BEYOND THE PROTOCOL: RECENT TRENDS IN EMPLOYMENT ARBITRATION

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I. INTRODUCTION

In 1995, a task force representing employers, employees, and arbitration service providers drafted *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (the Employment Protocol).[1] This Protocol set minimum procedural safeguards to be included in all employment arbitration agreements. For example, participants agreed that employment arbitrators should be qualified to decide statutory disputes, that employees should have a right to counsel in arbitration proceedings, and that arbitrators should be empowered to award the full panoply of damages permitted by law.[2]

The Employment Protocol has been extremely influential.[3] It has been adopted by the major arbitration service providers, members of which will refuse to arbitrate cases under rules inconsistent with the Protocol.[4] It has inspired two additional Protocols, both adopted in 1998: the Due Process Protocol for Consumer Disputes[5] (the Consumer Protocol) and the Health Care Due Process Protocol[6] (the Health Care Protocol). The Employment Protocol has provided scrupulous employers with a model for drafting fair, ethical, and enforceable arbitration agreements. It has also guided courts in their decisions of whether to enforce particular employment arbitration agreements.[7] The Employment Protocol remains the benchmark against which employment arbitration agreements are measured.

Nonetheless, the Employment Protocol no longer provides the degree of prospective guidance that it once did.[8] Courts now are faced

1. *See Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 9A LAB. REL. REP. (BNA) No. 142, at 534:401 (May 9, 1995) [hereinafter *Employment Protocol*]. The Employment Protocol is reproduced at LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 891–95 (2d ed. 2005).

2. *Employment Protocol*, *supra* note 1, §§ B.1, C.5.

3. *See generally* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369 (2004) (discussing the impact of the Employment Protocol).

4. *Id.* at 403–04; *see also* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 941 (4th Cir. 1999) (citing the testimony of several arbitrators and arbitral service providers as a basis for the court's finding that the employer-promulgated arbitral procedures were "warped" and "skewed" in the employers' favor).

5. CONSUMER DUE PROCESS PROTOCOL (Am. Arb. Ass'n 1998), *available at* <http://www.adr.org/sp.asp?id=22019> [hereinafter *Consumer Protocol*].

6. HEALTH CARE DUE PROCESS PROTOCOL (Am. Arb. Ass'n 1998), *available at* <http://www.adr.org/sp.asp?id=28633> [hereinafter *Health Care Protocol*].

7. *See* Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 178-84 (2005).

8. Harding, *supra* note 3, at 452–55.

with issues the Employment Protocol's drafters never anticipated. While the Employment Protocol was originally intended as a guidepost for employers rather than the judiciary, it has commendably functioned in both roles. Permitting the Employment Protocol to fade into obsolescence would be a considerable loss.

Part II of this article reviews[9] and describes the recent case law of several critical issues that either the Employment Protocol did not address or that might profitably be reconsidered.[10] These issues are grouped into five categories: contract-formation issues, barriers to access, process issues, remedies issues, and judicial review.

Part III of this article argues that the Employment Protocol should be updated in some form to provide prospective guidance to employers, courts, and arbitrators on a set of baseline rules designed to ensure arbitral fairness. This could be accomplished by amending the Protocol, drafting a successor to the Protocol, persuading the major arbitral service providers (perhaps in combination with the National Academy of Arbitrators) to adopt a joint Statement of Principles, or by drafting an Arbitral Bill of Rights to be presented to Congress.

II. CONTESTED ISSUES

The Employment Protocol is in danger of being left behind by ongoing legal developments. Moreover, the Protocol cannot function as an adequate guide to employers if it does not address many of the critical legal issues that employers must resolve when they draft their arbitration systems. And, of course, some unenlightened employers continue to promulgate intentionally lopsided agreements,[11] illustrating the need for a more complete source of guidance to employers and judges.

9. *See* Bales, *supra* note 7.

10. *See infra* Part II.

11. *See, e.g.*, Morrison v. Circuit City Stores, 317 F.3d 646, 655 (6th Cir. 2003) (en banc) (employer imposed a one-year cap on back pay, a two-year cap on front pay, and a $5000 cap on punitive damages in most cases); Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175-77 (9th Cir. 2003) (employer imposed a statute of limitations much shorter than the limitations period imposed by law, prohibited class actions, and required employees to pay a "filing fee" directly to the employer as a prerequisite for bringing a claim); Ferguson v. Countrywide Credit Indus., Inc., 298 F.3d 778, 786 (9th Cir. 2002) (employer limited depositions of employer representatives, but not depositions of plaintiff-employees, to "no more than four designated subjects"); Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 940 (S.D. Tex. 2001) (employer gave arbitration agreements – written in English – to Spanish-speaking employees, and pressured the employees to sign the agreements immediately).

A. Contract-Formation Issues

"Contract-formation" issues concern whether a purported arbitration "agreement" creates an enforceable obligation. These issues turn on interpretation of state contract law. This is because Section 2 of the Federal Arbitration Act (FAA) provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[12] Thus, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that arbitration agreements would be enforced absent "the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'"[13]

1. Notice

Notice and consent are in many ways flip sides of the same coin: a party normally cannot consent to a contract term of which the party was not given notice.[14] This article groups under "notice" the circumstances under which an employee might claim that she had no idea that the employer presented her with an arbitration agreement at all. This article groups under "consent" the circumstances under which an employee might claim that while she knew she was being presented with an arbitration agreement, she believes she had an inadequate opportunity to consider the terms of that agreement, and was pressured to enter into such agreement.

The notice cases tend to revolve around the notice that an employee should receive before the employee is bound by an arbitration agreement. An example is *Douglass v. Pflueger Hawaii, Inc.*,[15] from the Supreme Court of Hawaii. Adrian Douglass, age seventeen, was employed as a lot technician at the Pflueger Acura car dealership and was injured when his supervisor discharged an air hose into his buttocks.[16] Douglass sued the dealership for sexual harassment, sex discrimination, and negligence.[17] The dealership moved to compel arbitration pursuant to an arbitration provision in

12. 9 U.S.C. § 2 (2000).

13. 500 U.S. 20, 33 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)).

14. *See, e.g.*, Campbell v. Gen. Dynamics Gov't Sys. Corp., 321 F. Supp. 2d 142, 147 n.3 (D. Mass. 2004) ("[A]n employee's knowledge of the [employer's] offer is obviously a necessity for the inference of acceptance to hold." (citation omitted)), *aff'd* 407 F.3d 546 (1st Cir. 2005).

15. 135 P.3d 129, 145 (Haw. 2006).

16. *Id.* at 132-33.

17. *Id.* at 133.

the employment handbook, which it presented to employees during orientation.[18]

The trial court granted the motion, but the Hawaii Supreme Court reversed.[19] After concluding that the infancy doctrine did not render the arbitration agreement voidable,[20] the court nonetheless refused to enforce the agreement on the ground that Douglass had insufficient notice.[21] First, the arbitration provision was "buried" on page twenty of a sixty-page handbook, and was not set off in any way.[22] Second, the acknowledgement Douglass signed was located on page sixty and did not refer to the arbitration agreement on page twenty, which further indicated that Douglass was not sufficiently informed and therefore, could not consent.[23] Third, the court held that no arbitral contract was formed both because the handbook itself stated that it "did not create a contract" and because the handbook provided that its policies were meant to be treated as "guidelines" and were presented "for information only." [24] A fourth reason, based on consideration, is addressed in Part II.A.5.

Notice issues also are common when the employer uses the internet or e-mail to inform employees that they are subject to an arbitration agreement.[25] For example, in *Skirchak v. Dynamics Research Corp.*,[26] the United States District Court for the District of Massachusetts held a dispute resolution program unenforceable and unconscionable when the employer sent an e-mail with a link to its employees regarding the implementation of the program. After the implementation, two employees filed a class action alleging violations of the Fair Labor Standards Act (FLSA); however, Dynamic filed a motion to dismiss the complaint and compel arbitration according to the program, which prohibited class action claims.[27] The court

18. *Id.* at 132-33.

19. *Id.* at 133, 145.

20. *See id.* at 134-38.

21. *Id.* at 140 (citing Brown v. KFC Nat'l Mgmt. Co., 921 P.2d 146, 158-60 (Haw. 1996)).

22. *Id.* at 141; *but see* Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250 (Ill. 2006), discussed *infra* at Part II.B.3.

23. *Douglass*, 135 P.3d at 141.

24. *Id.*

25. *See, e.g.*, Campbell v. Gen. Dynamics Gov't Sys. Corp., 407 F.3d 546 (1st Cir. 2005) (holding that an employer's mass e-mail message to employees advising them of the establishment of a new arbitration policy for legal claims and describing the policy only through links was insufficient notice); Hudyka v. Sunoco Inc., 474 F. Supp. 2d 712 (E.D. Pa. 2007) (holding that e-mail failed to provide adequate notice where employer could not show that employee opened the e-mail message).

26. 432 F. Supp. 2d 175, 181 (D. Mass. 2006).

27. *Id.* at 177-78.

determined that the mass e-mail, the contained link to the dispute resolution program website, and articles in the company newsletter after the implementation date were inadequate to provide the employees with sufficient notice.[28] Additionally, Dynamic did not log which employees accessed the e-mail or website, nor did it require the employees to respond once they read it. The company therefore lacked evidence that the employees who filed suit impliedly consented when they continued to work after the implementation date.[29] Because the employees did not have a meaningful choice to consent, nor were they aware of the ramifications by continuing to work, the court held the dispute resolution program unenforceable.[30]

Conversely, in *Bell v. Hollywood Entertainment Corp.*,[31] an Ohio appellate court did find sufficient notice and enforced an employment arbitration agreement implemented by Hollywood Entertainment through an online job application. During the online application process, Lasunda Bell was presented with a screen that explained that Hollywood's consideration of the application was conditioned on the applicant agreeing to arbitration for all legal employment disputes.[32] The screen also contained a web address for a summary of the arbitration program as well as a complete set of arbitration rules.[33] The screen then directed the applicant to click to indicate (1) whether she knew how to visit the website, and if so, (2) whether she agreed to arbitration.[34] The applicant in this case selected "yes" for both questions.[35] The court found that this was sufficient to establish consent to the arbitration agreement.[36]

2. Consent

As with notice, the most effective way for an employer to demonstrate an employee's consent to arbitration is to produce an employee's signed acknowledgment that the employee has received and read the arbitration agreement and that the employee

28. *Id.* at 180.

29. *Id.*

30. *Id.* For a discussion on the substantive unconscionability of the class action provision, see Part II.B.3, *infra*.

31. No. 87210, 2006 WL 2192053, at *4 (Ohio Ct. App. Aug. 3, 2006).

32. *Id.* at *3.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at *4.

understands and agrees to it.[37] Courts generally will enforce an arbitration agreement under these circumstances, even if the employee later claims not to have read or understood the agreement, because of the common law rule that a signatory to a contract is bound by the contract's terms absent fraud or incompetence.[38] Courts often will not require arbitration, however, if the employer has committed some sort of affirmative act to impede the employee's understanding of what the employee ostensibly agreed to.

For example, in *Hardin v. Morningside of Jackson, L.L.C.*,[39] the U.S. District Court for the Western District of Tennessee ordered an employee to arbitration despite the employee's arguments that her arbitration agreement was adhesive because she was not given an opportunity to read the agreement before she signed it. The employee argued the arbitration agreement should not be enforced because a supervisor had handed the employee a number of forms (including the arbitration agreement) and requested the employee's signature without an explanation or a question-and-answer period. Nonetheless, the court ordered arbitration because under Tennessee law, a signatory to a contract is bound to that contract regardless of whether she read the contract.[40]

A similar issue that often arises is whether an employee entered an arbitration agreement knowingly and voluntarily. The federal circuit courts and state courts are split on whether to impose a "knowing and voluntary" standard.[41] A recent example is *Melena v Anheuser-Busch, Inc.,* in which the Illinois Supreme Court held that an employee's "knowing and voluntary" consent is not a precondition

37. *See* Newman v. Hooters of Am., Inc., No. 8:06-CIV-364EAK-TGW, 2006 WL 1793541, at *2 (M.D. Fla. June 28, 2006).

38. W.K. v. Farrell, 853 N.E.2d 728, 733 (Ohio Ct. App. 2006), *appeal denied*, 855 N.E. 2d 496 (Ohio 2006); *see also* Nagrampa v. Mailcoups, Inc., 401 F.3d 1024, 1030 (9th Cir. 2005) ("'Reasonable diligence requires the reading of a contract before signing it. A party cannot use his own lack of diligence to avoid an arbitration agreement.'" (quoting Brookwood v. Bank of Am., 53 Cal. Rptr. 2d 515, 519 (Ct. App. 6th Dist. 1996))); Comprehensive Accounting Corp. v. Rudell, 760 F.2d 138, 140 (7th Cir. 1985); Donovan v. Mercer, 747 F.2d 304, 308 n.4 (5th Cir. 1984); Sarbak v. Citigroup Global Mkts., Inc., 354 F. Supp. 2d 531, 541 (D.N.J. 2004).

39. Hardin v. Morningside of Jackson, L.L.C., 425 F. Supp. 2d 898, 900 (W.D. Tenn. 2006).

40. *Id.* at 901, 906. After analyzing several factors and determining that the legal issue was whether it was a knowing and voluntary waiver, the court concluded, "it would appear that she is conclusively presumed to have knowingly and voluntarily agreed to all of the Agreement's contents even if she never read the Agreement." *Id.* at 906.

41. Christine M. Reilly, Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CAL. L. REV. 1203, 1216-18 (2002). For a discussion of the cases going both ways, *see* Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 449-50 (2006).

to enforcement of an employment arbitration agreement.[42] Anheuser-Busch had implemented a dispute resolution program that it introduced in a letter to its employees and described in a later-distributed employee handbook.[43] The letter conditioned employment upon an agreement to submit all claims through the program; however, an acknowledgement accompanying the handbook, which Joann Melena signed, did not specifically reference the program.[44] When she sued for workers' compensation retaliation, Anheuser-Busch moved to compel arbitration.[45] The lower courts denied the motion, ruling that employment arbitration agreements were not enforceable unless employees entered into them knowingly and voluntarily.[46] Additionally, the appellate court noted "serious reservations" about whether an arbitration agreement, offered as a condition of employment, "is ever voluntary," and deemed "illusory" whatever choice the plaintiff had in arbitration.[47]

However, the Illinois Supreme Court reversed.[48] Quoting Professor Steve Ware, the court held that under "ordinary, plain-vanilla contract law," the plaintiff had consented by signing the arbitration agreement, regardless of whether she had read or understood it.[49] The Court reasoned that imposing a "knowing and voluntary" standard would conflict with the U.S. Supreme Court's oft-stated pronouncement that state statutes or court decisions cannot hold arbitration agreements to an enforceability standard any higher than standards applied to contracts generally.[50] The Court also found that the Seventh Amendment was not implicated because that Amendment only confers a right to trial by jury "once it is determined that the litigation should proceed before a court," and here the plaintiff had agreed to arbitration.[51]

The dissent argued that Anheuser-Bush's arbitration program was unenforceable because the agreement would not have effectively

42. 847 N.E.2d 99, 108 (Ill. 2006).

43. *Id.* at 101-02.

44. *Id.*

45. *Id.* at 102.

46. *Id.*

47. *Id.*

48. *Id.* at 112.

49. *Id.* at 106 (quoting Steve Ware, *Arbitration Clauses, Jury-Waiver Clauses, and other Contractual Waivers of Constitutional Rights*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 167, 171).

50. *See id.* at 108.

51. *Id.* (quoting Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1371-72 (11th Cir. 2005)).

vindicated Melena's statutory rights because her discharge took her outside the scope of the arbitration agreement, which covered "all employees."[52] Citing Professor David Schwartz, the dissent also argued that the plaintiff had not "knowingly and voluntarily" consented to arbitration, because she was "economically coerced" into signing the acknowledgment.[53]

Another consent issue occurs when the employee has notice that the employer intends to implement an alternative dispute resolution program and remains in the employer's employ after the implementation date. Such a scenario occurred in *Hardin v. First Cash Financial Services, Inc.*,[54] in which the Tenth Circuit held that a former assistant manager of an Oklahoma pawnshop had to arbitrate her sex discrimination claims even though she refused to consent to be covered by a newly-implemented alternative dispute resolution program.

Analyzing the case under Oklahoma contract law, Judge Tymkovich found that First Cash made an initial offer to Shelle Hardin of continued employment after March 1, 2003, based on her assent to the dispute resolution program, and that she then made a counteroffer to continue working under unchanged employment terms.[55] First Cash rejected the counteroffer and repeated its initial offer, after which Hardin continued her employment beyond the implementation date.[56] Reversing the lower court's decision denying a motion to compel arbitration, the Tenth Circuit held that by deciding to continue working after the announced implementation date, Hardin assented to First Cash's offer to modify the terms of her at-will employment.[57]

Although the FAA Section 3 requires courts to stay judicial proceedings for "any issue referable to arbitration under an agreement in writing . . ."[58] courts consistently have held that while the FAA "requires a writing, it does not require that the writing be signed by the parties."[59] Thus, it is usually sufficient for the party

52. *Id.* at 115 (Kilbride, J., dissenting).

53. *Id.* at 116 (Kilbride, J., dissenting) (citing David Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 WIS. L. REV. 33, 76, 114-19).

54. 465 F.3d 470, 478-79 (10th Cir. 2006).

55. *Id.* at 477.

56. *Id.*

57. *Id.* at 478.

58. 9 U.S.C. § 3 (2000).

59. *See, e.g.*, Tinder v. Pinkerton Sec., 305 F.3d 728, 736 (7th Cir. 2002) (citing Valero

seeking to compel arbitration to show that the other party received a written copy of the arbitration agreement. This is evident in *Newman v. Hooters of America, Inc.*,[60] where the court did not believe the employer's assertion that, while it could not produce the arbitration agreement the plaintiff purportedly had signed, she must have signed it because all employees were required to complete an Employment Application and New Hire Packet containing an arbitration agreement. The court denied the motion to compel arbitration because "defendants have the burden of producing the Arbitration Agreement and establishing the contractual relationship necessary to implicate the FAA and its provisions granting this Court authority to dismiss or stay the employee's cause of action and to compel arbitration," and Hooters did not carry its burden.[61]

3. Unilateral Modifications

Several recent cases deal with the enforceability of employment arbitration agreements between an employer and an at-will employee that contain a clause giving the employer the unilateral right to modify the agreement at any time. Most courts have refused to enforce such clauses for various reasons, but recently some courts have taken an opposite view.[62]

For example, the Tenth Circuit enforced the unilateral-modification clause in *First Cash Financial* because it contained several restrictions.[63] The disputed employment arbitration agreement gave the employer the unilateral right to modify the agreement, with three limitations: (1) the employer had to provide ten days notice to employees of the modification, (2) the employer could not modify the agreement with respect to any potential claim or dispute of which it had actual notice, and (3) the employer could not terminate the arbitration agreement with respect to any claim arising prior to the date of termination.[64] The Tenth Circuit held that while a completely unrestricted right to modify or terminate an employment arbitration

Refining, Inc. v. M/T Lauberhorn, 813 F.2d 60, 64 (5th Cir. 1987)).

60. Newman v. Hooters of Am., Inc., No. 8:06-CIV-364EAK-TGW, 2006 WL 1793541, at *1 (M.D. Fla. June 28, 2006).

61. *Id.* at *2.

62. For a recent article on unilateral-modification clauses in employment agreements, see Michael L. DeMichele & Richard A. Bales, *Unilateral-Modifications Provisions in Employment Arbitration Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 63 (2006).

63. Hardin v. First Cash Fin. Servs., Inc., 465 F.3d 470, 479 (10th Cir. 2006).

64. *Id.* at 478.

agreement would be unenforceable as illusory, reasonable restrictions, such as the three limitations in this agreement, are sufficient to avoid rendering the arbitration agreement illusory.[65]

Similarly, the Alabama Court of Civil Appeals, per curiam, reversed a trial court's order denying a motion by Ryan's Family Steakhouse to compel arbitration of an employee's workers' compensation claim.[66] Donna Kilpatric signed an arbitration agreement with Employment Disputes Services, Inc. (EDSI) during her application process with Ryan's.[67] The agreement stated that Kilpatric was a third-party beneficiary of the contract between Ryan's and EDSI, and that Ryan's was a third-party beneficiary of the agreement between Kilpatric and EDSI, pursuant to EDSI's program.[68] When Kilpatric sued Ryan's alleging retaliatory discharge and seeking worker compensation benefits, Ryan's filed a motion to compel arbitration, but not before commencing discovery and answering her complaint.[69]

Kilpatric raised three arguments as to why the court should not enforce the arbitration agreement. First, she argued that the arbitration agreement lacked consideration because Ryan's could change the arbitration rules at any time.[70] However, the court disagreed, holding that the non-retroactivity of the changed rules preserved consideration.[71] Second, Kilpatric argued that workers' compensation cases are not subject to mandatory arbitration. The court rejected this argument as well, finding that the FAA "does not provide an exclusion for workers' compensation claims."[72] Third, Kilpatric argued that Ryan's three-month delay in requesting arbitration, during which it obtained discovery from her through civil litigation, waived Ryan's right to compel arbitration.[73] The court found that although Ryan's "invoked the litigation process," it had not "*substantially* invoked the litigation process" that would have substantially prejudiced Kilpatric.[74]

65. *Id.* at 479.

66. Ryan's Family Steakhouse, Inc. v. Kilpatric, No. 2040557, 2006 WL 3691554, at *10 (Ala. Civ. App. Dec. 15, 2006) (per curiam).

67. *Id.* at *1.

68. *Id.*

69. *Id.*

70. *Id.* at *2.

71. *Id.* at *3.

72. *Id.* at *4-5.

73. *Id.* at *6.

74. *Id.* at *6-7.

The court did not even bother to address the reasons other courts have given for rejecting the arbitration agreement imposed by Ryan's on its employees. Dissenting Judge William Thompson discussed these reasons.[75] They included: (1) the for-profit nature of Ryan's arbitral service provider, EDSI, coupled with Ryan's fee structure for arbitration, created the potential for arbitral bias;[76] (2) the process for creating pools of potential arbitrators seemed designed to ensure the selection of a defendant-friendly arbitrator;[77] and (3) the discovery for the EDSI forum was extremely limited and could significantly prejudice employees.[78]

4. Non-Reciprocal Obligations

Another contract-formation issue concerns the enforceability of arbitration agreements that apply to employee claims against the employer but not to employer claims against the employee, or that require arbitration of claims brought by employees against employers but allow employers to choose whether to arbitrate or litigate their claims against employees. Some courts have held that such non-reciprocal arbitration agreements are unenforceable for lack of mutuality.[79]

75. *Id.* at *13-15 (Thompson, J., dissenting).

76. *See id.* at *13-14 (Thompson, J., dissenting) (citing Walker v. Ryan's Family Steak Houses, Inc., 400 F.3d 370, 386-88 (6th Cir. 2005) (relying on Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 314 (6th Cir. 2000))).

77. *Id.* at *14 (Thompson, J., dissenting) (citing *Walker*, 400 F.3d at 386-88).

> The individuals in the supervisor and employee pools are neither randomly selected nor chosen by a disinterested person for their skills. Instead, all members of these two pools are chosen by the small number of employers who, like Ryan's, have signed alternative dispute resolution agreements with EDSI: Golden Corral Steak Houses, K&W Cafeterias, Papa John's Pizza, Sticky Fingers Restaurants, The Cliffs at Glass, Inc., and Wieland Investments, Inc. In addition, the rules do not prevent a supervisor of a signatory company from sitting on an adjudication panel with a nonsupervisory employee from the same company, including someone whom the supervisor directly supervises. Further, EDSI has no policy in place that prohibits a signatory company from discussing the arbitration process or specific claims with its employee adjudicators or from attempting to improperly influence its employee adjudicators.

Id. (Thompson, J., dissenting).

78. *Id.* at *15 (Thompson, J., dissenting). The EDSI forum allows "just one deposition as of right and additional depositions only at the discretion of the (arguably biased) panel . . . and are not encouraged and shall be granted in extraordinary fact situations only for good cause shown." *Id.* (citing *Walker*, 400 F.3d at 386-88 (quoting Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985, 996 (S.D. Ind. 2001) (quoting EDSI Rules, Art. XII, § 6, reproduced at J.A. 315))).

79. *See, e.g.*, Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1108 (9th Cir. 2003) (even where arbitration clause requires both parties to arbitrate, because the possibility of the employer initiating an action against the employee is "so remote," arbitration clauses are unenforceable unless employer can show the arbitration clause is "bilateral" (quoting Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1174-75 (9th Cir. 2003))); Zimmer v. Cooperneff

However, in *Pellow v. Daimler Chrysler Servs. North America, LLC.*,[80] the U.S. District Court for the Eastern District of Michigan, enforced an employment arbitration agreement under similar circumstances. The court held that a clause in the agreement in which Daimler Chrysler reserved "the right to amend, modify, suspend, or terminate all or part of this [arbitration agreement] at any time at its sole discretion" did not render the agreement unenforceable until Daimler Chrysler made changes to the agreement.[81] She concluded that both parties intended to be bound by the agreement; Daimler Chrysler proved its intent via a severability clause in the agreement; and both parties offered consideration, namely Pellow's promise to arbitrate in exchange for Daimler Chrysler's consideration of his application.[82] Therefore, mutual assent was present, rendering the agreement between the parties binding.[83] The court, however, did sever several provisions limiting the relief the arbitrator could award,[84] which is discussed in Part II.D.1.

As with unilateral-modification clauses, mutuality problems are easy to avoid. The easiest way to ensure mutuality is to make the arbitration promises reciprocal: both the employer and the employee agree to arbitrate any legal claims that one has against the other.[85]

Advisors, Inc., No. 04-3816, 2004 WL 2933979, at *8 (E.D. Pa. Dec. 20, 2004) ("By giving [the employer] the exclusive right to choose between judicial action or arbitration in intellectual property disputes, yet forcing [the employee] to arbitrate all of his claims, the arbitration agreement is presumed to be unconscionable."); *see also* Lytle v. Citifinancial Servs., Inc., 810 A.2d 643, 665 (Pa. Super. Ct. 2002) ("[T]he reservation by [one party] of access to the courts for itself to the exclusion of the consumer creates a presumption of unconscionability, which in the absence of 'business realities' that *compel* inclusion of such a provision in an arbitration provision, renders the arbitration provision unconscionable and unenforceable under Pennsylvania law."); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 4th Dist. 2002) (in arbitration agreement between credit card company and credit card consumers, a "mutual" ban on arbitral class actions was presumptively unconscionable because "it is difficult to envision the circumstances under which the provision might negatively impact [the bank], because credit card companies typically do not sue their customers in class action lawsuits").

80. No. 05-73815, 2006 WL 2540947, at *3 (E.D. Mich. Aug. 31, 2006).

81. *Id.* at *7.

82. *Id.* at *5-7.

83. *Id.*

84. *See id.* at *9-11.

85. *See, e.g.*, Dantz v. Am. Apple Group, LLC, No. 03-4128, 2005 WL 465253, at *5 (6th Cir. Mar. 1, 2005) (finding consideration present where both employer and employee agreed to arbitrate claims against each other); Cooper v. MRM Invest. Co., 367 F.3d 493, 505 (6th Cir. 2004) (bilaterally satisfied where arbitration agreement required both parties to arbitrate); Blair v. Scott Specialty Gasses, 283 F.3d 595, 603-04 (3d Cir. 2002) (consideration satisfied where both parties agreed to arbitrate employment disputes and to be bound by the arbitral decision); Collie v. Wehr Dissolution Corp., 345 F. Supp. 2d 555, 559 (M.D.N.C. 2004) (consideration satisfied where both parties agreed to arbitrate employment disputes); Kinko's, Inc. v. Payne, 901 So. 2d 354, 356 (Fla. Ct. App. 2005) (same).

Additionally, the mutuality problem may be avoided by making arbitration part of a larger contract, in which the employer provides some other type of consideration, such as a pay increase or a term contract.[86]

5. Consideration

Many courts have cited lack of consideration as a basis for refusing to enforce employment arbitration agreements that give the employer the unilateral right to modify the agreement and/or when the arbitration agreement applies only to employee claims. Some of these courts focus on the nature of at-will employment. Ordinarily, an employer may modify the terms of at-will employment (such as the rate of pay or scheduled work hours) at any time, so long as the employer notifies the employee.[87] If the employee continues to work, she is deemed to have "accepted" the modified employment terms; the employer's promise to continue paying the employee's salary constitutes sufficient consideration to support the modified terms.[88]

In some contexts, however, courts have found that the promises underlying at-will employment are insufficient consideration to support a major change in the employment relationship. A traditional example is the non-compete agreement. Some courts have held that continued at-will employment cannot serve as consideration for a non-compete agreement[89] because the at-will employer's right to fire the employee at any time nullifies the employer's "promise" of continued employment.[90]

86. *See, e.g.*, Stenzel v. Dell, Inc., 870 A.2d 133, 143-44 (Maine 2005) (holding that arbitration clause between consumer and computer company was enforceable even though consumer – not computer company – was required to submit claims to arbitration; underlying contract for sale of computers was supported by consideration in the form of the computer company's delivery of computer).

87. *See, e.g.*, *In re* Dillard Dep't Stores, Inc., 198 S.W.3d 778 (Tex. 2006); Hathaway v. General Mills, Inc., 711 S.W.2d 227, 229 (Tex. 1986).

88. *Id.*

89. *See, e.g.*, Labriola v. Pollard Group, Inc., 100 P.3d 791, 794-95 (Wash. 2004); TMC Worldwide, Inc. v. Gray, No. 01-04-00624-CV, 2005 WL 1251078, at *6 (Tex. App. May 26, 2005); Poole v. Incentives Unlimited, Inc., 525 S.E.2d 898, 900 (S.C. Ct. App. 1999); *but see* Lake Land Emp. Group of Akron, LLC, v. Columber, 804 N.E.2d 27, 31-32 (Ohio 2004) (finding that continued employment alone was sufficient consideration to support a noncompetition agreement between an employer and an employee); Open Magnetic Imaging, Inc. v. Nieves-Garcia, 826 So. 2d 415, 417-18 (Fla. Ct. App. 2002); Research & Trading Corp. v. Powell, 468 A.2d 1301, 1305 (Del. Ch. 1983) ("[O]ur courts have held that continued employment of an employee whose position is terminable at will constitutes sufficient consideration to support an enforceable contract.").

90. *See* 31-W Insulation Co., Inc. v. Dickey, 144 S.W.3d 153, 158 (Tex. App. 2004).

Some courts apply the same analysis to arbitration agreements. For example, one of the reasons the *Douglass* court cited for refusing to enforce arbitration was that the dealership's reservation of a right to modify or revoke the arbitration provision at any time without notice demonstrated a lack of consideration.[91] Another example is *Vedachalam v. Tata America International Corp.*,[92] in which the U.S. District Court for the Northern District of California held that consideration was lacking when a purported arbitration agreement applied only to employee claims against the employer but not vice versa. As with the mutuality and reciprocity issues discussed above, consideration issues are easily avoided, either by making the arbitration promises reciprocal or by providing some other type of consideration, such as a pay increase or a term contract.[93]

6. Scope of Contract/Authority

Issues often arise concerning the scope of a given arbitration agreement. For example, in *Hobley v. Kentucky Fried Chicken, Inc.*, the D.C. Circuit held that tort claims involving "significant aspects of the employment relationship" may be arbitrable even if committed after the employment relationship ends.[94] K.F.C. fired Earnest Hobley for theft, then called the police.[95] Hobley then sued K.F.C. for false accusation of theft, but K.F.C. moved to compel arbitration pursuant to an arbitration clause in the employment application which provided that the parties agreed to arbitrate "any claims that arise" between them.[96] Hobley argued that this clause did not cover post-employment conduct; however, the D.C. Circuit disagreed. The court found that the accusation of theft involved many facts stemming from the employment relationship, and as such, fell within the scope of the arbitration agreement.[97]

Another case in which the scope of an arbitration agreement was

91. Douglass v. Pflueger Hawaii, Inc., 135 P.3d 129, 144 (Haw. 2006) (relying on Trumbull v. Century Marketing Corp., 12 F. Supp. 2d 683 (N.D. Ohio 1998)).

92. 477 F. Supp. 2d 1080 (N.D. Ca. 2007).

93. *See, e.g.*, Stenzel v. Dell, Inc., 870 A.2d 133, 143-44 (Maine 2005) (holding that arbitration clause between consumer and computer company was enforceable even though consumer – not computer company – was required to submit claims to arbitration; underlying contract for sale of computers was supported by consideration in the form of the computer company's delivery of computer).

94. Hobley v. Kentucky Fried Chicken, Inc., No. 04-7202, 2005 WL 3838163, at *1 (D.C. Cir. Dec. 22, 2005), *cert. denied*, 126 S. Ct. 2058 (2006).

95. *Id.*

96. *Id.*

97. *Id.*

at issue is *Sosa v. Parco Oilfield Services, Ltd.*[98] In this case, the U.S. District Court for the Eastern District of Texas required Joe Sosa to arbitrate a tort claim against his employer, Parco Oilfield Services, Ltd., for injuries he incurred while working. Texas allows employers to "opt out" of workers' compensation; Parco Oilfield Services did so and instead established an ERISA Occupational Injury Benefit Plan to cover workplace injuries. The Plan contained an arbitration clause.[99] Sosa, a seventy-year-old roustabout crew leader, was injured when electrical cables became entangled in his legs and dragged him into drilling equipment, causing spinal injuries and breaking his leg.[100] When the Plan denied him benefits, he sued for his injury in tort as well as under the Fair Labor Standard Act (FLSA).[101] The court held that the tort claims were subject to arbitration under the Plan's arbitration provision, because, even though the arbitration provision constituted a "pre-injury waiver of rights by employees of non-subscribers" under state law, the FAA preempted and invalidated the state law.[102] However, the arbitration clause did not cover the FLSA claims; therefore, they remained in federal court.[103]

Courts have also interpreted arbitration agreements as enabling an employee to file a claim pursuant to the arbitration agreement prior to termination. In *Cox v. Ocean View Hotel Corp.*,[104] the United States District Court for the District of Hawaii addressed the breadth of the arbitration agreement where it held that the agreement to arbitrate "any employment disputes" included those claims the employee may bring prior to terminating the employment relationship.[105] The employee, Thomas Cox, signed an arbitration agreement with his employer, Ocean View Hotel Corp.[106] Two years later, his supervisor accused him of having a "secret relationship" with a subordinate and ordered that the relationship stop.[107] One year after that, perceiving the relationship to have continued, the

98. No. 2:05-CV-153, 2006 WL 2821882, at *2, *8 (E.D. Tex. Sept. 27, 2006); *see also* Ryan's Family Steakhouse, Inc. v. Kilpatric, No. 2040557, 2006 WL 3691554, at *1 (Ala. Civ. App. Dec. 15, 2006) (per curiam) (discussing workers' compensation and arbitration agreements).

99. *Sosa*, 2006 WL 2821882, at *1.

100. *Id.*

101. *Id.*

102. *Id.* at *2.

103. *Id.* at *6.

104. 433 F. Supp. 2d 1171 (D. Haw. 2006).

105. *Id.* at 1178.

106. *Id.* at 1172.

107. *Id.* at 1173.

supervisor again ordered it to stop, and warned Cox in writing that continuing the relationship "may ultimately be deemed an act of subordination and grounds for immediate termination of employment."[108]

Cox responded by sending Ocean View a letter complaining of discrimination and requesting arbitration pursuant to the arbitration agreement.[109] Ocean View refused.[110] Cox then sued for sex discrimination, harassment, and retaliation; however, Ocean View moved to compel arbitration.[111] At issue was whether Ocean View's initial refusal to arbitrate foreclosed its later motion to compel.[112]

Ocean View argued that Cox did not have a claim ripe for arbitration when he filed his arbitration demand; because Ocean View had taken no "tangible employment action," Cox had no arbitral claim.[113] The court disagreed.[114] While an arbitral claim might not have arisen if Cox "did not like the color of the walls of his office, or because he thought the cafeteria's food was a bit bland," the court held that, just as an employee need not wait until termination to file a discrimination claim, Cox did not have to wait until termination to file a claim under his arbitration agreement.[115] The court therefore found that Ocean View had breached the arbitration agreement.[116] Because Ocean View had breached the arbitration agreement, the court held that it had waived its right to enforce the arbitration agreement in Cox's suit and therefore denied Ocean View's motion to compel arbitration.[117]

A similar case is *EEOC v. Physician Services, P.S.C.*[118] There, the U.S. District Court for the Eastern District of Kentucky refused to compel arbitration, notwithstanding an arbitration agreement, of claims brought by employees who had intervened in an EEOC suit against their employer.[119] The employees had signed a pre-dispute

108. *Id.* at 1173-74.
109. *Id.* at 1174.
110. *Id.*
111. *Id.*
112. *See id.* at 1175.
113. *Id.* at 1178.
114. *See id.* at 1178-80.
115. *Id.* at 1178-79.
116. *Id.*
117. *Id.* at 1179-81.
118. 425 F. Supp. 2d 859 (E.D. Ky. 2006).
119. *Id.* at 862-63.

employment arbitration agreement.[120] Later, one or more employees filed a charge of discrimination with the EEOC, and the EEOC sued the employer, alleging, among other things, sex and disability harassment and retaliation.[121] The employees intervened in the EEOC suit, which led to the employer moving to compel the employees to arbitrate their claims pursuant to the agreement.[122] Physician Services acknowledged that *EEOC v. Waffle House* precluded the employer from compelling the EEOC to arbitrate,[123] but argued that the decision did not negate the effect of the arbitration agreement as to the claims of the individual employees.[124] The employees, however, argued that under section 2000e-5(f)(1) of Title VII, they had lost their individual claims once the EEOC had filed suit on their behalf, and therefore they had no individual claims to arbitrate.[125] The court agreed with the employees, finding that once the EEOC sues on behalf of aggrieved employees bound to an arbitration agreement, "neither the EEOC, per *Waffle House*, nor the intervening employee[s] can be compelled to arbitrate the claims."[126]

7. Waiver

Some courts have held that an employer does not waive arbitration by taking affirmative actions during the litigation process.[127] For example, in *Jung v. Skadden, Arps, Slate, Meagher & Flom, L.L.P.*,[128] Jonathan Jung sued his employer, Skadden, for race and national origin discrimination in the U.S. District Court for the Southern District of New York, pursuant to his termination. Skadden filed a Rule 12(b)(6) motion to dismiss that included a footnote stating "[b]y filing this motion, the Firm is not waiving any claims or defenses, including but not limited to, the right to compel

120. *See id.* at 860.

121. *Id.*

122. *Id.*

123. *Id.* at 861 n.1 (citing EEOC v. Waffle House, Inc., 534 U.S. 279 (2002) and holding that the employer cannot mandate the EEOC arbitrate its claims, but recognizing that the issue was never resolved as it pertained to intervening employees).

124. *Id.* at 860-61. The court did not address the issue because the employees at issue in *Waffle House* had not intervened.

125. *See id.* at 861-62.

126. *Id.* at 862.

127. Additionally, the *Ryan's Family Steakhouse* court determined that some discovery does not equate to a waiver. *See* Ryan's Family Steakhouse, Inc. v. Kilpatric, No. 2040557, 2006 WL 3691554, at *6-7 (Ala. Civ. App. Dec. 15, 2006) (per curiam), discussed at Part II.A.3, *supra*.

128. 434 F. Supp. 2d 211 (S.D.N.Y. 2006).

arbitration."[129] The court found the 12(b)(6) motion meritorious but granted Jung leave to amend his complaint.[130] Jung successfully did so, and thereafter Skadden moved to compel arbitration pursuant to a pre-dispute arbitration agreement between the parties.[131]

Jung argued that Skadden had waived the right to compel arbitration by filing the 12(b)(6) motion, that his case would be prejudiced, both substantively and due to the excessive costs and delay, and that Skadden's position would encourage forum shopping.[132] He cited a case in which the Second Circuit had found waiver where a defendant had engaged in discovery before filing a motion to compel.[133] The district court disagreed with Jung's argument and granted the motion to compel arbitration.[134] Discovery, explained the court, creates sufficient prejudice to support waiver because "it is unfair to allow a party to gather information that will be advantageous in a later arbitration proceeding, if that information cannot be obtained in the arbitration proceeding."[135] A 12(b)(6) motion, the court ruled, did not create such prejudice; in fact it provided Jung the opportunity to discover and correct deficiencies in his complaint.[136]

The line the court drew here seems a bit fuzzy. Anecdotal evidence suggests that arbitrators are much less likely to grant motions to dismiss than courts are, in the same way that arbitrators generally permit less discovery than is allowed under the rules of civil procedure. If it is unfair to allow employers to use litigation to obtain discovery before seeking to compel arbitration, then it seems equally unfair to allow them to use litigation to seek a dismissal before seeking to compel arbitration.

B. Barrier-to-Access Issues

Another set of issues concerns requirements that employers

129. *Id.* at 214.

130. *Id.*

131. *Id.*

132. *Id.* at 216.

133. *Id.* at 217 (discussing PPG Indus., Inc. v. Webster Auto Parts, Inc., 128 F.3d 103, 109 (2d Cir. 1997) (holding that "sufficient prejudice to sustain a finding of waiver exists when a party takes advantage of pre-trial discovery not available in arbitration.")).

134. *Jung*, 434 F. Supp. 2d at 217.

135. *Id; but see Ryan's Family Steakhouse,* 2006 WL 3691554, at *6-7 (holding that the limited discovery Ryan's conducted did not substantially invoke the litigation process, nor did it substantially prejudice the plaintiff).

136. *Jung*, 434 F. Supp. 2d at 217.

impose that may make it difficult or impossible for employees to pursue their employment claims. In *Gilmer*, the Supreme Court held that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than a judicial, forum."[137] An arbitration agreement that restricts an employee's substantive rights or access to a dispute resolution forum thus is an unenforceable waiver of the employee's substantive rights.[138]

1. Limitations Periods

One such barrier-to-access issue is the enforceability of arbitration agreements that impose a statute of limitations (either explicitly or through a notice provision) different from the statute of limitations imposed by law.[139] Some courts have not enforced such limitation periods, while other courts have compelled arbitration despite a contractually shortened statute of limitations.

Conway v. Stryker Medical Division[140] exemplifies the former approach. Timothy Conway signed a form application for employment with Stryker Medical Division. The arbitration agreement contained a six-month limitation on any claim brought under the Family and Medical Leave Act of 1993 (FMLA).[141] Conway got the job, was denied leave to care for his ailing mother, and got fired. He sued Stryker after the expiration of the six-month period, but well before the expiration of the statutory limitation period.[142] Stryker then filed a motion for summary judgment premised on the limitation period. The court, however, denied the motion, holding that the shortened limitations period was unenforceable under the terms of FMLA and as a matter of public policy.[143]

Conversely, the North Carolina Court of Appeals, in an unpublished decision involving an employee's breach-of-contract claim, held that an employer could use an arbitration agreement to

137. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

138. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 51–52 (1974).

139. *Compare* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1175 (9th Cir. 2003) (holding unenforceable arbitration agreement that imposed one-year statute of limitations), *with* Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 230–32 (3d Cir. 1997) (holding enforceable arbitration agreement that imposed one-year statute of limitations).

140. No. 4:05-CV-40, 2006 WL 1008670 (W.D. Mich. Apr. 18, 2006).

141. *Id.* at *1.

142. *Id.*

143. *Id.*

shorten a statute of limitations.[144] In *Morgan v. Lexington Furniture Industries, Inc.*, Donald Morgan filed his complaint more than eight months after his termination, well after the 180-day contractual requirement but within the statutory period.[145] The court upheld the employer's requirement that a request for arbitration must be filed within 180 days of a dispute, notwithstanding a statutory three-year limitations period on contract claims.[146] The court noted that some statutory employment claims have a 180-day limitations period under North Carolina law, and held that this indicated that a 180-day filing requirement was not per se unreasonable.[147] The court also noted, however, that the employer and employee had individually negotiated the agreement containing the arbitration clause, and that the employee had successfully excised some of the clauses the employer had originally written.[148] Thus the court might have ruled differently had the employer imposed the arbitration agreement on a take-it-or-leave-it basis.

Other courts have attempted to find a middle ground. In *Hardin v. Morningside of Jackson L.L.C.*, the employment arbitration agreement contained a provision requiring employees to file for arbitration within ninety days of discharge.[149] When the employee sued, the employer moved for dismissal, citing the ninety-day filing requirement. The court, however, denied the motion, finding that the issue was for the arbitrator to decide.[150] The court stated: "Although the court cannot conclude, as a matter of federal arbitration law, that the ninety (90) day time limit is per se unenforceable, there are a number of legal and equitable reasons why an arbitrator might decide not to enforce the limit on the facts of this case."[151]

2. Costs and Fees

A similar issue is the enforceability of arbitration agreements that impose high costs and fees on the employees.[152] This includes the

144. Morgan v. Lexington Furniture Indus., Inc., No. COA06-1, 2006 WL 3717555, at *3 (N.C. App. Dec. 19, 2006).

145. *Id.* at *2.

146. *Id.* at *3.

147. *Id.*

148. *See id.*

149. 425 F. Supp. 2d 898, 903 (W.D. Tenn. 2006).

150. *Id.* at 911.

151. *Id.*

152. *See* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) (imposing $75 filing fee rendered arbitration agreement unenforceable); Williams v. Cigna, 197 F.3d 752, 765 (5th

enforceability of arbitration agreements that attempt to impose on the employee some or all of the cost of the arbitrator or the filing fees.[153] Employees seeking to avoid arbitration typically rely on the cost-deterrent defense in hopes that the court will render the agreement unenforceable.

However, the Sixth Circuit significantly limited the scope of the cost-deterrent defense to arbitration in *Stutler v. T.K. Constructors Inc.*[154] The Sixth Circuit had previously ruled, in a pair of employment cases, that arbitration clauses were not enforceable if the party seeking to avoid arbitration could show that the costs of arbitration were so high that they would deter potential claimants from pursuing their claims.[155] However, the *Stutler* decision limits that defense to cases in which the underlying claim is based on federal law.[156]

Michael and Kathy Stutler, the buyers, sued T.K. Constructors, Inc., the construction company, for building a shoddy house.[157] T.K. moved to compel arbitration; however, the U.S. District Court for the Eastern District of Kentucky agreed with Stutler's argument that arbitral costs were excessive, and refused to compel arbitration.[158] Reversing the district court, the Sixth Circuit stated,

> [Cases related to the cost-deterrent defense were] limited by their plain language to the question of whether an arbitration clause is enforceable where federal statutorily provided rights are affected. In this case, no federally protected interest was at stake. The [buyers], through diversity jurisdiction, seek to enforce contractual rights provided by state law. As a result, [those cases] simply do not apply. Under the FAA, the [buyers] must look to contract defenses available in Kentucky rather than those found in federal common law.[159]

The court did not then consider the obvious issue of whether Kentucky law would recognize a cost-deterrent defense. Judge Karen Moore, concurring, did consider this issue, but found no definitive

Cir. 1999) (enforcing arbitral award which, among other things, imposed a $3150 "forum fee" on plaintiff).

153. *But cf.* Christopher R. Drahozal, Arbitration Costs and Contingent Fee Contracts (Feb. 21, 2005) (unpublished manuscript on file with author) (arguing that courts should not focus on the finances of individual claimants).

154. 448 F.3d 343 (6th Cir. 2006).

155. *See id.* at 345-46 (citing Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 652-53, 663 (6th Cir. 2003); Cooper v. MRM Investment Co., 367 F.3d 493, 510-12 (6th Cir. 2004)).

156. *Id.* at 346.

157. *Id.* at 344.

158. *Id.* at 345.

159. *Id.* at 346.

answer in Kentucky law.[160] She concurred in the judgment because she concluded that the buyers had made an inadequate showing of excessive costs to justify federal action in light of state law ambiguity.[161]

Though this was not an employment case, it has obvious implications for employment law. The cost-deterrent defense that the Supreme Court hinted at in *Green Tree Financial Corp. v. Randolph*,[162] which has been recognized by several circuits, is limited (at least in the Sixth Circuit) to federal claims such as those brought under Title VII, the ADA, and the ADEA.[163] The defense will not apply to purely state law claims such as contract or tort claims unless state law provides a parallel defense.

A similar issue is whether, in a dispute subject to arbitration, the employer can impose filing and forum fees in addition to some other restrictions, e.g. discovery. A California Court of Appeal, in an unpublished decision, resolved this issue in the negative.[164] In *Tibbs v. Automobile Club of Southern California,* the employee filed a wrongful termination suit against the Auto Club alleging discrimination and failure to accommodate under the California Fair Employment and Housing Act.[165] The Auto Club requested arbitration pursuant to the "Mutual Arbitration Agreement"; Tibbs defended that the agreement was unconscionable because it required Tibbs to cover the costs of arbitration and allowed only limited discovery.[166] The arbitration agreement required the employer and employee to share fees equally, up to a cap determined by the employee's salary, which the court deemed unlawful because it violated public policy.[167] The court also rejected an after-the-fact offer by the employer to waive the fee, finding that the fee would have a chilling effect deterring other employees from pursuing legitimate claims.[168] The court also rejected an arbitration clause presumptively limiting the employee to a single deposition, finding that would be inadequate to allow the employee in this case to vindicate the myriad

160. *Id.* at 348-49 (Moore, J., concurring).

161. *Id.* (Moore, J., concurring).

162. 531 U.S. 79, 91-92 (2000).

163. *Stutler*, 448 F.3d at 346.

164. Tibbs v. Auto. Club of S. Calif., No. B189149, 2006 WL 3719422, at *9 (Cal. App. 2d Dist. Dec. 19, 2006).

165. *Id.* at *1.

166. *Id.* at *1-2.

167. *Id.* at *1, *5.

168. *Id.* at *6.

statutory claims she had brought.[169] Thus, the court affirmed the lower court's decision to deny the motion to compel.[170]

Additionally, a recently decided case, *Cook v. All State Home Mortgage, Inc.*,[171] describes an unusual employment arbitration clause. The All State Home Mortgage employment arbitration agreement provided that if a party to the agreement[172] sues on a claim covered by the arbitration agreement, the court must award the other party the "fees, costs, and expenses associated with filing in court a claim that should [have been] submitted to arbitration, along with costs of transferring the case to arbitration and any associated filing fees."[173] In *Cook*, six employees sued on FLSA claims.[174] All State moved to dismiss, to compel arbitration, and for fees. The trial court granted the motion.[175] Instead of paying the fees, however, the employees appealed to the Sixth Circuit. While that appeal was pending, All State brought a post-judgment motion asking the trial court to require immediate payment of the fees. The trial court held that it lacked jurisdiction over those matters on appeal, and refused to consider the issue while the case was pending before the Sixth Circuit.[176] This case illustrates a novel method at least one employer has attempted to use to deal with employee challenges to the enforceability of arbitration agreements, but the case does not hold that that method is legally enforceable.

3. Class Action Barriers

Yet another issue is the enforceability of arbitration clauses that forbid employees from bringing claims as an arbitral class action. Perhaps the most significant case involving this issue is the California Supreme Court decision of *Gentry v. Superior Court*.[177] Robert Gentry filed a class action against Circuit City arguing that he and other

169. *Id.* at *7.

170. *Id.* at *9.

171. No. 1:06 CV 1206, 2006 WL 2794702, at *1 (N.D. Ohio Sept. 27, 2006). For a holding that a court should analyze the fee agreement for unconscionability and not consider that the company offered to waive the fee in a particular case, see Kinkel v. Cingular Wireless L.L.C., 857 N.E.2d 250 (Ill. 2006), discussed *infra*, at Part II.B.3.

172. Meaning, of course, the employee 99-100 percent of the time.

173. *Cook*, 2006 WL 2794702, at *1.

174. *Id.*

175. *Id.*

176. *Id.* at *3. To do so would "place the Court in the unenviable position of having exercised jurisdiction to protect and effectuate a judgment reversed on appeal." *Id.* (citing Am. Town Ctr. v. Hall, 912 F.2d 104, 110 (6th Cir. 1990)).

177. 165 P.3d 556 (Cal. 2007).

salaried customer service managers had been misclassified as exempt employees not entitled to overtime pay under California wage and hour laws. Circuit City moved to compel arbitration based on an arbitration agreement. This arbitration agreement contained a class action which provided, "The Arbitrator shall not consolidate claims of different [employees] into one proceeding, nor shall the Arbitrator have the power to hear arbitration as a class action . . . ."[178] The arbitration agreement also contained limitations on damages and attorneys fees, a cost splitting provision, and a statute of limitations, all of which were less favorable to employees than the wage and hour statutes that Gentry invoked in his suit. Finally, the arbitration agreement gave employees thirty days to opt out of the agreement.

The trial court severed the cost splitting and remedies provisions but ordered Gentry to arbitrate his claims on an individual basis.[179] Gentry filed a mandamus petition which the California Court of Appeal denied.[180] The California Supreme Court reversed and remanded with instructions, but the Court of Appeals again denied Gentry's petition.[181] The California Supreme Court once again reversed, this time issuing an extensive opinion.

On the class action waiver issue, the court held that statutory wage and hour rights were unwaivable, and that "at least in some cases, the prohibition of classwide relief would undermine the vindication of [] employees' unwaivable statutory rights and would pose a serious obstacle to the enforcement of the state's overtime laws."[182] The court therefore held that class arbitration waivers "should not be enforced if a trial court determines . . . that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration."[183]

The Court held that in making such a determination, lower courts should consider four factors. First, courts should consider the size of the potential individual recovery, which often will be modest in wage and hour cases. Second, courts should consider the potential for retaliation against members of the class, which may be particularly acute for employees lower down on the corporate hierarchy. Third, courts should consider whether absent members of the class may be

178. *Id.* at 560.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 559.
183. *Id.*

ill-informed about their rights – a condition that may often be true in wage/hour cases because of the law's "sometimes complex classifications of exempt and nonexempt employees."[184] Fourth, courts should consider "other real-world obstacles to the class members' [statutory rights] through individual arbitration."[185] For example, the court stated, some employees may not be able to pursue individual litigation against a former employer because of the transient nature of their work.[186]

Regarding the other provisions in the arbitration agreement that were unfavorable to employees, Circuit City argued that the opt-out provision made the arbitration agreement procedurally conscionable and therefore enforceable. The California Supreme Court, however, found that Circuit City's agreement was not free of unconscionability. For example, the court noted, the agreement's explanation of the benefits of arbitration was markedly one-sided because it failed to explain how many of the substantive provisions in the agreement were less favorable to employees than were the employment statutes.[187] The court therefore remanded the case for a determination of whether the arbitration agreement was substantively unconscionable and, if so, whether such terms should be severed or whether the entire arbitration agreement should be invalidated.[188]

Another important case in which a court invalidated a class action waiver is the Illinois Supreme Court case of *Kinkel v. Cingular Wireless, L.L.C.* [189] In this consumer arbitration case, Donna Kinkel sought to challenge Cingular's imposition of a $150 early-termination fee.[190] The service contract, in accordance with the Wireless Industry Arbitration Rules, required consumers to pay a $125 arbitration fee to resolve any disputes.[191] When Kinkel filed a class action suit challenging the fees, Cingular moved to compel arbitration of her individual claims, pointing to a class-action waiver in the service contract.[192] While the case was still in the trial court, Cingular revised its arbitration provision whereby it agreed to pay, for the then-current

184. *Id.* at 567.
185. *Id.* at 568.
186. *Id.* at 567.
187. *Id.* at 573.
188. *Id.* at 575.
189. 857 N.E.2d 250 (Ill. 2006).
190. *Id.* at 254-55.
191. *Id.* at 256.
192. *Id.* at 255.

customers, "all [American Arbitration Association] filing, administration and arbitrator fees" and any fees and expenses incurred if the claimant was successful.[193] Additionally, Cingular also offered to waive Kinkel's individual arbitration fee.[194]

Kinkel opposed arbitration, arguing that the no-class-action clause was unconscionable, and the Illinois Supreme Court agreed.[195] This arbitration agreement was procedurally unconscionable, the court found, because it was adhesive and it did not put the consumer on notice of the arbitration fee – the agreement merely stated that fee information was available "upon request," and even this was buried "in fine print near the bottom of an 8-by 14-inch page that was filled, from margin to margin, with text."[196] The arbitration agreement was substantively unconscionable, the court found, because the cost of pursuing a claim would have approximated the amount of recovery, thus leaving the consumer with no effective remedy in any forum.[197] The court rejected Cingular's argument that it had offered to waive Kinkel's individual arbitration fee, holding that analysis of whether the arbitration fee was unconscionable should focus on the arbitration agreement as written, not on an after-the-fact effort to improve the company's litigation posture.[198] The court enforced the arbitration agreement but severed the class action waiver.[199]

The court emphasized, however, that it was not ruling that class action clauses were *per se* unconscionable, and that the clauses should be considered on a case-by-case basis.[200] Bizarrely, the court cited an article by Jean Sternlight and Elizabeth Jensen for the proposition that "consumers may benefit from reduced costs if companies are allowed to [limit their exposure to class arbitration or litigation]."[201] Somehow, the court missed the article's conclusion that:

> [t]hese prohibitions are detrimental not only to potential class members but also to the public at large in that they are preventing the law from being adequately enforced .... Thus, as a matter of fairness, efficiency, and justice, Congress should prevent companies

193. *Id.* at 257.
194. *Id.*
195. *Id.* at 274.
196. *Id.* at 266.
197. *See id.* at 267-68.
198. *Id.* at 259, 270.
199. *Id.* at 278.
200. *Id.*
201. *Id.* (citing Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?,* LAW & CONTEMP. PROBS., Winter/Spring 2004, at 75, 92-99).

from exempting themselves from class action liability.[202]

Similary, in *In re Cintas Corp. Overtime Pay Arbitration Litigation*, the Judicial Panel on Multidistrict Litigation approved a class action notwithstanding an arbitration clause. [203] Thousands of Cintas employees sued Cintas in seventy-one different cases – each in a different federal court – under state law and the FLSA for failure to pay overtime wages. Cintas filed a motion to compel arbitration in each of the cases.[204] The Judicial Panel transferred all the cases to the Northern District of California, where the plaintiffs filed their collective action.[205] The Panel found that the actions involved common questions of fact and that they required the interpretation of identical arbitration clauses.[206] Further, because each person named in the motion to compel arbitration was already an opt-in plaintiff in the collective action, and the action was already pending before a judge, the court deemed it necessary to centralize the actions in one court to reduce inconsistencies and excessive costs.[207]

Several courts have enforced arbitration clauses that forbid class actions by employees.[208] For example, in *Koenig v. U-Haul Co. of California*, an employee brought a class action claim for unpaid overtime and vacation pay.[209] The trial court dismissed the class action and sent the individual employee's claim to arbitration.[210] Affirming the trial court's decision, the California Court of Appeal, citing precedent stating that class action waivers would only be unconscionable if the effect would be to eviscerate an employee's access to a forum, held that the employee had not shown that the class members could expect "predictably . . . small amounts" of damages and thereby failed to prove substantive unconscionability.[211] Therefore, the employee had not shown that a class action was the only available forum for resolution of the claims.[212]

In the consumer-arbitration case of *Wong v. T-Mobile USA,*

202. Sternlight & Jensen, *supra* note 188, at 103.

203. 444 F. Supp. 2d 1353 (J.P.M.L. 2006).

204. *Id.* at 1354.

205. *Id.*

206. *Id.* at 1354-55.

207. *Id.* at 1355.

208. Konig v. U-Haul Co. of Calif., 52 Cal. Rptr. 3d 244 (Ct. App. 2d Dist. 2006), *rev. granted*, 153 P.3d 955 (Cal. 2007).

209. *Id.* at 246.

210. *Id.* at 248.

211. *Id.* at 251-52 (citing Discover Bank v. Super. Ct., 113 P.3d 1100 (Cal. 2005)).

212. *Id.* at 252.

Inc.,[213] decided in the Eastern District of Michigan, Judge Edmunds refused to enforce an arbitration agreement imposed by cellular phone provider T-Mobile on its customers. Plaintiff filed this suit after T-Mobile overcharged him by $19.74 and refused to refund his money.[214] The service contract mandated arbitration for disputes arising between the consumer and the provider, and contained a class action waiver.[215] Recognizing that the Third, Fourth, Seventh, and Eleventh Circuits had enforced consumer arbitration agreements prohibiting class actions, Judge Edmunds nevertheless held that

> [w]hether the right to a class action is a substantive or a procedural one, it is certainly necessary for the effective vindication of statutory rights, at least under the facts of this case. . . [I]n order for arbitration to be feasible, the amount at issue must also exceed the value in time and energy required to arbitrate a claim. Defendant is alleged to have bilked its customers out of millions of dollars, though only a few dollars at a time. Plaintiff's damages are a paltry $19.74, hardly enough to make arbitration worthwhile. Class actions were designed for situations just like this. The [] class action mechanism is essential to the effective vindication of [this] statutory cause of action.[216]

4. Forum Selection Clauses

Another pressing issue is the enforceability of agreements containing forum selection clauses in which, for example, a company headquartered in California but with employees in Hawaii requires nonetheless that all arbitrations occur in California.[217] An example is *Dominguez v. Finish Line, Inc.*[218] Finish Line required its employees to sign an arbitration agreement that contained a forum selection clause and required that arbitration occur in Indianapolis, where the company is headquartered. Dominguez, a discharged employee who had worked at a Finish Line store in Austin, Texas, sued and argued that he could not travel to Indianapolis to arbitrate, both because his

213. No. 05-73922, 2006 WL 2042512, at *1 (E.D. Mich. July 20, 2006).

214. *Id.* at *1.

215. *Id.*

216. *Id.* at *4.

217. *See, e.g.*, Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294, 299–300 (5th Cir. 2004) (enforcing arbitration agreement containing forum selection clause because employees all lived near the designated forum); Domingo v. Ameriquest Mortgage Co., 70 F. App'x 919, 920 (9th Cir. 2003) (refusing to enforce arbitration agreement that, among other things, required an employee in Hawai'i to arbitrate a claim in California); Ciago v. Ameriquest Mortgage Co., 295 F. Supp. 2d 324, 330 (S.D.N.Y. 2003) (holding that the validity and meaning of specific provisions within an arbitration agreement, including a forum selection clause that would require a New York employee to arbitrate in California, is a matter for the arbitrator to decide).

218. 439 F. Supp. 2d 688 (W.D. Tex. 2006).

multiple sclerosis made it physically difficult to travel and because his unemployment made it financially difficult.[219] The U.S. District Court for the Western District of Texas agreed, holding that enforcing the forum selection clause would effectively deprive Dominguez of his day in court; he had clearly proven that enforcing the forum selection provision would be subjectively unreasonable.[220] The court therefore severed the forum selection clause but otherwise enforced the arbitration agreement.[221]

C. Process Issues

Yet another set of issues concerns arbitral provisions that govern the process by which arbitration is conducted. The *Gilmer* Court held that arbitration agreements are enforceable because they represent only a change in forum and are not a prospective waiver of statutory rights. Substantive rights, however, depend for their enforcement upon the existence of at least minimal procedures. At a minimum, then, "statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections."[222] A procedurally lopsided arbitration agreement that effectively waives an employee's ability to enforce an underlying statutory antidiscrimination law, therefore, would effectively waive the employee's substantive rights, contrary to the Supreme Court's prescription in *Gilmer*.[223]

For example, in *Jones v. Titlemax of Georgia, Inc.*,[224] a consumer, Sharon Jones, pawned her car and signed an agreement containing an arbitration clause. She subsequently brought a Truth in Lending Act action in federal district court.[225] Titlemax moved to compel arbitration; however, Jones argued that a provision in the arbitration agreement stating that the arbitrator "shall not apply any federal or state rules of civil procedure or evidence" made the arbitration agreement unconscionable and unenforceable.[226] The U.S. District Court for the Northern District of Georgia disagreed, noting that, traditionally, arbitration does not apply the rules of civil procedure

219. *Id.* at 691.
220. *Id.*
221. *Id.*
222. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C. Cir. 1997).
223. *See id.*
224. No. Civ.A. 105CV 1154TWT, 2006 WL 562189, at *1 (N.D. Ga. Mar. 7, 2006).
225. *Id.* at *2.
226. *Id.* at *2-3.

and evidence.[227] The court cited the Eleventh Circuit decision, stating, "an arbitration's limitations on mechanisms traditionally available in courts do not offend notions of due process, are part and parcel of the arbitration process and therefore, are not unconscionable."[228]

1. Arbitral Selection[229]

Cases raising arbitral selection issues typically focus on whether additional safeguards are required to ensure that employees (who, unlike employers, are not repeat players in arbitration)[230] can meaningfully participate in the selection of arbitrators.[231] Over the last year, however, two cases have been decided raising non-typical arbitral selection issues.

In *Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C.*,[232] two commercial entities, signatories to an arbitration agreement, retained JAMS/Endispute and arbitrator John B. Bates to arbitrate their dispute. Pursuant to the agreement, Bates conducted a hearing where Morgan Phillips presented evidence of the non-conforming product,

227. *Id.* at *8.

228. *Id.* (citing Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (interpreting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991))).

229. For further discussion on arbitral selection, *see* Ryan's Family Steakhouse, Inc. v. Kilpatric, No. 2040557, 2006 WL 3691554, at *15 (Ala. Civ. App. Dec. 15, 2006) (Thompson, J., dissenting), discussed *supra*, at Part II.A.3.

230. Unlike labor arbitration, where both the employer and the union are repeat players, in employment arbitration, only the employer is a repeat player. This was one of the factors that led to the Dunlop Commission's hesitancy to endorse labor arbitration as a model for non-union employment dispute resolution, and to initiate the process that resulted in the creation of the Employment Protocol. Asymmetrical repeat-player status results in two systemic employer advantages. The first is that the employer is more familiar with the pool of potential arbitrators and therefore is in a better position than an employee to select an arbitrator favorable to its side. The second is that an arbitrator interested in generating future business will be predisposed to favor the employer. *See* Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997). *But see* Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK UNIVERSITY'S 53D ANNUAL CONFERENCE ON LABOR 303, 324 (Samuel Estreicher & David Sherwyn eds., 2004) (finding no statistically significant evidence that employers confronting the same arbitrator in a second case have a higher probability of success).

231. *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–39 (4th Cir. 1999) (finding that the arbitrator selection process was biased because, among other things, the employer unilaterally controlled the pool of arbitrators); Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 283 (3d Cir. 2004) (finding that a geographical exclusion of arbitrators did not create a biased arbitrator selection process).

232. 44 Cal. Rptr. 3d 782, 783 (Ct. App. 2d Dist. 2006).

and where Bates informed the parties that he would issue a binding decision if the parties could not reach settlement prior to the second hearing.[233] Bates was also aware that Morgan Phillips was under "financial distress" and required prompt resolution to the dispute.[234] At the conclusion of the second arbitration hearing, Bates attempted to settle the dispute without having to issue a decision. After the lunch break Bates announced that he was withdrawing as arbitrator, but that he was willing to continue to work with the parties as mediator.[235] Bates provided no ethical reason for his withdrawal and refused to issue a decision.[236]

Morgan Phillips sued JAMS/Endispute and Bates for breach of contract, to which JAMS/Endispute and Bates raised arbitral immunity as a defense.[237] Citing California law, the court defined arbitral immunity as "shield[ing] all functions which are integrally related to the arbitral process," and the narrow exception that it does not apply to the arbitrator's failure to issue a decision.[238] Thus, the court rejected the defense, finding that Bates' early withdrawal "defeat[ed] rather than serve[d] the adjudicatory purpose of arbitration" underlying the immunity defense; his failure to issue a decision stripped him of the immunity that accompanies the quasi-judicial role.[239]

Another case raising an arbitral selection issue is *Van Pelt v. UBS Financial Services*.[240] UBS Financial Services fired Wells Van Pelt.[241] Subsequently, Van Pelt arbitrated pursuant to a pre-dispute arbitration agreement and won; the panel of arbitrators awarded him nearly $2.5 million.[242] UBS then filed suit to vacate and sought discovery on the issue of whether the chair of the arbitral panel was biased.[243] The district court dismissed UBS's claims, stating that if UBS thought a panel member was biased, UBS should have objected before the arbitration, not afterward.[244] The court therefore concluded

233. *Id.*
234. *Id.* at 783-84.
235. *Id.* at 784.
236. *Id.*
237. *Id.*
238. *Id.* at 785.
239. *Id.* at 783, 787.
240. No. 3:05CV477, 2006 WL 1698861, at *1 (W.D. N.C. June 14, 2006).
241. *Id.*
242. *Id.* at *2.
243. *Id.*
244. *Id.* at *3.

that UBS had waived any argument as to arbitral partiality.[245]

This case illustrates several trends in recently reported cases. First, employment arbitrators aren't necessarily the stooges that many critics of employment arbitration seem to expect them to be – they often find in favor of employees, and award large (even large punitive) damages. Second, employees, like Van Pelt, seem increasingly to be foregoing pre-arbitration challenges to enforceability.[246] Third, many employers often seem surprised that an arbitral system they have designed could possibly result in an award for employees, leading to a recent increase in employer challenges to arbitration awards. Fourth, however, most of these employee-wins-big cases are brought by highly paid white males in the securities industry, alleging breach of contract or occasionally age discrimination, not by low- or middle-income employees alleging race, sex, or disability discrimination. Therefore, even if these cases demonstrate that employees can win in arbitration, they do not necessarily demonstrate that employees, whom the antidiscrimination laws mostly seek to protect, can win consistently.[247]

D. Discovery

The Employment Protocol's requirement of "[a]dequate but limited" discovery provides little guidance on where arbitrators and courts should draw the line between balancing employees' need for information to develop their cases, against the laudable goal of preventing arbitral discovery from morphing into the expensive and time-consuming discovery permitted by the federal and state rules of civil procedure. So far, most courts seem to have resolved the issue by enforcing arbitration clauses that give the arbitrator discretion to permit or limit discovery, but refuse to enforce clauses that impose absolute limitations on discovery (e.g., each party is limited to one, eight-hour deposition) or that forbid discovery altogether.[248] This

245. *Id.*

246. Perhaps because they have concluded they can get a fair deal in arbitration or perhaps because they realize that an enforceability challenge is unlikely to succeed.

247. For a more-detailed empirical discussion of some of these issues, see Michael H. LeRoy & Peter Feuille, *Reinventing the Enterprise Wheel: Court Review of Punitive Awards in Labor and Employment Arbitrations*, 11 HARV. NEGOT. L. REV. 199 (2006).

248. A pair of 2003 cases decided by Federal District Judge Traugher, of the Middle District of Tennessee, illustrates this approach. In *Wilks v. Pep Boys*, 241 F. Supp. 2d 860, 864–65 (M.D. Tenn. 2003), Judge Traugher enforced an arbitration agreement that presumptively limited each party to the deposition of one witness and one expert, but permitted the arbitrator to order additional depositions upon a showing of "substantial need." In *Walker v. Ryan's*

approach, however, provides no guidance to arbitrators as to how they should strike the discovery balance and provides little guidance to a court faced with a scenario in which an arbitrator's refusal to permit discovery appears to have denied an employee the ability to vindicate a statutory right.

A recent non-employment case, *Ostroff v. Alterra Healthcare Corp.*,[249] concluded with the court refusing to enforce the arbitration agreement due to discovery restrictions. A daughter sued on behalf of her mother who had been injured while residing in a nursing home.[250] An arbitration clause in the residency agreement permitted the deposition of only expert witnesses.[251] The court determined that this provision was substantively unconscionable because the mother needed to depose residents and staff to find out what happened; unlike in *Gilmer*, these restrictions would impede the plaintiff's ability to present her claim.[252] The court therefore refused to enforce the arbitration clause.[253]

Reported employment cases involving arbitral discovery restrictions are rare. Like the plaintiff in *Ostroff*, plaintiffs in employment cases often need to depose fact witnesses, both to find out what happened, usually by deposing the supervisor and/or decision maker, and to gather information on comparators.[254]

Family Steak Houses, Inc., 289 F. Supp. 2d 916, 925 (M.D. Tenn. 2003), however, Judge Traugher refused to enforce an arbitration agreement that limited each party to one deposition and permitted the arbitrator to order additional depositions only "in extraordinary fact situations and for good cause shown." *See also* Williams v. Katten, Muchin & Zavis, No. 92C5654, 1996 WL 717447, at *4 (N.D. Ill. Dec. 9, 1996) (enforcing arbitration award in favor of employer despite employee's argument that the arbitrator only permitted her to depose one of the four witnesses she wished to depose; the court noted that the arbitrator had considered but rejected the employee's request to depose the remaining three witnesses). *But cf.* Continental Airlines, Inc. v. Mason, 87 F.3d 1318 (table), No. 95-55343, 1996 WL 341758, at *2 (9th Cir. June 19, 1996) (enforcing, over objections of unconscionability, an arbitration clause that did not provide for any discovery by the employee; "[t]here is nothing that shocks the conscience about an arbitration procedure that does not provide for discovery . . . .").

249. 433 F. Supp. 2d 538, 546 (E.D. Pa. 2006).

250. *Id.* at 540.

251. *Id.* at 541.

252. *See id.* at 545-46.

253. *Id.* at 546-47.

254. For further discussion on discovery limitation in employment agreements, see Ryan's Family Steakhouse, Inc. v. Kilpatric, No. 2040557, 2006 WL 3691554, at *6-7 (Ala. Civ. App. Dec. 15, 2006) (per curiam), discussed *supra*, at Part II.A.3; *see also* Tibbs v. Auto. Club of S. Calif., No. B189149, 2006 WL 3719422, at *7 (Cal. App. 2d Dist. Dec. 19, 2006), discussed *supra*, at Part II.B.2.

E. Remedies Issues

Another set of issues concerns remedies. Employer attempts to restrict employee access to statutory remedies arguably run afoul of *Gilmer's* prescription that arbitration is a change of forum only, and not a prospective waiver of substantive rights.

1. Substantive Relief

One such remedies issue is the enforceability of contractual limitations on the arbitrator's authority to award relief, especially when these contractual limitations are inconsistent with the relief permitted by statute. Courts have taken a variety of approaches to this issue.[255]

For example, in *Pellow v. Daimler Chrysler Services North America L.L.C.*, the arbitration agreement contained several provisions that limited the arbitrator's award.[256] These provisions prohibited the award of pay in lieu of future earnings or benefits, did not include liquidated damages as an option, restricted the arbitrator from deciding any dispute that allowed relief of benefits under the employee benefit plan, and mandated that the arbitrator apply collateral sources to the award.[257] In addition, if the arbitrator issued a reinstatement award, Daimler Chrysler could petition the arbitrator to determine the amount of damages in lieu of reinstatement; moreover, this right was exclusive to the company.[258]

The court determined the provisions separately and severed each of them in some fashion. First, the court severed the front pay limitation but enforced the remainder of the provision, which stated

255. The first is to sever the claim for relief, which the arbitrator is not permitted to resolve, require the parties to submit the remaining claims to arbitration, and stay the non-arbitrated claim for resolution by the court after an arbitration award has been made. *See, e.g.*, DiCrisci v. Lyndon Guar. Bank of N.Y., 807 F. Supp. 947, 953–54 (W.D.N.Y. 1992). The second is to strike the arbitration clause altogether and allow the entire claim to be litigated. *See, e.g.*, Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 267 (3d Cir. 2003) (striking arbitration agreement which, among other things, limited employees' relief to reinstatement and "net pecuniary damages"); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998). The third is to strike the limitation-of-remedies clause and to give the arbitrator the authority to award damages to the full extent permitted by law. *See, e.g.*, Hadnot v. Bay, Ltd., 344 F.3d 474, 478 & n.14 (5th Cir. 2003). The fourth is to let the arbitrator decide whether to award the relief. *See, e.g.*, Gannon v. Circuit City Stores, Inc., 262 F.3d 677, 681 n.6 (8th Cir. 2001); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 232 (3d Cir. 1997). The final route is to enforce the agreement as written. *See, e.g.*, Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994).

256. No. 05-73815, 2006 WL 2540947, at *8 (E.D. Mich. Aug. 31, 2006).

257. *Id.* at *8-11.

258. *Id.* at *10.

"the arbitrator may award any remedy or relief that a court could grant," stating that the provision, after severing front pay, was "broad enough to allow liquidated damages by the FMLA."[259] The court also severed the provision that denied the arbitrator the authority to decide a claim based on employee benefits because such relief would be available to the plaintiff in court.[260] The court struck down Daimler Chrysler's unilateral right to reject reinstatement stating that such a right might "deprive the plaintiff of a substantive remedy he might otherwise be entitled to in court."[261] Analogizing FMLA claims to civil rights and disability cases, the court struck down the collateral source provision, stating that the Sixth Circuit strongly endorses the collateral source rule and there was no reason to deny it in this case.[262]

2. Attorneys Fees

Still another issue is the enforceability of arbitral attorney-fee provisions, especially as they relate to fee-shifting statutes.[263] A recent decision upheld the award of attorney's fees to an employee. In *Pirooz v. MEMC Electronic Materials, Inc.*,[264] the U.S. District Court for the Eastern District of Missouri upheld the arbitrator's decision to award attorneys fees to Saeed Pirooz because it concluded that the arbitrator did not exceed the scope of his authority. The employment severance agreement contained both a non-compete and an arbitration clause, with which the employer initiated arbitration

259. *Id.* at *9-10.

260. *Id.* at *10.

261. *Id.*

262. *Id.* at *11.

263. In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), the Supreme Court held that a prevailing employer in a Title VII case may only be awarded attorney fees where the employee's lawsuit was "frivolous"; allowing the routine award of attorney fees to prevailing employers would undermine Title VII by deterring employees from bringing claims. This leaves open, however, issues such as whether and under what circumstances arbitrators should award attorney fees, the enforceability of arbitral provisions in which an employee waives the right to recover attorney fees, and whether courts should confirm arbitral awards that either deny attorney fees to a prevailing claimant or that award attorney fees to a losing claimant. *See* Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1287 (11th Cir. 2001), *vacated*, 294 F.3d 1275 (11th Cir. 2002) (denying enforcement of arbitration agreement that contained clause requiring fee-splitting between the parties; clause impermissibly limited the employee's remedies contrary to the Title VII provision that provides fee-shifting to prevailing plaintiffs); George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 584–85 (7th Cir. 2001) (an arbitrator's refusal to award attorney fees to the prevailing party as authorized by state law cannot be vacated or modified for "manifest disregard" of the law); *see also* Musnick v. King Motor Co., 325 F.3d 1255, 1260–61 (11th Cir. 2003) (enforcing a "loser pays" provision in an arbitration agreement); Manuel v. Honda R & D Ams., Inc., 175 F. Supp. 2d 987, 994–95 (S.D. Ohio 2001) (same).

264. No. 4:05MC521CDP, 2006 WL 568571, at *7-8 (E.D. Mo. Mar. 7, 2006).

proceedings against Pirooz for breach of the non-compete agreement pursuant to the arbitration clause.[265] The Arbitrator found for Pirooz and ordered MEMC to pay his attorneys fees in the amount of $106,832 and to reimburse him for the arbitration costs.[266] Pirooz filed suit in federal district court to enforce the award, and MEMC moved to vacate.[267] The court confirmed the award based on its determination that the arbitrator was not acting outside his authority and enforced his factual findings and award in accordance with the agreement.[268] The court recognized that the arbitrator's award was both mutual and final, and the arbitrator did not act with manifest disregard for the law.[269] Based on its conclusion that the arbitrator "drew his award from the essence of the agreement," the court confirmed Pirooz's award and prejudgment interest.[270]

F. Judicial Review

As some unscrupulous employers continue to find new and inventive ways to tilt the arbitral playing field in their favor, courts continue to uphold their responsibility to ensure fair arbitral processes by refusing to enforce lopsided arbitration agreements.

In *Patten v. Signator Insurance Agency, Inc.*,[271] Ralph Patten sought to arbitrate his discrimination, wrongful discharge, and contract claims against his employer, Signator Insurance Agency. When Patten first began employment, he signed a Mutual Agreement to Arbitrate which imposed a one-year statute of limitations.[272] Subsequently, Signator promoted Patten and entered into the Management Agreement, a new agreement that did not include any time barring provision, but stated that it superseded all previous agreements.[273] Nearly fourteen months after Signator terminated Patten, Patten demanded arbitration, which Signator refused based on the one-year limitation in the Mutual Agreement.[274] The district court compelled arbitration. Signator then filed a motion for

265. *Id.* at *1.
266. *Id.* at *2.
267. *Id.* at *2-3.
268. *Id.* at *5-7.
269. *Id.* at *6-7.
270. *Id.* at *8.
271. 441 F.3d 230, 232 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 434 (2006).
272. *Id.* at 231.
273. *Id.* at 232.
274. *Id.*

summary judgment with the arbitrator, arguing that the employee's claims were time-barred.[275] The arbitrator agreed, finding that the arbitration agreement contained an implied one-year limitations period based on the Mutual Agreement, and therefore dismissed Patten's claim without a hearing.[276]

Patten filed a motion to vacate in the federal court, which the court denied.[277] On appeal, Patten argued that his current arbitration agreement, which contained no limitations period, explicitly superseded the previous agreement.[278] Moreover, he argued, since Signator had drafted both agreements, ambiguities should be construed against Signator.[279] The Fourth Circuit agreed, holding that the arbitral award constituted a manifest disregard of the law and failed to draw its essence from the agreement.[280] Even though the arbitrator determined that the Management Agreement was controlling and that it was silent to a limitations period, he disregarded the Management Agreement's plain, unambiguous language when he found an implied one-year limitations period.[281] The arbitrator's finding was unreasonable; by altering the Management Agreement he was acting outside his authority.[282]

This is an important decision for three reasons. First, the legal standard for vacating an arbitration award – manifest disregard – is an extremely difficult standard to meet. The party seeking to vacate must essentially show that the arbitrator knew the law and consciously refused to apply it. This case is an exceedingly rare example of a court finding that the standard was met. Second, arbitrators, unlike federal courts, almost never grant summary judgment motions – arbitrators usually take a case to hearing. This case may help re-affirm that trend. Third, the Fourth Circuit is notoriously hostile toward employees – this is a rare win for employees in that Circuit.

The circuit courts, however, are not consistent in their determinations to vacate awards.[283] The Eleventh Circuit, in *Harbert*

275. *Id.* at 233.
276. *Id.*
277. *Id.*
278. *Id.* at 234.
279. *Id.* at 235.
280. *Id.* at 235, 237.
281. *Id.* at 235-36.
282. *Id.* at 236.
283. *Compare* Pirooz v. MEMC Elec., Inc., No. 4:05MC521CDP, 2006 WL 568571, at *8 (E.D. Mo. Mar. 7, 2006) (finding that the arbitrator did not act with manifest disregard for the law, and therefore affirming the award), *with* Patten v. Signator Ins. Agency, Inc., 441 F.3d 230,

International, LLC. v. Hercules Steel Co.,[284] cautioned parties about filing frivolous appeals once arbitration was completed. Harbert and Hercules entered into a subcontract that included an arbitration provision, and Harbert created two schedules for completion dates, both of which the subcontract did not mention.[285] Harbert became dissatisfied with Hercules' timeliness and demanded damages for breach; Hercules counterclaimed for damages, attorneys fees, and interest, which led to seven days of arbitration.[286] At the conclusion, the arbitrator denied Harbert's claims, and awarded Hercules the balance remaining on the subcontract plus interest.[287] Harbert filed a motion to vacate, which the district court denied, finding that Hercules was bound by the more liberal schedule and as such was not in breach.[288] Harbert then filed an appeal arguing that the arbitrator acted with a manifest disregard of the law.[289] The Eleventh Circuit held that the appellant's position "did not come within shouting distance" of any basis to vacate the award.[290] The court held that more was required than simply showing that the arbitration award contradicted an express term of the contract, that Harbert must show that the arbitrator deliberately failed to apply a clear rule of law, and such evidence was lacking.[291] Chastising Harbert, the court stated, "when a party who loses an arbitration award assumes a never-say-die attitude and drags the dispute through the court system without an objectively reasonable belief that it will prevail, the promise of arbitration is broken."[292]

Courts have long wrestled with the balance between discouraging frivolous litigation on the one hand, and encouraging creativity and zealous advocacy on the other. The *Harbert* decision brings this problem into sharp relief.[293]

230 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 434 (2006) (holding that the arbitrator ignored the plain language of the agreement thereby acting outside his authority).

284. 441 F.3d 905, 914 (11th Cir. 2006).

285. *Id.* at 907.

286. *Id.* at 908.

287. *Id.*

288. *Id.* at 909.

289. *Id.* at 910.

290. *Id.* at 911-13.

291. *Id.* at 911-12; *but see* Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 230 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 434 (2006) (a divided panel of the Fourth Circuit vacated an arbitration award on a theory similar to the one appellant advanced in *Harbert*).

292. *Harbert*, 441 F.3d at 913-14.

293. Sean T. Carnathan, *Eleventh Circuit Criticizes Arbitration Award Appeals*, ABA LITIG. NEWS, July 2006, at 6.

III. LOOKING BACK . . . MOVING FORWARD

As discussed briefly in the introduction to this article, and as I have described more extensively elsewhere,[294] the Employment Protocol has been extremely influential. It served as a guide to employers drafting employment arbitration agreements, it served as the basis for arbitration rules adopted by arbitral service providers such as the American Arbitration Association (AAA), it inspired protocols governing arbitration of consumer and health care disputes, and it created a benchmark for courts to use in enforceability decisions. Today, however, the guidance offered by the Employment Protocol is much diminished, as issues arise that either the drafters did not anticipate or that they chose to avoid, often in the interest of achieving consensus. Many of these issues are described in Part III of this article. Should the Employment Protocol now be updated or amended?

Arnold Zack, the key progenitor of the original Employment Protocol, suggests the answer is no, and proffers three reasons.[295] First, he argues that the current debate over the future of employment arbitration is much ado about nothing. He points out, for example, that early post-*Gilmer* predictions that employment arbitration would largely replace employment litigation were significantly overblown. AAA, he says, arbitrates only about 500 statutory employment cases a year, nearly 1000 fewer than AAA did just a few years ago – and that's a drop in the bucket compared to number of employment cases *litigated* each year.

But the AAA docket does not necessarily represent the total market of employment arbitration cases. Practitioners in my part of the country (the mid-west) tell me anecdotally that the high fees AAA charges for employment arbitration cases has caused the organization to price itself out of the market. AAA might make sense for high-dollar executive-compensation cases, but it's priced too high for run-of-the-mill employment cases. Instead, parties to these cases are looking elsewhere for their arbitral service providers.

Where are they looking? A few employers, no doubt, are creating sham providers – providers such as EDSI that derive the bulk of their business from (and therefore are financially beholden

294. Bales, *supra* note 7, at 178-84.

295. Arnold M. Zack, *The Due Process Protocol: Getting There and Getting Over It*, 11 EMP. RTS. & EMP. POL'Y J. 257 (2007).

to) one or a few employers.[296] Most of the employment arbitration business, however, appears to be going to "mom and pop" arbitrators – solo arbitrators, university-affiliated ADR Centers, retired judges, arbitrators who previously did or concurrently are doing labor arbitration, and the like. This thesis is consistent with Alexander Colvin's conclusion that notwithstanding the paltry number of AAA statutory employment cases, approximately 15 to 20 percent of American employers have adopted employment arbitration, meaning that the number of employees currently covered by *Gilmer* arbitration exceeds the number of employees currently covered by arbitration provisions in collective bargaining agreements.[297]

Thus, the argument that we needn't bother amending the Employment Protocol because employment arbitration appears to be withering away on its own does not seem to be supported by the empirical evidence. Moreover, if it is true that an increasing proportion of employment arbitration cases are being handled by "mom and pop" arbitrators, the argument for amending the Employment Protocol becomes even stronger. AAA screening procedures help ensure that its employment arbitrators are well-versed in employment law and in AAA procedures. "Mom and pop" arbitrators may not be particularly knowledgeable in employment law, and they are not bound by AAA arbitration procedures designed to ensure fairness to both parties. These arbitrators could benefit significantly from guidance provided by an updated Employment Protocol.

Arnold Zack's second argument against updating or amending the Employment Protocol is that any such update or amendment would necessarily exceed the original purpose for which the Protocol was designed.[298] As a highly experienced labor arbitrator, Zack knows well the dangers of an arbitrator "exceeding the scope of the submission" – it's one of the few grounds for reversal of a labor arbitration award.[299] Zack argues that the Employment Protocol was designed for the narrow purpose of helping employers draft fair employment arbitration agreements, that the Protocol already has

296. *See, e.g.*, Walker v. Ryan's Family Steak Houses, Inc., 289 F. Supp. 2d 916 (M.D. Tenn. 2003).

297. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*, 12 EMP. RIGHTS & EMP. POL'Y J. 405, 411 (2007).

298. Zack, *supra* note 295 at 262-63.

299. *See* Stephen L. Hayford, *The Federal Arbitration Act: The Key to Stabilizing and Strengthening the Law of Labor Arbitration*, 21 BERKELEY J. EMP. & LAB. L. 521, 546 (2000).

achieved that function, and that well-enough should be left alone.

But the Employment Protocol already has far exceeded its intended effect. The drafters never contemplated consumer or health care disputes, yet the Employment Protocol has served as a model for Protocols covering those disputes. The Protocol was not intended for courts to use in deciding enforceability issues, but courts have used it for exactly that.

Arbitration generally has a way of exceeding nominal boundaries. Section 301 of the Labor-Management Relations Act,[300] for example, nowhere mentions arbitration, and appears to have been drafted as a purely procedural provision giving federal courts the jurisdictional authority to decide breach-of-contract lawsuits by a company or union for breach of a collective bargaining agreement.[301] Nonetheless, in a line of cases beginning with *Textile Workers Union v. Lincoln Mills*,[302] the Supreme Court used Section 301 as a foundation upon which to construct an entire theory of workplace self-governance centered on arbitration.[303] Similarly, the Federal Arbitration Act originally was intended to cover only commercial and maritime disputes,[304] but the Supreme Court has interpreted (some would say mangled) the statute to cover employment disputes.[305]

The genie is out of the bottle, and regarding the Employment Protocol, that's all for the good. It has exceeded its stated purpose because it filled a vacuum – it provided much-needed guidance that could be found nowhere else. The Supreme Court's *Gilmer* decision approved employment arbitration generally, but provided precious little guidance as to under what circumstances arbitration provisions would be "fair enough" to warrant enforcement. Lower courts then began to fill in the chasms, but might have taken a decade or more to accomplish what the Employment Protocol accomplished in one fell swoop. Without the Protocol, there probably would have been a lot

300. 29 U.S.C. § 185 (2000).

301. *See* Roberto L. Corrada, *The Arbitral Imperative in Labor and Employment Law*, 47 CATH. U. L. REV. 919, 922-23 (1998); Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 583 (1983).

302. 353 U.S. 448 (1957).

303. Richard A. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1867-71 (1994).

304. 9 U.S.C. § 1 (2000); Matthew W. Finkin, *"Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification*, 17 BERKELEY J. EMP. & LAB. L. 282 (1996); Matthew W. Finkin, *Employment Contracts Under the FAA – Reconsidered*, 48 LAB. L.J. 329 (1997).

305. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

more reported cases resembling the well-known *Hooters*[306] decision.

Zack's third argument against updating or amending the Employment Protocol is that the Protocol's strength derived from the unanimity with which it was adopted, that that unanimity is almost certainly not replicable today, and that any attempt to update or amend the Protocol risks undermining whatever force it still retains.[307] Employer representatives such as those representing Circuit City might attempt to roll back process guarantees secured in the original Protocol. Arbitral service providers may be unable to agree on the ground rules. Employee representatives might be unwilling to agree to arbitral procedures that are any less than the procedures available in court.

Zack may be correct that unanimity would not be possible today. There are many more players in the game now than when the Employment Protocol was adopted in 1995. Moreover, because employment arbitration has become entrenched, the stakes are higher. Zack is right, therefore, to advise caution.

But caution should not equate to inaction. As courts stumble toward a consensus on the procedures required for arbitral fairness, some employers have used their superior bargaining power to impose on employees lopsided agreements that make it all but impossible for employees to pursue valid claims and that deter many employees from even trying to do so.[308] Employees, employers, courts, and arbitral service providers alike would benefit from a consensus opinion on a set of baseline rules designed to ensure arbitral fairness.

Such a set of baseline rules could be accomplished by amending the Employment Protocol, but that is by no means the only way it could be accomplished. One alternative would be to draft a successor to the Protocol. Another alternative would be for the major arbitral service providers, perhaps in combination with the National Academy of Arbitrators (NAA), to adopt a joint Statement of Principles. Or the NAA, perhaps in conjunction with other organization(s), could draft an Arbitral Bill of Rights to be presented to Congress. The unpalatable alternative is to permit the continued ad hoc drafting (by employers), enforcing (by courts), and implementing (by arbitrators) of employment arbitration agreements.

306. Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

307. Zack, *supra* note 295, at 263-64.

308. Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceañera*, 81 TUL. L. REV. 331, 394 (2006).

IV. CONCLUSION

The Employment Protocol has been extremely influential. It has been adopted by the major arbitration service providers, it has provided scrupulous employers with a model for drafting balanced arbitration agreements, it has guided courts in their decisions of whether to enforce particular employment arbitration agreements, and it has inspired the creation of both the Consumer and the Health Care Protocols.

Nonetheless, the Employment Protocol is increasingly becoming outdated. The Protocol was drafted in the early years of employment arbitration, before the drafters could anticipate many of the issues now facing the courts. I have identified several issues; there are certainly others that I have missed, and there will be still more by the time this article goes to press.

This suggests two things. First, either the Employment Protocol should be revised and updated to provide guidance on the issues currently facing the courts and to anticipate issues likely to arise in the future, or a successor to the Protocol should be drafted to perform the same function. Second, as some unscrupulous employers continue to find new and inventive ways to tilt the arbitral playing field in their favor, courts should uphold their responsibility to ensure fair arbitral processes by refusing to enforce lopsided arbitration agreements.