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Recent Developments in Arbitration

by

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A. Circuit City Stores v. Adams

Circuit City Stores, Inc. v. Adams, 532 **U.S.** 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 85 FEP Cases 266, 17 IER Cases 545, 79 E.P.D. ¶ 40,401 (2001), held that the exception for contracts of employment in § 1 of the Federal Arbitration Act, 9 U.S.C. § 1, is limited to persons who directly move goods in interstate or foreign commerce, *i.e.*, that it is a "schlepper" provision.

Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 87 FEP Cases 1509 (**9th Cir.**), *cert. denied*, 535 **U.S.** 1112 (2002), on remand from the Supreme Court, held that Circuit City's arbitration provisions were unenforceable because procedurally and substantively unconscionable. Discussing the terms of the Dispute Resolution Agreement ("DRA"), the court described its provisions:

> Incorporated into the DRA are a set of "Dispute Resolution Rules and Procedures" ("dispute resolution rules" or "rules") that define the claims subject to arbitration, discovery rules, allocation of fees, and available remedies. Under these rules, the amount of damages is restricted: back pay is limited to one year, front pay to two years, and punitive damages to the greater of the amount of front and back pay awarded or $5000. In addition, the employee is required to split the costs of the arbitration, including the daily fees of the arbitrator, the cost of a reporter to transcribe the proceedings, and the expense of renting the room in which the arbitration is held, unless the employee prevails and the arbitrator decides to order Circuit City to pay the employee's share of the costs. Notably, Circuit City is not required under the agreement to arbitrate any claims against the employee.

Id. at 891.

B. *EEOC v. Waffle House*: What Has the Supreme Court Wrought?

On January 15, 2002, the Supreme Court handed down *EEOC v. Waffle House, Inc.*, __ **U.S.** __, 122 S. Ct. 754, 12 AD Cases 1001 (2002). The facts of the case are simple, but its implications are not.

1. The Facts

Before Eric Baker started to work for Waffle House, he was required to sign an arbitration "agreement" stating as follows:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both

> parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

122 S. Ct. at 758 n.1. Sixteen days later, he had a seizure at work and was fired.

Baker filed an EEOC charge, alleging a violation of Title I of the Americans with Disabilities Act. Neither he nor his employer initiated arbitration. Baker never filed suit. When the EEEOC brought suit on his behalf, Baker had a statutory right to intervene, but did not exercise it. He relied exclusively on the EEOC to protect his interests.

For its part, the EEOC represented to the lower court that it was suing on behalf of Baker. "The complaint requested the court to grant injunctive relief to 'eradicate the effects of [respondent's] past and present unlawful employment practices,' to order specific relief designed to make Baker whole, including backpay, reinstatement, and compensatory damages, and to award punitive damages for malicious and reckless conduct." 122 S. Ct. at 759. The EEOC did not seek any individualized relief on behalf of any other applicants or employees who were disabled or regarded as disabled.

The defendant moved to stay the action and to compel arbitration under the "agreement." The district court held that "agreement" was not part of the plaintiff's contract of employment and was unenforceable. Waffle House appealed, and the U.S. Court of Appeals for the Fourth Circuit reversed. *EEOC v. Waffle House*, 193 F. 3d 805, 808 (**4th Cir.** 1999). The court of appeals held that the EEOC could seek a judicial award of general relief against discrimination, but "held that the EEOC was precluded from seeking victim-specific relief in court because the policy goals expressed in the FAA required giving some effect to Baker's arbitration agreement." *Id.*

The EEOC petitioned for certiorari, and it was granted.

2. <u>The Narrow Holding</u>

The Court held 6–3 that the EEOC could not be bound by a charging party's arbitration agreement because the EEOC was not a party to it, that the EEOC exercised a power to sue in furtherance of the public interest that is independent of the charging party's personal rights, and that the EEOC does not act as the attorney for the charging party when it sues on the charging party's behalf. It therefore retains its full right to seek victim-specific relief—compensatory and punitive damages, back pay, and an order of reinstatement or instatement—just as if the charging party had never signed the "agreement."

The Court found the Fourth Circuit's distinction between general relief and victim-specific relief unworkable because relief running to the victim's direct benefit, such as an award of punitive damages, may serve the broad deterrent purposes of the EEOC and thus help enforce the statute generally.

3. The Doors the Court Opened

The holding is interesting, but the questions the Court flagged without answering are even more interesting. Here is the discussion that is our springboard:

> It is true, as respondent and its amici have argued, that Baker's conduct may have the effect of limiting the relief that the EEOC may obtain in court. If, for example, he had failed to mitigate his damages, or had accepted a monetary settlement, any recovery by the EEOC would be limited accordingly. See, *e.g.*, *Ford Motor Co.* v. *EEOC*, 458 **U.S.** 219, 231-32 (1982) (Title VII claimant "forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied"); *EEOC* v. *Goodyear Aerospace Corp*., 813 F.2d 1539, 1542 (**CA9** 1987) (employee's settlement "rendered her personal claims moot"); *EEOC* v. *U.S. Steel Corp*., 921 F.2d 489, 495 (**CA3** 1990) (individuals who litigated their own claims were precluded by res judicata from obtaining individual relief in a subsequent EEOC action based on the same claims). As we have noted, it "goes without saying that the courts can and should preclude double recovery by an individual." *General Telephon*e, 446 **U.S.**, at 333.
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> But no question concerning the validity of his claim or the character of the relief that could be appropriately awarded in either a judicial or an arbitral forum is presented by this record. Baker has not sought arbitration of his claim, nor is there any indication that he has entered into settlement negotiations with respondent. It is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek. The only issue before this Court is whether the fact that Baker has signed a mandatory arbitration agreement limits the remedies available to the EEOC. The text of the relevant statutes provides a clear answer to that question. They do not authorize the courts to balance the competing policies of the ADA and the FAA or to second-guess the agency's judgment concerning which of the remedies authorized by law that it shall seek in any given case.

Id. at 765–66.

a. Limitation of Arbitration "Agreements" to Changes of Forum

The Court again stated what it has stated in many of its arbitration cases under the FAA: all that an enforceable arbitration agreement does is change the forum for determination of a dispute. "We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum." *Id.* at 765 n.10. The court went on to quote some of its earlier language stating that the parties to an arbitration agreement do not agree to waive any of their substantive rights under the statutes. It then concluded:

> To the extent the Court of Appeals construed an employee's agreement to submit his claims to an arbitral forum as a waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit, the court obscured this crucial distinction and ran afoul of our precedent.

Id.

What does this mean in practical terms? Having the government litigate one's case on one's behalf is a substantive right, even if there is not a dime's worth of difference between the relief Baker could get and the relief the EEOC could get for Baker.

b. Practical Consequences

What else does it mean? It seems to me that the following consequences can flow:

- If the arbitration "agreement" had contained a clause waiving the right to have the EEOC proceed on the charge and file suit, it would not have been enforceable.

- What about arbitration "agreements" that specify an inconvenient venue? If the inconvenience is large enough, plaintiffs may be able to escape the "agreement."

- What about arbitration "agreements" that impose any kind of restrictions on relief? It seems to me that they are now all unenforceable.

- It seems to me that the same applies to "agreements" that shorten the time for bringing claims.

- What about arbitration "agreements" that restrict discovery? It seems to me that the question is one of degree. If the "agreement" restricts discovery to the extent that the plaintiff is denied a fair opportunity to litigate the merits of the claim, the plaintiff should be able to escape the "agreement." If the "agreement" restricts discovery but allows enough discovery to make a fair contest possible, the "agreement" should not be affected. "Agreements" that allow the plaintiff to make a showing of need to the arbitrator, who has discretion to allow more discovery and in practice acts reasonably, will likely pass muster.

- What about arbitration "agreements" that directly restrict the use of class actions or that have that effect? Congress actually addressed class actions in enacting the 1972 amendments to Title VII, rejecting a proposed change that would have required every class member to exhaust EEOC remedies. I think *Waffle House* sounds the death knell for these "agreements," both from the standpoint of the complainant and the standpoint of other employees, who have a right to have their claims litigated as part of a class without their having to become parties. There are, of course, potential problems for both sides with the litigation of class claims in an arbitral context. The problems are magnified if the arbitrator is not law-trained.

4. What if the Charging Party Had Taken Enforcement Action?

Justice Thomas's dissent presents an intriguing scenario:

> Assuming that the Court means what it says, an arbitral judgment will *not* preclude the EEOC's claim for victim-specific relief from going forward, and courts will

> have to adjust damages awards to avoid double recovery. See *ante*, at 766. If an employee, for instance, is able to recover $20,000 through arbitration and a court later concludes in an action brought by the EEOC that the employee is actually entitled to $100,000 in damages, one assumes that a court would only award the EEOC an additional $80,000 to give to the employee. Suppose, however, that the situation is reversed: An arbitrator awards an employee $100,000, but a court later determines that the employee is only entitled to $20,000 in damages. Will the court be required to order the employee to return $80,000 to his employer? I seriously doubt it.
>
> The Court's decision thus places those employers utilizing arbitration agreements at a serious disadvantage. Their employees will be allowed two bites at the apple—one in arbitration and one in litigation conducted by the EEOC—and will be able to benefit from the more favorable of the two rulings. This result, however, discourages the use of arbitration agreements and is thus completely inconsistent with the policies underlying the FAA.

Id. at 773.

The majority neither agreed nor disagreed, but stated: "It is an open question whether a settlement or arbitration judgment would affect the validity of the EEOC's claim or the character of relief the EEOC may seek." *Id.* at 766. The Court continued:

> And, in this context, the statute specifically grants the EEOC exclusive authority over the choice of forum and the prayer for relief once a charge has been filed. The fact that ordinary principles of res judicata, mootness, or mitigation may apply to EEOC claims, does not contradict these decisions, nor does it render the EEOC a proxy for the employee.

Id. Stay tuned.

5. Settlements

The EEOC argued to the Court that it was not bound by any action the charging party takes on his or her charge of discrimination, even settlements with the respondent. For many years, the EEOC's regulations have stated that it is not bound by a charging party's request to withdrawn his or her charge. I have always thought that the principal reason for the regulation was twofold: (a) to provide protection against the retaliation that might occur if the EEOC were to accept automatically charging parties' requests to withdraw charges; and (b) to preserve the right to seek broad systemic relief even if the individual accepted an individual settlement.

The Commission's arguments in *Waffle House* suggest that the EEOC is seeking to obtain or preserve a general right to take enforcement action on its own, even as to individualized relief, notwithstanding an individual settlement.

We are all familiar with the supervised-release question in the Fair Labor Standards Act, and the enactment of the Older Workers Benefits Protection Act. What we are not familiar with is the notion that the EEOC might sue on behalf of persons who had already

settled privately. Many attorneys on both sides of the fence would not be happy with such a prospect, or with having to share with the EEOC the details of a private individual settlement.

Fortunately, the EEOC's regulations provide a default closing point for the EEOC's taking of independent action. 28 C.F.R. § 1601.28(a)(3) states:

> 3) Issuance of a notice of right to sue shall terminate further proceeding of any charge not a Commissioner charge unless the District Director; Area Director; Local Director; Program Director, Office of Program Operations or upon delegation, the Director of Systemic Programs, Office of Program Operations or the Directors, Field Management Programs, Office of Program Operations; or the General Counsel, determines at that time or at a later time that it would effectuate the purpose of title VII or the ADA to further process the charge. Issuance of a notice of right to sue shall not terminate the processing of a Commissioner charge.

The EEOC would still retain the ability to intervene in a case brought by the charging party, but that is not our concern here.

6. The EEOC's Future Litigation Priorities

The Court took clear comfort from the fact that the EEOC brings so few cases per year. Speaking of the Fourth Circuit's decision, it stated:

> The court also neglected to take into account that the EEOC files suit in a small fraction of the charges employees file. For example, in fiscal year 2000, the EEOC received 79,896 charges of employment discrimination. Although the EEOC found reasonable cause in 8,248 charges, it only filed 291 lawsuits and intervened in 111 others. Equal Employment Opportunity Commission, Enforcement Statistics and Litigation (as visited Nov. 18, 2001), http://www.eeoc.gov/stats/enforcement.html.
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> In contrast, 21,032 employment discrimination lawsuits were filed in 2000. See Administrative Office, Judicial Business of the United States Courts 2000, Table C-2A (Sept. 30, 2000). These numbers suggest that the EEOC files less than two percent of all antidiscrimination claims in federal court. Indeed, even among the cases where it finds reasonable cause, the EEOC files suit in less than five percent of those cases. Surely permitting the EEOC access to victim-specific relief in cases where the employee has agreed to binding arbitration, but has not yet brought a claim in arbitration, will have a negligible effect on the federal policy favoring arbitration.

Id. at 762 n.7.

Given the limited resources of the Commission, it is difficult to imagine any large increase in the number of cases it files.

What may be more likely is that the Commission will adjust its litigation priorities in light of this decision. It already needs to do so in light of the Court's holdings in the last few years that private parties are barred by the Eleventh Amendment from suing State agencies for

monetary relief for violations of the Age Discrimination in Employment Act or of the Americans with Disabilities Act.

If so, I expect that the Commission will do two things. *First*, it will continue to bring individual cases based on charges on which it has found reasonable cause, using its normal case-selection guidelines, and will pay no attention whatsoever to the existence of an arbitration "agreement." Cases like Baker's will arise in small numbers.

Second, however, I would not be surprised if the Commission were to decide in the future to target for litigation employers with arbitration "agreements" like that discussed at the 2001 Chicago Annual Meeting of the ADR Committee, which bear the hallmark of attorneys vying with each other to see who could come up with the most oppressive conditions to impose on captive employees. The worse off the employee under the terms of a particular employer's arbitration "agreement," the likelier a sensible EEOC litigation priority would target that employer for suit.

My experience in reading a lot of arbitration rules and cases is that many employers find it difficult to resist the temptation to stack the deck in their favor when they unilaterally develop arbitration "agreements" and rules, or when they choose to use an intimidating provider or one with business relationships with their companies or commercial rules rather than rules subject to the Due Process Protocol. Arbitration is like Christmas for them. Any countervailing pressure making them less likely to take unfair advantage would be in the public interest.

C. Arbitrability

1. Late-Breaking Developments

a. *Duffield* and *EEOC v. Luce, Forward*

EEOC v. Luce, Forward, Hamilton & Scripps, __ F.3d __, 92 FEP Cases 1121, 2003 WL 22251382 (**9th Cir.** 2003) (*en banc*), overruled the holding of *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 76 FEP Cases 1450 (**9th Cir.**), *cert. denied*, 525 **U.S.** 982 (1998), that § 118 of the Civil Rights Act of 1991 barred mandatory predispute arbitration "agreements." The Ninth Circuit had been the only Circuit so holding.

b. Congress Has Exempted Auto Dealers from Arbitration Agreements Imposed by Manufacturers

Congress passed, and the President signed, a provision exempting automobile dealers from mandatory predispute arbitration requirements imposed by their franchisors: "Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy." Sec. 11028(a)(2) of Pub. L. 107–273, 116 Stat. 1836, enacted Nov. 2, 2002.

2. Costs of Arbitration

Green Tree Financial Corp.-Alabama v. Randolph, 531 **U.S.** 79, 90–91, 84 FEP Cases 769 (2000), held that a consumer arbitration agreement was enforceable notwithstanding the fact that it imposed on consumers an unliquidated and uncapped exposure to pay arbitral costs. "It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter. . . . The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement. (Footnote omitted.)

Spinetti v. Service Corp. Int'l, 324 F.3d 212, 91 FEP Cases 745 (**3d Cir.** 2003), held that the provision in the arbitration agreement for fees and expenses was unconscionable, but that the provision did not go the essence of the agreement and was therefore severable. The agreement provided "(1) that each party pay its own costs and attorney's fees, regardless of the outcome of the arbitration; and (2) that each party pay one-half of the compensation to be paid to the arbitrator(s), as well as one-half of any other costs relating to the administration of the arbitration proceeding." *Id.* at 214–15. The court held that this was prohibitively expensive under *Green Tree Financial Corp. v. Randolph.* It explained:

> Spinetti was required to pay an initial, non-refundable filing fee of $500 to the American Arbitration Association, an additional filing fee of $2,750, a case-filing fee of $1,000, an additional charge of $150 for each day of the hearing and half the cost of an arbitrator. Evidence disclosed that a mid-range arbitrator in Western Pennsylvania charges approximately $250 an hour with a $2,000-per-day minimum.
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> Although Spinetti was earning $63,000 a year when employed by SCI, she was unemployed for six months following her termination. When she found new employment she says she was earning less than $300 per week while her monthly expenses for food and rent totaled approximately $2,000. To cover the deficit between income and expenses, Spinetti had taken cash advances from her credit cards. On the basis of this record, the district court determined "that Spinetti has adequately demonstrated that the costs associated with arbitrating her claims are prohibitive."

Id. at 217.

Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 91 FEP Cases 771 (**11th Cir.** 2003), reversed the denial of arbitration and held that a "loser pays" provision in the arbitration agreement does not automatically make the arbitration agreement unenforceable. Relying on *Randolph*, the court held that the issue must be decided on a case-by-case basis, with respect to the to which costs an employee will likely be subjected. The court summarized current case law:

> Since *Green Tree*, all but one of the other Circuits that have reconsidered this issue have applied a similar case-by-case approach. See *Thompson v. Irwin Home Equity*

Corp., 300 F.3d 88 (1st Cir.2002) (adhering to case-by-case approach predating *Green Tree*); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 610 (3d Cir.2002) ("[T]he mere existence of a fee- splitting provision in an agreement [does not] satisfy the claimant's burden to prove the likelihood of incurring prohibitive costs"); *Primerica Life Ins. Co. v. Brown*, 304 F.3d 469, 471 n. 6 (5th Cir.2002) (adhering to case-by-case approach predating *Green Tree*); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir.2001) ("appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims"); *Burden v. Check into Cash, LLC*, 267 F.3d 483, 492 (6th Cir.2001) (*Green Tree* requires party resisting arbitration to show likelihood of prohibitive expenses); *Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 683 (8th Cir.2001) (on remand, district court should consider the plaintiff's arguments in light of Green Tree which requires her to show the likelihood of incurring prohibitive expenses in arbitration); *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 708 (D.C.Cir.2001) (upholding arbitration award requiring the plaintiff to pay a portion of the fees and costs, noting that the plaintiff had failed to establish her burden under Green Tree that the award had prevented her from attempting to vindicate her rights). In all of these cases, the Court of Appeals either enforced the arbitration agreement, or remanded the case for further fact-finding regarding plaintiff's claim of prohibitive costs.

Id. at 1259 (footnote referring to the exception of the Ninth Circuit in *Adams* omitted). The court declined to rule on the validity of the "loser pays" provision, holding that the issue was for the arbitrator in the first instance, and that if the arbitrator enforces the provision against the plaintiff, the issue would be ripe for resolution by the lower court. *Id.* at 1261.

3. Detailed Questions

a. Unsigned Agreements

Tinder v. Pinkerton Security, 305 F.3d 728, 735, 89 FEP Cases 1537 (**7th Cir.** 2002), affirmed an order compelling arbitration. The plaintiff testified that she did not remember receiving the arbitration "agreement," although she did recall seeing a company magazine article discussing it. The court held that this was not enough to create a triable issue of fact as to the existence of the agreement, since she did not controvert the defendant's affiants who stated that the "agreement" was attached to paychecks. The court held that the at-will plaintiff's continued employment, coupled with the defendant's mutual agreement to arbitrate, was adequate consideration under Wisconsin law.

b. Signed Agreements Reciting Receipt of the Policy or Rules, Where the Documents Were Not in Fact Provided

Nguyen v. City of Cleveland, 312 F.3d 243, 19 IER Cases 618 (**6th Cir.** 2002), dismissed the defendant's appeal from the denial of its motion to compel arbitration, holding that plaintiff's allegations that (1) prior to signing the ADR agreement stating that it applied to

disputes "after" employment, he asked a Vice President whether it applied to terminations and was told that it was unclear, (2) he asked for but did not receive the handbook another signed form stated he had received, (3) he signed the ADR agreement believing that it did not cover disputes over terminations, and (4) he was later told by the VP that the policy did not cover terminations. "Nguyen's affidavit raises a reasonable question as to whether there was valid assent on his part or whether the arbitration agreement covered the factual situation outlined above." *Id.* at 246.

c. Former Members of NASD

Riccard v. Prudential Insurance Co., 307 F.3d 1277, 1286 (**11th Cir.** 2002), held that an ADA and ADEA claimant was bound by his NASD U–4 agreement to arbitrate his claims against Prudential because Prudential was a NASD member at the time of the dispute, even though it was no longer a member at the time of suit.

d. Agreements Waiving Fee Awards

McCaskill v. SCI Management Corp., 298 F.3d 677, 89 FEP Cases 830 (**7th Cir.** 2002), held that an arbitration agreement barring fee awards in any situation was unenforceable. Judge Bauer so stated at 680. Judge Rovner's concurrence so stated at 683–86. Judge Manion dissented. *Id.* at 686.

e. Agreements Requiring the Splitting of Aritration Costs

Adkins v. Labor Ready, Inc., 303 F.3d 496, 502–03, 8 WH Cases 2d 7 (**4th Cir.** 2002), affirmed an order compelling arbitration of FLSA claims. The court rejected plaintiff's argument that arbitration imposed prohibitive costs on claimants, because there was no evidence of the cost of arbitration under the rules in question, and no evidence of the plaintiffs' financial status.

Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 663–65, 90 FEP Cases 1697 (**6th Cir.** 2003) (*en banc*), held that an arbitration agreement is not enforceable if a cost-splitting provision in the agreement would chill similarly situated individuals from seeking to vindicate their rights in arbitration. The claimant has the burden of making that showing, and may do so prior to the arbitration. If the claimant succeeds in that showing, the cost-splitting provision can be severed and the arbitration can go forward.

> The deterrent function of the laws in question is, in part, that employers who engage in discriminatory practices are aware that they may incur liability in more than one case. If, however, a cost-splitting provision would deter a substantial number of potential litigants, then that provision undermines the deterrent effect of the anti-discrimination statutes. Thus, in order to protect the statutory rights at issue, the reviewing court must look to more than just the interests and conduct of a particular plaintiff. A particular plaintiff may be determined to pursue his or her claims, regardless of costs. But a court considering whether a cost-splitting provision is enforceable should consider similarly situated potential litigants, for whom costs will loom as a larger concern, because it is, in large part, their presence in the system that will deter discriminatory practices.

> For this reason, if the reviewing court finds that the cost-splitting provision would deter a substantial number of similarly situated potential litigants, it should refuse to enforce the cost-splitting provision in order to serve the underlying functions of the federal statute. In conducting this analysis, the reviewing court should define the class of such similarly situated potential litigants by job description and socioeconomic background. It should take the actual plaintiff's income and resources as representative of this larger class's ability to shoulder the costs of arbitration. But, as one district court has noted, *Green Tree* "does not necessarily mandate a searching inquiry into an employee's bills and expenses." *Giordano v. Pep Boys--Manny, Moe & Jack, Inc.*, No. CIV. A. 99- 1281, 2001 WL 484360, at *6 (E.D.Pa. March 29, 2001). [FN9] "[N]othing in *Green Tree* requires courts to undertake detailed analyses of the household budgets of low-level employees to conclude that arbitration costs in the thousands of dollars deter the vindication of employees' claims in arbitral fora." *Id.*
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> Moreover, in addressing the effect of arbitration costs on a class, the reviewing court should look to average or typical arbitration costs, because that is the kind of information that potential litigants will take into account in deciding whether to bring their claims in the arbitral forum. In considering the decision-making process of the typical member of a class, it is proper to take into account the typical or average costs of arbitration.
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> Finally, under this analysis, the reviewing court should discount the possibilities that the plaintiff will not be required to pay costs or arbitral fees because of ultimate success on the merits, either because of cost-shifting provisions in the arbitration agreement or because the arbitrator decides that such costs or fees are contrary to federal law. The issue is whether the terms of the arbitration agreement itself would deter a substantial number of similarly situated employees from bringing their claims in the arbitral forum, and thus the court must consider the decision-making process of these potential litigants. In many cases, if not most, employees considering the consequences of bringing their claims in the arbitral forum will be inclined to err on the side of caution, especially when the worst-case scenario would mean not only losing on their substantive claims but also the imposition of the costs of the arbitration.

The court held that the results may differ, with "high-level managerial employees and others with substantial means" able to afford the costs of arbitration, but other employees not able to afford such costs.

Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 89 FEP Cases 706 (**9th Cir.** 2002), affirmed the district court's denial of defendant's motion to compel arbitration of plaintiff's harassment and retaliation claims. The court held that the cost-splitting provisions were unconscionable. The agreement provided for a $125 filing fee and stated that the employer would pay for the first day's arbitration costs, but that the parties would split all of the other arbitration costs. The court noted that this could run to $2,000-$3,000 a day, with arbitral fees ranging up to $300-$400 an hour. *Id.* at 785 n.7. The court held that the arbitrator's discretion to shift the costs did not save the agreement. *Id.* at 785 n.8.

f. Mutual Mistake

Adkins v. Labor Ready, Inc., 303 F.3d 496, 503–04, 8 WH Cases 2d 7 (**4th Cir.** 2002), affirmed an order compelling arbitration of FLSA claims. The court rejected plaintiff's argument that there was not a valid contract because of mutual mistake as to the everyday end-of-day termination of employment, because in West Virginia "mutual mistake" has to involve a mistake of fact, not a mistake of law. The court also rejected plaintiff's argument that the contract terminated at the end of the first day of employment, holding that the agreement was permissibly in the application form, and lived on with respect to the employment, notwithstanding any daily end of employment.

4. Terms of Collective Bargaining Agreements

New England Health Care Employees Union, District 1199, SEIU, AFL-CIO v. Rhode Island Legal Services, 273 F.3d 425, 168 LRRM 2961 (**1st Cir.** 2001), affirmed the grant of summary judgment to the defendant. The union had sought to arbitrate the claim of a former employee who claimed that she had been fired because of a disability. After the union filed a grievance on her behalf, she filed charges of discrimination with the Rhode Island Commission on Human Rights and the EEOC. The court held that the arbitrator was correct that this rendered her dispute nonarbitrable in light of the language of the collective bargaining agreement stating that the employer "shall not be required to arbitrate any dispute which is pending before any administrative or judicial agency."

5. Class Actions

The enforceability of arbitration clauses not allowing for class actions is currently one of the hottest issues in arbitration.

Green Tree Financial Corp. v. Bazzle, __ **U.S.** __, 123 S. Ct. 2402, 91 FEP Cases 1832 (2003), involved Green Tree's effort to set aside a classwide arbitration award against it. The arbitration agreement was silent, and the plurality held that the intrinsic evidence in the agreement left the matter open to doubt. Justice Stevens concurred in the judgment expressly to provide the fifth vote, stating that Justice Breyer's opinion is close to his own views, *id.* at 2408–09, but also stating: "Arguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court." *Id.* at 2408. As a result, it was for the arbitrator to determine whether the agreement permitted classwide arbitration. The plurality distinguished "gateway issues" that parties would ordinarily expect to be resolved by the courts, "such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." The plurality and Justice Stevens did not discuss whether the agreement would be enforceable if it banned classwide arbitration. The holding is not stable.

Following *Green Tree*, the Fifth Circuit has remanded a failure-to-pay insurance case for an arbitral decision whether the agreement, silent as to class actions, allows class claims to be arbitrated. *Pedcor Management Co., Inc. Welfare Benefit Plan v. Nations Personnel of Texas, Inc.*, 343 F.3d 355 (**5th Cir.** 2003). The court stated: "In light of Green Tree, however,

the American Arbitration Association is beginning to provide some assistance in organizing consolidated or class arbitrations." *Id.* at 360.

Enforcing Arbitration "Agreements" Barring Class Treatment: *Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (**3d Cir.** 2000) (TILA), *cert. denied*, 531 U.S. 1145 (2001); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503, 8 WH Cases 2d 7 (**4th Cir.** 2002) (FLSA collective action); *Livingston v. Associates Finance, Inc.*, 339 F.3d 553, 558–59 (**7th Cir.** 2003) (cursory discussion); *Boomer v. AT&T*, 309 F.3d 404 (**7th Cir.** 2002) (Communications act preempts State-law challenge to arbitration agreement); *Randolph v. Green Tree Financial Corp.—Alabama*, 244 F.3d 814 (**11th Cir.** 2001) (on remand) (TILA and ECOA).

Refusing to Enforce Arbitration "Agreements" Barring Class Treatment: *Ting v. AT&T*, 319 F.3d 1126 (**9th Cir.**) (consumer case; "agreement" held unconscionable under California law), *cert. denied*, __ U.S. __, __ S. Ct. __, 2003 WL 1988529, 71 USLW 3680, 72 USLW 3231, 72 USLW 3235 (U.S. Oct. 6, 2003) (No. 02–1521). A number of State Supreme Courts have held such agreements unconscionable.

Enforcing Arbitration Agreements Covering Statutory Claims, But Requiring Arbitrator to Ignore Contractual Limitations: *Bailey v. Ameriquest Mortgage Co.*, __ F.3d __, 2003 WL 22331890 (**8th Cir.** Oct. 14, 2003), held that plaintiffs' FLSA claims were subject to arbitration notwithstanding that the arbitration agreement contained a one-year period of limitations, required cost-sharing, specified a California venue, and did not provide for collective actions. See note 1. The court stated that these matters were for the arbitrator to resolve, and that contractual terms were to be overridden by the statutory terms:

> When an agreement to arbitrate encompasses statutory claims, the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply.[3]
>
> [3] Here, the Arbitration Agreement expressly requires the arbitrator to apply applicable federal and state law, authorizes the arbitrator to conclude that any part of the agreement is void or voidable, and provides for the severability of any unenforceable terms.

6. Conditions Precedent to Arbitration

HIM Portland, LLC v. DeVito Builders, Inc., 317 F.3d 41 (**1st Cir.** 2003), affirmed the denial of the defendant's motion to compel arbitration where the agreement stated that mediation was a condition precedent to arbitration, and the defendant had not requested mediation. It was unclear whether mediation was also a condition precedent to litigation.

Kemiron Atlantic, Inc. v. Aguakem International, Inc., 290 F.3d 1287 (**11th Cir.** 2002), affirmed an order refusing to compel arbitration where the agreement specified that mediation was a condition precedent to arbitration, and no mediation had occurred.

7. Unilateral Power to Pick the Panel from Which Arbitrators Are Chosen

Murray v. United Food and Commercial Workers International Union, 289 F.3d 297, 304, 88 FEP Cases 1185 (**2d Cir.** 2002), held that the arbitration agreement was unconscionable and unenforceable in part because it did not rely on external rules for the selection of arbitrators, but provided that "the selection method is to be by the alternate strike method from a list of arbitrators arbitrarily selected or created by Local 400, and then provided to the employee. Local 400's argument, therefore, is little more than a claim that because Local 400 says it will provide a list of neutral arbitrators and abide by the ultimate arbitration decision, the selection procedure is not one-sided and the agreement is not unconscionable." *Id.* at 304. This was not enough.

8. Rules Governing the Arbitration

The National Rules for the Resolution of Employment Disputes of the American Arbitration Association (AAA) have been held to authorize the grant of broad injunctive relief. *Brown v. Coleman Co., Inc.*, 220 F.3d 1180, 1183–84, 16 IER Cases 966 (**10th Cir.** 2000), *cert. denied*, 531 **U.S.** 1192 (2001). "We now hold that Rule 34(d) of the AAA Employment Disputes Rules permits the crafting of broad equitable relief, and that the panel did not exceed its power by granting the equitable relief of extending the time in which stock options could be exercised." *Id.* at 1184.

Brooks v. Travelers Insurance Co., 297 F.3d 167 (**2d Cir.** 2002), vacated the dismissal of plaintiff's ADA, ADEA, and ERISA Complaint after the defendant responded to the panel's concerns expressed at oral argument and dropped its insistence on the arbitration of the claim. The panel had questioned whether plaintiff would have an effective opportunity to vindicate his rights under the defendant's arbitration rules. *First*, the rules provided for a one-day hearing, and required a showing of good cause and unusual circumstances for a second day of hearing. The court held that an arbitrator could reasonably conclude that there could not be any more than two days of hearings in any circumstances. The court stated:

> At oral argument, members of the panel questioned whether these limitations might prevent a plaintiff from securing vindication of federal statutory rights, pointing out that it is by no means unusual for the presentation of evidence in suits under the federal employment discrimination statutes to exceed two days by a substantial margin. Furthermore, the time spent in the presentation of plaintiff's evidence is not within the plaintiff's exclusive control. Since the defendant is, of course, entitled to make objections and to cross-examine each witness the plaintiff presents, members of the panel hypothesized that by proliferating objections and extending its cross-examination of the plaintiff's witnesses, Travelers can effectively run out the plaintiff's time limitation. Also, the plaintiff has no control over how efficiently the arbitrator conducts the session. If the ambiguous policy language does restrict proceedings to one, or possibly two, days, we asked whether this could impair a plaintiff's ability to vindicate statutory rights.

Id. at 169–70. The court was also troubled by the limitations on relief: "The first sentence provides for compensatory damages only in cases of 'direct' injury; the second sentence allows

the arbitrator to order reinstatement of the employee 'only if money damages are insufficient as a remedy;' the third sentence forbids punitive damages, injunctive relief and attorney's fees '[u]nless expressly provided for by applicable statute.'" *Id.* at 170. The court pointed out that the "expressly" limitation seems to preclude such relief even where the courts have authoritatively construed a statute as providing or allowing for such relief. The court also pointed out that reinstatement is not conditioned on the inadequacy of money damages: "Federal employment discrimination statutes do not necessarily restrict reinstatement to circumstances where money damages are insufficient." *Id.* The court also questioned the limitation of compensatory damages to "direct" injuries. *Id.* at 171. The court expressed concern over an apparent limitation on arbitrators' ability to award attorneys' fees to a prevailing plaintiff, over the requirement of cost-splitting for arbitral fees, and over the requirement that plaintiff pay all of the costs of a second day of hearing. *Id.* Finally, the court expressed concern over the one-year period of limitations in the arbitration "agreement."

Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 89 FEP Cases 706 (**9th Cir.** 2002), affirmed the district court's denial of defendant's motion to compel arbitration of plaintiff's harassment and retaliation claims. Plaintiff challenged the limitation of discovery as unconscionable: "The discovery provision states that '[a] deposition of a corporate representative shall be limited to no more than four designated subjects,' but does not impose a similar limitation on depositions of employees. Ferguson also notes that the arbitration agreement sets mutual limitations (e.g., no more than three depositions) and mutual advantages (e.g., unlimited expert witnesses) which favor Countrywide because it is in a superior position to gather information regarding its business practices and employees' conduct, and has greater access to funds to pay for expensive expert witnesses." *Id.* at 786. The court held it was unclear that the limitations on discovery would prevent plaintiff from having an effective opportunity to vindicate his claims. However, it held that the limitations did favor the defendant over its employees, and were part of an "insidious pattern" that supported the court's decision to affirm the lower court. It stated that "the discovery provisions alone are not unconscionable, but in the context of an arbitration agreement which unduly favors Countrywide at every turn, we find that their inclusion reaffirms our belief that the arbitration agreement as a whole is substantively unconscionable." *Id.* at 787. the court held that severance was inappropriate in light of the multitude of improper provisions. *Id.* at 788.

9. Other Questions of Unconscionability

Murray v. United Food and Commercial Workers International Union, 289 F.3d 297, 304, 88 FEP Cases 1185 (**2d Cir.** 2002), held that the arbitration agreement was unconscionable and unenforceable in part because the agreement barred any relief that would diminish the power of the union President.

Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 91 FEP Cases 1426 (**9th Cir.** 2003), held that the defendant's arbitration agreement was procedurally and substantively unconscionable. Citing California decision, the court stated: "Unconscionability refers to 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.'" *Id.* at 1170. The court held that *Armendariz v. Found. Health Psychcare Servs., Inc.*, 24 Cal.4th 83, 99 Cal.Rptr.2d 745, 6 P.3d 669 (2000), was fully consistent with the FAA. 328 F.3d at 1170 n.3. The court held that the Circuit City

agreement at issue was the same agreement at issue in Adams, and was therefore procedurally unconscionable. *Id.* at 1171–72. The court held that it was irrelevant that plaintiff had had three days within which to consider the agreement. *Id.* at 1172. Here, unlike *Najd v. Circuit City*, there was no meaningful opportunity to opt out. There was also no meaningful opportunity to negotiate the terms of the agreement; the defendant had presented it to the plaintiff on an "adhere-or-reject" basis. *Id.* The court also found that the test of substantive unconscionability was met:

> Several substantive terms of Circuit City's arbitration agreement are one-sided. The provisions concerning coverage of claims, the statute of limitations, the prohibition of class actions, the filing fee, cost-splitting, remedies, and Circuit City's unilateral power to modify or terminate the arbitration agreement all operate to benefit the employer inordinately at the employee's expense. Because these one-sided provisions grossly favor Circuit City, we conclude that, under California law, these terms are substantively unconscionable, and address each term in turn.

Id. at 1172–73. The court found troubling the fact that the agreement covered only employment-related claims, *i.e.*, those an employee is likely to bring against Circuit City, and did not cover the claims the company might bring against an employee. *Id.* at 1173–75.

By contrast, *Stephan v. Goldinger*, 325 F.3d 874, 876–77 (**7th Cir.** 2003), *cert. denied sub nom. Stephan v. Refco, Inc.*, __ **U.S.** __, __ S. Ct.__, 2003 WL 21692210, 72 USLW 3093, 72 USLW 3229, 72 USLW 3240 (**U.S.** Oct. 6, 2003) (No. 03–71), held that the two-year limitations period in the Commodities Exchange Act could validly be shortened to one year in an arbitration agreement. Judge Posner held that there was no indication in the Act of an intent to benefit plaintiffs with respect to the limitations period, a factor that could distinguish this case from discrimination and harassment cases.

Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 89 FEP Cases 706 (**9th Cir.** 2002), affirmed the district court's denial of defendant's motion to compel arbitration of plaintiff's harassment and retaliation claims. The court stated:

> Countrywide's arbitration agreement specifically covers claims for breach of express or implied contracts or covenants, tort claims, claims of discrimination or harassment based on race, sex, age, or disability, and claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy. On the other hand, the arbitration agreement specifically excludes claims for workers' compensation or unemployment compensation benefits, injunctive and/or other equitable relief for intellectual property violations, unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information. We adopt the California appellate court's holding in *Mercuro*, that Countrywide's arbitration agreement was unfairly one-sided and, therefore, substantively unconscionable because the agreement "compels arbitration of the claims employees are most likely to bring against Countrywide . . . [but] exempts from arbitration the claims Countrywide is most likely to bring against its employees."

Id. at 784–85 (footnote omitted). The court also held the cost-splitting provision unconscionable, and disapproved of the limitations on discovery. See the above discussions of these issues.

10. Effect of "Opt Out" Rights

Circuit City Stores, Inc. v. Najd, 294 F.3d 1104, 89 FEP Cases 1149 (**9th Cir.** 2002), affirmed the order compelling arbitration but reversed the award of Rule 11 sanctions against the California FEHA plaintiff. The court held that Duffield did not apply because plaintiff was suing under State law, and not under Title VII. *Id.* at 1107. The court held that defendant's promise to be bound by the results of arbitration was adequate consideration, even though it was not required to submit any of its claims against employees to arbitration. *Id.* at 1108. The court held that the agreement, identical to one it had previously found unconscionable in another case, was not unconscionable here because the plaintiff was provided with a copy of the agreement and thirty days to review it with an attorney, and had the right to opt out of the agreement without any adverse effect on his employment status. As a result, the agreement was not unconscionable because California law requires both procedural and substantive unconscionability. *Id.* at 1108–09. Judge Paez concurred. *Id.* at 1110.

11. Stitches in Time? Employer Efforts to Dig Out of Holes

Murray v. United Food and Commercial Workers International Union, 289 F.3d 297, 304–05, 88 FEP Cases 1185 (**2d Cir.** 2002), held that the arbitration agreement was unconscionable and unenforceable, and rejected the defendant's efforts to save it:

> We decline to allow Local 400 to salvage the agreement simply because it may have provided, after much haranguing, a list of impartial arbitrators in this case, or because it promises to act fairly in future cases. The arbitration agreement is unenforceable as written and Local 400 may not rewrite the arbitration clause and adhere to unwritten standards on a case-by-case basis in order to claim that it is an acceptable one. *Cf. Perez v. Globe Airport Sec. Servs. Inc.*, 253 F.3d 1280, 1285-86 (**11th Cir.** 2001) (rejecting attempt to rewrite unenforceable arbitration clause in order to salvage it).

Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 89 FEP Cases 706 (**9th Cir.** 2002), affirmed the district court's denial of defendant's motion to compel arbitration of plaintiff's harassment and retaliation claims. The court held that the cost-splitting provisions were unconscionable, and that the agreement was not saved by the defendant's unilateral announcement that it would pay arbitration-specific costs, because the company did not follow the procedure for making changes specified in its own agreement, and the announcement therefore could not be enforced.

12. Retaliation Claims for Refusing to Sign A Lawful Agreement

Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312, 88 FEP Cases 1482 (**11th Cir.** 2002), held that an employer's discharge of employees who refuse to sign a lawful arbitration agreement is not retaliation prohibited by the fair employment laws. The court held that there is an objective as well as subjective component to the reasonableness of plaintiffs' belief that the employer was violating the law, and plaintiffs could not meet this element. "We agree with

Harden that the plaintiffs' belief that Harden was engaged in an unlawful employment practice by requiring the arbitration of employment discrimination claims was not objectively reasonable." *Id.* The court also held that "that an unenforceable arbitration agreement does not amount to an unlawful employment practice under the federal employment discrimination laws." *Id.* at 1316.

D. Other ADR

Department of Air Force, 436th Airlift Wing, Dover Air Force Base v. Federal Labor Relations Authority, 316 F.3d 280, 90 FEP Cases 1253, 171 LRRM 2774 (**D.C. Cir.** 2003), held that an EEO complaint is a grievance and that, in the absence of an objection by the plaintiff, the employee union had a right to notice and an opportunity to be heard at the mediation of the complaint.

E. Arbitration Services Providers

The following is from an October 14, 2001, editorial in the SAN FRANCISCO CHRONICLE, following a three-part investigative series on the American Arbitration Association and cram-down arbitration "agreements":

> "-- Conflicts of interest: The arbitration system allows conflicts that would not be permitted by the court system. The American Arbitration Association invests in major corporations whose legal disputes the firm's arbitrators hear; companies are allowed to buy 'memberships' in the association, and their executives sit on its board of directors. Arbitration firms often court clients by touting their small awards and perfunctory procedures. Also, arbitrators face an inherent conflict to 'please' companies to keep them coming back for repeat business."

F. Changing the Rules Governing the Arbitration

Plaintiffs' counsel should get a copy of the rules; do not assume they will be like other rules you have seen. *Cf. Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 79 FEP Cases 629, 75 E.P.D. ¶ 45,822 (**4th Cir.** 1999), which stated: "Because Hooters set up a dispute resolution process utterly lacking in the rudiments of even-handedness, we hold that Hooters breached its agreement to arbitrate. Thus, we affirm the district court's refusal to compel arbitration."

Even if the unfairness of the rules has not saved the plaintiff from an arbitration requirement, it may still be possible to seek an arbitral decision striking the unfair provision. *Great Western Mortgage Corporation v. Peacock*, 110 F.3d 222, 231–32, 73 FEP Cases 856 (**3d Cir.** 1997), *cert. denied*, 522 **U.S.** 915 (1997), held that, once the dispute has been determined arbitrable, all other issues are for the arbitrator. Thus, the arbitrator had to determine the validity of the waiver of punitive damages in the arbitration agreement.

The parties can agree to waive some provisions and amend others. Discovery rights, for example, can be expanded by agreement. The parties to an arbitration agreement can contractually specify additional grounds for review, however, and it may be in the interest of both sides to exercise this option in advance of the arbitration. Employers and employees share a

common interest in avoiding the consequences of "runaway arbitrators" issuing arbitrary awards, particularly where broad injunctive relief is claimed or awarded. Even if an agreement has been signed three times, as in *Peacock*, both sides can still agree to substantial changes where these seem mutually reasonable. In *Peacock* itself, for example, the employer represented to the Third Circuit that it would provide informal discovery during the arbitration and that attorneys' fees could be awarded by the arbitrator. *Id.* at 231 nn. 37, 38. If a thrice-signed agreement can be amended by representations in court, the parties can certainly sit down and reach modifying or clarifying agreements on their own. Valid arbitration agreements are contracts on paper, not engravings on stone.

G. Bifurcating the Arbitration

Ordinarily, a party to an arbitration can move to confirm or vacate the award only after the entire arbitration has concluded. However, the parties can make a formal agreement to bifurcate an arbitration. For example, the parties can agree that there will be a final award on liability, and that the arbitration will then resume solely as to the remedy. The First Circuit has held that such an agreement allows a motion to confirm or vacate the award on liability even though the arbitration is proceeding on the other issues. *Hart Surgical, Inc. v. Ultracision, Inc.*, 244 F.3d 231, 235 (**1st Cir.** 2001).

The First Circuit has held that the parties can achieve the same result by informally but consistently treating the arbitration as bifurcated, even without an explicit agreement. *Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16, 20, 168 LRRM 2804 (**1st Cir.** 2001). The court explained:

> It is evident from the November arbitration hearing that the parties intended, though never formally stated, to bifurcate the proceedings. They divided the arbitration into separate phases and requested that the arbitrator retain jurisdiction over the remedy issue. In fact, had the parties not been stipulating to bifurcation, there would have been no need for the parties to specifically request that the arbitrator retain jurisdiction over the remedial phase. Clearly, then, both the parties and the arbitrator agreed to bifurcate the arbitral proceeding and understood the determination of liability to be a final award.

In *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 155 LRRM 2738 (**3d Cir.** 1997), the Third Circuit affirmed the district court's vacating of an arbitrator's decision based on procedural irregularities. The arbitrator had verbally instructed the parties that his ruling would be on only one of two issues and that a later hearing would be held on the second if it was needed. However, the arbitrator issued a ruling that appeared to decide both issues without a second hearing. In a later letter the arbitrator clarified his ruling to have decided only the first issue. The union argued that the *functus officio* doctrine, a doctrine that deprives the arbitrator of power to decide a dispute after having made his ruling, prevented the second letter from having any effect. The court found that the second letter was merely a clarification of the procedural status of the case and did not alter any substantive decision of the arbitrator. The court relied on the exceptions to the *functus officio* doctrine, as well as similar language in the FAA, in its decision to affirm the vacation of one of the apparent rulings in the initial decision of the arbitrator.

Legion Insurance Co. v. VCW, Inc., 198 F.3d 718, 721 (**8th Cir.** 1999), held that, where an arbitral panel "by the language it uses makes clear that it intends its award to be indivisible, the district court must take the award as it finds it and either vacate the entire award under section 10 or modify the award using section 11."

H. Dismissals Before Hearing

The NASD Manual and Code of Arbitration Procedure allows an arbitrator to dismiss a fatally defective claim with prejudice based on the pleadings alone, "so long as the dismissal does not deny a party fundamental fairness." The opportunity to brief and argue the dismissal motion was adequate. *Sheldon v. Vermonty*, 269 F.3d 1202 (**10th Cir.** 2001).

I. Waiver

The Second Circuit has held that an indemnification claim subject to an arbitration clause that was not presented in the arbitration of other claims under the agreement, where there was an opportunity to do so, results in waiver of the claims not pursued. "Arbitration is not a trial run in which a party may sit quietly by without raising pertinent issues, wait to see if the result is in his favor and then seek judicial relief as an afterthought." *Pike v. Freeman*, 266 F.3d 78, 89 (**2d Cir.** 2001) (citation omitted). The court remanded the counterclaim and cross-claims for indemnification to determine if they were subject to the arbitration agreement. Id. at 91–93.

A party submitting a disability discrimination claim to arbitration could not subsequently argue that the arbitration panel did not have the authority to decide the claim. In *Kiernan v. Piper Jaffray Companies*, 137 F.3d 588, 7 AD Cases 1499 (**8th Cir.** 1998), a plaintiff submitted his disability discrimination claim against his employer to an arbitration panel. After losing, he argued that his ADA claim was not arbitrable based on the NASD rules and the ADA's history. The court held that the plaintiff's submission of the claim defined the authority of the arbitration panel regardless of whether he had a prior legal obligation to arbitrate the claim.

J. The Basis for an Award

In arbitrations involving contract rights under collective bargaining agreements, the arbitrator can base the award not only on the language of the CBA, but also on the practice of the parties. E.g., *Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16, 21, 168 LRRM (BNA) 2804 (**1st Cir.** 2001).

K. Questions of Appealability

An order confirming, denying confirmation of, or vacating an arbitration award is appealable. 9 U.S.C. § 16(a).

An order compelling arbitration is not appealable. 9 U.S.C. § 16(b).

Cortez Byrd Chips, Inc. v. Harbert Construction Co., 529 **U.S.** 193 (2000), held that the venue provisions in §§ 9, 10(a), and 11 of the FAA are permissive rather than exclusive,

and allow the filing of motions to confirm, vacate, or modify an arbitral award either in the district in which the award was made, or in any district proper under the general venue statute.

An order denying confirmation of an arbitration award and directing the submission of the dispute to a new arbitrator does not lose its appealability because of the additional element. *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 327-28 (**1st Cir.** 2000).

L. Jurisdiction

"Because the FAA itself does not create a basis for federal subject matter jurisdiction, there must be an independent basis for federal jurisdiction," including jurisdictional amount. *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 328 (**1st Cir.** 2000).

Where there is no other basis for Federal-court jurisdiction: "We conclude that: (1) the fact that the arbitration itself concerns issues of federal law does not, on its own, confer subject matter jurisdiction on a federal district court to review the award; but (2) federal jurisdiction may lie where the petitioner seeks to vacate the award primarily on the ground of manifest disregard of federal law." *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25 (**2d Cir.** 2000), *cert. denied*, 531 **U.S.** 1075 (2001).

M. The Standard of Review

The Supreme Court seems to have accepted that there can be review of an arbitral award on certain limited grounds in addition to those specified in the FAA, particularly where the award is in "manifest disregard of the law." *First Options of Chicago, Inc., v. Kaplan*, 514 **U.S.** 938, 942 (1995).

The findings in a district court order on review of an arbitration award are reviewed by a court of appeals for clear error, and the district court's legal rulings are reviewed de novo. *First Options of Chicago, Inc., v. Kaplan*, 514 **U.S.** 938, 947 (1995).

The same standard should be followed whether a party is seeking to confirm or vacate the arbitral award. *Gianelli Money Purchase Plan and Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309, 1311 (**11th Cir.**), *cert. denied*, 525 **U.S.** 1016 (1998).

Arbitration of Grievances based on a CBA: *United Paperworkers Int'l Union v. Misco, Inc.*, 484 **U.S.** 29, 36, 126 LRRM 3113 (1987), stated: "Collective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. In such cases, and this is such a case, the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. 'The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.' *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 **U.S.** 593, 596 . . . (1960). As long as the arbitrator's award

'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate. *Id.*, at 597." The Court stated that "improvident, even silly, factfinding . . . is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts." *Id.* at 39. The Court continued:

> Even in the very rare instances when an arbitrator's procedural aberrations rise to the level of affirmative misconduct, as a rule the court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement. Instead, the court should simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement. The court also has the authority to remand for further proceedings when this step seems appropriate.

Id. at 40 n.10.

D.C. Circuit: *Cole v. Burns International Security Services*, 105 F.3d 1465, 1469, 72 FEP Cases 1775 (**D.C. Cir.** 1997), held that the arbitrators' decisions on legal issues must be subject to judicial review "sufficiently rigorous" to ensure that the arbitrators "have properly interpreted and applied statutory law." The court explained:

> The value and finality of an employer's arbitration system will not be undermined by focused review of arbitral legal determinations. Most employment discrimination claims are entirely factual in nature and involve well-settled legal principles. See Alleyne, 13 HOFSTRA LAB. L.J. at 422 (most arbitration awards in employment cases are based on resolution of factual disputes); Martin H. Malin, *Arbitrating Statutory Employment Claims In the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 104 (1996) ("Most employment disputes are fact-based and not likely to raise the kind of legal issues that would call for significant judicial review."). In fact, one study done in the 1980s found that discrimination cases involve factual claims approximately 84 % of the time. See Michele Hoyman & Lamont E. Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner- Denver*, 39 ARB. J. 49, 53 (Sept.1984). As a result, in the vast majority of cases, judicial review of legal determinations to ensure compliance with public law should have no adverse impact on the arbitration process.[21] Nonetheless, there will be some cases in which novel or difficult legal issues are presented demanding judicial judgment. In such cases, the courts are empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct. Indeed, at oral argument, Burns conceded the courts' authority to engage in such review. Because meaningful judicial review of public law issues is available, Cole's agreement to arbitrate is not unconscionable or otherwise unenforceable.
>
> [21] The Hoyman/Stallworth study of arbitral awards in discrimination cases found that, even in cases where de novo review was available under *Gardner-Denver*, only 1.2 % of all discrimination cases were reversed by the courts. See Hoyman & Stallworth, 39 ARB. J. at 55.

Id. at 1487. The "strict deference" accorded the results of collectively bargained arbitration procedures "may not be appropriate in statutory cases in which an employee has been forced to resort to arbitration as a condition of employment."

First Circuit: In a case involving arbitration under a CBA: "we note that judicial review of an arbitration decision is extremely narrow and extraordinarily deferential." . . . judicial review of arbitration decisions "is among the narrowest known in the law"). A court cannot vacate an arbitral award as long as the arbitrator is even arguably construing the contract and acting within the scope of his authority. . . . In the end, the court's task "is limited to determining if the arbitrator's interpretation of the contract is in any way plausible." *Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16, 20, 168 LRRM (BNA) 2804 (**1st Cir.** 2001) (citations omitted).

In a case not involving a CBA, the court stated: "There are bifurcated standards of review. We review the district court's ruling on an arbitration award de novo, but we also are mindful that the district court's review of arbitral awards must be "extremely narrow and exceedingly deferential." . . . Indeed, "[a]rbitral awards are nearly impervious to judicial oversight." . . . A court's review of an arbitration award is highly deferential because the parties "have contracted to have disputes settled by an arbitrator" and thus, "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *United Paperworkers International Union v. Misco, Inc.*, 484 **U.S.** 29, 37-38 (1987). While the arbitrator's award must "draw its essence from the contract," as long as the arbitrator is "even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 38. *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 330 (**1st Cir.** 2000).

Second Circuit: "Federal court review of an arbitral judgment is highly deferential; such judgments are to be reversed only where the arbitrators have exceeded their authority or made a finding in manifest disregard of the law." *Pike v. Freeman*, 266 F.3d 78, 86 (**2d Cir.** 2001) (citation omitted).

Fifth Circuit: The review of arbitral awards in statutory discrimination cases is more intense than the review in other commercial arbitration contexts:

> The Supreme Court's assumptions and predictions in *Gilmer* assign heavy responsibilities to arbitrators and the federal courts. Arbitrators have a duty to ensure that, in the prospective subjection of federal statutory employment rights claims to compulsory arbitration, employees will not forgo substantive statutory rights or effective vindication of their statutory causes of action, and the statutes will continue to serve both their remedial and deterrent functions. The federal district courts and courts of appeals are charged with the obligation to exercise sufficient judicial scrutiny to ensure that arbitrators comply with their duties and the requirements of the statutes. In other words, the *Gilmer* Court anticipated that an employee's prospective waiver of the right to a court's decision about the merits of his or her future ADEA or Title VII disputes would not have the effect that it does in ordinary commercial arbitration-"relinquishment [of] much of that right's practical value." *First Options*, 514 **U.S.** at 942, 115 S. Ct. 1920. Accordingly, the judicial review of arbitral adjudication of federal statutory employment

> rights under the FAA and the "manifest disregard of the law" standard " 'must be sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 **U.S.** at 32 n. 4, 111 S. Ct. 1647 (quoting *Shearson/American Express*, 482 **U.S.** at 232, 107 S. Ct. 2332); see *Cole*, 105 F.3d at 1487.

Williams v. Cigna Financial Advisors Inc., 197 F.3d 752, 760 61, 81 FEP Cases 747, 77 E.P.D. ¶ 46,359 (**5th Cir.** 1999), *cert. denied*, 529 **U.S.** 1099 (2000).

Tenth Circuit: "However, 'we must give extreme deference to the determination of the arbitration panel for the standard of review of arbitral awards is among the narrowest known to law.'" *Sheldon v. Vermonty*, 269 F.3d 1202 (**10th Cir.** 2001) (citation omitted). "Brown and Coleman contracted for the arbitrator's construction of the contract not a judge's construction." *Brown v. Coleman Co., Inc.*, 220 F.3d 1180, 1183, 16 IER Cases 966 (**10th Cir.** 2000), *cert. denied*, 531 U.S. 1192 (2001).

N. Grounds to Set An Award Aside

9 U.S.C. § 10(a)(1) to (4) allows a court to set an award aside if (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone a hearing, in refusing to hear evidence, or in misbehaving in some other way; or (4) the arbitrators exceeded their powers or imperfectly executed them.

"We have also recognized 'a handful of judicially created reasons' that a district may rely upon to vacate an arbitration award, and these include violations of public policy, manifest disregard of the law, and denial of a fundamentally fair hearing. . . . 'Outside of these limited circumstances, an arbitration award must be confirmed,' and '[e]rrors in either the arbitrator's factual findings or his interpretation[s] of the law . . . do not justify review or reversal. . . .'" (citations omitted). *Sheldon v. Vermonty*, 269 F.3d 1202 (**10th Cir.** 2001) (citation omitted).

O. The Role of Public Policy in Review of an Award

Citing *W.R. Grace & Co. v. Rubber Workers*, 461 **U.S.** 757, 766, 26 FEP Cases 713, 107 LRRM 3251, 26 E.P.D. ¶ 32,024 (1983), the Supreme Court described the role of public policy in the review of arbitral awards of grievances under a CBA, in *United Paperworkers Int'l Union v. Misco, Inc.*, 484 **U.S.** 29, 43 (1987):

> First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interests." 461 **U.S.**, at 766, 103 S. Ct., at 2183. At the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.

The ruling by the United States Supreme Court in *Eastern Associated Coal Corp. v. United Mine Workers of America, District 17*, 531 **U.S.** 57, 16 IER Cases (2000), arose from a collective bargaining agreement under which the employer was required to show "just cause" for discharge. The subject of the arbitration was the discharge of a truck driver who lost his job after twice failing drug tests. The arbitrator reinstated the truck driver, reducing the discharge to a several month suspension and imposing other requirements. Appealing the arbitral decision in federal court, the employer argued that the decision contravened the public policy embodied in federal drug testing statutes and regulations governing truck drivers. The Supreme Court found that the statutory scheme did not dictate discharge of truck drivers who test positive for drugs and deferred to the arbitrator's award.

In *Westvaco Corp. v. United Paperworkers International Union*, 171 F.3d 971, 79 FEP Cases 595 (**4th Cir.** 1999), the Fourth Circuit held that the "general public policy against sexual harassment is not sufficient to supplant labor arbitration of employee disciplinary sanctions." *Id.* at 977. Here, the collective bargaining agreement allowed the labor arbitrator to review the company's discipline decisions. The nine month suspension given by the arbitrator instead of the termination sought by the company was a "strict punishment" and would not "prohibit the [the company] from exercising reasonable care to promptly correct harassing behavior." Id.

P. What Does It Mean that an Arbitrator Exceeded His or Her Powers?

"To determine whether an arbitrator has exceeded his authority under § 10, however, courts 'do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts,' *United Paperworkers International*, 484 **U.S.** at 38 . . . and '[e]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards.'" *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 330 (**1st Cir.** 2000) (citations and parallel cites omitted).

Q. What Does it Take to Show Partiality Under the FAA?

Partiality cannot be shown by a mere discrepancy between the amount claimed and the amount awarded, even where the only testimony on damages was presented by the claimant, where there were grounds in the record on which the arbitrators could have rejected part of the amount claimed. *Dawahare v. Spencer*, 210 F.3d 666, 669 (**6th Cir.**), *cert. denied*, 531 **U.S.** 878 (2000). "Only if a reasonable person would have to conclude that the arbitration panel was partial to a party will we find evident partiality. 'The alleged partiality must be direct, definite, and capable of demonstration, and the party asserting [it] . . . must establish specific facts that indicate improper motives on the part of the arbitrator.'" (Citation and some internal quotation marks omitted.)

Partiality cannot be shown merely by there having been frequent business contacts between the arbitrator and a party to the arbitration. *Gianelli Money Purchase Plan and Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309, 1312 (**11th Cir.**), *cert. denied*, 525 **U.S.** 1016 (1998). The court held that, because review of arbitral awards is limited, the "evident partiality test must be strictly construed. "The alleged partiality must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative.'" *Id.* (citation omitted).

The court rejected the more stringent disclosure rule of the Ninth Circuit, which required arbitrators to investigate to determine if they had had prior contacts with a party of which they were not aware. The court stated that the lower court should have followed "the law of our Circuit, which is that an arbitration award may be vacated due to the 'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists." *Id.*

R. What is Manifest Disregard of the Law?

First Circuit: An award is in manifest disregard of the law "'where an award is contrary to the plain language of the [contract]' and 'instances where it is clear from the record that the arbitrator recognized the applicable law and then ignored it.'" *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 330 31 (**1st Cir.** 2000) (citations and parallel cites omitted).

Second Circuit: "In determining whether arbitrators have "manifestly disregarded the law," we have held that there must be something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law, in order to sustain a finding of manifest disregard of the law. Illustrative of the degree of "disregard" necessary to support vacatur under this standard is our holding that manifest disregard will be found where an arbitrator understood and correctly stated the law but proceeded to ignore it. . . . ('[C]ourts may vacate awards only for an overt disregard of the law and not merely for an erroneous interpretation. . . . Moreover, the law ignored by the arbitrators must be well defined, explicit, and clearly applicable if the award is to be vacated.') (internal quotation marks omitted)." *Pike v. Freeman*, 266 F.3d 78, 86 (**2d Cir.** 2001) (citations omitted). *Accord*, *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (**2d Cir.** 2000), *cert. denied*, 531 **U.S.** 1075 (2001).

In *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 77 FEP Cases 182 (**2d Cir.** 1998), *cert. denied*, 526 **U.S.** 1034 (1999), the plaintiff alleged he was terminated due to his age. The employer defended by arguing that, in fact, the plaintiff had retired. The plaintiff presented what the Second Circuit called "very strong evidence of age-based discrimination." The parties fully informed the arbitrator of the applicable law. However, the arbitrator, without explanation, found for the employer. The Second Circuit held that the arbitrator acted with "manifest disregard of the law." *Id.* at 197. "[T]he arbitrators did not explain their award. It is true that we have stated repeatedly that arbitrators have no obligation to do so . . . . We merely observe that where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard." *Id.*

DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 74 FEP Cases 726 (**2d Cir.** 1997), *cert. denied*, 522 **U.S.** 1049 (1998), affirmed an arbitrator's award in an ADEA case that did not award attorney's fees to the plaintiff. The plaintiff argued that the arbitrator's refusal to grant attorney's fees constituted a "manifest disregard of the law." The court held that this standard was more stringent than the clearly erroneous standard and went on to uphold the

arbitrator's order. The court rested it argument primarily on the fact that the plaintiff never brought to the arbitrator's attention the fact that attorney's fees were mandated by the ADEA and not at the discretion of the court.

Fifth Circuit: *Williams v. CIGNA Financial* Advisers, 197 F.3d 752, 761–62, 81 FEP Cases 747, 77 E.P.D. ¶ 46,359 (**5th Cir.** 1999), *cert. denied*, 529 **U.S.** 1099 (2000), stated:

> The concept of "manifest disregard of the law" has not been defined by the Supreme Court. The circuits have adopted various formulations.[2] As indicated by our foregoing recognition of the standard, we agree with the D.C. Circuit that, "in this statutory context, the 'manifest disregard of law' standard must be defined in light of the bases underlying the Court's decisions in Gilmer-type cases." *Cole*, 105 F.3d at 1487. Professors MacNeil, Speidel, and Stipanowich have made a "modest proposal" that should prove helpful as a basis for articulating and applying the manifest disregard doctrine in the present context:
>
> > First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld.
> >
> > Second, where on the basis of the information available to the court it is manifest that the arbitrators acted contrary to the applicable law, the award should be upheld unless it would result in significant injustice, taking into account all the circumstances of the case, including powers of arbitrators to judge norms appropriate to the relations between the parties.
>
> MACNEIL, supra, §§ 40.7.2.6, at 40:95 (footnote omitted).

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[2] See, e.g., *Advest Inc. v. McCarthy*, 914 F.2d 6, 8-9 (**1st Cir.** 1990) ("where it is clear from the record that the arbitrator recognized the applicable law-and then ignored it"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (**2d Cir.** 1986)("The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator.

Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." (citations omitted)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (**6th Cir.** 1995)("an arbitration panel does not act in manifest disregard of the law unless (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle."); *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (**7th Cir.**1992)("there must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did.").

Sixth Circuit: *Dawahare v. Spencer*, 210 F.3d 666, 669–70 (**6th Cir.**), *cert. denied*, 531 **U.S.** 878 (2000), stated: "An arbitration decision 'must fly in the face of established

legal precedent' for us to find manifest disregard of the law. Id. An arbitration panel acts with manifest disregard if '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.' *Id.* Thus, to find manifest disregard a court must find two things: the relevant law must be clearly defined and the arbitrator must have consciously chosen not to apply it. . . . Arbitrators are not required to explain their decisions. If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law. . . ."

> "Chief Judge Martin, concurring in *Federated Department Stores, Inc. v. J.V.B. Industries, Inc.*, 894 F.2d 862 (**6th Cir.** 1990), recognized the problems inherent in reviewing an arbitration award for manifest disregard of the law where the arbitrators fail to state a reason for their decision. He stated that courts are forced to participate in a 'judicial snipe hunt' with the parties arguing about law that may or may not have been disregarded by the arbitrators. See *id.* at 871. He would allow reversal when there are no reasons given for an arbitration decision and the record is insufficient to show that the arbitrators did not manifestly disregard the law. See *id.* No panel of this court has adopted this reasoning."

Eleventh Circuit: *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 4 WH Cases 2d 385 (**11th Cir.** 1997), reversed an arbitration panel's decision because it appeared that the board had disregarded the law. The plaintiff sued the employer for overtime under the FLSA, arguing that she was a non-exempt employee. In its arguments to the arbitrator, the employer specifically asked the arbitrators to do "equity" and to disregard the FLSA. There was no evidence in the record that the arbitral panel did not heed this advice, and thus the court reversed the arbitrator's decision.

S. How Detailed Must the Decision Be?

"The nature of judicial review of arbitral action is complicated by the fact that arbitrators need not state any reason for their decision, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 **U.S.** 593, 598 . . . (1960), and, if they choose to say anything, are often remarkably terse." *Bull HN Information Systems, Inc. v. Hutson*, 229 F.3d 321, 330 31 (**1st Cir.** 2000) (parallel cites omitted).

Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 77 FEP Cases 182 (**2d Cir.** 1998), *cert. denied*, 526 **U.S.** 1034 (1999), reversed the lower court's refusal to vacate the ADEA arbitration award in favor of the employer. The court discussed the need for adequate review of arbitral awards in statutory discrimination cases, and its perception that the plaintiff presented "overwhelming evidence" of age discrimination. *Id.* at 203. The defendant admitted that the plaintiff's performance would not have justified discharge, but asserted that the plaintiff quit voluntarily. The court stated that the plaintiff "made a very strong showing that he did not choose the 'option' of quitting but was fired." *Id.* The law was explained to the arbitrators. *Id.* at 203–04. The court noted that the arbitrators did not explain their award, and that it had previously held that arbitrations were not under an obligation to do so. However, said the court, this case puts the assumptions of *Gilmer* to the test. *Id.* at 204. The court continued:

> At least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so, we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.

Id. at 204. The court stated that it was not holding that arbitrators should write opinions in every case, or in most cases. "We merely observe that where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard." *Id.*

In *Green v. Ameritech Corp.*, 200 F.3d 967, 81 FEP Cases 993 (**6th Cir.** 2000), the Sixth Circuit reversed a federal court's decision to vacate an arbitration award on the grounds that the arbitrator had insufficiently "explained" the basis of his decision as required by the arbitration agreement. The proper remedy, even if the award required further explanation, was to remand the case to the arbitrator, which the district court failed to do.

T. Interesting Award

Brown v. Coleman Co., Inc., 220 F.3d 1180, 16 IER Cases 966 (**10th Cir.** 2000), *cert. denied*, 531 **U.S.** 1192 (2001), upheld a high-dollar award for an employee, broken down as follows: "A three-member arbitration panel awarded Gerald E. Brown a total of $3,617,930 for breach of employment contract, wrongful termination, and defamation by the Coleman Company (Coleman). Brown brought an action under the Federal Arbitration Act to confirm the award. The district court vacated the $2,322,335 portion of the award that was based on the value of certain stock options and confirmed the rest of the award, including $350,001 for defamation. Brown appeals the vacatur of the $2,322,335 award for the stock options, and Coleman appeals the confirmation of the $350,001 award for defamation."

U. Setting Aside an Arbitration Award for Fraud

Int'l Bhd. of Teamsters, Local 519 v. United Parcel Service, 335 F.3d 497, 172 LRRM 2967 (**6th Cir.** 2003), vacated the denial of Local 519's motion to set aside the arbitration award for fraud, and remanded the case for findings on whether the union proved fraud by clear and convincing evidence, and whether the fraud could have been discovered during the course of the arbitration if the union has exercised due diligence.

V. Points of Agreement from Two Lawyers on Different Sides (from EQUAL EMPLOYMENT LAW UPDATE, Chapter 28 (Arbitration)

Comment by Nancy Williams, Perkins Coie LLP, and Richard Seymour on *Circuit City*: The *Circuit City* ruling answered a fundamental question about the applicability of the FAA to employment agreements, but it did not address other issues affecting the enforceability of arbitration provisions in such agreements. Such issues as whether an employee's agreement to arbitrate is knowing and voluntary (as the EEOC urges should be required), whether all requirements of an enforceable contract are met, and whether a particular arbitration procedure adequately affords the employee the remedies available through a civil

proceeding and at what cost, were subjects of judicial scrutiny before *Circuit City* (*see, e.g.*, cases discussed in sections D, E and F, infra); presumably, they will continue to be. It is natural that courts would concern themselves with these matters because of the tension between the public policy that favors arbitration as embodied in the FAA and the public policy that provides employees with civil remedies as embodied, for example, in Title VII, the ADA, and various other federal as well as state and local statutes prohibiting employment discrimination.

An employer that wants to adopt arbitration for resolving employment disputes should draft a plain and clear description of the procedure, then present the agreement to applicants and/or employees and obtain their acceptance in a manner that will be enforceable. The chosen procedure should not provide narrower remedies or a shorter time period within which a claim could be brought than are available to claimants in litigation. Factors that may be viewed as contributing to the procedural fairness of arbitration in employment situations include participation by the employee in selection of the arbitrator; use of a neutral and knowledgeable arbitrator; independent representation for the employee who desires it; reasonable discovery, and a fair and simple method for the employee to secure necessary information; the right to present proof through testimony; documentary evidence, and cross-examination; a transcript of the proceedings and a written opinion by the arbitrator; and sufficient judicial review to ensure that findings of fact are not clearly erroneous and that the award is in conformity with applicable legal standards.

W. Two California Cases

Armendariz v. Foundation Psychcare Services, Inc., 24 Cal.4th 83, 90 91, 6 P.3d 669, 99 Cal.Rptr.2d 745, 83 FEP Cases 1172 (Calif. S. Ct. 2000), stated as to claims under the California Fair Employment and Housing Act:

> We conclude that such claims are in fact arbitrable *if* the arbitration permits an employee to vindicate his or her statutory rights. As explained, in order for such vindication to occur, the arbitration must meet certain minimum requirements, including neutrality of the arbitrator, the provision of adequate discovery, a written decision that will permit a limited form of judicial review, and limitations on the costs of arbitration.

(Emphasis in original.) The court also held "that the agreement possesses a damages limitation that is contrary to public policy, and that it is unconscionably unilateral." *Id.* at 91. The latter problem arose from the fact that the arbitration "agreement" required employees to arbitrate their wrongful termination claims against the defendant, but did not require the defendant to arbitrate any claims against employees. The court stated:

> We agree with the *Stirlen* court that the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context. One such form is an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. The application of this principle to arbitration does not disfavor arbitration. It is no disparagement of arbitration to acknowledge that it has, as noted, both advantages and disadvantages. The perceived advantages of the judicial forum for plaintiffs include the availability of discovery and

> the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to "split the difference" between the two sides, thereby lowering damages awards for plaintiffs. (See Haig, *Corporate Counsel's Guide: Development Report on Cost-Effective Management of Corporate Litigation* (July 1999) 610 PLI/Lit. 177, 186 187 ["a company that believes it has a strong legal and factual position may want to avoid arbitration, with its tendency to 'split the difference,' in favor of a judicial forum where it may be more likely to win a clear-cut victory"]; see also Schwartz, *supra*, 1997 Wisc.L.Rev. at pp. 64-65.) An employer may accordingly consider courts to be a forum superior to arbitration when it comes to vindicating its own contractual and statutory rights, or may consider it advantageous to have a choice of arbitration or litigation when determining how best to pursue a claim against an employee. It does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the advantages and minimize the disadvantages of arbitration for itself at the employee's expense. On the contrary, a unilateral arbitration agreement imposed by the employer without reasonable justification reflects the very mistrust of arbitration that has been repudiated by the United States Supreme Court in *Doctors' Associates, Inc. v. Casarotto*, *supra*, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902, and other cases. We emphasize that if an employer does have reasonable justification for the arrangement i.e., a justification grounded in something other than the employer's desire to maximize its advantage based on the perceived superiority of the judicial forum such an agreement would not be unconscionable. Without such justification, we must assume that it is.

Id. at 119–20.

Camargo v. California Portland Cement Company, 103 Cal.Rptr.2d 841, 166 LRRM 2421, 84 FEP Cases 1569 (Calif. Ct. App, 3d Dist. 2001), held that the arbitration of the plaintiff's sexual harassment claim in the collectively bargained arbitration procedure did not have any collateral estoppel effect on her claims under the Fair Employment and Housing Law, and that two conditions must be satisfied before any such collateral estoppel could occur. "First, we believe that if the FEHA claims of a union member are to be finally resolved by arbitration (with the concomitant loss of a jury of one's peers), the agreement to do so in a CBA must be 'clear and unmistakable.' . . . That is not the case here." *Id.* at 855 (citations omitted). "Second, the procedures of the arbitration must allow for the full litigation and fair adjudication of the FEHA claim. The present record, which arises on demurrer, sheds little light on the fairness of the procedures of the subject arbitration, on the extent of discovery that was allowed the parties, or on whether the arbitrator had any special competence in the adjudication of FEHA claims. These matters are all relevant to a determination whether the arbitration award should be given collateral estoppel effect." *Id.* at 856 (citations omitted).