

# Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements\*

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The casual observer might be forgiven for thinking that the debate over predispute employment arbitration agreements ended in 1991, when the Supreme Court held in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>1</sup> that the Federal Arbitration Act of 1925 (FAA)<sup>2</sup> requires enforcement of such agreements, even when they are obtained as a condition of employment, and would preclude employees or former employees from suing in court on their federal (or state) statutory discrimination claims. The plaintiff bar, however, proceeded to launch a decade-long effort to undo *Gilmer*, meeting with little success everywhere but the Ninth Circuit. One of the premises of their challenge was the fact that the Court in *Gilmer* had not decided the scope of the FAA's section 1 exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>3</sup>

That legal issue has now been laid to rest with the Supreme Court's decision in *Circuit City Stores, Inc. v. Adams*.<sup>4</sup> In *Circuit City*, the Court rejected the Ninth Circuit's reading that section 1 excluded all employment contracts from the FAA's reach, and agreed with the view of the other eleven circuits that such a broad exclusion cannot be squared with the provision's specific reference to the employment contracts of "seamen" and "railroad employees." This language, the Court reasoned, indicates a congressional intention to exclude only employment

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

<sup>2</sup> 9 U.S.C. § 1 (1994 & Supp. 2000).

<sup>3</sup> *Id.*

<sup>4</sup> *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001).

contracts of “transportation workers,”<sup>5</sup> *i.e.*, other “class[es]” of workers directly engaged in interstate transportation functions in the same way that seamen and railroad employees are.

This article leaves for others the question whether the Court correctly interpreted the scope of the section 1 exclusion. Rather, the focus here is on the underlying policy debate that undoubtedly influenced the Justices, much as it influences the opponents of predispute agreements to arbitrate employment claims.

### I. STATES’ RIGHTS OR ARBITRATION’S “DEATH KNELL”?

What may seem a technical lawyers’ debate over the meaning of words Congress used in 1925 should not obscure the practical importance of *Circuit City* for the future of employment disputes in this country. Presenting themselves as champions of states’ rights and federalism values—no doubt in an effort to win over hoped-for swing votes, Justices O’Connor and Kennedy—Adams and his amici (which included a number of state attorneys general) argued that all that was at issue in *Circuit City* was whether state or federal law governs the enforceability of arbitration agreements covering employment disputes. If the Ninth Circuit’s expansive reading of the section 1 exclusion were affirmed, they insisted, all this means is that states, in keeping with their traditional responsibility in this area, will be permitted to decide whether arbitration is a suitable vehicle for resolving employment claims.

Adams’s counsel did not highlight for the Justices’ benefit during the oral argument, but which was acknowledged in Adams’s papers, plaintiff’s position that even those states that are favorably disposed to arbitration (which now also include California<sup>6</sup>) will be able to enforce arbitration agreements *only* with respect to state law claims. Most employment disputes, however, involve challenges to hiring, promotion, and termination decisions that raise *both* federal and state law claims. State law would not apply to the federal claims—we are told in a footnote in Adams’s brief—because a “federal antiwaiver rule would govern by reason of the Supremacy Clause.”<sup>7</sup>

Although Adams’s lawyers did not elaborate, the point is that if the FAA were not available to enforce arbitration clauses in the employment context, plaintiffs would argue that federal statutes like Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with

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<sup>5</sup> *Id.* at \*8 (“Section 1 exempts from the FAA only contracts of employment of transportation workers.”).

<sup>6</sup> See *Armendariz v. Foundation Health Psychcare Services Inc.*, 6 P.3d 669 (Cal. 2000).

<sup>7</sup> Respondent’s Brief at 40 n.19, *Circuit City* (No. 99-1379).

Disabilities Act, by their terms, contemplate law suits as the exclusive enforcement mechanism and, as a general matter, preclude prospective waivers of rights contained therein. Thus, unlike cases where the FAA applies, for employment cases (had Adams and his amici prevailed) there would be no countervailing “*federal* presumption of arbitrability” to be balanced in the equation.<sup>8</sup> Statutory silence on the question of arbitration in federal statutes, coupled with the general policy of these statutes on prospective waivers by employees, would lead to the conclusion that claims under these statutes cannot be the subject of an enforceable predispute arbitration agreement.

Fortunately, the *Circuit City* majority was not beguiled by this argument, noting that it could not be squared with *Southland Corp. v. Keating*,<sup>9</sup> which held “the FAA to apply in state courts, and to pre-empt state antiarbitration law to the contrary.”<sup>10</sup> Moreover, Justice Kennedy’s opinion observes, “there are real benefits to the enforcement of arbitration provisions,” and “[w]e have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context.”<sup>11</sup> The majority then proceeded to address Adams’s states-rights contention:

Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the Courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship, . . . and the necessity of bifurcation of proceedings in those cases where state law precludes arbitration of certain types of employment claims but not others. The considerable complexity and uncertainty that the construction of § 1 urged by respondent would introduce into the enforceability of arbitration agreements in employment contracts would call into doubt the efficacy of alternative dispute resolution procedures adopted by the Nation’s employers, in the process undermining the FAA’s proarbitration purposes and “breeding litigation from a statute that seeks to avoid it.”<sup>12</sup>

Consider what the American employment landscape would have looked like had respondent’s position prevailed. We could be certain of two things. First, it

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<sup>8</sup> Petitioner’s Brief at 3, *Circuit City* (No. 99-1379).

<sup>9</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

<sup>10</sup> *Circuit City*, 121 S. Ct. at 1312 (citing *Southland*, 465 U.S. at 16).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 275 (1995)) (citations omitted).

would have taken at least a decade of litigation to decisively resolve the validity of employment arbitration agreements, during which time the Equal Employment Opportunity Commission (EEOC) and the plaintiff bar would pursue a new theory of retaliation discrimination, invocable whenever job applicants are required to waive their federal rights to a judicial forum as a condition of obtaining employment. Second, employers would likely have responded to this legal uncertainty and inability to obtain under state law a complete resolution of all of the claims arising in a particular employment dispute, by abandoning employment arbitration entirely. The likely incentives of employers and employees, were the FAA to drop out of the picture, are illustrated in Table 1<sup>13</sup>.

**Table 1. Employer Incentives to Enter into  
Predispute Employment Arbitration Agreements**

<b>Probability of Enforcing Arbitration Agreements for Entire Employment Dispute</b>	<b>As a Matter of Federal Law</b>	<b>As a Matter of State Law: Arbitration--Supportive Jurisdiction</b>	<b>As a Matter of State Law: Arbitration--Skeptical Jurisdiction</b>
<b>A. Current Law</b>			
1. Federal Claims	HIGH	HIGH	LOW
2. State Claims	HIGH	HIGH	NONE
3. Plausibility of Retaliation Claim Against Employer	NONE	NONE	NONE
4. Incentive for Employer to Establish Arbitration Program for Low-Value Claims	HIGH	HIGH	LOW
<b>B. If FAA Had Dropped Out of the Picture</b>			
1. Federal Claims	NONE	LOW	NONE
2. State Claims	NONE	HIGH	NONE
3. Plausibility of Retaliation Claim Against Employer	HIGH	LOW	HIGH
4. Incentive for Employer to Establish Arbitration Program for Low-Value Claims	NONE	LOW	NONE

In other words, what Adams and his amici presented as a state-rights position in favor of allowing states to fashion their own policies on employment arbitration would, as a practical matter, end up as a regime that effectively ruled

<sup>13</sup> Originally supplied to the editorial writer in *Faux Federalism*, 4 THE GREEN BAG: AN ENTERTAINING J. OF LAW 2d 127, 128 (Winter 2001).

out the use of arbitration as an important option for resolving employment disputes. Not surprisingly, this result is what the plaintiff bar had been seeking to accomplish all along, in their campaign essentially to render *Gilmer* a dead letter in the employment arena.

## II. SHOULD WE CARE?

It may not be in the economic interests of lawyers, narrowly conceived, to take a favorable view of a dispute resolution mechanism that is considerably less expensive than litigation. However, as fiduciaries for our clients and citizens of the polity, we should take a different view, and ask whether the outcome sought by Adams and his amici is in the best interests of most employees and the larger society.

### A. *Cadillacs for the Few, Rickshaws for the Many*

In a world without employment arbitration as an available option, we would essentially have a “cadillac” system for the few and a “rickshaw” system for the many. The unspoken (yet undeniable) truth is that most claims filed by employees do not attract the attention of private lawyers because the stakes are too small and outcomes too uncertain to warrant the investment of lawyer time and resources. These claims have only one place to go: filings with administrative agencies where they essentially languish, for the agencies themselves lack the staffing (and often even the inclination) to serve as lawyers for average claimants. The people who benefit under a litigation-based system are those whose salaries are high enough to warrant the costs and risks of a law suit undertaken by competent counsel; these are the folks who are likely to derive benefit from the considerable upside potential of unpredictable jury awards. Very few claimants, however, are able to obtain a position in this “litigation lottery.”

Most plaintiff lawyers understandably value this system because it enables them to be highly selective about the cases they take on. Moreover, the sheer costs of defending a litigation and the risks of a jury trial create considerable settlement value irrespective of the substantive merits of the underlying claim. Thus, most cases where claimants obtain competent counsel will settle, and at sufficiently high values to give plaintiff lawyers ample economic rewards without actually having to try many law suits. Thus, the system works well for high-end claimants and most plaintiff lawyers, and not very well for average claimants.

A properly designed arbitration system, I submit, can do a better job of delivering accessible justice for average claimants than a litigation-based approach. It stands a better chance of providing Saturns for average claimants, in

place of the rickshaws now available to the many so that a few can drive Cadillacs. Average claimants will benefit under an arbitration system because the lower costs of the forum also mean lower costs for their representatives (which could include unions). Moreover, unlike litigation where resolutions often come too late and the process itself is so divisive that reinstatement is rarely practicable, arbitration holds out the promise of a prompt resolution more suitable for claims by incumbent employees or even former employees truly desiring reinstatement.

### B. *Are Saturns Likely?*

What little empirical data we have suggests that properly designed employment arbitration systems can out-perform court-based litigation systems. There seems little dispute that because arbitration proceedings tend to be informal (and quicker), they require less lawyer time and resources.<sup>14</sup> Median time from filing to disposition is also lower for arbitration over court litigation, as Table 2 indicates.

**Table 2. Median Time from Filing to Disposition**

U.S. District Court: All Cases Terminated as of 9/30/99	9 months
U.S. District Court: All Cases From Filing to Trial as of 9/30/99	20 months
Orrick Herrington Study of U.S. District Court (S.D.N.Y.) Dispositions from 4/1/97 to 12/1/99	24-28 months
Cornell Data Base: Federal Civil Filings Terminated in 1997 (category 24: "Jobs")	334.5 days
Cornell Data Base: State Civil Filings: Terminated from 7/1/91 to 6/30/92	413 days
Orrick Herrington Study of NYSE/NASD Arbitrations from 1989-2000	16 months

Also, claimants' win-loss ratios are at least as high in arbitration, and some evidence suggests that claimants win more cases in arbitration than they do in court (Table 3).

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<sup>14</sup> Employers generally report lower costs in arbitration. See William H. Howard, *Mandatory Arbitration of Employment Discrimination Disputes* 142 (1995) (Ph.D. Dissertation, Arizona State University) (reporting average cost of \$20,000 in arbitration as opposed to \$96,000 in litigation); U.S. GENERAL ACCOUNTING OFFICE, *ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE* 19 (1997). There is no reason to believe that these costs savings are not symmetrical for both sides to the dispute.

**Table 3. Plaintiff/Claimant Win Rate**

Cornell Data Base: Federal Civil Filings Terminated in 1997 (category 24: "Jobs")	0.124
Cornell Data Base: State Civil Filings Terminated from 7/1/91 to 6/30/92	0.643
Maltby Data for 1994 Federal Civil Cases	0.149
Maltby Data for AAA 1993-95 Employment Arbitrations	0.63
Bingham-Sarraf Data for AAA Employment Arbitrations Decided between 1/93 and 6/97	0.508

Given the current state of empirical work, the dispute narrows down to whether recoveries in arbitration match results in court, and whether employers because they are repeat players enjoy some systematic advantage in the process of selecting arbitrators.

**Table 4. Median Awards/Verdicts (Dollars)**

Cornell Data Base: Federal Civil Filings Terminated in 1997 (category 24: "Jobs")	89,000
Orrick Herrington Study of U.S. District Court (S.D.N.Y.) Dispositions from 4/1/97 to 12/1/99	125,000
Orrick Herrington Study of California Jury Verdicts 1989-1999	289,000
Orrick Herrington Study of NYSE/NASD Arbitrations from 1989-2000	82,100
Bingham-Sarraf Data for AAA Employment Arbitrations: Decided Between 1/93 and 6/97	
Pre-Due Process Protocol	52,737
Post-Due Process Protocol	39,279
Hill Data for AAA Employment Arbitrations: Decided Between 1/7/99 and 10/20/00	
84 Awards <sup>15</sup>	34,733

As reflected in Table 4, median awards do seem to be lower in arbitration, although it is unclear whether cases that are going to arbitration are truly comparable to cases that proceed to trial and judgment in court. As the plaintiff bar contends, lower median awards may reflect some disadvantage claimants face in arbitration that they would not confront in court. On the other hand, lower awards may reflect a greater reluctance of claimants to settle marginally weaker claims when a low-cost arbitration option is available, or the fact that average claimants enjoy greater access to arbitration. Without better empirical studies than we now have, this cannot be answered as a matter of theory.

On the "repeat player" phenomenon, early work by Professor Lisa Bingham<sup>16</sup> found that employers sued more than once in arbitration fared better

<sup>15</sup> Hill's study finds eighteen additional awards during this period that awarded equitable remedies, thirteen of which also awarded unspecified monetary relief.

<sup>16</sup> See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1

than employers sued only once. Bingham's study did not control for some rather obvious variables that may explain positive employer outcomes, such as the size of the employer and the presence of a personnel department. Moreover, factors such as size and sophistication also suggest that employers sued more than once in litigation would fare better than employers sued only once.

Later work by Professor Bingham,<sup>17</sup> looking at a larger sample of AAA awards rendered after the promulgation of the *Due Process Protocol*, found a significantly diminished repeat-player effect.<sup>18</sup> Even more importantly, the study found no statistically significant "repeat arbitrator" effect,<sup>19</sup> that is, that employers confronting the same arbitrator in a second case would have a higher probability of success. The likely absence of a repeat-arbitrator effect is consistent with the view that the real repeat players in arbitration are not the parties themselves but the lawyers involved. Moreover, the emergence of an organized plaintiff's bar, in the form of the National Employment Lawyers Association, should drive down considerably any claimed systematic advantage for employers.<sup>20</sup>

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EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997). Bingham's work was based on awards rendered before the American Arbitration Association (AAA) adopted a set of procedural safeguards in 1995, often referred to as the "Due Process Protocol." *Id.*; TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), reprinted in DISP. RESOL. J., Oct.–Dec. 1995, at 37–39, available at <http://www.adr.org/education/education/protocol.html> (May 9, 1995) [hereinafter DUE PROCESS PROTOCOL].

<sup>17</sup> See Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK UNIVERSITY'S 53RD ANNUAL CONFERENCE ON LABOR (Samuel Estreicher ed., forthcoming 2001) [hereinafter N.Y.U. CONFERENCE ON LABOR].

<sup>18</sup> *Id.* at tbl.4.

<sup>19</sup> *Id.* at tbl.3.

<sup>20</sup> Does arbitration provide the same incentives for deterring improper employment decisions as litigation? Certainly, highly publicized law suits have had an important deterrent effect in the employment arena, but such law suits occur so infrequently that once the factor of likely exposure is discounted for the probability of suit, it is not clear what their net deterrent effect is. Conceivably, arbitration, by making possible more frequent production of claims even if the median awards (and hence settlement values) are lower, may result in the same level of deterrence. Moreover, to the extent arbitration relieves the administrative agencies of the burden of charge processing, agency resources would be freed to pursue systemic claims.

The Supreme Court recently granted review in *EEOC v. Waffle House, Inc.*, 121 S. Ct. 1401 (2001), to decide whether the EEOC can seek individualized relief on behalf of



### C. *The Illusory Alternative of Postdispute Arbitration*

Plaintiff lawyers generally agree that arbitration enjoys advantages over litigation, but they argue that the choice between these two approaches should be made only *after* the dispute has arisen, not in predispute agreements secured as a condition of employment. As they might put it, if arbitration is indeed so desirable, it will be readily accepted by claimants in the postdispute setting. Hence, employers have no legitimate interest in forcing this choice earlier on.

There is a facial appeal to this contention but one that on further reflection dissolves from view. I know, from personal experience representing clients and in my work drafting postdispute arbitration rules for the Center for Public Resources (a consortium of companies and lawyers that promotes various forms of ADR), that postdispute arbitration agreements are almost never negotiated.<sup>21</sup> It is a chimerical alternative to predispute arbitration agreements.

An understanding of the underlying incentives of employers and employees makes clear that postdispute arbitration, in all but the rarest cases, will not be offered by one party or accepted by the other. Say, for example, a termination has occurred. If the former employee cannot obtain counsel, it is not in the employer's interest to offer arbitration because the lower costs of arbitration will make more likely the pressing of a claim that otherwise simply would languish in the administrative agency. If, on the other hand, the former employee's economic losses are high enough to attract competent counsel, that lawyer is exceedingly unlikely (absent unusual circumstances) to proffer arbitration even if the lawyer

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charging parties who previously agreed to arbitrate their employment claims. Even if the Court holds that the EEOC does not have this authority, the agency could still seek such relief on behalf of individuals who did not enter into valid arbitration agreements, and in any event could seek injunctive relief enjoining respondent from "discharging individuals and engaging in any other employment practice which discriminates," and ordering it "to institute and carry out policies, practices, and programs which provide equal employment opportunities for [covered individuals], and which eradicate the effects of its past and present unlawful employment practices . . ." *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999) (internal quotation marks omitted).

<sup>21</sup> Professor David Sherwyn of Cornell University is assembling data on the incidence of employment arbitration pursuant to postdispute agreements. See David Sherwyn, *Post-Dispute Offers to Arbitration*, in N.Y.U. CONFERENCE ON LABOR, *supra* note 11. Professor Andrew Morriss's empirical study of experience under Montana's wrongful discharge statute also shows that few postdispute offers to arbitrate are accepted by the other side to the dispute, even where the statute (MONT. CODE ANN. § 39-2-914 (1999)) imposes attorney's fees on parties rejecting such offers who do not prevail in litigation. See Andrew Morriss, *An Empirical Evaluation of the Montana Wrongful Discharge from Employment Act*, in 2001 N.Y.U. WORKING ESSAYS IN LABOR AND EMPLOYMENT LAW (David Sherwyn & Michael Yelnosky eds., forthcoming 2002).

would prefer not to go to trial. The reason the proffer will not be made is because it is not in the client's interest to do so, for such a proffer reduces the settlement value of the case as it takes off the table the in terrorem effect of a jury trial.

By contrast, when arbitration agreements are reached in the predispute stage, the parties' incentives are notably different. Employers do not know which of their employees will be claimants, and thus are likely to offer the program to broad categories of employees. Indeed, it is in the employers' interest to make the program as broadly available as possible.<sup>22</sup> Similarly, from the employees' vantage, they have no way of knowing whether they will one day be claimants and whether their claims will attract the kind of lawyers who can obtain for them a position in the "litigation lottery." A low-cost, properly designed dispute resolution system for disputes that are not likely to occur and if they do are not likely to elicit a lawyer's attention looks like a pretty good deal.

#### D. *A Special Arbitration-Only Test for "Voluntariness"?*

Plaintiff lawyers would counter at this point that if it is such a good deal then why require employees to accept the deal. Give employees the option to turn down arbitration, they might say; only if the employee "voluntarily" accepts arbitration should a predispute agreement be enforced.

There are at least two problems with this response. First, employers offer predispute arbitration programs precisely because they hope to avoid the costs and distraction of litigation. The prospect that enforceability of arbitration agreements will depend on the outcome of collateral litigation, at the postdispute stage, over whether the employee's agreement was "voluntary" in some abstract sense detracts substantially from the value of the arbitration option. Second, it is unclear what arbitration opponents mean by a "voluntary" agreement. Most arbitration agreements are executed when employees are initially hired. At that point in time, the terms of relationship are being set. Those terms include matters of considerable importance to new hires such as compensation, benefits, job security and the like. No one argues that agreement on these terms is not enforceable because the employee's assent is not truly "voluntary," in that if he were not in need of employment, or desirous of the particular job, he might hold out for a job that offered more pay, more leisure, or more status. Why should

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<sup>22</sup> See, e.g., *Halliburton Dispute Resolution Plan*, DISP. RESOL. PLAN & RULES (Halliburton Co., Del.), June 1999, at 2-3 (Plan "binds the Company, each Employee and Applicant"; covered "'Dispute' means all legal and equitable claims . . . between persons bound by the Plan"); *Philip Morris USA—Sales Dispute Resolution Program*, (Philip Morris USA, New York, N.Y.), Jan., 1, 1995, at 5 (covering all claims involving "legally protected right[s]").

agreement on a properly designed arbitration system be treated differently?

The important point here is that at the initial hiring stage, neither the employer nor the job applicant have made investments in their relationship. Employers are shopping for prospective employees with desired skills and traits, and job applicants are shopping for positions that offer the desired mix of pay, benefits, working conditions, and training and promotion opportunity. It is not clear, from any a priori view, why the mechanism for resolving future disputes is a term that should be excluded from the contractual bargain.<sup>23</sup>

It has been suggested that predispute arbitration agreements are problematic from the employees' standpoint because they are unable to put a proper value on the probability of a future employment dispute.<sup>24</sup> But it is not clear, as an empirical matter, why employees are unable to calculate the prospect that, say, one day they will be terminated for discriminatory or other unfair reasons. Certainly some information about the firm's employment practices is publicly available, and the employee has good information about the quality of the skills and motivation he brings to the job. The employer, too, has to make a difficult prediction as to whether a particular individual will engage in the necessary effort level and will fit well within the culture of the firm. How seriously are we to take these cognitive difficulties? Is it also the view of arbitration's opponents that terms like severance pay benefits should not be enforced because of ex ante valuation problems, or that employers cannot adhere to stated promotion policies, because new hires cannot easily value whether they will one day seek a promotion for which they are qualified, but which they will not receive for unfair reasons?

In the final analysis, we see in the plaintiff bar's resistance to predispute arbitration agreements a reprise of the early common law view that arbitration promises are disfavored and should be revocable. But was it not the point of the FAA and state arbitration laws that arbitration agreements should be treated no differently than other contracts, and should "be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract?"<sup>25</sup>

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<sup>23</sup> The issue becomes more complicated where employers insist on a predispute arbitration agreement as a condition of retaining, as opposed to obtaining initial, employment. Here, employees are likely to have made sunk-cost investments in the job—whether in the form of investments in firm-specific skills, participation in benefit plans that reward continued service, or simply taking roots in a particular community.

<sup>24</sup> See Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 29 (1996).

<sup>25</sup> Federal Arbitration Act, 9 U.S.C. § 2 (1994 & Supp. 2000).

### III. PROCEDURAL SAFEGUARDS

Arbitration agreements, to be enforceable, must be fairly designed not to result, *Gilmer* teaches, in employees' waiver of any substantive rights. Here, there is essentially no disagreement between plaintiff and defense lawyers. As set forth in the American Bar Association's *Due Process Protocol*, and as reflected in the rules of the leading ADR service providers such as the American Arbitration Association and JAMS, an enforceable program that is intended to cover statutory employment claims must authorize the arbitrator to apply statutory law and award statutory remedies if violations are found, including reasonable attorney's fees (if authorized by the statutes in question).<sup>26</sup> Moreover, the arbitrator should be experienced in employment law, allow some reasonable opportunity for discovery, and issue a written opinion stating reasons for the award rendered. Note should also be taken of the decisions of the D.C. Circuit<sup>27</sup> and the California Supreme Court<sup>28</sup> that require employers to front-load the costs of the forum, including forum fees and the arbitrator's compensation.

### IV. CONCLUSION

Arbitration programs so designed will not be attractive to every employer or employee in the country, but they should be available as an important option in the overall mix of fora for resolving employment disputes. Allowing this option is in the best interest not only of employers but also of most employees, not to mention overburdened courts that cannot effectively process these fact-sensitive, emotional disputes (today representing 15% of the federal docket).

As the Supreme Court in *Circuit City* has now brought the Ninth Circuit in line with the other Courts of Appeals, I hope we can look forward to the day when the plaintiff bar will retreat from its oppositional stance and begin to work cooperatively with defense counsel further to improve the employment arbitration process and help realize its full potential for improving the quality of justice in our society.

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<sup>26</sup> DUE PROCESS PROTOCOL, *supra* note 16; JAMS, EMPLOYMENT ARBITRATION RULES AND PROCEDURES, at [http://www.jamsadr.com/employment\\_arb.asp#twenty](http://www.jamsadr.com/employment_arb.asp#twenty) (Nov. 1, 2000).

<sup>27</sup> See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

<sup>28</sup> See *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669 (Cal. 2000).