THE MANDATORY ARBITRATION CLAUSE: FORUM SELECTION OR EMPLOYEE COERCION?

I. INTRODUCTION

Imagine that you have been searching for work for months — calling employers, writing cover letters, polishing your resume, and interviewing endlessly. Finally, you find a position and the employer extends you an offer of employment. Before you start, your employer tells you that as a condition of employment, you must sign a document filled with pages of fine print. Part of that fine print is a waiver of your right to seek resolution of any future employment disputes in court, including those disputes arising under federal or state law. Instead, you agree to resolve all such disputes in arbitration. You do not anticipate having any problems with your employer, and you do not really understand the difference between arbitration and adjudication, anyway. If you do not sign this document you will not be able to start work. You have no choice — you sign.[1]

Six months later, your employer discriminates against you. You want to take the employer to court, but you discover that you are compelled to arbitrate this matter due to the mandatory arbitration clause in the employment contract you signed. In arbitration, you do not have the chance to conduct extensive discovery to find the evidence you need to meet the stringent burden of proof required by statute. The "neutral" arbitrators you have to choose from are mostly older, white men. The arbitrator's decision is subject to appeal on only a very limited basis, and he has wide latitude in decision-making.

What has happened here? Did you knowingly and voluntarily waive your right to a judicial forum? Did you waive a substantive right or merely a procedural right? Should substance versus procedure determine whether or not your employer can compel you to waive the right as a condition of your employment? Is your employment contract an unconscionable adhesion contract?

The courts[2] and Congress[3] favor knowing and voluntary agreements between parties to use arbitration as a means of dispute resolution in general. This does not mean, however, that it is appropriate for an employer to force an employee to sign an individual employment contract containing a mandatory arbitration clause: i.e., a provision that prospectively waives the employee's right to have

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[1] Of course, not all waivers are this obvious. More and more employers are using tactics such as adding clauses to employee handbooks to make arbitration of employee claims of discrimination mandatory. Courts often find legitimate predispute agreements to arbitrate even in the situation where no agreement was signed at all. This Note will address only the case of a mandatory arbitration clause contained in an express individual employment contract.

[2] *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974) (holding that employees can enter into "knowing and voluntary" agreements to waive their statutory rights in a post dispute agreement); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

[3] *See* Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994).

statutory employment claims heard in a judicial forum. First, the 1991 amendments to the Civil Rights Act may be interpreted to forbid the prospective waiver of the right to have statutory employment law claims heard in a judicial forum. Second, even if these amendments do not prohibit such a waiver, these employment contracts may not be enforceable under the Federal Arbitration Act (the "FAA"). Third, even if the employment contracts are enforceable under the FAA, they may still be void as unconscionable adhesion contracts.

This Note will examine the arguments in favor of and in opposition to the enforceability of mandatory arbitration clauses in individual employment contracts, and conclude that they are not enforceable.

II. ENFORCING MANDATORY ARBITRATION CLAUSES

A. *General Enforceability of Arbitration Agreements*

Agreements to arbitrate claims are generally enforceable, pursuant to the FAA.[4] In the employment context, agreements to arbitrate contractual employment disputes arising under the terms of a collective bargaining agreement are enforceable.[5] Additionally, post dispute agreements to arbitrate statutory employment claims are enforceable; for example, the Age Discrimination in Employment Act (the "ADEA") allows plaintiffs to enter into "knowing and voluntary" agreements to arbitrate claims instead of pursuing a civil action.[6] This Note addresses whether an employer may condition the hiring of a potential employee upon the signing of a contract which contains a predispute agreement to arbitrate all statutory employment claims.

B. *Predispute Agreements to Arbitrate Statutory Claims*

The Supreme Court has indicated that a predispute agreement to arbitrate may be enforceable under certain circumstances. For example, the Court recently suggested that a union may prospectively waive the right of the employees it represents to a judicial forum as long as the collective bargaining agreement makes this clause clear and unmistakable.[7] It is unclear, however, whether an individual may sign an employment contract that prospectively waives the right to have his or her statutory claims heard in a judicial forum.

Two lines of cases are crucial in understanding the root of this issue. There is tension between them which the Court deliberately left unresolved in its most recent brush with mandatory arbitration clauses in *Wright v. Universal Maritime*

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[4] *See id.*

[5] *See, e.g., Alexander*, 415 U.S. 36.

[6] *See* Older Workers Benefit Protection Act, Pub. L. No. 101-433, § 201, 104 Stat. 978, 983-84 (1990) (codified as amended at 29 U.S.C. § 626 (f)(1) (1994)).

[7] *See* Wright v. Universal Maritime Service Corp., 119 S.Ct. 391, 397 (1998) (noting that the Court did not "reach the question whether such a waiver would be enforceable").

Service Corp.[8] The first line of case law arises from the Supreme Court's decision in *Alexander v. Gardner-Denver*, in which the Court held that an employee may not prospectively waive his right to a judicial forum for resolution of claims arising under Title VII of the Civil Rights Act.[9] The second line arises from the Court's subsequent decision in *Gilmer v. Interstate/Johnson Lane*, holding that an individual can prospectively waive his right to resolution of his statutory claim in a judicial forum by signing a licensing agreement with a mandatory arbitration clause as a condition of employment.[10] A close examination of these cases and their progeny is necessary in order to understand the issues involved and the best resolution of their inherent conflict.

1. *Alexander v. Gardner-Denver*

Alexander v. Gardner-Denver dealt with the issue of whether a discharged employee who arbitrated his grievance pursuant to a collective bargaining agreement was thereby prevented from bringing an action in federal court under Title VII based on the same conduct that resulted in the grievance.[11]

Harrell Alexander was discharged from his position as a maintenance worker at Gardner-Denver's plant.[12] Alexander submitted to the grievance-arbitration procedure outlined by his collective bargaining agreement, and in the final pre-arbitration step alleged that his discharge was the result of racial discrimination.[13] Before the arbitration hearing, Alexander filed a complaint that eventually reached the attention of the Equal Employment Opportunity Commission.[14] The arbitrator later issued a ruling that the employee had been discharged for just cause.[15] The Commission then issued a right to sue letter to Alexander, who filed suit with the District Court.[16] The District Court granted the employer's summary judgment motion on the ground that Alexander was bound by the arbitration decision and thereby precluded from bringing a judicial action.[17] The Tenth Circuit Court of Appeals affirmed the District Court's decision, and the Supreme Court granted certiorari.[18]

The Supreme Court held that the employee was not precluded from bringing the Title VII claim.[19] The Court stated,

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast,

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[8] *See id.* at 395.

[9] *See Alexander*, 415 U.S. 36.

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

[11] *See Alexander*, 415 U.S. 36.

[12] *See id.* at 38.

[13] *See id.* at 39, 42.

[14] *See id.* at 42.

[15] *See id.*

[16] *See id.* at 43.

[17] *See Alexander*, 415 U.S. at 43.

[18] *See id.*

[19] *See id.* at 49-50.

> in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence.[20]

The reason for the difference in treatment is that an arbitrator only has the authority to resolve contractual disputes to construe the intent of the parties.[21] The Court stated that the arbitrator does not have the "general authority to invoke public laws that conflict with the bargain of the parties."[22] The Court stressed that "there can be no prospective waiver of an employee's rights under Title VII."[23]

2. *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Incorporated*

The *Alexander* decision was soon restricted by the Supreme Court's decision in *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Incorporated.*[24] In *Mitsubishi*, the Court stated that unless an agreement to arbitrate "resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract[,]' . . . the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims . . . "[25] In other words, a complainant may only set aside a forum selection clause by showing that the agreement was " 'affected by fraud, undue influence, or overweening bargaining power'; that 'enforcement would be unreasonable and unjust'; or that proceedings in the contractual forum will be so gravely difficult and inconvenient that the [opposing party] will for all practical purposes be deprived of his day in court."[26] The Court held that an agreement to arbitrate all disputes, rather than resolve them in a judicial forum, does not interfere with a party's substantive rights granted by the statute involved.[27] Then, in the most oft-quoted sentence of *Mitsubishi*, the Court concluded, "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[28]

3. *Gilmer v. Interstate/Johnson Lane*

In 1991, in the landmark case of *Gilmer v. Interstate/Johnson Lane Corp.*,[29] the Supreme Court held that employees can enter into binding predispute agree-

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[20] *Id.*

[21] *See id.* at 53-54.

[22] *See id.* at 53.

[23] *See Alexander*, 415 U.S. at 51.

[24] *See* Mistubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

[25] *Id.* at 627.

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

[27] *See id.* at 628.

[28] *Id.*

[29] 500 U.S. 20.

ments to arbitrate discrimination claims arising under the ADEA, barring employees from bringing a legal action for discrimination under that act.

Gilmer was hired by Interstate/Johnson Lane Corporation as a Manager of Financial Services.[30] As a condition of his employment, Gilmer was required to register as a securities representative with the New York Stock Exchange ("NYSE").[31] The registration application provided that Gilmer agreed to arbitrate any dispute, which the by-laws of the NYSE required to be arbitrated, arising between him and his employer.[32] The NYSE required arbitration of any employment dispute arising between Gilmer and Interstate/Johnson Lane Corporation.[33] Gilmer's agreement to arbitrate employment disputes, therefore, arose through the registration process, rather than through a contract dealing directly with the issue of agreeing to arbitrate employment disputes that he signed with his employer.

Gilmer filed an age discrimination charge with the EEOC after he was terminated by his employer at the age of sixty-two.[34] Next, he filed a civil suit, alleging age discrimination in violation of the ADEA.[35] Interstate filed a motion to compel arbitration pursuant to the mandatory arbitration clause contained in Gilmer's registration application and the FAA.[36] The district court denied Interstate's motion, holding that the right to a judicial forum was a nonwaivable right under the ADEA.[37] The court of appeals reversed this decision, holding that the ADEA does not bar a plaintiff's waiver of the right to a judicial forum before a dispute arises.[38] The Supreme Court affirmed this decision.[39]

The Court's opinion reaffirmed the idea that statutory claims may be, under the proper circumstances, the subject of arbitration agreements, enforceable under the FAA.[40] It also noted that the purposes of the ADEA are not inconsistent with the NYSE arbitration procedures, because (1) the court declined to assume that the NYSE arbitrators are not competent and conscientious;[41] (2) limited discovery opportunities do not make it more difficult to prove age discrimination than to prove other types of arbitrable claims, such as RICO or

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[30] *See id.* at 23 (discussing the Age Discrimination Act in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994)).

[31] *See id.*

[32] *See id.*

[33] *See id.* (stating that "NYSE Rule 347 provides for arbitration of 'any controversy between a registered representative and any member organization arising out of the employment or termination of employment of such registered representative'").

[34] *See id.*

[35] *See Gilmer*, 500 U.S. at 23.

[36] *See id.* at 24.

[37] *See id.* (stating that "the district court denied Interstate's motion based on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and because it concluded that Congress intended to protect ADEA claimants from the waiver of a judicial forum").

[38] *See id.*

[39] *See id.* at 23.

[40] *See id.* at 26.

[41] *See Gilmer*, 500 U.S. at 30.

anti-trust claims;[42] and (3) there will be written opinions of the NYSE arbitration decisions, so there will not be a lack of public knowledge of employers' discriminatory policies, an inability to obtain effective appellate review, or a stifling of the law's development that might accompany a lack of written opinions.[43] Additionally, the court noted that NYSE rules do not prohibit arbitrators from fashioning equitable relief,[44] and that unequal bargaining power between the employer and the employee in this situation did not make this agreement unenforceable, though this should be determined on a case-by-case basis.[45] The Court observed that its decision in *Gilmer* must of necessity differ from *Alexander v. Gardner-Denver* because *Alexander* dealt with a completely different issue.[46] *Alexander* held that the arbitration of contract-based claims did not preclude subsequent judicial resolution of statutory claims.[47] *Alexander* did not decide whether an agreement to arbitrate statutory claims was enforceable.[48]

The decisions in *Alexander, Mitsubishi,* and *Gilmer* taken together stand for the proposition that an employee may prospectively waive his right to a judicial forum for his statutory employment claims, so long as the waiver agreement is not unconscionable and the agreement is enforceable under the FAA, because Congress did not manifest a clear intent to prohibit this waiver. This proposition can be challenged on all three elements: (1) Congress may have manifested its intent to prohibit such a waiver through the passage of the 1991 Amendments to the Civil Rights Act; (2) an employment contract containing a predispute agreement to arbitrate statutory employment claims may not be enforceable under the FAA; and (3) the waiver may be considered unconscionable. Thus, employees may not be allowed to prospectively waive their rights to a judicial forum for statutory employment claims.

C. *The Significance of the 1991 Amendments to the Civil Rights Act*

In 1991, Congress amended the Civil Rights Act to encourage the use of arbitration as a mechanism for resolving statutory employment law disputes.[49] In adopting the amendments, Congress rejected a proposed amendment which would have explicitly allowed predispute agreements to arbitrate on the grounds that "under the [proposed amendment] employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints" in a judicial forum, a situation that would force employees "to choose

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[42] *See id.* at 31.

[43] *See id.* at 31-32.

[44] *See id.* at 32.

[45] *See id.* at 33.

[46] *See id.* at 35 (noting that "*Gardner-Denver* involved the quite different issue of the enforceability of an agreement to arbitrate statutory claims").

[47] *See Gilmer*, 500 U.S. at 35.

[48] *See id.*

[49] *See* the Civil Rights Act of 1991, Pub. L. 102-166, § 118, reprinted in notes to 42 U.S.C. § 1981 (1994).

betweeen their jobs and their civil rights."[50] Instead, Congress chose to use the current language of the 1991 Civil Rights Act, authorizing the use of arbitration "where appropriate and to the extent authorized by law."[51]

This year, several circuit courts attempted to interpret the effect of this new language in the Civil Rights Act.[52] These courts addressed the question of whether these Amendments evince Congress' intent to prohibit or encourage mandatory arbitration clauses.[53]

1. *Duffield v. Robertson Stephens & Co.*

In *Duffield*, the Court of Appeals for the Ninth Circuit found that the 1991 amendments to the Civil Rights Act ("1991 amendments") bar employers from imposing mandatory arbitration as a condition of employment on their employees.[54] Tonja Duffield was a broker-dealer who brought suit in federal district court against her employer, Robertson Stephens & Co., for sexual harassment and discrimination in violation of Title VII and California's Fair Employment and Housing Act ("FEHA").[55] The court granted Robertson Stephens' motion to compel arbitration of the claims, on the grounds that the Form U-4 signed by Duffield as a condition of her employment required her to arbitrate any employment disputes.[56] The Ninth Circuit reversed this decision.[57] Judge Reinhardt, writing for the majority, noted that the *Gilmer* court made it clear that a court may not enforce an individual agreement to arbitrate statutory claims when "Congress itself has evinced an intention to preclude a waiver of judicial remedies."[58] Judge Reinhardt focused on § 118 of the Civil Rights Act of 1991 which encourages plaintiffs to arbitrate "where appropriate and to the extent authorized by law."[59] The court noted that this phrase limited the circumstances under which arbitration is to be used to resolve Title VII claims.[60] The word "encouraged" is inconsistent, said the court, with the idea of mandatory arbitra-

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[50] H.R. Rep. No. 102-40(I), at 104 (1991), reprinted in 1991 U.S.C.C.A.N. (105 Stat. 1071) 549, 642.

[51] Civil Rights Act of 1991, Pub. L. 102-166, § 118, reprinted in notes to 42 U.S.C. § 1981 (1994).

[52] *See, e.g.*, Rosenberg v. Merrill Lynch, 163 F.3d 53 (1st Cir. 1998); Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998); Seus v. John Nuveen, 146 F.3d 175 (3d Cir. 1998).

[53] *See, e.g., Rosenberg*, 163 F.3d at 55; *Duffield*, 144 F.3d at 1185; *Seus*, 146 F.3d at 175.

[54] *See Duffield*, 144 F.3d at 1185.

[55] *See id.* at 1186.

[56] *See id.* at 1185-86.

[57] *See id.*at 1185.

[58] *Id.* at 1190 (citing Mistubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985)).

[59] *See id.* at 1191 (citing the Civil Rights Act of 1991, Pub. L. 102-166, § 118, reprinted in notes to 42 U.S.C. § 1981).

[60] *See Duffield*, 144 F.3d at 1193.

tion.[61] The court stated that it would be "at least a mild paradox" to find that § 118 encouraged mandatory arbitration when other types of "encouraged" alternative dispute resolution mechanisms were all consensual.[62]

2. *Seus v. John Nuveen & Co.*

The Court of Appeals for the Third Circuit came to exactly the opposite conclusion, holding that under the 1991 amendments, predispute agreements to arbitrate claims that arise under the ADEA are enforceable under the FAA.[63] The court came to this conclusion only a month after the Ninth Circuit issued its decision in *Duffield*.[64]

Sheila Seus signed a Form U-4 agreement to register with the National Association of Securities Dealers (the "NASD") as a condition of her employment with John Nuveen & Company.[65] The court held that the Form U-4 constituted a valid and binding agreement by Seus to arbitrate all prospective age discrimination claims.[66] The 1991 amendments, concluded the court, established Congress' intent to encourage the use of arbitration.[67] Additionally, the court found that the right to a judicial forum is a procedural right rather than a substantive one, and, therefore, not subject to the "knowing and voluntary" waiver standard of the Older Workers Benefit Protection Act (the "OWBPA").[68]

3. *Rosenberg v. Merrill Lynch*

The Court of Appeals for the First Circuit also recently rejected the proposition that the 1991 amendments evince Congress' intent to prohibit predispute arbitration agreements in the employment context.[69] The court nonetheless found this particular agreement to arbitrate unenforceable because it did not meet the standard for enforcing such clauses established by the 1991 Civil Rights Act: that such clauses will be enforced "where appropriate and to the extent authorized by law."[70]

Susan Rosenberg was hired as a financial consultant for Merrill Lynch.[71] Once employed, she signed the Form U-4 that both Seus and Duffield were compelled

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[61] *See id.* at 1192-93.

[62] *See id.*

[63] *See Seus*, 146 F.3d at 175, 177.

[64] *See Duffield*, 144 F.3d at 1182.

[65] *See Seus*, 146 F.3d at 177.

[66] *See id.* at 184.

[67] *See id.* at 182 (stating that, "[o]n its face, the text of section 118 [of the Civil Rights Act of 1991] evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration").

[68] *See id.* at 181-182.

[69] *See Rosenberg*, 163 F.3d at 53, 56.

[70] *See id.* at 56.

[71] *See id.*

to sign as a condition of employment.[72] After two years of employment, Rosenberg was discharged.[73] She filed charges of age and gender discrimination in court, and the employer moved to compel arbitration.[74] The district court denied the employer's motion to compel.[75]

On appeal, the First Circuit found the Form U-4 to be an enforceable agreement to arbitrate on much the same grounds that the *Seus* court found the Form U-4 to be enforceable.[76] The court did not compel arbitration, however, because the employer did not follow the procedures dictated by the form: namely, to provide the employee with a copy of the rules so that the employee could become familiar with them.[77]

The Supreme Court may take the opportunity to review one of these decisions. If the 1991 amendments are interpreted to prohibit mandatory arbitration clauses, then employees will not be allowed to prospectively waive their rights to a judicial forum in an individual employment contract or otherwise. Assuming that the Supreme Court finds that the 1991 amendments do allow the use of mandatory arbitration clauses within a registration agreement, the question of whether a mandatory arbitration clause in an individual employment contract is enforceable still exists. The individual employment contract may still be excluded by section 1 of the FAA, or, failing that, may be found to be an unconscionable adhesion contract.

D. *The Employment Contract Exclusion of the FAA*

The Supreme Court has yet to specifically address whether or not an individual employment contract entered into by the employer and the employee may prospectively waive an employee's right to have statutory claims heard in a judicial forum. Though the Court's decision in *Gilmer* currently allows employees to prospectively waive their rights to a judicial forum in a registration agreement, the Court declined to interpret the exclusion clause of the FAA because the arbitration agreement was not part of an individual employment contract.[78] Thus, the Court left open the possibility that individual employment contracts made directly between the employer and employee could be excluded from the scope of the FAA.

Congress enacted the Federal Arbitration Act in 1925 to "reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other agreements."[79] The relevant section

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[72] *See id.* at 56-57.

[73] *See id.* at 57.

[74] *See id.*

[75] *See Rosenberg*, 163 F.3d at 58.

[76] *See id.* at 56.

[77] *See id.* at 72.

[78] *See Gilmer*, 500 U.S. at 25 n.2.

[79] *Id.* at 24.

of the FAA is section 2, which provides that

> "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[80]

Grounds that exist at law or in equity to revoke a contract include fraud, duress, or unconsionable adhesion.[81]

Section 1 of the FAA, however, limits this broad grant of enforceability by stating 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."[82] To come under the protection of the FAA, an arbitration agreement must, therefore, be part of a contract involving transactions in interstate or international commerce and not fall within the employment contract exclusion. Unless covered by the FAA, predispute agreements to arbitrate employment claims arising under anti-discrimination statutes will not be enforced.[83] Thus, in determining whether these agreements can be enforced, it is imperative to determine whether the employment contract which contains the arbitration agreement in question falls under this clause.

In *Gilmer,* the Supreme Court was able to forestall interpreting this clause because the arbitration agreement in that case was not part of an employment contract between the employee and employer but rather a registration by the employee with the New York Stock Exchange.[84] The question, therefore, remains open as to exactly how broad is the exclusion clause. Interestingly, Justice Stevens, writing the dissenting opinion in *Gilmer*, stated that, in his opinion, "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA."[85]

The Supreme Court generally interprets the phrase "involving commerce" in section 2 of the FAA as having the same meaning as the phrase "affecting commerce" in the Commerce Clause of the United States Constitution.[86] In *Allied-Bruce Terminix Cos., Inc. v. Dobson*, the court held that in determining whether a contract is a "transaction involving commerce,"a court need not find that the parties contemplated substantial interstate activity at the time they entered into the contract: the transaction need only "in fact" affect interstate commerce.[87]

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[80] 9 U.S.C. § 2.

[81] *See, e.g.*, HUGH COLLINS, THE LAW OF CONTRACT 60-63, 94, 146-148, 199 (1986).

[82] 9 U.S.C. § 1.

[83] *See* Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. Rev. 1344, 1345 (1997) (stating that "in the absence of FAA compulsion, predispute arbitration agreements covering statutory employment claims will generally be denied enforcement").

[84] *See id.*

[85] *See Gilmer*, 500 U.S. at 36 (Stevens, J., dissenting).

[86] *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995).

[87] *See id.*

Thus, it is nearly impossible for a court to find that an agreement to arbitrate employment disputes does not pass the commerce test of section 2 of the FAA.

The Supreme Court has not yet determined, however, whether a predispute agreement to arbitrate employment discrimination claims contained within an individual employment contract will fall under the employment contract exclusion of the FAA. Since the *Gilmer* holding, numerous lower courts have interpreted the clause narrowly, including the District of Columbia, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuit Courts.[88] These courts apply the exception only to employees who work directly in the transportation industry.[89] It seems incongruous, however, to read the "commerce" language of section 2 broadly enough to include all employment contracts, while simultaneously reading the same "commerce" language of section 1 narrowly enough to exclude employment contracts not involving transportation workers.

E. *Unconscionable Adhesion Contract*

Assuming that the Supreme Court holds that individual employment contracts are enforceable in all industries outside of the transportation industry, there is still a possibility that these contracts will be found to be unconscionable adhesion contracts.

Some find mandatory alternative dispute resolution systems problematic because such systems may deny plaintiffs the right to access courts, due process, trial by jury, and equal protection.[90] Others say that a mandatory predispute agreement to arbitrate statutory employment claims is a modern "yellow dog" contract,[91] or simply unenforceable as an unconscionable adhesion contract.[92] The *Gilmer* decision left employees with the right to challenge, on a case-by-case basis, a prospective waiver of judicial forum by arguing that the contract was an unconscionable adhesion contract.

The term "yellow dog contract" arose in the early nineteenth century, when workers were compelled to promise their potential employers that they would not join a union as a precondition to being hired.[93] After the Norris-LaGuardia Act of 1932[94] was passed, courts outlawed yellow dog contracts because these

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[88] *See* Estreicher, *supra* note 83, at 1345.

[89] *See id. See also* Asplundh Tree Expert v. Bates, 71 F.3d 592 (6th Cir. 1995). *But cf.* United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940 (10th Cir. 1989) (demonstrating the Tenth Circuit's broad interpretation of the exclusion).

[90] *See* William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 269 (1994).

[91] *See, e.g.*, Judith P. Vladeck, *"Yellow Dog Contracts" Revisited*, N.Y. L.J., July 24, 1995, at 7; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).

[92] *See* Van Wezel Stone, *supra* note 91, at 1036-37.

[93] *See id.* at 1037.

[94] Norris-LaGuardia Act, ch. 90, 72 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1994)).

contracts prevented employees from exercising their statutory right to organize.[95] Some argue that the mandatory arbitration clauses contained in employment contracts today are modern yellow dog contracts because they force employees to give up their statutory rights to pursue claims in court,[96] and thus they should not be enforced. Whether or not a mandatory arbitration clause is a yellow dog contract, however, it may still be an unconscionable adhesion contract.

A mandatory arbitration clause contained in an employment contract, assuming that the FAA applies, is " 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contracts.' "[97] Thus, such a contract will be enforced as long as the parties entered into it knowingly and voluntarily.[98] Unless there is a showing of fraud, duress, mistake, unconscionability, or some other type of defense recognized under contract law, a predispute agreement to arbitrate will be enforced just as any other contract.[99]

An adhesion contract has been defined as " 'a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' "[100] The parties have unequal bargaining power because a form contract is used, giving the subordinate party little or no opportunity to bargain over the terms of the contract.[101] Typically, an employment contract contains a great disparity in bargaining power. The clauses are designed unilaterally by employers and only presented to employees at the time they are hired, or put in the employee handbooks and not mentioned to the employees at all.[102] The employer presents the employee with a standard contract used for all employees, and the employee can either accept it or reject it, but cannot bargain over the terms. Employees who later have a dispute with the employer and bring a claim in court find themselves facing a motion to dismiss based on the agreement to arbitrate they signed on their first day, a day when they were in a weak position due to their need for employment.

The problem with an adhesion contract is framed well by Professor Grodin:

> Before a dispute arises, it is impossible for a party to assess precisely what is being waived and the probable effect of the waiver — even if his or her attention is focused on the issue. In the employment context this is especially a problem for the employee; while the employer can take into account statistical probabilities affecting all its employees, the employee's ability to predict what may happen to him or her individually is beyond the scope of such analysis. Moreover, while a post-dispute agreement to arbi-

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[95] *See* Estreicher, *supra* note 83, at 1352.

[96] *See* Van Wezel Stone, *supra* note 91, at 1037.

[97] *See Seus*, 146 F.3d at 183 (quoting the FAA, 9 U.S.C. § 1 *et seq.*).

[98] *See id.* at 183.

[99] *See id.* at 184.

[100] *See* Howard, *supra* note 90, at 266-67 (quoting Neal v. State Farm Ins. Co., 10 Cal. Rptr. 781, 784 (Dist. Ct. App. 1961)).

[101] *See id.* (citing Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 857 (N.J. 1967)).

[102] *See* Van Wezel Stone, *supra* note 91, at 1037.

> trate is likely to be the product of true negotiations against the backdrop of threatened litigation, pre-dispute agreements to arbitrate are far more likely to be part of a package of provisions imposed by the employer on a take-it-or-leave-it basis.[103]

Thus, an employee faced with the choice between unemployment and employment subject to an agreement to waive his or her right to adjudicatory resolution of potential employment disputes, is likely to choose to go along with the waiver because he or she does not fully understand what is being waived.

An adhesion contract is enforceable only if it falls within the reasonable expectations of the adhering party and is not unduly oppressive or unconscionable.[104] In *Prudential Ins. Co. of America v. Lai*,[105] the Ninth Circuit recognized the problems outlined above and found that a predispute agreement to arbitrate was unduly oppressive and therefore unenforceable because the employee did not knowingly enter into it.[106] The clause did not specifically refer to employment disputes, and, thus, the employee did not know the rights being waived.[107] Some argue that the mandatory arbitration clause within an employment contract is unenforceable because such a clause falls outside of the reasonable expectations of the employee. It is unreasonable for an employee to expect that his or her claim would be placed into the hands of arbitrators because of the procedural deficiencies of arbitration, as described below.[108]

First, unlike a court, arbitration does not allow for expansive discovery. Instead, parties are rushed through the procedure:[109] the entire arbitration process generally takes less than six months.[110] Employees still have the same strict burden of proof in an arbitration that they have in a court proceeding,[111] but because of the limited discovery, their ability to summon evidence is minimized. This disadvantage may be tempered because the employer is prevented from using its much larger financial resources to drag out discovery to increase the employee's willingness to settle by causing the employee to incur great costs.[112] Overall, however, the difficulty imposed on plaintiffs in proving their case with limited discovery far outweighs the slight benefit of preventing the employer from using stall tactics.

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[103] Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 29 (1996).

[104] *See* Howard, *supra* note 90, at 267 (citing Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172-73 (Cal. 1981)).

[105] 42 F.3d 1299 (9th Cir. 1994).

[106] *See id.* at 1305.

[107] *See, e.g.*, Howard, *supra* note 90, at 286.

[108] *See id.* at 287.

[109] *See* Sean T. Quinn, *Courts Uphold Employment Arbitration Clauses*, NAT'L L.J., Nov. 18, 1996, at D2.

[110] *See* Howard, *supra* note 90, at 287.

[111] *See id.*

[112] *See id.* at 287-88.

Another important disadvantage to employees in arbitration is the lack of diversity of the arbitrators from which the employee has to choose. Arbitrators tend to be fairly uniform with regard to race, ethnicity, sex, education level, wealth, and social status: they are largely highly-educated, older, white males.[113] According to a study by the GAO, 89 percent of the 3,000 arbitrators in the securities industry are white men over the age of 60 who are inexperienced in the area of employment law.[114] Additionally, only 6 percent of the 50,000 arbitrators on American Arbitration Association panels are women, and only 7 percent of the panel members of the National Academy of Arbitrators are women.[115] Representative Edward J. Markey (D-MA) recently condemned this situation, stating that "at best such a setting has the appearance of unfairness; at worst, it is a tainted forum in which an employee can never be guaranteed a truly fair hearing."[116]

The diversity imbalance among arbitrators has the most severe implications in Title VII sexual harassment situations, as recognized by Judge Norris of the Ninth Circuit in *Prudential Insurance Co. v. Lai*, when he stated, "in an area as personal and emotionally charged as sexual harassment and discrimination, the procedural right to a hearing before a jury of one's peers, rather than a panel of the National Association of Securities Dealers, may be especially important."[117] It is widely recognized that women in the securities industry who submit sexual harassment claims to arbitrators are poorly treated; in fact, the Wall Street Journal reported in 1994, "[s]o grim are the prospects for most women who go through the securities-industry arbitration process that lawyers say they now often advise their clients not to bother with arbitration at all. Instead, they urge

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[113] *See Mandatory Arbitration in the Securities Industry, 1998: Hearings Before the Senate Banking, Housing and Urban Affairs Comm.* 105th Cong. (1998) (statement of Rep. Edward J. Markey (D-MA)) [hereinafter Statement of Rep. Markey]. *See also* Vladeck, *supra* note 91.

[114] *See* Howard, *supra* note 90, at 267.

[115] *See* Statement of Rep. Markey, *supra* note 113. Representative Markey also contended that "mandatory arbitration contracts reduce civil rights protections to the status of the company car: a perk which can be denied at will." *See id.* Representative Markey, as well as Representative Connie Morella, sponsored a bill which was later introduced in the Senate entitled the Civil Rights Procedures Protection Act of 1997. This bill proposed to amend the civil rights statutes in existence, including Title VII, the ADEA, and others, to include a section prohibiting the prospective waiver of the right to bring a claim in a judicial forum. Section 3 of this bill stated, "Notwithstanding any Federal statute of general applicability that would modify any of the powers and procedures expressly applicable to the right or claim arising under this Act, such powers and procedures shall be the exclusive powers and procedures applicable to such right or such claim unless after such right or such claim arises the claimant voluntarily enters into an agreement to resolve such right or such claim through arbitration or another procedure." Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. § 3 (1997).

[116] Statement of Rep. Markey, *supra* note 113.

[117] *Lai*, 42 F.3d at 1305 n.4.

women to take modest settlements and walk away."[118] In contrast, jurors who are selected to serve in federal court are selected with care to avoid excluding candidates on the basis of their race, color, religion, sex, national origin, or economic status.[119] Thus, a claimant forced to proceed with arbitration may be severely disadvantaged by the racial, ethnic, or socio-economic background of the decision maker.

Additionally, employees are disadvantaged in the arbitration forum because the results are so unpredictable. Arbitrators are not bound to follow case law, nor are they required to report their decisions. The United States General Accounting Office ("GAO") issued a report one year after the *Gilmer* decision criticizing arbitration forums because they "lacked internal controls to provide a reasonable level of assurance regarding either the independence of the arbitrators or their competence in arbitrating disputes."[120] The report complained that "the forums had no established formal standards to initially qualify individuals as arbitrators, did not verify background information provided by prospective or existing arbitrators, and had no system to ensure that arbitrators were adequately trained to perform their functions fairly and appropriately."[121]

Employers may also argue that arbitration disadvantages them as well. The complexity of employment discrimination statutes, combined with the lack of competency on the part of many arbitrators, may make employers' technical defenses less effective.[122] The finality and limited basis for appeal of an arbitration decision can be beneficial to the employee if the employee gets a favorable result in arbitration. This is not particularly likely to happen, however, given the large number of procedural flaws associated with arbitration, as discussed above. Overall, the minor disadvantages that may arise over technicalities are far outweighed by the severe disadvantages faced by employees compelled to arbitrate their statutory claims, making arbitration more favorable to employers than to employees under current conditions.

An agreement to arbitrate may not always be unconscionable, however. Arbitration has its advantages in some situations. It is particularly useful in the interpretation of contracts between employers and employees, because the arbitrator's main expertise is contract interpretation. A GAO report on the effectiveness of alternative dispute resolution for workplace conflicts states that these programs are generally effective in resolving these issues quickly, fairly, and affordably.[123]

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[118] Margaret A. Jacobs, *Riding Crop and Slurs: How Wall Street Dealt With a Sex-Bias Case*, WALL ST. J., June 9, 1994, at A1.

[119] 28 U.S.C. § 1863(b)(3) (1994).

[120] G.A.O., *Securities Arbitration: How Investors Fare*, GAO-GDD-92-74, May 1992, at 6.

[121] *Id.* at 8.

[122] *See* Howard, *supra* note 90, at 288.

[123] *See* Michael D. Young and Kathleen W. Marcel, *Arbitration of Employment Disputes — What's a Company to Do?*, 6 METROPOLITAN CORP. COUNSEL 8, Aug. 1998, at 1 (citing GAO, *Alternative Dispute Resolution: Employers' Experience with ADR in the Workplace*, August 1997).

Additionally, Professor Samuel Estreicher recently testified before the Senate Committee on Banking, Housing and Urban Affairs in favor of enforcement of pre-dispute agreements to arbitrate statutory claims.[124] Professor Estreicher maintains that these agreements provide for an alternative that is "quicker, less costly, less divisive, less distracting and nonpublic resolution of employment disputes"[125] than litigation. For these reasons, Congress, through the FAA, usually encourgages the use of arbitration as a mechanism for resolution of disputes arising from the terms of a contract.

The problem with arbitration is that it currently lacks certain safeguards to ensure a fair resolution of the claim. Professor Estreicher suggests the following safeguards to ensure that substantive rights of employees are protected:

> "a competent arbitrator who knows the laws in question; a fair and simple method for exchange of information; a fair method of cost sharing to ensure affordable access to the system for all employees; the right to independent representation if sought by the employee; a range of remedies equal to those available through litigation; a written award explaining the arbiter's rationale for the result; and limited judicial review sufficient to ensure that the result is consistent with applicable law."[126]

Certainly, the judicial system has its flaws. Experts observe that most claimants cannot afford to hire expensive private lawyers and therefore find themselves represented by overworked administrative agencies who spend little time investigating their claims. Even when private lawyers are secured few cases go to trial.[127] Additionally, some argue that the jury trial is a recent phenomenon in employment law — for years employment laws did not provide for jury trial, so to waive the right to such a trial may not be that damaging to the complainant's case.[128]

The National Academy of Arbitrators (the "Academy"), however, believes that forcing an employee to sign a predispute agreement to arbitrate all claims is undesirable. The Academy made the following statement on May 21, 1997, "The National Academy of Arbitrators 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."[129] The Academy's position is most likely an acknowledgement that today's arbitration procedures do not adequately safeguard the rights of employees who wish to bring statutory employment discrimination claims against their employers.

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[124] *See Mandatory Arbitration in the Securities Industry, 1998: Hearings Before the Senate Banking, Housing and Urban Affairs Comm.* 105th Cong. (1998) (statement of Professor Samuel Estreicher).

[125] *Id.*

[126] *Id.*

[127] *See id.*

[128] *See id*

[129] *Statement and Guidelines of the National Academy of Arbitrators* (visited Dec. 13, 1998) <http://www.williamette.edu/dis-res/x9702.htm>.

III. CONCLUSION

In the future, the Supreme Court may very well construe the 1991 Amendments to the Civil Rights Act to prohibit an employer from forcing an employee to prospectively waive his or her rights to have statutory claims heard in a judicial forum. In the event that the Court does not construe the amendments this way, the Court should find that individual employment contracts are not covered under the FAA. Alternatively, the Court should hold that mandatory arbitration clauses are unconscionable adhesion contracts. Until the day when the arbitration system includes adequate safeguards to ensure a fair hearing, predispute mandatory arbitration clauses should not be enforced.

Victoria J. Craine