
REACHING TOO FAR? AN ANALYSIS OF THE CIRCUIT SPLIT REGARDING THE SCOPE OF ARBITRATION CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS

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This Comment examines side agreements of collective bargaining agreements (“CBAs”), specifically the extent to which a CBA’s arbitration clause can be applied to a seemingly related side agreement. There is somewhat of a universal agreement that in certain circumstances it is appropriate to apply the terms of a CBA’s arbitration clause to a related side agreement. It is unclear, however, what courts should use as the requisite threshold test for determining applicability. This Comment analyzes the current circuit split over the appropriate standard to utilize when determining the applicability of a CBA’s arbitration clause to a side agreement.

INTRODUCTION

As the United States’ national economy has expanded, so have the complexity and sophistication of labor negotiations and labor agreements. Workers yearning for the many potential benefits to be gained by collective bargaining often enter into elaborate agreements with their employers.¹ In the modern era, CBAs have become commonplace in American labor law.² Despite many legal opinions and cases discussing CBAs, a lesser-known area of controversy is the law regarding side agreements to CBAs. The process of crafting an agreement that is satisfactory to all parties involved in complex labor negotiations is extremely difficult, and as a result,

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1. *See United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960) (describing how the proliferation of collective bargaining agreements has been, in part, spurred by an increase in the complexity of employment relationships).

2. *See id.*

employers and labor unions often enter into side agreements for any number of reasons.³ Side agreements allow both labor unions and employers to modify their existing relationship and to concurrently avoid the risk of opening up the existing CBA for negotiation on other unrelated issues.⁴

Disagreements and litigation have always coexisted with CBAs and related side agreements. Modern labor policy emphasizes that the preferred forum for disputed CBAs is arbitration, rather than typical court proceedings.⁵ As a result, arbitration clauses have become a mainstay in most modern CBAs.⁶ Side agreements, which are often far less complex than the CBAs they are related to, do not always explicitly contain a separate arbitration clause.⁷ While a cursory evaluation would seem to indicate that an agreement without an arbitration clause cannot be subject to mandatory arbitration, in certain circumstances courts have held that related side agreements can be subject to the CBA's arbitration clause. These holdings are grounded in the strong policy preference for arbitration and the inter-related nature of CBAs and side agreements.⁸

Most courts agree that there are circumstances in which a side agreement to a CBA can be subject to the terms of the CBA's arbitration clause. However, there is currently a split between the circuits over the test that should be applied to determine when an arbitration clause should be held applicable. The Third, Sixth, Seventh, and Ninth Circuits consider a side agreement to be a part of the CBA.⁹ After establishing that a side agreement is part of the CBA, these courts then determine whether the side agreement would have fallen within the scope of the CBA's arbitration clause.¹⁰ Alternatively, the Second, Fourth, and Eighth Circuits consider the relatedness of the side agreement to the CBA when reviewing whether

3. Certain past cases involve a employer and a union entering into a new side agreement, rather than revising the original CBA. See *United Steelworkers of Am. v. Cooper Tire & Rubber Co.*, 474 F.3d 271 (6th Cir. 2007); *United Steelworkers v. Duluth Clinic, Ltd.*, 413 F.3d 786 (8th Cir. 2005); *Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1075 (9th Cir. 2002).

4. *Cooper Tire*, 474 F.3d at 274; *Duluth Clinic, Ltd.*, 413 F.3d at 787; *Dutra Group*, 279 F.3d at 1077.

5. See *Am. Mfg. Co.*, 363 U.S. at 566 (emphasizing the preference of modern courts for labor disputes to be handled by arbitrators).

6. See *id.*

7. See *Cooper Tire*, 474 F.3d 271; *Duluth Clinic, Ltd.*, 413 F.3d 786; *Dutra Group*, 279 F.3d 1075.

8. See *Cooper Tire*, 474 F.3d at 274; *Dutra Group*, 279 F.3d at 1077; *Duluth Clinic, Ltd.*, 413 F.3d at 787.

9. See generally *Cooper Tire*, 474 F.3d at 278; *Inlandboatmens Union of Pac.*, 279 F.3d at 1080; *Niro v. Fearn Int'l, Inc.*, 827 F.2d 173, 175 (7th Cir. 1987); *L.O. Koven & Bro., Inc. v. Local Union 5767, United Steelworkers*, 381 F.2d 196, 201 (3d Cir. 1967).

10. See *Cooper Tire*, 474 F.3d at 279; *Dutra Group*, 279 F.3d at 1080.

an arbitration clause of a CBA should be applied to a side agreement.¹¹ Side agreements deemed collateral are not subject to the terms of the CBA's arbitration clause, while those not deemed collateral are subject to the CBA's arbitration clause.¹²

This Comment will analyze the circuit split over which standard is appropriate to utilize when determining the applicability of a CBA's arbitration clause to a related side agreement. In doing so, I will analyze each of the seven primary cases that serve as the framework for this disagreement. Applying the reasoning of *United Steelworkers of Am. v. Cooper Tire & Rubber Co.*, I argue that the scope test is preferable to the collateral test because the former is more stable.¹³ While conceivably more technically correct, the collateral test marginalizes the stability and predictability that is an essential component of the American legal tradition.

Part I of this Comment examines the historical background of CBAs with a focus on the case law and legislative history that provide the framework for the debate over side agreements to CBAs. Part II focuses on the seven cases comprising the circuit split over the applicability of a CBA's arbitration clause to a related side agreement. Part II also details and emphasizes the circuits' reasoning for reaching their differing conclusions. In Part III, this Comment examines the potential ramifications of this split, along with the possibility of a Supreme Court resolution of this split. Finally, this Comment will emphasize the superiority of the scope test over the collateral test.

I. A BRIEF HISTORY OF THE ARBITRATION OF COLLECTIVE BARGAINING AGREEMENTS

In 1935, Congress took one of its most important steps toward the regulation of the organized labor market. The National Labor Relations Act (NLRA) was Congress' first attempt at managing labor relations.¹⁴ After twelve years of regulation under the NLRA, Congress amended it to include the National Labor Management Relations Act (NLMRA).¹⁵ One

11. See *Duluth Clinic, Ltd.*, 413 F.3d at 788-89; *Cornell Univ. v. UAW Local 2300, United Auto. Aerospace and Agric. Implement Workers*, 942 F.2d 138, 140 (2d Cir. 1991); *Adkins v. Times-World Corp.*, 771 F.2d 829, 831-32 (4th Cir. 1985).

12. See *Duluth Clinic, Ltd.*, 413 F.3d at 789; *Cornell Univ.*, 942 F.2d at 140; *Adkins*, 771 F.2d at 831-32.

13. *Cooper Tire*, 474 F.3d at 278-79 (discussing the scope test as applied by the Third, Seventh and Ninth Circuits).

14. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (2002)).

15. Labor Management Relations Act, ch. 120, 61 Stat. 156 (1947) (codified as amended at 29 U.S.C. § 185 (2000)).

of the NLMRA's primary purposes was to change the way that labor suits would be brought.¹⁶ Section 301 of the NLMRA created automatic federal standing for parties claiming breach of a CBA.¹⁷ As a result, federal district courts became the courts of original jurisdiction for many labor claims.¹⁸

For the next thirteen years, the federal courts resolved the majority of labor disputes. However, this structure changed with the "Steelworkers Trilogy," a series of cases decided in 1960 that had a dramatic effect on federal labor law.¹⁹ The Steelworkers Trilogy paved the way for arbitration to become the primary form of resolution for collective bargaining disputes.²⁰ In *United Steelworkers v. Enter. Wheel & Car Corp.*,²¹ the Supreme Court declared that the federal courts should grant strong deference to arbitration. Accordingly, the Court held that as long as the arbitration is reasonable, the federal courts should defer to arbitrators' judgments in collective bargaining disputes.²² In *United Steelworkers of America v. Warrior & Gulf Navigation*,²³ which was decided in the same year, the Court strongly argued in favor of an increased use of arbitration as a means to promote industrial peace and stability. In doing so, the Court in *Warrior & Gulf Navigation* noted that while arbitration is not a substitute for litigation, the increased use of arbitration in collective bargaining disputes would be beneficial to the national labor market.²⁴ While holding that federal courts should not force arbitration upon unwilling parties, the Court created a strong presumption in favor of arbitration for collective bargaining disputes.²⁵ Since these decisions, the Supreme Court has frequently emphasized its preference for and its deference to arbitrations.²⁶

II. THE CIRCUIT SPLIT

Currently, the circuits of the United States Court of Appeals are

16. *Id.*

17. *Id.*

18. *Id.*

19. *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigating Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

20. *Am. Mfg. Corp.*, 363 U.S. 564; *Warrior & Gulf Navigation*, 363 U.S. at 574; *Enter. Wheel & Car Corp.*, 363 U.S. at 593.

21. 363 U.S. at 596-97 (1960) (discussing the benefits provided by an arbitrator).

22. *Id.* at 593.

23. 363 U.S. at 578.

24. *Id.* at 578-80.

25. *Id.*

26. *See, e.g., Eastern Associated Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57, 68 (2000) (affirming the Court's prior holdings on the arbitration of labor disputes); *AT&T Techs., Inc. v. Commc'n Workers of Am.*, 475 U.S. 643, 647-51 (1986).

almost evenly split over the question of when to apply the arbitration clause of a CBA to a related side agreement. The Third, Sixth, Seventh, and Ninth circuits have adopted the “Scope Test.”²⁷ Conversely, the Second, Fourth, and Eighth circuits apply the “Collateral Test.”²⁸

A. *The Scope Test*

In the four cases that provide the framework for the scope test, labor unions brought suit against their employers to seek arbitration to help resolve their disputes.²⁹ In all four circuits, the courts involved held that the scope test was the proper test to determine when to apply a CBA’s arbitration clause to a related side agreement.³⁰

The courts articulated a two-step process. In the first step, the courts interpret the related side agreement as if it was part of the original CBA.³¹ The courts attempt to create a hypothetical agreement that contains both the related side agreement and the CBA, along with the CBA’s arbitration clause.³² In the second step, the courts examine this new agreement, focusing on the new terms provided by the side agreement in light of the arbitration clause.³³ If the terms of the arbitration clause would cause the side agreement’s provisions to be arbitrated, then courts will decide in favor of arbitration.³⁴ Conversely, if the terms of the arbitration clause would dictate that the provisions of the side agreement are not subject to arbitration, then the courts will find against extending the CBA’s arbitration clause to the related side agreement.³⁵

27. See generally *United Steelworkers of Am. v. Cooper Tire & Rubber Co.*, 474 F.3d 278 (6th Cir. 2007); *Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1075, 1080 (9th Cir. 2002); *Niro v. Fearn Int’l, Inc.*, 827 F.2d 173, 175 (7th Cir. 1987); *L.O. Koven & Bro., Inc. v. Local Union 5767, United Steelworkers*, 381 F.2d 196, 201 (3d Cir. 1967).

28. See *United Steelworkers v. Duluth Clinic, Ltd.*, 413 F.3d 788-89 (8th Cir. 2005); *Cornell Univ. v. UAW Local 2300, United Auto. Aerospace and Agric. Implement Workers*, 942 F.2d 138, 140 (2d Cir. 1991); *Adkins v. Times-World Corp.*, 771 F.2d 829, 831-32 (4th Cir. 1985).

29. *Cooper Tire*, 474 F.3d 271; *Inlandboatmens Union of Pac.*, 279 F.3d 1075; *Niro*, 827 F.2d 173; *L.O. Koven & Bro., Inc.*, 381 F.2d 196.

30. *Cooper Tire*, 474 F.3d at 278; *Inlandboatmens Union of Pac.*, 279 F.3d at 1080; *Niro*, 827 F.2d at 175; *L.O. Koven & Bro., Inc.*, 381 F.2d at 201.

31. *Cooper Tire*, 474 F.3d at 278; *Inlandboatmens Union of Pac.*, 279 F.3d at 1080; *Niro*, 827 F.2d at 175; *L.O. Koven & Bro., Inc.*, 381 F.2d at 201.

32. *Cooper Tire*, 474 F.3d at 278; *Inlandboatmens Union of Pac.*, 279 F.3d at 1080; *Niro*, 827 F.2d at 175; *L.O. Koven & Bro., Inc.*, 381 F.2d at 201.

33. *Cooper Tire*, 474 F.3d at 278; *Inlandboatmens Union of Pac.*, 279 F.3d at 1080; *Niro*, 827 F.2d at 175; *L.O. Koven & Bro., Inc.*, 381 F.2d at 201.

34. *Cooper Tire*, 474 F.3d at 278; *Inlandboatmens Union of Pac.*, 279 F.3d at 1080; *Niro*, 827 F.2d at 175; *L.O. Koven & Bro., Inc.*, 381 F.2d at 201.

35. *Cooper Tire*, 474 F.3d at 278; *Inlandboatmens Union of Pac.*, 279 F.3d at 1080; *Niro*, 827 F.2d at 175; *L.O. Koven & Bro., Inc.*, 381 F.2d at 201.

1. The Third Circuit

The issue of the applicability of the arbitration clause of a CBA to a related side agreement was first examined in *L.O. Koven & Bro., Inc. v. Local Union 5767, United Steelworkers*.³⁶ In *Koven*, the steelworkers' union argued for arbitration of a claim related to vacation pay.³⁷ While the United States District Court of New Jersey initially held in favor of the employer and against arbitration, the Court of Appeals for the Third Circuit reversed, finding in favor of the union and constructing what eventually became the modern day scope test.³⁸ In 1964, the union and *Koven* settled.³⁹ This settlement agreement became the side agreement at issue in this case.⁴⁰ While the main CBA contained an arbitration clause, the settlement agreement did not.⁴¹ Following the settlement, a dispute arose regarding whether *Koven* was correctly tabulating its employees' vacation time.⁴² Part of this dispute related directly to terms featured exclusively in the settlement agreement.⁴³ The union argued that the settlement agreement should be arbitrated in the same manner as the claims under the CBA; *Koven*, on the other hand, argued that the settlement agreement should not be subject to the arbitration clause.⁴⁴

At the outset, the Third Circuit noted that there was only a small amount of settled law in this area.⁴⁵ While one may predict that a lack of jurisprudence in this area would cause courts to devote considerable time and analysis to its decision, the exact opposite occurred in *Koven*. The Court held that "unless a release explicitly discharges the parties from the collective bargaining agreement itself . . . its effect should be determined by an arbitral forum."⁴⁶ Instead of devoting time to determining the proper standard to utilize, the Court, in little more than a sentence, elected to use the scope test.⁴⁷

The Third Circuit provided little justification for its position and explained in a single paragraph the creation of the scope test, the reason for it being the proper standard for the instant case, and its application to the

36. 381 F.2d 196 (3d Cir. 1967).

37. *Id.* at 199.

38. *Id.* at 205.

39. *Id.* at 198.

40. *Id.* at 199.

41. *Id.*

42. *L.O. Koven & Bro., Inc.*, 381 F.2d at 199.

43. *Id.*

44. *Id.* at 200.

45. *Id.* at 204.

46. *Id.* at 205.

47. *Id.*

facts at hand.⁴⁸ The Court's main justification for creating the scope test was that it wanted to let arbitrators handle as many issues as possible due to the arbitrator's expertise.⁴⁹ The Court labeled arbitrators as being "expertly atuned [sic]" to the types of issues in contention.⁵⁰ Because of this alleged expertise, the Court held that all of the issues that are not explicitly out of the scope of the arbitration clause should be subject to arbitration, including issues raised in related side agreements.⁵¹

2. The Seventh Circuit

The next case addressing this issue, *Niro v. Fearn Int'l*,⁵² was decided in 1987, two years after the Fourth Circuit decided in *Adkins v. Time World Co.* to utilize the collateral test instead of the scope test.⁵³ In *Niro*, the Seventh Circuit dealt with a dispute arising from a claim related to a wrongful termination.⁵⁴ After losing at the district court level, Niro's former employer appealed and argued that since the source of the wrongful termination was a related side agreement and not the CBA itself, the CBA's arbitration clause should not apply.⁵⁵ The Seventh Circuit disagreed and affirmed the decision of the district court, and, consequently, ensconced the scope test as part of its precedent.⁵⁶

Dominic Niro was an employee for Fearn International, Inc. and a member of Local 744 of the International Brotherhood of Teamsters.⁵⁷ In 1984, Fearn fired Niro, who had a history of drug and alcohol use, under the terms of the existing CBA.⁵⁸ After his termination, Fearn, the union, and Niro reached a settlement agreement that allowed Niro to return to work.⁵⁹ After creating this agreement, Fearn again terminated Niro.⁶⁰ On this occasion, Fearn fired Niro under the auspices of the settlement agreement, not the CBA.⁶¹ Niro attempted to seek arbitration under the CBA for his second termination, but Fearn argued that the CBA's arbitration clause should not be applied to the related side agreement.⁶²

48. *L.O. Koven & Bro., Inc.*, 381 F.2d at 204-05.

49. *Id.* at 205.

50. *Id.*

51. *Id.* at 204.

52. *Niro v. Fearn Int'l, Inc.*, 827 F.2d 173, 175 (7th Cir. 1987).

53. *Adkins v. Times-World Corp.*, 771 F.2d 829, 831-32 (4th Cir. 1985).

54. *Niro*, 827 F.2d at 174.

55. *Id.* at 174.

56. *Id.* at 176.

57. *Id.* at 174.

58. *Id.*

59. *Id.*

60. *Niro*, 827 F.2d at 174.

61. *Id.*

62. *Id.*

The Seventh Circuit's analysis clearly mirrors the Third Circuit's reasoning. Citing the Supreme Court's decision in *Warrior & Gulf Navigation Co.*, the Seventh Circuit asserted that there were strong policy reasons supporting the use of arbitration in these types of disputes.⁶³ However, the Seventh Circuit's analysis was more in depth than the Third Circuit's analysis, partially because there was a much greater volume of case law to rely upon.⁶⁴ Ultimately, the Seventh Circuit held that the scope test was the appropriate standard and that because Niro's second termination was within the scope of the CBA's arbitration clause, it should be subject to arbitration.⁶⁵

The Seventh Circuit's justification for utilizing the scope test is based on a two-prong approach. The Court's first justification is a reiteration of the Third Circuit's justification in *Koven*. Although the Seventh Circuit did not explicitly say that arbitrators were better equipped to handle these types of issues, the Court frequently cited the existence of strong policy reasons favoring arbitration.⁶⁶ Even though the Court did not detail the policy reasons, the expertise of arbitrators discussed in *Koven* would likely be among the reasons to adopt the scope test.

The Court's second justification for utilizing the scope test was its desire to respect the wishes of the contracting parties. The Court posited that while a party could not be subject to arbitration against its will, the inclusion of an arbitration clause places the onus on the contracting parties to show why a dispute should not be covered by it.⁶⁷ Specifically, the Court, citing *Warrior*, looked for specific enunciations of the areas to be covered and the areas not to be considered under the arbitration clause.⁶⁸ In the absence of one or both of these instances, the Court held that there was a strong preference for disputed issues to be arbitrated.⁶⁹

3. The Ninth Circuit

In *Inlandboatmens Union of the Pac. v. Dutra Group*,⁷⁰ the Ninth Circuit delivered a thorough and compelling discussion on the issue of the applicability of the arbitration clause of a CBA on a related side agreement. Unlike some of the other circuits, the Ninth Circuit in *Dutra* acknowledged the existence of relevant, yet conflicting, precedents.⁷¹ Of all of the cases

63. *Id.* at 175.

64. *Id.*

65. *Id.* at 176.

66. *Niro*, 827 F.2d at 175.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1079 (9th Cir. 2002).

71. *Id.* at 1079-80.

in this area, *Dutra* provides the most comprehensive analysis of the issue, with the Court ultimately choosing the scope test.⁷²

The Inlandboatmens Union (IBU) represents deckhands in the San Francisco Bay Area.⁷³ In November 1997, the IBU filed a grievance alleging that Dutra violated their subcontracting agreement with the union when they hired non-union workers to provide service for a boat Dutra rented from the IBU.⁷⁴ The CBA between Dutra and the IBU stated that Dutra would only hire IBU-represented personnel.⁷⁵ Dutra settled the dispute with the IBU through a five-element settlement agreement.⁷⁶ While the settlement forbade Dutra from hiring non-IBU laborers in the future, they soon reneged on this part of the settlement.⁷⁷

Citing *Warrior*, the Ninth Circuit artfully opined that a CBA is not meant to be construed in the same manner as a normal contract.⁷⁸ The Court stated that CBA's are meant to be "generalized code[s]"⁷⁹ designed to "govern a myriad of cases which the draftsmen cannot wholly anticipate."⁸⁰

In this case, the Ninth Circuit addressed a major concern with the breadth of arbitration clauses. With *Warrior* in mind, the Court indicated that the breadth of the arbitration clause is one of, if not the most, determinative factor for the Court to review.⁸¹ If the arbitration clause is sufficiently broad, the Ninth Circuit inferred that the parties intended to include any agreement that could potentially fall within its scope.⁸² Likewise, the Court envisioned a spectrum where narrowly tailored arbitration clauses would result in fewer arbitrations, while broad clauses would yield frequent arbitrations.

The Ninth Circuit's opinion is helpful because it thoroughly examines the contrasting viewpoints on the applicability of a CBA's arbitration clause to related side agreements. The Court rejected the collateral test and argued that Supreme Court precedent, namely *Warrior* and the Steelworkers Trilogy, requires the scope test.⁸³ Regardless of precedent, the Court (1) argues that stability dictates choosing the scope test over the

72. *Id.* at 1080.

73. *Id.* at 1077.

74. *Id.*

75. *Id.*

76. 279 F.3d at 1075.

77. *Id.*

78. *Id.* at 1079.

79. *Id.* (citing *Warrior*, 363 U.S. at 578-80).

80. *Id.*

81. *Id.* at 1080.

82. 279 F.3d at 1080-81.

83. *Id.*

collateral test;⁸⁴ and (2) finds that the collateral test was inherently unstable because the goal of labor law is, and should remain, industrial peace and stability.⁸⁵ Thus, the Ninth Circuit held that it had no choice but to adopt the scope test.⁸⁶

4. The Sixth Circuit

The most recent case to address this issue, *United Steelworkers of America v. Cooper Tire and Rubber Co.*,⁸⁷ employs the scope test, which is preferred by the Second, Fourth, and Eighth Circuits. Decided in 2007, *Cooper Tire and Rubber Co.* echoes the language and reasoning of the Ninth Circuit's 2001 *Dutra* opinion.⁸⁸ The Sixth Circuit, relying heavily on the precedent of *Warrior*, adopts the scope test analysis.⁸⁹

Cooper Tire and Rubber is a rubber and tire manufacturer with major operation plants in Ohio.⁹⁰ Since 1941, Cooper and the United Steelworkers of America entered into a series of CBAs dealing with issues such as wages and benefits.⁹¹ The CBA in question had a broad arbitration clause stating that "[a]ny grievance or dispute which remains unsettled after following the Grievance Procedure outlined above may be appealed to arbitration by the party desiring arbitration."⁹²

Since 1991, Cooper had, as a part of its employee pension program, sent out letters detailing the company's annual contribution to retiree healthcare benefits.⁹³ However, these letters did not contain any language relating to arbitration or other grievance procedures.⁹⁴ Between 2000 and 2003, Cooper Tire and Rubber attempted to adjust the caps placed on the benefits paid to retired workers.⁹⁵ In 2004, the union sued Cooper Tire and Rubber to compel arbitration over this issue, arguing that the terms of the letters fell under the coverage of the CBA's arbitration clause.⁹⁶

Using nearly identical language to the Ninth Circuit in *Dutra*,⁹⁷ the Sixth Circuit pointed to *Warrior's* holding that a CBA was "more than a

84. *Id.* at 1081.

85. *Id.*

86. *Id.*

87. *Cooper Tire & Rubber Co.*, 474 F.3d 278, 279 (6th Cir. 2007).

88. *Id.* at 279-81.

89. *Id.* at 279.

90. *Id.* at 273.

91. *Id.* 273-75.

92. *Id.* at 274.

93. 474 F.3d at 274.

94. *Id.*

95. *Id.*

96. *Id.* at 275-76.

97. *Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1079 (9th Cir. 2002).

contract”⁹⁸ and should be construed to be a “generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.”⁹⁹ Similar to *Dutra*, the Sixth Circuit rationalized that one of the primary motivating factors of labor law should be industrial peace and stability, a goal that the collateral test did not further.¹⁰⁰ The Sixth Circuit added that the ramifications of the scope test were more easily anticipated by the contracting parties, as parties can more easily determine the breadth of their arbitration clauses.¹⁰¹

5. Analysis of the Scope Test

To the average person, the scope test appears to be the more favorable of the two current alternatives. The scope test provides an ease of use not commonly found in complex labor negotiations. Given its usability, there is a strong argument to be made for the scope test’s ability to provide greater stability in labor disputes. However, the scope test presents a potentially major problem: circumvention. While possibly flawed, the scope test is a strong contender against the more elaborate collateral test.

One of the major benefits of the scope test is that it is much easier to apply than the collateral test. Whereas the collateral test examines many competing factors,¹⁰² the scope test only analyzes the CBA’s arbitration clause. As is evident in some of the above case law, one could create a continuum ranging from the most comprehensive to the least comprehensive arbitration clauses, as in *Dutra*.¹⁰³ For particularly broad arbitration clauses, the presumption will be in favor of arbitration of the side agreement in contention. Conversely, for extremely restrictive arbitration clauses, there will be a presumption against extending the arbitration clause to cover related side agreements.

The scope test could also be considered superior because it better promotes stability and predictability. This was the primary motivation behind its adoption by the Sixth and Ninth Circuits. The notion that the scope test is more predictable stems from its ease of application. In theory, parties should be able to examine their own CBA, analyze its breadth, and then easily determine if a side agreement will fall under it. The courts that are in favor of the scope test seem to create a “buyer-beware” situation. In other words, parties that opt to create ultra-inclusive arbitration clauses

98. *United Steelworkers of Am. v. Cooper Tire & Rubber Co.*, 474 F.3d 280 (6th Cir. 2007) (quoting *Warrior*, 363 U.S. at 582).

99. *Id.* at 278 n.8 (citing *Warrior*, 363 U.S. at 578-89).

100. *Id.* at 280.

101. *Id.*

102. *See infra* Part II.B.1. (providing a deeper analysis of the collateral test).

103. 279 F. 3d. at 1080.

designed to cover almost any type of dispute that could arise out of the agreement will be have to face the consequences of arbitrating every dispute, even if it arises out of a side agreement and not the CBA.

However, the scope test does have two potential drawbacks. First, it places a heavy burden on parties to exercise foresight. With the scope test, courts envision parties crafting a CBA and anticipating these side agreements. The paradox is that the main reason many side agreements come into existence is because they often address factors that could not be foreseen during the CBA's creation.

The second major drawback of the scope test is that it potentially circumvents the parties' intent, a major criticism by the collateral test's advocates.¹⁰⁴ The conflict between the scope and collateral tests is emblematic of a much larger conflict in the law: the conflict between textualism and intentionalism. A textualist would favor the scope test, while an intentionalist would favor the collateral test.¹⁰⁵ Some would fault the scope test for not taking into account the intent of the parties and deciding solely based on the plain meaning of the arbitration clause. This and other arguments frequently lodged against textualism can be used against the scope test as well. An argument can be made that the central holding in *Warrior* is an unfair circumvention of the parties' potential intent, as parties may not intend for a CBA to be used as the code by which to judge areas that are not explicitly mentioned in the CBA.

Despite its drawbacks, the scope test is certainly an effective way to handle side agreements. While not perfect, it provides a simple mechanism that provides parties some level of certainty regarding whether or not a court will be willing to extend an arbitration clause to apply to a side agreement. Overall, both textualists and courts advocate the scope test because of its simplicity and ease.¹⁰⁶

104. See *United Steelworkers v. Duluth Clinic, Ltd.*, 413 F.3d 789 (8th Cir. 2005) (ignoring certain phrases and formatting choices in the CBA that suggest that the arbitrator has the power to interpret the CBA).

105. Textualists argue that the best meaning of language is the plain meaning, while intentionalists argue that the meaning of language should be derived from the intent of the creators of the language. See Paul Killebrew, *Where Are All the Left Wing Textualists?* 82 N.Y.U. L. REV. 1895, 1897 (2007); Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else* 83 N.Y.U. L. REV. 769, 773 (2008) (both presenting modern views regarding the ongoing debate between textualism and intentionalism).

106. Courts usually adopt the scope test because of its simplicity and predictability. See *Cooper Tire*, 474 F.3d at 280; *Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1081 (9th Cir. 2002).

B. *The Collateral Test*

In the three cases that provide the framework for the collateral test, labor unions sued their employers and sought arbitration of their disputes.¹⁰⁷ In all three circuits, the courts held that the collateral test was the proper test to determine when to apply the CBA's arbitration clause to a related side agreement.

The collateral test examines the relatedness of the side agreement to a CBA.¹⁰⁸ Specifically, the court evaluates how independent the side agreement is to the CBA.¹⁰⁹ Side agreements that, while related, are independent enough to exist without the CBA are held to be collateral and insufficiently related to the source CBA for the CBA's arbitration clause to be held applicable.¹¹⁰ Conversely, side agreements that are so extensively interrelated and entwined with the original CBA that they could not exist independently without the CBA are held to not be collateral.¹¹¹ With non-collateral agreements that are tremendously interconnected with the CBA, the courts have utilized the CBA's arbitration clause in disputes over their related side agreements.¹¹²

1. The Fourth Circuit

Nearly twenty years after the Third Circuit's decision in *Koven*, the Fourth Circuit became the second court to rule on the issue of the applicability of a CBA's arbitration clause to a related side agreement. In *Adkins v. Time World Co.*,¹¹³ the Fourth Circuit laid the foundation for what would eventually come to be known as the collateral test.

Adkins was the named plaintiff in a group of journeyman printers who brought an action against Times World, the Roanoke Typographical Union, and the International Typographical Union.¹¹⁴ In 1975, Times World and the unions negotiated a CBA.¹¹⁵ Due to fears stemming from the increasing automation of the printing process, the union and Times World

107. See, e.g., *Duluth Clinic, Ltd.*, 413 F.3d at 788-89; *Cornell Univ. v. UAW Local 2300, United Auto. Aerospace and Agric. Implement Workers*, 942 F.2d 138, 140 (2d Cir. 1991); *Adkins v. Times-World Corp.*, 771 F.2d 829, 831-32 (4th Cir. 1985) (all holding that the collateral test should be used to analyze the applicability of a CBA's arbitration clause to a related side agreement).

108. *Cornell Univ.*, 942 F.2d at 140.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. 771 F.2d at 832.

114. *Id.* at 829-30.

115. *Id.* at 830.

entered into a side agreement, which contained provisions guaranteeing lifetime employment to certain printers.¹¹⁶ In the 1980s, Times World fell on hard times and reduced its staff. Adkins was one of the printers terminated despite the protection afforded under the side agreement.¹¹⁷

Unlike many of the later scope test decisions, which acknowledge the existence of the conflicting points of view in this area, *Adkins* does not even mention the scope test. Whereas a court utilizing the scope test would examine the breadth of the CBA's arbitration clause and then determine whether or not this side agreement would fall under the arbitration clause, the Fourth Circuit's analysis follows a decidedly different direction.

The Fourth Circuit's analysis turns on whether or not the side agreement could be considered a part of the CBA.¹¹⁸ In instances where a clear connection between the two exists, the courts can hold that the side agreement is not actually a separate side agreement at all, but instead a part of the main CBA, and thereby subject to the arbitration clause.¹¹⁹ However, if the side agreement appears to be too separate from or too far removed from the CBA, then courts may rule that the arbitration clause is inapplicable.¹²⁰ The Fourth Circuit listed several factors that should be considered in determining whether a side agreement is collateral: the language of the side agreement, the negotiation process, and the parties' understanding of the documents—emphasizing the parties' understanding of the documents as two separate agreements or a single agreement.¹²¹

While short in length and somewhat vague regarding the key determinative factors, the Fourth Circuit's opinion in *Adkins* lays the groundwork for the collateral test, which is further developed by the Second and Eighth Circuits.

2. The Second Circuit

In 1991, the Second Circuit adopted the collateral test in *Cornell University v. UAW Local 2300*.¹²² *Cornell University* is notable because it is one of the first cases that explicitly used the term "collateral."¹²³ The rationale in *Cornell University* built upon the groundwork laid by the Fourth Circuit in *Adkins* and differentiated between the scope and collateral tests more clearly.

116. The side agreement guaranteed the employment of certain workers to a retirement age set by the union. *Id.*

117. *Id.*

118. *Id.* at 831-32.

119. *Adkins*, 771 F.2d at 831-32.

120. *Id.*

121. *Id.* at 831.

122. *Cornell*, 942 F.2d at 138.

123. *Id.* at 140.

The Local 2300 Union represented a segment of employees at Cornell University.¹²⁴ In 1988, the union and the University entered into a four-year CBA, which contained a broad arbitration clause.¹²⁵ The arbitration clause stated that “any matter involving the interpretation or application of this Agreement which alleges a violation of the rights of an employee or the Union under the terms of this Agreement” was an arbitrable grievance.¹²⁶

One of the most contentious issues between the union and the University was the burgeoning cost of health care.¹²⁷ The union incorporated several of its healthcare proposals into a letter, which eventually became the side agreement at issue in the case.¹²⁸ When the University attempted to take an action contrary to the terms of the letter, the union sought redress through the procedures outlined in the arbitration clause of the CBA.¹²⁹

The union attempted to sway the Court to employ the scope test by drawing the Court’s attention to *Warrior*, the case most often cited in support of the scope test.¹³⁰ Given the broad applicability of the arbitration clause at question in this case, it seems likely that the Court would have found the arbitration clause to be applicable had the scope test been utilized. However, the Court ultimately ruled against the union and adopted the collateral test, as first seen in *Adkins*.¹³¹

Previously in *Pitta v. Hotel Ass’n of New York City, Inc.*,¹³² the Second Circuit held that a contract that lacked an arbitration clause, but was meant to serve as a supplement to a contract with an arbitration clause, could utilize the latter contract’s arbitration clause. Following this precedent, the Court argued that it should extend the *Pitta* reasoning to include cases where the contract is collateral, not just cases where the contract is supplementary.¹³³ Unlike the Fourth Circuit, the Second Circuit

124. *Id.* at 139.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Cornell*, 942 F.2d at 138.

129. *Id.*

130. *Id.* at 140.

131. *Id.*

132. *Pitta v. Hotel Ass’n of New York City, Inc.*, 806 F.2d 419, 422-23 (2d Cir. 1986).

133. The Second Circuit provided an interesting analysis in order to reach its use of the collateral test, essentially arguing that it had already effectively been using the collateral test for some time prior to the *Cornell* decision without calling it as much. The Court cited several prior Second Circuit cases as controlling on this issue, making them the building blocks of what would be dubbed the “collateral test.” See *Pitta v. Hotel Ass’n of New York City, Inc.*, 806 F.2d 419, 422-23 (2d Cir. 1986); *Associated Brick Mason Contractors of Greater New York, Inc. v. Harrington*, 820 F.2d 31, 35 (2d Cir. 1987). *Cornell*, therefore, appears to be better understood as the first instance in which the Second Circuit placed all of

provided no clear guidelines for determining whether to deem a contract collateral, and instead relied on a facial judgment of the side agreement.¹³⁴

3. The Eighth Circuit

In 2005, the Eighth Circuit in *United Steelworkers of America v. Duluth Clinic, Ltd.* became the most recent circuit to adopt the collateral test.¹³⁵ The Eighth Circuit's adoption of the collateral test is important because the Court's opinion is the most well-rounded and highly informed opinion to embrace the principle. While not as thoroughly reasoned as the later scope test decisions, the Eighth Circuit's decision in this case presents the most in-depth argument in favor of the application of the collateral test.

In early 2000, the union and the Clinic entered into a series of five CBAs covering various aspects of employee benefits.¹³⁶ Under a separate letter, the parties drafted an agreement that outlined the payment of various types of health benefits to retired employees and their spouses.¹³⁷ Almost as soon as the benefits were enacted, the Clinic eliminated the retiree benefits because, upon further inspection, it was discovered that the program did not comply with Medicare law.¹³⁸ After a year of debate, the parties reached an impasse, with the Union eventually attempting to file an unfair labor practice charge with the National Labor Relations Board.¹³⁹ When the Clinic denied that there was a grievance under the CBA, the Union sought to compel arbitration of the side agreement under the terms of the CBA's arbitration clause.¹⁴⁰

At the Union's urging, the Eighth Circuit began its analysis by looking at the then-recently decided *Dutra* case from the Ninth Circuit.¹⁴¹ After little consideration, the Court rejected the scope test and utilized the Second Circuit's approach.¹⁴² However, the Eighth Circuit's opinion is bizarre, as it makes no attempt to rationalize the choice between the two tests.

What makes the Court's opinion even stranger is that, barely a

its prior precedent together to create a cognizable set of case law and precedent regarding this issue. Unlike the Fourth Circuit before it, the Second Circuit provided no clear guidelines for determining whether to deem a contract collateral, and instead relied on a facial judgment of the side agreement.

134. *Cornell Univ. v. UAW Local 2300, United Auto. Aerospace and Agric. Implement Workers*, 942 F.2d 138, 140 (2d Cir. 1991).

135. *United Steelworkers v. Duluth Clinic, Ltd.*, 413 F.3d 786 (8th Cir. 2005).

136. *Id.* at 787.

137. *Id.*

138. *Id.* at 788.

139. *Id.*

140. *Id.*

141. 413 F.3d at 788.

142. *Id.*

paragraph after rejecting the scope test, the Court launches into an analysis that strongly resembles it.¹⁴³ The Court announces that it will first decide whether the arbitration clause is broadly or narrowly written, which, given the *Dutra* precedent, should not be the primary concern of a Court utilizing the collateral test.¹⁴⁴ After taking a narrow view of the arbitration clause, the Court then examines the issue of whether or not the side agreement is collateral to the CBA.¹⁴⁵ In turn, the Eighth Circuit completely adopts the Second Circuit's approach.¹⁴⁶ The Court does not adopt the Fourth Circuit's factor-based approach and instead merely evaluates whether the side agreement "may be read as part and parcel of the Collective Bargaining Agreement or whether it is collateral to it."¹⁴⁷

The Eighth Circuit seems to envision the collateral test as being a second prong for the scope test. Unlike the Fourth and Second Circuits, which place a priority on determining whether or not an agreement is collateral, the Eighth Circuit puts a great deal of emphasis on determining the scope of the CBA's arbitration clause.¹⁴⁸ While claiming to adhere to the collateral test, the Eighth Circuit has instead embraced a modified form of the collateral test with some of the principles of the scope test.

4. The Effect of the Collateral Test

If the scope test is the textualist's answer to the side agreement dilemma, then the collateral test is the intentionalist's answer. The collateral test is much more respectful of the parties' intent. It can, however, be difficult to apply, thus making its results somewhat difficult to predict. Overall, the collateral test offers a strong alternative to the scope test.

One of the benefits of the collateral test is that it takes into account many more factors than the scope test. As illustrated by the Fourth Circuit in *Adkins*, a court utilizing the collateral test can look to factors such as the parties' understanding and the negotiation process. This is in stark contrast to the scope test, which focuses primarily on the breadth of the arbitration clause.

The collateral test's focus on the parties' intent yields what can be seen as a more fair result than the scope test. From a normative standpoint, it is much more equitable to apply the arbitration clause only to issues that

143. *Id.*

144. *Id.* at 789.

145. *Id.* at 790.

146. *Id.*

147. *Duluth Clinic, Ltd.*, 413 F.3d at 790 (quoting *Cornell Univ. v. UAW Local 2300, United Auto. Aerospace and Agric. Implement Workers*, 942 F.2d 138, 140 (2d Cir. 1991)).

148. *Id.* at 788.

the parties intended it to be applied to. If the parties' intent can be discovered from the myriad factors available for the court to analyze, then it would seem proper for the court to respect the parties' wishes and only apply the arbitration clause in circumstances where it was meant to be applied.

The major drawback of the collateral test comes from the divination of the parties' intent. The same problems that plague intentionalism plague the collateral test. It is difficult, if not impossible, to always reliably determine the parties' intent. CBAs are massive documents created by dozens of people, representing many different, and sometimes conflicting, interests. The idea that a court can reliably look at the CBA and determine the parties' intent, no matter how many factors they examine, can come across as disingenuous. Not every case is as simplistic as *Adkins* where the title of the side agreement clearly indicated that the parties intended the side agreement to be considered part of the CBA.¹⁴⁹ From the standpoint of judicial efficiency, one can argue that, at the very least, the collateral test will cause substantially more litigation on the aforementioned issues than the scope test.

The collateral test, much like the scope test, is not a perfect solution to the issue of the arbitration of side agreements to CBAs. In situations where the collateral test works, it works well. It certainly seems preferable to respect the intentions of the parties and abide by their own interpretation of their documents. Such agreement, however, is unlikely, and it seems improbable that intent can be easily or reliably determined in all of the cases that would present this issue. Overall, while preferable in theory, the collateral test in practice has major flaws.

III. DETERMINING WHEN A CBA'S ARBITRATION CLAUSE SHOULD BE APPLIED TO A RELATED SIDE AGREEMENT

Part of what makes the analysis of this circuit split so challenging is that it involves cases that are nearly forty years old. Not only are many of the cases dated, but there is also a large gap between when each of the circuits rendered their decisions on the issue.¹⁵⁰ As times change, the environments in which decisions are made change as well.

This topic would, seemingly, be a strong candidate for review by the Supreme Court. It involves a major issue that affects millions of

149. The side agreement to the CBA had the word "addendum" in the title. *Adkins*, 771 F.2d at 830.

150. Such as the almost twenty year gap between *Adkins* and *Koven*. See *United Steelworkers of Am. v. Cooper Tire & Rubber Co.*, 474 F.3d 271 (6th Cir. 2007); *United Steelworkers v. Duluth Clinic, Ltd.*, 413 F.3d 786 (8th Cir. 2005); *Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1075 (9th Cir. 2002).

Americans,¹⁵¹ and it has left a split among the circuits, as they are almost evenly divided between the two tests, with four favoring the scope test and three favoring the collateral test. However, it seems highly unlikely that the Court would be willing to grant certiorari on this issue, because there has not been a strong push for it. Furthermore, even though the circuit split has existed for over twenty years, only one of the aforementioned cases—*Adkins*¹⁵²—actually applied for certiorari,¹⁵³ though the petition was denied by the Supreme Court.¹⁵⁴ This phenomenon could exist for any number of reasons, but it appears to indicate that there is a lack of interest in litigating this issue at the Supreme Court.

Another important factor indicating unlikelihood that the Supreme Court would grant certiorari is that despite its broad effects, this is a highly technical issue that deals with a very specialized area of the law. The Court has already indicated in the *Steelworkers Trilogy* and in *Warrior* that it would prefer to pass collective bargaining disputes to arbitrators.¹⁵⁵ The Court justified this by arguing that arbitration would lead to increased industrial stability.¹⁵⁶ As noted above, the Supreme Court has reaffirmed its stance on arbitration on multiple occasions.¹⁵⁷ Furthermore, given the low number of cases to which the Court grants certiorari, it seems unlikely that the Court would grant it here because of the implications of upsetting industrial stability by ruling on this issue. Even when framed as an issue of intentionalism versus textualism, it is not clear how the Court would rule. This author's prediction is that given the Court's current composition, the justices would likely rule in favor of the textualist-based solution found in the scope test.

Is the scope test, however, the decision that the Court should actually reach? Both tests present excellent solutions to the problem, yet both have distinctive strengths and weaknesses.

One can argue that the collateral test is superior to the scope test because it better addresses the parties' intent. By analyzing factors, including the negotiation process and the parties' subjective belief of whether the side agreement was to be covered by the CBA's arbitration clause, the collateral test, if it can genuinely and accurately be applied in a majority of real world settings, provides the best chance of assuring a result

151. The Bureau of Labor Statistics reports that over 15.7 million Americans are members of unions. Press Release, Bureau of Labor Statistics, Union Members In 2007 (Jan. 25, 2008) (on file with author).

152. *Adkins v. Times-World Corp.*, 771 F.2d 829, 829 (4th Cir. 1985).

153. *Adkins v. Time-World Corp.*, 474 U.S. 1109, 1109 (1986).

154. *Id.*

155. *See Enter. Wheel & Car Corp.*, 363 U.S. at 599; *Warrior & Gulf Navigation*, 363 U.S. at 578.

156. *Warrior*, 363 U.S. at 578.

157. *See supra* Part II (discussing the cases that utilize the scope test).

that is most in tune with the parties' original hopes for the contract.

Nonetheless, the collateral test's drawbacks ultimately make the scope test superior. The collateral test is unable to function in situations where the intent of the parties is unclear or non-existent. Modern labor negotiations are amazingly complex, with many parties arguing over numerous issues. The existence of these contentious side agreements displays the difficulty inherent in modern labor negotiations. If labor negotiations were simple, then there would be no need to amend the negotiations later with the related side agreements that have perplexed the circuit courts.

Admittedly, there are some cases that appear to suggest that a court should be able to reasonably determine the intent of the parties. In *Adkins*, for example, the title given to the related side agreement made it clear that the parties intended for the side agreement to be considered part of the main CBA, rather than as a distinct agreement.¹⁵⁸ The Second, Fourth, and Eighth Circuits, however, seem to be under the impression that cases like *Adkins* will be the norm. I would argue that, instead, *Adkins* and its progenies are outliers and do not represent what a court should reasonably expect to encounter when examining side agreements. In analogizing to criminal law, there will always be certain cases where the perpetrator is caught red-handed with a smoking gun. However, for every obvious case, there are other cases that are infinitely more complex.

Similarly, there will always be cases like *Adkins* where a court immediately determines the parties' intent. But, given the complexity of the negotiations involved, it is naïve to expect that a court will be able to magically interpret the parties' intentions in every case. The collateral test does nothing to prepare a court to deal with cases where the intent of the parties is unclear.

The scope test is superior because it counters this failing. Rather than search for intent by examining the parties' conduct, its textualism-focused analysis infers intent only through examination of the finalized CBA. The scope test does not rely on judgments from obtuse incentives that may have motivated the parties when creating the initial agreements. By only looking at the scope of the CBA's arbitration clause, the scope test prevents itself from falling subject to the inherent unreliability of the collateral test. Whereas the collateral test fails in situations where the parties' intent is unclear or cannot be divined through a thorough examination of all available evidence, the scope test prevails.

The scope test is also much easier to utilize. Contracting parties should be able to easily look to the scope of their arbitration clauses and determine if subsequent agreements will fall subject to arbitration. If the

158. *Adkins*, 771 F.2d at 829.

parties wish to prevent arbitration in later agreements, they need only narrow the arbitration clause or state that the arbitration clause is not applicable in the side agreement. For both courts and potential litigants, the scope test presents a much simpler analysis. Rather than focusing on the complexities of analyzing an entire collective bargaining situation, the courts can address a single provision, and in turn, learn virtually all the information necessary to render an informed decision.

Returning to the Ninth Circuit's decision in *Dutra*, the ease of use provided by the scope test will create much greater industrial stability than the collateral test.¹⁵⁹ If both parties to a contract and the courts can easily determine the situations in which it is appropriate to extend arbitration clause coverage, then the stability the Supreme Court aimed to create in *Warrior* and the Steelworkers Trilogy will come to fruition.¹⁶⁰ The collateral test is simply too complex to produce stability, which is valued not only in labor law, but in all of American jurisprudence.

CONCLUSION

The Supreme Court may never address the issue of when to extend arbitration clause coverage to side agreements to CBAs. As the international economy grows, labor disputes are inevitable. In the past ten years, the circuits have begun to decide these cases in a much quicker succession than one would have anticipated, given the long spans of time between the earliest cases involved.¹⁶¹ It seems a foregone conclusion that the remaining circuits will undoubtedly have to determine which of these tests presents the best way to settle future collective bargaining disputes. It is the opinion of this author that the remaining circuits, and the Supreme Court itself, should follow the scope test asserted by the Third, Sixth, Seventh, and Ninth Circuits. While the collateral test presents a viable solution to this problem, the scope test, for all of the aforementioned reasons, is a far superior approach.

159. *Inlandboatmens Union of Pac. v. Dutra Group*, 279 F.3d 1080-81 (9th Cir. 2002)

160. *See also* *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 567 (1960) (discussing the stabilizing influence of arbitration when it addresses all disputes under an agreement).

161. There was a nearly twenty-year gap between *Koven* and its nearest successor *Adkins*.