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TEACHING UNCONSCIONABILITY THROUGH AGREEMENTS TO ARBITRATE EMPLOYMENT CLAIMS

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I. INTRODUCTION

In 1991 the Supreme Court sanctioned mandatory arbitration of statutory employment claims.[1] The Federal Arbitration Act (FAA)[2] provides for the enforcement of arbitration agreements as any other contract "save upon such grounds as exist at law or in equity for the revocation of any contract."[3] The likely imbalance of power between employer and employee, coupled with the fact that pre-dispute arbitration agreements relegate resolution of employment claims to a private forum with limited judicial review,[4] has generated adverse reactions by various critics who oppose resolution of statutory rights in a private forum. That criticism, however, seems to be beside the point given the Supreme Court's decision that such claims are in fact arbitrable. Although the Supreme Court has also rejected the proposition that so called "mandatory" arbitration clauses between employers and employees must fail because of inherently unequal bargaining power, it is surprising that more attention has not been paid to other grounds "as exist in law or equity" in examining arbitration clauses in specific factual contexts in contracts of employment and, in particular, to unconscionability.

Addressing the topic of unconscionability in a first-year contracts class through pre-dispute agreements to arbitrate employment claims provides the opportunity to explore and evaluate the alternative dispute resolution method

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1. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

2. 9 U.S.C. §§ 1-14 (1994).

3. 9 U.S.C. § 2 (1994). Arbitration agreements not covered by the FAA are likely to be enforced under state arbitration statutes, which are very similar in substance to the FAA. For instance, thirty-five states have adopted the Uniform Arbitration Act (UAA), which generally parallels the FAA. Section 1 of the UAA has the same quoted language of FAA § 2, and further provides that the UAA applies to arbitration agreements between employers and employees. STEPHEN K. HUBER & E. WENDY TRACHE-HUBER, ARBITRATION CASES AND MATERIALS, 733-38 (1998).

4. 9 U.S.C. §§ 10-11 (1994); UAA §§ 12-13.

of arbitration. Consideration of the employment relationship and out-of-court resolution of employment claims, including those arising from statutes designed to protect individual employees and to serve broader societal goals (such as eradication of discrimination based on race, sex, age and disability), may present a richer basis for discussion of unconscionability than, for example, the-out-of-court resolution of a computer purchase dispute. Testing the social utility of these arbitration agreements in the employer-employee context should provoke lively inquiry along with serious analysis, and ultimately provide a most interesting and challenging vehicle for teaching unconscionability.

II. GENERAL BACKGROUND

A. The Federal Arbitration Act

Congress passed the FAA in 1925 to overcome the judicial hostility to agreements to arbitrate future claims, and to place arbitration agreements on equal footing with other contracts.[5] Under the FAA, issues regarding the formation of an agreement to arbitrate are resolved according to relevant state contract law.[6] Arbitration agreements may be invalidated based on ordinary contract defenses, such as unconscionability, without violating the FAA,[7] but states and courts are precluded from "singling out arbitration provisions for suspect status."[8]

5. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625-26 (1985). The FAA covers written arbitration agreements regarding "any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (1994). It excludes from coverage, however, employment agreements of seamen, railroad employees, and workers engaged in foreign or interstate commerce. 9 U.S.C. § 1 (1994). To date, only the Ninth Circuit has interpreted this provision to exclude all employment agreements from FAA coverage. Craft v. Campbell Soup Co., 161 F.3d 1199 (9th Cir. 1998). The Supreme Court has granted certiorari on this issue for the October 2000 term in Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S.Ct. 2004 (2000) (No. 99-1379).

6. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995).

7. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686-87 (1996). *See also* Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001 (1996) (advocating application of a contractual approach to issues of unconscionability in arbitration).

8. *Casarotto*, 517 U.S. at 687. "A court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable a court to effect what . . . the state legislature cannot.'" *Id.* (citing Perry v. Thomas, 482 U.S. 483, 493 (1987)).

B. The Gilmer *Decision*

The Supreme Court has recognized that the FAA expresses a "liberal federal policy favoring arbitration agreements,"[9] and that the Congressional intent of the FAA requires rigorous enforcement of arbitration agreements.[10] In the landmark case of *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court ruled that an Age Discrimination in Employment Act (ADEA)[11] claim could be subject to mandatory arbitration.[12] The Court found nothing in the text, legislative history, statutory framework or purpose of the ADEA to preclude resolution of the claim in arbitration.[13] Drawing upon the analysis in a trio of cases in which the Court enforced agreements to arbitrate other federal statutory claims,[14] the Court reiterated "that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum.'"[15] The Court further stated, "[s]o long as the prospective litigant effectively may litigate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[16]

The Court rejected employee Gilmer's general attacks on alleged deficiencies of the arbitral process (which was governed by the rules of the New York Stock Exchange (NYSE)) as inconsistent with the Court's current strong support of federal statutes sanctioning arbitration.[17] In particular, the Court found no merit in Gilmer's general speculation that the arbitration panel would be biased, noting that the NYSE arbitration rules and the FAA protect against arbitral bias.[18] The arbitration procedure also was not deficient

9. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983).

10. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 221 (1985).

11. 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998).

12. 500 U.S. at 20. The agreement to arbitrate arose under a Securities Industry Registration Application. *Id.* at 23.

13. *Id.* at 26-32.

14. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614; Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Rodriquez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

15. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

16. *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637).

17. *Id.* at 30 (quoting *Rodriguez*, 490 U.S. at 481).

18. *Id. See also* 9 U.S.C. § 10 (1994). The *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), decision that an adverse award from the arbitration procedure of a collective bargaining agreement did not preclude the grievant from pressing his federal employment discrimination claim in court was not controlling because, unlike the situation in *Gilmer*, in *Gardner-Denver* the labor arbitrator lacked authority to resolve statutory claims, the case did not arise under the FAA, the union rather than the employee agreed to arbitration and concern existed for the possible tension between protection of the individual grievant's statutory rights and the union's duty to represent the collective interest of all union members. *Gilmer*, 500 U.S. at 33-35.

because the NYSE rules provided for adequate discovery, made brief written opinions available to the public and imposed no limit on remedies available in arbitration.[19] The Court also deemed the limited judicial review available in arbitration[20] adequate to assure arbitral compliance with statutory requirements.[21]

Gilmer was hired as a manager of financial services and had no choice but to agree to arbitration in his securities representative registration application. The Court, however, rejected Gilmer's assertion of lack of bargaining power,[22] noting that disparity of bargaining power often exists between employers and employees. The Supreme Court stated in fairly strong and plain terms that "mere inequality in bargaining power" would not render the agreement to arbitrate unenforceable.[23] Accordingly, the Court left claims of unequal bargaining power and of procedural inadequacy in arbitration to be decided on a case-by-case basis.[24]

Thus, in *Gilmer* the Supreme Court recognized that agreements to arbitrate statutory employment discrimination claims (if not precluded by statute) are enforceable under the FAA except upon proof of an ordinary contract defense, such as unconscionability, to the arbitration agreement.[25] Enforcement of such an arbitration agreement will thus depend on evaluation of how the parties reached the arbitration agreement and the terms of actual arbitration procedure.

With only one notable exception,[26] lower courts have extended the *Gilmer* analysis and enforced agreements to arbitrate a variety of statutory employment claims including claims arising under Title VII,[27] the ADA[28] and the Family and Medical Leave Act.[29]

19. *Id.* at 31-32. The Court also noted that even the inability to pursue a class action in arbitration would not defeat the agreement to arbitrate because of the value of resolving the individual claim. Moreover, the EEOC could pursue a class action and equitable relief.

20. 9 U.S.C. §§ 10-11 (1994).

21. *Gilmer*, 500 U.S. at 32.

22. *Id*. at 33. The Court also found no evidence of fraud or coercion to enter the arbitration agreement.

23. *Id*. at 32-33 ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.").

24. *Id*.

25. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (holding that the grounds for revocation must specifically relate to the arbitration clause and not to the contract as a whole).

26. Duffield v. Robertson Stephens & Co., 144 F. 3d 1182 (9th Cir. 1998) (holding that Congress intended to preclude enforcement of mandatory pre-dispute agreements to arbitrate Title VII claims when it enacted the Civil Rights Act of 1991).

27. *See, e.g.*, Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998).

28. *See, e.g.*, McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998).

29. *See, e.g.*, O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997).

C. The Unconscionability Analysis

Following the principle of freedom of contract (and absent fraud or duress), common law courts traditionally left to the parties evaluation of the fairness of a bargain. By contrast, Courts of Equity historically refused to enforce agreements so unfair as to "shock the conscience" of the court.[30] The equitable doctrine of unconscionability inspired the Uniform Commercial Code (U.C.C.) § 2-302 on "Unconscionable Contract or Clause,"[31] which allows courts to regulate unfair bargains openly, eliminating the previous need to resort to "covert tools" such as interpreting contractual language against the offending party or stretching to find either offenses to public policy or shortcomings in the offer or acceptance process.[32] While Article 2 of the U.C.C. applies only to transactions for the sale of goods, courts have applied the unconscionability principle to a wide variety of contracts as the Restatement (Second) of Contracts § 208 on unconscionability demonstrates.[33] Despite the existence of the U.C.C. section and the Restatement provision, the definition of unconscionability remains sketchy and elusive.

To determine whether a term or a contract is unconscionable, courts generally consider the fairness of the bargaining process (procedural unconscionability) and the fairness of the bargain (substantive unconscionability) in light of the "setting, purpose and effect" of the transaction at the time the contract was made.[34] In other words, unconscionability generally includes "an absence of meaningful choice on the

30. *See, e.g.*, Campbell Soup Co. v. Wentz, 172 F.2d 80, 84 (3d Cir 1948).

31. U.C.C. § 2-302 provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder on the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

32. U.C.C. § 2-302 cmt. 1. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. 1 (1981).

33. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) provides:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Id.

34. U.C.C. § 2-302(2); RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. f (1981). Many courts and commentators have adopted the procedural and substantive terminology described in Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

part of one of the parties together with contract terms which are unreasonably favorable to the other party."[35] The late Professor and Judge Irving Younger explained his unconscionability analysis as a two-step process which first considered whether the bargain was fair, and if not, then considered whether the agreement was fairly reached—an imprecise process which ultimately seemed "to add up merely to the proposition that a judge's conscience is his only guide."[36]

Fairness in the bargaining process involves consideration of several factors, including: disparity of bargaining power between the parties; whether the parties had an opportunity to read and understand the terms; whether the terms were in legalese or fine print; and whether exploitation of a poor or uneducated party occurred.[37] Determining the reasonableness or fairness of the terms involves weighing the disparity of exchange in light of the entire bargain or assessing the inequity and oppressiveness of individual terms. Generally, to find an unconscionable agreement or term, courts require proof of some mixture of procedural unconscionability and substantive unconscionability,[38] and an abundance of one type reduces the necessary amount of the other type.[39] For example, proof of a contract of adhesion, which is usually a standardized form agreement offered by a stronger party on a take-it-or-leave-it basis with no opportunity for the weaker party to bargain over the terms, may satisfy the "procedural" unconscionability prong of the analysis, but a showing of an unfair, oppressive term or terms will also be necessary to establish the "substantive" unconscionability prong and for a court to find unconscionability.[40] The Supreme Court essentially followed this analysis in *Carnival Cruise Lines, Inc. v. Shute*.[41] In the context of its general approval of forum selection clauses,[42] the Court enforced against an injured cruise passenger, a forum selection clause contained in the cruise ticket, despite

35. *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965).

36. Irving Younger, *A Judge's View of Unconscionability*, JUDGE'S J., Apr. 1974, at 32-33.

37. *Id*. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

38. Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1531-33 (Cal. Ct. App. 1997).

39. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. c (1981).

40. "The presentation of an adhesion contract to a person is not, like the presentation of a pistol to his head, sufficient, if proven, to prevent the enforcement of the contract no matter how 'fair' its terms." Leff, *supra* note 34, at 508 (citing RESTATEMENT OF CONTRACTS §§ 454-455 (1932)). Still, some commentators question enforcement of adhesion contracts because the weaker party has not manifested knowing and voluntary assent to the terms. *See, e.g.*, Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179-80 (1983). *See also* U.C.C. § 2-302 cmt. 1; RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981).

41. 499 U.S. 585 (1991).

42. *Cf.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).

finding that the ticket was an adhesion contract, because under the circumstances the forum clause was not unfair.[43]

Because adhesion contracts challenge the basic notion of contractual assent, they often receive treatment different from other contracts in that the terms are subject to scrutiny for fairness and reasonableness despite the fact that the adhering party objectively manifested assent e.g., by signing the agreement.[44] To quote Judge J. Skelly Wright's classic articulation of this concern in *Williams v. Walker-Thomas Furniture*:[45]

Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all of the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[46]

Upon finding unconscionability, a court may deny enforcement of the entire contract, or enforce the contract without the unconscionable term, or limit the term's application to avoid unconscionable results.[47]

In view of the strong federal policy supporting enforcement of agreements to arbitrate even statutory claims, under what circumstances should a court deny or limit enforcement of an agreement to arbitrate employment claims on grounds of unconscionability?

III. ASSESSING THE FAIRNESS OF AGREEMENTS TO ARBITRATE EMPLOYMENT CLAIMS

As noted in section II, the Federal Arbitration Act (FAA) ensures that written arbitration agreements will be enforced according to ordinary contract law principles. Under the principle of unconscionability, courts may openly refuse to enforce an agreement, in whole or in part, where the court finds that the agreement contains oppressive, unfair terms and that unfair bargaining

43. "Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line . . . Including a reasonable forum clause in a form contract of this kind well may be permissible for several reasons . . . ." *Carnival*, 499 U.S. at 593. The Court concluded that the chosen forum was not designed to discourage legitimate claims and was Carnival's principal place of business as well as the departure and return point for many cruises. *Id*. at 595. The passengers conceded notice of the forum selection provision. *Id*. at 590.

44. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

45. 350 F.2d 445 (D.C. Cir. 1965).

46. *Williams*, 350 F.2d at 449-50.

47. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

conduct produced the agreement. A contract of adhesion—offered by a party with superior bargaining power strictly on a take-it-or-leave-it basis—prompts additional judicial scrutiny to determine if the terms of the agreement were within the reasonable expectation of the adhering party or whether the terms were so oppressive or unfair as to be unenforceable.[48]

Employers who condition offers of employment or continued employment on an agreement to arbitrate employment claims are usually offering adhesion contracts because the employer holds the stronger bargaining position and will not dicker over the terms of the arbitration clause. Of course, the employer may be offering a pension and a health plan, also on a non-negotiable basis, as part of the same employment package. Why then is the arbitration provision more suspect than a benefits provision? The answer to that question lies in the description of the arbitration process.

Arbitration is a private form of adjudication that provides for the adversarial presentation of evidence and reasoned arguments to a neutral party who is authorized to decide the matter.[49] Unlike the alternative dispute resolution method of mediation, the arbitration process provides finality in that the arbitrator renders a binding decision and the arbitrator's award is subject to limited judicial review.[50] Unlike the judicial litigation process, in arbitration the parties control the process, first and perhaps foremost, by selecting the decisionmaker.

The arbitrator must be impartial and unbiased in the dispute. In theory, the arbitrator will have expert knowledge of the industry or subject matter in dispute and will have arbitration experience. Arbitrators who bring a workplace perspective gained from experience in resolving workplace disputes may better understand how to fashion effective remedies.[51]

Conducted in a private setting, at a time convenient to the parties and the arbitrator, arbitration is a more informal, less intimidating and less hostile process than litigation. Generally, the rules of evidence are not followed. Discovery is limited to expedite the process and to avoid the expensive, time-consuming, often hostile and protracted fishing expeditions, which may occur in litigation.

The informal, less adversarial aspects of the arbitration process especially contribute to the possibility of maintaining a continuing relationship between the parties to the dispute and the process actually may have a therapeutic effect

48. *See, e.g.*, Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 511-12 (Cal. 1985).

49. For fuller discussion of the arbitration process described in this paragraph, see, e.g., STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 199-203 (1992).

50. 9 U.S.C. § 10 (1994); UAA § 12.

51. *See, e.g.*, David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. & EMP. L.J. 53, 78-80 (1998) (making this point in the labor arbitration context).

on the parties.[52] Unfettered by crowded judicial dockets, procedures and discovery, arbitration generally produces quicker results and costs less than litigation. In employment disputes, the savings in time and expense and the preferable aspects of arbitration benefit employees as well as employers. Final resolution of claims in arbitration also benefits the courts and the public by reducing the number of cases filed for judicial resolution.

Three particular attributes of arbitration motivate employers to adopt mandatory arbitration procedures to resolve employment disputes including statutory claims: the reduced cost, the finality of the process and fear of jury verdicts.[53] Employers are concerned that jurors may not understand the issues, may be overly sympathetic to employees and may reach unpredictable or erratic results.[54] The ability to finally resolve an employment dispute with less expense and without the delay of court dockets or appeals and only limited judicial review is also a major reason for employers to implement a mandatory arbitration plan. Under broad pre-dispute arbitration agreements, employers "trade off" avoidance of the possibility of one big court case for arbitration of many smaller cases.[55] Employers are less inclined to enter post-dispute agreements to arbitrate "run-of-the-mill" claims because those claims often fade away.[56]

The strong opposition to arbitration of employment claims arises in the context of pre-dispute agreements, imposed as a condition of obtaining or continuing employment (so-called mandatory arbitration agreements) to resolve statutory claims. The crux of the opposition is the perceived unfairness of forcing an employee to choose between obtaining or keeping a job and having the right to take a statutory employment claim to court.[57] Critics of mandatory pre-dispute arbitration believe that statutory employment claims,

52. Roger I. Abrams et al., *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994).

53. Mei L. Bickner et al., *Developments in Employment Arbitration*, DISP. RESOL. J., Jan. 1997, at 8, 10, 78-79.

54. *Id*. at 79. A recent study showing that in federal employment civil rights cases, employees won in jury trials no more than 35.5% of the time suggests that this fear may not be well founded. *See* Marika F.X. Litras, Bureau of Justice Statistics, U.S. Dep't. of Justice, Civil Rights Complaints in U.S. District Courts, 1990-98, 9 & Table 9 (Jan. 2000) (hereinafter "DOJ report").

55. Theodore J. St. Antoine, *Krinlock Lecture Series: Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T. M. COOLEY L. REV. 1, 8 (1998).

56. *Id*.

57. "Employees required to accept binding arbitration of [statutory employment claims] would face what for many would be an inappropriate choice: 'give up your right to go to court, or give up your job.'" U.S. DEP'T OF LABOR, COMM'N ON THE FUTURE OF WORKER-MGMT. REL. REP. & RECOM. 32 (1994) (hereinafter "Dunlop Report"). Former Secretary of Labor John T. Dunlop served as chairman of the commission and the commission and report often are referred to by his name.

and especially employment discrimination claims, should be resolved in court, rather than a private arbitration forum, because: in court the judge is a public figure accountable to the public and the decision is subject to appellate review; the public proceeding and published decision will have a deterrent, conduct-regulating effect on employers; depriving courts of jurisdiction of employment claims will stifle development of the law; and arbitration procedures including, e.g., lack of juries and limited discovery, as well as the possibility of a "repeat player" arbitral bias favoring employers, may diminish employee rights.[58]

Much of this criticism flies in the face of the *Gilmer* decision, and it must be noted that, with one exception, the circuit courts have extended the *Gilmer* analysis to a wide variety of statutory employment claims.[59] In other words, the courts have not found a legislative intention to restrict resolution of employment claims to courts. Moreover, such a change does not appear to be a priority on the congressional agenda.[60] To avoid enforcement of pre-dispute arbitration agreements, employees must then turn to contractual defenses.

The general framework of an attack on a pre-dispute agreement to arbitrate employment claims on the ground of unconscionability should first demonstrate that the agreement is a contract of adhesion, imposed on the employee as a condition of employment, which represents procedural unconscionability, and then show that the arbitration agreement is substantively unconscionable because the arbitration procedure, designed and imposed by the employer, lacks basic elements of fair process. While the *Gilmer* decision rejected the generalized claims of unequal bargaining power between employers and employees and of deficiencies in the arbitral process, it left resolution of such claims for decision on a case-by-case basis.

It is noteworthy that critics generally do not attack voluntary post-dispute agreements to arbitrate even statutory claims, on the theory that the process by which the employee voluntarily agrees to resolve an existing claim in arbitration "must be fair enough to be attractive to the employee."[61] But even the fairest arbitration procedure will be a private proceeding with a privately-selected decisionmaker and limited judicial review—if it really is still

58. *See, e.g.*, EEOC Policy Statement on Mandatory Arbitration, 915.002 (hereinafter "EEOC Policy"). Further, as the EEOC has emphasized, under federal employment discrimination statutes, individual employees serve as "private attorneys general" and "[t]he right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme." *Id*. at IV D. Congress has given the EEOC initial responsibility for processing employment discrimination charges under Title VII, 42 U.S.C. § 2000e-5 (1994), the ADEA, 29 U.S.C. § 626(b) (1994) and the ADA, 42 U.S.C. § 12117(a) (1994).

59. *See supra* notes 26-29 and accompanying text.

60. A number of bills have been introduced but have no promise of success. *See, e.g.*, *Arbitration: Senate Sub-committee Hears Testimony on Arbitration of Employment Bias Disputes*, available in LEXIS, BNA DAILY LAB. REP. 42 DLR A-10 (2000) (Mar. 2, 2000).

61. *See* EEOC Policy, *supra* note 58, at V B.

arbitration. Assuming that a voluntary agreement to arbitrate statutory employment claims can withstand scrutiny, then obviously arbitration schemes, at least carefully drafted ones, may be fair enough to survive a claim of substantive unconscionability.

In 1995, an American Bar Association (ABA) task force devised a set of standards to guide and to evaluate arbitral procedures for these claims. *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship*[62] ("*Due Process Protocol*") calls for a knowing agreement to arbitrate these claims;[63] an employee right to a representative of choice (with a recommendation of possible employer reimbursement of part of the employee's attorney fees); adequate, but limited discovery with adequate employee access to information relevant to the claim; and a qualified, independent, unbiased arbitrator (familiar with the statutory issues, and with workplace and employment issues) who has a duty to disclose any conflict of interest and who is chosen through a joint, fair selection process. The *Due Process Protocol* further recommends that the arbitrator should have authority to award the full range of statutory remedies; the arbitrator should issue an award with an opinion summarizing the issues decided and a statement explaining the disposition of statutory claims; that absent circumstances of economic hardship, the parties should share the arbitrator's fees and expenses to ensure arbitrator neutrality; and that there should be only limited judicial review of the final and binding award.[64] In theory, if the terms of an arbitration procedure comply with the *Due Process Protocol*, it should be viewed as a fair and non-oppressive arbitration process. But what if this fair arbitration procedure is part of mandatory pre-dispute agreement to arbitrate employment claims? Should a court still refuse to enforce this arbitration procedure, which is *not* substantively unconscionable,

62. *Prototype Agreement on Job Bias Dispute Resolution* (Text), available in LEXIS, BNA DAILY LAB. REP. 1995 DLR 91 d34 (May 11, 1995) (hereinafter "*Due Process Protocol*"). The task force members were designated by their respective organizations, but the protocol reflects the members' individual views. *Id.* The task force members included employer, union and employee representatives of the ABA Labor and Employment Section, the American Arbitration Association, the Federal Mediation and Conciliation Service, American Civil Liberties Union, the National Employment Lawyers Association, the Society of Professionals in Dispute Resolution, and the National Academy of Arbitrators. *Id.* Because the *Due Process Protocol* task force members could not agree, the protocol takes no position on mandatory arbitration agreements. *Id.*

63. *Cf.* Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) (noting that enforcement of an agreement to arbitrate a Title VII discrimination claim requires proof that the employee knowingly entered the arbitration agreement).

64. *Due Process Protocol*, *supra* note 62. It is noteworthy that the Commission on the Future of Worker-Management Relations proposed a similar set of procedural fairness standards. Dunlop Report, *supra* note 57, at 30-32. While the *Due Process Protocol* takes no position on mandatory arbitration schemes, the Dunlop Commission rejected use of mandatory predispute arbitration but suggested that the subject should be revisited in the future. *Id*. at 33.

simply because it is contained in a contract of adhesion imposed on an employee as a condition of employment?

Blanket rejection of a mandatory pre-dispute employment arbitration scheme assumes that compared to courts, arbitration will be inferior or inadequate to protect employee interests.[65] Again, the Supreme Court rejected this line of attack in *Gilmer* even as to statutory claims. Such criticism is also ill founded because it ignores the advantages arbitration may afford employees. If the process is a fair one, a mandatory pre-dispute arbitration procedure may provide the only realistic opportunity for the employee to pursue an employment claim. Due to the volume of claims and the EEOC's limited budget, the vast majority of employment discrimination claims are not resolved by the EEOC or by trial.[66] Employees in lower paying jobs cannot afford the time necessary to pursue a claim in court and juries are less likely to award them large monetary damages.[67] Lower wage earners also are likely to have difficulty finding an attorney to represent them because attorneys simply cannot afford to take to court cases with only a small potential for recovery.[68] Attorneys may be more willing to represent employees in arbitration which should consume less time than a court case would, and at least one study has found that legal fees were lower in arbitration.[69] Based on experience in labor arbitration, *pro se* representation may also be used more effectively and with fewer risks than in court because of the more informal nature of arbitration.

There is also a greater opportunity for an employee to have a "day in court" in an arbitration procedure, than in the litigation process.[70] A recent Department of Justice study of employment civil rights cases filed in federal district courts from 1990 through 1998 found that the percentage of employment claims resolved by trial decreased from 9% in 1990 to 5% in 1998.[71] Moreover, one analysis found that in 1994 the majority (60%) of

65. EEOC Policy, *supra* note 58, at VI.

66. *See* Susan A. FitzGibbon, *Reflections on* Gilmer *and* Cole, EMPLOYEE RTS. & EMPLOYMENT POL'Y J. 221, 245-47 (1997) (hereinafter "*Reflections*"). From 1990 to 1998, the number of employment claims filed in federal district court tripled from 8,413 to 23,735. DOJ report, *supra* note 54, at 2.

67. Chief Judge Harry T. Edwards, *Where Are We Heading With Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U.L. REV. 293, 308 (Winter 1999) (paper presented during the "Alternative Dispute Resolution" conference at The W.J. Usery, Jr. Center for the Workplace, Georgia State Univ., Atlanta, Georgia (Nov. 2, 1999)).

68. *See, e.g.*, St. Antoine, *supra* note 55, at 7-8. *See also* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS L. REV. 29, 57-59 (Fall 1998).

69. U.S. GEN. ACCOUNTING OFF., ALTERNATIVE DISP. RESOL.: EMPLOYER'S EXPERIENCE WITH ADR IN THE WORKPLACE GAO/GGD – 97-157 at 19 (1997).

70. "[I]n 'litigation . . . relatively few employees survive the procedural hurdles necessary to take a case to trial in the federal courts.'" Edwards, *supra* note 67, at 308.

71. DOJ Report, *supra* note 54, at 6.

employment cases filed in federal district court were resolved by pre-trial motions and that employers won 98% of those motions.[72]

According to the Department of Justice study, from 1990 to 1998, employee plaintiffs won at trial an average of 29.3% of the cases that went to trial.[73] In 1998, 78% of the trials of employment cases were jury trials, and employees won in 35.5% of all cases disposed of by trial.[74] This employee "win rate" does not support the perception that employees automatically will fare better if a jury decides the case. To compare how much employees won in judicial as opposed to arbitral resolutions of employment claims, one commentator weighed the percentage of the total demand received in arbitration and in litigation and concluded that "far more employees win in arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court."[75]

An arbitration procedure that finally resolves cases relatively quickly (compared with judicial resolution) offers employees a more realistic opportunity for reinstatement.[76] An arbitration decision closer in time to the events or conduct in question will send a message to the workplace and exert a conduct regulating effect, which also may serve statutory goals.[77] For example, members of a workplace will learn something from the reinstatement of a worker discharged in violation of the ADEA or the ADA. A written opinion explaining the arbitration award, which the *Due Process Protocol* recommends, will also influence workplace conduct.[78] Furthermore, it is fair to assume that if employees will seize the opportunity to process employment claims through arbitration, then the number of arbitration decisions will similarly exert a conduct regulating effect on the workplace as people react to

72. Lewis Maltby, *supra* note 68, at 47.

73. Average based on DOJ Report, *supra* note 54, at 9 and Table 9. The study found a dramatic increase in the number of employment cases resolved by jury trial; from 35% in 1990 to 78% in 1998. *Id*. at 6-7 and Figure 2.

74. DOJ Report, *supra* note 54, at 6-7 and Figure 2 and Table 9.

75. Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?* DISP. RESOL. MAG. Fall 1999, at 23-24.

76. *See Reflections*, *supra* note 66, at 249-55. The Department of Justice study found the federal district court processing time was 18 months in 1998; this does not include the additional case processing time taken by the EEOC process in discrimination cases. DOJ Report, *supra* note 54, at 11. By contrast, one study found that it took 8.6 months to process a case in arbitration. Maltby, *supra* note 68, at 55.

77. Stephen W. Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, AGE and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 992-93 (1993).

78. *Due Process Protocol*, *supra* note 62. *See also* Josef Rohlik, *Arbitrators Should Write Opinions for Parties and for Courts*, 44 ST. LOUIS U. L.J. 933 (2000).

the arbitration results.[79] Thus, in addition to resolving individual claims and workplace controversies, arbitration of statutory claims may also further broader statutory goals including, e.g., the goal of eradicating discrimination from the workplace.

The foregoing discussion of the benefits of arbitration to employees and arbitration's contribution to broader statutory goals puts mandatory arbitration in perspective. For employees who are not "forced" to resolve employment disputes in arbitration, resolution of these claims in court or by trial is not an automatic, readily-accessible alternative. In the context of the employment setting and relationship, arbitration may provide a preferable, efficient and beneficial process for employees. The point of this section has been to dispel the idea that, in general, a fair arbitral process for the resolution of employment claims should be denied enforcement on grounds of unconscionability simply because it was the product of a mandatory, pre-dispute arbitration agreement. The next section will test the limits of unconscionability in three cases of mandatory pre-dispute arbitration agreements.

IV. EXAMPLES OF MANDATORY PRE-DISPUTE EMPLOYMENT ARBITRATION SCHEMES

While the strongest attacks on mandatory employment agreements focus on agreements to arbitrate statutory claims, it must be emphasized that the unconscionability analysis is not so limited. Any agreement to arbitrate employment claims, whether it does or does not include statutory claims, may be denied enforcement, in full or in part, if the court finds it to be unconscionable. In addition, the evaluation of fairness with respect to the arbitration clause may in fact depend on the issue in a particular dispute, such as, whether the rights and obligations of the parties are governed by mandatory rules of a statute.

This section will consider three cases in which the plaintiff employees sought to avoid the operation of a mandatory pre-dispute agreement to arbitrate employment claims. Each case raises questions highlighting disparity of bargaining power and the fairness of key elements of any arbitration scheme: limited judicial review, arbitrator selection process, limited remedies and payment of the arbitrator's fee. When analyzed in terms of unconscionability, these case examples raise the broader question of whether and when courts should strike down or tinker with these arbitration agreements. These cases were chosen for this discussion because the differences in the parties, the

79. *See, e.g.*, Susan A. FitzGibbon, *Arbitration, Mediation and Sexual Harassment*, 5 PSYCH. PUB. POL'Y & L. 693, 726-29 (1999). *See also* Carrie Menkel-Meadow, *Do the "HAVES" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 J. DISP. RESOL. 19, 47-48 (1999) (noting that ADR systems perceived as fair and efficient may produce increased number of claims).

claims and the arbitration procedures raise a broad range of facts and issues that should resonate with students of contracts and prompt a rigorous analysis of the theory and application of unconscionability.

In *Cole v. Burns*,[80] when a new company took over his former employer's business, security guard Cole had to sign a pre-dispute agreement to arbitrate employment claims to retain his job. The arbitration agreement clearly provided for coverage of all employment matters, including federal and state statutory claims, provided for arbitration at the option of the employer and also stated as follows:

> The right to a trial, and to a trial by jury, is of value. YOU MAY WISH TO CONSULT AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT. IF SO, TAKE A COPY OF THIS FORM WITH YOU. HOWEVER, YOU WILL NOT BE OFFERED EMPLOYMENT UNTIL THIS FORM IS SIGNED AND RETURNED BY YOU.[81]

This paragraph with bold letters and the other plain language of the agreement indicate that the employee "knowingly" entered this contract of adhesion with no possibility of bargaining over the terms. The arbitration agreement also provided for the appointment of a neutral arbitrator through the American Arbitration Association (AAA),[82] for the arbitration to be conducted according to AAA's rules, and the parties concurred that this agreement authorized the arbitrator to apply applicable statutory law in substance and remedy.[83] When Cole subsequently sued Burns under Title VII for discrimination, harassment and retaliation based on race, he sought to avoid the operation of the arbitration clause.

Considering the arbitration agreement and the applicable AAA rules, the court concluded that the agreement was valid under the *Gilmer* analysis because it provided for a neutral arbitrator, for adequate discovery, for full statutory remedies, for a written award and did not provide for prohibitive preliminary forum fees or expenses.[84] Still the court enforced this mandatory

80. Cole v. Burns Intern Sec. Servs., 105 F.3d 1465, 1469 (D.C. Cir. 1997). It is noteworthy that the author of the majority opinion is Chief Judge Harry Edwards, a renowned labor and employment law professor who, prior to joining the bench, was a well known labor arbitrator and attorney. The *Cole* opinion contains an illuminating discussion of the difference between labor arbitration (between a union and management) and employment arbitration (between an individual employee and the employer). *Id*. at 1470-79.

81. *Id.* at 1469 (emphasis in original). In this agreement the parties also waived the right to a jury trial. *Id.*

82. The American Arbitration Association ("AAA") is a well-established (seventy-five year-old), not-for-profit agency which administers dispute resolution services, primarily offering arbitration and mediation. *See* American Arbitration Associate Website at <http://www.adr.org>. AAA's current National Rules for the Resolution of Employment Disputes expressly adopt and endorse the *Due Process Protocol*.

83. *Cole*, 105 F.3d at 1469 & n.3.

84. *Id.* at 1482.

pre-dispute arbitration agreement *only* with the addition of a requirement that the employer pay the fees and expenses of the arbitrator.[85] The court emphasized that the oppressive take-it-or-leave-it nature of the bargain imposing arbitration at the employer's option compelled this employer's responsibility to pay for the arbitrator's services. Absent the insertion of this clause, the court reasoned, a lower wage earning employee could effectively be denied his statutory right because he could not afford to gain access to the arbitral forum.[86]

Rather than engaging in an analysis of unconscionability, the court followed a circuitous process of interpretation to achieve this outcome: the preference for an interpretation that makes a contract lawful and for interpretation of ambiguous terms against the drafter compelled the court to define and clarify this otherwise open term, to save the contract from being unenforceable.[87] One may speculate that the court preferred to adjust the agreement using the more "covert tool" of interpretation because the court's conclusion on this point was not inescapable.

To reach this same result using an unconscionability analysis, the court could have found that the procedural unconscionability, evidenced by the contract of adhesion and an employee with essentially no bargaining power, prompted scrutiny of the terms despite the employee's agreement to them manifested by his signature. The arbitration process including the AAA rules was fair enough, but to ensure the employee's right to vindicate his statutory claim in this alternative forum, the employee needed access to the alternate forum. To process a claim in court, the employee would have to pay a filing fee and attorney fees but the services of the judge would be free. Because the fees of an arbitrator may be quite expensive and payment of even half of a large fee could prevent the employee from pursuing his claim, the agreement unaltered would be too oppressive to enforce. The court could have then avoided this unconscionable result by adjusting the agreement to require the employer to pay for the arbitrator's fees.

But the conclusion that under a mandatory pre-dispute agreement to arbitrate statutory employment claims, fair process requires the employer to pay the arbitrator's fees is a controversial one.[88] While the fees of arbitrators

85. *Id.* at 1485.

86. *Id.* at 1484.

87. *Id.* at 1485-86.

88. Some courts have adopted this requirement. *See, e.g.*, Shankle v. B-G Maint. Mgmt., Inc., 163 F.3d 1230 (10th Cir. 1999) (holding a mandatory arbitration agreement, which was entered into as a condition of continued employment, and which required the employee to pay a portion of the arbitrator's fees, unenforceable under the FAA); Paladino v. Avnet Computer Techs., 134 F.3d 1054, 1062 (11th Cir. 1998) (stating that the imposition on employee of substantial arbitration costs ($2000) is a legitimate basis for the conclusion that the clause does not comport with statutory policy).

may be high, generally the attorney's fees will be far more expensive. As previously noted, the *Due Process Protocol* calls for the parties to share the arbitrator's fees to ensure arbitrator neutrality.[89] Exclusive employer responsibility for the arbitrator's fees adds to the concern of some critics for a "repeat player" effect, that is, the concern that arbitrators will tend to favor employers because employers are more likely to need the services of an arbitrator again.[90] In *Cole*, the court rejected these concerns noting that professional and ethical standards of arbitrators as well as the rules of administering agencies such as AAA protect against arbitral bias.[91] The point here is not to suggest the validity of these criticisms because supporting evidence is lacking,[92] but rather to show that the court's conclusion was not obvious or automatic. Once the disparity of bargaining power is eliminated as the bar to enforcement, it would appear that the bargain lacked Younger's criteria of unconscionability.

Imposing the requirement that employers must pay the arbitrator's fee in mandatory arbitration of statutory employment claim schemes could produce an unintended effect of motivating employers to cancel the mandatory arbitration program. In other words, the court's paternalistic effort to protect employees could instead deprive them of the alternative forum. As previously noted, a mandatory arbitration scheme may provide employees the only real opportunity to pursue an employment claim particularly for employees who are low wage earners.

Turning to a different issue, in *Cole* the court rejected the argument that limited judicial review of the arbitration award rendered the agreement unconscionable. In view of the Supreme Court's enforcement of agreements to arbitrate a variety of statutory claims under the limited judicial review standard of the FAA,[93] the court had no choice but to find that standard of review fair and adequate. The court noted that in addition to the FAA grounds of review (mainly for fraud, arbitral bias, arbitral misconduct in handling the process or in exceeding the authority conferred), awards are also subject to judicially recognized grounds of review for violation of public policy or for manifest disregard of the law by the arbitrator.[94] Under this manifest disregard standard, the court articulated a tougher level of review which would be "sufficiently rigorous to ensure that arbitrators have properly interpreted and

89. *Due Process Protocol*, *supra* note 62, at C6.

90. *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189, 213-14 (1997) (based on small study of only 31 cases, the author found a repeat player effect but did not establish the cause). *But see* Menkel-Meadow, *supra* note 79, at 57-58 (little empirical evidence to support repeat player effect).

91. *Cole*, 105 F.3d at 1485.

92. *See, e.g.*, Menkel-Meadow, *supra* note 79, at 57-58.

93. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, n.4 (1991).

94. *Cole*, 105 F.3d at 1486-87.

applied statutory law."[95] How far courts may take this analysis remains to be seen, but it is fair to conclude that judges will not hesitate to review and overturn awards which seem unfair to them.[96] Despite extremely limited grounds of review of labor arbitration awards, courts routinely stretch the limits to vacate awards.[97] Of course this may not always benefit the employee. For example, in labor arbitration cases, courts often overturn arbitration awards which reinstated employees fired for conduct raising public policy concerns. The Supreme Court will revisit the standard of review to vacate awards on public policy grounds in the 2000-2001 term.[98]

It should also be noted that unconscionability has a place apart from and offers protection beyond either the public policy or manifest disregard of law grounds for vacation of arbitration awards. An unconscionable arbitration agreement will not be enforced and there will be no arbitration. By contrast, under the public policy and manifest disregard of law standards of review, courts decide whether to enforce an existing arbitration award. As such, the unconscionability analysis provides another means to attack a mandatory employment arbitration scheme.

The second case for discussion, *Hooters, Inc. v. Phillips*, involves the pre-dispute employment arbitration procedure imposed by the company on a female bartender who alleged sexual harassment.[99] The arbitration agreement contained a number of one-sided terms favoring the employer. One provision included an initial requirement for the employee to explain her claim and list fact witnesses with no reciprocal company obligation to respond, explain defenses or list witnesses. Other terms gave the company rights to "expand the scope of arbitration to any matter," to seek a summary judgment, to record the hearing, to cancel the arbitration agreement on thirty days notice, and to modify the arbitration rules without notice, while providing no corresponding rights to employees.[100] The most egregious term established a three-person arbitration panel to be chosen as follows: the company and the employee each would select an arbitrator and these arbitrators would then choose the third

95. *Id.* at 1487.

96. *See, e.g.*, DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459, 462 (S.D.N.Y. 1997) (arbitrator's failure to award attorney's fees to plaintiff DeGaetano was manifest disregard of the law under Title VII of Civil Rights Act of 1964).

97. For a discussion of unwarranted judicial tinkering with labor arbitration awards, see Susan A. FitzGibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485 (1990).

98. Eastern Associated Coal Corp. v. United Mine Workers of Am., No. 98-2527, 1999 U.S. App. LEXIS 1994 (4th Cir. Aug. 20, 1999), *cert. granted*, 68 U.S.L.W. 3593 (U.S. Mar. 20, 2000) (No. 99-1038). The Court will consider "whether courts asked to vacate arbitration awards on public policy grounds are limited to determining whether the award itself violates positive law or requires unlawful conduct, or instead may identify 'well defined and dominant' public policies and set aside arbitration awards that contravene such policies." *Id.*

99. 173 F.3d 933 (4th Cir. 1999).

100. *Id.* at 938-39.

"neutral" arbitrator. A number of industries routinely follow such a procedure to select a neutral labor arbitrator and that neutral may be chosen from a list of arbitrators upon whom the company and union have previously agreed.[101] By contrast, the Hooters arbitration agreement provided for selection of the employee's arbitrator and of the third arbitrator from a list of arbitrators chosen only by the company, with no express limits on those listed, that is, the company could include company managers, or the company could remove from the list any neutral who had ruled against the company.[102] In light of these oppressive terms, the court refused to enforce this arbitration agreement on the ground that the employer had breached its obligation to create a dispute resolution process worthy of the name "arbitration."

The *Hooters* case provides a striking example of an arbitration scheme, which would not withstand scrutiny on the ground of unconscionability. An arbitration procedure, which gives the employer the right to choose the decisionmaker cannot be enforced. The cornerstone of any fair arbitration scheme is a neutral arbitrator chosen by the parties through a fair selection process.[103] The person who runs the hearing and the pre- and post-hearing process and who ultimately decides the case must be neutral and unbiased for the arbitration process to be fair and for the agreement to be enforceable.[104]

In fact, the district court concluded that the Hooters arbitration agreement was unconscionable and unenforceable.[105] The district court emphasized the shocking unfairness of a number of the terms, including the biased arbitrator selection scheme and possible limits on statutory remedies[106] to which the Fourth Circuit did not refer. However, the district court went too far in citing the loss of the right to take a Title VII claim to court and the FAA's provision on limited judicial review of awards as additional evidence of one-sided terms.[107] Again, after the *Gilmer* decision, these concerns cannot be a basis for finding substantively unconscionable terms.

To reach the conclusion that the arbitration agreement was unconscionable, the district court also considered the fact that this was an adhesion contract imposed on a far less sophisticated party who had no bargaining power and that oppressive terms of the arbitration rules were "hidden" (because they were

101. For example, such a tripartite arbitration board is routinely used in the airline industry. For a discussion and evaluation of such arbitration panels, see FRANK ELKOURI, HOW ARBITRATION WORKS 176-81 (Martin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

102. *Hooters*, 173 F.3d at 938-39.

103. *Due Process Protocol*, *supra* note 62, at C.

104. 9 U.S.C. § 10(a)(2) (1994); UAA § 12.

105. Hooters, Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998). The district court also found no meeting of the minds on all material terms, that Hooter's promise to arbitrate was illusory and that the agreement was void on public policy grounds. *Id.*

106. *Id.* at 614.

107. *Id.*

practically unavailable) and "surprising," i.e., beyond the employee's reasonable expectations.[108] The number of oppressive terms and apparent conflicts and confusion among the terms dictated the district court's decision to refuse to enforce the arbitration agreement in its entirety.[109]

In affidavits, arbitration experts including the then President of the National Academy of Arbitrators, George Nicolau, AAA Board of Directors member Lewis Maltby and Professor Dennis Nolan agreed that the Hooter's arbitration scheme was singularly unfair to employees.[110] To quote Professor Nolan, "the Hooters rules do not satisfy the minimum requirements of a fair arbitration system."[111] This reaction is reminiscent of the late Judge Irving Younger's unconscionability analysis, which admittedly relied on his own conscience. Judge Younger's unconscionability analysis was a gutsy, I'll-know-it-when-I-see-it approach, and, in the *Hooters* case, it could not be missed.

Unlike the employee plaintiffs in *Cole* or in *Hooters*, the employee seeking to avoid arbitration in *Stirlen v. Supercuts, Inc.* was the company's vice-president and chief financial officer,[112] an employee who certainly bargained from a position of far greater strength than that of a security guard or a bartender. Analyzing this case under California's unconscionability statute, which adopted the text of U.C.C. § 2-302 and applied it to all contract cases,[113] the court still found that the pre-dispute agreement to arbitrate employment claims clause of Stirlen's employment agreement was an unconscionable contract of adhesion. The employer contended that the parties had equal bargaining power because the company had recruited Stirlen from another prestigious, lucrative position by offering a salary of $150,000 plus a number of "extras" beyond the standard executive employment agreement, including a signing bonus, stock options and a bonus plan.[114] But because the arbitration clause was one of the non-negotiable terms contained in the "standard employment contract" and the bargaining over the aforementioned salary and extra terms did not effect the standard contract provisions, the court concluded that the arbitration provision was part of an adhesion contract and evidence of a procedurally unconscionable term.

The arbitration clause of the standard employment contract expressly provided that it covered all disputes regarding employment, termination, the employment agreement and federal and state statutory employment claims; it excluded from coverage certain contractual claims initiated by the employer

108. *Id.* at 615.
109. *Id*.
110. *Hooters*, 39 F. Supp. 2d at 598.
111. *Id*.
112. 51 Cal. App. 4th 1519 (Cal. Ct. App. 1997).
113. CAL. CIV. CODE § 1670.5 (West 1985).
114. *Stirlen*, 51 Cal. App. 4th at 1533.

(for example, alleging violation of the non-compete clause); it imposed a strict one-year statute of limitations on requests for arbitration and provided for complete waiver of claims if the arbitration request did not comply with this timeframe; and it restricted the remedies available in arbitration exclusively to "a money award not to exceed the amount of actual damages for breach of contract."[115] Finding no special circumstances in the employer's business or relation to this employee to warrant this limit on remedies which could, for example, deprive an employee of punitive damages for a tort claim or a violation of Title VII and of attorney's fees available under federal statutes, and noting that the company retained its right to full common law and statutory remedies for certain contractual violations excluded from coverage of the arbitration clause, the court concluded that the terms of the arbitration clause were too oppressive to the employee. The court could have invalidated only the term which seemed most offensive—the limitation on remedies—and enforced the remainder of the arbitration clause but the court ultimately decided that a number of the aforementioned terms of the arbitration clause produced such an extreme imbalance of rights and remedies between the parties that the entire clause was unconscionable.[116] The court's brief discussion of the general "disadvantages" of the arbitration process suggests that the old judicial disdain for and hostility to arbitration, especially to resolve statutory claims, may have contributed to the decision to scrap the entire arbitration clause.[117]

But did employee Stirlen warrant this protection? In terms of procedural unconscionability, he may not have had an opportunity to bargain over the terms of the arbitration provision, but he certainly bargained over other significant terms (salary, bonus, pension) and, if he was hired away from another high-level job, he had the opportunity to choose whether to take this job and to enter this agreement. Any employee can turn down a position offered on the condition of a pre-dispute arbitration agreement and look for another job. But those seeking lower paying jobs may have limited options and are less likely to have any bargaining power over any terms of employment. The element of procedural unconscionability will more likely exist in those situations than in Vice President/Chief Financial Officer Stirlen's case.

If Stirlen's adhesion contract presents only a modicum of procedural unconscionability, then the terms of the agreement should supply a pretty

115. *Id.* at 1528-29.

116. *Id.* at 1539-42.

117. It is noteworthy that in *Stirlen*, the court did not focus on the arbitration provision that the parties would share payment of the arbitrator's fees. *Id.* at 1529. Obviously, the unfairness of this term depends on the employee's position and level of pay. *Cf.* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483-84 (D.C. Cir. 1997).

shocking measure of substantive unconscionability to avoid enforcement. Reviewing the terms, how unfair is it to require a company executive to request arbitration within one year of the occurrence of a termination or a covered dispute? Expedited resolution of such disputes would seem to serve a legitimate business purpose and this deadline would not severely limit the exercise of his rights. Preservation of the company's right to bring to court certain contractual claims, such as an alleged violation of a non-compete clause, while requiring the employee to bring employment disputes to arbitration certainly gives the employer more options to protect its rights and interests, but is this disparity so unfair that it warrants a judicial rescue of an executive employee from this agreement? If not, then the issue boils down to a standard arbitration clause, which may overstep the bounds of fairness by limiting the employee's remedies.

In his suit, Stirlen sought to nullify the arbitration clause and claimed wrongful discharge in violation of public policy, breach of contract, breach of implied covenant of good faith and fair dealing, defamation, intentional misrepresentation and violation of Labor Code § 970 which prohibits "knowing false representations" to induce an employee "to change from one place to another,"[118] and which imposes double damages for a violation.[119] The limitation of remedies in the arbitration clause barring recovery of double damages for a violation of Labor Code § 970 effectively deprived Stirlen of his full statutory right and, as such, the remedies limitation warranted non-enforcement. Similarly, if Stirlen had alleged, e.g., a violation of Title VII, the limitation on remedies would deny Stirlen the right to vindicate his statutory claim fully, and should be struck down as an unconscionable term. The question remains whether the unfairness of this term warranted invalidation of the entire arbitration clause or whether extracting the limitation of remedies would sufficiently avoid the problem of unconscionability.

The conclusion that the remedies limitation is an unconscionable term rests on the fact that the employee raised a statutory claim and would be deprived of access to a full statutory remedy in arbitration. As such, the determination of the unconscionability of a remedies limitation should focus on the claim raised at the time of enforcement of the arbitration clause. This is comparable to the analysis under the U.C.C. § 2-719 provision that remedies limitations are enforceable, except for limits of "consequential damages for injury to the person in the case of consumer goods [which are] prima facie unconscionable."[120] In other words, by analogy to U.C.C. § 2-719, an arbitration clause limiting statutory remedies is prima facie unconscionable if the employee raises a statutory claim. On the other hand, if Stirlen had alleged

118. *Stirlen*, 51 Cal. App. 4th at 1525.
119. CAL. LAB. CODE § 972 (West 1989).
120. U.C.C § 2-719(3).

no violation of any statute, then the arbitration clause limitation of damages should not be viewed as unconscionable.

In conclusion, the different types of employees and mandatory arbitration schemes represented in these three cases—ranging from one lower level employee trapped in a sham process which failed to ensure a neutral arbitrator, to another lower level employer in a fair mandatory arbitration agreement only possibly flawed by shared responsibility for the arbitrator's fee, to an executive employee restricted to limited damages recoverable in the arbitration process—provide a rich basis for exploration of the unconscionability analysis and consideration of circumstances in which courts should adjust or refuse to enforce such agreements.

V. CONCLUSION

Mandatory pre-dispute agreements to arbitrate employment claims may provide a variety of benefits: a process faster, less expensive, less formal and less hostile than litigation which still produces a final result; a process which allows the parties to choose an expert decisionmaker; and a process which will contribute to a reduction in the number of employment cases filed. Of course to produce these benefits, the mandatory arbitration procedure must be fair. The doctrine of unconscionability is one measure of the fairness of these mandatory arbitration agreements. In broad terms, the question at the heart of the unconscionability inquiry in these cases is whether this forum selection clause represents bad social policy and thus requires judicial regulation. Or, to put it in other words, should a mandatory agreement to arbitrate employment claims be treated like the limited warranty (or other limited or exclusive remedy) on a defective product which causes serious personal injury[121] or like a regulation of a strictly economic loss, or, say, the requirement to retake the LSAT based on reasonable suspicion of cheating?[122]

A number of unique factors relating to mandatory arbitration of employment claims will shape assessment of the setting, purpose and effect of the agreement. Employers and employees have a relationship of some duration, which usually involves some regular interaction. Employees want to keep their jobs or they want to decide for themselves whether or when to leave a job, and at work employees seek fair treatment, under statutes and in general. In the context of the employment relationship, as previously noted, arbitration agreements, which require final, out-of-court resolution of statutory and other employment claims may benefit individual employees and contribute to broader societal goals. The arbitration agreement may provide the employee the only real possibility of access to a forum and an opportunity to process the claim; the reinstatement remedy may be a more available and realistic remedy;

121. *Cf.* Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960).

122. *Cf.* K.D. v. Educ. Testing Serv., 386 N.Y.S.2d 747 (N.Y. Sup. Ct. 1976).

arbitral expertise and understanding of the workplace may produce more workable remedies, and finally, arbitration awards will exert a conduct regulating effect on the workplace and thus serve the goals of employment statutes. On the other hand, it is undeniable that a statutory right established to eliminate discrimination or to provide a significant new benefit transcends ordinary economic issues, e.g., a distribution of economic loss, and as such it is susceptible to the analogy of unconscionability in enforcement under U.C.C. § 2-719.

For now and for the foreseeable future, employers who implement or revise a mandatory arbitration plan will be well advised to ensure that employees are aware that they are agreeing to arbitrate statutory employment claims. Employees will not then be able to claim lack of knowledge or surprise as to the arbitration clause or its coverage.

When these mandatory agreements to arbitrate claims are conditioned on employment, courts should scrutinize the terms, bearing in mind the claims to be arbitrated and the status of the employee in question. For example, if an employee "knowingly" agrees as a condition of employment to an otherwise unobjectionable arbitration process, which meets the *Due Process Protocol* standards and allows for any remedy except punitive damages, enforcement of the remedies limitation should depend on the claims raised in arbitration. If the employee alleges violation of a federal anti-discrimination statute, which allows recovery of punitive damages, then the remedies limitation should fail on grounds of unconscionability. Again, by analogy to U.C.C. § 2-719, it would be too shocking and too unfair to enforce a contract term, which deprives an employee of full statutory rights. On the other hand, no similar concern exists as to non-statutory rights for which remedies may be limited.

With higher level employees, courts should take a hands-off approach and refuse to enforce only the most shocking, surprising or oppressive terms on the theory that a higher ranking employee had some bargaining power and some choice and likely traded-off the right to go to court for other terms. Courts should more carefully assess the terms of the arbitration agreement in the case of a lower-level employee with no real bargaining power and limited choices even as to other job opportunities. In either case, the court should ensure that the process is truly an arbitration process, that is, that it has the basic elements of an unbiased arbitrator, a fair arbitrator selection process, and a true opportunity to present and prove the employment claim.

Because evaluation of these claims of unconscionability will involve comparisons between judicial procedures and arbitration procedures, courts must guard against lapsing into the old judicial hostility to arbitration. Courts must also resist the urge to be overly protective, especially of lower level employees. Routine refusals to enforce these arbitration agreements, or adjustments to the arbitration process, such as, requiring the employer to pay

the arbitrator's fees or requiring a transcript of the proceedings[123] which add expense or make the process more cumbersome, may prompt employers to withdraw the mandatory arbitration schemes. And while this result might delight the critics of mandatory arbitration, again, it may rob lower level employees of their only real opportunity for a forum. If a reduction in the number of mandatory arbitration plans contributed to more crowded court dockets, the situation could be even more difficult for employees.

Concerns of critics who would advocate broader exercise of judicial power to police these bargains should be reduced by the prospect of sufficient judicial review. If judicial review of labor arbitration awards is predictive, courts will have no trouble in vacating and correcting awards where, in the court's view, justice has not been served.

At the same time, while the doctrine of unconscionability is advocated herein as a more appropriate method of dealing with the initial attack on the enforcement of arbitration clauses, it should be stressed that apart from limiting the analysis to truly shocking cases, courts should be limited to refusing enforcement only of objectionable elements of an arbitration clause if the objectionable elements are severable, rather than resorting to nullification of the entire clause.

In sum, mandatory arbitration of employment claims offers a focused (on the employment context) and multi-faceted opportunity for students of contracts to explore the doctrine of unconscionability and the process of arbitration.

123. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1483 n.11 (D.C. Cir. 1997) (suggesting the safeguard of a transcript in arbitration of statutory claims citing Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 791 (1990)).