In the Shadow of *Gilmer*: How Post-*Gilmer* Legal Challenges to Pre-Dispute Arbitration Agreements Point the Way Towards Greater Fairness in Employment Arbitration

LUCILLE M. PONTE*

I. INTRODUCTION

He closed the office door one last time. After about six years of hard work, he had lost his job as a financial services manager. At sixty-two, he hoped he would be able to find another good position in the securities industry. He wondered if he had been fired because of his age. He decided to fight back, to bring his claim to the Equal Employment Opportunity Commission (EEOC), and then to the federal courts. After more than four years of battling his employer, the United States Supreme Court denied him access to the courts because of an arbitration clause in his Securities and Exchange Commission (SEC) registration form. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court determined for the first time that parties may agree to resolve their statutory employment claims in arbitration.[1]

Although *Gilmer* signaled the Supreme Court's initial approval of employment arbitration for age discrimination claims, subsequent federal court decisions expanded *Gilmer* to embrace the arbitration of a wide range of statutory claims, including Title VII actions.[2] After *Gilmer* and these post-*Gilmer* federal decisions, some employers raced to insert pre-dispute

* Assistant Professor of Law, Bentley College.

[1] 500 U.S. 20, 23, 26 (1991).

[2] *See, e.g.*, Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516, 519 (11th Cir. 1994) (race discrimination); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698, 700 (11th Cir. 1992) (sexual harassment); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991) (gender discrimination); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229, 230 (5th Cir. 1991) (gender discrimination); Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091, 1099 (E.D. Mich. 1996) (age and gender discrimination); Maye v. Smith Barney, Inc., 897 F. Supp. 100, 109 (S.D.N.Y. 1995) (race discrimination and sexual harassment); Scher v. Equitable Life Assurance Soc'y, 866 F. Supp. 776, 778-779 (S.D.N.Y. 1994) (religion discrimination); Bleumer v. Parkway Ins. Co., 649 A.2d 913, 925-926 (N.J. Super. Ct. Law Div. 1994) (whistle-blower claim under Conscientious Employee Protection Act). *See also* Christopher S. Miller & Brian D. Poe, *Arbitrating Employment Claims: the State of the Law*, 46 LAB. L.J. 195, 195 (1995); Stuart L. Bass, *Recent Court Decisions Expand Role of Arbitration in Harassment and Other Title VII Claims*, 46 LAB. L.J. 38, 44 (1995); Rick Bales & Reagan Burch, *The Future of Employment Arbitration in the Nonunion Sector*, 45 LAB. L.J. 627, 627 (1994).

arbitration clauses into employee handbooks, offer letters, promotion awards, salary increases and other employment documents, hoping to avoid litigation costs and procedural and substantive statutory rights and remedies. Many employees have found themselves forced to sign pre-dispute arbitration agreements (PDAAs) in order to keep their jobs, to advance their careers or to obtain raises.[3] Concerned about the dangers of coercive arbitration agreements, legislative remedies were proposed, but those proposals stalled in Congress.[4]

Yet, the widespread judicial approval of employment arbitration and the stagnation of legislative proposals do not mean that there are no current limits on the utilization of PDAAs to resolve employment disputes. As with any other contract, arbitration agreements may be challenged on both legal and equitable grounds.[5] The focus of recent litigation[6] and administrative agency actions[7] has now shifted from challenging the arbitrability of

---

[3] *See* David A. Lipton, *Mandatory Arbitration: Where It Has Gone and Where It Has to Go*, NIDR F., Summer 1995, at 28-31; Frank Swoboda, *Employers Find a Tool to End Workers' Right to Sue: Arbitration*, WASHINGTON POST, Sept. 18, 1994, at H8.

[4] In 1994, Senator Russell Feingold proposed the Protection from Coercive Employment Agreements Act of 1994 (S. 2012), which would prohibit employers from requiring employees to agree to arbitration as a condition of employment or job advancement. The proposed act would also make it unlawful to discriminate against employees who refused to consent to arbitration. *See* Hope B. Eastman & David M. Rothenstein, *The Fate of Mandatory Employment Arbitration Amidst Growing Opposition: A Call for Common Ground*, 20 EMPLOYEE REL. L.J. 595, 601 (1995). In addition, several members of the House of Representatives proposed the Civil Rights Procedures Protection Act of 1994 (H.R. 4981), which would amend federal civil rights statutes to retain each statute's exclusive powers and procedures when an employment claim arises. *See id.* at 602. Under this Act, employees could only opt for arbitration after a dispute had developed. *See id.*

[5] Under the Federal Arbitration Act (FAA), arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1982). The FAA merely puts arbitration agreements on an equal footing with other contracts meaning they can be struck down on recognized legal or equitable grounds.

[6] *See infra* notes 21-59, 68-86, 91-102, 114-120, 122-126 and accompanying text.

[7] Both the EEOC and the National Labor Relations Board have raised objections to compulsory arbitration programs. *See* Richard C. Reuben, *Two Agencies Review Forced Arbitration*, A.B.A. J., Aug. 1995, at 26, 26. Paul Steven Miller, EEOC commissioner and co-chair of its ADR task force, stated:

> We are very much supportive of fair and credible voluntary programs for resolving workplace disputes. However, we continue to be opposed to mandatory programs that make agreement to binding arbitration of employment discrimination claims a precondition for getting or keeping a job, or that attempt to preclude an individual's right to have the EEOC process [his or her] charge.

statutory claims to invalidating arbitration agreements based on common law contractual and public policy grounds.[8] Recent cases have looked at issues of fundamental fairness in the employee's waiver of the judicial forum or in the handling of the actual arbitration process.[9] Specifically, courts have addressed: (1) whether parties knowingly and voluntarily waived their right to go to court[10] and (2) whether the arbitration process

---

Id. See also infra notes 60–67, 89–90 and accompanying text.

In addition, President Clinton in 1993 convened a ten-member Commission on the Future of Worker-Management Relations, headed by Former Secretary of Labor John T. Dunlop (Dunlop Commission). *See* Eastman & Rothenstein, *supra* note 4, at 603; Kevin P. McGowan, *Dunlop Commission: Panel Strongly Endorses Use of ADR, But Opposes Mandatory Arbitration*, Daily Lab. Rep. (BNA) No. 6, at d4 (Jan. 10, 1995). The Dunlop Commission heard several hours of testimony on the use of ADR in the workplace. *See* Eastman & Rothenstein, *supra* note 4, at 595. Released in January 1995, the Commission's report strongly favored the utilization of ADR but also rejected the establishment of mandatory arbitration programs as a condition of employment. *See* McGowan, *supra*, at d4.

In support of these administrative agencies, the National Employment Lawyers Association (NELA) recently threatened to boycott arbitral organizations, such as the American Arbitration Association (AAA) and JAMS/Endispute, that administer employment cases based on mandatory arbitration clauses. The NELA has been a strong opponent of such clauses which the organization believes are unfair and violate statutory objectives. *See* Domenic Bencivenga, *Fair Play in the ADR Arena*, HR MAGAZINE, Jan. 1996, at 54; William K. Slate II, *Out-of-Court Resolution of Employment Disputes*, N.Y.L.J., Jan. 11, 1996, at 3. In response to the proposed boycott, JAMS/Endispute restated its policy of not administering arbitrations that limit employee rights or remedies. *See* Bencivenga, *supra*, at 54. The AAA reiterated its view that it will turn down cases based on dispute resolution programs that are unconscionable or violate minimum due process requirements. *See id.*; Slate, *supra*, at 3.

The NELA recently called off its boycott against JAMS/Endispute when that ADR provider announced a new policy that establishes minimum standards of procedural fairness, including reasonable discovery, attorney representation and full judicial remedies. *See* Julie Gannon Shoop, *ADR Provider Averts Employment Lawyers' Boycott*, TRIAL, Apr. 1996, at 73.

[8] *See infra* notes 21–126 and accompanying text.

[9] *See* Jorge Aquino, *Shifting Sands of Arbitration Arena; Courts Have Begun Limiting How Far Employers Can Go in Forcing Workers to Abide by Mandatory ADR Provisions*, RECORDER, March 24, 1995, at 1; Jay W. Waks & John Roberti, *Challenges for Employment Alternative Dispute Resolution*, N.Y.L.J., Aug. 7, 1995, at S4.

[10] *See infra* notes 12–73 and accompanying text. As to the waiver issue, it is important to note that parties who voluntarily initiate an arbitration proceeding may not later try to deny the arbitrator's authority. *See* Nghiem v. NEC Elec., Inc., 25 F.3d 1437, 1440 (9th Cir. 1994) (holding that employee who voluntarily initiated corporate arbitration process was bound by arbitrator's determination). In contrast, a party that participates in litigation and fails

fairly protects procedural and substantive rights and remedies.[11] In addition, because the Supreme Court placed statutory employment disputes on the same footing as other commercial disputes in the arbitration context, it is useful to consider nonemployment cases in which courts have similarly refused to enforce commercial arbitration clauses to help further illustrate these new waves of litigation.

This Article will discuss both employment and nonemployment commercial cases in which courts have struck down or modified PDAAs on these grounds. These decisions provide some early indications of reasonable limits on the utilization of PDAAs. The lessons learned from these cases provide a foundation for making several important recommendations for improving employment pre-dispute arbitration clauses and promoting greater fairness in employment arbitration.

II. CIRCUMSTANCES OF WAIVER OF JUDICIAL FORUM

Courts and administrative agencies have reviewed the factual circumstances of the waiver of the judicial forum to determine whether the parties, and in particular the weaker party, intended to give up access to the courts or the benefits of other statutory rights or remedies. Using common contract parlance, the courts have looked at whether there was truly a "meeting of the minds" when the agreement was reached or whether circumstances such as fraud, coercion, ambiguity or unconscionability prevented a knowing, voluntary waiver.

The legal threads of the waiver issue can first be found in the *Gilmer* decision and are later discussed in *Mastrobuono v. Shearson Lehman Hutton, Inc.*[12] In interpreting the enforceability of pre-dispute arbitration

---

to promptly request arbitration may waive its right to arbitrate a dispute. *See* Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995) (holding that even though plaintiff was not prejudiced, defendant waived arbitration by nine-month participation in litigation); EZ Pawn Corp. v. Gonzalez, 921 S.W.2d 320, 324 (Tex. Ct. App. 1996) (holding that employer waived arbitration through its knowing failure to reveal arbitration agreement for two years).

[11] *See infra* notes 87–126 and accompanying text.

[12] 115 S. Ct. 1212 (1995). This case involved two investors who were awarded $400,000 in punitive damages against a securities dealer. *See id.* at 1215. The investors did not challenge the use of arbitration. Rather, they challenged lower court decisions that interpreted the terms of the arbitration agreement as preventing the arbitral panel from awarding punitive damages. *See id.* The dealer's standard investor agreement indicated that the arbitration would be in accordance with the NASD rules that allow arbitrators to award punitive damages. *See id.* at 1217. However, the agreement also included a choice-of-law provision that selected the laws of the State of New York. *See id.* at 1216–1217. Under New

agreements, the *Gilmer* and *Mastrobuono* decisions both considered the background of the party challenging the interpretation of arbitration agreements as well as the factual circumstances of the waiver.

In *Gilmer*, the Court pointed out that Gilmer was "an experienced businessman"[13] who had not been "coerced or defrauded into agreeing to the arbitration clause."[14] Rejecting Gilmer's claims about unequal bargaining power, the Court viewed Gilmer's waiver as knowing and voluntary, because he was a savvy broker who knew what he was sacrificing by signing the form which included an arbitration clause.[15]

However, in *Mastrobuono*, the Court pointed out that the claimants, Antonio and Diana Mastrobuono, were an assistant professor of medieval literature and an artist, respectively.[16] Unlike Gilmer, neither of them was considered an expert in investment transactions. In addition, the document they signed was ambiguous as to the issue of the availability of punitive damages.[17] Considering their business naivete and the lack of clarity in the document, the Court concluded that the Mastrobuonos, unlike Gilmer, did not fully understand what substantive rights they were waiving and allowed them to collect punitive damages in derogation of New York state law.

> As a practical matter, it seems unlikely that petitioners were actually aware of New York's bifurcated approach to punitive damages, or that they had any idea that by signing a standard form agreement to arbitrate disputes they might be giving up an important substantive right. In the face of such doubt, we are unwilling to impute this intent to petitioners.[18]

As to party intent and understanding of what rights are being surrendered, these cases suggest that the clarity of the provision as well as the level of one's business acumen can be factored into whether or not there was a "meeting of the minds." In interpreting arbitration agreements, ambiguous provisions will be interpreted against the drafter, and those not

---

York case law, arbitrators do not have the authority to award punitive damages. *See id.* at 1214. The Court ruled in favor of the investors. *See id.* at 1219.

[13] *See Gilmer*, 500 U.S. at 33.

[14] *See id.*

[15] *See id.* The *Gilmer* Court acknowledged that concerns about unequal bargaining power should be determined on a case-by-case basis. *See id.*

[16] *See Mastrobuono*, 115 S. Ct. at 1214.

[17] *See id.* at 1219. The Court applied the common law rule of contract interpretation that holds that ambiguous language should be interpreted against the interest of the drafter. *See id.* at 1219 n.10.

[18] *Id.* at 1219.

well-versed in business dealings may be treated differently than experienced, knowledgeable business people. These factors illustrate a continuing judicial willingness to protect weaker parties from stronger ones that might try to use coercion, fraud, ambiguity or other unfair means to secure arbitration agreements or, at least, more favorable terms under such agreements. Also, since these cases put statutory employment disputes on the same footing with other commercial disputes in the context of arbitration, it is useful to consider nonemployment cases that have refused to enforce commercial arbitration clauses for similar reasons.

A. *Ambiguity in Arbitration Provisions*

Since *Gilmer* and *Mastrobuono*, other lower federal courts have determined that ambiguous language will provide a basis for invalidating an arbitration clause in employment cases. However, striking down arbitration agreements based on ambiguity is not limited to statutory employment claims. Since *Gilmer* allowed courts to review PDAAs in a light similar to other nonemployment commercial clauses, it is important to note that issues of ambiguity are also being utilized to reject the enforcement of arbitration clauses in such cases.[19] What amounts to ambiguity in a provision is not clear-cut, with courts reviewing similar clauses arriving at opposite outcomes.[20] In some instances, courts interpret ambiguity as involving a lack of clarity in an arbitration provision about the use of arbitration or the lack of specificity about the nature of the claims covered under that process. In other cases, ambiguity may be drawn from a patchwork of provisions that are confusing or inconsistent about the utilization of arbitration. Ultimately, the Supreme Court will need to more explicitly address the concept and parameters of ambiguity in such disputes.

Initially, in *Farrand v. Lutheran Brotherhood*,[21] the Seventh Circuit found ambiguity when it determined that the NASD rules failed to clearly

---

[19] As in *Mastrobuono*, the lack of clarity in the arbitration provision is interpreted against the interests of the drafter. *See infra* notes 21-43 and accompanying text. *But see* Austin v. Owens-Brockway Glass Container, 844 F. Supp. 1103, 1106 (W.D. Va. 1994) (dismissing ADA lawsuit because collective bargaining agreement clearly specified use of internal grievance procedure for ADA claims); Mittendorf v. Stone Lumber, 874 F. Supp. 292, 295 (D. Ore. 1994) (holding that arbitration clauses were clearly set out in contract in which there was no showing of unequal bargaining power); Bleumer v. Parkway Ins. Co., 649 A.2d 913, 923 (N.J. Super. Ct. Law Div. 1994) (holding that detailed, extensive termination provisions, including arbitration clause, compel use of arbitration under whistle-blower statute).

[20] *See infra* notes 21-43 and accompanying text.

[21] 993 F.2d 1253 (7th Cir. 1993).

specify that employment disputes were covered under the arbitration provisions of the U-4 form.[22] Rejecting affidavits and other NASD internal documents, the court refused to compel arbitration because of the ambiguity in the NASD code regarding the nature of the disputes subject to arbitration.[23] The court recommended that to avoid confusion the NASD should amend its code language to explicitly address the issue of employment disputes.[24] Therefore, the court refused to enforce the arbitration provision due to a lack of specificity about the type of claims covered under the arbitration provision.

Even in instances in which both parties are businesses negotiating on an equal footing, arbitration clauses may also be struck down because the disputes covered are not clearly identified. For example, the Ninth Circuit held that a claim for the misappropriation of trade secrets was not arbitrable due to ambiguity in an arbitration provision. In *Tracer Research Corp. v. National Environmental Services Co.(NESCO)*,[25] the parties had entered into a licensing agreement, which contained an arbitration clause, for the use of Tracer's tank and pipeline leak detection process.[26] After termination of the licensing agreement, Tracer contended that NESCO continued to use

---

[22] *See id.* at 1255. In reviewing sections 1 and 8 of the NASD rules, the court wrote that "[o]ur opinion holds that the rules of the National Association of Securities Dealers do not provide for arbitration of employment disputes. Although we acknowledged that the language of the NASD's rules could be stretched to cover such disputes, we conclude that this was not the most natural reading." *Id. But see* Kidd v. Equitable Life Assurance Soc'y, 32 F.3d 516, 519 (11th Cir. 1994).

[23] *See id.* at 1255-1256. The court stated that "[n]othing in any of the materials defendants have submitted to us explains how the existing language reasonably can be interpreted to require arbitration of employment disputes." *Id.* at 1257.

[24] *See id.* at 1256. After *Farrand*, the NASD revised its code provisions in 1993 with the approval of the SEC to specifically address employment disputes. *See* 58 Fed. Reg. 45,932 (1993); *see also* DAVID S. RUDER ET AL., SECURITIES ARBITRATION REFORM, REPORT OF THE ARBITRATION POLICY TASK FORCE TO THE BOARD OF GOVERNORS OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS 113-115 (Jan. 1996) [hereinafter RUDER REPORT]. Revised Section 1 states that the NASD code applies to "the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of the Association, or arising out of the employment or termination of employment of associated person(s) with any member." NATIONAL ASSOCIATION OF SECURITIES DEALERS CODE OF ARBITRATION PROCEDURE § 1 (1993). Amended Section 8 also requires arbitration for "any dispute, claim or controversy ... arising out of the employment or termination of employment of such associated person(s) with such member." *Id.* § 8. *See* RUDER REPORT, *supra*, at 113 n.146.

[25] 42 F.3d 1292 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 37 (1995).

[26] *See id.* at 1293.

their confidential information and trade secrets to market an alternative product.[27] An arbitral panel dismissed Tracer's claims for misappropriation of trade secrets and Tracer sought to compel arbitration of those charges.[28]

The court reiterated that it would not require parties to arbitrate disputes unless they had explicitly agreed to do so.[29] In reviewing the language of the clause, the court found that the clause only applied clearly to contract claims. Therefore, the court refused to mandate arbitration of the tort claim of misappropriation of trade secrets.[30]

As in *Gilmer* and *Mastrobuono*, the issue of ambiguity can also be linked with the level of business experience of a weaker party to determine the validity of an arbitration agreement. The Ninth Circuit's decision in *Prudential Insurance Co. v. Lai*[31] rejected an arbitration clause based on a combination of ambiguity in the arbitration clause and a lack of business acumen in the weaker party in the dispute. The case involved two women who applied for and had been hired for positions as sales representatives with Prudential in 1989. In 1990, the women sued Prudential and their immediate supervisor in state court for rape, sexual harassment and sexual abuse. Prudential went to federal court to compel arbitration because the women had signed the U-4 form.[32]

The women were recent immigrants to the United States with limited language skills when they applied.[33] Unlike Gilmer, who was an investment manager, they were applying for entry-level positions as sales

---

[27] *See id.* at 1293–1294. Tracer initially succeeded in obtaining a preliminary injunction against NESCO on its trademark, trade secrets and contract claims. *See id.* at 1294.

[28] *See id.* at 1294. The arbitral panel permanently enjoined NESCO from using Tracer's trademark and found that NESCO had breached the licensing agreement through its use of Tracer's confidential information. Once the panel handed down its decision, NESCO sought to dissolve the preliminary injunction that the district court granted. *See id.* Tracer appealed that decision. *See id.*

[29] *See id.* at 1294.

[30] The court determined that the clause referring to claims "arising out of this Agreement" limited Tracer's claims to contractual issues only. *See id.* at 1294.

[31] 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995). *But see* Hall v. MetLife Resources, Fed. Sec. L. Rep. (CCH) ¶ 98,742 (S.D.N.Y. 1995) (rejecting *Prudential* and holding that one who signs a contract is expected to be aware of its terms and conditions).

[32] *See Prudential*, 42 F.3d at 1301. The U-4 form the women had signed referred to the NASD Code provisions prior to the 1993 amendments. *See supra* note 24 and accompanying text.

[33] *See id.* at 1301. *See also* Jorge Aquino, *Ninth Circuit Limits Arbitration of Disputes in the Workplace*, RECORDER, Dec. 21, 1994, at 1. The women had lived in the United States for less than two years when they were hired by Prudential. *See id.*

representatives and were not experienced business people.[34] Based on their inexperience in the securities industry, the women claimed that they were advised that the form was merely an application to take a test and were told to sign the documents without being given an opportunity to read them. In addition, no mention was ever made about arbitration nor were the women given a copy of the NASD manual containing the terms of arbitration.[35]

Relying on congressional intent regarding Title VII, the court restated the view that the parties must make a knowing and voluntary waiver of their rights to pursue judicial relief for statutory discrimination claims.[36] Initially, the court held that the language in the U-4 form failed to identify explicitly the types of disputes covered under arbitration, employment or otherwise.[37]

To determine the actual disputes involved, the parties would have to consult the NASD manual, which they were not given. Citing *Farrand*, the court added that even if the women had been given the NASD manual, that document was also too vague and did not specify that statutory employment

---

[34] *See Prudential*, 42 F.3d at 1301, 1305. The court notes that Gilmer, as an "experienced businessman," had knowingly agreed to submit his dispute to arbitration. *See id.* at 1305.

[35] *See id.* at 1301, 1303.

[36] *See id.* at 1304–1305. The court considered the House Report on the Civil Rights Act of 1991 which sought to increase plaintiff options to seek relief by encouraging, but not mandating, the use of ADR. *See id.* (citing H.R. Rep. No. 40(I), 102nd Cong., *reprinted in* 1991 U.S.C.C.A.N. 549, 635). The court also quoted former Senate Majority Leader Robert Dole, who stated that arbitration under Title VII was only appropriate "where the parties knowingly and voluntarily elect to use these methods." *Id.* at 1305 (citing 137 CONG. REC. S15472, S15478 (daily ed. Oct. 30, 1991) (statement of Sen. Dole)).

[37] *See id.* at 1305.

> In this case, even assuming that the appellants were aware of the nature of the U-4 form, they could not have understood that in signing it, they were agreeing to arbitrate sexual discrimination suits. The U-4 form did not purport to describe the types of disputes that were to be subject to arbitration.

Id.

The NASD has recognized this problem also. In order to eliminate any ambiguity as to the arbitrability of statutory civil rights claims, the Ruder Report recommended that the U-4 form be revised to specifically state that employment disputes, including those involving statutory civil rights claims, are subject to arbitration, and that Section 8 be further amended to explicitly mention the arbitrability of such statutory claims. *See* RUDER REPORT, *supra* note 24, at 120.

claims were arbitrable.[38] Because of the ambiguity in the provisions, the maze-like quality of the agreement and the women's lack of business experience, the court concluded that the women could not have been expected to understand that they were agreeing to arbitrate their Title VII claims. The court would not compel arbitration of the dispute because the women had not knowingly waived their rights.[39] The issues of ambiguity in the arbitration agreement, linked to the lack of business experience of the weaker party, provided the basis for the court to reject the PDAA.

Similar to *Farrand* and *Prudential*, ambiguity again arose due to a maze-like approach to an arbitration agreement in *Segall v. Tenet Healthcare Corp.*[40] In that case, there was conflicting language between an employee handbook and a separate arbitration agreement. A fired employee sought to bring an action for wrongful discharge under the provisions of the Americans with Disabilities Act (ADA). The company sought to compel arbitration pointing to the company's arbitration policy (spelled out on a separate sheet of paper) that referred employees to an arbitration process contained in the employee handbook. However, the employee handbook contained a detailed disclaimer that stated that the handbook was not a binding contract and could not be modified without the written agreement of a company executive director or senior officer.[41] The court determined that

---

[38] *See Prudential*, 42 F.3d at 1305. "Moreover, even if appellants had signed a contract containing the NASD arbitration clause, it would not put them on notice that they were bound to arbitrate Title VII claims. That provision does not even refer to employment disputes." *Id.* In his concurring opinion, Judge Norris indicated that the court need not have expressed its view on congressional intent about waivers or the circumstances of the waiver in this case. He believed that a reliance on *Farrand* alone provided an adequate basis for refusing to compel arbitration. *See id.* at 1305–1306 (Norris, J., concurring).

[39] *See id.* at 1305. However, several district courts have rejected *Prudential* and its emphasis on a knowing and voluntary waiver, asserting that *Prudential* contradicts *Gilmer* and its view of congressional intent. These district courts have emphasized that a party that signs a contract is presumed to know and assent to its content in the absence of fraud or other wrongful conduct. *But see* DeGaetano v. Smith Barney, Inc., 70 Fair Empl. Prac. Cas. (BNA) 401, 404 (S.D.N.Y. 1996); Beauchamp v. Great West Life Assurance Co., 918 F. Supp. 1091, 1098–1099 (E.D. Mich. 1996); Maye v. Smith Barney, Inc., 897 F. Supp. 100, 107 (S.D.N.Y. 1995).

[40] No. 95-1317 (S.D. Fla. Nov. 29, 1995). *See also Are Non-Competes, Arbitration Pacts, Etc. Invalid If They're in an 'Employee Handbook'?*, LAW. WKLY. USA, June 17, 1996, at 10 [hereinafter *Invalid Employee Handbook Arbitration Pacts*].

[41] A disclaimer in the front of the employee manual stated that the handbook was "not intended to constitute a legal contract with any employee or group of employees because that can only occur with a written agreement executed by a facility executive director and [a] senior executive officer [of the company]." *Invalid Employee Handbook Arbitration Pacts*,

"[s]ince by its own terms, the handbook is not a binding agreement, defendants cannot rely upon its provisions to compel arbitration."[42] Here, the ambiguity arose due to inconsistency between the terms of a company arbitration policy and the language in the employee handbook. Due to the inconsistency of the provisions and the language of the disclaimer, the employee was allowed to bring his ADA action in the courts.[43]

Outside the employment sphere, *Broemmer v. Abortion Services of Phoenix, Ltd.*,[44] ties together the issues of ambiguity in the PDAA and the lack of experience of a weaker party to strike down an arbitration agreement, as in *Prudential.* In *Broemmer*, the Supreme Court of Arizona considered a medical malpractice claim resulting from an abortion.[45] In overturning the lower courts, the court determined that the agreement was unconscionable based upon the circumstances surrounding the waiver process, including ambiguity in the arbitration agreement and the plaintiff's personal circumstances.[46]

---

supra note 40, at 10. A second version of the disclaimer was included at the end of the manual above the employee's signature stating that "[n]o written agreement concerning employment terms or conditions is valid unless signed by a facility executive director, and [a] senior officer [of the company], and no written statement or agreement in this handbook concerning employment is binding since provisions are subject to change." *Id.*

[42] *Id.* Similarly, in *Heurtebise v. Reliable Business Computers, Inc.*, 550 N.W.2d 243 (Mich. 1996), the Supreme Court of Michigan refused to enforce an arbitration clause, in part, because of disclaimer language in an employee handbook. *See id.* at 247. Unlike the arbitration clause in *Segall*, the arbitration clause in *Heurtebise* was contained in the handbook with clear contract disclaimers, and there was no conflict between an independent policy and the terms of the handbook. *See id.* The court determined that since no contract existed under the handbook, the clause was not enforceable. *See id.* A minority of the court went on further to decide that state discrimination claims as a matter of public policy may not be the subject of a PDAA as a condition of employment. *See id.* at 256. They determined that such PDAAs contravene public policy, elaborating on the state's long history of defending civil rights through the judicial forum. *See id.* at 250–256. *See also* Lambdin v. Dist. Court of Arapahoe County, 903 P. 2d 1126, 1129 (Colo. 1995) (striking down PDAA as violative of express language of state's Wage Claim Act).

[43] *See Invalid Employee Handbook Arbitration Pacts*, *supra* note 40, at 10.

[44] 840 P.2d 1013 (Ariz. 1992).

[45] Broemmer suffered a punctured uterus during the abortion that required follow-up medical treatment. She filed a medical malpractice suit against the clinic doctor and the clinic sought to compel arbitration. *See id.* at 1015.

[46] *See id.* at 1014, 1017. The defendants sought to dismiss the plaintiff's action, asserting a lack of subject matter jurisdiction due to the arbitration clause. The trial court granted summary judgment to the defendants. At the time of the trial court's action, plaintiff's affidavits were the only evidence provided to the court. On appeal, the court of appeals held

In this case, Melinda Broemmer was an unmarried twenty-one year old who was sixteen or seventeen weeks pregnant. Broemmer was a high school graduate earning only about one hundred dollars a week with no medical benefits. The court stated that she was experiencing a great deal of physical and emotional turmoil, with the father-to-be pressuring her to obtain an abortion and her parents advising against the procedure.[47]

Ultimately, she sought the abortion and was required to first complete three forms, one of which was a separate PDAA. The PDAA was never explained to her nor was the arbitration clause pointed out to Broemmer. The clinic never provided her with any copies of the documents. Broemmer alleged that she never recalled signing the arbitration agreement and still remains unsure about what arbitration means.[48]

The court determined that the PDAA was a contract of adhesion because Broemmer was provided the document on a "take it or leave it" basis as a condition of treatment. Broemmer was not allowed to negotiate the terms of the agreement nor did clinic staff indicate that she had the option to refuse to sign the document.[49] However, the court indicated that such contracts are enforceable if the provisions fall within the reasonable expectations of the weaker party or the terms are not unduly oppressive or unconscionable.[50] The court added that it favored the use of PDAAs, but only when such agreements had been freely and fairly entered into by the parties.[51]

---

that the PDAA was a contract of adhesion, but was enforceable since its terms were within the plaintiff's reasonable expectations and, therefore, were not unconscionable. *See id.* at 1015.

[47] *See id.* at 1014.

[48] *See id.* at 1014, 1017. In his dissent, Justice Martone argued for the enforcement of the PDAA, noting that Broemmer was an adult and that the PDAA was a separate form which, in bold-faced, capitalized type, stated: "PLEASE READ THIS CONTRACT CAREFULLY AS IT EFFECTS [sic] YOUR LEGAL RIGHTS." Below this statement it read "AGREEMENT TO ARBITRATE." *Id.* at 1018 (Martone, J., dissenting).

[49] *See id.* at 1016. The clause required the American Arbitration Association to administer the arbitration and the arbitrator to be a licensed doctor of obstetrics/gynecology. The court considered this limit as favoring the clinic over the plaintiff. *See id.*

[50] *See id.* at 1016.

[51] *See id.* at 1017–1018. The court refused to make any generalized statement against PDAAs, preferring to limit its review to a case-by-case approach. *See id.* at 1018. The court noted:

> [W]e restate our firm conviction that arbitration and other methods of alternative dispute resolution play important and desirable roles in our system of dispute resolution. We encourage their use. When agreements are freely and fairly entered, they will be welcomed and enforced. They will not, however, be exempted from the usual rules of

In reviewing the PDAA, the court also determined that the clause was ambiguous because there was no explicit language indicating that medical malpractice claims were subject to arbitration or that Broemmer was waiving her right to a jury trial for such claims. Considering her emotional stress, her lack of commercial experience and the ambiguity of the provision, the court determined that the clause was outside the plaintiff's reasonable expectations. The court struck down the clause and permitted Broemmer to bring her medical malpractice claim in the courts.[52] As in *Gilmer*, *Farrand* and *Prudential*, the court refused to compel arbitration because the provision failed to specify the nature of claims covered under arbitration. In addition, as in *Gilmer* and *Prudential*, the *Broemmer* court considered the factual circumstances of the waiver, including the lack of understanding and bargaining power of the weaker party, in rejecting the arbitration provision.

Based on these cases, PDAAs need to clearly identify the claims being covered under the arbitration clause. In addition, the courts will offer protection to weaker parties who lack the business expertise to understand the rights they are waiving under a PDAA.

B. *Fraud, Deceit and Other Coercive Conduct in the Waiver Process*

Although there are some disagreements on the issue of ambiguity, the United States Supreme Court[53] and most lower courts[54] clearly agree that fraud, duress and other coercive conduct will invalidate an arbitration clause. Fraud, duress and coercive conduct prevent a party from making a truly knowing and voluntary waiver of their rights to a judicial forum. Again, courts will evaluate the factual circumstances of the waiver in determining whether to enforce an arbitration provision. Several challenges to employment arbitration clauses have been successful on these grounds. In addition, as with cases involving ambiguity, issues of coercive conduct have also led courts to invalidate arbitration clauses found in nonemployment arbitration cases. In these nonemployment cases, the court also considered

---

> contract law . . . . Our enthusiasm for arbitration in general does not permit us to ignore the realities present in this case.

Id.

[52] *See id.* at 1017–1018. The court noted that since the terms were not within the plaintiff's reasonable expectations, there was no need to reach the issue of unconscionability. *See id.* at 1017.

[53] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985); *Gilmer*, 500 U.S. at 24, 33; *Mastrobuono*, 115 S. Ct. at 1216.

[54] *See supra* notes 19, 46–52 and accompanying text; *infra* notes 55–86 and accompanying text.

the business sophistication of the weaker parties as in the ambiguity cases discussed above.

In *EZ Pawn Corp. v. Gonzalez*,[55] a Texas appeals court considered whether a discharged employee would be required to utilize arbitration for claims of negligent hiring and disability discrimination.[56] In that case, company supervisors told Gonzalez, a store manager, that he must sign a particular document to start the process for receiving stock options and to retain his employment.[57] In reviewing testimony in the dispute, the appeals court agreed with the trial court that the managers had fraudulently represented the document that was not necessary for the receipt of stock options. The appeals court supported the trial court's view that the main purpose of the agreement was to induce fraudulently Gonzalez and other store managers to submit employment disputes to arbitration.[58] The appeals court affirmed the trial court's refusal to compel arbitration under the employment arbitration agreement.[59]

In *EEOC v. River Oaks Imaging and Diagnostic (ROID)*, an administrative action, the EEOC recently secured an injunction against a company whose ADR policy was misleading, retaliatory and inconsistent with the principles of Title VII.[60] The EEOC had asserted that ROID had instituted a coercive ADR policy after twenty-one employees filed sexual harassment and retaliation complaints with the EEOC.[61] Six females who had filed sexual harassment charges against a company manager were fired or forced to resign. Soon thereafter more workers filed retaliation claims with the EEOC based on the situation. To respond to the mounting

---

[55] 921 S.W.2d 320 (Tex. Ct. App. 1996). The appeals court upheld a trial court's denial of an employer's motion to compel arbitration based on fraud and the employer's intentional delay in seeking arbitration. *See id.* at 324-325.

[56] *See id.* at 321.

[57] *See id.* at 322, 324-325.

[58] *See id.* at 324-325.

[59] *See id.*

[60] 67 Fair Empl. Prac. Cas. (BNA) 1243 (S.D. Tex. 1995). ROID is one of the largest medical X-ray companies in Houston, with about 150 workers. *See EEOC Agrees with Houston Medical Form on Permanent Halt to Mandatory ADR Plan*, Daily Lab. Rep. (BNA) No. 127, at d6 (July 3, 1995) [hereinafter *EEOC Halts Mandatory ADR Plan*].

[61] *See River Oaks*, 67 Fair Empl. Prac. Cas. at 1243; *EEOC Halts Mandatory ADR Plan*, *supra* note 60, at d6. *See also* Waks & Roberti, *supra* note 9, at S4; Bencivenga, *supra* note 7, at 53. Aside from deterring EEOC complaints, the policy also required employees alone to pay for the costs of any ADR proceedings. *See River Oaks*, 67 Fair Empl. Prac. Cas. at 1243-1244.

complaints, ROID then moved to force employees to sign arbitration agreements in order to keep their jobs.[62]

The court agreed with the EEOC and enjoined ROID from requiring any present or future employees to agree to the retaliatory policy or attempting reprisals against those who filed complaints with the EEOC or opposed the policy.[63] In addition, ROID is prevented from making damaging disclosures about discharged employees who filed discrimination complaints.[64]

Similarly, the NLRB authorized the filing of an unfair labor practice against Bentley's Luggage Corporation for firing an employee who refused to agree to a mandatory employment arbitration policy.[65] The fired employee, Bob Letwin, had filed a complaint with the NLRB asserting that the compulsory ADR policy violated his right to NLRB protection for any employee efforts to unionize and to undertake other collective actions.[66] Letwin's firing was clearly in retaliation for his efforts to protect his statutory rights to access the courts. After reviewing Letwin's complaint, the NLRB indicated that the company's mandatory arbitration policy violated the National Labor Relations Act and is seeking to rescind the

---

[62] *See EEOC Halts Mandatory ADR Plan, supra* note 60, at d6.

[63] *See River Oaks*, 67 Fair Empl. Prac. Cas. at 1243–1244. The court did not decide whether employees discharged for retaliatory reasons should be immediately reinstated, leaving those issues open for future proceedings. *See id.* at 1244. Ultimately, ROID entered into a consent decree with the EEOC that finalized the court's preliminary injunction into a permanent order. *See EEOC Halts Mandatory ADR Plan, supra* note 60, at d6.

[64] In handling job references, the court limited ROID's disclosure about discharged employees to providing dates of employment, job descriptions and compensation. *See River Oaks*, 67 Fair Empl. Prac. Cas. at 1244.

[65] *See* Bentley's Luggage Corp., NLRB Case No. 12-CA-16658 (Advice Memorandum issued Aug. 21, 1995). *See also* Slate, *supra* note 7, at 3; Catherine Wilson, *NLRB Contesting Employer Insistence on Mandatory Arbitration Policies*, DAILY RECORD, Sept. 6, 1995, at 12. The arbitration clause stated: "By remaining a Bentley employee, you agree that, before filing any legal action regarding your employment or the termination of your employment, the dispute will be submitted to binding arbitration before a neutral third party pursuant to the procedures of the American Arbitration Association." *Id. See also* Skoler et al., *Recent Developments in Labor Law*, MASS. EMPLOYMENT L. LETTER, Jan. 1996. The NLRB is also reviewing a second case in which another employer fired a worker who refused to sign an arbitration agreement. *See* Great Western Financial Corp., NLRB Case No. 12-CA-166886 (Advice Memorandum issued Aug. 15, 1996); Slate, *supra* note 7.

[66] *See* Wilson, *supra* note 65, at 12; Susan Barciela, *Fired Worker Challenges Mandatory Arbitration*, MIAMI HERALD, Oct. 24, 1995, at 1C. Letwin said, "When I first read the policy, I could hardly believe what I was reading, and then I reread it and was firmly convinced that it was a company plot to take away all of the rights that an employee has." *Id.*

policy.[67] Clearly, waivers of a judicial forum that reflect an employer's fraudulent, misleading or retaliatory conduct are not valid, and arbitration will not be compelled under these circumstances.

Further, in nonemployment commercial disputes, courts review fraudulent or coercive conduct in the context of the business expertise of the weaker parties. A California appeals court, in *Bell v. Congress Mortgage Co.*,[68] reviewed the circumstances of the inclusion of an arbitration clause buried in mortgage refinancing documents.[69] A group of borrowers claimed that the mortgage company's conduct illustrated a pattern and practice of unfair, unlawful and fraudulent business practices.[70] Initially, the court determined that the documents, which included the arbitration clause, formed a contract of adhesion. However, the court noted that such contracts are not always unenforceable. Like *Broemmer*, the *Bell* decision indicated that such contracts are enforceable if the disputed contract provision falls within the "reasonable expectations" of the weaker party, is consistent with general contract principles of equity and therefore is not "unfairly oppressive or unconscionable."[71] In determining the enforceability of the arbitration clause, the court considered the relative bargaining strengths of the parties, the facts surrounding the contract negotiations and execution and the placement and conspicuousness of the arbitration provision.[72]

As in *Gilmer*, *Mastrobuono* and *Prudential*, the court considered the business sophistication of the consumers in the waiver process. The court found that the borrowers were primarily "elderly, unsophisticated and financially distressed individuals who relied upon the good graces of skilled sales persons from a substantial corporate lender."[73] Unlike the brokerage manager in *Gilmer*, the borrowers in *Bell* and the sales applicants in

---

[67] *See id.* at 1C, 3C; Skoler et al., *supra* note 65.

[68] 30 Cal. Rptr. 2d 205 (Cal. Ct. App. 1994). The California Supreme Court rejected a request to rehear the case brought by appellant, Congress Mortgage Company. *See* 1994 Cal. LEXIS 4258 (Calif. July 28, 1994). The court also ordered without explanation that the opinion not be published in the official reporter. *See id.* Although the decision will not be officially published, it raises important issues of fraudulent or coercive conduct regarding commercial arbitration provisions. In addition, even though the case is not in an official reporter, it may be found in electronic databases by its official cite.

[69] *See id.* at 207. The court wrote that the clause was not highlighted and was placed within a larger packet of real estate documents. *See id.* at 208.

[70] *See id.* at 207–209. The borrowers were unable to pay the refinanced loans and had lost their homes to foreclosure or were under threat of foreclosure. *See id.*

[71] *Id.* at 208–209.

[72] *See id.* at 209–210.

[73] *Id.* at 209. *See also infra* notes 114–120 and accompanying text.

Prudential were not experienced business people. In addition, the weaker parties were not represented by counsel at the signing of the documents.[74]

The court also evaluated the placement of the provision and the circumstances of the waiver to decide enforceability.

> We look, therefore, to the volume of the documents, ... the existence of a check off or other method of highlighting the provision, the verbal instructions provided, and the nature of any rights surrendered. Here, the compelled arbitration clause was placed in a paragraph in the middle of one of the documents. It was in no way highlighted or otherwise set apart. More importantly, it was contained in a document whose every other significant provision was a recitation of rights guaranteed the borrower. In that context, the potential for misapprehension is substantial.[75]

Furthermore, the court stated that the parties did not have a chance to read nor were they ever informed about the arbitration provision.[76]

In reviewing the nature of the rights being given up by the parties, the court recognized that the clause required the parties to surrender their state constitutional right to a jury trial.[77] The court recognized that parties may waive their right to use the judicial forum. However, considering the importance of this constitutional right, the court stated that any waiver must be a clear and informed waiver, not a casual or accidental one.[78] Based on all of these factors as to the waiver, the court decided that the arbitration clause was not enforceable because it was not within the reasonable expectations of the weaker party.[79]

To avoid fraud, deceit or other misunderstandings, the court recommended that arbitration clauses in adhesive contracts should be conspicuous through bold or highlighted print type. In addition, the court suggested that there must be a clear acknowledgment that the party is

---

[74] *See id.* at 209 n.3. The court decided that the fact that the borrowers later consulted an attorney after the execution of the documents was irrelevant to the dispute. *See id.*

[75] *Id.* at 209 (footnote omitted).

[76] *See id.* at 207, 209 n.3. Concerning other provisions in the agreement, the appeals court also noted that the trial record showed that the mortgage company had clearly engaged in conduct intended to deceive borrowers about their contract rights by leaving many blanks in the contract and modifying the documents after execution. *See id.* at 207, 209. *See also infra* notes 114–120 and accompanying text.

[77] *See id.* at 209. The decision indicated that article I, section 16 of California's Constitution guarantees the state right to a jury trial. *See id.*

[78] *See id.* at 209–210.

[79] *See id.* at 208, 210.

waiving their right to a jury trial through some kind of separate check off or initialing mechanism.[80]

In another commercial case, *ITT Commercial Finance Corp.(ITT) v. Tyler*,[81] a Massachusetts trial court refused to enforce an arbitral award,[82] concluding that the arbitration agreement was invalid because of economic duress.[83] In that case, ITT had provided some initial financing to a corporation, Sunshine Home Entertainment Centers (Sunshine), guaranteed by the Tylers, corporate officers for Sunshine. Sunshine sought to extend its credit agreement with ITT and engaged in several months of negotiations on the new credit terms, which appeared acceptable to ITT.[84]

Based on favorable representations from ITT about the credit extension, the Tylers purchased some commercial property prior to the final execution of the revised financing agreement. After purchasing the property, ITT then refused to stand by the renegotiated terms and provided the Tylers with a new agreement that contained an arbitration clause. If the Tylers failed to sign the new documents, ITT threatened to accelerate its payment demands for the Sunshine loan and to refuse to provide the much-needed additional credit. Fearing company bankruptcy and personal financial ruin, the Tylers believed they had no alternative but to sign the new documents.[85]

The court found that ITT had confused and misled the Tylers throughout the financing negotiations. The court also determined that ITT had contributed significantly to the Tylers financial turmoil. Due to ITT's conduct, the Tylers truly believed that they had to sign the new documents containing the arbitration clause. Therefore, the court refused to enforce the arbitral award and invalidated the arbitration agreement due to economic duress.[86]

Clearly, no fraudulent, retaliatory or misleading representations should be made when presenting a party with a PDAA. Such conduct will be viewed as vitiating a knowing and voluntary waiver of the courts under a

---

[80] *See id.* at 210.

[81] No. 917660, 1994 WL 879497 (Mass. Super. Ct. Aug. 10, 1994).

[82] *See id.* at *7 An arbitrator had awarded ITT $578,000, for which ITT sought judicial confirmation and enforcement. *See id.* at *4.

[83] *See id.* at *5. The court indicated that the elements of economic duress are: "(1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; (3) that said circumstances were the result of coercive acts of the opposite party." *Id.*

[84] *See id.* at *1, *2.

[85] *See id.* at *6. The court found that without the promised credit and inventory from ITT and the risk of accelerated loan payments, the Tylers had a realistic fear of financial disaster. *See id.*

[86] *See id.* at *5, *7.

PDAA. As in the relevant ambiguity cases above, the status of the parties, particularly the party lacking bargaining power or business expertise, will only further strengthen the grounds for invalidating the arbitration agreement.

III. FAIRNESS OF THE ARBITRATION PROCESS

The issue of fairness extends beyond a knowing and voluntary waiver of the judicial forum to encompass fairness in arbitral proceedings. Once again the *Gilmer* decision provides a starting point for these discussions. On the surface, the *Gilmer* Court seemed to brush aside the issue of substantive and procedural differences between arbitration and litigation. Yet, a closer analysis provides some clues on appropriate standards that are addressed in recent substantive and procedural challenges to arbitration clauses.

A. *Protection of Substantive Rights and Statutory Remedies*

The *Gilmer* Court clearly stated that parties agreeing to use arbitration were merely exchanging the forum for resolution and were not surrendering any substantive rights or statutory remedies.[87] For example, the Court indicated that the switch to an arbitral forum did not limit the arbitrator's authority to grant equitable and legal relief in disputes involving statutory rights.[88] Some recent cases have challenged mandatory arbitration clauses that impinge on constitutional and statutory rights. As explained in previous parts of this Article, the need to protect substantive rights and statutory remedies may also provide a basis for striking down arbitration clauses in nonemployment commercial cases.

At a minimum, *Gilmer* would lend support to the modification of the mandatory arbitration clause in the *Bentley's Luggage Company* dispute.[89] In that case, the arbitration policy allowed the arbitrator to award damages for back pay and emotional distress, but not punitive damages.[90] Therefore, under *Gilmer*, that provision is inconsistent with the ADEA and may be invalidated, or at least modified, to allow for the recovery of punitive damages.

---

[87] *See Gilmer*, 500 U.S. at 31–32. The Court further added that the use of arbitration does not bar investigatory or enforcement authority of administrative agencies like the EEOC. *See id.* at 32; *supra* notes 60–64 and accompanying text.

[88] *See id.* at 32.

[89] *See supra* notes 65–67 and accompanying text.

[90] *See* Skoler et al., *supra* note 65.

Recently, in *Board of Education of Carlsbad Municipal Schools v. Harrell*,[91] the New Mexico Supreme Court modified an arbitral provision that limited a party's right to appeal an arbitral award to issues of collusion, bias and corruption.[92] The case involved mandatory arbitration under state statute of a school superintendent's discharge. The court noted that the judiciary retains its authority to review arbitral awards for compliance with state constitutional due process standards, not just bias or impartiality issues, and struck down that portion of the arbitration provision.[93] The court emphasized the importance of protecting substantive due process rights and reiterated its authority to review arbitral awards for constitutional compliance.

In a commercial dispute, *Graham Oil Co. v. ARCO Products Co.*,[94] the Ninth Circuit rejected an entire arbitration clause that limited statutory remedies provided under the Petroleum Marketing Practices Act (PMPA).[95] In that case, ARCO had included an arbitration clause in its franchise agreement with Graham Oil that barred the recovery of exemplary damages and attorney's fees. Also, the arbitration provision required Graham Oil to bring any claims within as little as ninety days in some instances.[96]

However, under the PMPA, franchisees are entitled to recover exemplary damages and attorney's fees for certain cases.[97] In addition, the PMPA contains a one-year statute of limitations for franchisee claims.[98] Therefore, the court in *Graham Oil* concluded that the arbitration provision was attempting to circumvent important PMPA rights or benefits meant to protect the more vulnerable parties, the gasoline franchisees.[99]

---

[91] 882 P.2d 511 (N.M. 1994).

[92] *See id.* at 514–515.

[93] *See id.* at 526.

[94] 43 F.3d 1244 (9th Cir. 1994).

[95] *See id.* at 1248. *See also* 15 U.S.C. §§ 2801–2806 (1995). The PMPA seeks to provide certain rights or protections for gasoline station franchisees in disputes with major oil producers. *See Graham Oil*, 43 F.3d at 1246.

[96] *See Graham Oil*, 43 F.3d at 1247–1248.

[97] *See id. See also* 15 U.S.C. § 2805(d)(1)(B) (1995) (exemplary damages); 15 U.S.C. § 2805(d)(1)(C) (1995) (attorney's fees).

[98] *See Graham Oil*, 43 F.3d at 1248. *See also* 15 U.S.C. § 2805(a) (one-year statute of limitations).

[99] The court determined:

> Each of the three statutory rights is important to the effectuation of the PMPA's policies. The purpose of the exemplary damages is to deter franchisors from engaging in improper terminations of franchise agreements. The purpose of the attorney's fees is to deter franchisors from improperly contesting meritorious claims. Finally, the purpose of the one-year statute of limitations is to afford franchisees a reasonable period in which to

The Ninth Circuit refused to merely modify the provision to exclude those components, declaring that the illegal terms were highly integrated portions of a uniform dispute resolution procedure.[100] The decision indicated that the entire provision was tainted because it showed a clear attempt by ARCO to subvert congressional mandates through arbitration.[101] The court struck down the entire clause as violative of the PMPA and stated that a court must now resolve the dispute between the parties.[102] The cases show an effort to protect both substantive constitutional rights as well as the statutory rights and remedies of parties. A PDAA that seeks to limit court review of constitutional rights such as substantive due process, or statutory rights and remedies such as statutes of limitation or statutory damages, may be rejected.

B. *Maintaining Minimum Procedural Standards*

Aside from the protection of substantive rights, the *Gilmer* decision also considered the issue of procedural differences between arbitration and litigation,[103] seeming at the outset to discount procedural concerns about arbitrator selection,[104] limited discovery[105] and the lack of written

---

> seek relief for improper terminations and other abuses by petroleum franchisors. In attempting to strip franchisees of these statutory rights and benefits by means of an arbitration clause . . . ARCO violated the purpose as well as the specific terms of the PMPA.

Graham Oil, 43 F.3d at 1248.

[100] *See id.* at 1248.

[101] *See id.* at 1248–1249. The court wrote that "ARCO attempted to use an arbitration clause to achieve its unlawful ends. Such a blatant misuse of the arbitration procedure serves to taint the entire clause. As a leading treatise notes, severance is inappropriate when the entire clause represents an 'integrated scheme to contravene public policy.'" *Id.* (citing E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.8, at 70 (1990)).

[102] *See Graham Oil*, 43 F.3d at 1248–1249.

[103] *See Gilmer*, 500 U.S. 20, 30–32. To the contrary, it is interesting to note that court dicta in *Prudential* asserted that procedural differences between litigation and arbitration can be significant, at least in instances concerning rape, sexual harassment and abuse. The court noted that privacy rights receive greater protection in litigation than arbitration, under state statutory limits on discovery and admissibility of a party's sexual history. *See Prudential*, 42 F.3d at 1305 n.4.

[104] *See Gilmer*, 500 U.S. at 30–32.

[105] The Court stated that limited discovery had not harmed the resolution of RICO and antitrust claims which are as complicated as any ADEA claim. *See Gilmer*, 500 U.S. at 31. Furthermore, arbitrators are not limited by the rules of evidence, so a broader range of documentation and testimony are allowed to support one's claims. *See id.* at 31.

decisions.[106] But a closer inspection indicates that the Court clearly established certain minimum procedural standards in rejecting Gilmer's procedural arguments.

As to the issue of arbitrator selection, the *Gilmer* decision rejected generalized claims of arbitral bias, but only after recognizing the parties' rights to review arbitrator backgrounds, challenge arbitrator participation and appeal arbitral awards on the grounds of bias.[107] The Court rejected any presumption of bias in arbitral panels, noting that the applicable arbitration process provided background information to parties on potential arbitrators and allowed both a preemptory challenge and unlimited challenges for cause.[108] In addition, the Court noted that the FAA allows courts to vacate awards based on bias or corruption of the arbitral panel.[109] Therefore, any process that fails to provide these procedural protections against bias might be successfully challenged.

Regarding limited discovery, the *Gilmer* Court did not support the notion that all opportunities for discovery could be banned in arbitration. The Court accepted the notion of limited discovery, noting that the applicable arbitration rules did allow for document productions, information requests, depositions and witness subpoenas.[110] In addition, the Court noted that limited discovery did not prevent a party from having a full opportunity to present their side of the case with arbitrators not limited to the rules of evidence.[111] Clearly, any arbitral procedure that bars all discovery or prevents parties from fairly presenting their claims would likely be successfully challenged under *Gilmer*.

The *Gilmer* Court also considered the lack of written decisions in arbitration. Gilmer argued that the lack of written opinions would protect discriminatory employers from public exposure and limit effective appellate

---

[106] Gilmer argued that the lack of written opinions would stifle the development of ADEA precedent, protect discriminatory employers from public exposure and limit effective appellate review of arbitral awards. *See id.* at 31-32. The Court responded that NASD decisions, which include the names of parties, summary of issues and description of the award, are provided and made public. *See id.* Also, the Court indicated that many ADEA claims are not covered by arbitration agreements, so future precedent development will not be halted. *See id.* at 32.

[107] *See id.* at 30-31.

[108] *See id.* at 30.

[109] *See id.* at 30-31.

[110] *See id.* at 31.

[111] *See id.* at 31. The Court noted that a party is allowed to present its views in arbitration and merely "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id.* (citation omitted).

review of arbitral awards.[112] The Court responded that NASD decisions, which include the names of parties, summary of issues and description of the award, are provided and made public.[113] Any acceptable arbitration process must then provide this minimum information in order to achieve the standards set out in *Gilmer*.

The process issues raised in *Gilmer* are picked up in *Patterson v. ITT Consumer Financial Corp.*,[114] in which a court struck down an arbitration clause, primarily because of a confusing set of arbitration procedures and obstacles to a participatory hearing.[115] In this case, unsophisticated borrowers seeking "guaranteed loans" signed financing documents that were contracts of adhesion that included an arbitration clause as the final paragraph.[116] The court determined that the contract was oppressive and resulted in unfair surprise on the weaker parties based largely upon irregularities in the administering agency's own arbitration procedures.[117]

Initially, the location of the arbitration was unclear from both the financing documents and the agency's procedures. On its face, there was confusion about whether the arbitration would be held where the parties signed the documents (California) or where the administering agency, the National Arbitration Forum (NAF), was located (Minnesota). At execution of the documents, even the administering agency could not inform borrowers about the location of the arbitration until after a claim was filed.[118]

---

[112] *See id.* at 31–32. Gilmer also argued that the lack of written awards would stifle the development of ADEA precedent. *See id.* However, the Court indicated that many ADEA claims are not covered by arbitration agreements, so future precedent development will not be halted. *See id.* at 32.

[113] *See id.* at 31–32.

[114] 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993).

[115] *See id.* at 566.

[116] *See id.* at 565–566. As in *Bell*, *Mastrobuono*, *Prudential* and *Broemmer*, the borrowers in *Patterson* were not sophisticated business people. *See id.* Unlike this earlier precedent, the court also noted that the provisions were clearly written and highlighted in bold letters. *See id.*

[117] *See id.* at 566–567. Some confusion about the arbitral procedures also arose from the failure to provide a copy of the administering agency's manual to the borrowers. *See id.* at 567. Parties were only provided the rules after ITT had filed a claim against borrowers. *See id.* Similar to *Prudential* and *Broemmer*, the provisions had not been pointed out to the parties, and the parties indicated that they did not recall reading the provisions. *See id.* at 567.

[118] *See id.* at 566–567. In addition, parties seeking to challenge any claim had to notify the administering agency which would automatically confer jurisdiction on NAF in Minnesota, an inconvenient forum for California borrowers. *See id.* at 566.

More importantly, opportunities for a participatory hearing were severely limited in several ways. The arbitration was free only if parties submitted written documents for NAF's review and award. Borrowers would have to prepay substantial fees in order to gain an opportunity to initiate a participatory hearing. Also, borrowers would have to pay added fees for discovery, written findings and expedited hearings. The procedures for borrowers requesting a fee waiver based on indigency were "incomprehensible." The court determined that the contract was oppressive because these procedures worked in reality to deny unsophisticated borrowers any opportunity for a real chance to present their side of the case.[119]

> The likely effect of these procedures is to deny a borrower against whom a claim has been brought any opportunity to a hearing, much less a hearing held where the contract was signed, unless the borrower has considerable legal expertise or the money to hire a lawyer and/or prepay substantial hearing fees. The latter is especially unlikely given the small dollar amounts at issue. In a dispute over a loan of $2,000 it would scarcely make sense to spend a minimum of $850 just to obtain a participatory hearing. In short, the procedure seems designed to discourage borrowers from responding at all.[120]

Arbitration clauses that provide for arbitral procedures that fail to meet or discourage basic procedural due process rights may be questioned based upon the *Gilmer* and *Patterson* decisions.

Another issue of fundamental fairness in the arbitral process is the rising concern about the quality and diversity of arbitral panels. Some cases have also begun to discuss the lack of diversity of arbitral panels and its impact on the effective assessment of statutory discrimination claims. The opening salvo in this area involved a 1994 Government Accounting Office (GAO) report on securities arbitration. In that report, the GAO criticized NASD arbitral panels for their lack of experience and training in handling statutory discrimination claims, which are different from typical NASD cases that focus more on specific industry practices. The GAO report also stated that NASD panels lacked the diversity integral to assess fairly statutory discrimination claims. The study found that of those arbitrators eligible to consider discrimination claims, ninety-seven percent were white and eighty-nine percent were white males over the age of sixty.[121]

---

[119] *See id.*

[120] *Id.*

[121] *See* U.S. GOVERNMENT ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN EMPLOYMENT DISPUTES, GAO/HEH-94-

The *Prudential* court picked up on these concerns in their decision to reject arbitration of rape and sexual abuse and harassment claims. The court expressed its concern that the serious charges levied by the two immigrant women would be brought before an NASD panel lacking diversity. The court noted that "in an area as personal and emotionally charged as sexual harassment and discrimination, the procedural right to a hearing before a jury of one's peers, rather than a panel of the National Association of Securities Dealers, may be especially important."[122]

In a second case, *Olson v. American Arbitration Association*,[123] a former NCR employee challenged an attempt to compel arbitration on similar grounds under a state's deceptive trade practices law.[124] The employee charged that the American Arbitration Association (AAA) had misrepresented its arbitral panels as impartial, contending that AAA panels were biased in favor of employers, in part, because the AAA received significant fees and contributions from employers. In addition, she argued that the panels were overwhelmingly white, male and lawyers rather than a cross-section of the public.[125] In this instance, the court dismissed the claims, stating that Olson's charges were merely speculative and did not support a showing of bias.[126] However, the court's decision leaves open the opportunity for a legal challenge in which the party questioning the use of arbitration might provide statistics or other evidence to support their assertions.

Although neither the *Prudential* or *Olson* cases have found panel diversity to be dispositive, the issue should be considered regarding the fairness of the arbitration process in statutory discrimination disputes.

17, at 8 (1994), *cited in* RUDER REPORT, *supra* note 24, at 116–117. *See* Lipton, *supra* note 3, at 32–33.

[122] *Prudential*, 42 F.3d at 1305 n.4.

[123] 876 F. Supp. 850 (N.D. Tex. 1995). Olson initially brought an action for intentional infliction of emotional distress in the Texas state courts against her former employer NCR and certain individual defendants. Those defendants brought a motion to compel arbitration under the terms of a written employment agreement with Olson. The trial court granted the motion and an arbitration hearing date was set. Before the arbitration hearing, Olson filed her complaint in federal court against the AAA on her own behalf as well as those similarly situated. *See id.* at 850–851.

[124] *See id.* at 851.

[125] *See id.*

[126] *See id.* at 852. The court noted that even if Olson's claims were true, they did not show bias as a matter of law. The court added that Olson's assertions were "stereotypical characteristics" and not clear evidence of an individual panel's bias. *Id.*

IV. CONCLUSION AND RECOMMENDATIONS

Although the arbitrability of statutory claims is clearly recognized, the limits on the use of pre-dispute arbitration provisions are not yet firmly established. The recent court decisions discussed in this article provide some early indicators of appropriate limits on the use of pre-dispute arbitration clauses in employment and commercial disputes. Clearly, courts may consider the factual circumstances of a waiver of the judicial forum, examining the clarity of the provision, the business experience of the weaker party and any signs of coercion, fraud or deceit. Also, the court may consider whether the clause tries to thwart constitutional or statutory rights through limits on legal or equitable remedies and procedural protections. Furthermore, issues of arbitrator quality and diversity could provide additional factors in a court's refusal to compel arbitration.

As more employment arbitration clauses are challenged in court, issues of fairness in the waiver and arbitration process certainly need to be addressed in the employment field in order to retain public respect and trust in employment arbitration proceedings. Already, a number of governmental, legal and human resources organizations have made a flurry of recommendations to improve the fairness in employment arbitral proceedings, including better arbitrator training, increased subject matter knowledge and greater panel diversity in handling statutory discrimination claims.[127]

Although the case law is still developing, employers can take certain steps now to reduce legal challenges and employee mistrust of the arbitration process.[128] Some basic steps that can help promote fairness in employment arbitration include the following:

1. *Clearly Identify to Employees the Rights Being Waived and the Disputes Being Covered.* As some recent decisions show, courts may strike down all or part of ambiguous provisions that seem to prevent a clear,

---

[127] *See* Bencivenga, *supra* note 7 (Society for Human Resource Management recommendations); McGowan, *supra* note 7 (Dunlop Commission recommendations); RUDER REPORT, *supra* note 24 (NASD Task Force recommendations); Christopher A. Barreca et al., *Prototype Agreement on Job Bias Dispute Resolution, ABA Task Force on Alternative Dispute Resolution in Employment*, Daily Lab. Rep. (BNA) No. 91, at d34 (May 11, 1995); *EEOC: Statement of Principles of Commission's Policy on ADR*, 22 Pens. & Ben. Rep. (BNA) at 1734 (July 24, 1995) (EEOC Recommendations).

[128] *See supra* note 127. *See also* Bales & Burch, *supra* note 2, at 634–635; Eastman & Rothenstein, *supra* note 4, at 595; Lipton, *supra* note 3, at 32–33.

voluntary waiver of access to the courts. Employers seeking to use pre-dispute arbitration clauses should use specific language that clearly describes the rights being waived and the types of disputes subject to arbitration. Highlighting the clause in employment documents or using a separate sign-off sheet for an arbitration clause and process will further help to avoid claims based on lack of knowledge or coercion. Employees should be given an opportunity to review the arbitration clause, including any explanatory documents, before signing the agreement.

2. *Educate Employees About the Arbitration Process.* The cases also suggest that the courts may consider the business acumen of the weaker party in determining the validity of arbitration clauses. To help level the playing field, employers should take the time to educate their employees about the benefits and limitations of arbitration. The arbitration process can be discussed in employee training seminars and orientations. In addition, such training exercises may allow opportunities for employee input in shaping company ADR procedures. The more employees are aware of the benefits of arbitration and other forms of ADR, the less likely they are to be suspicious of the process or to challenge its validity. Company managers should be also properly trained about the arbitration process to avoid employee confusion and future lawsuits based on misrepresentations, fraud or coercion.

3. *Avoid Limiting Substantive and Procedural Rights.* As *Gilmer* suggested, parties are merely exchanging the forum for resolution, not the scope of substantive rights. Some employers have erroneously viewed arbitration as a mechanism to evade statutory requirements such as equitable relief, attorneys' fees, and punitive damages or constitutional mandates for procedural due process. In creating an arbitration program, the employer should allow the arbitrator the same statutory, equitable and legal remedies that a judge or jury would have in litigation. The employer also should not shorten the time period for filing a claim found in the relevant statute nor limit the standard grounds for appealing arbitral awards. Further, in an effort to promote a fair process, arbitration procedures should include reasonable discovery, a meaningful opportunity to present one's case, shared costs for the arbitral process, attorney representation of employees and written awards.

4. *Utilize Qualified, Diverse Arbitral Panels.* Despite the split in court views, any fair process should focus on the quality and diversity of the arbitral panel. Companies should work with administering organizations to convene diverse arbitral panels whose members have extensive subject matter knowledge specific to the dispute. To help bolster employee

confidence in the panel, company programs should allow employees to participate in the review and selection of the arbitrators or administering organization. Reasonable opportunities to challenge arbitrators should be allowed with a certain number of preemptory challenges and unlimited challenges for cause.