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Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation

Martin H. Malin

IIT Chicago-Kent College of Law, mmalin@kentlaw.iit.edu

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DUE PROCESS IN EMPLOYMENT ARBITRATION: THE STATE OF THE LAW AND THE NEED FOR SELF- REGULATION

BY
MARTIN H. MALIN*

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I. INTRODUCTION

The Supreme Court's decision in *Gilmer v. Interstate Johnson/Lane Corp.*,¹ was greeted by a chorus of critical commentary.² The reaction was understandable. After *Gilmer*, and

* Professor of Law and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology. An earlier version of this article was presented to a conference, "Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution," sponsored by the National Academy of Arbitrators on April 13-14, 2007. The article has benefitted greatly from comments received at the conference as well as comments independent of the conference from Dennis Nolan and Jean Sternlight. I also wish to acknowledge superb research assistant from Tracy Scholnick Gruber, Chicago-Kent class of 2009, and financial support from the Marshall-Ewell Research Fund at Chicago-Kent College of Law.

1. 500 U.S. 20 (1991).

2. See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); Joseph D. Garrison, *Mandatory Binding Arbitration Constitutes Little More Than a Waiver of a Worker's Rights*, DISP. RESOL. J., Fall 1997, at 15; Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public*

particularly after *Circuit City Stores, Inc. v. Adams*,³ employers were able to impose on employees as a condition of employment a waiver of their right to sue and an obligation to submit their public law claims to resolution through an arbitration system designed and controlled by the employer. Certainly there was cause for concern that employer-promulgated arbitration systems would be designed to protect against employer liability rather than provide a fair forum for litigation of employee claims.

The poster child for these concerns was the arbitration system that Hooters of America, Inc. imposed on its employees.⁴ The Hooters arbitration rules required the employee to state the nature of her claim and the specific acts or omissions on which the claim was based and to provide a list of witnesses with a summary of the facts known to each. The rules imposed no similar requirements on the employer.⁵ The rules provided for each party to select one arbitrator and for the party-appointed arbitrators to jointly select a third. However, the rules restricted the third arbitrator to those on a list completely controlled by Hooters.⁶ Furthermore, the rules allowed Hooters to seek summary judgment, to record the hearing and to sue to vacate the award if the arbitration panel exceeded its authority, but gave no similar rights to the employee.⁷ Lastly, the rules allowed the employer to amend them at any time without notice to the employee and allowed the company, but not the employee, to cancel the agreement to arbitrate by giving thirty days' notice.⁸

Even the arbitration-happy Fourth Circuit⁹ had no trouble

Disputes, 1995 U. ILL. L. REV. 635; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Panacea or Corporate Tool: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

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

4. See *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

5. *Id.* at 938.

6. *Id.* at 938-39.

7. *Id.* at 939.

8. *Id.*

9. I characterize the Fourth Circuit as "arbitration-happy" because it has been the circuit most willing to push the envelope in compelling employees to arbitrate their public law claims. At the time the Fourth Circuit decided *Gilmer*, it was the only circuit to enforce pre-dispute agreements to arbitrate statutory employment claims. Compare *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991) with *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104 (5th Cir. 1990), *vacated by* 500 U.S. 930 (1991); *Utey v. Goldman Sachs & Co.*, 883 F.2d 184 (1st Cir. 1989); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221 (3d Cir.

finding employee agreements to use this arbitration system unenforceable. The court held that Hooters' employment agreements imposed on the company a duty to establish a fair and impartial arbitration system. The court characterized the system that Hooters established as "a sham system unworthy even of the name of arbitration."¹⁰ It concluded that Hooters had breached its duty and ordered the agreement to arbitrate rescinded.

Gilmer did not endorse one-sided employer-promulgated arbitration systems. On the contrary, the rationale behind *Gilmer's* holding that pre-dispute agreements to arbitrate claims under the Age Discrimination in Employment Act (ADEA)¹¹ are enforceable was that the agreement did not diminish the employee's statutory rights but only substituted the arbitral forum for the judicial. The Court endorsed arbitration so long as the arbitral forum would allow the employee to vindicate effectively his or her statutory claim.¹² The Court's rationale dissipates if the arbitral forum does not meet minimum standards of procedural justice.

The *Gilmer* Court's analysis read like an invitation to the lower courts to police employer-promulgated arbitration systems to ensure that they merely substituted one forum for another and allowed employees to vindicate effectively their statutory rights. The D.C.

1989); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304 (8th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544 (10th Cir. 1988); and *Johnson v. Univ. of Wisconsin-Milwaukee*, 783 F.2d 591 (7th Cir. 1986). Of course, the Supreme Court vindicated the Fourth Circuit's position in *Gilmer*. Similarly, the Fourth Circuit was the only federal court of appeals to require employees covered by collective bargaining agreements (CBAs) to arbitrate their statutory claims under the CBA's grievance and arbitration procedure. Compare *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996) with *Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Varner v. Nat'l Super Mkts.*, 94 F.3d 1209 (8th Cir. 1996); and *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995). In *Wright v. Universal Maritime Services Corp.*, 525 U.S. 70, 80 (1998), the Supreme Court declined to determine whether a union's pre-dispute waiver in a CBA of employees' rights to sue for violations of employment statutes was enforceable but held that even if enforceable, it must be clear and unmistakable and that the Fourth Circuit had not adhered to this standard. Since *Wright*, the Fourth Circuit has again stood alone among the federal courts of appeals in finding clear and unmistakable waivers in CBAs. Compare *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206 (4th Cir. 2007) and *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001) with *Pyett v. Penn. Bldg. Co.*, 498 F.3d 88 (2d Cir. 2007); *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001); *EEOC v. Indiana Bell Tel. Co.*, 256 F.3d 516 (7th Cir. 2001); *Rogers v. New York Univ.*, 220 F.3d 73 (2d Cir. 2000); *Kennedy v. Superior Printing Co.*, 215 F.3d 650 (6th Cir. 2000); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625 (6th Cir. 1999); and *Quint v. A. E. Staley Mfg. Co.*, 172 F.3d 1 (1st Cir. 1999).

10. *Hooters*, 173 F.3d at 940.

11. 29 U.S.C. §§ 621-33 (2000).

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

Circuit took the lead in *Cole v. Burns International Security Services*.¹³ The decision in *Cole* received considerable attention because of its scholarly analysis, its comprehensiveness, and because its author, Chief Judge Harry Edwards, was a highly respected labor law professor and arbitrator prior to his appointment to the bench.

Judge Edwards distinguished arbitration of statutory claims under employer-promulgated arbitration systems from arbitration of grievances under collective bargaining agreements. He wrote:

The fundamental distinction between contractual rights, which are created, defined, and subject to modification by the same private parties participating in arbitration, and statutory rights, which are created, defined, and subject to modification only by Congress and the courts, suggests the need for a public, rather than private, mechanism of enforcement for statutory rights.¹⁴

Consequently, according to the court, employment arbitration must be evaluated to ensure that the agreement only substitutes the arbitral forum for the judicial forum and does not alter statutory rights. The employee must be able to effectively vindicate the statutory rights at issue in the arbitral forum. Judge Edwards enumerated five characteristics of an arbitration arrangement necessary for it to be enforceable. An arbitration arrangement is enforceable if it:

(1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all of the types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum.¹⁵

Cole raised the prospect of strict judicial policing, making unenforceable agreements to arbitrate statutory claims in fora that did not provide basic procedural safeguards necessary to ensure that employees were able to vindicate effectively their statutory rights. Under such a regime, procedurally just systems would evolve that would work to the advantage of employees, as well as employers.¹⁶ For a while, it appeared that the law would develop in that direction. Following *Cole*, courts tended to refuse to enforce arbitration

13. 105 F.3d 1465 (D.C. Cir. 1997).

14. *Id.* at 1476.

15. *Id.* at 1482.

16. See Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMP. RTS. & EMP. POL'Y J. 221 (1997); Martin H. Malin, *Privatizing Justice – But By How Much? Questions Gilmer Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589 (2001).

agreements that reduced the limitations period below that contained in the statute at issue or limited the arbitrator's remedial authority.¹⁷ Similarly, most courts considering the issue held that for an arbitration agreement to be enforceable, the employer must pay the entire fee of the arbitrator and the employee may not be required to pay more than a nominal amount, approximately equal to the filing fee for federal court.¹⁸ Then, along came *Green Tree Financial Corp. v. Randolph*.¹⁹

Although *Randolph* was a consumer rather than an employment case, it was the first of several Supreme Court decisions under the Federal Arbitration Act (FAA)²⁰ which, collectively, exchange the type of bright line standards advocated in *Cole* and similar cases for potentially insurmountable burdens on employees to demonstrate that their employers' arbitration systems impede the effective vindication of their statutory rights in their particular cases. These cases also send a clear message to the lower courts that issues of the adequacy of the arbitral forum should be deferred to the arbitrator and should not serve as a basis for invalidating the agreement to arbitrate. For the most part, lower courts have heard the message, and their failure to police employer-promulgated arbitration systems in a rigorous manner has heightened the need for self-regulation.

This article analyzes the evolving law of judicial policing of due process in employment arbitration. Part II examines the two vehicles available to courts to police employer-promulgated arbitration systems: the obligation to ensure that the arbitration system provides employees with an effective forum for vindication of their statutory rights; and the state contract law doctrine of unconscionability. Part II

17. See, e.g., *Brennan v. King*, 139 F.3d 258 (1st Cir. 1998); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Armendariz v. Found. Health Psychare Servs., Inc.*, 6 P.3d 669 (Ca. 2000). But see *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 231 (3d Cir. 1997) (compelling arbitration despite agreement's shortening of the limitations period and limitations on remedies, and opining that validity of those provisions was for the arbitrator to decide).

18. See, e.g., *Shankle v. B-G Maint. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Paladino*, 134 F.3d at 1054; *Armendariz*, 6 P.3d at 669; see also *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000) (expressing "serious reservations" about the enforceability of an agreement that required the employee to pay half the arbitrator's fee but denying enforcement on other grounds). But see *Williams v. Cigna Fin. Advisors, Inc.*, 197 F.3d 752 (5th Cir. 1999) (holding that court should evaluate fee splitting arrangement on a case-by-case basis to determine whether it deprives employee of an effective forum in which to vindicate statutory claims); *Rosenberg v. Merrill Lynch*, 170 F.3d 1 (1st Cir. 1999) (same).

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

20. 9 U.S.C. §§ 1-16 (2000). Subject to a very narrow exception, the FAA applies to employment arbitration agreements. See *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

also discusses the weaknesses of these tools for policing minimum due process guarantees in light of the evolving law. Part III demonstrates how those weaknesses have been applied to four areas: availability of class actions; allocation of the costs of arbitration; limitations on the arbitrator's remedial authority; and shortening of the limitations period provided for under the relevant statute. Part IV addresses the prospects that self-regulation can fill some of the void created by the lack of rigorous judicial policing.

II. THE EVOLVING LAW OF DUE PROCESS IN EMPLOYMENT ARBITRATION

Courts have two vehicles for policing procedural fairness in employer-promulgated arbitration systems: their obligation under *Gilmer* to ensure that the arbitration forum is one in which the employees may effectively vindicate their statutory claims, and the contract law doctrine of unconscionability. The first vehicle presents issues of federal law. Basically, the court interprets the policies behind the statutes under which the claims arose and determines whether, in light of the provisions of the arbitration agreement, those policies will be protected if the claims are arbitrated. Because this analysis raises issues of federal law, some courts have held that this tool does not apply to claims that arise under state law.²¹

The FAA provides that written agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."²² Unconscionability is one such ground, and, accordingly, courts may reform or refuse to enforce arbitration agreements that they find to be unconscionable. Policing for unconscionability raises issues of state contract law, and thus the doctrine is available regardless of the underlying claim that the employer is trying to force the employee to arbitrate. As developed below, however, although most states recognize the doctrine of unconscionability, their approaches to the doctrine vary greatly.

21. See, e.g., *Stutler v. T. K. Constructors*, 448 F.3d 343 (6th Cir. 2006); *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003); *Brown v. Wheat First Secs., Inc.*, 257 F.3d 821 (D.C. Cir. 2001). But see *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 988-90 (Cal. 2003) (criticizing *Brown*).

22. 9 U.S.C. § 2 (2000).

A. Policing to Ensure a Forum that Allows Employees to Vindicate Their Claims Effectively

As discussed previously, the Supreme Court's rationale in *Gilmer* that arbitration must allow claimants to vindicate effectively their statutory rights and the D.C. Circuit's decision in *Cole* led to optimism that courts would vigorously police the fairness of employer-promulgated arbitration systems.²³ Recent decisions of the Supreme Court have undermined that early optimism. Although these decisions were not employment cases, they arose under the FAA and would appear to apply with equal force to employment arbitration agreements.

The first such decision was *Green Tree Financial Corp. v. Randolph*.²⁴ In *Randolph*, the plaintiff financed her purchase of a mobile home through Green Tree, whose financing agreement required arbitration for all disputes related to the agreement.²⁵ Randolph sued Green Tree alleging violations of the Truth in Lending Act²⁶ and the Equal Credit Opportunity Act.²⁷ Green Tree moved to compel arbitration, and the district court agreed. However, the Eleventh Circuit reversed, observing that the arbitration agreement failed to specify which party would be responsible for the arbitrator's fees and related costs of the proceeding. Relying on employment arbitration precedent, the court held the agreement unenforceable because it subjected the plaintiff to an unreasonable risk of steep arbitration costs that would undermine her ability effectively to vindicate her statutory rights.²⁸

By a five to four vote, the Supreme Court reversed. The majority wrote:

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. As the Court of Appeals recognized, "we lack . . . information about how claimants fare under Green Tree's arbitration clause." The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly

23. See *supra* notes 12-16 and accompanying text.

24. 531 U.S. 79 (2000).

25. See *id.* at 82-83 & n.1.

26. 15 U.S.C. §§ 1601-1667f (2000).

27. 15 U.S.C. §§ 1691 - 1691f (2000).

28. See *Randolph*, 531 U.S. at 92.

insufficient to render it unenforceable. The “risk” that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.²⁹

The Court premised its analysis on the strong federal policy favoring arbitration. It analogized to the presumption that claims under a particular statute are arbitrable unless the party resisting arbitration shows that Congress intended that claims under the statute not be arbitrated. The Court placed a similar burden on a party resisting arbitration on the ground that excessive costs will impede her ability to vindicate her claims in the arbitral forum. The Court majority wrote:

[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue. 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. Randolph did not meet that burden.³⁰

The decision in *Randolph* requiring case-by-case adjudication of the effects of the costs of the arbitral forum on a plaintiff’s ability to vindicate statutory rights is in marked contrast to the bright line rule that the employer (or in *Randolph*, the creditor) must pay all arbitral fees above an amount equal to a federal court filing fee. The decision in *Cole* told employers to provide that employees pay only a nominal amount of forum costs if they want their arbitration agreements enforced. *Cole*’s rule thus is largely self-enforcing, as employers must provide in their plans for employees to pay only nominal fees. Indeed, employer counsel may be obligated to draft the plans that way.³¹ In contrast, *Randolph* effectively mandates pre-arbitration litigation over fee allocation. The prospect of costly and uncertain litigation likely deters many claimants from challenging a plan’s allocation of arbitral fees even where the prospect of being assessed large fees deters them from bringing their claims to arbitration.³²

29. *Id.* at 90-91 (citation and footnote omitted).

30. *Id.* at 91-92 (citations omitted).

31. See Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779 (2003).

32. See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, LAW & CONTEMP. PROBS., Spring 2004, at 75, 100-01 (making similar point with respect to case-by-case adjudication of validity of class action prohibitions in consumer arbitration agreements).

Randolph assumed that a court would decide whether a plaintiff proved that a provision of an arbitration agreement impeded the plaintiff's ability to vindicate statutory rights in the arbitral forum. Subsequent Supreme Court decisions have sent strong signals to the lower courts to refer those questions to the arbitrator.

The Court began signaling lower courts to refer to arbitrators questions concerning the adequacy of an arbitral forum to vindicate statutory rights in *PacifiCare Health Systems v. Book*.³³ In *PacifiCare*, a group of physicians sued several managed care organizations alleging that the managed care organizations violated, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act (RICO).³⁴ The managed care organizations moved to compel arbitration. Their contracts with the physicians required arbitration but also provided, "punitive damages shall not be awarded," or "[t]he arbitrators . . . shall have no authority to award any punitive or exemplary damages," or "[t]he arbitrators . . . shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages."³⁵ The lower courts refused to enforce the arbitration agreements because they precluded the plaintiffs from being awarded treble damages, as provided for in RICO. The Supreme Court reversed.

The Court observed that it had on several occasions commented that statutory treble damages in general, and RICO's treble damage provision in particular, serve remedial as well as punitive functions.³⁶ It characterized the contracts' limitations on the arbitrator's remedial authority as "ambiguous," and reasoned, "[W]e should not on the basis of 'mere speculation' that an arbitrator might interpret these ambiguous agreements in a manner that casts their enforceability into doubt, take upon ourselves the authority to decide the antecedent question of how the ambiguity is to be resolved."³⁷ The Court held that the lower courts should have compelled arbitration.³⁸

To resolve the issue of arbitral remedial authority, the arbitrator will, of necessity, have to decide whether RICO treble damages are punitive or compensatory. Significantly, the Court did not hold that RICO treble damages are not punitive in nature. It merely observed

33. 538 U.S. 401 (2003).

34. 18 U.S.C. §§ 1961-68 (2000).

35. *PacifiCare*, 538 U.S. at 405.

36. *Id.* at 405-06.

37. *Id.* at 406-07.

38. *Id.* at 407.

that in prior decisions, it had characterized various statutory treble damage provisions as serving remedial as well as punitive functions.³⁹ Thus, the Court left it to the arbitrator in *PacifiCare* to interpret RICO in the context of the arbitration agreements' limitations on arbitral remedial authority. Furthermore, if the arbitrator determined that the agreements precluded an award of treble damages, the arbitrator would have to decide whether such a prospective waiver of treble damages is allowed under RICO.

The Court's holding that these issues are for arbitral, rather than judicial, determination is analogous to its approach to compelling arbitration under collective bargaining agreements (CBAs). Courts have the responsibility to determine whether the parties to a collective bargaining agreement agreed to arbitrate the particular dispute, but in so doing, they must avoid intruding on the arbitrator's role to interpret the contract. Consequently, courts compel arbitration under CBAs unless it can be said with positive assurance that the parties did not agree to arbitrate.⁴⁰ Furthermore, issues of procedural arbitrability, such as whether the grievance was filed in a timely manner, are the exclusive province of the arbitrator.⁴¹

The analogy to CBAs, however, is flawed. Grievance arbitration under a CBA is an essential component of the parties' private system of workplace self-government. Arbitration of grievances under CBAs is not so much a substitute for litigation as it is a substitute for strikes and other job actions that a union might engage in to protest the grievance. Indeed, the grievance and arbitration procedure is generally considered to be the *quid pro quo* for the CBA's no strike clause.⁴² Furthermore, the availability of grievance arbitration allows the parties to reach agreement on the terms of the CBA by deferring their differences to case-by-case negotiation through the grievance procedure with the understanding that if they are unable to reach agreement in any case they will be bound by the resolution crafted by their mutually selected arbitrator.⁴³ In such instances, the arbitrator selected by and accountable to the parties has greater institutional

39. *Id.* at 405-07.

40. *United Steelworkers of Am. v. Am. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960).

41. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964).

42. *See Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 249 (1970).

43. *See Martin H. Malin & Robert F. Ladenson, Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1192-94 (1993).

qualifications to resolve the dispute than does a publicly appointed and publicly accountable judge.⁴⁴

In *PacifiCare*, in contrast, the arbitrator was called upon to interpret the public law, RICO. There is no analogous reason for the Court to avoid “intruding” on the arbitral function. A publicly appointed and publicly accountable judge has far greater institutional competence to interpret and apply public law than does a privately appointed and privately accountable arbitrator.⁴⁵

The First Circuit distinguished *PacifiCare* in *Kristian v. Comcast Corp.*⁴⁶ Plaintiff consumers brought a class action alleging that they and similarly situated consumers were harmed by Comcast’s violations of federal and Massachusetts antitrust laws. The contract purported to disclaim any liability for “punitive, treble, exemplary, special, indirect, incidental or consequential damages.”⁴⁷ It further provided that “regardless of whether such damages may be available under applicable law . . . the parties hereby waive their rights, if any, to recover any such damages.”⁴⁸

The First Circuit observed that in *PacifiCare*, the prohibition of punitive damages provision was ambiguous and thus the arbitrator had to interpret the contract before any adjudicator could reach the question of whether the contract was illegal or contrary to public policy. In contrast, in the court’s view, there was no ambiguity in the Comcast contract and, hence, nothing for the arbitrator to interpret. On its face, the Comcast contract prohibited an award of treble damages available under state and federal antitrust laws.⁴⁹

44. *Id.* at 1198-99; see also Bernard D. Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 31-35 (1971) (discussing arbitrator’s institutional competence).

45. See Malin & Ladenson, *supra* note 43, at 1230.

46. 446 F.3d 25 (1st Cir. 2006).

47. *Id.* at 44.

48. *Id.*

49. *Id.* at 46-47. The court’s effort to distinguish *PacifiCare* is admirable but may be flawed. The court failed to acknowledge the possibilities that an arbitrator might find latent ambiguities or might interpret contract language to avoid illegality. The breadth of the *PacifiCare* Court’s preference for arbitral resolution of all issues over judicial resolution is apparent when we recognize: first, by referring the matter to arbitration, the Court insured that if anyone reached the public law issue, it would be the arbitrator – there was no procedure whereby the arbitrator could interpret the contract and then refer the public law issue back to the court; and second, there was no reason that the Court would have encroached on the arbitrator’s authority to interpret the contract by resolving the public law issue. The Court could have ruled on whether prohibitions on treble damages in RICO cases are lawful, leaving open the question of whether the damage limitation in the arbitration agreement encompassed RICO treble damages. If the Court found such a prohibition lawful, the matter would have proceeded to the arbitrator who would have ruled on whether the contract prohibited treble damages in the actual case. If the

The court then observed that the Clayton Act provides that a prevailing plaintiff “shall recover threefold the damages by him sustained,”⁵⁰ and concluded that the law was clear that the right to treble damages for a federal antitrust violation could not be waived. Consequently, the court held the remedy limitation illegal and severed it from the contract.⁵¹

In contrast, the court observed, the Massachusetts antitrust statute did not mandate an award of treble damages but left enhancement of the damage amount to the court’s discretion. After surveying Massachusetts precedents, the First Circuit concluded that the law of Massachusetts was unclear concerning whether prohibitions on treble damage awards for state antitrust violations were lawful. Consequently, the court reasoned, *PacifiCare* compelled referral of that issue to the arbitrator for resolution.⁵²

If *Kristian’s* interpretation of *PacifiCare* is valid, it further highlights the flaws in the *PacifiCare* decision. The need for judicial resolution of the public law issue is less and the confidence with which resolution can be deferred to an arbitrator is greater, where the public law is clear. Where the public law is unclear, the need for judicial resolution of the uncertainties is greatest. This is particularly so because courts do not review arbitration awards for errors of law. Rather, they vacate arbitration awards only where an award displays “manifest disregard for the law” a standard that is impossible to meet where the law is unclear and the arbitrator makes any attempt to resolve the legal issue that is not a sham.⁵³

The strength of the signal to refer adequacy issues to arbitrators increased in *Green Tree Financial Corp. v. Bazzle*.⁵⁴ In *Bazzle*, the plaintiffs brought class actions in state court alleging that Green Tree violated a state consumer protection statute by failing to provide them with a required form. The South Carolina Supreme Court held

Court found treble damage prohibitions unlawful, the contract interpretation issue would have been moot. The *PacifiCare* Court never discussed why it preferred to have the contract issue resolved first, where such approach ensured that if the public law issue was reached it would be resolved by the arbitrator, in contrast to resolving the public law issue first, which would allow a court to interpret the public law without intruding on the arbitrator’s authority to interpret the contract.

50. *Id.* at 47 (quoting 15 U.S.C. § 15(a) (2000)) (emphasis added by the court).

51. *Id.* at 47-48.

52. *Id.* at 48-50.

53. For an excellent discussion of the “manifest disregard for the law” standard of judicial review, see Michael Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L.J. 547 (2005).

54. 539 U.S. 444 (2003).

that plaintiffs' contracts with Green Tree were silent as to whether class actions in arbitration were permitted and concluded that under South Carolina law the contracts permitted arbitral class actions. The court compelled arbitration. The Supreme Court reversed, holding that whether class actions in arbitration were allowed was an issue for the arbitrator rather than the court.

The Court reasoned that most issues related to the contract are for the arbitrator to decide. It recognized what it characterized as a "narrow exception" for "certain gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy."⁵⁵ In the court's view, the availability of a class action in arbitration did not fall within the exception.⁵⁶

In *Buckeye Check Cashing, Inc. v. Cardegna*,⁵⁷ the Supreme Court held that the question of whether a contract containing an arbitration clause was void under state law was an issue for the arbitrator and not the court. The Court found the case controlled by its decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,⁵⁸ which held that issues of fraud in the inducement of the contract were issues for the arbitrator, in contrast to issues of fraud in the inducement of the arbitration clause, which were issues for the court. The Court rejected the distinction established in contract law between void and voidable contracts as irrelevant, and interpreted the word "contract," as used in section 2 of the FAA to include contracts that are later held to be void.⁵⁹ Thus, the Court again deferred interpretation and application of the public law to the privately selected and privately accountable arbitrator.

The message of these recent Supreme Court decisions to the lower courts is clear. They are to avoid deciding most issues concerning the validity of the arbitration provision and instead refer those issues to the arbitrator. Furthermore, whether the apparent impediments in the arbitration provision will deny the plaintiff a forum in which to vindicate effectively his or her statutory rights is speculative until the arbitrator rules. Consequently, under *Randolph*, the plaintiff cannot sustain the burden of proof on this issue. This

55. *Id.* at 452.

56. *Id.*

57. 546 U.S. 440 (2006).

58. 388 U.S. 395 (1967).

59. *Buckeye Check Cashing*, 546 U.S. at 447-49.

message was not lost on then Circuit Judge, now Chief Justice, Roberts who, considering *Randolph* and *PacifiCare*, opined:

We take from these recent cases two basic propositions: *first*, that the party resisting arbitration on the ground that the terms of an arbitration agreement interfere with the effective vindication of statutory rights bears the burden of showing the likelihood of such interference, and *second*, that this burden cannot be carried by "mere speculation" about how an arbitrator "might" interpret or apply the agreement.⁶⁰

At common law, adjudicators have the authority to deny enforcement to contracts and contract provisions that are illegal or contrary to public policy.⁶¹ The Supreme Court has recognized, in the context of labor arbitration, that an arbitrator also has such authority.⁶² Consequently, taken to its logical extreme, the Court's most recent arbitration jurisprudence suggests that a court should not rule on even the most patently illegal characteristics of the arbitration agreement because it is "mere speculation" whether the arbitrator will enforce or strike them. The Eighth Circuit has come close to this approach. In *Bailey v. Ameriquest Mortgage Co.*,⁶³ the district court refused to compel arbitration of the plaintiffs' claims under the Fair Labor Standards Act (FLSA),⁶⁴ because the arbitration agreement imposed "procedural terms and remedial limitations [that] appear to be facially inconsistent with the FLSA statutory claims . . ."⁶⁵ The Eighth Circuit chided the district court for reflecting "outmoded judicial hostility to arbitration that the Supreme Court has consistently rejected in construing the FAA."⁶⁶ The court held that the validity of the contractual limitations was for the arbitrator to decide, reasoning, "When an agreement to arbitrate encompasses statutory claims, the arbitrator has the authority to enforce substantive statutory rights, even if those rights are in conflict with contractual limitations in the agreement that would otherwise apply."⁶⁷ The Eighth and Eleventh Circuits have refused to invalidate

60. *Booker v. Robert Half Int'l, Inc.* 413 F.3d 77, 81 (D.C. Cir. 2005).

61. *See generally* 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 5.1 (3d ed. 2003).

62. *See W. R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 767 n.10 (1983) (suggesting that under the contract doctrine of impossibility of performance, an arbitrator may refuse to enforce a CBA provision that conflicts with external law).

63. 346 F.3d 821 (8th Cir. 2003).

64. 29 U.S.C. §§ 201-19 (2000).

65. *Bailey*, 346 F.3d at 823.

66. *Id.*

67. *Id.* at 824.

contractual provisions limiting the statutory right of a prevailing plaintiff to recover attorney fees, reasoning that how the arbitrator will adjudicate the issue is too speculative to justify the conclusion that arbitration will not allow plaintiffs to vindicate effectively their statutory rights.⁶⁸ Under this approach, about the only issue that a court might consider policing is control over selection of the arbitrator.⁶⁹

A second message from *Randolph* in particular, is troubling. The Court's focus on whether excessive fees will impede the ability to vindicate statutory rights seems limited to the individual plaintiff. Although a few courts remain willing to consider the effects of arbitration agreement provisions on employees' generally and have held unenforceable provisions that would deter employees similarly situated to the plaintiff from exercising their statutory rights,⁷⁰ most have rejected this approach.⁷¹

*Brooks v. Travelers Insurance Co.*⁷² illustrates the impact of a focus limited to the particular plaintiff instead of a consideration of the systemic effects of provisions of an arbitration agreement. The employer imposed on its employees an agreement which limited the arbitration hearing to one day, absent unusual circumstances. It

68. *Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004); *Summers v. Dillards, Inc.*, 351 F.3d 1100 (11th Cir. 2003); *see also Siebert v. Amateur Athletic Union of the U.S., Inc.*, 422 F. Supp. 2d 1033 (D. Minn. 2006) (similar holding with respect to contractual provision prohibiting award of punitive damages).

69. *See, e.g., McMullen v. Meijer, Inc.*, 355 F.3d 485 (6th Cir. 2004); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 314 (6th Cir. 2000). Even here, however, some courts have refused to invalidate suspect arbitrator selection provisions on the ground that the plaintiffs did not meet their burdens under *Randolph* to show that the provision impeded their abilities to effectively vindicate their rights. *See Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943 (8th Cir. 2001); *see also Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001) (refusing to enforce agreement to arbitrate because of lack of consideration but suggesting that attack on arbitrator selection procedure would not meet burden under *Randolph*).

70. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 660-61 (6th Cir. 2003); *Dehart v. Stevens-Henager Coll., Inc.*, 87 Empl. Prac. Dec. (CCH) ¶42,191 (D. Utah 2005); *Perez v. Hospitality Ventures-Denver, LLC*, 245 F. Supp. 2d 1172 (D. Colo. 2003); *Ball v. SFX Broad., Inc.*, 165 F. Supp. 2d 230, 239-40 (N.D.N.Y. 2001).

71. *See James v. McDonald's Corp.*, 417 F.3d 672, 679-80 (7th Cir. 2005); *Faber v. Menard, Inc.*, 367 F.3d 1048, 1053-54 (8th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003); *Bradford v. Rockwell Semiconductors, Inc.*, 238 F.3d 549, 557 (4th Cir. 2001); *Tillman v. Commercial Credit Loans, Inc.* 629 S.E.2d 865, 872 (N.C. App. 2006). Even among courts willing to consider the systematic effects of provisions in arbitration agreements, the tendency is to sever the offending provision and enforce the agreement to arbitrate. *See Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003); *but see Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003). For a discussion of problems raised by judicial willingness to sever offensive provisions and enforce the promise to arbitrate see *infra* note 148-49 and accompanying text.

72. 297 F.3d 167 (2d Cir. 2002).

impliedly limited the hearing in unusual circumstances to two days. It limited the relief an arbitrator could award in ways that were more restrictive than some employment statutes. It provided that each party would bear its own legal fees and expenses and that the parties would split the costs of the arbitration proceeding beyond the first day of hearing, and it expressly prohibited the arbitrator from changing that allocation. Finally, it provided for a one year limitations period, a period considerably shorter than that provided under several employment statutes. Nevertheless, the district court dismissed the plaintiff's complaint for age and disability discrimination and ordered her to arbitrate.⁷³ During oral argument on appeal, the Second Circuit expressed concern that the arbitration agreement impeded plaintiff's ability to vindicate her statutory rights.⁷⁴ In light of those concerns, the employer abandoned its efforts to compel the plaintiff to arbitrate. The Second Circuit vacated the district court's judgment and dismissed the appeal.⁷⁵

If the focus is limited to the specific plaintiff present before the court, as *Randolph* suggests is required, the Second Circuit's decision makes perfect sense. However, the court's decision left Travelers free to continue to impose the arbitration agreement on all of its other employees and to waive it whenever an employee challenged it in court. Meanwhile the agreement could continue to deter many employees from bringing claims in the first instance. The failure to consider the potential systemic effects of the agreement permits such strategic behavior.⁷⁶

Thus, the Supreme Court's decisions considering provisions in arbitration agreements that may impede the ability of claimants effectively to vindicate their statutory rights have significantly undermined that tool for policing procedural fairness. The decisions place a heavy burden on plaintiffs to prove such impediments and strongly suggest that judicial considerations of such issues in pre-arbitral challenges is premature, leaving the issues to arbitral resolution. Part II.B considers the alternative policing tool, the doctrine of unconscionability.

73. *Id.* at 168-71.

74. *Id.* at 169.

75. *Id.* at 172.

76. In fairness to Travelers, I do not know how the company reacted to the litigation. I do not know if it is continuing to impose the arbitration agreement or if it amended the agreement in light of the concerns expressed by the court during oral argument.

B. Unconscionability

Unconscionability is a state law doctrine used to police the fairness of contracts. As such, it offers some potential advantages over the federal law doctrine that arbitral procedures must not impede the effective vindication of federal statutory rights. Whereas some courts have held that the federal law doctrine applies only to federal statutory claims,⁷⁷ the doctrine of unconscionability is not so limited.⁷⁸ Additionally, courts applying the state law doctrine of unconscionability are not bound by Supreme Court interpretations of the FAA, which impose excessive burdens of proving unfairness on plaintiffs or refer such issues to arbitrators.

For example, in *Great Western Mortgage Corp. v. Peacock*,⁷⁹ the Third Circuit interpreted the FAA to mandate arbitration of Peacock's claims for violation of the New Jersey antidiscrimination statute even though the arbitration agreement purported to shorten the limitations period and to restrict remedies. The court held that the validity of those provisions was for the arbitrator to decide.⁸⁰ It reasoned:

[A] court compelling arbitration should decide only such issues as are essential to defining the nature of the forum in which a dispute will be decided. . . . Once a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration. Since the purpose of the FAA is to ensure that agreements to arbitrate are enforced, a court compelling arbitration should preserve the remaining disputed issues for the arbitrator to decide. Any argument that the provisions of the Arbitration Agreement involve a waiver of substantive rights afforded by the state statute may be presented in the arbitral forum.⁸¹

In *Alexander v. Anthony International, L.P.*,⁸² the Third Circuit again faced an arbitration agreement that, *inter alia*, shortened the limitations period and limited remedies, but this time the plaintiff asserted that the agreement was unconscionable. Interpreting Virgin Islands law, the court refused to apply *Great Western* to refer the issue to the arbitrator. Rather, the court reasoned, the claim of

77. See *supra*, note 21 and accompanying text.

78. See *Little v. Auto Steigler, Inc.*, 63 P.3d 979 (Cal. 2003) (applying unconscionability doctrine to police arbitration agreement in context of state common law retaliatory discharge tort claim).

79. 110 F.3d 222 (3d Cir. 1997).

80. *Id.* at 231-32.

81. *Id.* at 230-31.

82. 341 F.3d 256 (3d Cir. 2003).

unconscionability went to the validity of the agreement to arbitrate and, under *Great Western* was for the court to resolve.⁸³ Professor Stemple has hailed the application of the doctrine of unconscionability as an evolving “unconscionability norm” which can “soften the rough edges of the Supreme Court’s pro-arbitration jurisprudence.”⁸⁴ Unfortunately, unconscionability analysis also has major deficiencies that impede its usefulness as a tool for policing procedural fairness in employment arbitration.

Unconscionability has generally been recognized as being of two types: procedural unconscionability, generally understood to mean the absence of meaningful choice; and substantive unconscionability, referring to terms that are unreasonably favorable to the stronger party.⁸⁵ There is no general definition of unconscionability, however, and the jurisdictions have varied greatly in their approach to the use of this doctrine as a tool for policing due process in arbitration.

One issue that divides the jurisdictions is the degree to which both procedural and substantive unconscionability must be present for judicial intervention. For example, the Illinois Supreme Court has “rejected the requirement that both procedural and substantive unconscionability must be found before a contract or a contract provision will be found to be unenforceable. A finding of unconscionability may be based on either procedural or substantive unconscionability or both.”⁸⁶ The court found under the circumstances presented that a consumer arbitration agreement that prohibited class actions was unconscionable.⁸⁷ Other jurisdictions require both procedural and substantive unconscionability but apply a sliding scale where a great deal of one will offset deficiencies in the showing of the other.⁸⁸ Still others require that an absolute amount of both procedural and substantive unconscionability be present.⁸⁹

83. *Id.* at 264; *see also* *In re Halliburton Co.*, 80 S.W.3d 566, 571-72 (Tex. 2002). Not all courts, however, agree with this distinction. *See Hawkins v. Aid Ass’n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003) (holding that alleged unconscionability of arbitration agreement’s limitations on remedies is for arbitrator, not court, to resolve).

84. Jeffrey W. Stemple, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 765-66 (2004).

85. *See* 1 FARNSWORTH, *supra* note 61, § 4.28.

86. *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 263 (Ill. 2006).

87. *Id.* at 274-75.

88. *See, e.g., Gentry v. Superior Court*, 165 P.3d 556 (Cal. 2007); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

89. *See, e.g., Scovill v. WSYX/ABC Sinclair Broad. Group, Inc.*, 425 F.3d 1012, 1017-18 (6th Cir. 2005) (applying Ohio law).

The requirement that procedural unconscionability be present, at least to a limited extent, limits the utility of unconscionability analysis to police procedural fairness. Where a court finds no or insufficient procedural unconscionability, it will enforce the agreement to arbitrate regardless of how unfair the terms are.⁹⁰ For example, in *Post v. Procare Automotive Service Solutions*,⁹¹ the Ohio Court of Appeals held that a provision in an employment arbitration agreement precluding a prevailing employee-plaintiff from recovering attorney fees was substantively unconscionable. Nevertheless, the court remanded the case to the trial court to determine whether the agreement was also procedurally unconscionable. Similarly, although the Ninth Circuit held that Circuit City's arbitration agreement imposed on new hires was unconscionable under California law,⁹² it enforced the agreement against incumbent employees, finding that the agreement was not procedurally unconscionable because Circuit City gave its incumbent employees a limited opportunity to opt out of the agreement.⁹³

Furthermore, courts vary in what they accept as establishing procedural and substantive unconscionability. Two cases, one from California and one from Michigan, illustrate the wide variation among courts in how they apply the unconscionability doctrine. In *Armendariz v. Foundation Health Psychcare Services, Inc.*,⁹⁴ the California Supreme Court invalidated an arbitration provision in an employment contract as unconscionable. The court found the arbitration provision to be procedurally unconscionable because it was presented to the employee on a take-it-or-leave-it basis. The court characterized the effects of an adhesive contract in an employment context as "particularly acute" because "few employees are in a position to refuse a job because of an arbitration requirement."⁹⁵ It found the agreement substantively unconscionable because it was one-sided. The employee was obligated to arbitrate

90. See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 430-33 (2006).

91. No. 87646, 2007 WL 1290091 (Oh. App. May 3, 2007).

92. *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002).

93. *Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104 (9th Cir. 2002); *Circuit City Stores, Inc. v. Admed*, 283 F.3d 1198 (9th Cir. 2002). In *Gentry*, however, the California Supreme Court found the Circuit City contract unconscionable despite the 30-day opt out provision because Circuit City failed to disclose the disadvantages of arbitration. *Gentry*, 2007 WL 2445122 at *15 - *17.

94. 6 P.3d 669 (Cal. 2000).

95. *Id.* at 690.

her claims but the employer was not obligated to arbitrate its claims. The court opined that such lack of bilaterality without any commercially reasonable justification rendered the agreement unconscionable.⁹⁶

Clark v. DaimlerChrysler Corp.,⁹⁷ did not involve an arbitration agreement. Rather, it involved an agreement by the employee that any claim arising out of employment would be brought within six months, regardless of whether the claim had a longer statute of limitations. The limitations provision was contained in the plaintiff's job application as the eighth numbered paragraph under a bold capitalized admonition to "read carefully before signing."⁹⁸ Clark signed the document five months before he was hired.⁹⁹ The Michigan Court of Appeals held that the provision was not unconscionable. It found no procedural unconscionability because "plaintiff did not present any evidence that he had no realistic alternatives to employment with defendant. Therefore, while plaintiff's bargaining power may have been unequal to that of defendant, we cannot say that plaintiff lacked any meaningful choice but to accept employment under the terms dictated by defendant."¹⁰⁰ The court further held that the shortened limitations period was not substantively unconscionable, asserting that it was not "so extreme that it shocks the conscience."¹⁰¹ It is difficult to imagine the California court reaching the same conclusion as the Michigan court in *Clark*, or the Michigan court reaching the same conclusion as the California court in *Armendariz*.

The different outcomes in *Armendariz* and *Clark* reflect deep divisions in the courts over their degree of skepticism with respect to terms unilaterally set by employers. These differences in attitude commonly produce differences in how to judge procedural unconscionability in employment contracts. Essentially the courts differ over whether the option of declining the job offer to avoid waiving the right to sue is a meaningful choice. In *Armendariz*, the court regarded the presentation of the arbitration agreement on a take-it-or-leave-it basis as not offering a meaningful choice. Many other courts disagree. In their view, particularly if the arbitration

96. *Id.* at 692-94.

97. 706 N.W.2d 471 (Mich. App. 2005).

98. *See id.* at 478 (Neff, P.J., dissenting).

99. *Id.* at 478 (Neff, P.J., dissenting).

100. *Id.* at 475.

101. *Id.*

agreement is not hidden and is easily understood, the employee's choice to accept it as a condition of employment or look elsewhere for work is meaningful. The Seventh Circuit articulated the rationale:

Winiacki does not deny that the arbitration clause is supported by consideration – her salary. Oblix paid her to do a number of things; one of the things it paid her to do was agree to non-judicial dispute resolution. It is hard to see how the arbitration clause is any more suspect, or any less enforceable, than the others – or, for that matter, than her salary. A person who accepts a “non-negotiable” offer of \$50,000 salary would be laughed out of court if she filed suit for an extra \$10,000, contending that the employer's refusal to negotiate made the deal “unconscionable” and entitled her to better terms. Well, arbitration was as much a part of this deal as Winiacki's salary and commissions, the rules about handling trade secrets, and other terms. All stand or fall together.¹⁰²

Intuitively, the case for the absence of meaningful choice may appear stronger where the employer imposes the arbitration agreement on an incumbent employee. Such an employee's only choices are to accept the agreement or terminate the relationship and thereby sacrifice what can be a considerable investment of human capital. The option to quit and start over looking for another job would not appear to be a meaningful one for most workers. Nevertheless, the Texas Supreme Court has rejected such an analysis and held that the imposition of an arbitration agreement on an incumbent employee is not procedurally unconscionable. The court reasoned, “Because an employer has a general right under Texas law to discharge an at-will employee, it cannot be unconscionable, without more, to premise continued employment on acceptance of new or additional terms.”¹⁰³

Even in jurisdictions that take a liberal approach to unconscionability, two factors further limit the doctrine's utility as a tool for policing procedural fairness. First, in some cases, an employer may be able to avoid such policing by inserting a choice of law clause providing for the contract to be governed by the law of a jurisdiction

102. *Oblix, Inc. v. Winiacki*, 374 F.3d 488, 491 (7th Cir. 2004); *see also Zuver v. Airtouch Commc'ns, Inc.*, 103 P.3d 753, 761 (Wash. 2004) (holding non-negotiable arbitration provision in employment agreement not procedurally unconscionable where provision was not hidden in fine print and employee had fifteen days to consider it before accepting).

103. *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2004). *But see Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1073-74 (9th Cir. 2007) (holding arbitration agreement imposed on incumbent employee procedurally unconscionable even though employee was given three months notice before agreement took effect and employee could have looked for another job during that period).

more favorable to employers.¹⁰⁴

Second, courts using unconscionability as a vehicle for policing procedural fairness must navigate a minefield of preemption by the FAA. In *Doctor's Associates, Inc. v. Casarotto*,¹⁰⁵ the Supreme Court held that the FAA preempted a Montana statute which required that notice that a contract is subject to arbitration be typed in underlined capital letters on the first page of the contract. The Court drew a line between "generally applicable contract defenses, such as fraud, duress, or unconscionability, [which] may be applied to invalidate arbitration agreements,"¹⁰⁶ and "state laws applicable only to arbitration provisions,"¹⁰⁷ which may not be applied because they are preempted by the FAA.

Although the Court expressly recognized that the use of unconscionability as a general contract doctrine to invalidate arbitration agreements would not be preempted by the FAA, courts using this tool to police arbitration agreements are vulnerable to attack that they are merely dressing up arbitration-specific doctrines in general contract clothing. Courts that find arbitration agreements unconscionable more readily than contracts generally are vulnerable to FAA pre-emption.¹⁰⁸

The Seventh Circuit took this view to the extreme in *Obliv, Inc. v. Winiecki*,¹⁰⁹ where it suggested that *Armendariz's* procedural unconscionability analysis was preempted unless the California Supreme Court held all standard form contracts that were non-negotiable to be unconscionable.¹¹⁰ The court's analysis ignores the reliance in *Armendariz* not only on the adhesive nature of the agreement but also on the absence of meaningful choice because "few

104. See *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456, 457 (Ct. App. 2005) (enforcing Delaware choice of law clause and applying Delaware law to enforce ban on class actions in arbitration agreement), *on remand from* 113 P.3d 1100, 1117-18 (Cal. 2005) (remanding to trial court to determine whether to enforce choice of law clause in credit card agreement with California resident adopting Delaware law); *Strand v. U. S. Bank Nat'l Ass'n*, 693 N.W.2d 918, 920 (N.D. 2005) (unconscionability of arbitration provision in credit card agreement with Oregon resident evaluated under North Dakota law due to choice of law clause).

105. 517 U.S. 681 (1996).

106. *Id.* at 687.

107. *Id.*

108. See generally Stephen J. Ware, *Arbitration and Unconscionability after Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001 (1996).

109. 374 F.3d 488 (7th Cir. 2004).

110. *Id.* at 491 ("Standard-form agreements are a fact of life, and given § 2 of the Federal Arbitration Act, arbitration provisions in these contracts must be enforced unless states refuse to enforce all off-the-shelf package deals.") (citation omitted).

employees are in a position to refuse a job because of an arbitration requirement.”¹¹¹ The analysis allows for a finding, consistent with general California contract law, that an agreement is not unconscionable despite its presentation in a standard form on a take-it-or-leave-it basis where the other party has alternatives to dealing with the offeror.¹¹² Although flawed, the *Oblix* court’s analysis demonstrates the vulnerability to preemption attack of holdings that arbitration provisions in employment agreements are procedurally unconscionable.

Substantive unconscionability analysis may also be vulnerable to preemption attack. Some provisions in arbitration agreements, such as those imposing more than a nominal amount of forum costs on employees, are unique to arbitration.¹¹³ As long as the court applies its general substantive unconscionability analysis to such provisions, its holding should not be preempted by the FAA.¹¹⁴ Professor Randall, however, has argued that cases holding the imposition of more than nominal administration and filing fees on employees to be unconscionable are preempted because a party’s inability to pay a court’s filing fee generally does not give that party a constitutional right to file a lawsuit for free.¹¹⁵ Her analysis is flawed. At issue is not free access to the forum but whether an agreement that increases the price of access above what would be paid in the absence of the agreement is so one-sided as to be oppressive and thus substantively unconscionable. Nevertheless, her analysis further highlights the vulnerability to preemption of the use of unconscionability to police procedural fairness. Furthermore, many other provisions in arbitration agreements, such as limitations on remedies, shorter limitations periods, and prohibitions on class actions, may be imposed by employers in employment contracts that do not mandate arbitration. If a court analyzes such provisions in an arbitration agreement differently from how it analyzes such provisions in other contexts, it is likely that its decision will be held to be preempted by the FAA.¹¹⁶

111. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

112. *See Dean Witter Reynolds, Inc. v. Superior Court*, 259 Cal. Rptr. 789, 795-98 (Ct. App. 1989).

113. *See Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 989-90 (Cal. 2003).

114. *See id.*

115. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 201-09 (2004).

116. *See id.* at 209-18; Ware, *supra* note 108, at 1026-29 (discussing prohibitions on punitive damages and hearing location clauses).

III. THE INADEQUACIES OF JUDICIAL POLICING: SPECIFIC EXAMPLES

The two primary tools that courts have for policing procedural fairness in employment arbitration have evolved in ways that render them deficient. This part illustrates those deficiencies in four areas: availability of class actions, allocation of the costs of arbitration, limitations on the arbitrator's remedial authority, and shortening of the limitations period provided for under the relevant statute.

A. Class Action Prohibitions

It is common for employer-imposed arbitration agreements to prohibit the arbitration from proceeding as a class action. Some agreements even prohibit the arbitrator from consolidating claims of more than one individual in the same proceeding. Such prohibitions clearly advantage the employer, as they preclude the ability to spread the costs of litigation among multiple plaintiffs. Indeed, there is evidence that a primary motive for employers imposing arbitration agreements on their employees is to eliminate their exposure to class actions.¹¹⁷ Most attacks on class and collective action prohibitions have involved consumer claims rather than employment claims, and most have invoked the doctrine of unconscionability.

Some courts have simply enforced class action prohibitions with no real analysis.¹¹⁸ Most have focused on whether the nature of the claim is such that the prohibition of class actions will impede the plaintiff's ability to bring the claim. In consumer cases, the focus is on the relatively small amounts at stake in individual claims. Thus, in *Kinkel v. Cingular Wireless, LLC*,¹¹⁹ the court held a class action prohibition unconscionable as applied to a claim that the defendant's \$150 cell phone service early termination fee was an illegal penalty; because the amount of the claim was so small, pursuit of the claim would not be economically feasible absent a class action. The California Supreme Court has reasoned similarly in consumer

117. See Estlund, *supra* note 90, at 427 & n.121.

118. See, e.g., *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) (saying that court is "obliged to enforce the type of arbitration to which these parties agreed" which precluded class actions); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (opining that plaintiff failed to establish that "Congress intended to confer a nonwaivable right to a class action under" the FLSA).

119. 857 N.E.2d 250 (Ill. 2006).

arbitrations.¹²⁰

Many courts, however, have enforced class action prohibitions in consumer arbitration agreements. Even in situations involving small claims, these courts note the availability under consumer protection statutes of attorney fees for prevailing plaintiffs and conclude that the plaintiffs did not carry their burden of proving that the class action waiver precluded them from effectively vindicating their statutory rights.¹²¹ The effects of *Randolph* are readily seen in these latter cases.

Employees attacking class action prohibitions face an initial hurdle posed by dicta in *Gilmer*. One of the grounds on which *Gilmer* attacked the arbitration agreement was his inability to bring a class or collective action in arbitration, in contrast to federal court. The *Gilmer* Court rejected the argument, observing that the New York Stock Exchange arbitration rules allowed for collective actions, but continued, in dicta, "But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing collective actions does not mean that individual attempts at conciliation were intended to be barred."¹²² The Fifth Circuit has read this dicta as mandating enforcement of class action prohibitions in employment arbitration agreements.¹²³

Employees who overcome the hurdle posed by the *Gilmer* dicta will still have a great deal of difficulty convincing courts that class action prohibitions in employment arbitration agreements are unconscionable. Even the most liberal among the jurisdictions considering whether class action prohibitions in consumer arbitration contracts are unconscionable rely on the typically small amount in controversy to hold that the absence of a class action vehicle effectively insulates the defendant from liability. Typically employment claims, particularly claims of wrongful termination, seek

120. See *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). On remand, however, the California Court of Appeal enforced the ban on class actions because the ban was enforceable under Delaware law and the contract expressly provided that it would be governed by Delaware law. *Discover Bank v. Superior Court*, 36 Cal. Rptr. 3d 456 (Ct. App. 2005).

121. See, e.g., *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Ornelas v. Sonic-Denver T, Inc.*, No. 06-cv-00253-PSF-MJW, 2007 WL 274738 (D. Colo. Jan. 29, 2007); *Tillman v. Commercial Credit Loans, Inc.*, 629 S.E.2d 865 (N.C. App. 2006); *Strand v. U.S. Bank Nat'l Ass'n*, 693 N.W.2d 918 (N.D. 2005).

122. *Gilmer v. Interstate Johnson/Lane Corp.*, 500 U.S. 20, 32 (1991) (internal quotations, brackets and citation omitted).

123. *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004).

damages in the tens or hundreds of thousands of dollars, a far cry from the consumer claims in the low hundreds of dollars. Although the Ninth Circuit, applying California law, has held a class action prohibition in an employment arbitration contract substantively unconscionable, the agreement before that court contained numerous other substantively unconscionable features, including requiring the employee to arbitrate while not requiring the employer to arbitrate its claims, reducing the limitations period below that provided for by statute, limitations on an award of attorney fees to a prevailing plaintiff, a requirement that the employee pay a filing fee to the employer and the employer's retention of the unilateral right to terminate or modify the arbitration agreement.¹²⁴

Employees attacking prohibitions on class and collective actions as undermining their ability to vindicate effectively their statutory rights in the arbitral forum also face significant hurdles. In light of *Bazzle*, courts may defer resolution of the availability of class or collective actions to the arbitrator.¹²⁵

Under *Randolph*, they face a burden of proving that, in their particular case, the inability to bring a class action impedes their ability to vindicate their statutory rights. The lengths to which employees must go to meet this burden is exemplified by *Kristian v. Comcast Corp.*¹²⁶ In *Kristian*, the First Circuit invalidated (and severed) a provision in Comcast's contracts with its cable television customers that prohibited class actions as applied to the consumers' antitrust claims. The court relied on expert testimony that the value of individual claims ranged from a few hundred to at most a few thousand dollars and the cost of litigation, particularly attorney time and expert witness fees and expenses would be several million dollars. The court concluded that no rational attorney would take the case if it could not be brought as a class action.¹²⁷ The court noted that the availability of an award of attorney fees to a prevailing plaintiff did not change its conclusion because "[i]n any individual case, the disproportion between the damages awarded to an individual consumer antitrust plaintiff and the attorney's fees incurred to prevail on the claim would be so enormous that it is highly unlikely that an

124. *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003).

125. *See, e.g., Johnson v. Long John Silver's Restaurants, Inc.*, 320 F. Supp. 2d 656 (M.D. Tenn. 2004), *aff'd*, 414 F.3d 583 (6th Cir. 2005).

126. 446 F.3d 25 (1st Cir. 2006).

127. *Id.* at 58-59.

attorney could ever begin to justify being made whole by the court.”¹²⁸

Employees bringing class actions under many employment statutes, such as the WARN Act,¹²⁹ the Employee Polygraph Protection Act,¹³⁰ the Family Medical Leave Act,¹³¹ and even many Title VII claims will find it very difficult to meet their burdens. Similarly, employees seeking to bring collective actions under the FLSA or ADEA will have a great deal of difficulty showing that they cannot bring the claims individually, particularly in light of statutory provisions for costs and attorney fees to prevailing plaintiffs. *Kristian* is likely to assist employees bringing large, complex pattern and practice and disparate impact discrimination class actions that require detailed expert analysis of large numbers of employment actions, expert testimony on such matters as stereotyping and unconscious biases, and huge up-front investments by plaintiffs’ counsel. But once we get beyond cases such as the national sex discrimination class action against Wal-Mart,¹³² employees will find it extremely difficult to meet their burden under *Randolph*.

At first blush, the California Supreme Court’s recent decision in *Gentry v. Superior Court*¹³³ offers hope for employees facing class action waivers in their employment contracts. The court held that the class action waivers, as applied to Gentry’s state statutory claim for unpaid overtime effectively exculpated Circuit City, Gentry’s employer, from compliance with state wage and hour laws and was unenforceable. The court reasoned that wage and hour awards tend to be modest, particularly in light of the practical difficulties and length of time involved in adjudication them.¹³⁴ The court rejected Circuit City’s argument that the availability of attorney fees to a prevailing plaintiff balanced the disadvantages of being limited to an

128. *Id.* at 59 n.21. On remand, Comcast withdrew its motion to compel arbitration and instead proceeded with the class action in United States district court. *Kristian v. Comcast Corp.*, 469 F. Supp. 2d 1 (D. Mass. 2006). At least for Comcast, the class action ban and the arbitration forum were linked. Apparently, Comcast did not want to arbitrate a class action. With the consent of the plaintiff, the class action proceeded in litigation rather than arbitration.

129. 29 U.S.C. §§ 2101-09 (2000).

130. 29 U.S.C. §§ 2001-09 (2000).

131. 29 U.S.C. §§ 2601-54 (2000).

132. *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007). There is good reason to believe that the claims against Wal-Mart, which focus on the embodiment of unconscious stereotyping in its corporate philosophy transmitted to every individual store, could only be brought as a class action. See Melissa Hart, *Learning from Wal-Mart*, 10 EMP. RTS. & EMP. POL’Y J. 355 (2006).

133. 165 P.3d 558 (Cal. 2007).

134. *Id.* at 564.

individual action.¹³⁵ The court also opined that class actions may be necessary because incumbent employees may fear retaliation if they bring individual claims,¹³⁶ and because many claimants may be unaware of their statutory rights.¹³⁷

Gentry, however, refused to hold class action waivers in employment agreements per se unenforceable, even in wage and hour actions.¹³⁸ The *Gentry* analysis, thus, is consistent with the general trend in the caselaw since *Randolph* to place on the plaintiff the burden of demonstrating that the provisions in the arbitration agreement preclude effective vindication of statutory rights in the plaintiff's particular case. *Gentry* simply takes a more employee-protective view of where to draw the line between meeting and not meeting that burden. It still refuses to adopt bright line rules, inviting case-by-case adjudication instead.

B. Costs of Arbitration

Not surprisingly, lower courts have been guided most by *Randolph* in assessing whether the likelihood of being charged excessive arbitration fees impedes arbitration as a forum for effective vindication of statutory rights. *Randolph* requires courts to place on the plaintiffs the burden of establishing that excessive costs impede their ability to vindicate effectively their statutory rights in the arbitral forum. Some courts, however, have gone beyond this general proposition and have imposed extremely strenuous burdens that almost guarantee that plaintiffs will not meet them. Not surprisingly, the Fourth Circuit has led the way. In a decision issued shortly after *Randolph*, the court held that the question of excessive costs must be decided on a case-by-case and plaintiff-by-plaintiff basis. The court must consider the likely arbitration fees, the plaintiff's financial condition and must offset potential savings in litigation costs made possible by the more efficient procedures available in arbitration.¹³⁹

Some courts have taken this analysis to extremes. They have refused to consider costs that are due only if the case proceeds to hearing, presumably because the possibility that the case might settle

135. *Id.* at 565.

136. *Id.* at 565-66.

137. *Id.* at 566-67.

138. *Id.* at 567-68.

139. *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 556 & n.5 (4th Cir. 2001).

short of hearing renders such costs speculative.¹⁴⁰ These courts also have refused to consider arbitration fees that the arbitrator has discretion to allocate in the award because how the arbitrator will rule is speculative,¹⁴¹ and have refused to consider costs that have yet to be billed by the arbitration agency.¹⁴² They have held that plaintiffs failed to carry their burdens because they did not request fee waivers,¹⁴³ and did not ask the defendant to absorb the costs.¹⁴⁴ The Fourth Circuit faulted a plaintiff for failing to establish the probable arbitrator fee even though the trial court did not allow discovery on that point, chiding the plaintiff that “[i]t was within his power to obtain this information by simply investigating the option of arbitration in the first place.”¹⁴⁵

Courts have also allowed defendants to game the system with respect to allocation of arbitration costs. Where it appears that the cost allocation provision of the contract may impede the effective vindication of plaintiff’s statutory rights, courts have allowed defendants to offer to pay all arbitration fees and obtain an order compelling arbitration.¹⁴⁶

Allowing defendants to avoid the consequences of allocation of excessive fees to plaintiffs in the agreements that the defendants themselves drafted has at least two negative consequences. First, as other courts have observed, the matter will proceed to arbitration with the offensive provision remaining in the defendant’s contracts thereby deterring others from bringing claims.¹⁴⁷ Second, allowing

140. *Shipp v. XA, Inc.*, No. 06 C 1193, 2006 WL 2583720, at *5 (N.D. Ill. Aug. 31, 2006).

141. *Id.*

142. *Veliz v. Cintas Corp.*, No. 03-01180(SBA), 2005 WL 1048699, at *4 n.5 (N.D. Cal. May 4, 2005).

143. *James v. McDonald’s Corp.*, 417 F.3d 672, 679 (7th Cir. 2005) (compelling arbitration despite showing that arbitration fees and service costs would range between \$38,000 and \$80,500 and affidavit from plaintiff that she lacked financial resources to pay those fees because plaintiff did not apply to AAA for a fee waiver); *Siebert v. Amateur Athletic Union of the U.S., Inc.*, 422 F. Supp. 2d 1033, 1043 (D. Minn. 2006) (relying on pre-*Randolph* decision in *Dobbins v. Hawk’s Enters.*, 198 F.3d 715, 717 (8th Cir. 1999)). *But see* *Ball v. SFX Broad., Inc.*, 165 F. Supp. 2d 230, 240 n.10 (N.D.N.Y. 2001) (rejecting this approach).

144. *Siebert*, 422 F. Supp. 2d at 1043.

145. *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002). Notably, the Sixth Circuit has rejected this approach, holding that the inquiry is whether the plaintiff or other employees similarly situated would be deterred from pursuing their claims by the arbitration agreement’s allocation of fees and costs. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003).

146. *See, e.g., Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 300 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 & n.3 (7th Cir. 2003); *Large v. Concesco Fin. Serv. Corp.*, 292 F.3d 49, 56-57 (1st Cir. 2002); *Roberson v. Clear Channel Broad., Inc.*, 144 F. Supp. 2d 1371 (S.D. Fla. 2001).

147. *See, e.g., Cooper v. MRM Investment Co.*, 367 F.3d 493, 512 (6th Cir. 2004); *Spinetti v.*

defendants to game the system invites them to, in effect, negotiate with the court. For example, in *Livingston v. Associates Finance, Inc.*,¹⁴⁸ when the magistrate judge permitted plaintiffs discovery on the likely arbitration costs and the district judge agreed, the defendant offered to pay all arbitration costs to the extent that they exceeded the costs of litigation. The district judge rejected the offer as too vague and denied the defendant's motion to compel arbitration. The defendant responded by offering to pay all arbitration costs and requested reconsideration. The district judge rejected the offer and denied the motion.¹⁴⁹ The Seventh Circuit, however, reversed and effectively required the district judge to play these games with the defendant by holding that the offer to pay all arbitration costs mooted the objection that arbitration was too expensive for the plaintiffs.¹⁵⁰ Similar evidence of defense negotiating with the court is evident in *Branco v. Norwest Bank*,¹⁵¹ where the court accepted the defendants' offer to pay whatever fees the court would find necessary to find the arbitration agreement enforceable.¹⁵²

Employees who overcome all of the above hurdles in asserting that excessive costs preclude ordering arbitration are likely to stumble over a final hurdle. Most courts that have found that arbitration agreements allocated excessive costs to plaintiffs have severed the offending provisions and compelled arbitration anyway.¹⁵³ Severing the offending provision eliminates the major incentive for employers to keep such provisions out of their agreements in the first instance – the desire to avoid a court refusing to compel arbitration.¹⁵⁴ Judicial policing to ensure that employees not be subject to excessive arbitration costs is largely ineffective.

Serv. Corp. Int'l, 324 F.3d 212, 217 n.2 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 676-77 (6th Cir. 2002); see also *Perez v. Hospitality Ventures-Denver, LLC*, 245 F. Supp. 2d 1172, 1174 (D. Colo. 2003) (opining that defendant's offer to pay arbitration costs was an offer to modify the contract that plaintiff chose not to accept).

148. 339 F.3d 553 (7th Cir. 2003).

149. *Id.* at 555-56.

150. *Id.* at 557.

151. 381 F. Supp. 2d 1274 (D. Hawaii 2005).

152. *Id.* at 1283.

153. See, e.g., *Faber v. Menard, Inc.*, 367 F.3d 1048, 1054 (8th Cir. 2004); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 223 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 675 (6th Cir. 2003).

154. See Estlund, *supra* note 90, at 435 ("If the court's standard response to an invalid clause is to sever or 'blue pencil' it, the employer has much less incentive to police itself.").

C. Limitations on Remedies

In *McCaskill v. SCI Management Corp.*,¹⁵⁵ the Seventh Circuit held an arbitration agreement unenforceable because it precluded an award of attorney fees to a prevailing plaintiff, even where the statutory basis for the plaintiff's claim provided for such an award. However, the three judge panel granted the employer's motion for reconsideration and vacated the opinion.¹⁵⁶

While the reconsideration was pending, a different panel of the same court decided *Metro East Center for Conditioning and Health v. Qwest Communications International, Inc.*¹⁵⁷ Metro East claimed that Qwest was overcharging it for interstate phone service. Qwest's tariff on file with the Federal Communications Commission (FCC) required arbitration of all disputes between it and its customers. Metro East resisted arbitration, citing the original panel decision in *McCaskill* and arguing, among other grounds, that the costs of the arbitral forum were excessive under the circumstances and that the tariff precluded an award of attorney fees to a prevailing customer in conflict with the Federal Communications Act which provided for fee shifting for prevailing plaintiffs. The *Metro East* panel rejected these arguments because of the filed-rate doctrine which provides that the FCC has the exclusive authority to set rates and other terms and conditions of service. Thus, the court lacked authority in the lawsuit to overturn part of the filed tariff; Metro East's remedy was to petition the FCC to do so.¹⁵⁸

The panel, per Judge Frank Easterbrook, did not stop there. It added considerable dicta critical of the original panel decision in *McCaskill*. Judge Easterbrook equated Metro East's arguments resisting arbitration to the position of the dissent in *Randolph*.¹⁵⁹ With respect to *McCaskill*, he commented:

Metro East overstates *McCaskill's* holding, because the employer in that case conceded that the American Rule would not be used in the arbitration and forfeited additional arguments as well. The employer did not, for example, contend in *McCaskill* that it is the arbitrator, not a judge, who must determine in the first instance what rules for the allocation of legal expenses are applicable. Although some language in *McCaskill* could be read to decide

155. 285 F.3d 623, 627 (7th Cir. 2002), vacated by 294 F.3d 879 (7th Cir. 2002).

156. See *McCaskill*, 294 F.3d 879.

157. 294 F.3d 924 (7th Cir. 2002).

158. See *id.* at 927-28.

159. See *id.* at 927.

issues on which the parties had not engaged, rehearing has been granted in that case to consider more fully the effects of the employer's forfeitures. Because *McCaskill* has been withdrawn, it remains open to decision in this circuit whether parties to a contract may agree to replace a fee-shifting system with the American Rule, whether the right party to make this decision is the arbitrator or the judge, and whether, if a contractual choice of the American Rule is indeed forbidden, this spoils the entire arbitration clause.¹⁶⁰

Judge Easterbrook continued, suggesting that an arbitration agreement's limitation on remedies precluding an award of attorney fees should be enforceable. He observed, "As far as we know, the Supreme Court has never held that any entitlement is outside the domain of contract, unless the statute forbids waiver . . ."¹⁶¹ He catalogued areas where parties may waive fundamental rights in exchange for other benefits.¹⁶² He cited decisions which held enforceable cognovit notes and opined, "A contract specifying use of the American Rule in arbitration is well short of a cognovit clause; and if the latter can be valid, why not the former?"¹⁶³

On rehearing, the *McCaskill* panel held the arbitration agreement unenforceable based on concessions made by SCI's counsel during oral argument. The court declined to consider further the effect of the conflict between the arbitration agreement and Title VII's provision for attorney fee awards to prevailing parties.¹⁶⁴ In a concurring opinion, Judge Ilana Rovner defended the original panel decision against Judge Easterbrook's attack in *Metro East*.¹⁶⁵

The Rovner-Easterbrook debate preceded the Supreme Court's decision in *PacifiCare*.¹⁶⁶ Since that decision, with limited

160. *Id.* at 928.

161. *Id.*

162. *See id.*

163. *Id.* at 929. Judge Easterbrook opined that enforcement of the arbitration agreement, regardless of how fundamentally deficient the procedures are, is necessary to preserve personal liberty. He characterized arbitration as something that "comes with the territory. . . . Although these requirements may be non-negotiable . . . they remain 'agreements' because the person could have chosen to do something else. A would-be securities dealer may elect a different occupation" *Id.* at 926 (citations omitted). Even if the agreement infringed on a statutory right, such as the right to recover attorney fees if successful in litigation, he opined, "One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly." *Id.* at 929.

Judge Easterbrook's view would justify enforcing an agreement to arbitrate under the most blatantly stacked deck system. Under this approach, even the Fourth Circuit was wrong in *Hooters* because the plaintiff had the liberty to exchange her statutory rights for something more valuable, a job.

164. *See McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002).

165. *See id.* at 681-86 (Rovner, J., concurring).

166. 538 U.S. 401 (2003).

exceptions,¹⁶⁷ courts have followed one of two approaches. Some courts have left remedy issues, including enforceability of contractual limitations on remedies, to the arbitrator.¹⁶⁸ Others have found remedy limitations unenforceable, severed them from the contract and compelled arbitration anyway.¹⁶⁹ Neither approach provides any significant incentive for employers to remove remedy limitations from their arbitration agreements. Consequently, such limitations are likely to continue to be used and continue to deter many employees from bringing legitimate claims.

D. Shortening the Statute of Limitations

Employees objecting to arbitration agreements that reduce the time to bring claims below the time permitted in applicable statutes of limitations stumble over the same hurdles as those asserting other procedural infirmities. Under *Randolph*, the burden is on the employee to prove that the reduced limitations period precludes effective vindication of statutory rights in the arbitral forum. As already discussed, this can be a very difficult burden to meet. It is not surprising that courts have upheld contractual limitations periods of one year¹⁷⁰ and of six months.¹⁷¹ *PacifiCare*, *Bazzle*, and *Buckeye Check Cashing* collectively send strong signals to courts to refer most issues to the arbitrator. Courts that do not enforce shortened limitations periods are likely to simply refer the issue to the arbitrator.¹⁷²

167. See, e.g., *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003) (refusing to enforce agreement to arbitrate because, *inter alia*, agreement restricted remedies arbitrator could award).

168. See, e.g., *Faber v. Menard, Inc.*, 367 F.3d 1048 (8th Cir. 2004); *Summers v. Dillard's, Inc.*, 351 F.3d 1100 (11th Cir. 2003); *Siebert v. Amateur Athletic Union of U.S., Inc.*, 422 F. Supp. 2d 1033 (D. Minn. 2006); *Johnson v. Long John Silver's Restaurants, Inc.*, 320 F. Supp. 2d 656 (M.D. Tenn. 2004), *aff'd*, 414 F.3d 583 (6th Cir. 2005).

169. See, e.g., *Booker v. Robert Half, Int'l, Inc.*, 413 F.3d 77 (D.C. Cir. 2005) (Roberts, J.); *Scovill v. WSYX/ABC Sinclair Broad. Group, Inc.*, 425 F.3d 1012 (6th Cir. 2005); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212 (3d Cir. 2003); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003); see also *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294 (5th Cir. 2004) (holding that contractual provision that arbitration be adjudicated in accordance with federal and state law controlled over contractual provision that each party bear its own costs and attorney fees to empower arbitrator to award prevailing plaintiff costs and attorney fees in accordance with statutes on which claims were based).

170. *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 673 n.16 (6th Cir. 2003).

171. *Clark v. DaimlerChrysler Corp.*, 706 N.W.2d 471, 473 (Mich. App. 2005).

172. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 43-44 (1st Cir. 2006). Even before these Supreme Court decisions, the Third Circuit had held that the validity of a shortened limitations period was for the arbitrator to resolve. *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997).

Judicial policing has proven to be largely ineffective at guaranteeing procedural due process in employment arbitration. The situation cries out for self-regulation by arbitrators and arbitrator appointing agencies to fill the void. Part IV examines the prospects for such self-regulation.

IV. PROSPECTS FOR SELF-REGULATION

Self-regulation will never be a complete substitute for judicial policing. The most arbitrators and arbitrator appointing agencies can do is refuse to service employers whose procedures impair due process. They cannot prevent arbitration under procedurally flawed agreements. As long as there is money to be made servicing such flawed arbitration systems, there will be providers willing to render those services. There are no arbitrator licensing bodies to require that arbitrators refrain from servicing procedurally unjust arbitration systems.

Furthermore, self-regulation will fall short unless courts support it by refusing to compel arbitration under flawed procedures that caused arbitrators and appointing agencies to refuse to serve. Unfortunately, in the one reported case considering the issue, the court went the other way. In *Great Western Mortgage Corp. v. Peacock*,¹⁷³ the Third Circuit compelled arbitration even though the arbitration agreement called for JAMS to administer the case and JAMS refused to do so. JAMS refused because the agreement also shortened the limitations period for filing a claim and restricted the remedies that the arbitrator was authorized to award. The court compounded its error by holding that the validity of those provisions was for the arbitrator to decide. It thus forced the employee to litigate the validity before an arbitrator who was willing to serve under the flawed agreement. With arbitrators adhering to due process safeguards removed from the case, the employee could not be confident of receiving a fair hearing on the issues.

Nevertheless, self-regulation can fill some of the gap left by inadequate judicial policing. As the National Academy of Arbitrators' Guidelines for Employment Arbitration recognize, "The power to withdraw from a case in the face of policies, rules or procedures that are manifestly unfair or contrary to fundamental due

173. 110 F.3d 222, 232-34 (3d Cir. 1997).

process can carry considerable moral suasion.”¹⁷⁴ The Guidelines advise arbitrators to decline any case in which both parties did not have a meaningful opportunity to participate in selecting the arbitrator,¹⁷⁵ to ensure that there are no restrictions on the arbitrator’s remedial authority or unfair limitations on discovery,¹⁷⁶ and to ensure that their remedial authority is equal to that of a judge or jury under any statute or common law applicable to the cases.¹⁷⁷

Just as the National Academy of Arbitrators has issued guidance for arbitrators presiding over statutory employment claims, the CPR Institute for Dispute Resolution and the Georgetown Law Center have provided guidance for arbitrator appointing agencies. The CPR-Georgetown Commission on Ethics and Standards in ADR, *Principles for ADR Provider Organizations* provide that an “ADR Provider Organization has an obligation to ensure that ADR processes provided under its auspices are fundamentally fair and conducted in an impartial manner.”¹⁷⁸ That obligation includes some oversight of the neutrals affiliated with the organization. The *Principles* provide that the Organization “should require [its] affiliated neutrals to subscribe to a reputable internal or external ADR code of ethics,”¹⁷⁹ and charge the Organization with a continuing duty “to take all reasonable steps to monitor and evaluate the performance of its affiliated neutrals.”¹⁸⁰

Lofty principles and guidelines alone do not make for an effective regime of self-regulation. Professor Harding, for example, has cautioned against excessive reliance on due process protocols and self-regulation for two reasons: a lack of universal commitment to comply with the protocols and turn away business from parties who refuse to comply; and a lack of transparency, monitoring, and sanctions against those who pledge to comply and instead renege on their pledges.¹⁸¹ Self-regulation can break down because arbitrator

174. National Academy of Arbitrators, Guidelines for Employment Arbitration, at <www.naarb.org/due-process.html>.

175. *Id.* § 3.

176. *Id.* § 4.

177. *Id.* § 5.

178. CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS, Principle III (May 1, 2002), available at <<http://www.cpradr.org/pdfs/finalProvider.pdf>> (Last visited July 4, 2007).

179. *Id.* Principle VII(a).

180. *Id.* Principle I(c).

181. Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 421-37 (2004).

appointing agencies refuse to commit to ensuring procedural fairness, individual arbitrators refuse to make such commitments, or because agencies or arbitrators who have made such commitments cheat when they perceive it to be in their financial interests to do so.

As Professor Harding has recognized, large arbitrator appointing agencies have strong incentives to insist on adherence to standards of procedural fairness. "[T]he consequences to them of a poor record of implementing fair arbitration programs is both substantial and visible. In addition, these firms . . . can usually afford to consider a range of goals in addition to short-term profits."¹⁸²

In employment arbitration, the major arbitrator appointing agencies are the American Arbitration Association (AAA) and JAMS. Both organizations have committed to ensuring procedural fairness in proceedings they administer. When AAA declared that it would not administer cases for employer-imposed arbitration systems that fail to ensure basic procedural fairness, it marked the first time in its history that it had taken "a formal position to decline to administer a class of cases. . ."¹⁸³

AAA has taken a major step in self-regulation by providing in its rules that the rules control over conflicting provisions in the arbitration agreement.¹⁸⁴ Consequently, regardless of whether contrary provisions exist in the agreement imposed by the employer, an employee may not be compelled to pay more than a \$150.00 filing fee and the employer is compelled to pay the entire arbitrator fee.¹⁸⁵ Similarly, regardless of any contractual provision to the contrary, the arbitrator is empowered to order discovery necessary to ensure a full and fair exploration of the dispute,¹⁸⁶ to provide interim relief to the same extent as a court could provide,¹⁸⁷ and to grant any remedy that could be obtained in a court.¹⁸⁸

JAMS declares that it will refuse to administer mandatory employment arbitrations if the arbitration agreement doesn't comply

182. *Id.* at 424 (internal quotations omitted).

183. AMERICAN ARBITRATION ASS'N, FAIR PLAY: PERSPECTIVES FROM AMERICAN ARBITRATION ASSOCIATION ON CONSUMER AND EMPLOYMENT ARBITRATION 13 (Jan. 2003).

184. American Arbitration Ass'n, Employment Arbitration Rules and Mediation Procedures, Rule 1 (2006), available at <www.adr.org/sp.arp?id=28481> [hereinafter AAA Employment Rules].

185. *Id.* Costs of Arbitration.

186. *Id.* Rule 9.

187. *Id.* Rule 32.

188. *Id.* Rule 39(d).

with its *Minimum Standards of Procedural Fairness*.¹⁸⁹ JAMS requires that all remedies available in court be available in arbitration.¹⁹⁰ It also requires that parties have at least an exchange of documents and witness lists and one deposition per side with additional discovery at the discretion of the arbitrator.¹⁹¹ JAMS's policy further provides that the employer pay all costs except for the employee's initial filing fee and that the hearing location not place the cost of the proceeding beyond the employee's reach.¹⁹²

AAA's Rules also call for employers to submit their arbitration plans to AAA at least thirty days prior to the plan's effective date.¹⁹³ Employers are not likely to submit plans that do not assure procedural fairness, knowing that AAA will decline to administer them. The thirty-day submission requirement allows time for AAA to notify an employer that its plan is substandard and to allow the employer to correct plan deficiencies. In this way, AAA's thirty-day submission requirement could prove to be a more effective policing mechanism than litigation, given that courts have increasingly not struck offensive provisions from arbitration agreements but referred issues of the provisions' validity to the arbitrator.

Of course, not all employers choose to use AAA or JAMS to administer their arbitration programs. As indicated previously, rogue arbitration agencies will exist as long as there is money to be made servicing employers who seek to stack the arbitration deck against their employees. To the extent those rogue arbitration agencies and opportunistic employers represent a significant share of the market, they could place competitive pressure on AAA and JAMS to deviate from their rules and policies.¹⁹⁴ There are reasons to believe that this is not a widespread problem. It is common for employer-imposed arbitration agreements to adopt by reference the rules of a particular arbitration services provider, or to simply designate that provider as the administrator of the arbitration proceedings. The most common designated agencies are AAA and JAMS, perhaps because employers seek the credibility those firms' reputations offer or perhaps because they represent the path of least resistance. The little evidence that

189. JAMS, POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS, Introduction (Revised Feb. 19, 2005).

190. *Id.* Standard No. 1.

191. *Id.* Standard No. 4.

192. *Id.* Standard No. 6.

193. AAA Employment Rules, *supra* note 184, Rule 2.

194. See Harding, *supra* note 181, at 425.

exists does not suggest that there is a large market of arbitrator appointing agencies pandering to opportunistic employers.¹⁹⁵

Self-regulation may also be undermined by employers choosing individual arbitrators and by the actions of those individual arbitrators. There is no requirement that employers contract with an arbitrator appointing agency to obtain panels of arbitrators. Parties are free to seek out arbitrators directly, and many sources of arbitrators are readily available.¹⁹⁶ Individual arbitrators may be tempted by the prospect of financial gain to service rogue employers directly. Even where appointed by an agency such as AAA or JAMS that adheres to principles of procedural fairness, an individual arbitrator may be tempted to curry favor with the employer by deviating from norms of procedural justice.¹⁹⁷

There are reasons to believe that the risk of the rogue arbitrator is not as great as might appear at first glance. Most arbitrators who are not concurrently advocates operate as sole practitioners, and many are academics who arbitrate part-time. There are definite limits to the size of caseload they can manage. Successful arbitrators who may be tempted to squeeze in additional business by pandering to a rogue employer likely will decide that such temptation is offset by the risks of damage to their reputations for neutrality and integrity which are the arbitrator's most important asset.¹⁹⁸ Furthermore, arbitrators appointed by agencies that adhere to fundamental principles of procedural justice will likely be deterred from cheating to curry favor with employers in particular cases if the agencies adhere to the CPR-Georgetown principle that they monitor and evaluate their affiliated neutrals' performance,¹⁹⁹ and follow its recommendation that they use such tools as user evaluations, feedback forms, debriefings, follow-up

195. See Estlund, *supra* note 90, at 418 n.106.

196. For example, contact information for most members of the National Academy of Arbitrators is available free of charge on the organization's website. National Academy of Arbitrators, Membership List, at <http://www.naarb.org/member_list.asp> (last visited July 4, 2007).

197. See Harding, *supra* note 181, at 424.

198. Arnold Zack, a highly respected arbitrator, has advised: [A]n arbitrator should decide every case as if it is his last one. . . . If an arbitrator is concerned with the parties' reactions to his rulings, he will not survive. An arbitrator must adhere to his own reasoning and judgment and establish his reputation on that.

Arnold Zack, *Decision-Making*, in LABOR ARBITRATOR DEVELOPMENT: A HANDBOOK 111, 113 (Christopher A. Barreca et al., eds. 1983).

199. CPR-GEORGETOWN COMMISSION ON ETHICS AND STANDARDS OF PRACTICE IN ADR, *supra* note 178, Principle I(c).

calls, and periodic performance reviews.²⁰⁰ Arbitrators who concurrently serve as advocates for employers or employee-plaintiffs may have even greater concerns about their reputations for impartiality and integrity when serving in a neutral capacity because of their concurrent advocacy.

The limitations on the effectiveness of self-regulation, although perhaps less than might initially be thought, nevertheless make it clear that self-regulation is no panacea for the courts' abdication of their responsibility to police employer-imposed arbitration agreements for fundamental fairness. Nevertheless, self-regulation can provide significant benefits.

Consider, for example, the issue of costs of the forum and their effect on employee access. Employees subject to an arbitration plan that adopts AAA or JAMS rules and procedures are assured that they need only pay a nominal filing fee to gain access. Outside the self-regulatory regime, employees are subject to whatever cost-allocations their employers impose. To challenge such cost allocations they must initiate litigation and face potentially insurmountable burdens to prove that the cost allocations impede their ability to vindicate their statutory rights in the arbitral forum.²⁰¹ Clearly, employees are better off as a result of self-regulation by arbitration appointing agencies and arbitrators.

Another way in which self-regulation helps fill the gap created by inadequate judicial policing arises from the trend among the courts to refer to the arbitrator issues of enforcement of restrictions contained in the arbitration agreement. This trend mandates self-regulation, and arbitrators must rule in ways that preserve due process. If a court leaves to the arbitrator the validity of, for example, a prohibition on remedies or class or collective actions, the arbitrator should be obligated to strike down the limitation.

The neutral community, as exemplified by the NAA Guidelines, the AAA Rules and the JAMS policy, has taken major strides in self-regulation to ensure due process in employment arbitration. There is more to be done, however.

One major shortcoming of existing efforts at self-regulation is the failure to address employer-imposed arbitration agreements that reduce the limitations period. The neutral community must make clear that such provisions are contrary to fundamental due process

200. *Id.* cmt 5.

201. See *supra* notes 139-45 and accompanying text.

and will not be enforced in arbitration.

Similarly, the neutral community has failed to address the common practice in employer-imposed arbitration systems that prohibit not only class actions but also joinder of claims of even two individuals. Such prohibitions substantially tilt the playing field in favor of the employer by ensuring that all costs of litigation will fall on a single claimant. As Professor Estlund has observed:

[A]n arbitration agreement's ban on class or aggregate claims arguably suggests an illegitimate purpose on the employer's part. Because aggregation almost only occurs when it is a more cost-efficient way to process certain substantive claims . . . a ban on aggregation suggests that the employer's aim is not to reduce the cost of the adjudication process but to escape some liabilities altogether.²⁰²

AAA's position is that it will accept class action arbitration filings where the arbitration agreement allows them or is silent on the issue, but will not accept class action filings where the arbitration agreement prohibits them.²⁰³ AAA justifies its refusal to accept class arbitration demands where the arbitration agreement prohibits them on the grounds that the state of the law as to the validity of such prohibitions is uncertain and that courts have indicated that the validity issue is for judicial resolution.²⁰⁴

AAA's justification, however, misconstrues the case law. In *Bazze*, the Court held that under the FAA the issue of availability of class actions is for arbitral resolution.²⁰⁵ Subsequent challenges to class action prohibitions have been brought on the ground of unconscionability. Because the issue of unconscionability goes to the validity of the arbitration agreement, many courts have held that it is for judicial resolution.²⁰⁶ But a judicial finding that such a prohibition is not unconscionable, for example because of an absence of procedural unconscionability,²⁰⁷ means that the issue of the validity of the prohibition under the FAA remains for arbitral determination. Consequently, arbitrator appointing agencies should declare that they will not administer class action or joint filing prohibitions and should

202. Estlund, *supra* note 90, at 429.

203. American Arbitration Ass'n, Policy on Class Arbitrations (July 14, 2005), at <<http://www.adr.org/sp.asp?id=28779> (last visited July 2, 2007).

204. *Id.* Commentary to the American Arbitration Association's Class Arbitration Policy (Feb. 18, 2005).

205. *See supra* notes 54-56 and accompanying text.

206. *See supra* notes 79-84 and accompanying text.

207. *See supra* notes 90-93 and accompanying text.

accept such filings even where the employer-imposed arbitration agreement prohibits them. Arbitrators, asserting their authority under *Bazze* and other cases which recognize that the application of contractual limitations is for arbitral resolution should refuse to enforce those prohibitions.

V. CONCLUSION

Courts have largely abrogated their responsibility for policing due process in employer-imposed arbitration agreements. The neutral community must step up and fill this void. Although not a substitute for strict judicial policing, vigorous self-regulation by the neutral community can go a long way to ensuring that employment arbitration functions as a fair, even-handed forum whose efficiency and cost advantages over litigation can work to the advantage of employees as well as employers. A commendable regime of self-regulation has evolved, but it must go further to police against agreements shortening limitations periods and prohibiting class claims or joinder of claims of more than one individual.