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ARBITRATING EMPLOYMENT DISCRIMINATION CLAIMS: DO YOU *REALLY* HAVE TO? DO YOU *REALLY* WANT TO?

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I. INTRODUCTION

The question the title poses was precipitated by the United States Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*,[1] which held an employee who agreed to arbitrate any dispute relating to his employment was compelled to submit the claim under the Age Discrimination in Employment Act of 1967 (ADEA)[2] to arbitration.[3] That 1991 decision has precipitated a veritable stampede by employers to fashion agreements with their employees to submit employment disputes to binding arbitration. Presumably, these disputes would

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1. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
2. 29 U.S.C. §§ 621-634 (1988).
3. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 23.

include wrongful discharge claims as well as employment discrimination claims under Title VII of the Civil Rights Act of 1964 (Title VII)[4] and the ADEA.

This Article will first examine the development of arbitration of statutory claims and analyze the Supreme Court's holding in *Gilmer*, and, more importantly, what the Court left unresolved in *Gilmer*.[5] It will then discuss whether the arbitration of statutory employment discrimination claims can be mandated by employment agreements. Issues developing under the Federal Arbitration Act (FAA)[6] employment contracts exception, adhesion contract enforceability, waiver of statutory rights, and fairness considerations will be examined, as well as the impact of the Civil Rights Act of 1991.[7] This Article will conclude with an examination of the circumstances in which arbitration of statutory employment discrimination claims probably would be mandated, the conditions under which arbitration probably could be avoided, and the desirability of the arbitral forum from the perspective of both employers and employees.[8]

II. HISTORICAL PERSPECTIVES

In 1925, Congress passed the FAA, which requires court enforcement of *all* written arbitration agreements (including predispute arbitration agreements) involving maritime transactions and interstate commerce,[9] but excludes "contracts of employment of . . . any . . . class of workers engaged in . . . interstate commerce."[10] The FAA also permits the stay of a court proceeding pending arbitration, compels a party to arbitrate, and provides for judicial enforcement of any arbitration award.[11] Additional provisions allow for the summoning of witnesses and the appointment of arbitrators.[12] An award is final, may not be appealed, but may be set aside only on limited grounds unrelated to the substantive merits of the case.[13]

The expressed congressional purpose of the FAA was not to establish an alternative judicial mechanism as such, but "[t]he bill declares that such agreements [for arbitration] shall be recognized and enforced, by the courts of the United States . . . *at this time when there is so much agitation against the costliness and delays of litigation.*"[14]

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4. 42 U.S.C. §§ 2000e to e-17 (1988 & Supp. III 1991).
5. *See infra* parts II, III.
6. 9 U.S.C. §§ 1-307 (1988 & Supp. III 1991).
7. *See infra* parts IV-VIII.
8. *See infra* parts IX, X.
9. 9 U.S.C. §§ 2, 4 (1988).
10. *Id.* § 1.
11. *Id.* §§ 3, 9.
12. *Id.* §§ 5, 7.
13. *Id.* § 9. An arbitration award may be set aside by a court where, *inter alia*: a) the award was procured by fraud; b) there was evident partiality of the arbitrators; c) the arbitrators refused to postpone the hearing upon a showing of sufficient cause or to hear material evidence; or d) the arbitrators exceeded their powers so that an award upon the subject matter submitted was not made. *Id.* § 10 (Supp. III 1991).
14. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1, 2 (1924) (emphasis added).

Shortly after its passage, the bill attracted much social criticism. Many attacked the bill as a product of "business propagandists."[15] Some critics suggested that a public courts system is a fundamental social necessity in a democratic society because the court is the only place "'the public . . . can find protection.'"[16] This rationale was expressed two decades earlier: "By first making the contract, and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy."[17]

Although the FAA was declared constitutional in 1932,[18] there were no significant reported cases involving the FAA for almost thirty years. During this period, Congress passed legislation to reform and regulate the securities industry.[19] One of the principal features of these laws was the regulation of the securities industry by Self Regulatory Organizations (SROs)[20] which were to be supervised by the Securities Exchange Commission (SEC).[21] The FAA and SROs became catalysts for the explosive growth[22] of mandatory arbitration as the exclusive mode of resolving customer, disciplinary, and employment disputes.[23]

In 1955, the Supreme Court decided *Wilko v. Swan*.[24] In this case, the plaintiff claimed he was induced to buy securities through fraudulent misrepresentations in violation of the 1933 Act.[25] Relying on a customer account contract which provided for mandatory arbitration of all disputes, the broker moved for a stay of the litigation pending arbitration.[26] On appeal, the Supreme Court found a predispute arbitration agreement to be a "'condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision'"[27] of the 1933 Act. Therefore, the agreement was void.[28] The Court stated:

> [T]he purpose and knowledge of an alleged violator of the Act . . . must be not only determined but applied by arbitrators without judicial instruction on the law. . . . Power to vacate an award is limited . . . [and] the interpreta-

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15. JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 112 (1983).

16. *Id.* at 113 (quoting Philip G. Phillips, *Commercial Arbitration Under the Law*, 1 U. CHI. L. REV. 424, 429 (1934)).

17. Parsons v. Ambos, 48 S.E. 696, 697 (Ga. 1904) (citations omitted).

18. Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932).

19. The legislation passed by Congress were The Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1988) ["1933 Act"] and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78ii (1988) ["1934 Act"], collectively referred to as "the Securities Laws."

20. Examples of SROs include the National Association of Securities Dealers and the New York Stock Exchange.

21. 15 U.S.C. § 78s (1988).

22. *See* Constantine N. Katsoris, *The Arbitration of a Public Securities Dispute*, 53 FORDHAM L. REV. 279, 283-84 (1984).

23. Arbitration provisions are also found in the constitutions of many SROs and major securities exchanges. *See* Robert J. Zepfel, Note, *Arbitration of Investor-Broker Disputes*, 65 CAL. L. REV. 120, 123-24 (1977).

24. Wilko v. Swan, 346 U.S. 427 (1953).

25. *Id.* at 428-29.

26. *Id.* at 429.

27. *Id.* at 430 (quoting 15 U.S.C. § 77n (1988)).

28. *Id.*

> tions of the law by the arbitrators . . . are not subject . . . to judicial review for error in interpretation.[29]

Although the Court recognized the congressional purpose of enforcing agreements to arbitrate, it found the overriding purpose in the 1933 Act was to protect the rights of investors and forbid the waiver of these rights by a predispute arbitration agreement.[30]

In *Textile Workers Union v. Lincoln Mills*,[31] the Supreme Court found that "under Sec[tion] 301 of the Taft-Hartley Act, courts could require the parties to arbitrate claims arising from collective bargaining agreements" despite the specific exclusion of "contracts of employment" from the FAA.[32] This was followed by its decision in three cases known as the *Steelworkers Trilogy*.[33] These cases confirmed a strong public policy favoring arbitration as the preferred method of dispute resolution in labor relations.[34] These cases also indicated that any doubt should be resolved in favor of arbitrability.[35]

Several years later, the Court manifested its growing approval of arbitration in its decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[36] In this case, the plaintiff claimed a contract containing an arbitration clause was fraudulently induced.[37] The Supreme Court held if a contract contains an arbitration clause, a court may consider only issues relating to making and performing the agreement to arbitrate, and defenses to the entire contract must be determined by the arbitrators.[38] The Court indicated that even if a state had a contrary law, the FAA created a federal substantive law that would govern in federal courts.[39]

The year following the *Prima Paint* decision, the National Association of Securities Dealers (NASD) instituted its arbitration code of procedure; other securities industry SROs soon followed suit. In 1976, the SEC's Office of Consumer Affairs issued a report recommending the adoption of procedures for handling investor disputes and the creation of a new entity to administer the new procedures.[40] As a result, the Securities Industry Conference on Arbitration (SICA) was established in 1977 and quickly developed a comprehensive Uniform

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29. *Id.* at 435-37 (citations omitted).
30. *Id.* at 438.
31. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
32. Martha S. Weisel, *Effectiveness of Arbitration Clauses in Employment Contracts*, 47 ARB. J. 1921 (1992).
33. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg., 363 U.S. 564 (1960).
34. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. at 581-82.
35. *Id.* at 583.
36. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
37. *Id.* at 406-07.
38. *Id.* at 403-04.
39. *Id.* at 405.
40. Exchange Act Release No. 34-12528, 9 SEC Docket 833-35 (June 23, 1976).

Code of Arbitration.[41] The various SROs adopted the Code by 1980,[42] prompting many brokers to include agreements to arbitrate in their customer account contracts. As a result, the number of arbitration cases filed with securities SROs grew from 830 in 1980 to 5332 in 1990.[43] The securities industry provides one of the most mature and extensive institutional collections of modern experience in predispute agreements mandating binding arbitration.

In 1974, the Supreme Court decided *Scherk v. Alberto-Culver Co.*[44] In an action alleging a 1934 Act violation, the Court held a provision in a contract to arbitrate before the International Chamber of Commerce in Paris would be enforced, indicating "[t]he exception to . . . the [FAA] carved out by *Wilko* is simply inapposite to a case"[45] in which the arbitration agreement is international, and *Wilko* might only narrowly apply to a dispute under the 1933 Act.[46] While *Scherk* can be considered a pivotal case, the majority probably saw this as simply a commercial dispute the claimant preferred to litigate and merely alleged a 1934 Act violation in an attempt to avoid arbitration.

The same year, however, the Supreme Court decided *Alexander v. Gardner-Denver Co.*,[47] holding an employee's right to an adjudication in federal court for a discriminatory discharge in violation of Title VII could not be defeated by an arbitration clause in a collective bargaining agreement.[48] The Court noted the shortcomings of the arbitration process: "The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."[49]

During the 1980s, a flurry of significant arbitration cases reached the Supreme Court. The first, *Barrentine v. Arkansas-Best Freight System, Inc.*,[50] followed the rationale of *Alexander*, holding an arbitration provision in a collective bargaining agreement did not preclude an employee from pursuing, in federal district court, a claim that the employer violated the Fair Labor Standards Act.[51] In his dissenting opinion, Chief Justice Burger stated: "The Court today moves . . . in a direction . . . *contrary to the interests of the judicial system* . . . toward making federal courts small claims courts . . . ."[52] He indicated civil filings in federal courts increased 184.7% in the past twenty years,[53] concluding: "The

41. Exchange Act Release No. 34-13470, 12 SEC Docket 186-88 (May 10, 1977).

42. Katsoris, *supra* note 22, at 284 (citing Fourth Report of the Securities Industries Conference on Arbitration to Statistical Report 2 (Nov. 1984)).

43. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, SECURITIES ARBITRATION: HOW INVESTORS FARE, GAO-GDD-92-74, 18 (May 1992) [hereinafter SECURITIES ARBITRATION].

44. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

45. *Id.* at 517.

46. *Id.* at 513-17.

47. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

48. *Id.* at 59-60.

49. *Id.* at 57-58.

50. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981).

51. *Id.* at 745-46.

52. *Id.* at 746 (Burger, C.J., dissenting) (emphasis added).

53. *Id.* at 748 n.1 (Burger, C.J., dissenting).

Court seems unaware that people's patience with the judicial process is wearing thin. Its holding is counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishment of reasonable mechanisms *to keep matters of this kind out of the courts.*"[54]

Alexander was followed by *McDonald v. City of West Branch*[55] in which the Supreme Court extended the *Alexander* rationale, stating arbitration agreements in collective bargaining contracts did not preclude lawsuits under 42 U.S.C. section 1983.[56] The following year in *Dean Witter Reynolds Inc. v. Byrd*,[57] a customer claimed fraud under the 1934 Act and under state law.[58] The Supreme Court unanimously decided the latter claim should go to arbitration while the former could be litigated, ignoring the fact that a 1934 Act claim was subject to arbitration in *Scherk*.[59]

Four months later, however, the Supreme Court decided *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[60] one of the most significant arbitration-related cases of the decade. The parties entered into a distributorship agreement covering Puerto Rico which contained a provision that "[a]ll disputes, controversies or differences which may arise . . . out of . . . this Agreement . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association."[61] Citing *Scherk*, the Court held that Soler's claims that Mitsubishi violated U.S. antitrust statutes must be arbitrated in Japan.[62] Moreover, the Court went far beyond the rationale of *Scherk*, stating unless "the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for revocation of any contract[,]' . . . the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims . . . ."[63] It further suggested "we are well past the time when judicial suspicion of . . . the competence of arbitral tribunals"[64] should inhibit enforcement of the FAA "'in controversies based on statutes.'"[65]

Perhaps one of the most profound aspects of *Mitsubishi* was the vigor with which the Court rejected almost two decades of precedent that declined to enforce the arbitration of antitrust claims.[66] Brushing aside the historical arguments against the arbitrability of such disputes, the Court indicated that in order to set aside a forum selection clause, a party must show: "The agreement was

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54. *Id.* at 752 (Burger, C.J., dissenting) (emphasis added).
55. McDonald v. City of West Branch, 466 U.S. 284 (1984).
56. *Id.* at 292 (considering the Reconstruction Era civil rights laws).
57. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985).
58. *Id.* at 214.
59. *Id.* at 223-24.
60. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
61. *Id.* at 617.
62. *Id.* at 640.
63. *Id.* at 627.
64. *Id.* at 626-27.
65. *Id.* at 626 (quoting Wilko v. Swan, 346 U.S. 427, 432 (1953)).
66. This precedent was set in American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968) and was "followed in later cases by that Circuit, and by the First, Fifth, Seventh, Eighth, and Ninth Circuits." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 655-56 (1985) (Stevens, J., dissenting) (citations omitted).

'affected by fraud, undue influence, or overweening bargaining power'; that 'enforcement would be unreasonable and unjust'; or that proceedings in the contractual forum will be so gravely difficult and inconvenient that [the resisting party] will for all practical purposes be deprived of his day in court."[67] The Court suggested "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute [but] only submits to their resolution in an arbitral, rather than a judicial, forum."[68] The Court concluded, "Having made the bargain to arbitrate, the party should be held to it unless *Congress itself has evinced an intention to preclude a waiver of judicial remedies* for the statutory rights at issue."[69] Much of this language from *Mitsubishi* has been quoted as the basis of subsequent precedent-setting decisions. Perhaps the most notable aspect of the majority opinion in *Mitsubishi*, however, was its failure to even mention, let alone distinguish, the vicissitudes of compelling arbitration of statutory claims which the Court lucidly articulated in *Alexander, Barrentine,* and *McDonald.*

Three years later, the Supreme Court decided *Shearson/American Express, Inc. v. McMahon.*[70] The McMahons sued their broker claiming violations of the 1934 Act and the Racketeer Influenced and Corrupt Organizations Act (RICO).[71] The Court reinterpreted *Wilko* by suggesting that while both the 1933 and 1934 Acts prohibited waivers of substantive rights, this prohibition did not extend to alternative forum choices.[72] In reference to RICO and other statutory claims, the Court stated the FAA, in face of an agreement to arbitrate all disputes, requires arbitration unless Congress intended to preclude a waiver of judicial forum for a particular claim.[73]

This was followed by *Rodriguez de Quijas v. Shearson/American Express, Inc.*[74] In *Rodriguez de Quijas*, the Supreme Court expressly overruled *Wilko*, holding in regard to a predispute agreement mandating arbitration, neither 1933 Act nor 1934 Act claims could be litigated.[75] Perhaps the most incomprehensible aspect of this decision is how the congressional intent in the 1925 passage of the FAA could be deemed to override its intent in 1933 and 1934 when, fully cognizant of the FAA, Congress passed legislation that included specific, detailed adjudicatory mechanisms and expressly voided any purported waiver of the use of these mechanisms.[76]

Before discussing *Gilmer*, another case worth mentioning is *Volt Information Sciences, Inc. v. Board of Trustees,*[77] decided two months earlier than *Rodriguez de Quijas.* The parties to a construction contract chose to apply

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67. *Id.* at 632 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12, 15, 18 (1972)).

68. *Id.* at 628.

69. *Id.* (emphasis added).

70. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).

71. 18 U.S.C. §§ 1961-1968 (1988). RICO, a criminal statute directed at organized crime, contains draconian civil sanctions and has come into widespread use in civil litigation.

72. Shearson/American Express, Inc. v. McMahon, 482 U.S. at 228-29.

73. *Id.* at 227.

74. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

75. *Id.* at 485.

76. *Id.* at 482; *see* 15 U.S.C. § 15 (1988).

77. Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. 468 (1989).

California law, and the Supreme Court held the FAA did not pre-empt state law which mandated a stay of arbitration pending resolution of related litigation.[78] Contrary to *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[79] and *Southland Corp. v. Keating*,[80] the Court suggested Congress did not intend the FAA to occupy the entire field of Alternative Dispute Resolution (ADR) and parties are free to construct procedural aspects of arbitration agreements.[81] The only suggested explanation for this aberration is that this precedent would not increase the burden on federal courts.

III. *GILMER*: WHAT IT SAID AND DIDN'T SAY

In *Gilmer v. Interstate/Johnson Lane Corp.*,[82] a securities licensee filed a charge with the EEOC and brought suit in federal district court claiming he had been discharged by his employer in violation of the ADEA.[83] The employer moved the court to compel arbitration, relying on a clause in Gilmer's New York Stock Exchange (NYSE) license registration application which contained an agreement to arbitrate whenever required under NYSE rules[84] and its Rule 347 providing for arbitration of "'[a]ny controversy arising out of . . . employment or [a] termination of employment.'"[85] The district court, relying on *Alexander* (and its progeny), denied the motion to compel arbitration, concluding Congress provided a specific procedure and mechanism for adjudicating ADEA claims that prevented protected persons from waiving their statutory rights.[86]

The Supreme Court, relying on *Mitsubishi*, held the claim for violation of the ADEA was subject to compulsory binding arbitration.[87] The Court took an unimpeded path to this conclusion, indicating statutory claims are subject to arbitration,[88] noting an absence of a statutory provision explicitly precluding compulsory arbitration,[89] and suggesting "the mere involvement of [the EEOC] is not sufficient to preclude arbitration."[90]

Although the Court claimed it did not specifically decide the issue, it stated the arbitration agreement was not subject to the "contracts of employment" exclusion of the FAA because it was contained in Gilmer's license application.[91] The Court rejected the argument that Congress intended claimants have access to

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78. *Id.* at 470.
79. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).
80. Southland Corp. v. Keating, 465 U.S. 1 (1984).
81. Volt Info. Sciences, Inc. v. Board of Trustees, 489 U.S. at 476.
82. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
83. *Id.* at 23-24.
84. *Id.* at 24.
85. *Id.* at 23 (quoting NYSE Rule 347).
86. *Id.* at 24.
87. *Id.* at 35.
88. *Id.* at 26 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).
89. *Id.* (citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 227 (1987)).
90. *Id.* at 29 (citing Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989)).
91. *Id.* at 25 n.2.

a formal court system to press and adjudicate their statutory claims, pointing to the fact that the ADEA directed the EEOC "to pursue 'informal methods of conciliation, conference, and persuasion.'"[92] The Court interpreted this to suggest "out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress."[93]

The Court considered Gilmer's challenges to the adequacy of arbitration procedures and his argument that the agreement to arbitrate constituted an unconscionable "adhesion" contract.[94] In rejecting the arguments regarding the adequacy of arbitration procedures, the Court stated: "Such *generalized* attacks on arbitration 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law . . . and, as such, . . . are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'"[95] The Court also rejected Gilmer's contentions that arbitration lacked procedural protections regarding discovery, written opinions, equitable relief, class actions, and appeal.[96]

The Court suggested Gilmer "speculates that arbitration panels will be biased."[97] After citing provisions of the NYSE arbitration rules concerning the appointment of arbitration panels, the Court concluded "[t]here has been no showing *in this case* that those provisions are inadequate to guard against potential bias."[98] The Court also "'decline[d] to indulge the presumption that the . . . arbitral body . . . will be unable or unwilling to retain competent, conscientious and impartial arbitrators.'"[99]

Regarding the adhesion contract issue, the Court stated, "[A]rbitration agreements are enforceable 'save upon such grounds as exist at law or in equity for the revocation of any contract.'"[100] The Court acknowledged "'courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for revocation of any contract."'"[101] It stated, however, there was no indication of fraud or coercion in the case before it, but suggested a "claim of unequal bargaining power is best left for resolution in specific cases."[102]

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92. *Id.* at 29 (quoting 29 U.S.C. § 626(b) (1988)).

93. *Id.*

94. *Id.* at 33. Adhesion contracts are typically "form contracts" presented in a "take it or leave it" manner with a significant inequality of bargaining power between the parties. BLACK'S LAW DICTIONARY 40 (6th ed. 1990).

95. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991) (emphasis added) (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

96. *Id.* at 31.

97. *Id.* at 30.

98. *Id.* at 31 (emphasis added).

99. *Id.* at 30 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 634 (1985)).

100. *Id.* at 33 (quoting 9 U.S.C. § 2 (1988)).

101. *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. at 627 (quoting 9 U.S.C. § 2 (1988))).

102. *Id.*

Although the Court distinguished *Alexander, Barrentine,* and *McDonald* as involving arbitration under union-management collective bargaining agreements, it failed to address the protections clearly articulated in those cases which zealously guarded the right of individuals to litigate their claim deprivations of federal statutory rights arising out of their employment.[103] During the mid-1980s, the Supreme Court started to become more conservative. Moreover, the litigation explosion that occurred (or was continuing since 1925), convinced the Court of the necessity to "legislatively" shield the federal judiciary by excluding litigation on a wholesale basis.[104] To annually eliminate over 5000 securities industry cases from federal dockets was an opportunity too tempting to pass up.[105]

Gilmer addressed two general areas but left these areas unanswered. The first was the issue of the "contracts of employment" exclusion to the FAA which the Supreme Court decided to "leave to another day," citing a number of cases holding the exclusionary clause inapplicable.[106] The other area dealt with the issue of whether agreements mandating the arbitration of employment disputes constitute unenforceable adhesion contracts; the Court suggested this was "best left for resolution in specific cases."[107]

Additionally, two other areas that could represent defenses to contractually mandated arbitration were not before the Court in *Gilmer*. The first was whether there was a valid waiver of the statutory rights to judicial process. This issue was raised in the appellate court,[108] and that court observed, "Gilmer has never asserted that his waiver was anything other than knowing and voluntary, nor is there anything to lead us to that conclusion."[109] The other area of defense raised the question of the fairness of the arbitral process particularly involving the competency and diversity of arbitrators and the assignment of arbitration panels. While the Court rejected "generalized attacks" on the arbitration process, it did not have a trial court record before it that evidentially challenged these aspects of contractually mandated arbitration.[110]

IV. FAA EMPLOYMENT CONTRACT EXCEPTION

Section one of the FAA excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce."[111] A number of circuits interpreted this to mean the worker must actually be engaged in interstate commerce rather than merely employed by a company that *affects* commerce.[112] Since *Gilmer*, several district courts have

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103. *Id.* at 35.
104. *See supra* note 14 and accompanying text.
105. *See supra* text accompanying notes 42, 55, and 56.
106. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991).
107. *Id.* at 33.
108. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991).
109. *Id.* at 200.
110. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 30.
111. 9 U.S.C. § 1 (1988).
112. Miller Brewing Co. v. Brewery Workers Union Local 9, 739 F.2d 1159, 1162 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985); Erving v. Virginia Squires Basketball Club, 468 F.2d

reached a similar conclusion.[113] The FAA exclusion, however, has been applied to postal workers generally, many of which are not engaged in transportation.[114] Similarly, other circuits have suggested, in dicta, a broader interpretation.[115]

Although the Supreme Court in *Gilmer* had an opportunity to consider the exclusion issue with regard to securities licensees, it did not do so because the issue was not properly raised in the lower courts.[116] In his dissent, Justice Stevens suggested the issue should have been considered because its resolution was clearly antecedent to the Court's disposition of the case.[117] He quoted the chairman of the ABA committee responsible for drafting the FAA, who stated, at the Senate Judiciary Subcommittee hearings, that the bill "'is not intended [to] be an act referring to labor disputes, at all.'"[118] One commentator who favors this interpretation boldly suggests:

> This history makes clear that the FAA exclusion was to protect employees who might otherwise be forced into arbitration agreements, presented on a take-it-or-leave-it basis, with employers controlling the arbitration process, and the arbitrators. The purpose of the exclusion was to preserve employees' common law rights and procedures.[119]

On the contrary, if Congress "intended to exempt all contracts of employment, the drafters easily and almost certainly would explicitly have so stated

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1064, 1069 (2d Cir. 1972); Dickstein v. Du Pont, 443 F.2d 783, 785 (1st Cir. 1971); Signal-Stat Corp. v. United Elec. & Mach. Workers Local 475, 235 F.2d 298, 301-02 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); Tenney Eng'g, Inc. v. United Elec., Radio, & Mach. Workers Local 437, 207 F.2d 450, 453 (3d Cir. 1953).

113. Williams v. Katten, Muchin, & Zavis, 837 F. Supp. 1430, 1438-39 (N.D. Ill. 1993); Scott v. Farm Family Life Ins. Co., 827 F. Supp. 76, 77-78 (D. Mass. 1993); Hull v. NCR Corp., 826 F. Supp. 303, 306-07 (E.D. Mo. 1993); Hampton v. ITT Corp., 829 F. Supp. 202, 203 (S.D. Tex. 1993); DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947, 952-53 (W.D.N.Y. 1992).

114. American Postal Workers Union v. United States Postal Serv., 823 F.2d 466, 473 (11th Cir. 1987).

115. Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 310-11 (6th Cir. 1991); Herring v. Delta Airlines, Inc., 894 F.2d 1020, 1023 (9th Cir.), *cert. denied*, 494 U.S. 1016 (1990); United Elec., Radio, & Mach. Workers v. Miller Metal Prods., 215 F.2d 221, 224 (4th Cir. 1954).

116. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991).

117. *Id.* at 36-37 (Stevens, J., dissenting).

118. *Id.* at 39 (Stevens, J., dissenting); *Bills Relating to Sales and Contracts to Sell in Interstate Commerce; and a Bill to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: Hearings on S. 4213 and S. 4214 Before the Subcomm. of the Senate Comm. on the Judiciary*, 67th Cong., 4th Sess. 9 (1923) [hereinafter *Bills Relating to Sales*].

119. Christine G. Cooper, *Where Are We Going With* Gilmer*?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 229 (1992). *See generally* Jeffery W. Stempel, *Reconsidering the Employment Contract Exclusion of Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259 (discussing the proper construction of section one and arguing for a more encompassing interpretation of the exclusion).

without qualification."[120] As the court stated in *Tenney*,[121] the language in the exclusionary portion of the section was quite distinct from that used in other parts of the FAA.[122] The exclusion refers to any "class of workers engaged in" interstate commerce, while section two makes the FAA generally applicable to agreements "evidencing a transaction involving" interstate commerce.[123] By the use of terms such as "class of workers" and "engage in," the court reasoned the employment contract exception was not intended to reach every employee otherwise covered by the FAA.[124]

Based on this rationale, the clear weight of judicial precedent, and the current Supreme Court's affection for arbitration, it seems highly unlikely the employment contract exclusion would be extended to any employee *affecting* commerce. Thus, if a signatory to an employment contract containing a comprehensive arbitration clause would seek to avoid arbitrating a claim, the signatory would find no comfort from section one of the FAA unless the signatory was a member of a class of workers who were actually engaged in interstate commerce.[125]

V. ADHESION CONTRACTS

It is appropriate, and ironic, to look at a warning urged by Senator Walsh during the Senate Judiciary Committee hearings prior to the passage of the FAA:

> The trouble about the matter is that a great many of these contracts are really not [voluntary] things at all. . . . It is the same with a good many contracts of employment. A man says, "These are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.[126]

An adhesion contract[127] has been described as a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject

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120. Dancu v. Coopers & Lybrand, 778 F. Supp. 832, 834 (E.D. Pa. 1991), *aff'd*, 972 F.2d 1330 (3d Cir. 1992).

121. Tenney Eng'g, Inc. v. United Elec., Radio, & Mach. Workers Local 437, 207 F.2d 450 (3d Cir. 1953).

122. *Id.* at 453-54.

123. *Id.*

124. *Id.*

125. *See generally* Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 784-85 (1990) (discussing arbitration claims governed by state substantive law and employee contracts affecting commerce); Henry C. Strickland, *The Federal Arbitration Acts' Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385, 436-38 (1992) (discussing history of "involving commerce" cases and "limited scope of affecting commerce" cases).

126. *Bills Relating to Sales*, *supra* note 118.

127. The term "adhesion contract" found its genesis in a law review article: Edwin W. Patterson, *The Delivery of a Life Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

it."[128] Typically, the principal characteristics of an adhesion contract are unequal bargaining power between the parties and the use of a form contract with little, or no, bargaining about the terms.[129] In some cases, courts have held the unequal bargaining power as tantamount to a lack of assent to the purported agreement.[130]

Generally speaking, adhesion contracts are fully enforceable.[131] The contract will not be enforced, however, if it does not fall within the reasonable expectation of the weaker or adhering party, and if it is within the reasonable expectation, it will not be enforced if it is unduly oppressive or unconscionable.[132] Some courts have introduced a third condition which is whether a "public interest" is at stake.[133] For example, a court overturned a clause in a standard form service station franchise contract permitting cancellation on short notice and without cause because the distribution and sale of motor vehicle fuels affected the public.[134]

The enforceability of adhesion contracts has been addressed by the *Restatement (Second) of Contracts* which characterizes them as "standardized agreements" and provides:

> (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing . . . , he adopts the writing as an integrated agreement with respect to the terms included in the writing.
>
> (2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.
>
> (3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not a part of the agreement.[135]

The comment elaborates: "Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation."[136]

Two recent cases addressed the enforceability of adhesion contracts in the context of contractually mandated arbitration. In *Broemmer v. Abortion Services, Ltd.*,[137] a patient brought a malpractice action against a physician and the abortion

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128. Neal v. State Farm Ins. Co., 10 Cal. Rptr. 781, 784 (Dist. Ct. App. 1961).

129. *See* Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 857 (N.J. 1967).

130. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 84-93 (N.J. 1960).

131. Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172 (Cal. 1981).

132. *Id.* at 172-73.

133. Henrioulle v. Marin Ventures, Inc., 573 P.2d 465, 468 (Cal. 1978); Shell Oil Co. v. Marinello, 307 A.2d 598, 601-03 (N.J. 1973), *cert. denied*, 415 U.S. 920 (1974).

134. Shell Oil Co. v. Marinello, 307 A.2d at 601-03.

135. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

136. *Id.* § 211 cmt. f.

137. Broemmer v. Abortion Servs., Ltd., 840 P.2d 1013 (Ariz. 1992).

clinic that employed the physician.[138] Prior to treatment, the patient signed an agreement to arbitrate "any dispute" between the parties before arbitrators who "'shall be licensed medical doctors who specialize in obstetrics/gynecology.'"[139] After discussing the characteristics of adhesion contracts and the principles governing their enforcement,[140] the court concluded "that the contract fell outside plaintiff's reasonable expectations and is, therefore, unenforceable."[141]

Similarly, in *Patterson v. ITT Consumer Financial Corp.*,[142] a loan agreement contained a provision that "any dispute, past, present, or future, between us . . . shall be resolved by binding arbitration . . . ."[143] The court indicated that if it analyzed the "arbitration clause as beyond the reasonable expectation of the borrower . . . or as substantively and procedurally unconscionable the result is the same."[144] The court found nothing to "suggest that plaintiffs had a 'meaningful choice of reasonably available alternative sources' of personal loans from lenders who would not require . . . arbitration."[145]

A typical employment contract clearly contains inequality of bargaining power.[146] *Gilmer* left open the possibility of an attack on the contract by suggesting a "claim of unequal bargaining power is best left for resolution in specific cases."[147] Mandatory arbitration in an agreement might be particularly vulnerable if the agreement did not provide for a specific forum through which the arbitration would be conducted or did not state which particular rules or procedures to follow. Similarly, enforceability might be successfully resisted if coverage was couched in such general terms that it was not clear which disputes were covered and whether statutory claims were included.

To attack an adhesion contract, the employee must do more than provide unsupported argument, as was done in *Gilmer*. The employee would have to contest the contract and present evidence at the trial court level. Such an attack would consist of comprehensive evidence of the structure of the NYSE, NASD, and SICA, along with the functioning of their arbitral forums. The possibility that such an attack could be successful was intimated in *Mago v. Shearson Lehman Hutton, Inc.*[148] The court stated the record was not sufficiently developed to adjudicate the attack on the arbitration clause and remanded the case to the district court "on the factual issue of adhesion," suggesting *Gilmer* left room

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138. *Id.* at 1014.
139. *Id.* at 1014-15.
140. *Id.* at 1015-16.
141. *Id.* at 1017.
142. Patterson v. ITT Consumer Fin. Corp., 18 Cal. Rptr. 2d 563 (Ct. App. 1993), *cert. denied*, 114 S. Ct. 1217 (1994).
143. *Id.* at 564.
144. *Id.* at 567.
145. *Id.*
146. Justice Stevens stated in his dissent in *Gilmer*: "[T]he Court has also put to one side any concern about the inequality of bargaining power between an entire industry, on the one hand, and an individual customer or employee, on the other." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 43 (1991) (Stevens, J., dissenting).
147. *Id.* at 33.
148. Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 934 (9th Cir. 1992).

for the rejection of agreements resulting from "fraud or overwhelming economic power."[149]

VI. WAIVER OF STATUTORY RIGHTS

Closely allied with the adhesion contract argument is the claim that there has been no conscious waiver of the employee's statutory employment rights.[150] In *Gilmer*, the plaintiff did not claim in the trial court that by executing his NYSE license application containing an agreement to arbitrate "whenever required under [NYSE] rules," he intended to waive his constitutional and statutory rights.[151]

The issue the Court did not consider—nor was it asked to consider—was whether Gilmer's NYSE application was an effective waiver of his constitutional rights under Articles I and III as well as under the Fifth, Seventh, and Fourteenth Amendments. In addition, the application effectively waived his rights that claims under ADEA and Title VII must be adjudicated in a district court under the Federal Rules of Civil Procedure and Federal Rules of Evidence by a judge appointed under Article III of the United States Constitution who would instruct a jury as to the applicable law and that the jury would be chosen in a fair, objective, and non-discriminatory manner.[152] It also served to waive his right to appeal an adverse verdict to a United States Court of Appeals or to petition for review by the Supreme Court.[153] It is unlikely Gilmer's reasonable expectation in executing his NYSE license application was a waiver of all these rights.

Many courts have held mandatory alternative dispute resolution systems violate rights to access to courts,[154] due process,[155] trial by jury,[156] and equal pro-

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149. *Id.* at 934-35.

150. In *Gilmer*, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), American Association of Retired Persons (AARP), and Lawyers' Committee for Civil Rights Under Law filed briefs as amici curiae urging that the claimed statutory deprivations not be mandated to adjudication by compulsory binding arbitration. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 36 (Stevens, J., dissenting).

151. *See id.* at 31. This, in turn, referenced NYSE Rule 347 requiring the arbitration of any dispute "arising out of the employment or a termination of employment," which the Court reasoned to include claimed statutory ADEA violations. *Id.* at 23.

152. *Id.* at 26-29.

153. *Id.* at 23.

154. *See* Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976); People *ex rel.* Christiansen v. Connell, 118 N.E.2d 262, 266-67 (Ill. 1954); State *ex rel.* Cardinal Glennon Memorial Hosp. v. Gaertner, 583 S.W.2d 107, 118 (Mo. 1979); State *ex rel.* Christian v. Barry, 175 N.E. 855, 857 (Ohio 1931).

155. *See* Henderson v. Ugalde, 147 P.2d 490, 491 (Ariz. 1944); Healy v. Onstott, 237 Cal. Rptr. 540, 542 (Ct. App. 1987); Aldana v. Holub, 381 So. 2d 231, 236-38 (Fla. 1980); *In re* Smith, 112 A.2d 625, 629 (Pa. 1955).

156. Dreiling v. Peugeot Motors, Inc., 539 F. Supp. 402, 403 (D. Colo. 1982); Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736, 741 (Ill. 1976); Fairfield Leasing Corp. v. Techni-Graphics, Inc., 607 A.2d 703, 706 (N.J. 1992); Mattos v. Thompson, 421 A.2d 190, 196 (Pa. 1980).

tection.[157] These constitutional rights are clearly subject to waiver, as are rights created by Title VII and the ADEA.[158]

If an agreement mandating binding arbitration is an effective waiver, the assumption is the agreement will waive *all* the pertinent constitutional and statutory rights, and if its not an effective waiver, it will waive none of them. The jurisprudential principles of what constitutes a valid and effective waiver of constitutional and statutory rights seem reasonably well defined and consistently applied. The Supreme Court articulated these principles in *Fuentes v. Shevin*.[159] Appellees contended appellants, by signing conditional sales contracts, waived their basic procedural due process rights.[160] The Court indicated "the considerations relevant to a determination of a contractual waiver of due process rights" would apply the "standards governing waiver of constitutional rights in a criminal proceeding."[161] These standards would require the contractual waiver to be made "'voluntarily, intelligently, and knowingly.'"[162] Moreover, the Court stated, "'We do not presume acquiescence in the loss of fundamental rights.'"[163] When a waiver is at issue, "'courts indulge every reasonable presumption against waiver.'"[164] The Court concluded by suggesting "a waiver of constitutional rights in any context must, at the very *least*, be clear."[165]

The Supreme Court later applied this rationale to Title VII in *Alexander v. Gardner-Denver Co.*,[166] stating that "[i]n determining the effectiveness of any such waiver, a court would have to determine at the outset that an employee's consent . . . was voluntary and knowing."[167]

Access to the court system is a fundamental right.[168] This right was considered in *Moore v. Fragatos*.[169] The plaintiff executed an agreement to arbitrate in lieu of litigating medical malpractice claims.[170] In analyzing the requirement that the waiver was "knowing, intelligent, and voluntary,"[171] the court suggested the "knowing" requirement was met merely by showing the plaintiff was aware he was signing an arbitration agreement.[172] The court stated, however, that in

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157. Lindsey v. Normet, 405 U.S. 56, 70 (1972).

158. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 625-26 (1985); Torrez v. Public Serv. Co., 908 F.2d 687, 689 (10th Cir. 1990).

159. Fuentes v. Shevin, 407 U.S. 67 (1972).

160. *Id.* at 94.

161. *Id.*

162. *Id.* at 95 (quoting D.H. Overmeyer Co. v. Frick Co., 405 U.S. 174, 187 (1972)).

163. *Id.* at 94 n.31 (quoting Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 307 (1937)).

164. *Id.* (quoting Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)); *see also* National Equip. Rental v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (addressing the presumption of a waiver of a jury trial).

165. Fuentes v. Shevin, 407 U.S. 67, 95 (1972).

166. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

167. *Id.* at 52 n.15.

168. Bounds v. Smith, 430 U.S. 817, 828 (1977); Thayer v. Phillips Petroleum Co., 613 P.2d 1041, 1044-45 (Okla. 1980).

169. Moore v. Fragatos, 321 N.W.2d 781 (Mich. Ct. App. 1982).

170. *Id.* at 783.

171. *Id.* at 785.

172. *Id.* at 786.

order to make an "intelligent" choice, "a person must be informed of the consequences of his decision: *i.e.*, the material differences between malpractice arbitration and trial in a civil court."[173]

To waive his right to access to the court system, the plaintiff must have been aware of all "material information" concerning the arbitration procedure, which the court defined as "information that a reasonable person would consider important in deciding whether or not to sign an arbitration agreement."[174] The court concluded for the plaintiff to have made an "intelligent" waiver, he would have had to be "informed (1) that by signing the form, he would be giving up his right to trial by jury or a judge, [and] (2) that the arbitration panel . . . would include an attorney, a layman, and a doctor or hospital administrator . . . ."[175]

Finally, the court addressed the requirement that the waiver be made "voluntarily."[176] To determine if the waiver was voluntary, the court must examine "the circumstances surrounding the execution of each arbitration agreement in order to gauge the coercive potential of the setting."[177] The court found "the coerciveness inherent in the physician-patient relationship sufficiently compelling to justify the imposition of a prophylactic rule to ensure the voluntariness of waivers of the right to court access."[178]

The court applied these principles to the waiver of ADEA and Title VII claims in *Coventry v. United States Steel Corp.*:[179]

> In Title VII cases, the determination of whether a waiver has been "knowingly and willfully" made has been predicated upon an evaluation of several indicia arising from the circumstances and conditions under which the release was executed. Among those factors relied upon to indicate a valid waiver are general principles of contract construction such as the clarity and lack of ambiguity of the language, . . . [but in] light of the strong policy concerns to eradicate discrimination in employment, a review of the totality of circumstances, considerate of the particular individual who has executed the release, is also necessary.[180]

The issue of a valid waiver of Title VII claims was before the court once again in *Torrez v. Public Service Co., Inc.*,[181] on an appeal from a summary judgment granted to the employer.[182] In vacating the summary judgment, the court held that while Title VII claims may be waived, such a waiver must be "knowing and voluntary," and "[w]aivers of federal remedial rights . . . are not to

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173. *Id.*
174. *Id.*
175. *Id.* at 789.
176. *Id.*
177. *Id.*
178. *Id.* at 790; *see also* Sanchez v. Sirmons, 467 N.Y.S.2d 757, 759-60 (1983) (holding the waiver of a jury trial in favor of arbitration was invalid because the patient did not make an informed, knowledgeable waiver of her constitutional rights).
179. Coventry v. United States Steel Corp., 856 F.2d 514, 521 & n.18, 522 (3d Cir. 1988).
180. *Id.* at 522-23.
181. Torrez v. Public Serv. Co., Inc., 908 F.2d 687 (10th Cir. 1990).
182. *Id.* at 688-89.

be lightly inferred."[183] The court followed the rationale adopted by the majority of the circuits,[184] acknowledging the need to "explicitly look beyond the contract language and consider all relevant factors in assessing a plaintiff's knowledge and the voluntariness of the waiver."[185] The court concluded "'[t]o assume that, notwithstanding strong evidence to the contrary, a signature implies understanding is to allow a rule of contract law to play too salient a part in the administration of a remedial civil rights statute.'"[186]

As a concluding note on the issue of waiver, Congress codified the notion that "[a]n individual may not waive *any right* or claim under [the ADEA] unless the waiver is knowing and voluntary."[187] These provisions were considered in *Oberg v. Allied Van Lines*,[188] when a group of employees executed written waivers of rights under the ADEA, accepted benefits given as consideration for the waiver, and then filed a class action against the employer for ADEA violations.[189] The employer moved for summary judgment on the ground that the waivers, even if technically faulty, were ratified by the employees' acceptance of benefits.[190] The court overruled the motion, reasoning that "Congress has occupied this area of the law through the enactment of the OWBPA" and "the statute's operative words carry the plain meaning within their context" which forbids any waiver so that, as a matter of law, the employees could not ratify the severance agreements.[191]

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183. *Id.* at 689-90. In *Laniok v. Advisory Committee*, the court reversed a summary judgment for the employer involving a claimed waiver, by an employee, of the employee's rights under ERISA, suggesting the claimed waiver was not "knowing and voluntary as a matter of law" and "[g]enuine factual disputes as to material issues remain." Laniok v. Advisory Comm., 935 F.2d 1360, 1369 (2d Cir. 1991); *see also* McElroy v. Union Pacific R.R., 961 F.2d 1397, 1399 (8th Cir. 1992) (reversing summary judgment for the employer and holding "a triable issue is presented as to whether the agreement was intended to constitute a waiver of McElroy's ADEA claim").

184. See Stroman v. West Coast Grocery Co., 884 F.2d 458, 462 (9th Cir. 1989); Riley v. American Family Mut. Ins. Co., 881 F.2d 368, 373-74 (7th Cir. 1989); Bormann v, AT&T Communications, Inc., 875 F.2d 399, 403 (2d Cir.), *cert. denied*, 493 U.S. 924 (1989); Cirillo v. Arco Chem. Co., 862 F.2d 448, 451 (3d Cir. 1988); Coventry v. United States Steel Corp., 856 F.2d 514, 522-23 (3d Cir. 1988); Rogers v. General Elec. Co., 781 F.2d 452, 456 (5th Cir. 1986).

185. Torrez v. Public Serv. Co., Inc., 908 F.2d at 689.

186. *Id.* at 690 (quoting Watkins v. Scott Paper Co., 530 F.2d 1159, 1172 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976)).

187. 29 U.S.C. § 626(f)(1) (Supp. IV 1992) (emphasis added). The statute provides "a waiver may not be considered knowing and voluntary unless at a minimum": the waiver is written in a manner to be understood by the average individual; specifically refers to rights and claims under the ADEA; does not waive prospective rights or claims; is given only in exchange for consideration in addition to anything to which one is already entitled; and the person is advised in writing to consult an attorney and is given at least 21 days in which to consider the agreement. *Id.* It also provides additional limitations in the event of group terminations. *Id.*

188. Oberg v. Allied Van Lines, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994).

189. *Id.* at 680-81.

190. *Id.* at 681.

191. *Id.* at 683; *see also* Forbus v. Sears Roebuck & Co., 958 F.2d 1036, 1041 (11th Cir.) (holding ADEA plaintiffs' "retention of their severance benefits during the pendency of [a] lawsuit does not constitute ratification of those releases" because this would violate public policy), *cert. denied*, 113 S. Ct. 412 (1992).

While the OWBPA permits a waiver of rights only under prescribed conditions, the OWBPA seems to encompass a waiver of the judicial forum under the rationale of *Oberg*.[192] Further, it could be argued the OWBPA's prohibition against the waiver of prospective rights or claims would encompass predispute arbitration agreements, thereby eviscerating *Gilmer*.[193] This, however, must be scrutinized in contrast to *Rodriguez de Quijas*, which held an absolute statutory prohibition of the waiver of substantive rights under a statute did not extend to a waiver of a judicial forum for adjudication in favor of binding arbitration.[194]

Although the waiver provisions of the OWBPA apply only to waivers of rights under the ADEA and not Title VII, it does serve to place the congressional imprimatur upon the concept that waivers of statutory employment rights must be "knowing and voluntary."[195] Nevertheless, the prevailing judicial precedent seems to look at this as an issue of fact which would permit an employee who desires a court adjudication of the statutory claim, but signed an agreement to arbitrate employment disputes, to survive an employer's motion for summary judgment.[196]

VII. FAIRNESS AND DUE PROCESS

In *Gilmer*, the claimant attacked the fairness of the arbitration process with "a host of challenges to the adequacy of arbitration procedures."[197] These challenges were not supported by evidence in the trial court; rather, they were addressed solely by argument of appellate counsel.[198] Understandably, the Supreme Court rejected generalized attacks on arbitration.[199] While the procedures might be subject to criticism, they generally follow the theme and coverage of the Federal Rules of Civil Procedure, although on a limited and less detailed or technical basis.[200]

These procedures may be challenged on due process grounds, particularly because the arbitrators are not required to articulate the basis or reasoning of the

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192. Oberg v. Allied Van Lines, 11 F.3d at 683.

193. The majority opinion in *Gilmer* acknowledged that under the OWBPA, a waiver must be knowing and voluntary, and the Court specified the circumstances which meet that criteria, but the majority made no reference to the facts in the case before it. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 n.3 (1991).

194. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989).

195. *See generally* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 n.3 (1991) ("An individual may not waive any right or claim under [OWBPA] unless the waiver is knowing and voluntary.").

196. *See id.*

197. *Id.* at 30.

198. *Id.*

199. *Id.*

200. *See* NATIONAL ASS'N OF SECURITIES DEALERS, CODE OF ARBITRATION PROCEDURE (1993); NEW YORK STOCK EXCHANGE, ARBITRATION RULES (1992); AMERICAN ARBITRATION ASS'N, EMPLOYMENT DISPUTE RESOLUTION RULES (1993).

award.[201] Such a pursuit would receive impetus from the recent Supreme Court decision in *Honda Motor Co., Ltd. v. Oberg*.[202]

Specifically, the FAA allows the court to set aside an arbitration award if, *inter alia*: (1) it was procured by fraud; (2) there was evident partiality of the arbitrators; (3) the arbitrators refused to postpone the hearing or hear material evidence; or (4) the arbitrators exceeded their powers so that an award upon the subject matter submitted was not made.[203] There are also provisions for appeal from an order "confirming or denying confirmation, . . . modifying, correcting, or vacating an award; . . . or a final decision with respect to arbitration."[204] Without trying to encompass the diversity of arbitration environments or procedures, a simple monetary damage award by an arbitration tribunal without a basis, explanation, or record of the proceeding might be subject to a due process challenge based on the rationale of *Oberg*.[205]

In *Oberg*, the Supreme Court decided a prohibition in the Oregon constitution of appellate review of damage awards resulted in the denial of procedural due process.[206] The Court observed judicial review of damage awards had been a part of the common law as well as an established part of the law of each of the several states except Oregon.[207] It concluded "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of Due Process."[208]

Thus, if one confronts an arbitration procedure involving an award functionally impervious to the review permitted under the FAA, the procedure would be tantamount to a denial of due process under *Oberg*. However, only a situation involving no record of the arbitration hearing and virtually nothing beyond the bare award available for judicial review would be successful in circumventing the precedent of *Gilmer* and its progeny.

A specific challenge to the fairness of the arbitration process regarding the competency and diversity of arbitrators might result in greater success. Such a challenge was raised by counsel's argument in *Gilmer*, to which the Court responded "Gilmer first speculates that arbitration panels will be biased," and after reciting NYSE rules concerning arbitrator selection, the Court observed "[t]here has been no showing in this case that those provisions are inadequate to guard against potential bias."[209]

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201. *Id.*

202. Honda Motor Co., Ltd. v. Oberg, 114 S. Ct. 2331, 2341 (1994) (holding Oregon's denial of judicial review of size of arbitration award violates the Due Process Clause of the Fourteenth Amendment).

203. 9 U.S.C. § 10 (1988 & Supp. V 1993).

204. *Id.* § 16 (Supp. V 1993).

205. *See* Oberg v. Allied Van Lines, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994).

206. Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2340 (1994) (citing *In re* Oliver, 333 U.S. 257, 273 (1948); *In re* Winship, 397 U.S. 358, 316 (1970); Brown v. Mississippi, 297 U.S. 278, 286-87 (1936); Tumey v. Ohio, 273 U.S. 510, 532-33 (1927)).

207. Honda Motor Co. v. Oberg, 114 S. Ct. at 2333.

208. *Id.* at 2340.

209. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30-31 (1991) (emphasis added).

While there was no evidence concerning the competency of the arbitrators in *Gilmer*, Gilmer's employment rights would have to be arbitrated through a system designed to adjudicate securities industry disciplinary matters or investment disputes between brokers and their customers.[210] The fairness of this system was criticized in a General Accounting Office (GAO) report issued a year after *Gilmer*.[211] Specifically, the GAO found the "arbitration forums lacked internal controls to provide a reasonable level of assurance regarding either the independence of the arbitrators or their competence in arbitrating disputes."[212] The GAO concluded "the forums had no established formal standards to initially qualify individuals as arbitrators, did not verify background information provided by prospective or existing arbitrators, and had no system to ensure that arbitrators were adequately trained to perform their functions fairly and appropriately."[213]

Under NYSE and NASD procedures for employment claims, the cases are heard by three arbitrators, two of which must be "public" arbitrators.[214] The arbitrator will always be a person currently or formerly affiliated with a securities broker.[215] In addition, a broker accused of discriminatory employment practices would be a member of the SRO administering and orchestrating the arbitration proceeding which would produce the binding, non-appealable adjudication of the employee's claim.[216] As Chief Justice Burger stated in his dissent in *Barrentine*: "For federal courts to defer to arbitral decisions reached by the same . . . forces that had long perpetuated invidious discrimination would have made the foxes guardians of the chickens."[217]Justice Stevens suggested in his dissent in *Mitsubishi* that "it is also proper to ask whether contracts of adhesion between alleged monopolists and their customers should determine the forum for trying antitrust violations."[218]

The printed guide given to all NASD and NYSE arbitrators[219] advises arbitrators as follows: "Arbitrators are not strictly bound by case precedent or statutory law. Rather, they are guided in their analysis by the underlying policies of the law and are given wide latitude in their interpretation of legal concepts."[220] This is contrary to the rationale enunciated by the Supreme Court in *Mitsubishi* indicating that by agreeing to arbitrate, a party "does not forgo substantive rights," but "only submits to their resolution in an arbitral, rather than judicial forum."[221] If arbitrators need not follow the law, this certainly bespeaks a potential loss of substantive statutory rights.

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210. *Id.* at 30.
211. SECURITIES ARBITRATION, *supra* note 43.
212. *Id.* at 6.
213. *Id.* at 8.
214. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991).
215. *Id.*
216. *Id.*
217. Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 750 (1981).
218. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 656 (1985) (quoting American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826-27 (1968)).
219. SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, THE ARBITRATORS MANUAL (1992).
220. *Id.* at 26.
221. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. at 627.

Two years after its initial visit to the arbitration forums of the securities industry, the GAO focused on the adjudication of employment discrimination claims.[222] In its report, the GAO acknowledged discrimination claims "are inherently different from the usual types of employment disputes arbitrated by SROs because they involve issues in federal civil rights law that lie beyond the scope of securities statutes and industry practices."[223]

Nevertheless, the GAO observed that according to the "SCIA's Arbitration Procedures, which have been adopted by all SROs, arbitrators should be 'knowledgeable in the areas of controversy,'" neither the NASD nor the NYSE "necessarily consider, as a primary criterion for arbitration panel selection, arbitrators' expertise in the subject matter of the dispute."[224] It is difficult to see how an arbitration panel could apply the law fairly and adjudicate substantive rights when they are required to know the law and the scope of the rights they adjudicate.

Perhaps the most profound aspect of the GAO revelations is that the arbitration panel which would decide Gilmer's case would be drawn from eligible arbitrators, approximately 97% of whom are white and 89% are highly educated males having an *average* age of sixty, none of whom would be required to have training in or knowledge of employment discrimination law.[225] Similarly, of the 50,000 neutrals on American Arbitration Association panels, only 6% are women and of the members of the National Academy of Arbitrators (consisting of only labor arbitrators), an estimated 7% are women.[226]

This stands in stark contrast to the statutory safeguards assuring fairness and diversity in the selection of federal petit jurors where there are statutory eligibility requirements.[227] Jurors must be selected from a fair cross section of the community,[228] and they cannot be excluded because of their race, color, religion, sex, national origin, or economic status.[229] The Supreme Court has taken fairness and diversity in jury selection to the point where it has prohibited, even in civil cases, counsel to use peremptory challenges to make race-based exclusions.[230] Most recently, the Court has extended this prohibition to gender-based peremptory challenges.[231]

Such arbitration panels do not approximate the ethnic, cultural, gender, and age diversity of the pool of citizens from which civil jury panels are drawn. It would seem an evidentiary challenge at trial would place the fairness of the arbitration process to adjudicate statutory employment discrimination claims squarely

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222. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN EMPLOYMENT DISCRIMINATION DISPUTES, GAO/HEHS-94-17 (March 1994).

223. *Id.* at 12.

224. *Id.*

225. *Id.* at 8.

226. Dorissa Bolinski & David Singer, *Why Are So Few Women in the ADR Field?* 48 ARB. J. 61, 61 (1993).

227. 28 U.S.C. § 1863 (1988 & Supp. IV 1993).

228. *Id.* § 1861 (1988).

229. *Id.* § 1862; 18 U.S.C § 243 (1988).

230. Edmonson v. Leesville Concrete, Inc., 500 U.S. 614, 616 (1991).

231. J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419, 1421 (1994).

in issue. While a claimant could raise and support other issues of procedural and substantive fairness,[232] the absence of diversity and lack of technical competency of arbitrators assigned to hear statutory employment discrimination claims should be at the forefront of the attack.[233]

VIII. CIVIL RIGHTS ACT OF 1991

As originally introduced in Congress, the stated purpose of the Civil Rights Act of 1990 was to void five decisions of the Supreme Court during its 1988 term.[234] Despite Congress's goal of merely "restoring" the civil rights laws altered by these decisions, the business community mounted an attack on the legislation, arguing the Act goes beyond the stated purpose by instituting race and gender-based hiring and promotion quotas.[235] As a result, President Bush vetoed the bill.

As elections were rapidly approaching, the legislation was resuscitated the following year, and on November 21, 1991, the Civil Rights Act of 1991 was signed into law.[236] The final product, an offspring of compromises between various interests in the Senate and the administration, amended five separate civil rights statutes,[237] partially altered the impact of the five referenced Supreme Court decisions, and injected some new concepts onto the employment discrimination landscape.[238]

The most significant aspect of the vetoed Civil Rights Act of 1990 was a provision to permit a plaintiff to raise a disparate impact claim without referring to a particular employment practice and by merely looking to the "bottom line" to find discrimination in the work force.[239] On the other hand, the Civil Rights Act of 1991 left the *Wards Cove*[240] rationale unchanged with regard to identification

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232. In the first GAO report on arbitration in the securities, an excellent presentation is made comparing the procedures in arbitrations under the securities SROs with those in American Arbitration Association arbitrations and litigation conducted in state and federal courts. SECURITIES ARBITRATION, *supra* note 43, at 64-65.

233. In a recent issue of the *Wall Street Journal*, Margaret A. Jacobs presents an illuminating article chronicling arbitration of sex discrimination claims in the securities industry. Margaret A. Jacobs, *Men's Club–Riding Crop and Spurs: How Wall Street Dealt with a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A6.

234. Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Price Waterhouse v. Hopkins, 490 U. S. 228 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

235. Civil Rights Act of 1991, Pub. L. No. 102-166, 1991 U.S.C.C.A.N. (105 Stat.) 1071.

236. 42 U.S.C. § 1981 (1988 Supp. IV 1992).

237. The five amended civil rights statutes are the following: The Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Civil Rights Act of 1866, and Civil Rights Attorney's Awards Act of 1976.

238. Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).

239. *See* 137 CONG. REC. S15,472-01, at S15,473-74 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

240. Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).

niques beyond not being a state institution.[253] This often results in confusion, which is vividly exemplified by the majority opinion in *Gilmer*.[254] The Supreme Court translated the ADEA's direction to the EEOC to pursue "informal methods of conciliation, conference, and persuasion"[255] to be a manifestation of congressional intent that binding arbitration may be a substitute for litigation in state-established forums.[256]

In section 118, "arbitration" was listed along with a number of other ADR techniques envisioning consensual resolutions.[257] Three interpretations could be fashioned for including "arbitration" in this section. First, Congress endorsed the Supreme Court's approval of binding arbitration as a substitute for court adjudication.[258] Second, by combining it with consensual ADR methods, it was considering "arbitration" in a non-binding advisory sense, rather than an adjudicatory one.[259] Third, Congress did not consider the significance of the terminology used, but just acknowledged the contemporary popularity of ADR to reduce litigation and "encouraged" its use.[260]

If Congress intended arbitration to supplant litigation, then by use of the conjunctive form, one could argue with equal force that *all* the other enumerated ADR techniques could likewise supplant court adjudications, which was obviously not intended. Moreover, the use of terms such as "encouraged," "[w]here appropriate," and "to the extent authorized by law" would also negate this interpretation.[261] Finally, in Representative Edwards's memorandum, he specifically states no approval of *Gilmer* was intended.[262]

Another interpretation of section 118 appears in the House Committee on Education and Labor Report which states:

> The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract,

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253. Although arbitration is considered an "alternative" adjudication method, if there is not voluntary compliance with the result, parties must rely on state instrumentalities for enforcement of the arbitration award.

254. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-35 (1991).

255. 29 U.S.C. § 626(b) (1988).

256. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 29.

257. 42 U.S.C. § 1981 (Supp. IV 1992); *see supra* text accompanying note 250.

258. *Gilmer* was decided some five months prior to the passage of the Civil Rights Act of 1991. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. at 20. *Gilmer* was decided on May 13, 1991, and the Civil Rights Act of 1991 was enacted November 21, 1991.

259. *Id.* at 29.

260. *Id.* at 29-30.

261. 42 U.S.C. § 1981 (1988 & Supp. IV 1992). By the use of this terminology, Congress seems to be suggesting that any mandate or even authorization for the use of ADR must come from *outside* of the Civil Rights Act of 1991.

262. *See supra* note 247 and accompanying text.

> does not preclude the affected person from seeking relief under the enforcement provision of Title VII.[263]

This report could literally be interpreted as an attempt to preclude the enforcement of predispute agreements to arbitrate statutory claims.[264] Considering it is merely the articulation of one committee of one house of Congress, it could hardly meet the requirement of *Mitsubishi* that "Congress itself has evinced an intention to preclude a waiver of judicial remedies . . . ."[265]

With regard to section 118, Congress either intended "arbitration" in its non-binding sense or it merely wanted to "encourage" other forms of dispute resolution which could serve to obviate the necessity for court adjudication. In either case, the Civil Rights Act of 1991 had no effect on *Gilmer,* nor upon the four potential defenses which were not before the Court in *Gilmer.*[266]

IX. DO YOU *REALLY* HAVE TO ARBITRATE?

Mitsubishi,[267] *McMahon,*[268] *Rodriguez de Quijas,*[269] and *Gilmer*[270] represent formidable precedent for the mandated arbitration of statutory claims and disputes. Thus, if an employee signs a predispute arbitration agreement, this rationale may mandate binding arbitration of a variety of statutory claims arising out of the employment relationship.[271] In light of the seven to two majority,[272] the present composition of the Court, and its fascination with arbitration, it is highly unlikely these general principles enunciated will be reversed in the foreseeable future. Similarly, it is unlikely Congress will amend the FAA, nor will it amend existing legislation solely to negate arbitration.[273]

Since *Gilmer* was decided, its rationale has been extended to Title VII discrimination claims,[274] as well as to violations of the federal Employee

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263. H.R. REP. NO. 40, 102d Cong., 1st Sess. pt. 1, at 97 (1991). Ironically, virtually identical language was used in a House/Senate Conference report on the Civil Rights Act of 1990 *before* the Supreme Court decision in *Gilmer.* H.R. REP. NO. 856, 101st Cong., 2d Sess. 26 (1990).

264. *See* H.R. REP. NO. 40, 102d Cong., 1st Sess. pt. 1 at 97 (1991).

265. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985).

266. *See supra* text accompanying notes 82-196.

267. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. at 640.

268. Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 242 (1987).

269. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485-86 (1989).

270. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 37 (1991) (Stevens, J., dissenting).

271. *See id.*

272. In *Gilmer,* Justice Stevens dissented, and Justice Marshall joined the dissent. *Id.* at 36 (Stevens, J., dissenting).

273. Senator Russell Feingold (D-Wis) introduced a bill addressing the contractually mandated arbitration of employment claims which would prohibit employers from requiring employees to waive their statutory rights. 140 CONG. REC. S2012 (1993).

274. *See* Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992); Willis v. Dean Witter Reynolds, 948 F.2d 305, 312 (6th Cir. 1991); Alford v. Dean Witter Reynolds, 939 F.2d 229, 230 (5th Cir. 1991).

Polygraph Protection Act (EPPA).[275] Interestingly, the EPPA contains an anti-waiver provision stating that "rights *and procedures* . . . may not be waived by contract or otherwise."[276] Relying on *Gilmer* and *Mitsubishi*, the court in *Saari v. Smith Barney, Harris Upham & Co.*[277] suggested this did not prohibit arbitration because "[t]he term 'procedures' is too broad to relate to forum selection."[278]

Pendent state law and ERISA claims have also been held to be subject to arbitration.[279] However, the Seventh Circuit held the NASD Code of Arbitration did not require the arbitration of employment disputes, stating: "*Gilmer* did not establish a grand presumption in favor of arbitration; it interpreted and enforced the texts on which the parties had agreed. The NYSE's Rule 347 and the NASD's Code of Arbitration Procedure are dissimilar."[280]

Initially, then, the answer to the question of whether one has to arbitrate is yes. Statutory employment discrimination claims must be arbitrated under a predispute mandatory arbitration agreement. In *Gilmer*, however, the arbitration clause was not contained in an employment agreement, nor was any evidence presented in the trial court on the issues of adhesion, waiver, or fairness.[281] Accordingly, the Court's rejection of the argument on those issues, in the absence of an adequate record below, was not surprising nor can it be deemed precedential. Thus, before the question posed can be answered definitely, these issues must be explored.

No attempt will be made to generalize the expansive and diverse spectrum of arrangements that create predispute arbitration mandates in an employment relationship. For example, a broad and generalized arbitration mandate could be published as a part of an employer's overall employment policies. The mandate may not solicit an employee's assent, but merely dictate that by continuing the employment relationship, the employee accepts these policies (including mandated arbitration of all disputes). This is not unlike the situation Gilmer faced when he needed a securities license for continued employment anywhere within the securities industry.[282] These relationships are highly adhesive.

At the other end of the spectrum, one could envision a situation where the predispute arbitration mandate is contained in an agreement or other documenta-

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275. Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 881 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992).

276. 29 U.S.C. § 2005(d) (1988) (emphasis added).

277. Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir.), *cert. denied*, 113 S. Ct. 494 (1992).

278. *Id.* at 881.

279. Bender v. A.G. Edwards & Sons, Inc., 971 F.2d at 699; Bird v. Shearson Lehman/American Express, Inc., 926 F.2d 116, 118 (2d Cir.), *cert. denied*, 111 S. Ct. 2891 (1991).

280. Farrand v. Lutheran Bhd., 993 F.2d 1253, 1255 (7th Cir. 1993). On August 31, 1993, the SEC approved an amendment to the NASD Code which requires arbitration of any dispute "arising out of employment or termination of employment." 58 Fed. Reg. 39,070 (1993). Subsequently, the Seventh Circuit held this amendment was not retroactive. Kresock v. Bankers Trust Co., 21 F.3d 176, 179 (7th Cir. 1994). *But see* Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516, 519 (11th Cir. 1994) (except for limited insurance exceptions, section one of the NASD code requires arbitration of any dispute arising out of a NASD member's business).

281. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991).

282. *Id.*

tion the employee executes or gives assent contemporaneously with the initial employment. It may even be a part of a comprehensive grievance or workplace dispute resolution procedure. At a minimum, it would describe the arbitration procedural rules, a demographic description of the arbitration panel from which the individual arbitrators would be chosen, the manner of selection, and a disclosure of the finality of the award. It would clearly spell out the statutory rights that would be included under the arbitration mandate, as well as explaining the employee would be waiving access to the courts and trial by jury. Conceptually, it would follow the disclosure and voluntariness philosophy articulated in the waiver provisions of the OWBPA.[283] Obviously, an arbitration mandate under these circumstances would find a great deal of support in *Gilmer*.

Avoidance of any contractually mandated arbitration must be done with evidence presented in the trial court, not just legal arguments by counsel. Furthermore, the plaintiff is well advised to have this marshalled and analyzed before the complaint is drafted and filed in court. This will also provide the needed insulation from the ravages of Federal Rule of Civil Procedure 11.[284] With the new amendments to Federal Rules of Civil Procedure 26 and 37 which went into effect on December 1, 1993, this preparation prior to filing the complaint will become virtually indispensable.[285]

In the complaint, the discrimination claims should be articulated well beyond the requirements of Federal Rule of Civil Procedure 8(a).[286] The claims should be joined with another count requesting a declaratory judgment[287] from the court to render the agreement to arbitrate unenforceable. The complaint should be carefully drafted to focus on the arbitration provision itself rather than any claimed deficiencies in the agreement or document in which it is contained.[288] This will give the plaintiff the momentum of affirmatively attacking the provision rather than waiting for the employer's inevitable motions for a stay and to compel arbitration.[289] This will also assist in defending against a motion for summary judgment,[290] which has become a notorious tool for employers in employment discrimination litigation.[291]

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283. *See supra* text accompanying note 191.

284. *See* FED. R. CIV. P. 11(b)(3).

285. *See* FED. R. CIV. P. 26, 37. These amendments impose on parties a duty to disclose certain basic information needed to prepare for trial or make an informed decision about settlement without awaiting formal discovery requests and to provide remedies and sanctions for failure to make disclosure or cooperation in discovery.

286. *See* FED. R. CIV. P. 8(a).

287. 28 U.S.C. § 2201 (1988 & Supp. IV 1993); 28 U.S.C. § 2202 (1988).

288. The Supreme Court held where an arbitration clause is contained in a contract, a court may consider only issues relating to the making and performance of the agreement to arbitrate, but defenses addressed to the entire contract must be determined by the arbitrators. Prima Paint Corp. v. Flood & Cronklin Mfg. Co., 388 U.S. 395, 404 (1967).

289. 9 U.S.C. §§ 3, 4 (1988).

290. FED. R. CIV. P. 56. The Supreme Court decided three cases involving summary judgment: Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). These cases have had a profound impact upon employment discrimination litigation by greatly facilitating a defendant's motion for summary judgment. To summarize their import, trial courts henceforth would be required to weigh the evidence using the same standards as at trial, Anderson v. Liberty

The declaratory judgment count could raise any of the four issues which were not before the Supreme Court in *Gilmer*: the FAA applicability, adhesion contract, waiver, and fairness of the arbitral procedure. As indicated previously, the FAA exclusion of certain employment agreements seems to be limited and would not apply unless the employee is a member of a "class of workers" actually "engaged in" interstate commerce.[292] Nevertheless, the coverage issue should be raised because the Supreme Court has never definitively ruled on these issues, and well-reasoned case authority and legislative history support a broad interpretation of the exclusionary clause.[293]

Another possibility exists in arguing that the entire FAA is inapplicable to the dispute in question. For coverage to exist, there must be "[a] written provision . . . in a contract evidencing a transaction involving commerce to settle by arbitration a controversy *thereafter arising* out of such contract or transaction . . .

Lobby, Inc., 477 U.S. at 250-52, to determine whether the plaintiff proved there is sufficient evidence to support the claim, Celotex Corp. v. Catrett, 477 U.S. at 323, and to scrutinize the plausibility of the plaintiff's theory, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 589. Thus, it was not surprising that the following year summary judgment was granted on the basis that the "establishment of a prima facie case does not in itself entitle an employment discrimination plaintiff to survive a motion for summary judgment." Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987). These cases have come to be referred to as the "summary judgment trilogy." *See generally*, Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206 (1993) (arguing courts are more inclined to grant summary judgments in favor of the defendant after the "summary judgment trilogy"); John V. Jansonius, *The Role of Summary Judgment in Employment Discrimination Litigation*, 4 LAB. LAW 747 (1988) (asserting the "summary judgment trilogy" indicates courts will be more likely to grant summary judgment motions in employment discrimination cases).

291. Before the trilogy, only four grants of summary judgment were reviewed, all of which were affirmed. McGinley, *supra* note 290, at 228 n.111. After the trilogy, fifty-three grants of summary judgment were reviewed, of which fifty were affirmed. *Id.*

A number of cases have required plaintiffs, at the summary judgment stage, to come forth with evidence sufficient to permit a rational trier of fact to find the employer's explanation to be pretextual; the mere fact that a bare prima facie case had been made was not in itself sufficient. *See* Durham v. Xerox Corp., 18 F.3d 836, 840 (10th Cir. 1994) (failing to offer sufficient evidence to support finding that reason was pretext), *cert. denied*, 115 S. Ct. 80 (1994); Davis v. Chevron, 14 F.3d 1082, 1087 (5th Cir. 1994) (failing to present more than mere refutation of employer's legitimate nondiscriminatory reason for not hiring); Anderson v. Baxter Health Corp., 13 F.3d 1120, 1124 (7th Cir. 1994) (requiring plaintiff to produce evidence from which rational fact finder could infer employer lied); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) (requiring evidence creating factual dispute about nondiscriminatory reason); Geary v. Visitation of the Blessed Virgin Mary Parish School, 7 F.3d 324, 332 (3d Cir. 1993) (failing to offer facts showing genuine issue of fact as to reason); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 843 (1st Cir. 1993) (requiring evidence sufficient for factfinder to conclude discriminatory motive), *cert. denied*, 114 S. Ct. 1398 (1994).

292. *See supra* notes 111-125; *see also* Tenney Eng'g, Inc. v. United Elec., Radio, & Mach. Workers, 207 F.2d 450, 452 (3d Cir. 1953) (determining the Congressional intent was to include only those workers directly engaged in the movement of commerce, rather than include all workers engaged in activities affecting commerce).

293. *See supra* note 116 and accompanying text.

save upon such grounds as exist at law or in equity for the revocation of any contract."[294]

Upon showing the employee had not entered into a "contract evidencing a transaction involving commerce," the employee could circumvent the arbitration mandate. An arrangement that might give rise to this argument would occur when the arbitration mandate was found in unilaterally promulgated employer policies. Courts have established the "handbook exception" to the employment-at-will doctrine.[295] Courts even suggested unilaterally promulgated policies cannot be unilaterally changed by the employer without the affected employee's assent.[296] Moreover, acceptance cannot be inferred merely by an employee continuing to work after the change had been made.[297]

In these circumstances, the contractual obligation arises "without mutual assent" and "outside the operation of normal contract principles,"[298] but the policies bind the employer because the employer benefits from promoting "an environment conducive to collective productivity."[299] The employer's obligation arises on a type of estoppel theory that is "akin to the administrative law doctrine that . . . agencies are bound to self-imposed restrictions."[300]

Obviously, such an arrangement is highly situational. Nevertheless, an arbitration mandate unilaterally imposed by the employer, in which an employee gave no assent beyond continuing to work, could hardly be considered "a contract evidencing a transaction involving commerce" within the meaning of section two of the FAA.[301]

The key to any challenge to mandated arbitration of statutory employment rights lies in the conception of whether or not there has been a "knowing and voluntary" waiver by the employee of his or her statutory rights. Any attendant issues of adhesion and fairness are inextricably intertwined with the notion of whether there has been a valid waiver of rights.

The overwhelming majority of the arbitration mandates that serve to waive an employee's statutory and constitutional rights to the adjudicatory process doubtless arise in an adhesive contract or policy promulgation. But, the "adhesive" aspect alone is not sufficient to render a contract unenforceable.[302] "[A] gross inequality of bargaining power [can suggest] that the waiver was nei-

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294. 9 U.S.C. § 2 (1988) (emphasis added). This section also mandates arbitration where there is "an agreement in writing to submit to arbitration *an existing controversy* arising out of such contract [or] transaction . . . shall be valid, irrevocable, and enforceable . . . ." *Id.* (emphasis added). Thus, a literal reading of the "written provision" language applies to predispute arbitration and the "agreement in writing" terminology pertains to the submission of an existing dispute.

295. Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 893 (Mich. 1980).

296. Robinson v. Ada S. McKinley Community Servs., Inc., 19 F.3d 359, 364 (7th Cir. 1994).

297. *Id.*

298. Bankey v. Storer Broadcasting Co., 443 N.W.2d 112, 116 (Mich. 1989).

299. *Id.* at 119.

300. Estreicher, *supra* note 125, at 770; *see* note 73 and accompanying text.

301. 9 U.S.C. § 2 (1988).

302. Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171 (Cal. 1981).

ther knowing or intentional."[303] As the Supreme Court stated in *Fuentes*,[304] "'[W]here the contract is one of adhesion, there is a great disparity in bargaining power,' the purported waiver provision was a printed part of a form . . . contract," and appellants were not "actually aware of the significance of the fine print now relied upon as a waiver of constitutional rights," the waiver could not be considered to have been made "'voluntarily, intelligently, and knowingly.'"[305]

The adhesion contract concept is similarly interrelated to the fairness notion insofar as the agreement must fall within the reasonable expectation of the adhering party[306] who is "not bound to unknown terms which are beyond the range of reasonable expectation."[307] The principal focus of any fairness attack should be the absence of diversity and lack of technical competency of the arbitrators assigned to hear statutory employment discrimination claims, as well as the procedure for their selection and assignment. Submitting a dispute for decision by such arbitrators with these deficiencies was clearly beyond the employee's "reasonable expectation," and this would not be difficult to prove.

The challenge to the fairness of panel selection also involves the waiver issue. In *Moore*, the court held the plaintiffs did not make an "intelligent" waiver, observing: "The agreement does not disclose the composition of a malpractice arbitration panel. There is no explanation of the manner in which a panel is 'mutually agreed upon.' Moreover, there is no explanation of the circumstances under which panel members must be appointed or who is responsible for such appointments."[308]

The waiver issue is at the core of any attempted avoidance of mandated arbitration.[309] Adhesion contracts are presumed valid, and the "fairness" of the arbitral process can be waived. Nevertheless, the contracts can enhance the waiver assertion. The Supreme Court has stated:

> [A]rbitration, whatever its merits or shortcomings, substantially affects the cause of action created . . . . The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. *The change from a court of law to an arbitration panel may make a radical difference in the ultimate result.*[310]

For contractual predispute arbitration of statutory employment discrimination claim to be enforceable, an employee must have "knowingly, voluntarily, and intelligently" accepted the vicissitudes of the arbitral process and waived the various constitutional, statutory, and procedural rights which it entails.[311] These

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303. National Equip. Rental v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977); *see* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 23 (1991) (Stevens, J., dissenting).

304. *See* Torrez v. Public Serv. Co., 908 F.2d 687, 689 (10th Cir. 1990).

305. Fuentes v. Shevin, 407 U.S. 67, 95 (1972) (quoting D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187-88 (1972)).

306. Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172 (Cal. 1981).

307. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1979).

308. Moore v. Fragatos, 321 N.W.2d 781, 787 (Mich. Ct. App. 1982).

309. *See supra* text accompanying notes 150-196.

310. Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 (1956) (emphasis added).

311. *See supra* notes 307-310 and accompanying text; *infra* notes 312-315.

"statutory rights are not only for the employee's benefit, they are expressions of public policy, designed to achieve public ends, that are best entrusted to public tribunals for their vindication."[312] Any waiver of those rights must be both clear and unequivocal; this is critical because "[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions."[313]

Whether one must arbitrate depends on the circumstances of each situation. The answer may be "no," because there are formidable statutory and common law bases that were not foreclosed or even considered by *Gilmer* and, situationally, would serve to avoid mandated arbitration. As suggested by the Seventh Circuit: "*Gilmer* did not establish a grand presumption in favor of arbitration; it interpreted and enforced the texts on which the parties had agreed."[314]

On the other hand, the answer may be "yes" because the employment relationship can be crafted and documented in a way that overcomes any and all of the objections or defenses raised by this Article. Perhaps the proper inquiry should go beyond the issues of mandated arbitration and examine the desirability of the arbitral forum in contrast to litigation of statutory employment claims.

X. DO YOU *REALLY* WANT TO ARBITRATE?

Up to this point, the assumption has been the employer wants to arbitrate all employment disputes, and the employees would prefer vindication of their rights in court.[315] One aspect of arbitration, the finality of the award and the limited basis for appeal,[316] could be disadvantageous to either party. On balance, however, this aspect of finality would be a distinct advantage for the employee because it is a losing employer who tends to appeal. Likewise, the truncated discovery in arbitration could be considered disadvantageous to both. For the employee who has the burden of proof, it becomes more difficult to obtain the evidence necessary to prove discriminatory motive or the pretext of the employer's claimed business necessity. The employer does not need discovery as much as the employee, but its financial resources permit it to engage in extensive discovery for the debilitating effect it will have on the employee's counsel, thereby enhancing the employee's willingness to settle.

Probably the greatest disadvantage an employee sustains in arbitration is the lack of diversity of arbitrators with respect to ethnicity, gender, education, financial resources, and social strata. This clearly would be the case of a woman's claim for sexual discrimination or harassment that would be presented to arbitrators who were selected from a panel "approximately 97% of whom are

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312. Matthew W. Finkin, *Commentary on "Arbitration of Employment Disputes Without Union,"* 66 CHI.-KENT L. REV. 799, 808-09 (1990).

313. Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1497 (1994).

314. Farrand v. Lutheran Bhd., 993 F.2d 1253, 1255 (7th Cir. 1993).

315. Regarding the generally perceived advantages of arbitration from an employer's perspective, see Thomas J. Piskorski & D.B. Ross, *Private Arbitration as the Exclusive Means of Resolving Employment Disputes*, 19 EMPL. REL. L.J. 205, 209 (1993).

316. 9 U.S.C. § 10 (1988 & Supp. V 1993).

white and 89% highly educated males having an *average* age of sixty."[317] If the arbitration is in the securities industry, at least one of the three arbitrators will have an affiliation with a securities broker.[318] Those arbitrators might not be a bad choice for an age discrimination claim made by a white male executive, particularly if there has been egregious conduct by the employer.

Arbitration can work against employers as well. The lack of competency of the arbitrators and the complexities of the various employment discrimination statutes and case precedent can stifle some of the employer's valid defenses which would be accepted by a federal judge. While the defenses would be presented to the arbitrators, the defenses may be too jurisprudential, or just ignored, particularly if the arbitrators had been advised beforehand that they "are not strictly bound by case precedent or statutory law" and had a "wide latitude in their interpretation of legal concepts."[319]

Rigid burden of proof requirements are imposed upon employees claiming employment discrimination that rest with the plaintiff and never shift.[320] Clearly, these requirements would not be given the same sanctity by arbitrators who operate under more informal procedures[321] than a federal judge who is bound by the Federal Rules of Evidence.[322]

Perhaps the greatest advantage arbitration would provide to an employee with a statutory employment discrimination claim is its speed, simplicity, economy, and finality. An arbitration agreement does not preclude the function of the EEOC.[323] However, the EEOC currently has a backlog of almost 88,000 claims, 99.5% of which *it will not litigate* on behalf of the claimant.[324] A vast majority of those claims will not be pursued because the claimant is not financially able to hire a lawyer, and most lawyers are reluctant to accept employment discrimination cases on a contingent fee basis.

More lawyers are shying away from employment discrimination litigation or being much more selective in their cases. As one plaintiff's employment lawyer is quoted as saying: "I have found . . . you're going to reject 90% of the cases." He continues by suggesting that "[a] successful plaintiff's lawyer doesn't

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317. *See supra* notes 225, 233 and accompanying text.

318. *See supra* note 200 and accompanying text.

319. *See supra* text accompanying note 220.

320. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747 (1993); Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 659-60 (1989).

321. *See supra* text accompanying notes 200, 213, 227.

322. Federal Rule of Evidence 301 provides: "In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast." FED. R. EVID. 301.

323. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991).

324. UNITED STATES GENERAL ACCOUNTING OFFICE REPORT, EEOC'S EXPANDING WORKLOAD: INCREASES IN AGE DISCRIMINATION AND OTHER CHANGES CALL FOR A NEW APPROACH, GAO/HEHS-94-32 (February 1994).

need a hundred cases worth a thousand dollars, [b]ut if you have four or five cases of value . . . you're going to be much more successful."[325]

Another employment claimant's lawyer suggested that under current counsel-fee provisions some lawyers were "repeatedly turning away potential clients whose claims were meritorious" and tells of "claimants with apparently strong cases who have approached in vain 10 or 15 different lawyers."[326] He also observes "[f]or many blue-collar and clerical workers . . . a requirement of a $2,500 or $5,000 retainer is an absolute bar to representation."[327]

Thus, arbitration affords an employee an opportunity to obtain an adjudication of an employment discrimination claim that might not otherwise be available. Many reluctant lawyers would be willing to handle an arbitrated case in which the arbitrators' decision would be final and from which there would be no appeal. Moreover, even if the employee is unable to obtain counsel, the employee may still proceed to arbitration on a pro se basis. The informality, the simplified procedures, and the absence of the application of strict rules of evidence serve to reduce the employee's disadvantage when opposed by an employer who has retained counsel. Typically, this disadvantage is further reduced by an arbitration panel that is most likely sympathetic toward an unrepresented claimant who wants to have the case presented and fairly decided.[328]

Contrary to conventional wisdom, an employer gives up significant advantages by moving from court litigation to arbitration. Simply stated, in arbitration, the employer has only "one bite at the apple" and, necessarily, must present a defense as thorough and convincing as would be presented to a jury. When litigating in federal court, however, the employer typically has the financial resources to erect series of hurdles, any one of which could put an end to the plaintiff's claim.

The first hurdle is an employee's difficulty in obtaining counsel, which is an absolute necessity in federal court. This difficulty is exacerbated by the federal court procedures, including the new pretrial disclosure requirements,[329] the specter of counsel incurring liability under Federal Rules of Civil Procedure 11, and various points of attack that can be launched by an aggressive defendant.

After the complaint is filed, the employer's counsel will undoubtedly challenge it by a motion to dismiss for failure to state a claim[330] and for more definite statement,[331] which may be followed by a motion for judgment on the pleadings.[332] Extensive discovery[333] follows, including depositions,[334] interroga-

325. 2 BNA *Employment Discrimination Report* 673 (June 1, 1994).
326. Eric Schnapper, *Advocates Deterred by Fee Issues*, NAT'L L.J., March 28, 1994, at C1.
327. *Id.*
328. This comment is based on the author's personal experience and observation as an arbitrator.
329. FED. R. CIV. P. 26(a).
330. *Id.* 12(b)(7).
331. *Id.* 12(e).
332. *Id.* 12(d).
333. *Id.* 26, 37.
334. *Id.* 30, 31.

tories,[335] production of documents,[336] and requests for admissions.[337] All of these tactics are pursued in anticipation of the defendant's motion for summary judgment,[338] which has achieved a significant success for employers in recent years.[339]

After trial preparation and pretrial conferences,[340] the trial begins. At the close of the plaintiff's case, the defendant will likely move for judgment as a matter of law,[341] and this motion will usually be repeated at the close of all the evidence.[342] After the trial is concluded, if the employer is dissatisfied with the result, it can renew its motion for judgment as a matter of law[343] or for a new trial.[344] Still ahead is the employer's right to appeal to the appropriate United States Court of Appeals,[345] or ultimately by petition for a writ of certiorari to the Supreme Court.[346]

In summary, by opting to have employment discrimination claims determined by an arbitral forum, an employer is abandoning a formidable arsenal of weapons that could create significant impediments to a plaintiff's case and which would also serve as strong encouragement for the plaintiff to settle. Furthermore, by using the arbitral forum to keep strong cases out of court, an employer will be required to defend, through arbitration, many more cases that would have never made it into court.

Conversely, by waiving the right to adjudication in a federal court, an employee may gain the capability to vindicate his employment discrimination claim that might be otherwise beyond his reach. Although the employee is not the party introducing an arbitration agreement into the employment relationship, the employer may still benefit from the arbitration process. If the employee's case is strong and has ample damages, the employee often will be able to use the strategies discussed in this Article to attack the enforceability of the arbitration agreement. On the other hand, the employee will still be able to obtain an adjudication of a waiver claim, which, as a practical matter, could not be litigated.[347] To the employer trying to minimize exposure by staying out of court and to the employee trying to maximize recovery by going to court, the question remains: Do you *really* want to arbitrate?

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335. *Id.* 33.
336. *Id.* 34.
337. *Id.* 36.
338. *Id.* 56.
339. *See supra* note 291.
340. FED. R. CIV. P. 16.
341. *Id.* 50(a)(1).
342. *Id.* 50(a)(2).
343. *Id.* 50(b).
344. *Id.* 59.
345. *See* FED. R. APP. P. 3(a).
346. *See* 28 U.S.C. § 1254(1) (1988 & Supp. V 1993).
347. *See supra* text accompanying notes 324-327.