RECENT DEVELOPMENTS

*Circuit City Stores, Inc. v. Adams**

I. INTRODUCTION

Employers need no longer worry that the arbitration agreements they include in contracts of employment will be subject to attack.[1] In *Circuit City v. Adams*,[2] the Supreme Court definitively stated that the Federal Arbitration Act (FAA)[3] covers binding arbitration clauses in employment contracts, even if the clauses require arbitration of statutory claims.[4]

The FAA[5] was passed in 1925 to legitimize arbitration as a dispute resolution mechanism and to compel parties who have entered into an arbitration agreement, but who attempt to sue, to resolve their disputes through arbitration.[6] To ensure continuity in the enforcement of arbitration agreements, the FAA preempts state laws hostile to arbitration.[7]

Until now, the precise scope of the FAA's coverage of employment contracts was unknown because of the ambiguous language in the statute's section 1 exemption provision. This exemption provision delineates the types of contracts that are not covered by the FAA, causing the arbitration provision within the contract to be unenforceable. Before *Circuit City*, the debate over FAA coverage of contracts of employment turned on the meaning of the phrase "engaged in commerce" in section 1. Section 1 states, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce."[8]

With the exception of the Ninth Circuit,[9] all federal circuit courts of appeals that have interpreted the FAA's section 1 exemption language have held that it exempts only employment contracts of workers actually engaged in the transport

---

* 121 S. Ct. 1302 (2001).

[1] *See* David G. Savage, *Justice in Job Disputes: With Mandatory Arbitration Ok'd, the Focus Shifts to Making Sure It's Fair*, 87 A.B.A. J., May 2001, at 30 (stating that employers are now free to require arbitration of all employment claims).

[2] Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001).

[3] Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2000).

[4] *Circuit City*, 121 S. Ct. at 1302

[5] 9 U.S.C. §§ 1–16.

[6] Holland & Hart, *High Court Holds Worker to Signed Agreement*, 6 WYO. EMP. LAW LETTER (M. Lee Smith Publishers LLC, Brentwood, Tenn.), June 2001, at 7.

[7] *Circuit City*, 121 S. Ct. at 1307.

[8] 9 U.S.C. § 1.

[9] Circuit City Stores, Inc. v. Adams, 194 F.3d 1070 (9th Cir. 1999).

of goods in interstate commerce.[10] With its decision in *Circuit City*,[11] the Supreme Court has finally interpreted the language in the section 1 exemption provision of the FAA, a task it declined to do in its 1991 decision in *Gilmer v. Interstate/Johnson Corp.*[12] As a result of the *Circuit City* decision, the FAA covers employment contracts of all workers other than transportation workers.

II. FACTS AND PROCEDURAL HISTORY

Saint Clair Adams applied for a job with Circuit City Stores, Inc. in October 1995.[13] To be considered for employment, Adams was required to sign an agreement to arbitrate all claims or disputes arising out of his employment.[14] Two years after his employment commenced, Adams filed an employment discrimination suit in California state court.[15] In turn, Circuit City filed suit in the United States District Court in the Northern District of California to enjoin Adams' state court action and to compel Adams to arbitrate the claim because of the mandatory arbitration contract he signed as part of his employment application.[16] Circuit City relied on the fact that the FAA's intended purpose is to provide judicial enforcement of a wide range of written arbitration agreements.[17] The United States District Court granted Circuit City's motion for injunctive relief and its motion to compel Adams to arbitrate his employment discrimination claim.[18] Adams appealed the decision to the Ninth Circuit Court of Appeals, which decided that the FAA does not cover any contracts of employment.[19] Circuit City appealed the decision to the Supreme Court, which granted certiorari on the issue of whether the FAA's section 1 exemption provision excludes all employment contracts from the FAA's coverage.[20]

---

[10] *See Circuit City*, 121 S. Ct. at 1306–07 (listing many of the appellate cases that have concluded that employment contracts are not excluded from the coverage of the FAA).

[11] *Id.* at 1302.

[12] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991). The Court upheld an arbitration provision in securities regulation literature that required arbitration of an ADEA claim. The Court declined to interpret section 1 of the FAA because the arbitration provision at issue was not in a contract of employment.

[13] *Circuit City*, 121 S. Ct. at 1306.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 1307.

[18] Circuit City Stores, Inc. v. Adams, No. C98-0365 CAL, 1998 U.S. Dist. LEXIS 6215, at *2 (N.D. Cal. May 1, 1998).

[19] Circuit City Stores, Inc. v. Adams, 194 F.3d 1070, 1071 (9th Cir. 1999).

[20] *Circuit City*, 121 S. Ct. at 1306–07.

III. THE COURT'S HOLDING AND REASONING

The Supreme Court held that the FAA's section 1 exemption provision expressly exempts from FAA coverage only seamen, railroad employees, or workers "actually engaged in the movement of goods in interstate commerce."[21] Thus the Court reversed the Ninth Circuit's determination that all employment contracts are exempt from FAA coverage.

The Court reached its holding by comparing the exemption language in section 1 with the coverage language in section 2, by relying on the ejusdem generis canon of statutory construction, and by acknowledging and deferring to precedent.

A. *Statutory Language Comparison of Section 1 and Section 2*

The Court compared the language of section 1 and section 2 to support its holding. Section 2 of the FAA states that "a written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract."[22] The Court rejected Adams' argument that the section 1 exemption applies to all contracts of employment, because such reasoning would make the exemption language in section 1 superfluous.[23] The Court reasoned that if all contracts of employment were exempt from the coverage of the FAA, then there would be no need for the special exemption provision in section 1.[24]

B. *Ejusdem Generis and Statutory Construction*

To further support its holding, the Court relied on the ejusdem generis canon of statutory construction.[25] This doctrine provides that general words that follow specific words should be construed to apply to objects similar to those in the preceding specific words.[26] Therefore, the general phrase "any other class of workers engaged in interstate commerce" specifically refers only to seamen and railroad or transportation workers, so the entire clause means that only contracts

---

[21] *Id.* at 1307 (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1471 (D.C. Cir. 1997)).

[22] Federal Arbitration Act, 9 U.S.C. § 2 (1994).

[23] *Circuit City*, 121 S. Ct. at 1308.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1308–09.

of workers engaged in actual transport of goods in interstate commerce are exempt from FAA coverage.

C. *The Court's Reliance on Precedent*

In devising its holding, the Court was conscious that acceptance of Adams' interpretation of the FAA would be inconsistent with *Gilmer v. Interstate/Johnson Lane Corp.*,[27] in which the Court enforced an arbitration provision in securities regulation literature based on the section 2 coverage language. The Court also wanted to maintain a holding consistent with *Allied-Bruce Terminix Cos. v. Dobson*,[28] in which it broadly interpreted the meaning of the section 2 coverage provision.

IV. THE IMPACT OF THE COURT'S HOLDING

What is noteworthy about the *Circuit City* decision is that the Supreme Court finally expressly upheld a contract providing for the use of mandatory arbitration for resolving statutory employment discrimination claims.[29] The decision acts almost as an express authorization for employers to include mandatory binding arbitration provisions in their employment contracts.

In reality, the holding in *Circuit City* may be less than controversial for many reasons. The decision does not alter the law as lower courts have interpreted it since the *Gilmer* decision in 1991.[30] In addition, the decision does not address many key issues surrounding arbitration of statutory claims. Finally, while the decision could benefit employers and harm employees, as many commentators have suggested, there may not be any real practical effect from the decision. Perhaps the greatest result from the decision may be found if congressional response stems from it.

---

[27] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). The Court held that the section 2 coverage provision of the FAA required the arbitration of an age discrimination claim.

[28] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265 (1995). The Court decided that the section 2 words "involving commerce" represented Congress' intent to exercise it commerce power in full. *Id.* at 277.

[29] *Circuit City*, 121 S.Ct. at 1313.

[30] *Practitioners Dispute Viability of Arbitration Clauses After* Randolph, Adams, 4 CONSUMER FIN. SERVS. L. REP. (LRP Publications, Alexandria, Va.), Apr. 30, 2001, LEXIS, Nexis Library, Combined Legal Newsletters File [hereinafter CONSUMER FIN.]; *see also supra* note 12 and accompanying text [hereinafter CONSUMER FINANCIAL].

A. *What the Ruling Does Not Address*

The *Circuit City* Court did not address what types of procedural due process safeguards are necessary for arbitration to fairly resolve statutory claims.[31] The Court did reiterate its statement from *Gilmer* that "by agreeing to arbitrate a statutory claim, a party does not forego substantive rights afforded by the statute; it only submits to their resolution in an arbitral not a judicial forum."[32] This statement does little to address the fact that there are no real standards of education, experience, or qualification required to be an arbitrator.[33]

The Court also did not address whether there should be a mandatory period of discovery before compulsory arbitration.[34] This issue is particularly important for employees because proving a statutory employment discrimination claim, even in arbitration, could be impossible if the employee does not have the opportunity to conduct discovery.[35] If employers are not required to allow discovery, then the employer may be able to dispose of the claim shortly after it is brought.

Similarly, the Court did not indicate who should bear the costs of the arbitration.[36] If the employer bears the entire cost, the arbitrator may be partial to the employer.[37] However, it may be substantially unfair for an employee to bear the cost, because the employee most likely has less financial resources. It is preferable that the employer and employee share the costs of the arbitration;

---

[31] *See* H. David Kelly, Jr., *An Argument for Retaining the Well Established Distinction Between Contractual and Statutory Claims in Labor Arbitration*, 75 U. DET. MERCY L. REV. 1, 67 (1997) (stating that the *Gilmer* decision supported an expectation that arbitration must meet a minimum of due process requirements to be appropriate for the resolution of statutory claims).

[32] *Circuit City*, 121 S. Ct. at 1313 (quoting *Gilmer*, 500 U.S. at 26).

[33] Kathleen M. O'Connell, *Employees Lose in* 'Circuit City', N.Y. L.J., May 24, 2001, at 2.

[34] *See* Michael J. Connolly & Clifford J. Scharman, *U.S. Supreme Court Gives Employers a Chance to Avoid Costly Litigation*, 16 LEGAL BACKGROUNDER (Washington Legal Foundation, Washington, D.C.), June 29, 2001, at 2.

[35] Jenifer A. Magyar, *Statutory Civil Rights Claims in Arbitration: An Analysis of* Gilmer v. Interstate/Johnson Lane Corp., 72 B.U. L. REV. 641, 655 (1992).

[36] Connolly & Scharman, *supra* note 34, at 2.

[37] Ann C. Hodges, *Dispute Resolution Under the Americans With Disabilities Act: A Report to the Administrative Conference of the United States*, 9 ADMIN. L.J. AM. U. 1007, 1097–98 & n.463 (1996). The arbitrator may also be partial to the employer because it is more likely, than an employee, to bring repeat business. *Id.* at 1097. *But see* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189, 193–94 (1997) (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d at 1465, 1485 (D.C. Cir. 1997)) (listing reasons that arbitrators will not be partial to employers: the plaintiff's lawyer will notice the bias and move for judicial review, a corrupt arbitrator will not survive in the arbitration business and arbitrators do not care who pays them, as long as they get paid).

however, whether the employee can ensure this may come down to bargaining power.

The Court also did not address whether arbitration may be procedurally inappropriate for employment disputes, because arbitrators tend to be white, male, and affluent.[38] Perhaps this issue did not need to be addressed because, until recently, the federal judiciary was comprised of the same homogeneous composition.[39] However, juries tend to have more minorities and working class people,[40] which could be important for employees.

Of course, the Court had no obligation to address any of these issues because it granted certiorari on the narrow issue of the meaning of the FAA section 1 exemption language. In reality, because an arbitration agreement is a contract, most of these issues will be resolved in the actual agreement. However, because of unequal bargaining power, the employee may have little influence over these procedural matters.

Because of these unresolved issues, such as a lack of procedural fairness and the absence of diversity of arbitrators, employees may have grounds to challenge an arbitration agreement.[41] Therefore, the *Circuit City* decision may have created more grounds for challenging an arbitration agreement than it has eliminated.

B. *The Ruling's Effect on Employers*

1. *Drawbacks for Employers*

The *Circuit City* decision seemingly gives greater security to employers who require their employees to sign arbitration agreements, so the decision may encourage other employers to require these agreements.[42]

Despite the apparent approval of requiring employees to agree to mandatory binding arbitration of employment disputes, the decision may not prompt many

---

[38] Charles Toutant, *Workplace Arbitration Agreements Get a Charge out of* Circuit City *but Limits of Their Effect in Employment Context Are Still Unclear*, N.J. L.J., Apr. 23, 2001, at 293 (referring to statement of Neil Mullin of Montclair office of Smith Mullin).

[39] Kelly, *supra* note 31, at 52–53.

[40] Toutant, *supra* note 38, at 293.

[41] Robert J. Lewton, Comment, *Are Mandatory, Binding Arbitration Requirements a Viable Solution for Employers Seeking To Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 1026 (1996) (stating that the arbitration framework in *Gilmer* may have been procedurally deficient and warning employers to anticipate litigation challenging these types of arbitration programs).

[42] Holland & Hart, *supra* note 6, at 7.

more employers to adopt such provisions.[43] One substantial drawback to mandatory arbitration provisions is that they may create more work for the employer. Employees who may be reluctant to file an actual lawsuit may be more apt to pursue a claim in arbitration, which could mean that employers must defend themselves against more claims.[44] Also, employers may give up the benefits of the substantial burden of proof that a plaintiff must satisfy in court because arbitrators may not apply the burden of proof with the same stringency as a federal judge.[45] In addition, the number of issues left unresolved by the decision may be an incentive for employers to forego adoption of these provisions.[46]

2. *Benefits for Employers*

The ruling does create some benefits for employers who have or will adopt arbitration provisions, because there will not be parallel inconsistent decisions.[47] Prior to this decision, states had created their own rules to prohibit or limit the use of pre-dispute arbitration agreements in the employment context.[48] In addition, states had civil rights laws affording employees a right to sue if they were discriminated against.[49] Now these laws are defunct, because the FAA preempts state laws hostile to arbitration of these claims.[50]

C. *The Ruling's Effect on Employees*

1. *Preemption of State Law*

While some have argued that the *Circuit City* ruling erases one of the few remaining arguments an employee may wage against an employer when

---

[43] *See* Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 400–02 (2000) (suggesting that mandatory arbitration of employment discrimination claims is not all that beneficial for employers).

[44] Lewton, *supra* note 41, at 1029–30.

[45] *Id.* at 1030.

[46] *Id* at 1031–32 (recognizing that *Gilmer* left so many issues unresolved that it may be better for employers not to adopt mandatory arbitration provisions). Though in the context of *Gilmer*, the argument still remains because of numerous unresolved issues.

[47] Toutant, *supra* note 38, at 293.

[48] Adrienne B. Koch, *Mandating Arbitration After* 'Circuit City', N.Y. L.J., June 7, 2001, at 1.

[49] Savage, *supra* note 1, at 30 (stating that employers are clear to require arbitration of all employment claims).

[50] Anthony Michael Sabino, 'Circuit City' *Marks Leap Forward for Arbitration,* N.Y. L.J., Apr. 17, 2001, at 9 (stating that the decision pre-empted California's civil rights laws).

attempting to render an arbitration agreement unenforceable,[51] this argument does not prove to be entirely true. Employees may be able to successfully challenge an arbitration agreement on the grounds that it is unconscionable or invalid or that it provides for a procedurally unfair arbitration proceeding.

While the ruling preempts state laws contrary to its holding that mandatory arbitration of statutory claims is permissible even if agreement to the provision is a condition of employment, the ruling does not preempt all state laws. The mandatory arbitration contracts must still afford the employee the full benefit of the law and cannot limit the substance of the employees' rights.[52] State law challenges to the arbitration clauses may be brought under specific state laws relating to the valid formation and construction of contracts.[53] Therefore, employees can attack an arbitration agreement if it is a contract of adhesion or if it is unconscionable or otherwise invalid.[54] In addition, as discussed above, the ruling leaves many procedural issues unanswered that could be a means to challenge the arbitration agreement.

2. *Anti-Discrimination Legislation*

Employee advocates view this decision as a blow to the ideals that the Civil Rights Act was enacted to achieve. Title VII, the ADA, and the ADEA were specially enacted to protect individuals from discrimination, especially in the employment context.[55] Therefore, it is arguable that employees who have claims falling under these statutes should be subject to more protection than other employees who bring non-statutory employment claims against their employer. [56] However, the *Circuit City* decision does not recognize this distinction.

---

[51] Holland & Hart, *supra* note 6, at 7.

[52] *Discrimination Case Must Be Heard in Arbitration, Supreme Court Rules FAA Applies to Employment Claims*, 16 AIDS POL'Y & L., Apr. 13, 2001, at 1, 6 (statement made by Robert Gregory, senior attorney, EEOC's Office of General Council).

[53] CONSUMER FIN., *supra* note 30.

[54] Ross Runkel, *After* Circuit City—*Individual Employment Dispute Arbitration*, LAB. & EMP. NEWS (Labor and Employment Law Section, Ohio State Bar Association), Spring 2001, at 5, 6.

[55] Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 485 (1999).

[56] *Id.*

3. *Contractual Nature of Arbitration*

Although arbitration offers many benefits,[57] it is nonetheless a creature of contract law.[58] As such, it is controlled by the private sector, which could be problematic for those who believe that the private sector has been the source of racial and social inequity in the United States.[59] Thus, it may be contrary to the anti-discrimination statutes to require claims that arise under them to be subject to binding arbitration.

4. *Benefits for Employees*

It is possible that the *Circuit City* ruling may actually benefit employees to some extent. Many litigated employment disputes end in favor of the employer on summary judgment, so arbitration may result in a better forum for employees who have workplace disputes.[60] In addition, arbitration's lower cost and quicker resolution can benefit employees because a large company, through the discovery phase of a trial, can "bleed an employee dry," rendering the employee unable to pursue the claim.[61]

The Court's decision may not be as disastrous for employees as first predicted. Although it may encourage more employers to adopt mandatory arbitration provisions, employees will not necessarily fare worse in arbitration than in litigation. In addition, the Court failed to address so many issues that an employee may still be able to successfully challenge an arbitration provision in an employment contract.

D. *What the Ruling Might Change*

Due to procedural deficiencies in arbitration and the lack of diversity or training among arbitrators, it remains to be seen whether the *Circuit City* decision

---

[57] Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 1313 (2001).

[58] Stephen A. Plass, *Arbitrating, Waiving & Deferring Title VII Claims*, 58 BROOK. L. REV. 779, 793 (1992).

[59] Halverson, *supra* note 55, at 488 (noting the historical perspective that the private sector has been the source of racism in the United States, and the federal government has been the savior).

[60] *U.S. Supreme Court Arbitration Act Covers Employment Contracts, Preempts State Laws*, PERSONNEL MANAGER'S LEGAL LETTER, June 2001, at 9, 11.

[61] Toutant, *supra* note 38 (quoting Don Innamorato, partner at Princeton office of Reed Smith). *But see* Marcia Coyle, *'Arbitration Heaven' Ahead*, THE NAT'L L.J., Apr. 2, 2001, at B3, (quoting Barry Cappello, employment attorney with Capello & McCann, Santa Barbara, CA). However, arbitration in the employment context can be more expensive than going to court. *Id.*

will prompt a statutory change of the limited standards for judicial review of arbitration[62] to balance the decreased amount of procedural protection that the statutory claimants will receive through arbitration.[63]

The *Circuit City* decision may serve as an implied call to Congress to amend the FAA to clearly delineate the FAA's intended coverage. In *Gilmer*, decided a decade prior to *Circuit City*, the Court specifically did not interpret the section 1 language. The *Gilmer* decision provided an excellent opportunity for Congress to clarify the statute because the Court made reference to the section 1 language, though it did not base its holding on the language because the contract at issue was not an employment contract. The Court waited a decade before attempting to construe the section 1 language, during which time Congress failed to clarify the language. This Congressional inaction may have prompted the Court to seize the opportunity to interpret the language so as to prompt Congress to clarify the scope of the FAA. Now that the Court has interpreted the language, it is Congress' responsibility to amend the language or implicitly approve of the Court's interpretation by inaction.

While it is impossible to know whether the Court used the *Circuit City* case as an opportunity to prompt Congress to clarify the language in section 1, what is clear is that the *Circuit City* decision has already garnered a congressional response. House Bill 2282[64] has been introduced by Democrats in the House of Representatives to amend the language in section 1 to clearly exclude all contracts of employment from the coverage of the FAA. This bill would reverse the Court's decision in *Circuit City*. A statutory reversal of the *Circuit City* decision would have a more profound effect on the law than the decision itself because all of the Circuit Courts of Appeals would have to cease holding that mandatory arbitration provisions are lawful as they have been doing since *Gilmer*.

V. CONCLUSION

The Court's holding in *Circuit City* may create more questions than it answers. Many issues are left open after the decision, and it does not alter the existing law, because lower courts have been enforcing mandatory arbitration provisions in employment contracts since the 1991 *Gilmer* decision. Perhaps the decision's greatest effect will be measured by congressional response that stems from it.

Charity Robl

---

[62] 9 U.S.C. § 10 (2000) addresses the narrow grounds for appeal of arbitral awards.

[63] Connolly & Scharman, *supra* note 34, at 2.

[64] H.R. 2282, 107th Cong. § 3 (2001).