

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

Robert D. Kraus, Esq.
261 Madison Avenue
New York, New York 10016
(212) 986-3650

and

Pearl Zuchlewski, Esq.
GOODMAN & ZUCHLEWSKI
500 Fifth Avenue, Suite 5100
New York, New York 10110-5197
(212) 869-1940

with special thanks to Geoff Mort, Esq.

I. Introduction: the *Gilmer* Decision and its Aftermath

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), ushered in a sea change in the arbitration of wrongful termination and other employment discrimination claims. In *Gilmer*, the Supreme Court stated that, as a general rule, statutory claims may be subject to binding arbitration, at least outside the context of collective bargaining. *Id.*, 500 U.S. at 26, 34-35, 111 S.Ct. at 1652, 1656-57. As a result of *Gilmer*, ever increasing numbers of employers require, as a condition of employment, that employees arbitrate all employment related disputes, including statutory discrimination claims. Litigation over the scope, interpretation and validity of employer crafted mandatory arbitration agreements has increased proportionally.

Gilmer and its progeny have been welcomed by arbitration proponents for a number of reasons. During the past twenty years employment litigation has increased fourfold and sizeable awards of compensatory and punitive damages are not uncommon. Proponents content that the arbitral forum leads to a quicker and more-cost-efficient resolution of the ever increasing numbers of employment disputes than does traditional litigation. It also diminishes the risk of large punitive damage awards.

On the other hand, many legal commentators have been critical of the trend toward mandatory arbitration, arguing that it deprives victims of discrimination of many of their basic statutory rights, such as a jury trial. Critics urge that there is an impermissible element of adhesion to mandatory pre-dispute arbitration agreements that employees are required to execute as a condition of employment. Other objections concern the denial of the fundamental right to a jury trial and the unsuitability and effectiveness of arbitrators to effectively enforce the myriad of public laws that have been enacted to protect workers.

As the public policy debate continues, the Courts are confronting a diverse array of arguments challenging the validity of specific mandatory pre-dispute arbitration agreements, and attacks on the process in general. For purposes of analysis, the challenges are organized below into three general categories. First, there are continuing challenges based on the fairness of the arbitration process. These challenges, which are addressed in Point II-A below, are generally rejected in light of *Gilmer*. Second, there are, and will continue to be, challenges based on ordinary principles of contract law. The Courts generally analyze these challenges under established principles of state contract law, but with a strong overarching presumption in favor of arbitration. These challenges, which are necessarily fact specific, are addressed in section Point II-B below. The final type of challenge to the validity of arbitration agreements is based on the limitations on employee rights and remedies imposed by some mandatory pre-dispute arbitration agreements.

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

Unlike issues pertaining to contract interpretation, the case law addressing this type of challenge is clearly evolving, with different Courts adopting different approaches. This final category of challenge is addressed in Point III below. Finally, Point IV below addresses other legal issues relevant to mandatory alternative dispute resolution.

A. The Gilmer Decision

Gilmer involved a securities representative registered with the New York Stock Exchange (NYSE). After he was discharged, Gilmer filed suit alleging a violation of the Age Discrimination in Employment Act (ADEA). His employer sought to compel arbitration based on the arbitration agreement in the Form "U-4", securities registration application form. The U-4 incorporated NYSE rules requiring the arbitration of any controversy arising out of his employment or the termination of his employment. Gilmer objected to arbitration, arguing that the arbitration agreement was unenforceable under the Supreme Court's prior decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and cases thereafter. In *Alexander*, the Supreme Court held that the arbitration of statutory claims of discrimination does not preclude subsequent litigation of a Title VII claim or require deferral by a Court to the arbitration award. *Id.*, 415 U.S. at 54-59. The Supreme Court rejected Gilmer's argument, holding that his statutory claim was subject to mandatory binding arbitration, unless he could prove that Congress intended to preclude arbitration. *Id.* at 26, 111 S.Ct at 1652. Since nothing in the legislative history or text of the ADEA showed any such congressional intent, the Court upheld the mandatory arbitration of Gilmer's claims. The Court supported its conclusion, in part, by noting its prior enforcement of agreements compelling arbitration of statutory claims arising under the Sherman Act, Racketeer Influenced and Corrupt Organizations Act, and the Securities and Exchange Acts of 1933 and 1934.

The Court also rejected each of Gilmer's "generalized attacks on arbitration" of statutory claims as based "on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants" and "far out of step with [the] current strong endorsement" of arbitration. *Id.* at 30 (internal citation omitted). Gilmer had objected that he could not effectively vindicate his statutory rights in arbitration on four grounds: (i) the arbitrators were not impartial; (ii) the limited discovery would hamper his ability to prove discrimination; (iii) the private, confidential nature of arbitration awards and the lack of appellate review, would undermine the legislative scheme; and, (iv) equitable relief was unavailable. *Id.* at 35, 111 S.Ct at 1656-57. The Court opined that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Id.* at 26, (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

Finally, in a section of the opinion that appears to be taking on increasing importance, the Court in *Gilmer* emphasized that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer*, 500 U.S. at 28, 111 S.Ct at 1653 (quoting *Mitsubishi*, 473 U.S. at 637)(alteration in original).

B. Other Statutory Claims are Subject to Mandatory Arbitration

Although the Supreme Court's holding in *Gilmer* only concerned arbitration of a claim under the ADEA, federal courts have relied on the Supreme Court's decision to enforce mandatory arbitration of a broad range of statutory claims.

For example, Courts have upheld the mandatory arbitration of disputes arising under:

(i) Title VII: See, e.g. *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465 (D.C.Cir 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 1997 (8th Cir. 1997); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F. 3d 1482 (10th Cir. 1994).

(ii) ADA and FMLA: See, e.g., *Miller v. Public Storage Management, Inc.*, 121 F. 3d 215 (5th Cir. 1997); *Satarino v. A.G. Edwards & Sons, Inc.*, 941 F. Supp. 609 (N.D. Tex. 1996); *Golenia v. Bob Barker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996); *Solomon v. Duke University*, 850 F. Supp. 372 (M.D.N.C. 1993); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F. 2d 698 (11th Cir. 1992).

(iii) ERISA: See, e.g., *Pritzker v. Merrill Lynch*, 7 F.3d 1110 (3d Cir. 1993).

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

(iv) Equal Pay Act: See, e.g., *Hurst v. Prudential Securities, Inc.*, 21 F. 3d 1113 (9th Cir. 1994).

(v) 29 U.S.C. § 1981: See, e.g., *Almonte v. Coca-Cola Bottling Co. of N.Y., Inc.*, 959 F. Supp. 569 (D. Conn. 1997); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. 111. 1993); *Scott v. Merrill Lynch*, 1992 U.S. Dist. LEXIS 13749, at *21 (S.D.N.Y. 1992).

(vi) Employee Polygraph Protection Act: See, e.g., *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877 (9th Cir. 1992), *cert. denied*, 506 U.S. 986 (1992);

(vii) RICO: See, e.g., *Haviland v. Goldman, Sachs & Co.*, 947 F.2d 601 (2d Cir. 1991), *cert. denied*, 504 U.S. 930, 112 S.Ct. 1995 (1992);

(viii) State discrimination claims: See, *Great Western Mortgage Corp. V. Peacock*, 110 F.3d 322 (3rd Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 1997 (8th Cir. 1997); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997).

C. Individual Employment Contracts Are Subject to Arbitration:

Section 1 of the Federal Arbitration Act (FAA) excludes from FAA coverage all "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce". The Supreme Court in *Gilmer* specifically declined to address the question of the scope of the FAA's "contracts of employment" exception because the arbitration provision at issue therein was contained not in a contract of employment, but rather in a NYSE U-4 securities registration form. Numerous challenges to the arbitration of statutory disputes based on arbitration provisions contained in employment agreements followed thereafter. Although not specifically addressed by the Supreme Court, "every circuit court to squarely address the issue" of the scope of the section 1 exclusion "has held section 1 only excludes from the coverage of the FAA only the employment contracts of workers actually engaged in the movement of goods in interstate commerce." *Cole v. Burns Inter. Security Services*, 105 F.3d 1465, 1467 (D.C. Cir 1997). See *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3rd Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, at 748(5th Cir. 1996); *Asplundh Tree Expert Co., v. Bates*, 71 F.3d 592, at 600-01 (6th Cir. 1995).

With the FAA held applicable to all employment contracts except for workers directly engaged in the movement of goods in commerce, the Courts have upheld the validity of mandatory arbitration agreements contained in all manner of individual employment agreements.

(i) Employment Contracts/Employment Agreements. *Miller v. Public Storage Managements, Inc.*, 21 F.3d 215 (5th Cir. 1997); *Oldroyd v. Elmira Savings Bank*, F.S.B. 956 F.Supp 393 (W.D.N.Y. 1997); *Crawford v. West Jersey Health Sys.*, 827 F. Supp. 1232 (D.N.J. 1994); *Maye v. Smith Barney, Inc.*, No. 95-1878, 1995 U.S. Dist. LEXIS 11881 (S.D.N.Y. August 1995).

(ii) Employee Handbooks. *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 1997 (8th Cir. 1997); *Topf v. Warnaco, Inc.*, 942 F. Supp. 762 (D. Conn. 1996); *Lang v. Burlington Northern Railroad Company*, 835 F. Supp. 1104 (D. Minn. 1993); *But see Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d756 (9th Cir 1997).

(iii) Employment Applications. *Ahing v. Lehman Brothers Inc.*, 75 Fair Emp. Prac. Dec. (BNA) 646 (S.D.N.Y. 1997); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992).

(iv) Partnership Agreements. *Williams v. Katten, Muchin, & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993).

II. Challenges to the Enforceability of Arbitration Provisions

A. Generalized Attacks On Arbitration Fail

Following *Gilmer's* lead, most Courts reject "generalized attacks on arbitration" of statutory claims.

1. Limited discovery. Even before *Gilmer*, the Supreme Court had ruled that limited discovery did not bar the enforceability of arbitration agreements under the Sherman Act, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), and other statutes. Accordingly, provided that the arbitral forum provides more than "minimal discovery", challenges to the enforceability of arbitration provisions based upon the unavailability of the full range of discovery

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

have also not proved successful. *Burns v. Intern. Security Services*, 105 F.3d 1465 (D.C.Cir. 1997)(in enforcing the arbitration agreement, the Court emphasizes that AAA rules provide for “more than minimal discovery”); *Williams v. Katten, Muchin & Zavis*, 873 F. Supp. 1430 (N.D. Ill. 1993).

2. Denial of Right to Jury Trial. Challenges to arbitration provisions based on the denial of the right to a jury trial have not proved successful. *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460 (N.D. Ill. 1997); *Dillard v. Merrill Lynch*, 961 F.2d 1148 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1046 (1993). The basis of these decisions is, in part, the *Gilmer* Court's conclusion that arbitration can provide a fair forum for hearing claims and can afford broad relief to claimants. *Gilmer*, 500 U.S. at 27-33.

3. Failure to read employment contract or agreement. Arguments by employees that they are not bound by arbitration clauses in signed employment contracts, agreements, personnel manuals, U-4 registration forms, and the like because they did not read them have met with little success. Courts generally rely on state law principles governing the formation of contracts and hold that, absent clear showing of fraud, mistake, duress, coercion or unconscionable terms, a literate party who signs a contract is bound by its terms and conditions. *Battle v. Prudential Ins. Co. Of America*, 973 F.Supp 861 (D. Minn, 3rd Div); *Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996). At least one court has gone so far as to compel arbitration where an employer mailed its employees copies of its arbitration policy without explaining its effect or seeking the employees' agreement to the policy. Simply receiving a copy of the arbitration policy and continuing to be employed was sufficient to bind the employees to submit any employment claims to arbitration. *Kinnebrew v. Gulf Ins. Co.*, 67 Fair Emp. Prac. Dec. (BNA) 189 (W.D. Tex 1994).

4. Adhesion contracts. Efforts by plaintiff/employees to argue that arbitration provisions or agreements constitute illegal contracts of adhesion have been almost universally rejected by the courts. Indeed, the Supreme Court in *Gilmer* rejected the challenge to arbitration agreements based on a “mere inequality in bargaining power.” *Gilmer, supra*, 500 U.S. 20, 33-34, 111 S.Ct. 1647, 1655-56, 114 L.Ed.2d 26. In addition to the guidance from *Gilmer*, federal courts rely on section 2 of the Federal Arbitration Act to either reject the adhesion “defense” or require that the issue be resolved by the arbitrator. *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir. 1996); *Great Western Mortgage Corp. V. Peacock*, 110 F.3d 322 (3rd Cir. 1997); *Nieminski v. John Nuveen & Co.*, 1997 WL 4324 at 3 (N.D. Ill., Jan 23, 1997); *Golenia v. Bob Barker Toyota*, 915 F. Supp. 201 (S.D. Calif. 1996); *Lang v. Burlington R.R. Co.*, 835 F. Supp. 1104 (D. Minn. 1993). *But see Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519 (1997)(contract found to be one of adhesion in that drafted by party with superior bargaining strength, was non-negotiable and was presented to employee after he had accepted employment).

5. Bringing claims under state law. The Supreme Court has held that the “FAA preempts state laws which ‘require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.’” *Volt Information Sciences inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)(quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)). Following *Gilmer*, courts generally have applied this principle and held that state statutory employment claims are subject to arbitration, notwithstanding that a state's anti-discrimination law is hostile to arbitration. *See, e.g., Great Western Mortgage Corp. V. Peacock*, 110 F.3d 322 (3rd Cir. 1997); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997)(FAA preempts state anti-arbitration law); *Scott v. Farm Family Life Ins. Co.*, 827 F. Supp. 76 (D. Mass. 1993); *Hull v. NCR Corp.*, 826 F. Supp. 303 (E.D. Mo. 1993); *Chisholm v. Kidder, Peabody Asset Management, Inc.*, 810 F. Supp. 479 (S.D.N.Y. 1992); *Kaliden v. Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179, 184 (W.D. Pa. 1991); *Fletcher v. Kidder, Peabody & Co.*, 619 N.E.2d 998 (N.Y. 1993); *Baker v. Aubry*, 216 Cal. App. 3d 1259, 1262 (1989) (employee's claim for overtime pay under California law subject to arbitration under Form U-4 securities registration); *Hall v. Nomura Securities Int'l*, 219 Cal. App. 3d 43 (1990) (FAA preempts provision in state statute providing for judicial forum); *Spellman v. Securities, Annuities and Insurance Services, Inc.*, 8 Cal. App. 4th 452, 462-63 (1992) (FEHA claim arbitrable under FAA).

6. Continued Challenges: Although most generalized attacks on mandatory arbitration fail, the Courts continue to confront challenges. For example, in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 74 Fair Emp. Prac. Dec. (BNA) 797 (D. Mass. 1997), Judge Gertner in the

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

District of Massachusetts, ordered additional briefing before ruling on whether former employee waived her right to litigate Title VII and ADEA claims based on the arbitration provision in her Form U-4. Among the issues to be briefed are: (a) the application of *Gilmer* to Title VII, in the light of the 1991 amendments to Title VII; (b) the application of *Gilmer* to the ADEA in the light of the 1990 amendments to the ADEA; (c) the adequacy of the arbitral scheme in the securities industry to enforce gender and age discrimination claims; (d) the legal standards for waiver of a right to an Article III judge and representative jury; and, (e) whether the plaintiff's waiver met those standards.

B. Contract Formation/Interpretation

Most Courts apply ordinary principles of contract interpretation in determining whether to uphold mandatory arbitration agreements. See *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1129 7th Cir. 1997 (applying ordinary contract principles to arbitration agreement); *Patterson v. Tenet Healthcare, Inc.* 113 F.3d 832, 834 (8th Cir. 1997) (under FAA, ordinary contract principles govern whether parties have agreed to arbitrate); *Zandford v. Prudential-Bache Securities Inc.*, 112 F.3d 723, 727 (4th Cir. 1997) (“arbitration clauses are contractual terms and ordinary means of contract interpretation must be applied to determine their applicability to particular disputes”).

While “ordinary” principles of contract interpretation are employed, the FAA affords a strong presumption in favor of arbitration. As a result, any doubts about the scope of arbitrable issues must be resolved in favor of arbitration. *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is in the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability”); See also *Thomas James Associates v. Jameson*, 102 F.3d 60, 65 (“arbitration must be preferred ‘unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute’”) (internal quotation and citation omitted). Although the broad federal policy favoring arbitration results in a bias toward the Courts generally compelling arbitration, the case law is fact specific and arbitration is never assured.

1. Lack of consideration. The courts that have considered this argument usually have ruled in favor of the employer, finding adequate consideration in the provision of employment itself, even where an arbitration provision was introduced after an individual's employment had already begun. *Patterson v. Tenet Healthcare, Inc.* 113 F.3d 832, 834 (8th Cir. 1997) (consideration for one party's promise to arbitrate is the other party's promise to do the same); *Accord, Brown v. Rexhall Industries, Inc.*, 72 Fair Emp. Prac. Dec. (BNA) 1002 (N.D. Ind. 1996); *Kinnebrew v. Gulf Ins. Co.*, 67 Fair Emp. Prac. Dec. (BNA) 189 (N.D. Tex. 1994) (“Federal Courts do not hesitate to find enforceable an agreement to arbitrate when an arbitration policy is instituted during an employee's employment and the employee continues to work for the employer thereafter.”)

Although clearly reluctant to void arbitration agreements entered into as part of the employment relationship (whether before or after commenced), there are limits. For example, in *Gibson v. Neighborhood Health Clinics, Inc.*, the Seventh Circuit addressed whether to compel arbitration based on a signed “Understanding” in which the employee agreed to the grievance and arbitration provisions set forth in a separate employee manual. 121 F.3d 1126, 1131 (1997). Since the “Understanding” used phrases such as “I agree” “I understand” “I am waiving”, but contained no promise by employer to submit to arbitration, the Court found that it was a one-sided bargain and refused to enforce it for lack of consideration. “In order for a contract to be enforceable both parties must be bound by its terms.” *Id.* at 1131. See also *Brooks v. Circuit City Stores, Inc.*, 73 Fair Emp. Prac. Dec. (BNA) 1838 (D. Md. 1997) (finding no consideration where an employer refused to consider any employment applications unless the prospective employee initially agreed to arbitrate any future employment disputes); *Phox v Allied Capital Advisers*, 74 Fair Emp. Prac. Dec. (BNA) 809 (D.D.C. 1997) (Court refuses to compel arbitration because, in part, the language in the handbook was permissive, not mandatory).

2. Specific statute[s] not referred to in arbitration provision. The fact that an arbitration clause does not make specific reference to a particular civil rights statute does not necessarily negate its enforceability. So long as the arbitration provision makes reference to disputes between the employee and employer in a way that encompasses employment discrimination and/or wrongful

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

termination it will most probably withstand judicial scrutiny. *Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (S.D. Cal. 1996). There are limits, however. For example, the Court in *Oldroyd v. Elmira Savings Bank F.S.B.*, 956 F.Supp 393 (W.D.N.Y. 1997, compelled arbitration of employee's breach of contract claim, but not of his retaliatory discharge claim. The clause at issue required arbitration of "disputes arising under or in connection" with employment agreement. The Court reasoned that existence and contents of employment agreement had "no bearing" on the retaliation claim. *Id.*, at 399.

Of similar effect is *Hoffman v. Kahmi*, 927 F. Supp. 640 (S.D.N.Y. 1996). In *Hoffman*, the court considered a provision in an employment agreement that required binding arbitration of "any claim or controversy among or between the parties hereto pertaining to the Corporations ... or respecting any matter contained in this agreement of any difference as to the interpretation of any of the provisions" of the agreement. The court concluded that this provision "contains no language that would have reasonably notified plaintiff that he was waiving his right to litigate federal employment claims in federal court," and denied the employer's motion to compel arbitration. See also *Rudolph v. Alamo Rent A Car, Inc.*, 952 F. Supp. 311 (E.D.Va. 1997)(court refuses to compel arbitration where the arbitration provision at issue did not specifically provide for arbitration of statutory claims).

3. No express consent to arbitration. As noted above, an employee need not sign or agree to an arbitration policy. If an employer has an arbitration or internal grievance policy that is set forth in an employee handbook, the employee is bound by that provision to arbitrate any employment claim. The plaintiff alleging wrongful termination in *Nghiem v. NEC Elec., Inc.*, 25 F.3d 1437 (9th Cir. 1994), had signed an employment contract that did not contain an arbitration provision. Nonetheless, the fact that the employer's employee handbook contained an arbitration process that the plaintiff made use of bound the plaintiff to the arbitrator's decision. See also *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997) (finding an arbitration provision in an employee handbook enforceable where another provision in the document explicitly stated that the handbook was not a contract).

4. Waiver and Estoppel. Where a party acts in a manner that is inconsistent with the intent to arbitrate, the right to arbitration may be waived if such actions result in prejudice to the opposing party. *National Foundation for Cancer Research v. A.G. Edwards & Sons*, 821 F.2d 772 (D.C. Cir. 1987); but see *Beauchamp v. Great West Life Assurance Co.*, 918 F. Supp. 1091 (E.D. Mich. 1996) (failure to compel arbitration of all claims by individuals who signed the Form U-4 does not estop the employer from compelling arbitration in this case). However, proof of such waiver or estoppel must be clear and convincing. *Kaliden v. Shearson Lehman Hutton, Inc.*, 789 F. Supp. 179 (W.D. Pa. 1991). In one recent decision, the court held that because federal policy so strongly favors arbitration, a party will be deemed to have waived its right to arbitration "only when parties have engaged in lengthy course of litigation, when extensive discovery has occurred, and when prejudice to party resisting arbitration can be shown." *Great Western Mortgage Corp. V. Peacock*, 110 F.3d 322 (3rd Cir. 1997). *Accord, Acquire v. Canada Dry Bottling*, 906 F. Supp. 819 (E.D.N.Y. 1995)(Mere participation in litigation insufficient to find waiver of right to arbitrate unless it is shown that a stay of litigation would prejudice the other party. A showing of delay in seeking arbitration is not, in itself, sufficient to demonstrate prejudice); see also *Greene v. American Cast Iron Pipe Co.*, 871 F. Supp. 1427 (N.D. Ala. 1994).

C. The Knowing Waiver Requirement

In *Gilmer*, the Supreme Court held that statutory claims of discrimination are generally arbitrable unless the plaintiff shows that Congress intended to preclude a waiver of the judicial forum. The Court held that the plaintiff had failed to meet his burden of proof with respect to the ADEA. But what about other statutes governing workplace conduct, such as Title VII, the ADA or the FLSA? Assuming that Congress did intend to preclude arbitration of other federal statutory claims, then before an employee could waive such a substantive right, the law requires that he or she understand and freely consent to the waiver.

1. The Ninth Circuit and U-4 Forms

In *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1995), the Ninth Circuit reviewed the District Court's grant of a motion to compel arbitration based on an arbitration

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

agreement contained in a U-4 form and the NASD Rules it incorporated. After reviewing the statutory language and legislative history behind the 1991 amendments to Title VII, the Ninth Circuit adopted a "knowing waiver" requirement. It held that "a Title VII plaintiff may only be forced to [forgo] her statutory remedies and arbitrate her claims if she has knowingly agreed to submit such disputes to arbitration." *Id.*, at 1305. The Court refused to compel arbitration because there had not been a knowing waiver. In contrast to *Gilmer*¹, neither the Form U-4 nor the NASD Rules at issue in *Lai* referred to employment disputes.

More recently, in *Renteria v. Prudential Insurance Co. of America*, 113 F.3d 1104 (9th Cir. 1991), the Ninth Circuit appeared to emphasize that its "knowing waiver" requirement means that an arbitration clause must identify, by statute, the types of claims that are subject to arbitration. In *Renteria*, the plaintiff was required to register as a securities dealer with the NASD. The U-4 registration form (amended from that at issue in *Lai*) compelled arbitration of "any dispute, claim or controversy that may arise...." The Court ultimately concluded that the employee could not be compelled to arbitrate her Title VII claim because the general language did not put the employee on sufficient notice that she is waiving specific statutory rights; thus, there could be no knowing waiver.

Other than in the Ninth Circuit, however, individuals who sign Form U-4s will generally be bound by them to arbitrate wrongful termination and other employment claims, regardless of the circumstances of the signing. *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447 (D. Minn. 1996) (arbitration agreements must be evaluated using ordinary principles of state contract law, and a literate party who signs a contract is bound by its terms); see also *Pilanski v. Metropolitan Life Insurance Co.*, 73 Fair Emp. Prac. Dec. (BNA) 1506 (S.D.N.Y. 1996) (enforcing arbitration pursuant to a Form U-4 because the plaintiff had failed to show special circumstances, e.g., fraud or duress, and noting that a person who has signed a contract is presumed to have read the document). One Court has gone as far as suggesting an employee who executes a Form U-4 may be automatically bound to arbitrate statutory discrimination claims. *Hall v. Metlife Resources*, 1995 U.S. Dist. LEXIS 5812 (S.D.N.Y. 1995).

2. Lai and Other Statutes

In *Nelson v. Cyprus Bagdad Copper Corp.*, the Ninth Circuit expanded its "knowing waiver" requirement to apply to claims under the Americans with Disabilities Act. 119 F.3d 756 (9th Cir. 1997). In *Nelson*, the Ninth Circuit found no "knowing" waiver even though the employee had signed a form acknowledging that he had read and understood the employee handbook containing an arbitration procedure. The Court reasoned that the employee who signed the form merely pledged that he would "read and understand" the handbook, but nothing in the acknowledgment form or the handbook placed the employee on notice that he was agreeing to waive his right to pursue his ADA claim. (The court reached the same conclusion with respect to the employee's rights under Arizona anti-discrimination laws.)

However, in *Kuehner v. Dickinson & Co.*, 1996 WL 375332 (9th Cir. 1996), the Ninth Circuit appeared to limit its "knowing waiver" requirement when it upheld a lower court order staying litigation pending arbitration of an FLSA claim where the plaintiff failed to demonstrate that Congress required a knowing waiver for the FLSA.

3. Lai Generally Rejected

Most courts that have considered the knowing waiver issue since the *Lai* decision have either distinguished *Lai*, (see e.g., *Maye v. Smith Barney, Inc.*, No. 95-1878, 1995 U.S. Dist. LEXIS 11881 (S.D.N.Y. 1995)), or have disagreed with its holding (see *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F.Supp 1460 at 1474-75 (prevailing view is that *Lai* is incompatible with the Supreme Court's decision in *Gilmer*, ignores core principles of contract law, and inappropriately used legislative history to contradict plain statutory language)); See also, *Beauchamp v. Great West Life Ins. Co.*, 918 F. Supp. 1091 (E.D. Mich. 1996). Most Courts reject the "knowing waiver" analysis on the grounds that its premise -- that an agreement to arbitrate statutory discrimination claims forces a waiver of substantive rights -- is inconsistent with the conclusion in *Gilmer* that "by agreeing

¹ NYSE Rule 347 at issue in *Gilmer* required arbitration of "any controversy arising out of the employment or termination of employment". *Gilmer, supra*, at 23.

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.” See e.g., *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F.Supp 1460, 1475 (1997).

Although no other federal appellate Court has adopted Lai’s “knowing waiver” requirement, plaintiffs continue to challenge various mandatory pre-dispute arbitration agreements on the ground that they did not know what claims they were agreeing to submit to arbitration. Such cases are highly fact specific.

For example, in *Phox v Allied Capital Advisers*, 74 FEP 809 (D.D.C. 1997), the Court considered whether to compel arbitration in circumstances where an employee handbook was distributed after the employee voiced concerns about discrimination. There was no evidence that he signed the handbook or otherwise acknowledged that he fully understood its terms. Citing to the unique concerns noted by the Circuit Court in *Burns* about the mandatory arbitration of statutory claims imposed as a condition of employment See Point III-A, the Court refused to compel arbitration for two reasons. First, the employee did not appear “to have knowingly and voluntarily entered into an agreement to arbitrate his statutory claims.” *Phox, supra*, at 810. Since there was no evidence that plaintiff “had signed the handbook or otherwise acknowledged that he fully understood and agreed to any of its provisions, the employer could not establish the existence of a knowing waiver. *Id.* (The second reason was that the language in the handbook was permissive, not mandatory).

4. Duress

Closely related to the issue of knowing waiver is the question of whether an employee’s signature on a Form U-4 or other employment agreement is a product of misrepresentation or duress. Of some significance is the recent decision in *Berger v. Cantor Fitzgerald Securities and Prudential Securities, Inc.*, 1996 WL 640888 (S.D.N.Y. 1996). In *Berger*, the plaintiff had signed a Form U-4 agreement and subsequently sought to bring an Americans with Disabilities Act and Title VII action in federal district court. The facts in *Berger* were similar to those in *Lai* – plaintiff alleged that the employer informed him that the Form U-4 was merely an application to take a test, he was given only a few minutes to fill out the form, and was not provided with a copy of the NASD manual. The Court pointed out that there is an important exception to the general rule that a signature on a Form U-4 binds the employee under the provisions of its arbitration clause: that the arbitration provision will not be deemed enforceable if the employee can show he was not placed on notice that he was waiving his right to a judicial forum in discrimination claims. The Court distinguished several other recent Southern District of New York cases on the grounds that the plaintiffs in those cases were provided with ample notice that employment disputes would be submitted to arbitration, and – citing *Hoffman, supra* – denied the employer’s motion to compel arbitration.

III. **Excessive Limitation of Statutory Remedies.**

A. **Cole**

Central to *Gilmer* is the Supreme Court’s prescription that “an employee who is made to use arbitration as a condition of employment effectively may vindicate [his or her] statutory cause of action in the arbitral forum.” *Gilmer*, 500 U.S. at 28, 111 S.Ct. At 1653. A leading case addressing the Court’s prescription is *Cole v. Burns Int’l Security Servs.*, 105 F.3d 1465 (D.C.Cir 1997).

In *Cole*, plaintiff was required as a condition of employment to sign a pre-dispute arbitration agreement mandating the arbitration of all employment disputes. 105 F.3d 1465, 1469. Following his discharge, Cole filed a Title VII suit in federal Court, alleging that he was the victim of discrimination and challenging the enforceability of the arbitration agreement. He focused specifically on the agreement’s alleged requirement that employees pay the arbitrators fees.

In a thorough decision, Chief Judge Edwards held that the Court was “constrained” by *Gilmer* to find the arbitration agreement enforceable, finding that the following factors provided the employee with an effective means of upholding his statutory rights: (1) the agreement provided for neutral arbitrators; (2) the agreement provided for more than minimal discovery; (3) the agreement required a written award; and, (4) the agreement provided for all types of relief that would otherwise be available in courts. However, in order to preserve the agreement’s validity, the Court interpreted the agreement to make the employer solely responsible for the arbitrator’s fees. The Court reasoned

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

that employees who elect to bring their claims in federal court need not pay for the services of a judge, but rather only for a filing fee. The Court concluded that to require an employee to pay for arbitration would undermine congressional intent and deter employees from pursuing their discrimination claims.

Although the Court upheld the arbitration agreement (as interpreted to require employer to pay arbitrator fees), it did so with clear reservations:

We are ... cognizant of the numerous concerns that have been voiced by arbitrators, legal commentators, and the Equal Employment Opportunity Commission ("EEOC"), and National Labor Relations Board ("NLRB") regarding the potential inequities and inadequacies of arbitration in individual employment cases, as well as their concerns about the competence of arbitrators and the arbitral forum to enforce effectively the myriad of public laws protecting workers and regulating the workplace. Nonetheless, in this case, we are constrained by *Gilmer* to find the arbitration agreement enforceable. We do not read *Gilmer* as mandating the enforcement of all mandatory agreements to arbitrate statutory discrimination claims; rather, we read *Gilmer* as requiring the enforcement of arbitration agreements that do not undermine the statutory scheme.

Id. at 1467-1468 (emphasis added). One District Court has commented *Gilmer* is most notable, not for its holding that the employer must pay attorney's fees, but for its "clarification" of *Gilmer* as standing for the proposition that "courts must enforce arbitration agreements that are consistent with the statutory scheme of the claims they cover." *Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 957 F.Supp 1460, 1473 (N.D.Ill 1997). Since *Cole*, at least three District Courts have considered the issue of arbitrator's fees and expressed agreement with the analysis of the D.C. Circuit Court in *Cole*.

In *Shankle v. B-G Maintenance Management*, the plaintiff commenced a Title VII action in District Court and the employer moved to compel arbitration. 74 Fair Emp. Prac. Dec. 94 (BNA)(D.C. Col. 1997). Plaintiff had signed a mandatory arbitration agreement which, in pertinent part, required each party to be responsible for one-half of the arbitrators fees. Following *Cole*, the Court in *Shankle* noted that "the premise of *Gilmer* is that the agreement at issue provided for arbitration which was a reasonable substitute for a judicial forum. By requiring Shankle to pay one-half of the arbitrator's fees, the arbitration agreement in this case does not provide for such a substitute." *Id.* at 96 (internal citation omitted). Since there was no way for the Court to "interpret" the arbitration agreement to require the employer to pay all arbitrator fees, the Court held that the arbitration agreement was unenforceable and denied defendants' motion to compel arbitration. *Id.*

Of similar import is *McWilliams v. Logicon*, 1997 Lexis 9822 (D.C. Kan June 4, 1997). In *McWilliams*, the District Court considered a motion for clarification of its earlier entry of judgment upon an arbitration award in favor of the defendants. The award recommended that the employee pay the arbitrator's \$1,300 fee and apparently the Court entered judgment confirming that recommendation. The parties then moved for clarification of who was responsible for payment of the arbitrator's fee, and the Court reconsidered. Adopting the reasoning of the D.C. Circuit's opinion in *Cole* as "both instructive and persuasive", the Court held that "if an employer requires its employees to submit their employment disputes to arbitration as a condition of their employment, then employer must assume the responsibility for all of the arbitrator's fees and expenses." *Id.*, at 9822. The employer was thus ordered to pay the arbitrator's \$ 1,300 fee.

Yet another case adopting the *Cole* analysis in considering an arbitration agreement that limited a prevailing plaintiff's right to recover attorney's fees is *DeGaetano v. Smith Barney, Inc.*, 1996 WL 697928 (S.D.N.Y. 1997). In *DeGaetano*, the Southern District considered plaintiff's motion to correct an arbitration award which denied her attorney's fees, although ruling in her favor on her Title VII discrimination claim. Adopting the *Cole* analysis, the Court in *DeGaetano* found the "governing law" to be that mandatory pre-dispute arbitration clauses are enforceable "only to the extent that the arbitration provisions preserves the substantive protections afforded by the statute..." *Id.* at 24. Finding that the Smith Barney arbitration policy provision waiving the right to attorney's fees was inconsistent with the policy goals of Title VII, the Court held the relevant portions of the Arbitration

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

Policy void as against public policy since they would deprive DeGaetano of her right to attorney's fees². *Id.*

See also *Alcaraz v. Avent, Inc.*, 934 F. Supp. 1025 (D.N. Mex. 1996) (refusing to compel arbitration of a Title VII claim where the arbitration clause limited the arbitrator to awarding damages for "breach of contract only")

B. Other Approaches

Only time will tell whether the analysis adopted by the D.C. Circuit Court in *Cole* will be widely followed. Some Courts have adopted clearly different approaches. For example, in *Great Western Mortgage Corp v. Peacock*, 110 F.3d 222 (3rd Cir 1997)(Garth, J.), the Third Circuit adopted an "analysis" that focuses exclusively on whether there is a valid arbitration agreement. If a valid agreement exists, the Court will not entertain any *Cole*-like argument that the arbitration provision undermines the relevant statutory scheme, but instead will refer all objections to the arbitrators (including issues of public policy).

In *Great Western*, the Third Circuit considered a mandatory pre-dispute arbitration agreement that prohibited the arbitrator from awarding punitive damages, exemplary damages or attorney's fees and provided that any arbitration had to be commenced within one year of an event giving rise to the dispute. The Court upheld the agreement and compelled arbitration, holding that under the FAA the only function of the Court was to determine if there was a valid arbitration agreement between the parties. Once a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration. *Id.*, at 230. The Court opined that "[a]ny argument that the provisions of the arbitration agreement involve a waiver of substantive rights afforded by the state statute may be presented in the arbitral forum." *Id.*, at 230.

C. The Scope of Judicial Review

The standard for judicial review of arbitration awards is closely related to the Courts' concerns with arbitration agreements that limit the substantive rights and remedies otherwise afforded to employees. Under Section 10(a) of the FAA, there are four statutory grounds for vacating an arbitration award: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party may have been prejudiced; (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

In addition to the statutory grounds, the Supreme Court has also indicated that arbitration awards can be vacated if they are in "manifest disregard" of the law. See *First Options of Chicago, Inc. v. Kaplan*, ___ U.S. ___, 115 S.Ct 1920, 1923, 131 L.Ed.2d 985 (1995). But the "manifest disregard of the law" standard is necessarily focused and construed narrowly: "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." *Merrill Lynch Pierce Fenner & Smith v. Bobker*, 808 F.2d 930, 933-34 (2nd Cir. 1986). See also *Chisholm v. Kidder, Peabody Asset Management, Inc.*, 810 F. Supp. 479 (S.D.N.Y. 1997).

DiRussa v. Dean Witter Reynolds Inc, 121 F.3d 818 (2nd Cir. 1997) illustrates how narrowly most Courts interpret the manifest disregard standard, including in the context of reviewing arbitral rulings on statutory claims. In *DiRussa*, the Second Circuit upheld an arbitration panel's refusal to award attorney's fees to an employee despite ruling in her favor on her ADEA claim. The *DiRussa* Court rejected the argument that the denial of attorney's fees constituted "manifest disregard" for the law because there was "no persuasive evidence that the arbitrators actually knew of — and

² The District Court's decision in *DeGaetano* is also notable for the manner in which it distinguished the Second Circuit's decision in *DiRussa v. Dean Witter Reynolds Inc*, 121 F.3d 818 (2nd Cir. 1997). See *infra*, pg 15.

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

intentionally disregarded — the mandatory aspect of the ADEA's fee provision.” 121 F.3d at 822. Apparently, plaintiff's counsel had “failed to inform the arbitrators of the relevant legal standard” or to advise the arbitrators in any fashion “that the ADEA mandated [a fee] award to the prevailing party. In the circumstances, the Court could not “infer that [the arbitrators] consciously disregarded the ADEA's fee provision.” *Id.* at 823. *But see DeGaetano v. Smith Barney, Inc.*, 1997 WL 697928 (S.D.N.Y. 1997) (granting the prevailing plaintiff's motion to vacate or modify the arbitration panel's award denying her attorney's fees and finding that the arbitration provision prohibiting the prevailing party from receiving attorney's fees to be against public policy and void; DiRussa distinguished on grounds that its panel was unaware of a prevailing party's rights to recover counsel fees under Title VII); See also *Montes v. Shearson Lehman Brothers Inc.*, 128 F.3d 1456 (11th Cir 1997)(arbitration decision vacated under “manifest disregard of law standard” after panel was “flagrantly and blatantly” urged to disregard the Fair Labor Standards Act, which governed the case).

1. Enhanced Judicial Review

The D.C. Circuit's opinion in *Cole* suggests the evolution of a different standard for judicial review of arbitration rulings on statutory claims. In *Cole*, the D.C. Circuit suggested in dicta that arbitration rulings should be given less deference where arbitrators construe federal statutes, rather than decide simply the usual issues in typical commercial or labor disputes. The *Cole* Court observed,

“[T]he strict deference accorded to arbitration decisions in the collective bargaining arena may not be appropriate in statutory cases in which an employee has been forced to resort to arbitration as a condition of employment. Rather, in this statutory context, the “manifest disregard of law” standard must be defined in light of the bases underlying the Court's decisions in *Gilmer* type cases.

Cole, supra, 105 F.3d at 1487. The *Cole* Court continued by calling for judicial review under the “manifest disregard” standard to be “sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law. *Id.*, at 1487. To date, however, it is unclear whether the courts will adopt the D.C. Circuit's call for an enhanced standard of review for cases involving arbitration of statutory discrimination claims.

IV. Other Issues Relevant to ADR and Wrongful Discharge

A. Collective Bargaining Agreements.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Supreme Court held that a union member required to arbitrate under a collective bargaining agreement (CBA) could later commence a Title VII action in federal Court. With the Supreme Court's 1991 decision in *Gilmer* that a securities industry employee — who had signed an agreement to arbitrate all employment disputes — could not bring an ADEA claim in federal Court, arbitration opponents advanced the argument *Gilmer* had overruled *Alexander*. To date, only the Fourth Circuit has accepted this argument.

In *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) *cert. denied*, 117 S. Ct. 432 (1996), the Fourth Circuit concluded that *Gilmer* overruled *Alexander*, and that a mandatory arbitration provision in a collective bargaining agreement covering discrimination and disability claims must be enforced. In *Austin*, the Fourth Circuit threw out a Title VII sexual discrimination claim and an ADA claim because the plaintiff had not filed a grievance pursuant to the terms of a collective bargaining agreement and had taken the matter to “final and binding” arbitration. The court saw no distinction between an individual's separate agreement to arbitrate future disputes and a collective bargaining agreement that the individual never signed. *Id.* at 886.

In *Brown v. Trans World Airlines*, 127 F.3d 337 (4th Cir. 1997), the Fourth Circuit retreated somewhat from its holding in *Austin*. In *Brown*, the Fourth Circuit held that the plaintiff was not required to arbitrate her sex harassment and retaliation claims pursuant to the grievance and arbitration clauses of her collective bargaining agreement where the union contract provided only for the arbitration of disputes arising under the contract itself. The court held that an arbitration agreement need not expressly mention rights created by an anti-discrimination statute “as long as it were made clear that their agreement is sufficiently broad to include the arbitration of such disputes.”

Alternative Dispute Resolution: Mandatory Arbitration of Statutory Discrimination and Other Employment Claims

Id. at 341-42. The court held that factual similarity between claims of violations of the anti-discrimination clause of the CBA and claims under the fair employment laws "is not sufficient to subsume Brown's statutory claims into the contract's arbitration clause. *Id.*, at 3342.

1. Austin Rejected

As noted above, the holding in Austin has been rejected by all circuits³ considering the issue, either in principle or explicitly. See, e.g., *Penny v. United States Parcel Service*, 128 F.3d 408 (6th Cir. 1997); *Brisentine v. Stone & Webster*, 117 F.3d 519 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997), cert. denied 66 U.S.L.W. 3281 (1997); *Varnier v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996); *Tran v. Tran*, 54 F.3d 115 (2^d Cir. 1995); *EEOC v. Board of Governors of State Colleges and Universities*, 957 F.2d 424 (7th Cir. 1992).

B. Punitive Damages:

Another issue that has periodically arisen since *Gilmer* is whether punitive damages may be awarded in arbitration proceedings. Some states, including New York, have traditionally prohibited the award of punitive damages in arbitration proceedings. However, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, __ U.S. __, 115 S. Ct. 1212 (1995), the Supreme Court considered an award of punitive damages under a contract that contained both a New York choice of law provision and an arbitration clause and upheld the arbitration panel's award of punitive damages, despite the prohibition in New York case law. Accordingly, an arbitration provision that permits punitive damage awards is valid even where state law bars punitive damages in arbitrations.

C. Effect on EEOC Enforcement Authority

Another issue raised by *Gilmer* is the effect of that decision on the EEOC's enforcement authority regarding discrimination claims that are subject to arbitration decisions. The Court in *Gilmer* partially addressed this question, concluding that the enforcement of arbitration decisions will not compromise the EEOC's authority in this area. For example, employees subject to arbitration agreements may still file EEOC charges, though they may be prohibited from filing federal court actions; the EEOC may freely obtain information and conduct investigations based on that information; and, the EEOC is not precluded from bringing class actions. The EEOC, however, may be precluded from seeking damages for individuals who are parties to valid arbitration agreements. *EEOC v. Kidder, Peabody & Co.*, 74 Fair Emp. Prac. Dec. (BNA) 1833 (S.D.N.Y. 1997).

D. OWBPA Waiver Prohibitions

The prohibitions against waiver of prospective rights in the Older Workers Benefit Protection Act, 29 U.S.C. §626(f) ("OWBPA"), do not preclude arbitration of Age Discrimination in Employment Act claims. Arbitration agreements, for example, take precedence over the OWBPA's provision guaranteeing the right to a jury trial in ADEA cases. See *Rice v. Brown Brothers Harriman & Co.*, 73 Fair Emp. Prac. Dec. (BNA) 1210 (S.D.N.Y. 1997).

³ The Third Circuit vacated and granted rehearing en banc of one of its panels' pro-Austin opinion in *Martin v. Dana Corp.*, 1997 WL 313054, 73 FEP Cases 1803 (3rd Cir. June 12 1997).