ened further because the claims being adjudicated involve issues of public law and policy rather than matters of purely private agreement.

Assuming that legislation is not enacted that will halt the trend toward adoption of these systems, one can expect norms to develop in the design of these ADR systems that will better balance the legitimate interests of employers and employees, the courts, the appointing agencies, and the legitimate interests of arbitrators to preside only in situations that are fair and regular and that achieve the valid goals of an ADR system. This will be the kind of system that enlists the services of expert arbitrators who can adjudicate employment disputes competently in a flexible, cost-effective, relatively prompt, and relatively informal forum.

II. UNRESOLVED ARBITRATION ISSUES IN THE NONUNION SETTING

HARRIET E. COOPERMAN*

Mandatory binding arbitration of employment disputes in a nonunion setting has faced challenges on many fronts, usually fed by misplaced employee fears that such a forum is more advantageous to the employer. This paper outlines how courts have addressed these arguments, the issues on which courts disagree or remain unresolved, and the issues an employer must consider in order to draft an acceptable arbitration agreement.

Background on Mandatory Binding Arbitration

Mandatory binding arbitration, as a term and condition of employment, requires that all disputes arising out of the employee's employment or the termination of employment be resolved through arbitration. Arbitration has been hailed as a welcome vehicle for the reduction and cost of litigation, the alleviation of unmanageable backlogs in the courts, and the general enhancement of

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efficiency in the American legal system. Arbitration can save the parties considerable time, expense, and trouble in resolving their disputes. For example, an employee asserting a discrimination claim in court might have to wait three to five years before having the claim resolved,[1] whereas arbitral resolution normally occurs in a matter of months.[2]

In addition to limiting the time and expense of litigation, employers view mandatory binding arbitration as having distinct strategic advantages, particularly the ability to avoid a jury trial. Employers have become concerned that a sympathetic plaintiff's chances of winning his or her case have been enhanced by statutes granting the right to a jury trial. Arbitration is a substitute for a civil trial and therefore avoids the possible emotional decisionmaking of a jury.

Recent Guidance From the Supreme Court

Over the past year, the U.S. Supreme Court has provided some guidance on the use of binding arbitration agreements to address employment disputes in the nonunion setting. Significantly, in *Circuit City Stores, Inc. v. Adams*,[3] the Supreme Court resolved a long-standing debate about the applicability of the Federal Arbitration Act (FAA) to arbitration agreements covering employment disputes. The Court held that the FAA may be used to judicially enforce arbitration agreements found in most employment contracts. The Court, furthermore, emphasized its belief that real benefits exist in utilizing arbitration as an alternative forum.[4]

The *Circuit City* decision gave employers a substantial comfort level that arbitration may actually be the answer to unpredictable and costly court litigation of employment disputes. The Supreme

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[1]Dealy, *Compulsory Arbitration in the Unionized Workplace: Reconciling Gilmer Gardner-Denver and the Americans with Disabilities Act*, 37 B.C. L. Rev. 479, 506 (May 1996) (citing Interview with Joan G. Dolan, Arbitrator and Professor of Arbitration at Boston College Law School, Newton, Mass. (Apr. 18, 1995)).

[2]Volz & Goggin, eds., Elkouri & Elkouri, How Arbitration Works, 5th ed. (BNA Books 1997), at 13 & n.48.

[3]532 U.S. 105, 85 FEP Cases 266 (2001).

[4]In *Adams*, the Court found that the exclusionary language of Section 1 of the FAA only applies to employment contracts of transportation workers. 532 U.S. at 119. Thus, the FAA's pronunciation that arbitration provisions found in contracts involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of any contract" applies to all other employment contracts and creates a "presumption of arbitrability" for such contracts. *See* 9 U.S.C. §2.

Court dampened this euphoria earlier this year when it issued its decision in *EEOC v. Waffle House*,[5] where the Court held that, despite the existence of an arbitration agreement between the employer and employee, the Equal Employment Opportunity Commission (EEOC) has the right to initiate a court action against an employer and seek damages and other relief for an individual employee alleged to be the victim of unlawful discrimination, even though that employee previously had agreed to arbitrate the employment dispute. The Court's reasoning was that because the EEOC was not a party to the arbitration agreement, it cannot be contractually restricted from carrying out its statutory authority to bring actions to enforce the federal antidiscrimination laws.

While these decisions have resolved a number of fundamental issues regarding the enforceability of arbitration agreements, numerous other issues remain unresolved. Such issues include:

1. What standard should be applied in analyzing whether an employee has waived his or her access to a judicial forum to resolve employment claims?
2. Is an arbitration agreement unconscionable if it is presented to the employee on a "take it or leave it" basis?
3. What consideration is sufficient to support an employee's agreement to arbitrate employment claims?
4. Is an arbitration agreement valid and enforceable if it allows the employer to unilaterally change its terms and procedures?
5. Can the agreement legitimately require the employee to share in the costs of arbitration?
6. Can an arbitration agreement reduce the applicable statute of limitations period for an employee to file a statutory claim?
7. Can an arbitration agreement limit the damages an employee may recover for a violation of his or her statutory rights?

Standards of Review for Waiver of Judicial Forum

As explained above, by entering into an arbitration agreement the employee has waived his or her right to file a lawsuit in court and instead has agreed that all employment disputes will be resolved through binding arbitration. Thus, a critical preliminary

[5]534 U.S. 279, 12 AD Cases 1001 (2002).

issue that must be addressed in deciding whether to enforce an arbitration agreement is whether there is a valid waiver of the right to litigate the dispute in a court of law. The federal circuit courts of appeal have enunciated three different standards for determining whether there has been an effective waiver of an employee's right to a judicial forum: (1) the "knowing" standard, (2) the "appropriate" standard, and (3) the "contract" standard. Each standard applies a different level of scrutiny. For example, the contract standard may hold an employee to be bound by an arbitration policy set forth in an employee manual, while the knowing standard may not permit such a result and may require a separate agreement that specifically mentions what statutes fall under the purview of the arbitration agreement.

Knowing Standard

In *Prudential Insurance Co. v. Lai*,[6] the Ninth Circuit adopted the "knowing standard," which provides that before an employee can be deemed to have waived his or her judicial remedies in favor of arbitration, the evidence must establish that the employee knew that he or she was waiving such rights at the time he or she entered into the agreement. The facts of *Prudential* were as follows: Upon the commencement of their securities industry employment, the plaintiffs had signed U-4 forms, which provided that they arbitrate any dispute, claim, or controversy required to be arbitrated under the rules, constitutions, or bylaws of the organizations with which they were registered. They became registered with the National Association of Securities Dealers (NASD), which mandated that disputes arising in connection with the business of its members be arbitrated. The plaintiffs asserted that at the time they signed the U-4 form, arbitration was not mentioned and they never were given a copy of the NASD manual that set forth the terms of the arbitration agreement. The plaintiffs brought an action against the employer alleging sexual harassment under Title VII. The district court granted the employer's motion to compel arbitration.

On appeal, the Ninth Circuit reversed. Citing the legislative history of the Civil Rights Act of 1991, the court explained that "Congress intended there to be at least a *knowing* agreement to arbitrate employment disputes before an employee may be deemed

[6]42 F.3d 1299, 66 FEP Cases 933 (9th Cir. 1994).

to have waived the comprehensive statutory rights, remedies, and procedural protections prescribed in Title VII and related state statutes."[7] As a result, the court concluded that Title VII plaintiffs may only be forced to forgo their statutory remedies and arbitrate their claims if they have knowingly agreed to submit such disputes to arbitration.

The Ninth Circuit again applied this standard in *Nelson v. Cyprus Bagdad Copper Corp.*,[8] which involved an arbitration agreement that was contained in an employee handbook. The employee had signed an acknowledgment declaring that he had received the handbook and agreed "to read it and understand its contents."[9] The court concluded that Nelson had not knowingly agreed to arbitrate his claims because the acknowledgment neither referenced the arbitration clause in the handbook nor notified him that his acknowledgement of the handbook constituted a waiver of his right to a judicial forum to resolve his statutory claims.[10]

Appropriate Standard

In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[11] the First Circuit rejected the "knowing standard," concluding that the "knowing and voluntary" language relied on in *Lai* was nowhere to be found in the language of the Civil Rights Act of 1991. Instead, the court applied an "appropriate standard" for determining whether to enforce an arbitration agreement.

The facts of *Rosenberg* were quite similar to *Lai.* During the application process, the employee was required to fill out a U-4 form containing a general arbitration provision. In the U-4 form, the employee's supervisor certified that Rosenberg would be familiar with all the applicable rules by the time her U-4 application was approved. The certification, however, was untrue, as the employee never was provided with the New York Stock Exchange or NASD rules, including the rules that all employment disputes be arbitrated. In adopting the "appropriate" standard of scrutiny, the First Circuit looked to the 1991 Civil Rights Act and its language, which provides that: "[w]here *appropriate* and to the extent authorized by law, . . . arbitration . . . is encouraged to resolve disputes

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[7] *Id.* at 1304 (emphasis added).
[8] 119 F.3d 756, 13 IER Cases 58 (9th Cir. 1997).
[9] *Id.* at 758.
[10] *See also Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153 (9th Cir. 1998).
[11] 170 F.3d 1, 22 EB Cases 2980 (1st Cir. 1999).

arising under [these laws]."[12] Applying this standard, the Court of Appeals for the First Circuit concluded that compelling arbitration in this case would be "inappropriate" because the defendant had never provided the plaintiff with a copy of the rules or made the plaintiff familiar with the arbitration rules. In addition, although the U-4 contained an arbitration provision providing for the arbitration of "any" disputes, the court noted that this was insufficient notice. If the form had "provided for the arbitration of all disputes, or given explicit notice that employment disputes were subject to arbitration," then it would have compelled arbitration.[13]

"Contract" Standard

A number of circuits have rejected the need for any heightened level of scrutiny and have held that, consistent with the Supreme Court's opinion in *Gilmer v. Interstate/Johnson Lane Corp.*,[14] an employee generally is charged with knowledge of the existence and scope of an arbitration clause within a document he or she has signed in the absence of fraud, deception, or other misconduct that would excuse the lack of such knowledge.[15] In rejecting the "knowing" and "appropriate" standards, the Sixth Circuit stated that such standards serve to release a party from his or her obligations under a contract with absolutely no basis in contract law.[16] In *Haskins v. Prudential Insurance Company of America*[17]—whose facts were virtually identical to both *Rosenberg* and *Lai*—the plaintiff, Haskins, signed a U-4 form as part of his application for employment. He subsequently sought to litigate his employment dispute in court, contending that he should not be compelled to arbitrate his claim because he never received a copy of the NASD rules and thus never was informed of the rights he would surrender by agreeing to arbitrate his claims. In rejecting the employee's argument, the Sixth Circuit stated that his ignorance of the terms of the U-4 form was no defense. Rather, the court concluded that

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[12] *Id.* at 18–19 (quoting §118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1081 (1991)) (emphasis added).
[13] *Id.* at 18.
[14] 500 U.S. 20, 55 FEP Cases 1116 (1991).
[15] *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231, 239, 83 FEP Cases 1329 (6th Cir. 2000). *See also Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183–84 & n.2, 77 FEP Cases 751 (3d Cir. 1998); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 838, 73 FEP Cases 1822 (8th Cir. 1997).
[16] *Haskins*, 230 F.3d at 239.
[17] *Id.*

Haskins was contractually bound to arbitrate his claims because he had signed the U-4 form, under which he agreed to arbitration of such disputes, and there was no showing of fraud, duress, mistake, or some other ground on which the contract might be voided.

In *Brown v. ITT Consumer Finance Corp.*,[18] the Eleventh Circuit refused to apply a more stringent standard. Brown argued that the arbitration clause should be voided for vagueness because it failed to specifically state that statutory claims were included in the agreement to arbitrate. The language in question stated that "any dispute between them or claim by either against the other" is subject to arbitration.[19] The court rejected the need to specifically list every federal or state statute that the arbitration provision purports to cover and held that an arbitration agreement is not vague solely because it includes the universe of the parties' potential claims against each other.[20]

In *Hightower v. GMRI, Inc.*,[21] the Fourth Circuit held that an employee was bound to arbitrate his employment dispute in accordance with the employer's previously disseminated arbitration policy. In reaching this conclusion, the court relied on the following facts: (1) the employee had attended a meeting where the company's dispute resolution procedure was discussed; (2) he had signed an attendance sheet in which he acknowledged receipt of the materials, including the policy that arbitration was the exclusive method for resolving employment disputes; and (3) after receiving the materials, he continued to work for the company for three months. The Fourth Circuit concluded that these facts, particularly the employee's notice of the policy and his continued employment, were sufficient evidence to demonstrate his assent to be bound by the policy under North Carolina law.

These cases demonstrate that the prerequisites for entering into an arbitration agreement remain unresolved. In drafting an arbitration agreement, an employer needs to be cognizant of the standard of review that is applicable in the jurisdiction in which the agreement will be enforced. Employers also should consider the nature and form of its arbitration agreement: Should it be part of an employment contract, or a stand-alone arbitration agreement,

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[18]211 F.3d 1217, 82 FEP Cases 1388 (11th Cir. 2000).
[19]*Id.* at 1220.
[20]*Id.* at 1221–22.
[21]272 F.3d 239, 87 FEP Cases 461 (4th Cir. 2001).

or a policy statement set forth in an employee handbook or employment application? It is also important to consider how clear and explicit the scope of the arbitration provision should be: Should the agreement simply indicate that all employment disputes shall be arbitrated, or should specific statutes be identified? The more formal and explicit the provisions, with clear notice to and acknowledgement by the employee, the greater likelihood that the agreement will be upheld under the most stringent standard.

Challenges to the Validity of an Arbitration Agreement Under State Law

An employee may apply state contract law to challenge the validity of an arbitration agreement.[22] Two primary areas of attack are that the agreement in question is unconscionable, is not supported by consideration, or both.

Unconscionable Contract of Adhesion

Employees have argued that when an arbitration agreement is presented to them on a take-it-or-leave-it basis and they have no ability to negotiate or amend its terms, the agreement is an unconscionable contract of adhesion, particularly in light of the employer's superior bargaining power. This argument has yielded mixed results.

Very recently, in *Circuit City Stores, Inc. v. Adams* (*Adams II*),[23] the Ninth Circuit, on remand from the Supreme Court, applied California state contract law to strike down Circuit City's arbitration agreement. Circuit City included in its employment application a dispute resolution agreement (DRA) requiring employees to agree to submit all claims and disputes to binding arbitration. But the agreement did not require Circuit City to arbitrate any claims that it might have against the employee and, moreover, significantly limited the amount of damages (i.e., a maximum of one year of back pay, two years of front pay) that the employee could recover and required the employee to share in the costs of

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[22] *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

[23] 279 F.3d 889, 87 FEP Cases 1509 (9th Cir.), *cert. denied*, 122 S.Ct. 2329 (2002).

arbitration. Circuit City had made it clear that it would not consider any applicant who refused to sign the DRA.

The court held that the DRA is a contract of adhesion—"a standard-form contract, drafted by the party with superior power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely."[24] As such, the DRA was procedurally unconscionable and unenforceable under California law. The court further found the DRA to be substantively unconscionable both by requiring employees to submit their disputes to arbitration, but not imposing a similar obligation on Circuit City, and by limiting the amount of damages that the employee could recover. "This unjustified one-sidedness deprives the DRA of the 'modicum of bilaterality' that the California Supreme Court requires for contracts to be enforceable under California law," the Ninth Circuit emphasized.[25]

One month after this decision, the same three-judge panel of the Ninth Circuit upheld Circuit City's arbitration agreement with respect to an employee who had signed the agreement one month after he began his employment. At the time he was presented with the agreement, Circuit City gave the employee the opportunity to "opt out" of the arbitration program without any threat of job termination. The court, therefore, concluded that "this case lacks the necessary element of procedural unconscionability . . . [unlike Adams,] Ahmed was not presented with a contract of adhesion because he was given the opportunity to opt-out of the Circuit City arbitration program by mailing in a simple one-page form."[26]

Other circuits have refused to find an arbitration agreement unconscionable even where the employee is obligated to agree to its terms. The Second Circuit, quoting *Gilmer*, has held that "[m]ere inequality in bargaining power" between the employer and the employee alone is insufficient to find an arbitration agreement unenforceable.[27] In *Desiderio,* an offer of employment was rescinded when the prospective employee refused to sign the U-4

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[24]279 F.3d at 893.

[25]*Id.* at 894. *See also Packin v. Astra USA, Inc.*, 2002 WL 120563 (Cal. Ct. App. Jan. 29, 2002) (unpublished opinion) (agreement unconscionable where it was presented on a "take-it-or-leave it" basis, employees were told they would lose entitlement to profit-sharing payments if offer was refused, employees not given clear idea of agreement's actual terms and consequences, and agreement limited amount of time employees had to present claim as well as the amount and kind of damages).

[26]*Circuit City Stores, Inc. v. Ahmed*, 283 F.3d 1198, 88 FEP Cases 626 (9th Cir. 2002).

[27]*Desiderio v. National Ass'n of Secs. Dealers, Inc.*, 191 F.3d 198, 207, 80 FEP Cases 1731 (2d Cir. 1999) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)).

form, which is a necessary prerequisite to becoming a securities broker, because the form provided that all employment disputes be resolved through compulsory arbitration. The rejected applicant then brought suit challenging the validity of the compulsory arbitration provision. Acknowledging that the U-4 form bound both parties to mandatory arbitration, the Second Circuit concluded that it "may not be said to favor the stronger party unreasonably."[28] Accordingly, the court held that the compulsory arbitration was not an unconscionable contract of adhesion and was enforceable.[29]

Lack of Consideration

Employees have challenged arbitration agreements on the grounds that they are not supported by consideration, a necessary element for a binding contract. It is well settled that

> a promise is legally enforceable only if the promisor receives in exchange for that promise some act or forbearance, or the promise thereof. . . . A promise constitutes consideration for another promise only when it creates a binding obligation. . . . Put more succinctly, such a contract must be binding on both or else it is binding on neither.[30]

Lack of consideration to support the agreement to arbitrate typically is raised where the agreement requires the employee to submit all employment disputes to arbitration but does not require the employer to do so. This challenge has been met with varying success. For example, in *Labor Ready Central Illinois L.P. v. Gonzalez*,[31] the Texas Court of Appeals ruled that the employee was not required to submit her claims against her employer to arbitration, despite the fact that her employment contract contained a mandatory arbitration clause. That provision required the employee to arbitrate any employment claims that she may have against the employer; however, it did not impose a similar obligation on the employer. In fact, the agreement specifically granted the employer the right to file an action in court against the employee if she

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[28] *Id.* at 207.

[29] *Id. See also Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 17, 22 EB Cases 2980 (1st Cir. 1999); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 229, 73 FEP Cases 856 (3d Cir. 1997).

[30] *Floss v. Ryan Family Steak Houses, Inc.*, 211 F.3d 306, 315, 6 WH Cases 2d 17 (6th Cir. 2000) (citations omitted).

[31] 64 S.W.3d 519, 87 FEP Cases 612 (Tex. Ct. App. 2002).

violated any of the restrictive covenants contained in the agreement. The court concluded that the arbitration agreement was not supported by consideration, because it lacked a mutuality of obligation.

The Seventh Circuit, in *Gibson v. Neighborhood Health Clinics, Inc.*,[32] also found a lack of consideration where the arbitration agreement obligated only the employee, not the employer, to submit her employment claims to binding arbitration. The court, moreover, observed that while an initial offer of employment may constitute valid consideration for an employee's promise to arbitrate subsequent claims, such consideration does not exist where the employee is already employed by the employer at the time that he or she agrees to the arbitration requirement. While acknowledging that an employer's specific promise to continue an at-will employee's employment may provide valid consideration for an employee's promise to forgo certain rights, the court found that, in the instant dispute, the employer did not make any specific promise to continue the employee's employment in exchange for her agreement to arbitrate her claims. In other words, the court held that such a promise must be explicitly provided for in the agreement to constitute consideration for the agreement to arbitrate.[33]

Other courts, in contrast, have found that valid consideration exists when both parties agree to be bound by the arbitration of an employee's claims. In *Johnson v. Circuit City Stores, Inc.*,[34] the Fourth Circuit concluded that Circuit City's promise to be bound by the process and results of arbitration of employee disputes constitutes sufficient consideration. The court rejected the contention that the employer must also agree to submit its claims to arbitration for there to be valid consideration.

Similarly, in *Blair v. Scott Specialty Gases*,[35] the Third Circuit, in applying Pennsylvania contract law, stated that a contract need not

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[32]121 F.3d 1126, 8 AD Cases 483 (7th Cir. 1997).

[33]In many jurisdictions, including Maryland, the courts have found that continued employment, even continued at-will employment, is sufficient consideration to support a covenant not to compete that is entered into after the employee has commenced employment. *See, e.g., Simko v. Graymar*, 55 Md. App. 561 (Md. Ct. App. 1983). In such jurisdictions, therefore, continued employment should also constitute valid consideration in exchange for an employee's agreement to arbitrate his or her employment claims. Of course, as *Gibson* instructs, it is essential that the employer explicitly state that the continued employment is in consideration for the employee's agreement to arbitrate his or her employment claims.

[34]148 F.3d 373, 378, 77 FEP Cases 139 (4th Cir. 1998).

[35]283 F.3d 595, 88 FEP Cases 464 (3d Cir. 2002).

have mutuality of obligation as long as the contract is supported by consideration. Noting that consideration exists when both parties have agreed to be bound by arbitration, the court stated that it is acceptable for the parties to agree to arbitrate any claim brought by an employee without a reciprocal promise of the employer to arbitrate its claims against the employee.[36]

Challenges to the Terms of the Agreement

Ability to Amend the Arbitration Agreement

Employees have sought to invalidate arbitration agreements claiming that the employer's promise to arbitrate the employee's claims is illusory, particularly where the language of the agreement permits the employer or a third party to change the terms or arbitration rules unilaterally without giving the employee any prior notice.

For example, the arbitration agreement used by Hooters restaurants preserved for the company the right to modify the rules, "in whole or in part," whenever it desired and "without notice" to the employees.[37] In fact, the court in that case observed, "[n]othing in the rules even prohibits Hooters from changing the rules in the middle of an arbitration proceeding."[38] The court found this provision, among others in the agreement, to be unfair, and thus rescission of the agreement was justified.

The arbitration agreement in *Penn v. Ryan's Family Steak Houses, Inc.*[39] gave EDSI, an independent dispute resolution company, the sole and unilateral discretion to modify or amend the rules and procedures of the arbitration. The Seventh Circuit found that this capability made the contract hopelessly vague and uncertain, and thus unenforceable.[40]

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[36] *Id.* at 603. *See also Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 180 (3d Cir. 1999) (arbitration agreement is enforceable even though employer has the option of litigating its claims in court while the employee's claims must be arbitrated, because both parties are bound by the arbitrator's decision); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 637, 79 FEP Cases 1160 (7th Cir. 1999) (consideration existed because employer agreed to be bound by arbitration process).

[37] *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 79 FEP Cases 629 (4th Cir. 1999).

[38] *Id.* at 939.

[39] 269 F.3d 753, 18 IER Cases 1114 (7th Cir. 2001).

[40] *Id.* at 760. *See also Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 6 WH Cases 2d 17 (6th Cir. 2000) (finding arbitration agreement illusory and unenforceable because agreement gave provider of arbitration services unlimited right to modify arbitration rules without providing notice to employee or gaining employee's consent); *Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683, 686, 77 FEP Cases 571 (N.D. Ohio 1998).

In *Blair v. Scott Specialty Gases,*[41] the Third Circuit found that certain restrictions on the employer's ability to amend the arbitration agreement could render the agreement enforceable. Under that agreement, the employer retained the right to alter the material aspects of the arbitration agreement, but only after setting forth the change in writing, providing a copy to the employees, and allowing the employees to accept the change by continuing employment.[42] The court found this provision to be acceptable under Pennsylvania contract law.

Cost of Arbitration

Arbitration agreements often require that the employee share in the cost of arbitration, such as splitting the cost of the arbitrator's fees and expenses. Employees have challenged such provisions, claiming that these costs can be prohibitive and thus can effectively preclude the employee from bringing legitimate employment claims against the employer, resulting in a deprivation of the employee's statutory rights. They argue that employees would not incur such costs if they were permitted to bring an action in court.

In *Green Tree Financial Corp.-Alabama v. Randolph,*[43] the Supreme Court considered this contention. While *Green Tree* did not involve claims under an employment arbitration agreement, the Court's decision is instructive and has been relied on by the lower courts. First, the Court acknowledged that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[44] Thus, in situations where a party resists arbitration on these grounds, that party has the initial burden of demonstrating that arbitration would be prohibitively expensive by showing "the likelihood of incurring such costs."[45] The Court, however, did not address "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence . . . ."[46] In *Green Tree,* the Court compelled arbitration,

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[41]283 F.3d 595, 88 FEP Cases 464 (3d Cir. 2002).
[42]*Id.* at 604.
[43]531 U.S. 79, 84 FEP Cases 769 (2000).
[44]*Id.* at 90.
[45]*Id.* at 92.
[46]*Id.*

concluding that the plaintiff's "unfounded assumptions" regarding costs were "speculative."[47]

In applying *Green Tree*, recent decisions of both the Third and Fourth Circuits provide some guidance on how to assess whether a fee-splitting provision precludes a litigant from vindicating his or her statutory rights.[48] These courts have held that analysis on this issue should be done on a case-by-case basis in which the appropriate inquiry is whether the arbitral forum is an "adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses 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."[49] The ability to address these issues would necessitate discovery into the rates charged for the arbitration and the approximate length of similar arbitration proceedings, and the employer would be given the opportunity to prove that arbitration will not be prohibitively expensive, or to offer to pay all of the arbitrator's fees.[50]

Prior to *Green Tree*, several circuit courts had expressed disapproval of fee-splitting provisions found in arbitration agreements.[51] In *Shankle v. B-G Maintenance of Colorado, Inc.*,[52] the arbitration agreement that the plaintiff signed as a condition of employment required that he pay one-half of the arbitrator's fees. The court estimated that it would cost the plaintiff between $1,875 and $5,000 to resolve his claim, a cost that the court determined neither the plaintiff nor other similarly situated employees could afford. As a result, the court concluded that the fee-splitting provision undermined the remedial and deterrent functions of the federal antidiscrimination laws and, on that basis alone, declared the agreement unenforceable. The court rejected the contention that arbitrators would be "unable to perform in a competent and impartial manner if one party pays the bill."[53]

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[47] *Id.* at 90 n.6, 91.

[48] *See Blair v. Scott Specialty Gases*, 283 F.3d 595, 88 FEP Cases 464 (3d Cir. 2002); *Bradford v. Semiconductor Sys., Inc.*, 238 F.3d 549, 84 FEP Cases 1358 (4th Cir. 2001).

[49] *Blair*, 283 F.3d at 609 (quoting *Bradford v. Semiconductor Sys., Inc.*, 238 F.3d 549, 556 (4th Cir. 2001)).

[50] *Id.* at 610.

[51] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997); *Shankle v. B-G Maint. of Colo., Inc.*, 163 F.3d 1230, 78 FEP Cases 1057 (10th Cir. 1999).

[52] 163 F.3d 1230.

[53] *Id.* at 1235.

The court in *Cole* upheld the arbitration agreement but required the employer to pay all of the arbitrator's fees. The court noted that this was necessary to ensure that the plaintiff received a full and fair resolution of his statutory claims. The court found that it was unlikely that a plaintiff would pursue his statutory claim if he was required to pay arbitrator's fees in addition to the necessary administrative and attorneys' fees he was likely to incur in either an arbitral or judicial forum.[54] The court also rejected the notion that arbitrators will systematically favor employers since they are the source of future business.

The continuing viability of the *Cole* reasoning in the District of Columbia Circuit is questionable. For example, in *LaPrade v. Kidder, Peabody & Co., Inc.*,[55] that court upheld an arbitration panel's decision to assess 12 percent of the "forum fees" against the plaintiff. The court refused to read either *Gilmer* or *Cole* as stating per se rules barring the assessment of costs against an employee when he or she arbitrates statutory claims. It also refused to read these cases as requiring that arbitration be a virtually cost-free alternative to traditional court proceedings.[56]

Nevertheless, since *Green Tree*, a number of courts continue to express significant problems with fee-splitting provisions and have refused to enforce agreements that include such a requirement. For example, in *Perez v. Globe Airport Security Services, Inc.*,[57] the Eleventh Circuit concluded that requiring a prevailing plaintiff to pay the cost of the arbitration was unlawful because it conflicted with Title VII, which provides that a prevailing plaintiff may be awarded reasonable attorneys' fees and costs. The fact that the rules of the American Arbitration Association (AAA) permit an arbitrator to award costs was insufficient because the agreement did not incorporate the AAA rules.[58]

Arbitration agreements that do not automatically require a claimant to pay arbitrator fees are more likely to be upheld. For example, in *Malone v. Bechtel International Inc.*,[59] the arbitration

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[54]*Cole*, 105 F.3d at 1484–85.
[55]246 F.3d 702, 85 FEP Cases 779 (D.C. Cir. 2001).
[56]*See also Brown v. Wheat First Secs., Inc.*, 257 F.3d 821, 17 IER Cases 1410 (D.C. Cir. 2001) (declining to extend *Cole*'s limitations on fee assessment where federal statutory claims are at issue to state common law or public policy-grounded claims).
[57]253 F.3d 1280, 86 FEP Cases 613 (11th Cir. 2001).
[58]*See also Bailey v. Ameriquest Mortgage Co.*, 2002 WL 100391 (D. Minn. Jan. 23, 2002).
[59]2002 WL 84601, at *3 (D.V.I. Jan. 22, 2002).

agreement provided that the employer initially would advance the arbitrator's fees and expenses, but that the employee could be held liable for these costs if he lost the arbitration and, further, was directed by the arbitrator to reimburse the company. In all cases, the agreement provided that the employer would cover the arbitrator's transportation and lodging costs. The court found that it was unlikely that such an arrangement, which includes both conditions and discretion, would cause an employee to incur prohibitive costs.

Neutrality of Arbitrators

At a minimum, statutory rights include both substantive protection and access to a neutral forum in which to enforce those protections. What constitutes a neutral forum with a neutral arbitrator remains unresolved.

In *Cole*,[60] the District of Columbia Circuit held that the requirement that all claims be arbitrated by one arbitrator in accordance with the rules of the AAA was sufficient protection to ensure a neutral arbitrator. In contrast, the Sixth Circuit, in dicta, has called into question the neutrality of the arbitrators where the agreement identifies a specific arbitration service that must be utilized when bringing a claim under the agreement.[61] In that instance, the employer had contracted with EDSI, a private arbitration service, to arbitrate all employment disputes brought under the employer's agreement with its employees. EDSI was provided complete discretion over the arbitration rules and procedures. The employee claimed that EDSI was biased in favor of the employer because it had a financial interest in maintaining its arbitration service contract. The court noted that, although the record did not clearly reflect whether EDSI operates on a for-profit basis, the potential for bias exists under such an arrangement.

The selection of arbitrators provision contained in Hooters' agreement was found by the Fourth Circuit to be "crafted to ensure a biased decisionmaker."[62] That agreement provided for three arbitrators—the employee and Hooters each selected an arbitra-

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[60] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997).

[61] *Floss v. Ryan Family Steak Houses, Inc.*, 211 F.3d 306, 314, 6 WH Cases 2d 17 (6th Cir. 2000).

[62] *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938, 79 FEP Cases 629 (4th Cir. 1999).

tor, and the two arbitrators then together selected a third arbitrator. The problem with this provision was that both the employee's arbitrator and the neutral were to be selected from a list of arbitrators created solely by the employer. There was no limitation, moreover, on whom Hooters could put on the list. "In fact," the court observed, "the rules do not even prohibit Hooters from placing its managers themselves on the list."[63] The rules, moreover, did not limit Hooters' right to punish arbitrators who rule against the company by removing their names from the list. In striking down the agreement, the Fourth Circuit emphasized, "[g]iven the unrestricted control that one party (Hooters) has over the panel, the selection of an impartial decision maker would be a surprising result."[64]

Similarly, in a very recent case, *Murray v. Food & Commercial Workers Local 400*,[65] the Fourth Circuit again struck down an arbitration agreement where it determined that the employer had unreasonable control over the choice of arbitrators. The agreement provided that the parties would select an arbitrator by alternatively striking names off of a list of arbitrators provided by the employer's president. The employer was a labor union. The court concluded that this procedure was "virtually indistinguishable" from that found invalid in *Hooters*.[66] In defense of its selection procedure, the employer asserted that the court should "trust us"—that the arbitrator list it would use would be provided by either the AAA or the Federal Mediation and Conciliation Service (FMCS), and that should ensure that the arbitrator would be neutral. The court, nevertheless, refused to trust the employer because the arbitration agreement contained no reference to the AAA National Rules for Resolution of Employment Disputes or to any other rules governing the selection of an arbitrator.

Scope of Remedies

Recognition of arbitration as an acceptable forum is conditioned on the prospective litigant being able to effectively vindicate his or her statutory rights through arbitration.[67] As a result, courts

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[63] *Id.* at 939.
[64] *Id.*
[65] 289 F.3d 297, 88 FEP Cases 1185 (4th Cir. 2002).
[66] *Id.* at 303.
[67] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–28, 55 FEP Cases 1116 (1991).

have evaluated arbitration provisions to ensure that such procedures do not limit the scope of the remedies available to the claimant. Courts repeatedly have refused to enforce arbitration provisions that restrict the amount of damages that are available to an employee, particularly where those damages are set forth in the applicable statute.

In *Bailey v. Ameriquest Mortgage Co.*,[68] a motion to compel arbitration was denied because the arbitration agreement failed to protect the remedies available to the plaintiff under the Fair Labor Standards Act (FLSA). The arbitration provision provided a one-year statute of limitations to all claims even if there was a federal or state statute that would have given more time to pursue a claim.[69]

In *Adams II*,[70] the limit on remedies was one of the reasons the Ninth Circuit struck down Circuit City's arbitration agreement. The agreement specifically limited the employee's available recovery to injunctive relief, up to one year of back pay and up to two years of front pay, compensatory damages, and punitive damages in an amount up to the greater of the amount of back pay and front pay awarded or $5,000. Relying on California contract law, the court found this provision to be substantively unconscionable. The court also objected to the agreement's strict one-year statute of limitations on arbitrating claims, finding that this provision deprived Adams of the benefit of the continuing violation doctrine and, thus, failed to afford him the benefit of the full range of statutory remedies.[71]

When confronted with arbitration agreements that unlawfully proscribe statutorily available remedies, some courts have severed the illegal provision and ordered arbitration, while other courts have held the entire agreement to be unenforceable. For example, in *Gannon v. Circuit City Stores, Inc.*,[72] the arbitration agreement

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[68]2002 WL 100391 (D. Minn. Jan. 23, 2002).

[69]*Id.* at *4. An employee could recover unpaid wages for two years, and, if the employer's actions were willful, the employee could go back and recover unpaid wages for three years. Noting that, under the FLSA, the scope of an employer's liability and thus a plaintiff's measure of damages is directly tied to the limitations provision, the court observed that this one-year limitations period is "fundamentally at odds with the statutory scheme of the FLSA, both procedurally and substantively: it not only shortens the period of time for bringing a FLSA claim, but more importantly, it limits a plaintiff's damage recovery." *Id.*

[70]*Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir.), *cert. denied*, 122 S. Ct. 2329 (2002).

[71]279 F.3d at 895. *See also Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060, 76 FEP Cases 1315 (11th Cir. 1998) (agreement is "fundamentally at odds with the purposes of Title VII because it completely proscribes an arbitral award of Title VII damages.").

[72]262 F.3d 677, 86 FEP Cases 755 (8th Cir. 2001).

capped the plaintiff's right to punitive damages at $5,000. Applying Missouri laws of contract interpretation, the Eighth Circuit held that the best way to give effect to the clearly stated intention of the parties was to sever the offending punitive damages cap provision, modify the agreement to comply with existing law, and require the parties to submit their dispute to arbitration.

In contrast, the Eleventh Circuit refused to order arbitration in *Perez v. Globe Airport Security Services, Inc.*,[73] where the arbitration agreement failed to provide the employee with Title VII's remedies of recovering attorneys' fees and costs. The court explained that "[t]o sever the costs and fees provision and force the employee to arbitrate a Title VII claim despite the employer's attempt to limit the remedies available would reward the employer for its actions and fail to deter similar conduct by others."[74] Similarly, in *McCaskill v. SCI Management Corp.*,[75] an arbitration agreement that required each party to pay its own attorneys' fees and pay one-half of the arbitrator's fee and administration costs was invalid because it deprived the plaintiff of the Title VII attorneys' fees remedy. The court rejected the employer's contention that this provision did not prohibit the arbitrator from awarding attorneys' fees to the prevailing party.

Other "Unfair" Provisions

The *Hooters* case,[76] which was discussed earlier, is instructive for the types of provisions that would render an arbitration agreement void and unenforceable. The agreement in *Hooters* included the following provisions:

- The employee was required to provide the employer with notice of her claim at the outset, but there was no requirement on the part of the employer to file any response or identify its defenses.
- The employee was required to provide the employer with a list of all fact witnesses and a brief summary of the facts known

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[73]253 F.3d 1280, 86 FEP Cases 613 (11th Cir. 2001).
[74]*Id.* at 1287.
[75]285 F.3d 623, 88 FEP Cases 705 (7th Cir. 2002).
[76]*Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 79 FEP Cases 629 (4th Cir. 1999).

to each, but there was no corresponding requirement for the employer.
- The employee's arbitrator and a neutral arbitrator were selected from a list created solely by employer.
- The employer could expand the scope of the arbitration to any matter, regardless of whether it was related to the employee's claim, but the employee was limited to matters raised in his or her "notice of claim."
- The employer could move for summary dismissal of the employee's claims before a hearing was held, but the employee could not seek summary judgment.
- The employer could record the arbitration hearing by audio or videotaping or by verbatim transcription, but the employee did not have a similar right.
- The employer could bring a suit in court to vacate or modify an arbitral award when it could show, by a preponderance of the evidence, that the panel exceeded its authority, but the employee did not have a similar right.
- Upon 30 days notice, the employer could cancel the agreement to arbitrate, but the employee did not have a similar right.

A senior vice president of the AAA testified that "the system established by the Hooters rules so deviated from minimum due process standards that the Association would refuse to arbitrate under those rules."[77] In refusing to enforce the agreement, the Fourth Circuit emphasized the following:

> [T]he promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties. The parties agreed to submit their claims to arbitration—a system whereby disputes are fairly resolved by an impartial third party. Hooters by contract took on the obligation of establishing such a system. By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.[78]

Accordingly, the court rescinded the agreement.

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[77] *Id.* at 939.
[78] *Id.* at 940.

Recommended Plan Components

In *Cole*, the District of Columbia Circuit approved an arbitration agreement, finding it

> (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.[79]

In doing so, it provided some guidance on what an employer's mandated binding arbitration agreement should include. For instance, the court in a footnote cited the work of the Department of Labor Commission on the Future of Worker-Management Relations (the Dunlop Commission), chaired by John T. Dunlop, which endorsed a consensus view among employers and employees that

> if private arbitration is to serve as a legitimate form of private enforcement of public employment law, these systems must provide:
>
> A neutral arbitrator who knows the laws in question and understands the concerns of the parties;
>
> A fair and simple method by which the employee can secure the necessary information to present his or her claim;
>
> A fair method of cost-sharing between the employer and employee to ensure affordable access to the system for all employees;
>
> The right to independent representation if the employee wants it;
>
> A range of remedies equal to those available through litigation;
>
> A written opinion by the arbitrator explaining the rationale for the result; and
>
> Sufficient judicial review to ensure that the result is consistent with the governing laws.[80]

Further, in response to opposition to employer manipulation of procedures for the arbitration of employment disputes, the *Cole* court noted that JAMS/Endispute, a large provider of arbitration services, announced it will not accept arbitration assignments in

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[79] *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482, 72 FEP Cases 1775 (D.C. Cir. 1997).
[80] *Cole*, 105 F.3d at 1483 (quoting U.S. Department of Labor, Commission on the Future of Worker-Management Relations, Report and Recommendations 30–31 (1994)).

employment cases unless the arbitration agreement has certain protective qualifications to ensure that the statute is served.[81] Specifically, JAMS / Endispute requires that the employment agreement (1) provides the same rights and remedies available to the individual under the applicable federal, state, and local law; (2) permits the employee to participate in the selection of a neutral arbitrator; (3) allows the employee the right to be represented by counsel; (4) allows reasonable discovery prior to the arbitration hearing; and (5) ensures that the employee has the right to present his or her proof through testimony, documentary evidence, and cross examination. JAMS / Endispute will also defer arbitration if a party wishes to challenge the enforceability of a mandatory arbitration clause in court.

These observations provide a useful road map when drafting arbitration agreements in the nonunion setting.

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[81] *Id.* at 1483 n.11.