The Federal Arbitration Act Needs a Due Process Protocol

By Richard A. Bales and Michelle Eviston

Introduction and History

When the Federal Arbitration Act[2] (FAA) was enacted in 1925, it was meant to strengthen commercial associations' internal arbitration.[3] In the years since its passage, the type and number of arbitrations have increased exponentially. In part, this increase is because pre-dispute arbitration agreements[4] are now widely used for consumer and employment contracts.

Another reason for the dramatic rise in the number of arbitrations is a change in the United States Supreme Court's attitude toward arbitration. In the past thirty years, the Court has expanded the reach of the FAA. In the *Mitsubishi* Trilogy[5] and *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court held that statutory claims could be arbitrated.[6]

In *Gilmer*, the Court held for the first time that pre-dispute arbitration is enforceable even when statutory discrimination rights are at issue.[7] Robert Gilmer was a financial services manager who, after he was fired, sued Interstate claiming age discrimination under the Age Discrimination Employment Act of 1967 (ADEA).[8] Gilmer had an agreement, as required by the New York Stock Exchange, to arbitrate any dispute arising from his employment or termination.[9] The Fourth Circuit compelled Gilmer to arbitrate because it found nothing in the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements.[10] The Supreme Court agreed with the Fourth Circuit and compelled Gilmer to arbitrate.[11] The Supreme Court used the *Mitsubishi* Trilogy for support, finding that statutory claims are arbitral under the FAA.[12]

Although the Court in Gilmer found no congressional intent in the history of the ADEA to preclude arbitration of an ADEA claim, the ADEA was enacted in 1967, and at that time, arbitration was used only for labor and commercial disputes.[13] It is likely that when Congress created the ADEA it never considered that statutory claims would be resolved by arbitration rather than in court. The Supreme Court, however, has consistently endorsed arbitration whether it is by pre-dispute or post-dispute agreement.

Scholars, commentators, plaintiffs' lawyers, and some members of Congress have not shared the Supreme Court's endorsement of compulsory arbitration, particularly for statutory discrimination claims and consumer disputes. Many employees, as a condition of employment, must sign mandatory arbitration contracts, and consumer contracts often contain hidden arbitration clauses.

As Congress continues to create new employment and consumer laws, arbitration of disputes continues to expand. However, Congress has not changed the FAA to keep up with this expansion. As a result, an amended FAA is long overdue. Although Senator Russ Feingold and Congressman Hank Johnson filed a bill in the 111th Congress, entitled the Arbitration Fairness Act of 2009 (AFA), to amend the FAA,[14] this proposed amendment is not the most effective way to resolve this issue. Instead of attempting to correct the problems with the FAA in today's world, the bill proposes to ban all forms of mandatory arbitration for consumer, employment, and franchise contracts.

This article proposes addressing the concerns with the FAA by amending it to ensure more equitable arbitration contracts and procedures. An amended FAA will save time and expense in resolving disputes. This article seeks to balance the Supreme Court's liberal policy favoring arbitration with the concern that "mandatory arbitration clauses are slowly eroding the legal protections that should be available to all Americans."[15] The second section of this article will briefly summarize the congressional hearings and the concerns the bill sought

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to address and explain why the AFA is not the best method of addressing those concerns. The third section will describe why the FAA should be amended. Finally, the fourth section will focus on the changes needed in providing a fair arbitration procedure, such as picking neutral arbiters, ensuring adequate discovery, and not severely limiting statutes of limitation.

The Arbitration Fairness Act of 2009

This section addresses the provisions of the AFA and the congressional hearings for the bill which occurred in 2007. Although the various individuals involved in the congressional hearings disagreed on whether the Arbitration Fairness Act of 2009 was an appropriate amendment, most agreed that changes to the arbitral forum are necessary.

The AFA seeks to forbid mandatory arbitration in employment, consumer, franchise, and securities contracts. Senator Feingold stated that mandatory arbitration contracts are unfair because individuals "hav[e] to choose either to accept a mandatory arbitration clause or forgo securing employment or needed goods and services." Proponents of the bill argued that the FAA has exceeded its original reach when courts decide that mandatory pre-dispute employment and consumer arbitration agreements are enforceable.[16] Proponents of the bill argue that under the current FAA, mandatory arbitration presents numerous disadvantages to consumers and employees, including prohibitive costs, a lack of discovery and civil due process, and no meaningful judicial review.[17] Dean Richard M. Alderman of University of Houston Law School also stated that arbitration was disadvantageous because there is no consistent application of the law by arbitrators and a lack of meaningful judicial review does not allow for "courts…to develop and adapt the law as society and business changes."[18]

Opponents of the AFA argue that the proposed amendments are too broad[19] and that the amendments fail to recognize the benefits of arbitration, including cheaper costs and quicker results.[20] Mark A. De Bernardo, Executive Director and President of the Council for Employment Law Equity, has suggested that parties such as employees and consumers are more likely to prevail on their claims in arbitration than in litigation, in part because here are no motions to dismiss or motions for summary judgment in arbitration. He also stressed that it's difficult for plaintiffs with smaller claims to obtain legal representation. In addition, he argued arbitration may be especially beneficial for employees because it allows them to resolve their issues with their employer while still keeping their job.[21]

While Richard Naimark, Senior Vice President of the American Arbitration Association opposed the proposed amendment, he recognized the need for change in arbitration legislation without prohibiting mandatory arbitration agreements. Instead of banning all mandatory arbitration, he stressed it would be more effective to pass legislation that creates a required due process protocol for arbitration proceedings and a code of ethics for arbitrators. This would ensure fairness in the arbitral system. He provided some suggestions of the protections that could be provided by a due process protocol. They include: reasonable costs, a reasonable location for the proceeding, the right to legal representation, no unilateral choice of the arbitrator, full disclosure of arbitrator conflicts, and no limitation of remedies.[22] However, rather than amending the FAA, Naimark suggests that companion legislation is more appropriate so that the case law surrounding the FAA is not disturbed.[23]

The AFA is not the most efficient way to cure the problems with mandatory arbitration. Simply forbidding all mandatory arbitration is too broad an approach. It also fails to embrace the Supreme Court's liberal policy favoring arbitration, as well as the benefits of arbitration. There are other alternatives that Congress should take instead, such as requiring due process protections during arbitration proceedings.

Naimark's approach provides the best balance of the concerns of both the supporters and the opponents of this bills and as such, is the one that Congress should adopt. However, because it is important for arbitration law to be in one statute, Congress should instead amend the FAA to provide for more fair and equitable arbitration proceedings. An amendment would not, as Naimark argues, provide ambiguity and hostility toward arbitration,[24] but would provide consistency that is needed nationwide for arbitration proceedings.

Congress Should Amend the FAA

The FAA does not explicitly define what constitutes a fair arbitration proceeding. This article presupposes several points. First, for some employees and consumers,

the present state of pre-dispute arbitration agreements is not entirely fair. Some pre-dispute contracts have the hallmarks of adhesion contracts, with inadequate consideration and unfair terms.[25] Because those employers and corporations that use these contracts do so for the majority of their employees and consumers, and these entities arbitrate many more claims, pre-dispute arbitration may favor these repeat players.[26] Moreover, these arbitration agreements often are presented to employees and consumers on a take-it-or-leave-it basis, often in a context in which the employee or consumer has no real option other than to take it. This has led some to conclude that forced arbitration is inherently unfair.[27]

Second, this article presupposes that without pre-dispute arbitration, court dockets would be overloaded with claims. In many cases civil litigation can take years to reach the trial stage. In addition, workers and consumers with relatively small claims and few resources are more likely to get dispute resolution in the alternative forum.[28] This is because some employees' potential recovery does not justify the investment of an experienced labor and employment attorney in litigation preparation.[29]

Third, this article presupposes that employers and corporations that want to use pre-dispute arbitration would rather have fair and equitable agreements than have Congress eliminate mandatory arbitration completely. This article takes the approach of recognizing both arguments for and against mandatory arbitration and attempts a solution that keeps pre-dispute arbitration but makes it more equitable.[30]

Why Changes in Arbitration Must Come from Congress

Although section 2 of the FAA expressly permits courts to revoke arbitration contracts on grounds that support "revocation of any contract,"[31] the Supreme Court has pieced together a federal preemption doctrine under the FAA and has adopted a liberal policy favoring arbitration.[32] First, the Court interpreted the FAA to preempt any conflicting state laws that specifically target arbitration agreements.[33] Later, it firmly established that state legislatures cannot enact laws that restrict, directly or indirectly, arbitration agreements.[34] The Court has routinely held that the FAA trumps state laws dealing with arbitration.[35] Because the FAA preempts state laws in this way, Professor Thomas Carbonneau states that "the FAA—in reality—is the national American law of arbitration."[36]

The current Supreme Court is enamored with arbitration in a way that even several successive Obama appointees are unlikely to change. Therefore, changes in how to interpret the FAA are unlikely to come from the Supreme Court, at least in the near term. Because the Court will not do it and the Court has determined that state legislatures cannot do it, any reform of the current system regarding enforceable contracts and procedures governing arbitration must come from Congress, and the one route Congress should consider is creating companion legislation to the FAA.

Why Congress Should Amend the FAA

In 1925, Congress passed the FAA to permit judicial enforcement of arbitration agreements covering contract disputes between parties of roughly equal bargaining power.[37] The Court has stressed that arbitration is an extension of the parties' "consent not coercion."[38] But scholars have consistently argued that the current state of mandatory arbitration is unfair and has given power to employers and corporations to displace the judiciary's role in enforcing both common law claims and statutory rights.[39]

Even defenders of mandatory arbitration agree that the statute needs to be updated to add legitimacy to the public's view of arbitration as a means of resolving disputes.[40] Although greater protections are needed in the area of contract formation, it is of utmost importance that arbitration proceedings are fair for all involved. New arbitration legislation should ensure that parties are accorded due process through equitable procedures.

When considering due process as to arbitration procedure, Congress may want to look at the work begun by the drafters of the Employment Due Process Protocol. The Protocol had its genesis in the Dunlop Commission in 1993. This Commission found that labor arbitration was fair to employees because employer power was counter-balanced by union power. The Commission found, however, that there is no such counter-balance for non-union employees.[41] The Commission then asked the National Academy of Arbitrators, in conjunction with a diverse array of constituencies, to draft a list of standards for arbitration

agreements to resolve statutory employment claims.[42] The Protocol recommended standards to help individual employees in the arbitration process; for example, it states that an employee has the right to a spokesperson and access to information relevant to the employee's claims.[43] It also developed criteria for arbitrator selection.[44] One of the goals of the Protocol was to create a level playing field for employees and employers.

The Protocol, as important as it was, is now, like the FAA, out of date. Courts are faced with issues that the Employment Due Process Protocol drafters never anticipated.[45] Although the adoption of the Protocol by American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS) was an important step, not all arbitrations are conducted by AAA or JAMS. Not all employers use providers that use the Protocol; some employers choose less expensive providers, and other less-scrupulous employers prefer a for-profit "sham provider."[46] In *Walker v. Ryan Family Steak Houses, Inc.*, the Middle District of Tennessee found that the arbitration provider EDSI "relied on the favor of its employer-clients for its livelihood."[47] For employers that choose providers that use the Protocol, the Protocol does not address important issues such as what constitutes adequate discovery, whether employees can meaningfully participate in the selection of arbitrators, and the enforceability of contracts that limit remedies.[48]

Despite the Protocol's shortcomings, it did recognize that non-union employees need additional protection in arbitration. Yet, the FAA has remained relatively unchanged since its 1925 form. Currently the statute is too thin, primarily in the areas of contract formation and due process procedures, to provide adequate protection to employees and individual consumers. Although it is important to cure the problems with contract formation of mandatory arbitration agreements, such as a lack of notice and consent, it is more important for Congress first to focus on providing for due process protections.

Due Process Protections

One of the concerns behind the proposed AFA is lack of fairness in arbitration proceedings. Rather than ban all mandatory arbitrations like the AFA proposes, Congress should instead amend the FAA to provide for due process protections.

Problems with Procedure in FAA

Codifying an equitable procedure is fundamental in providing for employees and consumers in arbitrations. Providing a neutral but knowledgeable pool of arbitrators is essential. Discovery must be adequate, particularly in employment disputes. Also, some rights should not be prospectively waived. These include a right to a class action, shortened statutes of limitation, and a waiver of statutory remedies. In addition, it is important that arbitration costs do not prohibit potential plaintiffs from pursuing their claims. Finally, it is necessary that arbitrators consistently apply the correct law and that courts offer meaningful judicial review of arbitration decisions.

Arbitral Selection

Arbitral selection is still a hot topic for scholars and plaintiff's advocates alike. The FAA provides a backwards-looking protection for bias. As the Supreme Court stated in *Gilmer*, quoting section 10(b), the FAA "protects against bias, by providing that courts may overturn arbitration decisions where there was evident partiality or corruption in the arbitrators."[49] However, this does not allow a pre-arbitration challenge when the entire arbitrator process itself is fundamentally unfair.[50] A party should not have to go through the arbitration first and then allege bias in post-arbitration judicial review.[51] Codifying a fair arbitrator selection process in the FAA would eliminate both pre- and post-hearing judicial review and would deter bad actors that continue to abuse the system.

Some scholars and employment attorneys see possibilities for abuse in arbitrator selection or at least a lack of consistency. Anecdotal evidence and a perusal of the ABA employment arbitrators' roster indicate the dearth of neutral arbitrators available. Arbitral selection is complex; scholars have identified several inter-related factors that could influence selection including the repeat-player effect, submerged bias, and employer-appointed panels.

The repeat-player effect is that employers and corporations are likely to arbitrate more than one case over time while individuals usually arbitrate only once. The situation grants an advantage to the employer or corporation because those entities are more familiar with the potential pool of arbitrators, which allows the entity to more easily select a favorable arbitrator.

Another advantage, sometimes unintentional, is called submerged bias. This bias occurs when an arbitrator's interest in being hired by the employer or corporation in the future predisposes the arbitrator to favor that organization rather than the individual.[52] Empirical research studies have attempted to track the repeat player effect,[53] but the findings are equivocal.[54]

The most flagrant problem with arbitral selection is when an employer reserves to itself, in the arbitration contract, exclusive or inordinate control in selecting the arbitrator or creating the pool of arbitrators. The Sixth Circuit has found that even if a panel contains some of the most respected arbitrators in the region, if the employer has exclusive control in creating the pool of arbitrators, the arbitration agreement is unenforceable.[55]

The Protocol considered a standard procedure whereby the parties select from a panel list compiled by a neutral agency such as AAA.[56] However, even this standard procedure has problems. Within the AAA's acceptable list, there are current practicing employment advocates. A currently practicing advocate is likely to see the issues framed in his or her worldview, and has current relationships with local counsel. It is unlikely that most attorneys who have defended employers or represented employees can one day flip an internal switch and become truly "neutral."

In the AAA rules, a plaintiff or a defendant can strike a practicing attorney, but this gives the parties fewer arbitrators to choose from in the remaining pool. One problem with statutory employment cases is that they are complex and need experienced attorneys or former judges to arbitrate.[57] The Protocol's guideline provides that the procedure should include "a jointly selected neutral arbitrator who knows the law."[58] But some mandatory arbitration contracts do not follow the Protocol.[59]

The FAA should be amended so that all arbitrations with statutory employment claims, even those not following the Protocol, provide the best potential neutral pool of arbitrators and that the neutral pool should not include currently practicing employment law advocates. Moreover, the FAA should be amended to indicate that one party should not have exclusive control over the selection of the arbitrator.

Discovery

The FAA provides little guidance, aside from stating that the arbiter has subpoena power and should not unfairly restrict the parties from presenting relevant evidence on how the arbitration proceeding's discovery should be conducted.[60] Discovery is at the heart of much of today's litigation and it is essential in employment discrimination suits. For arbitration to be a fair alternative to litigation, full and fair discovery must be available to the participants.

The Due Process Protocol provides little guidance on the minimum standard needed for discovery. Many courts allow arbitration clauses that give the arbitrator discretion to limit discovery, but do not enforce clauses that impose absolute limitations or forbid discovery completely.[61] However, discovery can take many forms. Interrogatories, although relatively inexpensive, rarely provide the kind of information needed to develop pretext. To develop discriminatory pretext, deposing the decision-makers is essential. How much discovery is adequate varies from case to case.

Some arbitration procedures do not allow for depositions at all. For example, the Financial Industry Regulatory Authority (FINRA),[62] which regulates stock brokers and makes them sign mandatory arbitration agreements regardless of employment, does not allow depositions in arbitration, except in statutory discrimination claims.[63] Absent statutory discrimination claims, FINRA's Code of Arbitration Procedure for Industry Disputes allows depositions only if a party can show extraordinary circumstances, such as when a witness is ill or unavailable.[64] FINRA's exception for depositions in statutory discrimination claims is a relatively recent change to its code.[65] FINRA's "no deposition rule" also applies to whistle-blower retaliation claims, making it difficult for the attorney to adequately prepare for a whistle-blower case, particularly when proving pretext.[66]

The importance of accessibility to depositions was illustrated in the Eastern District of Pennsylvania's decision in *Ostroff v. Alterra Healthcare Corp.*[67] Sharon Ostroff moved her mother into a nursing home operated by Alterra Healthcare Corp. The nursing home required Ostroff, as a condition of her mother's admittance, to sign an arbitration agreement. The agreement contained a provision regarding discovery permitting

depositions only of expert witnesses. In addition, the arbitration agreement gave claimants less time than Alterra to designate exert witnesses.[68] Ostroff argued that the agreement was substantively unconscionable, in part because of the discovery provision. The district court noted that this provision effectively disallowed Ostroff from being able to obtain statements from Alterra employees and residents. Instead, these statements would only be available if the other residents volunteered them. Moreover, pursuant to the Pennsylvania Rules of Professional Conduct, Ostroff would not be able to obtain a volunteered statement from the employees.[69] Therefore, the district court recognized that the inability to obtain depositions would unfairly disadvantage Ostroff in the arbitration proceedings, and thus found the agreement to be substantively unconscionable.[70]

Parties to arbitration need access to information to fully develop their cases. In particular, employees need information from decision-makers, supervisors, and sometimes co-workers, information which would unlikely be available unless the witness were deposed. While discovery may need to be limited in some aspects to ensure the proceeding moves quickly, parties still need the opportunity to acquire enough information to effectively pursue their claims. Without adequate discovery, including depositions, parties are not afforded a fair process, and the lack of information impedes the parties from effectively pursuing their claims.

Class Action Waivers

To resolve the current state of the law, including the Supreme Court's recent decision in *Stolt-Nielsen v. AnimalFeeds*, concerning class action waivers, the FAA should be amended to ban prospective class action waivers. Courts are currently split on the enforceability of such clauses. Even where courts are inclined to find the clauses unconscionable or a burden on the vindication of statutory rights, the parties seeking invalidation still bear the burden of proof.[71]

For example, the Southern District of New York enforced a class action waiver in *Sherr v. Dell, Inc.* When Sam Sherr bought a laptop computer from Dell, he agreed to Dell's Terms and Conditions, which contained an arbitration agreement. Also, the agreement included a provision that banned class action suits. Sherr, on behalf of a class, sued Dell for an alleged defect with his laptop.[72] After Dell moved to compel arbitration,[73] Sherr argued that the provision banning class actions was unconscionable and thus the agreement was unenforceable. In addition, Sherr also argued that the California Supreme Court's decision in *Discover Bank v. Superior Court* should apply.[74]

The Southern District of New York further discussed the holding in *Discover Bank*. The California Supreme Court held that class action waivers are unconscionable and unenforceable in consumer adhesion contracts when the "dispute[ ]…involve[s] small amounts of damages, and when it is alleged that the [business] has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[75] However, the Southern District Court of New York recognized that the holding in *Discover Bank* was limited to California law. Because Texas law, not California, applied, this decision was not dispositive. The district court also noted that since *Discover Bank*, other courts have held that class action waivers did not make arbitration agreements unenforceable.[76]

The district court rejected Sherr's argument that the class action waiver made the agreement unconscionable because it deprived potential plaintiffs the ability to pursue class action claims. The court focused on the purpose behind the FAA and found that its purpose was to the enforcement of arbitration agreements not to create a right of class action arbitration.[77] In addition, the court also found that Sherr failed to prove that consumers were "disadvantaged and individually burdened because of the class-wide arbitration bar."[78]

However, in *Gentry v. Superior Court*, the California Supreme Court provided factors for courts to consider in evaluating a waiver, but did not categorically ban all class action waivers.[79] The factors included "the modest size of the potential individual recovery, the potential for retaliation against members of the class, the fact that absent members of the class may be ill informed about their rights, and other real world obstacles to the vindication of the class members' right[s]."[80] The court held that "class arbitration waivers cannot, consistent with the strong public policy behind [California's wage and hour statute], be used to weaken or undermine the private enforcement of overtime pay legislation by placing formidable practical obstacles in the way of employees' prosecution of those claims."[81] Other courts, however,

have consistently enforced class action waivers with no restrictions. For instance, the Eighth Circuit found that a class action waiver was enforceable in *Cicle v. Chase Bank USA*, particularly because the agreement did not limit the damages the plaintiff could receive.[82]

With the exception of wage and hour cases, class action waivers appear more often in the consumer context, but courts are inconsistent as to whether these provisions are unconscionable.[83] Some courts in these consumer cases argue that companies are using these waivers to avoid liability on meritorious claims, leaving consumers without an appropriate remedy.[84]

In addition, courts are also split on whether a class action may be arbitrated when an arbitration agreement is silent on the issue. Recently, the Supreme Court addressed this issue in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* The Court noted that while in *Green Tree Financial, Inc. v. Bazzle* it decided when an arbitration agreement is silent as to whether class action arbitrations are permitted, class actions are not necessarily forbidden.[85] However, *Bazzle* "did not establish the rule to be applied in deciding whether class arbitration is permitted."[86] The Court answered this question in *Stolt-Nielsen* when it held that, under the FAA, class arbitration is not permitted unless there is a contractual consent to do so. [87] However, the Court did not define how a party can prove whether there was contractual consent for class arbitration.[88] Although the arbitration clause at issue was between two businesses and was not considered to be a mandatory arbitration clause,[89] the holding will likely be applicable, at least to consumer contracts,[90] when parties are disputing whether class actions are permitted when a mandatory arbitration agreement is silent on the issue. For these reasons, the FAA should be amended to forbid class action waivers, even if the arbitration agreement is silent on the issue, because waiving this right prospectively is not appropriate for mandatory arbitration.

This does not necessarily mean, however, that class claims should be arbitrated. As Thomas Doyle and Mark Irvings have pointed out,[91] class arbitration of employment claims can create difficult ethical issues for arbitrators. A judge in class-action litigation often must decide which of several competing lawyers will serve as class counsel.[92] An arbitrator faced with the same decision may have a conflict of interest. If the original class counsel chose the arbitrator, and/or advanced arbitration fees, this would create at the appearance that the arbitrator is likely to favor that candidate.

Similarly, when a class action lawsuit settles, the trial judge must ensure that absent class members receive a fair settlement[93]–i.e., that class counsel have not colluded with the defendant to sell out the class in exchange for large attorney's fees. An obvious conflict of interest occurs if this role must be played by an arbitrator who has been retained by, and paid by, the parties in a lengthy arbitration. That role may be even more awkward if the arbitrator has to make a fee award to Class Counsel out of a common fund from a settlement; worse still, the arbitration may have to decide whether that common fund should reimburse Class Counsel for arbitration expenses (including the arbitrator's own fees) that Class Counsel advanced during the course of the proceedings.[94]

For this reason, Congress should additionally consider either requiring that all class actions be litigated, or should create special safeguards (e.g., by permitting interlocutory certification to a federal judge) for class-wide arbitration.

Limitations Period

Some arbitration agreements provide for a shorter statute of limitations than provided for by law. Courts have been inconsistent as to whether an arbitration agreement can contractually shorten the claim's statute of limitations.[95] Some courts will find that the limitations provision is unenforceable under certain conditions and enforce it under others; other courts will leave it to the arbitrator's discretion.

Courts often evaluate whether a shortened-limitations-period provision violates public policy. The Western District of Michigan addressed the issue of the enforceability of a shortened statute of limitation in *Conway v. Stryker Medical Division*.[96] After Timothy Conway was hired by Stryker Medical Division, he signed an agreement containing a provision that effectively imposed a six-month limitation on a claim brought under the Family and Medical Leave Act of 1993 ("FMLA").[97] Conway requested a leave of absence under FMLA to care for his ill mother.[98] Stryker denied Conway's request and fired him.[99] Conway sued Stryker after the expiration of the contractual

six-month limitations period, but well before the statute of limitation provided for by the FMLA. Stryker moved for summary judgment citing the sixth-month limitations period. However, the district court denied the motion finding the provision unenforceable under the FMLA and as a matter of public policy. Here, the importance of the statute was relevant in determining that the provision was unenforceable.

However, the Middle District of Florida came to a different result in *Sanders v. Comcast Cable Holdings, LLC* where the claim involved a consumer contract rather than an employment statute.[100] The plaintiffs, as a class, alleged a violation of a consumer protection statute and breach of contracts. The plaintiffs argued that the one-year contractual limitations period, rather than the statutory four-year limitation, rendered the arbitration agreement unconscionable.[101] The district court quoted the Eleventh Circuit and held that the shortened period should be enforced, because "such an agreement does not conflict with public policy but, in fact, more effectively secures the end sought to be attained by the statute of limitations."[102]

The North Carolina Court of Appeals in *Morgan v. Lexington Furniture Industries, Inc.* found that a provision limiting the statute of limitations in an employment contract may not be unreasonable under public policy.[103] After Donald Boyd Morgan was hired for the Lexington Furniture Industries, Inc., he was required to sign an arbitration agreement that included a provision limiting the statute of limitations to 180 days. After Lexington Furniture terminated Morgan's employment contract, Morgan sued Lexington Furniture for wrongful termination after the expiration of the 180-day contractual limitation period,[104] but before the three-year statutory limitation period.[105] The trial court granted Lexington Furniture's motion for summary judgment on the ground that the claim was time-barred.[106] The North Carolina Court of Appeals found that the provision was not *per se* unreasonable and was consistent with other state statute of limitations for employment claims which also provided for a six-month limitation period. The court noted, however, that in this case, the employee had negotiating power for his contract.[107]

The Western District of Tennessee took a different approach in *Hardin v. Morningside of Jackson*.[108] After Morningside of Jackson hired Sharon Hardin, she was forced to sign paperwork including an arbitration agreement which included a three-month contractual limitation period. After Morningside fired Hardin, she sued Morningside, after the three-month statute of limitation expired, alleging retaliatory discharge.[109] The district court stated that the provision was not *per se* unreasonable and implied that the arbitrator has discretion in deciding whether to enforce the provision based on available legal principles and the facts and circumstances of the case.[110]

Because consumers and most employees have little or no opportunity to meaningfully negotiate the terms of their agreements, it is important for Congress to amend the FAA to set a standard regarding statutes of limitation. Particularly because of the significant deterrent function of employment discrimination statutes, a provision regarding the limitation of statute of limitations is necessary and should not be left to an arbitrator's discretion.

The FAA should be amended to forbid making the statute of limitations on arbitral claims shorter than it otherwise would be if the claim were litigated, or to provide that the statute of limitations on arbitrated claims would be a minimum of one year. A one-year-time period would not burden employee rights as employees are already confined to 180-day-periods for filing charges with the Equal Employment Opportunity Commission.[111] For other disputes, one year may be shorter than some state law contract statutes,[112] but one-year limitation periods are not uncommon.[113] Because statute of limitations may completely foreclose the parties' rights to any adjudication, limitation periods significantly shorter than those most state legislatures have deemed appropriate are too short for mandatory arbitration contracts.

Limitations on Remedies

Professor Theodore St. Antoine argues that "it is hard to imagine any provision in an arbitration agreement that would seem more contrary to public policy than one preventing the full relief authorized by an applicable statute."[114] But there is a circuit split on the issue as to whether a party can agree to waiver the right to a full statutory remedy.[115] Normally this takes the form of a contractual limitation on the arbitrator's authority to award relief.[116]

The Seventh Circuit takes the position that parties can contract for whatever terms they want. Judge Posner has stated:

> Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.[117]

Fellow Seventh Circuit Judge Frank Easterbrook has indicated that, absent a statutory anti-waiver provision, a party could agree to waive a right even as significant as the full statutory remedy.[118]

The majority of the circuits, like the Sixth, sever the offending provision and allow the arbitrator to offer the full statutory remedy despite the contract.[119] In *Morrison v. Circuit City Stores, Inc.*, Lillian Pebbles Morrison was forced to sign an arbitration agreement as a condition of her employment with Circuit City. This agreement contained a provision limiting the remedies available to Morrison. The agreement allowed for only twelve months of back pay, subject to a reduction based on other earnings or benefits that could have been earned. It also allowed for only twenty-four months of front pay and limited the amount of punitive damages to either $5000 or the total of the front and back pay awards.[120] The Sixth Circuit stated that enforcing the parties' arbitration agreement would require Morrison to forgo her substantive rights to the remedies available under Title VII.[121] The court held that the provision undermined the remedial goal of the statute to make plaintiffs whole for the injuries suffered because of discrimination. In addition, the limitation on punitive damages undermined the deterrent functions of the statute.[122]

Other circuits hold that a limited remedies provision makes the arbitration agreement unenforceable and allows the claim to be litigated.[123] In *Alexander v. Anthony Int'l, L.P.*, Blaise Alexander and Gerald Freeman signed an arbitration agreement, as a condition of their employment, which contained a limitation of remedies provision. Damages were limited to either back pay, which could be reduced by other earnings, or reinstatement. In addition, each party bore its own costs and attorney's fees.[124] The Third Circuit found that this was substantively unconscionable because it did not allow a plaintiff to receive the statutory remedies including attorney's fees and punitive damages and it did not allow a plaintiff to be compensated for any harm that was done.[125]

Based on the Supreme Court's endorsement of arbitration as a substitute for a judicial forum and the importance of consumer and employment statutes, the FAA should be amended to provide explicitly that arbitration agreements cannot waive statutory remedies.

Prohibitive Costs

The Supreme Court held in *Green Tree Financial v. Randolph* that prohibitive costs may make an arbitration agreement unenforceable. A party seeking to invalidate an agreement must prove the likelihood that he or she would incur those costs. However, the Court held that the plaintiff's claim that costs were too prohibitive for her to pursue her claim were too speculative. The Court did not reach the issue of how detailed a party must be in proving that such costs are prohibitive.[126]

Because the Supreme Court did not define how a plaintiff meets this burden, the circuits are split on how to apply this rule. A majority of the circuits will review each plaintiff's claim that costs are prohibitive on a case-by-case basis.[127] Of these circuits, most of them will look at how the costs affect the plaintiff individually.[128] The Sixth Circuit, and some district courts in the Second Circuit, also look to how the costs will affect similarly situated plaintiffs.[129] In contrast, the Ninth Circuit takes a different view and finds that an arbitration agreement is not enforceable when it requires an employee to pay for all or part of the arbitrator's fees.[130]

These approaches may not be the fairest way for Congress to address the issue. The majority approach fails to provide for a consistent method of evaluating when arbitration costs are prohibitive. While courts often enjoy a wide discretion in deciding issues, wide discretion is not appropriate when prohibitive costs can effectively block a plaintiff from bringing a claim. Moreover, the Ninth Circuit's approach, like the AFA, fails to consider the benefits of arbitration or that other costs besides arbitrator's fees may also deter a plaintiff from pursuing a claim.[131]

Congress should amend the FAA to provide for a more consistent method of allocating the costs of arbitration. Arbitration costs, including but not limited to filing fees, administrative fees and arbitrator fees, may deter potential plaintiffs from pursuing their claims in the arbitral forum pursuant to a mandatory arbitration clause. This situation does not serve the deterrent function of the many employee and consumer protection statutes. Consumers and employees should be guaranteed a low cost alternative to litigation when they sign mandatory arbitration agreements.[132]

One way that Congress can achieve this is by limiting the amount of fees that a consumer or employee is required to pay. For example, Congress could require that consumer or employee only needs to pay a filing fee equivalent to that charge to file a claim in court.[133] Limiting a consumer or employee's liability to what he or she would pay if litigating his or her suit in federal court is the most fair and effective way to enforce pre-dispute arbitration agreements. This helps give plaintiffs what they want, a low-cost forum similar to litigation, and it still maintains the liberal policy favoring arbitration. Plaintiffs are able to minimize their costs and this also provides additional incentives for plaintiff's attorneys to take on more arbitration cases on a contingency fee basis.

Any additional fees should be borne by the business or employer. This is important because it will provide an incentive to businesses and employers to draft fairer arbitration agreements. While this method would place a greater cost burden on the business or employer, it is fairer than forcing the consumer or employee to provide these costs. This is because the business or employer decides whether to include a mandatory arbitration clause in a consumer or an employer agreement. Any unfairness that may be inferred from the business or employer paying the majority of the fees can be safeguarded by the other due process protections mentioned in this article.

Suggested Amendment to the Federal Arbitration Act

Congress should amend the FAA to provide for a due process protocol for mandatory arbitration. The proposed bill is as follows:

> (d) No pre-dispute arbitration clause is valid and enforceable in an employment or consumer contract unless the clause provides for the following procedural requirements:
>
> (1) A jointly selected neutral arbitrator familiar with the applicable law;
> (2) In 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 regular equal basis;
> (3) Adequate Discovery, including but not limited to depositions, so that the parties have a fair opportunity to present their claims;
> (4) A consumer or employee only needs to pay a filing fee equivalent to what they would pay to file a claim in court. All other arbitration costs and fees will be paid for by the business or employer.
> (5) The right to representation by a person of the claimant's choice, including the right to recoup attorney's fees if allowed by law;
> (6) The right to remedies that are equal to those provided by law;
> (7) The right to pursue a class or collective action;
> (8) A written opinion with award, a statement of the law applied, and reasons for the award;
> (9) A minimum one year statute of limitation for all claims; and
> (10) Limited judicial review.
>
> (e) Any party found by a court of law to be in willful violation of this section shall be assessed a penalty which includes:
>
> (1) The contract is unenforceable;
> (2) A private right of action providing the aggrieved party the right to equitable relief; and
> (3) Civil penalties no greater than $100 a day to a maximum of two years for which the contract was in force.

Conclusion

Amending the FAA is long overdue. Because consumers and employees are increasingly being forced to sign pre-dispute arbitration agreements without notice or the opportunity to negotiate, it is important to ensure that they are ensured due process protection. Many arbitration agreements contain unfair provisions that hinder consumers and employees from effectively

vindicating their claims. Congress needs to amend the FAA to provide for a fair and equitable alternative to litigation.

Notes

1. Richard A. Bales and Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 Penn. St. L. Rev. 1081 (2009).
2. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2000)).
3. Katherine Van Wezel Stone, Rustic Justice: Community and Coercion Under the Federal Arbitration Act, 77 N.C. L. Rev. 931, 934-44 (1999).
4. This article uses pre-dispute arbitration and mandatory arbitration interchangeably.
5. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Mitsubishi Motors Co. v. Soler Chrysler-Plymouth Co.*, 473 U.S. 614 (1985).
6. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991); *Mitsubishi Motors Corp.*, 473 U.S. at 628.
7. Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceanara*, 81 Tul. L. Rev. 331, 338 (2006) [hereinafter Bales, *Normative Consideration*] (citing *Gilmer*, 500 U.S. at 35).
8. *Gilmer*, 500 U.S. at 23-24. The ADEA is codified at 29 U.S.C. §§ 621-34 (2000).
9. *Id.* at 23.
10. *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (4th Cir. 1990), *rev'd*, 500 U.S. 20 (1991).
11. *Gilmer*, 500 U.S. at 35.
12. *Id.* at 26.
13. *Wilko* was the controlling law at the time. *See Wilko v. Swan*, 346 U.S. 427 (1953).
14. The Arbitration Fairness Act of 2009, S. 931, H.1020, 111th Cong. (2009).
15. The Arbitration Fairness Act of 2007: Hearing on S. 1782 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 110th Cong. 1 (2007) [hereinafter Senate Hearing].
16. *See* The Arbitration Fairness Act of 2007: Hearing on H.R. 3010 Before the Subcomm. on Commercial and Administrative Law of the House Committee on the Judiciary, 110th Cong. 9 (2007) [hereinafter House Hearing].
17. *Id.* at 1-3; House Hearing, *supra* note 17 at 11.
18. Senate Hearing, *supra* note 16 at 10.
19. Senate Hearing, *supra* note 16 at 3; House Hearing, *supra* note 17 at 10.
20. Senate Hearing, *supra* note 16 at 3.
21. Senate Hearing, *supra* note 16 at 15-16.
22. Senate Hearing, *supra* note 16 at 12; House Hearing, *supra* note 17 at 29.
23. Senate Hearing, *supra* note 16 at 24.
24. House Hearing, *supra* note 17 at 32.
25. *See, e.g., Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 373 (6th Cir. 2005) (discussing why the lower court denied Ryan's motion to compel arbitration).
26. For a statistical study on the repeat player effect, see Lisa B. Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, 29 McGeorge L. Rev. 223 (1998).
27. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 787 (2008).
28. See Samuel Estreicher, Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001).
29. *See* St. Antoine, supra note 28, at 791-92.
30. This article does not address post-dispute arbitration or predispute arbitration agreements under collective bargaining agreements.
31. 9 U.S.C. § 2 (2005); *see also* Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 Brandeis L. J. 415, 422 (2006).
32. *See* Thomas Carbonneau, The Law and Practice of Arbitration xix (2d ed. 2007).
33. *See id.*; *see also Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).
34. *See Doctor's Assocs. V. Cassorotto*, 517 U.S. 681, 687 (1996) ("Congress precluded states from singling out arbitration provisions for suspect status…")
35. *See* Edward Brunet, The Minimal Role of Federalism and State Law in Arbitration, 8 Nev. L.J. 326, 326 (2007).
36. Carbonneau, supra note 26, at 80.
37. Richard A. Bales & Christopher Kippley, Extending OWBA Notice and Consent Protections to Arbitration Agreements Involving Employees and Consumers, 8 Nev. L.J. 10, 11 (2007); see also Matthew W. Finkin, Workers' Contracts Under the United States Arbitration Act: An Essay in Historical Clarification, 17 Berkley J. Emp. & Lab. L. 282, 296 (1996); Stephen J. Ware, Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights, 67 Law & Contemp. Probs. 167, 176-80 (2004).
38. *See* Bales & Kippley, supra note 38, at 12; *see also Volt Info. Scis., Inc. v. Bd. Of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).
39. David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33, 36-37.
40. *See* Carbonneau, supra note 33, at 75.
41. Richard A. Bales, The Employment Due Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest, 21 Ohio St. J. on Disp. Resol. 165, 171 (2006) [hereinafter Bales, The Employment Due Process Protocol at Ten].
42. *Id.*
43. *Id.* at 172.

44. *See id*.

45. Richard A. Bales, *Beyond the Protocol, Recent Trends in Employment Arbitration*, 11 Emp. Rts. & Emp. Pol'y J. 301, 302-03 (2007).

46. *Id*. at 340.

47. *Walker v. Ryan's Family Steak Houses, Inc.*, 289 F. Supp. 2d 916, 924 (M.D. Tenn. 2003).

48. Bales, The Employment Due Process Protocol at Ten, supra note 42, at 190-91.

49. *Gilmer*, 500 U.S. at 30 (quoting 9 U.S.C. § 10(b) (2008)); *see also* 9 U.S.C. § 10(b) (2008).

50. *Walker v. Ryan's Family Steakhouses, Inc.*, 400 F.3d 370, 385 (6th Cir. 2003) (quoting *McMullen v. Meijer, Inc.*, 335 F.3d 485, 494 n7 (6th Cir. 2004)).

51. *Id*.

52. Bales, *Normative Consideration*, supra note 7, at 383

53. *See* Lisa B. Bingham, Employment Arbitration: The Repeat Player Effect, 1 Emp. Rts. & Emp. Pol'y J. 189 (1997); Lisa B. Bingham, On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards, 29 McGeorge L. Rev. 223, 224 (1998); Lisa B. Bingham & Simon Sarraf, Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference, Alternative Dispute Resolution in the Employment Arena, Proc. of N.Y. Univ. 53rd Ann. Conf. of Lab. 303 (2001); see also Elizabeth Hill, AAA Employment Arbitration: A Fair Forum at Low Cost, Disp. Resol. J. (May-July 2003).

54. *See* Bingham & Sarraf, supra note 84, at 321-25; *see* Bales, *Normative Consideration*, supra note 5, at 384.

55. *Walker v. Ryan's Family Steakhouses, Inc.*, 400 F.3d 370, 373 (6th Cir. 2005).

56. St. Antoine, supra note 28, at 801.

57. This is also a concern for litigators in forum selection.

58. See Bales, Beyond the Protocol, Recent Trends in Employment Arbitrator, supra note 46.

59. *See Walker*, 400 F.3d at 373.

60. David S. Schwartz, If You Love Arbitration, Set it Free: How "Mandatory" Undermines "Arbitration," 8 Nev. L.J. 400, 404 (2007).

61. *See* Bales, Beyond the Protocol, Recent Trends in Employment Arbitration, supra note 46, at 333.

62. FINRA is the successor to the National Association of Securities Dealers ("NASD"). *See* FINRA. *http://www.finra.org/AboutFINRA/index.htm* (last visited Mar. 3, 2009).

63. *See* FINRA Code of Arbitration Procedure R. 13510 (2007), available at *http://www.finra.org/finramanual/rules/r13510/* (last visited Mar 3, 2009). Note that FINRA recently changed its rules regarding statutory discrimination claims, which do not require mandatory predispute arbitration through FINRA. *See id*. R. 13201. FINRA does provide special rules if the parties agree, including agreeing to arbitrate either before or after the dispute arises. *See id*. R. 13802.

64. *Id*. R. 13510.

65. The special rules for statutory employment disputes are interesting as they provide for a lower filing fee than for other disputes; have specific criteria for the panel of arbitrators; allow for depositions; allow for attorney's fees and any remedy allowable under the law. *See id*. *10210 et seq*.

66. *See, e.g., Bahravati v. Josenthal, Lyon, and Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (employee arbitrated a whistleblower retaliation and defamation claim against former employer).

67. *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538 (E.D. Pa. 2006).

68. *Id*. at 540-41.

69. *Id*. at 545.

70. *Id*. at 546-47.

71. *Nagrampa v. Mailcorps*, 469 F.3d 1257, 1298 (9th Cir. 2006); *Sherr v. Dell Inc.*, 2006 WL 210936, at 3 (S.D.NY 2006); *see also* St. Antoine, supra note 21, at 807.

72. *Sherr*, 2006 WL 210936 at 1.

73. *Id*. at 2.

74. *Id*. at 6.

75. *Id*. at 6.

76. *Id*. at 6.

77. *Id*. at 7.

78. *Id*. at 7.

79. *Gentry v. Sup. Ct.*, 165 P.3d 556 (Cal. 2007).

80. *Id*. at 568.

81. *Id*. at 569.

82. *Cicle v. Chase Bank USA*, 583 F.3d 549, 556 (2009).

83. *Compare Kinkel v. Cingular Wireless LLC*, 857 N.E. 2d 250, 267-68, 274-75 (Ill. 2006) (holding that a mandatory arbitration provision was substantively unconscionable because the cost of pursuing the claim would likely equal or surpass the amount the consumer could recover, therefore leaving the consumer without an effective remedy in any forum), *with Wong v. T-Mobile USA*, No. 05-73922, 2006 WL 2042512, at 5 (E.D. Mich. July 20, 2006) (holding that, under similar facts, a class action was essential to vindicating the consumer's statutory cause of action where the statute on which the claim was based expressly provided for class recovery, regardless of whether the waiver provision was unconscionable).

84. *See Wong*, 2006 WL 2042512 at 4.

85. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, No. 08-1198, 2010 U.S. LEXIS 3672, 33 (Apr. 27, 2010).

86. *Id*. at 34.

87. *Id*. at 40.

88. *Id*. at 46.

89. *See id*. at 40.

90. Posting of Richard A. Bales to Workplace Prof Blog, *http://lawprofessors.typepad.com/laborprof_blog/2010/04/more-on-stolt.html* (April 30, 2010).

91. Thomas A. Doyle, *Practical and Ethical Issues Involving Non-Party Class Members in Class Arbitrations*, Paper presented at the American Bar Association, Section of Labor & Employment Law, Midwinter Meeting of the Committee on ADR in Labor and Employment Law (Feb. 15-18, 2009); Mark Irvings, panel presentation at same.
92. Fed. R. Civ. P. 23(g)(2).
93. *Thorogood v. Sears Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008).
94. Doyle, supra note 103, at 10.
95. *Compare Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1175 (9th Cir. 2003) (holding that an arbitration agreement that imposed a one-year statute of limitations was unenforceable) *with Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-32 (3d Cir. 1997).
96. No. 4:05-CV-40, 2006 WL 1008670 (W.D. Mich. Apr. 18, 2006); *See* Bales, *Beyond the Protocol, Recent Trends in Employment Arbitrator*, supra note 46 at 320-21.
97. Conway at 1; See Bales, Beyond the Protocol, Recent Trends in Employment Arbitration, supra note 46 at 320-21.
98. Conway at 1; Bales, Beyond the Protocol, Recent Trends in Employment Arbitration, supra note 46 at 320-21.
99. Bales, Beyond the Protocol, Recent Trends in Employment Arbitration, supra note 46 at 320.
100. *Sanders v. Comcast Cable Holdings LLC*, No. 3:07-CV-918, 2008 WL 150479 (M.D. Fla. Jan. 14, 2008) (quoting *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337, 1341 (11th Cir. 2005)).
101. *Id*. at 11.
102. *Id*. at 12.
103. *Morgan v. Lexington Furniture Industries, Inc.*, No. COA06-1, 2006 WL 371755, 3 (N.C. App. Dec. 19, 2006)
104. *Id*. at 1.
105. *Id*. at 2.
106. *Id*. at 1.
107. *Id*. at 3.
108. *Hardin v. Morningside of Jackson, L.L..C.*, 425 F. Supp. 2d 898 (W.D. Tenn. 2006).
109. *Id*. at 901-902.
110. *Id*. at 911.
111. *See* 42 U.S.C. § 2000e-5(e)(1) (2000).
112. *See, e.g.,* Ohio Rev. Code Ann. § 1302.98 (West 2008) (providing that breach of contract for sale claims must be brought within four years; however, the parties, by agreement may limit this period to no less than one year); N.C. Gen. Stat. § 1-52 (2008) (providing a three-year statute of limitations for breach of contract).
113. *See, e.g.,* Ky. Rev. Stat. Ann. § 413.245 (West 2008).
114. St. Antoine, supra note 28, at 808.
115. *Id*. at 809.
116. Bales, Beyond the Protocol, Recent Trends in Employment Arbitration, supra note 46, at 335.
117. *Bahravati v. Josenthal, Lyon, and Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).
118. Martin H. Malin, Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation, 11 Emp. Rts. & Emp. Pol'y J., 363, 393-94 (2007).
119. *See, e.g., Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646, 670-75 (6th Cir. 2003) (holding that an arbitration agreement that limited back pay damages was unenforceable).
120. *Id*. at 654-55.
121. *Id*. at 670.
122. *Id*.
123. See e.g., Alexander v. Anthony Int'l L.P., 341 F.3d 256, 267 (3d Cir. 2003).
124. *Id*. at 259-60.
125. *Id*. at 267-68.
126. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90-92 (2000).
127. *See Hall v. Treasure Bay Virgin Island Corp.*, No. 09-1754, 2010 U.S. App. LEXIS 5539, at *3-4 (3rd Cir. March 16, 2010); *Parilla v. IAP Worldwide Servs. VI, Inc.*, 368 F.3d 269, 284 (3rd Cir. 2004); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053-54 (8th Cir. 2004); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *Musnick v. King Motor Co.*, 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., Inc.*, 246 F.3d 702, 708 (D.C. Cir. 2001)*Bell v. Koch Food of Miss.*, No. 3:08-cv-697, 2009 U.S. Dist. LEXIS 38003, *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*, 448 F. Supp. 2d 458, 463 (E.D.N.Y 2006) (listing cases); Stone and Bales, *supra* note 19, at 361-2 (listing cases).
128. *See e.g. Bradford*, 238 F.3d 549, 557 (4th Cir. 2001).
129. *See Morrison*, 317 F.3d at 663; *Rappaport*, 448 F. Supp. 2d at 463-64; *Ball v. SFX Broadcasting, Inc.*, 165 F. Supp. 2d 230, 239-40 (N.D.N.Y. 2001). *See alsoRappaport*, 448 F. Supp. 2d at 463-64 (listing cases).
130. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 880, 894.
131. *See* Michelle Eviston, Congress Should Limit the Costs of Arbitration, publication forthcoming.
132. *Id*.
133. *Id*.