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THE CURRENT STATUS OF SECURITIES INDUSTRY EMPLOYMENT ARBITRATION CLAIMS

by MARGO E. K. REDER, ESQ.

INTRODUCTION

The present system requiring individuals to prospectively waive their right to a judicial forum and arbitrate their individual employment disputes in the forums specified by the securities industry¹ is being called into question by courts,² legislators,³ and agencies,⁴ as well as by

¹ See generally United States General Accounting Office, *Employment Discrimination, How Registered Representatives Fare in Discrimination Disputes* 1, 3 (1994) [hereinafter GAO Employment Report] (noting long-standing practice of arbitrating disputes).

² See, e.g., *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997) (concluding that employees' statutory rights are not all completely or automatically waived by signing an arbitration agreement); *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1467-68 (D.C. Cir. 1997) (distinguishing between arbitration agreements noting that it will enforce only those 'that do not undermine the relevant statutory scheme'); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 965 F. Supp. 190 (D. Mass. 1997).

³ See Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997) (attempting to amend some civil rights statutes to prevent the involuntary application of arbitration); H.R. 983, 105th Cong. (1997) (similar bill).

⁴ See EEOC Notice, *Policy Statement on Mandatory Binding Arbitration of Employment discrimination Disputes as a Condition of Employment* (July 10, 1997) <<http://www.eeoc.gov/docs/mandarb.txt>>; *Enforcement Guidance on Non-Waivable Employee Rights Under EEOC Enforced Statutes* III EEOC Compl. Man. (BNA) at N: 2329 (April 10, 1997). See generally Darryl VanDuch, *Assault on Mandatory Arbitration*, NAT'L L.J., Aug. 25, 1997, at B1.

employees of the securities industry.⁵ Even employers are conceding that the present system may not work as it was meant to. The most intriguing question is why these various constituencies are tentative in their support of arbitration, even while the securities industry has enthusiastically supported it.

This article explores the alternate dispute resolution (ADR) mechanism of binding arbitration as it is invoked to resolve employment disputes in the securities industry. Newly hired securities employees must sign a U-4 form, which is a registration and disclosure document for all of the exchanges. Signing a U-4 agreement "is a condition of employment . . . [requiring] signatories to arbitrate disputes that may arise with their firms."⁶ The predispute arbitration agreement (PDAA) clause is triggered typically when a broker or other securities professional is fired. The dismissed employee brings suit in court believing that the employer has violated the employee's civil rights in employment.⁷ Citing the U-4 PDAA, the employer motions the court to stay proceedings because the employee signed an arbitration agreement. The catch is that employees sign the U-4 not so much as to prospectively agree to binding arbitration, but to be registered as employees, and most importantly, sign the U-4 so that they could have a job. For this, employees agree, usually, to have their disputes resolved in a system run by the securities industry with no effective agency oversight,⁸ and

⁵ See generally Peter Truell, "Smith Barney Plaintiffs Agree to Incentives For Settlement," N.Y. Times, Nov. 19, 1997, at D1 & D7 (reporting that plaintiffs balked at binding arbitration); Steve Bailey & Steven Syre, "The Showdown over mandatory arbitration," Boston Globe, Nov. 13, 1997, at D1 & D18.

⁶ GAO Employment Report, *supra* note 1, at 4.

⁷ The charges discussed in this article relate to Title VII claims, ADA (disability) as well as ADEA (age) claims. State statutes, and claims based upon various common law claims such as the intentional infliction of emotional distress may also be brought. See 42 U.S.C. § 1981 (1994) (guaranteeing for all persons the same and equal rights under the law); 42 U.S.C. § 2000e-2 (1994) (outlawing workplace discrimination because of race, color, religion, sex, national origin or pregnancy); 42 U.S.C. § 12112 (1994) (outlawing discrimination against handicapped individuals who are otherwise qualified for the job); 29 U.S.C. § 623 (1994) (outlawing workplace age discrimination). For an example of a state civil rights statute, see the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-3 (West Supp. 1997) (opposing discrimination because of 'race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, familial status').

⁸ See GAO Employment Report, *supra* note 1, at 3 (describing the lack of review, oversight, or inspection by the Securities and Exchange Commission of members' securities arbitration programs); see also Christine Godsil Cooper, *Where Are We Going With Gilmer? — Some Ruminations On The Arbitration of Discrimination Claims*, 11 St. LOUIS U. PUB. L. REV. 203, 219-20 (1992) (examining the EEOCs oversight of anti-discrimination laws, and concluding that it has not effectively enforced them).

little in the way of meaningful judicial review.⁹

This article addresses the important policy questions whereby employees must sign away their Article III rights to a judge and representative jury,¹⁰ in favor of a forum sponsored by none other than their employers. While the vast majority of courts in the last eleven years have upheld PDAAs, most recently there has been a demonstrable erosion of support for this system. This has created a high degree of uncertainty in the securities industry as to the enforceability of PDAAs. This article discusses the most important cases in this area, and in what respects the law is unsettled.

The reasons for these recent changes, as well as what has gone wrong with mandatory employment arbitration in the securities industry, are discussed below. The author also recommends strategies in order to stabilize the process for resolving these employment disputes.

The history of arbitration is briefly discussed in Part I, followed by a background of the major arbitration cases. In Part II, the arbitration of employment disputes in the securities industry is discussed, followed by a summary of the recent regulatory proposals and cases.

PART I

This Part, which details arbitration and how it has evolved, is composed of four sections. Section a provides a general background of arbitration. Section b traces the history of arbitration, beginning with the passage of the Federal Arbitration Act. Section c introduces more specifically cases involving arbitration in the securities industry. Finally, Section d discusses arbitration of employment disputes.

a) General Background of Arbitration

For a better understanding of the issues raised in this article, it is important to know what arbitration is, and what it is not. Arbitration may be defined as the process of submitting a disagreement to one or more impartial parties with the understanding that the two sides are

⁹ See *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 135-36 (6th Cir. 1996) (discussing the extremely limited circumstances in which an arbitration award might be vacated such as when it 'fl[ies] in the face of clearly established legal precedent'); see also Sharon Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Resolutions?*, 17 *BERKELEY J. EMP. & LAB. L.* 131, 134 (1996) (noting that under this 'highly deferential standard of judicial review,' arbitrators may have little incentive to engage in rigorous analysis and decision-making).

¹⁰ U.S. Const. Art III. The Seventh Amendment is possibly implicated, too, in that it guarantees trials in civil cases. U.S. Const. Amend. VII. See generally *Rosenberg*, 965 F. Supp. at 191, 193, & 202.

bound by the decision.¹¹ Arbitration is but one ADR technique¹² developed in response to the expense, delays, perceived shortcomings of juries, and the oftentimes negative public aspect of traditional litigation.¹³

Once arbitration is chosen, any subsequent disputes the parties may have, must be submitted to arbitration. Should one party try to preempt this arrangement by seeking relief in court, the court is bound to stay litigation until the dispute is decided in arbitration. Should a party after this time, wish for a court to review the decision, this may be done, but judicial review is cursory, and changes in the decision will be made only under limited circumstances such as if there has been a manifest disregard of the law. Parties usually hire counsel to represent them; arbitrators may be selected and paid for by one or both parties; discovery is limited; decisions and reasoning may or may not be written.

Arbitration may take place only when the parties agree to it, and only for those disputes contemplated in the agreement. Any matters outside the scope of the arbitration agreement are litigated. Parties may agree prospectively to arbitrate their disputes, or at a later time, subsequent to the matter in dispute.

The arbitration agreement, then, may be the product of the parties' efforts. The more troubling and contentious issue though, is whether this was a bargained-for exchange, or whether it was given on a 'take-it-or-leave-it' basis.

b) The Onset of Arbitration

Congress passed the Federal Arbitration Act (FAA) in 1925 in order to encourage the use of arbitration as a means of resolving commercial disputes. The Act was intended to reverse hostility to arbitration 'at this time when there is so much agitation against the costliness and

¹¹ See Margo E. K. Reder, *Securities Law and Arbitration: The Enforceability of Predispute Arbitration Clauses in Broker-Customer Agreements*, 1990 COLUM. BUS. L. REV. 91, 93 & n.10.

¹² Other ADR techniques include mediation, neutral evaluation, nonbinding arbitration, mini-trials and summary jury trials. See Edward J. Brunet, *ALTERNATIVE DISPUTE RESOLUTION, THE ADVOCATE'S PERSPECTIVE* (1997).

¹³ See generally Robert J. Lewton, Comment, *Are Mandatory Binding Arbitration Requirements A Viable Solution For Employers Seeking to Avoid Litigating Statutory Employment Discrimination Claims?*, 59 ALB. L. REV. 991, 993 (1996) (citing how employers are embracing ADR in an effort to avoid "the tremendous time and expense involved in litigating"); Sharona Hoffman, *supra* note 9, at 132 (discussing how ADR is a welcomed vehicle to reduce costs length and backlog of litigation); Eugene Rosner, *Mediating Commercial and Probate Disputes*, N. J. LAW., Sept. 8, 1997, at 33 (noting clients increasingly demanding ADR as a way of avoiding "expense and the unconscionable delays . . . [of] traditional litigation").

delays of litigation.¹⁴ The FAA places arbitration on the same footing as other contracts, and Congress intended the Act to be generously construed, notwithstanding any contrary state law of arbitration.¹⁵ Courts are, therefore, bound to uphold the parties' agreement and will stay litigation pending resolution by arbitration.

The Supreme Court has frequently considered arbitration cases and, while its support of the FAA was lacking in earlier cases,¹⁶ the Court most recently has consistently upheld predispute agreements to arbitrate,¹⁷ recognizing the supremacy of the federal substantive law of arbitrability.¹⁸ This has been the case even where the disputes have involved arbitration of: state law claims,¹⁹ Sherman Act antitrust violations,²⁰ Securities Act claims,²¹ Exchange Act claims,²² civil racketeering (RICO) claims,²³ international business claims,²⁴ and even age discrimination (ADEA) claims.²⁵

The Court has thus enforced arbitration agreements involving complex issues, and statutory claims even when those statutes provide for jury trials. The Court's rationale, best expressed in the *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* case, is that it is merely enforcing the parties' agreement, and that neither party will 'forgo the substantive rights afforded by the statute.'²⁶

There are limits, though, to the Court's support of arbitration. For example, it will hold the parties to their bargain – 'unless Congress itself has evinced an intention to preclude a waiver of judicial

¹⁴ H.R. Rep. No. 96, 68th Cong., 1st Sess. 1, 2 (1924).

¹⁵ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). While there are exceptions to the arbitration mandate of the FAA, these are construed most narrowly. See 9 U.S.C. § 1 (1994 & Supp. II 1996). See generally R. James Filiault, Note, *Enforcing Mandatory Arbitration Clauses in Employment Contracts: A Common Sense Approach to the Federal Arbitration Act's Section 1 Exclusion*, 36 SANTA CLARA L. REV. 559, 571-85 (1996) (discussing majority view construing narrowly the exclusions to arbitration).

¹⁶ See *Wilko v. Swan*, 346 U.S. 427 (1953) (refusing to compel arbitration of Securities Act claims).

¹⁷ See *infra* notes 18-21 and accompanying text.

¹⁸ See *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984).

¹⁹ *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 222-24 (1985) (*per curiam*); cf. *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989).

²⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

²¹ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-86 (1989).

²² *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

²³ *Id.* at 238-42.

²⁴ *Sherk v. Alberto-Culver Co.*, 417 U.S. 506, *reh'g denied*, 419 U.S. 885 (1974).

²⁵ *Gilmer*, 500 U.S. at 35.

²⁶ *Mitsubishi*, 473, U.S. at 628.

remedies.²⁷ The Court has also cautioned that "the FAA does not confer a right to compel arbitration of any dispute at any time, but rather it confers the right to seek an order compelling arbitration 'in the manner provided for in [the parties] agreement.'"²⁸

Arbitration, then, has evolved from a disfavored dispute resolution technique, into a preferred one under this line of Supreme Court cases. The Court has strongly endorsed arbitration as an alternative, so much so that it is currently a standard practice in many fields, most notably in the securities industry, which had been using arbitration for over 100 years as a method of resolving disputes.²⁹

c) Arbitration of Disputes in the Securities Industry - The Supreme Court's View

Disputes within the securities industry arise most often in two contexts. First, there are financial disputes. These disputes occur between brokers and customers regarding the management of the customers' accounts. More often than not, these disputes are triggered by market downturns or general portfolio losses due to mismanagement. Second, there are employment disputes. These arise between firms and their employees and may have to be resolved in arbitration. For example, the firm may fire a broker for failing to achieve a desired level of production or sales. [This article discusses arbitrations of individual employment disputes, rather than those covered by a collective bargaining agreement.³⁰ Part II *infra* contains the main focal point of discussion of this article, the arbitration of individual employment disputes in the securities industry. This present section serves to detail the law leading up to the present cases discussed *infra*.]

In 1953, the Supreme Court decided *Wilko v. Swan* which involved "a novel federal question affecting both the Securities Act and the

²⁷ *Id.* It should be noted here, that this article, and cases discussed herein relate to arbitration of individual employment disputes, rather than those resolved pursuant to collective bargaining agreements.

²⁸ Margo E. K. Reder, *Punitive Damages Are a Necessary Remedy in Broker-Customer Securities Arbitration Cases*, 29 IND. L. REV. 105, 109 (1995).

²⁹ See GAO Employment Report, *supra* note 1, at 3.

³⁰ Courts have addressed issues relating to the arbitration of disputes covered by a collective bargaining agreement (CBA). See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *Brisentive v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996); *Spyrnal v. Prudential Ins. Co.*, 1997 U.S. Dist. LEXIS 12607 (N.D. Ill. Aug. 20, 1997); *La Chance v. Northeast Publ'g, Inc.*, 965 F. Supp. 177 (D. Mass. 1997). The Supreme Court recently granted *certiorari* in *Wright v. Universal Maritime Corp.* to consider the arbitrability of a disability claim covered by a CBA. 118 S. Ct. 1162 (1998).

United States Arbitration Act.³¹ Finding that the complexity of securities issues necessitated litigation rather than arbitration, the Court concluded that the Securities Act trumped the Arbitration Act.³² The next challenge to arbitration in the securities industry occurred many years later, and by then, the perception of arbitration had improved dramatically.³³ Like *Wilko*, the claim in *Shearson/American Express, Inc. v. McMahon* arose from a broker-customer dispute, but the plaintiffs in this case brought suit under the Exchange Act, ostensibly hoping for a different result from *Wilko*. In a 5-4 opinion, the Supreme Court outlined the background of arbitration, especially noting its *Mitsubishi* decision. It upheld the validity of pre-dispute arbitration agreements, even when the claims involved complex federal securities issues, reasoning that it would do so unless there was a clear contrary directive from Congress.³⁴

Two years later, the court took the opportunity to reconsider *Wilko*, and overruled that opinion in *Rodriguez De Quijas v Shearson/Lehman Brothers, Inc.*³⁵ Again, it was a 5-4 opinion for a transitional Court, and thus the Court achieved a "uniform interpretation of similar statutory language" (between the Securities, and Securities Exchange Acts).³⁶

Following these major benchmarks in the law of securities arbitration, there have been few other securities arbitration disputes to reach the Supreme Court. The Court in *Perry v. Thomas* considered a statutory wage claim by a former securities employee.³⁷ Finding that the employee had signed a PDAA, the Court concluded that he was bound to arbitrate this claim.³⁸ In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Court considered whether state or federal law governs the arbitrability of claims for punitive damages.³⁹ (The investors, who suffered heavy losses, signed a PDAA purportedly governed by New York Law which prohibited arbitral awards of punitive damages.) Finding ambiguity in the parties' agreement, the Court construed this in favor of the investors and allowed relief in the form of punitive damages.⁴⁰ The Supreme Court's opposition to arbitration of securities

³¹ *Wilko v. Swan*, 346 U.S. 427, 430 (1953).

³² *Id.* at 434-45.

³³ See *supra* notes 18-20 and accompanying text (discussing line of arbitration cases).

³⁴ 482 U.S. 220, 242 (1987).

³⁵ 490 U.S. 477, 484-86 (1989).

³⁶ *Id.*

³⁷ *Perry v. Thomas*, 482 U.S. 483 (1987).

³⁸ *Id.*

³⁹ 514 U.S. 52 (1995).

⁴⁰ See generally Margo E. K. Reder, *Punitive Damages Are a Necessary Remedy in Broker-Customer Securities Arbitration Cases*, 29 IND. L. REV. 105-30 (1995).

disputes is long past, and the period from 1987 through 1995 will be recognized as a period of unquestioning support for arbitration.

d) Arbitration of Employment Disputes - The Supreme Court's View

The arbitration of employment disputes is somewhat more problematic, it seems, in comparison to the arbitration of financial disputes. First, there has been a fair amount of litigation over whether employment disputes are exempt from the FAA. For in Section 1 of the FAA, it states that "nothing herein . . . shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."⁴¹ It would appear then, that securities employees are not bound by the FAA. This, however, is not the case. Federal courts have held, and the Supreme Court implicitly agrees, that since the arbitration clause securities employees sign is contained in a registration application (the U-4 form) and is not part of an actual contract of employment, they are not exempt from the FAA.⁴²

The seminal Supreme Court case considering the arbitration of an employment dispute, is *Gilmer v. Interstate/Johnson Lane Corp.*⁴³ Relying on the *Mitsubishi/McMahon/Rodriguez deQuijas* trilogy, the Court held that a securities dealer's age discrimination claim was subject to compulsory arbitration, as per the registration application that Gilmer signed.⁴⁴ The Court reasoned that arbitration agreements should be vigorously enforced even for statutory claims, absent a contrary directive from Congress.

As with the *Rodriguez de Quijas/Wilko* contrast in outcomes, *Gilmer* stands in sharp contrast with similar line of employment arbitration cases decided years earlier, beginning with *Alexander v. Gardner-Denver Co.*⁴⁵ In this case, the Court held that a discharged employee whose grievance was arbitrated pursuant to the arbitration clause in a collective bargaining agreement (CBA) could also bring a Title VII claim in court.⁴⁶ The Court reasoned that a labor arbitrator had authority

⁴¹ 9 U.S.C. § 1 (1994).

⁴² See *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1471 (D.C. Cir. 1997) (noting that "every circuit to consider this issue squarely has found" this to be the case). See generally *Stokes v. Merrill Lynch, Pierce, Fenner & Smith*, 523 F.2d 433, 436 (6th Cir. 1975); *Malison v. Prudential-Bache Securities, Inc.*, 654 F. Supp. 101, 104 (W.D. N.C. 1987); *Tonetti v. Shirley*, 173 Cal. App. 3d 1144, 219 Cal. Rptr. 616 (1985). See generally *Perry*, 482 U.S. 483.

⁴³ 500 U.S. 20 (1991); see also Lucille M. Ponte, *In the Shadow of Gilmer: How Post-Arbitration Agreements Point the Way Towards Greater Fairness in Employment Arbitration*, 12 OHIO ST. J. ON DISP. RESOL. 359 (1997).

⁴⁴ *Gilmer*, 500 U.S. at 35.

⁴⁵ 415 U.S. 36 (1974); see also *McDonald v. West Branch*, 466 U.S. 284 (1984); *Barrentine v. Arkansas - Best Freight System, Inc.*, 450 U.S. 728 (1981).

⁴⁶ *Gardner-Denver*, 415 U.S. at 49-50.

only to resolve questions of contractual rights — and Title VII allegations, while a result of the same factual occurrence, were distinctly of a separate nature from those that were arbitrated.⁴⁷

The *Gilmer* Court took care not to overrule *Alexander*, but instead distinguished it. It is a case that has continuing vitality, and has been very recently cited as support for the view that Title VII claims should not be automatically sent to arbitration.⁴⁸ Nevertheless *Gilmer* stands for the proposition that where the employee signed an agreement to submit any employment dispute to binding arbitration, and subsequently an age discrimination claim was brought, the Court will enforce this agreement to arbitrate.

PART II ARBITRATION OF EMPLOYMENT DISPUTES IN THE SECURITIES INDUSTRY

It becomes clear, then, that arbitration is a relatively new dispute resolution technique, gaining widespread favor only in the past fifteen years. The Supreme Court first recognized arbitration for employment disputes in 1991 when it compelled arbitration of an age discrimination claim. The *Gilmer* decision has led other courts to embrace and expand employment arbitration for an even wider range of employment claims, including Title VII discrimination actions.⁴⁹ Whether this was the intent of the Supreme Court remains to be seen. This Part is composed of two sections. Section a discusses the legal and regulatory changes since *Gilmer* that have relevance to whether *Gilmer* has application beyond age discrimination claims. Section b discusses on a circuit-by-circuit basis, how courts are deciding whether individuals prospectively relinquish their right to a judicial forum when they sign a securities industry U-4 form.

⁴⁷ *Id.* at 49-50, 53-54.

⁴⁸ See *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 1998 U.S. Dist. LEXIS 877, at ** 13-14, 37-38, 54; *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177 (D. Mass. 1997). Although these opinions are both by Judge Gertner, these are by no means aberrations from the most current decisions passing on the arbitration of civil rights claims.

⁴⁹ See, e.g., *Wright v. Universal Maritime Service Corp.*, 121 F.3d 702 (4th Cir. 1997) (*per curiam*) (compelling arbitration of disability claim pursuant to a CBA, *cert. granted*, 118 S. Ct. 1162 (1998)); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (compelling arbitration of sexual harassment charge brought under state law); *Keuhner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996) (compelling arbitration of wrongful discharge claim); *Armijo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995) (compelling arbitration of race, sex, and national origin claims); *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (compelling arbitration of claims based on the age discrimination act as amended by the Older Workers Benefit Protection Act); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (compelling arbitration of pregnancy discrimination claim).

a) Legal and regulatory changes since Gilmer

Judge Nancy Gertner explained in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, that:

Gilmer addressed only the arbitrability of ADEA, not Title VII, claims. *Gilmer* did not raise and the Supreme Court did not resolve whether Title VII's text, history, or purpose should bar compulsory arbitration. Shortly after *Gilmer* was decided, moreover, Congress amended Title VII in numerous ways that are potentially relevant to that analysis.⁵⁰

i. Legal changes – the Civil Rights Act of 1991:

"To restore and reinforce the civil rights of victims of employment discrimination,"⁵¹ Congress passed a compromise measure which secured more complete compensation for victims of discrimination, and eased plaintiffs' procedural hurdles and burden of proof.⁵² Most notably for this article, though, the 1991 Act contains a section addressing ADR of Title VII claims. Section 118 encourages parties to use ADR "[w]here appropriate and to the extent authorized by law."⁵³ Clearly, the critical language here is the word, "encourages." Both zealous advocates and critics of binding arbitration may dispute Congressional intent in this case. However, a more congruous approach to the entire 1991 amendments and legislative history reveals that "Congress intended arbitration and jury trials to co-exist."⁵⁴ Cognizant of *Gardner-Denver* and its progeny, as well as recent Supreme Court opinions, Congress molded a middle ground. It refused to overrule *Gardner-Denver* and stated that its encouragement of ADR was intended to "supplement not supplant" rights and remedies (such as would be found in litigation) that would otherwise be available.⁵⁵

⁵⁰ 1998 U.S. Dist. LEXIS 877, at *31-32 (D. Mass. Jan. 26, 1998).

⁵¹ *Id.* at *33. The Act's purpose, to some degree, was to alter the impact of five Supreme Court decisions from the 1988 Term which Congress perceived as negatively impacting plaintiffs in employment discrimination cases. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁵² Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 42 U.S.C.). See generally William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 277-78 (1994); Pierre Levy, Note, *Gilmer Revisited: The Judicial Erosion of Employee Statutory Rights*, 26 N.M. L. Rev. 455, 466-69 (1996).

⁵³ Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (1991).

⁵⁴ Levy, *supra* note 52, at 468; see also H.R. No. 40(I), 102d Cong., 1st Sess. 97 (1991), reprinted in 1991 U.S.C.C.A.N. 635.

⁵⁵ *Gardner-Denver*, 415 U.S. at 48; see also *Rosenberg*, 1998 U.S. Dist. LEXIS 877, at * 38; H.R. Rep., *supra*, at 97.

It may be surmised then, with respect to the Supreme Court and Congressional pronouncements to date, that binding arbitration for Title VII disputes is merely optional – encouraged, but optional. Through the enactment of the 1991 Act, Congress had the opportunity to make binding arbitration mandatory, yet declined to do so. Binding arbitration of employment disputes has not yet been approved of by the Supreme Court outside the realm of age discrimination claims.

ii. Regulatory changes to arbitration by the securities industry:

Since *McMahon* was decided in 1987, there has been a development, and subsequent evolution of the regulations governing prospective agreements to arbitrate. The two agencies charged with supervising employment arbitration in the securities industry are the Securities and Exchange Commission (SEC), and the Equal Employment Opportunity Commission (EEOC).⁵⁶

The SECs oversight responsibility for arbitration programs is tenuous. Its management is largely derivative in that it regulates the self-regulatory organizations (SROs).⁵⁷ To the extent that oversight exists, the SEC focuses its attention on financial disputes — “customer-firm disputes because of its mandates for customer protection.” It does not monitor SRO arbitration of discrimination cases even though employees’ civil rights are at issue.⁵⁸

Despite this situation, the SEC was an ardent supporter of mandatory binding arbitration for employment disputes. In fact, one of the SROs, and perhaps considered a policy leader among them, the NASD in 1992 responded to the litigation regarding the applicability of its policies to employment disputes. It wanted to make clear that employment disputes were to be arbitrated.⁵⁹ The SEC approved this proposal, and it became effective October 1, 1993.⁶⁰

It requires the “arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of [the NASD] or arising out of the employment or termination of employment of

⁵⁶ See GAO Employment Report, *supra* note 1, at 3-5.

⁵⁷ *Id.* at 4. SROs are such organizations as the New York Stock Exchange (NYSE), and the National Association of Securities Dealers (NASD).

⁵⁸ *Id.* at 13.

⁵⁹ 58 Fed. Reg. 39,070 (1993). Previously, it was not clear whether NASD rules required arbitration of employment disputes. Cf. New York Stock Exchange (NYSE) Rule 347 (providing for arbitration of “[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.”)

⁶⁰ 58 Fed. Reg. 45,932, 45,932-33 (1993).

associated person(s) with any member."⁶¹ This is the rule in effect today.

Due to the extensive and "vexing issues confronting" this process,⁶² the SEC is presently reconsidering its position.⁶³ Even as the arbitration mandate passed in 1993, and was in fact reaffirmed in 1995,⁶⁴ forces coalesced which, by early 1997 caused the SROs to reexamine their support for mandatory employment arbitration.⁶⁵

By October 1997, the NASD filed with the SEC a proposed rule change that "remove[s] the requirement to arbitrate claims of statutory employment discrimination."⁶⁶ Should the SEC approve the proposal, this would, of course, nullify the present system of mandatory arbitration, and allow parties to bring their claims in court, or in an alternative forum.⁶⁷

The other regulatory agency to have oversight of employment arbitrations in the securities industry is the EEOC. This agency is charged with the interpretation and enforcement of U.S. employment discrimination laws. There are a number of antidiscrimination laws which compose a wide "statutory scheme to protect employees in the

⁶¹ 58 Fed. Reg. 39,070 (1993), reprinted in *Code of Arbitration Procedure*, NASD Man. (CCH) 10100-10406 (May 1996). Prior to this, the rule in effect did not specifically address employment disputes. It merely provided "for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of [NASD];" see *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656, 658 (5th Cir. 1995).

⁶² John F.X. Peloso & Stuart M. Sarnoff, *Guide to Recommendations of Ruder's Task Force*, N.Y.L.J., Feb. 15, 1996, at 3 (discussing the many problems with arbitration discussed by the NASD Arbitration Policy Task Force, including panel selection, discovery, decisions, and damages).

⁶³ See 62 Fed. Reg. 66,164 (1997) (providing notice of proposed rule change that securities employees are no longer required to arbitrate claims of statutory employment discrimination); Wall Street Letter, Inst. Investor, Dec. 1, 1997, at 7 (reporting that ending mandatory employment arbitration in 1998 is a top priority for an SEC commissioner).

⁶⁴ See 60 Fed. Reg. 7241 (1995).

⁶⁵ See 62 Fed. Reg. at 66,166 (discussing Congressional and regulatory pressures for changing the mandatory system); Arbitration Policy Task Force (NASD), *Report on Securities Arbitration Reform* (Jan. 1996) (presenting numerous recommendations to improve the process); Commission on the Future of Worker-Management Relations, (Dunlop Commission) U.S. Dep't of Labor, U.S. Dep't of Commerce, *Report and Recommendations* (Dec. 1994) (stating its belief that not all workplace disputes may be solved through in-house binding arbitration).

⁶⁶ 62 Fed. Reg. at 66,166.

⁶⁷ *Id. cf.* Dunlop Commission, *supra* note 65 (noting that certain claims, such as those involving civil rights allegations, may not be appropriate for consideration by arbitrators whose main focus is on financial arbitration. *Id.*

workplace nationwide.⁶⁸ Even while recognizing that states have a concurrent enforcement role, Congress emphasized that the federal government has the ultimate enforcement responsibility.⁶⁹ Arbitration of employment disputes does not undermine the EEOCs role, as the Agency may still receive information and has independent authority to investigate claims. It may bring charges in a case,⁷⁰ or instead issue a right to sue letter to the plaintiffs.⁷¹ EEO claims may be litigated or resolved through ADR or even settled – all with, or without the Agency’s help.⁷² Beyond the EEOCs jurisdictional and legal bases for enforcing these laws, it actually possesses limited power to even order, or prohibit binding arbitration of employment disputes. The SEC trumps the EEOC in the making of arbitration agreements in the securities industry. The EEOC has consistently and officially stated that the right to a judicial forum is non-waivable and the agency has opposed binding arbitration agreements reasoning that they “are contrary to the fundamental principles evinced in these laws.”⁷³ Even though the Agency is mindful of *Gilmer*, it considers that courts rather than arbitrators have “primary responsibility” for the development and interpretation of civil rights law.⁷⁴ It is interesting to note though, that for all of the EEOCs opposition to binding arbitration, it has generally not been at the forefront litigating these cases.⁷⁵ In fact, of all the cases discussed and cited in the following section, the EEOC is a named party in just one case.

⁶⁸ *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 357 (1995); see Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-5 (1994); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 - 634 (1994); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 - 12213 (1994); Civil Rights Act of 1991, 42 U.S.C. §§ (amending scattered sections) (1994); Rehabilitation Act of 1973, 29 U.S.C. §§ 791 - 796(i) (1994).

⁶⁹ See 118 Cong. Rec. 4941 (1972).

⁷⁰ See 29 C.F.R. § 1626.4, 1626.13 (1998); *Gilmer*, 500 U.S. at 28.

⁷¹ 29 C.F.R. § 1626 (1998).

⁷² See *Godsil Cooper*, *supra* note 8, at 209. The reality of the Agency’s cameo role in enforcement of these laws is discussed as well. *Id.*

⁷³ U.S. Equal Emp. Oppor. Comm’n, EEOC Policy Statement on Mandatory Arbitration (July 11, 1997), available in LEXIS Labor Library, BNALAB File.

⁷⁴ *Id.*; see also *Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes*, III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997).

⁷⁵ One need only note the case names in Sections b and c *infra* to see that the EEOC has not pursued the claims alleged. See also *Godsil Cooper*, *supra* note 8, at 219-20.

b) Judicial decisions on whether individuals have prospectively waived their right to a judicial forum by signing a securities industry U-4 form.

Notwithstanding *Gilmer*, it is unclear whether employees have waived their statutory rights under civil rights statutes other than the ADEA.⁷⁶ Of the lower courts to have considered this issue, clearly the majority favors extending *Gilmer* to mandate arbitration of other civil rights claims. This section discusses, circuit-by-circuit, the controlling cases, or the closest relevant case should none be on point. Federal district court cases are discussed as well.

First Circuit

It is evident that the First Circuit, like the Seventh, Ninth, and District of Columbia Circuits, is a minority jurisdiction and will not expand *Gilmer* to include automatic arbitration of Title VII claims. Although almost a decade old, the controlling circuit court case, *Utley v. Goldman Sachs & Company*, ruled that the terminated employee who signed a U-4 Form could not be compelled to arbitrate her Title VII claims due to that statute's "unique nature."⁷⁷ Decided prior to *Gilmer*, the court relied on *Gardner-Denver* to "rule that an employee cannot waive prospectively her right to a judicial forum at any time, regardless of the type of employment agreement which she signs."⁷⁸ It reasoned that "Title VII, while promoting conciliation and informal resolution, does not mandate exhaustion of arbitration before allowing an employee to proceed to a judicial forum."⁷⁹

This position has been resoundingly followed in the district court decision, *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*⁸⁰ There Judge Gertner forcefully and cogently spoke against the mandatory arbitration of statutory claims since there is a critical public function to civil rights litigation.⁸¹

⁷⁶ See generally Ellwood F. Oakley, III & Donald O. Mayer, *Arbitration of Employment Discrimination Claims and the Challenges of Contemporary Federalism*, 47 S.C. L. REV. 475, 477-79 (1996).

⁷⁷ 883 F.2d 184, 187 (1st Cir. 1989).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ 1998 U.S. Dist. LEXIS 877 (D. Mass. Jan. 26, 1998); see also *Rosenberg*, 965 F. Supp. 190 (D. Mass. 1997).

⁸¹ *Rosenberg*, 1998 U.S. Dist. LEXIS 877; see also *LaChance v. Northeast Publishing, Inc.*, 965 F. Supp. 177 (1997) (Gertner, J.) (refusing to extend *Gilmer* to ADA and ADEA claims by employee covered by a CBA, reasoning *Gardner-Denver* controls the outcome); cf. *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141 (1st Cir. 1998) (ordering arbitration of ADA claim since ADA encourages ADR; there was no evidence that agreement was involuntary or unfair or of inherent conflict with FAA; and so *Gilmer* controls outcome).

There has been quite a bit of activity on this issue at the state level recently within this Circuit. It is best characterized as disjointed. The state appeals court dismissed a sex discrimination complaint and confirmed an arbitration award despite the *Utley* decision.⁸² The state appeals court in apparent disregard of *Utley* stated that the "First Circuit has yet to extend the reasoning of *Gilmer* to employment discrimination claims brought under either Title VII or G. L. c. 151B" (the state anti-discrimination law).⁸³ In contrast to this, the state's highest court one year later (in 1998), allowed a 151B action for sex harassment to proceed in court notwithstanding a claim brought in arbitration pursuant to a CBA.⁸⁴ The Supreme Judicial Court rejected the invitation to abandon *Gardner-Denver* in favor of *Gilmer*. It reasoned that *Gardner-Denver* remains the standard, and absent a waiver of the right to pursue statutory claims in a judicial forum, the court would not presume this to be the case.⁸⁵

Second Circuit

This circuit wholeheartedly endorses securities industry employment arbitration. In *Thomas James Assoc. Inc. v. Jameson*, the court found "that a registered representative's employment-related claim against an NASD-member employer is arbitrable under the NASD Code."⁸⁶ The court further stated that employment disputes were required to be arbitrated even before the 1993 NASD Amendment.⁸⁷ While the court was not asked to consider its rule in the context of federal statutory discrimination claims, it does not appear from the court's language that this would not make any difference.

There are a considerable number of district court cases, all of which compel arbitration of discrimination claims. The district courts have rejected arguments that there was no knowing waiver of statutory rights,⁸⁸ or other defect in the making of the contract, and have upheld agreements for the spectrum of discrimination claims including those based on religion, age, race, sex, national origin, and sexual harass-

⁸² *Mugnano-Bornstein v. Crowell*, 42 Mass. App. Ct. 347, 677 N.E. 2d 242 (1997).

⁸³ *Id.* at 357 n.9.

⁸⁴ *Blanchette v. School Comm. of Westwood*, 1998 Mass. LEXIS 159 (April 6, 1998).

⁸⁵ *Id.*

⁸⁶ 102 F.3d 60, 64 (2d Cir. 1996).

⁸⁷ *Id.* at 64 n.1; cf. *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 695 (1998) (confirming an arbitration award for ADEA claims).

⁸⁸ See *Schuetz v. CS First Boston Corp.*, 1997 U.S. Dist. LEXIS 11612 (S.D.N.Y. Aug. 8, 1997).

ment.⁸⁹ As New York is the headquarters for many financial institutions, and the locus of Wall Street, it should be no surprise that it has the largest volume of this litigation.

Third Circuit

While there is no circuit case law on point, there are indications that it favors compelling arbitration of Title VII claims, and would most certainly do so in the context of securities industry discrimination claims. The court in *In re Prudential Insurance Company* noted in this employment action case where the employees were bound by their U-4 forms, that the NASD intended the 1993 amendments "to be read broadly so that employment disputes that also invoked matters 'involving public policy issues' would still be arbitrated."⁹⁰ This circuit also agreed to compel arbitration of Title VII claims pursuant to a general business arbitration clause.⁹¹ The court adamantly disagreed with Peacock's contention that the FAA excludes mandatory arbitration of employment contracts.

Moreover a federal district court in this circuit considered a case on point, and concluded that the plaintiff was bound to arbitrate all claims including those based upon Title VII, ADEA, and related state law claims.⁹² It found that arbitration procedures adequately protect statutory rights and so expanded upon the holding in *Gilmer*.⁹³

⁸⁹ See *Schuetz*, *supra*; *Stitz v. Equitable Life Assur. Society*, 1997 U.S. Dist. LEXIS 11357 (S.D.N.Y. Aug. 5, 1997); *Rice v. Brown Brothers Harriman & Co.*, 1997 U.S. Dist. LEXIS 3628 (S.D.N.Y. Mar. 21, 1997); *Pilanski v. Metropolitan Life Ins. Co.*, 1996 U.S. Dist. LEXIS 15963 (S.D.N.Y. Oct. 28, 1996); *Smith v. Lehman Brothers, Inc.*, 1996 U.S. Dist. LEXIS 9485 (S.D.N.Y. July 8, 1996); *Friedman v. Metropolitan Life Ins. Co.*, 1996 U.S. Dist. LEXIS 19889 (S.D.N.Y. June 19, 1996); *DeGaetano v. Smith Barney, Inc.*, 1996 U.S. Dist. LEXIS 1140 (S.D.N.Y. Feb. 5, 1996); *Kurschus v. Painewebber, Inc.*, 1996 U.S. Dist. LEXIS 962 (S.D.N.Y. Feb. 1, 1996); *Maye v. Smith Barney, Inc.*, 897 F. Supp. 100 (S.D.N.Y. 1995); *Gateson v. ASLK - Bank, N.V.*, 1995 U.S. Dist. LEXIS 9004 (S.D.N.Y. June 29, 1995); *Hall v. MetLife Resources*, 1995 U.S. Dist. LEXIS 5812 (S.D.N.Y. May 3, 1995); *Moore v. Interacciones Global, Inc.*, 1995 U.S. Dist. LEXIS 971 (S.D.N.Y. Jan. 27, 1995); *Scher v. Equitable Life Assur. Society*, 866 F. Supp. 776 (S.D.N.Y. 1994). See generally *Fletcher v. Kidder Peabody & Co.*, 81 N.Y. 2d 623, 619 N.E. 2d 998, 601 N.Y.S. 2d 686, *cert. denied*, 510 U.S. 993 (1993) (state's highest court upholding arbitration agreement).

⁹⁰ 133 F.3d 225, 233 (*citing* 58 Fed. Reg. 39,070, 39,071-72 (1993)).

⁹¹ *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 224, 234 (3d cir.), *cert. denied*, 118 S. Ct. 299 (1997).

⁹² *Seus v. John Nuveen & Co.*, 1997 U.S. Dist. LEXIS 8209 (E.D. Pa. June 2, 1997) (finding NASD rules included arbitration of employment disputes even before 1993); *cf. Lepera v. ITT Corp.*, 1997 U.S. Dist. LEXIS 12328 (E.D. Pa. Aug. 12, 1997) (court ordered arbitration of employment dispute involving tort-based claims).

⁹³ See *supra*.

Fourth Circuit

Although there is no case on point, it may be derived from the two most similar cases, that this circuit favors the majority view compelling arbitration of statutory employment claims. These two cases consider whether such claims must be arbitrated where the employees are covered by a CBA.⁹⁴ In *Austin*, the court ordered arbitration of plaintiff's Title VII and ADA claims reasoning that the CBA specifically provided that claims of gender and disability discrimination were to be referred to arbitration. In a particularly persuasive dissent, Judge Hall reminded the court of *Gardner-Denver* and the rule that a labor union, through a CBA, "may not prospectively waive a member's individual's right to choose a judicial forum for a statutory claim."⁹⁵

In a different panel of Fourth Circuit judges, in a *per curiam* opinion, in a case now to be heard by the Supreme Court, a similar result was reached. The court in *Wright* compelled arbitration of an ADA claim despite the fact that the employee was covered by a CBA.⁹⁶ Citing *Austin* as controlling precedent, and without citation to *Gardner-Denver*, the court quickly disposed of Wright's claims.

Fifth Circuit

This circuit emphatically endorses the majority view. The controlling case is *Alford v. Dean Witter Reynolds, Inc.* in which the court held that "Title VII claims are properly subject to arbitration under the analysis in *Gilmer*."⁹⁷ This pre-1993 NASD amendment case found the Title VII claims were arbitrable, and so rejected out of hand the

⁹⁴ *Wright v. Universal Maritime Service Corp.*, 121 F.3d 702 (4th Cir. 1997), *cert. granted*, 118 S. Ct. 1162 (1998); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir.), *cert. denied*, 117 S. Ct. 432 (1996).

⁹⁵ *Austin*, 78 F.3d at 886-87 (Hall, J., dissenting); *cf.* *Riley v. Weyerhaeuser Paper Co.*, 898 F. Supp. 324 (W.D.N.C. 1995) (finding plaintiff's ADA claim cannot be waived since the grievance and arbitration provisions of the CBA do not preclude plaintiff from pursuing his judicial remedies).

⁹⁶ *Wright*, 1997 U.S. App. LEXIS 19199, at * 6; *cf.* *Zandford v. Prudential-Bache Securities, Inc.*, 112 F.3d 723 (4th Cir. 1997) (compelling arbitration of breach of contract and other state law claims).

⁹⁷ 975 F.2d 1161, 1162 (5th Cir. 1992). This case had a long history. In light of *Gilmer*, the Supreme Court granted *certiorari*, then vacated and remanded this Circuit's earlier decision in *Alford*. See 500 U.S. 930 (1991), *vacating and remanding*, 905 F.2d 104 (5th Cir. 1990). The next decision reached is to be found at 939 F.2d 229 (5th Cir. 1991). This decision remanded the case to district court ruling that Title VII claims can be subject to compulsory arbitration. The district court granted Dean Witter's motion to compel arbitration. *Alford* appealed, and the Fifth Circuit affirmed that ruling. 975 F.2d 1161 (5th Cir. 1992).

applicability of the *Gardner-Denver* decision upon which its earlier decision had been based.⁹⁸

An interesting district court opinion, though not on point, refused to compel arbitration reasoning that the company's "ADR Policy" is "so misleading and against the principles of Title VII . . . that its use violates such law."⁹⁹ It is the one example in this entire section of this article of a case brought by the EEOC.

Litigation over mandatory arbitration has spawned another class of related lawsuits - arbitrator liability - the plaintiff in one instance filed suit against the arbitrators in which the plaintiff contends that the American Arbitration Association (AAA) panels are biased.¹⁰⁰ Plaintiff alleges that the AAA did not disclose that most of the potential arbitrators would be defense attorneys whose clients use AAA services.¹⁰¹

Sixth Circuit

This circuit has twice had the opportunity to consider this issue, and has found that employment claims under federal civil rights statutes "could be the subject of an enforceable arbitration agreement."¹⁰² While both cases are older and consider arbitration clauses prior to the 1993 NASD Amendment, the court made clear that *Gilmer* controls this question. In *Cosgrove v. Shearson Lehman Bros.*, the plaintiff filed suit alleging sexual harassment and retaliation in violation of Title VII, as well as state law claims.¹⁰³ The suit was filed in 1992. The Sixth Circuit considered the case in 1997, and stated that it is "well-settled that statutory claims may be the" subject of compulsory arbitration.¹⁰⁴ The Court will uphold the parties' agreement unless there is evidence

⁹⁸ *Id.* at 1162-64. The court hinted that it may consider, in an appropriate future case, whether the parties' agreement was a contract of adhesion. *Id.* at 1163; *see also* Williams v. Cigna Financial Advisors, Inc., 56 F.3d 656 (5th Cir. 1995) (arbitration agreement in U-4 form enforceable for ADEA and Older Workers Benefit Protection Act claims); *cf.* Folse v. Richard Wolf Medical Instr. Corp., 56 F.3d 603 (5th Cir. 1995), *aff'd*, 1998 U.S. App. LEXIS 2483 (Jan. 14, 1998) (ordering compensation dispute back to arbitration as per the parties' agreement).

⁹⁹ EEOC v. River Oaks Imaging and Diagnostic, 1995 U.S. Dist. LEXIS 6140 (S.D. Tex. Apr. 19, 1995).

¹⁰⁰ *See* Brenda Sapino, *Arbitrators' Fairness at issue in Appeal; Ex-Employee Protests Being Forced to Take Her Sexual Harassment Claim to Panel of 'White, Male, Defense Attorneys'*, TEXAS LAW. Nov. 6, 1995, at 4.

¹⁰¹ *Id.*

¹⁰² *See* Cosgrove v. Shearson Lehman Bros., 1997 U.S. App. LEXIS 392 (6th Cir. Jan. 6, 1997), *cert. denied*, 118 S. Ct. 169 (1997) (Craig Daughtrey, J., concurring).

¹⁰³ *Cosgrove*, 1997 U.S. App. Lexis 392, at *2.

¹⁰⁴ *Id.* at **4-5; *see also* Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 307 (6th Cir. 1991).

of fraud or duress, and expressly declined to adopt the Ninth Circuit "knowing waiver" standard of *Lai*.¹⁰⁵ Judge Craig Daughtrey stressed in her concurrence that it is incumbent on courts to carefully scrutinize whether agreements are truly the result of a "meeting of the minds" and a "bargained-for result of discussions between equally astute business entities."¹⁰⁶ The judge urged the court to remand the case "to ensure that employees are not unwittingly stripped" of a judicial forum.¹⁰⁷

Seventh Circuit

It is unclear whether the Seventh Circuit should be considered a majority jurisdiction, compelling arbitration of security industry employees' civil rights claims. The one case on point is a pre-1993 Amendment case which notes that the 1993 language changes "sweep into the realm of arbitration a whole new class of disputes."¹⁰⁸ This would seem to indicate that Title VII claims and others would be required to be arbitrated.

The law has evolved, though, and more recent (1997) cases, though not on point, are highly relevant and merit discussion. Two cases involved CBAs, and the court followed the *Gardner-Denver* line of cases allowing plaintiffs to litigate their ADA and Title VII claims in court.¹⁰⁹ The court has moved beyond the *Kresock* opinion and analysis, and in *Gibson v. Neighborhood Health Clinics, Inc.*, this time the court asked, "Whether the prerogative of litigating one's Title VII and ADA claims in federal court is the type of important right the relinquishment of which requires a knowing and voluntary waiver."¹¹⁰ Echos of *Lai*. . . . How one asks a question is as important as the answer. It would seem

¹⁰⁵ *Cosgrove*, 1997 U.S. App. LEXIS 392, at *7; see *infra* notes 119-27 and accompanying text (discussing the Ninth Circuit rule and in particular, *Prudential Ins. Co. v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995)). In fact, a federal district court in this circuit criticized the *Lai* decision, considering itself fortunate not to be bound thereby. See *Beauchamp v. Great West Life Assur. Co.*, 918 F. Supp. 1091 (E.D. Mich. 1996).

¹⁰⁶ *Cosgrove*, 1997 U.S. App. LEXIS 392, at **8-9.

¹⁰⁷ *Id.* at **10-11.

¹⁰⁸ *Kresock v. Bankers Trust Co.*, 21 F.3d 176, 178-79 (7th Cir. 1994); *cf. Mathews v. Rollins Hudig Hall Co.*, 72 F.3d 50 (7th Cir. 1995) (compelling arbitration of ADEA claim as per *Gilmer*).

¹⁰⁹ *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, 118 S. Ct. 294 (1997) (allowing Plaintiff to proceed with Title VII claim); *Spyrnal v. Prudential Ins. Co.*, 1997 U.S. Dist. LEXIS 12607 (N.D. Ill. Aug. 20, 1997) (denying motion to compel arbitration of ADA claim by employee covered by CBA).

¹¹⁰ 121 F.3d 1126, 1129 (7th Cir. 1997) (finding employee's promise to arbitrate unenforceable due to a lack of consideration); *cf. Farrand v. Lutheran Brotherhood*, 993 F.2d 1253, 1254-55 (7th Cir. 1993).

that this circuit court would now not automatically compel arbitration of these claims.¹¹¹

Eight Circuit

This circuit is a majority jurisdiction and has endorsed arbitration as the sole remedy for employment disputes within the securities industry. The court of appeals in *Kiernan v. Piper Jaffray, Inc.* refused to vacate an arbitration award based on an ADA claim and various state law claims.¹¹² The appeals court also recently considered whether a healthcare industry employee who signed an arbitration clause as a condition precedent to employment, is compelled to arbitrate her Title VII claims.¹¹³ It considered *Gilmer* to be dispositive, ruling that even employment discrimination claims are subject to binding arbitration.¹¹⁴

The federal district courts of this circuit have had the opportunity to consider Title VII claims in the securities industry. Most recently in *Battle v. Prudential Insurance Company*, the court compelled arbitration of the employee's age and race discrimination claims.¹¹⁵ Moreover it found that the NASD required arbitration of such claims even before the 1993 NASD amendment. The court declined to adopt *Lai*, and pronounced that the law was "clear" on this issue, and such agreements will be "upheld and enforced 'save upon such grounds as exist at law or in equity for the revocation of any contract.'"¹¹⁶ The court noted it would not compel arbitration of civil rights claims in the collective bargaining context, however.¹¹⁷ Another district court case upheld the arbitration agreement, but cautioned that it would not do so if there existed a "well-founded claim that the arbitration agreement resulted from the exercise of overwhelming economic power. . . ."¹¹⁸

¹¹¹ There are two district court cases on point, however, which resoundingly support the arbitration of employment disputes, but may be of questioned vitality due to the aforementioned circuit court cases. In the first mentioned case in this footnote, the plaintiff raises a number of outstanding points – none of which were resolved in her favor – similar points raised in *Rosenberg*, but with a different outcome. *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 1997 U.S. Dist. LEXIS 1955 (N.D. Ill. Feb. 24, 1997); *Nieminski v. John Nuveen & Co.*, 1997 U.S. Dist. LEXIS 764 (N.D. Ill. Jan. 23, 1997).

¹¹² 137 F.3d 588 (8th Cir. 1998).

¹¹³ *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 833-34 (8th Cir. 1997).

¹¹⁴ *Id.* at 837-38; *cf. Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 946 (1997) (considering a Title VII claim by employee covered by a CBA, and *citing* with approval *Gardner-Denver*).

¹¹⁵ 1997 U.S. Dist. LEXIS 11488 (D. Minn. Aug. 4, 1997).

¹¹⁶ *Id.* at * 18.

¹¹⁷ *Id.*; *cf. Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447 (D. Minn. 1996).

¹¹⁸ *Johnson*, 940 F. Supp. at 1456.

Ninth Circuit

Prudential Insurance Co. v. Lai is perhaps the leading, and most notorious employment arbitration case, and highlights the court's discomfort with compelling arbitration of federal civil rights claims.¹¹⁹ Justine Lai and Elvira Viernes signed U-4 forms in order to be employed, and allege that they were directed to sign them "without being given an opportunity to read the forms."¹²⁰ They claim they cannot now be bound by an agreement to arbitrate their workplace sexual discrimination and abuse claims "unless they knowingly agreed to arbitrate such claims."¹²¹ The court's opinion accords with this view where it concluded that there must be a knowing waiver of the statutory remedies (under Title VII in this case) because it found that in enacting this statute, Congress intended such a result.¹²² Although this case was bound to construe the arbitration clause prior to the NASDs 1993 Amendment, the court downplayed the importance of the NASD language in either instance, noting instead that it was more important to consider what actually was contemplated, and agreed upon by the parties.¹²³

Lai, which stood by itself for a long while, has since been reaffirmed in *Renteria v. Prudential Insurance Co.*¹²⁴ This court, as in *Lai*, ruled that the plaintiff could not be "compelled to arbitrate Title VII [sexual harassment] and related state law claims which she did not knowingly agree to arbitrate."¹²⁵ This "knowing waiver" is the Ninth Circuit's standard. Critical to this decision is the Court's statement that "whether an agreement to arbitrate constitutes a knowing waiver of a right is analyzed from the time the agreement is made."¹²⁶ The court expressly declined to "reach the question of whether the NASD Code as amended [in 1993] satisfies the knowing waiver requirement of *Lai*."¹²⁷

¹¹⁹ 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 516 U.S. 812 (1995).

¹²⁰ *Id.* at 1301.

¹²¹ *Id.* at 1304; *see also id.* at 1301.

¹²² *Id.* at 1303-05.

¹²³ *Id.* at 1305.

¹²⁴ 113 F.3d 1104 (9th Cir. 1997).

¹²⁵ *Id.* at 1108; *cf.* *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932 (9th Cir. 1992) (an older case, disregarding the *Gardner-Denver* line of decisions in favor of expanding *Gilmer* to Title VII claims); *Nadeau v. Thomas*, 1997 U.S. Dist. LEXIS 12633 (N.D. Cal. Aug. 21, 1997) (denying petition to compel arbitration).

¹²⁶ *Renteria*, 113 F.3d at 1107 § n.2.

¹²⁷ *Id.* n.2; *cf.* *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756 (9th Cir. 1997) (applying *Lai*'s knowing waiver analysis to ADA claim finding no automatic arbitration of these claims). *But cf.* *Kuehner v. Dickinson & Co.*, 84 F.3d 316 (9th Cir. 1996) (concluding that *Lai* analysis not applicable to employment dispute involving FLSA claims, and so court compelled arbitration). *Painewebber, Inc. v. Bahr* 1996 U.S. App.

An interesting follow-up to these decisions has been *Imhoff v. Charles Schwab & Co.*¹²⁸ Imhoff brought suit alleging employment discrimination in violation of Title VII, ADA, ADEA, and under state law. Imhoff signed the U-4 form in which Charles Schwab selected the NASD and the NYSE as forums for processing disputes.¹²⁹ Finding itself constrained to apply *Lai* to NASD arbitrations, the court concluded that Imhoff was not bound to arbitrate his claims. Citing the courts to have criticized *Lai*, the district court even suggested ways to overrule *Lai*.¹³⁰ The twist on this case though, is that the court ordered arbitration of the claims under the NYSE rules, reasoning that while "NYSE Rules may not specifically refer to Title VII, the ADEA [etc.], Rule 347 does make clear that Plaintiff's employment disputes had to be arbitrated."¹³¹ Clearly such a dichotomous result is undesirable, and the various exchanges must adopt congruous rules regarding employment arbitration.

Tenth Circuit

The Tenth Circuit is clearly a majority jurisdiction. In *Schooley v. Merrill Lynch, Pierce, Fenner & Smith*, the court considered, Schooley's claims that included tortious breach of contract, constructive discharge, negligent and intentional infliction of emotional distress, invasion of privacy, and fraudulent contractual interference.¹³² Citing the U-4 form Schooley signed, Merrill Lynch moved to compel arbitration.¹³³ Rejecting Schooley's various challenges, the court agreed, and ordered arbitration reasoning that federal policies favoring arbitration pre-empt any others.¹³⁴ This accords with previous Tenth Circuit decisions that have ordered arbitration of race, sex, national origin, and pregnancy discrimination claims.¹³⁵

Eleventh Circuit

This circuit is also a majority jurisdiction. The controlling case for the issue in this circuit is *Kidd v. Equitable Life Assurance Society*.¹³⁶

LEXIS 25314 (9th Cir. Sept. 24, 1996) *aff'd*, 97 F.3d 1460 (9th Cir. 1996) (upholding arbitration order despite claim of fraud).

¹²⁸ 1998 U.S. Dist. LEXIS 1178 (D. Ariz. Jan. 14, 1998).

¹²⁹ *Id.* at * 1.

¹³⁰ *Id.* at ** 1-2.

¹³¹ *Id.* at * 16.

¹³² 107 F.3d 21 (10th Cir. 1997).

¹³³ *Id.* at 22.

¹³⁴ *Id.* at 24.

¹³⁵ See *Armijo v. Prudential Ins. Co.*, 72 F.3d 793 (10th Cir. 1995); *Metz v. Merrill Lynch, Pierce, Fenner & Smith*, 39 F.3d 1482 (10th Cir. 1994); *Lockhart v. A. G. Edwards & Sons, Inc.*, 1994 U.S. Dist. LEXIS 1201 (D. Kan. Jan. 25, 1994).

¹³⁶ 32 F.3d 516 (11th Cir. 1994), *aff'd*, 119 F.3d 11, *cert. denied*, 118 S. Ct. 626 (1997).

Former securities sales agents brought suit against Equitable alleging race discrimination. Equitable moved to stay the litigation and compel arbitration of the claims. Finding that the former employees "signed the U-4 forms promising to arbitrate any disputes," the court reversed the district court, concluding that the claims are subject to arbitration.¹³⁷ The court made quick work of each of the former employees' points of contention, noting that arbitration of employment disputes at NASD member firms has been required even since before 1975.¹³⁸

Although not directly on point, a very recent related Eleventh Circuit opinion seems to echo the ambivalence most recently generated by the central issue of this article.¹³⁹ The court ruled on a motion by the employer to compel arbitration of a fired employee's Title VII claims. The court seemed eager to find deficiencies in the parties' agreement and thus deny the motion to compel arbitration.¹⁴⁰ In fact Chief Judge Hatchett found that the arbitration clause did not include Title VII claims.¹⁴¹ Moreover, this same circuit recently refused to compel arbitration of a disability claim because the arbitration clause was part of a CBA.¹⁴²

District of Columbia Circuit

While this Circuit has not decided a securities industry employment discrimination case, it has produced an influential opinion closely related to this subject.¹⁴³ In *Cole*, after the employee was fired from his job, he filed a complaint alleging, *inter alia*, discrimination and harassment based on race. Burns moved to compel arbitration of these claims. The court reluctantly upheld the parties' agreement because "we are constrained by *Gilmer* . . . [which requires] the enforcement of arbitration agreements that do not undermine the relevant statutory scheme."¹⁴⁴ The court took efforts to distinguish this individual dispute from a collective one,¹⁴⁵ and also made clear that it is cognizant of the reported "inequities and inadequacies of arbitration in individual

¹³⁷ *Kidd*, 32 F.3d at 520.

¹³⁸ *Id.* (quoting *Association of Inv. Brokers v. Securities and Exchange Commission*, 676 F.2d 857, 860 (D.C. Cir. 1982)). An older case also upheld an order compelling arbitration of a Title VII claim. *See Bender v. A. G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992).

¹³⁹ *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir. 1998).

¹⁴⁰ *Id.* at 1058.

¹⁴¹ *Id.* This is so despite the concurrence urging the court to rule that the arbitration clause includes Title VII claims.

¹⁴² *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519 (11th Cir. 1997).

¹⁴³ *Cole v. Burns Int'l Security Services*, 105 F.3d 1465 (D.C. Cir. 1997).

¹⁴⁴ *Id.* at 1467-68.

¹⁴⁵ *Id.* at 1467, 1472-76.

employment cases.¹⁴⁶ In conclusion, it found "[a]rbitration of public law issues . . . troubling."¹⁴⁷

CONCLUSION

A few conclusions can be drawn at this point regarding the arbitrability of civil rights in employment claims. First employment arbitration has reached its zenith. The cases during 1993-1996 almost without exception flatly endorse arbitration and undertake only a cursory analysis of contentions to the contrary. The most recent cases discussed, those from 1997-1998, however, seem more willing to explore the more complex and nuanced aspects to these employment arbitration clauses. There has been a recognition that their decisions do not have to fall in lock-step with *Gilmer*, which does not technically apply to other civil rights claims anyway – it does so only by analogy. The extensive and continuing negative coverage highlighting the present system's inequities has added another dimension hastening this evolution.¹⁴⁸

Since the arbitration of financial securities disputes became the law with *McMahon* and then *Rodriguez de Quijas*; and then also with ADEA employment disputes, federal and state courts rapidly expanded the law by reading into these decisions a requirement that all employment claims must be arbitrated. Perhaps not ready or capable of handling the complexities involved in this new class of disputes, and recognizing that the present system is flawed, there has been a retreat from this expansive view that arbitration covers all employment disputes. There is room for both arbitration and litigation, and had arbitration procedures been well thought out in the first instance, this wholesale retreat might have been avoided. There is no inherent conflict between arbitration and the vindication of statutory employment discrimination claims; it is incumbent, though, to provide all parties with a system that is perceived as fair, accessible, and voluntary, and that such perception is made a reality.

¹⁴⁶ *Id.* at 1467.

¹⁴⁷ *Id.* at 1476; cf. *Benefits Communication Corp. v. Klieforth*, 642 A.2d 1299 (D.C. App. 1994) (upholding arbitration of sex discrimination claims brought under the District of Columbia Human Rights Act).

¹⁴⁸ See De'Ann Weimer & Stephanie Anderson Forest, *Forced Into Arbitration? Not Any More*, BUS. WEEK, Mar. 16, 1998, at 66.