

**LET'S GET A VISION: DRAFTING EFFECTIVE ARBITRATION AGREEMENTS
IN EMPLOYMENT AND EFFECTING OTHER SAFEGUARDS
TO INSURE EQUAL ACCESS TO JUSTICE**

© 2003, Laurie Leader and Melissa Burger
Chicago-Kent College of Law
565 West Adams Street, Suite 600
Chicago, IL 60661
(312) 906-5048
Email: lleader@kentlaw.edu

Pre-dispute arbitration agreements in employment have the potential to revolutionize employment law. Between the years 1990 to 1998, the number of civil rights-based employment actions filed in federal court against private companies almost tripled from 8,413 in 1990 to 23,735 in 1998.¹ Employment battles are often hard-fought. Approximately one-third of the federal employment cases were tried in 1998; that percentage has since progressively decreased.²

Many employees never get to trial. They are denied justice at the outset because of their inability to afford counsel. Employees who opt to represent themselves are at an obvious disadvantage. If they are able to retain counsel, employees rarely go to trial, and—when they do—only 35.5% obtain favorable outcomes.³

¹ U.S. Dept. Of Labor, *2000 Report*, “Future of Worker-Management Relations.” Note that these figures do not include cases resolved by mediation or arbitration, by the Equal Employment Opportunity Commission (EEOC) at the administrative level or cases filed in state court. According to a Department of Justice study, over 30 million employment cases were filed in federal, state and local courts as of the year 2000. See Dept. of Justice, Bureau of Justice Statistics at www.ojp.usdoj.gov/bjs (“DOJ”).

² Administrative Office of the U.S. Courts, Bureau of Justice Statistics Civil Rights Complaints Report, 1990–98 (*1998 BOJ Report*). The percentage of cases proceeding to trial has been steadily decreasing. During the 2002 calendar year, 1,049 civil rights-employment cases were filed in the Northern District of Illinois. Over the same time period, 1,074 such cases were closed by the court. Only 21 cases or 2% were tried before a jury to verdict, four more (or .4%) were tried before a judge, and two more or .2% were the subject of directed verdicts. The majority were disposed of by settlement (445 or 41.4%), pre-trial motion (212 or 19.7%), or voluntary dismissal (124 or 11.5%).

³ The *1998 BOJ Report* notes that employees won in approximately 35% of the civil rights-employment cases tried during the 1990–98 time period. Other statistical reports paint a bleaker picture for employees. See generally Inter-University Consortium for Political and Social Research at the University of Michigan (ICPSR), which contains data gathered by the Administrative Office of the U.S. Courts and the Federal Judicial Center, at <http://www.icpsr.umich.edu>.

As these statistics suggest, employers fare better in federal court in terms of favorable outcomes. However, they achieve success at considerable cost. Defense costs and fees average in excess of \$100,000 if a case is tried. When coupled with the expenses associated with actual trial losses, most employers have difficulty shouldering their burden. In 1998, the median damage award in jury cases was \$137,000.⁴ In particular, 14.2% of the cases tried in 1998 resulted in jury awards of more than \$1 million; in 10.6% of the cases, the jury awards that year exceeded \$10 million.⁵ In addition to actual damages, employers are subject to pre- and post-judgment interest, compensatory damages and, in cases of intentional or reckless misconduct, punitive or liquidated damages. Attorneys' fees and costs may double when the employee prevails, since employers then face paying the plaintiff's statutory fees and costs in addition to their own.⁶

Against this backdrop, in *Circuit City Stores, Inc. v. Adams*,⁷ the United States Supreme Court endorsed the broad enforcement of pre-dispute arbitration clauses in employment agreements.⁸ From a policy perspective, this endorsement was not surprising. Clearly, the widespread arbitration of employment disputes promises to significantly reduce civil filings in federal court and, at the same time, provide a cost-effective alternative to litigation in resolving employment disputes. Why, then, do employers and employees alike resist the urge to arbitrate such disputes?

This article defines the permissible scope of arbitration agreements in employment and explores avenues to insure that both parties to the employment relationship view arbitration as a

⁴ 1998 BOJ Report.

⁵ *Id.*

⁶ *See, e.g.*, 42 U.S.C. §2000e-5(k) (Title VII's fee provision); 29 U.S.C. §216(b) (fees under the Age Discrimination in Employment Act). Costs are generally awarded to prevailing parties in federal litigation under Fed. R. Civ. P. 54(d). *See also* 28 U.S.C. §1920 for various expenses that may be taxed as costs.

⁷ 532 U.S. 105 (2001).

⁸ *Id.* at 119.

viable, cost-effective means to resolve employment disputes. It also proposes a model for district courts to use in referring employment disputes to arbitration. That model is based on the parties' pre- and post-dispute agreements to arbitrate and allows for the reformation of pre-dispute agreements that violate principles of basic fairness and mutuality. Court-sanctioned binding arbitration would reduce the court's civil docket and resolve employment disputes on a cost-effective basis without threatening plaintiffs' statutory remedies or fundamental notions of due process.

Part I: Circuit City and Its Progeny: Judicial Endorsement of Pre-Dispute Arbitration Agreements in Employment

Congress enacted the Federal Arbitration Act (FAA) to quell judicial hostility toward arbitration agreements.⁹ In the early years following enactment, the Supreme Court endorsed Congress's intent to "place arbitration agreements upon the same footing as other contracts"¹⁰ and consistently upheld written arbitration agreements in the commercial context.¹¹

The FAA's purpose is unmistakably commercial.¹² More specifically, Section 2 of the Act provides that a written agreement to arbitrate "any maritime transaction or a contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."¹³ Less clear—at least from the statutory language—is whether the FAA governs employment-related agreements to arbitrate.

⁹ *See Id.* at 118 (citing *Allied-Bruce v. Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995); *see also* *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-20 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974).

¹⁰ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

¹¹ *See, e.g.,* *Southland Corp. v. Keating*, 465 U.S. 1, 16-17 (1984); *Scherk*, 417 U.S. at 511, 519-20.

¹² *See, e.g.,* *Circuit City*, 532 U.S. at 125 (Stevens, J., dissenting).

¹³ Federal Arbitration Act, 9 U.S.C. § 2 (2002).

Section 1 of the Act provides that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹⁴ Until the Supreme Court decision in *Circuit City Stores, Inc. v. Adams*,¹⁵ courts struggled to determine whether Section 1 broadly excluded all types of employment agreements from the FAA’s reach.¹⁶ *Circuit City* resolved this issue, holding that Section 1 refers only to employment contracts of transportation workers directly engaged in commerce.¹⁷ Stated differently, the Supreme Court narrowly construed Section 1’s proscription to allow for arbitration clauses in all other types of employment agreements.

Since *Circuit City*, lower courts continue to struggle with enforcement issues in the employment context where parties enter into an agreement to arbitrate as a condition of employment.¹⁸ This struggle involves the tension between the courts’ desire to protect employees’ statutory rights, while permitting employers to regulate their workplace with minimal judicial intervention.

Employers increasingly seek pre-dispute binding arbitration agreements to avoid the costs and expenses associated with litigation. However, most employees view arbitration agreements with disdain, as negatively impacting their statutory rights to attorney’s fees and compensatory and punitive damages under the anti-discrimination laws. As a result, instead of viewing

¹⁴ 9 U.S.C. § 1.

¹⁵ 532 U.S. 105 (2001)

¹⁶ *See, e.g.*, *Herring v. Delta Airlines, Inc.*, 894 F.2d 1020, 1023 (9th Cir. 1990); *Arce v. Cotton Club*, 883 F. Supp. 117, 120 (S.D. Miss. 1995), interpreting Section 1 broadly to exclude all types of employment agreements from the scope of the FAA. *But see*, *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-76 (10th Cir. 1998); *O’Neil v. Hilton Head Hosp.*, 115 F. 3d 272, 274 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1470 (1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747-48 (5th Cir. 1996), interpreting Section 1 to exclude only the arbitration of employment agreements related to transportation workers.

¹⁷ 532 U.S. at 119.

¹⁸ *See, e.g.*, *Spinetti v. Service Corp. Int’l*, 324 F.3d 212 (3rd Cir. 2003); *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255 (11th Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (en banc); *McCaskill v. SCI Management Corp.*, 298 F.3d 677 (7th Cir. 2003); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677 (8th Cir. 2001).

arbitration as an opportunity to swiftly resolve their client’s dispute, employees’ counsel often challenge arbitration agreements on the grounds of lack of mutual obligation, coercion, or interference with statutory rights. Many of these concerns would be alleviated with well-drafted arbitration agreements and through adoption of procedural safeguards in the arbitration process itself.

A. Pre-Circuit City Arbitration Decisions

The Supreme Court first addressed the interplay of anti-discrimination statutes and the FAA in *Gilmer v. Interstate/Johnson Lane Corporation*.¹⁹ Employee Robert Gilmer filed suit in district court claiming that he was discharged in violation of the Age Discrimination in Employment Act (ADEA).²⁰ However, because Gilmer agreed to a pre-dispute arbitration provision as part of his broker registration application, the Supreme Court compelled arbitration.²¹ In doing so, the Court reaffirmed its position that “by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”²²

The *Gilmer* Court reasoned that Supreme Court precedent endorsed the arbitration of other federal statutory claims.²³ and that nothing in the Age Discrimination in Employment Act or its legislative history precluded the arbitration of age claims.²⁴ It further rejected any “generalized attacks” against the adequacy of arbitration procedures, such as the ability to retain impartial arbitrators, limited discovery procedures, restricted types of relief, or whether a written

¹⁹ 500 U.S. 20 (1991).

²⁰ *Id.* at 23.

²¹ *Id.* at 24, 35.

²² *Id.* at 26 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985)).

²³ *Id.* (citing antitrust, RICO and securities claims.)

²⁴ *Id.*

opinion would be issued.²⁵ Instead, the Court emphasized that the “FAA’s purpose was to place arbitration agreements on the same footing as other contract.”²⁶ However, because the arbitration agreement at issue was contained in a broker registration application and not with Gilmer’s employer, the Court failed to address the FAA’s scope in relation to individual employment contracts.²⁷

Thus, *Gilmer* provided limited guidance on how to apply the FAA’s Section 1 exemptions to employment contracts. Some post-*Gilmer* courts construed Section 1 broadly to exclude the arbitration of all employment disputes from the FAA’s reach,²⁸ while others excluded only the arbitration of employment agreements related to transportation workers.²⁹ Again, the Supreme Court’s subsequent decision in *Circuit City* construed Section 1 narrowly to exclude only employment contracts related to transportation workers directly engaged in commerce.³⁰

B. *Circuit City* and the Wrinkle of *EEOC v. Waffle House*

By virtue of their signed employment applications, Circuit City employees agreed to arbitrate any dispute arising out of their application for employment, employment and/or termination of employment, including claims under the federal anti-discrimination laws.³¹

Accordingly, when employee Saint Clair Adams filed an employment discrimination suit, the

²⁵ *Gilmer*, 500 U.S. at 30-32.

²⁶ *Id.* at 33.

²⁷ *Id.* at 25 n.2.

²⁸ See, e.g., *Herring*, 894 F.2d at 1023; *Arce*, 883 F.Supp. at 120.

²⁹ See, e.g., *McWilliams*, 143 F.3d at 575-76; *O’Neil*, 115 F.3d at 274; *Pryner*, 109 F.3d at 358; *Rojas*, 87 F.3d at 747-48.

³⁰ *Circuit City*, 532 U.S. at 109.

³¹ *Id.* at 109-110.

district court granted Circuit City's motion to compel arbitration.³² The Ninth Circuit reversed, reasoning that Section 1 of the FAA excluded mandatory arbitration.³³ The Supreme Court disagreed, limiting Section 1's exemptions to transportation workers.³⁴

In reaching its conclusion, the *Circuit City* Court rejected the argument that an employment contract was not "a contract evidencing a transaction involving interstate commerce," and that Section 2 of the FAA extended only to commercial contracts.³⁵ According to the Court, this interpretation "would make the section 1 exclusion provision superfluous."³⁶ In addition, it would be inconsistent with *Gilmer*, where arbitration of the employee's ADEA claim was compelled under a broker registration application, not a commercial contract.³⁷ The Court also restated its earlier determination that the FAA pre-empts state law.³⁸

Less than a year after *Circuit City*, the Supreme Court declined to expand the scope of the FAA in *EEOC v. Waffle House, Inc.*³⁹ There, the Court held that non-party public agencies are not bound by arbitration agreements arising out of the employment relationship.⁴⁰

The facts in *Waffle House* limit its reach. More specifically, Waffle House required its employees to sign pre-dispute arbitration agreements as a condition of employment. The company discharged Eric Baker shortly after he suffered a seizure at work.⁴¹ Baker filed a discrimination charge with Equal Employment Opportunity Commission (EEOC), challenging his discharge as a violation of the Americans with Disabilities Act.⁴² The Fourth Circuit held that the EEOC could pursue an enforcement action on behalf of Baker and the public interest, despite

³² *Id.* at 110.

³³ *Id.* at 110, 114; 9 U.S.C. §1.

³⁴ *Id.* at 109, 120-21.

³⁵ *Id.* at 113.

³⁶ *Id.*

³⁷ *Gilmer*, 500 U.S. at 23.

³⁸ *Circuit City*, 532 U.S. at 122 (citing the Court's decision in *Southland Corp.*, 465 U.S. 1).

³⁹ *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 122 S.Ct. 754 (2001).

⁴⁰ *Id.* at 759.

Baker's pre-dispute arbitration agreement, since the EEOC was not a party to the agreement.

However, the court limited the agency's remedies to injunctive relief.⁴³

The Supreme Court disagreed with this remedial limitation, noting that the FAA is designed to enforce private agreements and not to restrict a non-party's choice of forum.⁴⁴ The Court, thus, held that the EEOC could pursue a court action with victim-specific relief, including backpay, reinstatement, compensatory damages for pain and suffering and punitive damages for malicious and reckless conduct.⁴⁵

In theory, *Waffle House* creates a significant wrinkle in an employer's ability to preclude employment discrimination suits through pre-dispute arbitration agreements. In practice, *Waffle House* presents little impediment to employers seeking to resolve employment matters through arbitration. The EEOC files less than two percent (2%) of all anti-discrimination claims in federal court. That percentage only slightly increases (to close to 5%) in cases where the agency found reasonable cause following investigation.⁴⁶ Indeed, the *Waffle House* Court relied on these and other statistics to assert that "... permitting the EEOC access to victim-specific relief in cases where the employee has agreed to binding arbitration, ... will have a negligible effect on the federal policy favoring arbitration."⁴⁷

⁴¹ *Id.* at 758.

⁴² *Id.*; Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§12101–12213 (2202).

⁴³ *Waffle House*, 122 S.Ct. At 759.

⁴⁴ *Id.* at 764.

⁴⁵ *Id.* at 764–66, abrogating *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (limiting the EEOC to injunctive relief), and *Merrill, Lunch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814 (8th Cir.), *cert. denied*, U.S. 941 (2001).

⁴⁶ *Waffle House*, 122 S.Ct. At 762 n.7, citing EEOC, Enforcement Statistics and Litigation (as visited Nov. 18, 2001), <http://www.eeoc.gov/stats/enforcement.html>. According to EEOC statistics, "in fiscal year 2000, the EEOC received 79,896 charges of employment discrimination. Although the EEOC found reasonable cause in 8, 248 charges, it only filed 291 lawsuits and intervened in 111 others." *Id.*

⁴⁷ *Id.*

C. Post-Waffle House Lower Court Decisions

1. Cost Splitting Provisions as a Threat to Enforcement

More threatening to arbitration finality than *Waffle House* are cases which refuse to enforce agreements that mandate that each party pay half the costs of arbitration⁴⁸ or their own attorney's fees.⁴⁹ Historically, several courts found cost-splitting provisions to be unenforceable *per se*.⁵⁰ The Supreme Court decision in *Green Tree Financial Corp. v. Randolph*⁵¹ changed this tide. Since *Green Tree*, most courts address the issue of cost-splitting on a case-by-case basis to determine whether the potential cost of arbitration actually restricts an individual's access to the arbitral forum.⁵² Rather than void the entire arbitration agreement if the cost provision is prohibitive, the trend is to sever the offensive provision and compel arbitration under the balance of the agreement.⁵³

The *Green Tree* Court endorsed this case-by-case approach, refusing to void arbitration agreements silent on the issue of costs and fees as unenforceable *per se*.⁵⁴ While the Court recognized that "large arbitration costs could preclude a litigant ... from effectively vindicating her statutory rights in the arbitral forum," it held that the party challenging the agreement must

⁴⁸ See *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001); *Paladino v. Arnet Computer Techs., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).

⁴⁹ See *McCaskill*, 298 F.3d 677 (7th Cir. 2003). See also, *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001) (voiding agreement that required fee-splitting regardless of outcome).

⁵⁰ These cases found that cost-splitting agreements deny claimants an effective forum in which to vindicate their statutory rights. See, e.g. *Shankle v. B-G Maint. Mgmt. Of Col., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Perez*, 253 F.3d 1280 (4th Cir. 2001); *Paladino*, 134 F.3d 1054 (11th Cir. 1998); *Cole*, 105 F.3d 1465, 1484 (D.C. 1997) (establishing cost-splitting provisions as unenforceable *per se* and stating that claimants "would never be required to pay for a judge in court").

⁵¹ *Green Tree*, 531 U.S. 79.

⁵² See *Spinetti*, 324 F.3d at 217; *Musnick*, 325 F.3d at 1259; *Morrison*, 317 F.3d at 653, 660; *Bradford*, 238 F.3d at 556.

⁵³ See *Spinetti*, 324 F.3d at 219-22; *Morrison*, 317 F.3d at 675, 677; *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680-81 (8th Cir. 2001).

⁵⁴ *Green Tree*, 531 U.S. at 82, 92. Although the issue in dispute arose out of a consumer/lending agreement, the Courts analysis is instructive on how to approach the issue of whether arbitration is cost-prohibitive, thus precluding a plaintiff's ability to effectively vindicate his or her claim.

show that the cost of arbitration is prohibitive.⁵⁵ The Court criticized the plaintiff's reliance on American Arbitration Association (AAA) cost estimates as "too speculative" to support her contention that costs precluded her from pursuing arbitration.⁵⁶ Unfortunately, the *Green Tree* Court failed to offer more guidance on the type of evidence needed to show that arbitration is cost-prohibitive.⁵⁷ This void has been filled, in part, by a handful of Circuits considering the issue. The post-*Green Tree* courts have proposed various benchmarks for enforcement of cost-splitting provisions in employment arbitration agreements.⁵⁸

For example, in *Bradford v. Rockwell Semiconductor Sys., Inc.*⁵⁹ the Fourth Circuit posited that:

"... the appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims."⁶⁰

At least one problem with this approach exists where the plaintiff cannot produce a concrete estimate of arbitration costs during the initial stages of the proceeding. Under these circumstances, the court may prematurely determine that characterizing arbitration as cost-prohibitive is "too speculative."⁶¹ To avoid this problem, the Third Circuit has suggested that limited discovery identifying the arbitrator and approximating the length of the proceedings may

⁵⁵ *Id.* at 90-91.

⁵⁶ *Id.* at 91.

⁵⁷ *Id.* at 92. To support her assertion that pursuing arbitration was cost-prohibitive, Randolph used information provided by the American Arbitration Association (AAA) to estimate the potential cost of arbitration. Because the agreement did not designate an arbitrator, the court found that the estimates were insufficient to determine actual arbitration costs. *Id.* at 91 n.6. The dissent argued that, as a repeat player, the employer was in better position to estimate costs, and that this burden should not be placed on the plaintiff. *Id.* at 96 (Ginsburg, J, dissenting).

⁵⁸ See *Bradford*, 238 F.3d at 556; *Morrison*, 317 F.3d at 663-65.

⁵⁹ 238 F.3d 549 (4th Cir. 2001).

⁶⁰ *Id.* at 556.

⁶¹ *Morrison*, 317 F.3d at 660.

allow for a more accurate estimate of actual arbitration costs and the claimant’s ability to pay for them.⁶²

The Sixth Circuit has taken the cost-splitting inquiry one step farther. Recognizing that the federal discrimination laws protect individual rights as well as a “broader social purpose,” the Sixth Circuit has held that “[a] cost-splitting provision should be held unenforceable whenever it would have the ‘chilling effect’ of deterring a substantial number of potential litigants from seeking to vindicate their statutory rights.”⁶³ According to the Sixth Circuit, arbitration is cost-prohibitive when “similarly situated individuals” would forgo claims against an employer based on the likelihood of substantial arbitration costs.⁶⁴ Thus, in *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit considered this deterrent effect in terms of a former employee’s financial instability in determining whether to pursue arbitration where the risks of expending “scarce resources” would reap “uncertain benefit[s].”⁶⁵ This approach involves an expansive reading of *Green Tree*, since the *Green Tree* holding only considered whether arbitration is cost-prohibitive to the individual plaintiff.⁶⁶

A number of courts have opted to sever illegal cost-splitting provisions from arbitration agreements rather than void the entire agreement.⁶⁷ In *Spinetti v. Service Corporation*

⁶² See, e.g., *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3rd Cir. 2002). In *Blair*, the plaintiff submitted an affidavit of her limited financial capacity, but presented no evidence to establish the potential cost of arbitration. *Id.* at 608. The Third Circuit found that additional discovery was appropriate where the agreement indicated that the AAA would preside over any disputes. It, thus, remanded the case, so that the cost issue could be explored, giving the plaintiff the opportunity to prove that the potential cost of arbitration prevented her from vindicating her statutory rights. On remand, the defendant was given an opportunity to show that arbitration costs were not prohibitive, or in the alternative, to pay the arbitration costs and fees. *Id.* at 610.

⁶³ *Morrison*, 317 F.3d at 661.

⁶⁴ *Id.*

⁶⁵ *Id.* at 670. However, because the agreement contained a severability clause, the court deleted the cost-splitting provision and compelled arbitration. *Id.* at 675.

⁶⁶ *Green Tree*, 531 U.S. at 90-91.

⁶⁷ See, e.g., *Gannon*, 262 F.3d at 680 (endorsing severability of invalid terms where the arbitration agreement contemplated this result); *Morrison*, 317 F.3d at 675 (same). This suggests that severability clauses are critical to the enforcement of arbitration agreements.

International,⁶⁸ the Third Circuit affirmed severance of a cost-splitting provision that required “each party to pay its own costs and attorney’s fees, regardless of the outcome of the arbitration,” as well as one-half of the arbitrator’s fees and other arbitration costs.⁶⁹ As a result, the court compelled arbitration under the balance of the agreement.⁷⁰ The *Spinetti* Court also found that, implicit in the district court’s decision to sever, was a finding that the employer bear the responsibility for all arbitration costs; by contrast, the issue of attorney’s fees was governed by the statutory fee-shifting provision.⁷¹

2. Limitation of Remedies Further Threaten Enforcement

The *Spinetti* court further identified a “tension” between two public policy concerns: the federal policy favoring arbitration and the policy ensuring that claimants effectively vindicate their statutory rights through the arbitral forum.⁷² Where an arbitration agreement infringes on a plaintiff’s statutory rights by restricting the amount or type of remedy to which a plaintiff is otherwise entitled, courts do not hesitate to sever the remedial provision,⁷³ and sometimes even void the entire agreement.⁷⁴ In *McCaskill v. SCI Management Corporation*,⁷⁵ the Seventh Circuit opted to void a pre-dispute arbitration agreement which contemplated the arbitration of all employment disputes without the recovery of attorney’s fees. Notwithstanding the agreement, McCaskill filed a Title VII lawsuit arguing that the agreement was void and unenforceable,

⁶⁸ 324 F.3d 212.

⁶⁹ *Id.* at 214-15.

⁷⁰ *Id.* at 215, 223.

⁷¹ *Id.* at 218.

⁷² *Id.* at 213-14.

⁷³ *See, e.g., Morrison*, 317 F.3d at 675; *Gannon*, 262 F.3d at 680.

⁷⁴ *See, e.g., McCaskill*, 298 F.3d at 680 (7th Cir. 2003); *Ingle*, 328 F.3d at 1180 (9th Cir. May 13, 2003).

⁷⁵ 298 F.3d 677 (7th Cir. 2002).

because it required each party to pay its own attorney's fees.⁷⁶ Stated differently, McCaskill sought to void the agreement on the basis that the attorneys' fee provision precluded her from vindicating her Title VII right to attorney's fees as a prevailing plaintiff.⁷⁷ In an earlier opinion in the case, the Seventh Circuit agreed that a plaintiff's "statutory right to attorney's fees ... is essential to fulfill the remedial and deterrent functions of Title VII."⁷⁸ It, thus, determined that the entire agreement was unenforceable.⁷⁹ Severing the offensive provision was never raised as an option.⁸⁰

In *Spinetti*, the Third Circuit severed the *same* fee provision presented in *McCaskill*.⁸¹ The court explained that it reached a different result based on the parties' arguments. Severance was never raised in *McCaskill*; by contrast, it was the "main issue" before the *Spinetti* court.⁸² The Third Circuit first considered whether *Spinetti*'s arbitration agreement was valid under state law. Pennsylvania law provides that where an "essential" contract term is illegal, the entire contract is unenforceable.⁸³ The court found that the agreement's purpose was to resolve employment disputes and "not to regulate costs or attorney's fees."⁸⁴ Partial enforcement of the agreement was, therefore, proper. Indeed, the court could remove the illegal terms and modify the arbitration provision if equity so required.⁸⁵

⁷⁶ *Id.*, at 678. This decision endorsed an earlier decision by the Seventh Circuit, authored by Judge Rovner. See *McCaskill v. SCI Management Corp.*, 285 F.3d 623 (7th Cir. 2002) *rehearing granted and opinion vacated by* 294 F.3d 879 (7th Cir. 2003), *on rehearing* 298 F.3d 677 (7th Cir. 2003). On rehearing, the Court declined to address the provision which required the parties to split arbitration costs, including arbitrator fees, holding that the entire agreement was unenforceable based upon a provision stated that prohibited recovery of attorney's fees, in violation of Title VII. *McCaskill* 298 F.3d at 680.

⁷⁷ *McCaskill*, 298 F.3d at 680; *see also* *McCaskill*, 285 F.3d at 624.

⁷⁸ *McCaskill*, 285 F.3d at 627.

⁷⁹ *Id.* and *on rehearing* 298 F.3d at 680.

⁸⁰ *McCaskill*, 298 F.3d at 685. (Rovner, J., concurring).

⁸¹ *Spinetti*, 324 F.3d at 221.

⁸² *Id.*

⁸³ *Spinetti*, 324 F.3d at 214.

⁸⁴ *Id.* at 219; *See also*, *Gannon*, 262 F.3d at 681 ("The essence of the [disputed] contract ... is an agreement to settle ... employment disputes through binding arbitration.").

⁸⁵ *Spinetti*, 324 F.3d at 219–20.

Finally, in *Spinetti*, the Third Circuit rejected the EEOC’s position that “the employer should not have the benefit of a sanitized arbitration procedure stripped of the improper attorney fees and arbitration costs clauses” which would deter employees from seeking relief under arbitration agreements.⁸⁶ The court found that such argument would, in fact, ultimately compel employees to seek judicial resolution, along with the burdens and fees associated with litigation. It also found that the EEOC’s position was against the federal policy favoring arbitration. The court concluded that, “the increasing awareness by claimants’ counsel of their severability will, at least, ensure that employees who inquire about remedies will be given appropriate advice by counsel.”⁸⁷

The Sixth Circuit also will sever—rather than void—arbitration agreements that limit front pay and punitive damages, as well as other remedies available to prevailing Title VII plaintiffs.⁸⁸ In *Morrison v. Circuit City*, the Sixth Circuit consolidated two cases challenging the validity of an arbitration agreement under Title VII, in an *en banc* review.⁸⁹ In the first case, Morrison signed an arbitration clause as part of her application for a managerial position with Circuit City.⁹⁰ Morrison alleged that she was terminated because of race and sex discrimination and subsequently filed suit in district court. Circuit City’s motion to compel arbitration was granted, and Morrison appealed.⁹¹

⁸⁶ *Id.* at 223.

⁸⁷ *Id.*

⁸⁸ *Morrison*, 317 F.3d at 655, 670. The agreement also required each party to pay its own attorney’s fees, but gave the arbitrator discretion to award reasonable attorney’s fees to an employee who “prevails at the arbitration.”

⁸⁹ *Id.* at 652.

⁹⁰ *Id.* at 654.

⁹¹ *Id.* at 655-56. However, because the arbitration was not stayed, the parties participated in a hearing on Morrison’s claims and an award was issued. Morrison did not seek judicial review of the arbitration award. Despite the arbitration, the Sixth Circuit declined to dismiss the appeal as moot. The court reasoned that it could still grant effectual relief in the event it determined that the arbitration clause was unenforceable and, thus, that the arbitration should have never taken place. *Id.* at 656 n.2. Ultimately the Sixth Circuit determined that the offensive provisions should have been severed before compelling arbitration; however, it affirmed the lower court’s decision, because the arbitration had already taken place, and the arbitrator failed to require Morrison to share in the cost of the proceedings or to apply any limitations on remedies. *Id.* at 676.

Circuit City adopted specific “Rules and Procedures” to govern the arbitration of employment disputes, including an intricate cost-splitting provision under which the claimant/employee was required to pay the initial \$75 filing fee and Circuit City would advance subsequent arbitration costs. Absent an award of costs to the prevailing party, the employee was required to pay one-half of the final arbitration costs within ninety days of the arbitration award.⁹² In addition, each party was responsible for its own attorney’s fees, subject to the arbitrator’s discretion.

The rules also outlined discovery procedures and available remedies, including injunctive relief, back pay, front pay, compensatory damages, punitive damages, and a limited amount of monetary damages.⁹³ The *Morrison* court found that the remedies provision undermined the remedial and deterrent purposes of Title VII, and that the cost-splitting provision would likely deter potential litigants from pursuing grievances due to the potential cost of arbitration. Thus, it was appropriate for the court to sever the offensive provisions and enforce the balance of the agreement.⁹⁴

In the second *Morrison* case, Mark F. Shankle agreed to binding arbitration as a condition of his employment with Pep Boys. Shankle’s agreement stated that arbitrations held there under would follow the Model Employment Arbitration Procedures of the American Arbitration Association (AAA), “except as provided in this agreement.”⁹⁵ The agreement further provided that arbitrators would be selected from a list of eleven arbitrators presented by the AAA, and that

⁹² *Id.* at 654-55.

⁹³ *Id.* at 655.

⁹⁴ *Id.* at 675. The Sixth Circuit rejected Morrison’s argument that the arbitration agreement lacked mutuality of consideration. *Id.* at 667. Although the company was free to modify or terminate the agreement at the end of each year, the court found that there was sufficient consideration based on the agreement’s termination clause, which required thirty days’ notice. It also concluded that Morrison “knowingly and voluntarily waived her right to pursue her employment claims in federal court,” since she was highly educated, the waiver was clear and unambiguous, and applicants had three days to withdraw their consent. *Id.* at 667-68.

⁹⁵ *Id.* at 656.

additional lists would be provided if the parties did not agree on a common person.⁹⁶ The arbitrator's fee was to be split between the employee and the company, with each party bearing his or her other costs and attorney's fees, unless the arbitrator awarded fees to the prevailing party.⁹⁷

When Shankle sought severance pay following his resignation from Pep Boys, he was informed that the parties' prior agreement required that the claim be arbitrated. Although Shankle initiated arbitration, under the advice of new counsel, he tried to withdraw therefrom and sue Pep Boys in federal court for alleged violations of Title VII. The district court granted Shankle's motion to stay arbitration and held that the agreement's cost-splitting provision was unenforceable. Concerned with discrepancies between the procedures stated in the company's arbitration agreement and those followed by the AAA, the district court struck the remainder of the agreement as unenforceable, finding "no meeting of the minds as to the procedures to be followed during the arbitration."⁹⁸ The Sixth Circuit acknowledged significant discrepancies between the agreement procedures and those followed by AAA. Nevertheless, the court elected not to void the entire agreement. Instead, it compelled arbitration under the agreement's supremacy clause.⁹⁹

3. The New Wrinkle: Are Class Actions Permitted in Arbitration, and Who Decides this Issue?

⁹⁶ *Id.*

⁹⁷ *Id.* at 657.

⁹⁸ *Id.*

⁹⁹ *Id.* at 680.

Until recently, the concepts of arbitration and classwide relief were considered by most to be mutually exclusive.¹⁰⁰ That changed with the recent Supreme Court decision in *Green Tree Financial Corporation v. Bazzle*.¹⁰¹ In a plurality opinion authored by Justice Breyer, the court held that an arbitrator should decide whether the underlying agreements forbid class arbitrations where they were silent on the subject.¹⁰² The court, thus, rejected caselaw which upheld the judicial authority to direct class-wide arbitrations and vacated a judgment entered by the South Carolina Supreme Court.¹⁰³

Bazzle involved two cases and two financing agreements with Green Tree Financial. Both agreements contained clauses requiring the arbitration of all contract-related disputes. In the first case, Lynn and Burt Bazzle sued Green Tree in state court, claiming that their standard financing agreement for home improvements violated South Carolina law by failing to provide them with a legally required form advising them of their right to select their own attorney and insurance agent.¹⁰⁴ The Bazzles amended their complaint to include class allegations and moved for class certification. Green Tree moved to stay the court action and to compel arbitration based on the parties' agreement. The state court certified a class and compelled class-wide arbitration.

Similarly, Daniel Lackey and George and Florine Buggs sued Green Tree for failing to allow for attorney and insurance agent preferences in their finance agreements to purchase mobile homes. Lackey sought class certification, and Green Tree sought arbitration. After an appellate court found the arbitration clause to be enforceable, the parties consented to arbitration

¹⁰⁰ See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274 (7th Cir. 1999); *Med. Ctr. Cars, Inc. v. Smith*, 727 So.2d 9, 20 (Ala. 1998) (refusing to recognize class-based arbitration absent an arbitration clause expressly allowing class-based arbitration).

¹⁰¹ ___ U.S. ___, 123 S.Ct. 2402, 156 L.Ed.2d 414 (2003).

¹⁰² 123 S.Ct. at 2407–08. Justices Scalia, Souter and Ginsburg joined in the opinion. Justice Stevens concurred in the judgment. *Id.* at 2408–09.

¹⁰³ *Id.* at 2408, *vacating and remanding* 351 S.C. 244, 569 S.E.2d 349 (2000).

¹⁰⁴ *Id.* at 2405.

before the same arbitrator appointed to handle the Bazzles' dispute.¹⁰⁵ The arbitrator certified a class over Green Tree's objection.

Both the *Bazzle* and *Lackey* arbitrations resulted in multi-million dollar class awards, including attorneys' fees and costs, based on the arbitrator's finding that the financing agreements violated South Carolina's consumer protection law.¹⁰⁶ The trial court confirmed both awards, denying Green Tree's motions to vacate. Green Tree appealed, claiming that class arbitration was legally impermissible under its financing agreements.

The South Carolina Supreme Court withdrew both cases from the appeals court to assume jurisdiction over a consolidated appeal. It noted that where the parties' agreement is silent on the subject of class arbitration, South Carolina will construe this "ambiguity" against the drafting party. Accordingly, the court held that state law interpreted silent agreements as permitting class arbitrations.¹⁰⁷ The United States Supreme Court granted *certiorari* to determine whether this holding was consistent with the FAA, but never reached this question.¹⁰⁸ Instead, the Court remanded the case to the arbitrator to decide whether the agreement language allowed for class arbitration.

The plurality considered this issue to be one of contract interpretation and, thus, within the arbitrator's purview.¹⁰⁹ The court explained that the agreement language was ambiguous and that any doubts about the scope of arbitration should be resolved in favor of arbitration.¹¹⁰

¹⁰⁵ *Id.* at 2405–06.

¹⁰⁶ *Id.* at 2405–06. Specifically, the *Bazzle* class was awarded \$10,935,000 in statutory damages, along with attorneys' fees. The *Lackey* class was awarded \$9,200,000 plus fees.

¹⁰⁷ 123 S.Ct. at 2406.

¹⁰⁸ *Id.* Implicit in the plurality holdup is a finding that the FAA did not foreclose class arbitration; otherwise, it would not have reached the state law question of contract interpretation.

¹⁰⁹ 123 S.Ct. at 2406–07.

¹¹⁰ *Id.* at 2407, (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

The plurality further distinguished the issue of class arbitrability from other “gateway matters” decided by the courts, including whether the parties agreed to arbitration and “whether a concedely binding arbitration clause applies to a certain type of controversy.”¹¹¹

Without question, the availability of class arbitration could be deemed a “gateway matter” of the latter variety. By characterizing the issue as one of contract interpretation and not jurisdiction, the Supreme Court expanded the arbitrator’s role beyond the four corners of the contract. It justified this result by framing the relevant question in terms of “*the kind of arbitration proceeding* the parties agreed to.”¹¹² According to the Court, that question concerned neither a state statute nor judicial procedures. Under these circumstances, an arbitrator was deemed “well-suited” to decide the question.¹¹³

Chief Justice Rehnquist argued in his dissent that the issue of class-wide arbitration should be left to the courts, since it is “more akin” to questions of “what shall be arbitrated,” which are decided by courts and not arbitrators.¹¹⁴ Justices Kennedy and O’Connor joined in the dissent. They interpreted the underlying agreements to limit arbitration to the contracting parties.¹¹⁵ In their view, *Green Tree* was denied its right to select an arbitrator for each dispute when—in a class context—the same arbitrator was imposed to resolve multiple claims.¹¹⁶

Although *Green Tree* was not an employment case, its language is broad enough to impact employment arbitrations. Still unclear is the extent to which courts will endorse contract provisions which ban class arbitrations. Such clauses have been voided as against public policy

¹¹¹ 123 S.Ct. at 2407.

¹¹² *Id.*

¹¹³ *Id.* (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)).

¹¹⁴ 123 S.Ct. at 2410 (Rehnquist, C.J., dissenting, in which Justices O’Connor and Kennedy joined). Justice Thomas filed a separate dissent on the ground that the FAA does not apply to state court proceedings. *Id.* at 2411.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2411.

under California law.¹¹⁷ *Bazze* did not address this issue, since its holding was prescribed by the contract language. Indeed, a broader holding would have mandated that the class arbitration issue be decided by a court as a matter of jurisdiction.¹¹⁸

The Supreme Court's obvious split on the issue of class arbitrations raises these and other policy concerns. There is also the danger of inconsistent opinions if arbitrators decide whether to allow a matter to proceed to class arbitration. This danger is underscored by the fact that arbitration decisions are without precedential value.¹¹⁹ To avoid uncertainty, arbitration clauses must address the issue of whether class arbitration is contemplated and who will determine any ambiguities concerning arbitrability.

Part II: Ensuring Fundamental Fairness: Drafting Implications for Arbitration Agreements and Other Procedural Safeguards

The increasing use of pre-dispute arbitration clauses in employment agreements has the potential to significantly reduce civil filings in federal courts while, at the same time, providing a cost-effective alternative to litigation.¹²⁰ Employers generally recognize the cost benefits of arbitration. Employees, by contrast, are afraid to waive their right to a judicial forum and seek assurances for the protection of their legal and statutory rights. But this fear is often unfounded. It assumes biased arbitrators and that arbitration costs will exceed litigation expenses based on unfair comparisons. Rarely do these comparisons consider protracted discovery expenses unique to litigation or the fact that plaintiff's employment lawyers typically charge litigation retainers

¹¹⁷ See *Ingle*, 328 F.3d at 1175–76.

¹¹⁸ See, e.g., *First Options of Chicago, Inc. v. Kaylan*, 514 U.S. 938, 945 (1995).

¹¹⁹ See generally Harris, "The Use of Precedent in Labor Arbitration," 32 *Arb.J.*26 (1977). While arbitrators are not bound by the doctrine of *stare decisis*, they may follow other decisions as persuasive where different parties and agreements are involved.

¹²⁰ See e.g., Evan J. Spelfogel, *Mandatory Arbitration v. Employment Litigation*, 54 *Disp. Resol. J.* 78 (May 1999).

and, increasingly, reduced hourly rates.¹²¹ Instead, they compare filing fees among the various forums without regard to the additional expenses associated with jury demands or the fact the employers are likely to cover the arbitration fees in light of recurring enforcement problems that result when the employee is forced to bear costs.¹²² When more realistic comparisons are employed, arbitration emerges as a prompt and economical alternative to the litigation of employment disputes.

There is also evidence to suggest that employees more often prevail before an arbitrator than in court, although their awards may be less in arbitration.¹²³ Awards may be “evened out” through remedial provisions in arbitration agreements that allow employees to recover all statutory remedies in the arbitral forum. To insure full relief and that arbitration is generally viable, a well-drafted agreement is critical. This will help to ensure due process, protect employee rights and alleviate employee concerns that arbitrations favor employers.

A. Contract & Drafting Implications to Ensure Substantive Due Process

Drafting an effective arbitration agreement begins by adhering to the basic contract principles of offer, acceptance and consideration. The language of an arbitration agreement

¹²¹ See e.g., *Public Citizen*, “The Costs of Arbitration,” 40–44 (May 2002), at <http://www.citizen.org/publications/>. Few employees can afford to pay attorneys on an hourly basis, even when rates are reduced. Statutory fees provide little incentive to plaintiff’s counsel who spend hundreds of hours in discovery and responding to pretrial motions without relief. Because of these and other factors (including judicial decisions increasing a plaintiff’s burden of proof in discrimination cases), the pool of competent plaintiff’s counsel is diminishing. This trend, too, impacts employees’ access to justice. Arbitrations promise to reverse this trend if plaintiff’s counsel are allowed to obtain statutory fees in an expedited forum in which their rate of success exceeds that available in federal court. At least thus far, plaintiffs’ counsel continue to resist arbitration efforts, sometimes through propaganda that is more fiction than fact. See, e.g., “Mandatory Arbitration Subverts Civil Rights Laws” at the National Employment Lawyers Association website, <http://www.nela.org>.

¹²² *Id.* at 43.

¹²³ See generally, Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 Int’l J. Conflict Mgmt. 369 (1995); Inter-University Consortium for Political and Social Research, <http://www.icpsr.umich.edu>.

should clearly express the parties' intent to resolve disputes through binding arbitration rather than through a judicial forum.

There is a presumption that signed employment applications or employment agreements, including contracts of adhesion, are voluntary.¹²⁴ Courts have stricken only a handful of agreements as unconscionable, where the agreement is uneven.¹²⁵ Thus, an agreement was stricken which unilaterally required employees to arbitrate without creating a corresponding obligation on the employer. Agreements which give employers exclusive control over the pool of potential arbitrators will, likewise, be stricken as violating basic notions of due process.¹²⁶ By contrast, where the agreement is supported by consideration, and the employer is equally obligated to arbitrate employment-related disputes, the arbitration agreement will withstand arguments that it is against public policy or unconscionable.¹²⁷

The more common threat to enforcement and a principal concern of employee advocates lies in provisions that compromise an employee's statutory remedies or legal rights. *Green Tree* and its progeny stand for the proposition that courts may sever clauses that render arbitration cost-prohibitive or otherwise limit employee remedies.¹²⁸ Even class actions may be pursued in arbitral and judicial forums.¹²⁹ The ultimate question is how far courts should go in reforming agreements that are silent on critical issues or lack mutuality.

¹²⁴ See, e.g., *Gilmer*, 500 U.S. at 33 (“Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context”).

¹²⁵ See, e.g., *Ingle*, 328 F.3d at 1173–74 (finding that the arbitration agreement was one-sided because it “essentially cover[ed] only claims that at employees would likely bring against [the employer],” but not claims that the employer might bring against employees).

¹²⁶ See *McMullen v. Meijer, Inc.*, 337 F.3d 697, 703–05 (6th Cir. 2003) (*per curiam*) (finding the arbitrator-selection process fundamentally unfair.)

¹²⁷ See, e.g., *Morrison*, 317 F.3d at 668 (plaintiff “knowing and voluntarily waived her right to pursue her employment claims in federal court” considering the fact that she was highly educated, the waiver to file suit in court was clear, and applicants had three days to withdraw their consent); *Circuit City Stores, Inc. v. Ahmed*, 283 F. 3d 1198 (9th Cir. 2002) (holding that an arbitration agreement was not procedurally unconscionable where employee had the opportunity to opt out of program implementing binding arbitration, but did not do so).

¹²⁸ *Green Tree*, 531 U.S. 79; See also *Spinetti*, 324 F.3d at 219–20.

¹²⁹ See *Bazze*, 123 S.Ct. at 2407.

When drafting arbitration agreements, employers must consider whether to exclude cost-splitting provisions altogether or limit their scope to those cases in which the recovery of costs and fees will not effectively deny employees their right to representation. Arbitrators determine whether cost-splitting is prohibitive, based on a number of factors, including: whether the employee is currently employed; the identity of, and fees associated with the arbitrator presiding over the dispute; and the cost of initial filing fees.¹³⁰ The arbitrator also may request additional discovery to decide whether particular any cost-splitting measures are deserving of enforcement.¹³¹

Alternatively, the arbitration agreement may exclude cost-splitting provisions. The presumption here is that the employer will bear the cost of arbitration.¹³² The agreement also may state that the employer bears all costs. But even in this scenario, the employer comes out ahead, since the cost of arbitration is significantly less than the cost of protracted litigation.¹³³ To eliminate any perceived bias that the arbitrator favors the party who pays, the arbitrator's fees should be paid through the entity administering the arbitration and not directly to the arbitrator.¹³⁴ To alleviate concerns of unconscionability, the cost provisions must be clearly spelled out.

Although courts often sever provisions that limit statutory remedies, it is not in the employer's best interest to include provisions likely to threaten enforcement. By doing so, the advantages of arbitration are diminished or lost, as parties waste time and resources challenging

¹³⁰ *Bradford*, 238 F.3d at 556; *Morrison*, 317 F.3d at 670.

¹³¹ *E.g., Blair*, 283 F.3d at 610, *supra* note 63.

¹³² *See, e.g., Spinetti*, 324 F.3d at 218, *supra* note 72.

¹³³ Linda Goodspeed, *Litigation's Rising Price Tag Boosts Arbitration's Appeal*, Boston Bus. J. (Oct. 7, 2002) at <http://boston.bizjournals.com/boston/stories/2002/10/07/focus3.html>; Helen W. Gunnarsson, *Law Pulse*, 90 Ill. B. J. 282, 285 (2002).

¹³⁴ American Arbitration Association, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* at <http://www.adr.org/index2.1.jsp?JSPssid=15769> (May 9, 1995) [hereinafter *Due Process Protocol*]. The *Due Process Protocol* was established in 1995 by individuals representing

or defending offensive provisions. The wiser course is to design agreements that expressly protect employees' statutory rights and provide the same remedies as are available in law or equity.¹³⁵

For example, arbitration agreements should acknowledge an employee's right to counsel and encourage the employee to review the agreement with counsel before signing it.¹³⁶ Because it is in the employer's interest to expedite hiring and other employment decisions, the agreement should set a reasonable review period (such as five business days) before the employment offer is withdrawn. Where the agreement to arbitrate is part of an employment application, the employer should provide an opt-out period of at least three days.¹³⁷

B. Due Process Safeguards

Procedural safeguards are integral to the successful arbitration of employment disputes and to quell employee perceptions that arbitrations favor employers. Arbitration agreements should, therefore, provide that the parties jointly select the arbitrator, define the types of disputes to be arbitrated, and establish available remedies. Where the arbitration agreement and proceedings comport with due process requirements, employees need not fear any compromise of their legal rights.

Perhaps, the most significant distinction between arbitral and judicial forums is the right to jury trial. At least in the context of employment discrimination, employees who pursue arbitration waive their right to present their claims to a jury. The absence of procedural checks

labor, management, employment, civil rights organizations, private administrative agencies, government and the American Arbitration Association. It was amended, effective November 1, 2002.

¹³⁵ See, e.g., *Due Process Protocol* *supra* note 112; see also *supra* text accompanying note 23.

¹³⁶ See *Due Process Protocol* *supra* note 112.

¹³⁷ See *Morrison*, 317 F.3d at 668.

and balances further distinguishes the two types of forums. Arbitration decisions are not disturbed except for abuses of discretion.¹³⁸

Ironically, the advantages of arbitration are realized, in part, through diminished procedural safeguards. Arbitration is more expedient and cost-effective than litigation, because the process is streamlined and the arbitration decision is final and binding. A compromise position assuages employee concerns by establishing minimum procedural safeguards in the arbitral process.¹³⁹ These minimum safeguards may include:

- A neutral arbitrator with expertise in employment issues, particularly statutory anti-discrimination claims;
- Employer and employee participation in selecting the arbitrator;
- Limited pre-trial discovery methods to obtain relevant information, yet designed to curb discovery abuse;
- Application of the Federal Rules of Evidence;
- Right to representation by counsel;
- Arbitrator discretion of cost allocation;
- Arbitrator authority to award remedies available at law and in equity; and
- Issuance of a written opinion.

A practical impediment to the arbitration of employment disputes arises in the limited pool of available arbitrators with expertise in employment law.¹⁴⁰ Arbitration has thrived in the traditional labor context, since collective bargaining agreements typically include arbitration provisions as the final step in a grievance process.¹⁴¹ Labor arbitrators, adept at contract interpretation in a union setting, often have little or no experience in matters of statutory

¹³⁸ Nile J. Williamson, *Arbitration clauses in Employment Contracts: to Do or Not to Do*, 39 Labor and Employment Law (Ill. State Bar Ass'n) May 2002, at 3.

¹³⁹ See e.g., Spelfogel *supra* note 102; *Due Process Protocol supra* note 112; American Arbitration Association, *National Rules for the Resolution of Employment Disputes* ("NRRED") at <http://www.adr.org/index2.1.jsp?JSPssid=15747> (as amended and effective November 1, 2002).

¹⁴⁰ See *Due Process Protocol supra* note 112; *Prospects for Employment Arbitration Use Debated at American Bar Association Meeting*, 18 Individual Employee Rights (BNA) Sept. 3, 2002, at 78.

¹⁴¹ Dennis Nolan, *Labor and Employment Arbitration: What's Justice Got To Do With It?*, 53 Disp. Resol. J. 40, 44 (1998).

interpretation arising under anti-discrimination laws.¹⁴² Through training, arbitrators may be educated about substantive, procedural and remedial issues related to anti-discrimination statutes as well as general issues otherwise arising out of the employment relationship.¹⁴³

Neutrality furthers the interests of both parties by helping to ensure the finality of binding arbitration. An arbitrator must disclose financial or other interests that may result in a conflict of interest, any previous relationship with the party, or personal knowledge concerning the dispute, so that parties may make an informed decision.¹⁴⁴ Both employer and employee should participate in selection of the arbitrator. For example, the agency presiding over the arbitration can give the parties a list of arbitrators, including their experience and other information to identify potential conflicts of interest. Parties may choose an arbitrator from this list by agreement or process of elimination.¹⁴⁵

To the extent the agreement is silent on the topic of fees and costs, it must afford the arbitrator with the discretion to allocate costs and fees between the parties and to award remedies available in law and in equity. The arbitrator should reduce his or her opinion to writing and allow for limited discovery to allow employees to obtain information relevant to their claims.¹⁴⁶ Such safeguards help assure that employees' due process rights are protected.

In *Gilmer*, the Supreme Court recognized that the arbitration discovery procedures were more limited than in the federal courts, but that "by agreeing to arbitrate, a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and

¹⁴² *Id.* at 46-47

¹⁴³ *See Due Process Protocol*, *supra* note 112.

¹⁴⁴ *Id.*

¹⁴⁵ *See, e.g., Morrison*, 317 F.3d at 654, 656.

¹⁴⁶ *See e.g., Blair*, 283 F.3d at 610 and *supra* text accompanying note 63. Note, however, that the discovery process must be restricted to curb discovery abuses that could delay the arbitration hearing or significantly increase the costs associated with it.

expedition of arbitration.”¹⁴⁷ The Court also found that the NYSE discovery provisions, which allowed for document production, information requests, depositions and subpoenas, were sufficient.¹⁴⁸ Whether the procedures are promulgated by the employer in the arbitration agreement or by the agency presiding over the dispute, the rules should encourage the arbitrator to permit broader discovery, if necessary.¹⁴⁹

Additional safeguards may include limitations on the use of hearsay to insure that arbitration testimony has certain minimal indicia of reliability. Current arbitration practice allows for the admission of hearsay, as long as the opponent is afforded the opportunity to cross-examine the hearsay declarant.

Part III: Proposal

The idea of less formal and more expedited methods of dispute resolution to relieve the burdened judicial system has been a topic of debate since the 1970s.¹⁵⁰ In 1998, Congress enacted the Alternative Dispute Resolution Act,¹⁵¹ endorsing ADR programs as a means to provide “innovative methods of resolving disputes, and greater efficiency in achieving settlements,” as well as reduce federal judicial backlog. Section 652 of the Act states that “each district court shall ... require that litigants in all civil cases consider the use of an alternative

¹⁴⁷ *Gilmer*, 500 U.S. at 31.

¹⁴⁸ *Id.*

¹⁴⁹ Nolan *supra* note 120, at 47. For example, the AAA *National Rules for the Resolution of Employment Disputes* (NRRED) give the arbitrator authority to order discovery including deposition, interrogatory, and document production “as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.” Another time-saving measure is the pre-hearing Arbitration Management Conference, giving the parties an opportunity to “explore and resolve matters that will expedite the arbitration proceedings.” However, NRRED do not apply the Federal Rules of Evidence.

¹⁵⁰ *See Dispute Resolution*, 88 Yale L.J. 905 (1979).

¹⁵¹ 28 U.S.C. § 651-658 (2002).

dispute resolution process at an appropriate state in the litigation,¹⁵² and Section 654 specifically provides for arbitration where appropriate.¹⁵³

Despite widespread endorsement, the potential for alternative dispute resolution to revolutionize employment law is far from realized. Linking arbitration to the judicial system would help parties feel more comfortable with arbitration, rather than considering it a secondary alternative to litigation. And by targeting cases that are ripe for settlement, court-facilitated arbitration would alleviate judicial backlog and filings.¹⁵⁴

As a practical matter, the initial inquiry into whether court-facilitated arbitration is appropriate should begin when a complaint is filed. The parties would be requested to complete a questionnaire at the outset of litigation to identify disputes that are ripe for arbitration. To determine whether arbitration is compelled under a pre-dispute agreement, the questionnaire would seek information as to whether the parties entered into an employment agreement with a mandatory arbitration clause and, if so, the terms of that clause. Where an agreement to arbitrate exists, the court should dismiss the litigation if the arbitration is to be final and binding unless provisions for cost-splitting or limitation of remedies threaten enforcement.

¹⁵² *Id.* at § 652.

¹⁵³ *Id.* at § 654. For example, in Illinois, various methods of ADR are authorized or required in both state and federal judicial systems. See Jennifer E. Shack and Danielle Loevy, *Summary of Court-Related ADR in Illinois*, Center for Analysis of Alternative Dispute Resolution Systems, at http://www.caadrs.org/studies/adr_summary.htm (last modified May 15, 2002); Suzanne J. Schmitz, *Using ADR for your Client: An Illinois Lawyer's Guide*, 85 Ill. B.J. 64 (1997).

¹⁵⁴ The model proposed here requires judicial intervention, both in referring cases to binding arbitration and in reviewing and sometimes reforming pre-dispute arbitration agreements to ensure that the agreement contains due process safeguards and is not otherwise unconscionable. It thus differs from current court-annexed, non-binding arbitration programs funded by Congress that exist in ten federal districts nationwide, including: the Eastern District of Pennsylvania, the Middle District of Florida, the Western District of Missouri, the Western District of Oklahoma, the Middle District of North Carolina, the Western District of Michigan, the Northern District of California, the Eastern District of New York and the Western District of Texas. See Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (1990). Under these programs, parties who are dissatisfied with the arbitration decision may demand a trial *de novo* within a set time period. Absent timely demand for a trial *de novo*, the arbitration award becomes a non-appealable judgment of the court. *Id.* at 3.

Where enforcement of a pre-dispute clause is questionable because of remedial or cost-splitting provisions, the court may reform the agreement to allow for arbitration under circumstances that will comport with notions of fundamental fairness and insure that prevailing plaintiffs secure their statutory remedies. To the extent that the parties dispute whether the arbitration clause is itself enforceable, the court may resolve the issue early on through a petition for declaratory relief and avoid needless litigation in the process.

Even where the parties failed to provide for arbitration on a pre-dispute basis, a court-endorsed questionnaire could explore whether the parties are currently interested in pursuing arbitration as an alternative to litigation. Such post-dispute arbitration would be particularly appropriate in situations where there is a *pro se* litigant, a small amount in controversy, or a continued relationship between the parties. Other considerations favoring arbitration would include: time constraints, the failing health of parties or key witnesses, and the parties' ability or inability to pay for litigation. The court could dismiss the claims at its initial hearing if the parties agreed to submit their dispute to binding arbitration. A consent form signed by the parties, similar to that used to refer matters to a magistrate judge, could allow for post-dispute arbitration and memorialize the agreement to do so. Due process safeguards should be insured in any post-dispute agreement to arbitrate.

Conclusion

While arbitration is not a panacea for problems that plague the judicial system, it may alleviate those problems and emerge as a cost-effective option to the litigation of employment disputes. Courts continue to flush out enforcement issues related to unconscionability, fee-shifting, statutory remedies and procedural issues, including class actions. Within these

boundaries, the possibilities for arbitration are limited only by the terms of the parties' agreement and concepts of fundamental fairness.

Under the proposed model, courts would insure that the letter and spirit of employment arbitration agreements comport with procedural due process, in theory and in practice. To achieve widespread adoption, the judiciary needs to proactively endorse arbitration as a viable alternative to litigation. Judging by the impact to date of *Circuit City v. Adams* and its progeny, expanding the FAA's reach fails to go far enough. What is needed, in addition, is a court-sanctioned model through which courts and arbitrators can work together to minimize judicial backlog and maximize results. Employment disputes are a good starting point for realizing these goals and objectives.