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Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer

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Voluntary arbitration must be voluntary in a real and genuine sense. There can be little concern that it is genuinely voluntary, when arbitration is agreed upon in collective bargaining between unions and employers possessing an equality, more or less, of bargaining power. The same is true of commercial arbitrations between business concerns which enter into arbitration agreements knowingly and advisedly. The situation may be different, however, where an arbitration clause appears
as “boiler plate” in . . . [a] document where bargaining power may be unequal.¹

I. SUMMARY

The Supreme Court's receptivity to the arbitration of statutory claims, combined with its preemptive reading of the Federal Arbitration Act, has created the potential for wholesale diversion of employment-related disputes, including federal and state employment discrimination claims, from litigation to arbitration through agreements drafted by employers and imposed upon employees as a condition of employment. In the author's view, such a development threatens the effective implementation of anti-discrimination policy, and poses serious questions of fairness to individual claimants. While such problems are particularly acute when an employer crafts an arbitration agreement with a view toward gaining a procedural or substantive advantage, even "neutral" arbitration procedures are more likely to operate to the institutional advantage of employers.

The first part of this article sets forth the developments which have led to the current state of affairs, and then uses a hypothetical problem to examine various doctrines which may serve to limit the wholesale enforcement of pre-dispute arbitration agreements in the employment context. These doctrines include the Federal Arbitration Act's exemption for certain "contracts of employment"; common law doctrines of fraud, duress, and unconscionability; and the policies implicit in the various federal anti-discrimination statutes. While this examination reveals considerable uncertainty in current law, it also concludes that doctrine is available to control the unilateral imposition of arbitration procedures upon unwilling employees.

In the second part of this article, the author addresses in broader public policy terms the alternatives of policing agreements to arbitrate statutory employment claims for fairness and for voluntariness. While a program of policing for fairness is clearly preferable to doing nothing, it is difficult to implement and unlikely to resolve in a satisfactory way the problems of fairness and public policy posed by adhesive agreements to arbitrate. In the author's view, it would be preferable either to deny altogether the enforcement of pre-dispute agreements to arbitrate discrimination claims, or to insist that any waiver of a judicial forum be

knowing and voluntary. The author explores how an insistence that waiver be knowing and voluntary might be implemented, either on an individual basis or on a group basis through secret ballot elections. While conceding that the optimal solution may require legislation, the author concludes that there are a number of things that courts can and should do within existing doctrine to further statutory policy.

II. A HYPOTHETICAL PROBLEM

Georgeanne Phillips, forty-six, has been employed as a secretary in various companies since she graduated from high school. For the past two years she was employed by Hazard Insurance Company, but four months ago she was fired, allegedly for repeated tardiness in reporting for work. Georgeanne believes she was really fired because she complained to management about being sexually harassed by her supervisor, which had been going on for more than a year. She believes that company records would show that other employees with similar records of tardiness were not similarly disciplined. She also believes that the same supervisor has been harassing other female employees, who are too frightened to speak out.

A lawyer might advise Georgeanne that if the facts pan out, she has a good basis for claims under federal and state anti-discrimination laws, both for the ongoing harassment and for the termination itself. If her claims succeed, she stands to recover substantial monetary damages—especially under her state’s anti-discrimination law, which (unlike Title VII) does not limit the amounts of compensatory and punitive damages available in private actions. Thus, an attorney would most likely be willing to take her case for a contingency fee.

But there is a problem. When Georgeanne applied for the position at Hazard, she was informed that the company required all employees to sign an arbitration agreement as a condition of employment, and she did so. The agreement provides for binding arbitration of “all disputes arising out of the employment relationship.” The arbitrator is to be chosen by lottery from the arbitrators on a panel appointed by Hazard—all of whom are male and over the age of fifty. The arbitrator’s fees (at a daily rate of $1500) are to be paid equally by the parties, and each party is to make a deposit of $750 in advance. The claim must be submitted within six months of the occurrence from which the dispute arises, or it will be

deemed waived. While the employee may have representation, no lawyers are permitted. Remedies available to the arbitrator are limited to reinstatement and lost compensation. The agreement makes no provisions for discovery or class actions. It provides that the arbitrator is to make findings of fact and conclusions of law only if both parties agree that he should do so. It states that if any provision of the agreement is held to be invalid, the invalidity shall not affect the remainder of the agreement.

If Georgeanne’s arbitration agreement is enforceable against her, then clearly her situation is considerably altered to her detriment. She has no reason to trust the impartiality of any of the arbitrators on the employer’s panel; she will have to advance $750 simply to have her claim heard; she will most likely have no access to the kind of pre-hearing discovery that is critical to these types of cases; her claim, with respect to prior harassment, may be time-barred under the agreement, and even if it is not, the limitations on the arbitrator’s authority would, if enforced, deprive her of any effective remedy for that harassment; she has neither the education nor the training to represent herself adequately in the matter; and, in the event the arbitrator rules against her, generally applicable arbitration law principles will insulate the award from any meaningful judicial review. Unless the law provides some escape, either from the agreement to arbitrate or from the detrimental consequences which flow from the terms of her agreement and from legal principles generally applied to commercial arbitration, she would probably be well advised to forget her claim and make the best of it.

Georgeanne’s case is hypothetical and, a made up of a conglomerate of facts from actual cases and from a General Accounting Office survey, and thus, probably not typical. We have reason to believe that many employers have unilaterally promulgated arbitration programs

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4. See U.S. GEN. ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, GAO/HEHS-95-150 (July 1995). The survey is based on questionnaires sent to a random sample of 2,000 businesses that filed EEO reports with the EEOC in 1992 and reported having more than 100 employees. See id. at 1.

A second, more recent study, has been conducted under the auspices of the Research Committee of the National Academy of Arbitrators. See Mei L. Bickner et al., Developments in Arbitration For Unrepresented Employees (unpublished, on file with the Hofstra Labor Law Journal). The researchers contacted 80 employers known to have internal procedures. Of these, 12 indicated that they did not utilize outside arbitration, and 32 declined to participate or provided incomplete information. The study is based on the responses (written and oral) of the remaining 36 employers. See id.
covering statutory claims since the United States Supreme Court gave its apparent blessing to the arbitration of discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp.*, but we have little reliable information about the extent or their characteristics. While most employers have not been so overreaching as Hazard Insurance—indeed, some have been quite benign—there is evidence that some if not many employers utilize arbitration procedures that are in one or more respects one-sided.

6. See U.S. Gen. Accounting Office, Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution, GAO/HEHS-95-150 (July 1995). The GAO study reveals that approximately 10% of the businesses sampled utilized mandatory arbitration as a dispute resolution mechanism for non-union employees, and an additional 8.4% were considering adopting such procedures. See id. at 7. The survey suggests that smaller businesses are as likely to report using arbitration as larger ones, but that employers with some union employees were approximately three times as likely to use arbitration as employers with none. See id.

The study, *Developments in Arbitration*, casts little light on the percentage of employers which have established arbitration procedures. Of those covered by the study, 85% of the procedures reported were implemented since *Gilmer* was decided, and some employers were considering arbitration procedures, but were awaiting further judicial developments. See Bickner, supra note 4. Approximately 75% of employers surveyed required new employees to participate in the plan as a condition of employment; only half required existing employees to participate; approximately 25% of the plans were voluntary for both new and current employees. See Bickner, supra note 4. Asked their reasons for adopting arbitration procedures, most cited a desire to avoid the time and expense necessary to litigate employment claims, and many invoked their perception that jurors were unable to understand employment issues, or were too likely to be swayed by emotion. See Bickner, supra note 4. Fifteen percent said they adopted the arbitration policies to improve employee relations, to provide due process, or to "give them a voice." Ten percent cited union avoidance as a motivating factor. See Bickner, supra note 4.

In addition to the studies, there is much anecdotal evidence. See, e.g., Janet Novack, Silver Lining, *Forbes*, Nov. 21, 1994, at 124, 125 (reporting that Brown & Root, a Houston based construction and engineering company, requires all 30,000 of its U.S. employees to settle new claims exclusively through its arbitration system; and that Hughes Aircraft requires all new hires to agree to settle claims through binding arbitration); Companies Using Arbitration to Avoid Court in Bias Cases, *Atlanta J. & Const.* 7 (Mar. 20, 1994) (reporting that ITT, Rockwell International, NCR, Blue Cross/Blue Shield of Michigan and Travelers Insurance have adopted similar policies).

7. See, e.g., Novack, supra note 6. Brown & Root offers to pay all of the arbitrator's fee and up to $2500 in attorneys' fees for the employee. See Novack, supra note 6, at 125.

8. See, e.g., U.S. Gen. Accounting Office, Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution, GAO/HEHS-95-150 (July 1995). The GAO's survey notes that of the 26 policies examined, one provided for unilateral designation of the arbitrator by the employer, two provided for joint involvement in selection of arbitrators from a list provided by the employer (as in Georgeanne's case), one rather vaguely called for selection ""based on the parties' preferences,"" and three did not discuss arbitral selection. *Id.* at 13. The remainder utilized American Arbitration Association appointment procedures. See *Id.* at 12-13.

The survey also reports that only three of the policies reviewed discussed access to information by the employee through discovery. See *Id.* at 13.

Typically, the policies provided for equal sharing in payment of the arbitrator, though four provided for employer payment and in six the employee's share was either capped or limited to less than half the costs. See *Id.* at 14.
This hypothetical case is designed to provide a basis for a comprehensive exploration of post-Gilmer legal and policy issues, with respect to the arbitration of statutory employment discrimination claims pursuant to agreements with non-union employees. The first section of this article addresses Georgeanne's case within the context of the current doctrine. It examines whether there are any legal grounds for her to either escape the arbitration obligation altogether, or to obtain judicial relief from the more one-sided aspects of the agreement which she signed. The second section examines the policy issues posed by such a

Furthermore, while 21 of the policies reviewed expressly provided for the right of employees to be represented during arbitration, four policies did not address the issue, and one specifically stated that representation by an attorney would not be permitted. See id. Most policies did not address the issue of remedies, and seven expressly authorized the arbitrator to use any remedy available under the law, but one policy expressly prohibited the arbitrator from assessing damages beyond those required to be compensated for actual losses. See id.

While more than half of the policies called for the arbitrator to provide a written ruling, there was considerable variation in the description of what was required. One policy called for the inclusion of findings of fact and conclusions of law only if requested by both the employer and the employee. None of the policies addressed the issue of judicial review. See id. at 14-15.

The study, Developments in Arbitration, contains several findings of interest concerning the content of arbitration plans:
- About 25% of the plans covered terminations only, and a few covered only claimed violations of human resources policies or procedures. About half of the plans (mostly on the West Coast) covered most or all disputes arising out of employment.
- Ten percent of the plans disallowed representation by outside counsel. In some cases the employee's legal fees are subsidized by the employer.
- About two-thirds of the plans provided for discovery, but some of these limited discovery in terms of the number of depositions or document changes. Some give the arbitrator authority to expand discovery.
- About 15% percent of the plans provided for unilateral selection of the arbitrator by the employer; the remaining 85% percent provided for joint selection, typically through AAA or (less frequently used) JAMS rules.
- One-third of the plans limited the arbitrator's authority with respect to remedy; for example, by placing caps on back pay, by insisting upon the employer option to pay damages fixed by the arbitrator rather than reinstating the employee, by limiting the amount of front pay, or by precluding punitive damages.
- About half of the plans provided for the parties to share the arbitrator's fee, usually on a 50-50 basis though some plans limited the employee's contribution to a fixed amount (e.g., $250, or the equivalent of two days salary) or to a lesser percentage (e.g., 20%), or provided for the employer to pay the entire fee if the employee prevailed. About half of the plans provided for the employer to pay the arbitration fees. See Bickner, supra note 4.

9. The prospect of arbitrating statutory claims under collective bargaining agreements, if the agreements so provide, does not pose the same problems as individual employment contracts, since the balance of bargaining power is presumptively more equal between employers and unions. It does pose other problems, however, in terms of possible conflicts of interest between the union and the individual employee, which are beyond the scope of this article.
legal framework, and explores various alternatives which might be adopted by legislatures or courts.¹⁰

### III. The Current State of the Law

Two developments are critical to an understanding of the current state of the law: One has to do with arbitration of statutory claims, the other with the preemptive effect of the Federal Arbitration Act. This section describes those developments, and then addresses unanswered questions which persist in their wake. Readers already familiar with the developments may wish to skip to Part IV.

#### A. The Enforceability of Agreements to Arbitrate Statutory Claims

1. The Road to Gilmer

Congress enacted the Federal Arbitration Act¹¹ ("FAA") in 1925 at the behest of the business community, in order to overcome the resistance which some federal courts had displayed toward the enforcement of arbitration agreements, especially those which called for the

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¹⁰. I have chosen to limit the scope of this article to questions arising out of the arbitration of statutory claims for employment discrimination. Agreements to arbitrate claims under other employment-related statutes, such as ERISA or the Fair Labor Standards Act, and agreements to arbitrate employment-related tort claims pose similar questions, though with some obvious differences. Agreements to arbitrate employment-related contract claims, such as a claim for termination in breach of an express or implied contract, on the other hand, do not implicate the same sorts of public policy concerns. The potential which Gilmer may create for arbitration of statutory claims in the collective bargaining context, while of great interest, is a subject for another article. The literature already contains numerous fine contributions relating to Gilmer and its aftermath, to which I am indebted. See, e.g., Mark Berger, Can Employment Law Arbitration Work?, 61 U. MO. KAN. CITY L. REV. 693 (1992); Christine Godsil Cooper, Where Are We Going With Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Robert A. Gorman, The Gilmer Decision and the Private Arbitration of Public-Law Disputes, 1995 U. ILL. L. REV. 635 (1995); Sharona Hoffman, Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); Jeffrey R. Knight, Enforcing Arbitration Agreements Between Employers and Employees, 61 DEF. COUNS. J. 251 (1994); Lewis Maltby, Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights, 12 N.Y.L. SCH. J. HUM. RTS. 1 (1994); Jeffrey W. Stempel, Reconsidering the Employment Contract Exclusion in Section I of the Federal Arbitration Act: Correcting the Judiciary’s Failure of Statutory Vision, 1991 J. DISP. RESOL. 259 (1991). If there is justification for yet another article, it lies in my attempt to be somewhat more comprehensive in considering both doctrinal foundations and public policy.

arbitration of future disputes. Its key provision, section 2, provides that agreements to arbitrate either existing or future disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."  

The disputes which provided the impetus for the FAA, and which provided the subject matter for arbitrations under the statute for the next half century, arose out of the interpretation and application of commercial contracts. In Wilko v. Swan, the Supreme Court confronted the question of arbitrating a statutory claim. That case involved a claim by a customer against a brokerage firm for damages under section 12(2) of the Securities Act of 1933. The Court refused to permit the arbitration of a statutory claim, not because the agreement did not fall within the literal scope of the Arbitration Act, but because the agreement was invalid by reason of the Securities Act's ban on any "'stipulation . . . to waive compliance with any provision'" of the substantive statute.

In reaching its conclusion of non-arbitrability, the Wilko Court distinguished between pre-dispute and post-dispute agreements to arbitrate. In the former case, enforcement would deprive the investor of options with respect to choice of court and venue, at a time when the investor was least able to evaluate the consequences. More broadly, the Court reasoned that the limited scope of judicial review of arbitration awards would deprive the investor of any assurance that the law was being applied properly.

In Alexander v. Gardner-Denver, the Court expanded upon Wilko's critique of statutory claims for arbitration. The case arose in the context of a collective bargaining agreement subject to the National Labor Relations Act ("NLRA"). The claimant sought to pursue a claim of racial discrimination under Title VII of the Civil Rights Act of

12. "Future disputes" are disputes which may occur in the future from the perspective of the agreement, as distinguished from a dispute existing at the time of the agreement.
16. Id. at 430.
17. See id. at 435.
18. See id.
19. See id. at 436-37.
22. See id. at 38-39.
196423 ("Title VII") after losing his claim for wrongful termination under arbitration under the agreement.24 In deciding that the worker could have (as the employer characterized it) a second bite at the apple, the Court relied in part on the limited nature of the arbitrator’s contractual authority. The Alexander Court reiterated that the arbitrator’s role is to settle disputes in matters which involve interpretation or application of the collective bargaining agreement25—and upon the potential for conflict of interest in matters involving racial tension, between the union and an individual worker.26 In addition, however, the Court spoke more broadly of the shortcomings of the arbitration process in implementing of statutory policy: the lack of a complete record, the inapplicability of normal rules of evidence, and the absence of or severe limitations on “discovery, compulsory process, cross-examination, and testimony under oath.”27 The Court also noted the lack of any requirement that arbitrators state reasons for their awards, and the public nature of claims under Title VII.28 The Court declared in sweeping terms, “the resolution of statutory or constitutional issues is a primary responsibility of the courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.”29

But even as it decided Alexander, the Court began to question the scope of its holding in Wilko in the context of international transactions.30 In Scherk v. Alberto-Culver,31 decided the same year, the Court declined to apply the Wilko rationale to a claim under the Securities and Exchange Act of 193432, which arose out of an international business agreement.33 Assuming, arguendo, that Wilko applied to the 1934 Act, the Court then emphasized the international aspects of the transaction, and analogized the arbitration agreement to the sort of choice-of-law provision34 it had upheld in Bremen v. Zapata Off-Shore Co.35

24. See Alexander, 415 U.S. at 42.
25. See id. at 53.
26. See id. at 58 n.19.
27. Id. at 57-58.
28. See id. at 58.
29. Id. at 57.
31. Id.
33. See id. at 513.
34. See id. at 515.
First, the Court insisted that the FAA called for a presumption of arbitrability in interpreting an agreement to arbitrate; if there was a public policy opposed to arbitration of statutory claims, it should not be implemented through a "distort[ed]" reading of the agreement.\(^3\) Second, the Court declined to find, in the FAA itself, any presumption against arbitration of statutory claims; if an agreement to arbitrate such a claim was not to be enforced, such a result would have to be premised upon congressional intent as reflected in the statute under which the claim is made.\(^3\) The Court declared that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum."\(^3\)

Any doubts as to where the Supreme Court was going in *Mitsubishi Motors v. Soler Chrysler-Plymouth* were soon dispelled. In *Shearson/American Express Inc. v. McMahon*,\(^3\) the Court distinguished *Wilko* to hold that plaintiff's claim under section 10(b) of the Securities Act of 1934, as well as his RICO claims, were subject to arbitration.\(^4\) Additionally, the Court formally laid *Wilko* to rest in *Rodriguez de Quijas v. Shearson/American Express, Inc.*\(^4\) The stage was set for *Gilmer*.

2. *Gilmer v. Interstate/Johnson Lane Corp.*\(^4\)

When Robert Gilmer became Manager of Financial Services for Interstate/Johnson Lane Corp. in May of 1981, the nature of the services he was to render required that he register as a securities representative with the New York Stock Exchange ("NYSE").\(^4\) His registration application (Form U-4) contained an agreement to arbitrate "any dispute claim or controversy" between him and Interstate that the rules of the Exchange require to be arbitrated.\(^4\) Further, the rules of the Exchange provided for arbitration of "'[a]ny controversy . . . arising out of [his] . . .

\[^4\] See id. at 628.
\[^3\] Id.
\[^4\] See id. at 231-33.
\[^4\] 490 U.S. 477, 485 (1989) (holding a pre-dispute agreement to arbitrate claims under the Securities Act to be enforceable, regardless of the fact that the claims were decided outside the judicial forum).
\[^4\] See id. at 23. As a securities representative, federal law required his registration. See 42 U.S.C. § 406(a)(1) (1994).
\[^4\] Gilmer, 500 U.S. at 23.
When Gilmer was terminated after six years, he brought suit in federal court, claiming that he was terminated because of his age, in violation of the Age Discrimination in Employment Act ("ADEA"). Interstate filed a motion to compel arbitration of the ADEA claim. The district court denied the motion, based on Alexander and on the court's view that Congress intended to preserve a judicial forum for adjudication of ADEA claims. However, the Fourth Circuit, and ultimately the Supreme Court, disagreed.

When the case reached the Supreme Court, amici curiae advanced an argument on Gilmer's behalf which Gilmer had failed to assert in the lower courts: that his arbitration agreement fell within the FAA section 1 exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Justice Stevens, dissenting, would have reached that issue, and concluded that the exemption was broad enough to include Gilmer's agreement. However, the majority declined to consider the scope of that exclusion, noting that Gilmer's arbitration agreement was contained not in any contract of employment, but in his contract with a third party. Accordingly, the Court considered only Gilmer's argument that arbitration of age discrimination claims was inconsistent with the statutory framework and purposes of the ADEA, as well as with the Court's earlier opinion in Alexander.

The Court distinguished Alexander on several grounds: the agreement which Gilmer signed did not limit the arbitrator to the decision of contractual disputes; the potential for conflict with a union did not exist for Gilmer; and in any event Gilmer's case arose under the Federal

45. Id.
47. See id. at 23-24.
49. See id.
51. See Gilmer, 500 U.S. at 27.
52. Gilmer, 500 U.S. at 25 n.2 (citing 9 U.S.C. § 1 (1994)).
53. See id. at 38-40 (Stevens, J., dissenting).
54. See id. at 25 n.2.
55. See id. at 27-35.
Arbitration Act while Alexander was decided under the NLRA. These distinctions did not confront Alexander's critique of arbitration as a vehicle for implementing statutory norms, but there was no need. The Court had already undermined that critique in the Mitsubishi Motors trilogy and in the earlier part of the Gilmer opinion itself.

Gilmer argued that withholding a judicial forum on the basis of arbitration agreements such as the one he had signed would undermine the statutory scheme, which provided good reasons for a judicial forum. He insisted that the absence of written opinions would reduce public awareness of particular discriminatory practices, would undercut the policy of deterrence, and with the limited review available for arbitration awards, would stifle development of the law. Class actions and equitable, class-wide relief, essential to the effective implementation of ADEA policy, would not necessarily be available, discovery was likely to be limited, and arbitrators might well be biased. Finally, equality of bargaining power, which might be counted upon to correct these problems, was absent in the typical employer-employee relationship.

The Court dismissed each of these arguments seriatim, thereby discounting their cumulative impact, and it dismissed them in a manner which seemed to reflect a certain impatience. To a considerable extent, the Court relied upon what it had already held or said in the Mitsubishi Motors trilogy. That the ADEA was designed to further important social policies did not serve to distinguish it from the Sherman Act, the Securities Act, or RICO, all of which had been held amenable to arbitration, and Gilmer's "generalized attacks" on the adequacy of arbitration procedures were "'out of step with [the Court's] current strong endorsement of the federal statutes favoring this method of resolving

56. See id. at 35. Whether the FAA applies to collective bargaining agreements is an issue which the Supreme Court has not yet decided. See Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) (holding that provisions to arbitrate in collective bargaining agreements are enforceable under section 301 of the Labor Management Relations Act). This issue turns upon the scope of the FAA section 1 exemption for employment contracts.

57. See Gilmer, 500 U.S. at 26-27.
58. See id. at 31.
59. See id. at 30-32.
60. See id. at 32-33.
61. See id. at 30-33.
62. See id. (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627, 628, 634 (1985)).
63. See Gilmer, 500 U.S. at 28.
disputes.”\textsuperscript{64} Claims under the ADEA, like claims under these other statutes, were amenable to private settlement, and the effect of arbitration upon the implementation of public policy was no different; there would still be judicial opinions arising out of claims not subject to arbitration.\textsuperscript{65} Gilmer’s complaint regarding the inadequacy of discovery similarly had no greater validity in the ADEA context than in the context of the other statutes which the court had considered.\textsuperscript{66} Contextually, the court reasoned, limited discovery is a tradeoff for more expeditious proceedings and relaxed rules of evidence,\textsuperscript{67} and, “although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.”\textsuperscript{68}

In addition to invoking its newfound enthusiasm for arbitrating statutory claims in general, the Court focused upon the particular enforcement scheme of the ADEA.\textsuperscript{69} In the course of rejecting Gilmer’s arguments that arbitration was inadequate to the implementation of statutory policy, the Court indicated its view that arbitration could not preclude an individual from filing a charge with the Equal Employment Opportunity Commission (“EEOC”), thereby, triggering the EEOC’s jurisdiction to investigate and attempt to conciliate.\textsuperscript{70} Further, arbitration could not preclude the EEOC itself from instituting actions, including actions seeking class-wide and equitable relief.\textsuperscript{71}

Moreover, in rejecting Gilmer’s specific criticisms of arbitration, the Court relied in part upon the particular arbitration procedures provided for in the NYSE rules,\textsuperscript{72} as well as and upon circumstances pertaining to the plaintiff himself.\textsuperscript{73} For example, the Court rejected Gilmer’s argument that arbitration panels were likely to be biased as mere speculation, pointing to NYSE rules which made information about arbitrators available to the parties, and allowed each party a peremptory

\textsuperscript{64} Id. at 30 (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).
\textsuperscript{65} See Gilmer, 500 U.S. at 32.
\textsuperscript{66} See id. at 31.
\textsuperscript{67} See id.
\textsuperscript{68} Id. at 32 n.4 (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987)).
\textsuperscript{69} See Gilmer, 500 U.S. at 28-29.
\textsuperscript{70} See id. at 27-28.
\textsuperscript{71} See id.
\textsuperscript{72} See id. at 30-32 (relying on Arbitration, N.Y.S.E. Guide (CCH) ¶¶ 2608-2610, 2612(d), 2619-2620, 2627(a), 2627(e), 2627(f) (Nov. 1995)).
\textsuperscript{73} See Gilmer, 500 U.S. at 29.
challenge in addition to unlimited challenges for cause.\textsuperscript{74} Noting that the FAA itself provides that an arbitration award may be denied enforcement "[w]here there was evident partiality or corruption in the arbitrators,"\textsuperscript{75} the Court concluded that Gilmer has not shown these "provisions are inadequate to guard against potential bias."\textsuperscript{76}

Similarly, with respect to Gilmer's complaint regarding the limited nature of discovery in arbitration, the Court pointed to NYSE rules which allowed for depositions as well as document production, information requests, and subpoenas to witnesses, and concluded that Gilmer had not shown that these procedures would be "inadequate."\textsuperscript{77} In rejecting Gilmer's contention with respect to the lack of written opinions in arbitration, the Court observed that NYSE rules provide for written awards containing the names of the parties and a summary of the issues and a decision, and for such awards to be available for public inspection.\textsuperscript{78} Addressing Gilmer's concern about limitations on equitable relief and class actions, the Court noted that the NYSE rules did not restrict the type of relief available, and they do provide for consolidation of claims.\textsuperscript{79} Finally, in dismissing Gilmer's argument based on inequality of bargaining power, the court stated:

Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds "for the revocation of any contract." . . . There is no indication in this case, however, that Gilmer, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause or his registration application. As with the claimed procedural inadequacies discussed above, this claim of unequal bargaining power is best left for resolution in specific cases.\textsuperscript{80}

All of this suggests there may be some prospects for confining \textit{Gilmer} on the basis of its statutory and factual context, a subject which I will explore herein.

\textsuperscript{74} See id. at 30.
\textsuperscript{75} Id. (quoting 9 U.S.C. § 10(b)).
\textsuperscript{76} See \textit{Gilmer}, 500 U.S. at 31.
\textsuperscript{77} Id.
\textsuperscript{78} See id. at 31-32.
\textsuperscript{79} See id. at 32.
\textsuperscript{80} Id. at 33 (citation omitted).
B. The Preemptive Effect of the FAA

While the Supreme Court was travelling toward the open embrace of arbitration of statutory claims as a matter of federal law, it embarked upon another enterprise which was to have broad ramifications for the legal landscape. California's Franchise Investment Law, which governs certain aspects of the relationship between franchisors and franchisees, contains a no-waiver provision worded identically to the 1933 Securities Act language which the Supreme Court held in Wilko to preclude enforcement of agreements to arbitrate claims under that statute. The California Supreme Court interpreted that provision in the same manner as the United States Supreme Court had interpreted it in Wilko, to conclude that a franchisee could sue under the Franchise Investment Law without regard to a provision for arbitration contained in its standard-form franchise agreement. The Supreme Court reversed in Southland Corp. v. Keating. In its view, the FAA's mandate that arbitration agreements subject to its provisions be enforced was binding upon California, and precluded that state from creating a right by statute that could be enforced only through litigation.

In Perry v. Thomas, the Court applied the Southland preemption principle to hold that an employee was obligated by agreement to arbitrate his wage claims despite an express statutory provision exempting wage claims from arbitration. In addition, in Allied-Bruce Terminix Cos. v. Dobson, the Court assured the broadest possible scope for the preemption principle, holding that the language in FAA section 2 which makes the Act applicable to any "contract evidencing a transaction involving commerce," was intended to extend the reach

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82. See Wilko, 346 U.S. at 438.
83. See Keating v. Superior Court, 645 P.2d 1192, 1203-04 (Cal. 1982). The author of this article was also the author of the opinion. See id. at 1194.
85. See id. at 19. Justice O'Connor dissented, arguing that Congress did not intend for the FAA to have such preemptive effect. See id. at 21 (O'Connor, J., dissenting). Subsequently Justice Thomas and Justice Scalia have come to share that view, and have expressed a willingness to overturn Southland. See, e.g., Allied-Bruce Terminix Cos., Inc. v. Dobson, 115 S. Ct. 834, 844-51 (1995) (Scalia, J., dissenting) (Thomas, J., dissenting). However, Justice O'Connor has declared her commitment to Southland on grounds of stare decisis. See id. at 844 (O'Connor, J., concurring).
87. See id. at 489-90.
89. Id. at 836 (citing 9 U.S.C. § 2 (1994)).
of the statute to the limits of Congressional power under the Commerce Clause.  

One consequence of the Southland preemption principle is that, with respect to contracts subject to the FAA, Gilmer applies to claims under state as well as federal statutes, presumably without regard to contrary state policy. The Court has declared that state law may be applied in determining the scope of the exception to enforceability declared in FAA section 2—"save upon such grounds as exist at law or in equity for the revocation of any contract"—but only so long as that law "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Thus, with respect to contracts subject to the FAA, a state is not free to apply principles which target arbitration provisions uniquely, such as a requirement that such a provision, to be enforceable, appear in capital letters on the front page. We shall be examining the implications of that limitation after further examination of the scope of the FAA itself.

IV. BEYOND GILMER

Gilmer was, on the surface at least, a narrow opinion in a number of respects. It was decided in the context of an arbitration provision imposed, not by Gilmer's employer, but by the New York Stock Exchange, a governmental regulated entity, as a condition of Gilmer's registering to do the type of work for which registration was legally required. The agreement, or at least the rules of the Exchange which they incorporated by reference, provided reasonably clear notice to a person in Gilmer's position that statutory claims would be arbitrable. The Court found Gilmer to be an "experienced businessman," who was neither coerced nor defrauded into the agreement. The agreement did not purport to modify any of the substantive provisions of any applicable

90. See id. As a consequence, the Court held that a homeowner was obligated to arbitrate a claim against a pest control company pursuant to an arbitration clause in the applicable contract, despite an Alabama statute which declares pre-dispute arbitration agreements to be unenforceable. See id. at 843.
92. Perry, 482 U.S. at 492-93 n.9.
94. See infra notes 120-66 and accompanying text.
96. See id.
97. Id. at 33.
Arbitration of Employment Discrimination Claims

statute, restrict the type of relief available, or preclude Gilmer from filing a claim with the EEOC. The Court apparently considered the arbitration procedure to be a fair and efficacious one, both with regards to the selection of arbitrators and to the hearing itself. The Court found that NYSE rules provided for discovery, including depositions, for written awards open to public view, and for collective proceedings.

In all these respects, Gilmer is theoretically distinguishable from other cases which might arise, such as Georgeanne’s case, and to that extent leaves certain questions open for future argument. One question explicitly left open is the scope of the FAA section 1 exclusion of contracts of employment, and we will address that question first. Assuming that the answer will not help Georgeanne, we will proceed to examine the possibility, first, that the FAA itself (or state law permissibly applicable under the FAA) places limits on the enforceability of agreements such as Georgeanne’s, and second, that the statute under which the employee’s claim is asserted (in Georgeanne’s case, Title VII) should be interpreted to limit the enforceability of agreements to arbitrate.

A. What Is the Scope of the FAA Section 1 Exclusion of “Any Other Class of Workers Engaged in Interstate or Foreign Commerce” (And What Difference Does it Make)?

If Georgeanne’s contract is excluded from FAA coverage, then Gilmer does not apply. That does not necessarily mean that her contract will not be enforced. An argument could be made that by excluding employment contracts from FAA coverage Congress intended to insulate them from enforcement under state law as well. Subject to that

98. See id. at 32 & n.4.
99. See id. at 30-31.
100. See id. at 31-32.
101. Omitted from this analysis is the possibility that the National Labor Relations Act would be interpreted to prohibit an employer from insisting upon an agreement to arbitrate statutory claims, perhaps on the theory that resort to statute is an activity protected under section 7 against employer interference. See 29 U.S.C. § 158(a) (1994). In Bentley’s Luggage Corp., No. 12-CA-16658 (1994), the NLRB’s General Counsel authorized issuance of a complaint against an employer who discharged employees for refusing to sign an agreement to arbitrate any dispute concerning his employment or termination of employment before filing legal action. See Feds Oppose Requiring Workers to Arbitrate, 14 ALTERNATIVES TO HIGH COST LITIG. 39, 39 (1996). However, the theory may have been that the arbitration agreement purported to preclude the filing of charges with the NLRB, an activity which is clearly protected despite Gilmer. See id.
argument, however, the enforceability of her agreement to arbitrate would depend upon the law of her state, and state law comes in a variety of shapes and sizes. Some states do not enforce agreements to arbitrate future disputes. Others exclude from a general rule of enforceability arbitration agreements contained in employment contracts, or agreements made as a condition of employment, agreements calling for arbitration of employer-employee disputes, or arbitration clauses in contracts of adhesion. A recent Kentucky statute prohibits employers from requiring, as a condition of employment, that employees or applicants agree to arbitrate any existing or future claim under state or federal law. Some states have rules aimed at assuring notice and consent by insisting that the arbitration clause appear in a prominent place, or in prominent type. Further, some insist that the arbitration clause make specific reference to the arbitration statute, or that it be separately initialed by the parties or by their attorneys. Finally, some states have common law rules, limiting the enforcement of particular agreements to arbitrate, that are of questionable application in the face of FAA preemption. If the FAA and its preemption principles do not apply, all of these varying state law rules would come into play.


104. Four states (Alabama, Hawaii, Mississippi and West Virginia) have pre-modern arbitration statutes which provide only for the submission of existing controversies to arbitration. See ALA. CODE § 6-6-1 (Michie Supp. 1993); HAW. REV. STAT. § 658-2 (1993); MISS. CODE ANN. § 11-15-101 (Law Co-op 1972 & Supp 1995); W. VA. CODE § 55-10-1 (1990).

105. See ARIZ. REV. STAT. ANN. § 12-1517 (West 1982); IOWA CODE ANN. § 679A.1(2)(b) (West 1987); KAN. STAT. ANN. § 5-401(c)(2) (1986); KY. REV. STAT. ANN. § 417.050 (Michie 1992); LA. REV. STAT. ANN. CTS. & JUD. PROC. § 9:4216 (West 1991); MD. ANN. CODE, CTS. & JUD. PROC. § 34-206(b) (Michie 1989 & Supp. 1995).


110. See, e.g., MONT. CODE ANN. § 27-5-114(4) (1995) ("Notice that a contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract."). The Supreme Court has held that Montana may not apply that requirement to a contract subject to the FAA. See Doctor's Assoc. v. Casarotto, 116 S. Ct. 1652, 1657 (1996).


Two interpretive alternatives have been advanced. The first, reads FAA section 1 as exempting all contracts of employment. The second sees section 1 as exempting only those classes of workers who, like railroad employees and seamen, are engaged in the carrying of goods across state or international lines. A good deal has been written in support of one position or the other, and I see no reason for recapitulating that discussion here. Professor Finkin has argued, quite persuasively it seems to me, that Congress intended to exclude all employment contracts from coverage. The support for the statute came entirely from business interests seeking to assure enforceability of arbitration terms in commercial agreements, and while the impetus for the exemption came from the Seamen's Union and included concern over the impact of the statute upon seamen's contracts, legislative history reflects a broader concern. It seems that, due to likely inequality of bargaining power between employer and employee, enforcement of arbitration provisions contained in employment contracts might yield unfair results.

It is not easy to explain why Congress, if it wanted to exempt all employment contracts, did not simply say so. Perhaps Congress thought that the language of the section 1 exemption described all contracts within the reach of congressional power at the time. In any event, it is considerably more difficult to explain why Congress would want to exempt only a certain category of employment contracts, and in particular that category most obviously within the reach of congressional power under the Commerce Clause.

A plausible explanation exists in the case of railroad employees and seamen. Their employment relationships were subject to special regulation. However, absent some rational explanation, the classification that would be created by a narrow reading of the third category of exemption, seems to raise constitutional problems even under the lowest level of scrutiny required by the Equal Protection principle of the Fifth Amendment. On that ground alone, it seems to me, that the narrow reading of the section 1 exemption—what I call the "shlepper rule"—should be avoided.

115. See id. at 290.
116. See id. at 298.
117. See id. at 297.
118. See 9 U.S.C. §§ 1-2 (1994); Finkin, supra note 114, at 283.
119. In doing so, I acknowledge that I take certain liberties with the Yiddish language. In Yiddish, to "shlep", from the German "schleppen," means to drag, or pull. The noun "shlepper" has...
If we are to be Georgeanne's lawyers, however, we would have to advise her that the prospects of a broad reading of the section 1 exemption, however meritorious, are not the most favorable. The tide in the lower courts, influenced by the general policy of favoring arbitration, has been running heavily in favor of the shlepper rule, and there is no sound basis for predicting that the Supreme Court will reject it. This is not to say that the issue is not genuinely open in the Supreme Court.

The *Gilmer* Court's refusal to consider the issue on the ground that Gilmer's agreement to arbitrate was contained in a contract with a third party, has greater substance than Justice Stevens was prepared to acknowledge. Gilmer's application to the New York Stock Exchange was "required by his employment" in much the same way as a chauffeur's license is required of someone who seeks employment as a truck driver, and the Exchange is subject to supervision by the Securities and Exchange Commission ("SEC"). The Supreme Court could well conclude that the concerns which led Congress to exempt employment contracts from coverage under the FAA were not present in Gilmer's case. But, the virtually unbridled enthusiasm which the Court has displayed toward methods of diverting disputes from the judicial system may lead it to reject that argument.

B. *Does the FAA or Permissibly Applicable State Law Place Any Relevant Limitations on Agreements by Employees to Arbitrate Employment-Related Claims?*

In *Perry v. Thomas*, the plaintiff sought to avoid arbitration of his wage claim on two grounds. One was the state statutory provision which purported to allow access to the courts notwithstanding an agreement to arbitrate and which this the Supreme Court disposed

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120. Several circuit courts have developed case law which supports a narrow reading of the exclusion. See *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 595 (6th Cir. 1995); *Miller Brewing Co. v. Brewery Workers Local Union*, 739 F.2d 1159, 1162 (7th Cir. 1984); *Ering v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1982); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers*, 207 F.2d 450, 452 (3d Cir. 1953); *Golenia v. Bob Baker Toyota, 915 F. Supp. 201, 203* (S.D. Ca. 1996). Only the Fourth Circuit has chosen a more broad reading of the exclusion. See *United Elec. Radio & Mach. Workers v. Miller Metal Prods., Inc.*, 215 F.2d 221, 224 (4th Cir. 1954).


123. See id. at 486.
of on the basis of *Southland.* In addition, the plaintiff in *Perry* argued that the provision for arbitration, which he was required to sign as a condition of employment, was unconscionable, in that it called for arbitration by a presumptively biased arbitrator (*i.e.* an arbitrator appointed through the procedures of the New York Stock Exchange) and failed to allow for adequate discovery.

Perry’s second argument was premised on a decision of the California Supreme Court in *Graham v. Scissor-Tail.* In that case, the plaintiff Bill Graham, a well-known promoter of rock music, entered into a series of contracts with a musical group on forms provided by the Musicians Union. Each contract contained a clause providing that “the parties will submit every claim, dispute, controversy or difference . . . arising out of or connected with this contract . . . for determination by the [Union’s] International Executive Board.” Notwithstanding Graham’s prominence, and the fact that certain of the contract terms “of relatively minor significance” were subject to negotiation, the court characterized the contract as “adhesive” with respect to the arbitration term because it was imposed, along with terms governing the manner and rate of compensation, through the Union’s control over the musical group, on a non-negotiable basis. The court therefore invoked two principles which it deemed applicable to adhesive contracts (or provisions) generally: (1) that such a contract (or provision) will not be enforced against the “adhering” party if it “does not fall within the reasonable expectations” of that party, and (2) that even if it meets the reasonable expectations test, it will not be enforced “if, considered in its context, it is unduly oppressive or ‘unconscionable.’” The court concluded that the provision for arbitration in Graham’s contract met the first test but failed the second “because it designates an arbitrator who, by reason of its status and identity, is presumptively biased in favor of one party.” While parties are generally free to designate as an arbitrator anyone they wish, including a person who by reason of relationship or some similar factor can be expected to adopt something other than a “neutral” stance, when the contract is the product of

124. *See id.* at 489-91.
125. *See id.* at 492 n.9.
127. *See id.* at 167-69.
128. *Id.* at 168.
129. *Id.* at 172.
130. *Id.* at 172-73.
131. *Id.* at 173 (emphasis added).
circumstances suggesting adhesion, "the possibility of overreaching by the dominant party looms large." Therefore, the contract "must be scrutinized with particular care to insure that the party of lesser bargaining power, in agreeing thereto, is not left in a position depriving him of any realistic and fair opportunity to prevail in a dispute under its terms." Rather, "certain 'minimum levels of integrity' [must] be achieved if the arrangement in question is to pass judicial muster." That requirement is not met when the designated arbitrator is "one whose interests are so allied with those of the party that, for all practical purposes, he is subject to the same disabilities which prevent the party himself from serving."

Prior to Perry there was a split of authority within California as to the applicability of Graham principles to the NYSE arbitration procedures. The Supreme Court did not decide the merits of that issue, but remanded it to the state court with the following admonition:

We note . . . the choice-of-law issue when defenses such as Thomas' so-called "standing" and unconscionability arguments are asserted. In instances such as these, the text of Section 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable as a matter of federal law "save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with the requirement of Section 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes non-arbitration agreements under state law. Nor may a court rely on the

132. Id. at 176.
133. Id.
134. Id.
135. Id. at 177. The court's reference here was to a New York case, In re Cross & Brown Co., 4 A.D.2d 501, 502-03 (N.Y. App. Div. 1957) (refusing to enforce, on grounds of "natural justice," a provision in an employment contract which provided for arbitration by the employer itself).
136. See Tonetti v. Shirley, 173 Cal. App. 3d 1144 (Cal. Ct. App. 1985) (rejecting the Hope rule, believing it was compelled to do so by more recent federal cases holding the NYSE's arbitration procedures to be fair and enforceable); Hope v. Superior Ct., 122 Cal. App. 3d 147 (Cal. Ct. App. 1981) (holding NYSE procedures unconscionable under the Graham test, authored by the author of this article). 

uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the legislature cannot.137

On remand, the California Court of Appeal viewed the Supreme Court's directive in Perry to mean that it was not free to apply the Graham principle, and on those grounds, it ordered arbitration of the dispute.138 The Ninth Circuit has since fallen line with this line of reasoning.139 But, in terms of the principle declared in Perry, it would seem that these courts are not correct. If the Perry Court believed that dismissal of the plaintiff's case followed from that principle, then these later courts have misinterpreted its meaning. The unconscionability doctrine is of general application, not peculiar to arbitration agreements,140 and while its application necessarily requires some assessment of the fairness of particular terms, along with overall imbalance and weaknesses in the bargaining process,141 that is not the same as singling arbitration agreements out for special treatment. Obviously, the FAA policy favoring arbitration would be offended by a ruling that a

137. Perry, 482 U.S. at 492-93 n.9 (citations omitted).
139. See Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992).

Id. (citations omitted).

The adhesion/unconscionability principles applied in Graham had previously been applied to contracts not involving arbitration clauses. See e.g., Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 514 (Cal. 1985) (holding the terms of an adhesion contract unconscionable where its terms allowed a bank to charge an unreasonable fee for processing checks drawn from accounts with insufficient funds); Ellis v. McKinnon, 23 Cal. App. 4th 1796, 1804, 1807 (Cal. Ct. App. 1993) (finding forfeiture provisions of an adhesive contract to be unconscionable).


Particular terms may be unconscionable whether or not the contract as a whole is unconscionable. Some types of terms are not enforced, regardless of context; . . . [o]ther terms may be unconscionable in some contexts but not in others. Overall imbalance and weaknesses in the bargaining process are then important.

Id. (citation omitted).

In assessing unconscionability, it may be relevant to consider "gross inequality of bargaining power," and whether the provision appears in a "standardized agreement." Id. at § 208 cmts. a & d.
provision calling for arbitration is unfair per se, but whether particular terms of such a provision should be regarded as unfair, and unenforceable in light of the adhesive nature of a particular agreement, is another matter entirely.

The Court's recent opinion in Doctor's Associates v. Casarotto appears to put a new gloss on the Perry footnote, and apparently to Georgeanne's advantage. While reiterating its opposition to the singling-out of arbitration agreements for special treatment, the Court stated:

Repeating our observation in Perry, the text of Section 2 declares that state law may be applied "if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Thus, generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2.

While that language appears to open the door to arguments that would prove useful to one in Georgeanne's situation, several considerations counsel caution. First, as a matter of state law these traditional contract defenses are difficult to come by. A party seeking revocation on grounds of fraud must ordinarily show detrimental reliance on intentional, or at least reckless, misrepresentations of material fact, and it is unlikely that Georgeanne could show that. Duress typically requires a showing that the contract was obtained either through physical compulsion or a "wrongful" threat, and a threat of non-employment is unlikely to suffice. The unconscionability doctrine, which focuses both upon inequality of bargaining power and the unfairness of particular terms, unquestionably holds out the greatest hope of the three, but even here Georgeanne is likely to have an uphill battle. Not all state

143. Perry, 482 U.S. at 492 n.9.
144. Casarotto, 116 S. Ct. at 1656 (alterations in original) (second emphasis added) (citation omitted).
146. See RESTATEMENT (SECOND) OF CONTRACTS § 175 (1979).
courts have accepted the reasoning of *Graham*,\(^\text{149}\) and even in the terms of that opinion, the fact that the arbitrator is to be chosen from a panel designated by the employer may not rise to the level of presumptive bias. Other aspects of Georgeanne’s contract considered in combination would arguably support a characterization of unconscionability, especially in a state such as California which has developed principles of “common law due process.”\(^\text{150}\) Thus, the *Graham* court declared that “[w]hen it can be demonstrated, . . . that the clear effect of the established procedure of the arbitrator will be to deny the resisting party a fair opportunity to present his position, the court should refuse to compel arbitration.”\(^\text{151}\) The court confined that principle narrowly, however, to situations “when the applicable procedures essentially preclude the possibility of a fair hearing.”\(^\text{152}\) and Georgeanne may have difficulty proving that.

Second, there exists a body of federal principles which must be applied in interpreting contracts subject to the FAA, including principles which govern the allocation of authority between courts and arbitrators. Under *Prima Paint v. Flood & Conklin*,\(^\text{153}\) “arbitration clauses as a matter of federal law are ‘separable’ from the contracts in which they are embedded,”\(^\text{154}\) so that, “a federal court may consider only issues relating to the making and performance of the agreement to arbitrate.”\(^\text{155}\) Thus, while a court may adjudicate a claim of fraud in the inducement of the arbitration clause itself, it is for the arbitrator to pass upon a claim of fraud in the inducement of the contract generally.\(^\text{156}\) To avoid arbitration on grounds of fraud, therefore, Georgeanne would


\(^{151}\) See *Graham*, 623 P.2d at 176-77.

\(^{152}\) Id. at 177 n.23.


\(^{154}\) Id. at 402.

\(^{155}\) Id. at 404. A similar problem may arise in connection with unconscionability claims. See Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996) (applying *Prima Paint* to an unconscionability claim because, *inter alia*, plaintiff’s assertions of inequality of bargaining power extended to the entire agreement).

\(^{156}\) See id. at 403-04.
need to allege and prove that the agreement containing the arbitration clause was itself infected by fraudulent representation.\textsuperscript{157}

Finally, while the Supreme Court has repeatedly declared that state law governs the issue of revocability so long as it is a law of general application,\textsuperscript{158} it would be unwise to accept that declaration at face value, especially when it comes to the application of unconscionability principles. Clearly, the Supreme Court would not permit a state court, or a federal court on the basis of state law, to deny enforcement of a contract similar to that upheld in \textit{Gilmer} because state law deems the New York Stock Exchange procedure to be unfair. If the Supreme Court is to maintain its insistence upon the preemptive effect of the FAA, the development of a uniform body of federal law with respect to the revocability of agreements under that statute is inevitable,\textsuperscript{159} and Goergeanne's invocation of unconscionability principles must take that into account.

There is one other provision of the FAA which needs to be taken into account in assessing Goergeanne's situation. Section 10(b) provides, as one ground for withholding enforcement from an arbitration award, "evident partiality or corruption in the arbitrators."\textsuperscript{160} The Supreme Court has held in \textit{Commonwealth Coatings Corp. v. Continental Casualty Co.},\textsuperscript{161} that an award should be overturned under this standard where a supposedly neutral arbitrator was discovered to have an undisclosed

\textsuperscript{157} See, e.g., Southside Internists v. Janus Capital Corp., 741 F. Supp. 1536 (N.D. Ala. 1990) (holding that allegations of fraud, duress or unconscionability in the making of a contract are not sufficient to invalidate the arbitration clause itself); Hurlbut v. Gantshar, 674 F. Supp. 385 (D. Mass. 1987) (finding that the separability doctrine precludes consideration of plaintiff's argument that arbitration agreement should not be enforced because broker rushed her into signing the investment contract). The Fifth Circuit has applied the \textit{Prima Paint} rule to hold that an attack on an employment agreement containing an arbitration provision as an "unconscionable contract of adhesion" presents an issue as to the formation of the contract generally, rather than the arbitration clause itself, and on that ground must be submitted to the arbitrator. See Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996). The court based this conclusion not only on the ground that the plaintiff claimed that other aspects of her contract were unconscionable, but also on the ground that she alleged the entire contract was the product of inequality of bargaining power, a ground that would apply to most unconscionability attacks. See Rojas, 87 F.3d at 749 n.3.
\textsuperscript{158} See Perry, 482 U.S. at 492 n.9.
\textsuperscript{159} Cf. Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962) (insisting upon the federalization of principles governing enforcement of arbitration provisions under section 301 of the Labor Management Relations Act, and favoring a uniform body of federal principles, while rejecting application of conflicting state principles).
\textsuperscript{161} 393 U.S. 145 (1968).
business relationship with the successful party in the arbitration.\textsuperscript{62} However, the justices were unable to agree whether the mere "appearance of bias" would be sufficient to invalidate an award.\textsuperscript{63} The Second Circuit has rejected both "appearance of bias" and "actual bias" standards, concluding that the appropriate standard is whether "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration,"\textsuperscript{64} based on "inferences from objective facts inconsistent with partiality."\textsuperscript{65} Other courts, insisting on actual bias, have displayed reluctance to overturn an award on the basis of a relationship between a party and the arbitrator so long as the relationship was disclosed.\textsuperscript{66}

The fact that Georgeanne's employer has appointed the arbitration panel—while certainly suggestive of possible bias in a practical sense—is unlikely, by itself, to constitute "evident partiality" within the meaning of section 10(b). Moreover, even if an award against Georgeanne could be set aside on that ground, that prospect does little to further her interest in obtaining redress for the discrimination she claims to have occurred. Some federal district courts have asserted inherent equitable authority to reform arbitration agreements that provide for evidently biased arbitrators.\textsuperscript{67} Even if that is so, the \textit{Gilmer} Court's endorsement of the relatively one-sided NYSE arbitration procedures in that case poses a problem for Georgeanne, unless \textit{Gilmer} can be distinguished on the ground that it did not involve a typical contract of employment.\textsuperscript{68}

\textsuperscript{62} See id. at 147-48.

\textsuperscript{63} Justice Black, writing for a plurality of four justices, appeared to impose upon arbitrators ethical standards similar to those applicable to judges, including avoidance of the "appearance of bias." Id. at 150. Justice White's concurring opinion, joined by Justice Marshall, disclaims such a standard. See id. (White & Marshall, JJ., concurring).

\textsuperscript{64} Morelite Constr. Corp. v. New York City Dist. Council, 748 F.2d 79, 84 (2d Cir. 1984) (finding father-son relationship between arbitrator and principal representative of a party constituted evident partiality).

\textsuperscript{65} Pitta v. Hotel Assn. of New York City, Inc., 806 F.2d 419, 423 n.2 (2d Cir. 1986).

\textsuperscript{66} See, e.g., Woods v. Saturn Distribution Corp., 78 F.3d 424 (9th Cir. 1996); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (7th Cir. 1983) ("The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen.").

\textsuperscript{67} Compare Cristina Blouse Corp. v. ILGWU, 492 F. Supp. 508 (S.D.N.Y. 1980) (noting that the arbitrator had acted as attorney for one of the parties), and Erving v. Virginia Squires Basketball Club, 349 F. Supp. 716 (E.D.N.Y. 1972), aff'd, 468 F.2d 1064 (2d Cir. 1972) (noting that the arbitrator was a partner in law firm that represented one of the parties), with \textit{In re Dover Steamship}, 143 F. Supp. 738 (S.D.N.Y. 1956) (noting that the court's power to deal with bias of an arbitrator under FAA is limited to setting aside the award after it has been rendered).

\textsuperscript{68} Cf. Pompano-Windy City Partners v. Bear-Stearns & Co., 698 F. Supp. 504 (S.D.N.Y. 1988) (applying criteria used in post-award challenge under section 10(b) of FAA to hold that the
The conclusion for Georgeannte must be that while it is possible that federal common law principles or the permissible application of her state's unconscionability principles would provide her with protection against at least the more egregious provisions of her arbitration agreement, there is very little authority upon which she can rely. Moreover, it does not seem likely that the courts will be receptive to theories which would open the door to litigation over enforcement of arbitration agreements generally. If Georgeannte is to succeed in bypassing arbitration, she must invoke the distinctive character of the claim she is asserting, and reach beyond the FAA to the principles contained or implied in the statute which underlies that claim.

C. What Limitations Do Federal Anti-discrimination Statutes Impose upon the Enforcement of Pre-dispute Arbitration Agreements?

If the only way in which a plaintiff could invoke an anti-discrimination statute as a defense to enforcement of an arbitration agreement were to show that Congress intended to "preclude waiver of a judicial forum," we could forget about that possibility for Georgeannte. As the Supreme Court observed in *Gilmer*, if Congress did not intend to preclude private parties from settling a discrimination claim without litigation, Congress surely did not intend to preclude them from settlement through agreement to abide by the decision of a third party.169 Indeed, the Americans With Disabilities Act170 ("ADA") and Title VII both contain provisions encouraging resolution of disputes through alternative dispute resolution ("ADR"), including arbitration, "where appropriate and to the extent authorized by law."171

But this way of stating the question leaves out the important differences between the settlement of an existing dispute and an agreement to submit to arbitration unknown disputes which may arise in the future. Even the Court's opinion in *Wilko* implied that the result would have been different if the agreement had been of that nature.172 Once a dispute has arisen, the parties are focused upon the issues and in a position to assess precisely what is being waived and the probable effect of the waiver. Their agreement, entered into in the shadow of

plaintiff's allegations of bias against NASD arbitration procedures were too speculative and attenuated to justify invalidation of the arbitration agreement).

171. Id. §§ 1981, 12212.
litigation as an alternative, is far more likely to be the product of true negotiation. Thus, there is little reason to be concerned, in the case of such agreements, about either voluntariness or fairness. However the parties choose to structure their arbitration, unless they agree to something unlawful, should be up to them. And, while any system of alternative dispute resolution may detract somewhat from statutory policies which favor deterrence and the development of a coherent and uniform body of principles, the impact upon those policies of enforcing *ad hoc* agreements to arbitrate is likely to be relatively slight. Therefore, Congress would have little reason to preclude enforcement of arbitration agreements relating to existing disputes.

Pre-dispute agreements are of a different nature. Before a dispute arises, it is impossible for a party to assess precisely what is being waived and the probable effect of the waiver—even if his or her attention is focused on the issue. In the employment context this is especially a problem for the employee; while the employer can take into account statistical probabilities affecting all its employees, the employee's ability to predict what may happen to him or her individually is beyond the scope of such analysis. Moreover, while a post-dispute agreement to arbitrate is likely to be the product of true negotiations against the backdrop of threatened litigation, pre-dispute agreements to arbitrate are far more likely to be part of a package of provisions imposed by the employer on a take-it-or-leave it basis. Further, while the post-dispute agreement is individual and *ad hoc*, the wholesale nature of pre-dispute agreements applicable to a broad range of employees magnifies their impact upon the overall implementation of the statutory scheme. If all employers were to require all employees to enter into pre-dispute agreements to arbitrate discrimination claims, judicial development of the law, subject to a minuscule number of EEOC lawsuits, would disappear. If we are to inquire as to the incompatibility of arbitration with particular statutes, it is pre-dispute agreements that must be the focus of our attention.

*Gilmer*, of course, did involve a pre-dispute agreement, but its holding does not preclude our inquiry.\(^1\)\(^7\) \(^3\) That case involved a single statute, the Age Discrimination in Employment Act,\(^1\)\(^7\)\(^4\) and it is possible that an analysis of other statutes and their legislative history would yield different results. Even with respect to that statute, the Court acknowledged that an arbitration agreement could not preclude resort to

\(^{173}\) See Gilmer, 500 U.S. at 21, 23.
\(^{174}\) See id.
agency jurisdiction.\textsuperscript{175} The circumstances of the \textit{Gilmer} case—the fact that Gilmer's agreement to arbitrate was not imposed directly by his employer, Gilmer's relative sophistication, and what the Court perceived to be the relative fairness of the New York Stock Exchange's arbitration procedures—provide grounds for distinction.\textsuperscript{176}

1. Are Other Statutes Distinguishable from the ADEA?

In deciding \textit{Gilmer} the Court remanded to the Fifth Circuit, for reexamination in light of that opinion, a case involving arbitrability, under NYSE procedures, of sex discrimination claims under Title VII, and the Fifth Circuit had no difficulty deciding that \textit{Gilmer} controlled.\textsuperscript{177} Other circuits considering that question since have agreed.\textsuperscript{178} On that score, things do not look bright for Georgeanne.

There is a plausible argument to be made, however, that the 1991 Civil Rights Act\textsuperscript{179} and its legislative history reflect congressional intent to preclude enforcement of pre-dispute arbitration agreements.\textsuperscript{180} Section 118 of the 1991 Act provides: "[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this Act."\textsuperscript{181}

This language derives from identical language in the Civil Rights Act of 1990,\textsuperscript{182} which was aborted by presidential veto, and that language, in turn, was derived from section 513 of the Americans With Disabilities Act,\textsuperscript{183} which was adopted in the same year.

The bill which became the ADA originated in the Senate, but the ADR-encouragement provision which became section 513 was added by

\begin{footnotes}
\item[175] See id. at 28-29.
\item[176] See id. at 25 n.2, 30-33.
\item[177] See Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991).
\item[178] See, e.g., Metz v. Merrill Lynch, 39 F.3d 1482 (10th Cir. 1994); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991).
\item[180] The Fourth Circuit, minimizing the significance of the committee reports, has rejected this argument. See Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996). A petition for certiorari to review other aspects of the court's ruling is pending in the Supreme Court.
\item[181] See id.
\end{footnotes}
amendment in the House.\textsuperscript{184} The May 15, 1990 report of the House Judiciary Committee states:

This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law. The Committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act. Thus, for example, \textit{the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of this Act}. This view is consistent with the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in Title I. The Committee believes that the approach articulated by the Supreme Court in \textit{Alexander v. Gardner-Denver Co.} applies equally to the ADA and does not intend that the inclusion of Section 513 be used to preclude rights and remedies that would otherwise be available to persons with disabilities.\textsuperscript{185}

Congressman Glickman, who offered the amendment, echoed this position on the House floor.\textsuperscript{186}

The Conference Committee, where the difference between the House version and the Senate version of the bill was resolved in favor of retaining section 513, issued a report which adopted by reference the statement of the House Judiciary Committee regarding that provision and added the following declaration: \textit{“[i]t is the intent of the conferees that the use of these alternative dispute resolution procedures is completely voluntary. Under no condition would an arbitration clause in a collective bargaining contract or employment contract prevent an individual from pursuing their rights under the ADA.”}\textsuperscript{187}

These committee reports were written approximately one year before \textit{Gilmer} was decided. While it is possible to read the House Judiciary

\textsuperscript{185} Id. at 76-77 (emphasis added).
\textsuperscript{186} Specifically, Rep. Glickman stated:
I want to make it very clear that the use of alternative dispute resolution procedures, such as settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, is completely voluntary. Just to clear up any confusion there might be, under no condition would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.
Committee report as merely a statement of what the committee "believed" to then be existing law as to the effect of an arbitration clause in a collective bargaining agreement or employment contract, such a reading assumes that the drafters were indifferent to that effect, and that does not seem likely. In any event, the Conference Committee report expresses more than a belief; it states the intent of the conferees with respect to the proper scope of arbitration and other dispute resolution procedures. On their face, therefore, the committee reports provide a substantial basis for the argument that the Congress which enacted the ADA thought the policies of that statute would be undermined by precluding judicial enforcement on the basis of a pre-dispute agreement contained in an employment contract.

The legislative history underlying section 118 of the aborted Civil Rights Act of 1990 parallels the history of ADA section 513. Section 118 was added to the bill by amendment in the House Judiciary Committee in July, 1990, two months after passage of the ADA. The report of that Committee acknowledges that a "virtually identical amendment was enacted as part of the Americans With Disabilities Act," and proceeds to state its understanding with respect to the meaning of the language in the identical terms the same Committee used earlier with respect to ADA section 513.

188. This was the position of the New York Court of Appeals in Fletcher v. Kidder Peabody & Co., 619 N.E.2d 998, 1003 (N.Y. 1993) (holding that committee reports merely set forth the committee’s understanding of existing precedents).


192. Specifically it states:

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). The Committee does not intend for the inclusion of this section be used to preclude rights and remedies that would otherwise be available.

Id. at 47-48.
Again in conference the Senate acceded to the House language, and the Conference Committee reiterated the gloss provided by the House Judiciary Committee.\footnote{193}

Following President Bush's veto, the aborted Civil Rights Act of 1990 was reintroduced as House Report 1.\footnote{194} That bill, which contained dispute resolution language identical to the comparable provision of the vetoed statute, was referred jointly to the House Judiciary Committee and the House Committee on Education and Labor.\footnote{195} On April 24, 1991, that Committee issued a report\footnote{196} which characterized the provision (now section 216) as follows:

Section 216 encourages the use of alternative means of dispute resolution to resolve disputes arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq., the Civil Rights Act of 1871, 42 U.S.C. § 1981, or the Age Discrimination in Employment Act, 29 U.S.C. § 621 et. seq., where appropriate and to the extent authorized by law. These methods include settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials and arbitration. This section is intended to encourage alternative means of dispute resolution that are already authorized by law.

The Committee emphasizes, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by Title VII. Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of \textit{Alexander v. Gardner-Denver Co}.\footnote{197}
In addition to this characterization of the language contained in House Report 1, the Committee's report states that at the markup of the bill the Committee "considered and rejected by voice vote an amendment in the nature of a substitute," based upon a proposal by the Bush administration. With regards to the issue of dispute resolution, the Committee report states that unlike section 216 of House Report 1, which:

includes a provision encouraging the use of alternative means of dispute resolution to supplement rather than supplant the rights and remedies provided by Title VII, . . . [the Republican proposal] encourages the use of such mechanisms "in place of judicial resolution." Thus under the latter proposal employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints. Such a rule would fly in the face of Supreme Court decisions holding that workers have the right to go to court, rather than being forced into compulsory arbitration, to resolve important statutory and constitutional rights, including employment opportunity rights. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); McDonald v. City of West Branch, 466 U.S. 284 (1984). American workers should not be forced to choose between their jobs and their civil rights.

It must be acknowledged that certain aspects of the legislative history underlying the dispute resolution provisions of the 1991 Civil Rights Act render it somewhat less definitive than the comparable legislative history underlying those provisions of the ADA. Section 216 of the Act does not by its terms amend Title VII, or any other statute; it stands as an independent provision encouraging the use of dispute resolution, not only with respect to Title VII, but also with respect to other statutes affected by the 1991 Act. These statutes include (as the Committee report states) section 1981 and the Age Discrimination in Employment Act considered (on the basis of a record which did not include section 216) in Gilmer itself. When the Supreme Court decided Gilmer—subsequent to the report of the Labor and Employment Committee, but prior to the passage of the statute—there was no legislative reaction to that decision, presumably because by that time the

199. Id. at 104; cf. H.R. REP. NO. 102-40, pt. 1, at 156 (1991) (stating that the Republican bill, H.R. 102-1375 "specifically provide[d] that any agreement to such a mechanism must be 'knowing and voluntary.'").
deal had been struck on a compromise bill which no one was motivated to upset.\textsuperscript{201} Instead, legislators attempted, as usual, to make legislative history on both sides of the issue.\textsuperscript{202}

Nonetheless, and disregarding expressions from the floor, the continuity of legislative intent as expressed in committee hearings underlying both the ADA and the Civil Rights Act of 1991 provides powerful support for an argument that if plaintiffs cannot be barred from judicial recourse under the ADA by a provision for arbitration contained in an employment agreement, they cannot be barred from judicial recourse under the statutes affected by the 1991 Act—or at least (since it was singled out in the 1991 Committee report) under Title VII.

In the case of Title VII, such an argument is bolstered by the nature of the amendments which were made to the statute through the 1991 Act, and particularly by the provisions for damages and jury trial.\textsuperscript{203} While it is possible that Congress contemplated that the newly created right to jury trial could be waived by a pre-dispute provision in an employment contract, such an assumption seems less plausible than the one reflected in the express language of the various committee reports that considered the issue. This is especially so in light of the constitutional considerations discussed in the following section.


\textsuperscript{202} Senator Dole authored a memorandum expressing the views of the Administration and several other Senators with respect to the compromise bill. See id. That memorandum explains the dispute resolution provision as

"encourag[ing] the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use these methods. In light of the litigation crisis facing the country and the increasing sophistication and reliability of alternatives to litigation, there is no reason to disfavor the use of such forums. See Gilmer v. Interstate/Johnson Lane Corp. 111 S. Ct. 1647 (1991)."

Id. at S15478. The implication is that the agreement enforced in Gilmer, though obviously a condition of employment, was nevertheless knowing and voluntary.

A week later, Congressman Edwards, a Democrat from California, authored a counter-memorandum interpreting the compromise bill. 137 CONG. REC. H9526 (daily ed. Nov. 7, 1991). That memorandum, which reiterates the language of the Committee report, states: "No approval whatsoever is intended of the Supreme Court's recent decision in Gilbert [sic] v. Interstate Johnson Lane Corp., 111 S. Ct. 1647 (1991), or any application or extension of it to Title VII. See id. This section is virtually identical to section 216 in House Report 1 as previously passed by the House in this Congress and as explained in H.R. Rep. No. 102-40, 102nd Cong., 1st Sess. 97 (1991)." 137 CONG. REC. at H9530.

\textsuperscript{203} See 42 U.S.C. § 1981a(b)-(c) (1994). The EEOC has offered this argument to the courts, but so far has been rebuffed. See, e.g., Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447 (D. Minn. 1996).
2. Must Waiver Be “Knowing and Voluntary”?

Short of reading the employment-related statutes to preclude enforcement of all pre-dispute waivers of a judicial forum, they may be read to require at least that the waiver be both knowing and voluntary. There are, as noted, portions of the legislative history underlying both the ADA and the 1991 amendment to Title VII which contain language to that effect. The implication of such a requirement, aimed at assuring meaningful bargaining and choice surrounding the waiver of statutory procedures and the design of their replacement, may well be considered a necessary prophylactic against the unilateral imposition of arbitration procedures which would otherwise tend to defeat the policy objectives of the respective statutes.

Moreover, insistence that waiver be both knowing and voluntary may be particularly appropriate when what the employee is relinquishing the right to trial by jury on a claim for which a jury trial would be not only statutorily but constitutionally required. Presumably, this is the case regarding claims for compensatory or punitive damages under either the ADA or the 1991 amendments to Title VII. Under such circumstances, for the government to insist upon enforcement of a waiver without regard to whether it was knowing or voluntary would appear to raise serious constitutional issues.

A requirement that waiver be at least “knowing” has already been read into Title VII by the Ninth Circuit. In *Prudential Insurance Co. v. Lai*, the court found in the text and history of the 1991 Civil Rights Act a congressional intent that “there . . . be at least a knowing agreement to arbitrate employment disputes before an employee may be

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205. *See* National Equip. Rental v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (holding contractual provision not effective for waiver of jury trial where contract is one of adhesion with gross inequality of bargaining power); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 755-56 (6th Cir. 1985) (holding waiver of jury trial right subject to knowing and voluntary standard); Dreiling v. Peugeot Motors of Am., Inc., 539 F. Supp. 401, 403 (D. Colo. 1982) (stating that strong presumption in favor of jury trial deems that waiver will only be considered valid if done knowingly and intentionally); cf. Nghiem v. NEC Elecs., Inc., 25 F.3d 1437, 1441 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 635 (1994) (rejecting the argument that establishment of jury trial right for Title VII claims evinced a congressional intent to preclude arbitration). *But see* Dillard v. Merrill Lynch, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2321 (2d ed. 1995) ("A contractual provision for waiver of jury will be enforced, but it will be strictly construed.").

deemed to have waived the comprehensive statutory rights, remedies, and procedural protections prescribed in Title VII and related state statutes." On that basis, the court concluded that plaintiffs could proceed with their state law sexual harassment claims, notwithstanding a provision in their employment application forms which called for arbitration of "any dispute, claim or controversy that is required to be arbitrated under the rules . . . of the organizations with which I register." Plaintiffs, required to register with the National Association of Securities Dealers, were not provided a copy of the relevant rules, and in any event the rules, which called for arbitration of disputes "arising in connection with the business" of its members, made no reference to employment disputes.

But, a requirement of knowing waiver in these terms is also rather easily met and by itself does little to assure that an arbitration agreement will be the product of meaningful choice. Unless the law is prepared to say that the waiver must be voluntary as well as knowing, little will be accomplished. At this point, however, we encounter a problem with thorny philosophical and practical dimensions. Voluntariness, the economists will tell us, is present in any agreement, short of the sorts of coercion we are prepared to recognize as amounting to duress. The fact that Georgeanne might not have been able to find any employment that did not require her to sign a similar arbitration agreement would no more satisfy the economists than the press of similar economic circumstances satisfied the court in *Lochner v. New York.*

207. Id. at 1304.
208. Id. at 1302.
209. See id. at 1303.
210. Id. at 1302-03. The court emphasized the particular significance for sexual harassment cases of differences likely to exist between judicial and arbitral fora, noting that, "in an area as personal and emotionally charged as sexual harassment and discrimination, the procedural right to a hearing before a jury of one's peers, rather than a panel of the National Association of Securities Dealers, may be especially important." Id. at 1305 n.4. The court referred also to the protections afforded by California law for the privacy rights of victims of sexual harassment. See id. at 1305.
211. The NASD "U-4" form, at issue in *Lai,* has since been modified. See *Uniform Application for Securities Industry Registration or Transfer,* Blue Sky L. Rep. (CCH) ¶ 5118 (1996). The Ninth Circuit has since enforced arbitration under the new rule. See Kuehner v. Dickinson & Co., 84 F.3d 316, 320-21 (9th Cir. 1996); cf. Berger v. Cantor Fitzgerald Sec., No. 96 CIV. 2836 (SAS), 1996 WL 640888, at *5 (S.D.N.Y. Nov. 1, 1996) (holding that plaintiff was entitled to an evidentiary hearing on his contention that he was misled as to the nature of the U-4 clause, and was given no more than five minutes to complete the application form).
212. 198 U.S. 45 (1905).
The truth is that "voluntariness" is a matter of degree in any context, and the characterization is inevitably normative. To say that an agreement someone has signed is "involuntary" is to say that it is accompanied by a degree of pressure, economic or otherwise, which creates risks of unfairness or infringement upon public values that under the circumstances society is not prepared to accept. The question is whether our society has said that with respect to the employment statutes, and if so with respect to what circumstances.

One answer would be to say that any waiver of access to a judicial forum that an employer imposes as a condition of employment, or of continued employment (or, perhaps, as a condition of receiving any benefit of employment), is not "voluntary" for purposes of the federal statutes. Gilmer does not necessarily preclude that answer, because Gilmer's arbitration agreement was not imposed by his employer. Rather, it was required by law as a condition of doing the sort of work Gilmer was hired to do. The distinction is meaningful because imposition of a requirement by operation of law does not entail the same potential for abuse as the imposition of the same requirement by an employer seeking to minimize its legal exposure. Such a position would be vulnerable in marginal cases. Perhaps an arbitration agreement entered into willingly by a sought-after corporate executive officer should be enforced even if the company insists upon it, and perhaps companies should be permitted to "bargain" with employees by offering incentives to enter into arbitration agreements, but it does have the advantage of providing a bright-line rule that would likely avoid the more egregious use of power to obtain undue advantage.

If the courts are to be brought to such a position, agency guidance would be useful. In 1995, the EEOC issued a policy statement declaring the Commission's, "belie[f] that parties must knowingly, willingly and

213. See Stephen J. Ware, Employment Arbitration and Voluntary Consent, 25 Hofstra L. Rev. (forthcoming fall 1996). Professor Ware suggests that voluntariness can be defined only by reference to a "baseline" of rights specified by non-contract law. See id. If the "baseline" includes the policies of the anti-discrimination laws discussed herein, I would agree.


216. See id.
voluntarily enter into an ADR proceeding,\footnote{217} but the statement was not accompanied by explanation or legal analysis. In the same year, the EEOC took the position in litigation that an employer’s insistence upon arbitration agreements as a condition of employment was itself a violation of Title VII, but the foundation for its position—whether that was because the agreements in question purported to preclude the filing of charges with the agency itself, or perhaps because the requirement was in retaliation for activity protected under the statute—was ambiguous.\footnote{218} A long-awaited clarification by the EEOC has yet to appear.

Realistically, there is not much solace in all of this for Georgeanne. Her agreement did make reference to statutory claims in a way likely to satisfy the Ninth Circuit, and if courts can eventually be brought to withhold enforcement from pre-dispute agreements to arbitrate such claims, or from those which are not in some sense truly voluntary, they seem a long way from doing that. Georgeanne’s best chances of avoiding arbitration, or of limiting her risks, may lie in combining her argument based upon the involuntariness of her agreement with arguments directed at those aspects of her arbitration agreement which arguably offend the policies reflected in the federal anti-discrimination laws.

3. Limits on What Can be Waived Through a Pre-dispute Agreement

Once a dispute has arisen, the parties (in the absence of a class action) are free to settle that dispute on any terms they negotiate, so long as those terms are not themselves unlawful, and presumably they may do so through an arbitration agreement which allows the arbitrator to reach any conclusions that the parties themselves would have been free to accept. Since, for example, the parties are free to settle for whatever amount the plaintiff is willing to accept, nothing prevents the parties from submitting their dispute to an arbitrator with a stipulation that the award may not exceed a specified amount, or that the arbitrator may not

\footnote{217} Sharona Hoffman, \textit{Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?}, 17 BERKELEY J. EMP. \\& LAB. 131, 140 n.49 (1996) (citation omitted).

\footnote{218} See EEOC v. River Oaks Imaging & Diagnostic, 67 Fair Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. 1995); Hoffman, \textit{supra} note 217, at 135. After 2 women who declined to sign a mandatory arbitration agreement were discharged, the EEOC challenged the unilateral imposition by employers of mandatory alternative dispute resolution policies. See Hoffman, \textit{supra} note 217, at 139. In April the court issued a preliminary injunction. See Hoffman, \textit{supra} note 217, at 139. In June, the case was resolved by consent order, permanently revoking ROID’s alternative dispute resolution policy. See Hoffman, \textit{supra} note 217, at 140.
award reinstatement, or whatever other conditions they consider appropriate.

But in Alexander, the Court, in dealing with Title VII, found it "clear that there can be no prospective waiver of an employee's rights." While Gilmer rejected Alexander's premise that these rights included the right to a judicial forum, the Court did not otherwise question that premise. We can assume, therefore, that a distinction continues to exist, with respect to what is waivable, between a post-dispute agreement to arbitrate and a pre-dispute agreement. Perhaps further distinctions need to be drawn among pre-dispute agreements with respect to the circumstances, or the degree of voluntariness, but if that is so the case law to date provides scant guidance.

a. Access to a Federal Agency

One right which is apparently non-waivable, according to the Gilmer Court, is the right of access to a federal agency with jurisdiction to enforce the federal statute under which the employee's claim is made. Responding to Gilmer's contention that arbitration would undermine the role of the EEOC in enforcing the ADEA, the Court declared, without explanation, that "[a]n individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC." Presumably the explanation for this proposition lies in the Court's interpretation of the ADEA, and implies that were that proposition not correct Gilmer's contention would have greater merit. Assuming the ADEA is indistinguishable from Title VII with respect to this issue, we may conclude that Georgeanne's agreement to arbitrate is not enforceable to the extent that it purports to waive her right to file a charge with the EEOC.

It would seem likely also that the existence of Georgeanne's arbitration agreement would not affect the statutory jurisdiction of the EEOC to bring suit on her behalf if it deems such action appropriate—particularly since, as the Gilmer Court observed, EEOC jurisdiction is not dependent upon the filing of a charge. The Gilmer opinion does not address that issue directly, but in response to Gilmer's argument

221. See id. at 28.
222. Id.
223. See id.
224. See id.
that arbitration is an inadequate substitute for litigation because of the
inability to pursue class actions the court stated (again without analysis),
"it should be remembered that arbitration agreements will not preclude
the EEOC from bringing actions seeking class-wide and equitable
relief." While it is perhaps arguable that an individual action, not
involving class-wide or equitable relief, is distinguishable, such an
argument ought not prevail in the face of clear statutory language.

b. Substantive Rights Under Federal Law

The Gilmer Court also reiterated the Mitsubishi Motors distinction
between a waiver of the right to a judicial forum and a waiver of
"substantive rights" under a particular statute. Presumably an
arbitration agreement could not validly direct an arbitrator to apply
substantive rules of liability different from those which the statute
mandates—to rule for the employer in a sexual harassment case, for
example, unless the arbitrator found that the employer knowingly
arranged for the employee to be harassed. But, short of that, what is to
be said of arbitration agreements, such as Georgeanne's, which purport
to shorten the statutory period of limitations, or to limit the remedies
otherwise available under the statute?

In Graham Oil Co. v. Arco Products Co., the Ninth Circuit held
that a franchisee under a distributorship agreement covered by the
Petroleum Marketing Practices Act could sue under that statute notwith-
standing arbitration provisions contained in the agreement. Those
provisions purported to establish a shorter period of limitations than the
statute, and to preclude exemplary damages and attorney fees which the
statute authorized. Rather than excise the offensive provisions, the
court characterizing them as parts of an integrated scheme to circumvent
public policy, held the entire arbitration clause invalid.

While Graham Oil rests on an interpretation of a statute pertaining
to franchise relationships, its reasoning would appear equally
applicable to federal employment discrimination statutes. It suggests that
those portions of Georgeanne's arbitration agreement, which purport to

225. Id. at 32.
226. See id. at 29.
227. 43 F.3d 1244 (9th Cir. 1994), cert. denied, 116 S. Ct. 275 (1995).
228. See id. at 1246-47.
229. See id. at 1247-48.
230. See id. at 1249.
231. See id. at 1247.
shorten the period of limitations and limit the relief available, are not only invalid, but provide grounds for invalidating the entire agreement.\textsuperscript{232} As Georgeanne’s lawyers, we must be cautious in this conclusion. A federal district court, without citing to Graham Oil, has concluded that an agreement to arbitrate discrimination claims is enforceable even though it precludes punitive damages, attorney fees, and equitable relief.\textsuperscript{233} Moreover, Georgeanne’s arbitration agreement, unlike the agreement in Graham Oil, contains a severability clause. We can at least be cautiously optimistic that if we go to arbitration the arbitrator can be persuaded to ignore these restrictive provisions or, if we are prepared to litigate, that a court can be persuaded to strike them down.

c. Rights to Fair and Effective Procedures

Representatives of the American Bar Association and of various private organizations which provide or sponsor ADR services have recognized the problems of fairness which may arise in connection with arbitration under agreements similar to those used in Gilmer, and have joined in the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship\textsuperscript{234} recommending certain procedural safeguards.\textsuperscript{235} The American Arbitration Association in its California operations and JAMS-Endispute, an organization providing ADR services through retired judges, have adopted special rules governing such arbitrations.\textsuperscript{236} Such actions are

\textsuperscript{232} See id. at 1248-49.
\textsuperscript{233} See DeGaetano v. Smith Barney, Inc., No. 95 Civ. 1613, 1996 WL 44226, at *6 (S.D.N.Y. Feb. 5, 1996); see also Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447 (D. Minn. 1996) (holding that plaintiff was bound to arbitrate her discrimination claims under an agreement that required notice of demand for arbitration period within a shorter period than allowed under applicable federal and state law, limited the arbitrator’s award out to out-of-pocket expenses, and provided that each party would be reasonable for its own costs and attorney fees regardless of the award. The magistrate’s opinion upon which the court’s order was based acknowledged that if they were applied to limit plaintiff’s access to a tribunal or to remedies beyond the limitations of applicable law, these provisions would be invalid, but in effect ruled that plaintiff’s arguments on these grounds premature).
\textsuperscript{234} Disp. Res. J. Oct.-Dec. 1995, at 37 [hereinafter Due Process Protocol]. This document was signed on May 9, 1995 by representatives of the National Academy of Arbitrators, the Society of Professional in Dispute Resolution, the American Arbitration Association, and Council officers of the Labor & Employment Section of the American Bar Association, as well as the American Civil Liberties Union and the Federal Mediation and Conciliation Service. See id.
\textsuperscript{235} See id.
\textsuperscript{236} See AMERICAN ARBITRATION ASS’N, CALIFORNIA EMPLOYMENT DISPUTE RESOLUTION RULES (1995).
likely to have considerable influence on the way in which employers structure their arbitration procedures. But the protocol and the special rules are not law, and even if, as in the case of JAMS-Endispute, an ADR provider insists that it will not handle arbitrations except pursuant to the special rules there is nothing to prevent an employer, such as in Hazard Insurance from going its own way. The question remains, whether there is any legal basis for insisting that pre-dispute arbitration agreements in the employment context conform to any requirements of fairness or effectiveness in implementing the policies of the federal statutes.

Interpreting the federal anti-discrimination statutes to impose such requirements would seem like a logical extrapolation from the existence of the statutes and the policies they reflect. *Gilmer* appears to leave the door open to such an interpretation, at least with respect to arbitration programs less protective of fairness and effectiveness than the NYSE arbitration procedures. But, if that is the case, what specific safeguards would such an interpretation require?

i. Procedures Related to Selection of Arbitrator

At a minimum, it would seem that a requirement for fair and effective procedures should preclude an employer from unilaterally designating the arbitrator or the arbitral panel. This is true even if the persons designated bear no particular relationship to the employer, and have established reputations as independent neutrals. The very fact that they owe their status to the employer and inferentially to his continuing satisfaction with them should be sufficient basis for disqualification.

When the arbitrator is selected on a bilateral basis, through the auspices of a private dispute resolution agency such as the American Arbitration Association, problems of unfairness in the selection procedure are more subtle. The employer, as a more frequent user of the system, has two potential advantages over individual employees; (1) the employer is more likely to have information about the past decisions and proclivities of particular arbitrators; and (2) the chosen arbitrator will be aware that his future employment may depend to a greater extent upon an outcome that does not displease the employer community. I do not mean to suggest that responsible arbitrators will consciously slant their decision

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for such reasons, but the potential for unconscious bias toward the employer’s position, or perhaps toward the inoffensive middle ground (as when it comes to assessing claims for punitive damages) is another matter.

To some extent these problems can be alleviated by making information about the arbitrator readily available to both parties, and by the involvement and networking of plaintiffs’ lawyers, but both these alleviating factors depend upon activities that may or may not occur. Their success in eliminating the institutional slant of traditional arbitration procedures is likely to depend upon the organization and effectiveness of the plaintiffs’ bar in particular areas, and the extent to which individual claimants, confronted with a unilaterally imposed arbitration system, in fact have access to a lawyer who will provide the necessary advice. If a level playing field is to be assured, governmental involvement in the selection of panels and in the designation of arbitrators may be necessary.

ii. Elimination of Unreasonable Financial Barriers

From a purist’s perspective, any requirement that a complainant pay money as a condition of access to a tribunal beyond what would be required for the filing of a complaint in court, should be viewed as invalid because it imposes burdens upon the vindication of statutory rights that would not otherwise exist under the statutory scheme. Perhaps that perspective needs to be modified to take into account the likelihood that litigation would entail the risk of greater costs that the employee might end up paying if she loses, and the added problems of potential bias that would exist if the arbitrator’s fees were paid entirely by the employer. Even subject to those qualifications, it seems that there must be some limits placed upon the liability of employees for access and costs if arbitration is to provide a meaningful alternative for the


239. In addition, both fairness and the public interest in the implementation of public norms require that arbitrators be knowledgeable with respect to employment discrimination laws and their interpretation. The Due Process Protocol recognizes that the, “existing cadre of labor and employment mediators and arbitrators, some lawyers, some not—although skilled in conducting hearings and familiar with the employment milieu—is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.” Due Process Protocol, supra note 234, at 38. It recommends reexamination of roster eligibility by designating agencies, and training programs aimed at providing the necessary skills. Due Process Protocol, supra note 234, at 38.
vindicating of statutory policy. Whether and how courts will recognize that remains to be seen.

iii. Right to Counsel

Absent knowing and voluntary waiver, the right to representation by counsel in arbitration would seem essential both in terms of fairness and in terms of effectuating the public goals reflected in the employment discrimination statutes. The basis for such a right might be found in common law due process doctrine, but in any event, should be implicit in the statutes themselves, which provide not only for counsel but for the recovery of counsel’s fees when the plaintiff prevails. Again, however, the establishment and vindication of such a right will require Georgeanne to make new law.

iv. Class Actions or Consolidated Proceedings

While the facts in Georgeanne’s case may not present the issue, there are certain employment discrimination cases—pattern or practice cases and some disparate impact cases, for example—in which the ability to proceed on a class-wide basis is especially important to the vindication of statutory rights. Even Georgeanne’s case might be strengthened and facilitated by the ability to join, as claimants, other women complaining of sexual harassment. Arbitration rules and agreements do not typically provide for either class actions or consolidated proceedings, however, as far as the FAA is concerned, that may mean that a court lacks authority to order arbitration to proceed on a class-wide or consolidated basis.\(^{240}\) The rules of the New York Stock Exchange involved in Gilmer did allow for “collective proceedings,”\(^ {241}\) and the

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240. In Keating v. Superior Court, 645 P.2d 1192 (Cal. 1982), the California Supreme Court held that under the California Arbitration Act, courts have authority to order arbitration proceedings on a class-wide basis and to supervise the proceedings to safeguard the rights of absent class members. See id. at 1209. The United States Supreme Court, reversing on other grounds, declined to pass upon this aspect of the state court’s decision. See Southland Corp. v. Keating, 465 U.S. 1 (1984). The issue under the FAA remains open. See Stephen H. Kupperman & George C. Freeman, Selected Topics in Securities Regulations, 65 TULANE L. REV. 1547, 1577-93 (1991). Compare Champ v. Siegel Trading Co., 55 F.3d. 269 (7th Cir. 1995) (holding as disruptive a consolidation order where the parties agreement makes no mention of class arbitration), with New England Energy, Inc. v. Keystone Shipping Co., 855 F.2d 1 (1st Cir. 1988) (holding that a consolidation order pursuant to state statute when the contract is silent on the subject is not an improper modification of the agreement).

Court relied in part upon that fact in rejecting Gilmer's complaint that arbitration was an inadequate substitute for litigation; but the opinion proceeds to minimize the significance of the complaint by observing that the EEOC could, in any event, bring actions seeking class-wide relief, so that the prospects of distinguishing *Gilmer* on that ground are not bright. It may be that, as a matter of policy, it would be preferable to deny arbitration in cases where class actions would be appropriate, rather than attempt to structure arbitration in a class-wide mode. However, at the present time it does not appear that either alternative is likely under the FAA.

v. Right to a Record or Statement of Reasons and to Meaningful Judicial Review

The grounds for judicial review of an arbitration award under the FAA are extremely limited. While some courts have recognized non-statutory exceptions to arbitral finality, such as "manifest disregard of the law," these exceptions appear to be quite limited. While dicta in some of the cases suggests that the Supreme Court may be willing to

242. See id. at 30.
243. See id. at 32.
244. See Kupperman & Freeman, supra note 238, at 1592 (stating courts should refrain from imposing class actions on the arbitral process).
246. In addition to the "manifest disregard" standard, some courts have expressed willingness to vacate an arbitration award which is found to be "arbitrary and capricious" or "completely irrational," or contrary to "public policy," or (in the case of wayward contract interpretation), contrary to the "essence of the agreement." See, e.g., M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 850 (6th Cir. 1996) (acknowledging existence of the "manifest disregard of the law" standard, and stating that an award should be vacated only where the error is obvious and readily apparent to the average person qualified to be an arbitrator); United Food & Commercial Workers Int'l Union v. Foster Poultry Farm, 74 F.3d 169, 173 (9th Cir. 1995) (stating that a reviewing court is "extremely limited" in its review of arbitration decisions, upholding them so long as the solution can be "rationally derived" from a plausible reading of the agreement); French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (3d Cir. 1072) (finding that an arbitration decision must be upheld unless it is "completely irrational").

Some courts that have adopted the "manifest disregard" standard, insist that it applies only when it is apparent from the award that the arbitrator was aware of the law and deliberately disregarded it. See, e.g., Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1153, 1267 (7th Cir. 1992); Siegel v. Titan Indus. Corp., 779 F.2d 891, 893 (2d Cir. 1985). One federal district court has concluded that under the Second Circuit's position an award withholding attorney's fees from a successful plaintiff should be enforced even though the applicable statute—in that case the ADEA—clearly mandates that such fees should be awarded. See DiRussa v. Dean Witter Reynolds, Inc., 936 F. Supp. 104 (S.D.N.Y. 1996).
entertain a broader scope of review in cases involving arbitration of statutory claims, that suggestion has yet to materialize.

Viewed by itself, the traditional rule of arbitral finality might be considered a neutral principle, favoring neither the employer nor the employee with respect to employment discrimination claims, and relevant only to the abstract public interest in assuring the uniform application of the laws. If the employer and employee each have a fair shot at persuading a neutral and competent arbitrator, they can be said to have an equal interest (pre-award) in assuring that the award is not subject to further litigation. Considered in the light of the various factors which may otherwise slant arbitration in favor of the employer’s interests, however, the situation is quite different; to the extent that the deck is stacked against the employee with respect to arbitral selection or procedures, a rule which insulates the award from judicial review is hardly neutral. If arbitration of discrimination claims is to be permitted on the basis of adhesive agreements, then considerations of both public policy and fairness to plaintiffs argue in favor of meaningful judicial review.

But if there is to be meaningful review, there must be an adequate basis for review—either a record of the proceedings or, at a minimum, a statement by the arbitrator which reflects his or her factual findings and legal analysis. Again, *Gilmer* need not be read to preclude such a requirement.

d. Rights Under State Law

Although the Supreme Court has found the FAA to contain a broad preemption principle, requiring states to enforce agreements to arbitrate that would be enforceable under federal law, nothing in case law suggests that principle would require states to accede to modifications in their substantive law or policies simply because those modifications are contained in agreements to arbitrate. Thus, the Supreme Court’s distinction between waiver of the judicial forum and waiver of substantive rights, as declared in *Gilmer* and as explicated in *Graham Oil* (assuming that explication to be valid) should apply equally to claims

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247. In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court stated, "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Id.* at 232. In *Gilmer*, the Court reiterated that cryptic language in response to Gilmer’s argument that the limited scope of judicial review made arbitration an inappropriate vehicle for the implementation of public norms. *See Gilmer*, 500 U.S. at 32 n.4.
under state law. As a consequence, if the provisions of Georgeanne’s arbitration agreement are invalid insofar as they purport to waive the statute of limitations and remedies available under federal law, they should be invalid, as they purport to waive the statute of limitations and remedies available under state law as well.

The question of Georgeanne’s access to the state agency charged with responsibility for administering the state’s anti-discrimination law is a bit different. As a result of *Southland* and *Perry* we know that under FAA general preemption principles, a state cannot insist upon the availability of a judicial forum for enforcement of state statutory rights in the face of an arbitration agreement that is subject to the FAA, so that (subject to other possible defenses to the arbitration clause) Georgeanne will not be permitted to sue under her state’s anti-discrimination law. The reasoning of those cases would seem to apply equally to an administrative forum. For example, if the plaintiff’s arbitration agreement in *Perry* precluded him from suing in court to obtain wages due, presumably it would have precluded him from invoking the jurisdiction of the State Labor Commissioner as well.

This would seem to be the case with any state law claim unless some statute other than the FAA calls for a different result. If Georgeanne’s claim were for violation of a state law prohibiting discrimination on grounds which lie outside the scope of federal anti-discrimination laws—such as sexual orientation, or whistle-blowing—and if her arbitration agreement were otherwise enforceable, federal preemption principles would appear to require her to arbitrate rather than litigate her claim before either a state court or a state agency. The same would be true of claims under other state laws, such as those regulating wages or conditions of employment.

But in the case of Title VII, Congress has made state laws and state agencies an integral part of federal anti-discrimination policy. Indeed, Georgeanne’s complaint to her state agency is a statutory precondition to her filing with the EEOC. If Georgeanne cannot be precluded from filing with the EEOC, it should follow that she cannot be precluded from filing with her state agency either.

Does this mean that the state agency would be free to exercise the full scope of its jurisdiction under state law, even if that entails remedial authority—the holding of hearings and the issuance of judicially enforceable orders, perhaps including orders for compensatory damages and administrative fines—that the EEOC does not have? While that result might be contrary to the expectations of Georgeanne’s employer when it insisted upon the agreement to arbitrate, it is not a result
markedly different from the scenario contemplated by the Supreme Court in *Gilmer*, in which the EEOC exercises its authority to bring a lawsuit on the complainant's behalf. In light of Title VII's general blessing for state laws and agencies, we should conclude—albeit tentatively—that state agency proceedings remain a possibility for Georgeanne, whatever other consequences flow from her arbitration agreement. Of course, if her state's agency has only the power to investigate and conciliate, like the EEOC, that will not be much of an asset.

e. Advice to Georgeanne

On the basis of this survey of existing doctrine, we should probably advise Georgeanne something as follows.

There is a possibility that she could defeat a petition to compel arbitration under the FAA on the basis of the section 1 exclusion of employment contracts. However, given the current state of the case law, she will probably have to go all the way to the Supreme Court in order to do that. She has a better chance, under present case law, of obtaining a court order striking those portions of her agreement which purport to modify the statutory limitations period or available remedies, and possibly of avoiding arbitration on those grounds. She has other tenable arguments that her arbitration agreement should not be enforced, or that it should be modified in certain respects, based upon the employment discrimination statutes or common law theories, but these arguments do not yet have support in judicial opinions. In any event, resisting arbitration on any of these grounds will likely be costly and onerous.

Alternatively, Georgeanne could proceed before the arbitrator designated in the agreement and try to persuade him as to the invalidity of the provisions on limitations or remedy. Yet, it is unlikely that the arbitrator would have jurisdiction to consider those arguments, since his authority is limited by the agreement. Finally, she could simply file a charge with the EEOC and her state agency, and wait to see what happens.

V. BEYOND DOCTRINE (AND BEYOND GEORGEANNE)

Georgeanne's arbitration agreement is particularly egregious, and the possibility that existing legal principles might nonetheless call for its enforcement is particularly appalling. But less egregious agreements, including many commonly used by employers, pose substantial policy
questions which the courts so far seem willing to ignore. The motivation for that judicial attitude is easy enough to understand.

It is tempting to view with favor any procedure which diverts disputes away from the increasingly clogged dockets of the courts, and for that matter from the overly backlogged EEOC. But it does seem odd that we as a society should be willing, in the name of contract, to entrust the implementation of public policy as important as that embodied in our anti-discrimination laws to a procedure unilaterally promulgated by the party whose conduct is sought to be regulated. It seems odder still that we would allow the regulatee to designate the decision maker, or the method by which that person is chosen, and permit that person to conduct a hearing in a manner and pursuant to procedures which may or may not be effective in achieving legislative policies; then, allow that person’s decision to be kept from public view, and in the end accord it a degree of finality we are not willing to accord the decisions of our designated public tribunals.

It is probable that most employers who seek to substitute arbitration for litigation are not trying to obtain unfair advantage over their employees. Rather, they are motivated by a desire to avoid the costs, tribulations, and publicity of litigation, and what they see as the unpredictability of jury verdicts. They may believe — and probably for good reason — that an arbitrator is less likely than a jury to be swayed by emotional appeal, and less likely to award damages that employers would view as excessive. They may also believe that these motivations are not inconsistent with the best interests of their employees—indeed, that an arbitration system will be of benefit to their employees as well.

Depending upon how the arbitration system is configured, the employers may be right. The number of employees with viable statutory claims who are able to retain competent lawyers to represent them in litigation, is undoubtedly small compared with the total number of such employees; many of whom would be well advised to forego litigation in favor of a fairly constructed arbitration. Employees, no less than employers, may well prefer the advantages which arbitration has to offer. Indeed, an in-depth survey of worker attitudes conducted by Richard Freeman & Joel Rogers found that while one-third of those who had gone to court over workplace rights were “very satisfied” with the outcome, and twenty-three percent were “somewhat satisfied,” thirty-four percent were either “not too satisfied” or “not satisfied at all,” and fifty-five percent of the employees surveyed said they would prefer an alternative system to deal with disputes in which an elected committee of employees and management would jointly choose an outside arbitrator
to resolve the dispute. A follow-up survey showed employees favorably disposed to using arbitration to resolve disputes in place of court or agency resolution, but nearly all (ninety-five percent) said they believed an arbitration system should be jointly administered by employees and management, and more than three-fourths expressed the opinion that it should be illegal for companies to make reliance on arbitration a condition of employment.

But, employees do not necessarily need to have pre-dispute commitments for arbitration in order to obtain those advantages. Perhaps there is some psychological value to the employee in having the security of an arbitration system in place, and there may be some situations in which an employer who would have been willing to commit to arbitration as a general matter will decline to arbitrate a particular dispute after it arises, or decline to do so on terms as favorable as those which the employer would have accepted in a pre-dispute agreement. This might be the case, for example, if the employer believes that the employee's case is so weak, or so lacking in the potential for substantial damages, that there is no real risk of litigation to be avoided. But there is no reliable evidence to suggest that employers would routinely decline offers to arbitrate from employees with potentially litigable claims.

It is in this light that current doctrine must be evaluated and alternatives appraised. To the extent that current doctrine permits an employer, by means of an "agreement" exacted as a condition of employment, to divert all statutory claims from a judicial forum to an arbitration process which tends to favor the employer's interests, then I suggest current doctrine is unacceptable. It is unacceptable as a matter of individual fairness, and it is unacceptable (to the extent there is a difference) as a matter of public policy. The question is what can and should be done about it.

There appear to be two possibilities. One is to mold doctrine in the direction of assuring greater fairness. There is room, within existing case law, for such a molding—to a limited extent through the FAA and applicable common law principles, to a greater extent through interpretation of the applicable substantive statute, perhaps on the basis of administrative guidelines. Gilmer, with its emphasis upon the particular circumstances of NYSE arbitration and the particular status of Gilmer himself, need not be read to preclude such a development. And, of

249. See id. at 16.
course, there is the potential for legislative reform. Several commentators, recognizing the need for procedural protection, have advocated such an approach.250

The other possibility is to withhold enforcement from pre-dispute agreements to arbitrate statutory claims in the employment context, either altogether or on the basis of a rule requiring that the agreement be knowing and voluntary. Again, there is room for supportive doctrinal development. A broad reading of the FAA section 1 exemption for contracts of employment would go a long way in the directing of withholding enforcement, though concededly not all the way unless it were accompanied by an interpretation of the FAA that would preclude enforcement under state law. Alternatively, the applicable substantive statute could be interpreted—in the case of Title VII and the ADA through reliance upon explicit legislative history—to preclude or condition enforcement as a matter of federal policy. Again, Gilmer, because of its particular facts, does not necessarily stand in the way.

There are powerful arguments in favor of preclusion as opposed to amelioration. First, even if an employer does not seek to obtain any special advantage from arbitration, it is likely to favor employer interests somewhat more than employee interests. Problems of institutional bias are likely to persist even in the face of standard procedures for arbitral selection. The limitations on discovery associated with standard arbitration statutes and rules are likely to operate more often to the employer’s advantage. The absence of class actions, to the extent that is a feature of standard arbitration law, is a detriment primarily to plaintiffs in certain types of proceedings. If lawyers for employers are any indication, arbitrators are less likely than juries are to award large amounts as damages, and to the extent that the process does tend to favor employer interests, the traditional rule of non-reviewability of arbitration awards also works to the employer’s advantage.

Second, a regime of policing arbitration arrangements for fairness, while by no means impossible, would pose certain jurisprudential and practical problems. Ruling out limitations on statutory rights and remedies would be easy enough, but adopting meaningful and enforceable standards with respect to such matters as arbitral selection and discovery is likely to prove awkward for courts without guidance through legislation or administrative rule making. Although this may seem

awkward, the nature of the criteria that would have to be adopted, and
the scrutiny which the appropriate criteria would require, would likely
invite litigation over their application in a manner otherwise considered
antithetical to arbitration as an expeditious dispute resolution procedure.
In the end, it is inevitable that despite policing by the courts, substantial
problems of fairness and public policy would remain.

Finally, notwithstanding the Supreme Court’s protests to the
contrary, there is unavoidable tension between private dispute resolution
procedures and public norms. Even if arbitration can be counted upon to
adequately implement the public goal of compensating individuals for
wrongs, a system which operates on the twin premises of privacy and
finality can hardly be expected to serve as a substitute for public
tribunals in achieving the goals of deterrence and the systematic
development of the law.

In addition, while arbitrators can issue orders in the nature of
equitable relief, they may not have the same authority to do so, and do
not have the same public responsibility as courts to reach beyond the
interests of the particular claimant so as to assure compliance with
statutory commands.

The reasons that the Supreme Court has asserted for rejecting these
concerns—that public norms may be equally compromised through
settlement and that the EEOC retains authority to litigate on its own behalf—
are not satisfying. Whatever the impact of settlement and
its arbitration counterpart—the enforcement of post-dispute agree-
ments—have upon the integrity of public norms, it is minimal compared
to the impact likely to exist through the wholesale enforcement of pre-
dispute agreements which may affect hundreds of thousands of employ-
ees. Also, given the level of funding which exists and which is likely to
exist in the near future, the prospect of independent EEOC litigation to
any significant degree is far more theoretical than real.

Between a rule withholding enforcement from pre-dispute agree-
ments to arbitrate statutory claims in the employment context, and a rule
requiring that waiver of a judicial forum be knowing and voluntary, the
former is certainly capable of formulation and enforcement with greater
clarity. However, the latter may also be workable, either on an individual

Between October 1, 1994 and September 30, 1995, the EEOC filed a total of 322 substantive
lawsuits, 191 under Title VII, 37 under the ADEA, 76 under the ADA, 1 under the Equal Pay Act,
and 15 under a combination of statutes. See id. Of the 322 lawsuits, 79 were class actions. See id.
The total figure represented a substantial drop from the 373 lawsuits filed the previous year. See id.
or group basis. A rule requiring that waiver be knowing and voluntary could be developed along the lines established by the Older Workers Protection Act for waiver of rights under the ADEA: a writing "calculated to be understood," specifically referring to claims under identified statutes, supported by consideration in addition to anything of value to which the individual is already entitled, with opportunity to consult an attorney and to withdraw from the waiver within a specified period.\textsuperscript{253} The right to refuse should be made clear, perhaps by insisting upon use of a form in which the employee may elect to participate or not to participate in the arbitration program.\textsuperscript{254} Such a rule should also incorporate an assurance against reprisals for refusing to sign, and specifically prohibit insistence upon waiver as a condition of employment.

Alternatively, the voluntariness principle could be established and implemented on a group basis, requiring that any arbitration program, to be given effect, must be approved by a majority of employees who would be covered, voting by secret ballot in an election conducted by a federal or state agency. Such a regime would create an environment in which an employer seeking approval for arbitration would have an incentive to develop a program that a majority of its employees would be likely to accept. It would enable the employees to band together in consultation with one another, and perhaps with the employer, over the details of an acceptable program. Approval, once given, could remain in effect for a specified period, or from period to period thereafter, subject to a procedure that would enable dissatisfied employees to call for a new election.

At least two arguments might be asserted against the majority rule alternative. One is that it calls for, or at least contemplates the acceptance of, negotiation between the employer and its employees over the contents of the program. Under section 8(a)(2) of the National Labor Relations Act that might well constitute prohibited employer interference with or domination of an employee organization.\textsuperscript{255} Amending section 8(a)(2) has proved to be a sensitive political matter, but in this case unions might find the existence of arbitration programs an attractive basis for organizing, and be willing to accept at least a limited modification.

The other argument against the majority rule alternative is that it carries with it the potential for conflict between individual interests and

\textsuperscript{254} See id. § 626(f)(1)(H).
group interests similar to that which the court in *Alexander* gave as a reason for disassociating arbitration under a collective bargaining agreement from judicial remedies under Title VII. Unlike the typical union situation, however, the alternative under consideration could require individual access to arbitration free of a group veto. That would still leave the possibility, however, that a majority of workers, say predominantly white, male and young, would be willing to accept an arbitration program which is unsatisfactory from the perspective of those workers most likely to need it. That possibility suggests that a requirement for majority approval should not entirely displace the rules designed to assure the fairness of the procedures.

The reality is that an optimum solution to the problems posed will require legislation. If it is believed that a system like arbitration is preferable to the litigation of employment discrimination claims, then such a system should be installed and regulated by law. Meanwhile, however, there are principled alternatives to the regime of “anything goes.” Courts can and should read the FAA section 1 exclusion in accordance with its original intent to encompass all employment contracts, and leave the enforcement of arbitration provisions in such contracts to state law. Courts can and should read at least the ADA and Title VII to preclude enforcement of pre-dispute arbitration agreements in such a way as to deprive the employee of access to a judicial forum. Courts can and should insist, on the basis of federal statutes, that an arbitration agreement may not be used in such a way as to limit access to a tribunal, to limit rights or remedies that would be available under statute, or to deprive an employee of representation by counsel. Courts can and should insist, as a matter of statutory and common law, that arbitration programs imposed through adhesive contracts provide a system of arbitral selection as free as possible from actual or apparent bias, including institutional bias. Finally, Courts can and should insist, as a matter of statutory and common law, that arbitration under such contracts provide a scope of discovery appropriate to the issues being litigated, that the right to class actions be maintained, that the arbitrator render an opinion from which the arbitrator’s reasoning can be determined, and that the award be subject to judicial review for substantial errors of law.

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