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## Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims

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# DEBUNKING THE MYTH OF EMPLOYER ADVANTAGE FROM USING MANDATORY ARBITRATION FOR DISCRIMINATION CLAIMS

Michael Z. Green\*

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I. INTRODUCTION: MANDATORY ARBITRATION AND EMPLOYER ADVANTAGE RHETORIC	

As a matter of general practice, the use of mandatory arbitration<sup>1</sup> as a dispute resolution mechanism for employment discrimination claims has

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1. The term "mandatory arbitration" has been used synonymously with the descriptor "pre-dispute arbitration agreements." See Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute Mandatory Arbitration Outlived Its Welcome?*, 40 ARIZ. L. REV. 1069, 1069 (1998); see also Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 398 n.2 (1998) (finding the same). In this Article, mandatory arbitration means those instances where an employer has developed a mandatory policy requiring that employees, as a condition of their employment, agree to use binding arbitration as the method to resolve any future disputes that may arise. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (enforcing motion to compel arbitration of statutory age discrimination claim based on pre-dispute agreement in the securities industry). This landmark case is referred to throughout the Article and discussed in more detail *infra* Part II. This Article does not address mandatory, court-annexed, or court-administered arbitration. See generally Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169 (1993); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty*:

failed to give employers an overall advantage.<sup>2</sup> Instead, this Article will show that the use of mandatory arbitration to resolve statutory employment discrimination disputes presents a significant number of disadvantages for employers, especially large corporations that operate as repeat players<sup>3</sup> in employment litigation.

First, despite purported cost benefits from using alternative dispute resolution ("ADR"), arbitration can be just as expensive as litigation if not more costly.<sup>4</sup> Second, the reluctance of the Supreme Court to clarify the

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*Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996). Some recent articles provide an excellent discussion of specific mandatory arbitration court programs. See, e.g., Thomas L. Fowler, *Court-Ordered Arbitration in North Carolina: Selected Issues of Practice and Procedure*, 21 CAMPBELL L. REV. 191 (1999) (describing the North Carolina mandatory arbitration program); Celia Guzaldo Gamrath, *A Lawyer's Guide to Mandatory Arbitration in Illinois*, 86 ILL. B.J. 550 (1998) (describing the Illinois mandatory arbitration program); Michael E. Weinzierl, *Wisconsin's New Court-Ordered ADR Law: Why it is Needed and its Potential for Success*, 78 MARQ. L. REV. 583 (1995) (describing the Wisconsin mandatory arbitration program).

2. The terms "advantage" and "benefit" are used synonymously throughout this Article, along with their opposites "disadvantage" and "no benefit." Because these are broad terms, this Article has limited their meaning to an analysis of the costs and outcomes from the mandatory arbitration forum versus the judicial forum. If the costs and outcomes are better for an employer in one forum, it is an advantage to pursue that forum over the other and a disadvantage if the costs or outcomes are worse. The thesis of this Article is that mandatory arbitration is a disadvantage for large employers in terms of overall costs and outcomes when compared to the courts. While this Article takes no position on the value of different procedures used as a whole for each forum, e.g., rules of evidence, written decisions, discovery, etc., to the extent any procedures have been alleged to affect costs or outcomes, they are, nevertheless, discussed in this Article.

3. Repeat players are defined as individuals or entities that have "had and anticipate[] repeated litigation." Marc S. Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 98 (1974). Repeat players have low stakes in the outcome of any case, and [have] the resources to pursue their long-run interests." *Id.*

4. See Jean R. Sternlight, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunction Against Courts*, 147 U. PA. L. REV. 91, 126 (1998). Sternlight states:

Although it is often posited that binding arbitration is quicker and cheaper than litigation, this has yet to be established by empirical evidence. Anecdotal evidence reveals that binding arbitration can, at times, be more fraught with delay than litigation, and also can be more costly, at least for one of the parties.

*Id.* (footnotes omitted); see also Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 959 & n.161 (1999) ("[E]mpirical studies have found that at least some forms of alternative dispute resolution take as long as litigation and are as costly to the litigants . . ."); Deborah R. Hensler, *Does ADR Really Save Money? The Jury's Still Out*, NAT'L L.J., Apr. 11, 1994, at C12 (discussing findings from a Rand study showing that it was more expensive to use court-ordered ADR

problems with mandatory arbitration has increased the likelihood of ongoing litigation and uncertainty about enforcement of mandatory arbitration agreements. Third, a growing judicial hostility to unfair mandatory arbitration procedures in the lower courts has made arbitration more like litigation, including adding certain components that increase the costs of arbitration. Fourth, some members of Congress and certain civil rights groups have shown a strong determination to challenge these agreements, and their efforts have contributed to the essential abolishment of mandatory arbitration agreements in the securities industry. Fifth, a tremendous opposition from the Equal Employment Opportunity Commission ("EEOC") has made mandatory arbitration agreements essentially worthless in instances where the EEOC has disregarded these agreements, assisted others in challenging their enforcement in court, and successfully obtained injunctive relief and monetary damages from courts in their own actions against companies to attack the use of these agreements.<sup>5</sup> Finally, with evidence of resounding results on behalf of employers in the litigation process and absent evidence that arbitration will provide similar results, employers have no real advantage and little incentive to use mandatory arbitration.<sup>6</sup>

Despite these disadvantages, many critics of mandatory arbitration may find the thesis that large employers do not derive an advantage from it hard to swallow. Without any empirical evidence of employer advantage,<sup>7</sup> most

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than the courts and Ms. Hensler's position that the use of arbitration outside of the courts would likely produce unanticipated outcomes regarding costs because the disputing behavior of litigants and their attorneys is influenced by non-economic as well as economic factors).

5. For a discussion of how the EEOC's actions create tremendous problems for employers, see *infra* Part III.

6. See *infra* Part III. Despite the clamor about mandatory arbitration, the reality is that only a relatively small percentage of employers use mandatory arbitration. See United States General Accounting Office, *Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution* (Letter Report, 07/05/95, GAO/HEHS-95-150), at 7 (visited Feb. 28, 2000) <<http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?Paddress=162.140.64.21&filename=he95150.txt&directory=/diskb/wais/data/gao>> (finding that, despite a general increase in using ADR for employment disputes, only 9.9% of employers using these ADR approaches employed arbitration programs, while only "about one-fourth to one-half" of those employers used mandatory arbitration in their arbitration programs) [hereinafter GAO Report]. This 1995 report was based on a questionnaire sent to a nationally representative sample of businesses with more than 100 employees according to reports filed with the EEOC in 1992. *Id.*

7. Indeed, it is extremely difficult to develop empirical studies of the use of ADR without the joint support of employers, employees, and providers of ADR services, due to the private nature and confidentiality of the disputes. See Carrie Menkel-Meadow, *When Dispute*

of the scholarly debate has assumed that mandatory arbitration benefits employers.<sup>8</sup> A great degree of this employer advantage rhetoric<sup>9</sup> has relied on the reverse logic that employers would not be trying to use mandatory arbitration if it did not provide an advantage for them and a disadvantage for employees.<sup>10</sup> Although the relationships between employers and their

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*Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1924 (1997) ("In contrast to the many court-connected program evaluations, however, there is little to no information concerning the private uses of ADR, in large part because developing anything close to an experimental or comparative design model is virtually impossible.") (footnotes omitted). The American Arbitration Association ("AAA") has assisted with the collection of data for some initial empirical investigations of mandatory arbitration. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPL. POL. J. 189 (1997) (describing empirical study of employment arbitration results from information provided to the author by the AAA). The AAA has admitted, however, that there is a lack of empirical data to assist corporations in deciding whether they should choose ADR. See Julie A. Klein, *Researching Results of Alternative Dispute Resolution*, N.Y.L.J., July 1, 1999, at 3. In response, the AAA has created a global research center to gather this information and is developing funding to support the thorough analysis of this data. *Id.*

8. See, e.g., Steven M. Kaufmann & John A. Chanin, *Directing the Flood: The Arbitration of Employment Claims*, 10 LAB. LAW. 217, 219 (1994) (alleging the purported "significant benefits" of speed and lower cost for employers in employment discrimination disputes as compared to the federal courts as stated by management-side attorneys from Morrison & Forester in Denver, Colorado). It is a bit surprising to hear how much of an advantage mandatory arbitration is supposed to provide employers because many management-side attorneys have been more inclined to be concerned about the problems with mandatory arbitration than its purported benefits. See *Employers Reluctant to Embrace Mandatory Arbitration, Survey Finds*, Daily Lab. Rep. (BNA) No. 84, at A-14 (Apr. 30, 1992) (finding from a survey of management-side attorneys and employer counsel of Fortune 500 companies that most employers disliked *Gilmer* because it is on "the cutting edge of a thorny legal issue, which they expect will generate further litigation" and employers want "the law to be more settled and the benefits to be clearer"). From this Article's review of mandatory arbitration, the purported benefits of speed and lower cost are at worst illusory, especially for large employers, and at best may only benefit certain small employers. See *infra* Parts III and IV.

9. Because this Article will show that most of the presumed advantages for employers in using mandatory arbitration, including advantages that are repeatedly stated by commentators, have been wrongly assumed, see *infra* Part III, this Article has resorted to calling these purported advantages "employer advantage rhetoric," a term developed from an analogous situation discussed recently by Jacqueline Nolan-Haley. See Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle For Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 775-81 (1999) (describing a repetitive discourse about the existence of consent in mediation and attacking that assumption as an ongoing ADR consent rhetoric).

10. Employers, like individuals, are fallible and make decisions every day without fully

employees, or perhaps more appropriately between corporations and plaintiffs' counsel, might have reached an all-time high of discontent,<sup>11</sup> absent some empirical support, this reverse logic has little justification. Likewise, the assumption that employers have chosen arbitration because certain advantages in arbitration will allow them to prevail at higher rates than in the court system has yet to be proven by empirical evidence.<sup>12</sup> The

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understanding or appreciating the effects of those decisions. As discussed in Part III of this Article, a general "disconnect" between corporate leaders and their counsel has led to some of the decision-making regarding the employment of mandatory arbitration for the sole purpose of cutting legal fees without any appreciation of the overall costs or whether arbitration is an advantageous forum. Because of this focus on legal fees, evidence that corporations are using arbitration for a large number of its disputes, including many disputes where they are not able to create the system, suggests that it is not intended as a mechanism for the pure disadvantage of employees. See Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 32 (1998) (noting how corporations are choosing arbitration in a variety of disputes where they cannot control the process because they are seeking to cut legal expenses).

11. See Mark Ballard, *Lawyer Label Hurts at Polls*, NAT'L L.J., Nov. 18, 1999, at A1 (describing how the public hate for plaintiffs' trial attorneys has become so pervasive that individuals seeking legislative positions are losing when their opponents identify their background as trial attorneys because the anti-trial lawyer theme resonates with the public that has been sharpened to these concerns by insurance companies and businesses).

12. Nevertheless, there were some reports after *Gilmer* about employer advantage while using arbitration in the securities industry when those disputes were handled by their arbitration panels. See Stuart H. Bompey et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. L. 21, 65-66 nn.284-87 (1997) (describing unofficial survey of law firm representing a large number of securities industry employers and finding that employers successfully defeated claimants in 57 out of 63 (90.4%) discrimination issues raised in cases with NASD and 33 out of 54 (61.1%) discrimination issues raised in cases with NYSE in published arbitration awards from 1991 to 1997). Admittedly, this survey was small and unofficial, and it gave no reason to explain the validity of those results or whether they would transfer to outside of the securities industry. *Id.* at 66. The somewhat incestuous relationship between the securities industry and the arbitration pools used in the arbitration process probably played a significant role in such results. See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190, 207, 210 & n.25 (D. Mass. 1998) (finding inherent bias in employment arbitration in the securities industry because employers were controlling the arbitrator appointment process by governing the stock exchanges as exemplified by the fact that the Chairman of the Merrill Lynch was also on the Board of the NYSE and the NYSE Chairman of the Board was responsible for recommending and appointing the arbitrator pools and the only person listed in NASD's arbitration pool with any employment experience in 1995 was a Merrill Lynch officer), *aff'd on other grounds*, 170 F.3d 1 (1st Cir. 1999). Even with these purported outcome advantages, other costs have led the securities industry to virtually abandon the use of mandatory arbitration. See *infra* Part III.A.3.

other unproven assumption of the employer advantage rhetoric asserts that employers save time and money by using mandatory arbitration.<sup>13</sup>

Surprisingly, few commentators have challenged these assumptions.<sup>14</sup> With little empirical evidence that mandatory arbitration does, in fact, benefit employers or for that matter provide a disadvantage to employees, many commentators still emphatically believe that mandatory arbitration should be banned. They have made persuasive arguments in support of their positions.<sup>15</sup> What little empirical evidence that does exist shows that the costs of using arbitration are unpredictable because economic and non-economic factors dictate the actions of parties.<sup>16</sup> Given the number of disadvantages in costs and outcomes, employers now have no incentive to use mandatory arbitration.

Very little work has been done to foster the use of arbitration after a dispute arises instead of mandatory arbitration. Because the limited empirical data shows that employees are much more successful in arbitration, employees have an incentive to use arbitration after a dispute arises. With limited finances, small employers may still prefer arbitration after a dispute arises. Large employers must still be provided with an incentive to choose arbitration. If offering arbitration after the dispute arises

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13. Sternlight, *supra* note 4, at 126.

14. There are a few instances where these assumptions were challenged when court-annexed arbitration programs were involved. See Bernstein, *supra* note 1, at 2211, 2253 (arguing that court-annexed arbitration may even prompt an increase in costs to the extent it becomes another layer of procedure added onto the existing adjudication system); Frank E.A. Sander et al., *Judicial (Mis)use of ADR? A Debate*, 27 U. TOL. L. REV. 885, 886 (1996) (describing Rand study and results showing no savings in costs or time by using court-annexed arbitration); see also Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 46 (finding that ADR creates a "new layer of administrative expense for courts and another layer of transaction costs for litigants"). Without explaining his point, Professor Stempel appears to agree that the assumption of ADR savings is not well-founded even in ADR programs that are not court-annexed. See Stempel, *supra* note 1, at 329 ("Not surprisingly, subsequent studies of arbitration in practice, even those generally favorable to arbitration, have found that it is not appreciably faster or cheaper than litigation of similar matters."). With respect to the only clear and discernible benefit of arbitration for employers, a quicker decision, Professor Stempel has also noted that this may not necessarily be an advantage because it may result in an improper rush to judgment causing "inaccuracy, unfairness, or frayed relations between the disputants or between the disputants and the tribunal." *Id.* at 330.

15. See sources cited *infra* note 25.

16. See Hensler, *supra* note 4, at C12 (discussing comments of Debra Hensler, Rand corporation researcher, describing empirical results from court ADR programs showing no cost savings and her opinion that cost savings in outside arbitration programs will be very unpredictable).

could limit punitive damages, it would create an incentive for both large and small employers to use arbitration without the problems created by mandatory arbitration.

The goal of this Article is to promote critical thinking about the practical problems that employers face when using mandatory arbitration. By realizing that mandatory arbitration presents no panacea for employers, the inherent value of using arbitration as a fair supplement and not a replacement to the court may start to be analyzed, and a limit to the scholarly focus on mandatory arbitration can hopefully result. The absence of any true advantage for employers as a whole suggests that the massive criticism and tremendous focus on mandatory arbitration over the past decade may have resulted in a huge waste of time, except for those employers in the securities industry that were directly affected by *Gilmer v. Interstate/Johnson Lane Corp.*<sup>17</sup> Those efforts could have been focusing on the use of non-binding mechanisms, such as post-dispute arbitration or even mediation—which is becoming the more preferred option for resolving employment discrimination disputes.<sup>18</sup>

Part II of this Article identifies the tortuous evolution of mandatory arbitration by explaining the growing support for using arbitration to resolve statutory disputes and its intersection with development of the broad remedies in the judicial forum provided by the Civil Rights Act of 1991 (the “Act”)<sup>19</sup> for employment discrimination claims. This provides the framework for understanding the disadvantages for large employers in using mandatory arbitration instead of litigation to resolve these disputes. Part III addresses the central inquiry of this Article—does mandatory arbitration give large employers an advantage? After providing a negative answer to that question for large employers in Part III, Part IV addresses the unique and somewhat complex issues for smaller employers with respect to purported benefits from mandatory arbitration. Part V describes a short proposal to correct these problems by providing an incentive for large and small employers to use arbitration after a dispute arises rather than mandatory arbitration. Finally, Part VI presents a final assessment of where the critical

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17. See Bompey et al., *supra* note 12, at 65-66 (describing the effect of *Gilmer* on the securities industry from 1991 to 1997 by an unofficial survey).

18. See Lisa Brennan, *What Lawyers Like: Mediation*, NAT’L L.J., Nov. 15, 1999, at A1 (describing a 1999 survey of attorneys conducted by the American Arbitration Association and the *National Law Journal* finding an overwhelming preference in 69% of litigators and 88% of in-house counsel for using mediation instead of arbitration, which was preferred by only 25% of the litigators and only 9% of in-house counsel).

19. 42 U.S.C. § 1981a (1994).

focus of ADR may shift now that the myth about employer advantage from mandatory arbitration has been exposed.

## II. THE DEVELOPMENT OF MANDATORY ARBITRATION AND ITS PROBLEMATIC INTERSECTION WITH THE CIVIL RIGHTS ACT OF 1991: FROM *GARDNER-DENVER* TO *GILMER* AND THE *WRIGHT* FALLOUT

Due to the meteoric rise of the ADR movement,<sup>20</sup> increasing distrust of the legal system by corporate leaders,<sup>21</sup> and the Supreme Court's 1991 endorsement of arbitration to resolve statutory employment discrimination disputes in *Gilmer*,<sup>22</sup> a growing number of employers have started to use mandatory arbitration agreements.<sup>23</sup> As a result, a prolific amount of scholarly criticism about *Gilmer*<sup>24</sup> and about employers' use of mandatory arbitration has transpired over the last decade.<sup>25</sup>

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20. See generally David P. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133 (1998) (discussing survey and interviews with 606 Fortune 1000 corporate counsel respondents about the general increase in the use of mandatory arbitration and reasons for its growth).

21. See John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinion*, 3 HARV. NEGOTIATION L. REV. 1 (1998) (describing results of survey started in 1994 of 178 respondents, including 70 outside counsel, 58 inside counsel, and 50 executives showing a decreasing belief in the benefits of litigation versus ADR especially among corporate executives); see also Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986) (analyzing the general loss of faith in litigation and suggesting reasons why faith in litigation should be renewed).

22. 500 U.S. 20 (1991).

23. See Stephanie Armour, *Mandatory Arbitration: A Pill Many are Forced to Swallow*, U.S.A. TODAY, July 9, 1998, at 1A (showing a growing number of employers, including Circuit City, Travelers Group, Hooters of America, The Olive Garden, and Red Lobster, are using mandatory arbitration); John Leming, *Companies Seek to Reduce Employee Suits*, J. COM., Feb. 9, 1999, at 5A (discussing efforts of insurance companies to encourage employers to adopt mandatory arbitration policies); see also Catherine Cronin-Harris, *Mainstreaming: Systematizing Corporate Use of ADR*, 59 ALB. L. REV. 847 (1996) (describing the growing use of ADR by businesses).

24. Professor Robert Covington recently stated, "The [*Gilmer*] opinion has been the subject of commentary in well over a hundred law review articles, and has been chewed over in countless academic conferences, after-dinner speeches, and briefings for managers." Robert N. Covington, *Employment Arbitration after Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. L.J. 345, 351-52 (1998); see also Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 603 n.116 (1997) ("The [*Gilmer*] case has prompted a flood of scholarly literature and criticism.").

25. See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Lisa B. Bingham, *On*

Before 1991, most parties believed that courts would not enforce agreements requiring mandatory arbitration of statutory employment discrimination claims.<sup>26</sup> Since 1991, employers have increasingly and

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*Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998); Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997); Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449 (1996); Christine Godsil Cooper, *Where Are We Going With Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS U. L.J. 561 (1997); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); Pierre Levy, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. REV. 455 (1996); 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); Jennifer N. Manuszak, *Pre-Dispute Civil Rights Arbitration in the Nonunion Sector: The Need for a Tandem Reform Effort at the Contracting, Procedural and Judicial Review Stages*, 12 OHIO ST. J. ON DISP. RESOL. 387 (1997); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33 (1997); Jean R. Sternlight, *Panacea Or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims With Special Reference to the Three A's—Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Christine K. Biretta, Comment, *Prudential Insurance Company of America v. Lai: The Beginning of the End for Mandatory Arbitration?*, 49 RUTGERS L. REV. 595 (1997); Michele L. Giovagnoli, Comment, *To Be or Not To Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena*, 64 UMKC L. REV. 547 (1996); Catherine B. Hagen & Kathleen B. Hayward, *The Issues Concerning Mandatory Arbitration*, DISP. RESOL. J., Oct.-Dec. 1995, at 23; see also Symposium: *New York Stock Exchange, Inc. Symposium on Arbitration in the Securities Industry: Employment Discrimination*, 63 FORDHAM L. REV. 1613, 1626-27 (1995) (noting statements of plaintiffs' counsel, Judith Vladeck, about problems with mandatory arbitration). About seven years ago, I was also one of the commentators who had criticized the Supreme Court's enforcement of mandatory arbitration clauses. See Michael Z. Green, *Preempting Justice through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer*, 5 LOY. CONSUMER L. REP. 112 (1993).

26. See, e.g., R. Gaull Silberman et al., *Alternative Dispute Resolution of Employment Discrimination Claims*, 54 LA. L. REV. 1533, 1541-42 & n.4 (1994) (finding that, before

successfully used mandatory arbitration. That increase can be attributed to the Supreme Court's endorsement of arbitration to resolve statutory employment discrimination disputes in *Gilmer* and the right to extended legal remedies and a jury trial made possible by the Act.<sup>27</sup>

A bitter debate about the use of mandatory arbitration has developed since *Gilmer*. The strong feelings about *Gilmer* have stemmed from the concern that employers, the group whose actions the employment discrimination laws attempt to regulate, may circumvent certain statutory rights, remedies, and procedures afforded to claimants under the Act by requiring that employees agree to arbitrate their future disputes as a condition of employment.<sup>28</sup> In an apparently endless attack, many commentators have argued that fundamentally important rights to jury trials and legal damages (that were only obtained in 1991 after two years of contentious debate in Congress and factious negotiations)<sup>29</sup> are being subsumed by mandatory agreements to arbitrate these claims when employers force employees to sign them as a condition of obtaining

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*Gilmer*, arbitration and litigation of statutory discrimination claims were considered supplementary and not mutually exclusive); see also Ralph H. Baxter, Jr., & Evelyn M. Hunt, *Alternative Dispute Resolution: Arbitration of Employment Claims*, 15 EMPLOYEE REL. L.J. 187 (1989) ("With the possible exception of employment discrimination claims, employers can establish mandatory written arbitration procedures as the sole method for resolving disputes with their employees."). Baxter and Hunt made this statement because of the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), which proscribed arbitration of Title VII employment discrimination claims from being the sole method of resolving those disputes. *Id.* at 195-96.

27. See Mei L. Bickner et al., *Developments in Employment Arbitration*, DISP. RESOL. J., Jan. 1997, at 8, 10 (stating that "a growing number of lower federal courts have been called upon to review employment-related [mandatory] arbitration agreements with respect to a broad range of statutory employment claims" because of the *Gilmer* decision, monetary remedies, and jury trial rights provided by the Act).

28. Joseph R. Grodin, *On the Interface Between Labor and Employment Law*, 19 BERKELEY J. EMP. & LAB. L. 307, 310-11 (1998).

29. Several commentators have addressed the acrimonious process leading to the passage of the Act in 1991. See generally Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921 (1993); Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994); Reginald C. Govan, *Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991*, 46 RUTGERS L. REV. 1 (1993); William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have to? Do You Really Want to?*, 43 DRAKE L. REV. 255 (1994); Timothy D. Loudon, *The Civil Rights Act of 1991: What Does it Mean and What is its Likely Impact?*, 71 NEB. L. REV. 304 (1992); Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993).

employment.<sup>30</sup> The plaintiffs' bar, government agencies, academics, and ADR providers have all sought to ban mandatory arbitration.<sup>31</sup> Their actions and a lack of clarification by the Supreme Court since *Gilmer* have forced employers to explore the depths of any underlying tension or conflict between the growing use of mandatory arbitration and the significant accomplishments of the Act.

*A. Development of Mandatory Arbitration Under the Federal Arbitration Act*

In 1991, the Federal Arbitration Act ("FAA")<sup>32</sup> and its preference for resolving disputes by arbitration collided with the hard-fought availability of jury trials and damage awards for intentional employment discrimination claims under the Act.<sup>33</sup> In a decision interpreting the scope of the FAA on

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30. See, e.g., Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 420-39 (1999) (criticizing the increasing use of arbitration as a legitimate forum to resolve employment discrimination disputes and arguing that mandatory arbitration agreements should not be enforced because the strong public policy in eradicating discrimination in the workplace dictates a public forum to handle these disputes). A number of other recent articles exemplify the ongoing criticism of the *Gilmer* decision, its impact, or both. See, e.g., Mark L. Adams, *Compulsory Arbitration of Discrimination Claims and the Civil Rights Act of 1991: Encouraged or Proscribed?*, 44 WAYNE L. REV. 1619 (1999); Covington, *supra* note 24; Andrea Fitz, *The Debate Over Mandatory Arbitration in Employment Disputes*, DISP. RESOL. J., Feb. 1999, at 35; Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 173 (1998); Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 ARIZ. L. REV. 1039 (1998); Victoria J. Craine, Note, *The Mandatory Arbitration Clause: Forum Selection or Employee Coercion*, 8 B.U. PUB. INT. L.J. 537 (1999); David M. Kinnecome, Note, *Where Procedure Meets Substance: Are Arbitral Procedures a Method of Weakening the Substantive Protections Afforded by Employment Rights Statutes?*, 79 B.U. L. REV. 745 (1999); Amy L. Ray, Comment, *When Employers Litigate to Arbitrate: New Standards of Enforcement for Employer Mandated Arbitration Agreements*, 51 SMU L. REV. 441 (1998); Monica J. Washington, Note, *Compulsory Arbitration of Statutory Employment Disputes: Judicial Review Without Judicial Reformation*, 74 N.Y.U. L. REV. 844 (1999).

31. See *infra* Part III.

32. 9 U.S.C. §§ 1-16 (1994).

33. See Feller, *supra* note 25, at 568 (describing the intersection of disputes covered by the FAA and the Act as resulting in either a fender bender or train wreck "collision"); see also *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997) (finding that the Act's new provision for jury trials and legal damages in Title VII cases was a "strong expression of federal policy that should be enforced" and that "by being forced into binding arbitration [employees] would be surrendering their right to trial by jury—a right that civil rights plaintiffs (or their lawyers) fought hard for and finally obtained in the 1991 amendments to

May 13, 1991, the Supreme Court in *Gilmer*<sup>34</sup> held that an employee who had signed an agreement to arbitrate employment-related disputes could be compelled to take a claim under the Age Discrimination in Employment Act ("ADEA")<sup>35</sup> to arbitration rather than pursuing the claim in court.<sup>36</sup>

An interesting issue that the Court in *Gilmer* refused to decide and that still remains unanswered today is whether the FAA applies to employment agreements. Section 1 of the FAA,<sup>37</sup> known as the Employment Contract Exclusion, states, in pertinent part: "Nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce."<sup>38</sup> In *Gilmer*, the arbitration agreement was contained in the securities registration application, a contract between Gilmer and the securities exchange, not an agreement between Gilmer and his employer, Interstate/Johnson Lane. Although the Supreme Court held the ADEA claim to be arbitrable, in footnote two of its decision, the Court left "for another day" the issue of the contracts of employment exemption in section 1 and whether an arbitration agreement in an employment contract is enforceable under the FAA.<sup>39</sup> Nevertheless, the

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Title VII").

34. 500 U.S. 20 (1991).

35. 29 U.S.C. §§ 621-634 (1994).

36. *Gilmer*, 500 U.S. at 20. In 1981, when Gilmer became a manager of financial services for his employer, he was required as a condition of his employment to execute a registration application with the New York Stock Exchange that provided for arbitration of any controversy between him and his employer. *Id.* at 23. When he was terminated several years later, Gilmer filed an age discrimination claim in federal court under the ADEA against his employer. *Id.* at 23-24. The employer moved to compel arbitration pursuant to the arbitration clause in the registration agreement. *Id.* at 24.

37. 9 U.S.C. § 1 (1994).

38. *Id.*

39. *Gilmer*, 500 U.S. at 25 n.2. Despite the Court's failure to address the contracts of employment exemption in *Gilmer*, several lower courts have limited the scope of the exemption to employees directly engaged in the movement of interstate commerce. *See, e.g.*, *Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999); *Patterson v. Tenet Health Care*, 113 F.3d 832 (8th Cir. 1997); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995); *see also* Jennifer A. Marler, Note, *Arbitrating Employment Discrimination Claims: The Lower Courts Extend Gilmer v. Interstate/Johnson Lane Corp. to Include Individual Employment Contracts*, 74 WASH. U. L.Q. 443 (1996) (describing expansion of *Gilmer* by lower courts). Only one court has found that the FAA does not apply to labor or employment agreements. *See Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir. 1998) (finding that other courts allowing these agreements have ignored the requirement that, for the FAA to apply, the contract must evidence a "transaction" involving interstate

*Gilmer* case made it clear that mandatory arbitration of federal employment discrimination claims was not automatically precluded as a matter of law and that the Court was now willing to endorse its use.

The *Gilmer* decision appeared to conflict with the Court's prior decision in *Alexander v. Gardner-Denver*.<sup>40</sup> In *Gardner-Denver*, the plaintiff had filed a Title VII lawsuit alleging employment discrimination on the basis of race despite having lost his claim of unjust discharge based on race in labor arbitration proceedings conducted under a collective bargaining agreement between the plaintiff's union and his employer. The Court in *Gardner-Denver* found that the rights of an individual to pursue statutory employment discrimination claims were separate and apart from the contractual claims handled by his union in the grievance and labor arbitration process.<sup>41</sup> Consequently, *Gardner-Denver* established that employees may pursue employment discrimination claims in arbitration without being precluded from pursuing vindication of their statutory claims in court.

Only seventeen years later, the Court in *Gilmer* signaled for the first time that it would approve the use of the arbitral forum to resolve statutory employment discrimination disputes. Since the *Gilmer* decision, most lower courts have expanded the scope of *Gilmer* to apply to virtually all statutory employment discrimination disputes.<sup>42</sup> The *Gilmer* decision did, however,

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commerce). See generally Matthew W. Finkin, "Workers Contracts" under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282 (1996) (asserting that exemption for employment contracts by section 1 of the FAA should have broad coverage); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259 (asserting same).

40. 415 U.S. 36 (1974).

41. *Id.* at 50 ("The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.").

42. See, e.g., *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998) (ADA); *In re Prudential Ins. Co. of Am. Sales Practice Litig. All Agent Actions*, 133 F.3d 225 (3d Cir. 1998) (RICO); *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997) (ADA); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997) (FMLA); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997) (Title VII); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (Title VII); *Cole v. Burns Int'l. Sec. Serv.*, 105 F.3d 1465 (DC Cir. 1997) (Title VII); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995) (ADEA); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993) (ERISA); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (Title VII); *Saari v. Smith Barney, Harris Upham & Co.*, 968 F.2d 877 (9th Cir. 1992) (Employee

leave open the possibility that an agreement to compel arbitration of statutory claims will not be enforceable when a statute's language or legislative history indicates an express intent to preclude compulsory arbitration or an inherent conflict between arbitration and the statute's purpose.<sup>43</sup>

*B. Encouragement of Arbitration By The Civil Rights Act of 1991*

Only six months after the *Gilmer* decision, President Bush signed the Act, which created several amendments to Title VII of the Civil Rights Act of 1964,<sup>44</sup> the preeminent federal law proscribing discrimination in employment on the basis of certain protected classes, including race, sex, color, and national origin.<sup>45</sup> Prior to the Act, Title VII claimants were limited to seeking backpay and equitable relief through a bench trial. Accordingly, a key provision of the Act established that Title VII plaintiffs with intentional discrimination claims could also seek compensatory and punitive damages and have their claims settled through a jury trial.<sup>46</sup>

Section 118 of the Act also encouraged the use of alternative means of dispute resolution, including arbitration, "[w]here appropriate and to the extent authorized by law," to resolve employment discrimination disputes.<sup>47</sup> Consequently, many employers have contended that section 118 allows or even encourages compulsory arbitration of Title VII claims. Employers have also argued that, by the time the Act was passed, compulsory arbitration of statutory employment discrimination claims was "authorized by law"—that

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Polygraph Protection Act); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992) (Title VII); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (Title VII); *Haviland v. Goldman, Sachs & Co.*, 947 F.2d 601 (2d Cir. 1991) (RICO); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (Title VII); *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993) (§ 1981).

43. 500 U.S. 20, 35 (1991). The Court in *Gilmer* found that neither the ADEA's language nor its legislative history demonstrated a conflict with or an intent to preclude compulsory arbitration. *Id.*

44. 42 U.S.C. §§ 2000e to e-17 (1994 & Supp. III 1997).

45. See William H. Daughtrey, Jr. & Donnie L. Kidd, Jr., *Modifications Necessary for Commercial Arbitration Law to Protect Statutory Rights Against Discrimination in Employment: A Discussion and Proposals for Change*, 14 OHIO ST. J. ON DISP. RESOL. 29, 45 (1998) (noting that Title VII is the "most commonly invoked" statute in addressing claims of unwarranted discriminatory practices in hiring and employment).

46. See 42 U.S.C. §§ 1981a(b), (c) (1994).

47. See 42 U.S.C. § 1981 (statutory note).

is, by *Gilmer*; therefore, compulsory arbitration is one of the means of dispute resolution that section 118, and the Act, encourages.<sup>48</sup>

In response to employer arguments that section 118 encourages mandatory arbitration, the United States Court of Appeals for the Ninth Circuit decided that the jury trial and damage components of the Act should not be eluded through pre-dispute arbitration clauses. In *Duffield v. Robertson Stephens & Co.*,<sup>49</sup> the Ninth Circuit held that an employer may not require, as a condition of employment, that an employee waive the right to bring Title VII claims in court and agree, in advance, to submit all future employment-related disputes to binding arbitration.<sup>50</sup> Instead, the Ninth Circuit found that Congress had demonstrated conclusively its intent to preclude the mandatory arbitration of Title VII claims.<sup>51</sup> According to the Ninth Circuit, a review of the Act's purposes and the text of its legislative history reveals that Congress valued the importance of its newly-created rights to a jury trial and legal damages. From that review, the *Duffield* court found that Congress expected that its encouragement of arbitration in section 118 of the Act would not mean that employers could use mandatory arbitration to eliminate an employee's access to these new rights for victims of intentional discrimination.<sup>52</sup> Specifically, the *Duffield* court interpreted "where appropriate" in section 118 of the Act to mean where arbitration furthers the Act's purpose and objective by providing employees an opportunity to present discrimination claims in an alternative forum. It was not appropriate to force employees into a forum where they did not want to be.<sup>53</sup>

The *Duffield* court also read the terms "to the extent authorized by law" as referring to the law as it existed when section 118 was drafted.<sup>54</sup> That section was drafted prior to the *Gilmer* decision and at a time when *Gardner-Denver* provided the clear rule that arbitration of Title VII claims could not be compelled. Because of this timing, the *Duffield* court found that, although *Gilmer* may have undermined the scope of *Gardner-Denver*, it did not alter Congress' intent in drafting section 118, i.e., any arbitration

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48. See, e.g., *Johnson v. Hubbard Broad., Inc.*, 940 F. Supp. 1447 (D. Minn. 1996) (where employer successfully made this argument).

49. 144 F.3d 1182 (9th Cir. 1998).

50. *Id.* at 1190.

51. *Id.* at 1193.

52. *Id.*

53. *Id.* at 1194.

54. *Id.* at 1195-96.

agreement would operate to the extent authorized by *Gardner-Denver*.<sup>55</sup> According to the *Duffield* court, Congress understood that section 118 was drafted with the intent that compulsory arbitration of Title VII claims was not "authorized by law" and that compelling employees to give up their right to litigate future Title VII claims as a condition of employment was not "appropriate."<sup>56</sup>

Similarly, in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,<sup>57</sup> the United States District Court for the District of Massachusetts found that Congress intended to preclude the enforcement of mandatory, pre-dispute arbitration agreements in Title VII cases. Likewise, Judge Gettleman of the United States District Court for the Northern District of Illinois agreed with these decisions and explained their reasoning in *Winkler v. Pacific Brokerage Services, Inc.*<sup>58</sup> as follows:

This court finds these particularly thorough and well-reasoned opinions [*Duffield* and *Rosenberg*] persuasive. As both the *Duffield* and *Rosenberg* courts recognized, Congress rejected an amendment to the Civil Rights Act of 1991 under which "employers could refuse to hire workers unless they signed a binding statement waiving all rights to file Title VII complaints." The amendment was rejected because Congress believed that "American workers should not be forced to choose between their jobs and their civil rights." In the instant case, plaintiff appears to have faced such a choice. Accordingly, this court finds that any agreement by plaintiff to submit future Title VII claims to arbitration, made either in the employment application or in the arbitration agreement, is unenforceable.<sup>59</sup>

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55. *Id.* at 1196.

56. *Id.* at 1198.

57. 995 F. Supp. 190, 203-04 (D. Mass. 1998), *aff'd on other grounds*, 170 F.3d 1 (1st Cir. 1999).

58. No. 97 C 7340, 1998 WL 341622 (N.D. Ill. June 19, 1998).

59. *Winkler*, 1998 WL 341622, at \*2 (quoting H.R. REP. NO. 40(I) (1991), *reprinted in* 1991 U.S.C.C.A.N. 549). Since Judge Gettleman's decision in *Winkler*, the Seventh Circuit Court of Appeals, which has jurisdiction over the *Winkler* court, has rejected the reasoning of *Duffield* and *Rosenberg* and stated that the Civil Rights Act of 1991 was not intended to prevent the enforcement of mandatory arbitration and that the legislative history does not indicate a desire to prevent those claims from being resolved by arbitration rather than the courts. *See Koveleskie v. SBC Capital Mkts., Inc.*, 167 F.3d 361 (7th Cir. 1999); *see also Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999) (following *Koveleskie* in finding that mandatory arbitration agreements are enforceable, that there was sufficient consideration under state law to support enforcement of the arbitration agreement, and that the plaintiff's pregnancy discrimination claim under Title VII had to be resolved in

Many commentators had hoped that the *Duffield* case would set the stage for the Supreme Court to finally explain how mandatory arbitration as a condition of employment could be enforceable in light of the strong public policy of allowing jury trials and compensatory and punitive damage awards under the Act. However, in November 1998, the Supreme Court refused to hear the petition for review of *Duffield*. Then only a week after its refusal to hear the review of *Duffield*, the Court issued its opinion in *Wright v. Universal Maritime Service Corp.*<sup>60</sup> In *Wright*, the Court addressed the issue of whether an agreement for mandatory arbitration as a condition of employment would be enforceable in a union setting. The Court stated that, in order for a union to waive an individual employee's right to pursue a discrimination claim in a judicial forum, clear and unmistakable relinquishment of the right to pursue the statutory claim in question must exist.<sup>61</sup> Because the collective bargaining agreement in *Wright* failed to specify that it covered disputes involving the statutory claim at issue, the Court found that it was not a clear and unmistakable waiver, and the employee was not compelled to resolve the matter in arbitration.<sup>62</sup>

By limiting its decision to the actual language in the collective bargaining agreement, the *Wright* Court skirted the question of whether the

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arbitration). In addition to the express rejection of *Duffield* by the Seventh Circuit in *Koveleskie*, the Third Circuit expressly rejected the Ninth Circuit's analysis of the legislative history of the Act in *Duffield*. See *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998). But see Karen Halverson, *Arbitration and the Civil Rights Act of 1991*, 67 U. CIN. L. REV. 445, 464-77 (1999) (criticizing the analysis in *Seus*).

60. 525 U.S. 70 (1998). A full review of *Wright's* implications is beyond the scope of this Article, but other commentators have explored that subject. See, e.g., T. Christopher Baile, Comment, *Reconciling Alexander and Gilmer: Explaining the Continued Validity of Alexander v. Gardner-Denver Co. in the Context of Collective Bargaining Agreements*, 43 ST. LOUIS U. L.J. 219 (1999); Michael B. Kass, Note, *Wright v. Universal Maritime Service Corp.*, 14 OHIO ST. J. ON DISP. RESOL. 945 (1999); Daniel Roy, Note, *Mandatory Arbitration of Statutory Claims in the Union Workplace after Wright v. Universal Maritime Service Corp.*, 74 IND. L.J. 1347 (1999); Jacob E. Tyler, Comment, *Mandatory Arbitration of Discrimination Claims Under Collective Bargaining Agreements: The Effect of Wright*, 4 HARV. NEGOTIATION L. REV. 253 (1999). Also, Professor David E. Feller, who prepared an amicus brief to the Supreme Court in *Wright* on behalf of the National Academy of Arbitrators, wrote an article predicting the results of *Wright* that was published shortly after the *Wright* decision. See David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 HOFSTRA LAB. L.J. 53 (1998); see also David G. Savage, *Arbitration Clause Nixed, Longshoreman Can Sue Employer*, A.B.A. J., Jan. 1999, at 40 (describing reactions to the *Wright* decision).

61. *Wright*, 525 U.S. at 75.

62. *Id.* at 82.

*Gilmer* decision applied to the union setting. Other than clarifying the clear and unmistakable waiver requirement before compelling arbitration of a union employee's statutory employment discrimination claim, the *Wright* decision failed to answer the pressing ADR issue of this past decade for employment discrimination claims—whether *Gilmer* overruled *Gardner-Denver*, thus superseding all subsequent decisions finding that compulsory arbitration in a collective bargaining agreement was not enforceable against individual employees.<sup>63</sup>

The *Wright* case created an interesting anomaly with respect to the Court's enforcement of mandatory arbitration clauses involving non-union versus union employees.<sup>64</sup> Non-union employees who lack bargaining power and a representative may find that their pre-dispute agreements to

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63. Before the Supreme Court decision in *Wright*, virtually every other circuit found that *Gilmer* did not apply to collective bargaining agreements, and *Gardner-Denver* controlled those disputes so that a union employee still had a right to seek relief in a judicial forum without being compelled to arbitrate. See, e.g., *Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997). The Fourth Circuit was an exceptional court. It produced *Wright*, which adhered to its earlier decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

64. There are legitimate reasons for being concerned about protecting individual employees when their unions enter into sweetheart deals with their employers or other employees at the expense of certain employees, especially if made on the basis of race, sex, or one of the other protected classes under Title VII. See, e.g., Reginald Alleyne, *Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions*, 2 U. PA. J. LAB. & EMP. L. 1 (1999) (describing the inherent conflicts for unions in sexual harassment disputes between employees that it represents and the complexity of handling competing grievances if brought by the alleged harasser and the alleged victim). The courts have attempted to address the concern about union conflicts and improper deals that disadvantage certain employees under section 301 of the Labor-Management Relations Act. See 29 U.S.C. § 185 (1994). For example, courts have required that a union owes a duty of fair representation to its members and it may be sued by members for breach of that duty. See James E. Jones, Jr., *The Development of the Law Under Title VII Since 1965: Implications of the New Law*, 30 RUTGERS L. REV. 1, 24-28 (1976) (discussing the duty of fair representation in relationship to Title VII race discrimination claims). However, any challenge to these breaches is limited by the requirement of showing that a union's actions were arbitrary and capricious. See *Vaca v. Sipes*, 386 U.S. 171 (1967) (explaining arbitrary and capricious requirement and how the judicially-created duty developed in response to a series of cases involving alleged discrimination by unions against individual members on the basis of their race, as exemplified by the court's decision in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944)); see also *Pryner*, 109 F.3d at 361-63 (describing the ineffectiveness of the duty of fair representation when an individual employee wants to seek court action for a discrimination claim against the will of the employee's union).

arbitrate statutory employment discrimination claims are enforceable because adhesion agreements are not presumed unenforceable under general contract law principles.<sup>65</sup> By contrast, unionized employees, who are usually represented by an organization with tremendous bargaining power, may find their union's agreement to arbitrate their statutory discrimination claims is presumed unenforceable absent a "clear and unmistakable" waiver of their individual statutory rights to pursue the matter in court. Thus, the *Wright* decision shows that a lack of bargaining power continues to be an issue that the Court has given short shrift to in its analysis.

A fair reading of *Gilmer*, *Duffield*, and *Wright* demonstrates that the use of mandatory arbitration raises legitimate questions about the continued value of the legal damage and jury trial rights that were created by the Act. The Supreme Court appears determined to continue to avoid the clarification of these matters as evidenced by its refusal to accept review of *Duffield* or answer whether *Gilmer* overruled *Gardner-Denver* in *Wright*. Absent action by Congress, these issues will likely remain unresolved and present thorny legal problems for employers.<sup>66</sup>

### III. WHY MANDATORY ARBITRATION CREATES SIGNIFICANT DISADVANTAGES FOR LARGE EMPLOYERS

Despite the abundance of scholarly criticism about mandatory arbitration, even a few prior detractors have now suggested that, regardless of the concerns of being coerced into the arbitral forum, the overall benefits of having disputes resolved in arbitration outweigh the drawbacks.<sup>67</sup>

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65. See *Gilmer*, 500 U.S. 20, 33 (1991) (noting that "mere inequality" in bargaining power does not make an adhesion agreement to arbitrate statutory employment discrimination claims per se unenforceable); see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (finding a consumer's adhesion agreement involving a forum selection clause was not per se unenforceable).

66. See Michael Delikat & Renee Kathawala, *Arbitration of Employment Discrimination Claims Under Pre-dispute Agreements: Will Gilmer Survive?*, 16 HOFSTRA LAB. L. & EMP. L.J. 83, 131 (1998) (acknowledging a growing trend in the challenge of mandatory arbitration agreements "in courts, by administrative agencies and in the legislature" and assuming that a "flood" of challenge cases to mandatory arbitration agreements would continue absent clarification by Congress or the Supreme Court).

67. See Theodore J. St. Antoine, *Mandatory Arbitration of Employee Discrimination Claims: Unmitigated Evil or Blessing in Disguise?*, 15 T.M. COOLEY L. REV. 1, 7-8 (1998) (arguing that many individual employees may find mandatory arbitration a cheaper, simpler, and overall worthwhile process to resolve their employment disputes because most employees do not have the money, time, or resources available to them to pursue traditional avenues for relief) [hereinafter St. Antoine, *Mandatory Arbitration*]; Samuel Estreicher, *Predispute*

Professors St. Antoine, Estreicher, and Fitzgibbon have undertaken the yoke of standing against the multitude of scholarly criticism and perceptions about the advantages for employers and disadvantages for employees due to mandatory arbitration. Their arguments consistently suggest, however, that, despite the concerns of being coerced into arbitration, employees may still derive some actual benefit.<sup>68</sup> Additionally, another recent commentary has made strong claims about the benefits of mandatory arbitration. It argues that, as long as certain procedural guarantees are provided to the claimants, employees will obtain far better opportunities to have their claims heard through a mandatory arbitration process rather than being subjected to the tremendous limitations inherent in the judicial process.<sup>69</sup>

Likewise, Professor St. Antoine posited, "Without more empirical evidence about the actual experience of discrimination victims, we could be mistaken in condemning mandatory arbitration out of hand. It may well be the most realistic hope of the ordinary claimant."<sup>70</sup> Professor St. Antoine

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*Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997) (suggesting that mandatory pre-dispute arbitration is more efficient if it provides certain procedural safeguards and provides equal concerns for both employers and employees); Susan A. Fitzgibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMPLOYEE POL'Y J. 221 (1997) (asserting that mandatory arbitration provides employees with access to a dispute resolution process that they usually would not have the opportunity to use) [hereinafter Fitzgibbon, *Reflections*]. It is interesting to note that Professors St. Antoine, Estreicher, and Fitzgibbon had previously stated concerns about coercing employees into having their disputes resolved by arbitration. See, e.g., Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753, 782-83, 797 (1990) (arguing that mandatory arbitration will "compromise the integrity of the public law scheme" and is "highly problematic" for adjudicating claims governed by external law); Susan A. Fitzgibbon, *The Judicial Itch*, 34 ST. LOUIS U. L.J. 485, 489 (1990) ("The author asserts that freedom to choose a forum is, in itself, a right that should be vindicated."); Theodore J. St. Antoine, *Thirty Years After The Steelworkers Trilogy: Afterword*, 66 CHI.-KENT L. REV. 845, 856 (1990) (asserting concerns about "coercion, surprise, or other overreaching by a more powerful employer" but noting that his view that consenting adults should be allowed to arbitrate may conflict with his prior objection to the NLRB's deferral of individual discrimination charges to arbitration).

68. In taking up these arguments, Professors Estreicher, Fitzgibbon, and St. Antoine have exposed an "employee disadvantage rhetoric" with respect to mandatory arbitration.

69. See generally David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing Out The Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73 (1999). These authors strongly believe that, whatever disadvantages there may be to using arbitration, even as a mandatory arbitration participant, it is worth it. Further, these authors take every opportunity to try to establish that any alleged disadvantages (employee disadvantage rhetoric) are minimal.

70. St. Antoine, *Mandatory Arbitration*, *supra* note 67, at 9.

supported this statement and his claim that mandatory arbitration should be applauded, not denigrated, by pointing to the overworked and underfunded EEOC<sup>71</sup> and his belief in the likelihood that plaintiffs will not find attorneys to represent them.<sup>72</sup> Professor St. Antoine may now believe that mandatory arbitration could be good for employees, absent empirical evidence to the contrary. Likewise, mandatory arbitration may be bad for employers, absent some empirical evidence to the contrary.<sup>73</sup> Professor St. Antoine identified a number of concerns with the legal system that not only represent disadvantages to employees, but also represent advantages to employers, including the likelihood that plaintiffs will not find counsel.<sup>74</sup> By agreeing to arbitrate before a dispute arises, an employer relinquishes these advantages without knowledge of the actual nature of the dispute or the individuals involved.

Large employers have no incentive to seek mandatory arbitration in most cases because of the disadvantages highlighted herein. If those cases are handled by their capable counsel, who are repeat players in the court system, they will almost certainly end favorably for the employer. As a

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71. Several commentators have developed excellent critiques of the EEOC and discussed whether it can adequately address the concerns of discrimination in the workplace. See, e.g., Elizabeth Chambliss, *Title VII as a Displacement of Conflict*, 6 TEMP. POL. & CIV. RTS. L. REV. 1 (1997) (criticizing the EEOC's systematic role in displacing or denying the pursuit of conflicts from the court system and thereby hindering enforcement); Maurice E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 219 (1995) (stating that "race discrimination in employment remains pervasive despite three decades of government effort" and asserting that the EEOC has been "constrained to focus on processing individual charges of discrimination" rather than being able to "concentrate on combatting broader unlawful practices"); Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1 (1996) (reviewing the overall ineffectiveness of the EEOC and suggesting that it should be disbanded or its duties and functions should be significantly altered); Lamont E. Stallworth & Linda K. Stroh, *Who is Seeking to Use ADR? Why Do They Choose to Do So?*, DISP. RESOL. J., Jan./Mar. 1996, at 31 (noting the tremendous hardships placed on claimants by the EEOC's backlog); Ronald Turner, *A Look at Title VII's Regulatory Regime*, 16 W. NEW ENG. L. REV. 219 (1994) (arguing that Title VII has failed to meet its goals and aspirations due to its limited enforcement mechanisms).

72. St. Antoine, *Mandatory Arbitration*, *supra* note 67, at 2, 7-8.

73. This is the first step in attacking what this Article has referred to as the "employer advantage rhetoric" with respect to mandatory arbitration.

74. See St. Antoine, *Mandatory Arbitration*, *supra* note 67, at 7-8 (observing that plaintiffs' attorneys take very few discrimination cases); see also Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 2-3 (1994) (noting that most cases do not have potential recovery large enough for plaintiffs' attorneys to take the risk).

result of the employer advantage rhetoric, the disadvantages for employers in adopting mandatory arbitration programs have not been highlighted or thoroughly explored.<sup>75</sup> Those overall key disadvantages include growing legal costs and other uncertainties, coupled with the failure to appreciate the overwhelming success of employers in the litigation process.

#### A. Growing Legal Costs and Other Uncertainties

##### 1. No Apparent Cost Savings

As discussed in the introduction of this Article, no studies have been performed to show whether arbitration or litigation is more cost effective for employers.<sup>76</sup> A number of surveys throughout the 1990s demonstrated that some employers have used *Gilmer* as an incentive to invest their litigation reserves in handling a growing percentage of employment disputes in the arbitral forum rather than the judicial forum.<sup>77</sup> One recent survey, which was conducted in Spring 1997, received responses from 606 corporate lawyers from the 1,000 largest U.S. corporations. They reported that their corporations had used arbitration in 62% of their employment disputes.<sup>78</sup>

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75. But see 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, 1028-31 (1996); John-Paul Motley, Note, *Compulsory Arbitration Agreements in Employment Contracts from Gardner-Denver to Austin: The Legal Uncertainty and Why Employers Should Choose Not to Use Preemployment Arbitration Agreements*, 51 VAND. L. REV. 687 (1998). Both Motley and Lewton merely speculated that employers may not benefit without offering any reasons to support their speculation. In opposition to Motley's and Lewton's inferences and also without any reasons supporting their claims, other commentators have argued that employers do benefit from mandatory arbitration. See, e.g., Martin J. Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitration Agreements are an Effective Alternative to Employment Litigation*, DISP. RESOL. J., Fall 1997, at 19.

76. See Hensler, *supra* note 4, at C12; Sternlight, *supra* note 4, at 126; Stone, *supra* note 4, at 959 & n.61.

77. See, e.g., E. Patrick McDermott, *Survey of 92 Key Companies: Using ADR to Settle Employment Disputes*, DISP. RESOL. J., Jan. 1995, at 8, 12 (discussing results from 92 out of 336 Fortune 500 employers surveyed regarding their use of ADR in employment disputes in late 1993 and also finding that 78% of the respondents were willing to allow an outside arbitrator to make final decisions regarding employment disputes). These findings should be viewed with skepticism regarding mandatory arbitration because the questionnaire only asked the employers about their interest in having an arbitrator decide the dispute. Also, the findings did not distinguish whether that decision would occur before or after the dispute arose or as a condition of employment. *Id.*

78. See David B. Lipsky & Ronald L. Seeber, *Top General Counsels Support ADR:*

Unfortunately, "[v]ery few corporations have undertaken the rigorous internal studies that are necessary to see if and how ADR pays off."<sup>79</sup> In an interview with "Marc Galanter, a law professor at the University of Wisconsin Law School and an authority on the court system," Professor Galanter noted that no "independent study [has] been able to verify the claims . . . that [ADR] is usually faster, cheaper and more satisfying for the parties than traditional litigation, or that ADR has materially shrunk state or federal court dockets."<sup>80</sup>

There is no doubt that employers have embraced the use of ADR to resolve their disputes. Especially after the dispute arises, ADR can provide "more 'satisfactory settlements' than litigation" by "preserving good relationships."<sup>81</sup> However, the failure of employers to assess the costs in light of the increasing political, agency, and enforcement costs for mandatory arbitration remains a puzzling predicament at this stage.

The little data (either anecdotal or empirical) that does exist supports the position that arbitration may not be as big a savings in cost or time as proponents claim. Employers now have their own horror stories describing instances where arbitration has become so expensive and overblown that it was not worthwhile.<sup>82</sup> For example, Intel Corporation participated in a lengthy and expensive pre-dispute, mandatory arbitration, including several rounds of collateral litigation. The arbitration originated from a pre-dispute clause, and the proceedings lasted seven years and cost them about \$100 million due to the extended examination of witnesses that was required because of limited pre-hearing discovery.<sup>83</sup> Also, a study of arbitrations

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*Fortune 1000 Lawyers Comment on its Status and Future*, 8 BUS. L. TODAY 24, 26 (Mar./Apr. 1999) (describing general arbitration, not mandatory arbitration programs).

79. *Id.*

80. See Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 55.

81. See *Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, Daily Lab. Rep. (BNA) No. 93, at A4-5 (May 14, 1997) (providing another survey of 530 Fortune 1000 companies from 1994 to 1997, finding that 79% of the respondents reported having used arbitration, that 69% said they would use it again, that 66% found ADR provided more "satisfactory settlements" than litigation, and that 59% found that ADR "preserves good relationships"). Again, the issue of mandatory arbitration was not discussed by this survey. See *id.*

82. See Brennan, *supra* note 18, at A1 (describing complaints of outside counsel, John Lowrey, regarding a particularly horrendous arbitration that was required to be held in New York, even though one party was from California; the New York arbitrator refused to let the parties go five straight days in a week because the arbitrator had his own private law practice and the cost got so expensive that the case had to be settled).

83. See Reuben, *supra* note 80, at 58-59 (describing arbitration proceedings that took

involving a California health maintenance organization found that arbitrations typically took nearly twenty-nine months to complete in comparison to the relevant trial court proceedings that lasted fifteen to nineteen months.<sup>84</sup>

With these ever-growing nightmarish experiences, one attorney recently noted: “[a]rbitration is almost as costly as litigation, without the same safeguards to achieve a fair result” because “[a]rbitration awards [cannot] be appealed.”<sup>85</sup> As a result of these concerns, some employers have refused to arbitrate for fear that an arbitrator will not “care who is right and wrong” and will just want to “come up with a compromise.”<sup>86</sup>

A 1996 Rand Corporation study of the 1990 Civil Justice Reform Act assessed six different ADR programs that included mediation and early neutral evaluation and found that neither time nor costs were cut by these ADR programs.<sup>87</sup> The Rand study analyzed a random sample of more than 12,000 case histories and survey responses from judges, 10,000 lawyers, and approximately 5,000 litigants in thousands of cases, as well as data from judges’ time sheets, court records, and districts’ plans.<sup>88</sup>

Because court-ordered arbitration differs from private arbitration by creating another layer of procedure, the connection between the results from the Rand study and private arbitration may be too attenuated. However, that study also determined that, even if ADR reduces the time to reach a decision, overall costs to the company depended on factors unrelated to the time of resolution. These factors include the aggressiveness of counsel and their tendency to try to do just as much work as they would in court proceedings and filings, but over a shorter time period.<sup>89</sup> The Rand study

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place over seven years and included several rounds of collateral litigation); *see also* *Advanced Micro Devices, Inc. v. Intel Corp.*, 885 P.2d 994 (1994); *Intel Corp. v. Advanced Micro Devices, Inc.*, 12 F.3d 908, 911 (1993) (describing the dispute as ongoing for five years at that time); Schwartz, *supra* note 25, at 45 n.33 (“In practice, the notion of arbitration as a ‘speedy’ remedy compared to litigation is often illusory. Delays of months or years are common.”).

84. *See* Reuben, *supra* note 80, at 59.

85. Brennan, *supra* note 18, at A1.

86. *Id.* (noting comments of Bennie Laughter, vice-president and general counsel of carpet manufacturer, Shaw Industries, Inc., in Daulton, Georgia, describing why his company will “never arbitrate”).

87. *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 34-44 (1996).

88. *See* Rand Institute For Civil Justice, *Press Release: January 29, 1997* (visited Feb. 28, 2000) <<http://www.rand.org/hot/Press.97.98/cjra.1.97.html>>.

89. *Id.*

continues to represent some of the best information available comparing the use of ADR versus the courts. As one commentator recently noted:

[T]he empirical data garnered from experiments with arbitration of civil disputes in the federal courts suggests that arbitration does not materially save time or expense in prosecuting civil cases, and the parties' satisfaction with this ADR device—to the extent that it can be accurately measured at all—does not appear to be so high as to outweigh its uncertainties.<sup>90</sup>

## 2. Developing Forum Fairness: The Protocol & Litigation-Like Procedures

Concerns about mandatory arbitration have been raised from the beginning and are continuing to create challenges to the use of arbitration with respect to basic concerns of due process that are provided to parties in the court system.<sup>91</sup> Initially, a Taskforce on Alternative Dispute Resolution in Employment was created to address these concerns. The Taskforce included representatives of the American Arbitration Association ("AAA"), the Federal Mediation and Conciliation Service ("FMCS"), the National Employment Lawyers Association ("NELA"), the American Civil Liberties Union ("ACLU"), the Society of Professionals in Dispute Resolution ("SPIDR"), the National Academy of Arbitrators ("NAA"), and the Labor and Employment Law Section of the ABA.<sup>92</sup> On May 9, 1995, the Taskforce developed a document to address the growing concerns regarding

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90. Johnathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 154 (1999) (describing the results from the Rand study of court-annexed ADR systems).

91. Even in one of the most recent studies showing the increasing use of ADR, 54% of the respondents who do not use ADR stated that their companies "do not use arbitration because arbitrators' decisions are difficult to appeal . . . discovery isn't required in the process and arbitrators are not confined to standard legal rules, such as those governing the admissibility of evidence." Lipsky & Seeber, *supra* note 78, at 27. The respondents of that survey also noted a general lack of confidence in arbitrators stemming from concerns about their qualifications and experience. *Id.*

92. See George Nicolau, *Scrutiny of Arbitration Forums Focuses on Fairness*, NAT'L L.J., Oct. 5, 1998, at B7; Evan J. Spelfogel, *A Focus On Fairness, Due Process in ADR*, NAT'L L.J., Aug. 9, 1999, at B10 (finding that, absent Supreme Court clarification of the arbitration of statutory employment disputes, the primary focus should be on the fairness of the ADR process and its incorporation of the Due Process Protocol); see also Green, *supra* note 30, at 174 nn.10-13 (describing the ABA, AAA, SPIDR, JAMS/Endispute organizations, and the make-up of their memberships). Professor Leona Green provides an excellent review of the development of the Due Process Protocol and responses thereto. See *id.* at 211-21.

the arbitration of employment disputes, entitled "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship."<sup>93</sup>

The Protocol established minimum guidelines for procedures to ensure a fair system for the arbitration of employment disputes, including "fundamental due process safeguards, fair and appropriate discovery procedures, the right of employees to be represented by counsel, and the selection of an arbitrator who is neutral, familiar with the statutory issues and authorized to grant the same remedies available in court."<sup>94</sup> The impetus for the Protocol originated in 1994 with the Dunlop Commission on Labor-Management Relations, a diverse group composed of persons from management, employment, and government that made recommendations about important labor and employment issues to the Secretary of the Department of Labor and the Secretary of the Department of Commerce.<sup>95</sup> The Dunlop Commission encouraged the use of arbitration, but recommended that agreements requiring arbitration of employment discrimination claims as a condition of employment should not be enforced.<sup>96</sup> Nevertheless, the Protocol Taskforce struggled with a clear recommendation on how to address the issue of mandatory arbitration and could not agree on a compromise.<sup>97</sup>

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93. Green, *supra* note 30, at 211 & nn.258-61.

94. Spelfogel, *supra* note 92, at B10 (describing the requirements of the Protocol).

95. See Nicolau, *supra* note 92, at B7.

96. See Commission on the Future of Worker-Management Relations, Report and Recommendations—Final Report, at 33, § 4(2)(3) (1994) (photocopy on file with author), available in *Catherwood Library-Electronic Archive* (visited Feb. 28, 2000) <<http://www.ilr.cornell.edu/lib/e-archive/Dunlop/section4.html>> (stating findings from the group commonly known as the Dunlop Commission, named after its chair, former Secretary of Labor John Dunlop, that, despite the *Gilmer* decision, their recommendation was that binding arbitration agreements should not be enforceable as a condition of employment and should be interpreted that way or Congress should pass legislation making it clear that arbitration is to be pursued only if the employee chooses it not as part of an employment contract).

97. See Nat'l Acad. of Arbitrators, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (May 9, 1995) (visited Feb. 28, 2000) <<http://www.naarb.org/protocol.html>>; see also *A Due Process Protocol for Resolving Employment Disputes Involving Statutory Rights*, DISP. RESOL. J., Oct.-Dec. 1995, at 37-39 (describing the four distinct and conflicting options offered by the Protocol Taskforce to address the use of arbitration to resolve employment disputes including: (1) pre-dispute arbitration with an informed, voluntary agreement to arbitrate that is not agreed to as a condition of employment; (2) mandatory, pre-dispute arbitration as a condition of employment; (3) absolute prohibition of any agreement permitting employees to waive

Since the Protocol Taskforce's failure to reach a compromise about mandatory arbitration, the ACLU has challenged the use of mandatory arbitration through lawsuits filed in California.<sup>98</sup> Also, NELA "issued an ultimatum to AAA and JAMS: [e]ither those brokerages stop handling cases arising from mandatory and binding predispute resolution clauses, or NELA's lawyers would boycott those companies' arbitrators whenever possible."<sup>99</sup> The NAA debated the mandatory arbitration matter and issued a statement condemning the use of mandatory arbitration, but it still agreed to participate in those employment arbitrations as long as the protections from the Protocol existed.<sup>100</sup> SPIDR also agreed with the NAA's condemnation of mandatory arbitration.<sup>101</sup> Moreover, the National Employee Rights Institute ("NERI") issued a statement condemning the use of mandatory arbitration.<sup>102</sup> Key arbitration service providers, including AAA and JAMS/Endispute, agreed to adopt the Protocol requirements and have developed their own procedures consistent with the Protocol.<sup>103</sup> After the

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their right to judicial relief of statutory employment discrimination claims; or (4) post-dispute agreements to arbitrate statutory claims); see also Green, *supra* note 30, at 212 n.265 (discussing the four competing options to address mandatory arbitration about which the Protocol Taskforce could not reach a consensus).

98. See Paul W. Cane, Jr. & E. Jeffrey Grube, *Employment Dispute Arbitration: An Antidote to Frivolous Litigation*, LEGAL BACKGROUNDER, Nov. 13, 1998, available in LEXIS, News Database (describing two lawsuits filed by the ACLU in California against law firms that used pre-dispute arbitration agreements as a condition of employment).

99. Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58-60.

100. On May 21, 1997, the NAA adopted its own guidelines in support of the Due Process Protocol, "Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems" and criticized the use of mandatory arbitration, "Statement of the National Academy of Arbitrators on Individual Contracts of Employment." See *Academy Votes to Oppose Mandatory Arbitration of Job Disputes*, Daily Lab. Rep. (BNA) No. 103, at E1 (May 29, 1997); see also NAA Website <<http://www.naarb.org/guidelines.html>>. The NAA's guidelines went beyond the Due Process Protocol to create a fair system from initial selection of the arbitrator to the issuance of a written opinion. See *id.*; see also Nicolau, *supra* note 92, at B7.

101. See SPIDR, Statement On Arbitration of Statutory Rights Imposed As A Condition of Employment (Jan. 24, 1998). The statement is available on the Internet at <<http://www.mediate.com/spidr/work.htm#7>> (visited Feb. 28, 2000).

102. See NERI's Position on Mandatory Arbitration of Employment Disputes, 1 EMP. RTS. & EMP. POL'Y J. 263 (1997).

103. See Bingham, *supra* note 25, at 230 (discussing adoption of protocol items by American Arbitration Association); see also Michael D. Young & Kathleen W. Marcel, *Arbitration of Employment Disputes What's a Company to Do?*, THE METROPOLITAN CORPORATE COUNSEL, Aug. 1998, at 1 (describing the JAMS/Endispute's minimum standards

adoption of the Protocol, employment arbitration's evidentiary and general procedures have become more like those procedures available to parties in court litigation.<sup>104</sup>

### 3. Political Backlash

The National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE") have now adopted policies banning their longstanding requirements of mandatory arbitration.<sup>105</sup> Political pressure played a big role in the reversal of the mandatory arbitration policies, as members of Congress signed a letter condemning its use, which was sent to the NASD.<sup>106</sup> The NASD and NYSE actions have essentially resulted in the

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for Mandatory Employment Arbitration Program, including the requirement that all remedies available under the applicable law must remain available in arbitration, the arbitrator must be neutral and the employee must have the right to participate in the selection of the arbitrator, the employee must have the right to be represented by counsel, reasonable discovery must be available, the parties must each have the right to present evidence, and the costs of the proceeding must not preclude the employee's access to the process); Arnold M. Zack, *The Evolution of the Employment Protocol*, DISP. RESOL. J., Oct.-Dec. 1995, at 36 (describing the adoption of the Protocol by the AAA); see also *Arbitration Rules Force Debate*, DALLAS MORN. NEWS, July 20, 1998, at 2D (describing the AAA employment arbitration minimum standards). The AAA website contains its rules titled: "National Rules For The Resolution of Employment Disputes (Including Mediation and Arbitration Rules)," which were effective January 1, 1999. See American Arbitration Association, *National Rules for the Resolution of Employment Disputes* (visited Feb. 28, 2000) <[http://www.adr.org/rules/employment/employment\\_rules.html](http://www.adr.org/rules/employment/employment_rules.html)>.

104. See Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289 (1998) (proposing the establishment of certain procedures that would make arbitration closer to litigation).

105. See *Arbitration: SEC Approves NASD Proposal To End Mandatory Arbitration of Bias Claims*, Daily Lab. Rep. (BNA) No. 121, at A-10 (June 24, 1998); see also 63 Fed. Reg. 35,299 (1998) (NASD); 64 Fed. Reg. 1051 (1998) (NYSE); *New York Stock Exchange Moves to End Mandatory Arbitration of Bias Claims*, Daily Lab. Rep. (BNA) No. 173, at A-2 (Sept. 8, 1998); Patrick McGeehan, *Big Board Moves To End Practice On Arbitration*, WALL ST. J., Sept. 4, 1998, at B6. But see Scott S. Moore, *Arbitration of Employment Disputes—Drafting Enforceable Pre-Dispute Agreements*, 32 CREIGHTON L. REV. 1521, 1522 (1999) (referring to the change of rules and prohibition of mandatory arbitration by the NYSE and NASD as a "small political victory" and suggesting that mandatory arbitration is still a legitimate and viable option for employers).

106. See *Legislators Criticize Mandatory Arbitration of Job Bias Complaints in Securities Industry*, Daily Lab. Rep. (BNA) No. 127, at D-11 (July 2, 1997) (discussing a June 27, 1997 letter to the president of NASD Regulation, Inc., a subsidiary of NASD, calling for the end of mandatory arbitration of employment discrimination disputes in the securities

abandonment of mandatory arbitration in the securities industry, despite authorization of it by *Gilmer*.<sup>107</sup> The NYSE and NASD policy changes represent classic examples of how repeat players encompassing an entire industry can buckle under political pressure and protests from employee groups. Those groups had argued that the widespread use of mandatory arbitration policies was intended to shield an entire industry from discrimination lawsuits. Likewise, no large employer or group of large employers covering a particular industry want a similar political backlash of becoming targets for civil rights groups or under the specific scrutiny of Congress due to their use of mandatory arbitration policies.<sup>108</sup>

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industry that was signed by 30 members of Congress); see also *SEC to Monitor Securities Firms' Forum Choice for Resolving Employee Bias Claims*, 11 Empl. Discrim. Rep. (BNA) No. 6, at 74 (Aug. 5, 1998) (describing statements of Securities and Exchange Commissioner Isaac C. Hunt to a Senate panel indicating that the SEC intends to monitor securities firms to see if they are forcing employees to agree, as a condition of employment, to arbitrate statutory discrimination claims); *NASD Votes to Eliminate Mandatory Arbitration of Bias Claims*, Daily Lab. Rep. (BNA) No. 153, at AA-1 (Aug. 8, 1997) (describing how NASD bowed to the pressure from "members of Congress, civil rights advocates, and plaintiffs' attorneys" in voting to eliminate mandatory arbitration of statutory employment discrimination claims for registered brokers).

107. See *Judge Approves Merrill Lynch Accord Ending Mandatory Arbitration of Disputes*, Daily Lab. Rep. (BNA) No. 171, at A-1 (Sept. 3, 1998) (discussing approved settlement in *Cremin v. Merrill Lynch & Co.*, 957 F. Supp. 1460 (N.D. Ill. 1997), which creates a separate resolution process for handling all future civil rights claims where employees have the option of pursuing court relief and mediation and arbitration). Although the actions by the NASD and NYSE still allow individual brokerage firms to establish their own mandatory arbitration programs, the reality is that due to the competitive nature of the securities industry, the Merrill Lynch program established by the *Cremin* settlement has effectively eliminated mandatory arbitration of statutory employment discrimination disputes in the securities industry. See also Rosalyn Retkwa, *Forced Arbitration Under Attack*, REGISTERED REPRESENTATIVE, Aug. 1998, available in LEXIS, News database (noting that NASD and NYSE were pressured by state and federal officials into changing their rules to prohibit mandatory arbitration and although individual securities firms could still choose to employ mandatory arbitration agreements the likelihood is that mandatory arbitration is over in the securities industry with Merrill Lynch's announcement that its new ADR program allows its employees to pursue court claims for employment discrimination because it would "put their competitors at a disadvantage in recruiting" if Merrill Lynch allowed this freedom and its competitors did not offer it); *Securities Industry Throwing In the Towel on Compulsory Arbitration*, LITIG. NEWS, Mar. 1999, at 10 (referring to the new rules of the NASD and NYSE that repealed prior mandatory arbitration requirements and noting that Paine Webber has followed Merrill Lynch so that both have removed their employment contracts provisions mandating arbitration of employment discrimination claims).

108. For that matter, small employers would not want to be the target of civil rights groups or Congress either. But given their size, that is less likely.

## 4. Lower Court Hostility: Additional Search for Forum Fairness?

Whatever benefits in cost and time that arbitration may allegedly provide, mandatory arbitration destroys those purported benefits. A newfound judicial hostility has developed to the point where some courts have decided that these mandatory agreements are unenforceable when they are too one-sided in not providing for the same remedies or similar procedures as available in the courts.<sup>109</sup> This fairness concern originates from the fact that in mandatory arbitration employees may not have knowingly chosen to have their case resolved in arbitration because they were required to accept arbitration as a condition of employment. Now if a court finds that the arbitral forum designed by the employer restricts or prohibits certain rights that the employee would have been able to pursue in court, courts are striking these mandatory arbitration agreements as patently unfair.<sup>110</sup>

In 1997, the United States Court of Appeals for the District of Columbia Circuit addressed the issue of whether mandatory arbitration of Title VII claims is enforceable in light of the remedies provided by the Act. Chief Judge Harry Edwards, a well-known labor lawyer and professor before he became a member of the judiciary, wrote the opinion in *Cole v. Burns International Securities Services*.<sup>111</sup>

The court in *Cole* enforced an agreement to arbitrate a Title VII job discrimination claim, but created a new requirement of establishing certain "minimum standards" for arbitrations of statutory claims when the arbitration is a mandatory condition of employment. These standards,

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109. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (deciding that the mandatory arbitration agreement was unenforceable because, in part, Hooters failed to provide employees with the complete written terms of the proposed agreement, threatened its employees' careers if they refused to execute the agreement, and the agreement unlawfully prohibited any court review by employees despite stating that the FAA governed the terms of the agreement); see also *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138 (Cal. Ct. App. 1997) (finding arbitration agreement was an unenforceable adhesion agreement under California law because it was too one-sided in only allowing the employer to challenge decisions in court); Alexandra Varney McDonald, *Escape from Arbitration: Sticking Points in Adhesion Contracts Ruled 'Unfair'*, A.B.A. J., Aug. 1999, at 32 (discussing the *Hooters* case).

110. See, e.g., *Hooters*, 173 F.3d at 933. The Ninth Circuit Court of Appeals' finding that the legislative history of the Act indicates that Congress intended to preclude compulsory and mandatory arbitration of employment discrimination claims under Title VII, as discussed earlier, represents another form of the growing judicial hostility. See *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). But this form of hostility is limited as no other Court of Appeals has adopted this approach yet.

111. 105 F.3d 1465 (D.C. Cir. 1997).

derived from procedures of the Dunlop Commission, include: the requirement of a neutral arbitrator knowledgeable in relevant law; a fair method to obtain necessary information to establish a claim; an affordable access to the process, which may require payment by employers of the full costs of the arbitrator's fees when use of arbitration is imposed as a condition of employment, because having to pay for the arbitration would deter its use and "undermine Congress's intent" when plaintiffs do not have to pay judges in the judicial forum; a right to legal representation; a right to the same remedies as those remedies available in litigation; a written opinion by the arbitrator explaining the reasons for the award; and the right to sufficient judicial review to ensure compliance with governing statutory rights.<sup>112</sup> All of these standards assure that the arbitral forum approximates the minimum guarantees that plaintiffs usually have available to them in the court system.

The last standard can include the traditional scope of review of arbitration awards under the FAA that is essentially limited to acts of fraud or misconduct<sup>113</sup> or the court-made standard of allowing a showing of "manifest disregard of the law" to overturn an arbitrator's decision by judicial review.<sup>114</sup> The *Cole* court insisted that courts ensure meaningful

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112. *Id.* at 1482-83, 1485 & n.11 (describing procedures proffered by the Dunlop Commission). Other cases have followed *Cole* by requiring some of the minimum standards of fairness identified therein. *See, e.g.,* Ramirez-de-Arellano v. American Airlines, Inc., 133 F.3d 89, 91 (1st Cir. 1997) (requiring notice, discovery, unbiased arbitrators, and meaningful review for wage and hour claims); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997) (requiring "neutral arbitrators, adequate discovery" for Title VII claims).

113. Under the FAA, an arbitration award may be vacated on a number of grounds, including: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; and (4) where the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. *See* 9 U.S.C. § 10(a) (1994).

114. The definition and application of the "manifest disregard of the law" standard of review has become a bit elusive. *Compare* Halligan v. Piper Jaffray Inc., 148 F.3d 197 (2d Cir. 1998) (finding a failure of an arbitration panel to rule in favor of plaintiff despite strong evidence of discrimination was in manifest disregard of the law), *with* Dirussa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997) (deciding that failure of an arbitration panel to provide the prevailing party an award of attorneys' fees does not constitute manifest disregard of the law). *See also* Michael A. Landrum & Dean A. Trongard, *Judicial Morphallaxis: Mandatory Arbitration and Statutory Rights*, 24 WM. MITCHELL L. REV. 345, 373-80 (1998) (discussing the confusing "manifest disregard of law" standard and how courts have struggled

review of public law issues and may set aside arbitral awards if they violate explicit public policy that is well-defined and dominant.<sup>115</sup> Recent indications suggest that litigators are becoming more successful in obtaining meaningful review of arbitration decisions, and the courts are now setting aside arbitration awards in some instances.<sup>116</sup> Also, a number of courts have followed the *Cole* reasoning. These courts have required certain minimum standards of fairness and refused to enforce arbitration agreements where employees had to pay excessive arbitration fees that they would not have had to pay in court<sup>117</sup> or where the same remedies available in court were denied the parties in arbitration.<sup>118</sup>

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to apply it); Norman S. Poser, *Arbitration: Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 BROOK. L. REV. 471 (1998) (questioning the logic of applying the manifest disregard of the law as a standard of review for arbitration decisions under the FAA).

115. *Cole*, 105 F.3d at 1486.

116. See Ethan A. Brecher, *Putting the Reins on Employment Arbitration: Courts Safeguard Employee Rights*, N.Y.L.J., Aug. 24, 1999, at 1 (describing recent cases where issues of fairness have concerned the courts enough to overturn arbitration decisions as a manifest disregard of the law or as ignoring traditional notions of fairness).

117. See *Shankle v. B-G Maintenance Management of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999) (finding mandatory arbitration clause was unenforceable where the employee, a janitor, was required to pay about \$2,000 to \$5,000 for one-half the arbitration fees because when he could not afford the fee it served as a significant barrier to his pursuit of his claim); *Paladino v. Avnet Comp. Techs., Inc.*, 134 F.3d 1054, 1060-62 (11th Cir. 1998) (Cox, J., concurring, for a majority of the court) (finding that mandatory arbitration agreements banning key Title VII statutory remedies are unenforceable including those imposing "steep filing fees" and "fee-shifting" agreements requiring a financial obligation similar to the one placed on the plaintiff in this case who was required to pay a \$2,000 filing fee and incur possible liability for a portion of the arbitrator's fee); *McWilliams v. Logicon, Inc.*, No. 95-2500, 1997 WL 383150 (D. Kan. June 4, 1997), *aff'd*, 143 F.3d 573 (10th Cir. 1998) (requiring that an employer must pay all fees and expenses of the arbitration that the employee was required to use as a condition of employment). But see *Arakawa v. Japan Network Group*, 56 F. Supp. 2d 349 (S.D.N.Y. 1999) (finding the possibility that plaintiff might be charged arbitration fees as part of a fee-splitting agreement did not make the arbitration agreement unenforceable since it was not clear that the fee-splitting agreement would prevent the plaintiff from vindicating her statutory rights); *Howard v. Anderson*, 36 F. Supp. 2d 183 (S.D.N.Y. 1999) (stating that improper assessment of fees should be raised with the arbitrator and having to pay \$500 up front was not a barrier to the vindication of the plaintiff's statutory rights in arbitration pursuant to the arbitration agreement).

118. See *DeGaetano v. Smith Barney, Inc.*, 983 F. Supp. 459 (S.D.N.Y. 1997) (noting that arbitration agreements which fail to award attorneys' fees to prevailing parties are unenforceable as against the public policy of Title VII and are in manifest disregard of the law if they prohibit attorneys' fees to a prevailing party as required by Title VII); see also *Paladino*, 134 F.3d at 1060 (finding an arbitration agreement that eliminates the availability of certain Title VII damages is unenforceable because it is "fundamentally at odds with the

## 5. Aggressive Agency Challenges

The EEOC represents probably the most significant deterrent and disadvantage for employers seeking to use mandatory arbitration agreements. Although it has enthusiastically endorsed the use of mediation to resolve employment discrimination disputes,<sup>119</sup> the EEOC has maintained a longstanding policy against mandatory arbitration agreements, and it continues to vigorously challenge the legality of mandatory arbitration agreements.<sup>120</sup> Pursuant to its policy, the EEOC will ignore the existence of an arbitration agreement when it processes a charge against an employer,

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purposes of Title VII"); *cf.* *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1365 (2d Cir. 1993) (finding that arbitration must allow remedies central to the statutory scheme but not the exact same remedies as in adjudication, while affirming an arbitration award after finding that a foreign arbitral forum's different remedies met the statutory purposes involved because "the available remedies are adequate and the potential recoveries substantial").

119. See Nancy Montwieler, *EEOC's New Nationwide Mediation Plan Offers Options of Informal Settlements*, Daily Lab. Rep. (BNA) No. 29, at C-1 (Feb. 12, 1999) (discussing the EEOC's wholesale efforts to increase the use of mediation to resolve charges that have been filed and how the EEOC's mediation program operates).

120. The EEOC issued a policy statement in 1995 opposing the use of mandatory arbitration agreements as a condition of employment. Two years later, "the EEOC reiterated its opposition to mandatory arbitration agreements and restated its commitment to challenging the legality of these agreements in the courts, even in cases where the employee has agreed to abide by such a contract." Mark Hansen, *Contract Disputes: EEOC Reaffirms Policy Favoring Judges Over Arbitrators for Workplace Discrimination Claims*, A.B.A. J., Sept. 1997, at 26. On July 10, 1997, the EEOC issued a 17-page policy statement reaffirming its prior opposition to the use of mandatory arbitration. See *Excerpts From Text: EEOC Rejects Mandatory Binding Employment Arbitration*, DISP. RESOL. J., Fall 1997, at 11 (providing excerpts of the position statement). The full position statement may be found on the EEOC website. See EEOC, EEOC Notice No. 915.002 (visited Feb. 28, 2000) <<http://www.eeoc.gov/docs/mandarb.txt>> [hereinafter EEOC Policy Statement]; see also *EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, Daily Lab. Rep. (BNA) No. 133, at E-4 (July 11, 1997). A number of commentators have criticized the EEOC's position. See, e.g., Lynne M. Longtin, *The EEOC's Position on Mandatory Arbitration*, 67 U. CIN. L. REV. 265 (1998) (discussing the EEOC's policy statement opposing mandatory arbitration and criticizing the EEOC's position); Oppenheimer & Johnstone, *supra* note 75 (disagreeing same); Beth M. Primm, Comment, *A Critical Look at the EEOC's Policy Against Mandatory Pre-Dispute Arbitration Agreements*, 2 U. PA. J. LAB. EMP. L. 151 (1999) (disagreeing with the EEOC's policy and suggesting that mandatory arbitration may work with certain procedural safeguards already in place under the Due Process Protocol adopted by most ADR providers). But see Joseph D. Garrison, *The Employee's Perspective: Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights*, DISP. RESOL. J., Fall 1997, at 15 (arguing that the EEOC's position opposing mandatory arbitration is well-deserved).

and it will file amicus briefs in cases involving mandatory arbitration issues.<sup>121</sup> In addition to filing amicus briefs in other lawsuits, the EEOC started to challenge the enforceability of mandatory arbitration agreements directly through its own lawsuits. With respect to its attempts to obtain injunctive relief, the EEOC has been generally successful despite the existence of mandatory arbitration agreements because courts have recognized the EEOC's independent authority to enforce discrimination claims as a public body regardless of the private agreements of individual employees with their employers.<sup>122</sup>

In *Gilmer*, the Court made it clear that an individual subject to an arbitration agreement is still free to file an EEOC charge and that arbitration agreements "will not preclude the EEOC from bringing actions seeking class-wide and equitable relief."<sup>123</sup> Although *Gilmer* was silent on the scope of relief the EEOC may seek, the EEOC has taken the position that its enforcement actions vindicate the broader public interest in eradicating employment discrimination.<sup>124</sup> With recent judicial support, the EEOC has

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121. See Ellen J. Vargyas, *EEOC Explains its Decision: Verdict on Mandatory Arbitration in Employment*, DISP. RESOL. J., Fall 1997, at 10 (explaining the EEOC's reasoning); see also EEOC Policy Statement, *supra* note 120 (explaining same). At an annual conference on current developments in employment law held on July 17, 1997, EEOC Associate General Counsel Peggy Mastroianni stated, "Mandatory arbitration of employment disputes is the greatest threat to civil rights enforcement, and is why the Equal Employment Opportunity Commission is devoting 'a lot' of energy in the area." Nadya Aswad, *EEOC Attorney Calls Mandatory Arbitration 'Greatest Threat' to Civil Rights Enforcement*, Daily Lab. Rep. (BNA) No. 139, at D-13 (July 21, 1997).

122. See, e.g., *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999) (preventing the defendant from compelling the EEOC to arbitrate the individual employee's discrimination claims, allowing the EEOC to seek injunctive relief but precluding the EEOC from seeking any "make-whole" monetary relief for individuals subject to arbitration agreements); *EEOC v. Kidder, Peabody*, 156 F.3d 298 (2d Cir. 1998) (finding EEOC was denied the opportunity to seek legal damages but received injunctive relief in an ADEA suit on behalf of a class of employees who had signed arbitration agreements); *EEOC v. River Oaks Imaging & Diagnostic*, No. H-95-755, 1995 WL 264003 (S.D. Tex. Apr. 19, 1995) (describing how the EEOC successfully obtained a permanent injunction against an employer that forced employees to sign mandatory arbitration agreements and either terminated those employees who would not sign or refused to hire others who would not sign after 21 of its employees filed discrimination charges).

123. 500 U.S. 20, 32 (1991).

124. See, e.g., *Waffle House*, 193 F.3d at 805 (seeking broad relief in EEOC suit); *Kidder, Peabody*, 156 F.3d at 298 (seeking same relief). Given the tremendous battle and another hard-fought victory to give the EEOC this power, it is understandable that the EEOC's enforcement authority is more important than an individual claim. See Herbert Hill, *The Equal Employment Opportunity Acts of 1964 and 1972: A Critical Analysis of the*

also been successful in challenging these agreements by obtaining both injunctive and compensatory relief against employers, regardless of the compulsory agreements to arbitrate.<sup>125</sup>

In *EEOC v. Frank's Nursery & Crafts*,<sup>126</sup> the United States Court of Appeals for the Sixth Circuit addressed the issue of the EEOC's authority to seek *both* monetary and injunctive relief on behalf of an individual, even if that individual was a party to a mandatory arbitration agreement. Because the court found that the EEOC had the right to pursue money damages, in addition to injunctive relief, the Court in *Frank's Nursery* disregarded the earlier ruling of the Second Circuit Court of Appeals in *EEOC v. Kidder, Peabody & Co.*<sup>127</sup> In *Kidder, Peabody*, the EEOC filed an ADEA suit on behalf of a class of employees. The Second Circuit granted injunctive relief, but denied monetary relief. Specifically, the court held that where an "individual has freely agreed to arbitrate [his] ADEA claim, that decision, like the decision to waive or settle a claim, prevents the EEOC from pursuing monetary remedies on behalf of the individual in the federal forum."<sup>128</sup>

Nevertheless, in *Frank's Nursery*, the Sixth Circuit rejected the *Kidder, Peabody* approach and decided that, pursuant to the 1972 amendments to Title VII, which authorized the EEOC to bring independent court actions for the public interest, the EEOC could pursue not only injunctive relief, but

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*Legislative History and Administration of the Law*, 2 INDUS. REL. L.J. 1, 7, 51-52 (1977); see also James E. Jones, Jr., *Some Reflections on Title VII of the Civil Rights Act of 1964 at Twenty*, 36 MERCER L. REV. 813, 819-20 nn.32 & 35 (1985) (describing the compromise involved with the 1964 Act that became Title VII and noting that the 1964 Act was believed to be "far short of that hoped for" because, instead of creating an exclusive federal commission with cease and desist powers similar to the National Labor Relations Board, it only granted the newly-created agency, the EEOC, a right to investigate and conciliate, but not the right to prosecute cases and seek enforcement, which was left up to individual lawsuits brought by an aggrieved plaintiff); Belton, *supra* note 29, at 957 (referring to description of Title VII as a "toothless tiger" before the 1972 amendments that gave the EEOC the power to bring suits and seek judicial enforcement of Title VII).

125. See, e.g., *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999) (holding that employee's signing of a mandatory arbitration agreement did not preclude the EEOC from seeking monetary and injunctive relief against employer); see also *EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695, 703 (6th Cir. 1999) (Nelson, J., concurring) (agreeing with opinion following *Frank's Nursery* and allowing monetary and injunctive relief to be pursued by the EEOC in light of *Frank's Nursery*, but noting that the parties in *Frank's Nursery* settled before the matter could be appealed).

126. 177 F.3d at 448.

127. 156 F.3d at 298.

128. *Id.* at 302.

also monetary relief on behalf of the individual claimant.<sup>129</sup> Unlike the court in *Kidder, Peabody*, the *Frank's Nursery* court found that the importance of the EEOC's independent right to file suits under Title VII would be compromised if it could not obtain monetary relief, even if the employees who filed the charges had agreed to arbitrate.<sup>130</sup> Pursuant to *Frank's Nursery*, a mandatory arbitration agreement will be virtually useless to an employer. The agreement will not preclude the EEOC from processing the matter or wielding its considerable influence to challenge an employer's actions in court for monetary and injunctive relief on behalf of the employee who agreed to arbitrate under a mandatory arbitration agreement.

Similar to the EEOC, the National Labor Relations Board has also opposed mandatory arbitration agreements.<sup>131</sup> These governmental agency actions indicate an ongoing effort to ensure that the courts play a key role in the enforcement of mandatory arbitration agreements that handle statutory employment discrimination claims.<sup>132</sup> Also, with the continuous court challenges to the enforcement of mandatory arbitration agreements, hostility to such agreements by government agencies, and wholesale attacks by scholars, civil rights activists, and members of Congress,<sup>133</sup> employers have little certainty regarding the legality of any mandatory arbitration agreements that they may choose to adopt for their employees. Such uncertainty about mandatory arbitration suggests that "employers would be

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129. *Frank's Nursery*, 177 F.3d at 447-49 (discussing the EEOC's authority in Title VII cases).

130. *See id.* at 466.

131. *See* Tanya A. Yatsco, Comment, *How About a Real Answer? Mandatory Arbitration as a Condition of Employment and the National Labor Relations Board's Stance*, 62 ALB. L. REV. 257 (1998) (describing the full scope of the Board's stance on mandatory arbitration and suggesting that the Board reverse its position and support the enforcement of mandatory arbitration agreements); *see also* Margaret A. Jacobs, *Firms With Policies Requiring Arbitration are Facing Obstacles*, WALL ST. J., Oct. 16, 1995, at B6 (discussing the separate challenges to mandatory arbitration authorized by both the EEOC and the NLRB).

132. *See* Carolyn L. Wheeler, *Issues in Employment and Labor Law: Foreword: Courts' Central Role in Implementing Equal Employment Opportunity*, 32 CREIGHTON L. REV. 1501, 1504 (1999) (referring to statements of an assistant general counsel of the EEOC asserting the significance of the courts' role in fleshing out equal employment laws and the need to "revisit the question of the propriety of submitting questions and cases arising out of our nation's commitment to equal employment opportunity to arbitration rather than to Article III judges").

133. Although a number of gallant attempts to block or limit the effect of *Gilmer* have occurred in both Congress and state legislatures, none of those efforts have been successful in passing new legislation. *See generally* Ray, *supra* note 30, at 459-62.

wise to avoid mandatory arbitration as a component of an internal ADR system for the time being and opt instead for programs of mediation or voluntary arbitration."<sup>134</sup>

#### 6. Comparing Any Remaining Benefits with the Disadvantages

Although not generally used as part of the employer advantage rhetoric, there are assumptions that employers prefer arbitration because of the privacy of the proceedings and the limited discovery.<sup>135</sup> These purported preferences suggest benefits for employers in arbitration; however, they also create similar disadvantages. Because of these disadvantages, the use of mandatory arbitration instead of litigation is not warranted, especially given the other disadvantages already discussed.

Some critics have complained about the use of mandatory arbitration because it keeps certain decisions private and out of the public discourse.<sup>136</sup> That might be a legitimate concern from an employee's perspective or from an overall reflection on understanding the public values of employment discrimination jurisprudence through a review of public precedents. However, the goal of keeping discrimination disputes private, albeit an aim of many employers, cannot be realistically obtained. Even an employer with a mandatory arbitration agreement cannot prevent public discussion of the dispute. It is not practical for an employer to expect that the dispute will remain private absent a separate agreement to keep the matter confidential, which is part and parcel of most private settlement agreements.<sup>137</sup>

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134. Manuszak, *supra* note 25, at 415.

135. See Bompey et al., *supra* note 12, at 34-38 (describing the pros and cons of arbitration and listing privacy and limited discovery as purported benefits for employers). Another purported advantage is lower attorneys' fees, which is discussed *infra* section III.

136. See Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992) (describing the private nature of arbitration and its perceived benefits by the parties); see also Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 BROOK. L. REV. 1459, 1483-84 (1996) (lamenting a lack of public awareness in securities industry arbitrations, which are mostly private affairs with little publicity absent some SEC oversight which allows some public airing of major developments); Schwartz, *supra* note 25, at 61 (describing why corporations like the privacy aspects of arbitration).

137. But see Brenda Rios, *Edison Bias Suits Settled: Employees in 3 Class Actions to Split \$45.15 Million*, DET. FREE PRESS, Oct. 29, 1999, at 1E (describing how arbitrators ordered the Detroit Edison utility company to pay salaried employees \$45.15 million to settle 1,400 current and former employees' class action based on an age and race discrimination suit where the employer agreed with the public disclosure of the award and used arbitrators to come up with a fair resolution as a settlement of the dispute).

In reviewing the privacy issue, Professor Stipanowich stated:

While arbitrations are less likely to be the subject of press coverage than civil litigation, publicity may attend preliminary court proceedings or judicial appeals of arbitration awards. And while members of the press may be excluded from arbitration hearings, they still have opportunities to gather information if a dispute is particularly newsworthy; there is nothing to keep a party who wishes a controversy to be made public from going to the news media with details of the dispute. Moreover, although a party may be protected to some degree from the collateral estoppel effects of an award in third party litigation, it may still be possible for third parties to obtain transcripts of sworn testimony from the arbitration for use in later proceedings.<sup>138</sup>

Under the same circumstances that Professor Stipanowich has identified and despite the privacy of mandatory arbitration, a number of high-profile cases resolved in arbitration have still become part of the public discourse.<sup>139</sup> Thus, while employers may hope that there will be some

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138. Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425, 447 (1988) (footnote omitted).

139. In a key example, a well-known Chicago law firm used a mandatory arbitration clause to resolve a discrimination dispute with one of its former African-American partners. See *Williams v. Katten, Muchin & Zavis*, 837 F. Supp. 1430 (N.D. Ill. 1993). One would assume that this firm would not want the results of that case to become part of public discourse in light of a highly-publicized discrimination case brought by another African-American attorney alleging discrimination against the same firm. See *Mungin v. Katten, Muchin & Zavis*, 116 F.3d 1549 (D.C. Cir. 1997). The *Williams* case, however, became public knowledge due to the *Mungin* case. Despite the fact that Williams was compelled to arbitrate her Title VII claims, her testimony became public knowledge. See PAUL BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 1, 285 (1999) (describing the details of the *Mungin* case and referring to the results of the *Williams* case in arbitration including Williams' testimony at Mungin's trial about what happened to her). Also, other details about what happened in arbitration were divulged when Williams challenged the arbitrator's rulings by seeking review in federal court. See *Williams v. Katten, Muchin & Zavis*, No. 92 C 5654, 1996 WL 717447 (N.D. Ill. Dec. 9, 1996) (denying Williams' motion to set aside arbitrators' award due to limits on discovery, including a refusal to allow the deposition of three witnesses, assessment of arbitration costs, and failure to assess compensatory damages requests, but entering judgment confirming the arbitration award and noting key facts regarding what happened at arbitration including that: (1) arbitration took place over 9 days, and (2) Williams lost her discrimination claims, but won her retaliation claim, which resulted in an award of compensatory damages of four months of disability salary continuation benefits in the amount of \$37,000, plus \$1,754 in interest, and punitive damages in the amount of \$74,000).

benefit to private resolution by mandatory arbitration, the only guarantee of privacy would be through some contractual agreement to keep the results private. Regardless of whether such agreements would be enforceable, the likelihood that employers would go to such aims in light of the threat of litigation does not bode well for such agreements. Thus, from an employer's perspective, the privacy of arbitration may be a benefit, but it is a benefit that employers cannot guarantee unless it is part of a negotiated settlement.<sup>140</sup>

Likewise, the issue of discovery represents a double-edged concern. Commentators concerned about employees' rights have criticized arbitration's limited discovery as a hindrance to plaintiffs and an added benefit to those employers who will not be exposed to lengthy and difficult discovery requests, an essential part of developing a plaintiff's case.<sup>141</sup> It is

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140. Also, because the EEOC can still pursue suits independently and it is under no obligation to adhere to any private agreements, an employer will still be subject to having its dispute become part of a public discussion. See, e.g., Ross Kerber, *Arbitrator Hits Raytheon in Bias Case; Says Firm Discriminated Against Several Women*, BOSTON GLOBE, Nov. 11, 1999, at C20 (describing results from an arbitrator's award against Raytheon provided to the newspaper by the claimants' attorney along with a responsive document filed by Raytheon in response to an accompanying EEOC charge even though Raytheon refused to respond to the reporter's requests for the information it filed with the arbitrator). Another example involving a law firm demonstrates the premise that, despite the existence of an agreement to arbitrate, a filing of an EEOC charge will open up the entire matter to public scrutiny. See Michael D. Goldhaber, *Bryan Cave in Sex Bias Mess*, NAT'L L.J., Nov. 1, 1999, at A4 (describing a sex discrimination charge that a female associate filed against her former firm, despite the firm's claim that she must adhere to the arbitration agreement and the creative way she brought this matter to public attention by discussing it in a federal court action seeking a temporary restraining order against the employer for allegedly trying to use the arbitration agreement to prevent her from pursuing the matter with the EEOC).

141. See Sherwyn et al., *supra* note 69, at 147 (noting the lack of discovery as one of the reasons why the EEOC has stated its opposition to mandatory arbitration). A classic example of the limited discovery concern occurred in *Williams v. Katten, Muchin, & Zavis*, where the arbitrator made several rulings prohibiting the plaintiff from deposing three key employees of the defendant, including one of the name partners, Michael Zavis. *Williams*, 1996 WL 717447, at \*3 n.6. While there is certainly a possible letdown in not deposing the three witnesses, there is empirical support for the fact that discovery does not affect the litigation's outcome in the ways that most people assume. See also Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 796 (1998) (discussing empirical studies finding that the more days plaintiffs spent in discovery, the lower their recovery was relative to expectations, while the number of days spent in discovery for defendants was independent of the amount they were ultimately liable to pay); David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 110-16 (1983) (finding that increased lawyer time spent on discovery was associated with decreased measures of success for plaintiffs).

also true, however, that limited discovery creates a difficult burden for employers.<sup>142</sup>

An employer's focus in the litigation process is to get the case dismissed on summary judgment without having to go to trial. In line with that objective, employers are very good at using the discovery process to hold the plaintiff's feet to the fire and locking in the plaintiff's story to support a summary judgment motion. With limited discovery, an employer has no idea what the story might be when the plaintiff presents it to the arbitrator or what little "Perry Mason" surprises or smoking guns might be brought forward at the last minute without the employer having time to prepare a response.<sup>143</sup> If you are talking about defending a company from an award of several thousand dollars, possibly even millions, you want to know the plaintiff's theory of the case well before you have to present your defense to the decisionmaker. The right to "[t]ake depositions early in litigation and use the plaintiff's own words to prove that the challenged reason [for an adverse employment decision] was nondiscriminatory" is essential, because "if you know your rules of evidence, you can win a case just on evidentiary issues."<sup>144</sup> In arbitration, employers may lose these options due to its limited discovery.

Also, to the extent that plaintiffs will likely be unrepresented in arbitration, employers would benefit tremendously by being able to use the well-defined federal court discovery rules to rein in a plaintiff, use the discovery process to control any abuses, and file a motion for summary judgment to dismiss the matter.<sup>145</sup> Although it is no small matter, as a whole, the loss of discovery by and large has to be a disadvantage for an employer as the stronger party who has given up one of its strong

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142. In fact, many of the surveys of employer interest in ADR have noted that employers are less interested in arbitration because of its limited discovery. *See, e.g.*, Lipsky & Seeber, *supra* note 78, at 27 ("Many corporate lawyers worry about arbitration because discovery isn't required in the process and arbitrators are not confined to standard legal rules, such as those governing the admissibility of evidence.").

143. *See* Bompey et al., *supra* note 12, at 36 (describing employer disadvantages from lack of discovery including likelihood of a "Perry Mason style surprise").

144. Leslie King, *Summary Judgment In Bias Cases Should Be Used With Caution*, *Judge Says*, Daily Lab. Rep. (BNA) No. 153, at D-20 (Aug. 8, 1997); *see also* Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 432-42 (1994) (describing the scope of the summary judgment process in employment discrimination matters for defendant employers).

145. *See* Bompey et al., *supra* note 12, at 35-36 (describing the loss of summary judgment proceedings as an enormous disadvantage for employers).

advantages even if the employee has also given up a strong advantage. The reality is that there will be very few instances when an employer faces a well-represented opponent with the skills to adequately use the discovery process to hold the employer's feet to the fire.<sup>146</sup>

Based on increasing legal challenges and overall uncertainty about enforceability, the fears of many employers regarding lawsuits have created a recent hesitancy to adopt mandatory arbitration programs.<sup>147</sup> Other new legal challenges<sup>148</sup> may crop up soon, including unique claims from people

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146. See also Sherwyn et al., *supra* note 69, at 147 (asserting that one of the benefits for employees of limited discovery is that it prevents employers from "big firming" employees and driving up the cost of plaintiffs' claims).

147. Some employers rushed to judgment and adopted mandatory arbitration agreements immediately. After *Gilmer* spawned enormous criticism, many employers became increasingly skeptical about the costs of mandatory arbitration. See Joseph P. Beckman, *Courts Cooling To Compulsory Arbitration of Civil Rights Claims*, LITIG. NEWS, Mar. 1999, at 1, 10 (describing the *Duffield* and *Wright* decisions as evidence of a "clear pullback" from *Gilmer* and noting that the question of mandatory arbitration is becoming an academic exercise in the securities industry since that industry has stopped requiring it); Dominic Bencivenga, *Mandatory Arbitration: Are Programs Dead or Just in Need of Repair?*, N.Y.L.J., Sept. 17, 1998, at 5 (describing how employers have been humbled by the legal challenges and the reverberations from the NASD and NYSE decisions to end mandatory arbitration so that they are "less likely to choose it in a knee-jerk fashion"); Brecher, *supra* note 116, at 1 (describing numerous court decisions limiting the scope of mandatory arbitration clauses); Evan J. Charkes, *Recent Court Decisions Demonstrate that Mandatory Arbitration is Waning*, N.Y.L.J., Apr. 27, 1999, at 1 (suggesting that the future of mandatory arbitration is in doubt); Ben L. Kaufman, *Courts Collide on Discrimination; When Suing the Boss is Against the Rules*, CIN. ENQUIRER, July 11, 1999, at C02, available in 1999 WL 9445090 (describing the *Frank's Nursery* case and how the EEOC may still sue employers for damages even if the individual employees have a mandatory arbitration agreement with their employer); Nancy Erika Smith, *Is the Bell Tolling For Mandatory Arbitration?*, N.J. LAW. MAG., Apr. 12, 1999, at 8; *Supreme Court Ruling May Dilute Industry Arbitration Agreements*, REG. REPRESENTATIVE, Jan. 1999, available in LEXIS, News database (describing the *Wright* decision and noting a possible shift in the current presumption that agreements to arbitrate are enforceable).

148. See Miriam A. Cherry, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN'S L.J. 267, 280-84 (1998) (arguing that mandatory arbitration policies force women to give up certain statutory protections and claiming that such policies can create disparate impact liability under Title VII).

of color,<sup>149</sup> women,<sup>150</sup> the poor,<sup>151</sup> or a combination of these groups.<sup>152</sup> Few arbitrators tend to be women or people of color, and there have been some challenges based on this lack of diversity.<sup>153</sup> With these existing

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149. See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1360-61, 1375-91 (1985).

150. Cherry, *supra* note 148, at 298-304 (discussing disparate impact on women by mandatory arbitration policies). See, e.g., Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1549 (1991) (showing that mediation "can be destructive to many women"); see also Carol J. King, *Burdening Access To Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375 (1999) (asserting concerns about mediation limiting access to the court system for poor women in divorce proceedings).

151. See Larry R. Spain, *Alternative Dispute Resolution for the Poor: Is it an Alternative?*, 70 N.D. L. REV. 269 (1994) (describing issues with respect to use of ADR for the poor).

152. See, e.g., Rebecca E. Zietlow, *Two Wrongs Don't Add Up to Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111, 1114-21 (1996) (asserting that low-income women, particularly of color, do not fair well in informal processes); see also Stephen Meilli & Tamara Packard, *Alternative Dispute Resolution in a New Health Care System: Will it Work for Everyone?*, 10 OHIO ST. J. ON DISP. RESOL. 23, 30-35 (1994) (describing problems with ADR for women, minorities, and the poor). But see Beryl Blaustone, *The Conflicts of Diversity, Justice and Peace in the Theories of Dispute Resolution*, 25 U. TOL. L. REV. 253, 260-61 n.17 (1994) (arguing that the theses of Delgado and Grillo are not supported empirically and are limited to anecdotal support); Gary LaFree & Christine Rack, *The Effects of Participants' Ethnicity and Gender on Monetary Outcomes in Mediated and Adjudicated Civil Cases*, 30 L. & SOC'Y REV. 767, 770 (1996) (finding no empirical studies that show how a disputant's ethnicity or gender compares in cases decided in court versus mediated cases); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 468 (1991) (asserting that Grillo's account of mediation only refers to the abuses of bad mediators without full appreciation of the overall good mediation experiences).

153. See ADR Taskforce Approves Prototype For Arbitration of Statutory Rights, Daily Lab. Rep. (BNA) No. 91, at D-14 (May 11, 1995) (listing comments of Due Process Protocol Taskforce member and former National Academy of Arbitrators' President Arnold Zack stating that "there is a shortage of women and minorities" to develop a "roster of qualified arbitrators"); *Fairness of Compulsory Arbitration Debated by Lawyers at D.C. Bar*, Daily Lab. Rep. (BNA) No. 34, at D-15 (Feb. 21, 1995) (noting comments of Howard Law Professor and arbitrator, Homer LaRue, that the National Academy of Arbitrators is "mostly white and male" because only 10% are women and less than 1% are people of color); United States General Accounting Office, *Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes*, (Letter Report, 03/30/94, GAO/HEHS-94-17), at 2 (visited Feb. 28, 2000) <<http://frwebgate.access.gpo.gov/cgi-bin/useftg.cgi?/Paddress=162.140.64.21&filename=he94017.txt&directory=/diskb/wais/data/gao>> (estimating that "most of the NYSE New York arbitrators (about 89% of 726 arbitrators at the end of 1992) were white men, averaging 60 years of age"); see also *Improving*

disadvantages of mandatory arbitration and a new set of disadvantages on the horizon, the costs of using mandatory arbitration warrant dismissing it as a legitimate option for employers.<sup>154</sup>

Although there is an interest in employing arbitration to resolve employment disputes, the use of mandatory arbitration has created too many significant risks and disadvantages, which have curtailed that interest. Despite potential human resource benefits and the employer advantage rhetoric, mandatory arbitration issues have left employers, employees, government agencies, and various ADR and civil rights organizations befuddled about how to effectively use arbitration and explore the opportunities provided by the *Gilmer* decision.<sup>155</sup>

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*Diversity in Arbitrator Pool Not Easy, Stock Exchange Officials Say*, Daily Lab. Rep. (BNA) No. 93, at D-7 (May 14, 1996) (describing difficulty of the stock exchange in filling its arbitrator pool with minorities and women despite initial criticism in the GAO report). *But see* Kenneth May, *Participants at SPIDR Gathering Discuss Present and Future of Labor Arbitration*, Daily Lab. Rep. (BNA) No. 188, at A-6 (Sept. 29, 1999) (noting comments of arbitrator, Charles Donegan, that the National Bar Association's Arbitration Section lists 75 black arbitrators as members). This does not mean that the court system is immune from attacks of being prejudiced. *See, e.g.*, Yael Schacher, *Evidence of Bias in the Legal System*, N.Y.L.J., July 1, 1999, at 2 (reviewing comments from a panel of 12 lawyers and judges who spoke openly and critically about prejudice in the New York legal system). The federal court system has much better representation but it is having its own difficulties placing federal judges of color, especially with the current political make-up of Congress. *See* Debra Baker, *Judicial Nominations, Waiting and Wondering*, A.B.A. J., Feb. 1999, at 52-53 (discussing lengthy confirmation battles for President Clinton's minority nominees for federal judgeships). Approximately 82 out of 825 federal district and circuit court judges are black, 36 Hispanic, seven Asian-Americans, two American-Indian, one Arab-American, and another 124 are white women. *Id.* at 53.

154. *See* William W. Fick, Note, *Gnawing at Gilmer: Giving Teeth to "Consent" in Employment Arbitration Agreements: Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 1999 WL 80964 (1st Cir. 1999), 17 YALE L. & POL'Y REV. 965 (1999) (arguing that courts are starting to limit mandatory arbitration despite *Gilmer* and proposing a strong consent standard before allowing the arbitration of a statutory employment discrimination claim); *see also* Giovagnoli, *supra* note 25, at 547 (describing recent court challenges and opposition to mandatory arbitration and suggesting that employers recognize that the enforceability of mandatory arbitration must be based on fair procedures or litigation will ensue).

155. *See generally* Maltby, *supra* note 74 (describing how the Supreme Court in *Gilmer* missed the opportunity to expand the use of arbitration to fair situations where both employees and employers have balanced tools of representation and support to pursue access and resolution by arbitration). *But see* Lucille M. Ponte, *In the Shadow of Gilmer: How Post-Gilmer Legal Challenges to Pre-Dispute Arbitration Agreements Point the Way Towards Greater Fairness in Employment Arbitration*, 12 OHIO ST. J. ON DISP. RESOL. 359 (1997) (describing how post-*Gilmer* court decisions have identified some of the fairness

*B. Shooting Blanks To Fix What Isn't Broke: Is There a Big Need for Mandatory Arbitration When Employers Win Discrimination Cases Handily In Court?*

With the growth of ADR, "policy-makers cannot avoid making deliberate if fallible choices among alternative ways of processing disputes."<sup>156</sup> To assist corporate policy makers in making an informed decision, a brief review of the litigation option's value in resolving employment discrimination claims presents a worthwhile exploration.<sup>157</sup> This brief exploration begins with the proviso that any assertion that the use of ADR or the courts would provide a better means of resolving employment discrimination disputes is better left to empirical study.<sup>158</sup> Also, the focus of this exploration will show that the litigation system provides unique advantages for large repeat employers that should not be dismissed so quickly by pursuing arbitration.

Unfortunately, corporate leaders have shown a tendency to care much more about large jury verdicts than they should in light of the actual results. Aside from large jury verdicts, one of the main reasons why corporate leaders have chosen to increase the use of arbitration, including mandatory arbitration, is their burning desire to cut legal expenses.<sup>159</sup> This

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concerns and pointed the way to continuing fairness in handling employment disputes in arbitration that *Gilmer* failed to address).

156. Marc S. Galanter, *Introduction: Compared to What? Assessing the Quality of Dispute Processing*, 66(3) DENV. U. L. REV. xi, xi (1989).

157. The use of the terms "litigation," "adjudication," "legal system," or "courts" in this section are used interchangeably for ease of discussion when referring to the traditional dispute resolution process employed in the court system although it is probably not accurate to consider these terms synonymous. See Robert A. Baruch Bush, *Defining Quality in Dispute Resolution: Taxonomies and Anti-Taxonomies of Quality Arguments*, 66 DENV. U. L. REV. 335, 342 n.17 (1989) (suggesting that the terms should not be used interchangeably because of differences but recognizing that other scholars have used the terms interchangeably).

158. Although, empirical study and development of such comparatives is "attended by a host of methodological and conceptual difficulties." Galanter, *supra* note 156, at xi. Despite these difficulties, it is incumbent upon scholars and researchers to develop empirical measurements to compare the quality of one dispute resolution system versus another system, including a traditional, jury-based litigation system, so that "[i]f our choices [about which system to employ] are inevitably political, [those choices can be based upon] real alternatives not imaginary ones." *Id.* at xiv.

159. See Maltby, *supra* note 10, at 32 ("The primary motivation of employers for creating such [arbitration] systems appears to be reducing legal expenses. The Rand Institute estimated in 1988 that defense costs in wrongful discharge actions averaged over \$80,000."); see also Bickner et al., *supra* note 27, at 78-79 (finding the number one reason for choosing

concentration on reducing legal fees at all costs<sup>160</sup> and the unnecessary fear of jury verdicts are what this Article has referred to as a "disconnect" between corporate leaders and their outside counsel. With a little more understanding and effort, both groups should realize that they have the mutual goal of defending employment discrimination lawsuits with high quality and high results. If this mutual goal is reached by capable outside counsel, who consistently deliver high quality results for large employers in the court system and rarely, if ever, have a jury trial, both groups should be able to develop a connection on how to meet each others' financial objectives.

### 1. Enjoying Status Quo: A True Litigation Romanticist's View of the Results

In some situations, there are legitimate benefits to going to court.<sup>161</sup> Professor Stempel has noted that those favoring litigation (rather than ADR) have been unfairly referred to as "litigation romanticists."<sup>162</sup> While looking at the issue of the disadvantages for employers in mandatory arbitration, the

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arbitration is reducing legal defense costs). *But see* Trubek et al., *supra* note 141, at 114-22 (finding that the costs of court litigation are less than many ADR proponents claim).

160. If corporate leaders and their counsel work together, they can find ways to meet each other's needs as long as they both realize that in some instances you get what you pay for. *See, e.g., The Committee on Lawyer Business Ethics, Business and Ethics Implications of Alternative Billing Practices: Report on Alternative Billing Arrangements*, 54 BUS. LAW. 175, 177 (1998) (citing the "strong desire of business clients that legal costs be not only reasonable but also predictable" as a major reason for the growing use of alternatives to hourly rate billing arrangements). Wal-Mart is a key example of a company that has developed a clear vision on how it wants to handle its litigation goals and has found quality counsel to meet those goals as part of its corporate family. *See* Bob Van Voris, *Can Controlling Costs Backfire?*, NAT'L L.J., Oct. 11, 1999, at B1 (describing Wal-Mart's fixed fee billing structure, defiant litigation strategy, and close, personal relationships with its outside counsel).

161. *See generally* Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807 (1994) (describing a benefit for lawyers and as a whole for those groups covered by a law to have lawyers proceed with claims through the court adjudication process). *But see* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Rights Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996) (discussing how it is difficult to even use the adjudication or litigation system when it is geared to force parties to settle).

162. Stempel, *supra* note 1, at 304-05 & n.13 (discussing comments by Professor Menkel-Meadow referring to the views of Laura Nader and Judith Resnik and citing Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 604 (1994)).

resulting question, at this stage, was whether court adjudication was a better option. By choosing to answer that question with a positive, it may foster notions about being considered a litigation romanticist. However, at least with respect to the current employment litigation system, large employers have a great advantage in litigation, and the status quo should be considered as the best option instead of a rush to mandatory arbitration.

In looking at the status quo legal system, it may not be politically correct for employers to highlight the significant disadvantages that the current system creates for employees. However, employers can appreciate that some of their substantial success in the litigation process has been highlighted by royal criticism from plaintiffs and employee advocates. These criticisms highlight key advantages for employers and support the incentive to maintain the status quo, i.e., employment litigation before the fascination with mandatory arbitration became acceptable.

For example, certain scholars have questioned the ability of the legal system to even address the needs and concerns of the disadvantaged members of our society; those criticisms have existed for many years.<sup>163</sup> Whether plaintiffs' advocates believe that the effectiveness of Title VII is completely doomed because either victims of discrimination should not expect the law to right the injustice of institutional discrimination<sup>164</sup> or the

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163. See, e.g., JERROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE* 74 (1976) (claiming that the legal justice system has failed to address the ills of our society as the author provides excruciating detail of the injustices and cruelties perpetrated by America's elite lawyers from the 1870s to the 1970s as they ignored the plight of the weak and the disenfranchised members of our society). In fact, the issue of legal system reform and the ineffectiveness of the legal system has been challenged as long ago as 1906 when Roscoe Pound "shocked" the American Bar Association with his complaints about the legal system. Lesley Oelsner, *Unlike 1906, A.B.A. Meeting is Receptive to Reform*, N.Y. TIMES, Apr. 11, 1976, at 30. Those complaints have focused on efforts to limit access to the court system, which have been described as actions that "could also limit the ability of people to have important rights vindicated" even if there is some doubt about "the courts' competence or authority to become a problem solver for society." *Id.* Several years ago, even then-Harvard President and long-term Harvard Labor and Employment Law Professor, Derek Bok, lamented that the American legal system and its attendant costs may be flawed in that "[t]here is far too much law for those who can afford it and far too little for those who cannot." Derek Bok, *A Flawed System*, HARV. MAG., May-June 1983, at 38-39.

164. See Derrick A. Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (suggesting that civil rights leaders should abandon efforts to use the law and the legal system to remedy the effects of discrimination in our society by coming to the racial realism or acknowledgment that discrimination has survived and will continue to survive and cause frustration within a legal system that endorses racism); cf. Davison M. Douglas, *The Limits of the Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L.

specific statute and its mechanisms have failed,<sup>165</sup> the reasons for failure are important, because society, not employers, will bear the burden for any discrimination costs.<sup>166</sup> In fact, an employer has no incentive to address these costs.<sup>167</sup> If an employer's focus remains on bottom-line economics,

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REV. 677 (1997) (explaining that, because of the entrenchment of racism in our society, the law, albeit an important piece in accomplishing change, cannot transform that racism and may give the illusion of legal gains without any real reform because real reform only occurs when the group in power sees some political, economical or other interest in supporting the reform). Although the argument was made with respect to another milieu, school desegregation, the arguments made by Professor Douglas are quite persuasive in establishing that the law, in itself, just cannot accomplish radical change in improving racial issues. *Id.*; see also DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 97-100 (1992) (discussing Professor Bell's belief that racism in our society is too intrinsic and deep-seated for the courts or laws to eradicate it); CARL T. ROWAN, *THE COMING RACE WAR IN AMERICA: A WAKE-UP CALL* *passim* (1996) (claiming that growing racial tensions and injustices in our society along with the lack of success from the legal system may lead to a race war). However, Professor Cynthia Estlund has persuasively argued that labor and employment discrimination laws have successfully helped and can continue to help integrate the workplace, which has now become an important arena for racial discourse and discussion. See Cynthia L. Estlund, *The Workplace in a Racially Diverse Society: Preliminary Thoughts on the Role of Labor and Employment Law*, 1 U. PA. J. LAB. & EMP. L. 49 (1998).

165. See, e.g., Jean Wegman Burns, *Horizontal Jurisprudence and Sex Discrimination*, 49 HASTINGS L.J. 105, 108, 122-25 (1997) (asserting that Title VII has failed to cure the problem of gender inequality in the workplace); see also Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 374-76 (1991) (pointing out that court actions under Title VII provide different issues and concerns for African-American women); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139 (pointing out the same criticism). Professor Reginald Robinson has also asserted that the Hobbesian philosophical foundation of empirical natural law prevents Title VII from eliminating racial discrimination in employment practices and the philosophical foundation should be shifted to Hegel's ethical theory. Reginald Leamon Robinson, *The Impact of Hobbes's Empirical Natural Law on Title VII's Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607, 612 (1993).

166. See Robert J. Rabin, *The Role of Government in Regulating the Workplace*, 13 LAB. LAW. 1, 3 (1997) (referring to Supreme Court Justice Stephen Breyer's book, *REGULATION AND ITS REFORM* (Harvard University Press 1982) and finding that "the costs of leaving the problem uncorrected fall on society rather than on the employer, so the employer has no direct financial incentive to change"). There are those who believe that discrimination laws are ineffective because they create a perverse effect on the economy. They have contended that absent such government intervention sound business judgment and related economic considerations dictate an employer's actions rather than any basis for employment discrimination. See, e.g., RICHARD ALLEN EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST DISCRIMINATION LAWS* 395-437 (Cambridge, Mass., 1992).

167. Rabin, *supra* note 166, at 3.

the resounding success of the current legal system would be the best option in many instances for employers, absent the wholesale dismantling of the discrimination laws.<sup>168</sup>

Criticisms of the current legal system for handling employment discrimination disputes tend to focus on providing better results for plaintiffs, which support the claim that results for employers are excellent. Many believe the EEOC has failed to make a dent in the war against employment discrimination.<sup>169</sup> A number of critics have found problems with the enforcement of Title VII.<sup>170</sup> If Title VII was supposed to provide a ray of hope for victims of employment discrimination, many commentators have stated that they believe the statute failed woefully, even with the extended remedies available under the Act.<sup>171</sup>

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168. See EPSTEIN, *supra* note 166 (proposing the elimination of discrimination laws and a reliance on economic decisionmaking as the prime method for the elimination of workplace discrimination).

169. See Munroe, *supra* note 71, at 219 (stating that "race discrimination in employment remains pervasive despite three decades of government effort" and asserting that the EEOC has been "constrained to focus on processing individual charges of discrimination" rather than being able to "concentrate on combatting broader unlawful practices").

170. See, e.g., Jerome M. Culp, *A New Employment Policy for the 1980s: Learning from the Victories and Defeats of Twenty Years of Title VII*, 37 RUTGERS L. REV. 895, 905-06 (1985) (finding that a big and unnecessary focus of Title VII jurisprudence between 1979 and 1985 was on procedural issues, including a large number of cases relating to issues on the statutes of limitations); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329 (1987) (describing how discrimination laws, including Title VII, refuse to recognize the existence of unconscious racism); see also Herbert Hill, *The Equal Employment Opportunity Commission: Twenty Years Later*, 11 J. INTERGROUP REL. 45, 63-64 (1983) (lamenting the EEOC's inability to adequately enforce Title VII and its failure to reorganize itself into an enforcement agency despite its power to do so after the 1972 amendments).

171. See Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1455 (1996) (criticizing the *Gilmer* decision and the Supreme Court's 1993 decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), as evidence of growing judicial hostility to civil rights claimants and an increasing number of cases where courts are granting employers summary judgment in discrimination cases); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 583-97 (1999) (identifying several critiques of Title VII including its failure to provide a source of success for litigation romanticists); see also Chambliss, *supra* note 71, at 41-54 (criticizing the EEOC's systematic role in displacing or denying the pursuit of conflicts from the court system and thereby hindering enforcement); Munroe, *supra* note 71, at 220-21, 275-79 (asserting that the enforcement of Title VII by the EEOC has been so inept that the administrative requirement of involving the EEOC in these charges should be dropped); Selmi, *supra* note 71, at 5-11, 21-25, 57-64 (reviewing the overall ineffectiveness of the EEOC and suggesting that it should be disbanded or that its duties and functions should

Thus, the current legal regime of enforcement and vindication for employment discrimination has raised a number of concerns for employees and created a host of advantages for employers, despite the existence of the extended remedies and jury trial rights provided by the Act. Those advantages are: problems of proof;<sup>172</sup> inability to afford counsel and legal representation;<sup>173</sup> the requirements of showing intentional discrimination versus discriminatory impact;<sup>174</sup> and the increasing grant of summary judgment.<sup>175</sup> They are provided to employees by a judiciary that appears to

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be significantly altered); Turner, *supra* note 71, at 235-40, 285-88 (arguing that Title VII has failed to meet its goals and aspirations due to its limited enforcement mechanisms).

172. See Linda S. Greene, *Equal Employment Opportunity Law Twenty Years After the Civil Rights Act of 1964: Prospects for the Realization of Equality in Employment*, 18 SUFFOLK U. L. REV. 593, 606-08 (1984) (citing Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1280-85 (1981) and making general complaints about the burdens that are placed on plaintiffs to prove discrimination and the limited burden on the employer to disprove it); see also Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2230-32 (1995) (criticizing the Supreme Court's shifting burden of production and overall proof requirements for Title VII claims as explained by the *Hicks* decision); McGinley, *supra* note 171 (criticizing burdens of proof under *Hicks* currently being enforced by courts reviewing Title VII claims); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1657 (1991) (suggesting that, because Title VII litigation is costly and its scheme of proof makes it difficult to discover discriminatory motives, employers should be required to hire minorities in proportion to their percentage in the national population).

173. See Julie Davies, *Federal Civil Rights Practice in the 1990s: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 239 (1997) (describing several disincentives in the law and overall difficulties for plaintiffs' attorneys in undertaking representation of clients in civil rights litigation and noting from a survey of plaintiffs' attorneys that the economics involved may make it hard for someone with a good case to find an attorney if the person does not have the resources to pay a retainer or legal fees).

174. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1245 & n.343 (1995) (agreeing with the proposal of Professor David Oppenheimer in David P. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993), that the standard for assessing discrimination under Title VII should be lowered to a negligence standard); see also Alfred W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 70 (1972) (arguing that a disparate impact theory of discrimination that does not require a showing of intentional discrimination is necessary to prevent employers from perpetuating the "societal" discrimination of the past); Lawrence, *supra* note 170, at 323 (arguing that forms of unconscious and negative stereotypes also constitute unlawful discrimination).

175. See, e.g., John Parry, *American Bar Association Survey on Court Rulings Under Title I of Americans with Disabilities Act: Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, Daily Lab. Rep. (BNA) No. 119, at D-25 (June 22,

be, at most, hostile to these claims and, at least, concerned that these cases are a nuisance to the courts' efforts to clear its dockets.<sup>176</sup> Judge Stanley Sporkin of the D.C. District Court stated, in a recent opinion: "It would be hoped that at some point Congress would review the law in this area and make the necessary adjustments to eliminate these meritless, lottery-type cases."<sup>177</sup>

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1998) [hereinafter ABA Survey] (describing ABA survey of 1,200 ADA decisions between 1992 and 1997 and finding that employers prevail in almost 92% of the disability discrimination cases through judicial resolution and 86% through administrative resolution with the EEOC). See also *Disabilities Discrimination: Overwhelming Majority of ADA Job Suits Fail in Court, ABA Survey Finds*, Daily Lab. Rep. (BNA) No. 119, at D-7 (June 22, 1998) (describing same survey); Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 L. & SOC. INQUIRY 497, 562 (1996) (finding that a survey of federal litigation involving the 2,000 largest U.S. corporations indicates that large firms are usually "highly successful" in legal proceedings and "they generally win"); Howard Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where it is Today, Where it's Going*, 31 U. RICH. L. REV. 579, 637-39 (1997) (reviewing 222 non-appealed federal district court rulings on motions for summary judgment and motions to dismiss or other dispositive motions involving age discrimination in 1996 and finding 125 of those cases were resolved by a substantive ruling and the defendants prevailed in 86 (69%) of these rulings); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 418-19 (1992) (describing empirical study of defense counsel's belief that summary judgment proceedings were a key reason for choosing a federal court as the preferred forum to resolve a dispute).

176. See Shannon P. Duffy, *Attorney Rips Into 3rd Circuit for "Disfavoring" Employment Suits*, N.J.L.J., Oct. 25, 1999, at 8 (discussing debate where attorney Alice Ballard confronted U.S. District Court Judges James T. Giles and Donetta Ambrose regarding their alleged comments that there were "too many" Title VII cases and that they are "unattractive" cases, respectively, and discussing the judges' denial that they had made those comments but noting their belief that a number of discrimination cases should have never been brought); see also Yelnosky, *supra* note 171, at 593 (discussing various reports and surveys stating that judges believed that Title VII cases were a waste of time). Indeed, many employers believe that certain discrimination cases were a waste of time and engendered "over-litigation" or frivolous lawsuits. See *Disabilities Law Viewed Positively But Also As Cause of Frivolous Suits*, 5 Empl. Discrim. Rep. (BNA) No. 5, at 128 (Aug. 2, 1995) (asserting that most suits filed under the then-relatively new law of the ADA were frivolous because of the broad definition of disability and that further definitions, including a good faith defense, needed to be expanded to protect employers).

177. *King v. Georgetown Univ. Hosp.*, 9 F. Supp. 2d 4, 8 (D.D.C. 1998); see also *Turner*, *supra* note 71, at 220 (disagreeing with the perception and earlier comments of Federal Judge Stanley Sporkin that Title VII cases are "not as important as cases arising under other federal statutes" and citing Sporkin's views from Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 757 (1992)).

### a. Employment Litigation Results

As of August 9, 1999, reports indicated that the EEOC's backlog of charges had reached 50,000.<sup>178</sup> By October 4, 1999, the number of charges awaiting review dropped to 45,624.<sup>179</sup> Although that represents a remarkable improvement from reports a couple of years ago indicating that the backlog had reached well more than 100,000,<sup>180</sup> it still begs the question: Does justice delayed mean justice denied? A number of commentators have answered yes. They have criticized this backlog as part of an overall belief that the EEOC consists of an overworked and underfunded agency that cannot deliver justice on behalf of individual victims of discrimination.<sup>181</sup> Notably, these criticisms occurred in 1995, a time when the charge backlog had reached the ultimate high of 111,000.

In 1995, the EEOC implemented a charge prioritizing process. Three years later, in June 1998, the EEOC announced that it had nearly cut the backlog in half by reducing it to 58,000 cases.<sup>182</sup> Professor St. Antoine has referred to the new charge prioritizing process as a "triage" procedure . . . classifying cases as 'A,' 'B,' or 'C' priorities depending on merit and importance, and tossing out many charges after the briefest of investigations."<sup>183</sup> The EEOC receives approximately 80,000 charges

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178. Spelfogel, *supra* note 92, at B10 (noting that the EEOC backlog was at 50,000).

179. See Jenna Greene, *EEOC Whittling Away Backlog*, LEGAL TIMES, Oct. 4, 1999, at 20.

180. *Id.* (noting that, while 45,624 remains a substantial amount, it is down 6,500 from last year and a "whopping 66,000 less than its high of 111,000 in 1995").

181. See, e.g., St. Antoine, *Mandatory Arbitration*, *supra* note 67, at 8-9 (noting Professor Munroe's belief that the EEOC should get out of the business of processing charges); see also Munroe, *supra* note 71, at 275-79 (proposing same); Selmi, *supra* note 71, at 11-15 (complaining about the EEOC's backlog).

182. See *EEOC Reduces Pending Inventory By Half—to 58,000 cases—In Three Years*, Daily Lab. Rep. (BNA) No. 157, at A-1 (Aug. 14, 1998); *EEOC Statistics on Charge Receipts and Resolutions*, Daily Lab. Rep. (BNA) No. 157, at E-6 (Aug. 14, 1998); *EEOC Cuts Charge Inventory to 58,000 Cases*, 11 Empl. Discrim. Rep. (BNA) No. 8, at 251 (Aug. 19, 1998); *EEOC Statistics on Charges Through June 1998*, 11 Empl. Discrim. Rep. (BNA) No. 8, at 277 (Aug. 19, 1998).

183. St. Antoine, *Mandatory Arbitration*, *supra* note 67, at 8 & n.26. The EEOC also referred to the process as a "triage" process when it was first developed. See United States General Accounting Office, *EEOC Burgeoning Workload Calls For New Approaches* (Testimony, 05/23/95, GAO/T-HEHS-95-170), at 8 (visited Feb. 28, 2000) <<http://www.cgi-bin/useftp.cgi/?Paddress=162.140.64.21&filename=the95170.txt&directory=/diskb/wais/data/gao>> (elaborating on testimony to U.S. Senate Committee on Labor and Human Resources describing the tremendous growth in the EEOC backlog up to 1995 and the development of

annually.<sup>184</sup> The average timeframe to process those charges through the EEOC's traditional processes takes approximately 268 days, which is down 46 days from last year.<sup>185</sup> Given its progress in improving efficiency, the EEOC's backlog problems may be less of an issue today than when most of the backlog criticism started.<sup>186</sup> Still, delays present unique problems for plaintiffs and employers. Also, to the extent that the new charge processing system has worked so well, a large number of charges are being expeditiously dismissed at the administrative level. That provides further advantages for employers, because it may end the case if the charging party is unwilling, or unable, to then pursue the matter in court after receiving a right to sue letter.

Additionally, the overall costs of litigating will either wear down a plaintiff or prevent the plaintiff from gaining access to the court system to challenge an employer in the first instance.<sup>187</sup> Thus, the issue for employees of being coerced into an arbitration forum loses some of its sting in light of some of the inadequacies of the judicial forum that create advantages for employers.

The simple truth is that Title VII cases, more often than not, are resolved via summary judgment granted for the defendant by a district court judge.<sup>188</sup>

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the priority charge processing plan and its "triage" system as one of a number of responses to the increasing backlog).

184. See Montwieler, *supra* note 119, at C-1.

185. See Greene, *supra* note 179, at 20.

186. Although, some state administrative agencies also have enormous problems processing charges. See Mark Hamblett, *State Agency Must Clear Backlog; Housing, Job Bias Claims Take Seven Years*, N.Y.L.J., Oct. 28, 1999, at 1 (discussing court order requiring that the New York State Division of Human Rights take several drastic measures to remove its tremendous backlog where a charge typically takes seven years to resolve and out of 43,327 charges from 1990 to 1998, 34% had taken more than three years to resolve and out of 3,947 probable cause determinations, 75% were unresolved after three years, 50% after five years, 28% after 7 years, and 14% after nine years).

187. See, e.g., James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2218 (1993) (reviewing surveys noting that access to courts is limited because many cannot afford the costs of litigation); see also Sabatino, *supra* note 104, at 1291 (suggesting that parties are increasingly "unable or unwilling to bear the excesses of our elaborate civil justice system"); Turner, *supra* note 25, at 283 & n.400 (noting that the problem of access to the court system is particularly difficult for employment discrimination claimants).

188. See, e.g., *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1006-07 (7th Cir. 1997) (noting that 26 Title VII cases in 1996 reached the court by this posture and that the Court of Appeals affirmed the trial court 21 out of 26 times).

More than 90 percent of employment cases are resolved before trial.<sup>189</sup> "Unless the employer is a latter-day George Washington, employment discrimination is as difficult to prove as who chopped down the cherry tree."<sup>190</sup> Claims of unlawful discrimination may be based on disparate treatment, where proof of discriminatory intent is the nature of the claim, or based on the disparate impact theory, when the claim involves a facially neutral employment policy alleged to disproportionately or adversely affect a protected group. In a disparate treatment case, the ultimate burden is on the employee to prove that he or she was the victim of intentional discrimination.<sup>191</sup> It is possible for an employee to present direct evidence of the employer's discriminatory intent, but it is unlikely, save for that handful of cases where the employer was momentarily imprudent and, for example, uttered some pejorative remark or admitted in writing that the person's protected status was the reason for the decision in question.<sup>192</sup>

Therefore, Title VII plaintiffs have been forced to rely on the indirect shifting burdens of production to establish a case of intentional discrimination by circumstantial evidence, as set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>193</sup> Under this method, the employee has the initial burden of proving, by a preponderance of the evidence, a prima facie case of unlawful discrimination.

In a termination setting, the plaintiff typically must establish that: (1) the employee is a member of a protected group under Title VII; (2) the employee was qualified for his or her employment position; (3) the employee was terminated; and (4) the position remained open and was ultimately filled by someone not in the protected group.<sup>194</sup> Establishment of this prima facie case creates a presumption that the employer unlawfully discriminated against the employee.<sup>195</sup> The burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its employment decision; by articulating such reason, the employer rebuts the

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189. *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997).

190. *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985).

191. See, e.g., Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case*, 12 LAB. LAW. 371, 377-78 (1997) (lamenting the difficulties for employers and employees in addressing summary judgment under the established burden shifting analysis).

192. See, e.g., *Thornbrough*, 760 F.2d at 638 ("Employers are rarely so cooperative as to include a notation in the personnel file, 'fired due to age.'").

193. 411 U.S. 792 (1973).

194. *Id.* at 802.

195. See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

presumption of discrimination created by the employee's *prima facie* case. The employee must, then, prove by a preponderance of the evidence that: (1) the reason offered by the employer is not the true reason for its employment decision and (2) the reason offered was merely a pretext for discrimination.<sup>196</sup>

This burden shifting process and overall alignment of proof has created a well-established and successful process for employers to consistently obtain summary judgment, at a rate as high as ninety-two percent in some instances and depending upon the type of claim involved for cases decided through 1997.<sup>197</sup>

#### b. Comparison with Employment Arbitration Results

What little empirical evidence that does exist demonstrates that employers will not win similar cases on the same level and frequency in arbitration as they do in the courts. Lewis Maltby compared data between arbitration and litigation results as follows:

Comparisons of the result rates in arbitration versus litigation reveal that, contrary to what many would expect, employees prevail more often in arbitration than in court. For example, an AAA survey of employment arbitration results from 1993-95 shows that employees who arbitrated their claims won sixty-three percent of the time. In comparison, according to federal district court records for 1994, only 14.9% of the employees who took their claims to court won their cases.<sup>198</sup>

Maltby's review also discovered, unsurprisingly, that a large number of discrimination cases never reach a jury. In 1994, of the 3,419 employment discrimination cases in which the federal courts made a definitive judgment, Maltby noted that sixty percent were disposed of by pre-trial motion and that employers won virtually all of these decisions (ninety-eight percent).<sup>199</sup>

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196. *Id.* at 256.

197. See ABA Survey, *supra* note 175 (finding employers prevail in almost 92% of the disability discrimination cases through judicial resolution, and 86% through administrative resolution with the EEOC); Eglit, *supra* note 175, at 637-39 (reviewing 222 non-appealed federal district court rulings on motions for summary judgment and motions to dismiss or other dispositive motions involving age discrimination in 1996 and finding 125 of those cases were resolved by a substantive ruling and defendants prevailed in 86 of these rulings, i.e., 69%).

198. Maltby, *supra* note 10, at 46 (citations omitted).

199. See *id.* at 47 (citations omitted).

Using the same data sets, Maltby compared the mean damages awarded in arbitration and litigation as a percentage of the damages demanded.<sup>200</sup> For arbitration, the mean damages added up to approximately twenty-five percent of the amount demanded. The mean damages in court added up to seventy percent of the amount demanded, which suggests that plaintiffs do not win in court often and that if they do they will likely receive much closer to what they demanded than they will in arbitration.<sup>201</sup> Maltby, then, calculated an "adjusted outcome" as a percentage of demands for all participants in arbitration and the courts, not just those who were successful. This adjusted outcome resulted in eighteen percent for arbitration and a little more than ten percent for litigation, which means that as a whole employees tend to prevail on their demands with much greater frequency in arbitration than they do in litigation.<sup>202</sup> Overall, the Maltby results refute the employer advantage rhetoric by showing how employees will do better in arbitration versus the courts and employers will do worse in terms of outcomes.<sup>203</sup> Accordingly, with results favoring employers in litigation, mandatory arbitration fails as a worthwhile option.

## 2. A Disconnect Between Corporate Leaders & Their Counsel: Fearing Jury Verdicts and Attorneys' Fees

### a. Much Ado Than Should Be Due About Jury Verdicts

Many corporate leaders have pointed to the use of ADR as a panacea.<sup>204</sup> These leaders appear to have developed what Professor Judith Resnik has called a "failing faith in adjudication."<sup>205</sup> Concerns about often-publicized,

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200. See *id.* at 48-49.

201. See *id.* at 48.

202. See *id.*

203. See also Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—A Proposed Way Out*, 67 FORDHAM L. REV. 1517, 1565 (1999) (demonstrating how arbitrators tend to split the difference or give the claimant something in arbitration, by finding, in a review of 316 arbitration decisions involving alleged sexual harassers, who challenged disciplinary action against them in arbitration, that "almost half of all discipline issued for sexual harassment (or conduct which could constitute sexual harassment under Title VII standards) is altered by the arbitrator" to a lesser penalty or no penalty).

204. See Lande, *supra* note 21, at 61 & nn.177-78; Lipsky & Seeber, *supra* note 20, at 138-41.

205. See, e.g., Resnik, *supra* note 21, at 529-30.

but rarely-occurring large jury verdicts have also driven this failing faith.<sup>206</sup> Large punitive damage awards should be a concern, especially when "the top ten verdicts awarded in the United States totaled \$2.8 billion, up 375 percent over the top ten verdicts of 1997, according to Lawyers Weekly USA."<sup>207</sup> Neither companies nor their outside counsel want a large jury verdict against them.<sup>208</sup>

However, the concern about juries has become a pervasive and misunderstood issue among employers.<sup>209</sup> Is this concern about juries really well-placed or is it much ado than should be due given the limited number of matters that get decided by juries?<sup>210</sup> When compensatory damages and

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206. See Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 277 (1998) (analyzing the effect that the media has on our perceptions of punitive damages by finding that, although punitive damages occur in only 4.6% of verdicts, they occur in 21.3% of all reports of verdicts). Gerber also found that, because of the media emphasis, "company decisionmakers are likely to substantially overestimate the frequency and magnitudes of punitive damages awards." *Id.* at 250.

207. David Segal, *Tag-Team Lawyers Make Businesses Blink; HMOs Latest to Grapple With Threat of Investor-Scaring Mega-Verdicts*, WASH. POST, Nov. 12, 1999, at A1.

208. *Id.* (noting a new trend in plaintiffs firms of joining together across the country to pool resources that helps force settlement with large companies because the stock market responds to suits from powerful plaintiffs' firms by lowering stock and "[e]very CEO fears the random billion-dollar verdict and the wrath of stockholders that could bring" so "when companies settle, even if it isn't on the merits, the stock will rise.")). See generally John H. Mason & Christopher L. Ekman, *Defending Against Damages Claims in Discrimination Cases*, 13 LAB. LAW. 471 (1998) (describing the hopes of most employers that they do not have to address the issue of damages and a jury verdict in an employment discrimination trial).

209. See, e.g., Greg Guidry & Gerald Huffman, Jr., *Legal and Practical Aspects of Alternative Dispute Resolution in Non-Union Companies*, 6 LAB. LAW. 1, 3 (1990) (discussing the problems employers have faced when employees bring lawsuits before juries); see also William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMP. REL. L.J. 404, 405 (1987) ("The cost of lawsuits that respond to a discharge, as measured by jury awards and settlements, has also increased geometrically and is beginning to draw concern from the business community."); Francis A. Spina, *Jury Selection in Employment Discrimination Cases*, FOR THE DEFENSE, Mar. 1994, at 25-26 (asserting that employers come to bat with two strikes against them due to the glee with which plaintiffs' attorneys welcomed the jury trial right granted by the Act in 1991).

210. See Sabatino, *supra* note 104, at 1342 & n.222 (citing Marc S. Galanter & Mia Cahill, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994) (referring to statistics reflecting that 85% to 95% of civil cases do not go to trial and stating, "One must remember that about ninety percent of all civil cases are resolved without a trial, mainly in settlement.")). But see Harvey Berkman, *Want Big Bucks? Try With a Jury*, NAT'L L.J., Sept. 27, 1999, at A1 (reviewing a recent Department of Justice survey of nearly 16,000 tort, contract, and property cases tried in state courts of the nation's

punitive damages first became available under the Act, at least one commentator asserted that employers should fear increasing litigation and large jury verdicts in Title VII cases.<sup>211</sup> The fear of subjecting employers to a litigation "lottery" was also one of the key reasons why certain groups vigorously challenged the 1990 version of the Act.<sup>212</sup> If employees really choose to litigate because of legal and punitive damages and the right to a jury trial, then those extended remedies may warrant concern from employers.<sup>213</sup> However, a study of jury trials in race discrimination claims decided pursuant to section 1981 of the Civil Rights Act of 1866<sup>214</sup>

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75 largest counties showing that in 1992, plaintiffs won only 51.7% of civil jury trials and that number had decreased to only 48.7% by 1996, including a decline in all categories of tort suits, as well as in employment discrimination cases). Specifically, for employment discrimination cases, the success rate for plaintiffs fell from 56.1% to 47.6%. *Id.* Although the overall median award for damages dropped during that time, the median "almost doubled in cases of employment discrimination, from \$141,000 to \$250,000" and the "portion of employment-related awards over \$250,000 also rose, from 40% to 48%." *Id.* In employment discrimination cases plaintiffs have a "substantially better shot at victory before a jury than a judge: Juries in 1996 found for the employee-plaintiff almost half the time, while judges did so in just a quarter of cases." *Id.* In those employment cases, juries awarded a median of \$250,000 and gave more than \$1 million in one out of seven cases but judges, in contrast, awarded a median of only \$75,000 and gave no verdicts of more than \$1 million. *Id.*

211. See Loudon, *supra* note 29, at 321-22 (despairing about the expected growth in damage claims and jury trials because of the Act); see also *Costs of Litigation*, Gilmer *Decision Encourages Alternative Dispute Resolution*, Daily Lab. Rep. (BNA) No. 243, at A-8 (Dec. 18, 1991) (recounting statements of certain employers suggesting a growing interest in alternative dispute resolution mechanisms after passage of the Act); Susan Schenkel-Savitt, *New and Improved Remedies for Intentional Discrimination and the Expanded Reach of Title VII and the Disabilities Acts*, in *THE CIVIL RIGHTS ACT OF 1991: ITS IMPACT ON EMPLOYMENT DISCRIMINATION LITIGATION*, at 217, 224-25 (PLI Litig. & Admin. Practice Course Handbook Series No. 429 (1992)) (predicting that the Act's "[p]unitive and compensatory damages will increase the amount of monies won in . . . successful employment discrimination cases" and also "dramatically" increase the effect of the ADA which extended "civil rights protection to 43 million Americans who are disabled").

212. See Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1125 n.5 (1992) (referring to a statement by Victor Schachter made during the debate of the 1990 version of the Act).

213. To the extent that there is empirical information, it suggests that employees choose to litigate because they want their side or "voice" to be heard by an impartial party and the typical employee who files suits is non-white, likely to be young, and apt to file a great number of grievances. See Michele M. Hoyman & Lamont E. Stallworth, *Who Files Suits and Why: An Empirical Portrait of the Litigious Worker*, 1981 U. ILL. L. REV. 115, 118-19, 138-39, 143 (1981).

214. 42 U.S.C. § 1981 (1994).

demonstrates that few cases get to juries and that overall huge damage awards happen too infrequently to consider them an overriding concern.<sup>215</sup>

In 1998, the EEOC made large recoveries in a few-high profile cases, including a \$34 million settlement in a sexual harassment class action against Mitsubishi Motor Corporation's American subsidiary and a \$183 million age discrimination settlement against Lockheed Martin, predecessor of Martin Marietta.<sup>216</sup> In addition, the even more publicized race discrimination case involving Texaco and alleged tape recordings identifying racial and religious slurs that occurred in 1996 and led to a landmark \$176 million dollar private settlement with the plaintiffs has added to the concern about unpredictable jury verdicts.<sup>217</sup> Adding to this fear is the further recovery of more than \$268 million through enforcement and litigation in 1999, including \$25 million in a class action pregnancy discrimination suit against Pacific Bell and Nevada Bell Telephone, an \$8 million settlement in a sexual and racial harassment class action against Ford Motor Company, and a \$28 million age discrimination class settlement

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215. See WENDY S. WHITE ET AL., ANALYSIS OF DAMAGE AWARDS UNDER SECTION 1981 (1990) (describing a review of 576 § 1981 race discrimination cases and finding that 144 settled or were reversed or remanded, 314 of the cases were dismissed before trial or a court or jury ruled that the plaintiff was not entitled to relief, and out of the 118 remaining cases where the plaintiff proved that discrimination had occurred, in 50 of these cases plaintiffs did not receive any compensatory relief or punitive damages despite their availability in § 1981 cases).

216. See Greene, *supra* note 179, at 20 (discussing the EEOC's "high-profile" victories in 1998 involving Mitsubishi and Lockheed Martin).

217. See Charles M. Foster et al., *Compliance Programs: An Alternative to Punitive Damages for Corporate Defendants*, 49 S.C. L. REV. 247, 266 n.153 (1998) (noting that the fear of liability for punitive damages under the Act "likely sparked [Texaco's] willingness to enter into such a large settlement"); see also *Ameritech, EEOC Reach \$1 Million Accord Over Midwest Workforce Resizing*, Daily Lab. Rep. (BNA) No. 163, at A-3 (Aug. 24, 1998) (describing settlement entered in federal court with 40 former Ameritech employees who will divide \$1 million in agreed resolution of age discrimination claims in a suit filed by the EEOC); Benjamin A. Holden, *Ex-Employees at GM's Hughes Unit Win \$89.5 Million in Race-Bias Suit*, WALL ST. J., Oct. 27, 1994, at B4 (describing large punitive damage awards given to two individual plaintiffs totaling \$80 million out of total award of \$89.5 million for race discrimination claims); Thomas Scheffey, *Federal Caps Runneth Over in \$600,000 Pregnancy Firing*, THE CONN. L. TRIB., Oct. 18, 1999, at 1 (describing a jury award of \$600,000 (more than \$300,000 allowed by the damage caps for the plaintiff's employer with over 500 employees) granted to a former \$7-an-hour employee who worked at a mall after finding evidence of pregnancy discrimination). See, e.g., *Timm v. Progresssive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998) (finding that award of \$15,000 in punitive damages was appropriate even though the jury found that no compensatory damages were warranted).

involving insurance brokerage company Johnson and Higgins, now a part of Marsh & McLennan.<sup>218</sup> These highly-publicized but rarely-occurring cases contribute to paranoia about juries.

Conventional wisdom holds that juries sympathize more with discharged employees than do judges and consequently will find for employees more frequently and award higher damages.<sup>219</sup> However, Professor Martha West has asserted that "[e]mployment is one area of modern life where the public's perception of presumed rights does not correspond to the legal system's refusal to recognize such rights" demonstrates that juries adapt to the "economic realities" involved.<sup>220</sup> In Professor West's opinion, these "economic realities" tend to place employers and employees on a level playing field when addressing discharge questions.<sup>221</sup>

A classic example of unnecessary fear of jury verdicts started in wrongful discharge cases in the 1980s. Although it is understood that jury verdicts may be "unpredictable and erratic, producing different outcomes on similar facts,"<sup>222</sup> the public perception inspired by the media that employees get very large jury verdicts for wrongful discharge was another overly publicized matter based on situations that rarely occur.<sup>223</sup>

In a study of 223 California wrongful discharge cases between January 1979 and May 1987, researchers found that a more accurate report of awards would be that "[m]ore than half the plaintiffs in litigated wrongful discharge cases lost outright, and among those who won, half won less than \$135,000," although "the average award when plaintiffs won exceeded \$450,000."<sup>224</sup> Again, Professor West's view of this information is that it suggests the prospect of large compensatory and punitive damage awards may have served to deter employers from arbitrarily using their power to discharge

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218. Greene, *supra* note 179, at 20.

219. Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 48 n.235 (1988).

220. *Id.* at 48.

221. *Id.*

222. *Id.* at 49.

223. David J. Jung & Richard Harkness, *Life After Foley: The Bottom Line*, 5 LAB. LAW. 667, 668 (1989) ("[W]e concluded that selective reports of landmark verdicts, haphazardly reported surveys, and anecdotal evidence had combined to present a misleading picture of wrongful discharge litigation."); *see also* Cooper, *supra* note 25, at 239 ("Management is well protected by law, by jury instructions, and by juror attitudes that are more conservative than commonly believed. The average employment discrimination claimant loses.").

224. Jung & Harkness, *supra* note 223, at 669 (referring to original study made by Jung & Harkness reprinted in 4 LAB. LAW. 257 (1988)).

employees rather than placing an onerous burden on employers to make frequent payouts and provide financial windfalls to their employees.<sup>225</sup>

Nevertheless, the threat of punitive damages has exacerbated the concern of employers regarding large jury verdicts.<sup>226</sup> Yet, in some instances, the threat of punitive damages may be more about imagination than reality.<sup>227</sup> Even most large punitive damage awards are overturned on appeal.<sup>228</sup> Whether there is truly a litigation explosion or it is truly a hyperbolic construct to benefit those who want court and tort reform, there is little information to support the incessant corporate fear of jury verdicts and large punitive damage awards.<sup>229</sup> Recent indications strongly suggest that there might be little to support the punitive damages scare other than partisan politics.<sup>230</sup>

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225. West, *supra* note 219, at 46.

226. Jung & Harkness, *supra* note 223, at 669 (noting that, if punitive damage awards were eliminated in wrongful discharge suits, "the average award in wrongful discharge cases would have dropped by over half").

227. See, e.g., Bob Van Voris, *Tort Lawyers Give Up Punies*, NAT'L L.J., Sept. 20, 1999, at A1 (reviewing a significant trend where plaintiffs are willing to trade big punitive awards in exchange for a corporate defendant's promise to make changes that prevent future injuries as evidenced by a proposal of plaintiffs' lawyer Brian Panish to forego most of the punitive damages his client had won in a suit against General Motors in exchange for preventative action).

228. *Id.*

229. See Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 27 (1986) (noting a general but benign increase in filings and finding that "[i]n federal, as in state courts, most cases settle."); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 61-63 (1983) (challenging the existence of a litigation explosion); see also Selmi, *supra* note 71, at 40-42 (reviewing a study of tort awards and finding that chances of a large verdict in employment discrimination cases before a judge was a virtual nullity with only 22% success but it could be nearly double that amount or 42% success for a plaintiff if a jury is involved). But see WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) (alleging the existence of a litigation explosion and arguing for court reform). Surprisingly, since Republicans took over the majority in Congress in 1994, there has been very little federal court or tort reform legislation passed to address the alleged litigation explosion; apparently, that is because President Clinton, with the threat of veto, has been able to keep most reform efforts at some middle ground. See Harvey Berkman, *After the Hype, Tort Reform Moves Slowly*, NAT'L L.J., June 14, 1999, at A1 (noting comments of President Clinton's Deputy White House Counsel, Bruce R. Lindsey: "We've tried to take a middle position between the Republicans who would like to make major changes in our tort system and consumer groups who basically think our current tort system isn't broken and therefore doesn't need fixing.").

230. See Marc S. Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 741, 751 (1998) (citing Herbert M. Kritzer &

### b. Build Trust, Not Fees

In some instances, the current corporate decisionmaking process regarding legal fees, while having a worthy end of reducing costs, has escalated into a focus on cutting legal expenses so much that there is a disregard of the results.<sup>231</sup> Despite the large percentage of employers that do not use arbitration, some employer proponents of mandatory arbitration exist.<sup>232</sup> These proponents of mandatory arbitration claim that they have saved large amounts of money in using arbitration.<sup>233</sup>

By choosing to arbitrate rather than litigate, corporate leaders and their outside employment counsel have failed to connect regarding the value of using the court system to resolve employment discrimination cases.<sup>234</sup> At least one of the reasons for this disconnect may arise from the handling of the discovery process. Employers may be surprised by the costs of paying their own counsel, who will drag out the process to force plaintiffs with

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Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring it into View*, 1998 WIS. L. REV. 157 (1998) and noting unsuccessful efforts to have all the key players, including those interested in tort reform get together to study punitive damages, but being sandbagged at the last minute by tort reformists and corporate leaders who apparently "took their marching orders from corporate operatives" and were merely seeking an "arena for [their own] partisan advocacy").

231. Two commentators have noted, "The problem with such thinking is that" you cannot "fixate on the amount of legal fees paid, while giving insufficient consideration to whether total legal costs are really reduced when one factors into the analysis not only legal fees, but also judgments and settlements." See Robert L. Haig & Steven P. Caley, *Does a Good Result Beat a Cheap Legal Fee?*, 69 FLA. B.J., Dec. 1995, at 44 (describing how an effort to cut legal fees without focusing on the bottom-line costs of results and judgments had led USF&G company to realize that, while it had reduced its legal fees over time by using small firms that charged nearly \$100 per hour less than the big firms it had been using, these lawyers tended to negotiate more settlements, which had led USF&G to develop a reputation as an "easy mark" in insurance defense cases).

232. Brennan, *supra* note 18, at A1 (referring to survey finding that only 25% of litigators and 9% of the in-house counsel preferred using arbitration).

233. *Id.* (noting the comments of Clifford Whitehill, vice-president and general counsel of Darden Restaurants in Orlando, Florida, who asserted "that his company has saved nearly \$5 million by using ADR, primarily arbitration in employment cases"). Although Mr. Whitehill made this comment, there was no explanation or support for how he reached this conclusion and nothing to determine whether the savings were based on a decrease in attorneys' fees without comparing the amount and quantity of awards issued in arbitration versus awards in the court system to determine a bottom-line savings.

234. The most likely reasons are that corporate leaders have many bad personal experiences with litigation and the media exacerbates the problems with the legal system so that the average member of society has negative views of lawyering and the litigation process. See Lande, *supra* note 21, at 3-7, 51-52.

limited resources to settle when they still have to pay plaintiffs some amount as part of the settlement. Outside counsel should invest the time and effort to work with in-house counsel and corporate leaders to understand these discovery dynamics. With joint efforts, corporate leaders and their counsel may realize the benefits of paying outside counsel fees and a settlement amount to a plaintiff after a lengthy discovery battle. As an example, an employer may spend \$35,000 in legal fees to outside legal counsel to handle the case through extended and contentious discovery while eventually settling a case for \$15,000. Instead of reacting negatively to having to pay \$35,000 in legal fees and having to pay the plaintiff \$15,000 too, the employer may have saved itself from having to pay a larger amount of possibly \$90,000, plus \$50,000 in attorneys' fees, if the case had quickly gone to trial or to an arbitrator.

Another reason for the disconnect is that corporate leaders can always point to some anecdotal situation where they believed they were involved in a frivolous case. Then, the administrative agency and the courts unnecessarily prolonged the matter, which made the company incur significant attorneys' fees<sup>235</sup> despite the ultimate resolution in its favor.<sup>236</sup> As established above, these few anecdotal situations pale in comparison to the results favoring employers in courts.<sup>237</sup>

Other issues related to the disconnect between employers and their outside counsel may be based on a failure of outside counsel to become key quality and trusting business partners with their corporate clients as part of a customer-supplier relationship.<sup>238</sup> In the 1980s, company leaders became

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235. See Herbert M. Kritzer, *Lawyers' Fees and the Holy Grail: Where Should Clients Search For Value?*, 77 JUDICATURE 187 (1994) (suggesting that clients explore creative mechanisms for improving relationships with lawyers and payment of legal fees).

236. See Lande, *supra* note 21, at 51-52 (noting that most corporate leaders surveyed had negative personal experiences with the court system).

237. See WHITE ET AL., *supra* note 215 (describing a review of 576 § 1981 race discrimination cases and finding that 144 settled, were reversed or were remanded, 314 of the cases were dismissed before trial or a court or jury ruled that the plaintiff was not entitled to relief, and out of the 118 remaining cases where the plaintiff proved that discrimination had occurred, in 50 of these cases plaintiffs did not receive any compensatory relief or punitive damages despite their availability in § 1981 cases); Eglit, *supra* note 175, at 645-50 (finding that employers prevailed in 71 out of 94 cases published in 1996 and defendants who won below were able to preserve their victories 70% of the time and plaintiffs who won below were only able to preserve their victory on appeal 57% of the time); see also Dunworth & Rogers, *supra* note 175, at 562 (noting that large firms are usually "highly successful" in legal proceedings and "they generally win").

238. See, e.g., Michael B. Kinnard, *What Companies Want from Law Firms: Quality, Service, Responsibility—The Relationship of Corporation to Outside Counsel is Becoming*

driven to improve their profits and overall financial standing on a global basis.<sup>239</sup> Litigation costs and payment of attorneys fees in the United States represented key areas for companies to improve their financial position when competing with companies in other countries.<sup>240</sup> But with most multinational corporations, who have a substantial amount of business in the United States, the emphasis on improved relationships and mutual gains for corporate leaders and their counsels will remove this disconnect about the value of the current employment litigation system for employers.

If corporate leaders develop cooperative relationships of trust<sup>241</sup> and use non-binding ADR mechanisms like mediation<sup>242</sup> without the attendant problems and costs associated with mandatory arbitration, employers and their counsel should be able to reconnect and make an informed decision about ADR versus the court system as a resolution to an employment discrimination dispute.<sup>243</sup> But given the overwhelming success for employers in the court system and absent some empirical data showing a big bottom-line cost savings from employing arbitration instead of the courts, if it is not broken, why use mandatory arbitration to fix it?

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*One that Will be Fueled by Innovation and Technology*, 63 DEF. COUNS. J. 387, 387-88 (1996) (noting the necessity to build customer-supplier relationships between companies and their counsel that will foster true partnerships); see also Martin A. Frey, *Representing Clients Effectively in an ADR Environment*, 33 TULSA L.J. 443, 444 (1997) (suggesting that litigation attorneys develop a better understanding of ADR to assist clients in making informed choices or else they risk losing those clients).

239. Lipsky & Seeber, *supra* note 20, at 141-42.

240. But see Trubek et al., *supra* note 141, at 109 (concluding from an empirical study of civil litigation cases that litigation "pays" for the parties who engage in it as a whole, including defendants).

241. See, e.g., Zoe Baird, *A Client's Experience with Implementing Value Billing*, 77 JUDICATURE 198, 198-200 (1994) (discussing the implementation of a billing system where payment is linked to performance and how working together with outside counsel provided a positive and synergistic relationship).

242. Brennan, *supra* note 18, at A1 (referring to a survey finding that 69% of litigators and 88% of in-house counsel prefer non-binding mediation and 88% of in-house counsel and 80% of litigators believed that mediation was quick and cost-effective).

243. See Lande, *supra* note 21, at 60-65 (proposing the development of private ADR as a mechanism to improve perceptions of corporate leaders and their counsel's faith in litigation).

#### IV. RECOGNIZING THE UNIQUE PROBLEMS WITH MANDATORY ARBITRATION FOR SMALL EMPLOYERS

The EEOC has issued a statement that intends to focus on building relationships with small<sup>244</sup> and mid-sized businesses.<sup>245</sup> Current chairwoman of the EEOC, Ida L. Castro, launched this effort at her first meeting after taking over leadership of the EEOC in December 1998.<sup>246</sup> At that EEOC meeting, panelists from the Society for Human Resource Management, the National Employment Council, and the U.S. Chamber of Commerce (as representatives of certain small and mid-sized business interests) noted positive accomplishments by the EEOC. Some of those accomplishments included the EEOC's ongoing enforcement reforms, which have reduced the required time to process charges, its technical assistance seminars focusing on the needs of small businesses, and its newer and simplified policy guidances.<sup>247</sup> However, the panel also addressed ongoing concerns of small business with respect to dealing with the EEOC. Those concerns included long delays in processing a discrimination charge, investigators who lack objectivity, and the need for education about the benefits of mediation versus the EEOC's traditional investigation process.<sup>248</sup>

Another legitimate concern that small businesses should address with the EEOC in the next millennium is the issue of mandatory arbitration. A

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244. Small employers are already treated differently under the Small Business Regulatory Enforcement Fairness Act of 1996, which requires federal agencies to provide additional services to small businesses to help them understand laws and to assist them with compliance. Pub. L. No. 105-135, 111 Stat. 2592 (1994) (codified throughout the code). A key requirement to be considered a small business is to have "annual receipts not in excess of \$500,000." 15 U.S.C. § 632(a)(1) (1994 & Supp.). The EEOC, the Department of Labor, and the Small Business Administration have devoted specific parts of their Internet web sites to small businesses. See EEOC, *Small Business Information* (last modified Mar. 22, 1999) <<http://www.eeoc.gov/small>>; U.S. Dept. of Labor, *Office of Small Business Plans* (last modified Nov. 5, 1999) <<http://www.dol.gov/dol/osbp>>; Small Business Administration, *Small Business Home Page* (visited Mar. 20, 2000) <<http://www.sba.gov>>, respectively. Also, the Civil Rights Act of 1991 limited compensatory and punitive damages by employer size. See 42 U.S.C. § 1981a(b)(3) (1999) (placing caps on recovery of \$30,000 for employers with less than 101 employees and up to a maximum of \$500,000 for employers with more than 500 employees).

245. See EEOC, *EEOC Focuses on Relationship with Small and Mid-Sized Businesses* (last modified Dec. 10, 1998) <<http://www.eeoc.gov/press/12-10-98.html>>.

246. *Id.*

247. *Id.*

248. *Id.*

General Accounting Office ("GAO") study showed that the percentage use of arbitration was actually highest with the smallest employers.<sup>249</sup> Because they tend to be "one-shotters" that do not have the resources to truly gain from the legal system like larger advantaged "repeat players," smaller employers may find some interest in mandatory arbitration.<sup>250</sup> If you look at the issue of mandatory arbitration for small employers from solely a standpoint of results, there is not much benefit. Small employers do not possess a repeat player advantage in arbitration. The empirical data shows that small employers are much more likely to lose to employees than large employers.<sup>251</sup> However, the peace of mind, certainty, and lack of an ongoing mental drain on its supervisors and human resource personnel, if a quick resolution can be obtained, may provide non-economic advantages regardless of the long-term costs and poorer outcomes.

The bargaining and results that develop in the shadow of the law and the courts have strongly contributed to the overwhelming success of large employers in litigation.<sup>252</sup> Professor Galanter predicted that, when the

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249. GAO Report, *supra* note 6, at 9 (noting that 10.2% of businesses with 100 to 499 employees used arbitration versus 7.5% for businesses with 500 to 999 employees and 9.5% for businesses with 1,000 or more employees). Although not a statistically significant difference, the use of arbitration by smaller businesses at similar percentages or higher than the percentages of larger businesses shows that arbitration has a strong interest with small employers.

250. Galanter, *supra* note 3, at 97-104.

251. See Bingham, *supra* note 25, at 234. Professor Bingham found that, when one-shot employees face arbitration with one-shot employers, the employees win more than 70% of the time, but when one-time player employees face arbitration with repeat-player employers, the employees win only about 16% of the time. *Id.* In cases involving one-time-player employers, employees recover an average of 48% of what they demand as opposed to only recovering 11% of what they demand with repeat-player employers. *Id.* Shortly after Professor Bingham made her findings, the ABA Journal asked her to review the data and Richard Reuban commented:

In figures separately computed for the ABA Journal, Professor Bingham looked at the 232 claims brought by employees [at the AAA in 1993] and found that the odds are 5-to-1 *against* the employee in a repeat-player case, while the odds are 2.4-to-1 *in favor of* the employee in non repeat-player cases.

Reuben, *supra* note 80, at 61.

252. See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (describing how the realities of the law cast a shadow over the outcomes and choices that opponents may have when negotiating a resolution to their dispute); see also Rachel H. Yarkon, Note, *Bargaining in the Shadow of the Lawyers: Negotiated Settlement of Gender Discrimination Claims Arising from Termination of Employment*, 2 HARV. NEGOTIATION L. REV. 165, 165 n.3 (1997) (explaining that bargaining in the shadow of the law refers to an understanding of "how rules and

litigation ebbs along at a snail's pace, as it does now either through the EEOC or the courts, the powerful will be able to prevail.<sup>253</sup> In contrast, small employers, as one-shotters, want a fast decision regardless of the outcome. The horrendous costs and delays in the court system would cause a small employer great expense to obtain legal counsel who has the skills and repeat knowledge to navigate the litigation process. The risk-averse, small employer does not have the huge coffers to wait out a long, drawn-out piece of litigation or the flexibility to drum up a large fund to pay defense attorneys while the matter is ongoing.<sup>254</sup> These small employers tend to operate on fairly equal bargaining terms with their employees. Those employees also maintain a closely vested interest in seeing that their employer does not have to go out of business due to litigation costs. They need their employer to continue operating so they can continue to collect a paycheck.

Professor Galanter predicted that like kinds (repeat players with repeat players and one-shotters with one-shotters) would be less likely to use the court system and more likely to employ the benefits of privatized systems.<sup>255</sup> Lawsuits against start-up and emerging companies in high-tech industries where competition is at a premium can result in an "economic hit" that "could be devastating."<sup>256</sup> Although these "start-ups have the same obligations as corporations," they are usually more "vulnerable to lawsuits

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procedures used in court for adjudicating disputes affect the bargaining process that occurs between [parties] outside the courtroom" and then rejecting this theory as too unpredictable as an incentive to why plaintiffs in sex discrimination cases decide to settle).

253. Galanter, *supra* note 3, at 119-22.

254. See Yarkon, *supra* note 252, at 189-90 nn.119 & 123 (noting that smaller employers are risk-averse in comparison to large companies and that a pending lawsuit would not interrupt the economic stream of a large employer but small and mid-sized businesses "don't have the same degree of discretionary funds as a large company").

255. Galanter, *supra* note 3, at 124-26 (referring to dispute resolution as "Alternatives To The Official System"); see *id.* at 108 (describing how most one-shotter versus one-shotter disputes are "pseudo-litigation" where the parties have worked out a settlement that is ratified in the guise of adjudication or that it involves fights with overtones of "spite" and "irrationality" and it involves few appeals); see also *id.* at 144 (finding that private dispute resolution will be preferred when both parties are repeat players).

256. Tatiana Boncompagni, *Labor Practices Boom with Economy*, LEGAL TIMES, Nov. 8, 1999, at 1 (noting that new high-tech companies' growth and recent Supreme Court decisions requiring the development of certain anti-discrimination policies to prevent liability has created a large increase in labor and employment law staffing at both plaintiff-side and management-side firms in the metropolitan D.C. area and nationwide).

because 'they don't have in place the proper mechanisms to ensure that hiring and firing isn't discriminatory.'"<sup>257</sup>

In light of uncertain litigation about the legality of mandatory arbitration agreements,<sup>258</sup> a cautious approach to the use of mandatory arbitration is required. This understandable response constitutes an unfortunate result for small employers that need quick and flexible alternatives to unpredictable litigation. Given the general benefits that arbitration may provide employees<sup>259</sup> and the overall peace of mind and short-term flexibility that it could provide if a dispute is resolved quickly, small employers may still crave mandatory arbitration with their employees.<sup>260</sup> A marginal increase in a small employer's bottom-line costs from defending litigation could make the overall advantage of litigation subject to diminishing returns. Because of this volatile economic existence, these small employers would likely still be willing to use arbitration despite exposing themselves to all the

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257. *Id.* (quoting Debra Katz, an attorney for a plaintiffs' boutique firm).

258. *See supra* discussion in Part II.B.

259. *See* Maltby, *supra* note 10, at 45-56 (describing the comparative outcomes in arbitration for employees).

260. By highlighting the unique problems for small employers, this Article is only suggesting that small employers may find reasons outside of overall costs and outcomes to choose mandatory arbitration. Concerns about enforcement of mandatory arbitration agreements would still present a problem for even small employers and it would be very difficult for the courts to make distinctions between small employers and larger employers. More precisely, a court would likely have the difficult task of focusing on the relative bargaining power of the employee versus the small employer and deciding enforcement of the agreement based upon general fairness and the totality of the circumstances. *Cf. Torrez v. Public Serv. Co.*, 908 F.2d 687, 689-90 (10th Cir. 1991). In *Torrez*, the majority reviewed the following factors to determine if an age discrimination waiver was valid:

(1) the clarity and specificity of the release language; (2) the plaintiff's education and business experience; (3) the amount of time plaintiff had for deliberation about the release before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek, or in fact received benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the [a]greement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeds the benefits to which the employee was already entitled by contract or law.

*Id.* (quoting *Cirillo v. Arch Chem. Co.*, 862 F.2d 448, 451 (3d Cir. 1998)); *see also* *Coventry v. United States Steel Corp.*, 856 F.2d 514, 524 & n.12 (3d Cir. 1988) (analyzing a waiver of an age discrimination claim where Judge Higginbotham, in writing for the majority, noted that when an employee is faced with a "Hobson's choice" or "take it or leave it" situation in signing a waiver of statutory rights, this dilemma supports a finding that the decision "was not knowingly and willfully made" and that the company had placed "unfair economic pressure" on the employee).

disadvantages in outcomes and even overall costs identified in this Article. As a contrast, repeat player large employers with huge litigation budgets, an in-house corporate legal department, and highly-paid outside legal counsel may have larger issues to address with the handling of one case as it pertains to future claims. But given the differences in lacking the financial wherewithal to navigate the complex and costly litigation system, arbitration, even mandatory arbitration with its additional attendant costs and disadvantages, may still be enticing to small employers.<sup>261</sup>

#### V. NEW MILLENNIUM PROPOSAL: CREATING A PUNITIVE DAMAGE DEFENSE AS AN INCENTIVE TO USE ARBITRATION AFTER A DISPUTE ARISES

Few commentators have challenged the purported benefits of agreeing to use ADR after a dispute has occurred because it resembles the widely-accepted practice of settlement.<sup>262</sup> At least, the legal and political costs that remain prevalent with mandatory arbitration would be removed with the decision to use binding arbitration after the dispute arises. Some skeptics have argued that few employers will choose to use arbitration after the dispute has arisen.<sup>263</sup> Large employers are still concerned about the prospect

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261. Although it is beyond the scope of this Article, a more practical alternative for handling the unique issues for small employers would be a congressional amendment allowing the special handling of mandatory arbitration for smaller employers. Congress has been especially concerned of late about the impact of litigation on small employers. See, e.g., Y2K Act, Pub. L. No. 106-37, 106 Stat. 185 (1999) (creating certain exceptions for small employers involved in actions related to problems caused by the transition to the year 2000). A small employer under the Y2K Act is defined as a defendant: (A) who "(i) is sued in his or her capacity as an individual; and (ii) whose net worth does not exceed \$500,000; or (B) that is an unincorporated business, a partnership, corporation, association, or organization, with fewer than 50 full-time employees." *Id.* at § 2. Under this definition, Congress could amend Title VII (as currently amended by the Act), the Federal Arbitration Act ("FAA"), or both to allow the enforcement of mandatory arbitration exceptions for small employers.

262. See, e.g., Yarkon, *supra* note 252, at 168-72 (describing the benefits and incentives to settlement in employment discrimination cases). Notable opponents of settlement have included then-Professor, now Judge, Harry Edwards and Professor Owen Fiss, respectively. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986) (raising concerns about the tendency of ADR to diminish pressure on courts to resolve important constitutional and public law issues); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (analyzing adjudication in terms of public values that are threatened by settlement and ADR processes).

263. See St. Antoine, *Mandatory Arbitration*, *supra* note 67, at 8 & n.25 (stating that there was strong testimony to the Dunlop Commission from management representatives that employers generally would not be willing to arbitrate after a dispute arose and would instead just wait the plaintiff out); see also Fitzgibbon, *Reflections*, *supra* note 67, at 248 (asserting

of excessive punitive damage verdicts from runaway juries and mounting legal fees. Still, there remains some incentive to still use arbitration after the dispute arises.

To further encourage the use of arbitration after a dispute arises and in order to allow an employer a defense to any punitive damage claims if the employer gave an unconditional offer to arbitrate the dispute after it arose, Congress should amend Title VII, and in particular section 118 of the Act.<sup>264</sup> The offer to arbitrate would create an affirmative defense that an employer may use to block any punitive damages claims brought under the Act. This would create an express incentive for employers to arbitrate after a dispute arose.

To enforce the punitive damages defense, an employer's unconditional offer to arbitrate must involve fair procedures that are not one-sided. As the courts are already starting to do after the *Cole* decision and consistent with the Protocol and similar rules established by ADR providers, any arbitration agreement that fails to provide minimum guarantees of fairness will not be enforced. The result is that these arbitrations may tend to be a little more like litigation.<sup>265</sup> But those basic procedures have become necessary to guarantee that the arbitral forum approximates the judicial forum without denying participants any substantive guarantees.

Courts may already be able to find that a post-dispute offer to arbitrate limits punitive damages. The Supreme Court recently stated in *Kolstad v. American Dental Association*,<sup>266</sup> that an employer's "good faith" efforts will provide a safe harbor from punitive damage claims brought under the

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that arbitration must be mandatory because employers will not arbitrate every case after a dispute arises); *ACLU Supports Arbitration of Employment Disputes*, ALTERNATIVE DISP. RESOL. ALERT, Nov. 1995, at 1 (describing in a monthly newsletter update published by management law firm, Littler, Mendelson, Fastiff, Tichy & Mathiason, the comments from an interview of Lewis Maltby, Director of the ACLU's National Taskforce on Civil Liberties in the Workplace, where he stated, "[N]o employee with any sense would agree to arbitrate the 'brass ring' case, and likewise no employer would agree to arbitrate a case that is unlikely to attract the interest of a plaintiff's lawyer or the EEOC."). By allowing an offer of arbitration to cut off punitive damages as described in this section of this Article, it would possibly tarnish the advantage for an employee to take the brass ring case to court and it would still provide an incentive for an employer to arbitrate a case that may not attract a plaintiff's lawyer or the EEOC by cutting off punitive damage claims.

264. 42 U.S.C. § 1981 (1994) (statutory note).

265. Sabatino, *supra* note 104, at 1348-49 (describing the benefits of a "litigation lite" system, which allows ADR to add some components that make it closer to litigation).

266. 119 S. Ct. 2118 (1999).

Act.<sup>267</sup> What efforts are considered to be "good faith" efforts by the employer? Although specific acts are not identified, in writing for the majority, Justice O'Connor found that employers who implement written anti-discrimination policies, provide educational awareness sessions to employees, and take other steps to create and maintain a discrimination-free workplace can avoid punitive damage liability for discriminatory acts of supervisors and employees.<sup>268</sup> Offering a fair arbitration process after a dispute arises could constitute evidence of other acts in support of the employer's good faith efforts to eradicate discrimination quickly.<sup>269</sup> From this approach, even large employers have some incentive to use voluntary arbitration after the dispute arises.

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267. *Id.* at 2123 (finding in a 7-2 vote that an employer cannot be found liable for punitive damages under the Act if it has a strong policy against discrimination and it acts in good faith even if a supervisor's conduct was contrary to their policy); *see also* David G. Savage, *New Damages Insurance*, A.B.A. J., Aug. 1999, at 48 (quoting management attorney who has stated that the *Kolstad* decision is a "huge victory for employers" who "will [likely] be able to show that a supervisor's conduct was contrary to their policies" and prevent the possibility of a punitive damage claim). *But see* EEOC v. Wal-Mart, 187 F.3d 1241 (10th Cir. 1999) (finding that, although an employer had adopted anti-discrimination policies, those policies did not provide a safe harbor from punitive damage claims because the evidence showed that the supervisors who discriminated against the employee were not familiar with the accommodation requirements of the Americans With Disabilities Act or with Wal-Mart's anti-discrimination policy and had never received training on this subject from Wal-Mart).

268. *Kolstad*, 119 S. Ct. at 2123.

269. Because *Kolstad* left open the question of exactly what employers must do to demonstrate good faith efforts to comply with Title VII, it would appear that adopting anti-discrimination policies and increasing efforts by an employer to resolve the dispute through ADR and without litigation would support the denial of any punitive damage award. *See* Douglas E. Motzenbecker, *Higher Bar For Title VII Punitive Damages*, LITIGATION NEWS, Sept. 1999, at 1-2. This article quotes management attorney Barbara Ryniker Evans' statements that the *Kolstad* decision was a reasonable extension of the Supreme Court's 1998 decisions in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Farragher v. Boca Raton*, 524 U.S. 775 (1998), which found that employers may avoid sexual harassment liability by showing that they exercised reasonable care to prevent and promptly correct discriminatory conduct and that the plaintiff failed to take advantage of any preventive or corrective opportunities provided by the employer because, after *Kolstad*, "employers have never had better reason to adopt antidiscrimination policies and grievance procedures, and to train their supervisors on Title VII's requirements." *Id.*; *cf.* Jan William Sturner, *Arbitration, Labor Contracts, and the ADA: The Benefits of Pre-Dispute Arbitration Agreements and an Update on the Conflict Between the Duty to Accommodate and Seniority Rights*, 21 U. ARK. LITTLE ROCK L.J. 455, 515-16 (1999) (reviewing comments made to Congress regarding the benefits of having the EEOC support mandatory arbitration rather than challenge it and testimony given suggesting that the EEOC should adopt a policy requiring that employees use the employer's grievance procedure before the EEOC will process a charge).

With an affirmative defense to punitive damages, small employers can use arbitration after a dispute arises without incurring the legal difficulties and increased uncertainties that mandatory arbitration presents. Moreover, they can resolve the dispute quickly, avoiding the complex financial burdens that the litigation system offers. Also, large employers would have a well-defined incentive to pursue post-dispute arbitration—the elimination of the dreaded punitive damages. Because employees do have legitimate advantages in arbitration that they do not have in the courts, employees would benefit from using arbitration even at the expense of not having a claim for punitive damages available, especially given the lack of success with such claims in the judicial system. If arbitration and other methods of dispute resolution are truly encouraged by Congress, then adopting this proposal would show that Congress and the courts have endorsed ADR without unfairly coercing an employee to give up the right to the judicial forum as a condition of employment.

#### VI. EPILOGUE: MOVING THE DEBATE BEYOND MANDATORY ARBITRATION

The increasing use of mandatory arbitration by some employers has constituted an ill-advised departure from the overwhelmingly successful experience of employers in the court system. Without much evidence of an advantage, some employers quickly pursued the mandatory arbitration option when it became available in 1991. By giving up on the significant advantage that summary judgment and other court procedures provide, those employers have relinquished their stranglehold on the way employment discrimination disputes are resolved.

Whatever advantage mandatory arbitration may have provided employers has been lost over the last several years. Because the Supreme Court is reluctant to give any further explanation of mandatory arbitration since *Gilmer*, employers have no clear legal protection from using mandatory arbitration agreements and a tremendous amount of uncertainty about their enforcement. Furthermore, legal costs have increased because a number of employee and civil rights groups continue, with limited success, to bring actions challenging mandatory arbitration in the court system. Political backlash even forced the securities industry to virtually eliminate mandatory arbitration. Also, as lower courts have become more concerned about the fairness of the arbitration agreement, they have required certain procedures that make arbitration resemble the court system. Culminating with the virtual ineffectiveness of mandatory arbitration when the EEOC

becomes involved, the rhetoric regarding employer advantage in pursuing mandatory arbitration is nothing more than a myth.

Without investigating the bottom-line costs, the enthusiasm for mandatory arbitration in the 1990s may have been fostered by an unnecessary fear of jury verdicts and rising legal fees. As we approach a new millennium, employers and their counsel need to make critical empirical findings to support their dispute resolution choices and to understand the effects of those choices.

The courts or Congress can help end the debate about mandatory arbitration by providing employers with an incentive to use arbitration after a dispute arises. A defense to punitive damages would create this incentive. With this incentive, both small and large employers may finally be able to identify a clear advantage to using arbitration, allowing employers to truly decide whether arbitration provides a second-class option to the overwhelming success of the court system.<sup>270</sup> Given the increasing use of mediation by employers, the critical ADR focus may now also shift to understanding mediation's effect on resolving employment discrimination disputes.<sup>271</sup> Then, the myth of employer advantage from mandatory arbitration can finally be put to rest.

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270. Few critics have recently addressed whether the arbitration of discrimination claims provides a problem for our system of justice as a whole. See Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 SANTA CLARA L. REV. 1055, 1058-60 (1996) (bemoaning the lack of recent scholarly discourse and critique of ADR with respect to a general imbalance in power for those who may not benefit from an informal dispute resolution option, especially those lacking power because of racial, gender, or economic status); see also Green, *supra* note 30, at 175 & n.15 (noting a general failure of scholarly literature to address the use of mandatory arbitration from the perspective of the individuals who the civil rights laws were intended to protect). See generally Stone, *supra* note 4 (criticizing the use of arbitration as a delegation of court responsibility to self-regulating communities and suggesting a different level of judicial review and analytical enforcement of arbitration matters involving community outsiders versus insiders).

271. Some examples of this kind of critique are starting to develop. See Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 OHIO ST. J. ON DISP. RESOL. 831 (1998) (encouraging the general use of mediation for dispute resolution); Aimee Gourlay & Jenelle Soderquist, *Mediation in Employment Cases is Too Little Too Late: An Organizational Conflict Management Perspective in Resolving Disputes*, 21 HAMLINE L. REV. 261 (1998) (encouraging same in employment disputes); see also Harkavy, *supra* note 90, at 150-64, 168-69 (encouraging same in employment disputes involving harassment); Yelnosky, *supra* note 170, at 156 (encouraging same). But see Nolan-Haley, *supra* note 9, at 778-80 (criticizing the increasing use of mediation when the choice to use mediation and the resulting settlement agreement were not based on informed consent).

