Determining the Proper Standard for Invalidating Arbitration Agreements Based on High Prohibitive Costs: A Discussion on the Varying Applications of the Case-by-Case Rule

by

Mark B. Gerano & Richard Bales

__ Transactions: Tenn. J. Bus. L. ___ (fall 2012)

Abstract

Compulsory arbitration agreements placing a high risk of prohibitive costs on plaintiffs can make it difficult for plaintiffs to bring their disputes and effectively vindicate their statutory claims. The Supreme Court has indicated that high costs can make an arbitration agreement unenforceable, but the Court has not yet articulated a clear standard on when agreements should be invalidated on that basis. While most courts agree that a case-by-case inquiry is appropriate, the courts are split on whether to apply the case-by-case inquiry to the individual plaintiff's situation, or to a broader class of prospective plaintiffs. This article argues that the proper case-by-case inquiry is the broader approach, which evaluates the agreement's impact on a group of prospective plaintiffs because it provides the most protection of the deterrent function of anti-discrimination statutes for the broad group of parties the statutes are designed to protect.

I. INTRODUCTION

Arbitration is a common means of resolving commercial disputes. Although arbitration is an attractive alternative to litigation, arbitration can be disadvantageous to a potential plaintiff because of high costs.[1] The United States Supreme Court has made clear its "liberal policy favoring arbitration agreements" whenever possible.[2] However, in many cases, a party was at a disadvantage when it signed the arbitration agreement and did not understand the agreement's cost implications. Examples of agreements signed during unequal bargaining situations include adhesion contracts or employee handbook agreements. These agreements give rise to the question of whether an agreement can be invalidated because of its cost implications.

The U.S. Supreme Court in *Green Tree Financial Corp. v. Randolph* left open the possibility of an arbitration agreement being invalidated because of prohibitive costs.[3] However, the *Green Tree* Court did not rule on how detailed the showing of prohibitive costs must be for an agreement to be invalidated, only that if the costs deterred a party from vindicating its rights, then the agreement should be invalidated.[4] The *Green Tree* court left it to the circuit courts to examine the cost issues and decide when an agreement should be invalidated.[5]

The circuit courts have taken varying approaches on how to invalidate an agreement based on cost.[6] One circuit considers any agreement that places significant costs on the party *per se* invalid.[7] The majority of jurisdictions apply a case-by-case analysis to determine if an agreement should be invalidated.[8] These circuits, however, use varying approaches in applying the case-by-case test.[9] The Fourth Circuit evaluates the cost impact of the agreement based on the individual

---

[1] Michelle Eviston & Richard A. Bales, *Capping the Costs of Consumer and Employment Arbitration*, 42 U. TOL. L. REV. 903, 903 (2011).
[2] Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).
[3] Green Tree Fin. Corp. v Randolph, 531 U.S. 79, 90 (2000).
[4] *Id.* at 91.
[5] *Morrison*, 317 F.3d at 660.
[6] Eviston and Bales, *supra* note 1, at 904.
[7] Circuit City Stores Inc. v. Adams, 279 F.3d 891, 892 (9th Cir. 2002).
[8] Eviston & Bales, *supra* note 1, at 904.
[9] *Morrison,* 317 F.3d 669; Bradford v. Rockwell Semi-Conductor Systems Inc., 238 F.3d 549, 557 (4th Cir. 2001).

party's situation.[10] By contrast, the Sixth Circuit applies the case-by-case test and evaluates the cost impact to a similarly situated "group of plaintiffs."[11]

This article argues that the best method of assessing prohibitive costs is the case-by-case approach that evaluates the costs to a group of potential plaintiffs as opposed to making an individualized inquiry like in the Fourth Circuit.[12] Part II of this article provides background on arbitration costs as opposed to litigation costs and examines the *Green Tree* opinion that sets the stage for invalidating arbitration agreements based on prohibitive costs. Part III explains the federal circuit split between the "group of plaintiffs" approach found in *Morrison v. Circuit City Stores Inc.,* and the "individual plaintiff" approach in *Bradford v. Rockwell Semiconductor Systems Inc*. Part IV analyzes the advantages and disadvantages of the group-of-plaintiffs approach and the individual-plaintiff approach. Part V of this article concludes that the best method of analyzing prohibitive costs is the group-of-plaintiffs approach used in the Sixth Circuit in the *Morrison* case.[13]

II. BACKGROUND

A. The FAA and the Supreme Court's Preference For the Enforcement of Arbitration Agreements.

Arbitration is deeply rooted in both the English and American legal systems.[14] The early courts were hostile to resolving disputes through arbitration.[15] Because judges in English courts were paid based on the number of cases in which they ruled, the judges believed arbitration would infringe on their ability to make money because they would decide fewer cases.[16] In the early 1920s the industrialization of the United States and the resulting increase in disputes led to a push for

[10] *Bradford*, 238 F.3d at 557.
[11] *Morrison*, 317 F.3d at 669.
[12] *Morrison*, 317 F.3d at 663.
[13] *See id.*
[14] JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL 30934, THE FEDERAL ARBITRATION ACT: BACKGROUND AND RECENT DEVELOPMENTS 2 (2002).
[15] *Id.*
[16] *Id.*

a more favorable view of arbitration agreements.[17] The original proponents of the FAA were merchants who wished to strengthen internal arbitrations within trade associations.[18] Trade associations had three goals for arbitration.[19] First, they hoped arbitration would control the costs of resolving disputes and therefore reduce the cost of doing business.[20] Second, they hoped the rules of decision would be supplied by industry insiders rather than by judges with little knowledge of trade practices.[21] Third, they wanted disputes to be kept "in the family" rather than put on expensive public display in the courts.[22] On February 12, 1925 their wishes were granted when President Calvin Coolidge signed the Federal Arbitration Act (FAA).

The FAA was written to provide an equal alternative to the judicial forum for resolving disputes. The purpose of section 2 of the Federal Arbitration Act was to place arbitration agreements "upon the same footing as other contracts, where [they] belong."[23] Like today, litigation in the 1920s was very costly and it took a long time for parties to achieve an adequate remedy.[24] By creating the FAA, Congress agreed that many issues that normally would proceed to litigation were more easily resolved in arbitration, so long as the agreements were valid and enforceable.[25]

Recent Supreme Court decisions have gone even further and have created a strong preference of enforcing the agreements in all types of claims.[26] Even in cases involving major public policy questions, arbitration agreements have been enforced.[27] A number of cases have made clear that all claims are subject to mandatory arbitration unless

---

[17] *Id.*
[18] David S. Schwartz, *If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration,"* 8 NEVADA L. J. 400, 403 (2007).
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] H.R. REP. No. 68-96 (1924).
[24] *Id.*
[25] *Id.*
[26] Southland v. Keating, 465 U.S. 1, 10 (1984); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91 (2000).
[27] Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc., 473 U.S. 614 (1985).

there is a clear intent from Congress to bar the claim from the arbitral forum.[28]

B. The Price of Arbitration vs. The Price of Litigation

Because many parties do not have unlimited liquid assets, the cost of resolving a dispute is an important consideration and may be the deciding factor for whether to pursue a claim.[29] This section first describes the approximate cost of arbitration and then compares the cost of arbitration to the cost of resolving a dispute in court. This article only describes the "forum costs" of arbitration and litigation. Forum costs are costs a party must pay to have a claim heard in a particular forum.[30] Forum costs are only part of the "transactional cost" of litigation, which also includes attorneys' fees, discovery costs, expert witnesses, and other expenses borne by a party regardless of the forum.[31]

1. American Arbitration Association

The American Arbitration Association ("AAA"), one provider of arbitration services in the United States, charges both administrative fees and arbitrator fees in each arbitration proceeding.[32] The fees are listed in several different fee schedules and are determined based on the damage amount sought and on the type of claim being arbitrated (consumer, commercial, labor or employment).[33] This section evaluates the costs of two types of arbitration proceedings commonly found in agreements entered into without any meaningful negotiations: consumer and employment arbitration.

---

[28] Schwartz, *supra* note 19, at 407.

[29] Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003).

[30] Public Citizen, *Report on Costs of Arbitration* 40 (2002).

[31] *Id.*

[32] *See* Eviston & Bales *supra* note 1, at 907.

[33] Consumer Arbitration Costs, http://www.adr.org/sp.asp?id=22039 (last visited March 9, 2012)[hereinafter Consumer Arbitration Costs]; *see also* Employment Arbitration Rules, 1 *available at* http://www.adr.org/sp.asp?id=32904 (last visited March 9, 2012)[hereinafter Employment Arbitration Rules].

A. Consumer Arbitration

Parties in a dispute involving a consumer contract must pay both filing fees and arbitrator fees to use the AAA for arbitration.[34] Fees are allocated between the consumer and the business according to the AAA schedule, and are based on the amount of money in controversy.[35]

Arbitrator fees for the AAA are based on the size of the claim.[36] If the amount in controversy is less than $75,000, a desk-arbitration[37] costs $250, and an in-person arbitration hearing costs $750 per day.[38] If the amount in question is over $75,000, the arbitrator's fee is the amount in the arbitrator's panel biography.[39]

The allocation of fees is based upon the amount of money in controversy. As long as neither party's claim nor counterclaim exceeds $10,000, the consumer must pay one half of the arbitrator's fee up to $125 and is not responsible for administrative fees and the business must pay $975 in administrative fees and whatever remains for the arbitrator's fee.[40] If either party's claim or counterclaim involves between $10,000 and $75,000, the consumer must pay one half of the arbitrator's fee up to $375 and is not required to pay administrative fees.[41] The business is required to pay $1275 in administrative fees (only $900 if a hearing does not occur) and the remainder of the arbitrator's fee.[42] In summary, for disputes involving less than $75,000 the consumer could pay up to $375 of the arbitrator's fee and does not pay any administrative or filing fees.[43] The business is responsible for all remaining costs.[44]

---

[34] Consumer Arbitration Costs *supra* note 23.
[35] *Id.*
[36] *Id.*
[37] A desk arbitration is where the case is decided based solely on the written documents, and no face-to-face hearing is held.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Consumer Arbitration Costs, *supra* note 23.
[42] *Id.*
[43] *Id.*

Consumer arbitration is significantly more expensive when the amount in controversy exceeds $75,000 or when a non-monetary issue is the subject of the dispute.[45] Claims and counterclaims exceeding $75,000 require parties to pay fees according to the Commercial Fee Schedule.[46] According to the Commercial Fee Schedule, the filing party pays the fees.[47] The fees vary based on the amount in controversy.[48] For example, a claim involving $300,000 requires the filing party to pay an initial "filing fee" of $4350 and a "final fee" of $1750.[49] The final fee is due at the first hearing.[50] A filing party in a non-monetary claim must pay a filing fee of $3350 and a final fee of $1250.[51] In addition to the administrative fees, each party must pay half of the arbitrator's fee and half of the other fees incurred.[52] In summary, in consumer disputes where actual damages in excess of $75,000 are sought, or in a non-monetary dispute, a party seeking arbitration could face significant costs to pursue the claim in arbitration.

B. Employment Arbitration

When an arbitration request in the employment setting is first filed, the AAA makes an initial administrative determination to determine whether the dispute arises from an employer-promulgated plan or an individually negotiated employment agreement or contract.[53] According to AAA rules, "this determination is made by reviewing the documentation provided to the AAA by the parties, including, but not limited to, the demand for arbitration, the parties' arbitration program or

[44] *Id.*
[45] Eviston & Bales, *supra* note 1 at 909.
[46] Consumer Arbitration Costs, *supra* note 23.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] Commercial Arbitration Rules, http://www.adr.org/si.asp?id=5379 (last visited March 9, 2012) [hereinafter Commercial Arbitration Rules].
[51] *Id.*
[52] *Id.*
[53] Employment Arbitration Rules, *supra* note 23.

agreement, and any employment agreements or contracts between the parties."[54] The reason it is important to determine the type of agreement is that the fee-schedule differs for each type.[55] Parties in any type of employment arbitration agreement could agree to a different cost allocation scheme than the default rules of the AAA.

In an "employer promulgated plan," an employee's fees are limited. The employee must pay only $175 for the filing fee.[56] The employer bears most of the burden when it has compelled arbitration through company police and must pay the remainder of the filing fee, the arbitrator's fees, hearing fees, room rental fees, and any other expenses.[57]

If AAA classifies the dispute as a dispute arising from an individually negotiated employment agreement, the Commercial Fee Schedule applies.[58] The amount in controversy affects the amount of money that the filing party must pay.[59] Unlike in consumer arbitration, there is no "small claim" provision that caps the filing party's expenses for smaller claims.[60] In the employment setting, the filing party bears the administrative fees according to the fee schedule no matter how small the amount of actual damages being sought.[61] A party seeking actual damages of $1 is required to pay $975 in administrative expenses.[62] In a larger claim such as a Title VII claim where actual damages sought equal $300,000, the filing party must pay $6100 in administrative expenses.[63] In addition to administrative expenses, the parties involved in employment arbitration where the arbitration agreement is an individually negotiated contract are required to split all other associated costs including arbitrator's fees, room

[54] *Id.*
[55] *Id.*
[56] *Id.* at 40.
[57] *Id.* at 41.
[58] *Id.*
[59] Employment Arbitration Rules, *supra* note 23.
[60] *Id.*
[61] *Id.* at 44.
[62] *Id.*
[63] *Id.*

rental, and expenses.[64] Beyond just estimating the costs based on the fee schedule, one court cited to a Public Citizen Study that found the costs of arbitrating an $80,000 claim could be as high as $11,625.[65]

In summary, it is critical to determine which type of arbitration exists to accurately anticipate costs. The system for determining the type of agreement is fairly subjective and as a result prospective litigants will assume the worst-case scenario before filing.[66] If a prospective litigant is faced with the possibility of paying high arbitration costs, the litigant could be deterred from filing the claim.

C. Fee Waivers and Other Means of Moving Costs

The AAA offers fee waiver for those who meet certain economic criteria.[67] A party can be considered for fee waiver if its annual gross income is below 200% of the federal poverty line.[68] The annual poverty line for a family of four in the lower 48 states is $22,350.[69] The poverty line is $10, 890 for a single person.[70] If a party has a family of four, and an AGI of less than $44,700, the party may be considered for the fee waiver.[71] Despite the financial guideline, the AAA reserves the right to approve or deny any hardship requests it wishes.[72] Once a party has demonstrated its need for a waiver through affidavits and other evidence, the AAA may appoint a single pro bono arbitrator for a one-day hearing.[73]

---

[64] *Id.* at 45.
[65] *Morrison*, 317 F.3d at 646; Eviston & Bales, *supra* note 1 at 9.
[66] *Morrison*, 317 F.3d at 665.
[67] Administrative Fee Waivers and Pro Bono Arbitrators Services, http://www.adr.org/sp.asp?id=22040 (last visited April 21, 2010) [hereinafter Fee Waivers].
[68] *Id.*
[69] 2011 HHS Poverty Guidelines, http://aspe.hhs.gov/poverty/11poverty.shtml (last visited March 9, 2012 [hereinafter Poverty Guidelines].
[70] *Id.*
[71] *Id.*
[72] Fee Waivers *supra* note 53.
[73] *Id.*

2. Other Providers of Arbitration

In addition to the AAA, two other major providers of arbitration services are the National Arbitration Forum (NAF) and Judicial Arbitration and Mediation Services/Endispute (JAMS).[74] The fee procedures for the other arbitration providers are mostly comparable with the basic structure of the AAA's fee schedule.[75] For example, the NAF requires the filing party to pay fees, but rather than pay two administrative fees there are three fees that must be paid.[76] For a filing party in a dispute where $300,000 in actual damages is being sought, the fees for the NAF arbitration are a $500 filing fee, a $500 commencement fee, and a $1000 administrative fee, for a total of $2000.[77] In addition to these fees, the party requesting the hearing pays the arbitrator's fee.[78] NAF charges fees for other small items like discovery requests and written reports.[79] The costs for NAF are a little bit cheaper on their face than the costs of the AAA; however a 2002 Public Citizen Study identified the NAF costs, taken in their totality, were significantly higher than the AAA's costs.[80]

3. The Cost of Litigating a Case in Court

Three primary costs are associated with litigating a dispute in court: attorney's fees, litigation expenses, and forum costs.[81] This section explains each of the costs in more detail and identifies their impact on the parties in litigation.

A party entering into litigation will always pay some type of attorney's fees unless the party is litigating *pro se*. Attorney's fees may be very high, especially in cases where complex

---

[74] Public Citizen, *Report on Costs of Arbitration* 40 (2002).
[75] NAF Fee Schedule, http://www.adrforum.com/resource.aspx?id=606 (last visited April 6, 2012) [hereinafter NAF Fee Schedule].
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] Public Citizen, *Report on Costs of Arbitration* 42 (2002).
[81] Eviston & Bales, *supra* note 1 at 912.

discovery is required; however, such cases are often litigated on contingency fee arrangements.[82] Contingency fee arrangements started becoming popular in the United States in the mid 1800's.[83] Contingency fees were at one point labeled "the individual's key to the courthouse."[84] The key issue with contingency fee arrangements is that a party can eliminate the up-front or "pay as you go" attorney fees and can litigate with little, if any, out-of-pocket expense.

Second, parties must pay "litigation expense" type fees. These fees include travel, expert witnesses, and other expenses associated with litigation.[85] There is no specific data showing whether litigation expenses are higher in court versus arbitration.[86] A party's attorney normally pays the up front costs of litigation expenses until the case is resolved.[87]

The third cost to a party in a court dispute is the forum fees. The forum fee of court currently consists only of the filing fee.[88] For a party to file a claim in Federal court, the cost is $350.[89] Unlike in arbitration conducted by the AAA, the fee schedule in court is not based on the size of the dispute and there is no cost difference for different types of claims.[90]

Forum cost is the primary cost difference between arbitration and court resolution. For example, a party seeking $300,000 in actual damages in a Title VII claim would be forced to pay $6100 in administrative expenses and half of the arbitration fees just to file and proceed through the arbitral forum.[91] In addition to the forum cost, the party would still be responsible for

---

[82] Public Citizen, *Report on Costs of Arbitration* 4-5 (2002).
[83] Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 728 (2010).
[84] *Id.*
[85] Public Citizen, *Report on Costs of Arbitration* 4-5 (2002).
[86] Christopher R. Drazohal, *Arbitration Costs & Contingent Fee Contracts,* 59 VAND. L. REV. 729, 736 (2006).
[87] *Id.*
[88] *Id.*
[89] Fee Schedule, http://www.ohsd.uscourts.gov/feeschedule.htm (last visited March 9, 2012).
[90] *Id.*
[91] Employment Arbitration Rules, *supra* note 23.

attorney's fees and litigation expenses.[92] The same party in Federal court at least gets into court for $350 plus whatever expense is agreed upon between the party and the attorney and the litigation expenses.[93] The high price of arbitration as opposed to court resolution may be enough to deter a party from vindicating its rights.[94]

A. Judicial Treatment of Excessive Costs

1. *Green Tree* and Invalidation of Arbitration Agreements Based on Cost

Arbitration costs could be very high for a party who chooses or is forced to resolve a dispute in arbitration, and as a result, the party might be deterred from filing a claim.[95] In the 2000 decision *Green Tree Financial Corp. v. Randolph*, the Supreme Court faced the question of whether an arbitration agreement could be found unenforceable due to prohibitive costs.[96] Although *Green Tree* arose out of a consumer claim, its principles related to arbitration agreements are broadly applicable.

In *Green Tree*, Larketta Randolph financed a mobile home through Green Tree Financial Corporation.[97] The financing agreement contained an arbitration clause[98] providing that "all disputes arising from or relating to the contract, whether arising under case law or statutory law, must be resolved in binding arbitration."[99] The clause was silent regarding which party would bear the costs of arbitration.[100]

---

[92] *Id.*
[93] Fee Schedule, http://www.ohsd.uscourts.gov/feeschedule.htm (last visited March 9, 2012).
[94] *Morrison*, 317 F.3d at 665.
[95] *Id.* at 664.
[96] Green Tree Fin. Corp. v Randolph, 531 U.S. 79, 93 (2000).
[97] *Id.* at 82.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 84.

Randolph sued Green Tree in federal court alleging Green Tree violated the Truth in Lending Act (TILA),[101] by failing to disclose charges in Randolph's loan.[102] Randolph also amended her claim to include a violation of the Equal Credit Opportunity Act,[103] for the requirement for her to arbitrate the statutory claim.[104] After Randolph sued, Green Tree filed a motion to compel arbitration that was granted by the district court.[105] Randolph appealed to the Eleventh Circuit, which reversed the district court's order to compel arbitration.[106] The Eleventh Circuit was concerned with the silence regarding which party would bear the costs of arbitration.[107] The court held the agreement was unenforceable because the risk of "steep" arbitration costs interfered with Randolph's ability to effectively vindicate her statutory claims.[108] The Supreme Court then granted certiorari to review the case.

Randolph argued to the Supreme Court that she was unable to vindicate her statutory rights because of the high risk of incurring significant costs in arbitration.[109] Randolph reasoned the agreement's silence regarding costs created a significant risk that she would be obligated to pay a large sum of money.[110] The Court acknowledged that large arbitration costs might deter someone from vindicating their statutory rights; however the Court noted the lack of evidence Randolph would actually bear the costs if the case proceeded to arbitration.[111] The Court held the mere risk of Randolph being saddled with the costs was too speculative to justify finding the arbitration agreement unenforceable.[112] The Court held that invalidating the agreement

[101] 15 U.S.C. § 1601-169 (West 2012).
[102] *Green Tree Fin. Corp.,* 531 U.S. at 83.
[103] 15 U.S.C. §§ 1691-169 (West 2012).
[104] *Green Tree Fin. Corp.,* 531 U.S. at 83.
[105] *Id.*
[106] *Id.* at 84.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Green Tree Fin. Corp*., 531 U.S. at 84
[111] *Id.*
[112] *Id.* at 91

on such grounds was contrary to the liberal policy favoring enforcement of arbitration agreements.[113] Additionally, the Court held "where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs," and that Randolph did not meet that burden.[114]

Although the Supreme Court did not invalidate the particular agreement in *Green Tree* based upon prohibitive costs,[115] the Court did leave open the possibility that other agreements could be invalidated based upon cost issues.[116] However, the Court did not provide direction on how detailed the showing of prohibitive expenses must be for a court to invalidate an agreement.[117] The lack of precedent in this area has led to varying approaches at the circuit court level,[118] and has created the need for a consistent approach to be adopted by the Supreme Court.

2. The *Per Se* Rule.

Since *Green Tree*, one circuit still holds arbitration agreements containing fee-splitting provisions requiring a plaintiff to pay any part of the arbitrator's fee make the agreement *per se* unenforceable.[119] In *Circuit City Stores Inc. v. Adams*, St. Clair Adams applied for a job at Circuit City and signed an arbitration agreement when he was hired.[120] The agreement required Adams to potentially have to pay half of the arbitrator's fees.[121] A dispute ensued and Adams sued Circuit City alleging discrimination and state claims.[122] When the case was litigated, the Ninth Circuit held that agreements requiring an employee to pay

[113] *Id.*
[114] *Id.*
[115] *Green Tree Fin. Corp*., 531 U.S. at 92
[116] *Id.* at 90.
[117] *Id.* at 92.
[118] Eviston & Bales *supra* note 1 at 915.
[119] *Adams*, 279 F.3d at 894.
[120] *Id.* at 891.
[121] *Id.*
[122] *Id.*

even part of the arbitrator's fees make the agreement unenforceable as a matter of law.[123] The court based its reasoning on precedent that a person should not be required to pay the salary of an arbitrator any more than a person would be required to pay the salary of a judge hearing claims.[124]

The *per se* rule is followed only in the Ninth Circuit.[125] Most other courts now follow the case-by-case rule discussed in the next section of this article.[126]

3. Case-by-Case Rule

Most courts evaluate the prohibitive costs of arbitration using a case-by-case analysis.[127] The Fourth Circuit adopted its case-by-case approach in *Bradford v. Rockwell Semi Conductor Systems Inc.* Generally the case-by-case test adopted by the courts has contained three parts. First, the court evaluates whether a party can pay the fees.[128] Second, the court calculates the cost differential between arbitration and litigation.[129] And third, the court decides if the difference in cost is so significant that it would deter parties from bringing claims.[130] Where costs could deter parties from bringing claims the court should invalidate the agreement.[131]

Although most courts agree that the case-by-case inquiry is the most appropriate, different variations of the case-by-case test have emerged.[132] The Fourth Circuit, in *Bradford* evaluated the "case" based on the particular situation of the individual plaintiff.[133] A modified approach has emerged in the Sixth Circuit as well as in parts of the Second Circuit that apply the case-by-case analysis from the viewpoint of

---

[123] *Id.* at 894.
[124] *Id.*
[125] Eviston & Bales, *supra* note 1 at 915.
[126] *Id.*
[127] *Id.*
[128] *Bradford*, 238 F.3d at 556.
[129] *Id.*.
[130] *Id.*
[131] *Id.*
[132] Eviston & Bales, *supra* note 1 at 917.
[133] *Bradford*, 238 F.3d at 556.

a group of similarly-situated potential litigants.[134] The primary difference between the two approaches is that the Fourth Circuit, *Bradford* approach focuses on the financial situation of the specific party involved in the dispute, whereas the Sixth Circuit's focus is on the impact of the cost provision on similarly situated individuals, not just the particular party in the litigation.[135] The next section of this article explains the difference in approaches in more detail.

III. CIRCUIT SPLIT

In *Green Tree* the Supreme Court hinted at applying a case-by-case standard for invalidating an arbitration agreement based on prohibitive costs, but the Court never squarely adopted a test.[136] As cases have been decided, all the federal courts have adopted some type of case-by-case rule with the exception of the Ninth Circuit, which still uses a *per se* approach.[137] Although most courts have adopted the case-by-case approach, a circuit split has emerged on how to apply the case-by-case rule.[138] This section explains two of the predominant methods to apply the case-by-case analysis, one that evaluates the cost to an individual plaintiff and the other that evaluates the cost impact on a larger group of plaintiffs.

A. *Bradford's* Individual Plaintiff Case-by-Case analysis

The Fourth Circuit adopted its version of the case-by-case analysis in *Bradford v. Rockwell Semiconductor Systems Inc*.[139] when it answered the question of whether arbitration agreements with cost-splitting provisions should be found invalid regardless of the circumstances of the case.[140]

---

[134] Eviston & Bales, *supra* note 1 at 917.
[135] *Id.* at 920.
[136] *Green Tree Fin. Corp.,* 531 U.S. at 92.
[137] Circuit City Stores Inc. v. Adams, 279 F.3d 892 (9th Circuit 2002).
[138] *See Bradford*, 238 F.3d at 558; *Morrison*, 317 F.3d at 658.
[139] *Bradford*, 238 F.3d at 558.
[140] *Id.* at 554.

John Bradford worked for Brooktree Corporation (Brooktree) in 1996 when Brooktree was in the process of being acquired by Rockwell Semi Conductor Systems Inc. (Rockwell).[141] As a condition of employment, Bradford signed a "Mutual Agreement to Arbitrate Claims."[142] The agreement included statutory claims.[143] The agreement also provided for the parties to "share equally" the fees and costs of the arbitrator.[144] The stated purpose of the fee-splitting arrangement was "to ensure that the arbitrator is not biased in any way in favor of one party because that party is paying all or most of the costs."[145]

The dispute arose as a result of Rockwell informing Bradford that his employment was discontinued.[146] Bradford believed his discharge was based on age discrimination and undertook two legal actions: first a demand to arbitrate based on an alleged violation of an age discrimination statute,[147] and second, a lawsuit alleging discrimination.[148] The arbitrator ruled against Bradford's demand to arbitrate.[149] Nearly simultaneously, the district court granted summary judgment against Bradford in the lawsuit.[150] In granting summary judgment, the court held Bradford did not meet his burden of showing the arbitration agreement's cost-splitting provision made the agreement unenforceable because the financial hardship it caused him.[151]

Bradford appealed the district court's ruling to the Fourth Circuit.[152] Bradford argued on appeal that the fee-splitting provisions contained in the arbitration agreement made the agreement invalid as a matter of law.[153] Bradford's reasoning was that provisions creating a high cost risk to an employee could deter victims of discrimination from

---

[141] *Id.* at 551.
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] Bradford, 238 F.3d at 551.
[146] *Id.*
[147] *Id.*
[148] *Id.* at 552.
[149] *Id.* at 551.
[150] *Bradford*, 238 F.3d at 552.
[151] *Id.*
[152] *Id.*
[153] *Id.*

having their rights effectively vindicated.[154] Bradford argued that the deterrent and remedial functions of the federal anti-discrimination statutes were undermined when employees were forced to arbitrate their claims because the high cost to arbitrate makes an employee unable to vindicate statutory rights because the employee could not afford the up front cost of arbitration.[155] As a secondary argument, Bradford argued that even if the agreement was not *per se* unenforceable, that he had shown enough personal hardship and personal deterrence that the agreement should not have been enforced against him.[156]

The Fourth Circuit rejected Bradford's position that arbitration agreements containing fee-splitting provisions were *per se* invalid.[157] There is currently one circuit that still applies the *per se* rule.[158] All other circuits have shifted to some type of case-by-case test.[159] The court reasoned that the critical inquiry is whether or not the arbitral forum is an adequate and accessible substitute to litigation.[160] The most important issue was whether the individual party had an adequate ability to effectively vindicate his or her statutory rights.[161] The court was not willing to hold the agreements unenforceable as a matter of law because circumstances in each case could be different with respect to each plaintiff's situation.[162] For these reasons, the court rejected Bradford's argument that arbitration agreements that contain cost-splitting provisions are invalid as a matter of law.[163]

After rejecting the notion of a *per se* rule, the court applied a case-by-case test to determine whether or not Bradford was in fact deterred from vindicating his statutory claims. Applying its interpretation of *Green Tree* the court held that each plaintiff should have the burden to prove the claims were not suitable for arbitration.[164] The court looked at two issues in deciding if the claimant had met its burden. First, the court

---

[154] *Id.*
[155] *Id.*
[156] *Bradford*, 238 F.3d at 552.
[157] *Id.* at 556.
[158] *See Adams*, 279 F. 3d at 892.
[159] Eviston & Bales, *supra* note 1 at 915.
[160] *Bradford*, 238 F.3d at 556.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*

evaluated the individual claimant's ability to pay.[165] In this case, Bradford had already proceeded through arbitration and was billed $4,470.88.[166] The court ruled Bradford did not show evidence that he was unable to pay the amount billed.[167] Second, the court analyzed the expected cost differential between arbitration and litigation, and whether it was so substantial to deter the bringing of claims.[168] The court ruled against Bradford on the issue of whether the costs deterred him from bringing a claim.[169] In fact, Bradford had already brought a claim to arbitration, and did so prior to filing the federal lawsuit.[170] The court reasoned that Bradford's actual bringing of a claim to arbitration evidenced that he was NOT deterred by the cost of arbitration.[171] The court noted that although in some cases the existence of large costs could prevent a litigant from having the ability to effectively vindicate its rights, in this case, Bradford's rights had been effectively vindicated and he was not deterred from filing a claim because of the costs.[172]

A. *Morrison's* Group of Plaintiffs Case-by-Case Analysis

In *Morrison v. Circuit City Stores Inc.*, the Sixth Circuit created a revised case-by-case analysis that evaluated the possible "chilling effect" of the cost-splitting provision on similarly-situated plaintiffs rather than just on the party actually involved in the dispute.[173] *Morrison* was a consolidation of two cases involving employees who were terminated, sued their employers for discrimination, and the employers in both situations were attempting to compel arbitration.[174] For the purposes of this section, since the two fact situations in the consolidated case are largely similar, only the facts of the Morrison situation will be discussed.

---

[165] *Id.* at 558.
[166] *Bradford,* 238 F.3d at 558.
[167] *Id.*
[168] *Id.* at 556.
[169] *Id.* at 556.
[170] *Id.* at 552.
[171] *Id.*
[172] *Id.*
[173] *Morrison*, 317 F.3d at 663.
[174] *Id.* at 652.

Lillian Peebles Morrison was a highly qualified candidate [175] applying for a managerial position at a Circuit City store in Cincinnati, Ohio.[176] During the application process, Morrison signed a "dispute resolution agreement" that required the resolution of all disputes arising out of her employment with Circuit City to be resolved in an arbitral forum.[177] The agreement included all state and federal statutory claims, tort claims, and contract claims.[178] The arbitrations were to proceed under a company manual called the "Circuit City Dispute Resolution Rules and Procedures."[179] The rules included a cost-splitting clause that required Morrison to pay a $75 filing fee,[180] as well as half the costs of the arbitration unless the arbitrator used its discretionary power and required one party to pay more.[181]

Circuit City hired Morrison in December of 1995 for the managerial position, and then two years later fired her.[182] After her termination, Morrison sued Circuit City alleging race and sex discrimination.[183] Circuit City removed the case to federal court and filed a motion to compel arbitration.[184] The district court granted Circuit City's motion to compel, and Morrison appealed to the Sixth Circuit.[185]

On appeal, Morrison argued the cost-splitting provisions contained in the agreement denied her from being able to vindicate her statutory rights.[186] The first issue the court addressed in this case was whether to apply a *per se* approach like in the Tenth, Eleventh, and D.C. Circuits at the time this case was decided.[187] The court rejected the argument that cost-splitting provisions make an agreement *per se* invalid, and interpreted *Green Tree* to require a case-by-case approach to

---

[175] *Id.* at 654.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Morrison*, 317 F.3d at 654.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Morrison*, 317 F.3d at 656.
[185] *Id.*
[186] *Id.* at 658.
[187] *Morrison*, 317 F.3d at 659.

determine whether the cost schemes interfered with vindication of rights.[188]

The court next looked for guidance on how to apply the case-by-case test found in *Green Tree* and evaluated the Fourth Circuit approach used in *Bradford*.[189] The court acknowledged the case-by-case analysis in the Fourth Circuit was appropriate, but identified two negative aspects of it.[190]

First, the court reasoned it was difficult for a plaintiff to have a concrete estimate of projected costs at the start of a dispute.[191] During its consideration of this problem, the court considered the possibility of using a post-hoc judicial review of arbitration awards to protect the plaintiff from high costs.[192] The court rejected the idea of judicial review because of its narrowness and because once a party has arbitrated, the party has already assumed the risk of incurring the costs.[193] The problem for the claimant arises on the front end of the dispute when he or she is using cost as a factor in deciding whether or not to file the claim.[194] Reviewing the cost after the arbitration places the claimant in a "catch-22" because once the proceedings are concluded and at the point of review, the claimant has already gone too far down the path of having to pay and cannot turn back.[195] The second negative aspect of the *Bradford* approach was that it did not adequately protect the deterrent functions of federal anti-discrimination statutes.[196]

After evaluating the various standards for invalidating the agreements, the court adopted a "revised case-by-case approach."[197] The court held potential litigants needed an opportunity to show that the potential costs of arbitration were such that the litigants and other similarly situated plaintiffs would be deterred from vindicating their statutory rights if forced to arbitrate.[198] The Sixth Circuit approach

---

[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Morrison*, 317 F.3d at 659.
[193] *Id.* at 662.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Morrison,* 317 F.3d at 662.

differed from the Fourth Circuit's approach in *Bradford* by evaluating the "chilling effect" of enforcing the agreement upon similarly situated potential plaintiffs, rather than by evaluating only the individual plaintiff's situation.[199] The court preferred this approach to protect the deterrent function of anti-discrimination statutes because it better addressed protection of the deterrent functions of anti-discrimination statutes by looking at the impact to the people the statute is designed to protect.[200]

The next issue the court addressed was how to decide whether or not the parties were actually deterred from vindicating rights because of the cost-splitting provisions.[201] The court held that any court reviewing cost arrangements should look to "average or typical" arbitration costs and the difference between the cost of arbitration and the cost of litigation because the party will do the same.[202] In reviewing the costs, the court should also discount the possibility that the party may not be required to pay based on fee shifting or because of success on the merits.[203] The analysis should be on the "worst-case scenario" because most parties will err on the side of caution and not take the risk of incurring significant fees by filing a claim.[204]

Ultimately, the court held Morrison met the burden in showing that the cost-splitting provisions would deter her and similarly situated plaintiffs from pursuing their claims in the arbitral forum.[205] During its analysis, the court evaluated what arbitration would cost each plaintiff and found that the cost was high enough to deter them and similarly situated plaintiffs from filing their claims.[206]

The final issue in the *Morrison* case was severability.[207] Because the agreement contained a severability clause, the court followed state contract law in determining whether or not the cost-allocation clause could be severed from the agreement, and severed the cost-splitting scheme from the arbitration agreement.[208] In the Morrison case,

---

[199] *Id.* at 663.
[200] *Morrison*, 317 F.3d at 664.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id.* at 669, 676.
[206] *Id.*
[207] *Morrison*, 317 F.3d at 675, 680.
[208] *Id.*

arbitration had already occurred due to an outside agreement, and Morrison did not have to pay any costs, so the arbitration award was upheld.[209]

Thus, the *Morrison* court evaluated the impact of the cost-splitting provision on both the party involved and a class of similarly situated potential claimants and found that although Morrison showed financial hardship, she was compelled to arbitrate due to a severability clause that allowed the agreement to be enforced without the cost-splitting provision.[210]

IV. ANALYSIS

This Part of the article will first address the two negative aspects of the *Bradford* approach that evaluates each individual plaintiff's situation separately. It then will address how *Morrison's* "group of plaintiffs" approach provides solutions to the two pitfalls. Finally, it will argue that the *Morrison* approach is the best-reasoned way to apply the case-by-case analysis.

A. The Two Problems With the Individualized-Plaintiff Approach

The individualized-plaintiff approach in *Bradford* creates two primary problems. First, in the initial stages of proceedings, it is very difficult for a plaintiff to accurately project potential costs. Second, the individualized-plaintiff approach does not adequately protect the deterrent functions of anti-discrimination statutes. This section examines each of the two problems in detail.

1. Plaintiff's Difficulty in Determining Concrete Costs

The first problem with the individualized-plaintiff approach is that in the initial stages of litigation, it is difficult for a plaintiff to accurately project arbitration costs. Some relatively concrete numbers seem to be required to pass the *Bradford* test.[211] The *Bradford* court required

[209] *Id.* at 675.
[210] *Id.* at 675, 680.
[211] *Bradford*, 238 F.3d at 556.

analysis of the plaintiff's expected cost of arbitration and the difference between the cost of arbitration and the cost of court resolution.[212] In cases where a party seeks to invalidate an arbitration agreement because of prohibitive costs, the party bears the burden to demonstrate why the costs warrant invalidation of the agreement.[213] A party will have a difficult time meeting its burden of proof under the *Bradford* analysis because at the beginning of the proceedings, the party may not have a good grasp of what the costs might be.

Cost ambiguity in arbitration agreements makes it very difficult to apply the individualized-plaintiff analysis in *Bradford*. *Green Tree's* holding that silence on costs was not enough to show the risk of incurring prohibitive costs set the stage for plaintiffs having difficulty proving prohibitive costs.[214] For example, consider an arbitration agreement that allows for different arbitration providers, contains ambiguous language as to how many arbitrators would hear the case, and contains ambiguity involving the possibility of shifting of attorney's fees. A party faced with such a situation would have a difficult time calculating a concrete projected cost in order to meet the burden under the individualized-plaintiff approach. In this case, the potential is very high for a party to end up with a very high cost burden; however the party will have a very difficult time proving what the real risk might be. Most people faced with this decision would err on the side of caution and not pursue the claim.[215] Even in less ambiguous agreements, a party could still have difficulty calculating the potential costs because at the beginning of a proceeding, prior to discovery, a party may not know the size or complexity of the issue at hand. Without such information, a party will not be able to produce a good estimate of potential costs.

2. The Individualized-Plaintiff Approach Fails to Protect the Deterrent Function of Anti-Discrimination Statutes.

The second negative aspect of the individualized-plaintiff approach is that is fails to protect the deterrent function of anti-discrimination statutes because it allows the potential for a large number

[212] *Id.*
[213] *Green Tree Fin. Corp*., 531 U.S. at 92.
[214] *Id.*
[215] *Morrison*, 317 F.3d at 665.

of plaintiffs to be deterred from vindicating their rights.[216] An agreement that would deter a large group of potential litigants should be held unenforceable.[217] Based on this view, if a court were to look merely at an individual plaintiff's situation as opposed to the "chilling effect" the agreement has on a larger group of potential litigants, the deterrent function will not be protected.

Disputes arising out of statutory claims can be arbitrated as long as the arbitration allows a plaintiff to effectively vindicate their statutory rights.[218] *Gilmer* makes clear that anti-discrimination statutes serve two purposes: remediation and deterrence.[219] The remedial function of the statutes serves to make the plaintiff whole from injuries suffered as a result of the violation.[220] On the other hand, the deterrent function serves to protect a much larger group of potential plaintiffs. The goal of the deterrent function is to "deter conduct which has been identified as contrary to public policy and harmful to society as a whole."[221] The Supreme Court stated the importance of protecting the deterrent function of the statute in Title VII cases in *Teamsters v. United States.*[222] The Court in dicta stated, "[T]he private litigant [in Title VII] not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."[223] The Court's language suggests that if a plaintiff were unable to fully vindicate his or her rights under Title VII, then the deterrent function would be undermined.

The issue of critical importance that the individual-plaintiff test fails to address is that if the court's analysis is based only on the situation of the plaintiff involved in the litigation, a court may miss the fact that the cost-splitting provision interferes with the deterrent function for the rest of the group that the statute is designed to protect.[224] Although one plaintiff may be able to handle the costs and would not be deterred from

---

[216] *Id.* at 661.
[217] *Id.*
[218] *Gilmer*, 500 U.S. at 28.
[219] *Id.*
[220] Price Waterhouse v. Ann B. Hopkins, 490 U.S. 228, 265 (1999).
[221] *Id.* at 264.
[222] Teamsters v. United States, 431 U.S. 324, 364 (1977).
[223] *Id.*
[224] *Morrison*, 317 F.3d at 663.

filing a claim, other plaintiffs protected by the statute may not be able to afford to do the same. If only the single plaintiff's situation is assessed, the larger impact of the cost-provision, and the potential chilling effect it may have on litigation may never be known.

B. Post Hoc Judicial Review as an Alternative Approach

Several courts have hinted at the attractiveness of using post hoc judicial review to guarantee the adequacy of the arbitral forum.[225] Courts have reasoned that if the issue were whether the costs of arbitration make the arbitral forum too expensive, then determining the actual costs after the arbitration is complete would be far easier than trying to force plaintiffs and reviewing courts to "speculate" beforehand what the costs might be.[226] Although judicial review may seem attractive, there are two primary arguments against it.

The first argument against post hoc judicial review of arbitration awards is that a party faces a nearly impossible task in showing that arbitration costs were an actual deterrent after the claim has already been filed and arbitrated.[227] If a party has already proceeded through arbitration, and received a bill, it seems that a court would draw the conclusion that the party was not deterred since it actually pursued the claim. The *Morrison* court reasoned that deterrence occurs early in the process.[228] "If we are not able to resolve the cost splitting issue until the end, we will know from the beginning who has lost, and that is the plaintiffs who were deterred from filing their claims at all."[229]

---

[225] *See, e.g.,* *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 16 (1st Cir.1999)* ("[If unreasonable fees were to be imposed ... the argument ... could be presented by the employee to the reviewing court."); *Koveleskie v. SBC Capital Mkts., Inc.,* 167 F.3d 361, 366 (7th Cir.) ("[W]e are convinced that judicial review of arbitration awards is sufficient to protect statutory rights."; *Boyd v. Town of Hayneville,* 144 F.Supp.2d 1272, 1280-81 (M.D.Ala.2001). (noting that "judicial review" of any arbitration award is available in rejecting argument that potential costs of arbitration were excessive); *Arakawa v. Japan Network Group,* 56 F.Supp.2d 349, 355 (S.D.N.Y.1999). (maintaining jurisdiction "over any subsequent petition with respect to the award").

[226] *Id.*

[227] *Id.*

[228] *Morrison*, 317 F.3d 662.

[229] *Id.*

The second argument against post hoc judicial review is that most parties faced with high upfront costs will err on the side of caution and not file the claim.[230] Parties considering bringing claims will look at the worst-case scenario for potential cost.[231] If a party is forced to arbitrate first, pay later, then have judicial review; the party bears the risk of arbitrating, having to pay a significant bill, and then potentially losing in judicial review. For this reason, the party is placed in a very difficult position, and normally will be deterred from filing a claim.[232] Because of this "catch 22" situation, judicial review of arbitration costs does not adequately protect the deterrent function of anti-discrimination statutes.

C. The *Morrison* Group Approach's Benefits

This section will discuss the two reasons the *Morrison* approach is the best approach for determining if an arbitration agreement should be invalidated due to high prohibitive costs. It will then discuss the primary counter argument against the *Morrison* group-of-plaintiffs approach.

First, the *Morrison* approach is the most effective means to protect the deterrent functions of anti-discrimination statutes. As opposed to an individualized approach like in *Bradford*, the *Morrison* approach looks at the "chilling effect" on a group of potential plaintiffs.[233] If a cost-splitting provision would deter a significant number of plaintiffs from vindicating their claims, the deterrent function of federal statutes would be undermined. The reason the "group-of-plaintiffs" approach is preferred over the "individual-plaintiff approach" is because if only one plaintiff's personal situation were evaluated, the possibility exists that the particular plaintiff might have the desire and resources to fight the claim, and a court might find that the particular plaintiff was not deterred. Just because one plaintiff was not deterred does not mean that the agreement would not deter other plaintiffs. The point of ensuring the deterrent function of the statute is not undermined has nothing to do with a particular plaintiff's situation, but rather with the impact of the cost-splitting provision in the aggregate. If only one plaintiff's situation is assessed, a court might not uncover that the

[230] *Id.* at 665.
[231] *Id.*
[232] *Id.*
[233] *Id.* at 663.

deterrent function was undermined even though it may have been undermined for many other similarly situated persons.

The second reason the *Morrison* approach is preferred is because it places less importance on the individual employee's financial situation and instead looks at the financial situation of the group of employees as a whole. The *Morrison* inquiry focuses on the individual plaintiff's personal situation only as representative of the class.[234] The *Bradford* approach; however stresses the need to look at the individual plaintiff's specific financial situation.[235] The difference is that *Morrison* takes into account other factors such as job description, socioeconomic background, and other factors to identify the class of "similarly situated plaintiffs."[236] The reason *the Morrison* approach is more effective is because it prevents the possibility of having "outliers" like when an extremely wealthy plaintiff exists amongst a group of many plaintiffs who are far less wealthy. If the inquiry is on an individual's situation, and the individual happens to be very wealthy, an agreement might be found valid when in the cases of many other identically situated employees, the exact same agreement would deter them from effectively vindicating their rights.

A counter argument against the *Morrison* group approach is that it arguably is contrary to some of the language in *Green Tree*. In *Green Tree*, the Supreme Court held that the risk Randolph would be saddled with prohibitive costs was too speculative to justify invalidating the agreement.[237] This language seems to suggest that the Court made, or would have made, its assessment based on Randolph's particular situation. If this reading of *Green Tree* is accurate, the *Morrison* group approach could be inconsistent with *Green Tree*. On the other hand, *Green Tree* also contains language indicating that the Court evaluated how "claimants" fare under the *Green Tree* arbitration clause.[238] This language seems to suggest that the Court at least evaluated the impact to a group of potential litigants. In summary, the Court seems to have some language on either side of the argument of whether or not *Morrison's* group approach is contrary to the language of *Green Tree*.

---

[234] *Morrison*, 317 F.3d at 663.
[235] *Bradford*, 238 F.3d at 558.
[236] *Morrison*, 317 F.3d at 663.
[237] *Green Tree Fin. Corp*., 531 U.S. 79 at 91.
[238] *Id.* at 90.

V. CONCLUSION

Arbitration agreements are becoming increasingly common across the United States as an alternative to resolving a dispute in the court system. Many studies suggest that the "forum costs" of arbitrating a claim are significantly higher than resolving the same claim in court. It is critical for plaintiffs to have some type of protection from the possibility of incurring very high arbitration fees and thus preventing them from having an accessible forum to vindicate their statutory rights.

The Supreme Court in *Green Tree* first held that an arbitration agreement could be invalidated because of high prohibitive costs. The *Green Tree* court however did not give a test for how to evaluate agreements to determine their enforceability. The majority of courts have adopted a case-by-case approach in determining whether a cost is prohibitive enough to cause the agreement to be held unenforceable. The circuits are split on whether to assess the situation of particular plaintiff involved in the dispute, or to assess the situation based on a broader group of similarly situated litigants.

Courts should follow the approach that assesses prohibitive costs based on the impact of the costs on a larger group of similarly situated potential plaintiffs because doing so best protects the deterrent functions of anti-discrimination statutes, and provides the most protection to plaintiffs who could potentially be deterred from filing their claims if the agreement were enforced against them.