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In Light of *Circuit City Stores, Inc. v. Adams*, What is the Fate of Employment Law? Does an Analysis of Consumer Law Shed Light on the Future of Employer/Employee Relations?

INTRODUCTION

The popularity of Alternative Dispute Resolution has increased gradually as “courts have abandoned their traditional hostility towards arbitration and openly embraced agreements to arbitrate.”¹ Still, many express concern about the consequences for those unsuspecting parties who agree to waive their right to a judicial forum and submit all disputes, including those that arise under statutory law, to binding arbitration. Until recently, American jurisprudence had yet to see whether arbitration agreements, governed by the Federal Arbitration Act (FAA), might be applied constitutionally in an employment context. Following the United States Supreme Court’s decision in *Gilmer v. Interstate/Johnson Lane Corp.*,² there were numerous reservations about the FAA’s section 1 language, which excludes specific employment contracts. The Supreme Court, however, clarified this issue in *Circuit City Stores, Inc. v. Adams*.³

The Court decided *Circuit City* on March 21, 2001. After a great deal of speculation by federal courts, the Supreme Court attempted to clarify a number of uncertainties. Of greatest importance, it is now clear that agreements to arbitrate can be enforced under the FAA.⁴ In support of this holding, the Supreme Court rejected the supposition that the advantages of arbitration disappear when transferred to the employment context.⁵ Therefore, the only parties that are excluded under the lan-

1. Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187 (1993); see also *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

2. 500 U.S. 20 (1991).

3. 532 U.S. 105 (2001).

4. See Arthur D. Rutkowski & Barbara Lang Rutkowski, *U.S. Supreme Court Decision Gives New Life to Mandatory Arbitration of Statutory Discrimination Claims in an Employment Setting*, 16 No. 4 EMP. L. UPDATE 1 (Apr. 2001); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30–32 (1991). While the Court in *Gilmer* does not state the proposition clearly, it does suggest that employment contracts were not intended to be excluded from the FAA. *Id.*

5. See Rutkowski, *supra* note 4.

guage of the statute are seaman, railroad employees, and transportation workers.⁶ While on the surface the conflict appears to have been resolved, there are still numerous questions that remain unanswered.

For a better understanding of the issues that may arise given the Court's decision in *Circuit City*, it is instructive to look at the law as it has developed outside of the employment context, particularly the issues that have been debated and argued over consumer contracts. Arguably, employees may benefit from worthwhile arguments that have been made and won by consumers facing similar arbitration clauses within consumer contracts.

Three issues of particular importance will be considered. The first focuses on the constitutionality of the arbitration clause itself. Certainly, many employees will continue to argue that their constitutional right to due process is abridged with the loss of formalities associated with a jury trial. How will courts respond under *Circuit City*? What has developed pertaining to consumer law?

The second section will focus on consent issues as they have developed under consumer law. What constitutes voluntary consent? In evaluating consumer contract law, what are the most prominent arguments made by consumers? Can predictions be made for employees who may face similar problems in the future? The final section will show that even after *Circuit City* these two critical arbitration issues remain unanswered. To provide the proper framework for this Comment, it is necessary to take a brief look at the basics of arbitration, the history of the FAA, and the facts of *Circuit City*.

THE ARBITRATION CLAUSE

Under Federal law, arbitration is considered a matter of contract between two parties.⁷ Congressional legislation in this area suggests that there is a liberal federal policy toward the enforcement of contractual arbitration agreements. These policies are rooted in the basics of contract law. Very simply, if two parties bargain for goods or services and agree to arbitrate all disputes that arise under the terms of the contract, those parties should be bound to that agreement.⁸ The FAA governs disputes that arise in this context. Likewise, courts have expressed that a liberal construction of the FAA's scope should be implemented,

6. See Ross Runkle, *After Circuit City – Arbitration of Individual Employment Disputes*, available at <http://www.lawmemo.com/emp/articles/circuitcity.htm> (Nov. 11, 2001).

7. A. Daniel Woska, *Arbitration Clauses Added to Consumer Contracts: Why They Are Not Enforceable*, 17 GPSOLO 40, 41 (2000).

8. *Id.*

thus reinforcing the court's decision in *Circuit City*.⁹ As a result, it is now certain that the FAA governs employment contracts.

In drafting an arbitration clause, several goals should be kept in mind. First, the clause should be sufficiently detailed to apprise consumers and employees of their legal rights and to disclose aspects of the arbitration process.¹⁰ Second, the language used should be both clear and plain.¹¹ Finally, the clause should be fair.¹² Each of these elements help facilitate the arbitration process and ensure an arbitral agreement that is both fair and proper. It has also been suggested that the party drafting the agreement refer to the FAA in the text of the clause.¹³ This ensures that courts will enforce the agreement for which the parties bargained under the FAA.¹⁴ The arbitration agreement itself will frame the types of disputes that may arise in the future between the parties involved.¹⁵

One scholar comments that the wise lawyer should recognize two distinct moments when disputes over arbitration agreements are likely to occur.¹⁶ The first of these takes place pre-arbitration when, for example, one party moves to compel the other to submit to the terms of an arbitration provision.¹⁷ The second instance arises post-arbitration when one party moves to vacate the arbitrator's award.¹⁸ These two examples are not exhaustive; there are a variety of other instances when a dispute could arise. These two examples simply represent the most frequent disputes. The basis of a party's argument usually stems from the fairness of either the proceedings or the clause itself.¹⁹ When aware of the problems that may arise, a better arbitration clause can be drafted with the hope of curbing some of the process's negative effects.

The incorporation of arbitration clauses into contractual agreements ultimately involves both positive and negative aspects. After balancing the attributes associated with the process, the clauses are generally more beneficial than they are harmful to the parties involved. The most glaring concern over the use of an arbitral rather than judicial forum is the

9. *Id.*

10. Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should be Considered by a Consumer Lender*, SF 81 ALI-ABA 215, 217 (2001).

11. *Id.*

12. *Id.*

13. Jeffrey J. Mayer & Theodore W. Seitz, *Recognizing and Understanding Consent Issues in Arbitration*, 79 MICH. BUS. L.J. 504, 505 (2000).

14. *Id.*

15. Runkle, *supra* note 6, at 2.

16. *Id.*

17. *Id.*

18. *Id.*

19. See Mayer & Seitz, *supra* note 13, at 504.

inferiority of the arbitral proceedings, particularly the lack of a jury trial.²⁰ This concerns many individuals who fear infringement upon or waiver of their Seventh Amendment right to a jury trial.

Another serious concern facing parties is the lack of safeguards essential to the legal system.²¹ These safeguards form the foundation of traditional adjudication and provide for continued faith in the judicial system. For instance, discovery is an invaluable aspect of litigation that is severely limited in the arbitral forum. When faced with a final judgment from an arbitrator, only limited discovery is allowed.²² Furthermore, the proceedings are not governed by the Federal Rules of Evidence, nor is the possibility of class certification available after one has agreed to arbitrate a claim.²³ There are no required written decisions, fewer available remedies,²⁴ and because the arbitrator's decision is essentially final, there is no possibility of appeal.²⁵

While there are numerous concerns about the downsides to arbitration, the process does in fact resemble traditional adjudication in very basic ways. The process "involves adversary presentations of proof and reasoned argument to an arbitrator."²⁶ These fundamental qualities form the basics of any proceeding, be it arbitral or judicial. Moreover, unlike the judicial forum, arbitral parties are given the opportunity to control the procedure and have a say in the remedies available depending on the type of dispute.²⁷ The time-honored form of courtroom adjudication does not allow for such informality, expediency, or efficiency in the process.²⁸ Based on several of these theories, strong arguments can be made in favor of arbitration agreements. Yet, regardless of whether one favors such clauses, if the parties agree to the terms of the clause, a court will likely enforce it under the FAA.

THE FEDERAL ARBITRATION ACT

Congress enacted the FAA in 1925 in an attempt to thwart judicial animosity towards arbitration agreements.²⁹ As the Supreme Court

20. *Id.* at 505.

21. See Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992).

22. *Id.*

23. Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1234 (2001).

24. *Id.*

25. See Brunet, *supra* note 21, at 82, 86-87.

26. *Id.* at 82.

27. See Mayer & Seitz, *supra* note 13, at 507.

28. See Brunet, *supra* note 21, at 82.

29. *Circuit City Stores Inc. v. Adams*, 532 U.S. 105, 111 (2001); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

stated in *Gilmer v. Interstate/Johnson Lane Corp.*,³⁰ the purpose of the Act was to “reverse longstanding judicial hostility to arbitration agreements that had existed at English Common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.”³¹ By placing both arbitration clauses and contracts on the same level, arbitration law has become enveloped by the underlying rules of contract law. According to the Supreme Court, any doubts that arise concerning the scope of arbitrable issues will be resolved in favor of arbitration.³² Therefore, the terms of written contracts for which parties bargain are likely to be upheld.³³ Since its enactment by Congress, the FAA has been applied to contracts for the interstate sale of goods, construction contracts, service contracts, and partnership agreements.³⁴ Employment contracts now fall within the scope of the Act as well.

Sections 1 and 2 of the FAA are the most controversial. They read:

SECTION 1. “MARITIME TRANSACTIONS” AND “COMMERCE” DEFINED;
EXCEPTIONS TO OPERATION OF TITLE

“Maritime transaction”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, *but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.*³⁵

SECTION 2. VALIDITY, IRREVOCABILITY, AND ENFORCEMENT OF
AGREEMENTS TO ARBITRATE

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the

30. 500 U.S. 20 (1991).

31. *Id.* at 24.

32. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *see also* Kaplinsky & Levin, *supra* note 10, at 233.

33. *See* Smith, *supra* note 23, at 1197.

34. Scott R. Swier, *The Tenuous Tale of the Terrible Termites: The Federal Arbitration Act and the Court's Decision to Interpret Section Two in the Broadest Manner: Allied Bruce Terminex Companies, Inc. v. Dobson*, 41 S.D. L. REV. 131 (1996).

35. 9 U.S.C. § 1 (2000) (emphasis added).

refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.³⁶

The terms of these two sections have caused a great deal of speculation and doubt about the statute's outer limits. Despite the lack of textual and historical support, one scholar notes that the Court has "greatly expanded the preemptive scope of the statute"³⁷ More recently, *Circuit City* expanded the Act even further to encompass contracts of employment.³⁸

Originally, the FAA was interpreted as a procedural device to be used by federal courts in the enforcement of arbitration agreements in federal question and diversity cases.³⁹ It became possible, however, for federal courts to enforce arbitration clauses in diversity cases that otherwise may have been void under a state statute if the proceedings had been brought in state court.⁴⁰ This is precisely the type of situation that the *Erie* Doctrine sought to prevent. Therefore, the Supreme Court has held that the enforcement of an arbitration provision may affect substantive rights as well as procedural rights.⁴¹ Now arbitration agreements may fall under the *Erie* Doctrine, in which case state substantive law will apply in diversity cases.⁴²

This issue was argued fiercely for several years because some believed the Act distorted Congress's original intent.⁴³ In a stern Supreme Court dissent, Justice Black claimed that application of the FAA in state courts would be "statutory manipulation" of the framers' intent.⁴⁴ Almost thirty years later, Justice O'Connor noted that "although arbitration is a worthy alternative to litigation," the Court's belief that substantive rights are infringed upon is an "exercise in judicial revisionism [that] goes too far."⁴⁵ Regardless of the numerous concerns and powerful dissents exhibited in recent years, the FAA continues to be applied in both state and federal courts. Some have likewise noted

36. 9 U.S.C. § 2 (2000).

37. Megan Davis, *From Procedural Law to Preemption: The Supreme Court's Transformation of the Federal Arbitration Act*, 1 HARV. NEGOT. L. REV. 169 (1996).

38. 532 U.S. 105 (2001).

39. Davis, *supra* note 37, at 176-77.

40. *See id.* at 178-79.

41. *See Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (holding that the Federal Arbitration Act affected not only the procedural rights of the parties, but substantive rights as well).

42. *See id.*

43. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

44. *Id.* at 416 (Black, J., dissenting).

45. *Southland Corp. v. Keating*, 465 U.S. 1, 36 (1984) (O'Connor, J., dissenting).

that, “[a]ll the FAA does is enforce an arbitration clause that is otherwise valid and bargained for under state contract law.”⁴⁶

A REVIEW OF *CIRCUIT CITY STORES, INC. v. ADAMS*

In *Circuit City* the Supreme Court conclusively determined the scope of the FAA’s section 1 contract exemption.⁴⁷ In a 5-4 decision, with two powerful dissents, the Court narrowed the exemption from “contracts of employment of seamen, railroad employees, or other class of workers engaged in foreign or interstate commerce” to transportation workers.⁴⁸ After an in-depth analysis of the terms of the statutory text, the Court found this rationale to be the only reasonable reading of Congress’s exclusionary clause.

FACTS

In applying for a job at the Petitioner’s place of business, Circuit City Stores, Inc., the Respondent, Saint Clair Adams, signed an employment application. The signed application included a provision which stated that the Respondent would resolve “any and all previously unasserted claims, disputes or controversies arising out of or relating to [the] application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator.”⁴⁹ Upon signing, Adams was hired as a sales counselor at a Circuit City Store located in Santa Rosa, California.⁵⁰

After two years of employment, Adams filed several discrimination claims against Circuit City in California state court.⁵¹ These claims included violations of California’s Fair Employment and Housing Act, as well as other general tort law claims.⁵² In response, Circuit City filed suit in the United States District Court for the Northern District of California, seeking to enjoin the state court proceedings and compel arbitration of Adams’s claims. The District Court concluded that Adams must submit all claims against Circuit City to arbitration.⁵³

Adams appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit adhered to its precedent and found that that the FAA could not

46. Davis, *supra* note 37, at 182.

47. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (internal quotation marks omitted).

48. *Id.*

49. *Id.* at 109-10.

50. *Id.* at 110.

51. *Id.*

52. *Id.* at 105.

53. *Id.*

be applied to the employment contract between Adams and Circuit City.⁵⁴ Circuit City filed for certiorari arguing that every other Court of Appeals was in direct opposition with the Ninth Circuit on this issue.⁵⁵ The Supreme Court granted certiorari to hear arguments and resolve the dispute.⁵⁶

RATIONALE

While in the past the Supreme Court dealt mainly with the language of section 2 of the FAA, specifically the “involving commerce” terminology,⁵⁷ here the Court quickly narrowed its analysis to the section 1 exemptions.⁵⁸ Originally, the exemption issue was raised over a securities registration application in *Gilmer* but the court was able to reach a decision in that case without having to interpret the scope of the exemptions because the application was not an employment contract.⁵⁹

The *Circuit City* court concluded that the issue reserved in *Gilmer* would be resolved based on the facts before it.⁶⁰ Adams argued initially that the section 1 exclusion need not be addressed because an employment contract is not a “contract evidencing a transaction involving interstate commerce” under section 2 of the FAA.⁶¹ The Court deflated this argument by noting that the section 1 exemption would not have been necessary had contracts of employment fallen outside the scope of the FAA under the section 2 language.⁶² The Court stated that the section 1 exemption would have been “pointless” and inconsistent with the Court’s holding in both *Gilmer* and *Allied-Bruce*.⁶³ Adams continued to

54. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 105 (2001); *see also* *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (holding that the FAA does not apply to employment contracts).

55. *Id.* at 109; *see also, e.g.*, *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 575-76 (10th Cir. 1998); *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 358 (7th Cir. 1997); *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1265, 1270-72 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.* 87 F.3d 745, 747-48 (5th Cir. 1996); *Asplundh Tree Co. v. Bates* 71, F.3d 592, 596-601 (6th Cir. 1995); *Erving v. Va. Squires Basketball Club*, 468 F.2d 1064, 1069 (2nd Cir. 1972); *Dickstein v. DuPont* 443 F.2d 783, 785 (1st Cir. 1971); *Tenney Eng’g, Inc. v. United Elec. & Mach. Workers of Am.*, 207 F.2d 450 (3d Cir. 1953).

56. *See Circuit City Stores, Inc.*, 532 U.S. at 111.

57. *See supra* note 29 and accompanying text.

58. *See supra* note 28 and accompanying text.

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

60. *Circuit City Stores, Inc.*, 532 U.S. at 113.

61. *Id.*

62. *Id.*

63. *Id.* In *Allied-Bruce Terminex*, 513 U.S. 265, the Court adopted an expansive reading of the section 2 language quoted by the respondent in *Circuit City*. *Id.* The Court in *Circuit City* held that if the Respondent wished to argue that employment contracts are not covered by the FAA, such argument would only be successful if done under the section 1 exemption. *See id.*

argue that the language of the statute excludes all employment contracts from enforcement under the FAA. The Court, however, used several canons of construction to refute Adams's approach. In so doing, the Court did not consider the legislative history of the FAA, explaining that its decision was based on the text of the statute alone.⁶⁴

Various amici briefs submitted on behalf of both parties raised several concerns. One suggested that by allowing the FAA to cover employment contracts, the statute would "in effect pre-empt those state employment laws which restrict or limit the ability of employees and employers to enter into arbitration agreements."⁶⁵ The Court disagreed, noting that this issue had been specifically addressed in *Southland Corp. v. Keating*,⁶⁶ and again affirmed in *Allied-Bruce Terminix Cos., v. Dobson*.⁶⁷ To conclude its extensive analysis of the Federal Arbitration Act, the Court observed several of the benefits of arbitration, including lower transactional costs for those involved.⁶⁸ The Supreme Court noted that by "agreeing to arbitrate a statutory claim, the party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum."⁶⁹

GILMER VS. CIRCUIT CITY: WHAT'S LEFT?

One scholar pointed out that before the Supreme Court handed down its decision in *Gilmer*, it had consistently refused to compel employees to arbitrate statutory claims.⁷⁰ After *Gilmer*, lower courts continuously attempted to narrow the scope of the *Gilmer* holding because it appeared to raise more questions than it answered and left many individuals uncertain about the scope of the FAA.⁷¹

The Supreme Court stated, however, that it has "been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."⁷² One should question whether now, after *Circuit City*, there may still be

64. *Circuit City Stores, Inc.*, 532 U.S. at 119.

65. *Id.* at 121-22.

66. 465 U.S. 1, 16 (1984) (holding that Congress intended the FAA to apply in state courts and to pre-empt state anti-arbitration laws to the contrary).

67. 513 U.S. 265, 272 (1995). The Supreme Court in *Circuit City* distinguishes both *Allied-Bruce Terminix* and *Keating* on the basis that both of those decisions concerned the application of the FAA in a state court proceeding. See *Circuit City Stores, Inc.*, 532 U.S. at 122. *Circuit City*, on the other hand, dealt specifically with the FAA's application in the federal court system. *Id.*

68. *Circuit City Stores, Inc.*, 532 U.S. at 122-23.

69. *Id.* at 123 (quoting *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

70. See Martin H. Malin, *Arbitrating Statutory Claims in the Aftermath of Gilmer*, 40 St. Louis U. L.J. 77, 78 (1996).

71. *Id.* at 81.

72. *Circuit City Stores, Inc.*, 532 U.S. at 123; see also *Gilmer*, 500 U.S. 20, 30-32 (1991).

room for doubt. The *Gilmer* holding was interpreted in a variety of ways: some courts more broadly, others more narrowly. Does *Circuit City* leave any room for doubt? On the surface, the answer to this question appears to be no. The Court has drawn a distinct line and employment contracts now fall within the reach of the FAA. It is yet to be determined, however, how lower courts will respond to the Court's rationale.

It appears that arbitration is no longer restricted to a debate on statutory terminology. The Court has clearly defined the FAA's terms and meanings.⁷³ Any agreement not considered a transportation-employment contract is now fair game under the FAA. While one might suggest that all previous controversies have lost their merit, many scholars idealistically believed that the issue was resolved after the *Gilmer* decision in 1991.⁷⁴ Just as there were many debates over *Gilmer*, it is likely that *Circuit City* will also spark some controversy.

Some have already criticized the *Circuit City* decision for failing to determine whether there are limits on mandatory arbitration agreements that include federal statutory rights.⁷⁵ It will be interesting to see whether arbitration agreements are purely contractual or whether they involve statutory rights that require regulation. Some examples of statutory rights that might be at issue include those protected under the Civil Rights Act of 1964,⁷⁶ the ADEA,⁷⁷ and the Americans with Disabilities Act.⁷⁸ While this certainly is an understandable concern, the *Circuit City* decision was an improper forum to raise the issue given the facts of the case.⁷⁹ The respondent, Saint Clair Adams, brought claims against Circuit City under the California Fair Housing and Employment Act and general tort claims under California law.⁸⁰ These were state law claims that did not involve federal statutes. As a result, one should hesitate to criticize the Supreme Court for failing to address those statutory rights that arise under federal statutes, given that the circumstances of Circuit City revolved around state law.

No single Supreme Court decision will resolve every issue relating to a given topic. *Circuit City*, however, is a positive development for

73. For a more complete analysis of the Court's reading of the FAA, see *Circuit City Stores, Inc.*, 532 U.S. 10 (1991); *Allied-Bruce Terminix Cos. Inc. v. Dobson*, 513 U.S. 265 (1995); and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

74. See Malin, *supra* note 70, at 88.

75. See James M. Sconzo & Michelle L. Treadwell, *Have the Conflicts Over Arbitration Finally Been Resolved?*, 9 CONN. EMPL. L. LETTER 2 (2001).

76. 42 U.S.C. § 2000e (2001).

77. 29 U.S.C. § 621 (2001).

78. 42 U.S.C. § 12101 (2001).

79. See *supra* notes 41–51 and accompanying text.

80. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

those employers who wish to keep their employer/employee disputes out of the courtroom. Employees, on the other hand, may have a different response. While it is true there are benefits to mandatory arbitration, there are arguments to be made that some claims belong in the hands of a jury and deserve the proper formalities of the courtroom, including those previously mentioned federal statutory rights. Because the *Circuit City* decision will likely prompt an increase in the number of arbitration clauses in employment contracts, employees must be prepared to defend their claims carefully, or at least be cautious when agreeing to submit all claims to mandatory arbitration.

THE LAW OUTSIDE OF THE EMPLOYMENT CONTEXT: CONSUMER VERSUS EMPLOYMENT CONTRACTS

Employment law will experience a revolution in contractual interpretation just as consumer law has faced similar changes in tradition. Originally, if a corporation violated the statutory rights of a consumer or subjected the consumer to an invalid contract under federal or state law, the consumer could recover damages from that corporation by filing a lawsuit.⁸¹ As consumer law developed, however, many consumers were forced to submit all claims to alternative dispute mechanisms after unknowingly signing away their rights in an agreement to arbitrate.⁸²

These issues often arise when consumers sign mandatory arbitration clauses in adhesion contracts. Adhesion contracts are usually offered on a "take it or leave it" basis, thus emphasizing the disparity in bargaining power between consumers and larger corporations.⁸³ As most consumers do not seek legal advice before entering such agreements, they tend to miss the fine print within the contract, and ultimately forfeit their right to a jury trial.⁸⁴ One scholar stated that "[i]n consumer contracts, one party in the transaction is always a company or organization who is likely to be financially powerful" while "[t]he other party, an individual . . . who may be uneducated, inexperienced in business, elderly, unable to read fine print . . . indigent and very desperate for money."⁸⁵ In some consumer cases, courts have held that if an arbitra-

81. See Smith, *supra* note 23, at 1191; see also U.S. CONST. amend. VII (granting individuals the right to bring forth any claim before a jury).

82. See Smith, *supra* note 23, at 1191.

83. *Id.* at 1192; see also Alan S. Kaplinsky and Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should Be Considered by a Consumer Lender*, SF81 ALI-ABA 215, 258 (2001).

84. See *id.* at 1192.

85. Smith, *supra* note 23, at 1226-27. The author goes on to note that these larger companies also have a legal advantage because their own attorneys draft the clauses, which must then be interpreted by the individuals. *Id.* Smith also suggests that these clauses become difficult for consumers to interpret without the help of an attorney. *Id.*

tion provision was not fully explained to the consumer, it may be unenforceable.⁸⁶ Might this theory also apply in the employment context?

Employees likewise face disproportionate bargaining power and similarly do not often seek the advice of legal counsel before signing employment contracts. This creates comparable problems for consumers and employees alike. One difference between the employee's circumstances and the consumer's situation, however, lies in the fact that most consumer contracts are sent to the consumer through the mail.⁸⁷ Therefore, it becomes a more pressing issue for companies to explain arbitration clauses to consumers, because they are not in the presence of a company representative when signing an agreement. Employees, on the other hand, are likely to be at the place of business when signing an employment application containing an arbitration clause. As a result, an employer might later argue that the employee had ample opportunity to question the terms of the agreement, making it difficult for an employee to argue that she was unaware of the terms of the contract. Of greater concern is the Supreme Court's holding in *Doctor's Associates, Inc. v. Casarotto*,⁸⁸ which made it clear that arbitration clauses could not be singled out for special treatment.⁸⁹

In an analysis of consumer law, one scholar noted that while "Congress intended for citizens to benefit from the FAA's enactment, large corporations have used their legal, financial, and political resources to turn the FAA into a shield against consumer lawsuits."⁹⁰ Even though Congress has created numerous federal statutes to protect the rights of consumers and employees, it still appears that something should be done about the FAA to better protect the interests of the individuals it was created to serve. Perhaps as consumer law has become so heavily regulated,⁹¹ more protective legislation needs to be created on behalf of employees as well. Hence it has been suggested that the FAA be amended to curb the effects of unequal bargaining power given to larger entities, such as corporations and employers.⁹²

86. *Lawrence v. Walzer & Gabrielson*, 256 Cal. Rptr. 6 (Cal. Ct. App. 1989). The court held that an arbitration agreement between an attorney and a client was unenforceable because the client was not fully aware of the scope of the agreement. *Id.* For a more in-depth analysis of the case, see Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1226, 1228 (2001).

87. Smith, *supra* note 23, at 1192.

88. 517 U.S. 681 (1996).

89. *See also Allied - Bruce Terminex Cos. v. Dobson*, 513 U.S. 265 (1995). As a result of the Court's holding in these cases, there is no legal requirement for employers to explain or point out arbitration provisions. Kaplinsky & Levin, *supra* note 10, at 220.

90. *See* Smith, *supra* note 23, at 1194-95.

91. Kaplinsky & Levin, *supra* note 10, at 273.

92. *See* Smith, *supra* note 23, at 1246.

Congress has the power to remedy this situation, but in doing so it must not violate the United States Constitution.⁹³ Time and time again, however, employees and consumers have argued that enforcing arbitration clauses infringes upon their constitutional right to due process.⁹⁴ It has been suggested that by preserving the benefits of arbitration and removing a case from the courtroom, the constitutional protections of the judicial process likewise are lost.⁹⁵ One scholar also noted that "arbitration represents an alternative litigation and offers a forum where legal rights are not guaranteed and, in a very real sense, are de-emphasized."⁹⁶ Because arbitrators are not bound by legal rules, it is nearly impossible to make a constitutional argument.⁹⁷

CONSTITUTIONAL CONCERNS

In terms of constitutional protections, many argue that employment arbitration scores high relative to other areas of the law. It has been proposed that in constitutional terms, arbitration between employers and employees before a labor arbitrator has a "rich and successful history" and is considered a "model of dispute resolution."⁹⁸ Due process, however, remains a serious concern for both employees and consumers.

One benefit of employment arbitration is the surplus of written decisions.⁹⁹ Commercial arbitration is lacking in this area, which makes it difficult to analyze the arbitral proceeding in terms of fairness and propriety.¹⁰⁰ Many employment and consumer decisions have turned on the fairness of the proceedings,¹⁰¹ while other decisions have focused more on the existence of "just cause" to support an arbitral award.¹⁰² As long as arbitration does not require the same formalities of the court-

93. *See id.* at 1245.

94. *Id.*

95. *See* Brunet, *supra* note 21, at 81.

96. *Id.*

97. *Id.* at 88.

98. *Id.* at 89; *see also* David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 745-51 (1973).

99. *Id.* at 89.

100. Brunet, *supra* note 21, at 96.

101. *Id.* at 92. The author refers to three cases in particular to highlight the notion of "procedural fairness" to ensure that an individual's right to due process is properly protected. *Id.* at 93. He refers to this concept in the labor arbitration context as "industrial due process." *Id.* He goes on to note that "a full and fair investigation of the facts and circumstances surrounding the employee conduct" is necessary, including "an opportunity for the employer [sic], before the Company makes its final decision, to offer any denials, explanations or justifications which may be relevant." *Id.* *See also* City of Detroit, 79-2 Lab. Arb. Awards (CCH) ¶ 8533, at 5358 (quoting United Tel. Co. of Fla., 61 Lab. Arb. (BNA) 443 (1973) (Murphy, Arb.)).

102. The author also noted that some arbitration clauses refer to a "just cause" clause. *Id.* at 95. These clauses often prompt the arbitrator to ensure fairness in the proceedings, and this equates to due process. *See* Brunet, *supra* note 21, at 95.

room, employees will have a difficult time trying to argue that their constitutional rights are being abridged. As long as those rights are not guaranteed during the proceedings, they cannot be infringed upon by the simplicity of the process. *Circuit City* will not effectively change the weight of the arguments made concerning the arbitral proceeding's constitutionality. The *Circuit City* opinion focused on the scope of the Federal Arbitration Act, not on the constitutionality of arbitration.

CONSENT

On several occasions, lower courts have faced the issue of voluntary consent in arbitration agreements. If the consent is deemed inadequate, the clause itself may not be enforced. Consumers and employees similarly will attempt to argue that they were not made aware of a material fact in the contract, thus dissolving that portion of the agreement.¹⁰³ Some companies, however, may want to voluntarily disclose arbitration provisions within employment contracts because it will be less likely that the employee will later succeed in having the clause declared unconscionable.¹⁰⁴ Further, it has been suggested that employees sign a separate arbitration clause to ensure that the issue of consent will not create future problems.¹⁰⁵

The *Circuit City* opinion did not address these subjects, and as of the 2001 decision, the Supreme Court has failed to subsequently face head-on the issues of notice and consent. Nevertheless, the problem consistently arises in both consumer and employee disagreements. Unfortunately, consumers have been unsuccessful in arguing that they were unaware of an arbitration clause located in a signed contract.¹⁰⁶ As a result, it does not seem likely that the argument will be more successful when made by employees. Simply changing the circumstances of the parties does not make an argument more plausible.

Consumers have also used fraudulent inducement as another method of arguing the unconscionability of an arbitration provision. In many instances, consumers have attempted to show that the alleged consent was false because it was induced under deceitful circumstances. In

103. See Jeffrey J. Mayer & Theodore W. Seitz, *Recognizing and Understanding Consent Issues in Arbitration*, 79 MICH. BUS. L.J. 504, 506 (2000).

104. See Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should be Considered by a Consumer Lender*, SF81 ALI-ABA 215, 225 (2001).

105. *Id.*

106. *Id.* at 223. The authors list numerous case opinions that uniformly have denied consumers the opportunity to argue that they were unaware of an arbitration clause within a contract. *Id.* See, e.g., *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *Golenia v. Bob Baker Toyota*, 915 F. Supp. 201 (D. Cal. 1996); *Rosenthal v. Great W. Fin. Sec.*, 59 Cal. Rptr. 2d. 875 (1996).

these instances, the Court has specifically stated that the fraud must be shown to have occurred in reference to the arbitration provision.¹⁰⁷

As courts have not been sympathetic to consumers who attempt to make these arguments, a great deal of criticism surrounds the concept of consent and notice. One scholar has noted that the "freely consenting party is a legal fiction," suggesting that courts should perhaps be more cautious before denying an individual the ability to argue a consent issue.¹⁰⁸ Where Federal law has failed to protect employees, states usually implement their own laws to protect both consumers and employees.¹⁰⁹

A problem arises when states attempt to infringe on the FAA. The Supreme Court responded to this problem with its decision in *Doctor's Associates, Inc. v. Casarotto*.¹¹⁰ There, the Court held that state laws could not conflict with the FAA by singling out arbitration clauses.¹¹¹ The Court continued to hold that courts could not invalidate arbitration agreements under state laws that are only applicable to the arbitration provision and not the entire contract.¹¹² It appears that, whether one is a consumer or an employee, if the party has agreed to a contract in writing, it will be difficult to show that he was unaware of the specific arbitration clause. The individual, therefore, is left only a few defenses, including fraud, duress, and lack of mutuality.

It seems the Court has glossed over the issue of consent and failed to properly consider many of the elements that may come into play when a potential employee signs an employment application. It is of the utmost importance that the Court be more sympathetic to the vast disparity in bargaining power between employee and employer.

CONCLUSION

The use of arbitration for settling disputes is intended to make the process of resolution more efficient, speedy, and cost effective.¹¹³ To ensure the process is fair, Congress has implemented statutory law to regulate the enforcement of arbitration agreements. Because courts disagreed on the scope and terms of the Federal Arbitration Act, the

107. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). In *Prima Paint*, the Supreme Court held that if a contract is induced by fraud, this may not be enough to invalidate the mandatory agreement to arbitrate. *Id.* at 403-04. The parties must show that that consent to the arbitration provision was procured by fraudulence. *Id.*

108. See Mayer & Seitz, *supra* note 13, at 506.

109. *Id.*

110. 517 U.S. 681 (1996).

111. *Id.* at 683.

112. *Id.* at 686-87.

113. See Brunet, *supra* note 21, at 82.

Supreme Court attempted to clear the air regarding the limits of the FAA. After ten years of speculation and disagreement since *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court handed down its decision in *Circuit City Stores, Inc. v. Adams*. While the latter opinion addressed many of the concerns raised in the past years, it has still left several vital issues in conflict. As a result, challenges to arbitration clauses are likely to continue for some time.

By focusing on the Court's failure to address issues central to arbitration, this is not necessarily a denunciation of the opinion in *Circuit City* itself. It is merely a critique of the Supreme Court's inability to answer pressing questions being debated in lower courts, particularly those of constitutional due process and notice and consent. These topics certainly are important to consumers, but likewise are valuable to employees. Since many employees are unlikely to have the means to hire independent counsel before signing an employment application or contract, there is a great deal of room for employees to be taken advantage of by larger, more powerful employers.

Public policy demands a sound method of resolution that will not jeopardize the already small amount of bargaining power that employees retain. Before anyone can claim success after the *Circuit City* decision it must be recognized that the future of employer/employee relations is at stake. More must be done to promote peaceful negotiations, fairness in procedure, and sound decision-making.

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