

2001

Who Pays Arbitration Fees? The Unanswered Question in *Circuit City Stores, Inc. v. Adams*

Melissa G. Lamm

Follow this and additional works at: <https://scholarship.law.campbell.edu/clr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Melissa G. Lamm, *Who Pays Arbitration Fees? The Unanswered Question in Circuit City Stores, Inc. v. Adams*, 24 CAMPBELL L. REV. 93 (2001).

This Comment is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized editor of Scholarly Repository @ Campbell University School of Law.

WHO PAYS ARBITRATION FEES?: THE UNANSWERED QUESTION IN *CIRCUIT CITY STORES, INC. v. ADAMS*

I. INTRODUCTION*

As courts and administrative agencies are becoming busier and litigation more complex, many today see alternative dispute resolution, specifically arbitration, as a way to promptly and efficiently resolve disputes.¹ Arbitration, especially in light of the recent United States Supreme Court decision in *Circuit City Stores, Inc. v. Adams*,² is becoming more common in employer-employee, business-customer, and business-business relationships. The Court held in *Circuit City* that the Federal Arbitration Act (FAA) applies to nearly all interstate employment relationships.³ The challenge before the courts now is determining who should bear the burden of paying for the arbitration of disputes.

II. HISTORICAL BACKGROUND AND CURRENT LAW

A. *Origins, Operative Provisions, and Purposes of the Federal Arbitration Act*

At common law, agreements to arbitrate were met with hostility and generally held void as attempts to “oust” the courts from jurisdiction over the subject matter.⁴ However, by the beginning of the twentieth century, the United States Supreme Court started issuing opinions supporting and encouraging arbitration as means of peaceful settlement.⁵ In 1925, Congress enacted the Federal Arbitration Act (FAA) compelling judicial enforcement of written arbitration agreements.⁶

* The author wishes to express her gratitude to Professors Richard A. Lord and E. Gregory Wallace for their helpful insight in regard to the issues discussed herein.

1. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

2. 532 U.S. 105, 121 S. Ct. 1302 (2001). The focus of this article is on arbitration in the employer-employee setting.

3. *Id.*

4. SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* 6 (Walter H.E. Jaeger ed., The Lawyers Co-operative Publishing Co. 1977) (1920); *Hamilton v. Home Ins. Co.*, 137 U.S. 370 (1890).

5. SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* 28-30 (Walter H.E. Jaeger ed., The Lawyers Co-operative Publishing Co. 1977) (1920).

6. *Circuit City*, 532 U.S. 105. FAA was reenacted and codified in 1947 in Title 9 of the United States Code (9 U.S.C. §§ 1-14 (1999)).

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.⁷

The express purpose of the FAA was to “enforce [arbitration] agreements into which parties had entered” and to “place such agreements ‘upon the same footing as other contracts.’”⁸

Section 1 of the FAA contains an exception to the Act stating that: “nothing [in this Act] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”⁹ Under the maxim, *ejusdem generis*, this exception has been strictly construed by the United States Supreme Court and the United States Courts of Appeal, save the Ninth Circuit, to apply solely to transportation workers and those specifically engaged in interstate commerce.¹⁰

7. 9 U.S.C. § 2 (1999).

8. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985); *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 474 (1989).

9. 9 U.S.C. § 1 (1999).

10. *Ejusdem generis*, meaning: “when a general word or phrase follows a list of specific persons or things, the general words or phrase will be interpreted to include only persons or things of the same type as those listed” (BLACK’S LAW DICTIONARY 535 (7th ed. 1999)). *Circuit City*, 535 U.S. 105, 121 S. Ct. 1302 (2001); see generally *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999) (applying FAA to Title VII claims); *Desiderio v. Nat’l Ass’n of Sec. Dealers, Inc.*, 191 F.3d 198 (2d Cir. 1999) (applying FAA to pre-dispute agreements to arbitrate Title VII claims); *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998) (holding that pre-dispute agreements to arbitrate claims under the Age Discrimination in Employment Act are enforceable under the FAA); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001) (subjecting federal statutory claims, like those under the Age Discrimination in Employment Act, to mandatory arbitration agreements); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229 (5th Cir. 1991) (holding that Title VII claims are subject to securities industry compulsory arbitration); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir. 1991) (holding that only those employment contracts which specifically implicate interstate commerce are not subject to the FAA, falling within the exclusion of “contracts of employment”); *Baltimore & Ohio Chicago Terminal R.R. Co. v. Wis. Cent. Ltd.*, 154 F.3d 404 (7th Cir. 1998) (holding that “most, perhaps all, statutory claims are arbitrable.”); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634 (7th Cir. 1999) (applying FAA to pre-dispute agreements to arbitrate Title VII claims); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997) (holding that Section I of the FAA “applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate

Arbitration is a method of settling disputes by one or more unofficial persons, issuing a decision and an award in lieu of a judicial proceeding.¹¹ The benefits of the enforcement of arbitration provisions are numerous. An arbitration agreement permits the parties to avoid the high costs of prolonged litigation, especially beneficial in employment situations where smaller sums of money are involved and difficult choice-of-law questions are presented.¹² Unfortunately, many attorneys think of arbitration narrowly, applying only to employment situations.¹³ One of the trade-offs for less costly dissolution of a case is limited discovery procedures, for a party “trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”¹⁴

Although many arbitrators appear to be acting as private judges, arbitration does provide a form of mediation with a more informal hearing, issuing a final and binding decision on the merits.¹⁵ Because decisions are rendered upon the merits of a particular case and arbitrators are subject to only very limited review by a court, arbitrators may sometimes reach decisions and give relief that a trial court cannot award.¹⁶

Despite allegations that arbitration panels will be biased, the United States Supreme Court has consistently rejected such attacks: “[w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain

commerce”); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (holding that Title VII claims are subject to mandatory arbitration); *McWilliams v. Logicon, Inc.*, 143 F.3d 573 (10th Cir. 1998) (holding that FAA’s “workers engaged in interstate commerce” exemption only applies to contracts of employees actually engaged in interstate commerce); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992) (holding that Title VII claims are subject to securities industry compulsory arbitration); *but see, e.g., Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir. 1999), *op. amended and superseded on denial of reh’g by* 177 F.3d 1083 (9th Cir. 1998).

11. *Omaha v. Omaha Water Co.*, 218 U.S. 190 (1910).

12. *See Circuit City*, 532 U.S. 105; *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

13. Judith A. La Manna, *Mediation Can Help Parties Reach Faster, Less Costly Results in Civil Litigation*, 73 N.Y. St. B.J. 10 (2001).

14. *Mitsubishi Motors*, 473 U.S. at 628.

15. *See La Manna*, *supra* note 13.

16. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *see Nat’l Rules for the Resolution of Employment Disputes (Including Mediation & Arbitration Rules)*, Rule 34 (effective Jan. 1, 1999), 1998 WL 1527109. The most common example is the award of punitive damages when they could not otherwise be awarded.

competent, conscientious and impartial arbitrators.”¹⁷ Moreover, arbitral rulings are reviewable by the courts and may be overturned “[w]here there [is] evident partiality or corruption in the arbitrators.”¹⁸

Often, unequal bargaining power will exist between an employee and employer.¹⁹ However, the Supreme Court of the United States observed that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable.”²⁰ Thus, an arbitration agreement is enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”²¹

In North Carolina, a contract provision requiring that the parties settle disputes by arbitration is valid, enforceable, and irrevocable unless the parties agree to the contrary.²² Further, arbitration is favored by public policy with any doubt concerning the existence of an arbitration agreement resolved in favor of arbitration.²³ However, arbitration may only exist between employers and employees if the employment contract explicitly so provides.²⁴

North Carolina, along with approximately 35 other states, has adopted the Uniform Arbitration Act, which is similar to the Federal Arbitration Act.²⁵ North Carolina’s general provision regarding arbitration is comparable to Section 2 of the Federal Arbitration Act, reading as follows:

Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and

17. *Mitsubishi Motors*, 473 U.S. at 634.

18. 9 U.S.C. § 10(a)(2) (1999).

19. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (requiring arbitration of claims under Age Discrimination in Employment Act is enforceable because arbitration provides an adequate alternative forum).

20. *Id.* at 33.

21. 9 U.S.C. § 2 (1999).

22. *Johnston Co. v. Rouse*, 331 N.C. 88, 414 S.E.2d 30 (1992); N.C. Gen. Stat. § 1-567.2 (1999).

23. *Johnston Co. v. Rouse*, 331 N.C. 88, 414 S.E.2d 30 (1992).

24. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982); N.C. Gen. Stat. § 1-567.2(b)(2) (1999).

25. 9 U.S.C. §§ 1-14 (1999); N.C. Gen. Stat. §§ 1-567.1-29 (1999); *see, e.g.*, *Ariz. Rev. Stat. §§ 12-1501* (2000) (providing table with statutory citations for jurisdictions which have adopted the Uniform Arbitration Act).

irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.²⁶

The primary difference between the FAA and North Carolina's statute is that the FAA solely governs contracts "evidencing a transaction involving commerce."²⁷ Thus, whether an employment contract is governed by state or federal arbitration law makes no significant difference since the arbitration rules are basically the same and are applied similarly.²⁸

B. *United States Supreme Court Decisions Upholding and Interpreting the FAA*

The constitutional validity of the FAA has been questioned in several United States Supreme Court cases.²⁹ The Court, in defending the FAA, goes back to the origins of the United States Constitution to establish the validity of the Act. Article I, Section 8, Clause 3 of the United States Constitution empowers Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."³⁰ The United States Supreme Court has broadly defined "commerce" to encompass nearly all activity affecting two or more states by including: "every species of commercial intercourse . . . which concerns more States than one."³¹ The Supreme Court further extended congressional power to regulate any activity, local or interstate, that either in itself or in combination with other activities has a "substantial economic effect on" interstate commerce.³² However, while Congress' power to regulate commerce is broad, it is not without boundaries. The Supreme Court held in *United States v. Lopez* that the mere possibility that an activity *might* have a substantial effect on interstate commerce was not sufficient to justify congressional regulation; a jurisdictional nexus must exist between the activity regulated and interstate commerce.³³ Despite that proscription, the Supreme Court preserved Congress' commerce authority to regulate those activities, including persons, having a substantial relation to interstate com-

26. N.C. Gen. Stat. § 1-567.2(a) (1999); see *Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

27. 9 U.S.C. § 2 (1999).

28. N.C. Gen. Stat. § 1-567.2(a) (1999); see *Crutchley*, 306 N.C. 518, 293 S.E.2d 793 (1982).

29. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995); see *Southland*, 465 U.S. 1; *Circuit City*, 532 U.S. 105.

30. U.S. CONST. art. I, § 8, cl. 3.

31. See *Gibbons v. Ogden*, 22 U.S. 1, 193-194 (1824).

32. See *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

33. See *United States v. Lopez*, 514 U.S. 549 (1995).

merce even though involved in solely intrastate activities.³⁴ Accordingly, the Court has found that the FAA is a proper exercise of Congress' commerce clause power and thus is applicable to arbitration provisions involving interstate activity, excluding employment contracts of transportation workers.³⁵

Despite this broad grant of power by the Supreme Court, attorneys general of 22 states have argued that the FAA unreasonably intrudes upon the policies of individual states by preempting state employment laws which restrict or limit pre-dispute arbitration agreements between employees and employers and preclude employees from contracting away their right to pursue claims in court.³⁶ However, in *Southland Corporation v. Keating*, the United States Supreme Court held that Congress intended the FAA to apply to individual states as well.³⁷ The FAA was "motivated, first and foremost, by a . . . desire" to change state antiarbitration policies by placing arbitration "agreements 'upon the same footing as other contracts.'"³⁸ Thus, states are still afforded a "method for protecting consumers against unfair pressure to agreement to a contract with an unwanted arbitration provision. States may regulate . . . arbitration clauses . . . under general contract law principles and may . . . invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'"³⁹ Further, the Court stated, by "agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial forum."⁴⁰ In the end, the Court found that the FAA preempted state legislative attempts to undermine the enforceability of arbitration agreements.⁴¹

Then in 1995, the United States Supreme Court in *Allied-Bruce Terminix Companies, Inc. v. Dobson* further defined the scope of the FAA, holding that by enacting the FAA, Congress intended to exercise extensive interstate commerce power.⁴² Section 2 of the FAA covers contracts "involving commerce," a broader term than the traditionally

34. *See id.*

35. *See Circuit City*, 532 U.S. 105.

36. *Id.*

37. *See Southland*, 465 U.S. 1.

38. *Byrd*, 470 U.S. at 220; *Volt Info.*, 489 U.S. at 474.

39. *Allied-Bruce*, 513 U.S. at 281. (1995).

40. *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors*, 473 U.S. at 628) (Fourth Circuit case of registered securities representative who brought suit against employer alleging termination violated Age Discrimination in Employment Act).

41. *See Southland*, 465 U.S. 1.

42. *See Allied-Bruce*, 513 U.S. 265.

used words of “in commerce.”⁴³ The Supreme Court held that the word “involving” was the functional equivalent of “affecting,” indicating Congress’ intent to fully exercise its constitutional power.⁴⁴ Thus, again, the Supreme Court dismissed an attack on the FAA, holding the Act was a constitutional exercise of Congress’ commerce power.⁴⁵

The most recent Supreme Court case questioning the application and scope of the FAA is *Circuit City Stores, Inc. v. Adams*.⁴⁶ In that case, the employer brought an action in federal court under the FAA to compel arbitration and enjoin the employee’s state court employment discrimination action.⁴⁷ The circuit court held that all employment contracts were beyond the scope of the FAA’s reach.⁴⁸ The United States Supreme Court summarily reversed, holding that the only contracts that were exempted from the FAA were employment contracts of transportation workers.⁴⁹ The Court recited the same commerce clause discussion as in *Allied-Bruce Terminix Companies*.⁵⁰ Although the Court resolved the issue of the scope and application of the FAA, the Court did not indicate who would be responsible for all the fees associated with arbitration.⁵¹ The issue now before the federal courts, and ultimately the United States Supreme Court, is the treatment of fee-splitting provisions in arbitration agreements.⁵²

III. TYPES OF ISSUES ARBITRATED IN THE EMPLOYER-EMPLOYEE SETTING

Given the expansive application of the FAA by the United States Supreme Court in *Circuit City*, many diverse issues can be subjected to

43. 9 U.S.C. § 2 (1999). See *Wickard*, 317 U.S. 111.

44. *Allied-Bruce*, 513 U.S. at 273-274. The United States Supreme Court ruling in *United States v. Lopez* has no effect on the Court’s interpretation of the FAA: “To say that the statutory words ‘engaged in commerce’ are subject to variable interpretations depending upon the date of adoption, even a date before the phrase became a term of art, ignores the reason why the formulation became a term of art in the first place: The plain meaning of the words ‘engaged in commerce’ is narrower than the more open-ended formulations ‘affecting commerce’ and ‘involving commerce.’ [citation]. . . It would be unwieldy for Congress, for the [Supreme] Court, and for litigants to be required to deconstruct statutory Commerce Clause phrases depending upon the year of a particular statutory enactment.” *Circuit City*, 532 U.S. at --, 121 S. Ct. at 1310.

45. *Allied-Bruce*, 513 U.S. at 273-274.

46. See *Circuit City*, 532 U.S. 105.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*; *Allied-Bruce*, 513 U.S. at 273-274.

51. See *Circuit City*, 532 U.S. 105.

52. This article will specifically deal with fee-splitting in the employer-employee context.

arbitration in the employer and employee relationship, either through compelled statutory arbitration or through contractual provisions.⁵³ Restrictive covenants, statutory rights, wrongful termination, choice of law, forum selection clauses, and anti-trust disputes are just some topics that are commonly submitted by employment contracts to arbitration.⁵⁴ This article will focus on the arbitration of restrictive covenants, statutory rights, and wrongful termination in the employer-employee setting.

A. Restrictive and Noncompetition Covenants

A restrictive covenant is a contractual provision found in employment contracts in which one party agrees to forego conducting business similar to that of the other party.⁵⁵ A majority of states uphold noncompetition covenants if signed prior to, contemporaneously with, or shortly after employment begins so long as the conditions are reasonable in their scope, time, and geographical restrictions.⁵⁶

Determining whether to apply state arbitration law (usually the Uniform Arbitration Act) or the FAA to restrictive covenants is sometimes difficult.⁵⁷ However, when the contract terms do not specify whether state or federal arbitral provisions are to apply, most courts look to the scope of the geographical restrictions to determine if the transaction involves interstate commerce.⁵⁸ If the restrictive covenant does in fact involve interstate commerce, then according to *Circuit City*, the FAA applies to the dispute.⁵⁹ If geographical restraints are solely intrastate or are not imposed by the restrictive covenant, then state law is applied, absent a choice of law clause in the employment contract.⁶⁰

When a restrictive covenant involves intertwined facts and issues, with some issues requiring arbitration and others not, jurisdictions

53. *Walker v. S. Ry. Co.*, 385 U.S. 196 (1967) (stating that some claims are subject to mandatory arbitration due to statute requirement); *Circuit City*, 532 U.S. 105.

54. Topics such as choice of law provisions, forum selection clauses, and anti-trust disputes, are not discussed in this article due to their unique and complex nature.

55. BLACK'S LAW DICTIONARY 370 (7th ed. 1999).

56. *Cent. Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); BLACK'S LAW DICTIONARY 370 (7th ed. 1999).

57. *Graphic Scanning Corp. v. Yampol*, 850 F.2d 131 (2nd Cir. 1988).

58. *See id.* (subjecting parties to federal arbitration law because restrictive covenant limiting activities in three states clearly involved interstate commerce).

59. *See id.*; *Circuit City*, 532 U.S. 105 (employment contracts of transportation workers are not subject to the FAA).

60. *See Graphic Scanning*, 850 F.2d 131.

were split in their treatment of whether to deny or grant arbitration.⁶¹ However, in 1985, the United States Supreme Court clarified the issue, holding that the FAA

divests the district courts of any discretion regarding arbitration in cases containing both arbitrable and nonarbitrable claims, and instead requires that the courts compel arbitration of arbitrable claims, when asked to do so [B]oth through its plain meaning and the strong federal policy it reflects, [the FAA] requires courts to enforce the bargain of the parties to arbitrate, and “not substitute [its] own views of economy and efficiency” for those of Congress.⁶²

Hence, the FAA “requires district courts to compel arbitration of pending arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.”⁶³

B. *Statutory Rights under Title VII and the ADEA*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination and harassment on the basis of an individual’s race, color, religion, sex, pregnancy, or national origin, and further prohibits retaliation against an employee who opposes illegal harassment or discrimination in the workplace.⁶⁴ In 1991, the United States Supreme Court stated that statutory claims, specifically those under the Age Discrimination in Employment Act (ADEA), may be subjected to the FAA since nothing in the text or the legislative history explicitly precludes arbitration or other nonjudicial resolution of claims.⁶⁵ Additionally, while dicta, the *Gilmer* Court concluded that Title VII claims and those under the Older Workers Benefits Protection Act, which amended the ADEA, were not excepted from the FAA either.⁶⁶ According to the Civil Rights Act of 1991, “[w]here appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, includ-

61. See *Byrd*, 470 U.S. 213 (general principal of requiring arbitration is applicable in other situations besides employer-employee restrictive covenants; however, for simplicity sake, this article only discusses in restrictive covenant context). For a comparison of state treatment of intertwined facts and issues, see, *Atmel Corp. v. Vitesse Semiconductor Corp.*, No. 98CA0586, 2001 WL 125909, at *8-9 (Colo. Ct. App. Feb. 15, 2001), holding that due to judicial economy, all issues should be resolved by litigation.

62. *Byrd*, 470 U.S. at 217 (quoting *Dickinson v. Heinold Sec., Inc.*, 661 F.2d 638, 646 (9th Cir. 1981)).

63. *Byrd*, 470 U.S. at 217.

64. 42 U.S.C. § 2000e-2 (1994).

65. *Gilmer*, 500 U.S. at 33.

66. *Id.*; see *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir.).

ing . . . arbitration, is encouraged to resolve disputes arising under [Title VII and the ADEA].”⁶⁷ The majority of courts have interpreted the phrase “to the extent authorized by law” to mean “current law,” meaning current arbitration law.⁶⁸ Thus, both *Gilmer* and the FAA apply to statutory claims.⁶⁹

However, the employment contract must specify that statutory claims are subject to arbitration.⁷⁰ If the employment agreement only requires the arbitration of contract-based claims, an employee is not precluded from subsequently bringing statutory claims in a judicial setting.⁷¹

One of the primary challenges to the enforceability of arbitration provisions, specifically those affecting Title VII claims, is the issue of unconscionability.⁷² Courts have held that requiring an employee to sign an employment contract submitting claims to arbitration as a prerequisite to employment does not constitute an unconscionable contract of adhesion.⁷³ The burden of proof to establish unconscionability requires a showing of “both a lack of meaningful choice about whether to accept the provision in question, and that the dispute provisions were so onesided as to be oppressive.”⁷⁴ Mere gross disparity in bargaining power “is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”⁷⁵ The party alleging inequality of bargaining power must show fraud or other oppressive conduct to invalidate the arbitral provision.⁷⁶

C. Wrongful Termination

Wrongful termination and discharge actions brought by a former employee against an employer, allege that the termination of employment was illegal or violated a contract provision.⁷⁷ The United States Supreme Court has held that contract grievance procedures, especially those relating to wrongful termination, are permissible so long as the

67. *Rosenberg*, 170 F.3d at 4 (quoting Civil Rights Act of 1991).

68. *See Desiderio*, 191 F.3d 198.

69. *Id.*

70. *Gilmer*, 500 U.S. at 33.

71. *Id.*

72. *Id.*; *see Rosenberg*, 170 F.3d 1.

73. *See Rosenberg*, 170 F.3d 1.

74. *Id.* at 17.

75. *Gilmer*, 500 U.S. at 33.

76. *Rosenberg*, 170 F.3d at 17.

77. BLACK'S LAW DICTIONARY 1607 (7th ed. 1999).

provisions are “voluntarily incorporated by the parties.”⁷⁸ However, some employer-employee relationships implicate federal laws that mandate arbitration of certain disputes.⁷⁹ The Supreme Court held that an employee is not required to pursue a remedy for wrongful termination under arbitration if the agreement was involuntarily entered, even if statutorily mandated.⁸⁰

Courts have addressed two primary issues concerning wrongful termination claims: the first issue involves unilateral arbitration requirements with the second pertaining to overly broad arbitration provisions.⁸¹ First, many employment contracts compel the “arbitration of employee—but not employer—claims arising out of wrongful termination.”⁸² The employer cannot require the employee to waive rights to a jury trial and then retain all the “benefits and protections the right to a judicial forum provides” the employer.⁸³ The court requires some “modicum of bilaterality.”⁸⁴ Accordingly, unilateral obligations to arbitrate wrongful termination disputes are unconscionable.⁸⁵ Second, in drafting clauses requiring arbitration of wrongful discharge claims, an overly broad clause may encompass more causes of action than the parties desire.⁸⁶ For instance, an arbitration provision calling for resolution of disputes involving an employee’s termination is broad enough to include any disputes arising out of the employment relationship, including Title VII claims.⁸⁷ Thus, parties must be specific when providing for arbitration of wrongful termination claims, and excluding statutory claims.

78. *Walker*, 385 U.S. at 197.

79. *See Walker*, 385 U.S. 196 (subjecting fireman to Railway Labor Act compelling arbitration for minor disputes was not voluntarily entered into; matters involving federal acts are outside the scope of this article due to their complexity; however, it is noteworthy to see the United States Supreme Court’s treatment of involuntarily entered agreements to arbitrate).

80. *See Walker*, 385 U.S. 196.

81. *See Armendariz v. Found. Health Psychcare Servs. Inc.*, 6 P.3d 669 (Cal. 2000); *Arakawa v. Japan NetworkGroup*, 56 F. Supp. 2d 349 (S.D.N.Y. 1999).

82. *Armendariz*, 6 P.3d at 694.

83. *Armendariz*, 6 P.3d at 692 (quoting *Kinney v. United HealthCare Servs., Inc.*, 83 Cal. Rptr. 2d 348 (1999)).

84. *Armendariz*, 6 P.3d at 692.

85. *See Armendariz*, 6 P.3d 669.

86. *See Arakawa*, 56 F. Supp. 2d 349.

87. *Id.*

IV. ARBITRATION EXPENSES IN THE EMPLOYER-EMPLOYEE SETTING

With the recent United States Supreme Court decision in *Circuit City* making arbitration applicable to many new contexts, the issue of fee-splitting is a growing concern.⁸⁸ United States Circuit Courts are split in their treatment of this issue and the United States Supreme Court has yet to take a stand on the issue.⁸⁹ The circuit courts have taken four different approaches in apportioning expenses and fees between the parties: a per se rule against fee splitting, a provision requiring costs unique to arbitration to be paid by the employer, a rule splitting fees between the parties, and a case-by-case analysis to determine a party's ability to bear the burden of costs.⁹⁰ The basic rationale behind a per se rule against fee-splitting is that "plaintiffs should not be required to pay more than if they had proceeded to court and should not have to pay part of the arbitrators' fees any more than they would have paid a fee to a judge."⁹¹ The justification for requiring an employee to pay only administrative costs is that an employee should solely bear the expenses one would have to pay if the action were brought in court.⁹² Some courts have reasoned that because arbitration overall is usually less expensive than litigation, fee-splitting is acceptable so long as the fees do not make the forum inaccessible for plaintiffs.⁹³ And finally, other courts have taken a case-by-case approach, looking at the claimant's particular circumstances in determining the claimant's ability to pay.⁹⁴ Nevertheless, the primary areas for concern in apportioning costs are the payment of arbitrators' fees, filing and administrative fees, and travel expenses for parties and for arbitrators.⁹⁵

88. See *Circuit City*, 532 U.S. 105.

89. *Gilmer*, 500 U.S. at 33 (cautioning that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'"); *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79 (2000) (hinting that broad per se ban on fee-splitting may not be proper).

90. *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). See *Armendariz*, 6 P.3d 669; *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999); *Bradford*, 238 F.3d 549.

91. *Courts Split on Requiring Employees to Pay Fees in Mandatory Arbitrations* (U.S. Law Week, Washington, D.C.), April 3, 2001, at 2587.

92. *Id.*

93. *Id.*

94. See *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79 (2000); *Bradford*, 238 F.3d 549.

95. Other fees, such as witness and attorney fees and room rentals, are outside the scope of this article, which focuses on what courts believe to be primary areas of concern.

A. Arbitrator's Fees

Arbitrator's fees vary based upon the expertise of the arbitrator and the number of arbitrators on the panel.⁹⁶ However, per diem arbitrator fees are generally steep, ranging from \$125 per hour to \$600 per hour to resolve a claim.⁹⁷ Thus, with an average employer-employee claim lasting up to forty hours, the parties would incur between \$3,750 and \$14,000 just for the arbitrator's fee.⁹⁸

Many employment contracts require an employee to pay one-half, or sometimes all, of the arbitrator's fees.⁹⁹ Some courts take the position that a plaintiff "should not have to pay part of the arbitrators' fees any more than they would have paid a fee to a judge."¹⁰⁰ In *Cole v. Burns International Security Services*, the United States Court of Appeal for the District of Columbia Circuit maintained that a former employer could not require an employee to pay for all or part of the arbitrator's fees.¹⁰¹ The court relied heavily on the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corporation* in which the Court observed that employers in the securities industry routinely pay all of the arbitrator's fees.¹⁰² The D.C. Circuit concluded that "there is no reason to think that the [United States Supreme] Court would have approved a program of mandatory arbitration of statutory claims in *Gilmer* in the absence of employer agreement to pay arbitrators' fees."¹⁰³ The circuit court went even further, declaring that an "employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims . . . (any more than an employee can be made to pay a judge's salary)."¹⁰⁴ Thus, the court concluded that a per se ban is needed to prevent "de facto forfeiture of the employee's statutory rights."¹⁰⁵

96. Nat'l Rules for the Resolution of Employment Disputes (Including Mediation & Arbitration Rules) (effective Jan. 1, 1999), 1998 WL 1527109 (AAA's default provision provides the appointment of one arbitrator).

97. *Bradford*, 238 F.3d at 557; see *Shankle v. B-G Maint. Mgmt., Inc.*, 163 F.3d 1230 (10th Cir. 1999). Per hour fees based on eight hour work day.

98. *Cole*, 105 F.3d at 1477; see *Shankle*, 163 F.3d 1230.

99. See *Shankle*, 163 F.3d 1230.

100. *Courts Split on Requiring Employees to Pay Fees in Mandatory Arbitrations* (U.S. Law Week, Washington, D.C.), April 3, 2001, at 2587.

101. See *Cole*, 105 F.3d 1465.

102. *Id.*; see also *Gilmer*, 500 U.S. 20 (court did not specifically address fee-splitting).

103. *Cole*, 105 F.3d at 1468.

104. *Id.*

105. *Id.*

Other courts have applied a per se ban if the mandatory arbitration agreement is entered into as a condition of continued employment, holding that requiring an employee to pay even a portion of the arbitrator's fees is unenforceable.¹⁰⁶ In one case, the agreement mandated the employee (a janitor) pay for one-half of the arbitrator's fees.¹⁰⁷ Such an agreement puts the employee "between the proverbial rock and a hard place—it prohibit[s] 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."¹⁰⁸ Hence, the employee had no reasonable access to a forum for resolving claims. Even arbitration governed by the American Arbitration Association (AAA) provides no relief as the rules require each party to pay one-half of the arbitrator's fees unless otherwise agreed, giving no indication of apportioning, reducing, or waiving arbitrator's fees which are usually the most expensive cost of arbitration, on average costing \$700 per day.¹⁰⁹ Those courts that have suggested the apportionment of costs at the end of arbitration neglect to take into account the substantial monetary risk a claimant must assume, potentially discouraging meritorious claims.¹¹⁰

Another approach advocated in dealing with arbitrators' fees, applied in the First Circuit, permits fee-splitting between parties.¹¹¹ In one case, an agreement was enforceable notwithstanding the employee paying up to \$3000 per day so long as the amount assessed was reviewable by a court for unreasonableness.¹¹² The court pointed to the United States Supreme Court's reasoning in *Gilmer v. Interstate/Johnson Lane Corporation* that parties trade the courtroom for the simplicity of arbitration which is "far more affordable . . . than is pursuing a claim in court."¹¹³

The Fifth Circuit in *Williams v. Cigna Financial Advisors, Inc.* held that a claimant can be required to pay up to half of the forum fees for compulsory arbitration so long as the payment does not violate public policy by precluding access to an adequate substitute to a judicial

106. See *Shankle*, 163 F.3d 1230.

107. *Id.*

108. *Id.* at 1235.

109. Nat'l Rules for the Resolution of Employment Disputes (Including Mediation & Arbitration Rules) (effective Jan. 1, 1999), 1998 WL 1527109; *Cole*, 105 F.3d 1465 (quoting Kenneth May, *Labor Lawyers at ABA Session Debate Role of Am. Arbitration Ass'n*, DAILY LAB. REP. (BNA) No. 31, at A-12 (Feb. 15, 1996)).

110. See *Armendariz*, 6 P.3d 669.

111. See *Rosenberg*, 170 F.3d 1.

112. *Id.*

113. *Id.* at 16.

forum for protecting the claimant's rights.¹¹⁴ The Fifth Circuit interpreted *Gilmer* as not imposing a per se ban on fee-splitting; *Gilmer* only "indicates that an arbitral cost allocation scheme may not be used to prevent effective vindication of federal statutory claims."¹¹⁵ In *Williams*, no evidence existed that the prospect of incurring arbitrator fees hampered or discouraged the employee in bringing the claim.¹¹⁶ Thus, fee-splitting of the arbitrator's costs by itself does not necessarily render an arbitration provision unenforceable.¹¹⁷

Courts that have adopted a case-by-case approach have hinted that a broad per se ban against fee-splitting may not be proper.¹¹⁸ The United States Supreme Court in *Green Tree Financial Corp. – Alabama v. Randolph* addressed the issue of whether the possibility of splitting an arbitrator's fee precluded a litigant from effectively vindicating federal statutory rights in the arbitral forum, looking specifically at the individual's ability to pay.¹¹⁹ The Court concluded that an arbitration agreement that does not mention allocation of the arbitrator's fee is not per se unenforceable because of the risk that the claimant will be required to bear prohibitive arbitration costs.¹²⁰ The claimant has the "burden of showing the likelihood of incurring such costs."¹²¹ One court elaborated on the Supreme Court's holding by stating:

[The Supreme Court's] refusal to accept the speculative risk that a claimant might incur prohibitive costs undermines the rationale of those courts that would impose a per se prohibition against an arbitration provision that might impose prohibitive costs against an individual on the theory that any such risk of prohibitive costs, even if that risk is entirely uncertain, surely deters the bringing of arbitration.¹²²

The Fourth Circuit in *Bradford v. Rockwell Semiconductor Systems, Inc.*, relying on the decision in *Green Tree*, explained that although "fee splitting can render an arbitration agreement unenforceable where the arbitration fees . . . are so prohibitive as to effectively deny the [claimant] access to the arbitral forum," a case-by-case analysis should be performed, focusing on the claimant's ability to pay the arbitrator's fees.¹²³ The *Bradford* court construed *Gilmer* and *Williams* as also

114. See *Williams*, 197 F.3d 752.

115. *Id.*; see *Gilmer*, 500 U.S. 20.

116. See *Williams*, 197 F.3d 752.

117. *Id.*

118. See *Green Tree*, 531 U.S. 79; *Bradford*, 238 F.3d 549.

119. See *Green Tree*, 531 U.S. 79.

120. *Id.*

121. *Id.* at 92.

122. *Bradford*, 238 F.3d at 557.

123. *Id.* at 554.

focusing on the particular individual involved and “whether the particular claimant has a full and fair opportunity to vindicate . . . statutory claims”—essentially a “case-by-case analysis that focuses . . . upon the claimant’s ability to pay . . . , 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.”¹²⁴ Thus, the “proper inquiry under *Gilmer* [and *Green Tree*] is not where the money goes but rather the amount of money that ultimately will be paid by the claimant,” for a claimant cannot be deterred from vindicating statutory rights “simply by the fact that [the] fees would be paid to the arbitrator where the overall cost of arbitration is otherwise equal to or less than the cost of litigation in court.”¹²⁵

B. *Filing and Administrative Fees*

A major cost component of arbitration is the filing and administrative fees.¹²⁶ The AAA’s requirements provide a typical representation of standard fees which the parties have to pay.¹²⁷ In addition to the arbitrator’s fees, the AAA requires a nonrefundable filing fee of \$500 for claims under \$10,000 and a \$2,000 filing fee for claims not seeking a specific amount of damages.¹²⁸ The filing fee must be advanced by the initiating party, “subject to final apportionment by the arbitrator in the award”; in cases before three or more arbitrators, a nonrefundable filing fee of \$1,500 is required.¹²⁹ Moreover, a \$150 per diem hearing fee is assessed to each party; in cases before three or more arbitrators, a \$250 per diem hearing fee is assessed.¹³⁰ The rules also provide for stiff postponement and cancellation penalties and an advanced deposit for any fees that the AAA deems necessary.¹³¹ The AAA does “defer or reduce the administrative fees” due to “extreme hardship.”¹³² Nevertheless, the AAA Rules give no indication of apportioning, reducing, or waiving other costs, such as renting a room

124. *Id.* at 555-556.

125. *Id.* at 556.

126. Nat’l Rules for the Resolution of Employment Disputes (Including Mediation & Arbitration Rules) (effective Jan. 1, 1999), 1998 WL 1527109.

127. *Id.*

128. *Id.*; *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998).

129. Nat’l Rules for the Resolution of Employment Disputes (Including Mediation & Arbitration Rules), Rule 38 (effective Jan. 1, 1999), 1998 WL 1527109.

130. *Id.*

131. *Id.*

132. *Id.*; *Cole*, 105 F.3d 1465 (quoting Kenneth May, *Labor Lawyers at ABA Session Debate Role of Am. Arbitration Ass’n*, DAILY LAB. REP. (BNA) No. 31, at A-12 (Feb. 15, 1996)).

and expense of witnesses.¹³³ Thus, those courts that have suggested the apportionment of costs at the end of arbitration neglect to take into account the substantial monetary risk a claimant must assume, and the potential of discouraging meritorious claims.¹³⁴

As with the apportionment of arbitrator's fees, courts are split in their treatment of filing and administrative fees. The Eleventh Circuit found that when an employee is vulnerable to steep filing fees, fee-splitting provisions rendered arbitration agreements unenforceable because the high costs deprive "an employee of any hope of meaningful relief."¹³⁵ The court held that the "arbitrability of . . . claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies . . . [However], when an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable."¹³⁶ Other courts mandate that employees pay solely administrative costs since the employee would have to bear those if the action were brought in court.¹³⁷

Another approach compels the employer to bear all costs unique to arbitration.¹³⁸ One court stated that it is not a sufficient response that an employee may have the costs reduced after judicial review, because substantial costs "still pose[] a significant risk that employees will have to bear large costs to vindicate their statutory right . . . and therefore chill[] the exercise of that right."¹³⁹ While the cost of arbitration is, "on average smaller than [that] of litigation, it is also true that the amount awarded is on average smaller as well The payment of large, fixed, forum costs, especially in the face of expected meager awards, serves as a significant deterrent."¹⁴⁰ Thus, the "arbitration agreement or arbitration process cannot generally require the employee to bear any *type* of expenses that the employee would not be

133. *Id.*; *Cole*, 105 F.3d 1465 (quoting Kenneth May, *Labor Lawyers at ABA Session Debate Role of Am. Arbitration Ass'n*, DAILY LAB. REP. (BNA) No. 31, at A-12 (Feb. 15, 1996)).

134. *See Armendariz*, 6 P.3d 669.

135. *Paladino*, 134 F.3d at 1062 (subjecting employee to an administrative filing fee of \$2000).

136. *Id.*

137. *Courts Split on Requiring Employees to Pay Fees in Mandatory Arbitrations* (U.S. Law Week, Washington, D.C.), April 3, 2001, at 2587.

138. *See Armendariz*, 6 P.3d 669 (Cal. 2000).

139. *Id.* at 687; *see also Arakawa*, 56 F. Supp. 2d 349 (holding that the mere possibility that plaintiff might be compelled to pay a portion of arbitration costs did not preclude arbitration unless fees were so great and employee's financial situation was such that imposition would make the employee unable to enforce his rights or would substantially deter the employee from seeking to enforce his rights).

140. *Armendariz*, 6 P.3d at 688.

required to bear if [the employee] were free to bring the action in court."¹⁴¹

The United States Supreme Court has provided little guidance but does explain that the mere *risk* of incurring prohibitively high costs, including filing and administrative fees, is not sufficient to invalidate an otherwise valid arbitration provision.¹⁴² The party opposing arbitration must show the likelihood of being saddled with deterrently high costs.¹⁴³ However, exactly how much proof a court should demand prior to invalidating an arbitration provision is not yet clear.¹⁴⁴

C. *Travel Expenses*

According to the AAA, an employment contract may designate the location of the arbitration.¹⁴⁵ However, if the parties do not establish a place for the arbitration, either party may request a specific location prior to the appointment of the arbitrator.¹⁴⁶ In the absence of a timely objection, the request will be granted; if the other party objects to the location, the AAA has the power to determine the location, which is final and binding.¹⁴⁷ If a request for a location is submitted after the appointment of an arbitrator, the arbitrator will decide all location disputes.¹⁴⁸

When the employment contract does not designate a location, the AAA's procedure for selecting a location does not present any special problems when the employer and employee are located in the same city or state, since presumably, both parties will request arbitration to take place near the employment setting.¹⁴⁹ However, difficulties arise when an employee works for a national employer, headquartered in another state. Customarily, the employer will outline in the employment contract that arbitration is to take place in the state where the national headquarters are located. Such a provision can impose a severe hardship on the employee, who may have to travel long distances for resolution of a dispute. Adding yet another burden, the AAA directs that the arbitrator's travel expenses are to be shared equally by the parties, unless the employment contract provides differently or the arbitrator directs

141. *Id.* at 687.

142. *See Green Tree*, 531 U.S. 79 (2000).

143. *Id.*

144. *Id.*

145. Nat'l Rules for the Resolution of Employment Disputes (Including Mediation & Arbitration Rules), Rule 38 (effective Jan. 1, 1999), 1998 WL 1527109.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

otherwise, making an employee responsible for even greater expenses if the arbitrator is also from another state.¹⁵⁰ Many arbitration provisions in employment contracts do specify how fees, including travel expenses, are to be apportioned between parties.¹⁵¹ However, these provisions are sometimes unenforceable because they “circumscribe[] the arbitrator’s authority to grant effective relief by mandating equal sharing of fees and costs of arbitration despite the award of fees permitted a prevailing party . . .” in some circumstances.¹⁵²

Travel expenses also effect the production of witnesses. For instance, the AAA provides that any travel expenses for witnesses are to be borne equally by both parties, unless otherwise agreed by the parties or otherwise awarded by the arbitrator.¹⁵³ When a party requires the production of witnesses, having them travel across several states is usually not feasible. This is especially true for the employee’s witnesses, because employees would choose, in many instances, to forego the calling of some witnesses in lieu of fronting expensive travel costs and awaiting apportionment of travel expenses at the end of arbitration. The employer, on the other hand, usually has more than sufficient funds to advance the costs of travel and has easier access to witnesses as most will be the company’s employees. Consequently, unless otherwise agreed, if an employer calls numerous witnesses, the employee will be assessed for one-half of the opposing party’s presentation of witnesses.¹⁵⁴

V. SUGGESTIONS FOR ENSURING A REASONABLE ALTERNATIVE FORUM

The goal of arbitration is the final disposition of disputes between employers and employees in a faster, less expensive, more expeditious, and typically less formal manner than is available in ordinary judicial proceedings.¹⁵⁵ Thus, the primary purpose of arbitration is to provide a reasonable alternative to a judicial forum.¹⁵⁶

150. Nat’l Rules for the Resolution of Employment Disputes (Including Mediation & Arbitration Rules) (effective Jan. 1, 1999), 1998 WL 1527109.

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

152. *Perez*, 253 F.3d at 1285 (applying specifically to Title VII claims).

153. Nat’l Rules for the Resolution of Employment Disputes (Including Mediation & Arbitration Rules) (effective Jan. 1, 1999), 1998 WL 1527109.

154. See *id.*

155. *Mitsubishi Motors*, 473 U.S. at 628; Judith A. La Manna, *Mediation Can Help Parties Reach Faster, Less Costly Results in Civil Litigation*, 73 N.Y. St. B.J. 10 (2001).

156. *Cole*, 105 F.3d at 1484 n.15 (using the phrase “arbitrators’ fees” to include the “arbitrator’s expenses and any other costs associated with the arbitrator’s services.”).

While the rationale behind arbitration of disputes is commendable, arbitration should not be encouraged if it is used for the detriment of either the employer or the employee. Typically, though, the employer has the advantage, offering employees contracts on a “take-it-or-leave-it” basis allowing employers to structure arbitration agreements that “systematically disadvantage employees.”¹⁵⁷ It is unlikely that an employee would voluntarily submit a claim to arbitration, with arbitrators’ fees costing up to \$1,000 per day, unless mandated by the employer as a condition of employment.¹⁵⁸ Absent the arbitration provision, the employee would be free to pursue claims in court.¹⁵⁹

Fee-splitting provisions, which are common in most employment contracts, potentially operate as a disincentive to the submission of meritorious claims to arbitration.¹⁶⁰ Even those courts that have suggested the apportionment of costs at the end of arbitration neglect to take into account the substantial monetary risks a claimant must assume, disadvantaging those employees with less than sufficient means.¹⁶¹

Therefore, a per se ban of fee-splitting is needed. An arbitration clause requiring an employer to pay all arbitration costs seems to be in accord with the goal of arbitration: encouragement of employees’ vindication of claims in an alternative forum.¹⁶² Indeed, by dictating arbitration, the employer has already chosen to avoid the substantial risk of a jury trial, benefiting from arbitration’s traditionally smaller awards.¹⁶³ Moreover, preventing employees who are seeking to vindicate their rights from gaining access to a judicial forum and then requiring them to pay for the services of an arbitrator when they would never be required to pay for a judge in court, seems to undermine Congress’ intent of providing a reasonable alternative forum and not discouraging employee claims.¹⁶⁴ Never in the history of American jurisprudence has a beneficiary of a federal statute been required to pay for a judge.¹⁶⁵

157. *Cole*, 105 F.3d at 1477.

158. *Id.*

159. *Id.*

160. *See Armendariz*, 6 P.3d 669.

161. *Id.*; *see, e.g., Shankle*, 163 F.3d 1230.

162. *Floss v. Ryan’s Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000).

163. *See Armendariz*, 6 P.3d 669.

164. *Cole*, 105 F.3d at 1484; *see Bradford*, 238 F.3d 549.

165. *See Cole*, 105 F.3d 1465.

VI. CONCLUSION

The 2001 United States Supreme Court's decision in *Circuit City* expanded the application of the Federal Arbitration Act to all arbitration agreements involving interstate commerce, save employment contracts of transportation workers, and clarified when the FAA should be applied.¹⁶⁶ Prior to *Circuit City*, the circuit courts were split in their approach to arbitration agreements involving interstate commerce.¹⁶⁷

With arbitration becoming more common in employment contracts, and given the recent holding in *Circuit City*, determining who should bear the burden of arbitration fees is essential.¹⁶⁸ While some courts contend that the splitting of arbitration fees is lawful, many employees will be prevented from bringing claims due to prohibitively high forum costs. Consequently, the employment contract should require the employer to pay all fees and costs associated with arbitration to ensure that no meritorious claim is deterred.¹⁶⁹ The employment contract is, after all, customarily solely an employer creation, with the employer precluding employee access to a judicial forum.

Arbitration does produce efficiency along with creating burdens for litigants.¹⁷⁰ Arbitral litigants often lack traditional "discovery, evidentiary rules, a jury, and any meaningful right to further review."¹⁷¹ Nevertheless, in "light of a strong federal policy favoring arbitration, these inherent weaknesses should not make an arbitration clause unenforceable."¹⁷² Yet, when an arbitration clause "deprives an employee of any hope of meaningful relief, while imposing high costs on the employee," the purpose behind the FAA is undermined, thus reconfirming the need for a per se ban of employee payment of arbitration fees, fulfilling Congress' intent of providing a reasonable alternative forum for dispute resolution.¹⁷³

Melissa G. Lamm

166. See *Circuit City Stores*, 532 U.S. 105.

167. *Id.*; see *supra* note 19.

168. *Id.*; see *supra* note 19.

169. See *Armendariz*, 6 P.3d 669.

170. *Byrd*, 470 U.S. at 217; see *Paladino*, 134 F.3d 1054.

171. *Paladino*, 134 F.3d at 1062.

172. *Id.*

173. *Id.*; *Cole*, 105 F.3d at 1484. See *Bradford*, 238 F.3d 549.