GILMER V. INTERSTATE/JOHNSON LANE CORP.: ITS RAMIFICATIONS AND IMPLICATIONS FOR EMPLOYEES, EMPLOYERS AND PRACTITIONERS

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So much has been written and said about the Gilmer¹ case in the last few years that many may wonder what else, if anything, there is left to say. Yet, as we were reminded by the proposed settlement in Martens v. Smith Barney² in November 1997 and the cases that seem to come down every day, the Gilmer landscape is constantly changing.

The ramifications and implications of this case are of immense importance today, much more so than had the decision been handed down in the fifties. Since that time, there has been a proliferation of protective legislation, such as the Civil Rights Act of 1964,³ the Occupational Safety and Health Act (OSHA),⁴ the Employee Retirement Income Security Act (ERISA),⁵ the Americans with Disabilities Act (ADA),⁶ the Age Discrimination in Employment Act (ADEA),⁷ and the Family and Medical Leave Act (FMLA),⁸ almost all of which presupposes individual litigants seeking to enforce public norms. It is this Europeanization of the American workplace and the manner in which individual rights conferred by these statutes are to be enforced—fairly, unfairly, or not at all—that is at the center of the Gilmer landscape. The Gilmer decision, in other words, has the potential to affect everyone who works for a living, whether

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² No. 96 Civ. 3779 (S.D.N.Y. filed May 28, 1996). The settlement was proposed on November 18, 1997.
⁵ 29 U.S.C. § 1144(a) (West 1994).
a manager, supervisor, or rank-and-file employee, and regardless of the presence of unionization in the workplace. What is said or written about *Gilmer* today might well be overtaken by future events. Nevertheless, it is imperative that many of the implications we can now foresee be openly and candidly discussed so that they are clearly understood by all.

By this time, most readers know of Robert Gilmer. Gilmer was the Manager of Financial Services for Interstate/Johnson Lane Corporation (IJL), hired in 1981 and fired in 1987. Gilmer sued IJL alleging that his termination was in violation of the ADEA. IJL contended that Gilmer could not go to court to enforce his statutory right, but was required to arbitrate the issue. When Gilmer accepted his job as manager, he registered as a securities representative with various stock exchanges, signing a U-4 form, which is required by the National Association of Securities Dealers (NASD) as a condition of employment in the securities industry. That form provided that Gilmer arbitrate any dispute that was required to be arbitrated pursuant to the rules of any of the exchanges with which he was registered. At the time of his dismissal, Gilmer was registered with the New York Stock Exchange (NYSE). Under NYSE rules, all controversies arising out of his employment, including termination, had to be arbitrated—a requirement that Gilmer was not fully aware of at the time. On May 13, 1991, the Supreme Court decided, by a vote of 7-2, that Gilmer was required to arbitrate his statutory claim.

I. THE PRE-*GILMER* LEGAL LANDSCAPE

Before discussing the state of the law almost seven years after *Gilmer* and where it may be going, it is instructive to examine where things were before 1991 and how it was that the *Gilmer* result was reached. In 1953, not so long ago, at least in the annals of law, the Supreme Court decided, in another 7-2 decision, that statutory claims could not be arbitrated. The case was *Wilko v. Swan,* and the statute under consideration was the Securities Act of 1933. The opinion was written by Justice Reed; Justice Jackson wrote a concurring opinion and Justice Frankfurter wrote the dissent. Reading each of these opinions in light of the legal landscape in 1998 is fascinating, for the concerns expressed then resonate today.

Wilko was a customer of a brokerage house known as Hayden, Stone and Company. He sued Hayden Stone for misrepresentation. Hayden Stone argued to the Court that Wilko had signed an arbitration agreement, as indeed he had, and therefore was required to arbitrate his statutory claim rather than sue. In its argument, Hayden Stone asserted that arbitration

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was "merely a form of trial to be used in lieu of a trial at law."

In reversing the Second Circuit, the Supreme Court declared the arbitration agreement invalid, asserting that Wilko could not be compelled to waive the right to sue in a judicial forum, a right that the Securities Act had conferred. The Court assumed—indeed, all nine justices assumed—that the arbitrators would be bound by and would have to follow the law, even though the arbitration agreement specified no such requirement. But the majority went on to emphasize that an arbitration award could be rendered without a statement of reasons explaining the result and without a record of the proceedings, making it impossible for a court or anyone else to examine the arbitrator’s understanding of the meaning of the law or its procedural or substantive requirements. The Court also stated that pre-dispute waivers of the right to sue were suspect because they had to be signed before customers could assess the consequences of the waiver.

Justice Jackson, as I mentioned, concurred in the result in Wilko. In hindsight, his only caveat seems prescient. Citing the encouragement of arbitration in what is now known as the Federal Arbitration Act of 1925 (FAA), Justice Jackson suggested that a post-dispute, rather than a pre-dispute, agreement to arbitrate statutory claims could pass muster.

Justice Frankfurter, having fewer concerns about arbitration generally, dissented and would have permitted the arbitration of the statutory dispute to proceed. He noted, however, that if the arbitration of statutory claims were to be approved, some basis for judicial review—a record, an arbitral opinion, or both—would be required, for "want of it [would] upset the award."

It was not very long before this judicial hostility to arbitration took a very different turn. When faced with the enforcement of labor-management agreements to arbitrate, the Supreme Court recognized that companies and unions, standing on relatively equal footing, had voluntarily fashioned private methods of dispute resolution to which they should be held. The case was Textile Workers Union v. Lincoln Mills. In that 1957 decision, the Supreme Court, in compelling an agreement to arbitrate, fashioned a substantive federal labor policy based on section 301 of the Labor Management Relations Act (LMRA). Though Justice

13. See id. at 436.
14. See id. at 435.
17. Id. at 440.
Frankfurter, again in dissent, characterized the decision as attributing an "occult content" to the "empty darkness" of section 301, the majority abandoned, as the Petitioner union hoped it would, the previously expressed judicial hostility to executory agreements to arbitrate in the collective bargaining context. Of equal importance, the Court avoided wrestling with the scope of the "contract of employment" exclusion in the FAA, about which the majority did not say a word.

In 1960, some three years after *Lincoln Mills*, the Supreme Court decided three cases that came to be known as the *Steelworkers Trilogy*. In those rulings, the Court emphatically approved the arbitration of labor-management disputes and sought to protect the decisions of labor-management arbitrators from what it considered unwarranted and unwise judicial intrusion. The majority accepted the union’s argument—an argument with which I agree—that labor arbitration, rather than being a substitute for litigation, was and is a substitute for industrial warfare: the strike or the lockout. Justice Douglas, writing for the Court in *Warrior & Gulf*, stated that the "run of arbitration cases, illustrated by Wilko v. Swan, becomes irrelevant."

More than twenty years later, the Court began to reconsider its view of commercial arbitration, which, unlike labor arbitration, is the substitute for litigation. In the 1983 decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court found that the Federal Arbitration Act (FAA), like section 301 of the LMRA on the labor side, created a body of substantive law enforceable in state as well as federal courts, and that all doubts, as in labor cases, should be resolved in favor of arbitration.

*Cone Memorial Hospital* was followed by *Southland Corp. v. Keating* in 1984. In an opinion written by then Chief Justice Burger, who had long favored less litigation and increasing resort to arbitration (i.e., less work for judges and more for arbitrators), the Court struck down the California Franchise Investment Law on preemption grounds. That law,

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20. See id. at 466.
21. The Act exempts from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (West 1970). As discussed later in this article, the Supreme Court has yet to determine the scope of this exclusion.
27. See *Southland*, 465 U.S. at 1.
designed to protect franchisees, had declared unenforceable agreements requiring arbitration of issues arising under the California statute. In a decision characterized by Justice O'Connor in her dissent as an "exercise in judicial revisionism [that had gone] too far," 28 the majority reasoned that the Federal Arbitration Act, passed in 1925, "withdrew the power of the states to require a judicial forum for the resolution of claims [even state statutory claims] which the contracting parties agreed to resolve by arbitration." 29

Beginning in 1985, the Supreme Court turned its attention to federal statutory claims, holding in a series of cases now referred to as the Mitsubishi Trilogy 30 that plaintiffs who had signed general agreements to arbitrate were barred from litigating statutory claims in federal court. In Mitsubishi Motors Co. v. Soler Chrysler-Plymouth, Inc., the Court held that alleged violations of the Sherman Act 31 had to be arbitrated. 32 In 1987 in Shearson/American Express, Inc. v. McMahon, the Court declared that a general agreement to arbitrate controversies barred suits alleging violations of the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act of 1961 (RICO). 33 Finally, in Rodriguez de Quijas v. Shearson/American Express, Inc., the Court, by the slimmest majority, expressly overruled Wilko, finding in 1989 that claims under the Securities Act of 1933 were arbitrable after all. 34

The McMahon decision teaches that the ruling in Wilko had to be read as barring the use of an arbitral forum only when arbitration was deemed inadequate to protect the substantive rights at issue. And the Rodriguez decision, in the course of finally overruling Wilko as "incorrectly decided," 35 suggested that it was difficult to reconcile Wilko's mistrust of arbitration in 1953 with the Court's subsequent decisions sanctioning the arbitration of statutory disputes. Although the Court's path from Wilko's hostile skepticism to its strong and virtually unqualified embrace of arbitration in Rodriguez is evident enough, I suggest that the difficulty alluded to by the Court in reconciling the holding in Wilko with its later decisions is due solely to the Court's refusal to acknowledge the overriding, but generally unstated, policy consideration driving those

28. Id. at 36.
29. Id. at 10.
32. See Mitsubishi, 473 U.S. at 637.
33. See McMahon, 482 U.S. at 238, 242.
34. See Rodriguez, 490 U.S. at 480.
35. Id. at 484.
decisions: clearing the dockets and ridding the courts of certain kinds of cases, particularly those considered less prestigious or less worthy of their attention.

Justice Blackmun said as much in his dissent in *McMahon*, and Chief Justice Burger was even more direct in his 1981 dissent in *Barrentine v. Arkansas-Best Freight System, Inc.* *Barrentine* followed *Alexander v. Gardner-Denver*, and permitted a Fair Labor Standards Act (FLSA) suit in the face of a collectively bargained arbitration clause. In chastising the majority for allowing a suit under the FLSA rather than limiting the employee to a grievance under his collective bargaining agreement, Justice Burger stated that permitting the worker's legal proceeding "runs counter to every study and every exhortation of the Judiciary, the Executive, and the Congress urging the establishment of reasonable mechanisms to keep matters of this kind out of the courts."

Against this backdrop, the result in *Gilmer*, at least to those who closely followed the Court, should have come as no surprise in 1991. In one sense, of course, the decision was a significant extension of previous rulings. For the first time, an agreement to arbitrate a statutory claim was upheld in the employment context rather than the commercial contract context of *Mitsubishi*, *McMahon*, and *Rodriguez*. Yet, in another sense, the result in *Gilmer*, given the aforementioned policy considerations, had the aura of inevitability.

In the *Gilmer* decision, the Court quickly rejected what it characterized as Gilmer's "generalized attacks on arbitration." It also found inapposite its holding in *Gardner-Denver* and the line of collective bargaining agreement cases, such as *Barrentine*, that followed. Borrowing from *Mitsubishi*, the Court told Gilmer: "[B]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." In adopting the argument it had pointedly rejected in *Wilko*, the Court assured Gilmer that nothing had changed because of his arbitration agreement, that he would be well served in arbitration because he had not surrendered any substantive rights afforded by the statute, and that all he had done was change forums.

40. *Barrentine*, 450 U.S. at 752.
42. Id. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).
II. THE IMPACT OF GILMER ON CURRENT ARBITRATION PLANS

The Court’s conclusion in Gilmer—that an employee lost nothing by arbitrating a claim, that substantive statutory rights remained intact, and that only the forum changed—was reached some seven years ago. The following is an example of a mandatory arbitration plan in existence today, a plan which an employee must accede as the price of her job:

The parties agree and consent that the arbitrator shall not be empowered to award punitive damages in any claims arbitrated hereunder. This waiver of punitive damages shall apply to any claims which may proceed in a court of law in the event a court determines that the agreement herein or agreement to arbitrate a specific claim covered herein is not binding.43

A section in the same plan provides: “Pre-hearing discovery . . . shall consist only of there being a mutual exchange of lists containing the names of witnesses . . . and a copy of all proposed exhibits.”44

Another plan in force today contains the following provisions:

Each party may depose up to two individuals for a total deposition time of not more than eight hours. . . . Each party shall be required to provide only as much information and/or documents to the requesting party as the producing party can reasonably locate and assemble within an eight-hour time period.45

If the deposition exceeds eight hours, the terms of the plan specify that the producing party “shall solely determine the nature and amount of the requested information” it will produce.46 The same plan permits employees to see their personnel files and to request additional information not in their files. However, the company is not required to provide any of this information. Moreover, “employees shall not directly or indirectly attempt to obtain information to support their concerns/claims from other [company] employees outside the limitations of this procedure.”47

Think of the restrictions: two depositions, an hourly limitation on


44. Dolan & Weckstein, supra note 43.
45. Id.
46. Id.
47. Id.
search for materials, and a ban on seeking information by other means. Couple those limitations with the ethical constraints a lawyer faces in seeking to talk to other employees of the corporate employer, a great many of whom are protected as "clients" under other decisions of the Court, and certainly one can see—that nothing had changed but the forum.

Under the plan quoted directly above, the arbitrator is required, no matter how complex the case, to limit the hearing to two eight-hour days. Other plans in existence today have thirty-day time limits for filing "any claim based . . . on federal, state, or local law, such as discrimination, whether constitutional, statutory, or common law." Just last December, Federal District Court Judge Robert Sweet, at the New York City Bar Association's Leslie Arps Lecture, made the case for a constitutional right to a lawyer in civil cases for those who could not afford one. Yet, there are mandatory arbitration plans that forbid representation by counsel even though a claimant can afford it. Other plans prohibit post-hearing briefs. Some plans, like one of the examples quoted above, prohibit punitive damages or an award of attorney's fees, while others condition or even prohibit reinstatement. Still others require review as if the court were reviewing the decision of a trial court sitting without a jury. Such plans are the creation of major employers who have found it to their advantage to do just a bit more than change a forum.

None of these employers are members of the NASD, but the NASD system, to which Gilmer was subject, also involved much more than a change of forum. I am well aware that the NASD, at the urging of the Securities and Exchange Commission (SEC) and many other organizations, including the National Academy of Arbitrators (NAA), has proposed that mandatory arbitration of statutory claims be eliminated as an industry-wide condition for employment. The NASD is to be commended for that step, which will probably not take effect until 1999, even though it took some time to get there. It appears, however, that the NASD will still permit member firms to mandate arbitration for their own employees. Evidently, the proposal now under consideration would require that the plans of member firms operate under guidelines based on the Due Process Protocol for the Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (Due Process Protocol), initiated by the NAA. Even if the NASD's proposed step forward prevails, the plans of individual employers will still be mandatory, thus depriving employees

49. Dolan & Weckstein, supra note 43.
50. See Robert W. Sweet, Civil "Gideon" and Justice in the Trial Court (the Rabbi's Beard), 52 RECORD ASS'N B. CITY N.Y. 915, 924-28 (1997).
51. See supra text accompanying note 43.
and applicants for employment of their choice of forum.

As for today and at least the next year, the still-mandatory NASD system does not provide for neutral arbitrators, as that term is commonly understood. The current NASD arbitrators have been chosen by representatives of the industry. Though occasionally some "public" arbitrators have been added, there is little indication that the industry's control of the process by which the arbitrator pool is selected will change, even though the mandatory nature of the industry-wide system may be abandoned. Moreover, arbitrators are not currently assigned to employment or statutory disputes based on their knowledge of the law. In fact, the manual given to NASD arbitrators provides that arbitrators need not follow statutory law because they are not "bound" by it, a guideline their training evidently reinforces. In addition, as a 1994 GAO study pointed out, the panel's composition does not reflect our world: almost ninety percent of the arbitrators on that panel were, like myself, white males over sixty.

Under NASD procedures, discovery, so important in cases of this kind, is somewhat limited and not readily available. As for remedies, NASD arbitrators are not required to award attorney's fees in cases where statutes either permit or require such fees, and they are not required to award punitive damages in instances where the courts would do so. There is a great deal more. Although parties to NASD proceedings may request a reasoned award, an arbitrator is bound to this request only if it is made by both sides. Moreover, the NASD and the NYSE do not encourage written opinions. In fact, the Arbitrator's Manual reminds arbitrators that, under present law, reasons for a decision are not required.

It is obvious that substantial policy issues, and possible constitutional issues, are raised when arbitrators of statutory disputes do not know the law or, even if they know it, are told that they need not follow it. It is equally obvious that similar issues are raised when arbitrators need not give reasons for their determinations, thus precluding effective judicial review. At times, reasoned opinions are in fact written under NASD

55. More recent information indicates that female representation has improved somewhat from 11% in 1994 and now stands at approximately 16%.
procedures. However, a typical opinion merely summarizes the issues, indicates who won, and if the employee was victorious, the amount awarded. A district court judge in New York recently referred to one of these opinions as "brief and cryptic,"57 a Massachusetts district court judge characterized other arbitral decisions as "mysterious."58 Without an appropriate statement of the facts and an explanation of the reasons for the award, these summaries yield precious little information about the facts of the case and its outcome—whether the claimant’s statutory rights were or were not vindicated—both for the claimant and for employees who may find themselves in a similar situation in the future. In the context of adjudicating public law issues, private proceedings and short-form awards, as now countenanced, are inadequate and unacceptable. Although the NASD proclaims that awards issued under its rules are made publicly available, those awards have little meaning if there is virtually nothing to inspect.

On this point, the proposed settlement in Martens v. Smith Barney59 is of interest. The settlement has yet to be approved and has some aspects, such as a rebuttable presumption against depositions, that are less appealing than others. However, several elements of the proposed settlement represent steps forward. For example, the settlement abandons NASD arbitration in favor of three-person panels of neutral arbitrators knowledgeable in arbitration and the law, at least one of whom must be a woman. In addition, there is a voluntary mediation step, and the cost of mediation and arbitration is to be borne by the employer. The employer also pays the cost of counsel if the claimant prevails and pays part of that cost even if the claimant loses. Certain defenses, such as reliance on after-acquired evidence, have been eliminated, and discovery is controlled by the panel.

Importantly, the agreed-upon process requires written opinions reviewable under section 10 of the FAA, and unless the claimant objects, proceedings that are open to the public and to media representatives. Open hearings are an overdue recognition of a point that I and others have been making for some time: that issues of public law should be publicly heard. To those familiar with labor arbitration, this step may come as a surprise. Labor arbitrations are private proceedings; confidentiality is the watchword. Indeed, the proceedings that come immediately to mind pertain only to the parties involved and deal with contractual issues particular to them. The proceedings to which I am referring are different. They concern public law questions in which we all have a stake, and the

claimants in these proceedings act as "private attorney[s] general... vindicating a policy that Congress considered of the highest priority." Consequently, the public interest provides a much greater reason for the proceedings to be open if the claimant so desires. There is also greater reason for opinions to be reasoned and decisions to be publicly available, even published as a matter of course, with any redacting that may be required.61

Let me return for another moment to the NASD. Concern about its procedures recently led the National Academy to file its first amicus brief in a court of appeals case; in the Academy’s fifty year history, the organization had only filed three amicus briefs, all in the Supreme Court. The brief was filed in the summer of 1997 in Duffield v. Robertson, Stephens,62 a case currently pending in the Ninth Circuit. The Duffield case involves a broad attack on employment dispute arbitration in the securities industry as it now exists and will, in many respects, continue. Unlike what the Gilmer Court dismissed as a “generalized attack on arbitration,”63 the attack in Duffield, bolstered by a detailed analysis of NASD proceedings, indeed every NASD employment case, is specific. The Academy authorized the filing of an amicus brief in Duffield because research revealed procedural failings in the NASD arbitration system, failings that should give anyone concerned with fairness considerable pause. In that light, we thought it important that the Appeals Court have the benefit of our views.64

All of these shortcomings, all of these restrictions in NASD procedures and elsewhere, are simply inconsistent with the Academy-initiated Due Process Protocol. While I am aware that the Protocol is often referred to as the ABA Protocol, if history is to have meaning, one must remember that the idea of the Protocol, as well as the Task Force that


61. Public proceedings and opinions published as a matter of course would require an amendment to section 2C of the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes (the Code). The Code, a joint product of the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service, is now applicable to the arbitration of statutory disputes in the employment setting.


64. In Rosenberg, the attack on the NASD system was also specific. In that decision, Judge Gertner, after a detailed examination of the evidence, found the NASD and NYSE systems structurally biased in favor of the industry. In denying Merrill Lynch’s motion to compel arbitration, the court held that “the employer’s... dominance of the NYSE arbitration [made] it an inadequate forum for the vindication of civil rights claims.” 1998 U.S. Dist. LEXIS 877, at *74.
created it, was sparked by then Academy President Arnold Zack’s testimony before the Dunlop Commission. The Academy was also one of the first participating institutions to endorse the Protocol after its unanimous adoption by the Task Force members on May 9, 1995.

As I mentioned earlier, the language in *Gilmer*—that arbitration was only a change in forum—came from the decision in *Mitsubishi*, the 1985 case in which a divided Court held that a Sherman Act antitrust claim arising out of an international transaction could be arbitrated pursuant to an arbitration agreement. What the *Gilmer* Court ignored then and what the NASD and many other institutions overlook now when they tell us that arbitrators need not follow the law was another principle enunciated by the *Mitsubishi* Court: if claims arise from the application of American antitrust law, the tribunal should be bound to decide that dispute in accord with the national law giving rise to the claim. Clearly, what is appropriate for international transactions—following the applicable law—should be appropriate for statutory disputes confined to our own shores.

III. TOWARD A WORKABLE EMPLOYER ARBITRATION PLAN

Certainly, decent arbitration plans exist, as I and many others would acknowledge. By no means do all plans reach the depths of the infamous one promulgated by Hooters of America. I know that some plans require that the law be followed; that some provide adequate procedural protections and permit representation by counsel; and that some even pay at least a portion of a claimant’s counsel fees. The plan long in existence at Brown and Root is an example of a good arbitration plan, as are those in effect at Rockwell International and TRW. The recently implemented United Parcel Service plan, like the internal plan of the American Arbitration Association, requires mediation, but, significantly, does not command arbitration. Rather, it permits arbitration at the employee’s option. Having gone through the required step of mediation, the employee can elect to sue. But if the employee chooses arbitration, he may also unilaterally choose the source from which the arbitrator will be selected—

66. *See id.* at 636-37.
67. Judge Denise Cote’s decision in *DeGaetano*, which declared Smith Barney’s arbitration policy void to the extent that it waived DeGaetano’s right to obtain attorney’s fees as a prevailing Title VII plaintiff, is a spirited case in point. *See DeGaetano*, 75 Fair Empl. Prac. Cas. at 587.
the AAA, Jams/Endispute, or another recognized impartial provider.

Yet, as the EEOC and others point out, even decent plans, if mandatory with arbitration as a mandatory final step, raise significant questions. For this reason, although the legislative history of the Civil Rights Act of 1991 is generally considered ambiguous, it is not surprising that the EEOC has interpreted it as permitting voluntary arbitration and prohibiting mandatory arbitration. On the other hand, it is not altogether surprising that a number of courts have rejected the EEOC's view.

Those rejections, I hasten to say, and court approval of mandatory arbitration plans, is not, in my estimation, driven by any firm conviction that the EEOC is wrong. The plain fact is that many judges do not like discrimination cases. They would rather have them out of the courtroom. In the ten years preceding the passage of the 1991 amendments to the Civil Rights Act of 1964, annual filings of discrimination cases rose marginally from 8,000 to 9,000. Following the 1991 amendments, which guaranteed jury trials and provided for punitive damages, annual filings rose from 10,771 in 1992 to 23,152 in 1996. Couple this dramatic rise in discrimination cases with the rise in federal drug cases, the time taken up in sentencing procedures and prisoner petitions, and the shameful shortage of federal judges, and you can begin to discern explanations.

Circuit courts even began responding to this greatly increased discrimination caseload with what Professor Pat Hardin of the University of Tennessee calls "deterrence"—making it harder for plaintiffs to win, thus discouraging or barring future plaintiffs. Just look at the circuit court decisions in McKennon v. Nashville Banner (after-acquired evidence bars all recovery), O'Connor v. Consolidated Coin Caterers (replacement by someone in a protected class is not discrimination), EEOC v. Metropolitan Educational Enterprises (the narrow "method of counting employees" for determining coverage under Title VII is appropriate), and Robinson v. Shell Oil (former employees are not protected). It is no small irony, as Hardin has pointed out, that the Supreme Court, which was the first to start chipping away at statutory protections with its rulings in

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75. 60 F.3d 1225, 1230 (7th Cir. 1995), rev’d, 117 S. Ct. 660 (1997).
Wards Cove Packing Co. v. Atonio\textsuperscript{77} and St. Mary's Honor Center v. Hicks,\textsuperscript{78} has unanimously overturned these subsequent narrowing decisions and has become, at least for now, the "honest cop."\textsuperscript{79} Yet the Court, while overturning these decisions and expressing a present preference for an expansive view of these statutory protections, has also expressed an indifference to what actually goes on in mandatory arbitration plans, as \textit{Gilmer} made clear.

Some contend that mandatory arbitration plans may be the wrong target, that the focus should not be on whether a plan is or is not mandatory, but on whether it's fair, and that we should be content with mandatory plans as long as they are fair. The argument, made last summer at the ABA Annual Meeting by my friend and future Academy President Ted St. Antoine, is this: in light of an overworked and underfunded EEOC, the backlog in the courts and their aversion to statutory discrimination cases, as well as the cost of litigation and the difficulty of finding a lawyer willing to invest the time and energy in what will usually be a protracted legal battle, most employees might arguably be better off with mandatory arbitration, provided those systems have due process guarantees and offer the full range of statutory remedies.\textsuperscript{80}

Professor Samuel Estreicher, a long-time advocate of mandatory plans, asserts that employees subject to mandatory plans would in fact be better off. According to Estreicher, "A judgment has to be made... whether the benefits of allowing the parties to shape their own dispute resolution mechanism outweigh the attendant costs to the parties and to the public policy objectives of the statutes in question."\textsuperscript{81} Once that judgment is made, presumably in favor of mandatory plans, we need do no more than make sure the plans are fair.

It is, I would suggest, both naïve and unrealistic to assume that the parties in an existing or prospective employment relationship are shaping their own dispute resolution mechanisms. Except in the case of the highly sought-after executive, mandatory plans are not mutually made. As recent history teaches, employers and employees do not, contrary to what

\textsuperscript{77} 490 U.S. 642, 657 (1989) (limiting the comparison pool in disparate impact cases).
\textsuperscript{78} 113 S. Ct. 2742, 2754 (1993) (holding that proof of pretext is not necessarily enough for the plaintiff to prevail).
\textsuperscript{79} Hardin, \textit{supra} note 72. Mr. Dooley reminded us long ago that the Court followed the election returns. Since the Court acted in the aforementioned cases only after Congress expressly overruled \textit{Wards Cove} in 1991, it might be said that the Court, at least in this instance, also heard Congress.
\textsuperscript{80} See, e.g., Theodore J. St. Antoine, Mandatory Arbitration of Employment Disputes, Address at the ABA Labor & Employment Section Annual Meeting (Aug. 4, 1997) (transcript on file with author).
Estreicher seems to believe, "negotiate a contract that meets their joint objectives." Plans are unilaterally designed by employers and then put forward as a mandatory condition of employment. If the employee or prospective employee does not agree, she must go elsewhere, presuming that an "elsewhere" exists. Indeed, Estreicher recognizes the absence of any opportunity for negotiation when he argues that an employer's plan must apply uniformly to all employees, and that the real issue is whether such a plan, if adhering to the right standards, is "socially desirable."

I do not dispute that arbitration, if appropriately designed and implemented, can be socially desirable and a suitable forum to resolve public law disputes. But because individual employees have neither the power nor the resources to bargain for the conditions of their employment, the question is whether arbitration plans, no matter how desirable, should be mandatory. The answer to that question does not rest on the principles of Benthamism or, as my Trekkie friends would have it, its intergalactic parallel of Vulcanism. Instead, the fundamental principle is the individual's right to choose arbitration or the courts. And if an arbitration plan is fair and fairly explained, employees and prospective employees will choose to be bound by it.

If I am right as to this fundamental principle, we should continue to contend that voluntary arbitration is the appropriate approach. Our insistence will not impede arbitration as some seem to suggest. It will strengthen arbitration and foster the fairness on which its growth depends. In my judgment, mandatory arbitration is less and less a viable option for employers. The momentum is against it; its days are numbered. Spurred by the plans some employers have adopted, questions of fairness are being raised more frequently and more urgently. The National Academy has taken a strong position against mandatory arbitration, as have the EEOC and the General Counsel of the NLRB. The AAA, Jams/Endispute and other organizations, all hesitant at first, now actively encourage voluntary agreements. Legislation has been proposed in both houses of Congress—in the House by Representative Markey of Massachusetts and in the Senate by Senator Feingold of Wisconsin—to ban mandatory, pre-dispute agreements to arbitrate statutory disputes and to require that such agreements be voluntary and post-dispute. The development of this growing pro-voluntary sentiment was well traced in *DeGaetano*. Given this rising tide and the increasingly close scrutiny of mandatory systems exemplified by the analysis in *Rosenberg*, the price of sticking with

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82. *Id.* at 1354.
mandatory arbitration is relatively high and, I would suggest, not worth the candle even in the short term.

So what is an employer to do? My answer is: "Make it voluntary. Make it fair. If you build it, they will come." I say this because nobody relishes or wants litigation. With litigation comes its costs, its abrasiveness, the time it takes for a final resolution of a dispute, and the sometimes unbearable drain on the energies of the parties and their counsel. Endless discovery, the courtroom drama, and drawn-out appeals take their course. Employers do not want to be involved in litigation. Employees, once they realize what it takes, do not want it either. Even though the lead plaintiff opted out of the class in Martens, the proposed settlement in that case stands as an example of my thesis: fully a year and a half had gone by and Smith Barney had yet to answer the complaint; almost everyone knew that the case, if it continued, might never end. The courts certainly do not want this litigation. Even the plaintiff bar, as represented by the leadership of the National Employment Lawyers Association, does not want it. A review of cases in various stages of litigation, including Duffield, Martens, Stirlen v. Supercuts, Inc., Cheng Canindin v. Renaissance Hotel Assocs., or Hooters of America, Inc. v. Phillips, demonstrate that the resistance is to unfair mandatory systems.

If a voluntary system is fair, it will work. People will choose to arbitrate rather than face the difficulties of litigation. Some employees and, indeed, some employers, may choose to litigate a particular matter rather than arbitrate it, especially where an area of the law is hotly disputed. Such cases, however, should be relatively few in number. If an arbitration system is fairly designed and implemented, most employees will see it as more advantageous than litigation and will likely choose that alternative. Moreover, a system that is fair to both sides, one which parties can voluntarily opt for after a dispute arises and, perhaps, even before one arises, has the potential of reconciling the divergent interests of employer and employee. A unilaterally imposed condition-of-employment system simply cannot accomplish this goal.

There will be a debate, of course, as to the meaning of "voluntary" in this context. In Prudential Insurance Co. v. Lai, the Ninth Circuit, which has carefully scrutinized mandatory arbitration issues, spelled out what is

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89. 51 Cal. App. 4th 1519 (1997) (affirming trial court's determination that employer's arbitration agreement was part of a contract of adhesion).
90. 50 Cal. App. 4th 676 (1996) (refusing to compel arbitration because procedure lacked minimum level of impartiality).
meant by a "knowing and voluntary waiver." Courts that have criticized the standard applied in *Prudential* have not been as sensitive to the inequality of bargaining power present in many, but by no means all, of these situations. Though there will be a debate, there is a standard that can be applied. Adaptation of the detailed waiver language required under the Older Workers Benefit Protection Act may well suffice as evidence of the knowing and voluntary nature of one's consent. The point is that the chances for approval of a pre-dispute agreement in which arbitration is required will be enhanced if it is offered without strings and with a guarantee against retaliation or disparate treatment if the offer is not accepted.

Three final points remain: (1) the standard of review that should be applied to the arbitration of statutory disputes; (2) the interplay of collective bargaining agreements and statutory issues; and (3) what the Court may do with the critical question *Gilmer* left unanswered—whether the holding, which was limited to *Gilmer*'s registration application and thus applicable only to those employed in the securities industry, will be applied to contracts of employment generally.

A. *The Standard of Review*

As a preface to the standard of review issue, the position the Board of Governors of the Academy adopted in May 1997 deserves mention. When the Board voted to oppose mandatory arbitration of statutory disputes, it knew that, under present law, mandatory arbitration was permissible and, indeed, encouraged. It could have decided that Academy members should not take such cases, a position that was considered but ultimately rejected because it could have left the field to some less concerned with fair procedures. Instead, the Board chose to use the prestige of the Academy and its members to influence the continuing debate. Accordingly, the Academy indicated that members could take such cases. However, we also adopted guidelines so that members could evaluate the procedures in which they were asked to serve in hope that the Academy could bring about change where change was required. Moral suasion, we have found, can be effective.

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92. 42 F.3d 1299, 1305 (9th Cir. 1994), cert. denied, 64 U.S.L.W. 3240 (U.S. Oct. 2, 1995) (No. 94-1923); see also Renteria v. Prudential Ins. Co., 113 F.3d 1104, 1105-06 (9th Cir. 1997).


In this paper, I will not go over the Board’s guidelines in any detail. I do suggest, however, that the Due Process Protocol and the Guidelines, which were designed to ask the right “Beyond the Protocol” questions, can serve as paths to a fair plan. The Guidelines essentially require that the arbitrator act as a substitute for a judge. They presuppose that the arbitrator knows the law, the burdens of persuasion and proof applicable to the statutory claim at issue, and whether the available remedies are permissible or mandatory. If the arbitrator does not possess the knowledge, the Protocol and the Guidelines suggest proper training before undertaking cases. Of particular importance for the future, the Guidelines require the issuance of an opinion which recites the findings of fact and the reasoning underlying the conclusions of law contained in the opinion and award and which identifies and deals with all statutory issues raised.

There are two basic reasons why the Academy urges written opinions. One reason, of course, is that the rigor of writing makes for better results; writing an opinion justifying your conclusions makes you think—indeed, makes you think you may be wrong. The second reason is equally simple: written opinions mean reviewable decisions. The availability of review is essential; there is no substitute. These cases deal with public law, and public law requires public accountability. In addition, reviewable decisions encourage greater uniformity across the land, to the extent that the circuit courts can ever agree.

The question still remains: what standard of review should be applied to arbitration decisions? When I began to think about the standard of review that would be applicable to statutory disputes, I was concerned that a more rigorous standard of review in this area would give activist judges room to intrude even further into another area, the self-contained governmental system we call collective bargaining. I am less concerned about this possibility since David Feller convinced me that the “manifest disregard of the law” standard, discussed by Judge Edwards in Cole v. Burns International Security Systems, is appropriate in cases of this kind. This standard is less intrusive than the “plain meaning rule” that the Fifth Circuit and some other circuits now use in cases arising under collective bargaining agreements. Under the “plain meaning rule,” a judge who

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95. Those who have yet to see the Guidelines can find them on the American Academy of Arbitrator’s web site <http://www.naarb.org>. They are also on the Academy’s web site <http://www.adr.com> and on the Willamette Law School’s site <http://www.willamette.law.edu>.

96. Professor Feller, the John H. Boalt Professor of Law Emeritus at the University of California School of Law and a past president of the National Academy, argued the Steelworkers Trilogy for the Steelworkers’ Union and was also instrumental in labor’s earlier victory in Lincoln Mills.

97. 105 F.3d 1465, 1486-87 (D.C. Cir. 1997).

98. See, e.g., Bruce Hardwood Floors, Div. of Triangle Pacific Corp. v. UBC,
disagrees with an arbitrator’s determination can set aside the arbitrator’s interpretation of a contract, notwithstanding that it was the interpretation for which the parties bargained if, in the judge’s opinion, that interpretation is contrary to the contract’s plain meaning. In contrast, under the “manifest disregard of the law” standard applicable to commercial arbitration and, it seems, to the arbitration of statutory disputes, a judge can set aside a decision only if it is clear from the record, not that the arbitrator may have misread or misinterpreted the law, but that the arbitrator recognized the applicable law and then proceeded to ignore it.99

The Second Circuit’s decision in DiRussa v. Dean Witter Reynolds, Inc.,100 illustrates this point well. Under the ADEA, a “prevailing party” is entitled to attorney’s fees.101 The arbitrators in DiRussa did not award attorney’s fees, and an attempt was made to overturn that portion of the decision as in “manifest disregard of the law.”102 The court disagreed, saying that the arbitrators did not disregard the law; rather, they were unaware of it and no one informed them.103 Thus, the second point of DiRussa is this: if you are claimant’s counsel, do not fail to inform arbitrators of the relevant law.

It is possible, and perhaps even probable, that the standard of review applicable to statutory disputes ultimately may be even more stringent than it now appears. After all, Judge Edwards went beyond the general understanding of the “manifest disregard of the law” standard, saying that the assumptions underlying Gilmer were “valid only if judicial review under the ‘manifest disregard of the law’ standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.”104 With such language, we may rapidly approach and ultimately reach the “absolute correctness” standard set forth in McLeod v. Egan,105 a standard which Canadian arbitrators interpreting statutory law have had to live with for more than twenty years. This stringent standard may not be inappropriate for an area such as this, but the precise standard of review ultimately required by the Court to effectuate public policy remains to be seen.

Irrespective of the standard of review that may evolve in statutory

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100. 121 F.3d 818 (2d Cir. 1997).
102. See DiRussa, 121 F.3d at 821.
103. See id. at 822-23.
dispute cases and the fact that a transcript may be required in addition to a reasoned opinion, it is inappropriate, in my judgment, to impose a review of an arbitrator’s factual findings akin to the review of agency factual findings under the Administrative Procedure Act.\(^{106}\) The Bar Association of the City of New York’s Committee on Labor and Employment Law, in its comments on the Due Process Protocol, has suggested such a review to determine if there is “substantial evidence” to support the arbitrator’s findings.\(^{107}\) This approach would simply rob arbitration of its utility and, in my estimation, is dead wrong. For years, arbitrators have sorted out conflicting testimony and ascertained the facts in both simple and complex cases. In accord with Supreme Court doctrine, their judgments have long been accepted.\(^{108}\) To subject arbitral fact-finding to judicial review would simply invite appeals, extending the process and sapping arbitration of its core values of speed and efficiency. While arbitrators, like parties, need to be educated in the law as they move into the area of statutory disputes, they can still be relied upon to determine the facts.

B. Collective Bargaining Issues and Statutory Disputes

As to the effect of a collective bargaining agreement on the arbitration of statutory disputes, the Court has only now entered into that debate. In the past two years, it denied petitions for certiorari in both the Fourth Circuit’s decision in *Austin v. Owens-Brockway Glass Container, Inc.*,\(^{109}\) which, in effect, said that *Gardner-Denver* was no longer the law, and in the Seventh Circuit’s decision in *Pryner v. Tractor Supply Co.*,\(^{110}\) which said that *Gardner-Denver* remained the law. In *Brown v. TWA*,\(^{111}\) the Fourth Circuit recently backed down a bit from its departure from *Gardner-Denver* when viewing this issue through the lens of the Railway Labor Act. Nevertheless, Judge Posner’s decision in *Pryner* provided the Supreme Court with the perfect opportunity to resolve the dispute surrounding the effect of a collective bargaining agreement on the

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107. On file with the Bar Association of the City of New York and with the author.
109. See 78 F.3d 875, 886 (4th Cir. 1996), cert. denied, 117 S. Ct. 432 (1996) (holding that an employee must go through arbitration before pursuing a claim under Title VII).
110. See 109 F.3d 354, 363 (7th Cir. 1997), cert. denied, 118 S. Ct. 329, (1997) (holding that a collective bargaining agreement cannot compel an employee to arbitrate a Title VII statutory claim).
111. See 127 F.3d 337, 342 (4th Cir. 1997) (holding that in a collective bargaining agreement governed by the RLA, both Title VII and Family and Medical Leave Act claims are beyond the scope of the mandatory provisions of the agreement).
arbitration of statutory disputes. But the Court refused to act. However, it has now acted, taking certiorari on March 2, 1998, in *Wright v. Universal Maritime Service Corp.*, an unpublished disposition of the Fourth Circuit that followed its holding in *Austin*.

The Court's hesitancy in this area generated an intense debate among union lawyers and various commentators as to how best, in this period of uncertainty, to resolve the tension between majority and minority interests that may exist within a union and the tensions between a union's interest and the interests of individual employees. Some who have considered this issue advocate the elimination from collective bargaining agreements of all references to statutes, leaving union members free to pursue statutory remedies and ridding unions of the duty of fair representation claims in this area. Others argue that employment contracts should prohibit discrimination without specific reference to statutes, an approach designed to preserve the *Gardner-Denver* "one bite out of two separate apples" result. Still others in the debate suggest that statutes should be specifically referenced, despite the possibility that under such clauses arbitrators may lack the power or the inclination to award statutory remedies. They also express concern, as I have, about the effect such specific references will have on the standard of review normally accorded arbitral decisions under collective bargaining agreements.

The other issue in this area—a concern more for the employee than the union—is whether the union can ever prospectively waive an employee's statutory rights. On this point, Max Zimny of UNITE and Mitchell Kraus of the Transportation Communications International Union have suggested that the arbitration of statutory disputes be "*Gilmerized*"—that there be a separate procedure for the arbitration of statutory disputes in which the employee, rather than the union, controls the process.

Each of these approaches has its problems. As Janet McEneaney of the Office of Collective Bargaining describes the situation, each proposal "has something for everyone not to like." Until the Supreme Court clarifies the law, we cannot be sure of the efficacy of any approach. It may be that the Eleventh Circuit had it right in *Brisentine v. Stone & Webster Engineering Corp.*, a case in which the Court decided that a collectively bargained arbitration clause barred litigation of federal statutory claims

113. See 78 F.3d at 886.
only if (1) the arbitration agreement expressly authorized an arbitrator to resolve such claims; (2) the individual employee had expressly agreed to that provision; and (3) the employee could compel arbitration even if the union disagreed. But, as McEneaney points out, even if this approach is ultimately approved, many vexing questions will remain, including those pertaining to issues of financial responsibility for processing the claim and access to independent counsel.

C. Gilmer’s Application to Contracts of Employment

Now to my final point. Gilmer did not deal with an employment agreement, or so the Court said. Thus, the Court finessed the question of the FAA’s applicability to contracts of employment, declining to examine and decide the scope of the FAA’s exclusion of employment contracts of “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The issue, of course, is whether the exclusion is applicable to all contracts of employment in interstate commerce or whether it only excludes contracts of seamen, railroad workers, or others directly involved in the transport of goods—what some have called the “schlepper rule.” According to the majority opinion, Gilmer had signed a securities registration application which, in the Court’s view, was not a contract of employment. Thus, it is difficult to know with any certainty whether managerial and non-represented employees who sign or are otherwise bound by employment agreements will be required to arbitrate their statutory claims under the FAA, or whether Gilmer will be confined, as it is now, to the securities industry. The Court, as it said, has left that “scope of exclusion” question “for another day.”

That day will arrive and when it does, it is altogether likely that the Court will select the narrow interpretation adopted by the overloaded courts below. As Professor Matthew Finkin has convincingly demonstrated, both before and after Pryner, those courts are wrong in that they have completely misread the FAA’s legislative history. Nevertheless, our highest court, driven by a host of policy considerations, will most likely agree with them. Finkin points out that Congress, not the

116. See 117 F.3d 519, 526-27 (11th Cir. 1997).
117. See McEneaney, supra note 115.
118. See Gilmer, 500 U.S. at 25 n.2.
120. Gilmer, 500 U.S. at 25 & n.2.
courts, is the proper forum to sort out these issues, since it was Congress that avoided the policy questions inherent in unilaterally promulgated employment arbitration plans in 1925. But it may well be, given its history in the area of arbitration, that the Court will choose to act.

Unless the Court curtails its activist expansion of the FAA, which began with *Southland* and *Mitsubishi*, we can expect an enormous expansion of *Gilmer*'s reach when it finally deals with the FAA "contract of employment" exclusion. In that event, the consequences of *Gilmer* and its effect on all of us—employers, employees, practitioners, and, if I may add, mediators and arbitrators—will be with us for a very long time.

Since the Court seems unwilling for now to confront the inequality of bargaining power inherent in the typical relationship between an employer and an individual employee and the consequent unfairness of arbitration systems imposed as conditions of employment, I do not expect that the Court's anticipated extension of *Gilmer*'s scope will be tempered by due process considerations or protective guidelines. Certainly, nothing we have seen since *Gilmer* suggests attention to these concerns. As a consequence, it will be up to employers—and in those situations where a union joins the process, up to the union as well—to adopt systems built on the principles of the Due Process Protocol and the Academy Guidelines. Only then will the arbitration of statutory disputes over civil rights claims be what the Court mistakenly said it was in *Gilmer*—solely a change in forum—not more but certainly not less.