WHEN IS COST AN UNLAWFUL BARRIER TO ALTERNATIVE DISPUTE RESOLUTION? THE EVER *GREEN TREE* OF MANDATORY EMPLOYMENT ARBITRATION

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During its last term, the U.S. Supreme Court reaffirmed its approval of mandatory arbitration in Circuit City Stores, Inc. v. Adams *and* Green Tree Financial Corp.-Alabama v. Randolph. *The 5-4 votes in these decisions show, however, that this public policy remains controversial.*

Many firms now require employees to waive their right to sue on employment claims and to submit to their employers' exclusively selected arbitration procedures. Some of these agreements also require employees to pay large sums for arbitrator fees and other forum costs. Having no recourse to sue, these workers are denied access to any dispute resolution forum because they cannot afford arbitration. Courts have begun to scrutinize these barriers only recently.

Our Article presents the first empirical research on court enforcement of mandatory arbitration agreements that shift some or all forum and representation costs to employees. Analyzing sixty-two of these federal court decisions—most of which were decided since 1999—we find that district courts ordered arbitration in 77 percent of cases in which employees objected that arbitration was too costly to be an accessible forum. Only 50 percent of appellate decisions ordered arbitration.

These results suggest that even though there is a strong federal policy favoring arbitration of employment disputes, courts do not automatically preclude lawsuits. In particular, if a mandatory arbitration agreement creates a cost barrier to a private dispute resolution process, some courts void the entire agreement or rescind the cost-shifting provision.

We observe some preliminary empirical patterns among federal courts. Counting appellate and district decisions equally in each circuit, the Second, Third, Fourth, Fifth, and D.C. Circuits favored arbitration over litigation when cost was asserted as an argument against enforcement of these agreements. In contrast, the First, Sixth, and Tenth Circuits often denied arbitration in cost-challenge cases, thereby clearing the way for employment discrimination lawsuits. The Seventh, Ninth, and Eleventh Circuits had inconsistent patterns of ordering arbitration.

These conflicting trends reflect emerging doctrinal differences. The forum substitution theory holds that employees cannot be compelled to pay more than

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court filing fees—a nominal sum. In sharp contrast, there is the comparative cost doctrine. According to this view, employees can be required to pay thousands of dollars in arbitration costs. Judges who endorse this theory compare these expenditures to fully litigated disputes, which average about $50,000 in total costs.

Precedents are in place to institutionalize these competing doctrines. A January 15, 2002 decision, EEOC v. Waffle House, Inc., created a narrow exception to the pro-arbitration rulings in Circuit City and Green Tree, but failed to resolve the developing conflict among the circuits concerning cost-shifting. Thus, a future Supreme Court may need to clarify these fundamental differences in alternative dispute resolution (ADR) perspectives, and judging from the bitter and frustrated tone in Justice Stevens's Circuit City dissent, we believe that four Justices await the opportunity to right some of the wrongs they perceive in mandatory employment arbitration. Our Article also provides important insights to practitioners who draft, implement, or resolve workplace disputes under mandatory arbitration agreements.

INTRODUCTION

> The Agreement thus placed Mr. Shankle between the proverbial rock and a hard place—it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum. Essentially, B-G Maintenance required Mr. Shankle to agree to mandatory arbitration as a term of continued employment, yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws.
>
> *Shankle v. B-G Maintenance Management of Colorado, Inc.*[1]

> Contrary to [Ms.] Rosenberg's arguments, arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court.
>
> *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[2]

STATEMENT OF RESEARCH QUESTION

This Article explores an important interface between public and private forms of workplace dispute resolution: money. Many firms now require that employees sign agreements to arbitrate, rather than litigate, a dispute arising out of employment. In some cases, these agreements also require employees to pay for part or all the costs of an arbitration. Having no recourse to sue, some employees are denied access to any dispute resolution forum because they cannot pay for arbitration. Courts have begun to scrutinize these barriers only recently.

1. 163 F.3d 1230, 1235 (10th Cir. 1999) (citation omitted).
2. 170 F.3d 1, 16 (1st Cir. 1999).

This current development is rooted in a long history. For over a century, the doctrine of employment-at-will[3] provided workers their main response to perceived wrongs committed by their employers—quitting their jobs.[4] However, from the mid-1960s through the present, fundamental changes in government regulation of employment altered this arrangement. Congress passed sweeping employment discrimination laws.[5] State courts developed common law exceptions to employment-at-will.[6] Today, workers have unprecedented employment rights. This expansion mitigated historic patterns of employment discrimination.[7] Progress came at a cost, however, to employers who were found liable for transgressing these rights,[8] and to others who successfully defended themselves in lawsuits.[9]

3. The doctrine was first recognized in HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). Comparing American and English law, Horace Wood wrote that:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. . . . [I]t is an indefinite hiring and is determinable at the will of either party, and in this respect there is no distinction between domestic and other servants.

Id. (footnote omitted). English law presumed that master and servant were bound to each other for one year, unless varied by contract. *Id.* § 134, at 271.

4. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY 21–29 (1970).

5. *See infra* notes 56 and 59.

6. Early cases include *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 925 (Ct. App. 1981), which found an implied oral contract exception to employment-at-will; *Petermann v. Teamsters Local 396*, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959), which found a public policy exception to employment-at-will; *Toussaint v. Blue Cross and Blue Shield of Michigan*, 292 N.W.2d 880 (Mich. 1980), which found a handbook exception to employment-at-will; and *Monge v. Beebe Rubber Co.*, 316 A.2d 549, 551 (N.H. 1974), which found a covenant of good faith dealing exception to employment-at-will.

7. In 1960, nonwhite male wage-earners earned only 59.9 percent of what their white counterparts earned, while the figure for nonwhite females was even lower, 50.3 percent. MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 224 tbl.3 (4th ed. 1998) (reporting median annual wage and salary incomes of white and nonwhite persons). By a generation later, these earnings differentials narrowed but remained evident. *See* U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS 204 tbl.37 (1997) (reporting that weekly earnings for full-time wage and salary workers in 1996 were $580 for white males, $412 for African American males, $356 for Hispanic males, $428 for white females, $362 for African American females, and $316 for Hispanic females).

8. *See infra* note 61.

9. For a federal judge's analysis of the irrational cost of litigation, see Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1645 (1985), in which Jon Newman reports that $1.56 was spent on litigation expenses for every $1.00 awarded to victims of asbestos exposure. A more specific estimate of the cost of employment litigation appears in *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 552 (4th Cir. 2001). "'[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve.'" *Id.* (quoting Hooters of America, Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999)).

While the U.S. Congress expanded employment rights by creating new causes of action, it devoted much less attention to the need for courts and judges to adjudicate these claims.[10] As courts grew more congested in the 1970s, Chief Justice Warren Burger advocated alternative dispute resolution (ADR) as a remedy.[11]

These historical trends reached a turning point on May 13, 1991, when the U.S. Supreme Court ruled in a landmark decision on employment arbitration in *Gilmer v. Interstate/Johnson Lane Corp.*[12] The Court held that an employee who had been required by his employer to sign an arbitration agreement was precluded from suing on his age discrimination claim. This encouraged privatization of workplace dispute resolution. The Court's recent ruling in *Circuit City Stores, Inc. v. Adams*[13] expanded *Gilmer*.

This is the setting for our empirical research question. As we detail below, employer substitution of arbitration for court adjudication has been controversial. We draw from a sample of 313 federal court decisions in which a party to a mandatory arbitration agreement tried to litigate a legal claim arising from the employment relationship. More specifically, we focus on sixty-two cases in which an employee opposed arbitration by arguing that the agreement made this private process too costly. In over 90 percent of these cases, employees sued under a federal employment discrimination statute.[14] By their view, not only were they were forced to waive their right to a low-cost trial, but they were also required to agree to a private ADR process that imposed prohibitive cost barriers to vindicating their employment rights.

The research we present shows a rapid growth in federal court decisions that compare the costs of workplace dispute resolution in trials and arbitrations.[15] Some courts refuse to enforce arbitration agreements because claim-

10. *See* Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A.J., Jan. 1993, at 52 ("Simply put, our federal court system is too small for the job."). *But cf.* Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 188 (1993) (arguing that adding more judges would impair the quality of decisionmaking by adding mediocre talent to the federal bench). In 1991, there were 828 federal judgeships. *Id.* at 187 & n.1 This number grew to only 846 by 1998. J. Harvie Wilkinson III, *We Don't Need More Federal Judges*, WALL ST. J., Feb. 9, 1998, at A19. While the number of judgeships has increased marginally, case filings have grown more rapidly. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL COURT MANAGEMENT STATISTICS, STATISTICS FOR FILINGS IN FEDERAL DISTRICT COURT, http://www.uscourts.gov/cgi-bin/cmsd2000.pl (showing 281,681 filings in 1995 and 310,346 filings in 2000) (last visited Sept. 15, 2002).

11. *See* Warren Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274, 276–77 (1982); *see also* Warren Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, 70 F.R.D. 83, 93–96 (1976).

12. 500 U.S. 20 (1991).

13. 532 U.S. 105 (2001).

14. *See infra* note 194 and accompanying text.

15. *See infra* tbls.1–3.

ants cannot afford to pay thousands of dollars to arbitrate their claims.[16] Such refusals seem inconsistent with *Gilmer*'s message to lower courts that there is a "'liberal federal policy favoring [enforcement of] arbitration agreements.'"[17] But most courts reject cost-shifting challenges and enforce mandatory arbitration agreements after comparing the expense of arbitration to litigation.[18] They order arbitration even when an employee has no ability to bargain over the choice of the arbitration service, the arbitrator, or related fees and expenses.

The Supreme Court's recent decision in *Green Tree Financial Corp.-Alabama v. Randolph*[19] shows that allocation of arbitration costs is an important public policy issue. The stakes involved in employment arbitration disputes are no less important than those which arose in the debtor-creditor relationship in *Green Tree*.[20] The strong increase in cost challenges to employment arbitration arrangements suggests that this phenomenon deserves further scrutiny. To the best of our knowledge, this is the first empirical study of federal court decisions in which employees asserted cost challenges to preclude enforcement of mandatory arbitration agreements.

ORGANIZATION OF THIS ARTICLE

Part I provides more detail about the expansion of employment rights. Congress wanted discrimination plaintiffs to have access to federal courts,

16. *See infra* note 313.

17. *Gilmer*, 500 U.S. at 25 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). In reaching this conclusion, the U.S. Supreme Court observed that the U.S. Congress intended the Federal Arbitration Act (FAA) "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Id.*

18. *See infra* Part V.C.

19. 531 U.S. 79 (2000).

20. There are notable similarities between the borrower in *Green Tree* and some employees in the cost-allocation cases we discuss below, such as *Shankle v. G-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230 (10th Cir. 1999). In both contexts, a large organization with superior bargaining power presented an individual with a contract. When Larketta Randolph arranged financing through a subsidiary of Green Tree Financial Corporation, she was compelled to waive her right to litigate any claim she might have under the federal Truth in Lending Act. *See infra* notes 120–122 and accompanying text. In addition, her contract required her to share the cost of the arbitration forum. *See infra* notes 143–145 and accompanying text. Like Randolph, Matthew Shankle was compelled by a more powerful organization—his employer—to waive his right to sue and submit any dispute to arbitration. *See infra* note 251 and accompanying text. In another similarity, this waiver involved potential adjudication of federal statutory rights. *Id.* Finally, like Randolph, the agreement over which he had no power to bargain required that he share in the obligation to pay forum fees with the larger organization. *See infra* note 252 and accompanying text.

even if they could not afford a lawyer.[21] Over time, employers found that employment lawsuits were costly.[22] Numerous firms now require their employees to sign pre-dispute arbitration agreements as a condition of new or continued employment, thus substituting arbitration for litigation of employment claims.[23]

The Supreme Court has begun to regulate this aspect of workplace dispute resolution. In *Gilmer*, the Court defended its preclusion of discrimination lawsuits by stating that arbitration is simply a change in dispute resolution forum.[24] We show that some courts sidestep *Gilmer*'s strong arbitration signal by interpreting this forum substitution theory to mean that mandatory arbitration cannot cost an employee more than court filing fees.[25] This development is important because some arbitration agreements impose unaffordable forum costs on lower-wage workers.

Part II.A examines cost elements in employment arbitrations.[26] These include fees for the arbitrator[27] and the arbitration service provider.[28] Attorney's fees, which are usually awarded to prevailing plaintiffs in court, are typically denied or limited in arbitration.[29] But courts are not cost-free alternatives to arbitration. While filing fees are minimal, the civil procedures that courts administer add considerable expense and delay.[30] In addition, only attorneys represent disputants before a court. Thus, representation costs may be higher than in arbitration. Pre-trial disputes over issues of jurisdiction and evidence compound the cost of litigation.[31]

Part II.B focuses on the Supreme Court's regulation of arbitration costs. The Court has consistently viewed arbitration as a cost-saving alternative to litigation. In *Green Tree*, the Court ruled that an arbitration agreement can be enforced against a person who is compelled to sign it, even when it shifts unspecified forum costs to her.[32] We explain *Green Tree*'s facts[33] and majority[34] and dissenting[35] opinions.

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21. *See infra* notes 56–58 and accompanying text.
22. *See infra* notes 61–62.
23. *See infra* note 63.
24. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).
25. *See infra* Part V.B.
26. *See infra* notes 102–114.
27. *See infra* notes 93–95.
28. *See infra* notes 96 and 98.
29. *See infra* notes 100, 212–219 and accompanying text.
30. *See infra* notes 103–104.
31. *See infra* note 108.
32. *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 79 (2000).
33. *See infra* notes 120–134.
34. *See infra* notes 135–150.
35. *See infra* notes 151–165.

Part III.A presents current research that informs our study. Many commentators criticize mandatory employment arbitration.[36] A current empirical study shows, however, that federal courts rule more often for employers in discrimination lawsuits than for other types of defendants in civil lawsuits.[37] This research implies that arbitration may be more advantageous than previously believed. Also, some studies make a good case for the use of well-designed employment arbitration systems.[38] Relying upon this background, we use Part III.B to describe our criteria for sampling federal court decisions[39] and online research methods.[40]

Part IV presents our empirical findings.[41] Some of these are surprising, given the usual pronouncements made by nearly all federal courts that judicial policy strongly favors enforcement of arbitration agreements. In our sample of sixty-two cost-challenge cases, 77 percent of trial courts ordered arbitration of an employment dispute, but this figure dropped to 50 percent in appellate cases. We also observed a split among the circuits. Some courts always or nearly always ordered arbitration,[42] others never or almost never ordered arbitration,[43] and some had mixed results.[44] Our research also measures the current spurt in these cases.[45]

Part V is a textual analysis of divergent approaches taken by appellate courts in cost-shifting cases. We define forum costs and representation costs.[46] In unusual cases in which employers pay all arbitration costs, we explain how courts view this as evidence of a contract.[47] In Part V.B, we examine conflicting approaches taken by appellate courts. In this part we focus on the three courts—the U.S. Courts of Appeals for the D.C.,[48] Tenth,[49] and Eleventh[50] Circuits—that have agreed with employee cost arguments and concomitantly upheld employee access to litigation. Part V.C discusses courts that reject employee cost challenges: the U.S. Courts of Appeals for the First[51] and Seventh[52] Circuits. Part VI.D discusses a recent

36. See *infra* notes 166–172.
37. See *infra* note 175.
38. See *infra* notes 173 and 174.
39. See *infra* notes 181–192.
40. See *infra* note 193 and accompanying text.
41. See *infra* notes 194–211 and accompanying text.
42. See *infra* notes 201–205.
43. See *infra* notes 206–208.
44. See *infra* notes 209–211.
45. See *infra* last paragraph of Part IV.
46. See *infra* notes 212–219.
47. See *infra* notes 220–227.
48. See *infra* notes 230–247.
49. See *infra* notes 248–264
50. See *infra* notes 265–281.
51. See *infra* notes 282–299.
52. See *infra* notes 300–303.

tack—a case-by-case approach to cost arguments—taken by the U.S. Courts of Appeals for the Third[53] and Fourth[54] Circuits.

We conclude with consideration of the implications of the growth in cost-shifting cases.[55] These decisions divide into two conflicting streams. First, courts order arbitration for plaintiffs who seem able to afford forum fees, even if these are expensive, but allow lower-wage workers to litigate their claims. Second, judicial decisions are motivated by conflicting cost theories, one of which narrowly compares arbitration forum fees to court filing fees, and a much more expansive conception that compares total arbitration costs to total litigation costs. These differences in analytic doctrines may prompt the Supreme Court to intercede with more clarity about the cost principles set forth in *Gilmer* and *Green Tree*.

I. The Growth of Mandatory Employment Arbitration

Congress was deeply concerned about ensuring access to courts for employment discrimination plaintiffs when it enacted Title VII of the Civil Rights Act of 1964 (Title VII).[56] Concerned about the connection between poverty and discrimination,[57] Congress created a monetary incentive for private attorneys to represent poor plaintiffs. Courts could order law-breaking employers to pay all plaintiff attorney's fees.[58]

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53. *See infra* notes 308–309.

54. *See infra* notes 304–307.

55. *See infra* notes 310–328.

56. *See* S. Rep. No. 88-872, pt. 1, at 11, 24 (1964); H.R. Rep. No. 88-914, pt. 1, at 18 (1963); *id.*, pt. 2, at 1–2. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2 (2000).

57. *See* Newman v. Piggie Park Enters., 390 U.S. 400, 401–02 (1968). This brief decision, involving race discrimination in serving restaurant customers under Title II of the 1964 Civil Rights Act, set forth the legal standard for awarding attorney's fees to prevailing plaintiffs under all titles of this landmark legislation:

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. . . . If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

Id. (footnote omitted).

58. The Civil Rights Act of 1964 accomplished this by providing fee awards to "prevailing parties" under 42 U.S.C. § 2000e-5(k) (2000). To effectuate the purposes of Title VII, a plaintiff "is the chosen instrument of Congress," a role underscored by the notion that "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418 (1978). The Supreme Court has stated that Congress provided for attorney's fees to prevailing plaintiffs in order "to facilitate

Since then, individual employment rights have grown rapidly on several fronts. Federal laws prohibit other forms of employment discrimination.[59] Disparate impact theory holds employers liable for employment practices that are neutral in form but discriminatory in effect when those actions have no business justification.[60] Pendent state law claims, particularly emotional distress and defamation, afford plaintiffs lucrative damages.[61] Large corporations with long records as equal opportunity employers pay hundreds of millions of dollars to settle class action discrimination lawsuits.[62]

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the bringing of discrimination complaints." N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980). The "legislative history and purpose of § 706(k)" of Title VII was to make "clear that one of Congress' primary purposes in enacting the section was to 'make it easier for a plaintiff of limited means to bring a meritorious suit.'" *Id.* (quoting *Christiansburg*, 434 U.S. at 420) (§ 706(k) of Title VII is codified at 42 U.S.C. § 2000e-5(k)).

There are occasions, however, when an employer prevails in a Title VII lawsuit and a court orders the employee to reimburse at least some of the employer's attorney's fees. *See, e.g.*, Spence v. Eastern Airlines, Inc., 547 F. Supp. 204, 206 (S.D.N.Y. 1982) (ordering flight attendant who earned $20,000 per year to pay $1500 in fees to Eastern Airlines, the prevailing party in a Title VII lawsuit, because her claims were groundless and litigation was continued after it was manifest that it had no factual substance); *see also* Harris v. Plastics Mfg., 617 F.2d 438, 440 (5th Cir. 1980) (finding no evidence to support plaintiff's claim of race discrimination); Kaimowitz v. Howard, 547 F. Supp. 1345, 1351 (E.D. Mich. 1982) (finding "no basis in fact" for claim of discrimination against ten individual defendants); Hill v. BASF Wyandotte Corp., 547 F. Supp. 348, 354 (E.D. Mich. 1982) (concluding that plaintiff produced no proof of race and sex discrimination claims); *Spence*, 547 F. Supp. at 205 (concluding that plaintiff's discrimination claim was "devoid of any evidential support" at trial); Hughes v. Defender Ass'n of Phila., 509 F. Supp. 140, 141 (E.D. Pa. 1981) (determining that there was "virtually no evidence" to support race discrimination claim); Dailey v. Dist. 65, UAW, 505 F. Supp. 1109, 1110 (S.D.N.Y. 1981) (holding that there was "not a scintilla of evidence" to support discrimination claim); Keown v. Storti, 456 F. Supp. 232, 242 (E.D. Pa. 1978).

59. *See, e.g.*, 8 U.S.C. § 1324b(a) (2000); 29 U.S.C. §§ 621–634 (2000); 29 U.S.C. § 1140 (2000); 42 U.S.C. §§ 12101–12213 (2000).

60. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that employment practices that are not justified by business necessity and that cause a "disparate impact" upon a protected group violates Title VII of the Civil Rights Act of 1964).

61. *See, e.g.*, Susan Hylton, *Couple Due $1.2 Million*, TULSA WORLD, Jan. 9, 2001, at 11 (reporting that a jury awarded an employee $2.7 million for wrongful discharge and intentional infliction of emotional distress arising out of pregnancy discrimination), *available at* 2001 WL 6915952; *Jury Finds Systems Manager Was Discrimination Target*, NAT'L L.J., July 2, 2001, at B7 (reporting that a jury, finding that an employer engaged in unlawful employment discrimination, awarded a manager $5 million in damages for emotional distress); Tom Troy, *Painter Wins $4M*, NAT'L L.J., Mar. 12, 2001, at A5 (reporting that an employee was awarded $1 million for past and future mental anguish stemming from racial harassment by a supervisor and coworkers).

62. *See* Kathy Bergen & Carol Kleiman, *Mitsubishi Will Pay $34 Million*, CHI. TRIB., June 12, 1998, at 1 (reporting that car-maker agreed to pay $34 million to settle class action lawsuit claiming sexual harassment); Jim Fitzgerald, *Anti-Bias Efforts, Payments to Blacks OKd*, CHI. SUN-TIMES, Nov. 16, 1996, at 1 (reporting that Texaco agreed to spend $176.1 million to settle a two-year-old race discrimination suit); *Record $300M Agreement in State Farm Sex-Bias Suit*, NEWSDAY, Jan. 20, 1988, at 45 (reporting that the insurance company agreed to pay 1100 female employees up to $300 million to settle a sex discrimination lawsuit); Henry Unger, *17 Coke Class-Action Parties Planning Individual Suits*, ATLANTA J.-CONST., July 7, 2001, at 3F (reporting that a judge approved Coca-

For many employers, this regulatory regime has grown to such threatening proportions that they have turned to private forms of dispute resolution—most notably, arbitration.[63] This substitution has stirred controversy, however, because employees are required to agree to arbitrate all legal claims that arise during their employment.[64] Because signing this agreement is regarded as a condition of employment, some employees feel coerced into waiving their rights.[65] Even worse, some employers create arbitration systems that are stacked in their favor. These can be so one-sided that courts find them egregiously unfair.[66]

Cola's $192.5 million settlement of a class action employment discrimination lawsuit), *available at* 2001 WL 3681156.

63. See Ken May, *Arbitration: Attorney Urges Employers to Adopt Mandatory Programs as Risk-Management*, DAILY LAB. REP., May 14, 2001, at A-5, for a report of an employment lawyer's advice that mandatory arbitration helps employers limit damages and eliminate class action lawsuits. The lawyer, David Copus, also noted that the biggest financial risk for employers in termination lawsuits—tort claims in which a single plaintiff can get millions of dollars—is eliminated by arbitration programs that cap damages. *Id.*

64. *See, e.g.*, Jones v. Fujitsu Network Communications, Inc., 81 F. Supp. 2d 688, 689–90 (N.D. Tex. 1999). In a memo to all employees concerning the company's arbitration policy, the president of Fujitsu explained that "participation in this program is mandatory for all employees—continuing and new, full time and part time, regular and temporary—and is a condition of employment." *Id.* at 692. The policy comprehensively covered most or all causes of action arising out of the employment relationship:

> Any dispute between an employee and [company] arising out of the employee's employment agreement with the Company or its termination, including without limitation any claim of wrongful termination, breach of implied contract, discrimination, unlawful harassment, including sexual harassment, breach of the covenant of good faith and fair dealing, violations of public policy, or any federal or state law, or as to all of the proceeding, any related claims of defamation, or intentional infliction of emotional distress, which are not resolved by the Company and employee through direct discussion or mediation, will be submitted exclusively to final arbitration in accordance with the Company's Arbitration Procedures.

Id. at 691–92; *see also* Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 200 (2d Cir. 1999). In *Desiderio*, Suntrust Bank offered to hire Susan Desiderio on the condition that she sign a pre-dispute arbitration agreement. *Id.* at 200–01. When she stated she would work only if the mandatory arbitration clause was removed, the National Association of Securities Dealers (NASD) informed Suntrust that she could not work as a registered securities broker. *Id.* Suntrust then revoked its offer of employment. *Id.*

65. See Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996), in which the author contends that "[m]any pre-hire arbitral agreements are blatant contracts of adhesion." *Id.* at 1036. Katherine Van Wezel Stone notes that at "the moment of hire, employees lack bargaining power and are needful of employment, so they frequently agree to such terms without giving them much thought." *Id.* Van Wezel Stone concludes that pre-hire arbitration agreements "discourage workers from asserting statutory rights" and "operate like the early nineteenth century 'yellow dog contracts'—contracts in which employees had to promise not to join a union in order to get a job. Today's 'yellow dog contracts' require employees to waive their statutory rights in order to obtain employment." *Id.* at 1037 (footnote omitted).

66. *See* Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999). In *Hooters of America*, the court refused to enforce a *Gilmer*-type employment arbitration agreement because the dispute resolution system imposed on the complainant by Hooters was "egregiously unfair." *Id.* at 938. The court reasoned:

In the past decade, the Supreme Court has approved the privatization of dispute resolution systems for employment discrimination claims, albeit in close votes and over strident dissents.[67] In *Gilmer*, the Supreme Court ruled that a securities broker's mandatory arbitration agreement with his employer precluded him from suing under the Age Discrimination in Employment Act (ADEA).[68] The Supreme Court recently extended *Gilmer* to cover almost all individual employment contracts in *Circuit City*.[69]

In each case, the employer successfully avoided a discrimination lawsuit by enforcing a pre-dispute arbitration agreement. *Gilmer* and *Circuit City* also continued the Supreme Court's modern rejection of judicial hostility to arbitration.[70] Taking advantage of *Gilmer*, employers have designed, im-

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> We hold that the promulgation of so many biased rules—especially the scheme whereby one party to the proceeding so controls the arbitral panel—breaches the contract entered into by the parties. . . . By creating a sham system unworthy even of the name of arbitration, Hooters completely failed in performing its contractual duty.

Id. at 940.

67. Consider, for example, Justice John Paul Stevens's sharply worded and disparaging criticism of Justice Anthony Kennedy's majority opinion in *Circuit City*:

> Playing ostrich to the substantial history behind the amendment . . . the Court reasons in a vacuum that "[i]f all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption" in § 1 "would be pointless." But contrary to the Court's suggestion, it is not "pointless" to adopt a clarifying amendment in order to eliminate opposition to a bill.

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 128 (2001) (Stevens, J., dissenting) (citation omitted). Continuing his verbal assault against the majority opinion, Justice Stevens said, "[W]hen its refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority." *Id.* at 132.

68. 29 U.S.C. §§ 621–634 (2000).

69. *Id.* at 109.

70. Supreme Court cases that approve the use of arbitration include *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constructions Corp.*, 460 U.S. 1 (1983); *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); *Prima Paint Corp. v. Flood and Conklin Manufacturing Co.*, 388 U.S. 395 (1967); and *Wilko v. Swan*, 346 U.S. 427 (1953).

A history of the jurisdictional rivalry between public courts and private tribunals appears in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007 (S.D.N.Y. 1915):

> It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in Scott v. Avery, 4 H.L. Cas.811)—"in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive every one of them of jurisdiction."
>
> "A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule than upon its excellence or reason."

Id. at 1007 (quoting Scott v. Avery, 4 H.L. Cas. 811 (source unavailable)).

posed, and implemented a variety of arbitration programs.[71] For instance, the American Arbitration Association (AAA) reports that "more than 500 employers and five million employees" rely upon the AAA's employment arbitration programs.[72]

In this context, our Article makes a new contribution to the intense debate about judicial regulation of employment arbitration. Many commentators have concluded that federal courts abdicate their role in ensuring that discrimination claimants are provided a just and fair dispute resolution process.[73] Certainly, employer behaviors described in numerous court decisions lend support to this view, and it is true that the Supreme Court sent lower courts two very strong signals to leave the arbitration system alone. But our research shows a newly unfolding story. A growing number of federal courts impose minimum standards of procedural fairness on the employment arbitration system. This evolving regulation stems from one or more of judicial perspectives described below.

A. Some Courts Refuse to Enforce Mandatory Arbitration Agreements That Impose Unfair Procedures on Employees

Although all federal courts are bound by the Supreme Court's broad ruling in *Circuit City* that mandatory arbitration agreements are enforceable under the Federal Arbitration Act (FAA),[74] the Supreme Court did not prohibit them from imposing due process standards in ADR proceedings. In

71. *See Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, DAILY LAB. REP., May 14, 1997, at A-4 (surveying 530 Fortune 1000 companies, and finding that 79 percent of employers use arbitration); *see also* Mei Bickner et al., *Developments in Employment Arbitration*, 52 DISP. RESOL. J. 8, 10 (reporting a massive increase in the use of arbitration in nonunion workplaces following the Supreme Court's *Gilmer* decision in 1991). But recently, the pioneering industry for employment arbitration has curtailed the use of mandatory employment arbitration. The Securities and Exchange Commission on June 29, 1998 approved a proposed rule change offered by the NASD that abolishes mandatory NASD arbitration of statutory employment discrimination claims. *See* Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, 63 Fed. Reg. 35,299 (June 29, 1998) (codified at 17 C.F.R. 240) (effective Jan. 1, 1999) [hereinafter Order Granting Approval]. In a separate action, on December 29, 1998, the SEC amended the New York Stock Exchange (NYSE) Rules 347 and 600 "to exclude claims of employment discrimination, including sexual harassment, in violation of a statute from arbitration unless the parties have agreed to arbitrate the claim after it has arisen." *See* Order Approving Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Arbitration Rules, SEC Release No. 34-40858, 64 Fed. Reg. 1051 (Jan. 7, 1999), *available at* 1999 WL 3315.

72. AMERICAN ARBITRATION ASSOCIATION, PROUD PAST, BOLD FUTURE, 2000 ANNUAL REPORT 28 (2001), *available at* http://www.adr.org/upload/LIVESITE/About/annual_reports/annual_report_2000.pdf. The American Arbitration Association (AAA) is one of many alternative dispute resolution (ADR) service providers in this market.

73. *See infra* notes 166–171.

74. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. § 1–16 (2000)).

fact, *Gilmer* opened the door to review concerns that the arbitration process unduly burdens a complainant's access to this alternative forum.

This is significant because some judges have encouraged ADR processes to avoid substantial cost barriers in litigating claims.[75] Empirical research supports judges who express concerns about access to their own courts. Employment discrimination plaintiffs have difficulty obtaining counsel.[76] If they succeed in persuading an attorney to represent them in federal court, they face crowded dockets with concomitant delays, and long odds of ever receiving a verdict on the merits of their claims.[77] These access problems are so ingrained that a decade ago Congress amended key employment discrimination laws to foster use of ADR methods, including arbitration.[78]

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75. *See* Bradford v. Rockwell Semiconductor Sys., Inc. , 238 F.3d 549, 552 (4th Cir. 2001). "'[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve.'" *Id.* (quoting Hooters of America, Inc. v. Phillips, 173 F.3d 933, 936 (4th Cir. 1999)). Also, an emerging trend that may promote wider accessibility to low-cost arbitration appears in *Scheehle v. Justices of Supreme Court of State of Arizona*, 257 F.3d 1082 (9th Cir. 2001). The U.S. Court of Appeals for the Ninth Circuit found no violation of the Fifth Amendment Takings Clause in Arizona state and county court arbitration rules that require attorneys to serve as arbitrators in civil cases. *Id.* at 1085. Attorneys are required to hear cases two days a year, with their pay capped at $75 per day. *Id.* at 1084.

76. One survey of attorneys who represent plaintiffs in employment discrimination disputes found that respondents accepted an average of 5 percent of the cases in which their legal services were requested. William M. Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RES. J., Oct.–Dec. 1995, at 40, 44.

77. Statistical measures of this complex problem are reported by Susan K. Gauvey, *ADR's Integration in the Federal Court System*, MD. B.J., Mar.–Apr. 2001, at 36, 41, in which the author reports that the rate of civil cases that go to trial in federal courts has steadily declined from 8.4 percent in 1975, to 4.7 percent in 1985, to 3.5 percent in 1995, to 2.3 percent as of June 30, 2000. A study of employment discrimination lawsuits in the federal courts found that the proportion disposed of by trial declined from 8 percent in 1990 to 5 percent in 1998. Marika F. X. Litras, *Bureau of Justice Statistics Report on Civil Rights, Complaints Filed in U.S. District Courts*, DAILY LAB. REP., Jan. 20, 2000, at E-10. This study also found that the median amount of time for processing an employment discrimination case from filing to trial verdict was eighteen months in 1998. *Id.* at E-15.

78. *See* Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (amending Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 1981–2000h-6); The Americans with Disabilities Act of 1990, Pub. L. 101-336 (codified as amended in scattered sections of 42 U.S.C.). Both laws state: "Where appropriate . . . the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." *Id.* at §§ 1981 note, 12212. Recent examples of ADR initiatives are The Civil Justice Reform Act, 28 U.S.C. § 471, 472–482 (2000), which authorizes more ADR programs to be administered by federal courts to alleviate problems with cost and delay, *id.* § 471; the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§651–58 (2000); and the Administrative Dispute Resolution Act, enacted in 1990, 5 U.S.C. §571–581, 583 (2000), which authorizes all federal agencies to implement ADR policies for internal disputes, *id.* § 571(a).

But the trend of promoting ADR in employment disputes may be subsiding. The Secretary of Labor under President Clinton proposed revised regulations that would forbid ERISA plans to use arbitration clauses. *See* Amendments to Employee Benefit Plan Claims Procedures Regulation, 65 Fed. Reg. 23,040, 23,041 (Apr. 24, 2000); Employment Retirement Income Security Act of 1974,

On the other hand, some judges are skeptical about the basic fairness of employment arbitration. They see "unconscionable" applications.[79] Judges with this view lost the threshold battle over the enforceability of mandatory employment arbitration agreements under the FAA. However, this clash in the judiciary is still unfolding. This Article shows that these judges are determining standards for judicially acceptable arbitration practices and procedures.

B. Some Courts Reject or Revise Mandatory Agreements That Shift Forum Costs to Employees

The Supreme Court's recent promotion of employment arbitration has been part of a broader and sustained trend to encourage disputants to use ADR methods. The Court recently considered an unresolved issue: Is a mandatory arbitration agreement enforceable when it leaves open the question of who bears the cost of this process? While the *Green Tree* Court ruled that a mandatory commercial arbitration agreement is enforceable, the Court also stated that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[80] This ambiguity has left lower courts to resolve specific issues, for example, under what conditions "fee splitting can render an arbitration agreement unenforceable where the arbitration fees and costs are so prohibitive as to effectively deny the employee access to the arbitral forum."[81] Our research shows that a growing number of appellate courts are divided on the cost-barrier issue.[82]

Rules and Regulations for Administration and Enforcement, Claims Procedure, 63 Fed. Reg. 48,390, 48,405 (Sept. 9, 1998).

79. *See, e.g.*, Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 940 (S.D. Tex. 2001). In one case, several employees who were injured in an explosion at an oil refinery filed a personal injury lawsuit, but their employer sought to enforce the arbitration agreement that they had signed. *Id.* at 938. Denying part of a motion to compel arbitration, the court noted:

> In this case, there is substantial evidence that the arbitration agreements are unconscionable. The arbitration agreements were written in English. Plaintiffs testify in sworn affidavits presented to the Court that they could not read English at the time that they signed the arbitration agreement. The affidavits also state that the documents were not translated for them and that they did not know the nature of the agreement into which they were entering. According to Plaintiffs, their superiors told them not to worry about it and to quickly sign the documents so they could get back to work.

Id.

80. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000).

81. Bradford v. Rockwell Semiconductor Sys., Inc. 238 F.3d 549, 553–54 (4th Cir. 2001) ("The question, therefore, is whether we should apply a case-by-case basis inquiry in making this determination, or whether we should apply a broad per se rule against all fee-splitting irrespective of the circumstances surrounding each individual's case.").

82. *Compare infra* Part V.B, *with* Part V.C.

C. Some Courts Reject or Revise Mandatory Agreements Because They View the ADR System as Flawed by Comparison to Voluntary Labor Arbitration

Mandatory employment arbitration differs from traditional labor arbitration.[83] Under the mature labor model, unions and employers willingly agree to arbitrate disputes.[84] Both sides have an equal voice in arbitrator selection and choose from a mutually acceptable neutral agency.[85] These referral organizations charge little or no fee to the disputants. Arbitrators on their rosters charged about $500–$600 per day in the years following *Gilmer*.[86] In short, voluntary labor arbitration is reasonably priced. Union-represented grievants are not required to pay any direct costs of arbitration, and unions have the same input as employers in the process.

The employment arbitration model differs in several respects. The employer or industry group establishes and maintains the arbitration process,[87]

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83. These differences are thoroughly considered in *Cole v. Burns International Securities Services*, 105 F.3d 1465, 1473–79 (D.C. Cir. 1992). Judge Harry T. Edwards stated:

> In order to properly consider the validity of the arbitration agreement in this case, it is crucial to emphasize the distinction between arbitration in the context of collective bargaining and mandatory arbitration of *statutory claims* outside of the context of a union contract. These are vastly different situations, involving very different considerations.

Id. at 1473.

84. In the labor-management system, employers have been the party reluctant to agree to arbitration. They have expressed concern that arbitrators favor unions. The views of an experienced management attorney appear in Tracy H. Ferguson, *An Appraisal of Arbitration: A Management Viewpoint*, 8 INDUS. & LAB. REL. REV. 79 (1954). "It is understandable that those who are experts in the field . . . would see the problems presented for arbitration in what has been called the 'enlightened' view, but which many employers feel is inimical, not alone to their own self-interests, but to . . . the general economy." *Id.* at 81. Nevertheless, only a handful of employers have resisted arbitration clauses in labor contracts, while most have agreed to arbitration procedures. *See* CHARACTERISTICS OF MAJOR COLLECTIVE BARGAINING AGREEMENTS JULY 1, 1976 (U.S. Bureau of Labor Statistics Bulletin No. 2013, 1979).

85. The Federal Mediation and Conciliation Service—a government agency—and the American Arbitration Association—a private entity—have been the largest providers of arbitration services for many years. *See* Peter Feuille & Michael H. LeRoy, *Grievance Arbitration Appeals*, ARB. J., Mar. 1990, at 35, 41 tbl.1 (showing that, for example, in 1987, 4145 awards and 5651 awards were issued respectively under the auspices of the FMCS and AAA).

86. FEDERAL MEDIATION AND CONCILIATION SERVICE, FORTY-EIGHTH ANNUAL REPORT, *available at* http://www.fmcs.gov/annuals/94-95rpt/default.htm (last visited on August 27, 2002). Average arbitrator per diem fees were $470.95 in 1991, $489.90 in 1992, $515.92 in 1993, $540.69 in 1994, and $560.10 in 1995. *See* "Arbitrator's Per Diem Rate Fees and Expenses Charged Fiscal Years 1991 Through 1995." The average number of per diem units charged by arbitrators ranged in this period from 3.70 to 3.94. *Id.* tbl. titled *Average Number of Days Charged by Arbitrator for Travel, Hearing and Study Time Based on Closed Arbitration Award Cases Sampled for Fiscal Years 1991 Through 1995*. Average total fees were $1975.82 in 1991, $2110.34 in 1992, $2222.38 in 1993, $2351.91 in 1994, and $2458.95 in 1995. *Id.*

87. *See* Order Granting Approval, *supra* note 71, at 1053.

or the employer contracts with a private dispute resolution service.[88] The former has potential for bias. The latter has been criticized for aligning the financial interests of employers with their dispute resolution service providers, because ADR providers would not want the arbitrators they select to impose costly awards on their clients.[89] In addition, the method of selecting arbitrators may tie these neutrals too closely to an industry. Finally, organizations that provide employment arbitration services may impose much higher costs on disputants compared to the labor arbitration model. Sometimes these arbitrators charge several thousand dollars a day.[90] Courts question the fairness of employment arbitration, especially when a complainant cannot afford this ADR method and is required to waive her right to litigate a claim.

II. THE ALLOCATION OF COSTS IN ARBITRATION

A. Elements of Cost in Arbitrating Employment Disputes

Cost-saving is a key benefit of arbitration.[91] This perceived advantage derives from a comparison to litigation.[92] It is important to realize, however,

88. *See, e.g.*, Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306, 309 (6th Cir. 2000) (involving an employer who selected Employment Dispute Services, Inc. (EDSI) as an arbitration service).

89. *See id.* at 314 (stating that "we have concerns with both the fee structure and potential bias of EDSI's arbitral forum").

90. *See, e.g.*, Rick Brundrett, *Mediation, Arbitration Keep Cases Out of Court*, KNIGHT-RIDDER TRIB. BUS. NEWS, Mar. 1, 1999, (stating that court-appointed arbitrators in South Carolina charge $200 per hour), 1999 WL 13721987; Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, WALL ST. J., July 26, 1996, at A1 (showing that fees of $500 or $600 per hour are not uncommon); Ted Rohrlich, *Growing Use of Private Judges Raises Questions of Fairness Court*, L.A. TIMES, Dec. 26, 2000, at A1 (reporting that arbitrators charge between $275 and $600 per hour, thereby denying access to arbitration for poor litigants); *see also* Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 410 n.189 (1996) (noting that an arbitrator charged a $9000 fee in a dispute that resulted in a $15,000 award).

Some court opinions also reveal the growing expense of arbitration fees. *See* Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234–35 (10th Cir. 1999) (finding an arbitration agreement unenforceable under the FAA because it required the employee to pay half of the arbitrator's fees, estimated at $1875–$5000); LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2, 4 (D.D.C. 2000) (requiring the plaintiff to pay $8376 in arbitration fees); Davis v. LPK Corp., No. C-97-3998, 1998 WL 210262 (N.D. Cal. Mar. 10, 1998) (denying enforcement of an arbitration agreement that would obligate the Title VII plaintiff to pay one-half of the arbitration fee, estimated to be $2000 per day).

91. *See* FRANK ELKOURI, ELKOURI & ELKOURI: HOW ARBITRATION WORKS 24 (Marlin M. Volz & Edward P. Goggin eds., 5th ed., 1997) (stating that the "total cost of arbitration can be and often is considerably less than taking the dispute to court").

92. JOHN S. MURRAY ET AL., PROCESSES OF DISPUTE RESOLUTION 504 (2nd ed. 1996) ("Any savings in time and in related pre-and post-trial work are likely to be reflected in savings in expense . . . .").

that dispute resolution process costs are bundled in a complex relationship. Thus, a direct comparison to forum costs may be misleading.

For example, fees charged by the arbitrator to the disputants is a major component of ADR costs. Trials have an advantage over arbitrations because litigants do not owe the judge a fee.[93] The average per diem fee charged by labor arbitrators has risen modestly to about $700,[94] compared to $2000 per diem fees for employment arbitrators.[95] So at first blush, individual employment arbitration is not cost-effective compared to courts.

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93. The most informative analysis of this appears in *Cole v. Burns International Securities Services*, 105 F.3d 1465, 1484 (D.C. Cir. 1997). This influential court did not provide an estimate of direct court costs in filing a lawsuit, but implied a functional limit in this cost-analysis framework:

> There is no doubt that parties appearing in federal court may be required to assume the cost of filing fees and other administrative expenses, so any reasonable costs of this sort that accompany arbitration are not problematic. However, if an employee like Cole is required to pay arbitrators' fees ranging from $500 to $1,000 per day or more, in addition to administrative and attorney's fees, is it likely that he will be able to pursue his statutory claims? We think not.

Id. (citation omitted).

94. The American Arbitration Association's most recently published estimate is that its average daily fee for a labor arbitrator is $700. Kenneth May, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, DAILY LAB. REP., Feb. 15, 1996, at A-12.

95. Several courts report that employment discrimination disputes arbitrated under the American Arbitration Association rules provide for payment of $2000 per day for arbitrator fees. *See, e.g.*, Solieri v. Ferrovie Dello Stato Spa, No. 97-Civ.-8844, 1998 WL 419013, at *4 (S.D.N.Y. July 22, 1998).

There is no definitive explanation for the disparity in fees charged by labor arbitrators and employment arbitrators. We also note that some arbitrators serve in both capacities, and therefore charge very different fees that are tied to the distinct markets for these services. One possible explanation is that dispute resolution agencies impose their own fees on arbitrators, which in the case of employment arbitration may be passed on in the form of higher fees to the disputing parties. To illustrate, Judicial Arbitration and Mediation Services, Inc. (JAMS) is a nationally recognized dispute resolution provider that offers employment arbitration, as distinguished from labor arbitration. *See* JAMS EMPLOYMENT ARBITRATION RULES AND PROCEDURES, *at* http://www.jamsadr.com/employment_arb.asp (last revised Sept. 2002). A published report indicates that some "arbitrators . . . have left or bypassed JAMS . . . because JAMS generally takes too much of their fees—a whopping 50%." Kathryn Kranhold, *Solo Legal Arbitrators Put Longtime Leader in a Jam*, WALL ST. J. Nov. 13, 1996, at A2. It is plausible that the much higher fee for employment arbitrators reflects the substantial sum that the arbitrator owes to the referral agency. In contrast, labor arbitrators are presently assessed annual listing fees that range from $100 to $300 by the Federal Mediation and Conciliation Service and the American Arbitration Association. Memorandum from Federal Mediation and Conciliation Service, to Arbitrators on the FMCS Roster (July 2002) (on file with author).

A second explanation is that the higher fees for employment arbitrators originate in the securities industry. One of the criticisms of NASD arbitration is that many arbitrators are industry professionals who have no independent specialization as dispute resolution neutrals. *See* U.S. GEN. ACCOUNTING OFFICE, HEALTH, EDUCATION, AND HUMAN SERVS. DIV., REPORT TO THE CHAIRMAN OF THE SUBCOMM. ON TELECOMM. AND FIN. COMM. ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES, 103RD CONG., EMPLOYMENT DISCRIMINATION—HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES (GAO Doc. No. GAO/HEHS 94-17 1994), *at* 1994 WL 836270 (reporting that only "[a]bout 58 percent of all arbitrators making up the NYSE pool are

This impression is strengthened by the fact that nonprofit organizations such as the American Arbitration Association now charge forum fees. Depending on which AAA procedures are used, these fees are moderate or substantial.[96] In addition, the market for arbitration service providers has grown rapidly and is served primarily by private agencies.[97] Regardless of their nonprofit or for-profit status, they charge whatever fees the market will bear.[98] In sum, the charging of forum fees by service providers further undermines the cost advantage of arbitration.

Mandatory arbitration can result in another cost for complainants: attorney's fees. While a variety of antidiscrimination statutes provide complainants with a remedy for attorney's fees, arbitrators often deny the remedy to complainants.[99] In some cases employees prevail in the award but likely owe more to their attorneys than the sum of their damages, and thus potentially gain nothing from arbitrating—and winning—a meritorious claim.[100]

The cost picture is more complicated, however. Even in the case of ADR services that charge forum fees of several thousands of dollars,[101] arbitrators still may be less expensive than courts. This depends on how arbitration costs are calculated. While courts are virtually cost-free in terms of direct fees, they impose large process costs. Formal rules of civil procedure require legal representation throughout court proceedings, to the point of making litigation costs unacceptably expensive even for large employers.[102]

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public arbitrators," while the balance are "industry arbitrators" who have significant experience and standing in their financial profession). The per diem fee of $2000 for these arbitrators may reflect the daily compensation for securities professionals who are based in New York City, where this arbitration process is administered.

96. *Compare*, *Cole*, 105 F.3d at 1480 (noting that Rule 35 of the American Arbitration Association's National Rules for the Resolution of Employment Disputes imposes a $500 filing fee, to be advanced by the initiating party, and an administrative fee of $150 per hearing day), *with* Giordano v. Pep Boys—Manny, Moe & Jack, Inc., No. Civ. A. 99-1281, 2001 WL 484360, at *6 (E.D. Pa. Mar. 29, 2001) (estimating that plaintiff's "upfront" costs to AAA would range from $600 to $900 for one-half of the arbitrator's fee, plus filing fees, and "would function as a barrier to plaintiff's pursuit of arbitration of his claims").

97. An informative account appears in Johanna Harrington, Comment, *To Litigate or Arbitrate? No Matter—The Credit Card Industry Is Deciding for You*, 2001 J. DISP. RESOL. 101, 106 nn.23–26.

98. *See, e.g.*, Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1232 (10th Cir. 1999). In *Shankle*, the employer imposed a mandatory arbitration agreement that referred disputes to The Judicial Arbiter Group. *Id.* Parties were required to pay $250 per each hour of arbitrator time and $125 per hour of the arbitrator's travel time. *Id.* The service provider also required parties to pay a $6000 deposit. *Id.*

99. *See, e.g.*, DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459, 460 (S.D.N.Y. 1997).

100. *See infra* notes 212–217 and accompanying text.

101. *See, e.g.*, Gardner v. Benefits Communications Corp., 175 F.3d 155, 157 (D.C. Cir. 1999) (reporting that a discrimination complainant was charged $3000 in forum fees for arbitration hearings that lasted six days).

102. *See* ALTERNATIVE DISPUTE RESOLUTION—EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE 50 (GAO doc. No. GAO/GGD 97-157, Aug. 12, 1997), *available at* 1997 WL 709361

Because many civil trials are preceded by lengthy discovery, this phase can be very expensive.[103] If a plaintiff tries her case, she must be represented by a licensed attorney. This adds to the dispute resolution cost.

By comparison, procedural informality usually makes arbitration less expensive than trial.[104] Labor arbitration provides useful examples, especially because the employment rights model borrows from it. Attorney representation is not required and is occasionally prohibited by contract.[105] Management is often represented by a lawyer, and the union by a nonlawyer staff representative or elected official.[106] The fact that this arrangement is common suggests that unions do not feel that their interests are compromised by having nonlawyer advocates. This is probably true because arbitration hearings have permissive rules of evidence.[107]

Arbitration has other significant cost advantages. Many employment disputes involve preemption issues. To illustrate, in employee benefits lawsuits, plaintiffs frequently seek relief in state court, where theories of employer liability are broad and lucrative damages are available.[108] The first round in these lawsuits often concerns the employer's motion to remove to

(explaining that one of the surveyed employers who adopted a mandatory arbitration system was motivated to do so after spending over $1,000,000 to defend itself in a discrimination suit).

103. *See* E. Norman Veasey & Michael P. Dooley, *The Role of Corporate Litigation in the Twenty-First Century*, 25 DEL. J. CORP. L. 131, 150 (2000) ("[T]here are clear cost advantages to arbitration in view of lower discovery costs . . . ."); Gerald Walpin, *America's Failing Civil Justice System: Can We Learn from Other Countries?*, 41 N.Y.L. SCH. L. REV. 647, 649 (1997) (noting that pretrial discovery is the main component of litigation, accounting for as much as 80 percent of litigation costs).

104. *See, e.g.*, Mark L. McAlpine, *ADR in Large and Complex Cases*, 72 MICH. B.J. 1054, 1054 (1993). Mark McAlpine provides this illustration:

> For instance, empowering the arbitrators to summarily rule on dispositive issues, while leading to narrower and more streamlined hearings, may also facilitate the settlement process. This is particularly true where the interpretation of a contract or a ruling on a point of law stands in the way of substantive settlement discussions, or prevents one party from agreeing to arbitration in the first place. In these situations, the party who perceives that there is a chance to obtain a dismissal of all or part of the case may prefer litigation over arbitration. This concern can be addressed by an agreement to arbitrate limited issues or by providing for dispositive motions as a way of resolving the dispute or setting the parameters for later settlement discussions. This also allows threshold issues to be addressed without the cost of preparing for a hearing on all of the issues in dispute, thus blending cost advantages of arbitration with the potential efficiencies of the summary disposition characteristics of litigation.

Id.

105. *See, e.g.*, National Bituminous Coal Wage Agreement of 1993, Art. XXIII, Section (h) (Exclusion of Legal Counsel) (copy on file with authors).

106. *See* ELKOURI, *supra* note 91, at 336–37 ("[R]epresentatives such as higher union or company officials may be used to present the case at the arbitration stage.").

107. *See* MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 50 (1980) ("[T]he rules of evidence are not strictly followed . . . .").

108. See ROTHSTEIN & LIEBMAN, *supra* note 7, at 504, to explain why employers seek to avoid state court benefits-denial lawsuits:

federal court.[109] Naturally, this adds time and cost to the dispute resolution process.[110] Arbitration avoids this encumbrance and likely adds to its cost advantages by allowing disputants to schedule a hearing on the merits sooner than a trial.

Apart from cost-saving features, employment arbitration is potentially advantageous to individual claimants when the rules expressly provide for minimum standards of procedural fairness. Judicial Arbitration and Mediation Services, Inc. (JAMS), a major provider of employment arbitration services, recently revised its policies to ensure that cost is not a barrier.[111] It also adopted a policy to allow arbitrators to award attorney's fees to prevailing complainants.[112] AAA procedures provide for the possibility of relieving

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> ERISA preemption defenses, when available, present extraordinary advantages: (1) the complete bar to all state law claims, including "bad faith" conduct, (2) certain "deep pocket" defendants, such as the plan sponsor and claims review agents, cannot even be sued under federal law, (3) the participant has no cause of action for delay in processing claims, (4) the participant cannot recover extracontractual compensatory damages or punitive damages, (5) the participant must generally exhaust administrative remedies as a prerequisite to filing suit, (6) the defendants have a statutory right to remove cases to federal court, (7) ERISA bars a jury trial, (8) the courts do not conduct de novo hearings on a participant's [claim] for benefits, and instead uphold the fiduciary's decision unless "arbitrary or capricious," and (9) ERISA permits an award of attorney's fees and costs.

Id. (citation omitted).

109. *See, e.g.*, Kuhl v. Lincoln Nat'l Health Plan of Kan. City, 999 F.2d 298 (8th Cir. 1993). In *Kuhl*, a truck driver's widow sued her deceased husband's health insurance plan for medical malpractice when the plan's apparent delay in pre-certifying heart surgery left the employee too debilitated for surgery, thereby hastening his death. *Id.* at 300. The lawsuit, filed in the Circuit Court of Jackson County, Missouri, asserted claims for medical malpractice, emotional distress, tortious interference with the decedent's right to contract for medical care, and breach of contract. *Id.* The employer successfully removed the matter to federal court under ERISA, thus extinguishing the state causes of action. *Id.* at 300–01.

110. *See id.* at 300–01 (recounting lengthy procedural wrangling). After the Kuhls filed suit, the employer moved for removal, which was followed by the Kuhls' motion for remand to argue that ERISA did not apply. The employer's plan opposed the motion to remand and filed a motion for summary judgment. The Kuhls then moved to amend the judgment and replead their complaint to include a cause of action under ERISA. After filing a second suit in the district court alleging that Lincoln National breached its fiduciary duty under ERISA, the court dismissed the matter, concluding that the state law claims could not be recharacterized as ERISA claims. *Id.*

111. *See* JUDICIAL ARBITRATION AND MEDIATION SERVICES, INC., JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS (2002), *at* http://www.jamsadr.com/employmentArb_min_stds.asp#two (revised Sept. 10, 2002). JAMS Policy on Employment Arbitration Minimum Standards on Procedural Fairness provides:

> Standard No. 6: Costs and Location Must Not Preclude Access to Arbitration.
>
> An employee's access to arbitration must not be precluded by the employee's inability to pay any costs or by the location of the arbitration. The only fee that an employee may be required to pay is JAMS' Case Management Fee.
>
> *Comment:* JAMS does not preclude an employee from contributing to administrative and arbitrator fees and expenses. JAMS will not disclose to the arbitrator any information about the fee arrangements with the employer.

Id.

112. *Id.* at Standard No. 1. The appropriate portion provides:

individuals of most arbitration costs, but only "in the event of extreme hardship."[113]

In sum, the available evidence supports several conclusions about the comparative costs of arbitration and litigation. First, on a total cost basis, the average employment arbitration process costs less than the average employment discrimination lawsuit.[114] Second, however, employment arbitration is not inexpensive. Its total cost depends on many factors: the arbitrator's hourly rate, the duration of the process, attorney's fees and expenses, and the complexity and scope of the dispute. Under some circumstances, the transaction costs of obtaining an arbitration award may equal or

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All remedies that would be available under the applicable law in a court proceeding, including attorneys fees and exemplary damages, must remain available in the arbitration. Post-arbitration remedies, if any, must remain available to an employee.

Comment: This standard does not make any change in the remedies available. Its purpose is to ensure that the remedies available in arbitrations and court proceedings are the same. JAMS does not object if an employer chooses to limit its own post-arbitration remedies.

Id.

113. *See* AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR RESOLUTION OF EMPLOYMENT DISPUTES, *at* http://www.adr.org/index2.1.jsp?JSPssid=15747&JSPsrc=upload\LIVESITE\Rules_Procedures\National_International\. .\. .\focusArea\employment\employment_rules2.html (as amended and effective on Jan. 1, 2001). Rule 38, Administrative Fees, states:

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees to compensate it for the cost of providing administrative services. The AAA administrative fee schedule in effect at the time the demand for arbitration or submission agreement is received shall be applicable.

The filing fee shall be advanced by the initiating party or parties, subject to final apportionment by the arbitrator in the award.

The AAA may, in the event of extreme hardship on any party, defer or reduce the administrative fees.

Id.

Rule 39 (Expenses) continues:

Unless otherwise agreed by the parties, the expenses of witnesses for either side shall be borne by the party producing such witnesses. All expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the costs relating to any proof produced at the direction of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator directs otherwise in the award.

The arbitrator's compensation shall be borne equally by the parties unless they agree otherwise, or unless the law provides otherwise.

Id.

114. Most of the cost advantages of arbitration stem from lower billings by attorneys. For example, in a 1994 survey, attorneys who represent employers estimated that their average fee to litigate an employment discrimination lawsuit was $96,000, compared to $20,000 to defend their clients in an arbitration. *See* Howard, *supra* note 76, at 44. This study did not report equivalent dollar cost figures reported by plaintiff lawyers because they customarily work for a contingency fee. *Id.* In arbitration, the disputants must pay forum and arbitrator fees, which can total several thousand dollars, whereas lawsuit filing fees are nominal and judicial services are a public good. However, forum and arbitrator fees do not come close to reaching the amount of attorney's fees in litigation.

even exceed the cost of a verdict. Third, in cases in which employment arbitration mimics labor arbitration by providing for equal cost-sharing by the disputants, a pseudo-equality results because individuals, unlike labor unions, are less able to bear these costs.

B. The Supreme Court's Regulation of Arbitration Costs

Congress justified enactment of the FAA in 1925 by stating that arbitration allows disputants to avoid "the costliness and delays of litigation."[115] In rulings to uphold arbitration, the Supreme Court has repeatedly invoked this rationale.[116] Congress has also reaffirmed its commitment to the cost-saving advantages of arbitration.[117] Many experts agree that arbitration costs less than litigation.[118]

Against this backdrop, the Supreme Court ruled in *Green Tree Financial Corp.-Ala. v. Randolph*[119] on a consumer version of arbitration that can cost more than litigation. To purchase a mobile home, Larketta Randolph arranged financing through a subsidiary of Green Tree Financial Corporation.[120] She signed a retail installment contract that contained an insurance provision to protect the lienholder against the costs of repossession if she

115. S. REP. NO. 68-536, at 3 (1924) (stating that the FAA, by avoiding "the delay and expense of litigation" would appeal "to big business and little businesses . . . corporate interests [and] . . . individuals"); H.R. REP. NO. 68-96, at 2 (1924) (showing that Congress believed the procedural simplicity of arbitration would "reduc[e] technicality, delay, and [keep] expense to a minimum and at the same time safeguard[ ] the rights of the parties").

116. *See, e.g.*, Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("Congress, when enacting [the FAA], had the needs of consumers, as well as others, in mind.").

117. *See* H.R. REP. NO. 97-542, at 13 (1982). A growing number of arbitrations have been costly and protracted. Still, the following benefits of arbitration are not widely challenged:

> The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices . . . .

Id.

118. *See* Stephen B. Goldberg et al., *Litigation, Arbitration or Mediation: A Dialogue*, 75 A.B.A. J. 70, 72 (1989). Stephen Goldberg explains how the efficiency of arbitration reduces dispute costs compared to litigation:

> My advice on this point would be to provide for only as much discovery as you absolutely need to prepare for trial. This is one of the great advantages of arbitration. If we were to go through normal court discovery in this case, say four or five depositions, plus the five or so days you've told me it should take to try it, that could cost Jones as much as $50,000. That just doesn't make sense in a case with a maximum recovery of $75,000.

Id.

119. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

120. *Id.* at 82.

defaulted.[121] In addition, the contract also stated that all disputes relating to the contract would be resolved by binding arbitration.[122]

Nevertheless, Randolph sued Green Tree under the federal Truth in Lending Act (TILA).[123] She alleged that the lender did not comply with TILA's requirement to disclose the insurance requirement as a finance charge.[124] Later, she amended her complaint to add a claim that Green Tree violated the Equal Credit Opportunity Act by requiring her to arbitrate her statutory causes of action.[125]

Green Tree moved to compel arbitration.[126] The district court granted this motion, and also denied Randolph's motion to certify a class of similarly situated plaintiffs.[127] Randolph requested reconsideration, contending that she could not afford arbitration and would have to forgo her legal claims.[128] After the court denied her request, she appealed.[129]

The court of appeals first decided that the district court's order was final.[130] Thus, the appellate court ruled that it had jurisdiction over Randolph's arbitrability appeal.[131] Analyzing Randolph's claim as it arose under the FAA, the appeals court concluded that the arbitration agreement failed to provide her minimum guarantees to vindicate her rights under TILA.[132] This conclusion rested upon the court's observation that the arbitration agreement was silent about the cost of arbitration (for example, payment of filing fees, arbitrators' costs, and other expenses).[133] Thus, the court held that when "steep" arbitration costs posed a risk of preventing a party from vindicating a statutory right, the arbitration agreement was unenforceable.[134]

After affirming the appeals court's first ruling that it had jurisdiction over Randolph's claim,[135] the Supreme Court, in a split decision,[136] ruled that "an arbitration agreement's silence with respect to such matters does

121. *Id.*
122. *Id.* at 82–83.
123. Truth in Lending Act, 15 U.S.C. §§ 1601–1667f (2000); *Green Tree*, 531 U.S. at 83.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.* at 83–84.
129. *Id.* at 84.
130. *Id.*
131. *See id.*
132. *Id.*
133. *See id.*
134. *Id.*
135. *See id.*
136. The Court was unanimous in holding that the district court order compelling arbitration was final for purposes of establishing appellate jurisdiction. *Id.* at 89. However, on the substantive issue of cost as a potential barrier to vindicating statutory rights, the Court split in a 5-4 vote. *See id.* at 81, 92–97.

not render the agreement unenforceable."[137] The majority cited the FAA's purpose "'to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts.'"[138] They underscored their support for arbitration by rejecting "generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'"[139] By their reasoning, "even claims arising under a statute designed to further important social policies may be arbitrated because 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum,' the statute serves its functions."[140]

Turning to the facts, the majority noted that Randolph and Green Tree agreed to arbitrate all statutory rights related to their contract.[141] The opinion added that Congress did not intend in TILA to preclude a waiver of judicial remedies.[142] As for whether the agreement's silence on costs and fees would make arbitration of her TILA claims prohibitively expensive, the Court stated:

> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum. But the record does not show that Randolph will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter.[143]

In concluding that she could not afford arbitration, Randolph had estimated the cost of her arbitration.[144] The majority dismissed this calculation, however, as "unsupported statements [that] provide no basis on which to ascertain the actual costs and fees to which she would be subject in arbitration."[145]

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137. *Id.* at 82.

138. *Id.* at 89 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991)).

139. *Id.* at 89–90 (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989)).

140. *Id.* at 90 (quoting *Gilmer*, 500 U.S. at 28) (citation omitted).

141. *Id.*

142. *See id.*

143. *Id.*

144. *Id.* at 90, 91 n.6. The agreement did not specify which arbitration provider or arbitrator would resolve their dispute. In her motion for reconsideration before the district court, Randolph therefore assumed that arbitration would occur under auspices of the commercial proceedings administered by the American Arbitration Association. Because the amount in dispute was under $10,000, AAA would impose a filing fee of $500 for her claim, plus the cost of the arbitrator and administrative fees. Her motion also contained an exhibit showing that a typical commercial arbitration fee is $700 per day. Using these figures, she contended that she could not afford to arbitrate her TILA claim. *Id.*

145. *Id.* at 91 n.6.

They returned to an evidentiary matter in arbitration challenges, repeating *Gilmer*'s view that "the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue."[146] By analogy, they extended this logic to arbitrability challenges that claim cost as a prohibitive barrier to asserting statutory rights: "Similarly, we believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."[147] On this point, the Court concluded that Randolph's proof was too speculative.[148] They also concluded, however, that "[h]ow detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is a matter we need not discuss."[149] Because the U.S. Court of Appeals for the Eleventh Circuit ruled on such indefinite cost information, the *Green Tree* majority reversed the ruling that arbitration would deprive Randolph of an opportunity to pursue her statutory claims.[150]

Justice Ruth Bader Ginsburg limited her dissent to the issue of cost-shifting.[151] She preferred a middle ground between the majority and the Eleventh Circuit. She would not have made a definitive ruling as the majority did,[152] but would instead have vacated the Eleventh Circuit's ruling that the arbitration clause was unenforceable and remanded for more evidence concerning Randolph's access to arbitration.[153]

She believed that the majority placed an unreasonable evidentiary burden on plaintiffs: "[T]he Court requires a party, situated as Randolph is, either to submit to arbitration without knowing who will pay for the forum or to demonstrate up front that the costs, if imposed on her, will be prohibitive."[154] She criticized this approach because it overlooked separate inquiries that courts should make in determining whether arbitration can properly substitute for litigation: "First, is the arbitral forum *adequate* to adjudicate the claims at issue; second, is that forum *accessible* to the party resisting arbitration."[155] The problem is that a party resisting arbitration already bears the burden to prove the inadequacy of the arbitral forum to adjudicate a statu-

146. *Id.* at 92 (citations omitted).
147. *Id.*
148. *See id.*
149. *Id.*
150. *Id.*
151. *See id.* at 92–93 (Ginsburg, J., concurring in part and dissenting in part).
152. *See id.* at 93.
153. *See id.*
154. *Id.*
155. *Id.*

tory claim.[156] She reasoned: "It does not follow like the night the day, however, that the party resisting arbitration should also bear the burden of showing that the arbitral forum would be financially inaccessible to her."[157]

She emphasized the control that the party imposing arbitration has over the party wanting to sue. The arbitration agreement that Randolph signed was part of a take-it-or-leave-it form contract. This made Randolph's situation different from Robert Gilmer's, even though he, too, was compelled to sign an arbitration agreement. Justice Ginsburg noted that "who pays" was not an issue in Gilmer's case, because he and others like him were not required under New York Stock Exchange rules to pay for the arbitrator. Relying on an earlier analysis of the securities arbitration system, she observed:

> [I]n *Gilmer*, the Supreme Court endorsed a system of arbitration in which employees are not required to pay for the arbitrator assigned to hear their statutory claims. There is no reason to think that the Court would have approved arbitration in the absence of this arrangement. Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case.[158]

In contrast, Randolph's arbitration agreement was too vague to prevent abuse or mischief. It did not specify forum costs or predetermine each party's responsibility for arbitration expenses. Thus, Justice Ginsburg believed that the majority unfairly made Randolph bear the burden of proving that the arbitration system was too expensive for her.[159] Green Tree, as the drafter of the contract, should have been more specific.[160] If the process had been governed by the American Arbitration Association's Consumer Arbitration Rules, Randolph would have known that she owed no filing fee and only $125 of the arbitrator's fees.[161] The drafting party would be required to pay all other forum fees and costs.[162]

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156. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20 (1991) (noting that ADEA claims are amenable to arbitration); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 221 (1987) (holding that claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and Securities Exchange Act are amenable to arbitration). Justice Ruth Bader Ginsburg noted that these decisions hold that "the party resisting arbitration bears the burden of establishing the inadequacy of the arbitral forum for adjudication of claims of a particular genre." *Green Tree*, 531 U.S. at 94 (Ginsburg, J., concurring in part and dissenting in part).

157. *Green Tree*, 531 U.S. at 94.

158. *Id.* (quoting Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1484 (D.C. Cir. 1997)) (alteration in original).

159. *See id.* at 96.

160. *See id.* at 95.

161. *See id.*

162. *See id.*

Justice Ginsburg also thought the majority ruling was unfair to Randolph because Green Tree, "[a]s a repeat player in the arbitration required by its form contract, . . . has superior information about the cost to consumers of pursuing arbitration."[163] She concluded that "it is hardly clear that Randolph should bear the burden of demonstrating up front the arbitral forum's inaccessibility, or that she should be required to submit to arbitration without knowing how much it will cost her."[164]

Finally, the dissenting opinion also noted that the majority ruling did not prevent Randolph from returning to court after the arbitration to challenge process costs. But doing so would undermine the advantages of arbitration by creating an additional basis for appealing an arbitration award or ruling: "Neither certainty nor judicial economy is served by leaving that issue unsettled until the end of the line."[165]

In sum, the disputed consumer arbitration process in *Green Tree* is pertinent to employment arbitrations. The case arose under the Federal Arbitration Act and involved a mandatory arbitration agreement. Its majority opinion favored drafters of these agreements by allowing vague or silent cost-shifting arrangements to be enforced against a person who claimed inability to pay for arbitration. This decision therefore added to the Supreme Court's strong messages to lower courts to enforce mandatory arbitration agreements. Do lower courts act on these messages or do they distinguish their cases from *Green Tree* and *Gilmer*? The following empirical research offers a preliminary answer.

III. RESEARCH LITERATURE AND METHODS

A. Research Literature

Most of the current research literature criticizes mandatory arbitration. A leading authority compares this form of employment arbitration to antiunion yellow dog contracts from a century ago.[166] Another commentator denounces the expansion of arbitration under the FAA from commercial uses involving evenly matched companies to the employment arena, in which large corporations exert their superior bargaining power over workers.[167] In a related critique, employment arbitration is questioned because its proce-

163. *Id.* at 96.

164. *Id.*

165. *Id.* at 97.

166. *See* Van Wezel Stone, *supra* note 65, at 1037.

167. Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power*, 1999 UTAH L. REV. 857, 857–63.

dures are tailored by one party to serve only its interests.[168] Others express concern that arbitration will arrest the development of public policies that embody employment discrimination law.[169] Mandatory arbitration is also attacked for lacking procedural fairness.[170]

This prescriptive research stream also views employment arbitration as part of a broad extension of corporate power over "the little guy."[171] By this view consumers, renters, HMO patients, small investors, and employees find a hostile dispute resolution process set between them and more protective courts, even though Congress provides statutory rights to these disadvantaged parties.[172]

There are notable exceptions to this prevailing view. Two authorities summarize the case for mandatory arbitration. Professor Samuel Estreicher contends:

> [A]rbitration of employment disputes should be encouraged as an alternative, supplementary mechanism—in addition to administrative agencies and courts—for resolving claims arising under public laws as well as contracts. It is an alternative that offers the promise of a less expensive, more expeditious, less draining and divisive process, and yet still effective remedy. Private arbitration will never, and should not, entirely supplant agency or court adjudication. But if properly designed, private arbitration can complement public enforcement and, at the same time, satisfy the public interest objectives of the various statutes governing the employment relationship.[173]

Richard Bales, who studied a positive model of mandatory employment arbitration, struck a similar theme: If designed and implemented carefully, this dispute resolution method produces net gains to all disputants.[174]

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168. Sarah Rudolph Cole, *Managerial Litigants?: The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1201 (2000).

169. Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 439 (1999).

170. Julian J. Moore, Note, *Arbitral Review (Or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1593–97 (2000).

171. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638–39 (1996); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 1025 (1999).

172. *See, e.g.*, Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U. L. REV. 255, 325 (1998); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93.

173. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1349 (1997).

174. See RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 169 (1997), for an examination of a progressive arbitration system at Brown & Root, a nonunion construction company with 30,000 employees. The experience of this firm is noted here because it is the subject of the most comprehensive analysis of a large mandatory arbitration system.

Then, there is a recent empirical study showing that federal courts often rule against employment discrimination plaintiffs.[175] While its authors do not endorse arbitration, their results imply that a fairly administered and accessible arbitration system could benefit employees with discrimination claims.[176] This study is reinforced by research that shows that only a tiny percentage of discrimination lawsuits ever go to trial,[177] and that the judicial-access problem is largely due to the very small percentage of cases that plaintiff lawyers accept.[178] Emerging research studies also identify best practices in employment arbitration.[179]

> Compulsory employment arbitration offers tremendous benefits to both employers and employees. It can reduce significantly the costs and time involved in resolving disputes. It also provides a forum for adjudicating grievances to employees currently shut out of the litigation system. Finally, it presents an opportunity for parties to resolve their differences in a way that promotes, rather than discourages, maintaining the employment relationship.
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> . . . .
>
> Employment arbitration is not, however, a panacea for disputes arising in the nonunionized workplace. The dangers of employer abuse require courts to be vigilant in ensuring that arbitration agreements do not become a vehicle for eliminating employees' legal protections. Nonetheless, given the litigation system's current inability to provide any meaningful forum to so many employees who feel they have suffered legal wrongs in the workplace, compulsory arbitration, properly implemented, can be a significant improvement over litigation.

Id.

175. Results appear in Jess Bravin, *U.S. Courts Are Tough on Job-Bias Suits*, WALL ST. J., July 16, 2001, at A2. After analyzing nine years of federal trial statistics, Professors Stewart J. Schwab and Theodore Eisenberg concluded that federal appeals courts are more hostile to workers who allege job discrimination than they are to almost any other type of plaintiff. *See id.* Appeals courts reversed victories for plaintiffs in 43.6 percent of discrimination cases, compared to a plaintiff-win reversal rate of only 32.5 percent for defendants in all cases who appealed their losses. *Id.* Moreover, employee job-bias suits were less likely than other types of suits to win at trial. *Id.* About 30 percent of the 7575 job-bias suits that were tried resulted in a win for the employee, compared to a plaintiff win rate of 43 percent in all 57,878 civil trials. *Id.* "The authors concluded that appellate courts have a double standard . . . harshly scrutinizing employee victories at trial while gazing benignly" when an employer wins. *Id.* Their study used data from the Administrative Office of the U.S. Courts, and included lawsuits brought under federal discrimination laws (for example, the ADEA, Title VII of the 1964 Civil Rights Act, and the ADA). *Id.*

176. Part of their conclusions can be read as a skeptical reply to employment arbitration critics who prefer to see more access to courts for plaintiffs. Because appellate cases "typically involve subtle questions of employer intent, where credibility of witnesses is especially important," it is surprising to see that appellate judges do not defer more often to the factual findings of trial judges and juries. *Id.*

177. A study of employment discrimination lawsuits in the federal courts found that the proportion disposed of by trial declined from 8 percent in 1990 to 5 percent in 1998. *See* Litras, *supra* note 77. This study also found that the median amount of time for processing an employment discrimination case from filing to trial verdict was eighteen months in 1998. *Id.*

178. A survey of attorneys who represent plaintiffs in employment discrimination disputes found that respondents accepted 5 percent of the cases in which their legal services were requested. Howard, *supra* note 76, at 44.

179. *See* BALES, *supra* note 174, at 103–11.

B. Research Methods

This Article does not take sides in the prescriptive debate, but emphasizes instead that mandatory arbitration has a mixture of serious flaws and significant advantages over litigation.[180] As our empirical research shows, employment arbitration processes vary greatly. Categorical condemnations of this ADR method are therefore difficult to support, especially because courts have slow and expensive processes that make trials open to all in theory, but unavailable to many in reality. On the other hand, our research on the cost features of employment arbitration lend some support to critics who claim that this method can be egregiously unfair and one-sided. Our guiding research questions are: What is the aggregate behavior of courts that rule on the enforceability of mandatory employment arbitration agreements when an employee asserts she cannot afford this ADR process? How often do courts enforce these agreements and refer these disputes to arbitration? How often do they deny enforcement and thus allow the possibility of a trial?

To answer these questions, we extensively searched for all reported federal court decisions that dealt with this subject. Our sample was created by applying the following criteria:

- We used only federal court decisions. A large number of state court decisions on this subject were excluded because our focus is only on the federal judiciary.[181]
- The sample included only decisions involving pre-dispute arbitration agreements with individual employees.[182] This excluded many em-

180. We are influenced by Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 670–72 (1986).

181. *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 99 Cal. Rptr. 2d 745 (2000); Lee v. Tech. Integration Group, 82 Cal. Rptr. 2d 387 (Ct. App. 1999); Spellman v. Sec., Annuities & Ins. Servs., Inc., 10 Cal.Rptr.2d 427 (Ct. App. 1992); Bryant v. American Express Fin. Advisors, Inc., 595 N.W.2d 482 (Iowa 1999); Skewes v. Shearson Lehman Bros., 829 P.2d 874 (Kan. 1992); Freeman v. Minolta Bus. Sys., Inc., 699 So. 2d 1182 (La. Ct. App. 1997); Rushton v. Meijer, Inc. 570 N.W.2d 271 (Mich. Ct. App. 1997) (on remand); Johnson v. Piper Jaffray, Inc., 515 N.W.2d 752 (Minn. Ct. App. 1994); Rembert v. Ryan's Family Steak Houses, Inc., 596 N.W.2d 208 (Mich. Ct. App. 1999);Kindred v. Second Judicial Dist. Court *ex rel.* County of Washoe, 996 P.2d 903 (Nev. 2000); Quigley v. KPMG Peat Marwick, LLP, 749 A.2d 405 (N.J. Super. Ct. App. Div. 2000); Fletcher v. Kidder, Peabody & Co., Inc., 584 N.Y.S.2d 838 (N.Y. App. Div. 1992); Gunby v. Equitable Life Assurance Soc'y of the United States, 971 S.W.2d 7 (Tenn. Ct. App. 1997); Pony Express Courier Corp. v. Morris, 921 S.W.2d 817 (Tex. Ct. App. 1996).

182. An unusual case in the sample involved a union-represented employee. In *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 759 (9th Cir. 1997), a worker who received a kidney transplant claimed that his employer violated his ADA rights. The union did not grieve the matter, believing it should be handled as a lawsuit. The employer sued to compel arbitration, but notably for this Article, the basis for this employer motion was an individual agreement—apart from the collective bargaining agreement—to arbitrate discrimination claims. Thus, Nelson was

ployment discrimination claims asserted by union-represented employees, in which the employers contended that these claims should be resolved at arbitration.[183] This approach reflects the Supreme Court's repeated statement that unionized employees may pursue employment claims in arbitration and in court.[184] Because these employees have "two bites at the apple," they do not face the same dilemma of nonunion employees who are compelled to arbitrate their claims. For nonunion workers, court is not an option unless a judge rules otherwise.

- For a case to be included, a party to a pre-dispute agreement had to oppose arbitration. If an employee voluntarily proceeded to arbitration, his or her case was not included.[185] There is no way to compare the percentage of cases involving an employee's initial resistance to arbitration, and cases in which employees submit to arbitration and later challenge the arbitrator's award (that is, ruling). The latter is also an emerging type of challenge to mandatory arbitration.[186]
- Cases that occurred before *Gilmer* were included as long as they involved a pre-dispute mandatory arbitration agreement. To use *Gilmer* as a cutoff would be arbitrary because this was not the first Supreme Court decision to deal with employment arbitration.[187] Two surprises resulted from this open-time parameter. First, mandatory employment arbitration has a longer history than is widely recognized.[188] Also, in a few cases the *employee* moved to compel arbitration, after the *employer* tried to bypass mandatory arbitration by suing.[189]

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like a nonunion employee who had signed a mandatory arbitration agreement. This case was therefore included in the sample.

183. *See, e.g.*, Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996).

184. *See* Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 79–82 (1998); Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 409–10 (1988); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).

185. There is another close case in the sample. *See* Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999) (stating that the plaintiff voluntarily proceeded to arbitrate his claim, without litigating the mandatory arbitration agreement, until a high down-payment requirement prompted him to contest the enforceability of this contract).

186. *See* Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998); Michael H. LeRoy & Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 OHIO ST. J. ON DISP. RES. 19, 57 (2001), *available at* http://www.ilir.uiuc.edu/faculty/images/privatejustice.pdf. Cases include *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997), and *LaPrade v. Kidder, Peabody & Co.*, 94 F. Supp. 2d 2 (D.D.C. 2000).

187. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956).

188. For example, *Dickstein v. DuPont*, 443 F.2d 783 (1st Cir. 1971), was decided twenty years before the Supreme Court ruled in *Gilmer*.

189. These cases typically involved an apparently successful stockbroker who accepted employment with a rival firm, prompting the former employer to seek an injunction, notwithstanding

- Cases involving public-sector employment were included, although they were rare. *Boyd v. Town of Hayneville*[190] is an example. In *Boyd*, an African American police chief sued after his governmental employer dismissed him.[191] Like the private-sector employees in the sample, Boyd was compelled to sign a pre-dispute arbitration agreement.[192]

The sample was generated by using two case-finding methods in Westlaw's online research service. We began with *Gilmer*, *Circuit City*, and *Green Tree*, and used the "Table of Authorities" and "KeyCite" features to identify previous and subsequent cases associated with these milestone decisions. State court decisions were excluded. Other decisions were disregarded because the litigants involved a union, or one corporation suing another. Many cases remained and ultimately were rejected because they failed in some way to meet the specified criteria.

As cases were included in the sample, they were listed in a roster.[193] The multitasking ability of computers simplified this research. When a potential new case was identified during online research, it was checked against a growing roster of data-coded cases on a simultaneously running word-processing program. This ensured unduplicated additions to the sample.

Data for seventy-eight variables were extracted from each decision. Although these variables are too numerous to list here, they were grouped by (a) year of decision, (b) type of employment, (c) demographic characteristics of the employee, (d) type of legal claim asserted by the party resisting arbitration, (e) legal argument used to resist arbitration, (f) party (employee or employer) who prevailed in district and/or circuit court, (g) district and/or circuit court ruling, and (h) length of time to litigate this arbitrability dispute.

This method produced 313 cases. Sixty-two decisions received a positive code for a legal issue titled "cost of the dispute resolution process." While some cases in this subsample involved only a cost issue, most raised other issues as well (for example, whether the agreement was an adhesion contract).

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the contractual requirement to arbitrate employment disputes. *See, e.g.*, Legg, Mason & Co. v. Mackall & Coe, Inc., 351 F. Supp. 1367, 1368–69 (D.D.C. 1972).

190. 144 F. Supp. 2d 1272 (M.D. Ala. 2001).

191. *Id.* at 1274.

192. *Id.*

193. *See infra* Appendix I. July 31, 2001 is the cutoff date for this sample.

IV. EMPIRICAL RESULTS: HOW FEDERAL COURTS RULE ON COST-ALLOCATION CHALLENGES TO MANDATORY EMPLOYMENT ARBITRATION

Fifty-nine of the sixty-two cost cases involved a federal statutory claim.[194] Title VII was the most common claim (93 percent), followed by the ADEA (17 percent) and the Americans with Disabilities Act (ADA) (16 percent).[195] Among the 251 cases that did not raise a cost issue, the courts in 226 of the cases ruled either to dismiss or to grant a motion to compel arbitration (the others involved a collateral issue). At the district court level, 118 of 169 decisions (or 73.3 percent) ordered arbitration, compared to thirty-seven of fifty-seven decisions (or 64.9 percent) by appellate courts. These results provide a baseline to compare the results for cost cases.

Cost-challenge cases are organized at the end of this Article in Tables 1 through 3 in reverse chronological order, beginning with 2001 decisions. In some cases, a circuit court citation appears for district court decisions, because the appellate court discusses the outcome of an unreported district court decision.

Table 1 lists decisions in which courts rejected cost challenges and ordered enforcement of arbitration agreements. There are two potentially misleading cases. In *Cole*, the court agreed with the plaintiff that his arbitration agreement imposed a prohibitive cost barrier. The court ordered arbitration of his claim, but revised the contract to require the employer to pay all arbitrator fees and process costs.[196] Thus, *Cole* may be confusing. To classify it properly, it must be grouped with courts that order enforcement of arbitration agreements, even though it set a key precedent for upholding cost challenges to mandatory arbitration. *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[197] has the same misleading quality.[198] While analyzing Susan Rosenberg's claim that her arbitration was biased, the U.S. Court of Appeals for the First Circuit rejected her cost contention. Nevertheless, *Rosenberg* denied the employer's motion to enforce an arbitration agreement on other grounds and is therefore listed in Table 2.[199]

194. *Caporale v. National Association of Securities Dealers, Inc.*, No. Civ. A. 90-4070, 1991 WL 281890 (D.N.J. May 10, 1991), involved a breach of contract claim, while *Campbell v. Cantor, Fitzgerald & Co.*, 21 F. Supp. 2d 341 (S.D.N.Y. 1998), dealt with a defamation claim. *Dowling v. Anthony Crane International*, No. Civ. 1998/127, 2001 WL 378838 (D.V.I. Mar. 20, 2001), did not specify the underlying employment claim.

195. These figures were computed by excluding the one case with no statistical information.

196. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1486 (D.C. Cir. 1997).

197. 170 F.3d 1 (1st Cir. 1999).

198. *See infra* notes 282–299.

199. *See, e.g.*, Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 553 (citing *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15–16 (1st Cir. 1999) for the

Table 1 shows that thirty-seven district decisions and seven appellate decisions ordered a cost-challenger to arbitrate an employment claim. This compares with eleven district and seven appellate decisions in Table 2, in which courts found cost challenges persuasive and denied motions to compel arbitration. The latter effectively cleared the way to litigate these employment claims.

Combining outcomes in Tables 1 and 2, district courts ordered arbitration in 77.1 percent (thirty-seven of forty-eight) of cost cases. Among appellate cases, only 50 percent (seven of fourteen) ordered arbitration.[200] There have been too few decisions after *Green Tree* to reach a definitive conclusion about its effect on employment arbitration (see Table 3). We note, however, that in the fourteen cases decided after *Green Tree*, eleven (78.6 percent) upheld cost-shifting provisions. This rate is very similar to the overall rate for enforcement of these provisions (77.1 percent).

In addition, some preliminary patterns emerged on a circuit-wide basis (counting appellate and district decisions equally in each circuit). The Second,[201] Third,[202] Fourth,[203] Fifth,[204] and D.C.[205] Circuits favored arbitration over litigation in cases in which cost was asserted as an argument against enforcement of these mandatory agreements. In contrast, the First,[206] Sixth,[207] and Tenth[208] Circuits often denied arbitration in cost-challenge cases. The Seventh,[209] Ninth,[210] and Eleventh[211] Circuits had a less consistent pattern of ordering arbitration.

The results also demonstrate the currency of the cost-shifting issue in employment arbitration. Fifty-two cases reported a date of decision. Twenty-five (48.1 percent) were decided in 2000 or 2001, while thirteen (25 percent) were decided in 1999, and five (9.6 percent) were decided each year in 1998 and 1997.

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holding: "refusing to invalidate arbitration scheme simply because of the possibility that the arbitrator would charge the plaintiffs a [high] forum fee").

200. Forty-three of the sixty-two cases (69.3 percent) involved direct cost challenges to arbitration agreements.

201. Nine of nine (100 percent) cases resulted in an arbitration order.

202. Six of six (100 percent) cases resulted in an arbitration order.

203. Four of four (100 percent) cases resulted in an arbitration order.

204. Seven of nine (77.7 percent) cases resulted in an arbitration order.

205. Five of six (83.3 percent) cases resulted in an arbitration order.

206. Two of two (100 percent) cases denied a motion for arbitration.

207. Two of two (100 percent) cases denied a motion for arbitration.

208. Five of seven (71.4 percent) cases denied a motion for arbitration.

209. Four of six (66.7 percent) cases resulted in an arbitration order.

210. Three of five (60 percent) cases resulted in an arbitration order.

211. Four of six (66.7 percent) cases resulted in an arbitration order.

V. APPELLATE DECISIONS ADOPT DIVERGENT THEORIES: FORUM SUBSTITUTION VERSUS COMPARATIVE COST OF LITIGATION

A. What Is a Cost Case?

Our sample contained three different types of cost decisions. The most common case involved the cost of the arbitrator's fee or the arbitration service. Other cases involved indirect arbitration costs, for example, denial of attorney's fees that a prevailing plaintiff would be awarded in court. These types are now explained.

- *Forum Costs*: Most decisions ruled directly on the cost issue. A plaintiff complained that forum fees (e.g., payment to the arbitration service, or payment for hearings) or the arbitrator's fee were too costly. Leading examples of forum cost cases are analyzed below.
- *Representation Costs*: In some cases cost was embedded in a web of arguments. For instance, some complainants contended that arbitrators were not required to award attorney's fees to prevailing plaintiffs. In *DeGaetano v. Smith Barney, Inc.*,[212] the court vacated part of an arbitration ruling that denied a complainant's motion for attorney's fees. During an early phase of this sex discrimination arbitration, DeGaetano formally applied for recovery of her attorney's fees.[213] When the arbitration panel awarded her $90,355 in damages and interest—an amount equal to one year of pay—they effectively ruled that she was a prevailing plaintiff.[214] Nevertheless, they denied her petition for attorney's fees.[215] This amount was not reported, but had to be substantial because the hearing phase of her arbitration lasted ten days.[216]

  Her suit to vacate this part of the award relitigated her initial contention that she should not be compelled to arbitrate her Title VII claim.[217] While the court originally did not accept that argument, it did so after DeGaetano provided specific evidence that she suffered too much of a transaction cost by substituting an arbitral

212. 983 F. Supp. 459 (S.D.N.Y. 1997).
213. *Id.* at 461.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 460.

forum for court.[218] The judge ordered reimbursement of DeGaetano's attorney's fees.[219]

- *Cost Allocation as Evidence of a Contract*: In a few cases, cost took on a different but still germane complexion. Access was not the issue. Instead, cost allocation was considered as a form of contract consideration. Employers who offered to pay all direct arbitration costs were found by courts to have supplied enough consideration to transform an ADR policy stated in their handbook into a binding contract.

  This occurred in *Kreimer v. Delta Faucet Co.*[220] The employee challenged the validity of her arbitration agreement because it was only a policy in a handbook.[221] After the employer sought to enforce this agreement under the FAA, Sue Kreimer argued that she could not be held to this kind of agreement because it lacked consideration.[222] In rejecting this contention, the court observed: "Delta Faucet's agreement to pay the expenses and fees of mediation and the entire arbitrator's fee in the event of arbitration, demonstrate a detriment to Delta Faucet that can constitute consideration."[223]

  In contrast, the court in *Dumais v. America Golf Corp.*[224] refused to enforce a waitress's arbitration agreement because it was vague and illusory.[225] The court reasoned: "[T]he agreement binds Plaintiff

218. *See id.* at 461. The court reasoned:

> Based on the foregoing authority, the Court finds the governing law in this case to be as follows: contractual clauses purporting to mandate arbitration of statutory claims as a condition of employment are enforceable only to the extent that the arbitration preserves the substantive protections and remedies afforded by the statute; in other words, only if a plaintiff pursuing claims under the statute effectively may vindicate [his or her] statutory cause of action in the arbitral forum.

Id. at 468–69 (alteration in original) (citations omitted).

219. *See id.* at 470–71.

220. No. IP99-1507-C, 2000 WL 962817 (S.D. Ind. June 2, 2000).

221. *Id.* at *1. While Sue Kreimer was employed by Delta Faucet, the company gave every employee a copy of its Corporate Dispute Resolution Policy. This included a detailed explanation of the arbitration process that was being substituted for an employee's right to sue in an employment dispute. *Id.*

222. *Id.* at *2.

223. *Id.* at *3.

224. 150 F. Supp. 2d 1182 (D.N.M. 2001), *aff'd*, 299 F.3d 1216 (10th Cir. 2002).

225. Judge Martha Vazquez reasoned:

> [The court] forum to resolve disputes is a fundamental right that may not be relinquished without consideration. In the case of an arbitration agreement unsupported by consideration, issues surrounding the method of dispute resolution must be clear, unequivocal and apply mutually to both sides before that agreement may be enforced. The alleged arbitration agreement in this case was ambiguous, illusory, not mutual, and unsupported by consideration. For these reasons, the alleged arbitration agreement is unenforceable. Plaintiff should not be compelled to arbitrate her claims brought herein.

Id. at 1194.

> to arbitration, but allows AGC free rein to renege. This lopsided arrangement is illusory because it allows AGC to unilaterally modify the terms at any time."[226] In pertinent part, the arbitration agreement was not enforced because the employer could change the cost-shifting provision at any time to its sole advantage.[227]

B. Appeals Courts That Accept Cost Arguments: Forum Substitution Theory and Lower-Wage Workers

At the outset of this and the following part, background is provided for the terms "lower-wage workers" and "higher-wage employees." Although there are only a few appellate cases on cost challenges to arbitration, they are divided by an employee's pay. The lower-wage worker cases involved a train station security guard, an airport security guard, and a former janitor who was promoted to crew supervisor. These decisions invalidated cost-shifting provisions in arbitration agreements. Yet, in higher-wage employee cases—involving a financial consultant and a securities trader—courts upheld cost-shifting contracts.

These terms are imprecise. As the first appellate court to rule on this issue, the *Cole* court adopted this terminology:

> "[L]itigation has become a less-than-ideal method of resolving employees' public law claims. . . . [E]mployees bringing public law claims in court must endure long waiting periods as governing agencies and the overburdened court system struggle to find time to properly investigate and hear the complaint. Moreover, the average profile of employee litigants . . . indicates that lower-wage workers may not fare as well as higher-wage professionals in the litigation system; lower-wage workers are less able to afford the time required to pursue a court complaint, and are less likely to receive large monetary relief from juries."[228]

President Clinton's Dunlop Commission, appointed to study alternative forms of workplace dispute resolution, introduced these labels.[229]

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226. *Id.* at 1193.

227. *See id.* at 1189–90. The court was presented with an out-of-date set of AAA procedures (dated 1989) that required the filing party to pay a nonrefundable administrative fee of $300 and $75 for any additional hearing. Thus, the agreement likely failed to reflect the cost of arbitration to Teresita Dumais. *Id.*

228. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1488 (D.C. Cir. 1997) (quoting COMMISSION ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'T OF LABOR & U.S. DEPARTMENT OF COMMERCE, REPORT AND RECOMMENDATIONS 30 (1994).

229. The third question that the Commission answered was: "3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than [by seeking remedies in] state and federal courts and governmental bodies?" COMM'N ON THE FUTURE OF WORKER -MGMT. RELATIONS, *supra* note 228, at xvi.

1. The U.S. Court of Appeals for the D.C. Circuit: *Cole v. Burns International Security Services*

The plaintiff was employed as a security guard at Union Station in Washington, D.C. when he was discharged.[230] In 1991, Burns Security required Clinton Cole and other employees to sign a "Pre-Dispute Resolution Agreement" as a condition of employment.[231] The agreement expressly waived an employee's right to litigate a dispute related to his or her employment, and designated the American Arbitration Association as a service provider. It also stated that Burns would not provide employment unless Cole signed this agreement.[232]

Cole signed the form and remained employed until he was fired in October 1993.[233] He filed a complaint with the Equal Employment Opportunity Commission (EEOC), and in his subsequent lawsuit alleged racial discrimination, harassment, and unlawful retaliation for protecting a coworker from sexual harassment.[234] In federal district court, his employer moved to compel arbitration of the dispute.[235] The court granted this motion and rejected Cole's numerous arguments to invalidate the arbitration agreement.[236]

The D.C. Circuit rejected Cole's contention that his type of employment was excluded from the FAA[237] before it ruled on his cost argument. Judge Harry T. Edwards's attention was drawn to the AAA's cost-allocation rules that governed Cole's agreement to arbitrate his discrimination claim.[238]

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230. *Cole*, 105 F.3d at 1469.

231. *Id.*

232. *Id.*

233. *Id.* at 1469–70.

234. *Id.*

235. *Id.* at 1470.

236. *Id.*

237. The court rejected Cole's contention that Section 1 of the FAA excluded his employment. *Id.* He believed that his employment fell within the elastic clause of this section stating "any other class of workers engaged in foreign or interstate commerce." *Id.* By his reasoning, this term applied to all workers whose jobs have any effect on commerce. *Id.* The *Cole* court dismissed this argument, however, because it would ignore the specific inclusion of seamen and railroad workers in the main body of this exclusionary section. *Id.* The court explained that Section 1 "covers only those workers actually involved in the 'flow' of commerce, *i.e.*, those workers responsible for the transportation and distribution of goods." *Id.* at 1472.

238. *See id.* at 1480. Rule 35 required a filing fee of $500 from the initiating party, as well as an administrative fee of $150 per hearing day from each party. *Id.* The rule also allowed AAA to "defer or reduce" this fee "in the event of extreme hardship on any party." *Id.* Rule 36 required both parties to share equally in paying the expenses of the arbitration, including travel and other expenses of the arbitrator, AAA representatives, and witnesses. *Id.* Rule 37 bound the parties to agree to pay the arbitrator appropriate compensation for his or her work. *Id.*

These required the parties to share equally in paying arbitrator fees that ranged from $500 to $1000 or more per day.[239]

The court found that this fee allocation system created an unreasonable barrier for Cole. Judge Edwards stated that "an employee cannot be required as a condition of employment to waive access to a neutral forum in which statutory employment discrimination claims may be heard."[240] He reasoned that these procedural rights must (1) provide for neutral arbitrators, (2) allow for more than minimal discovery, (3) require a written award, (4) afford all the types of relief that would otherwise be available in court, and (5) protect employees from unreasonable costs.[241]

All of these conditions were satisfied in Cole's arbitration agreement, except for cost protection. In contrast to Robert Gilmer's arbitration agreement,[242] this contract obligated Cole to submit his statutory claims to arbitration and then required him to pay a substantial part of the arbitrator's fees. Judge Edwards noted that under New York Stock Exchange (NYSE) or National Association of Securities Dealers (NASD) arbitration, employees may be required to pay a filing fee, expenses, or an administrative fee, but these expenses are routinely waived in the event of financial hardship.[243]

This comparison led him to conclude that the Supreme Court would not approve a cost allocation provision that was more expensive than the one approved in *Gilmer*.[244] In a pointed conclusion, he stated: "Indeed, we are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case."[245] Because *Gilmer* held that "arbitration is supposed to be a reasonable substitute for a judicial forum,"[246] Congress could not have intended to require employees to arbitrate employment discrimination claims *and* "pay for the services of an arbitrator when they would never be required to pay for a judge in court."[247]

239. *Id.*

240. *Id.* at 1482.

241. *See id.*

242. Judge Edwards observed that "under NYSE Rules and NASD Rules . . . employers pay . . . all of the arbitrators' fees." *Id.* at 1483.

243. *Id.* at 1483–84.

244. *See id.* at 1484.

245. *Id.*

246. *Id.*

247. *Id.* Applying its theory of forum substitution to the facts, the *Cole* court found that AAA's fees were too costly for the plaintiff. *See id.*

2. The U.S. Court of Appeals for the Tenth Circuit: *Shankle v. B-G Maintenance Management of Colorado, Inc.*

B-G Maintenance employed the plaintiff as a janitor beginning in 1987.[248] In 1995, the company distributed an arbitration agreement to Matthew Shankle and other employees.[249] At first he refused to sign, but ultimately he acquiesced.[250] Under the agreement, employees waived their right to sue for a variety of employment discrimination claims.[251] It also obligated Shankle to "be responsible for one-half of the arbitrator's fees. . . . If I am unable to pay my share, the company will advance the entirety of the arbitrator's fees; however, I will remain liable for my one-half."[252]

After the company ended Shankle's employment, he filed a race and age discrimination complaint with the EEOC.[253] When the agency did not sue on his behalf, Shankle and the company referred the dispute to the Judicial Arbiter Group, Inc., as specified by the agreement.[254]

Judicial Arbiter Group wrote to the parties, stating that "'[t]he arbiter charges $250.00 per each hour of arbiter time and travel time at $125.00 per hour, and where appropriate, $45.00 for each hour of paralegal support time.'"[255] Both parties were also directed to pay a $6000 deposit.[256]

Shankle filed a separate charge with the EEOC, this time objecting to his upcoming arbitration. He then canceled the arbitration and sued on his employment discrimination claims. The district court denied B-G Maintenance's motion to compel arbitration, and the company appealed.[257]

The appellate court considered only the cost issue.[258] Noting that *Gilmer* stated that an individual does not forgo discrimination rights by submitting that claim to arbitration,[259] the court concluded that the ADR forum must provide an adequate mechanism for furthering public policy goals ad-

248. Shankle v. B-G Maintenance Mgmt. of Colorado, Inc., 163 F.3d 1230, 1231 (10th Cir. 1999).
249. *Id.* at 1232.
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* (quoting Letter from Judicial Arbiter Group, Inc. to parties).
256. *Id.*
257. *See id.*
258. *See id.* at 1233 (stating the issue as whether "a mandatory arbitration agreement, which is entered into as a condition of continued employment, and which requires an employee to pay a portion of the arbitrator's fees, [is] unenforceable under the Federal Arbitration Act").
259. *Id.* at 1234 ("'So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'") (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991)).

vanced by the statute.[260] While the Tenth Circuit agreed that a strong national policy favors arbitration, it qualified this view:

> As *Gilmer* emphasized, arbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition, falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights.[261]

Examining the facts, the Tenth Circuit assumed an average length of time for Shankle's arbitration, and estimated that his share of arbitrator fees would cost between $1875 and $5000.[262] Because

> Shankle could not afford such a fee . . . [t]he Agreement thus placed Mr. Shankle between the proverbial rock and a hard place—it prohibited use of the judicial forum, where a litigant is not required to pay for a judge's services, and the prohibitive cost substantially limited use of the arbitral forum.[263]

Ultimately, the Tenth Circuit concluded that the company required Shankle to agree to mandatory arbitration as a term of continued employment, "yet failed to provide an accessible forum in which he could resolve his statutory rights. Such a result clearly undermines the remedial and deterrent functions of the federal anti-discrimination laws."[264]

3. The U.S. Court of Appeals for the Eleventh Circuit: *Perez v. Globe Airport Security Services, Inc.*

Damiana Perez, a gate security agent at the Miami International Airport, signed a pre-dispute employment arbitration agreement.[265] It had several cost-allocation provisions. Each party agreed "to pay the costs and attorney's fees to the other party in the event of a breach of this agreement."[266] The contract also bound Perez to this promise: "If you refuse to arbitrate after the Company has demanded you do so, and if a court orders

260. *See id.*

261. *Id.* (citations omitted).

262. *Id.* at 1234 n.5 (stating that the typical employment case averages between fifteen and forty hours of an arbitrator's time).

263. *Id.* at 1234–35. B-G Maintenance also argued that the court should enforce the agreement because it allowed fee-shifting for employees unable to pay their share of arbitrator fees. The court disagreed, noting that B-G Maintenance only agreed to advance the employee's share of fees. The employee remained liable for this payment. *Id.* at 1234 n.4.

264. *Id.* at 1235.

265. Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1282 (11th Cir. 2001).

266. *Id.*

arbitration, you agree to pay the Company's legal costs, including attorney's fees, incurred in enforcing this agreement."[267] The contract added:

> The Company and you agree that, despite any rule providing that any one party must bear the cost of filing and/or the arbitrator's fees, all costs of the American Arbitration Association and all fees imposed by any arbitrator hearing the dispute, will be shared equally between you and the Company.[268]

After Globe discharged Perez, she filed a sex discrimination lawsuit. Globe moved to compel arbitration of her claim. The district court ruled that the fee-sharing provision created an unreasonable cost barrier to Perez's adjudication of Title VII claims. Thus, the district court denied Globe's motion to compel arbitration.

The Eleventh Circuit affirmed this ruling.[269] Globe contended that because Perez failed to show that she would incur prohibitive expenses by pursuing arbitration, her cost challenge was too indefinite under *Green Tree*.[270] Globe also stated that arbitration would not be prohibitively expensive because the company was willing to forgo use of the American Arbitration Association in favor of less expensive arbitration.[271] The Eleventh Circuit sidestepped these arguments by reasoning that "this court need not determine whether the evidence of arbitration expense produced by Perez was sufficient to find arbitration prohibitively expensive . . . . [because] [t]he Agreement is illegal and unenforceable for other compelling reasons."[272]

These reasons still pertained to allocation of arbitration costs. The court noted that even though Perez unambiguously waived her right to sue, the agreement could not limit the arbitrator's authority to award a prevailing plaintiff attorney's fees.[273] In addition, the court found the contract's cost-shifting provision unlawful.[274]

Globe's sloppy or devious drafting of the contract also played a part in the court's decision. The agreement stated that all disputes must be "'arbitrated . . . in accordance with the rules of the American Arbitration Association governing *labor* arbitration.'"[275] The court noted that AAA rules

267. *Id.*
268. *Id.*
269. *See id.* at 1287.
270. *See id.* at 1284.
271. *Id.* at 1284 n.2.
272. *Id.* at 1285.
273. *See id.* at 1285–86.
274. *See id.* at 1287. This provision stated, "[D]espite any rule providing that any one party must bear the cost of filing and/or the arbitrator's fees, all costs of the American Arbitration Association and all fees imposed by any arbitrator hearing the dispute, will be shared equally between you and the Company." *Id.* at 1282.
275. *Id.* at 1286 (alteration in original) (quoting contract language).

governing labor arbitration are separate and distinct from the rules governing employment disputes.[276] Under labor arbitration rules, the parties could agree to "vary the procedures set forth in these rules."[277] In contrast, Rule 34(e) for AAA's employment arbitration permits an arbitrator "to assess fees, expenses, and compensation . . . in favor of any party," but does not allow the parties to bargain any limitation on this authority.[278]

Without deciding how this discrepancy occurred, the court rejected Globe's suggestion to sever this provision and enforce the rest of the agreement.[279] Instead, it ruled that the entire agreement was unenforceable.[280] Its reasoning suggested, nonetheless, that the court was suspicious about how Globe interpolated AAA's labor arbitration procedures:

> If an employer could rely on the courts to sever an unlawful provision and compel the employee to arbitrate, the employer would have an incentive to include unlawful provisions in its arbitration agreements. Such provisions could deter an unknowledgeable employee from initiating arbitration, even if they would ultimately not be enforced. It would also add an expensive procedural step to prosecuting a claim; the employee would have to request a court to declare a provision unlawful and sever it before initiating arbitration. Including an unlawful provision would cost the employer little, particularly where, as here, the arbitration agreement provides the employee must bear the employer's court costs and attorney's fees incurred defending the agreement if arbitration is challenged and the employer prevails.[281]

C. Appeals Courts That Reject Cost Arguments: Comparative Cost of Litigation Theory and Higher-Wage Employees

1. The U.S. Court of Appeals for the First Circuit: *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*

Susan Rosenberg sued Merrill Lynch after the company terminated her employment as a financial consultant.[282] Responding to her suit alleging sex and age discrimination, Merrill Lynch moved to compel arbitration of her claims.[283] Rosenberg replied with a series of challenges to the securities in-

276. *Id.*
277. *Id.*
278. *Id.* at 1286 & n.3.
279. *See id.* at 1287.
280. *See id.*
281. *Id.*
282. Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 5 (1st Cir. 1999).
283. *Id.*

dustry's use of mandatory arbitration.[284] The district court denied the company's motion on two grounds. It found that the 1991 Civil Rights Act amendments to Title VII precluded enforcement of these employment arbitration agreements.[285] Also, the court believed that the arbitral forum made available to Rosenberg had "structural bias."[286]

The First Circuit affirmed the lower court's denial of the company's motion to compel arbitration, but for a different reason.[287] Disagreeing with the district court, it held that an arbitration agreement applied to ADEA and Title VII claims is not precluded by the Older Workers Benefit Protection Act (OWBPA, amending the ADEA),[288] or by the 1991 Civil Rights Act (amending Title VII).[289] The First Circuit also disagreed with the district court's conclusion that the agreement was unenforceable because of structural bias in the securities industry arbitration forum.[290] But in a key ruling the appellate court affirmed the lower court's order because the particular arbitration agreement signed by Rosenberg did not meet a standard set forth in the 1991 Civil Rights Amendment.[291]

For this Article's analysis of cost barriers to employment arbitration, the First Circuit's decision is potentially misleading. While addressing Rosenberg's claim that the Merrill Lynch arbitral forum was biased, the court considered whether cost was a prohibitive barrier. It concluded that cost was

284. *See id.* at 5–6, 12, 16. Before the district court, Rosenberg contended that (1) Title VII, as amended by the 1991 Civil Rights Act, prohibits pre-dispute arbitration agreements, *id.* at 6–7, 9; (2) pre-dispute arbitration agreements to arbitrate ADEA claims are precluded by the Older Workers Benefit Protection Act (OWBPA), *id.* at 12; (3) the New York Stock Exchange's arbitration system is structurally biased, *id.* at 6; (4) the securities industry registration form, incorporating the arbitration agreement, is an adhesion contract, *id.* at 16 (the district court did not rule on this contention); and (5) the arbitration agreement does not meet the standard set forth in the 1991 Civil Rights Act for enforcing arbitration clauses, *id.* at 16–19.

285. *Id.* at 4, 6.

286. *Id.*

287. *Id.*

288. Older Workers Benefit Protection Act, 29 U.S.C. §§ 621, 623, 626, 630 (2000); *see Rosenberg*, 170 F.3d at 13.

289. *See id.* at 11.

290. *See id.* at 14–16.

291. *See id.* at 19. On this point, the court observed that the

> arbitration agreement did not by itself "define the range of claims subject to arbitration, even though Merrill Lynch expressly represented that she would be advised of the rules. It referred only to arbitration of such claims as were required to be arbitrated by the NYSE rules. But those rules were not given to Rosenberg or described to her.

Id. The court continued: "The question then becomes which party should bear the risk of her ignorance. Given Congress's concern that agreements to arbitrate employment discrimination claims should be enforced only where 'appropriate,' a concern not expressed in the FAA or at common law, Merrill Lynch should, we believe, bear that risk." *Id.*

not a problem, and this part of the decision is isolated and cited by other courts that reach similar conclusions on cost issues.[292]

Our analysis focuses only on the *Rosenberg* court's treatment of cost as a barrier to arbitration. To be clear, on this point the court found that the arbitration system had no legal defect. Rosenberg and amici briefs presented two cost arguments to the court. They contended that the New York Stock Exchange's arbitration procedures were inadequate for Title VII claims because arbitrators often refuse to award statutory attorney's fees, and because arbitration panels often require complainants to pay some or all of the forum fees.[293] She noted that these fees can reach $3000 per day and tens of thousands of dollars per case.[294] She reasoned that these costs unlawfully interfered with her right to vindicate her statutory rights.[295]

The court roundly dismissed these arguments. First, it said that just because "arbitrators may sometimes do undesirable things in individual cases does not mean the arbitral system is structurally inadequate."[296] The court's point was that NYSE rules do not require arbitrators to order complainants to pay forum fees. Thus, the cost-sharing aspect of Rosenberg's argument failed because "such outcomes [are not] necessary concomitants of the NYSE arbitral system."[297] Second, the court reached a preliminary conclusion "that it does not appear to be the usual situation that a plaintiff is asked to bear forum fees."[298] Finally, the court stated that "[c]ontrary to Rosenberg's arguments, arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court."[299]

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292. *See, e.g.*, Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 553 (4th Cir. 2001) (citing *Rosenberg* in the context of "refusing to invalidate arbitration scheme simply because of the possibility that the arbitrator would charge the plaintiffs a [high] forum fee").

293. *Rosenberg*, 170 F.3d at 15.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* The record before the court was not extensively developed on this point. Amicus briefs "in support of Rosenberg cite[d] arbitration decisions in which plaintiffs . . . [were] required to pay costs." *Id.* at 15–16. Merrill Lynch disagreed, pointing out that in "the thirty-three arbitration cases Rosenberg placed in the record, only one plaintiff who prevailed on statutory grounds was denied fees and costs." *Id.* at 16. The court sidestepped this argument by stating that "NYSE arbitrators possess discretion to award costs and fees when they decide a dispute." *Id.* The court also seemed to rely more heavily on interpretive guidance taken from *Gilmer* and *Cole* and other authorities. *See id.* (endorsing the view that "'the NYSE rules applicable here do not restrict the types of relief an arbitrator may award,'" and further noting that "'[g]enerally, parties to an arbitration are responsible for their personal costs associated with bringing or defending an arbitration action'" (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991))).

299. *Rosenberg*, 170 F.3d at 16 (stating that, although arbitration discovery "procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration'" (quoting *Gilmer*, 500 U.S. at 31)).

This last reason amounted to a theoretical justification and was not the product of a factual comparison. Like the *Cole* court, this court measured the affordability of arbitration by comparison to litigation. However, while the *Cole* court only compared arbitration costs to filing fees imposed by a court, the *Rosenberg* court looked at the overall costs of litigation.

2. The U.S. Court of Appeals for the Seventh Circuit: *Koveleskie v. SBC Capital Markets, Inc.*

After Mary Koveleskie resigned her job as a securities trader, she claimed that she was constructively discharged following a pattern of discrimination. Eventually, she sued under Title VII, the Equal Pay Act,[300] and the New York Human Rights Law[301] for sexual discrimination and harassment, wage discrimination, and retaliation. She also sought to invalidate her mandatory arbitration agreement.

The district refused to compel arbitration of her claims, and SBC appealed. In reversing this ruling, the Seventh Circuit considered a variety of issues, including her two cost-barrier arguments. She claimed that securities industry arbitrators routinely fail to follow Title VII's provision for awarding attorney's fees to prevailing plaintiffs. She also alleged that arbitrators charge plaintiffs expensive forum fees. Without engaging in its own analysis, the Seventh Circuit rejected these contentions by citing *Rosenberg* and *Cole* at length.[302] A more recent decision, *McCaskill v. SCI Management Corp.*,[303] conflicted with this approach but did not expressly overrule it.

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300. N.Y. LAB. LAW § 194 (McKinney 2002).

301. N.Y. EXEC. LAW § 290 (McKinney 1996).

302. Kovaleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 364–65 (7th Cir. 1999). The Seventh Circuit quoted from *Roseberg* extensively: (1) although "'arbitrators may . . . do undesirable things in individual cases does not mean that the arbitral system is inadequate,'" (2) "'it does not appear to be the usual situation that a plaintiff is asked to bear forum fees,'" (3) "'if unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with the 1991 C[ivil] [Rights] A[ct] could be presented by the employee to the reviewing court,'" (4) "'arbitration is often more affordable to plaintiffs and defendants than litigating a claim in court,'" and (5) "'under NYSE and NASD rules . . . employers [generally] . . . pay all of the arbitrators' fees.'" *Id.* (quoting *Rosenberg*, 170 F.3d at 15–16).

303. 285 F.3d 623 (7th Cir. 2002) (involving an employee's Title VII claim against her employer). *McCaskell* did not raise the issue of allocation of direct forum costs. However, it involved the related matter of attorney's fees. The arbitration agreement prevented Gloria McCaskill from ever recovering her attorney's fees, even if the arbitrator ruled in her favor. *Id.* at 624. This departed from the litigation model in which the judicial norm is to order employers to pay the attorney's fees of prevailing Title VII plaintiffs. The Seventh Circuit agreed with McCaskill's contention that such an arrangement undermined the deterrent function of Title VII: "The right to attorney's fees therefore is integral to the purposes of the statute and often is central to the ability of persons to seek redress from violations of Title VII." *Id.* at 626. Thus, the agreement was held to be unenforceable.

D. Appeals Courts That Use a Case-by-Case Approach to Cost Arguments

The most recent appellate decisions take an approach that differs from the forum substitution and comparative-cost theories. These two courts adopted a case-by-case methodology for deciding cost-allocation challenges.

1. The U.S. Court of Appeals for the Fourth Circuit: *Bradford v. Rockwell Semiconductor Systems, Inc.*

The *Bradford* court adopted a case-by-case approach to determine whether fee-splitting renders an agreement unenforceable. The court rejected a broad per se rule against all fee-splitting,[304] and stated instead that the "appropriate inquiry is one that evaluates whether the arbitral forum in a particular case is an adequate and accessible substitute to litigation, i.e., a case-by-case analysis that focuses, among other things, upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims."[305] The court found that Bradford failed to prove he was unable to pay or that he was deterred from arbitration, because he had initiated arbitration before litigation and proceeded through a full arbitration hearing on the merits of his claim.[306] It also relied upon evidence that, prior to his discharge, he earned a salary of $115,000 in addition to yearly bonuses.[307]

2. The U.S. Court of Appeals for the Third Circuit: *Blair v. Scott Specialty Gases*

A female employee sued her employer for sexual harassment in *Blair*. She claimed financial inability to pay for arbitration, but did not present specific evidence to support her assertion. The Third Circuit rejected her position that "the mere existence of a fee-splitting provision in an agreement would satisfy the claimant's burden to prove the likelihood of incurring prohibitive costs."[308] Nevertheless, the court remanded the matter to the district court for further inquiry into Blair's affidavit of her limited financial capacity. The court offered this guidance: "Limited discovery into the rates charged by the AAA and the approximate length of similar arbitration pro-

304. Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549, 556 (4th Cir. 2001).
305. *Id.*
306. *Id.* at 558.
307. *Id.* at 558 n.6.
308. Blair v. Scott Specialty Gases, 283 F.3d 595, 610 (3d Cir. 2002).

ceedings should adequately establish the costs of arbitration, and give Blair the opportunity to prove . . . that resort to arbitration would deny her a forum to vindicate her statutory rights."[309]

CONCLUSIONS

Our research results shed new light on emergent judicial regulation of mandatory employment arbitration. On the academic ledger, most research condemns or very seriously questions this dispute resolution method. Considering that employers require this ADR process as a condition of employment, do not engage in any real bargaining, and curtail employee access to courts, these critical views have merit. On the judicial ledger, however, numerous arbitrability decisions intone that "there is a strong public policy favoring arbitration"[310] to convey the message that courts should approve this ADR method. In short, academic and judicial assessments seem far apart.

But the empirical picture we develop here suggests that these portraits miss a new and intermediate evolutionary step in judicial regulation of employment arbitration. While courts broadly approve this ADR method, they are willing to deny enforcement of contracts that create access barriers for employees. Our research shows that cost allocation is a specific issue that is now fertile for resisting arbitration. Turning to our findings, which we emphasize are preliminary, we answer the following questions:

- *What is the significance of the rapid growth of cost-shifting cases?* The rapid growth of cost-shifting cases does more than suggest the currency of this issue. It confirms that mandatory employment arbitration is becoming widespread, and more importantly, has great variety. The rapid growth of these cases also shows that the Supreme Court's strong pronouncements in favor of ordering arbitration are not the final word on this subject. Resourceful plaintiffs' lawyers are exploiting *Gilmer*'s isolated observation that arbitration is just a difference in dispute resolution forum,[311] and appear to be arguing that the private arbitration forum should be no more costly for plaintiffs

309. *Id.*

310. McCaskill v. SCI Management Corp., No. 00-C-1543, 2000 WL 875396, at *6 (N.D. Ill. June 22, 2000). *See, e.g.*, Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 105, 107 (5th Cir. 1990); Prevot v. Phillips Petroleum Co., 133 F. Supp. 2d 937, 938 (S.D. Tex. 2001); Fuller v. Pep Boys—Manny, Moe & Jack of Del., Inc., 88 F. Supp. 2d 1158, 1161 (D. Colo. 2000); Quinn v. EMC Corp., 109 F. Supp. 2d 681, 683 (S.D. Tex. 2000); Cline v. H.E. Butt Grocery Co., 79 F. Supp. 2d 730, 732 (S.D. Tex. 1999); Heller v. MC Fin. Servs., Ltd., No. 97-CIV.-5317, 1998 WL 190288, at *2 (S.D.N.Y. Apr. 21, 1998); Gaylor v. Donald B. MacNeal, Inc., No. 95-C-7250, 1996 WL 224566, at *2 (N.D. Ill. May 1, 1996).

311. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991).

than the public law forum. Our research also shows that this reasoning resonates with a visible minority of courts who perceive *Gilmer* as permitting nothing more than forum substitution, and as a result, are inclined to invalidate cost-sharing provisions or entire employment arbitration agreements.

- *What is the significance of the variation in court orders that compel arbitration?* Our *findings* imply that the textual edifice supporting mandatory employment arbitration has noticeable cracks. As the first appellate tribunal to analyze the cost-shifting issue, the *Cole* court doubted that employment arbitration provides the same safeguards as the labor-management model for ordinary workers.[312]

  Courts are sensitive to the claimant's ability to pay and, by implication, to his or her type of job.[313] When an employee holds a

312. *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1473–79 (D.C. Cir. 1997). Judge Edwards noted, for example, that "[i]n the context of collective bargaining arbitration, there are also unique protections for both parties built into the arbitration process that minimize the risk of unfairness or error by the arbitrator." *Id.* at 1475. He observed that

> because both unions and employers are repeat customers of arbitration and have a hand in selecting the arbitrator to hear their disputes, arbitrators who regularly favor one side or the other will not be hired again. As a result, arbitrators have a strong personal interest in crafting awards that will be respected as fair by both parties regardless of who wins or loses the particular dispute.

Id. He also believed that employment arbitration was more problematic "because the structural protections inherent in the collective bargaining context are not duplicated in cases involving mandatory arbitration of individual statutory claims." *Id.* at 1476. He observed that "[u]nlike the labor case, in which both union and employer are regular participants in the arbitration process, only the employer is a repeat player in cases involving individual statutory claims. As a result, the employer gains some advantage in having superior knowledge with respect to selection of an arbitrator." *Id.*

Judge Edwards left no doubt that he regarded mandatory arbitration with suspicion: "[M]andatory arbitration agreements in individual employees' contracts often are presented on a take-it-or-leave-it basis; there is no union to negotiate the terms of the arbitration arrangement. Thus, employers are free to structure arbitration in ways that may systematically disadvantage employees." *Id.* at 1477. He cited a litany of actual and potential problems, including (1) "there is no organization [like a] union to represent employee interests in developing arbitration procedures," (2) the employer and its lawyers have a freer hand in drafting arbitration provision, (3) "some employers may seek to . . . narrow the legal rights of employees in the arbitration clause," and (4) employers may shield themselves from intrusive discovery and also punitive damages. *Id.* Finally, he specifically worried that "a company might impose a requirement that the employee pay the fees for an arbitrator's time in order to discourage or prevent employees from bringing a claim." *Id.*

313. Courts that have refused to enforce cost-shifting provisions have explicitly based their rulings on evidence that plaintiffs were too poor to afford arbitrator fees. The *Cole* court stated:

> There is no indication in AAA's rules that an arbitrator's fees may be reduced or waived in cases of financial hardship. These fees would be prohibitively expensive for an employee like Cole, especially after being fired from his job, and it is unacceptable to require Cole to pay arbitrators' fees, because such fees are unlike anything that he would have to pay to pursue his statutory claims in court.

Cole, 105 F.3d at 1484. In *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280 (11th Cir. 2001), the court found: "Here, the arbitration agreement expressly provides that the parties must

> low-paying job, judges are more likely to sever a cost-allocation provision and order arbitration,[314] or void the agreement and deny enforcement of it.[315] Conversely, if a case involves a professional employee, the cost-allocation argument fails.[316] If this trend continues, a two-tiered employment arbitration system may emerge in which higher-wage employees are forced to agree to share the costs of their arbitration, while lower-wage workers are provided arbitrations paid by their employers.

The more pertinent question for courts—and perhaps ultimately, the Supreme Court—is whether our empirical results showing pronounced differences in enforcement rates by judicial circuits represent a split in the law or factual idiosyncrasies in these cases. At this early stage, we cannot say. The two leading appellate decisions that rejected cost arguments involved professional employees. Conversely, in the three leading appellate decisions that responded favorably to employee cost arguments, the plaintiffs were a train station security guard, an airport security agent, and a janitorial supervisor.

There is more to this schism, however, than different fact patterns. Judges take very different approaches in addressing cost arguments. Some recognize that discrimination complainants face very long odds in ever getting to trial.[317] In their judgment, arbitration alleviates a significant problem in the enforcement of employment rights. The contrasting approach makes a direct comparison of forum costs for complainants who are compelled to

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share the fees and costs of arbitration equally, and Perez produced evidence of her income and the costs of arbitration before the district court to prove those costs would inhibit her from pursuing her claims." Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280, 1285 (11th Cir. 2001). The district court in *Shankle* concluded that "[t]he agreement's requirement that Shankle assume responsibility for one-half of the arbitrator's fees operates as a disincentive to his submitting a discrimination claim to arbitration. Moreover, Shankle testified that he could not afford the fees." Shankle v. B-G Maint. Mgmt. of Colo., No. 96-N-2932, 1997 WL 416405, at *4 (D. Colo. Mar. 24, 1997). The appeals court agreed: "Mr. Shankle could not afford such a fee, and it is unlikely other similarly situated employees could either." Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234–35 (10th Cir. 1999). The court also concluded that "it is unlikely that an employee in Mr. Shankle's position, faced with the mere possibility of being reimbursed for arbitrator fees in the future, would risk advancing those fees in order to access the arbitral forum." *Id.* at 1234 n.4. In contrast, no evidence of the plaintiffs' inability to pay for arbitration was introduced in *Rosenberg* or *Koveleskie*, the cases involving professional employees. *See* Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1, 15–16 (1st Cir. 1999); Koveleskie v. SBC Capital Markets, Inc., 167 F.3d 361, 366 (7th Cir. 1999).

314. *See, e.g.*, *Cole*, 105 F.3d at 1465.

315. *See, e.g.*, *Perez*, 253 F.3d at 1287.

316. *See Rosenberg*, 170 F.3d at 16 ("[I]f unreasonable fees were to be imposed on a particular employee, the argument that this was inconsistent with the 1991 CRA could be presented by the employee to the reviewing court. [But] [t]hat issue is not presented by this case." (citation omitted)).

317. *See* Howard, *supra* note 76, at 44.

arbitrate and those who sue. When arbitration forum costs exceed litigation forum costs, these judges distinguish their decisions from *Gilmer*.

This analytical schism may become institutionalized in competing doctrines. Because precedents are in place for this evolution, a future Supreme Court may need to clarify these fundamental differences in ADR perspectives. The differing approaches in cases such as *Cole* and *Rosenberg* re-create the same 5-4 ideological divide that has been visible in the Supreme Court's recent *Circuit City* and *Green Tree* decisions. The slim *Green Tree* majority—consisting of Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—would not permit Larketta Randolph to conjecture about what an arbitration would cost.[318] By dismissing her reasonable pre-hearing cost estimates as "unsupported statements [that] provide no basis on which to ascertain the actual costs and fees to which she would be subject in arbitration,"[319] these Justices endorsed a policy of ordering arbitration and allowing post-hearing appeals based on concrete financial information. The four dissenters—Justices Ginsburg, Stevens, Souter, and Breyer—indignantly responded that "it is hardly clear that Randolph should bear the burden of demonstrating up front the arbitral forum's inaccessibility, or that she should be required to submit to arbitration without knowing how much it will cost her."[320]

The cost-shifting issue in cases such as *Cole* and *Rosenberg* is part of the current Court's open ideological dispute over appropriate dispute resolution methods for employment discrimination. Falling just one vote short of a majority, the dissenters struck a discordant note in *Circuit City* when they lambasted their colleagues for "[p]laying ostrich to the substantial history"[321] behind the FAA and for "reason[ing] in a vacuum."[322] They concluded with this barb:

> A method of statutory interpretation that is deliberately uninformed, and hence unconstrained, may produce a result that is consistent with a court's own views of how things should be, but it may also defeat the very purpose for which a provision was enacted. That is the sad result in this case.[323]

The *Cole* and *Rosenberg* decisions reflect the Justices' internal conflicts. The bitter and frustrated tone in the *Circuit City* dissent implies that four Justices await the opportunity to right some of the wrongs they perceive in

318. *See* Green Tree Fin. Corp.-Ala. V. Randolph, 531 U.S. 79, 90 n.6 (2000); *see also supra* note 144.

319. *Green Tree*, 531 U.S. at 91 n.6.

320. *Id.* at 96 (Ginsburg, J., concurring in part and dissenting in part).

321. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 128 (2001) (Stevens, J., dissenting).

322. *Id.*

323. *Id.* at 133.

mandatory arbitration. Moreover, a January 15, 2002 decision, *EEOC v. Waffle House, Inc.*,[324] created a narrow exception to the pro-arbitration rulings in *Gilmer*, *Circuit City*, and *Green Tree*, but failed to resolve the developing conflict among the circuits concerning cost-shifting. Thus, a future Supreme Court may need to clarify these fundamental differences in ADR perspectives.

On a final note, our empirical investigation prompts new questions about the arbitration profession. If *Cole* continues to be an influential decision, will designers of ADR systems respond to the fact that this court used the much lower labor arbitration rate and still found that form of cost-sharing was unlawful? More generally, if a two-tiered cost-sharing system emerges, will expensive arbitration service providers price themselves out of a large segment of the ADR market?[325] If so, this could diminish the supply of arbitrators and arbitration services to handle the burgeoning work load for employment arbitrators. What effect would this have on employee access to arbitration? These questions arise because the findings here show that courts now engage in de facto price regulation of arbitrators and arbitration services.[326]

This leads to a second line of inquiry. Suppose employers address the cost-allocation issue simply by paying all forum costs. That would increase the likelihood that their arbitration agreements would be enforced. Or would it? Some empirical research shows that when employers are repeat players in an arbitration system that they subsidize, while employees are only one-time players, arbitrators are biased in favor of employers.[327] Courts have already expressed disapproval of repeat-player arbitration systems.[328]

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324. 534 U.S. 279 (2002). This 6-3 decision held that the EEOC is not a party to an individual's mandatory employment arbitration agreement, and therefore is not precluded by such an agreement from suing under any of the statutes that the agency is charged to enforce. *See id.* at 763, 765–66.

325. If employers agreed to pay all arbitration costs, we would answer no.

326. We emphasize that employers can readily opt out of this regulation by agreeing to pay all arbitration costs, or specifying that employees pay nominal fees as the *Cole* court stated.

327. *See, e.g.*, Lisa B. Bingham, *On Repeat Players, Adhesion Contracts, and the Use of Statistics on Judicial Review of Employment Arbitration Awards*, 29 McGEORGE L. REV. 223, 254, 258–59 (1998); Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining* Alexander v. Gardner-Denver *in the Wake of* Gilmer v. Interstate/Johnson Lane Corp., 1997 BYU L. REV. 591, 619–24 (discussing the advantages repeat-player employers have when negotiating contracts and later participating in dispute resolution with one-time player employees); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (discussing the systemic advantages of "repeat players" in the civil justice system over individuals or one-time players); *see also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 nn.16–17 (D.C. Cir. 1997) (recognizing the concern that neutrals have a financial interest to favor employers, as repeat players, and that empirical studies demonstrate favoritism based on the party who selects, rather than pays, the neutral).

328. See, for example, *Geiger v. Ryan's Family Steak Houses, Inc.*, 134 F. Supp. 2d 985 (S.D. Ind. 2001), offering this analysis:

In sum, our research supports two key conclusions. It shows that resistance to mandatory arbitration agreements is an uphill struggle, because courts continue to reject most of these challenges. However, notwithstanding the strong signals sent by *Gilmer* and *Circuit City*, courts are more receptive to these challenges than is generally understood. This tempers the outlook for ADR providers, who could only read *Gilmer*, *Circuit City*, and *Green Tree* as strong market-enhancing precedents. For these arbitrators and organizations, the money tree for their services may not be ever green.

> [W]hen courts are faced with an arbitration agreement reached in a collective bargaining setting, they know that both employer and union are "repeat players" in the arbitration forum. In clear contrast are cases . . . such as the one at bar: while Ryan's is a repeat player (as evidenced in part by the number of cases found in the federal and state courts challenging the validity of arbitration agreements allegedly made with EDSI on behalf of Ryan's), "any . . . plaintiff/employee who signs the [Arbitration Agreement] is not a repeat customer of [EDSI]—there is no equivalent interest on the other side weighing in to balance or provide a check to [EDSI's] incentive to please Ryan's."

Id. at 994–95 (quoting Penn. v. Ryan's Family Steak Houses, Inc., 95 F. Supp. 2d 940, 946 (N.D. Ind. 2000), *aff'd*, 269 F.3d 753 (7th Cir. 2001) (alterations in original) (citations omitted)).

Table 1. Cost-Shifting Challenges to Mandatory Employment Arbitration: Federal Court Decisions Granting Motions to Arbitrate

Courts of Appeals

LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702 (D.C. Cir. 2001) *
Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001) *
Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001) *
Chappel v. Lab. Corp. of Am., 232 F.3d 719 (9th Cir. 2000) *
Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752 (5th Cir. 1999) *
Koveleskie v. SBC Capital Mkts, Inc., 167 F.3d 361 (7th Cir. 1999)
Cole v. Burns International Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) *

District Courts

Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001) (no district court citation) *
Chappel v. Lab. Corp. of Am., 232 F.3d 719 (9th Cir. 2000) (no district court citation) *
Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000) (no district court citation)
Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752 (5th Cir. 1999) (no district court citation) *
Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997) (no district court citation)
Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997) (no district court citation) *
Rajjak v. McFrank & Williams, No. 01-Civ.-0493, 2001 WL 799766 (S.D.N.Y. July 13, 2001) *
Roberson v. Clear Channel Broad., Inc., 144 F. Supp. 2d 1371 (S.D. Fla. 2001) *
Boyd v. Town of Hayneville, 144 F. Supp. 2d 1272 (M.D. Ala. 2001) *
Giordano v. Pep Boys—Manny, Moe & Jack, Inc., No. 99-1281, 2001 WL 484360 (E.D. Pa. Mar. 29, 2001) *
Nur v. K.F.C., USA, Inc., 142 F. Supp. 2d 48 (D.D.C. 2001) *
Dowling v. Anthony Crane Int'l, No. 1998/127, 2001 WL 378838 (D.V.I. Mar. 20, 2001) *
Goodman v. ESPE Am., Inc., No. 00-CV-862, 2001 WL 64749 (E.D. Pa. Jan. 19, 2001) *
Zumpano v. Omnipoint Communications, Inc., No. 00-CV-595, 2001 WL 43781 (E.D. Pa. Jan. 18, 2001) *
Quinn v. EMC Corp., 109 F. Supp. 2d 681 (S.D. Tex. 2000) *
McCaskill v. SCI Mgmt. Corp., No. 00-2839, 2000 WL 875396 (N.D. Ill. June 22, 2000) *
Jenks v. Workman, No. IP 99-C-1389, 2000 WL 962821 (S.D. Ind. June 22, 2000)
Kreimer v. Delta Faucet Co., No. IP 99-C-1507, 2000 WL 962817 (S.D. Ind. June 2, 2000)
Fuller v. Pep Boys—Manny, Moe & Jack of Delaware, Inc., 88 F. Supp. 2d 1158 (D. Colo. 2000)
LaPrade v. Kidder, Peabody & Co., 94 F. Supp. 2d 2 (D.D.C. 2000); *see also LaPrade*, 246 F.3d 702 (D.C. Cir. 2001) *
Blair v. Scott Specialty Gases, No. 00-3865, 2000 WL 1728503 (E.D. Pa. Feb. 6, 2000) *
Moorning-Brown v. Bear, Stearns & Co., No. 99-Civ.-413, 2000 WL 16935 (S.D.N.Y. Jan. 10, 2000) *
Cline v. H.E. Butt Grocery Co., 79 F. Supp. 2d 730 (S.D. Tex. 1999) *
Jones v. Fujitsu Network Communications, Inc., 81 F. Supp. 2d 688 (N.D. Tex. 1999) *
Arakawa v. Japan Network Group, 56 F. Supp. 2d 349 (S.D.N.Y. 1999) *
Hart v. Canadian Imperial Bank of Commerce, 43 F. Supp. 2d 395 (S.D.N.Y. 1999)
Howard v. Anderson, 36 F. Supp. 2d 183 (S.D.N.Y. 1999) *
EEOC v. World Sav. & Loan Ass'n, Inc., 32 F. Supp. 2d 833 (D. Md. 1999) *
Campbell v. Cantor Fitzgerald & Co., Inc., 21 F. Supp. 2d 341 (S.D.N.Y. 1998) *
Solieri v. Ferrovie Dello Stato Spa, No. 97-Civ.-8844, 1998 WL 419013 (S.D.N.Y. July 23, 1998) *
Martens v. Smith Barney, Inc., 181 F.R.D. 243 (S.D.N.Y. 1998) *
Brooks v. Circuit City Stores, Inc., No. DKC 95-3296, 1997 WL 580364 (D. Md. May 30, 1997); *see also* Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 1998)
DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997)
McWilliams v. Logicon, Inc., No. 95-2500, 1996 WL 439291 (D. Kan. July 9, 1996); *see also McWilliams*, 143 F.3d 573 (10th Cir. 1998) *
Nazon v. Shearson Lehman Bros., Inc., 832 F. Supp. 1540 (S.D. Fla. 1993) *
Gardner v. Benefits Communications Corp., No. 91-0536, 1991 WL 294564 (D.D.C. Dec. 31, 1991); *see also Gardner*, 175 F.3d 155 (D.C. Cir. 1999) *
Caporale v. Nat'l Ass'n of Sec. Dealers, Inc., No. 90-4074, 1991 WL 281890 (D.N.J. May 10, 1991) *

* Denotes Forum Cost Case as Discussed in Part V.A

Table 2. Cost-Shifting Challenges to Mandatory Employment Arbitration: Federal Court Decisions Denying Motions to Arbitrate

Courts of Appeals

Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280 (11th Cir. 2001) *
Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000)
Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999) *
Gardner v. Benefits Communications Corp., 175 F.3d 155 (D.C. Cir. 1999) *
Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230 (10th Cir. 1999) *
Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998) *
Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997)

District Courts

Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280 (11th Cir. 2001) (no district court citation) *
Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001) (no district court citation)
Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000) (no district court citation)
Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999) (no district court citation)
Paladino v. Avnet Computer Techs., Inc., 134 F.3d 1054 (11th Cir. 1998) (no district court citation)
Dumais v. Am. Golf Corp., 150 F. Supp. 2d 1182 (D.N.M. 2001) *
Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985 (S.D. Ind. 2001) *
Patterson v. Red Lobster, 81 F. Supp. 2d 681 (S.D. Miss. 1999) *
Davis v. LPK Corp., No. C-97-3988, 1998 WL 210262 (N.D. Cal. Mar. 10, 1998)
Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 995 F. Supp. 190 (D. Mass. 1998); *see also Rosenberg*, 170 F.3d 1 (1st Cir. 1999)
Shankle v. B-G Maint. Mgmt. of Colo., Inc., No. 96-N-2932, 1997 WL 416405 (D. Colo. Mar. 24, 1997); *see also Shankle*, 163 F.3d 1230 (10th Cir. 1999) *

* Denotes Forum Cost Case as Discussed in Part VI.A

Table 3. Federal Court Decisions Ordering and Denying Arbitration in Cost-Shifting Arbitration Cases Decided After *Green Tree*

Decisions Ordering Arbitration

Courts of Appeals

LaPrade v. Kidder, Peabody & Co., Inc., 246 F.3d 702 (D.C. Cir. 2001) *
Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001) *
Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (5th Cir. 2001) *

District Courts

Rajjak v. McFrank & Williams, No. 01-CIV-0493, 2001 WL 799766 (S.D.N.Y. July 13, 2001) *
Roberson v. Clear Channel Broad., Inc., 144 F. Supp. 2d 1371 (S.D. Fla. 2001) *
Boyd v. Town of Hayneville, 144 F. Supp. 2d 1272 (M.D. Ala. 2001) *
Giordano v. Pep Boys—Manny, Moe & Jack, Inc., No. 99-1281, 2001 WL 484360 (E.D. Pa. Mar. 29, 2001) *
Nur v. K.F.C., USA, Inc., 142 F. Supp. 2d 48 (D.D.C. 2001) *
Dowling v. Anthony Crane Int'l, No. 1998/127, 2001 WL 378838 (D.V.I. Mar. 20, 2001) *
Goodman v. ESPE Am., Inc., No. 00-CV-862, 2001 WL 64749 (E.D. Pa. Jan. 19, 2001) *
Zumpano v. Omnipoint Communications, Inc., No. 00-CV-595, 2001 WL 43781 (E.D. Pa. Jan. 18, 2001) *

Decisions Denying Arbitration

Courts of Appeals

Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280 (11th Cir. 2001) *

District Courts

Dumais v. Am. Golf Corp., 150 F. Supp. 2d 1182 (D.N.M. 2001) *
Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985 (S.D. Ind. 2001) *

* Denotes Forum Cost Case as Discussed in Part VI.A

APPENDIX I: FEDERAL DECISIONS INVOLVING CHALLENGES TO MANDATORY EMPLOYMENT ARBITRATION

Arce v. Cotton Club of Greenville, Inc., 883 F. Supp. 117 (N.D. Miss. 1995).
Albert v. Nat'l Cash Register Ca., 874 F. Supp. 1328 (S.D. Fla. 1994).
Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990).
Arakawa v. Japan Network Group, 56 F. Supp.2d 349 (S.D.N.Y. 1999).
Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793 (10th Cir. 1995).
Aspar v. Pharmacia & Upjohn, Inc., 990 F. Supp. 523 (W.D. Mich. 1997).
Aspero v. Shearson Am. Express, Inc., 768 F.2d 106 (6th Cir. 1985).
Asplundh Tree Expert Co. v. Bates, 71 F.3d 592 (6th Cir. 1995).
Aynes v. Space Guard Prods., Inc., No. IP 99-1299-C, 2000 WL 962826 (S.D. Ind. July 3, 2000).
Barrowclough v. Kidder, Peabody & Co., Inc. 752 F.2d 923 (3d Cir. 1985).
Bauer v. Morton's of Chic., No. 99-C-5996, 2000 WL 149287 (N.D. Ill. Feb. 9, 2000).
Beauchamp v. Great W. Life Assurance Co., 918 F. Supp. 1091 (E.D. Mich. 1996).
Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992).
Benestad v. Interstate/Johnson Land Corp., 946 F.2d 1546 (11th Cir. 1991) (unpublished opinion).
Bernhardt v. Polygraphic Co. of Am., 218 F.2d 948 (2d Cir. 1955).
Bierdeman v. Shearson Lehman Hutton, Inc., 963 F.2d 378 (9th Cir. 1992) (unpublished opinion).
Bishop v. Smith Barney, Inc., No. 97-CIV-4807, 1998 WL 50210 (S.D.N.Y. Feb. 6, 1998).
Blair v. Scott Specialty Gases, No. 00-3865, 2000 WL 1728503 (E.D. Pa. Nov. 21, 2000).
Borg-Warner Protective Servs. Corp. v. EEOC, 245 F.3d 831 (D.C. Cir. 2001).
Borenstein v. Tucker, 757 F. Supp. 3 (D. Conn. 1991).
Boyd v. Town of Hayneville, 144 F. Supp. 2d 1272 (M.D. Ala. 2001).
Bradford v. KFC Nat'l Mgmt. Co., 5 F. Supp. 2d 1311 (M.D. Ala. 1998)
Bradford v. Rockwell Semiconductor Sys., Inc., 238 F.3d 549 (4th Cir. 2001)
Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217 (11th Cir. 2000).
Brown v. Wheat First Sec., Inc., 257 F.3d 821 (D.C. Cir. 2001).
Buchignani v. Vining-Sparks IBG, 208 F.3d 212 (6th Cir. 2000) (unpublished opinion).
Burns v. N.Y. Life Ins. Co., 202 F.3d 616 (2d Cir. 2000).
Campbell v. Cantor Fitzgerald & Co., 21 F. Supp. 2d 341 (S.D.N.Y. 1998).
Caporale v. Nat'l Ass'n of Sec. Dealers, Inc., No. 90-4070, 1991 WL 281890 (D.N.J. May 10, 1991).
Carey v. Conn. Gen. Life Ins. Co., 93 F. Supp. 2d 165 (D. Conn. 1999).
Chanchani v. Salomon/Smith Barney, Inc., No. 99-CIV-9219, 2001 WL 204214 (S.D.N.Y. Mar. 1, 2001).
Chappel v. Lab. Corp. of Am., 232 F.3d 719 (9th Cir. 2000).
Cherry v. Wertheim Schroder & Co., Inc., 868 F. Supp. 830 (D.S.C. 1994).
Chisolm v. Kidder, Peabody Asset Mgmt., Inc., 810 F. Supp. 479 (S.D.N.Y. 1992).
Circuit City Stores, Inc. v. Ahmed, 195 F.3d 1131 (9th Cir. 1999).
Cline v. H.E. Butt Grocery Co., 79 F. Supp. 2d 730 (S.D. Tex. 1999).
Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).
Cole v. Halliburton Co., No. CIV-00-0862, 2000 WL 1531614 (W.D. Okla. Sept. 6, 2000).
Coudert v. Paine Webber Jackson & Curtis, 705 F.2d 78 (2d Cir. 1983).
Craft v. Campbell Soup Co., 177 F.3d 1083 (9th Cir. 1999).
Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460 (N.D. Ill. 1997).
Dancu v. Coopers & Lybrand, 972 F.2d 1330 (3d Cir. 1992) (unpublished opinion).
Davis v. LPK Corp., No. C-97-3998, 1998 WL 210262 (N.D. Cal. Mar. 10, 1998).
Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198 (2d Cir. 1999).
DeGaetano v. Smith Barney, Inc., 983 F. Supp. 459 (S.D.N.Y. 1997).
Dean Witter Reynolds, Inc., v. Ness, 677 F. Supp. 866 (D.S.C. 1988).
Dickstein v. DuPont, 443 F.2d 783 (1st Cir. 1971).
DiCrisci v. Lyndon Guar. Bank of N.Y., 807 F. Supp. 947 (W.D.N.Y. 1992).
Dowling v. Anthony Crane Int'l, No. 1998/127, 2001 WL 378838 (D.V.I. Mar. 20, 2001).
Downing v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 725 F.2d 192 (2d Cir. 1984).
Doyle v. Raley's Inc., 158 F.3d 1012 (9th Cir. 1998).
Drayer v. Krasner, 572 F.2d 348 (2d Cir. 1978).

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).
Dumais v. Am. Golf Corp., 150 F. Supp. 2d 1182 (D.N.M. 2001).
Durkin v. CIGNA Prop. & Cas. Corp., 942 F. Supp. 481 (D. Kan. 1996).
EEOC v. Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999).
EEOC v. Kidder, Peabody & Co., 156 F.3d 298 (2d Cir. 1998).
EEOC v. Luce, Forward, Hamilton & Scripps, LLP, 122 F. Supp. 2d 1080 (C.D. Cal. 2000).
EEOC v. Waffle House, Inc., 193 F.3d 805 (4th Cir. 1999).
EEOC v. World Sav. & Loan Ass'n, Inc., 32 F. Supp. 2d 833 (D. Md. 1999).
Emeronye v. CACI Int'l, Inc., 141 F. Supp. 2d 82 (D.D.C. 2001).
Etokie v. Carmax Auto Superstores, Inc., 133 F. Supp. 2d 390 (D. Md. 2000).
Farrand v. Lutheran Bhd., 993 F.2d 1253 (7th Cir. 1993).
Feinberg v. Bear, Stearns & Co., No. 90-CIV-5250, 1991 WL 79309 (S.D.N.Y. May 3, 1991).
Feinberg v. Oppenheimer & Co., 658 F. Supp. 892 (S.D.N.Y. 1987).
First Liberty Inv. Group v. Nicholsberg, 145 F.3d 647 (3d Cir. 1998).
Fleck v. E.F. Hutton Group, Inc., 891 F.2d 1047 (2d Cir. 1989).
Floss v. Ryan's Family Steak Houses, Inc., 211 F.3d 306 (6th Cir. 2000).
Flynn v. AerChem, Inc., 102 F. Supp. 2d 1055 (S.D. Ind. 2000).
Foley v. Presbyterian Ministers' Fund, No. 90-1053, 1992 WL 63269 (E.D. Pa. Mar. 19, 1992).
Fox v. Merrill Lynch & Co., Inc., 453 F. Supp. 561 (S.D.N.Y. 1978).
Fuller v. Pep Boys—Manny, Moe & Jack of Del. Inc., 88 F. Supp. 2d 1158 (D. Colo. 2000).
Gaghich v. Prudential Ins. of Am., No. 96-CV-0464E, 1997 WL 128269 (W.D.N.Y. Mar. 10, 1997).
Gannon v. Circuit City Stores, Inc., 262 F.3d 677 (8th Cir. 2001).
Gardner v. Benefits Communications Corp., 175 F.3d 155 (D.C. Cir. 1999).
Gateson v. Aslk-Bank, N.V., No. 94-CIV-5849, 1995 WL 387720 (S.D.N.Y. June 25, 1995).
Gaylor v. Donald B. MacNeal, Inc., No. 95-C-7250, 1996 WL 224566 (N.D. Ill. May 1,1996)
Geiger v. Ryan's Family Steak Houses, Inc., 134 F. Supp. 2d 985 (S.D. Ind. 2001).
Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126 (7th Cir. 1997).
Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990).
Giordano v. Pep Boys—Manny, Moe & Jack, Inc., No. 99-1281, 2001 WL 484360 (E.D. Pa. Mar. 29, 2001).
Golenia v. Bob Baker Toyota, 915 F. Supp. 201 (S.D. Cal. 1996).
Goodman v. ESPE Am., Inc., No. 00-CV-862, 2001 WL 64749 (E.D. Pa. Jan. 19, 2001).
Gonzalez v. Toscorp, Inc., No. 97-Civ.-8158, 1999 WL 595632 (S.D.N.Y. Aug. 5, 1999).
Hall v. Metlife Res., No. 94-CIV-0358, 1995 WL 258061 (S.D.N.Y. May 3, 1995).
Hart v. Canadian Imperial Bank of Commerce, 43 F. Supp. 2d 395 (S.D.N.Y. 1999).
Haviland v. Goldman, Sachs & Co., 947 F.2d 601 (2d Cir. 1991).
Heller v. MC Fin. Servs., Ltd., No. 97-Civ.-5317, 1998 WL 190288 (S.D.N.Y. Apr. 21, 1998).
Herko v. Metro. Life Ins. Co., 978 F. Supp. 141 (W.D.N.Y. 1997).
Herman v. SBC Warburg Dillon Read, Inc., No. 99-CIV-1593, 1999 WL 688304 (S.D.N.Y. Sept. 3, 1999).
Hoffman v. Aaron Kamhi, Inc., 927 F. Supp. 640 (S.D.N.Y. 1996).
Hooters of Am., Inc., v. Phillips, 173 F.3d 933 (4th Cir. 1999).
Horne v. New England Patriots Football Club, Inc., 489 F. Supp. 465 (D. Mass. 1980).
Howard v. Anderson, 36 F. Supp. 2d 183 (S.D.N.Y. 1999).
Hughes Training Inc. v. Cook, 254 F.3d 588 (5th Cir. 2001).
Hydrick v. Mgmt. Recruiters Int'l, Inc., 738 F. Supp. 1434 (N.D. Ga. 1990).
In re Prudential Ins. Co. of Am. Sales Practice Litig., 133 F.3d 225 (3d Cir. 1998).
Jenks v. Workman, No. IP 99-C-1389, 2000 WL 962821 (S.D. Ind. June 22, 2000).
Johnson v. Circuit City Stores, Inc., 148 F.3d 373 (4th Cir. 1998).
Johnson v. Hubbard Broad., Inc., 940 F. Supp. 1447 (D. Minn. 1996).
Jones v. Fujitsu Network Communications, Inc., 81 F. Supp. 2d 688 (N.D. Tex. 1999).
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Kaliden v. Shearson Lehman Hutton, Inc., 789 F. Supp. 179 (W.D. Pa. 1991).
Kidd v. Equitable Life Assurance Soc'y of the United States, 32 F.3d 516 (11th Cir. 1994).
Kinnebrew v. Gulf Ins. Co., No. 3:94-CV-1517, 1994 WL 803508 (N.D. Tex. Nov. 28, 1994).
Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999).

Kresock v. Bankers Trust Co., 21 F.3d 176 (7th Cir. 1994).
Kreimer v. Delta Faucet Co., No. IP 99-C-1507, 2000 WL 962817 (S.D. Ind. June 2, 2000).
Kropfelder v. Snap-On Tools Corp., 859 F. Supp. 952 (D. Md. 1994).
Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996).
Kummetz v. Tech Mold, Inc., 152 F.3d 1153 (9th Cir. 1998).
Landis v. Finova Capital Corp., No. 00-Civ.-0187, 2000 WL 546985 (S.D.N.Y. May 3, 2000).
Lang v. Burlington N. R.R. Co., 835 F. Supp. 1104 (D. Minn. 1993).
LaPrade v. Kidder, Peabody & Co., 246 F.3d 702 (D.C. Cir. 2001).
Legg, Mason & Co. v. Mackall & Coe, Inc., 351 F. Supp. 1367 (D.D.C. 1972).
Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 431 F. Supp. 271 (E.D. Pa. 1977).
Litaker v. Lehman Bros. Holdings, Inc., No. 97-Civ.-1607, 1999 WL 619638 (S.D.N.Y. Aug. 16, 1999).
Ludwig v. Equitable Life Assurance Soc'y of the United States, 978 F. Supp. 1379 (D. Kan. 1997).
Lyster v. Ryan's Family Steak Houses, Inc., 239 F.3d 943 (8th Cir. 2001).
McCaskill v. SCI Mgmt. Corp., No. 00-2839, 2000 WL 875396 (N.D. Ill. June 22, 2000).
McDonough v. Equitable Life Assurance Soc'y of U.S., No. 98-Civ.-3921, 1999 WL 731424 (S.D.N.Y. Sept. 20, 1999).
McGill v. Rural/Metro Corp., No. 2:00-CV-192, 2001 WL 484796 (N.D. Miss. Feb. 20, 2001).
McMahon v. RMS Elec., Inc., 618 F. Supp. 189 (S.D.N.Y. 1985).
McWilliams v. Logicon, Inc., 143 F.3d 573 (10th Cir. 1998).
Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992).
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Manion v. Nagin, 255 F.3d 535 (8th Cir. 2001).
Martens v. Smith Barney, Inc., 181 F.R.D. 243 (S.D.N.Y. 1998).
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Merrill Lynch, Pierce, Fenner & Smith, Inc. v. DeCaro, 577 F. Supp. 616 (W.D. Mo. 1983).
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Metzler v. Harris Corp., No. 00-Civ.-5847, 2001 WL 194911 (S.D.N.Y. Feb. 26, 2001).
Meyer v. Starwood Hotels & Resorts Worldwide, Inc., No. 00-Civ.-8339, 2001 WL 396447 (S.D.N.Y. Apr. 18, 2001).
Michalski v. Circuit City Stores, Inc., 177 F.3d 634 (7th Cir. 1999).
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Moore v. Interacciones Global, Inc., No. 94-Civ.-4789, 1995 WL 33650 (S.D.N.Y. Jan. 27, 1995).
Moorning-Brown v. Bear, Stearns & Co., Inc., No. 99-Civ.-4130, 2000 WL 16935 (S.D.N.Y. Jan. 10, 2000).
Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984).
Morrison v. Circuit City Stores, Inc., 70 F. Supp. 2d 815 (S.D. Ohio 1999).
Muh v. Newburger, Loeb & Co., Inc., 540 F.2d 970 (9th Cir. 1976).
Nazon v. Shearson Lehman Bros., Inc., 832 F. Supp. 1540 (S.D. Fla. 1993).
Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997).
Nicholson v. CPC Int'l Inc., 877 F.2d 221 (3d Cir. 1989).
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Penn v. Ryan's Family Steak Houses, Inc., 269 F.3d 753 (7th Cir. 2001).
Perez v. Globe Airport Sec. Servs., Inc., 253 F.3d 1280 (11th Cir. 2001).
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Pierce v. Shearson Lehman Hutton, Inc., No. C-0722, 1990 WL 60751 (N.D. Ill. Apr. 26, 1990).
Pihl v. Thomson McKinnon Sec., Inc., No. 87-7632, 1988 WL 54036 (E.D. Pa. May 24, 1988).
Pitter v. Prudential Life Ins. Co. of Am., 906 F. Supp. 130 (E.D.N.Y. 1995).
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Porter v. CIGNA, No. 1:96-CV-765, 1997 WL 1068630 (N.D. Ga. Mar. 26, 1997).
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Rojas v. TK Communications, Inc., 87 F.3d 745 (5th Cir. 1996).
Roodveldt v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 585 F. Supp. 770 (E.D. Pa. 1984).
Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999).
Rudolph v. Alamo Rent A Car, Inc., 952 F. Supp. 311 (E.D. Va. 1997).
Satarino v. A.G. Edwards & Sons, Inc., 941 F. Supp. 609 (N.D. Tex. 1996).
Scher v. Equitable Life Assurance. Soc'y of the United States, 866 F. Supp. 776 (S.D.N.Y. 1994).
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