CAPPING THE COSTS OF CONSUMER AND EMPLOYMENT ARBITRATION

Michelle Eviston[*] *and Richard Bales*[**]

ABSTRACT

ARBITRATION agreements requiring arbitration but imposing costs of thousands of dollars can effectively make it impossible for consumers and employees to bring their disputes in any forum. The Supreme Court has stated that high costs can make an arbitration agreement unenforceable, but has not articulated clear standards. Lower courts are split two ways on the issue: some courts have adopted a per se approach and others a case-by-case approach. This article argues that the Federal Arbitration Act should be amended to take a third approach: arbitration fees paid by consumers or employees should be limited to what consumers or employees would pay if they litigated their claim.

I. INTRODUCTION

Arbitration offers great benefits to parties as a form of dispute resolution. It allows parties to resolve disputes more quickly than if the case was litigated.[1] In addition, it allows parties a private forum to resolve their disputes.[2] Arbitration may also be disadvantageous to some prospective plaintiffs, however. Arbitration can be expensive and in some cases, more expensive than litigation.[3] Thus, arbitration costs may prohibit plaintiffs from arbitrating their claims.[4]

---

[*] Pretrial Officer, Kentucky Administrative Office of the Courts. J.D. Northern Kentucky University, Salmon P. Chase College of Law.

[**] Professor of Law and Director of Advocacy Center, Northern Kentucky University, Salmon P. Chase College of Law.

1. Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 11 (1987); Christine L. Newhall, *Benefits and Opportunities in Mediation and Arbitration*, CPA J., Mar. 2004, at 62, *available at* http://0-galenet.galegroup.com.carlson.utoledo.edu/servlet/BCRC?issn=0732-8435&locID=ohlnk130&srchtp=pub&ste=108&p2=2004; Tracy Lipinski, Note, Major League Baseball Players Ass'n v. Garvey *Narrows the Judicial Strike Zone of Arbitration Awards*, 36 AKRON L. REV. 325, 329 (2003).

2. Lipinski, *supra* note 1, at 329 n.29. *See also* Jennifer Tafet Klausner, *Considering Arbitration: The Benefits, Risks and Recommendations*, METROPOLITAN CORP. COUNS., Mar. 2004, at 19, *available at* http://www.metrocorpcounsel.com/pdf/2004/March/19.pdf.

3. JACKSON WILLIAMS, PUBLIC CITIZEN'S CONGRESS WATCH, THE COSTS OF ARBITRATION 1-3 (2002), *available at* http://www.publiccitizen.org/documents/ACF110A.pdf.

4. *See id.* at 2.

These prohibitive costs are particularly true for consumers and employees, who often are forced to sign adhesion contracts that contain mandatory arbitration agreements.[5] With these contracts, the consumer or employee tends to be less sophisticated and have less bargaining power than the business or employer.[6] Also, consumers and employers may not realize the effect of an arbitration agreement or even know what an arbitration agreement is.[7] Because of the federal courts' liberal policy favoring arbitration, these plaintiffs are unable to choose their preferred forum to resolve their disputes.[8] Instead, plaintiffs are forced to use arbitration, and the prohibitive costs of this forum may prevent plaintiffs from bringing a claim at all.[9]

The Supreme Court stated in *Green Tree Financial Corp. v. Randolph* that when plaintiffs can prove that the costs of arbitration would prohibit them from pursuing their claims, a court may invalidate the arbitration agreement.[10] But, the federal circuits are split on when prohibitive costs justify invalidating an arbitration agreement.[11] A majority of the circuits have adopted a case-by-case approach when deciding whether the arbitration costs are sufficiently prohibitive.[12] Currently, only the Ninth Circuit differs: It invalidates arbitration agreements when a plaintiff is required to pay even a portion of the arbitrator's fees.[13]

This article argues that Congress should amend the Federal Arbitration Act to provide for a consistent method to allocate the costs of arbitration in predispute arbitration agreements[14] by limiting the fees paid by consumers or employees to what they would pay if they litigated their claim. Part II of this article examines the connection between the costs of arbitration and the Federal Arbitration Act, as well as the Arbitration Fairness Act pending in Congress. It also evaluates arbitration costs and examines what different arbitration providers charge. It then evaluates two federal court decisions addressing the costs of arbitration. Finally, Part II examines the costs of litigating a claim.

Part III evaluates the current circuit split between the case-by-case rule found in *Morrison v. Circuit City Stores, Inc.* and the per se rule found in *Cole v.*

---

5. Richard A. Bales & Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 PENN. ST. L. REV. 1081, 1083 (2009).

6. *See id.*

7. *See id.*

8. *See id.*

9. *See id.*

10. 531 U.S. 79, 92 (2000).

11. *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 669 (6th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 891-92 (9th Cir. 2002); Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 557 (4th Cir. 2001); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997); Phillips v. Assocs. Home Equity Servs., Inc., 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001).

12. *Morrison*, 317 F.3d at 669; *Bradford*, 238 F.3d at 557.

13. *Adams*, 279 F.3d at 891-92.

14. This article uses "predispute arbitration agreements" and "mandatory arbitration agreements" interchangeably.

Burns International Services.[15] Part IV explains why the case-by-case rule and the per se rule are unfair and advocates for a new rule limiting arbitration costs to what it would cost a plaintiff to file a lawsuit in court.

II. BACKGROUND

A. The Federal Arbitration Act and Its Silence on Arbitration Costs

The Federal Arbitration Act[16] ("FAA") was enacted by Congress in 1925 to "[overcome] courts' refusals to enforce arbitration clauses in contracts."[17] Since 1925, parties to a dispute have used arbitration extensively, and the number of disputes arbitrated has increased greatly.[18] Two reasons explain this increase. First, in the past 50 years, the federal courts have adopted a liberal policy favoring arbitration, expanding the scope of the FAA to a broader reach of cases.[19] Second, predispute arbitration agreements are found in many consumer and employment contracts and force consumers and employees to use arbitration.[20]

This article presumes that although costs may be prohibitive, arbitration can be a beneficial alternative to litigation. First, arbitration typically resolves disputes quicker than if they were litigated.[21] Second, arbitration relieves the caseload on the courts.[22] Third, arbitration offers parties a more private and informal forum to resolve their disputes.[23] Fourth, arbitration allows parties to have their disputes resolved by an expert in the field.[24] Fifth, in arbitration, discovery can be simplified or streamlined, thus saving the parties money in discovery costs.[25]

The FAA is silent as to how costs for arbitrating a case should be assessed.[26] This silence allows the arbitration providers to set varying costs, and it does not provide any consistency for potential plaintiffs.[27] Yet, the FAA contains some provisions that implicate arbitration costs.

---

15. The per se rule was originally found in *Cole*. 105 F.3d at 1468. The D.C. Circuit no longer follows the per se rule and has since adopted the case-by-case rule. *See* LaPrade v. Kidder, Peabody & Co., 246 F.3d 702, 708 (D.C. Cir. 2001). However, the Ninth Circuit still follows the per se rule. *See Adams*, 279 F.3d at 891-92.

16. 9 U.S.C. §§ 1-16 (2006).

17. Karon A. Sasser, Comment, *Freedom to Contract for Expanded Judicial Review in Arbitration Agreements*, 31 CUMB. L. REV. 337, 340 (2000).

18. *See* Bales & Irion, *supra* note 5, at 1082-86.

19. *See id.* at 1082-83.

20. *Id.* at 1084.

21. Brunet, *supra* note 1, at 11.

22. *See* Bales & Irion, *supra* note 5, at 1084.

23. Lipinski, *supra* note 1, at 329 n.29. *See also* Klausner, *supra* note 2, at 19.

24. Lipinski, *supra* note 1, at 329 n.29.

25. Daniela F. Almeida, *Drafting Arbitration Provisions for Complex Business Litigation in Healthcare*, J. HEALTH & LIFE SCI. L., Apr. 2008, at 137, 148.

26. 9 U.S.C. §§ 1-16 (2006).

27. *See infra* Part II.B.

Section 2 of the FAA provides that courts may refuse to enforce an arbitration agreement on basic contract grounds.[28] When courts refuse to enforce an arbitration agreement because of prohibitive arbitration costs, many do so based on the contract doctrine of unconscionability.[29] Inequality in bargaining power may cause an agreement to be unconscionable.[30] For example, in *Faber v. Menard, Inc.*, the Eighth Circuit relied on this ground when it stated that "[a] fee-splitting arrangement may be unconscionable if information specific to the circumstances indicates that fees are cost-prohibitive and preclude the vindication of statutory rights in an arbitral forum."[31]

The proposed Arbitration Fairness Act of 2011 ("AFA") seeks to amend the FAA to forbid certain forms of arbitration.[32] Specifically, the AFA provides that "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, franchise or civil rights dispute."[33]

Both the House and Senate versions of the AFA cite identical reasons for why the amendment is needed.[34] First, the FAA originally was intended to resolve disputes only "between commercial entities of generally similar sophistication and bargaining power."[35] The Supreme Court, however, has expanded the FAA's reach to govern disputes between parties of unequal bargaining power, and as a result, many consumers and employees are forced to arbitrate their disputes.[36] Consumers and employees may not understand the rights they are giving up.[37] Second, arbitration providers may feel pressured to favor employers and businesses to keep their business in future arbitrations.[38] Third, the lack of judicial review of awards "undermines the development of public law for civil rights and consumer rights."[39] The lack of transparency in arbitration does not protect civil and consumer rights. Fourth, many mandatory arbitration agreements contain unfair provisions that can hurt potential plaintiffs.[40] These provisions "strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes."[41]

Although these are legitimate concerns, there are other ways of correcting these issues without forbidding arbitration of these types of disputes. A more specific amendment that takes these issues, as well as the issue of arbitration

---

28. 9 U.S.C. § 2.

29. *See, e.g.*, Faber v. Menard, Inc., 367 F.3d 1048, 1053 (8th Cir. 2004).

30. *See id.*

31. *See generally id.*

32. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); H.R. 1873, 112th Cong. (2011).

33. S. 931, 111th Cong. § 402(a) (2009); H.R. 1020, 111th Cong. § 2 (2009).

34. S. 931 § 2; H.R. 1020 § 2.

35. S. 931 § 2(1); H.R. 1020 § 2(1).

36. S. 931 § 2(2)-(3); H.R. 1020 § 2(2)-(3).

37. S. 931 111th Cong. § 2(2)-(3) (2009); H.R. 1020, 111th Cong. § 2(2)-(3) (2009).

38. *See* S. 931 § 2(2), (4); H.R. 1020 § 2(2), (4).

39. S. 931 § 2(5); H.R. 1020 § 2(5).

40. S. 931 § 2(6)-(7); H.R. 1020 § 2(6)-(7).

41. S. 931 § 2(7); H.R. 1020 § 2(7).

costs, into account can level the playing field.[42] The reasoning behind the proposed amendment does not consider prohibitive costs, which play a huge role when potential plaintiffs are deciding whether to arbitrate. An amendment that addresses this important issue will help make arbitration a fair and effective forum.

The AFA goes too far because it does not take into account the benefits of arbitration and attempt to correct arbitration's disadvantages. Prohibiting mandatory arbitration of consumer and employment contracts is not the best solution. Regardless of its disadvantages, arbitration is an advantageous forum that allows plaintiffs to pursue their claims in a quick and private manner in a less formal forum than a court.[43]

B. What Are the Costs of Arbitration?

Although arbitration is not always more expensive than litigation, the upfront costs unique to arbitration may still deter prospective plaintiffs from pursuing arbitration.[44] Parties must pay costs including, but not limited to filing fees; arbitrator's fees; travel costs for the arbitrator, parties, attorneys, and witnesses; hearing room rental; and other administrative expenses.[45] Arbitration providers charge various amounts for these expenses. This section analyzes what the American Arbitration Association ("AAA") and other arbitration providers charge for arbitrating disputes arising out of consumer and employment contracts.

1. *American Arbitration Association*

AAA assesses both administrative fees and arbitrator fees for arbitration hearings. The fees vary based on the amount of actual damages sought and the type of claim, i.e., consumer or employment.[46] This section first analyzes the costs of fees for consumer and employment claims. It then addresses when a plaintiff may receive an AAA fee waiver.

i. Consumer arbitration costs

For a dispute arising out of a consumer contract, AAA charges both administrative fees and arbitrator fees to the parties.[47] This section describes what those fees are and how AAA allocates these costs among the consumer and

---

42. *See* Bales & Irion, *supra* note 5, at 1091-93, 1100-02.

43. The information in this paragraph was taken from a class discussion in Arbitration Law & Procedure taught by Professor Richard Bales in the Spring 2010 semester at Salmon P. Chase College of Law.

44. *See generally* WILLIAMS, *supra* note 3.

45. KATHERINE V.W. STONE & RICHARD BALES, ARBITRATION LAW 340 (2d ed. 2010).

46. *Consumer Arbitration: Costs*, AM. ARBITRATION ASS'N [hereinafter *Consumer Arbitration: Costs*], http://www.adr.org/sp.asp?id=22039 (last visited Feb. 7, 2011).

47. *Id.*

the business. It also provides examples of what potential plaintiffs suing for alleged consumer law violations would pay if they used AAA for arbitration.

AAA's administrative fees cover the costs of "administrative services provided to the parties, including assistance in selecting the arbitrator, handling documents, scheduling a hearing if required, and distributing the arbitrator's decision."[48] The fees are calculated based on the amount of actual damages sought in the claim and the counterclaim.[49] Other monetary awards such as punitive damages or attorney's fees, are not considered when calculating the administrative fees.[50] The administrative fees do not include the costs of hearing rooms or witnesses, among other things.[51] The parties must pay these fees in addition to administrative and arbitrator's fees.[52] Arbitrator's and administrative fees are discussed in more detail below.

Arbitrator fees cover the time that "trained and experienced arbitrators ... spend on a case."[53] These fees also vary based on the size of the claim and, additionally, based on the type of arbitration.[54] If the claim and counterclaim seeks damages of less than $75,000, arbitrator fees are set at $250 for a desk arbitration[55] or telephone hearing and $750 per day for an in-person hearing.[56] If a claim or counterclaim seeks damages of more than $75,000, then arbitrator fees are based on the rates listed in their panel biographies.[57] In *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit evaluated AAA's arbitrator fees.[58] It noted that the average AAA arbitrator's fee was $700 per day.[59]

AAA limits the amount of fees a consumer with a small claim has to pay.[60] If the claim or counterclaim is less than $10,000, the most a consumer must pay is $125.[61] If the claim or counterclaim is more than $10,000 but less than $75,000, the most a consumer must pay is $375.[62] The consumer payments are deposited toward the arbitrator's fees; these consumers do not pay the filing fee

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Consumer Arbitration: Costs*, *supra* note 46.
54. *Id.*
55. In a desk arbitration, there is no in-person hearing. The arbitrator makes his or her decision based on the documents submitted by the parties. *Supplementary Procedures for Consumer-Related Disputes*, AM. ARBITRATION ASS'N (fees effective Jan. 1, 2010), *available at* http://www.adr.org/sp.asp?id=22014.
56. *Consumer Arbitration: Costs*, *supra* note 46.
57. *Id.*
58. 317 F.3d 646, 647 (6th Cir. 2003).
59. *Id.* at 669.
60. *Consumer Arbitration: Costs*, *supra* note 46.
61. *Id.*
62. *Id.*

or the case service fee.[63] The business is responsible for any remaining fees the consumer has not paid.[64]

But, for consumers with a claim or counterclaim of more than $75,000 or with a non-monetary claim, fees may be much higher and are paid according to the Commercial Fee Schedule.[65] The consumer must pay for the initial filing fee and the case service fee.[66] The case service fee is due when the first hearing is scheduled.[67] These fees vary based on the size of the claim. For example, a consumer alleging multiple consumer-protection-law violations and requesting $300,000 in actual damages would have to pay a $2,800 filing fee and a $1,250 case service fee.[68] A consumer alleging $500,000 in actual damages would have to pay a $4,350 filing fee and a $1,750 case service fee.[69] The consumer must also pay for half of the arbitrator's fees as stipulated in the arbitrator's panel biography.[70] In addition, the consumer would have to pay other expenses, including but not limited to the arbitrator's travel costs, hearing room rental, witness's travel costs, and attorney's fees.[71] Taken collectively, these costs can be burdensome and may prohibit a consumer from pursuing claims in the arbitral forum, and under a predispute arbitration agreement, these consumers would not be able to pursue their claims in any other forum.

ii. Employment arbitration costs

When an employee or employer uses the AAA for employment arbitration, AAA first determines whether the dispute arose out of an employer-promulgated plan or an individually-negotiated employment agreement or contract.[72] AAA's website merely states that AAA determines this by looking at the documents,[73] and it provides that agreements or contracts may be considered individually-negotiated even if they "reference or incorporate an employer-promulgated plan."[74] Other than this information, AAA provides no further guidance.[75] Thus, this article assumes that a predispute arbitration agreement could be considered an individually-negotiated employment agreement or contract.

---

63. *See id.*

64. *Id.*

65. *Id.*

66. *Commercial Arbitration Rules and Mediation: Procedures*, AM. ARBITRATION ASS'N (rules effective June 1, 2009), http://www.adr.org/sp.asp?id=22440 (last visited Feb. 7, 2011).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Consumer Arbitration: Costs*, *supra* note 46. On average, a consumer would pay $350 per day for the arbitrator's fee. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 669 (6th Cir. 2003) (noting that the average AAA arbitrator's fee is $700 per day).

71. *See Consumer Arbitration: Costs*, *supra* note 46.

72. *Employment Arbitration Rules and Mediation: Procedures*, AM. ARBITRATION ASS'N (rules effective June 1, 2009), http://www.adr.org/sp.asp?id=36789 (last visited Feb. 7, 2011).

73. *Id.*

74. *Id.*

75. *See id.*

AAA limits an employee's fees for disputes arising out of employer-promulgated plans.[76] An employee needs to pay only $175 for the filing fee; the employer is responsible for the remaining portion of the filing fee.[77] AAA does not charge a filing fee for a counterclaim.[78]

The employer pays the arbitrator's fees, hearing fees, and hearing room rental fees.[79] The employer is also responsible for the arbitrator's travel expenses and any other expenses, as well as "the costs relating to proof and witnesses produced at the direction of the arbitrator."[80] An employee would have to pay fees for postponing or cancelling a hearing, or if a case was held in abeyance.[81]

AAA uses the Commercial Fee Schedule for disputes arising out of individually-negotiated employment agreements and contracts.[82] Here, however, the AAA does not provide any caps for small claims like it does for consumer disputes.[83] Thus, if an employee sues his or her employer alleging a Title VII violation and seeking $300,000 in actual damages, he or she would owe a $2,800 filing fee and a $1,250 case service fee.[84] If the employee also alleges state tort violations with Title VII violations and seeks $1,000,000 in actual damages, then he or she would owe a $6,200 filing fee and a $2,500 case service fee.[85]

Absent a contrary agreement, an employee would also have to pay half of the arbitrator's fees.[86] As mentioned in the section above, the average AAA arbitrator's fee is $700 per day. In *Morrison v. Circuit City Stores, Inc.*, the Sixth Circuit cited to a Public Citizen study which found that the costs of arbitrating an $80,000 claim ranged from $4,350 to $11,625.[87] The Sixth Circuit noted that many employment claims would cost significantly more than this range because Title VII allows plaintiffs to seek damages of $300,000.[88] As mentioned in the section above, these costs—taken collectively with the other expenses likely to be incurred—could prohibit employees from pursuing their claims in the arbitral forum.[89] Given that many employees are unemployed when bringing their claims, these employees would likely be unable to pursue their claims in any forum under a predispute arbitration agreement.

---

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *See id.*
84. *Id.*
85. *Id.*
86. *See id.*
87. 317 F.3d 646, 669 (6th Cir. 2003).
88. *Id.*
89. *See supra* Part II.B.1.i.

iii. Fee waivers

AAA waives administrative fees in some cases, but parties will only be considered for the waiver if their annual gross income is below 200% of the federal poverty guidelines.[90] Despite the decrease in income or total loss in income that many may have suffered in this economic downturn, this rule still may make it difficult for consumers and employees to be considered for a fee waiver. For example, a two-person family living in the continental United States must make less than $29,140, and a four-person family must make less than $44,100.[91] In addition, a party is not guaranteed to receive this waiver even if his or her annual gross income is below 200% of the federal poverty guidelines.[92]

Even if a party is granted a waiver of administrative fees, the party still must pay for the arbitrator's fee, among other additional fees.[93] This alone can be a prohibitive cost to parties pursuing a claim in the arbitral forum. Although there are some arbitrators available through AAA who will serve as an arbitrator pro bono for a one-day hearing, this pro bono service is generally only available to those who have received an administrative fee waiver[94] and "where the inability of one party to pay the arbitrator may prevent the case from going forward."[95]

2. *Other Arbitration Providers*

Other arbitration providers, such as the National Arbitration Forum ("NAF"), assess similar fees as the AAA.[96] But, when using NAF, the claimant must pay a commencement fee when the arbitration starts and an administrative fee in addition to a filing fee. For example, if a consumer or employee uses NAF and files a $500,000 claim, the plaintiff would owe a $500 filing fee, a $500 commencement fee, and a $1,000 administrative fee, along with the arbitrator's hourly rate and other expenses, including but not limited to hearing rental rooms, travel costs, and attorney fees.[97] NAF also charges fees for discovery requests, continuances, subpoenas,[98] and written findings of fact or conclusions of law.[99] While some of these costs are lower than the AAA fees, taken collectively these fees may still prohibit consumers and employees from pursuing their claims. A study conducted by Public Citizen in May 2002 found that the expenses for

90. *Administrative Fee Waivers and Pro Bono: Arbitrators*, AM. ARBITRATION ASS'N, http://www.adr.org/sp.asp?id=22040 (last visited Feb. 7, 2011).

91. For more information on the 2009 federal poverty guidelines, see *2009 Federal Poverty Guidelines*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://aspe.hhs.gov/poverty/09poverty.shtml (last visited Feb. 7, 2011).

92. *See Administrative Fee Waivers and Pro Bono: Arbitrators*, *supra* note 90.

93. *See id. See also supra* Part.II.B.

94. *Administrative Fee Waivers and Pro Bono: Arbitrators*, *supra* note 90.

95. *Id.*

96. *See Fee Schedule to Code of Procedure*, NAT'L ARBITRATION FORUM (2007) [hereinafter NAF], http://www.adrforum.com/users/naf/resources/20070801FeeSchedule.pdf.

97. *Id.* at 1.

98. WILLIAMS, *supra* note 3, at 2.

99. NAF, *supra* note 96, at 5.

arbitration claims of $60,000 to $80,000 were 1,787% to 3,597% more expensive than court costs.[100] Thus, no matter the arbitration provider, these expenses can deter plaintiffs from pursuing their claims in the arbitral forum.

C. *Costs of Litigating a Case*

The Public Citizen study on the costs of arbitration compared the costs of arbitrating a case to the costs of litigating a case.[101] The study noted that there are three types of costs in litigation.[102] First, it noted that parties have to pay attorney's fees, but recognized that several employees or consumers retain attorneys on a contingency basis.[103] Second, it noted that there are litigation expenses, including travel, discovery, and exhibits.[104] Third, the study noted that there is a forum cost.[105] This is the court's filing fee.[106]

Currently, regardless of the claim's size, it costs $350 to file a civil claim in federal court.[107] By contrast, the employee using AAA to arbitrate his or her Title VII claims, seeking $300,000 in actual damages, would have to pay $4,050 in administrative fees alone.[108] Additionally, as the Sixth Circuit noted in *Morrison v. Circuit City Stores, Inc.*, a plaintiff seeking an $80,000 claim could face a total forum cost, including arbitrator's fees, ranging from $4,350 to $11,625.[109] The Sixth Circuit stated that this cost would significantly increase as the size of the claim increased,[110] so the plaintiff seeking $300,000 would face even higher costs. Therefore, while the cost of attorney's fees and litigation expenses could be higher when litigating a case—particularly large cases with complex discovery—the additional upfront costs in arbitration may still dissuade plaintiffs from pursuing claims in the arbitral forum.

D. Green Tree Financial Corp. v. Randolph

As illustrated in Section II.B, the costs of arbitration may be high.[111] Because many of these costs are due upfront, these fees may prohibit plaintiffs from pursuing their claims.[112] In 2000, the Supreme Court indicated that when arbitration costs prohibit plaintiffs from pursuing their claims, a court may refuse

---

100. WILLIAMS, *supra* note 3, at 42.
101. *Id.*
102. *Id.* at 4-5.
103. *Id.* at 4.
104. *Id.* at 4-5.
105. *Id.* at 5.
106. *Id.*
107. *Frequently Asked Questions—Filing a Case*, UNITED STATES COURTS, http://www.uscourts.gov/faq.html#filing (last visited Feb. 7, 2011).
108. *See supra* Part II.B.
109. 317 F.3d 646, 669 (6th Cir. 2003).
110. *See id.*
111. *See supra* Part II.B.
112. *See id.*

to enforce an arbitration agreement.[113] Since handing down this standard, other courts have struggled with how to apply it when determining whether prohibitive costs justify invalidating an arbitration agreement.[114]

In *Green Tree Financial Corp. v. Randolph*, the Supreme Court considered whether an arbitration agreement that is silent as to allocating costs may be invalidated because the agreement does not protect the party from prohibitive costs.[115] Larketta Randolph financed her purchase of a mobile home through Green Tree Financial Corporation ("Green Tree").[116] The contract between the parties required that Randolph purchase insurance to protect Green Tree from repossession costs.[117] This contract also contained an arbitration clause that was silent as to allocating costs.[118]

Randolph sued Green Tree, alleging violations of the Truth in Lending Act ("TILA") and the Equal Credit Opportunity Act ("ECOA").[119] Green Tree moved to compel arbitration, which the district court granted.[120] After the district court denied Randolph's motion for reconsideration, she appealed.[121] The Eleventh Circuit reversed the district court's decision compelling arbitration.[122] It found that because of the expensive costs associated with arbitrating a claim, the arbitration agreement could not provide Randolph with the necessary minimum guarantees to vindicate her statutory rights.[123] It noted that this was particularly true here because the arbitration agreement was silent as to allocating costs.[124] Green Tree appealed the Eleventh Circuit's decision, and the Supreme Court granted certiorari.[125]

Randolph argued that the Eleventh Circuit's decision should be affirmed because the arbitration agreement did not stipulate how the costs associated with arbitration were to be allocated and that the possibility of high costs would prohibit her from pursuing a claim against Green Tree in the arbitral forum.[126] Randolph, however, never showed any specifics on what costs she would incur, and the Supreme Court found her risk of prohibitive costs to be "too speculative to justify the invalidation of an arbitration agreement."[127]

---

113. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 82 (2000).

114. *See, e.g.*, *Morrison*, 317 F.3d at 669; Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 891-92 (9th Cir. 2002); Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 557 (4th Cir. 2001); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997).

115. 531 U.S. at 82.

116. *Id.*

117. *Id.*

118. *Id.* at 82-83.

119. *Id.* at 83.

120. *Id.*

121. *Id.* at 84.

122. *Id.*

123. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 84 (2000).

124. *Id.*

125. *Id.*

126. *Id.* at 90.

127. *Id.* at 91.

The Supreme Court noted that invalidating the arbitration agreement on a mere assertion that costs were prohibitive did not follow the liberal policy favoring arbitration.[128] It held that before an arbitration agreement may be invalidated because of prohibitive costs, the party seeking to invalidate the agreement "bears the burden of showing the likelihood of incurring such costs."[129] The Court did not reach the issue of how detailed a party must be in proving that such costs are prohibitive.[130] But, it held that Randolph did not prove that the costs would be prohibitive to her.[131]

E. Arbitrator Bias

When the employer or business pays for the arbitrator's fee, there can be an appearance of bias. This section first examines how the FAA generally protects consumers and employees against bias during arbitration. It then evaluates bias in the arbitral selection process.

Section 10(a) of the FAA provides plaintiffs protection against bias.[132] A district court can vacate an arbitration award in four situations:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[133]

The statute, however, only protects plaintiffs after the arbitration is complete.[134] It does not protect plaintiffs when the arbitral selection process is abused or unfair.[135]

Bias, or at least the appearance of bias, may occur during the arbitral selection process.[136] Factors that may affect bias are "the repeat player effect, submerged bias, and employer-appointed panels."[137] The repeat player effect states that because employers and businesses are more likely than employees and

---

128. *Id.*
129. *Id.* at 92.
130. *Id.*
131. *Id.*
132. 9 U.S.C. § 10(a) (2006).
133. *Id.*
134. *See* Bales & Irion, *supra* note 5, at 1093-94.
135. *Id.*
136. *Id.* at 1094.
137. *Id.*

consumers to arbitrate numerous different cases, the employers and businesses may be more familiar with the arbitrators.[138] This familiarity may allow the employer or business to choose an arbitrator that will treat them more favorably.[139] In addition, employers and business may also be advantaged by submerged bias, which "occurs when an arbitrator's interest in being hired by the employer or [business] in the future predisposes the arbitrator to favor that organization rather than the individual."[140] Moreover, employers and businesses have a huge advantage when they have control in creating the pool of arbitrators.[141] The employer or business may often reserve this right to itself in the arbitration agreement.[142]

Admittedly, these problems can still arise even under this article's cost-limiting approach. Capping the employee or consumer's arbitration fees and requiring the employer to pay the remaining fees, in effect, has the employer or business paying for the arbitrator. As stated above, this payment can create the appearance of arbitral bias in favor of the employer or business. However, there are other solutions to minimize or eliminate arbitral bias. Although this article does not address these solutions in detail, Congress could also amend the FAA to provide for a fair and equitable arbitral selection process to ensure that a neutral and fair arbitrator is selected.[143]

III. CIRCUIT SPLIT

Since the Supreme Court ruled in *Green Tree* in 2000, it has not reevaluated the standard it set forth. Instead, the federal courts have interpreted *Green Tree* differently, establishing different tests for when a plaintiff has proven that the arbitration costs are prohibitive.[144]

This section evaluates the current state of the law following *Green Tree*. Every circuit except the Ninth Circuit follows a case-by-case approach determining whether costs are so prohibitive that those costs prevent a plaintiff from pursuing his or her claim.[145] The Ninth Circuit uses a per se approach,

---

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 1101 (arguing that Congress should amend the FAA to provide for the following arbitral selection procedures: "(1) A jointly selected neutral arbitrator familiar with the applicable law [and] (2) [i]n employment disputes, a neutral arbitrator may not have represented the views of employees or employers within the last three years, or must have a practice in which the arbitrator represents both employers and employees on a roughly equal basis").

144. *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 669 (6th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 891-92 (9th Cir. 2002); Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 557 (4th Cir. 2001); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997).

145. *Morrison*, 317 F.3d at 670; *Bradford*, 238 F.3d at 557-58.

which finds that an arbitration agreement is unenforceable when an employee must pay for a portion of the arbitrator's fees.[146]

A. Case-by-Case Rule

The Fourth Circuit adopted the case-by-case approach in *Bradford v. Rockwell Semiconductor Systems, Inc.*[147] where it addressed the issue of when arbitration costs prohibited plaintiffs from pursuing their claims.[148] While in the process of acquiring Brooktree Corp., Rockwell Semiconductor Systems, Inc. required John Bradford to sign an arbitration agreement as a condition of continued employment.[149] The agreement contained a provision stating that the parties would split equally the arbitrator's fee and costs.[150] Before Rockwell completed the acquisition of Brooktree, it told Bradford that it would not continue his employment.[151]

While Bradford's arbitration was pending, he sued Rockwell in district court alleging age discrimination.[152] The district court granted Rockwell's motion for summary judgment, finding that Bradford did not prove that the cost-splitting provision would cause him financial hardship.[153] On appeal, Bradford argued that cost-splitting provisions make an arbitration agreement per se unenforceable because they "deter employees who have been victims of discrimination from pursuing their rights, thus undermining the remedial and deterrent purposes of the federal antidiscrimination statutes."[154] He also argued alternatively that the district court erred in finding that he failed to "show individual financial hardship and actual deterrence."[155]

The Fourth Circuit noted that the circuits adopting the case-by-case rule "focus upon whether the particular claimant has a full and fair opportunity to vindicate his statutory claims."[156] The circuits focus on whether the individual plaintiff is financially able to pay the fees or whether the fees themselves are so prohibitive.[157] The Fourth Circuit also adopted the case-by-case rule in deciding whether costs may be so prohibitive as to make an arbitration agreement unenforceable.[158]

The Fourth Circuit stated that the case-by-case approach best followed the U.S. Supreme Court's guidelines in *Green Tree* because the Court focused on the

146. *Adams*, 279 F.3d at 894.
147. *Bradford*, 238 F.3d at 559.
148. *See id.* at 558-59.
149. *Id.* at 551.
150. *Id.*
151. *Id.*
152. *Id.* at 551-52.
153. *Id.* at 552.
154. Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 552 (4th Cir. 2001).
155. *Id.*
156. *Id.* at 555.
157. *Id.*
158. *Id.* at 555, 557.

plaintiff's "individualized costs and, by inference, the individualized deterrent effect arising from those costs."[159] The Fourth Circuit adopted a three-part test to evaluate when a plaintiff has shown that costs are so prohibitive that it makes an arbitration agreement unenforceable.[160] First, a court must examine whether the plaintiff is able to pay the arbitration costs and fees.[161] Second, a court must examine what it would likely cost to arbitrate the case versus what it would likely cost to litigate the case.[162] Third, the court must decide if the difference is substantial enough to deter the plaintiff from arbitrating his or her claims.[163]

After rejecting Bradford's argument that a cost-splitting provision makes an arbitration agreement per se unenforceable, the Fourth Circuit then evaluated whether Bradford was able to prove that costs were prohibitively expensive.[164] First, it found that Bradford did not prove that he could not afford the fees because he did not provide any contrary evidence.[165] Second, it found that the arbitration costs did not deter Bradford from arbitrating his case because Bradford initially initiated the arbitration prior to filing suit in district court.[166]

Most of the circuits that use the case-by-case approach follow or use something similar to the Fourth Circuit's standard set out in *Bradford*, which focuses on whether the costs are prohibitive to the individual plaintiff.[167] The Sixth Circuit and some of the district courts in the Second Circuit use a modified *Bradford* standard, which instead focuses on whether prohibitive costs prevent similarly situated plaintiffs, as well as the individual plaintiff, from pursuing their claims.[168]

The Sixth Circuit adopted its modified *Bradford* approach in *Morrison v. Circuit City Stores, Inc.*[169] *Morrison* was a consolidated case involving two

159. *Id.* at 557.

160. *Id.* at 556.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 558.

165. *Id.*

166. *Id.* at 551, 558.

167. *See* Hall v. Treasure Bay Virgin Islands Corp., No. 09-1754, 2010 U.S. App. LEXIS 5539, at *3-4, *7 (3d Cir. Mar. 16, 2010); Faber v. Menard, Inc., 367 F.3d 1048, 1053-54 (8th Cir. 2004); Parilla v. IAP Worldwide Servs. VI, Inc., 368 F.3d 269, 284 (3d Cir. 2004); Livingston v. Assocs. Fin., Inc., 339 F.3d 553, 557 (7th Cir. 2003); Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259 (11th Cir. 2003); Large v. Conseco Fin. Servicing Corp., 292 F.3d 49, 56-57 (1st Cir. 2002); LaPrade v. Kidder, Peabody & Co., 246 F.3d 702, 708 (D.C. Cir. 2001); Bell v. Koch Food of Miss., No. 3:08-cv-697-WHB-LRA, 2009 U.S. Dist. LEXIS 38003, at *25-27 (S.D. Miss. May 5, 2009); Stewart v. Paul, Hastings, Janofsky & Walker, LLP, 201 F. Supp. 2d 291, 293-94 (S.D.N.Y. 2002). *See also Musnick*, 325 F.3d at 1259 (listing cases); EEOC v. Rappaport, Hertz, Cherson & Rosenthal, P.C., 448 F. Supp. 2d 458, 463 (E.D.N.Y. 2006) (listing cases); STONE & BALES, *supra* note 45, at 361-62 (listing cases).

168. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003); *Rappaport*, 448 F. Supp. 2d at 463-64; Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230, 239-40 (N.D.N.Y. 2001). *See also Rappaport*, 448 F. Supp. 2d at 463-64 (listing cases).

169. 317 F.3d at 658.

different employees, Lillian Pebbles Morrison and Mark F. Shankle, who sued their respective employers for discrimination after they were terminated.[170]

Morrison applied for a managerial position at Circuit City Stores, Inc. ("Circuit City") and was required to sign an arbitration agreement as part of that application.[171] Although the arbitration agreement provided that Circuit City would front all but a $75 filing fee, Morrison would still have to pay half of the total costs at the conclusion of the arbitration unless the arbitrator allocated all costs to the losing party, meaning that Morrison could be subject to no costs (except the filing fee), half the costs, or all costs.[172]

Circuit City hired Morrison but terminated her approximately two years later.[173] She sued Circuit City, alleging Title VII violations.[174] The district court granted Circuit City's motion to compel arbitration.[175] Morrison then appealed.[176] The appeal was originally held before a panel,[177] but a majority of the Sixth Circuit judges agreed to rehear the case en banc.[178]

Morrison's rehearing was combined with Shankle's appeal.[179] Shankle, an employee of Pep Boys, was also required to sign an arbitration agreement as a condition of his employment.[180] The arbitration agreement provided that Shankle and Pep Boys would split the arbitrator's fees, and that each party would pay their own remaining costs.[181] The arbitrator could award reasonable fees to a prevailing party pursuant to a relevant statute or agreement.[182]

Shankle later quit Pep Boys and attempted to obtain severance pay.[183] Shankle initially began to arbitrate this dispute on advice from his first counsel.[184] After retaining new counsel, however, he attempted to stop the arbitration and sued Pep Boys in state court, alleging Title VII violations.[185] After Pep Boys removed the case to federal court, the district court granted Shankle's motion to stay arbitration, finding that the cost-splitting provision was unenforceable because of discrepancies between AAA procedures and the procedures mentioned in the agreement.[186] Pep Boys appealed the district court's decision.[187] As in Morrison's case, the appeal was initially heard before a

170. *Id.* at 652.
171. *Id.* at 654.
172. *See id.* at 655.
173. *Id.*
174. *Id.*
175. *Id.* at 646.
176. *Id.* at 656.
177. The opinion did not explain what the panel found. *See id.*
178. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 656 (6th Cir. 2003).
179. *Id.*
180. *Id.* at 656-57.
181. *Id.* at 657.
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*

panel,[188] and subsequently a majority of Sixth Circuit judges agreed to rehear the case en banc and consolidated Morrison and Pep Boy's appeals.[189] Morrison and Shankle argued that the cost-splitting provision of their respective arbitration agreements prevented them from effectively pursuing their claims.[190]

The Sixth Circuit first addressed the test used by the Tenth, Eleventh, and D.C. Circuits at that time.[191] Those circuits had held that "cost-splitting provisions *per se* deny litigants an effective forum for the vindication of their statutory rights."[192] After rejecting this standard, the Sixth Circuit recognized that a majority of the circuits have instead adopted a case-by-case approach for determining when cost-splitting provisions justify invalidating an arbitration agreement.[193] The Sixth Circuit adopted the case-by-case approach and next looked to what standard would apply for determining when costs prohibit plaintiffs from arbitrating their claims.[194]

The Sixth Circuit looked to the Fourth Circuit for guidance on what must be shown under this test.[195] It criticized the Fourth Circuit's approach, however. First, it stated that requiring specifics as to costs is premature because costs would be merely speculative at this stage.[196] Second, it stated that the *Bradford* test did not "protect the deterrent functions of the federal anti-discrimination statutes."[197]

The Sixth Circuit also rejected using a judicial review approach, which would provide for review of arbitration awards.[198] The court stated that this approach was a "Catch-22" for plaintiffs because the rule does not allow them to claim prior to arbitration that the costs will prevent them from pursuing their claims, and after arbitration they can no longer argue that the costs were too prohibitive, since they already completed arbitration.[199]

Instead, the Sixth Circuit revised the case-by-case approach adopted in *Bradford* and held that costs are prohibitive when plaintiffs "demonstrate that the potential costs of arbitration are great enough to deter them and similarly situated individuals from"[200] using the arbitral forum.[201] The court stressed the need to look at the "possible 'chilling effect' of the cost-splitting provision on similarly

188. The opinion did not explain what the panel found. *See* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 657 (6th Cir. 2003).

189. *Id.*

190. *Id.* at 657-58.

191. These circuits have since adopted the case-by-case approach. *See* Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259 n.3 (11th Cir. 2003).

192. *Morrison*, 317 F.3d at 658-59.

193. *Id.* at 659.

194. *See id.* at 660.

195. *Id.*

196. *Id.*

197. *Id.* at 661.

198. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003).

199. *Id.* at 662-63.

200. *Id.* at 663.

201. *Id.*

situated potential litigants."[202] The Sixth Circuit determined that this test addressed its concern with the *Bradford* approach because this test would protect the deterrent role of federal anti-discrimination statutes.[203]

The Sixth Circuit further defined how courts should use its standard. The class of similarly situated individuals should be determined by looking at the "actual plaintiff's income and resources."[204] A court does not, however, need to be so detailed that it is leafing through the plaintiff's bills.[205] The court should compare this information with average arbitration costs because this information is what plaintiffs will consider when determining whether they can afford to arbitrate their claims.[206] The court should compare the average arbitration costs with the average litigation costs, taking into account that in many cases, there would be a contingency fee arrangement.[207] The Sixth Circuit held that both Morrison and Shankle satisfied its test and proved that the costs of arbitration would prohibit similarly situated individuals from pursuing their claims in the arbitral forum.[208] Thus, the court found that the cost-splitting provisions were unenforceable.[209]

However, each arbitration agreement contained a severability clause.[210] The Sixth Circuit found that the cost-splitting provisions were severable from the arbitration agreements.[211] Therefore, the court held that the arbitration agreements were enforceable.[212]

B. Per Se Rule

Cole v. Burns International Security Services was decided before *Green Tree*, but it was not expressly overruled by *Green Tree* and the Supreme Court has yet to overrule it.[213] Although the D.C. Circuit has overruled *Cole*, the Ninth Circuit still follows its approach.[214]

In *Cole*, in an opinion written by Chief Judge Harry Edwards, the D.C. Circuit addressed whether a mandatory arbitration agreement could require an employee to pay for the arbitrator's fees.[215] Clinton Cole worked for LaSalle and Partners ("LaSalle").[216] When Burns International Security Services ("Burns") took over LaSalle's contract, Burns forced Cole to sign an arbitration agreement

202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 664.
207. *Id.*
208. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 669, 676-77 (6th Cir. 2003).
209. *Id.* at 677.
210. *Id.* at 675.
211. *See id.*
212. *Id.* at 675, 677-78.
213. *See generally* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).
214. *See* Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 895 (9th Cir. 2002).
215. 105 F.3d at 1468.
216. *Id.* at 1469.

as a condition of his employment.[217] Under this agreement, the AAA Rules of Conduct ("AAA Rules") applied to any future arbitration.[218]

After Burns fired Cole, he sued Burns for Title VII and state tort violations.[219] The district court granted Burns's motion to compel arbitration, finding that the arbitration agreement was enforceable and rejecting Cole's argument that the agreement was unconscionable.[220]

The D.C. Circuit then evaluated the AAA rules relating to cost.[221] The relevant AAA rules were as follows:

> (4) Rule 35: *A filing fee of $500 must be advanced by the initiating party*, subject to final apportionment by the arbitrator in the award, and an *administrative fee of $150 per hearing day must be paid by each party*, but the AAA "may in the event of extreme hardship on any party, defer or reduce the administrative fees;"
> (5) Rule 36: The *expenses of the arbitration, including required travel and other expenses* of the arbitrator, AAA representatives, and witnesses, *will be shared equally by the parties*, unless the parties agree otherwise or the arbitrator directs otherwise in the award;
> (6) Rule 37: The parties are to agree with the arbitrator on appropriate compensation for the arbitrator's work, but *if the parties cannot agree with the arbitrator on a rate of compensation, the arbitrator's fee will be set by AAA.* Payment of the arbitrator's fee is made through AAA, not directly between the parties and the arbitrator.[222]

In sum, the AAA Rules provided that a plaintiff must pay for a $500 filing fee, $150 administrative fee per hearing day, and half the arbitrator's fee, which would be set either by negotiating with the arbitrator or by AAA.[223] At this time, arbitrators' fees were, at minimum, $500 to $1000 per day.[224] The AAA Rules did not provide a method for allocating the costs between the parties.[225]

The court then discussed how an arbitrator's fees are unique compared to other arbitration expenses.[226] In the judicial forum, no fee compares to the arbitrator's fee because parties are not responsible for paying for the judge.[227] Also, the AAA rules did not provide for a waiver of arbitrator's fees in case of financial hardship.[228] The court found that "it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from

---

217. *Id.*
218. *Id.*
219. *Id.* at 1469-70.
220. *Id.* at 1470.
221. *Id.* at 1480.
222. *Id.* (emphasis added).
223. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1480 (D.C. Cir. 1997).
224. *Id.* at 1480.
225. *Id.* at 1480-81.
226. *Id.* at 1484.
227. *Id.*
228. *Id.* at 1483-84.

gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court."[229] The high cost of an arbitrator's fees, in addition to other expenses associated with arbitration (such as filing fees and administrative costs), would deter a plaintiff from pursuing a claim because of prohibitive costs.[230] These costs are prohibitively expensive because they are unlike what one would pay in a judicial forum.[231] The D.C. Circuit held that when an employee is required to arbitrate his or her claim, the arbitrator's fees are per se unreasonable, and thus, "an arbitrator's compensation and expenses must be paid by the employer alone."[232] Here, the arbitration agreement was held to be valid, but the employer would have to pay the arbitrator's fees because the addition of this fee would prevent plaintiffs from pursuing their claims in the arbitral forum.[233]

Since *Green Tree* was decided, the D.C. Circuit has switched to using the case-by-case approach[234] as described in Section III.A.[235] The Ninth Circuit, however, still uses the per se standard.[236]

In *Circuit City Stores, Inc. v. Adams*, the Ninth Circuit evaluated when arbitration costs make an arbitration agreement per se unenforceable.[237] Saint Clair Adams applied for a sales position at Circuit City.[238] To be considered for the position, Adams had to sign an arbitration agreement.[239] The agreement provided that Adams would have to pay for half of the arbitration fees unless the arbitrator decided in her favor and shifted all fees to Circuit City.[240] Also, Circuit City retained the option of choosing either litigation or arbitration if it sued Adams.[241]

Adams sued Circuit City, alleging discrimination and state law claims.[242] After the case was removed to federal court, the district court granted Circuit City's motion to compel arbitration.[243] On appeal, Circuit City argued that the current version of its rules did not require Adams to split the costs.[244] The Ninth Circuit rejected this argument, stating that it must base its decision on the version

229. *Id.* at 1484.
230. *Id.*
231. *Id.*
232. *Id.* at 1481.
233. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1481, 1484 (D.C. Cir. 1997).
234. *See* Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259 n.3 (11th Cir. 2003).
235. *See supra* Part III.A.
236. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892-94 (9th Cir. 2002). *See also Musnick*, 325 F.3d at 1259 n.3.
237. *Adams*, 279 F.3d at 892-94.
238. *Id.* at 891.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 892.
243. *Id.*
244. *Id.* at 894 n.4.

of the rules in place at the time the claim arose.[245] The Ninth Circuit stated that a fee-splitting provision that requires an employee to pay part of the arbitrator's fees makes an arbitration agreement unenforceable.[246]

Again, in *Ingle v. Circuit City Stores, Inc.*, the Ninth Circuit reviewed the enforceability of a Circuit City arbitration agreement.[247] As part of Catherine Ingle's application, Circuit City Stores, Inc. required her to sign an arbitration agreement.[248] The arbitration agreement contained a cost-splitting provision requiring the parties to split the arbitration costs at the conclusion of the arbitration.[249] An arbitrator could hold a plaintiff liable for all arbitration costs if Circuit City won the dispute.[250] Moreover, even if the plaintiff won her dispute, she could still be liable for her share and Circuit City's share of the arbitration costs because the arbitrator had discretion in deciding when Circuit City should be liable for all costs.[251] Additionally, the arbitration agreement required a plaintiff to submit a $75 filing fee to Circuit City, not the arbitration provider, when filing a claim.[252]

Ingle sued Circuit City, alleging discrimination claims under federal and state law.[253] The district court denied Circuit City's motion to compel arbitration, finding that "Circuit City's form application for employment unlawfully conditioned Ingle's employment on her agreement to forego statutory rights and remedies."[254] Circuit City appealed.[255]

On appeal, the Ninth Circuit first addressed the provision relating to the filing fee.[256] The court noted that requiring a plaintiff to submit the filing fee to the employer rather than the arbitration provider gave an appearance that "the employee is required to pay [the employer] for the privilege of bringing a complaint.... Moreover, by requiring employees to pay the fee to the very entity against which they seek redress, Circuit City may very well deter employees from initiating complaints."[257] Additionally, the court noted that the provision did not provide a waiver for indigent plaintiffs.[258] Due to this lack of waiver, the Ninth Circuit found that the filing fee provision was unenforceable because it could be prohibitively expensive and was "manifestly one-sided."[259]

---

245. *Id.*
246. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002).
247. 328 F.3d 1165, 1177-78 (9th Cir. 2003).
248. *Id.* at 1169.
249. *See id.* at 1177.
250. *Id.* at 1177-78.
251. *Id.* at 1178.
252. *See id.* at 1177.
253. *Id.* at 1169.
254. *Id.*
255. *Id.*
256. Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1177 (9th Cir. 2003).
257. *Id.*
258. *Id.*
259. *Id.*

The Ninth Circuit then addressed the cost-splitting provision.[260] The court noted that the mere possibility that an unsuccessful plaintiff could be liable for the employer's share of arbitration costs "renders the provision substantively unconscionable."[261] Additionally, the Ninth Circuit stated that it was unfair that a successful plaintiff would be liable for his or her share of the arbitration costs.[262] Thus, the Ninth Circuit found Circuit City's cost-splitting provision was substantively unconscionable.[263]

IV. ANALYSIS

This section addresses the arguments for the case-by-case approach and for the per se rule. It then addresses problems with each approach. Additionally, this section advocates for a new approach to the problem of prohibitive arbitration costs. This article argues that Congress should amend the FAA to limit a plaintiff's arbitration costs. This section then provides a proposed amendment to the FAA and explains why capping the costs is the most fair and effective way to address the problem of prohibitive costs.

A. Problems with the Case-by-Case Approach

Courts have articulated three arguments favoring the case-by-case approach. First, the decisions infer that the case-by-case approach is following a precedent established by *Green Tree*.[264] Second, some courts stress the importance of evaluating the potential plaintiff's individual financial situation when determining whether costs are prohibitively expensive.[265] Third, other courts stress the importance of looking at the overall deterrent effect by evaluating similarly situated potential plaintiffs' financial situations when determining whether costs are prohibitively expensive.[266] This article addresses each argument in turn and then explains why the case-by-case approach is not the best approach in dealing with prohibitive arbitration costs.

As for the first argument, the courts recognize the importance of consistency in applying the law. All but one of the circuits use the case-by-case approach.[267] The Eleventh Circuit recognized that after *Green Tree* was decided, even the D.C. Circuit, which formerly used the per se rule, had switched to the case-by-case standard in *LaPrade v. Kidder, Peabody & Co., Inc.*[268] In *LaPrade*, the D.C. Circuit noted that LaPrade failed to provide proof that the arbitration costs were

260. *Id.* at 1177-78.
261. *Id.* at 1178.
262. *Id.*
263. *Id.*
264. Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1259 (11th Cir. 2003).
265. Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 557 (4th Cir. 2001).
266. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003).
267. *Musnick*, 325 F.3d at 1259.
268. *Id. See also* LaPrade v. Kidder, Peabody & Co., 246 F.3d 702, 708 (D.C. Cir. 2001).

prohibitive, and that as such, her arguments were merely speculative.[269] The court recognized that under *Green Tree*, this speculation is insufficient.[270] The D.C. Circuit affirmed the district court's confirmation of an arbitration award that assessed arbitration fees against LaPrade's award.[271]

Second, courts also argue for the case-by-case approach because they stress the importance of evaluating the potential plaintiff's individual financial situation when determining whether costs are prohibitively expensive.[272] In *Bradford,* following the Supreme Court's analysis in *Green Tree* the Fourth Circuit stressed the need to evaluate a plaintiff's individual financial situation to ensure that the determination that costs are prohibitive is not merely speculative.[273] A majority of the circuits agree with the Fourth Circuit and apply the *Bradford* approach.[274] These circuits evaluate the plaintiff's individual financial situation to determine whether the arbitration costs will pose a financial hardship.[275] Thus, in these circuits, it is important to determine whether the plaintiff individually can afford the arbitration costs and whether the potential costs would prevent him or her from filing a suit.

The third argument for the case-by-case approach is similar to the second argument. It stresses the importance of looking at the overall deterrent effect by evaluating similarly situated potential plaintiff's financial situations when determining whether costs are prohibitively expensive. In *Morrison*, the Sixth Circuit stressed the importance of protecting the deterrent function of certain statutes by evaluating similarly situated potential plaintiffs' financial situations.[276] The Sixth Circuit recognized that if a large number of potential plaintiffs are dissuaded from pursuing their federal anti-discrimination claims, then the deterrent role of these statutes are not protected.[277] This deterrent role encourages employers to engage in fair practices and not discriminate against their employees.[278]

The main problem with the case-by-case approach is that it is inconsistent and indeterminate—a standard that tells courts to examine the facts on a case-by-case basis and "do the right thing" is really no standard at all. To ensure fairness to all plaintiffs, Congress should establish a cap on arbitration costs: When plaintiffs file an arbitration claim, they should pay no more than they would pay if they filed the case in federal court. This cap would minimize plaintiffs' up-front costs and thus prevent plaintiffs from not pursuing claims because of potentially prohibitive costs.

---

269. *LaPrade*, 246 F.3d at 708.
270. *See id.*
271. *Id.* at 704, 708. *See also Bradford*, 238 F.3d at 549, 556.
272. *Bradford*, 238 F.3d at 557.
273. *Id.*
274. *See supra* Part III.A.
275. Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 558 n.6 (4th Cir. 2001).
276. Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663 (6th Cir. 2003).
277. *Id.*
278. *Id.*

In addition, capping arbitration costs would ensure consistency among the circuits because judges would no longer need to use their discretion in analyzing the plaintiff's situation on a case-by-case basis. This is especially important given the types of claims that plaintiffs bring, particularly when considering the deterrent function of the federal anti-discrimination and consumer protection statutes.[279] Many potential plaintiffs pursue important statutory rights, such as consumer protection or Title VII discrimination violations, when arbitrating their claims.[280] An amendment that caps a plaintiff's arbitration costs, however, would resolve this issue immediately as every consumer or employee across the nation would be responsible for one flat fee when pursuing claims through arbitration.

B. Problems with the Per Se Rule

Courts have articulated one main reason for favoring the per se rule, which finds arbitration agreements unenforceable when an employee has to pay for arbitrator's fees. Courts adopting the per se rule reason that plaintiffs should not be required to pay for their "judge" and "jury."[281] This section addresses this argument and then explains why the per se rule is not the most effective way to deal with prohibitive arbitration costs.

The D.C. Circuit recognized in *Cole* that an employee or consumer should not have to pay separate fees for his or her "judge" or "jury" in arbitration.[282] In the federal court system, a plaintiff need only pay one fee, a $350 filing fee.[283] Taxes subsidize compensation for judges and jurors. An arbitrator's fee is unique to arbitration, and the court stated that it was per se unreasonable for an employee to pay for the arbitrator's fees.[284] The Ninth Circuit has since refused to enforce arbitration agreements that allocate a portion of the arbitrator's fees to the employee.[285]

There are two disadvantages to the per se approach. First, much like the proposed AFA, the per se rule fails to recognize the benefits of arbitration.[286] Second, as noted in section II.B, there are additional costs besides arbitrator's fees that may still dissuade a plaintiff from pursuing his or her claims in the arbitral forum.[287]

As to the first disadvantage, arbitration is beneficial because it offers a forum where parties can resolve their disputes more quickly. They can obtain an arbitrator who is experienced and knowledgeable in the area of law that the claim concerns. Arbitration is also a less formal forum that is not tied down by the

279. *See id.*
280. *See, e.g., id.* at 646.
281. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468, 1480-81 (D.C. Cir. 1997).
282. *Id.*
283. *Frequently Asked Questions—Filing a Case, supra* note 107.
284. *Cole*, 105 F.3d at 1468.
285. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 891-92 (9th Cir. 2002).
286. *See supra* Part II.A.
287. *See supra* Part II.B.

rules of evidence or other formal procedures. It also relieves the caseload on the courts' dockets. All of these benefits are very important.[288]

Thus, the per se rule goes too far because it automatically determines that an agreement is unenforceable when a consumer or employee is required to pay for at least a portion of the arbitrator's fees, even when the plaintiff *can* afford to pay.[289] There are other methods of curing the problems that this rule seeks to fix. If Congress amended the FAA to limit the amount a consumer or employee could be charged for arbitrating a case to what he or she would pay when litigating the claim, this issue would be resolved. This article recognizes that other disadvantages to arbitration also need to be addressed,[290] but an amendment limiting the liability of consumer and employees would be the first step in the right direction.

The second disadvantage goes to the holding in *Cole*. Instead of the court holding that requiring an employee to pay for arbitrator's fees is per se unreasonable and refusing to enforce the arbitration agreement, the D.C. Circuit found the agreement enforceable, but required the employer to pay the arbitration fees.[291] The problem with this approach is that other arbitration fees may still dissuade potential plaintiffs from pursuing their claims. These fees include higher filing fees, travel expenses if forced to arbitrate away from home, hearing room rentals, and other administrative fees.[292] When considering all the fees that may be incurred, a plaintiff's attorney may be dissuaded from taking these cases because the verdict may not be large sufficient to cover the attorney's fees, the expenses, and a worthwhile recovery for the plaintiff.[293]

Again, a congressional amendment to the FAA would fix these problems. Capping the arbitration costs for a consumer or employee would eliminate these upfront costs. Potential plaintiffs would no longer be deterred from pursuing their claims. In addition, plaintiff's attorneys would be more likely to arbitrate more cases on a contingency basis.

C. *Congress Should Amend the FAA to Provide for a Cap on a Plaintiff's Arbitration Costs*

This article proposes that Congress should amend the FAA to limit a consumer or employee plaintiff's arbitration costs. A plaintiff should pay no more than he or she would pay to file a claim in federal court. Currently, this means that a plaintiff would pay $350 toward the arbitration costs, and the business or employer would pay the remaining costs.

---

288. The information in this paragraph was taken from a class discussion in Arbitration Law & Procedure taught by Professor Richard Bales in the Spring 2010 semester at Salmon P. Chase College of Law.

289. *See, e.g., Adams*, 279 F.3d at 894.

290. *See* Bales & Irion, *supra* note 5, at 1091-93, 1100-02.

291. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997).

292. *See supra* Part II.B.

293. *See supra* Part II.C.

1. *Proposed Amendment*

Chapter 1 of the FAA should be amended to provide the following provision:

Section 17. Arbitration Costs

(a) Definitions.[294]

(1) "'pre-dispute arbitration agreement' means any agreement to arbitrate ... dispute[s] that had not yet risen at the time of the making of the agreement";[295]

(2) "employment dispute ... means a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act";[296] and

(3) "consumer dispute ... means a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit."[297]

(b) When a consumer dispute or employment dispute arises out of a predispute arbitration agreement, the arbitration costs will be allocated as follows:

(1) The consumer or employee will pay the equivalent of the filing fee in federal court. This fee is currently set at $350.

(2) The business or employer will pay the remaining costs:

(a) the filing fee;

(b) other administrative fees, including but not limited to fees for filing a discovery request with the arbitration provider, requesting a continuance, and requesting written statements of fact or conclusions of law;

(c) the arbitrator's or arbitrators' fee;

(d) the arbitrator's or arbitrators' travel expenses;

(e) if a consumer or employee must arbitrate at a location more than one hundred (100) miles from his or her home, then the business or employer must pay for the travel expenses of the consumer or employee and any witnesses; and

(f) a prevailing plaintiff's attorney's fees, if allocated by an arbitrator pursuant to the appropriate statutory guidelines.

(3) The consumer or employee will be responsible for other costs normally incurred during litigation, including but not limited to attorney's fees, discovery costs, and costs related to consulting an expert witness.

(4) Courts will have limited jurisdiction over arbitration agreements to determine whether a claim is frivolous. If the court finds that a claim is frivolous, then the court can apply Rule 11 sanctions to the plaintiff's attorney, or

294. This amendment is utilizing some of the definitions provided in the Senate version of the Arbitration Fairness Act of 2009. *See* S. 931, 111th Cong. § 401 (2009).

295. S. 931 § 401(5) (internal quotations omitted).

296. S. 931 § 401(3) (internal quotations omitted).

297. S. 931 § 401(2) (internal quotations omitted).

the plaintiff, as well as allocate all of the arbitration costs incurred by the business or employer to the consumer or employee.

2. *How the Amendment Was Drafted*

This section evaluates the proposed amendment further and explains why each provision is needed to maintain a fair and effective FAA.

Section 17(b)(1) is the premise behind this entire article. This provision caps the arbitrations costs of a potential consumer or employee plaintiff to what he or she would pay to file a claim in federal court.[298] Currently, this filing fee is $350. This fee represents the same amount that plaintiffs would pay if they were litigating a case instead of arbitrating it.[299] This provision is important because it removes the burden from plaintiffs, allowing them to more freely pursue legitimate claims. It also provides an incentive to plaintiff's attorneys to arbitrate more claims.[300]

Section 17(b)(2) provides for the various fees for which a business or employer would be liable. This provision encompasses the remaining fees that may be charged by various arbitration providers.[301] This allocation should provide an incentive to the business or employer to choose a low-cost and fair arbitration provider. Section 17(b)(2)(e) provides an incentive for the employer to leave the location of the arbitration open or to designate it at a location close to the potential plaintiffs. While other amendments are needed to safeguard consumers and employees from further deception,[302] this provision is the first step in providing a more fair and effective FAA.

Section 17(b)(3) merely reiterates that a plaintiff will still be responsible for whatever other fees are normally incurred during litigation. These are the expenses that a plaintiff's attorney will usually cover for a plaintiff when retained on a contingency fee basis.[303] Section 17(b)(4) provides protection for the business and employer from having to pay for frivolous lawsuits.

D. Why Congress Should Limit a Plaintiff's Arbitration Costs

Limiting a consumer or employee's arbitration costs to what he or she would pay if litigating a suit in federal court is the most fair and effective way to enforce predispute arbitration agreements. These limits give some plaintiffs what they want—a low-cost forum similar to litigation—while still maintaining the liberal policy favoring arbitration. Plaintiffs can minimize their costs, and this cap also provides additional incentives for plaintiff's attorneys to take on more arbitration cases on a contingency fee basis.

---

298. *Frequently Asked Questions—Filing a Case*, *supra* note 107.
299. *Id.*
300. *See supra* Part II.C.
301. *See supra* Part II.B.
302. *See* Bales & Irion, *supra* note 5, at 1091-93, 1100-02.
303. *See supra* Part II.B.

The business or employer should pay any additional fees above the $350 filing fee.[304] This rule will provide an incentive to businesses and employers to draft fairer arbitration agreements. If the business or employer is required to bear the brunt of the arbitration costs regardless of the outcome of the dispute, they will be more likely to include provisions that are fair to both the business or employer *and* the consumer or employee. To ensure a consistent application, however, the amendment will need to come from Congress. While additional amendments to the FAA will be needed to continue to ensure a fair arbitral forum,[305] an amendment limiting the plaintiff's liability is a great start toward making the FAA more fair and effective.

There are two main advantages to amending the FAA. First, arbitration fees will be consistent across the nation. Second, the amendment will balance some plaintiffs' preference for litigation with the liberal policy favoring arbitration.

To begin with, as illustrated in section II.B, arbitration fees vary across the nation since arbitration providers differ. To ensure fairness to plaintiffs, there should only be one flat fee for plaintiffs. Because of employers' and businesses' more sophisticated bargaining power, employers and businesses are in a better position to cover the rest of the arbitration fees. Additionally, the proposed amendment protects the employer or business from frivolous claims by requiring plaintiffs to cover costs and by providing for possible Rule 11 sanctions if a frivolous claim is filed.

Next, the plaintiffs in the previously discussed cases attempted to avoid arbitration and instead litigate their cases. This shows that at least some plaintiffs would rather litigate cases than arbitrate them. However, it is also likely that some plaintiffs would still prefer to arbitrate their cases regardless of the upfront costs. It is important to balance both types of plaintiffs' preferences. Some prefer to litigate because of prohibitive arbitration costs; other plaintiffs will most likely prefer to arbitrate their cases because the benefits of arbitration outweigh the monetary costs. Because of arbitration's benefits, the liberal policy favoring arbitration should still be followed. Arbitration is still an advantageous alternative to litigation and should still be an available option, even in mandatory arbitration agreements. This article's approach balances all preferences—the plaintiffs' as well as the government's—by capping the costs of arbitration while still making mandatory arbitration agreements enforceable regardless of costs.

V. CONCLUSION

Arbitration fees vary drastically across the nation among the different arbitration providers.[306] Because employers and businesses are using mandatory arbitration agreements more often, plaintiffs must have some protection from

304. Because the employer would then be paying for all remaining fees, including the arbitrator's fee, there is a possibility of the appearance of arbitral bias. However, Congress could create additional amendments to the FAA to eliminate this problem. *See supra* Part II.E.

305. *See* Bales & Irion, *supra* note 5, at 1091-93, 1100-02.

306. *See supra* Part II.B.

high arbitration fees. Moreover, in some instances, the costs of arbitration may prohibit a plaintiff from pursuing his or her claim.

In *Green Tree*, the Supreme Court indicated that an arbitration agreement might be unenforceable because of prohibitive costs.[307] But, the circuits are split on how to determine when costs are prohibitive.[308] A majority of the circuits evaluate the plaintiff's situation on a case-by-case basis to determine when arbitration costs are prohibitively expensive.[309] In contrast, the Ninth Circuit follows a per se rule, holding that an arbitration agreement is unenforceable when a plaintiff has to pay for the arbitrator's fees.[310]

These approaches should not be followed because they do not provide for consistent fees across the nation; nor do they properly balance the plaintiff's interests with the benefits of arbitration. Instead, Congress should amend the FAA to provide for consistent arbitration fees. These fees need to be capped to protect the plaintiff from unfair arbitration. This cap would also properly balance the plaintiff's interests with the benefits of arbitration as well as the liberal policy favoring arbitration.

307. *See generally* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

308. *See, e.g.*, Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 669 (6th Cir. 2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 891-92 (9th Cir. 2002); Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 557 (4th Cir. 2001); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1468 (D.C. Cir. 1997); Phillips v. Assocs. Home Equity Servs., Inc., 179 F. Supp. 2d 840, 847 (N.D. Ill. 2001).

309. Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1258-59 (11th Cir. 2003).

310. *Adams*, 279 F.3d at 894.