Arbitration of Employment Discrimination Claims Under Pre-Dispute Agreements: Will Gilmer Survive?

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ARBITRATION OF EMPLOYMENT DISCRIMINATION CLAIMS UNDER PRE-DISPUTE AGREEMENTS: WILL GILMER SURVIVE?*

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I. INTRODUCTION

Arbitration as a method of alternate dispute resolution ("ADR") has a long tradition in American jurisprudence. Congress declared the public policy favoring arbitration in 1925, when it enacted the United States Arbitration Act, today called the Federal Arbitration Act ("FAA"). The FAA provides that valid, written arbitration clauses in contracts involving transactions in, inter alia, interstate commerce, are enforceable in the courts of the United States. Accordingly, the FAA expresses a strong federal policy favoring arbitration. That policy has been articulated at all levels of the federal judicial system, including the United States Supreme Court.⁵

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1. For a history of alternative dispute resolution, see Bette J. Roth et al., THE ALTERNATIVE DISPUTE RESOLUTION PRACTICE GUIDE, § 1.1 (1993).
3. See id.
4. See id.
The use of arbitration in certain industries to resolve disputes has a tradition that even predates the FAA. For example, participants in the securities industry have created their own organizations, rules, and practices to promote the fair and efficient operation of the financial markets for over 150 years. One long-established industry practice has been the use of arbitration, rather than litigation, to resolve disputes. Indeed, arbitration has been widely used in the securities industry since at least 1817.

Nevertheless, despite the Supreme Court’s pronouncements which clearly affirm the “national policy favoring arbitration,” the enforceability of pre-dispute arbitration agreements when dealing with statutory discrimination claims, sometimes referred to as “mandatory arbitration,” is under siege in the courts, administrative agencies and even in the legislatures. For example, the Ninth Circuit Court of Appeals recently held that the 1991 amendments to the Civil Rights Act of 1964 preclude the compulsory arbitration of Title VII disputes. Other courts, including one circuit court of appeals decision which post-dated and specifically rejected the Ninth Circuit’s reading of the legislative history surrounding the 1991 Civil Rights Act, continue to find that pre-dispute arbitration agreements are enforceable and consistent with the strong federal policy favoring arbitration, making this issue now ripe for Supreme Court review, despite the Court’s decision to deny certiorari in Duffield v. Robertson Stephens & Co.
This article examines the arguments underlying the latest challenges to pre-dispute arbitration agreements, whether pursuant to a private agreement to arbitrate or pursuant to the rules of various self-regulatory organizations ("SRO's") with whom employees are required to register. It also addresses the challenges raised to pre-dispute arbitration agreements by the Equal Employment Opportunity Commission ("EEOC"), the National Labor Relations Board ("NLRB") and Congress, discusses the recent decision by the Securities and Exchange Commission ("SEC") to approve a National Association of Securities Dealers Inc. ("NASD") proposal to end the requirement that broker-dealers arbitrate statutory claims of employment discrimination, and the decision by the New York Stock Exchange ("NYSE") to no longer require its employees to arbitrate statutory discrimination claims, subject to SEC approval. The article also provides practical advice for parties who, in the face of these developments, desire to maintain or implement a system of private mandatory arbitration for their employees.

II. ENFORCEABILITY OF AGREEMENTS TO ARBITRATE EMPLOYMENT DISPUTES

In jurisdictions where arbitration agreements are specifically enforceable, enforcement is nevertheless subject to a variety of defenses. Some of these defenses apply to contracts in general, including that the agreement to arbitrate was procured by fraud, is unconscionable or a contract of adhesion. Other defenses are specific to agreements to arbitrate claims, such as that the claim is not subject to arbitration or that the agreement is unenforceable under the FAA.

The following theories have been asserted in recent cases by parties challenging the enforceability of agreements to arbitrate employment disputes: the employee is asserting a federal statutory discrimination claim which is not subject to mandatory arbitration under the 1991 Civil Rights Act;¹¹ the arbitration agreement denies the employee some of the remedies available under law;¹² the arbitration procedures violate the employee's constitutional rights;¹³ the employee did not knowingly and voluntarily agree to arbitrate this claim;¹⁴ the arbitration agreement

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¹¹ See infra Part II.B.
¹² See infra Part II.C.
¹³ See infra Part II.D.
¹⁴ See infra Part II.E.
is an unconscionable contract of adhesion;\textsuperscript{15} the arbitration agreement is not enforceable because the Federal Arbitration Act contains an exception for arbitration clauses in employment contracts;\textsuperscript{16} the employee is asserting a state statutory claim that is not subject to arbitration;\textsuperscript{17} the employee is asserting a claim on behalf of a class of similarly situated persons and the arbitration procedures do not allow for the adjudication of class action claims;\textsuperscript{18} and the employee is entitled to a jury trial under the Federal Arbitration Act to determine whether a valid agreement to arbitrate exists.\textsuperscript{19}

A. The United States Supreme Court Has Held That Federal Statutory Discrimination Claims Are Arbitrable Pursuant To Pre-Dispute Agreements

The question of whether federal statutory employment-related claims such as those asserted pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"),\textsuperscript{20} the Americans With Disabilities Act ("ADA"),\textsuperscript{21} and the Age Discrimination in Employment Act ("ADEA")\textsuperscript{22} are subject to arbitration, at least in the absence of a law precluding arbitration, was answered by the U.S. Supreme Court in \textit{Gilmer v. Interstate/Johnson Lane Corporation},\textsuperscript{23} in at least one context. In \textit{Gilmer}, the Court held that there was no absolute right of access to the court system to pursue an ADEA claim.\textsuperscript{24} Upholding the arbitrability of employment claims in the securities industry, the Court cited the liberal policy of the federal courts favoring arbitration and reasoned that (1) arbitration of ADEA claims would not be contrary to legislative intent or the statute's remedial and deterrent purposes; (2) arbitration would not undermine the enforcement powers of the EEOC because claimants would still be free to file a charge with the EEOC, which has independent authority to investigate age discrimination claims; (3) arbitration can provide a fair forum for hearing claims and can afford broad relief to claimants; and (4) inequality of bargaining power between employers

\textsuperscript{15} See infra Part II.F.
\textsuperscript{16} See infra Part II.G.
\textsuperscript{17} See infra Part II.H.
\textsuperscript{18} See infra Part II.I.
\textsuperscript{19} See infra Part V.B.
\textsuperscript{24} See Gilmer, 500 U.S. at 23.
and employees is not a sufficient reason to reject arbitration agreements, absent evidence of coercion or fraud.\textsuperscript{25}

\textit{Gilmer} resolved a conflict between courts that had upheld arbitration of age discrimination and other statutory employment claims and those that refused to compel arbitration of such disputes.\textsuperscript{26} Because of the specific facts presented, \textit{Gilmer}, on its face, can be read to hold that arbitration agreements between employees and regulatory or licensing bodies are enforceable to compel arbitration of statutory employment discrimination claims.

For instance, in \textit{Williams v. Cigna Financial Advisors, Inc.},\textsuperscript{27} a decision following \textit{Gilmer}, the Fifth Circuit Court of Appeals held that the Older Workers Benefit Protection Act ("OWBPA") does not bar pre-dispute arbitration of employment disputes.\textsuperscript{28} In so doing, the Court of Appeals determined that a discharged employee's Form U-4\textsuperscript{29} required arbitration of his age discrimination claim.\textsuperscript{30} In \textit{Williams}, the discharged employee seeking to avoid arbitration argued that his agreement to arbitrate was not enforceable because he had not knowingly and voluntarily waived his right to a judicial forum, as required by the OWBPA.\textsuperscript{31} The OWBPA requires a written "knowing and voluntary" waiver by the employee which refers specifically to claims under the ADEA.\textsuperscript{32} In rejecting the employee's argument, the court reasoned that "[t]here is no indication that Congress intended the OWBPA to affect agreements to arbitrate employment disputes."\textsuperscript{33} Furthermore, the Fifth Circuit concluded that "OWBPA protects against the waiver of a right or claim, not against the waiver of a judicial forum."\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{25} See id. at 27-33.
\item \textsuperscript{26} Compare \textit{Bird v. Shearson Lehman-Am. Express, Inc.}, 926 F.2d 116, 122 (2d Cir. 1991) (upholding arbitration of ERISA claim) \textit{with Nicholson v. CPC Int'l, Inc.}, 877 F.2d 221, 231 (3d Cir. 1989) (denying arbitration of ADEA claim).
\item \textsuperscript{27} 56 F.3d 656 (5th Cir. 1995).
\item \textsuperscript{28} See \textit{Williams}, 56 F.3d at 660-61.
\item \textsuperscript{29} The Form U-4 (Uniform Application for Securities Industry Registration) is a uniform, standardized form which must be completed by anyone seeking to work as a broker in the securities industry. See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190, 193 (D. Mass. 1998). The form requires all brokers to agree to arbitrate any dispute, claim or controversy between the broker and the firm, customer or any person, that is required to be arbitrated under the rules or by-laws of the organizations listed, including the NYSE and NASD. See id.
\item \textsuperscript{30} See \textit{Williams}, 56 F.3d at 659.
\item \textsuperscript{31} See \textit{id.} at 660.
\item \textsuperscript{33} \textit{Williams}, 56 F.3d at 660.
\item \textsuperscript{34} \textit{id.} (emphasis added).
\end{itemize}
Similarly, in Kahalnik v. John Hancock Funds, the plaintiff argued that the Form U-4 arbitration agreement he signed violated the OWBPA. The court disagreed, holding that "the arbitration agreement does not violate the OWBPA which only bars the waiver of substantive rights and not the waiver of a particular judicial forum in which to adjudicate those rights."

Because the arbitration agreement in Gilmer was between the employee and the NYSE, the Gilmer opinion declined to consider the broader question of whether arbitration agreements between employees and their employers are enforceable with respect to such claims. Thus, Gilmer arguably left open the question of whether arbitration clauses in employment contracts, as opposed to arbitration clauses in the Form U-4, can be used to compel arbitration of employment discrimination claims. Nonetheless, many federal courts have relied upon Gilmer to enforce employment-related arbitration agreements with respect to a broad range of statutory employment claims.

Nevertheless, despite the willingness of virtually all courts to compel parties to arbitration in the immediate aftermath of Gilmer, a number of recent decisions involving the enforceability of pre-dispute arbitration agreements have either struggled to distinguish Gilmer or otherwise cast doubt about the continuing viability of pre-dispute arbitration as an alternate dispute resolution method.

36. See id. at *3.
37. Id.
B. Does The 1991 Civil Rights Act Make Pre-Dispute Arbitration Agreements Unenforceable With Respect To Title VII Claims? A Split In The Circuits Develops

In *Duffield v. Robertson Stephens & Company*, the Ninth Circuit ruled that employers may not require as a condition of employment that employees waive their Title VII right to a judicial forum and instead agree in advance to submit all employment-related disputes to binding arbitration. Judge Stephen Reinhardt, writing for the court, found that the Civil Rights Act of 1991 precludes compulsory arbitration of Title VII disputes, and thus permitted Duffield to litigate her sex discrimination claims under Title VII and California’s Fair Employment and Housing Act in federal court.

In *Duffield*, the Ninth Circuit began its analysis by noting that before 1991, the U.S. Supreme Court’s decision in *Alexander v. Gardner-Denver Co.*, “was widely interpreted as prohibiting compulsory arbitration of Title VII claims.” Although the Court conceded that *Gilmer* held that employees who signed Form U-4 applications could be required to arbitrate statutory claims brought under ADEA, the Ninth Circuit found that the legislative history to the 1991 Civil Rights Act, developed prior to the Court’s rendering of the *Gilmer* decision, was determinative. Seizing on the language in the 1991 Act that parties can choose to use alternative dispute resolution, including arbitration, to resolve Title VII disputes “where appropriate” and to “the extent authorized by law,” the court interpreted the qualifiers as setting forth “separate and distinct limitations on the conditions and circumstances under which the arbitration process may be invoked to resolve Title VII claims.” After examining the legislative history of the 1991 Act, the Court concluded that Congress did not intend to include *Gilmer* within what was “authorized by law” and clearly expressed the opposite inten-

41. See *Duffield*, 144 F.3d at 1193-1201.
42. See id.
43. 415 U.S. 36, 56 (1974) (holding that an arbitration clause in a collective bargaining agreement does not preclude litigation of Title VII claims in court because the “purpose and procedures of Title VII... indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII”).
44. *Duffield*, 144 F.3d at 1188.
45. See id. at 1189.
46. Id. at 1193.
tion when Congress “rejected a proposal that would have allowed employers to enforce ‘compulsory arbitration’ agreements.”

Concluding that the Form U-4 was unenforceable as applied to Title VII claims, the court reasoned that the Form U-4 “compels precisely what Congress intended to prohibit in the 1991 Act: mandatory requirements under which prospective employees agree as a condition of employment to surrender their rights to litigate future Title VII claims in a judicial forum and accept arbitration instead.” Moreover, “[b]ecause every employer in the securities industry requires its employees to sign Form U-4, the form is especially violative of Congress’ limitations.” Nevertheless, the Ninth Circuit emphasized in its opinion that Congress did not “preclude employees from agreeing after a claim has arisen to submit the dispute to arbitration.”

Similarly, a federal district court in Massachusetts has also ruled that agreements compelling arbitration of claims under Title VII are unenforceable. The court held that while mandatory arbitration of age discrimination claims was made permissible by Gilmer, the system used by the New York Stock Exchange, at issue in Rosenberg, was inadequate to protect employee rights, and thus Gilmer was distinguishable.

47. Id. at 1196.
48. Id. at 1199. In Ackerman v. Money Store, No. L-4301-98 (N.J. Super. Ct. Union Co. Oct. 15, 1998), a New Jersey trial court followed the lead of the Duffield opinion and ruled that the employer violated the New Jersey Law Against Discrimination (“NJLAD”) by conditioning the plaintiff’s continued employment on her signing an arbitration agreement that would have relinquished her right to pursue NJLAD claims either administratively or in a judicial forum. The New Jersey Division on Civil Rights (the “Division”) intervened in the case and argued that conditioning employment on signing an arbitration agreement covering discrimination claims interfered with the plaintiff’s rights under state law. The court agreed with plaintiff and the Division, pointing out that an employee required to sign an arbitration agreement would be forced to relinquish the right to bring NJLAD claims in court or with the Division, which can investigate and order remedies without plaintiffs incurring any litigation costs. See Judge Finds New Jersey Law Violations in Conditioning Job on Waiver of Rights, Daily Lab. Rep. (BNA) No. 203, at AA-1-2 (Oct. 21, 1998).
49. Duffield, 144 F.3d at 1199. Despite the strong language contained in Duffield, a California appeals court recently ordered a trial judge to enter summary judgment for a health and fitness club in a sexual harassment suit filed under the state’s Fair Employment and Housing Act, Cal. Gov’t Code §§ 12900-12996 (West 1997), by a former employee who sought to repudiate an arbitration pledge contained in an employee handbook. See 24 Hour Fitness, Inc. v. Superior Court, Nos. A079501, A079502, 1998 WL 663348, at *9 (Cal. Ct. App. Sept. 28, 1998). In a footnote, the court said that the outcome was not governed by Duffield, finding that state rulings upholding the enforceability of arbitration agreements despite the state’s anti-discrimination statute continue to be valid regardless of the contrary stance taken by the Ninth Circuit. See id. at *9 n.9.
50. 24 Hour Fitness, 1998 WL 663348, at *9 n.9.
52. See id.
The plaintiff, who alleged age and gender discrimination, as well as sex harassment, signed a standard Form U-4 requiring her to submit disputes to arbitration under the rules of, among other organizations, the NYSE. Although plaintiff acknowledged signing the document, she stated that she was never advised that the Form U-4 required her to arbitrate all future disputes with her employer, including employment disputes.

The court in Rosenberg acknowledged that Gilmer upheld the enforceability of Form U-4 arbitration clauses as they applied to age discrimination claims, but held that the Supreme Court in Gilmer left open the question of whether claims under Title VII can be arbitrated, and also "left open the possibility of evaluating the adequacy of the arbitral forum in specific cases," including those where an ADEA claim is brought. Judge Nancy Gertner, author of the Rosenberg opinion, stated that the rationale in Gilmer was inapposite to the case before her because of what she believed to be the "structural biases" of the arbitration system created by the NYSE. Moreover, the court believed it unlikely that Congress would grant employees new rights (e.g., right to jury trial in Title VII cases) by enacting the 1991 Civil Rights Act, and yet permit the "erosion" of that right by sanctioning pre-dispute arbitration agreements.

In Seus v. John Nuveen & Co., the Third Circuit expressly rejected the Ninth Circuit's analysis of the legislative history of the Civil Rights Act of 1991 and held that federal claims where a brokerage firm discriminated against one of its former employees on the basis of age and race are subject to arbitration under the parties' Form U-4 agreement. Seus, like Duffield, executed a Form U-4 at the commencement of her employment. In 1996, Seus filed suit against Nuveen, alleging discrimination in violation of, among other causes of action, Title VII and ADEA, and the district court compelled Seus to arbitration pursuant to the Form U-4. On appeal, Seus claimed that the Civil Rights Act of

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53. See id. at 193.
54. See id. at 193-94.
55. Id. at 206.
56. See Rosenberg, 995 F. Supp. at 207.
57. See id. at 205.
58. 146 F.3d 175 (3d Cir. 1998).
59. See Seus, 146 F.3d at 182, 183.
60. See id. at 177.
61. See id. at 178.
1991 carved out an exception to the Federal Arbitration Act for pre-dispute agreements to arbitrate claims under Title VII.\(^6\)

The court rejected Seus' argument, holding that on its face, the text of the Civil Rights Act of 1991 "evinces a clear Congressional intent to encourage arbitration of Title VII and ADEA claims, not to preclude such arbitration."\(^6\) Whereas the Duffield court afforded considerable weight to the remarks of individual legislators and to comments by the House Committee on Education and Labor, the Third Circuit declared that "no amount of commentary from individual legislators or committees would justify a court in reaching the result" that the 1991 Act reflects a congressional intent to preclude pre-dispute waivers of a judicial forum for Title VII claims.\(^6\) Accordingly, the court rejected the notion that the 1991 Civil Rights Act's "straightforward declaration of the full Congress can be interpreted to mean that the FAA is impliedly repealed with respect to agreements to arbitrate Title VII claims which were executed by an employee as a condition of securing employment."\(^6\) Although the Ninth Circuit had interpreted the phrase "where appropriate and to the extent authorized by law" as a codification of the case law regarding arbitration of Title VII claims, the Third Circuit determined that it most likely referred to arbitration agreements which were lawful under the FAA.\(^6\)

Moreover, the Third Circuit held that even if it were to accept Duffield's reasoning that the 1991 Civil Rights Act was intended to codify existing case law, "we would find the text incompatible with the notion that the law codified was case law inconsistent with a Supreme Court case decided six months before the passage of the Act," referring to Gilmer.\(^6\)

C. Arbitration Agreements Will Likely Not Be Given Full Effect If They Do Not Provide All Available Statutory Remedies

Courts in at least three judicial circuits have directly held that those portions of pre-dispute arbitration agreements which do not authorize the arbitrator to award the employee the full panoply of remedies available under the pertinent federal statute (e.g., Title VII, ADEA) will not

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\(^{62}\) See id. at 179.
\(^{63}\) Id. at 182.
\(^{64}\) Seus, 146 F.3d at 182.
\(^{65}\) Id. at 183.
\(^{66}\) See id.
\(^{67}\) Id.
be enforced. The rationale for such a policy is that the forum in which employees’ statutory claims are heard is not outcome determinative, but to deny employees substantive rights bestowed upon them by Congress violates public policy because it prevents employees from obtaining relief to which the employees are specifically authorized.

In *Cole v. Burns International Security Services*, the D.C. Circuit Court of Appeals applied the logic of *Graham Oil Co. v. ARCO Products Co.* to the employment context and held that an arbitration agreement that does not provide all remedies available in court may be unenforceable. Although the court in *Cole* found that the arbitration agreement provided “for all of the types of relief that would otherwise be available in court,” the court indicated that *Gilmer* did not permit employees to waive the substantive rights provided for in Title VII, including attorney’s fees and punitive damages.

Moreover, one court in the Second Circuit refused to enforce that portion of an employer’s arbitration policy which barred employees from receiving attorney’s fees if they won their case in arbitration. The plaintiff in *DeGaetano* signed an agreement to abide by the employer’s arbitration rules. Although the court upheld a motion forcing plaintiff to arbitrate her claims rather than allow her to bring them in federal court, the court ruled that “forcing an employee to arbitrate important statutory claims pursuant to a valid employment agreement, and forcing her to do so in a forum or under an agreement that affords her less than the full measure of rights granted by the statute, are two very different things.” The court stated that its ruling was bolstered by comments made by the EEOC and NASD in which the two agencies expressed opposition to mandatory arbitration of employment discrimination claims as a condition of employment in the securities industry.

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69. See *Cole*, 105 F.3d at 1482.
70. 105 F.3d 1465 (D.C. Cir. 1997).
71. 43 F.3d 1244 (9th Cir. 1994), amended, 95 C.D.O.S. 1888 (9th Cir.).
72. See *Cole*, 105 F.3d at 1482.
73. Id.
75. See id. at 460.
76. See id. at 466.
77. Id.
78. See also *Paladino v. Avnet Computer Techs.*, Inc., 134 F.3d 1054, 1058 (11th Cir. 1998) ("the presence of an unlawful provision in an arbitration agreement may serve to taint the entire arbitration agreement, rendering the agreement completely unenforceable;" arbitration agreement
Employees asserting federal statutory employment discrimination claims also have asserted as a defense to arbitration that these claims must be adjudicated in federal court because of the right to jury trial. In Nghiem v. NEC Electronic Inc., the Ninth Circuit rejected the plaintiff's argument that because the 1991 amendments to Title VII provide for trial by jury, an arbitration agreement governing such claims is unenforceable. The court held that the Civil Rights Act of 1991 did not "evince a congressional intent to preclude arbitration; it merely defines those procedures which are available to plaintiffs who pursue the federal option, as opposed to arbitration." Moreover, the court recognized that the Civil Rights Act of 1991 explicitly encourages alternative dispute resolution, including arbitration, "to the extent authorized by law."
D. Constitutional Challenges To Arbitration Pursuant to the Form U-4

Along with a general attack on the compatibility of mandatory pre-dispute arbitration agreements with the federal statutory employment discrimination statutes such as Title VII and ADEA, employees in the securities industry have challenged mandatory arbitration as being constitutionally infirm. The first hurdle for an employee to overcome in making a constitutional challenge to arbitration is finding state action. Obviously, an arbitration agreement written and implemented by a private employer will not amount to state action. However, in several recent cases, including Duffield, employees have asserted that the requirement to arbitrate found in the Form U-4 is the product of state action for the following reasons: (1) the requirement by the SEC that all securities traders be registered; (2) the "plenary" regulation of the exchanges by the SEC; (3) the exercise of the judicial power by arbitrators in hearing and deciding employment-related disputes; (4) the involvement of the SEC in the development of the Form U-4 and in the exchanges' arbitration rules; and (5) the action of the courts in compelling arbitration and confirming awards. These arguments, nonetheless, have so far been consistently rejected and may become moot given the NASD's rule change effective January 1, 1999, which eliminates the requirement that broker-dealers are required to arbitrate statutory employment discrimination claims pursuant to the Form U-4, and the decision by the NYSE to eliminate the requirement that its employees arbitrate statutory discrimination claims, subject to SEC approval.

For example, Duffield argued that the Form U-4 is unconstitutional because it required her to forfeit her Fifth Amendment right to due process, her Seventh Amendment right to a jury trial, and her right to an Article III judicial forum. The Ninth Circuit rejected Duffield's contention, finding that although private entities like the NYSE and NASD may be held to constitutional standards if their actions are "fairly attributable" to the government, the court decided that there was no evidence to support that conclusion. Specifically, the court found that: federal law did not require that broker-dealers register with a national securities exchange until 1993 (after Duffield signed the Form U-4); the

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84. See id. at 1200-02.
85. See id. at 1186 n.1.
86. See id. at 1200.
87. See id. at 1201-02.
SEC's involvement in approving NASD rules is insufficient to make the arbitration requirement fairly attributable to the government; and the NASD and the NYSE do not evoke governmental authority through their arbitration system. Similarly, other courts have rejected the argument that arbitration pursuant to the Form U-4 amounts to state action where the individual was not required by statute or regulation to register.

Similarly, a court in the Second Circuit rejected a claim brought by a registered representative who refused to sign a Form U-4, and who contended, among other things, that the mandatory arbitration of discrimination claims violated her constitutional rights. The plaintiff, who apparently was unhappy with being required to sign the Form U-4 in prior jobs, struck out the mandatory arbitration provision in the Form U-4 when she accepted employment with her new employer. The NASD subsequently advised the employer's compliance department that an altered form would not be permitted, but plaintiff refused to submit an unaltered Form U-4. The employer subsequently revoked its offer of employment because plaintiff could not become registered. The court stated that although "neither the Supreme Court nor the Court of Appeals for the Second Circuit has held specifically that the mandatory arbitration clause of Form U-4 can apply to a claim under Title VII, the weight of authority from other circuits clearly supports such a conclusion," and thus, no constitutional provision barred enforcement of the validly entered agreement.

Security industry employers may not have heard the end of this argument. The Northern District of California is currently considering an identical constitutional challenge to the Form U-4 arbitration requirement in Prassas v. Smith Barney, Inc. However, in Prassas, unlike Duffield, the plaintiff-employee contends that he was a broker-dealer within the meaning of the Securities Act of 1934 and that he registered after the SEC adopted a new regulation which requires individual bro-

88. See Duffield, 144 F.3d at 1201-02.
91. See id. at 519.
92. See id.
93. See id.
94. Id. at 520.
96. See 17 C.F.R. § 240.15b7-1 (1997).
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ker-dealers to register with the exchanges of which their firms are members. Since the SEC required him to register as a broker-dealer, Prassas contends, the arbitration provision contained in his Form U-4 is a product of state action, subject to constitutional challenge.

Nevertheless, the whole issue as to the constitutionality of the Form U-4 will likely become moot given the SEC’s decision on June 23, 1998 to approve a NASD proposal to end the requirement that broker-dealers registered with the NASD through the Form U-4 arbitrate statutory claims of employment discrimination effective January 1, 1999 and the most recent action by the Board of Directors of the NYSE to no longer require its employees to arbitrate statutory discrimination claims, subject to SEC approval.

E. Challenges to the “Knowing and Voluntary” Nature of Arbitration Agreements

Another basis on which employees attempt to challenge a motion to compel arbitration is that they did not knowingly and voluntarily enter into the pre-dispute arbitration agreement (i.e., that they did not knowingly and voluntarily waive their right to a trial in court). Except for one case which has been limited on its facts, the arguments by securities industry employees that the Form U-4 should not be enforced against them because they did not “knowingly” agree to waive their right to have their claims adjudicated in a courtroom, have been largely unsuccessful. However, there have been at least three significant cases decided recently where courts have held “private” arbitration agreements to be unenforceable because the employee did not “knowingly” waive the right to pursue a court action.

1. The Knowing Requirement as Applied to the Form U-4

Employees frequently claim that their agreement to arbitrate was not “knowing.” The requirement that an agreement to arbitrate be

97. See id.
98. See Prassas, No. 97-8500 at 20-22.
100. See Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994).
101. See infra Part II.E.2.
"knowing" typically originates in the statute from which the claim arises.\textsuperscript{102}

The courts in only one federal circuit have refused to compel arbitration because the employee did not "knowingly" waive the right to pursue statutory rights in court pursuant to the Form U-4.\textsuperscript{103} In \textit{Lai}, the Ninth Circuit reversed a district court's order compelling arbitration of Title VII claims based on the following evidence relating to the arbitration agreement contained in the Form U-4: (1) when the employees were hired and signed their U-4 Forms, they were told only that they were applying to take a required test for their employment with the company; (2) they were directed to sign the U-4 Forms in the relevant places without being given an opportunity to read them; (3) they were not advised about the arbitration agreement contained in the U-4 Forms; (4) they were not given a copy of the NASD Manual containing the actual terms of the arbitration agreement; and (5) the U-4 Forms that the plaintiffs signed did not describe the type of disputes that the parties were agreeing to arbitrate.\textsuperscript{104} The Ninth Circuit emphasized Congress's intent in enacting Title VII that "there . . . be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in [the statute] and in related state statutes."\textsuperscript{105} Finding support for plaintiffs' claim that they were deceived as to the meaning of the Form U-4's arbitration provisions, the court held that the employees were not required to arbitrate their sexual harassment and gender discrimination claims.\textsuperscript{106}

Nevertheless, \textit{Lai} appears to be an anomaly because the NASD rules applicable at the time did not clearly indicate in the Form U-4 that employment discrimination claims had to be arbitrated. The NASD amended its arbitration rules in 1993 and it had been more difficult to plead ignorance of their scope:

\begin{quote}
Any dispute, claim or controversy . . . between or among members and/or associated persons, and/or certain others, arising in connection with the business of such member(s) or in connection with the activi-
\end{quote}

\begin{footnotes}
\begin{enumerate}
\item See \textit{Prudential Ins. Co. v. Lai}, 42 F.3d 1299 (9th Cir. 1994).
\item See \textit{id.} at 1303-05.
\item \textit{Id.} at 1304.
\item See \textit{id.} at 1301, 1305; see also \textit{Hurst v. Prudential Sec. Inc.}, 923 F. Supp. 150, 151, 156 (N.D. Cal. 1995) (following \textit{Lai} and denying defendant's motion to compel arbitration where it was unclear whether plaintiff understood that by signing her form U-4 she was agreeing to submit future Title VII claims).
\end{enumerate}
\end{footnotes}
ties of such associated person(s), or arising out of the employment or termination of employment of such associated person(s) with such member, shall be arbitrated under this Code . . . . 107

For example, the trend toward rejecting claims that an arbitration agreement is not enforceable because the claimant did not understand (or "know") its scope was recently reaffirmed by the Ninth Circuit, when it narrowed Lai in Renteria v. Prudential Insurance Co. of America. 103 The court reaffirmed its holding in Lai that the NASD Code of Arbitration Procedure, prior to the 1993 amendments, did not adequately notify Title VII claimants that they were waiving their rights to bring such claims in court because the language of that agreement did not refer to employment disputes. 109 However, the court narrowed its holding in Lai by ruling that the "knowing waiver" requirement applies only to claims arising under Title VII "or similar laws." 110 This is because, the court explained, the requirement "derives from a recognition of the importance of the federal policy of protecting the victims of discrimination." 111

Besides the Ninth Circuit's limited recognition of the "knowing" defense to the enforceability of an arbitration agreement in Lai, courts in the other judicial circuits have uniformly rejected this argument to invalidate the arbitration agreements contained in the employment applications signed by securities industry employees. 112

107. NASD Manual—NASD Code of Arbitration Procedure, Rule 10201 (emphasis added); see also New York Stock Exchange Guide, Vol. II, Rule 347 (providing similarly for arbitration of "[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative").
108. 113 F.3d 1104, 1108 (9th Cir. 1997).
109. See Renteria, 113 F.3d at 1107.
110. Id.
111. Id.; see also Kuehner v. Dickinson & Co., 84 F.3d 316, 320 (9th Cir. 1996) (enforcing arbitration agreement where plaintiff failed to show that the Fair Labor Standards Act carried a knowing waiver requirement similar to that under Title VII).
112. See, e.g., Seus v. John Nuveen & Co., Inc., 146 F.3d 175 (3d Cir. 1998) (holding that plaintiff's misunderstanding of Form U-4's arbitration clause will not excuse her contractual obligations under the Form U-4 because she was on sufficient notice of the arbitration clause's coverage); Rice v. Brown Bros. Harriman & Co., 73 Fair Empl. Prac. Cas. (BNA) 1210, 1212 (S.D.N.Y. 1997) (holding that subjective knowledge of the scope of the arbitration clause is irrelevant since, by virtue of signing Form U-4, employee signals he has agreed to all its terms); Randleman v. New York Life Ins. Co., No. 2:96CV243, 1996 U.S. Dist. LEXIS 13956, at *9 (M.D.N.C. Aug. 9, 1996) (holding that the allegedly discriminatory act occurred in 1993 after NASD amended its arbitration provisions to clarify that they cover employment disputes, and thus the employee was on notice that discrimination claims were covered by the arbitration agreement); Vitone v. Metropolitan Life Ins. Co., 943 F. Supp. 192, 197 (D.R.I. 1996) (holding that plaintiff, who filed his claim almost two years after the NASD amended its provisions to clarify that they cover employment disputes,
2. The Knowing Requirement in "Private" Arbitration Agreements

The fact that employees are still able to challenge "private" pre-dispute arbitration agreements successfully on the basis of the "knowing" argument is highlighted by another recent Ninth Circuit decision in which the court applied the "knowing waiver" standard set forth in *Lai* and refined in *Renteria*, to an employee's claim under the ADA.\(^{113}\) In *Nelson*, the Court ruled 2-1 that the unilateral promulgation of a mandatory arbitration provision contained in an employee handbook does not constitute a "knowing agreement" by the employee to waive a statutory remedy provided by a civil rights law.\(^{114}\) The fact that the employee signed an acknowledgment that he received the employee handbook and agreed to read and understand its contents and contact his supervisor if he had any questions is not sufficient to constitute a knowing waiver in this context.\(^{115}\) Moreover, in *Trumbull v. Century Marketing Corps.*,\(^{116}\) the court held that an employee did not waive her right to pursue a jury trial of discrimination claims under Title VII when she acknowledged receipt of an employee handbook containing a mandatory arbitration clause because the handbook did not explain the significance of the provision.\(^{117}\) The court stated that a valid waiver of the right to a jury trial must be "knowing or clear," a standard not met because "[t]he language of the arbitration clause says nothing about the arbitration of statutory claims as opposed to contractual disputes, or about the significance of the right to a judicial forum. For a waiver to be valid, such language must be present in the agreement."\(^{118}\)
Courts generally consider the objective language of the arbitration agreement at issue when making the "knowing agreement" determination. For example, in *Rojas v. TK Communications, Inc.*, the plaintiff signed an employment agreement which included a requirement that "any action contesting the validity of this Agreement, the enforcement of its financial terms, or other disputes shall be submitted to arbitration." The plaintiff argued that her sexual harassment and retaliation claims under Title VII were not covered by the arbitration agreement. The Fifth Circuit disagreed, holding that the language "other disputes" was sufficiently broad to encompass Title VII claims.

By contrast, a district court in New Mexico held that an arbitration agreement which granted the arbitrator authority to award damages for "breach of contract only, and shall have no authority whatsoever to make an award of other damages," precluded arbitration of Title VII and ADEA claims. Similarly, in *Mugnano-Bornstein v. Crowell*, the Massachusetts Appeals Court rejected a recent challenge to an arbitration agreement contained in an employment application. The *Mugnano* court held that the language of the application which provided that the employee agreed to arbitrate any "controversy concerning compensation, employment, or termination of employment" adequately notified the plaintiff that her sex harassment and discrimination claims were subject to arbitration. The court stated that it was "not aware of any rule that requires an arbitration agreement to contain a list of the specific claims or causes of action which are subject to arbitration in order
to be enforceable.” In fact, the court stated, “such a requirement would be unreasonable and impractical.”

Thus, for employees who are registered with the NYSE (or NASD) pursuant to a Form U-4, the issue of whether they have been apprised that employment claims are subject to arbitration seems to be settled. However, those securities industry employers who wish to develop arbitration agreements for their non-registered employees, or impose mandatory pre-dispute arbitration agreements on registered NASD brokers on or after January 1, 1999, when the NASD requirement that all broker-dealers must mandatorily arbitrate statutory discrimination claims is eliminated, or on registered NYSE brokers in the event that the SEC approves the NYSE’s proposal to eliminate the mandatory arbitration of statutory employment claims, should draft such agreements carefully to refer to employment claims expressly. Specifically, employers who wish to implement a pre-dispute arbitration agreement should keep the following in mind: (1) any pre-dispute arbitration agreement should clearly state that it is an agreement to arbitrate employment-related claims and that arbitration will be the exclusive remedy to resolve such disputes; (2) if possible, define those employment-related disputes which must be submitted to arbitration, i.e., all issues related to compensation, benefits, termination or all disputes arising under Title VII or other anti-discrimination laws; and (3) always give the employee an opportunity to read the arbitration agreement before signing, and if the arbitration agreement is promulgated in a revision to an existing employee manual, new acknowledgment forms for current employees may be in order.

3. The Voluntary Requirement

Employees are increasingly challenging agreements to arbitrate by asserting that they did not voluntarily waive their right to pursue their claims in court. The voluntary requirement is analogous to the knowing requirement. The first question an employer must ask itself in responding to such a charge is what claims are being asserted and where does the “voluntary waiver” requirement derive from. For example, constitutional claims may only be waived knowingly, voluntarily and intelligently. On the other hand, no court has found such a require-

127. Id.
128. Id.
129. See supra Parts I.E.1-2.
130. See, e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832-33 (4th Cir. 1986); K.M.C.,
ment in Title VII. Even the OWBPA, which expressly requires that a waiver of an age discrimination claim pursuant to ADEA be knowing and voluntary, has not been construed to preclude a mandatory, pre-dispute arbitration clause. 131

Most employers who have implemented arbitration programs require employees to sign such agreements as a condition of employment. Employees who are broker-dealers under the Securities and Exchange Act of 1934 are required, as a condition of employment, to register. 132 By virtue of registering with the NYSE or NASD (for the NASD, only until January 1, 1999, and for the NYSE, only until and when the SEC approves the NYSE proposal to eliminate the requirement that brokers arbitrate statutory discrimination claims) pursuant to a Form U-4, the employee currently agrees to arbitrate all employment disputes with his or her employer under the auspices of the exchange. 133 Increasingly, plaintiffs are claiming that pre-dispute arbitration—that is, arbitration agreements they are forced to sign as a condition of employment—are unenforceable because they are not voluntary. 134

The U.S. Supreme Court, in Gilmer v. Interstate/Johnson Lane Corp. 135 rejected such an involuntariness argument. 136 Gilmer entered into an arbitration agreement by signing a Form U-4 because he was "required by his employment" as a securities representative to register with the NYSE. 137 Although the Supreme Court declined to hold that unequal bargaining power could never invalidate an agreement to arbitrate, it found no reason not to enforce Gilmer's arbitration agreement. 138

F. Mandatory, Pre-Dispute Arbitration Agreements May Be Opposed as Adhesory and Unconscionable

Employees trying to avoid the language of employment agreements have claimed, with little success until recently, that the arbitration clauses contained within the employment agreement are products of

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131. See, e.g., Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 660 (5th Cir. 1995).
132. See 17 C.F.R. § 240.15b7-1 (1997).
136. See id. at 33.
137. See id. at 20.
138. See id. at 35.
unequal bargaining power and/or that their agreements were exacted from them as conditions for hire. 139

Since Gilmer, courts have, until recently, uniformly rejected the attempts of plaintiff/employees, especially those in the securities industry, to avoid written arbitration agreements by arguing that the agreement was fraudulently induced, unconscionable or a contract of adhesion. For example, in PaineWebber, Inc. v. Bahr, 140 the plaintiff stockbroker contended that he was fraudulently induced and coerced into signing an arbitration agreement by PaineWebber employees. 141 In rejecting plaintiff's contention that the arbitration clause contained in his Form U-4 and a separate agreement contained in his employment contract were fraudulently induced and were a product of coercion, duress and adhesion, the court focused on plaintiff's sophistication as a highly successful stockbroker with a strong bargaining position, and noted that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." 142

139. See, e.g., Hoffman v. Aaron Kamhi, Inc., 927 F. Supp. 640, 643 (S.D.N.Y. 1996) (holding that plaintiff's bare allegation that bargaining power was unequal simply because defendant was his prospective employer will not render arbitration agreement unenforceable). The concept of "contracts of adhesion" arose with the development of standardized form contracts, and is defined as a contract in the form of a take-it-or-leave-it proposition under which the only alternative to complete adherence is outright rejection. See E. Allan Farnsworth, CONTRACTS § 4.26, at 480 (2d ed. 1990). In an adhesion contract, the bargaining power is inherently unequal, because one party controls the terms and drafting of the agreement, which the other party may not even read before signing, and the terms are not subject to negotiation. See id. Nonetheless, courts do not find that unequal bargaining power, as such, makes a contract unenforceable, and courts are usually unresponsive to parties attempting to avoid contracts by simply claiming adhesion. See id. at 481. Instead, courts presume that the parties are aware of the terms and conditions and have entered into an enforceable contract. See id.


141. See Bahr, 1996 WL 540164, at **1.

142. Id. at **5 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991)); see also Continental Airlines, Inc. v. Mason, No. 95-55343, 1996 WL 341758, at **2 (9th Cir. 1996) (rejecting the plaintiff's argument that an arbitration agreement which did not provide for discovery or legal counsel was unenforceable because it was an unconscionable contract of adhesion); Lepera v. ITT Corp., No. 97-1461, 1997 WL 535165, at *4-*5 (E.D. Pa. Aug. 12, 1997) (holding that the contract of adhesion argument fails under New York law in absence of allegation that employee was prevented from reading arbitration agreement, denied an explanation, or subject to high pressure or deceptive tactics); Beauchamp v. Great W. Life Ins. Assurance Co., 918 F. Supp. 1091, 1098 (E.D. Mich. 1996) (enforcing arbitration agreement because a party is charged with knowledge of the terms of a contract and there was no suggestion that execution of Form U-4 was procured by fraud or deception); Lang v. Burlington N. R.R. Co., 835 F. Supp. 1104, 1106 (D. Minn. 1993) (enforcing arbitration agreement because well-founded claim that arbitration agreement resulted from sort of fraud or overwhelming economic power that would provide grounds for revocation of any contract was absent).
Nevertheless, two recent cases may be changing the receptivity of courts to arguments by plaintiffs that at least certain arbitration agreements may be contracts of adhesion.43 In Hooters of America, Inc. v. Phillips,44 a federal district court in South Carolina ruled that an arbitration agreement signed by employees of the restaurant chain Hooters was an unenforceable contract of adhesion, and thus denied the employer’s motion to compel arbitration on plaintiff’s sexual harassment claims under Title VII.45 The court found the arbitration agreement to be unenforceable because, in part, Hooters failed to provide employees with the complete written terms of the proposed contract and threatened its employees’ careers if they refused to execute the agreement.46 Hooters “presented [the agreement to] its employees on a take-it or agree-never-to-be promoted basis," the court stated in holding the agreement to be an unlawful contract of adhesion.47 “Striving to locate an enforceable arbitration agreement from the few non-offensive provisions of the Hooters Rules simply rewards Hooters for its unconscionable conduct in compiling such Rules,” the court wrote.48 Further, the agreement unlawfully prohibited any court review despite stating that the FAA governed the terms of the agreement.49

In Stirlen v. Supercuts, Inc.,50 the court held that the agreement to arbitrate was a procedurally unconscionable contract of adhesion due to the imbalance of power between the employer and employee.51 Noting that the employee was a successful and sophisticated corporate executive, the court based this determination on the findings that the terms of the employment contract were presented to him after he accepted employment, he was told that the terms were not negotiable, and the contract was presented on a “take it or leave it” basis.52 Due to this one-sidedness, the court concluded that the agreement was invalid since the employee did not willingly agree to arbitrate his claims.53 It is important to note, however, that the Stirlen court’s reliance on its view of the

145. See Hooters, 75 Fair Empl. Prac. Cas. (BNA) at 1780.
146. See id. at 1772-73.
147. Id. at 1790.
148. Id.
149. See id. at 1770.
151. See Stirlen, 60 Cal. Rptr. 2d at 152.
152. See id. at 146.
153. See id.
inequality of bargaining power is facially inconsistent with the *Gilmer* decision. The fact that the arbitration clause in *Stirlen* was so one-sided, eliminating remedies and curtailing the statute of limitations, may have influenced that court’s decision.

The argument that an arbitration agreement is unconscionable has been alternatively stated as contending that the arbitration procedures of the NYSE and NASD are, in themselves, discriminatory or otherwise so deficient as to render any agreement to arbitrate pursuant to them unenforceable.\(^{154}\) The recent decision in *Rosenberg v. Merrill Lynch, Pierce & Smith, Inc.*\(^{155}\) was the first time that a court ruled that the arbitration process established by one of the self-regulatory organizations was “unfair.”\(^{156}\) There remains at least one prominent pending litigation which has raised the same issue.\(^{157}\) The purported deficiencies of the NYSE and NASD arbitration procedures which employees commonly cite include: (1) the alleged bias of arbitrators due to the demographics of the arbitrator pool; (2) the lack of written opinions; (3) the purported bias of arbitrators due to their selection by the exchanges; (4) the alleged lack of training, legal or otherwise, for arbitrators; (5) the lack of a requirement that arbitrators strictly follow the law, including the Federal Rules of Evidence; (6) the limited judicial review of arbitration awards; (7) the limited discovery; (8) the potential for claimants to be assessed forum fees; and (9) the private nature of arbitration.\(^{158}\) Most, if not all of these factors, were referenced by the *Rosenberg* court.\(^{159}\)

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\(^{154}\) Pursuant to the FAA, an arbitration agreement is not unenforceable merely because it is presented on a “take-it-or-leave-it-basis.” 9 U.S.C. §§ 1-16 (1994). The objecting party must also show that its terms are unconscionable, or that the circumstances surrounding the implementation of the agreement were revealed by “confusion” or “duress.” See *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1470 (D.C. Cir. 1997); *Hooters*, 75 Fair Empl. Prac. Cas. (BNA) at 1779; Thomas v. Perry, 246 Cal. Rptr. 156, 158 (1988). In *Cole*, the plaintiff was required, as a condition of employment, to sign an agreement that required arbitration of disputes pursuant to the rules of the American Arbitration Association. See *Cole*, 105 F.3d at 1469. Relying on *Gilmer*, the court found that an employee may be forced to arbitrate claims pursuant to an agreement that is presented on a take-it-or-leave-it basis. See *id.* at 1467-68, 1472. However, the court in *Cole* noted the Supreme Court’s refusal to extend *Gilmer* to mean that “any sort of arbitration procedure before any manner of arbitrator would be satisfactory in the adjudication of public rights.” *Id.* at 1482. Therefore, the *Cole* court went on to examine the AAA’s arbitration procedures to ensure that they provided “minimal standards of procedural fairness.” *Id.* at 1483.


\(^{156}\) See *Rosenberg*, 995 F. Supp. at 211 (“Dominance of an arbitral system by one side in the dispute does not comport with any model of arbitral impartiality, especially when that dominance takes the form of selecting the entire arbitration pool, appointing the individual arbitration panels, and making procedural and discovery decisions.”).


\(^{158}\) See *Rosenberg*, 995 F. Supp. at 198, 207.

\(^{159}\) See *id.*
With respect to a challenge that arbitration procedures are deficient, rendering the arbitration agreement unconscionable, the question of whether the FAA or state law governs may win the war. Most courts which have considered the issue have held that if an agreement is subject to the FAA, the FAA’s standards of unconscionability control.160

G. Federal Arbitration Act Exception to Enforcement of Arbitration Agreements is Extremely Limited

Section 2 of the FAA provides for specific enforcement of any “written provision” for arbitration in any “contract evidencing a transaction involving commerce.”161 The Supreme Court has held that the reach of the FAA is as broad as the Commerce Clause.162 In other words, if a dispute arises out of a contract between parties either in commerce or affecting commerce, the enforceability of an agreement to arbitrate will be governed by the FAA.

However, section 1 of the FAA states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”163

This proviso raises two issues pertaining to arbitration of employment claims. One issue is its scope — does this language exclude all contracts of employment within the jurisdictional reach of the FAA, i.e., any claim against an employer in or affecting commerce, or only the claims of workers who themselves are actually engaged in commerce (or, perhaps, whose employers are actually engaged in commerce, such as airlines)? The second issue is whether a state law, to the extent it applies, may compel arbitration of all employment contracts, including those excepted from the FAA.


Although *Gilmer* did not address the issue, decisions since *Gilmer* have been consistent with pre-*Gilmer* cases adopting the view that, based on the language of the FAA, its legislative history, and the strong federal policy favoring arbitration, the exemption for employees engaged in interstate commerce should be construed narrowly to apply only to those persons who are involved literally in the physical movement of goods in interstate commerce, such as seamen, railroad employees, and other similar employees in the transportation industry, and should not be read to prohibit the arbitration of claims arising from employment contracts just because the employer is in commerce.\textsuperscript{164}

1. Judicial Review of Arbitration Awards

Those plaintiffs that are unsuccessful in avoiding arbitration pursuant to pre-dispute agreements are increasingly attempting to have their claims heard in court by seeking broad judicial review of arbitration

\textsuperscript{164} See, e.g., Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141, 148 (1st Cir. 1998) (extending enrollment agreement containing arbitration provision governing the terms of a child's education at a private school to cover claims under FAA and Rehabilitation Act); Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054, 1056 n.1 (11th Cir. 1998) (stating that the issue has not yet been decided by the Eleventh Circuit); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1467 (D.C. Cir. 1997) (narrowly construing section one to include security guard); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 835 (8th Cir. 1997) (including medical technologist in 9 U.S.C. § 1; “We are persuaded by the reasoning of those circuits which have held that section one applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce”); Great W. Mortgage Corp. v. Peacock, 110 F.3d 222, 227 (3d Cir.), cert. denied, 118 S. Ct. 299 (1997) (stating that mandatory arbitration applies to mortgage consultant; reaffirming Tenney Eng’g, Inc. v. United Elec. Radio & Mach. Workers, Local 437, 207 F.2d 450, 452 (3d Cir. 1953) (en banc) (holding that the exceptions specified in 9 U.S.C. § 1 refer only to workers actually engaged in interstate commerce)); Asplundh Tree Expert Co. v. Bates, 71 F.3d 592, 596 (6th Cir. 1995) (holding employment agreement between consultant and his corporate employer enforceable and narrowly construing 9 U.S.C. § 1 to apply only “to employment contracts of seamen, railroad workers, and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are”); Matthews v. Rollins Hudig Hall Co., 72 F.3d 50 (7th Cir. 1995) (compelling arbitration in ADEA and fraudulent inducement claims); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 934 (9th Cir. 1992) (observing that the issue has not yet been resolved by the Ninth Circuit); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984) (narrowly construing 9 U.S.C. § 2 to cover brewery employees); United Elec., Radio & Mach. Workers v. Miller Metal Prods., Inc., 215 F.2d 221, 224 (4th Cir. 1954) (“Nor are we impressed by the argument that the excepting clause . . . should be construed as not applying to employees engaged in the production of goods for interstate commerce . . . .”); Durkin v. CIGNA Property & Cas. Corp., 942 F. Supp. 481, 486 (D. Kan. 1996) (“[T]he court concludes that the exclusion in section 1 of the FAA does not encompass all employment claims . . . . the court is persuaded that the Tenth Circuit would agree with its conclusion.”).

awards. The FAA itself allows a reviewing court to vacate an arbitration award only in extremely limited circumstances, including “[w]here the award was procured by corruption, fraud or undue means;” “[w]here there was evident partiality or corruption [by] the arbitrators;” where there existed specified misconduct by the arbitrators; or “[w]here the arbitrators exceeded their powers.”[165] Courts have fashioned very narrow standards outside the confines of the FAA when they will overturn an arbitration award. For example, courts in the Second Circuit have overturned arbitration decisions because of manifest disregard of the law,[166] manifest disregard of the contract,[167] compelling a violation of law,[168] violation of strong public policy,[169] and total irrationality.[170] With the exception of the statutory bases for review set forth in the FAA and the very limited judicially legitimized standards, arbitration awards, until a recent decision from the Second Circuit, were generally given complete deference.[171]

166. See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Bobker, 808 F.2d 930, 937 (2d Cir. 1986).
168. See Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110 (2d Cir. 1980).
171. See, e.g., Gallus Invs., L.P. v. Pudgie’s Famous Chicken, Ltd., 134 F.3d 231, 233-34 (4th Cir. 1998) (finding that judicial review of arbitration award is limited to grounds set forth in FAA and scrutiny for whether award evinces manifest disregard of applicable law); Kiernan v. Piper Jaffray Cos., 137 F.3d 588, 594 (8th Cir. 1998) (discussing challenge to arbitration proceeding pursuant to Form U-4, the court held that the “arbitrators’ interpretation of the law is insulated from review,” except when “manifest disregard may be shown” or when party satisfies standards established in FAA); Barnes v. Logan, 122 F.3d 820, 821 (9th Cir. 1997), cert. denied, 118 S. Ct. 1385 (1997) (stating that “manifest disregard of the law” is one of the only appropriate reasons to review and vacate an arbitration panel’s decision); Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1457, 1460 (11th Cir. 1997) (recognizing the non-statutory ground of “manifest disregard of the law” as an appropriate basis to overturn an arbitration award); Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir.), cert. denied, 117 S. Ct. 432 (1996) (the burden on a claimant for vacating an arbitration award is extremely high); M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 848, 850-51 (6th Cir. 1996) (stating that the standard for judicial review of arbitration awards is very limited); Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 237-41 (1st Cir. 1995) (finding vacatur appropriate only in unusual circumstances such as when the decision is completely irrational and/or violates public policy); United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 378, 379 (3d Cir. 1995) (recognizing that arbitration awards are given great deference by the courts); National Wrecking Co. v. International Bhd. of Teamsters, Local 731, 990 F.2d 957, 960, 961 (7th Cir. 1993) (stating that the court will reverse arbitration award only in very unusual circumstances including where the award was made in manifest disregard of the law); Forsythe Int’l, S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1020 (5th Cir. 1990) (limited judicial review of arbitration decisions stems in part from FAA’s requirement that “[i]n reviewing the

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Nevertheless, although the law relating to judicial review of arbitration awards seemed well-settled, the Second Circuit's decision in *Halligan v. Piper Jaffray, Inc.*, 172 appears to create a new standard for review.173 The plaintiff-appellant, Halligan, brought his ADEA claim to arbitration before the NASD.174 After twenty-six days of arbitration hearings in which twenty-five witnesses appeared, more than two hundred and forty exhibits were introduced, and extensive briefs were filed, the arbitrators issued a written award denying all of Halligan's claims.175 Thereafter, Halligan filed a petition to vacate the arbitration award which was denied by the district court.176

On appeal, the Second Circuit reversed, finding that the arbitrators engaged in "manifest disregard of the law or the evidence or both," thereby adding a "disregard of the evidence" gloss to the "manifest disregard" standard.177 Using this newly enunciated "disregard of the evidence" standard, the Court of Appeals went into an extensive discussion of the facts of the arbitration, and apparently based its decision on a disagreement with the arbitrators weighing of the evidence, not on any perceived refusal by the arbitrators to apply the law.178 In addition to finding that Halligan presented "very strong evidence of age-based discrimination" to the arbitration panel, the Court also held that the arbitrators failed to explain their award.179 Although recognizing that arbitrators have no obligation to explain an award, the Court took the absence of a reasoned opinion into account in concluding that the arbitrators had disregarded the law or the evidence or both, thus suggesting that opinions should be written at least in some cases.180 However, the Court did not remand the case to the arbitrators for a reasoned award to enable the court to determine if the law had been disregarded, but simply reversed the district court decision below that had refused to vacate the arbitration award.181 Should the Second Circuit's decision in *Halligan* with-
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stand further review, critics of the opinion have argued that the "'manifest disregard of the evidence' standard will become an invitation for every losing party in every arbitration to seek judicial review, in hopes that the reviewing court will conduct its own assessment of each party's factual presentation."\(^{182}\)

2. Arbitration Under Collective Bargaining Agreements

The arbitrability of a federal statutory employment claim pursuant to an individual employee's arbitration agreement under *Gilmer* must still be distinguished from the arbitrability of such a claim pursuant to an arbitration agreement in a collective-bargaining agreement ("CBA"). In *Alexander v. Gardner-Denver Co.*,\(^{183}\) the Supreme Court held that an arbitration provision in a CBA cannot bar an individual employee from bringing a statutory discrimination claim in court where the contract at issue containing the arbitration clause was a CBA agreed upon by the union but not the individual employee.\(^{184}\)

On November 16, 1998, a unanimous Supreme Court clarified *Alexander* and ruled in *Wright v. Universal Maritime Service Corp.*\(^{185}\) that a longshoreman covered by a collective bargaining agreement and a seniority plan including arbitration clauses does not have to arbitrate his ADA claim.\(^{186}\) Vacating an unpublished decision by the Fourth Circuit,\(^{187}\) the Court held that the arbitration clause in the CBA between the employer and union did not clearly and unmistakably cover statutory discrimination claims.\(^{188}\) Justice Antonin Scalia, writing for the Court,
found that the bargaining agreement’s arbitration clause was very general, covering “matters under dispute,” and did not explicitly incorporate statutory discrimination claims. An arbitration clause in the second contract — the long shore seniority plan — also failed to make a clear and unmistakable waiver of employees' right to a federal judicial forum for statutory EEOC claims.

The Court held that the presumption of arbitrability arising from section 301 of the Labor Management Relations Act does not extend beyond disputes over interpretation of a bargaining contract’s terms. The Court found that the petitioner’s dispute ultimately concerned interpretation of the ADA, not the application or meaning of a bargaining contract.

Nevertheless, the Court observed that the Fourth Circuit’s decision, that the CBA’s arbitration clause encompassed an ADA claim and was enforceable against the petitioner, brought into focus the tension between two lives of Supreme Court cases following Alexander and Gilmer. However, the Court limited the breadth of its holding because it found it unnecessary to decide the validity of a union-negotiated waiver of employee’s statutory right to a federal judicial forum. The Court found this because it was clear that there was no such waiver in the case.

Regardless, the Supreme Court’s decision in Wright settles a dispute that had emerged between the Fourth Circuit’s decision in Wright, an earlier Fourth Circuit decision, Austin v. Owens-Brockway Glass Containers, Inc., and the other federal circuit courts of appeal which had not followed the Fourth Circuit’s logic in Wright or Austin. In Austin, the Fourth Circuit required an employee to arbitrate her Title VII and ADA claims pursuant to the language of the CBA. The plaintiff’s employment in Austin was subject to a CBA which specifically provided that claims of gender and disability discrimination were subject to the grievance procedure. Following the last step of the grievance procedure, the CBA stated that an unsettled dispute “may be referred to

189. See id. at *7.
190. See id. at *8.
193. See id.
194. See id. at *5.
195. See id. at *5-7.
196. See id.
198. See Austin, 78 F.3d at 880-81.
199. See id. at 879.
The Fourth Circuit held that "may" means "must" and that, *Alexander v. Gardner-Denver* notwithstanding, an agreement to arbitrate statutory claims is enforceable regardless of whether it is contained in a securities registration application, a simple employment contract or a CBA. The Court side-stepped *Alexander* by noting that *Gilmer* rejected the premise in *Alexander* that arbitration is an inappropriate forum for the resolution of Title VII claims.

Nevertheless, despite *Austin*, nearly every court outside the Fourth Circuit presented with the issue had prior to the Supreme Court decision in *Wright* expressly rejected *Austin* and/or its logic, holding that an employee’s contractual rights under a CBA are distinct from the employee’s statutory rights pursuant to the federal anti-discrimination statutes.

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200. *Id.* at 880.

201. *See id.* at 885.


H. State Statutory Claims May Also Be Subject to Arbitration

The FAA provides for enforcement of all arbitration agreements to the extent it applies and it has been held to override state laws which exclude statutory claims from arbitration. Cases decided subsequent to Gilmer generally have applied this principle to hold that state statutory employment claims are subject to arbitration where the parallel federal discrimination claim is arbitrable, or where the state statute permits or is silent as to arbitrability.

In addition to state statutory claims, employees subject to arbitration agreements may be required to arbitrate common-law claims arising out of their employment.

Under the FAA, arbitration is to be compelled “in accordance with the terms of the agreement.” Some contracts containing arbitration clauses also contain choice of law clauses. The Supreme Court has held that, when a choice of law clause provides for the application of state arbitration law, the arbitration clause should be enforced according to state law. Thus, the only remaining loophole by which an employee may avoid arbitration is to assert a state statutory employment claim and then argue that: (1) the pertinent employment agreement calls for application of state arbitration law; and (2) under state law the alleged


206. See, e.g., Stone v. Pennsylvania Merchant Group, Ltd., 949 F. Supp. 316 (E.D. Pa. 1996) (holding that arbitration agreement required employee to arbitrate all disputes arising out of his employment, not merely those arising out of his employment contract, including a defamation claim); Kurschus v. PaineWebber, Inc., No. 95 Civ. 1652 PKL, 1996 WL 389303 (S.D.N.Y. July 11, 1996) (holding that employee was required to arbitrate defamation claim arising out of his Form U-5, pursuant to the arbitration agreement contained in the Form U-4).

207. 9 U.S.C. § 3 (1994); see also Davidson County v. Ground Improvement Techniques, Inc., 83 F.3d 414 (4th Cir. 1996) (holding that the FAA confers only the right to compel arbitration in the manner provided for in the parties’ agreement).

claim is not arbitrable. However, the viability of this argument is questionable in light of the increasing willingness of state courts to compel arbitration of state statutory claims under state arbitration law.\textsuperscript{209} Moreover, the United States Supreme Court has held that if the FAA governs enforceability of an arbitration contract, then state law cannot exempt a claim or controversy covered by the contract from arbitration.\textsuperscript{210}

\textit{I. Assertion of a Class Action Claim May Avoid the Obligation to Arbitrate}

One novel approach to avoiding arbitration is to assert a claim on behalf of “all others similarly situated,” or on behalf of a class. In one case, an employee who was ordered to proceed to arbitration pursuant to the terms of her Form U-4 amended her complaint to assert claims on behalf of a class of plaintiffs.\textsuperscript{211} Similarly, in \textit{Olde Discount Corporation v. Hubbard},\textsuperscript{212} the court held that a fired stockbroker trainee was not required to arbitrate racial discrimination claims against his former firm because he filed a class action encompassing those same claims.\textsuperscript{213} In so doing, the court rejected the employer’s argument that plaintiff should be compelled to arbitration because plaintiff’s “class action suit was filed in response to [the employer’s] petition to compel arbitration.”\textsuperscript{214}

The courts in \textit{Cremin} and \textit{Hubbard} refused to compel the plaintiffs to arbitration because the arbitration rules of the NASD and NYSE expressly prohibit the arbitration of class action claims.\textsuperscript{215} However, they permit arbitration of the claims of class members who have elected not to participate in, or have withdrawn from, a class action.\textsuperscript{216} While the

\begin{thebibliography}{99}
\bibitem{211} \textit{See Amended Complaint at 1, Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460 (N.D. Ill. filed Feb. 21 1997) (No. 96 Civ. 3773).}
\bibitem{212} 4 F. Supp. 2d 1268 (D. Kan. 1998).
\bibitem{213} \textit{See Olde Discount Corp., 4 F. Supp. 2d at 1269-72.}
\bibitem{214} \textit{Id. at 1271.}
\bibitem{216} \textit{See NASD Manual—Code of Arbitration Procedure, Rule 10301(d); New York Stock}

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arbitration rules of the NASD prohibit the arbitration of class action claims, the rules permit joinder and consolidation of claims.217

Only one federal appellate court has directly addressed the issue of whether courts have authority under the FAA to order a suit to proceed to arbitration as a class action where the arbitration agreement is silent on the issue. In Champ v. Siegel Trading Co.,218 the Seventh Circuit held that section 4 of the FAA, which requires district courts to enforce arbitration agreements in accordance with their terms, precludes federal judges from ordering a class arbitration where the parties' arbitration agreement is silent on the issue.219 The dominant concern in Champ is that private arbitration agreements are to be viewed as contracts and the parties to these contracts are free to agree to the terms of the arbitration.220

Several circuit courts have addressed the analogous issue of whether district courts have the authority to consolidate claims involving common questions of law or fact for arbitration proceedings.221 The Second, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits have held that absent either an express provision in an arbitration clause or statutory authority, courts should not order consolidated arbitration.222 Nevertheless, at least one federal appellate court has held that the FAA allows for the “consolidation” of claims, and thus permits class arbitrations.223

III. THE SEC HAS APPROVED THE ELIMINATION OF MANDATORY ARBITRATION OF STATUTORY EMPLOYMENT PURSUANT TO THE U-4

On June 23, 1998, the SEC announced that it had approved the NASD’s December 1997 proposal to end the requirement that broker-dealer employees arbitrate statutory claims of employment discrimina-

218. 55 F.3d 269 (7th Cir. 1995).
219. See Champ, 55 F.3d at 275.
220. See id.
221. See infra notes 223, 224.
222. See, e.g., Champ v. Siegel Trading Co., 55 F.3d 269 (7th Cir. 1995); Government of the United Kingdom v. Boeing Co., 998 F.2d 68 (2d Cir. 1993); American Centennial Ins. Co. v. National Cas. Co., 951 F.2d 107 (6th Cir. 1991); Baesler v. Continental Grain Co., 900 F.2d 1193 (8th Cir. 1990); Protective Life Ins. Corp. v. Lincoln Nat’l Life Ins. Corp., 873 F.2d 281 (11th Cir. 1989); Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987); Weyerhaeuser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir. 1984).
In announcing the rule, SEC Commissioner Isaac C. Hunt, Jr. stated that the rule change "will not address all the issues," because although the NASD will now be taken out of the business of enforcing industry-wide mandatory arbitration agreements, the rule change does not prevent any brokerage from including pre-dispute arbitration agreements in individual contracts. In the SEC's press release announcing its decision, SEC Chairman Arthur Levitt stated that he encouraged "the other SROs to promptly change their rules to conform to those of the NASD." 

The NASD's rule change occurred after a significant amount of activity and public debate about the arbitration of employment discrimination disputes during the last year. In February 1997, three members of Congress (Representatives Edward J. Markey (D-Mass.), Anna G. Eshoo (D-Cal.), and Jessie Jackson, Jr. (D-Ill.)), wrote to the SEC and questioned the authority of the NASD and other SROs to require arbitration of discrimination claims in employment disputes through an associated person's signing of the Form U-4.

Accordingly, in response to pressure from Congress, civil rights advocates and plaintiffs' attorneys, the NASD staff met with various groups and individuals, including national and regional member firms, members of NASD Regulation District Committees, management and employee attorneys, members of the Bar of the City of New York Labor and Employment Committee, and staff of the New York Stock Exchange. In general, the groups from or representing the securities industry believed the current practice of requiring mandatory pre-dispute arbitration of employment claims is fair, and is more cost-effective for all parties than going to court. The groups representing employees unanimously believed "that the NASD and other SROs should remove

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224. As of September 1997, there were approximately 556,000 registered persons with the NASD. See NASD Regulation Statistics, <http://www.nasdr.com/2320>.


226. Id.


229. See id.
the requirement for registered persons to arbitrate employment discrimination disputes as a condition of registration in the industry.  

After consideration of all the views presented, and "in light of the public perception that civil rights claims may present important legal issues better dealt with in a judicial setting," the NASD determined that the appropriate action was to remove the arbitration requirement for statutory and sexual harassment claims.  

The rule effective January 1, 1999, provides in relevant part: "A claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute is not required to be arbitrated. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose."  

Accordingly, the new NASD policy produces three significant consequences: (1) member firms would still be able to impose "private" pre-dispute arbitration agreements with their brokers; (2) common law (and not statutory) claims would still be required to be submitted to arbitration; and (3) member firms that use private arbitration agreements with their employees would have to specify an arbitration forum that meets standards similar to those articulated in the American Bar Association's "Due Process Protocol."  

Because the rule is limited to statutory employment discrimination claims, common law claims (e.g., unpaid compensation, defamation, tortious invasion of privacy), which are often brought in conjunction with statutory claims, will still be subject to mandatory arbitration, thereby raising the possibility of bifurcation. Typically, the state common law claims involve the same or separate aspects of the employment relationship. Nonetheless, under the NASD rule, the statutory discrimination claims could be litigated in court, while the common law claims would have to be decided in arbitration.  

Among the problems that bifurcation will generate are increased expenses for both sides, parallel proceedings that may even be ongoing in different states with different lawyers, pretextual court filings to  

230. Id.  
233. See Letter from Joan C. Conley, supra note 228.  
235. See id.
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augment discovery in arbitration, and complex issues of res judicata and collateral estoppel.\(^{236}\)

Despite these concerns, the Board of Directors of the NYSE followed the NASD’s decision and announced on September 3, 1998 that it, like the NASD, had decided to no longer require its employees to arbitrate statutory discrimination claims.\(^{237}\) The move, which affects thousands of stock brokers at the NYSE, 479 member firms, as well as other exchange members and employees, still requires formal approval from the SEC, which will likely be given.\(^{238}\) Pursuant to the new rule, if adopted, arbitration in employment disputes where discrimination is alleged will be permitted only in situations where both the claimant and the firm agree to it.\(^{239}\) The amended language to NYSE Rule 347 would read: "A claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim after it has arisen."\(^{240}\)

IV. ADMINISTRATIVE AGENCIES OPPOSE MANDATORY PRE-DISPUTE ARBITRATION

A. Equal Employment Opportunity Commission

According to the EEOC, while individuals can waive an existing Title VII claim if the waiver is made knowingly and voluntarily, any agreement to waive rights prospectively—that is, a pre-dispute arbitration agreement—cannot be knowing and voluntary.\(^{241}\) On May 17, 1996, the EEOC filed an *amicus curiae* brief in *Johnson v. Hubbard Broadcasting Inc.*,\(^{242}\) arguing that if the court enforced the arbitration agreement signed by Johnson, a former broadcasting employee, it would be the equivalent of the plaintiff waiving her rights under Title VII.\(^{243}\) According to the plaintiff, when she was hired by Hubbard Broadcasting,

\(^{236}\) See *id.* at 2-3.


\(^{238}\) See *id.*

\(^{239}\) See *id.*

\(^{240}\) Id.


\(^{243}\) See *Johnson*, 940 F. Supp. at 1449-50.
she was required to sign an “agreement to hire” which stipulated that all claims and disputes arising from all federal, state and local laws must be submitted to arbitration. The agreement purported to cover all ADA, ADEA and Title VII suits. The EEOC argued that, while individuals can waive an existing Title VII claim if the waiver is made knowingly and voluntarily, agreements that purport to waive rights prospectively cannot be knowing and voluntary. Additionally, the Commission contends that mandatory arbitration contravenes the policy goals of Title VII and that private litigation in court is integral to enforcement of the statute.

The EEOC filed a similar amici curiae brief more recently in support of the plaintiff in Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc. The District Court of Massachusetts agreed with the EEOC’s position and held that employees cannot be required, as a condition of employment, to arbitrate Title VII claims, stating “[i]t is similarly unlikely that the same Congress would in a single act [the Civil Rights Act of 1991] create a new constitutionally-based right to a jury trial for Title VII plaintiffs, only to erode that right by endorsing mandatory pre-dispute arbitration agreements.”

The EEOC also contends that an employer may not terminate or refuse to hire an employee who refuses to execute an arbitration agreement that interferes with an employee’s Title VII rights. The EEOC’s position in this regard was preliminarily upheld in EEOC v. River Oaks Imaging, and a consent decree ultimately was entered. Subsequently, the EEOC issued a policy statement on alternative dispute resolution. This statement, coupled with the EEOC’s decision to empower the field offices to seek temporary restraining orders in disparate treatment cases without the approval of EEOC headquarters, will likely result in increased use of temporary restraining orders against employers in situations similar to River Oaks.

244. See id. at 1450.
245. See id.
246. See id. at 1451.
247. See id. at 1459.
In fact, in its National Enforcement Plan issued in March 1996, the EEOC declared that its second highest enforcement priority will be cases that present unresolved issues of statutory interpretation or which the federal courts of appeal differ in their interpretations, such as claims that address whether binding arbitration of employment disputes can be imposed as a condition of employment.254

B. National Labor Relations Board

The Regional Director for Region Twelve of the National Labor Relations Board ("NLRB") recently sided with the EEOC and took the position that mandatory arbitration provisions in employment contracts should not be enforced.255 In a case of first impression, the Regional Director considered but never issued a complaint against Bentley’s Luggage Corporation because it implemented a mandatory ADR policy and terminated an employee who refused to sign the agreement, on the grounds that requiring employees to submit their disputes with management to binding arbitration is an unfair labor practice in violation of the National Labor Relations Act.256 While Bentley’s was pending, the Regional Director for Region Twelve of the NLRB filed its first administrative case challenging a binding arbitration clause in an employment agreement which requires that the employee waive any right to resolve employment disputes through trial by jury.257

C. Administrative Agencies May Not Be Subject to Arbitration

Although Gilmer permits employers to compel arbitration with employees who have signed valid agreements to arbitrate, there is some question as to whether a governmental agency, such as the EEOC, that files an action on behalf of an employee, can be required to arbitrate under such an agreement.258

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255. See Lara Wozniak, Out-of-Court Settlements Face Challenge In Court, ST. PETERSBURG TIMES, Sept. 16, 1996, at 12.

256. See Letwin v. Bentley’s Luggage Corp., 12-CA-16658 (Region 12, Tampa Jan. 26, 1996); see also Wozniak, supra note 255 (reporting that the case settled in the interim).

257. See Great W. Bank v. Fathi, 12-CA-16886 (Region 12, Miami Jan. 26, 1996); see also Wozniak, supra note 255 (reporting that the case is currently pending before a federal court).

In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court recognized the EEOC’s independent statutory authority to investigate discrimination complaints and to bring its own charges against employers. The Court stressed that compelling arbitration of discrimination disputes would not undermine the EEOC’s role in enforcing anti-discrimination statutes. Accordingly, it made clear that an employee subject to an arbitration agreement is not precluded from filing an administrative charge with the EEOC, and the EEOC retains its authority to investigate the claim and proceed through the administrative process.

However, the *Gilmer* court did not address the issue of whether the EEOC may institute a judicial action on behalf of an employee who is otherwise subject to an arbitration agreement. The EEOC asserts that it has independent authority to bring discrimination actions on behalf of a claimant, and is not bound by a private arbitration agreement executed by a claimant. However, in a setback to the EEOC, the Second Circuit Court of Appeals recently affirmed a district court’s dismissal of a suit brought by the EEOC on behalf of a group of former investment bankers at Kidder, Peabody & Co. on the ground that the employees were bound to arbitrate their claims. In *EEOC v. Kidder, Peabody & Co.*, the EEOC sought only monetary relief on behalf of the plaintiffs since Kidder, Peabody & Co. had discontinued its investment banking operations, precluding injunctive relief. In a case of first impression, the court held that while *Gilmer* reserved to the EEOC the right to bring actions seeking class-wide or injunctive relief, it precluded the EEOC from seeking monetary relief on behalf of individuals who were subject to valid arbitration agreements. The Second Circuit found that “to permit an individual, who[, like the claimants before the Court,] has freely agreed to arbitrate all employment claims, to make an end run around the arbitration agreement by having the EEOC pursue back pay

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260. *See Gilmer, 500 U.S. at 28.*
261. *See id.*
262. *See id. at 32.*
266. *See Kidder, 1998 WL 635699, at *3.*
267. *See id. at *4.*
or liquidated damages on his or her behalf would undermine the Gilmer decision and the FAA. 268

V. ARBITRATORS' AUTHORITY TO RULE ON TRADITIONAL LEGAL ISSUES

A. Courts are Split on Who Decides Issues of Eligibility

Both the NYSE Arbitration Rules and the NASD Code of Arbitration Procedure contain an “eligibility” rule which requires that arbitration claims be filed within six years. 269 In the past, securities industry employers have sought injunctive relief against claimants who have submitted claims to the NYSE or NASD relating to actions that occurred prior to six years from the date of submission. 270 The federal courts are split as to who decides issues of eligibility. 271

In PaineWebber, Inc. v. Bybyk, 272 the Second Circuit decided that eligibility under the NYSE and NASD arbitration procedures is an issue for the courts to decide. 273 Relying on First Options v. Kaplan, 274 the court held that the issue of arbitrability was for the court, absent “clear and unmistakable” evidence of the parties’ contrary intent. 275 The Court went to great lengths to avoid interpreting the NYSE and NASD rules, stating that under New York law, they were not incorporated within the terms of the Form U-4. 276 Therefore, considering the Form U-4 alone, the Court found that the language requiring arbitration of “any and all controversies” includes issues of eligibility. 277

The First, Fifth and Eighth Circuits agree that eligibility is an issue for the arbitrators. 278 The Third, Sixth, Seventh, Tenth and Eleventh Circuits have held that eligibility is to be arbitrated. 279

268. Id. at *5.
271. See supra note 240.
272. 81 F.3d 1193 (2d Cir. 1996).
273. See Bybyk, 81 F.3d at 1198.
275. See Bybyk, 81 F.3d at 1198-99.
276. See id. at 1201.
277. See id. at 1202.
278. See PaineWebber v. Elahi, 87 F.3d 589 (1st Cir. 1996); Smith Barney Shearson Inc. v.
The Second Circuit generally follows the *First Options* dichotomy that the arbitrator decides what is arbitrable and the court decides only whether the parties have agreed to be bound by arbitration. Recently, New York state courts have followed suit, allowing eligibility issues to be decided in arbitration.

B. Who Decides Whether the Parties Have Agreed to Arbitrate: the Court or the Jury?

The overwhelming majority of courts hold that the issue of whether the parties have agreed to arbitrate is one for the courts. However, under the FAA, a party seeking to avoid arbitration may request a jury trial on the issue of whether there is a valid agreement to arbitrate. Section 4 of the FAA directs a court to hold a jury trial “[i]f the making of the arbitration agreement . . . be in issue.” Moreover, the court may order discovery prior to commencement of the trial on the issue of the validity of the agreement. This right, however, is not automatic. The party seeking the jury trial has the burden of establishing the existence of a genuine issue of material fact regarding the making of the agreement. “To make a genuine issue entitling the plaintiff to a trial by jury, an unequivocal denial that the agreement had been made

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Boone, 47 F.3d 750, 753-54 (5th Cir. 1995); FSC Sec. Corp. v. Free, 14 F.3d 1310, 1312 n.2 (8th Cir. 1994).

279. *See* Smith Barney, Inc. v. Sarver, 108 F.3d 92 (6th Cir. 1997) (holding that eligibility is decided by the courts only when the arbitration agreement does not manifest clear and unmistakable intent that the issue be subject to arbitration); Cogswell v. Merrill Lynch, Pierce, Fenner & Smith, 78 F.3d 474, 478 (10th Cir. 1996); Smith Barney v. Schell, 53 F.3d 807 (7th Cir. 1995); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cohen, 62 F.3d 381, 383-84 (11th Cir. 1995); PaineWebber v. Hofmann, 984 F.2d 1372 (3d Cir. 1993). Although the Ninth Circuit has not addressed this particular issue, it has held that the NASD’s previous five year rule was an issue for the arbitrators. *See* O’Neal v. National Ass’n of Sec. Dealers, Inc., 667 F.2d 804, 807 (9th Cir. 1982).


284. *Id.*


286. *See* id.

287. *See* id.
was needed, and some evidence should have been produced to substantiate the denial.\textsuperscript{288}

Moreover, the party opposing arbitration must request a jury trial on the issue of the validity of the arbitration agreement within the five day notice period set out in section 4 of the FAA.\textsuperscript{289} Failure to make a timely request for such a trial will result in a waiver.\textsuperscript{290}

VI. A SURVEY OF SECURITIES INDUSTRY EMPLOYMENT DISCRIMINATION ARBITRATION AWARDS

In light of the fact that employment claims between registered securities representatives and their firms have been arbitrable for many years, and that such claims may be arbitrable outside of the securities industry as well, it is useful to examine the types of awards that have been rendered in such cases. Intuitively, one would assume that having these claims heard before a panel of arbitrators familiar with the securities industry would generally provide a more balanced forum for the resolution of these disputes. In fact, an unofficial survey of securities industry arbitrations demonstrates that awards vary as widely as jury verdicts.\textsuperscript{291}

The unofficial survey was conducted by Orrick, Herrington & Sutcliffe LLP and examines 437 claims involving discrimination in NASD and NYSE arbitrations from January 1989 through August 1998. The data is compiled from the \textit{Securities Arbitration Commentator}, P.O. Box 112, Maplewood, New Jersey 07040 and the Westlaw database.\textsuperscript{292} Although not exhaustive, this survey sheds some light on how employers and employees have fared in arbitrating discrimination and wrongful termination claims.

\textsuperscript{288} T&R Enters., Inc. v. Continental Grain Co., 613 F.2d 1272, 1278 (5th Cir. 1980) (denying trial where plaintiff submitted agreement that included arbitration provision with complaint); see also Kanuth v. Prescott, Ball & Turben, 695 F. Supp. 1213 (D.D.C. 1988) (denying trial where plaintiff's own affidavit conceded execution of Form U-4). \textit{But cf.} PMC, Inc. v. Atomergic Chemetals Corp., 844 F. Supp. 177 (S.D.N.Y. 1994), aff'd, 122 F.3d 1057 (2d Cir. 1995) (genuine issue asserted as to whether plaintiff's employee had authority to bind plaintiff to arbitration agreement).


\textsuperscript{291} See Orrick, Herrington & Sutcliffe LLP, Summary of Securities Arbitration Awards in Employment Cases (1998) (unofficial survey on file with the \textit{Hofstra Labor & Employment Law Journal}).

\textsuperscript{292} See id.
In the NASD arbitrations surveyed, for example, employers prevailed in 72 out of 104 (69.23%) discrimination claims. Employers prevailed in 94 out of the 141 (66.67%) wrongful termination claims asserted in NASD arbitrations. In some of the arbitrations, claimants asserted claims for both employment discrimination and wrongful termination. Therefore, the number of discrimination claims and wrongful termination claims asserted may total more than the number of arbitrations surveyed. Similarly, in the NYSE arbitrations surveyed, employers prevailed on the discrimination issue in 39 out of 67 cases (58.21%). In wrongful termination claims, the employer was successful in defeating 67 out of 134 (50%) claims.

Awards for prevailing claimants have generally been higher for wrongful termination claims than for discrimination claims. For example, in 1990 one NASD panel awarded a claimant $38,000,000 for claims of wrongful termination, breach of contract, defamation and intentional infliction of emotional distress. While this award is aberrationally large, the survey reveals five additional awards of one million plus dollars for wrongful termination claims. One NYSE panel awarded $2,176,000 on claims of discrimination and harassment for five claimants. Moreover, a panel of arbitrators in South Dakota ordered Merrill Lynch to pay $1.8 million to the former manager of its Sioux Falls office after determining that the investment firm discriminated on the basis of age when it demoted him in 1991. In general, however, the NASD and NYSE awards tend to be less than six figures. In total, employees in both NASD and NYSE arbitrations prevailed on at least one of their claims in 188 out of the 437 cases (43.36%) overall.

With respect to the award of punitive damages and attorneys’ fees, the majority of arbitration awards are not broken down into components, so it is difficult to determine the portion of the award that is allocated to a particular type of damages or fees. However, of those cases

293. See id.
294. See id.
295. See id.
296. See Orrick, Herrington & Sutcliffe LLP, supra note 291.
297. See id.
298. See id.
299. See id.
300. See id.
301. See Orrick, Herrington & Sutcliffe LLP, supra note 291.
303. See Orrick, Herrington & Sutcliffe LLP, supra note 291.
304. See id.
where the awards are broken down into components, punitive damages appear to be awarded most frequently in arbitrations involving defama-
tion claims. 305

Finally, a 1993 survey of 4,000 AAA arbitrations conducted in 1992 countered the charge that arbitration awards generally fall in the middle of the request sought by the claimant. 306 In only eleven percent of the cases did the award fall between forty percent to fifty-nine percent of the claim. 307 In twenty-six percent of the cases, the award exceeded eighty percent of the claim and in ten percent of the cases, it fell below twenty percent. 308

VII. IMPLEMENTING A SYSTEM OF MANDATORY, PRE-DISPUE 
ARBITRATION

The use of arbitration as an alternative to litigation depends upon the parties agreeing that their dispute will be resolved through arbitration. 309 Such an agreement may occur prior to the dispute arising ("pre-dispute" arbitration), such as in the case of a registered employee who agrees, pursuant to his Form U-4, to abide by the rules of the exchanges with which he registers, including the arbitration rules. 310 Alternatively, the parties may reach such an agreement when a controversy arises. 311

Regardless of whether the agreement is reached pre- or post-dispute, it must normally be reduced to writing, unless a written agree-
ment is not required by law. 312 Employers should consider addressing a variety of issues in arbitration agreements such as what disputes will be

305. See id.
306. See Arbitrators Do Not "Split the Baby" in Rendering Awards, WORLD ARB. & ME-
307. See id.
308. See id.
309. See AT&T Techs., Inc. v. Communications Workers, 475 U.S. 643, 648 (1986) (finding that arbitration is a matter of contract between the parties); see also Nantucket Indus., Inc. v. Varon, 129 F.3d 114 (2d Cir. 1997) (holding that claims held outside scope of arbitration agree-
ment where they occurred prior to Nov. 1, 1992, and employment agreement including arbitration clause not effective until Nov. 1, 1992).
arbitrated, who will serve as arbitrator, where will any arbitration take place, when or on what time schedule will it be administered, and how or by what procedures will it be conducted. Specifically, employers should consider the following in their arbitration policies:

1. the employer should bear the full costs of arbitration;
2. specify the arbitration organization to administer the arbitration, ensure that the arbitrators are perceived to be, and are in fact, impartial, and establish the number of arbitrators to hear the case;
3. establish the location of the arbitration as well as which rules shall govern issues not covered by the parties' arbitration agreement;
4. include a choice of law provision;
5. specify the nature of the claims to be arbitrated, including express reference to employment disputes and/or specific statutory claims such as Title VII and ADEA;
6. notify employees of their right to representation by an attorney;
7. provide for sufficient pre-arbitration discovery to ensure a fair proceeding;
8. allow for pre-hearing dispositive motions;
9. require the arbitrator to issue a written opinion specifying factual and legal bases for the award;
10. limit arbitral authority to, and require the arbitrator to adhere to, applicable law, including the allocation of burden of proof as well as substantive law such as employment at-will;
11. empower the arbitrator to award the full panoply of remedies that the court could award under applicable statutes, e.g., reinstatement and punitive damages;
12. allow employees sufficient time to read and understand the agreement and incorporated policies;
13. provide employees with a copy of the agreement and any incorporated policies or rules;
14. encourage employees to ask questions; and
15. require employees to sign a receipt acknowledging that they have read and understand the policy and explain to employees that they are executing an agreement to arbitrate all or specific categories of employment disputes.

The incentive for employers to draft precise arbitration agreements is highlighted by abundant case law revealing that any doubts concerning the scope of arbitrable issues will be resolved in favor of arbitration. For example, in *American Recovery Corp. v. Computerized Thermal*
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The court gave the arbitration clause an expansive reading to encompass certain state common law claims, such as an employee’s breach of fiduciary duty, and the tortious interference of a contractual relationship. Thus, incorporation of a broad arbitration provision may prevent the employer from later claiming that the arbitrator does not have authority to decide these claims and that an employee’s employment claim should be decided in a court of law.

Some arbitration organizations have developed guidelines for arbitrations conducted under their auspices to insure that such arbitrations are fair to employees. In 1995, JAMS/Endispute, a leading arbitration organization, set minimum standards of procedural fairness that must be met before the organization will accept an assignment to arbitrate an employment-related dispute. Employers might wish to consider these minimum standards as guidelines in drafting their own arbitration policies. JAMS/Endispute requires that a company policy under which all employees are compelled to submit their employment disputes to arbitration:

1. afford individuals the same rights and remedies in arbitration that would be available to them under the applicable statute or law, e.g., reinstatement, backpay, damages, etc., unless the individual employee would retain the right to pursue in court any remedies unavailable in arbitration, such as exemplary damages;
2. provide for a neutral arbitrator, and allow the employee to participate in selection of the arbitrator;

313. 96 F.3d 88 (4th Cir. 1996).
314. See American Recovery, 96 F.3d at 93; see also Weinstein v. The Equitable Life Assurance Soc’y, 132 Lab. Cas. (CCH) ¶ 58,186, 87,664 (E.D. Pa. 1996) (holding that employer’s allegedly defamatory statements concerned conduct occurring during plaintiff’s employment; since resolution of case required evaluation of plaintiff’s job performance, the matter was plainly fit for arbitration); Berger v. Cantor Fitzgerald, 658 N.Y.S.2d 591 (N.Y. App. Div. 1997) (holding that claims for emotional distress based on termination involve evaluation of job performance and, thus, are appropriate for arbitration); Austin v. U S West, Inc., 926 P.2d 181 (Colo. Ct. App. 1996) (claim by employees for fraud in the inducement and outrageous conduct were based on allegations that defendants misrepresented type and quality of benefits the company would provide its employees, subjects specifically addressed in the plaintiffs’ employment agreements). But see Slade v. Metropolitan Life Ins. Co., 647 N.Y.S.2d 504 (N.Y. App. Div. 1996) (employee who ran single person sales office was not an “associated person,” as defined by the NASD Code, and therefore, could not be compelled to arbitrate wrongful discharge claim pursuant to Form U-4); Van Weber v. Hall, 929 S.W.2d 138 (Tex. Ct. App. 1996) (employee claims for breach of contract, fraud, conspiracy, conversion, unconscionability and quantum meruit were not subject to arbitration because they arose out of the company’s annual sales plan and not the employment agreement containing the arbitration provision).
3. make clear that the employee has the right to be represented by counsel;
4. provide for a minimum level of discovery, including document exchange and the deposition of the employee and the individual responsible for the adverse employment action; and
5. ensure that the employee has the right to present his or her proof, through testimony and documentary evidence, and through cross-examination.316

JAMS/Endispute recommends that the arbitration policy require the arbitrators to render a written opinion or at least a "concise explanation of the basis of the award," particularly in cases involving the adjudication of statutory rights, such as those afforded under Title VII or the ADEA.317

On May 10, 1995, an ADR task force formed in response to a resolution adopted by the American Bar Association (the "ABA") released a protocol agreement designed to ensure due process in the mediation and arbitration of statutory rights involving nonunion workers.318 This protocol agreement may also guide employers in drafting pre-dispute arbitration agreements. The protocol reflects the task force's recommendations that employees be given the right to representation of their choice and to adequate but limited pre-hearing discovery, that the arbitrators be authorized to award any relief that would be available in court, that the pool of arbitrators and mediators be demographically diverse, skilled in the conduct of hearings and knowledgeable in the employment statutes at issue.319 The task force could not reach a consensus on whether an agreement to mediate should be a condition of employment, whether employees should be permitted to waive their right to bring their claim in court, and whether agreements requiring arbitration or mediation of employment disputes should be entered into at the commencement of employment or only after a dispute arises.320

The protocol agreement has been endorsed by the AAA, the ABA, the National Academy of Arbitrators, the Society of Professionals in Dispute Resolution and the American Civil Liberties Union.321

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316. See id. at 938-39.
317. See id. at 939.
320. See id.
VIII. CONCLUSION

Although pre-dispute agreements requiring the submission of statutory discrimination claims to arbitration are being challenged with increasing frequency—in courts, by administrative agencies and in the legislature—the debate on this important issue is far from over. At stake is whether alternative dispute resolution will be a viable forum for the disposition of many of these claims, or whether the court dockets will become further clogged with an even greater number of discrimination cases. The United States Supreme Court will play a significant role in the resolution of this debate when it hears and decides *Wright* and when it decides whether to grant certiorari in *Duffield* and the other cases that are likely candidates for certiorari petitions. Congress, of course, could also resolve the debate once and for all, although it is highly unlikely that a Republican controlled Congress will amend the relevant statutes to require that all claims of discrimination must be heard by a jury. Until such time as these issues are settled by the Supreme Court and Congress, the virtual flood of cases challenging pre-dispute arbitration agreements will likely continue.