

Pre-Dispute ADR Programs: Past and Future

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Introduction

In recent years, consumers, franchisees, shareholders and employees in increasing numbers have been denied access to the courts. This is not because the elected bodies which once enacted protections for them have changed their minds about the wisdom of such laws. Last time anyone looked, Congress had not repealed Title VII of the Civil Rights Act of 1964. To the contrary, Title VII was recently amended to include, among other things, the right to a trial by jury. But in a series of recent cases, the United States Supreme Court has made it possible for powerful business institutions to draft adhesive agreements which effectively remove these institutions from the government's regulatory reach. There are those -- mostly large businesses and their representatives -- who see the trend toward mandatory, pre-dispute arbitration as something positive: a cheap, reliable alternative dispute resolution mechanism which relieves courts of time-wasting minor disputes. Others are considerably less sanguine:

As architecture, the arbitration law made by the Court is a shanty town. It fails to shelter those who most need shelter. And those it is intended to shelter are ill-housed. Under the law written by the Court, birds of prey will sup on workers, consumers, shippers, passengers, and franchisees; the protective police power of the federal government and especially of the state governments is weakened; and at least some and perhaps many commercial arbitrations will be made more costly while courts determine whether arbitrators have been faithful to certain federal laws.

Carrington and Haagen, "Contract and Jurisdiction," 1996 Chicago Law Rev. 331, 401.

American workers are being herded into this "shanty town" under the prod of the Supreme Court's decision in Gilmer v. Interstate Johnson/Lane Corp. (1991) 500 U.S. 20, 111 S.Ct. 1647, which appears to have approved of mandatory arbitration of employment disputes even where they implicate statutory rights. In Gilmer, the Court held that an employee who claimed he had been terminated in violation of the Age Discrimination Employment Act (ADEA) could be compelled to submit his claim to arbitration where he had signed a standard U-4 form as part of his application to be a licensed security trader. Applying a trilogy of cases which articulate a "federal policy favoring arbitration," (Rodriguez de Quijas v. Shearson/American Express, Inc., (1989) 490 U.S. 477; Shearson/American Express Inc. v. McMahon, (1987) 42 U.S. 220 and Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., (1985) 473 U.S. 614), the Court held that Gilmer's statutory employment discrimination claims could be adjudicated as well in an arbitral forum as in a judicial one -- even where the "agreement" to arbitrate had been entered into by the employee before any dispute had arisen and under circumstances in which it was clear he had no other choice. Gilmer's claims that securities industry arbitrators were virtually in the pocket of his employer, that little or no discovery was allowed, that he would be obliged to pay at least part of the cost of the forum, that the arbitrators

would not be obliged to follow the law, and that he would not necessarily be entitled to a full remedy including statutory attorneys' fees were all brushed aside.

The decade which started with Gilmer is now coming to a close. Though it may yet be too soon for any definitive statements, there are indications that Gilmer is not the harbinger of the wholesale privatization of employment law that some saw at the beginning of the nineties. Federal courts throughout the country have limited Gilmer's apparent reach, California courts have done likewise, and the administrative agencies charged with enforcement of workplace rights have expressed skepticism as well. Finally, and perhaps most tellingly, important ADR service providers have backed away from Gilmer. Developments in each of these areas are summarized below.

Case Law

Cases on mandatory arbitration of statutory disputes are legion. Set out below are case summaries in several areas in which courts have been active and which might be of interest to the plaintiff-side practitioner:

1. When Is Fraud in the Inducement A Defense to Agreement to Arbitrate?

To what extent will courts recognize a defense of fraud in connection with an employer's inducement to enter into an arbitration agreement? An important corollary is the issue of what body - an arbitrator, a jury or a court sitting without a jury -- should decide whether an arbitration agreement is void due to fraud in the inducement?

In one recent case, the Ninth Circuit Court of Appeals affirmed a lower court order compelling arbitration of the plaintiff's employment-related disputes. PaineWebber, Inc. v. Bahr, 1996 U.S. App. LEXIS 25314 (9th Cir. Sept. 24, 1996). Claiming that his employer told him that the arbitration clause would apply *only* if he voluntarily terminated his employment, Bahr asserted that the clause was unenforceable due to fraud in the inducement and coercion. The court held that, regardless of whether federal or state contract law applied, Bahr failed to establish fraud in the inducement. Bahr could not have reasonably relied on the allegedly misleading statements because the plain language of the agreement conflicted with those alleged misrepresentations. With respect to Bahr's claim that the arbitration clause was invalid because he had no choice but to sign them, the court followed Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), in holding that inequality of bargaining power is insufficient to hold an arbitration agreement unenforceable in the employment context. The court determined that Bahr had not made a particularized showing of duress or coercion and upheld the arbitration clause.

In Rosenthal v. Great Western Financial Securities Corp. (1996) 14 Cal.4th 394, 58 Cal.Rptr. 2d 875, the California Supreme Court held that even in cases governed by the Federal Arbitration Act (FAA), a court, rather than a jury, will resolve disputes over the existence of an arbitration agreement. The state constitutional guarantees of the right to due process of law and to a trial by jury do not entitle a party opposing arbitration of a dispute to a jury's determination of the existence or validity of the arbitration agreement. Petitions to compel arbitration are considered suits in equity to compel specific performance of a contract. Because actions for specific performance were not recognized at common law, California's Constitution does not guarantee a jury trial for such proceedings. *Id. citing Hastings v. Matlock*, (1985) 171 Cal.App.3d 826, 835. The FAA, which allows for a jury trial to decide the matter, does not preempt state law as long as the "applicable state procedures do not defeat the rights granted by Congress." California's arbitration statute is similar to the FAA in most important respects, and thus furthers the full and uniform effectuation of the purpose behind the federal arbitration statute.

The Rosenthal decision thus takes away from plaintiffs the advantage deriving from at least the threat that a jury will take a dim view of fraud or overreaching in the inducement of an arbitration provision. But the court also substantially curtailed the examination in which a court may engage. The twenty-four plaintiffs in Rosenthal, who sued the defendants to recover losses from failed mutual fund investments, had asserted two theories of fraud: *fraud in the inception* (or execution) of the agreement and also *fraud "permeating" the entire agreement*. The court found that fraud in the inception, which occurs when the "promisor is deceived as to the nature of his act, and actually does

not know what he is signing, or does not intend to enter into a contract at all,” can void an arbitration agreement because the necessary mutual assent is lacking and the parties never in fact agreed to anything. Rosenthal at 58 Cal.Rptr.2d 887, *quoting Ford v. Shearson Lehman American Express, Inc.*, (1986) 180 Cal.App.3d 1011, 1028. (By contrast, fraud in the inducement, which occurs when the promisor knows what he is signing but is fraudulently induced to consent, does *not* void an arbitration agreement, although it can make such an agreement voidable if the party elects rescission. *Id.*) Questions of fraud in the inception, as noted above, are for courts (but not juries) to decide.

Claims of “fraud permeating the entire agreement,” however, are for an arbitrator and not a court to decide. Indeed, the court “declines to further recognize” the permeation doctrine at all, concluding that it conflicts with Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-404. *Id.* at 889.

In Rosenthal the court looked at the merits of the fraud in the inception claims for the purpose of providing guidance to the trial court in its task of resolving them. This “guidance” suggests that it will not be easy for a plaintiff to extricate herself from an agreement to arbitrate: the court was willing to invalidate an arbitration agreement on the basis of fraud in the inception *only* where the individual was unable to read or write English (*id.* at 895), blind (*id.* at 896), or suffering from Alzheimer’s disease (*id.* at 897).

2. Must an Agreement to Arbitrate be Knowing and Voluntary to be Enforceable?

A number of cases have addressed one of the most obvious issues in mandatory arbitration: How should an agreement to waive important substantive and procedural rights be construed when one of the parties had no knowledge that he or she was giving up those rights? A fairly substantial body of law has developed:

Prudential Insurance Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 61 (1995) held that, to be enforceable, an agreement to arbitrate must have been *knowingly* entered into by the employee: “Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes.” *Id.* at p. 1304.

In contrast to the Ninth Circuit, the Fifth Circuit Court of Appeals stayed an age-discrimination claim in order to enforce an arbitration clause contained in a National Association of Securities Dealers U-4 Registration contract. Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656 (5th Cir. 1995). Following Gilmer, the court held that the Federal Arbitration Act requires courts to enforce such arbitration agreements. In addition, the court held that the knowing and voluntary waiver provisions of the Older Workers Benefit Protection Act were not applicable to arbitration agreements. Finally, the court refused to consider the plaintiff/appellee’s argument that, as a general rule, waiver of a judicial forum must be knowing and voluntary. The court characterized this argument (which was based on Prudential Insurance Co. of America v. Lai, *supra*), as a factual issue raised for the first time on appeal.

In Armijo v. Prudential Insurance Co. of America (10th Cir. 1995) 72 F.3d 793, the plaintiffs were terminated securities sales agents who had signed standard NASD U-4 forms. When they brought state and federal discrimination claims against Prudential, it moved to compel arbitration and dismiss the claims based on the U-4’s arbitration clause. The court held that the plaintiffs failed to rebut the presumption of arbitrability articulated in Gilmer v. Interstate/Johnson Lane Corp., *supra*, 500 U.S. 20. The court articulated five reasons for holding that the U-4 form’s arbitration provision applied to the plaintiffs’ employment dispute:

- (1) arbitration clauses must be interpreted liberally and all doubts must be resolved in favor of arbitration;
- (2) a consistent reading of the NASD Code of Arbitration Procedure requires inclusion of employment disputes;

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- (3) most courts that have addressed the arbitrability of employment disputes under the November 1992 NASD Code have concluded that such disputes are arbitrable;
- (4) the parties' signatures on the U-4 forms clearly indicate that they believed, intended and understood that certain disputes would be arbitrated; and
- (5) NASD indicated as early as 1987 that the Code applies to disputes between employers and sales representatives.

Senior District Judge Bruce Jenkins, sitting by designation, concurred in the result, but expressed reservations about how "far afield" the cases interpreting the Federal Arbitration Act (FAA) had gotten from Congress' original intent. Referring to the FAA's exemption for employment contracts in interstate commerce, Judge Jenkins observed that "[i]n making an exception for employment contracts, Congress recognized that arbitration provisions in such contracts are not really bargained for at all. Ordinarily, if a person wants a job, he must agree to the employer's terms, however onerous that may be." *Armijo* at 1995 U.S. App. LEXIS 35278, *26.

In *DeGaetano v. Smith Barney, Inc.*, 70 Fair Empl. Prac. Cas. (BNA) 401, 1996 U.S. Dist. LEXIS 1140 (S.D.N.Y., 1996), the plaintiff signed the defendant's employment policies which included arbitration procedures for employment disputes. The plaintiff alleged that she was subjected to sexual harassment which forced her resignation. She then sued the defendant, alleging federal and state law causes of action, and refused its demands to arbitrate.

Using the Second Circuit's four-prong test for considering a motion to compel arbitration in the context of a claim based on statutory rights, the court quickly disposed of the first two prongs, finding that the parties agreed to arbitrate (the elements of duress or coercion were absent) and that the scope of the arbitration agreement encompassed each one of the plaintiff's claims. In analyzing the third prong (whether Congress intended Title VII claims to be arbitrable), the court looked to the text and legislative history of Title VII, and found no Congressional intent to preclude a waiver of judicial remedies by means of arbitration. In fact, the court found that the policies supporting arbitration converged with those of Title VII because both favor informal methods of conference, conciliation and persuasion.

Finally the court dismissed plaintiff's argument that she did not knowingly and voluntarily waive her rights, distinguishing *Prudential Insurance Co. v. Lai*, *supra*, 42 F.3d 1299, and finding that the policies signed by the plaintiff put her on notice that her claims would be subject to arbitration. For these reasons, the court granted the motion to compel arbitration of plaintiff's sex discrimination claims.

Another federal case out of New York, *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100 (S.D.N.Y. 1995), reaches the same result. There, the plaintiffs signed employment policies which included an agreement to arbitrate all employment disputes, including state and federal discrimination claims. The defendant's arbitration policy was also contained in its employee handbook. The plaintiffs then brought federal and state law claims alleging sexual harassment and racial discrimination.

The court preliminarily found that the employment policies signed by the plaintiffs constituted agreements within the purview of the Federal Arbitration Act. The court then found that:

- (1) the plaintiffs' signatures on the employment policies evinced their knowing agreement to arbitrate employment disputes (distinguishing *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974));
- (2) the plaintiffs' disputes were within the scope of their agreements to arbitrate; and

- (3) Congress did not intend to preclude arbitration of the plaintiffs' Title VII claims (criticizing Prudential, *supra*).

Thus, the court granted the defendant's motion to compel arbitration and stayed the action pending arbitration.

In Beauchamp v. Great West Life Assurance Co. (E.D. Mich. 1996) 918 F. Supp. 1091, the plaintiff brought an ADEA and Title VII suit against the defendants, alleging discriminatory termination because of her age and gender. Beauchamp had signed an NASD U-4 form, but claimed she was not informed of the arbitration clause it contained. Citing Prudential Insurance Co. v. Lai, she argued that she did not knowingly relinquish her right to a judicial forum for employment discrimination claims. The court reviewed the analysis in Lai and found its reasoning unpersuasive. Following Gilmer, the court found that a party is generally charged with knowledge of the existence and scope of an arbitration clause within a document signed by that party. Turning to the plaintiff's argument that the U-4 form was unenforceable as an unreasonable contract of adhesion, the court found that the form was substantially reasonable and neither oppressive nor unconscionable. The court noted that the plaintiff was not surrendering substantive statutory rights through use of an arbitral forum. Therefore, the court directed the plaintiff to submit her claims to binding arbitration pursuant to the NASD Code of Arbitration Procedure.

In Golenia v. Bob Baker Toyota (S.D. Cal. 1996) 915 F. Supp. 201, the plaintiff alleged violations of the ADA. When he was hired, Golenia had signed an employment agreement with an arbitration clause, a receipt for an employee handbook which described the arbitration provisions, and a form acknowledging receipt of the arbitration policy. In response to the defendant's efforts to compel arbitration, Golenia argued that: (1) the FAA does not apply to employment contracts; (2) the arbitration clause is unenforceable because he had not read the clause before signing the employment agreement; (3) the clause is an oppressive term in the adhesion contract; and (4) the clause may not be enforced as to ADA claims because such claims were not identified in the arbitration policy and because such claims may not be waived until after the cause of action accrues. The court rejected each of these arguments, finding: (1) the FAA only excludes employment contracts involving workers directly involved in the interstate transportation of goods; (2) plaintiff could not argue that he is not bound because of his own failure to read the contract; (3) the clause is not an unenforceable adhesion contract because it applies equally to both parties; (4) the arbitration policy is enforceable as to ADA claims because the policy provides sufficient notice that ADA claims are within its scope, because ADA claims do not require a higher form of waiver than other claims, and because the plaintiff cited no authority that ADA claims may not be waived before they accrue. Thus, the court granted the motion to stay and compel.

In Hoffman v. Aaron Kamhi, Inc. (S.D.N.Y. 1996) 1996 U.S. Dist. LEXIS 3600, 3 Wage & Hour Cas. 2d (BNA) 445, the plaintiff alleged violations of the ADA and the Family & Medical Leave Act. Although Hoffman had signed an employment agreement which contained an arbitration clause, the court denied defendants' motion to compel arbitration on the ground that these claims were outside the scope the arbitration clause because the clause was ambiguously phrased and failed to make specific reference to discrimination claims. Furthermore, the employment contract was signed before the ADA or FMLA were enacted, so the court concluded that Hoffman could not have intended to waive his rights under those laws.

In Kahalnik v. John Hancock Funds, Inc., et al. (N.D. Ill. 1996) 1996 U.S. Dist. LEXIS 3701, the plaintiff alleged violations of the ADEA, ERISA and the OWBPA. The defendants moved to dismiss the litigation and compel arbitration because Kahalnik had signed an NASD U-4 form, which contained an arbitration clause. The court held (adopting a Magistrate Judge's Report and Recommendation) that Kahalnik was bound by his signature on the compliance clause of the U-4 Form and that the arbitration agreement did not violate the OWBPA because the agreement only affected the dispute resolution forum and not substantive rights under ADEA. In addition, the court agreed that the agreement did not violate due process because the NASD is not a government actor and because Kahalnik explicitly agreed to arbitrate employment disputes. However, the court

refused to compel arbitration of the ERISA claim because the parties seeking to compel arbitration of that claim were not NASD members and so were not parties to the arbitration agreement.

In another recent case, the Ninth Circuit applied California law to uphold an arbitration clause in an employee handbook. Continental Airlines, Inc. v. Mason, 1996 U.S. App. LEXIS 16558 (9th Cir. June 16, 1996). Appealing the district court's order compelling her to arbitrate her employment discrimination, wrongful termination and infliction of emotional distress claims, Mason argued that the arbitration provision in the employee handbook did not contain an express waiver of her right to a judicial forum, was unclear as to what claims are arbitrable and was an unconscionable adhesion contract. Citing Madden v. Kaiser Foundation Hospitals, 17 Cal. 3d 699 (1976), the court stated that a valid arbitration provision need not contain an express waiver of an employee's right to try her claims before a jury. In addition, the court distinguished Prudential Insurance Co. v. Lai, 42 F. 3d 1299 (9th Cir. 1994) on both legal and factual grounds. The court noted that Lai was decided under federal law and that, in contrast to Mason, the employees in Lai were not given accurate information about the arbitration provision or an opportunity to read it. Relying on California's "strong public policy in favor of arbitration," and citing Moncharsh v. Heily & Blase, 3 Cal. 4th 1 (1982), the court upheld the arbitration agreement. Furthermore, the court held that the arbitration provision was not an unconscionable adhesion contract because Mason knew of the arbitration procedure and had used it in the past. Thus, the court reasoned that the procedure could not have violated her reasonable expectations. Finally, the court held that "nothing shocks the conscience about an arbitration procedure that does not provide for discovery or legal representation."

Two recent Ninth Circuit opinions rely on Prudential Insurance Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994) to hold that a wrongful termination plaintiff did not knowingly waive the right to litigate statutory discrimination claims. In the first case, Renteria v. Prudential Insurance Co. of America (9th Cir. 1997) 113 F.3d 1104, the court recited the "knowing waiver" requirement articulated in Lai and noted that the only significant difference between the two cases is that the arbitration provision in the U-4 securities form signed by Renteria stated that she was bound to arbitrate all disputes listed in the NASD Code, as it "may be amended from time to time." The additional language, the court held, did no more to put Renteria on notice that she was waiving the right to litigate Title VII claims than the agreement at issue in Lai. The arbitration clause did not, at the time the agreement was executed, describe any disputes that the parties agreed to arbitrate. Therefore Renteria did not, by agreeing to the provision, knowingly waive her right to arbitrate her discrimination claims. See also Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 1997 U.S. Dist. LEXIS 7031 (D. Mass. April 23, 1997) (ordering additional discovery to determine whether plaintiff's U-4 form evidenced a knowing and voluntary waiver of her statutory rights and whether the New York Stock Exchange provides an adequate forum to resolve Title VII and ADEA claims).

In Nelson v. Cyprus Bagdad Copper Corp., (9th Cir. 1997) 119 F.3d 756, the court held that arbitration provisions contained in an Employee Handbook unilaterally issued by an employer do not serve to waive an employee's rights to a judicial determination of his Americans with Disabilities Act or state civil rights claims. Nelson had signed an acknowledgment for the handbook, which specifically stated that all employment disputes, including statutory claims, are subject to arbitration. Citing only to Lai, Judge Stephen Reinhardt wrote for the court that neither signing a promise to read and understand the handbook nor continuing to work after reading the handbook constitutes a knowing agreement on the part of an employee to waive a statutory remedy provided by a civil rights law. Rather, the court stated that the choice must be explicitly presented to the employee, and the employee must explicitly agree to waive the specific right in question. Cf. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) (requiring an employee who signed an arbitration agreement within an employee handbook to arbitrate her discrimination claims).

Going the other way is Brookwood v. Bank of America, NT & SA (Sixth Dist., 1996) ___ Cal. App. ___, 53 Cal. Rptr. 2d 515, in which the plaintiff alleged sex discrimination in violation of California's FEHA. At the time she was hired, Brookwood signed a registered representative agreement and an NASD U-4 form, which contained arbitration clauses. When defendants petitioned to compel arbitration, Brookwood declared that she was not aware that the agreements she had signed contained arbitration provisions. Citing Prudential Insurance Co. of America v. Lai, she argued that did not knowingly accept arbitration of Title VII claims. The court pointed out that Lai

has been extensively criticized and should not, in any event, be read to change state law regarding the revocation of a contract. The court held that unilateral lack of understanding was not, under these circumstances, ground for revocation of the contract to arbitrate disputes. Furthermore, the court held that the broad arbitration clauses at issue encompassed Brookwood's claims. Therefore, the court affirmed the trial court's order granting defendants' motion to compel arbitration.

3. Can an Employer Waive the Right to Compel Arbitration by its Conduct?

Courts have been called upon to decide whether one party or the other, usually the employer, has *waived* its right to compel arbitration by engaging in litigation.

In *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 73 Fair Empl. Prac. Cas. (BNA) 856, 1997 U.S. App. LEXIS 6233 (3rd Cir. April 3, 1997) the plaintiff complained that she did not understand the arbitration agreement which she signed as a condition of her employment and that she should not be forced to arbitrate her state (New Jersey) law sexual harassment claims. The court rebuffed the plaintiff's arguments, holding that she had voluntarily agreed to arbitrate her employment dispute and that the waiver of a state law right to a judicial forum for the resolution of state claims is enforceable under the FAA. Finally, the court rejected the plaintiff's argument that the employer had waived its right to compel arbitration by failing to commence arbitration proceedings in accordance with the agreement and by failing to seek another arbitrator after Judicial Arbitration & Mediation Services (J.A.M.S.) refused to arbitrate the dispute, apparently because the arbitration agreement failed to meet J.A.M.S.' minimum fairness standards. Noting that waiver of the right to compel arbitration is not to be lightly inferred, the court held that there was no evidence that the employer had initiated litigation or discovery or had in any manner waived its right to compel arbitration of the plaintiff's claims.

Several other appellate courts have rejected plaintiffs' claims that the defendant waived its right to compel arbitration. See, e.g., *Burns v. Imagine Films Entertainment, Inc.*, 1997 U.S. App. LEXIS 4031 (2nd Cir. March 6, 1997); *Doctor's Associates, Inc. v. Distajo*, 107 F.3d 126 (2nd Cir. 1997); *American Heart Disease Prevention Foundation, Inc. v. Hughey*, 1997 U.S. App. LEXIS 1806 (February 4, 1997). In these cases, engaging in eviction proceedings or extensive pretrial litigation were held not to constitute a waiver of the defendant's right to compel arbitration. Rather, the above courts held that the plaintiffs had not shown sufficient prejudice from the defendants' failure to promptly stay the litigation to make a finding of waiver appropriate.

However, in *Davis v. Continental Airlines, Inc.* (2d Dist. 1997) 59 Cal.App.4th 205, an employer was sued by an employee whose claims were supposedly subject to arbitration, but its decision to avail itself of state court discovery proceedings cost it the right to compel arbitration. The plaintiff, Alsenia Davis, was a skycap for Continental. Alleging she had been sexually harassed by her supervisor, she sued in state court under the FEHA and on other claims in contract and tort. Her complaint was filed on January 24, 1995, but it was not until January 3, 1996 that defendant filed its motion to compel arbitration. In the meantime, defendants answered the complaint (asserting, among other affirmative defenses that plaintiff's action was barred for her failure to pursue Continental's "binding internal grievance procedures" or to submit her dispute to arbitration). Defendants also propounded interrogatories, obtained approximately 1,600 pages of documents in 86 categories and took plaintiff's videotaped deposition for two days producing a 410 page deposition transcript.

Declaring that "the courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration" (59 Cal.App.4th 205, 209, citing *Christiansen v. Dewor Developments*, (1983) 33 Cal.3d 778, 784), the court sustained the trial court's refusal to compel arbitration. Waiver of the right to compel arbitration may be found where the parties seeking arbitration has (1) previously taken steps inconsistent with an intent to invoke arbitration (2) unreasonably delayed in seeking arbitration, or (3) acted in bad faith or with wilful misconduct. Here, the court found that Continental had delayed unreasonably, sought and gained an advantage over its adversary, then attempted to foreclose plaintiff from availing herself of discovery procedures available in court by demanding arbitration.

4. When Will The Demonstrated Inadequacy of the Arbitral Forum and/or Imposed Limitations on Remedies Serve as a Defense to Arbitration?

a. Limitations on Remedies

Graham Oil Co. v. ARCO Products, Inc., 43 F. 3d 1299 (9th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 275 (1995) invalidated an arbitration clause in a franchise agreement which deprived the arbitrator of the authority to award various statutory remedies, observing: “that franchisees may agree to an arbitral forum in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily-mandated rights and benefits that Congress intended them to possess.” *Id.* at p. 1305.

b. Award in Manifest Disregard of the Applicable Law

In Glennon v. Dean Witter Reynolds, Inc., (6th Cir. 1996) 83 F.3d 132, the Sixth Circuit sounded a variation on the finality theme. Dean Witter had appealed a District Court order denying its motion to vacate an arbitration decision, claiming that the limited federal judicial review of arbitrators’ awards of punitive damages violated the Due Process Clause of the Fifth Amendment. The appeals court held that the arbitrator’s rulings were not in “manifest disregard of the applicable law,” and that, because the FAA’s “manifest disregard of the law” standard permits meaningful review of the defendant’s claims, due process is satisfied with respect to those claims.

In a case applying New York law, a federal district court found that an arbitrator’s award should be upheld, even if legally incorrect, unless there is evidence that the arbitrator willfully ignored the law. DiRussa v. Dean Witter Reynolds, Inc., 71 Fair Emp. Prac. Cas (BNA) 1002 (S.D.N.Y. 1996). DiRussa arbitrated his wrongful termination and age discrimination claims before a National Association of Securities Dealers arbitration panel. Unhappy with the amount awarded and the failure of the arbitrator to award attorneys’ fees pursuant to the Age Discrimination in Employment Act, DiRussa sue to vacate the arbitrator’s award. The court explained that, under New York law, an arbitrator’s award will not be vacated unless the arbitrator ignores legal principles which are obvious or capable of being readily and instantly perceived by the average arbitrator. The court found that the statutory scheme applying the Fair Labor Standards Act’s attorneys’ fees provision to the ADEA was not so obvious that it justified overturning the arbitrator’s award. The court also found that the arbitrator did not need to explain his calculation of damages and confirmed the award.

But in DeGaetano v. Smith Barney, Inc., (S.D.N.Y., 1997) __ F.Supp. __ 75 FEP Cases (BNA) 579, 1997 U.S. Dist. LEXIS 17350, the court granted a motion to modify or correct an arbitration award rendered in favor of a Title VII plaintiff to whom an arbitration panel had awarded in excess of \$90,000 in damages but no attorneys’ fees. The plaintiff, Alicia DeGaetano, had sued Smith Barney for sexual harassment, sex discrimination and related claims. On February 5, 1996 the court granted Smith Barney’s motion to compel arbitration. DeGaetano v. Smith Barney, Inc., (S.D.N.Y., 1996) __ F.Supp. __ , 1996 U.S. Dist. LEXIS 1140. In the subsequent arbitration proceedings, DeGaetano applied for fees, providing the arbitrators with a memorandum of law on the particulars of Title VII’s fee shifting provision and case law interpreting it. On March 18, 1997, following ten days of hearings, the arbitration panel rendered its decision which states in its entirety:

Respondents shall pay to claimant \$90,355 in damages and interest. This award is joint and several. The panel does not find that the conduct of respondents rose to the level contemplated by Title VII and therefore deny the request for punitive damages and attorneys’ fees. Unpaid forum fees of \$10,800 are assessed against respondent Smith Barney.

The court reviewed the law applicable to attorneys’ fees under Title VII and held that the arbitration panel simply engaged in a manifest disregard of that law in failing to award such fees. In so doing it distinguished DiRussa v. Dean Witter Reynolds, Inc. (2d Cir. 1997) 121 F.3d 818 which had upheld an arbitration panel’s refusal to award attorneys’ fees to a successful ADEA claimant. In Di Russa the Second Circuit held that there was no evidence that the arbitration panel actually knew

of -- and therefore disregarded -- the ADEA attorney fee standard. Here the evidence of knowing disregard was unmistakable. Significantly, the court also held that Smith Barney's arbitration policy "to the extent that it prevents prevailing plaintiffs from obtaining an award of attorneys' fees in employment discrimination cases is void as a matter of public policy." 1997 U.S. Dist. LEXIS at *19.

c. Plaintiff Responsible for Forum Fees

A case of major importance was authored by Judge Harry Edwards, who held that a mandatory agreement to arbitrate employment disputes, including claims resting on statutory rights, could be enforced at the employer's option *only if* the affected employee was not required to pay the arbitrator's fees. *Cole v. Burns International Security Services, et al.*, 105 F.3d 1465, 1997 U.S. App. LEXIS 2223 (D.C. Cir. 1997). Because the court felt that the arbitration provision at issue did not undermine the relevant statutory scheme, it held that it was constrained by *Gilmer v. Interstate/Johnson Lane Corp., supra*, to find the agreement enforceable. However, the court noted that public law confers on employees both substantive rights and a reasonable right of access to a neutral forum in which those rights can be vindicated, and held that employees cannot be required to pay for the services of the decision maker to pursue their statutory rights. Since the arbitration agreement did not specify who would pay the arbitrators, the court construed it to require the employer to pay all arbitrators' fees associated with the resolution of the employee's claims.

Judge Edwards also made some possibly significant remarks about the standard for reviewing arbitration decisions. Citing *Gilmer*, he notes that Supreme Court jurisprudence regarding mandatory agreements to arbitrate statutory rights relies on two principles: (1) by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial forum; and (2) although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue. "These twin assumptions regarding the arbitration of statutory claims are valid *only if* judicial review under the "manifest disregard of the law" standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law." *Id.* at ___, 1997 U.S. App. LEXIS 2223 at *71 (emphasis added). It is clear that the presence of meaningful judicial review was crucial to the court's decision to uphold the arbitration agreement. In California, however, arbitral decisions are not reviewable for even clear errors of law. See *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 28 (1992).

d. Adequacy of Arbitration Procedures

Not much attention has been given to significant facts about arbitration procedures that were left *out* of the record in *Gilmer*. In that case, the court approved arbitration of the plaintiff's ADEA claim based on certain critical *assumptions* about the adequacy of the arbitration process because factual information about that process was missing. The plaintiff strenuously argued to the Court that the arbitration process was woefully flawed, in that it was private, inherently biased and lacking in the fundamentals of discovery and other procedural necessities. However, since he had no explicit facts upon which to rest his claims, the court was able to sweep them aside as "generalized" and "speculative." *Gilmer* at 30. Similarly, *Gilmer* argued that arbitration was not something to which he freely agreed; rather, it was the product of a one-sided contract of adhesion. Here again, in the absence of specific facts, the court was unimpressed: "As with the claimed procedural inadequacies [of the NYSE system] ..., this claim of unequal bargaining power is best left for resolution in specific cases." *Gilmer* at 33. Thus, *Gilmer* rests on the *assumption* that there are no substantive or procedural differences in litigation before a private, securities industries arbitrator and in court. The Court was able to conceptualize the dispute as one over the appropriate *forum* for employment dispute resolution. Those familiar with employment law -- on both sides -- know better: being forced into arbitration has a tremendous impact on a case's outcome. But it is not until recently that disputes have come along which present concrete facts upon which the adequacy of private arbitration systems may be examined. In *Rosenberg v. Merrill Lynch Pierce Fenner & Smith, Inc.*, (D. Mass. Jan. 26, 1998) ___ F.Supp. ___, the plaintiff has put together a trial record which, should it get to the Supreme Court, will force an examination of these untested assumptions.

Susan Rosenberg was 45 years old and had never worked in the securities industry when she was hired by Merrill Lynch on January 6, 1992 in its Wellsley, Massachusetts office. After she had commenced her training program, she was required to sign a U-4 form, the uniform application for securities industry registration. The U-4 form recites her agreement to arbitrate “any dispute, claim or controversy that may arise between me and my firm” According to her testimony, she had no idea when she initially negotiated her employment terms with Merrill Lynch that she would be required to arbitrate any disputes that might arise. Indeed, since the form was one of many which she signed in the early days of her employment, she had no memory of signing it at all.

As it turned out, Rosenberg’s employment with Merrill Lynch did not go well. She claimed to have been sexually harassed then discriminated against by her supervisor. Although she outperformed at least four male employees in her group, she was terminated in May, 1994. She sued in state court alleging age and gender discrimination as well as sexual harassment. Her suit was removed to the District of Massachusetts, and Merrill Lynch, citing Gilmer, asked the district court judge to stay it pending arbitration of her claims.

Before considering defendant’s motion, the court ordered the parties to develop a record on several issues the court considered important: First, “while the Gilmer court had enforced the U-4 arbitration clause in a case brought under the ADEA, its decision had not addressed the arbitrability of claims brought under Title VII.” Rosenberg v. Merrill Lynch Pierce Fenner & Smith, Inc. (Rosenberg I) (D. Mass. 1997) 965 F.Supp. 190, 192. The court wanted to know whether the Gilmer reasoning applied with equal force to Title VII. Also, the court was concerned with the two factual issues the Gilmer court had left for “decision in specific cases”: Whether a particular arbitral forum was adequate to vindicate the statutory rights involved; and whether the agreement to arbitrate was involuntary or unconscionable.

Having permitted the parties to develop the underlying facts through discovery the court reheard defendant’s motion and decided that Ms. Rosenberg could not be compelled to arbitrate her statutory claims. As to the plaintiff’s Title VII claims, the court concluded that Congress had made it clear in its deliberations over the CRA that such claims were not to be subject to mandatory arbitration. Next, the court looked at the evidence amassed by the parties and *amici* as to the adequacy of the securities industry arbitration procedures, and found them wholly wanting. Thus, even as to Rosenberg’s ADEA claim, defendant’s motion to stay was denied. Having reached these two conclusions, the court found it unnecessary to decide the question of unconscionability.

Rosenberg’s discussion of whether the CRA explicitly or implicitly prohibits mandatory arbitration of Title VII claims will delight some and disappoint others. (Predictably, Merrill, Lynch has already appealed.) The question, as posed by the court, is whether the “where appropriate and to the extent authorized by law” language in the Act was enacted with Gilmer in mind, or with the line of cases preceding Gilmer which had disapproved of arbitration as a means of resolving civil rights disputes in the work place. *See, e.g., Alexander v. Gardner Denver*, (1974) 415 U.S. 36. The court in Rosenberg carefully reviewed the timing of the various phases of the enactment of the CRA and concluded that Congress did not mean to authorize mandatory arbitration.

This will be controversial. However, the more interesting part of the opinion from the practitioner’s point of view may well be its analysis of the adequacy of the actual securities industry arbitration procedures in light of Gilmer’s assumptions about them. The court conducted an exhaustive review of evidence amassed by the parties and made several interesting conclusions: First, the court promptly tossed out the “age/gender card,” rejecting the plaintiff’s contention that, because most securities industry arbitrators are older white men, the procedures must be as a whole, suspect. Although there is some evidence that arbitration awards are in general lower than jury verdicts in similar cases, the court was not convinced that there is enough similarity in the merits of those cases to make a valid comparison.

However, the court expressed considerable dismay at what it termed the “structural bias” inherent in the securities arbitration system. Individual brokerage houses such as Merrill Lynch are members of “self-regulating organizations” (SRO’s), the New York Stock Exchange (NYSE) or the National Association of Securities Dealers (NASD), for example, which exercise complete control over the arbitration process, including the rules by which hearings are held, appointment and qualifications of the arbitrators, challenges to their appointment, information about their prior

decisions and the form of their awards. Arbitrators appointed in this fashion by an organization governed in part by one of the parties to the dispute *cannot* be free of bias, the court held. Interestingly, the court analogized the securities arbitration system to that found to be unconscionable in Bill Graham v. Scissor-Tail, (1981) 28 Cal.3d 807.

Although Rosenberg's focus is on structural bias, the court also noted some other defects in arbitration procedures: they are intended to be confidential, (thus depriving the public of the benefits of open adjudication of legal norms); arbitrators are encouraged *not* to state reasons for their decisions; and the parties to a typical arbitration have scant ability to review the qualifications of an arbitrator prior to exercising any challenges for cause or preemptory challenges. In this fashion, Rosenberg answered the questions left open by Gilmer with a resounding condemnation of at least one set of mandatory, pre-dispute arbitration procedures.

In Ramirez-de-Arellano v. American Airlines, Inc., (1st Cir. 1997) U.S. at LEXIS 35917, the First Circuit refused to enforce an arbitration agreement because of its "strong concerns about the fundamental fairness of giving preclusive effect" to it. 1997 U.S. at LEXIS *6. Citing Nelson v. Cyprus Bagdad Copper Corp., (9th Cir. 1997) 119 F.3d 756, the court noted that the claimant could not be shown to have had clear notice of the policy, and that, in any event the policy was one-sided and unfair in that it provided no opportunity for discovery, the decision-maker was not a disinterested party, but rather an American Airlines managerial employee and that, according to the record, the claimant was denied any review by any disinterested hearing officer or panel. However, the court found that there was no evidence of cognizable employment discrimination raised by Ramirez's complaint and upheld its dismissal on summary judgment.

In Linney v. Turpen, 49 Cal. Rptr. 2d 813 (First Dist. Ct. App. 1996), a California Court of Appeal addressed the difficult issue of the possible appearance of bias by arbitrators in favor of "repeat users." An airport vehicular traffic controller was charged with violation of the rules set forth in the Airport Police Manual. Pursuant to San Francisco Civil Service Commission Rules, the employee was entitled to a dismissal hearing, at which the hearing officer recommended a six-month suspension without pay. The employee appealed the trial court's denial of his petition for a writ of mandate.

The employee argued that the San Francisco Civil Service Commission Rule 6 governing the selection of hearing officers deprived him of due process. More specifically, the employee alleged that the hearing officer was deprived of impartiality because he was selected only by the employer who had sole responsibility for paying him, thus providing a financial incentive to the hearing officer to render a decision favorable to the employer.

The court noted that the employee had failed to utilize mechanisms to challenge the hearing officer's impartiality and held that it was not an issue properly raised on appeal. Furthermore, the court held that due process merely requires a "reasonably impartial, noninvolved reviewer." Absent evidence of prejudice or the appearance of bias, the court declined to hold that an inferior selection process amounts to a due process violation.

A lengthy dissent by Presiding Justice Anthony Kline argues that Linney's rights to due process are impaired when the arbiter of his claims is selected and compensated by his employer.

In Saika v. Gold, 1996 Cal. App. LEXIS 911 (Sept. 30, 1996), a California Court of Appeal invalidated a one-sided, "heads I win, tails you lose" arbitration agreement. After a chemical skin peel went awry, Saika sued Dr. Gold for malpractice, and the doctor moved to compel arbitration pursuant to an agreement which the parties had executed. The trial court ordered Saika to arbitrate her malpractice claim, and the arbitrator awarded her \$325,000.00. Dr. Gold filed a request for a trial de novo, citing a clause in the arbitration agreement which granted either party the right to such a trial if the arbitration award exceeded \$25,000.00. It was this provision that the court characterized as a "heads I win, tails you lose" proposition: the chances that an injured patient would ever benefit from such a provision were negligible, since it would be uncommon for an arbitrator to award an unfairly low sum to an injured patient, which amount nevertheless exceeded \$25,000.00. This clause made the arbitration process itself "an offensive weapon in one party's arsenal." The court emphasized that by giving one party the power to annul the arbitration if it that party loses, the trial de novo provision perverted the arbitration agreement by denying the patient an inexpensive and efficient resolution of her claims. The court held that such a lopsided provision undermines public

confidence in arbitration. Invoking principles of equity, the court refused to enforce the trial de novo provision on the grounds that it rendered arbitration an illusory remedy for one party and contravened the strong public policy in favor of arbitration. Although the court analyzed the one-sidedness of the trial de novo provision, it did not discuss the other elements of unconscionability under California law, such as whether the provision violated the reasonable expectations of the parties or shocked the conscience. Nor did the court explore whether every one-sided provision in an arbitration agreement undermines public confidence in arbitration and is unenforceable under equitable principles. However, the court did stress that the trial de novo clause “thwarts the salutary aims of arbitration” because it gives one party the right to bounce the other out of the arbitral forum and back into the “palaver of procedural challenges that lend, at least for a time, uncertainty to any judgment rendered in the courts.”

In Cheng-Canindin v. Renaissance Hotel Assoc., (1996) 50 Cal.App.4th 676, 57 Cal Rptr.2d 867, the court denied an employer’s motion to compel because it found that the parties had never agreed to arbitrate. 50 Cal.App.4th at 678. Here, the employer argued that the employee had elected arbitration when she signed a document agreeing, among other things, to resolve all disputes concerning her employment by the procedures set forth in the employee handbook. 50 Cal.App.4th at 682. The “internal problem solving procedure” outlined in the handbook provided for a “Review Committee” to resolve all “problems and concerns” arising from employment. 50 Cal.App.4th at 679. The “Review Committee” was composed of two employees, two members of management, and the hotel’s General Manager, and was authorized to resolve the complaint *only* in a manner consistent with hotel policy by voting on whether hotel procedures had been followed. (Shades of 1984: not only was the committee explicitly *precluded* from changing, altering, modifying or making exceptions to hotel policies, employees were instructed that they may not challenge the existence or wisdom of hotel policies, rules or procedures.)

The court concluded that, whatever the nature and intended effect of the internal problem solving procedure, it could not be construed as arbitration. “[A]lthough arbitration can take many procedural forms, a dispute resolution procedure is not an arbitration unless there is a third party decision maker, a final and binding decision and a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision.” 50 Cal.App.4th at 687-688. The “internal problem-solving procedure” was deemed to be inappropriately slanted in the employer’s favor, since management selected Committee members, decided the relevancy of evidence, and controlled who testified. Because the Review Committee was under the control of the employer, even a minimum level of impartiality could not be ensured.

In Stirlen v. Supercuts, (1997) 51 Cal.App.4th 1519, the First District Court of Appeal refused to enforce an employment arbitration agreement which limited remedies to contract damages, enabled the employer to use the court system for certain claims *it* might wish to bring, but restricted the employee to the arbitral forum as to any dispute *he* might have. The court found this agreement to be unconscionable and against public policy. *Id.* at 1520-21. The arbitration agreement was held to be unconscionable, that is lacking in a “meaningful choice on the part of one of the parties,” but containing “contract terms which are unreasonably favorable to the other party,” (*id.*) in spite of Supercuts’ claim that it did not have superior bargaining power because Stirlen was an experienced businessman. *Id.* The court noted that Stirlen had no realistic expectation to modify the terms because he was presented with the contract after he accepted employment on a take it or leave it basis. *Id.* Moreover, although Stirlen may have been experienced in business, he was legally unsophisticated and could be unfairly surprised by the contract terms. *Id.*

The agreement’s restrictions on remedies were found to violate the public policy articulated in Cal. Civ. Code Section 1668 which prohibits contracts exempting a party from “responsibility for [its] own fraud, willful injury to the person or property of another or violation of the law.” Rather than attempt to defend the remedial limitations in its own contract, Supercuts argued it had cured the defect when, prior to litigation, its counsel offered to give the arbitrator authority to award full damages. Since Stirlen’s lawyer never responded to this letter, the court found that Supercuts’ “offer” had never been accepted and therefore could not be construed as a revocation or waiver of the restrictions on remedies as Supercuts claimed. “No existing rule of contract law permits a party to resuscitate a legally defective contract merely by offering to change it.” *Id.* at 1523.

In Engalla et al. v. Permanente Medical Group, Inc. et al., (1997) 15 Cal. 4th 951, 64 Cal.Rptr.2d 843, P.2d 903 the California Supreme Court finally found a written arbitration agreement it didn't like -- at least as applied -- but the court's narrow holding actually broke little new ground.

The egregious facts of the case presented a particularly compelling opportunity for the Supreme Court to take a more critical look at private arbitration systems. Due to a missed diagnosis by Kaiser, Wilfredo Engalla did not discover that he had cancer until it became inoperable and terminal. Upon discovering the malpractice, Engalla's attorney promptly served a written demand for arbitration pursuant to the provisions of the Kaiser policy which covered Engalla. The arbitration clause provided the process for selecting arbitrators, which was to be accomplished within 60 days of service of the claim. Although Kaiser knew that Engalla had only a short time to live, a fact his attorney repeatedly emphasized in attempting to expedite the process, it delayed selection of an arbitrator until 144 days after the claim was served. Engalla died the next day. When Kaiser refused to stipulate that Engalla's death would not reduce the amount of damages his estate could collect, Engalla's heirs refused to continue with the arbitration and filed suit.

Ruling on Kaiser's motion to compel arbitration, the trial court found evidence of fraud in the inducement and in the application of the arbitration agreement and further found that the arbitration agreement, as applied, was overbroad, unconscionable and a violation of public policy. The court also found that equitable considerations required invalidation of the arbitration provision. The court of appeals reversed, holding that Kaiser had not defrauded the Engallas and rejecting the Engalla's waiver and unconscionability claims.

The California Supreme Court reversed. The court noted that arbitration agreements are voidable on the same grounds as other contracts and agreed with the trial court that there was evidence of fraud in the inducement and evidence that Kaiser's conduct was dilatory, unreasonable and in bad faith, which would support the Engallas' claim that Kaiser waived its right to arbitrate their claims. The court pointed to evidence that Kaiser persisted in its contractual promises of expedition long after it became aware that severe delay was endemic to the arbitration program and that Kaiser intended these promises to induce subscription or renewal of subscription in Kaiser's health services plan. The court also found evidence that the misrepresentations were material to Engalla's employer's decision to offer the Kaiser plan to Engalla and other employees. While there was evidence to support the Engalla family's claims of fraud and waiver, the court held that the arbitration provision was not, on its face unconscionable. Although the trial court had found some evidence to support the fraud and waiver claims, the Supreme Court remanded the case in order for the trial court to resolve whether the evidence of fraud and waiver met the plaintiffs' burden of proof.

5. Does the FAA Exclude Contracts of Employment?

The U.S. Supreme Court confirmed its expansive approach to issues concerning the preemptive effect of the Federal Arbitration Act (FAA) in Doctor's Associates, Inc v. Casarotto (1996) ___ U.S. ___, 116 S.Ct. 1652, reviewing the state of Montana's requirement that a contract subject to arbitration so state in underlined capital letters on the first page of the contract. The Montana Supreme Court had interpreted earlier Supreme Court teachings on FAA preemption (Southland Corp. V. Keating (1984) 465 U.S. 1, Perry v. Thomas (1987) 482 U.S. 483 and Volt Information Sciences v. Board of trustees of Leland Stanford University (1989) 489 U.S. 468 to permit states to regulate arbitration agreements so long as such regulation did not undermine the goals of the FAA. When the Supreme Court remanded this case to Montana for reconsideration after Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. ___, 115 S.Ct. 834, the Montana Supreme Court adhered to its view. So, the Court reversed in this decision, holding that the "front page" requirement, since it applies only to arbitration agreements, conflicts with, and is therefore displaced by, the FAA.

But should the Federal Arbitration Act's exemption for contracts involving "workers engaged in foreign or interstate commerce" be interpreted to have the same broad reach the Commerce Clause presently has, or should it be construed narrowly to apply only to those workers who actually carry goods across state lines?

Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. (1995) is among many cases which have interpreted the employment contract exemption. In this case, the plaintiff filed *both* a demand for arbitration pursuant to the arbitration clause of his written employment agreement *and* a lawsuit

contending that he was fired in violation of the ADEA. In response to defendants' motion to compel arbitration and for a stay of his suit, Matthews argued, *inter alia*, that he fell within the "workers engaged in foreign or interstate commerce" exception of the FAA. The court summarily dismissed that argument, noting that the exclusion is limited to workers actually engaged in the movement of goods in interstate commerce. The court went on to hold that, resolving all doubts in favor of arbitration, the plaintiff's ADEA claim was within the scope of arbitrable issues.

In Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996) a disc jockey at a Texas radio station, argued that the arbitration provision in her employment contract did not preclude her Title VII lawsuit. She claimed that her employment contract was within the FAA's exclusion for employment contracts, that the narrow scope of the arbitration provision does not include Title VII claims and that her employment contract was an unconscionable adhesion contract. The court took the opportunity to repeat its holding in Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) that Title VII claims, like ADEA claims, are subject to arbitration. The court then held that the FAA exclusion of employment contracts should be narrowly construed to apply only to seamen, railroad workers and "any other class of workers actually engaged in the movement of goods in interstate commerce in the way that seamen and railroad workers are." Thus, the court affirmed the trial court's finding that Rojas' employment contract was subject to the FAA. With respect to Rojas' claim that the arbitration clause was too narrow to encompass her Title VII claims, the court found the clause's reference to "any other disputes" sufficiently broad to include those claims. Finally, the court determined that Rojas' claim that her employment contract was unconscionable was a question for the arbitrator.

6. Is Alexander v. Gardner-Denver Good Law After Gilmer?

In Austin v. Owens-Brockway Glass Container, Inc. (4th Cir. 1996) 78 F.3d 875, a panel of the Fourth Circuit Court of Appeals seemed to use Gilmer to do away with Alexander v. Gardner Denver. Austin brought Title VII and ADA claims against her employer. The trial court granted summary judgment for the defendant because Austin failed to use the grievance-arbitration provisions in her collective bargaining agreement. The Court of Appeals affirmed, holding that since the CBA contained a voluntary agreement to arbitrate discrimination claims and since such agreements are approved in Gilmer and consistent with the legislative intent behind Title VII and the ADA, the arbitration provision was enforceable. Although the majority failed even to mention Gardner Denver, the dissent cited the case prominently: "the majority concludes that 'the only difference between [Gilmer and its progeny] and this case is that this case arises in the context of a collective bargaining agreement.' I agree. The majority fails to recognize, however, that the only difference makes all the difference. A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim." Austin, 78 F.3d 875, 886 (Hall, J., dissenting.)

Later, the Seventh Circuit held that a union-represented employee need not arbitrate statutory employment claims. A "union cannot consent for the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement." Pryner v. Tractor Supply Co., ___ F.3d ___, ___, 1007 U.S. App. LEXIS 5299, *31 (7th Cir. March 20, 1997). Writing for the court, Judge Richard Posner first confirmed that the FAA applied and that the court had jurisdiction to consider the merits of Pryner's appeal. In so doing, the court reviewed the history of the FAA and the policies and provisions of the Labor-Management Relations Act and, following the majority of jurisdictions, determined that the FAA's exclusion of employment contracts should be limited to employees actually engaged in the transportation of goods in interstate commerce. Since Pryner was not subject to this exclusion, the FAA was held to apply and jurisdiction over the appeal was proper. Reaching the merits, the court weighed the interest in allowing unions and employers to establish a comprehensive regime for the adjustment of employment disputes against the interest in the effective enforcement of rights designed for the protection of workers whom Congress has classified as belonging to vulnerable groups. The court concluded that allowing a union to waive a represented worker's right to a jury trial would be inconsistent with federal anti-discrimination law. The court noted that the worker ordinarily cannot initiate arbitration under a collective bargaining

agreement, but must persuade the union to grieve the complaint. Furthermore, the court expressed concern about whether unions would vigorously protect the rights of minority workers. "The employers' position delivers the enforcement of the rights of these minorities into the hands of the majority, and we do not think that this result is consistent with the policy of these statutes or justified by the abstract desirability of allowing unions and employers to cut their own deals." *Id.* at *29. Finding the case at bar to be more closely aligned with *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), than with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1987), the court affirmed the trial court's denial of the defendants' motions for stays of the judicial proceedings pending arbitration.

Although *Pryner* is primarily significant for accentuating the Circuit split which may lead to resolution of this issue by the Supreme Court (*compare, Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) with *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996)), the opinion has some very interesting language which may help to shape the debate over mandatory ADR in the future: "We are not holding that workers' statutory rights are never arbitrable," Judge Posner said,

They are arbitrable *if the worker consents to have them arbitrated*. If the worker brings suit, the employer suggests that their dispute be arbitrated, the worker agrees, and the collective bargaining agreement does not preclude such side agreements, there is nothing to prevent binding arbitration.

Pryner v. Tractor Supply Company, *supra*, 197 U.S.App. LEXIS 5299, *39 (citations omitted, emphasis mine).

In *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), the Tenth Circuit joined the majority of courts in holding that *Gilmer* did not overrule *Alexander v. Gardner-Denver*. The court acknowledged the inherent conflicts between group goals and individual rights that exist in the collective bargaining process and also noted the significant differences between labor arbitration and commercial arbitration in reaching its conclusion that the FAA does not require arbitration of individual statutory claims in the collective bargaining context.

In *Brown v. TransWorld Airlines*, (4th Cir. 1997) 127 F.3d 337, a panel of the Fourth Circuit Court of Appeal distinguished *Austin* and refused to compel arbitration of claims for sexual harassment under Title VII and for violation of the Family and Medical Leave Act. The court examined the collective bargaining agreement between the employer and the employee's union and the provisions of the Railway Labor Act (RLA) providing for arbitration of contractual grievances. Noting that while "the collective bargaining agreement in *Austin* provided that the parties 'comply with all laws preventing discrimination,' it also provided that the agreement 'shall be administered in accordance with the applicable provisions of the Americans With Disabilities Act.'" 1997 U.S. at LEXIS 27245 at *13. By contrast, the CBA in issue in this case, "instead of mandating arbitration of all employment-related disputes or, more specifically, of statutory disputes ... submits to arbitration only disputes that 'grow out of the interpretation or application of any of the terms of this agreement.'" *Id.* Thus, the court held that the claimant in this case was free to proceed with her Title VII claim, although it dismissed the Family Medical Leave Act claim on other grounds.

The Sixth Circuit also joined in the chorus of disapproval of *Austin* in *Penny v. United Parcel Service*, (6th Cir. 1997) 128 F.3d 408. A UPS employee sued his employer under the ADA alleging a refusal to accommodate his work-related injury. Noting that "*Austin* has not inspired many followers," *Penny* at 1997 U.S. at LEXIS 28876 *13, the court concluded that "an employee whose only obligation to arbitration is contained in a collective bargaining agreement retains the right to obtain a judicial determination of his rights under a statute such as the ADA." The court then reviewed the claim and upheld its dismissal on the basis that plaintiff could not prevail as a matter of law.

7. Does *Gilmer* Apply To Title VII, the ADA or to Statutes Other Than the ADEA?

In *Riley v. Weyerhaeuser Paper Co.*, 898 F. Supp. 324 (W.D.N.C. 1995), the court held that it had jurisdiction to hear a claim brought pursuant to the Americans with Disabilities Act,

notwithstanding the fact that the plaintiff was subject to a collective bargaining agreement which contained an arbitration clause. The court found that Congress clearly expressed its intent that the statutory rights and judicial remedies of the ADA cannot be waived. Thus, relying on language in Gilmer, *supra*, the court determined that the arbitration provisions of a CBA do not preclude a plaintiff from pursuing judicial remedies guaranteed by the ADA.

In Devlin v. Arizona Youth Soccer Association (D.Ariz. 1996) 5 ADA Cases 321 (BNA), an Arizona district judge struck certain of the defendant's affirmative defenses in a non-employment ADA case. Plaintiff, a minor, claimed disability discrimination based on his exclusion from participation in a youth soccer league. Defendant asserted that plaintiff was required to arbitrate under league rules. The court struck defenses based on this assertion on the grounds that the "ADA's legislative history indicates that Congress intended not to preclude judicial remedies." *Id.* at 5 AD Cases 322. See also, Riley v. Weyerhaeuser Paper Company (W.D.N.C. 1995) 898 F.Supp. 324, 326, 5 AD Cases 326; *but see*, Austin v. Owens-Brockway Glass (4th Cir. 1996) 70 FEP Cases 272.

Administrative Agency Developments

1. The Equal Employment Opportunity Commission (EEOC)

The EEOC contends that Gilmer notwithstanding, mandatory arbitration as a condition of employment will be considered a *per se* violation of Title VII. The EEOC's aggressive prosecution of the Texas employer which imposed mandatory arbitration on its employees in EEOC v. River Oaks Imaging & Diagnostic, (S.D. Tex. No. 95-755, June 23, 1995) was not based on the peculiar facts of that case but on EEOC policy.

The EEOC distinguishes Gilmer on the grounds that that case did not interpret a contract of employment, noting that the Supreme Court specifically left for another day the question of whether an employment agreement -- as contrasted with a U-4 form -- containing mandatory arbitration would be exempt from the reach of the Federal Arbitration Act (FAA). (The Gilmer court side-stepped the language in Section 1 of the FAA providing 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," on the ground that it had not been properly raised below. Gilmer at p. ____ fn.2. Justice Stevens felt it should apply, (*id.* at pp. 1658-61) as to do at least two other courts. Willis v. Dean Witter Reynolds, Inc. (6th Cir. 1991) 948 F.2d 305; Slawski v. True Form Foundations Corp. (E.D. Pa. No. 91-1822, 1991 U.S. Dist. LEXIS 7428, at *3.)

That the Commission may be embarking on an aggressive approach in this area is suggested not only by its much-noted litigation in EEOC v. River Oaks Imaging & Diagnostic, *supra*, but by its continued prosecution of EEOC v. Kidder-Peabody & Co. (S.D.N.Y. 1993) 1993 U.S. Dist. LEXIS 11949, and its *amicus* brief in Duffield v. Robertson Stephens & Co., *supra*, as well as in Cosgrove v. Shearson, Lehman Brothers (6th Cir. No. 95-3432), another case challenging the requirement to arbitrate Title VII claims. Further guidance from the EEOC can be expected in the near future.

On April 25, 1995, the EEOC adopted a policy supporting only voluntary arbitration of employment disputes. The EEOC stated:

Alleged victims of employment discrimination should be able to file charges with the EEOC, regardless of the outcome of any employer-sponsored ADR program ... [and] mandatory arbitration policies that are unilaterally imposed by employers upon their employees are unlawful because they violate Title VII, which gives workers the right to go to court, have a jury and obtain certain remedies.

2. The National Labor Relations Board

Of equal interest are developments at the National Labor Relations Board (NLRB). Several recent NLRB cases suggest a strong anti-mandatory arbitration policy at that agency. In Bingham Toyota, (Case No. 32-CA-13604) the Regional Director in Oakland, California has been instructed by

the NLRB's Division of Advice to issue a complaint in a case involving an employment contract which, among other things, arguably chills the rights of employees to organize because the contract provides for discharge without cause rendering the right to arbitrate as to discharge illusory.

In Florida a terminated employee filed an NLRB charge alleging that she was retaliated against for engaging in protected concerted activities protected by Section 7 of the NLRA. The employer asserted that the employee was bound by the mandatory arbitration provision she had previously signed. Although the employer contended that it wished to do nothing to interfere with the employee's access to the NLRB and its processes, the Board's Division of Advice authorized the issuance of a complaint alleging that the arbitration agreement violated the employees rights under Section 8(a)(1) and (4) of the Act. Great Western (Case No. 12-CA-16886). Also in Florida, a Section 8(a)(1) and (4) complaint has issued in Bentley's Luggage Corp. (Case No. 12-CA-16658) in which an employee was terminated following his refusal to sign an agreement to arbitrate any and all disputes concerning his employment or the termination thereof.

Clearly the NLRB, like the EEOC, is concerned about what may appear to be employer attempts to interfere with employee access to the Agency's remedial efforts. However, the NLRB complaints present an additional interesting issue: Is an employee who refuses to sign an individual mandatory arbitration agreement engaging in "protected concerted activity?" That is, does such an employee act not just on his or her own behalf, but on behalf of others in the workplace? Board policy on this issue has expanded and contracted over the years, but most recently, in Meyers Industries, 281 NLRB 882, 123 LRRM 1137 (1986), *aff'd. sub nom. Prill v. NLRB*, 835 F.2d 1481, 127 LRRM 2415 (D.C. Cir. 1987), the Board held that an employee's activity is only deemed concerted if it is engaged in, with, or on authority of other workers and not solely on behalf of the employee himself. Perhaps the mandatory arbitration issue will prompt revisitation of the Meyers Industries standard as well.

ADR Providers

Private dispute resolution services providers appear to be acting with caution in this area. Since mandatory arbitration is an issue on which employment lawyers disagree, generally according to whether they represent plaintiffs or employers, arbitration service providers worry about losing "neutrality" if they appear to be taking sides.

By way of background the U.S. Department of Labor's Commission on the Future of Worker-Management Relations, the so-called "Dunlop Commission," studied the matter and concluded:

The public rights embodied in state and federal employment law -- such as freedom from discrimination in the work place and minimum wage and overtime standards -- are an important part of the social and economic protections of the nation. Employees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your job. Private arbitration systems, which we believe can work well if properly administered, will have to prove themselves through experience before the nation is in a position to decide whether employers should be allowed to require their employees to use them as a condition of employment. . . . [Therefore] . . . *binding arbitration agreements should not be enforceable as a condition of employment.*

Commission on the Future of Worker-Management Relations, Report And Recommendations, p. 32, 33. The Dunlop Commission went on to recommend legislation "making it clear that any choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract." Id.

Later, however a Task Force on ADR in employment organized by the American Bar Association's Labor and Employment Law Section was unable to achieve a consensus on this question. The drafters of the Task Force's "Due Process Protocol For Mediation And Arbitration Of Statutory Disputes Arising Out Of The Employment Relationship," numbering representatives from all sectors, could do no more than "recognize the dilemma" inherent in mandatory arbitration.

But on February 5, 1996, a nationwide provider of alternative dispute resolution services, announced that it would only accept cases involving arbitration agreements that meet minimum standards of due process. JAMS/Endispute will only arbitrate disputes if the arbitration agreement gives parties the remedies otherwise available in court (including attorneys' fees and punitive damages) and provides for reasonable discovery and counsel for the employee. Furthermore, the agreement must permit the employee to have some role in selecting a neutral arbitrator.

In addition to notifying parties that it will not arbitrate disputes unless the arbitration agreement complies with its minimum standards, JAMS/Endispute will encourage the use of mediation and voluntary arbitration. The company will not encourage the use of pre-dispute arbitration clauses that are made a condition of employment, and it will not arbitrate such agreements in any jurisdiction where they are determined to be unenforceable by an agency, court or legislature. If a party contests a mandatory arbitration agreement that was made a condition of employment JAMS/Endispute will not arbitrate a dispute governed by the agreement until a court rules on the issue.

Recently, the National Academy of Arbitrators, perhaps the most influential body of individual private arbitrators in the country, announced that it "opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." However, the Academy's statement goes on to recognize "that, given current case law, Academy members may serve as arbitrators in such cases. However, members should consider and evaluate the fairness of any employment procedures in light of the Academy's "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems."

The AAA recently made a similar announcement:

The Association's experience and belief is that any ADR method used in the employment context is most effective when the parties knowingly and voluntarily agree on the process, and have confidence in the neutrality of the mediator or arbitrator and the procedures and the institution under which their case is being administered.

Although the AAA administers binding arbitration programs required as a condition of initial or continued employment, such programs must be consistent with the Association's *National Rules for the Resolution of Employment Disputes* and the *Due Process Protocol*. If the ADR plan conforms to the Rules and the Protocol, the Association will administer disputes arising from it, pending future legal developments.

It is perhaps even more notable that the NASD announced on August 7, 1997 that it would no longer require mandatory arbitration of employment discrimination disputes. The NASD has submitted a proposed rule change to the Securities Exchange Commission (SEC) for that agency's required and apparently still pending approval.

Conclusion

On the one hand, the U.S. Supreme Court seems to be busily constructing as social policy the doctrine that employers should be able to force employees to arbitrate potential disputes. On the other hand, private bodies which might be expected to welcome the business generated by this outsourcing of work disputes from the judicial system, are anything but enthusiastic about the possibility. Why there should be this conflict in views is both beyond my expertise and the scope of this article. I have, however, located an elegantly simple suggestion for resolving the tension:

Stripped of any statutory justification, the Supreme Court's "national policy favoring arbitration" is exposed as judicial policy, and one that conflicts with statutes creating private rights of action. The Court should correct the wrong turn it took when it began routinely enforcing adhesive agreements to arbitrate future disputes, particularly those based on violations of statutory rights. As observed by Justice

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Scalia in a related context, “proper application of *stare decisis* [does not] prevent [] correction of the mistake.

Schwartz, “Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims In An Age of Compelled Arbitration,” 1997 *Wisconsin Law Rev.* 34, 132 (1997).