas ombudsman's office in 1991, the court in Kientzy v. McDonnell Douglas Corp., 133 F.R.D. 570, 572 (E.D. Mo. 1991), found that the office had received approximately 4,800 communications since 1985, but neither the court nor McDonnell Douglas in the present case provides us with any context to evaluate the significance of this statistic.

[11] Second, McDonnell Douglas has failed to make a compelling argument that most of the advantages afforded by the ombudsman method would be lost without the privilege. Even without a privilege, corporate ombudsmen still have much to offer employees in the way of confidentiality, for they are still able to promise to keep employee communications confidential from management. Indeed, when an aggrieved employee or an employee-witness is deciding whether or not to confide in a company ombudsman, his greatest concern is not likely to be that the statement will someday be revealed in civil discovery. More likely, the employee will fear that the ombudsman is biased in favor of the company, and that the ombudsman will tell management everything that the employee says. The denial of an ombudsman privilege will not affect the ombudsman's ability to convince an employee that the ombudsman is neutral, and creation of an ombudsman privilege will not help alleviate the fear that she is not.

[12] We are especially unconvinced that "no present or future [McDonnell Douglas] employee could feel comfortable in airing his or her disputes with the Ombudsman because of the specter of discovery." See Appellee's Br. 45. An employee either will or will not have a meritorious complaint. If he does not and is aware that he does not, he is no more likely to share the frivolousness of his complaint with a company ombudsman than he is with a court. If he has a meritorious complaint that he would prefer not to litigate, then he will generally feel that he has nothing to hide and will be undeterred by the prospect of civil discovery from sharing the nature of his complaint with the ombudsman. The dim prospect that the employee's complaint might someday surface in an unrelated case strikes us as an unlikely deterrent. Again, it is the perception that the ombudsman is the company's investigator, a fear that does not depend upon the prospect of civil discovery that is most likely to keep such an employee from speaking openly.

[13] McDonnell Douglas also argues that failure to recognize an ombudsman privilege will disrupt the relationship between management and the ombudsman's office. In cases where management has nothing to hide, this is unlikely. It is probably true that management will be less likely to share damaging information with an

ombudsman if there is no privilege. Nonetheless, McDonnell Douglas has provided no reason to believe that management is especially eager to confess wrongdoing to ombudsmen when a privilege exists, or that ombudsmen are helpful at resolving disputes that involve violations of the law by management or supervisors. If the chilling of management-ombudsman communications occurs only in cases that would not have been resolved at the ombudsman stage anyway, then there is no reason to recognize an ombudsman privilege.

[14] McDonnell Douglas relies on the analysis of the court in Kientzy, supra, apparently one of only two federal courts to have recognized a corporate-ombudsman privilege.[fn3] We do not find the reasoning of that opinion convincing. For example, the Kientzy opinion argues that confidentiality is essential to ombudsman-employee relationships because the function of that relationship is to "receive communications and to remedy workplace problems, in a strictly confidential atmosphere. Without this confidentiality, the office would just be one more non-confidential opportunity for employees to air disputes. The ombudsman's office provides an opportunity for complete disclosure, without the specter of retaliation, that does not exist in the other available, non-confidential grievance and complaint procedures." 133 F.R.D. at 572. As we have said, the corporate ombudsman will still be able to promise confidentiality in most circumstances even with no privilege. To justify the creation of a privilege, McDonnell Douglas must first establish that society benefits in some significant way from the particular brand of confidentiality that the privilege affords. Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information. The creation of a wholly new evidentiary privilege is a big step. This record does not convince us that we should take it.

[15] We disagree with the District Court's holding that employee communications to Therese Clemente were protected from discovery by an ombudsman privilege. The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion. On remand, the District Court should order the production of the evidence it had believed the privilege protected, unless there are other reasons why discovery of this evidence would not be appropriate. It should then reconsider its ruling on defendant's motion for summary judgment in light of this new evidence and the parties' arguments with respect to its significance.

This decision has far reaching potential effects that illustrate the risks now manifest in using not only “Ombudsmen”, but also any type of “internal” dispute resolution programs without some type of very specific waiver or contract attempting to create an enforceable confidentiality scheme. Considering the language chosen by the Court, that endeavor is apt to be rather hazardous and may engender yet more litigation. Clearly, that is contrary to the original purpose and intent of every type of dispute resolution program.

X. Conclusion

The use of arbitration to resolve employment disputes is continually expanding. The Supreme Court jurisprudence, together with that of the inferior federal courts, has for the last decade consistently encouraged and increased the reach and ambit of arbitration under the Federal Arbitration Act. The clearly articulated policy of the United States is not merely to allow parties to elect arbitration but to aggressively encourage the use of arbitration and the other forms of alternative dispute resolution. This is reflected both in the dispute resolution provisions of certain recent legislation, such as the Civil Rights Act of 1991 and the Americans with Disabilities Act and the recent series of United States Supreme Court decisions. Now, counsel for all parties to employment disputes must be knowledgeable about the uses of arbitration and take aggressive advantage of them to best represent our clients.

Should you have any questions or need further assistance, please contact us. We maintain an extensive private collection of arbitration treatises, books, memoranda and awards from the United States and abroad. We will gladly assist you, if possible.