ARBITRATING SECURITIES INDUSTRY EMPLOYMENT DISCRIMINATION CLAIMS: RESTRUCTURING A SYSTEM TO ENSURE FAIRNESS

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Courts, legislators, agencies, and employees of the securities industry are calling into question the present system requiring individuals to prospectively waive their right to a judicial forum and arbitrate their individual employment disputes in the forums specified by the securities industry. Even employers are conceding that the present system may not

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1. See, e.g., Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756, 762 (9th Cir. 1997) (concluding that employees' statutory rights are not all completely or automatically waived by signing an arbitration agreement); Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1467-68 (D.C. Cir. 1997) (distinguishing between arbitration agreements, and noting that the court will enforce only those "that do not undermine the relevant statutory scheme"); Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 965 F. Supp. 190 (D. Mass. 1997), aff'd on other grounds, 163 F.3d 53 (1st Cir. 1998).


5. See generally U.S. GENERAL ACCOUNTING OFFICE, EMPLOYMENT DISCRIMINATION, HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES 1, 3 (1994)
work as originally intended. This situation poses an intriguing question: Why are these various constituencies tentative in their support of arbitration, while even the securities industry has enthusiastically supported it?

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

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6. Id. at 4.
7. The charges discussed in this Article relate to Title VII, Americans with Disabilities Act ("ADA"), and Age Discrimination in Employment Act ("ADEA") claims. State statutes and claims based upon various common law claims, such as the intentional infliction of emotional distress, may also be brought. See, e.g., 29 U.S.C. § 623 (1994) (outlawing workplace age discrimination); 42 U.S.C. § 1981 (1994) (guaranteeing all persons the same and equal rights under the law); 42 U.S.C. § 2000e-2 (1994) (outlawing workplace discrimination because of race, color, religion, sex, national origin, or pregnancy); 42 U.S.C. § 12112 (1994) (outlawing discrimination against handicapped individuals who are otherwise qualified for the job). For an example of a state civil rights statute, see the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-3 (West 1993 & Supp. 1998) (opposing discrimination because of "race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, [or familial status]").
8. See GAO EMPLOYMENT REPORT, supra note 5, at 3 (describing the lack of review, oversight, or inspection by the Securities and Exchange Commission of members' securities arbitration programs); see also Christine Godsil Cooper, Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims, 11 ST. Louis U. PUB. L. REV. 203, 219-20 (1992) (examining the EEOC's oversight of antidiscrimination laws and concluding that it has not effectively enforced them).
9. See Glennon v. Dean Witter Reynolds, Inc., 83 F.3d 132, 135-36 (6th Cir. 1996) (discussing the extremely limited circumstances in which an arbitration award might be vacated, such as when it "fl[i]es in the face of clearly established legal precedent"); see also Sharona Hoffman, Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Resolutions?, 17 BERKELEY J. EMP. & LAB. L. 131, 134 (1996) (noting that under
This Article addresses the important policy questions whereby many employees have alleged that they must sign away their Fifth Amendment right to due process, Article III right to an independent judge, and Seventh Amendment right to a representative jury, in favor of a forum sponsored and run by none other than their employers. While the vast majority of courts in the last eleven years have upheld PDAAs, most recently, there has been a demonstrable erosion of support for this system. This in turn has created a high degree of uncertainty in the securities industry regarding the enforceability of PDAAs. This Article discusses the most important cases in this area and in what respects the law remains unsettled.

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

The history of arbitration is briefly outlined in Part I, followed by a background of the major arbitration cases. Part II presents the arbitration of employment disputes in the securities industry and a summary of recent regulatory proposals and cases. Part III discusses the reasons for the changes to the system and proposals that have been made for the future.

I. HISTORY OF ARBITRATION

Part I, which describes arbitration and details how it has evolved, is composed of three sections. Section A provides a general background of arbitration. Section B traces the history of arbitration, beginning with the this "highly deferential standard of judicial review," arbitrators may have little incentive to engage in rigorous analysis and decision making).

10. See U.S. Const. amend. V (guaranteeing that no one will be deprived of life, liberty, or property without due process of law); see also U.S. Const. art. III (providing federal judges with life tenure and salary protection to safeguard the independence of the judiciary); U.S. Const. amend. VII (guaranteeing trials in civil cases). See generally Rosenberg v. Merrill Lynch, Pierce Fenner & Smith, Inc., 965 F. Supp. 190, 192-94, 202 (D. Mass. 1997), aff’d on other grounds, 163 F.3d 53 (1st Cir. 1998).

passage of the Federal Arbitration Act. Section C introduces more specifically cases involving arbitration in the securities industry. Finally, Section D discusses arbitration of employment disputes.

A. General Background of Arbitration

To better understand the issues raised in this Article, it is necessary to know what arbitration is and what it is not. Arbitration may be defined as the process of submitting a disagreement to one or more impartial persons with the understanding that the two parties are bound by the decision.\(^1\) Arbitration is but one ADR technique\(^13\) developed in response to the expense, delays, perceived shortcomings of juries, and the oftentimes negative public aspect of traditional litigation.\(^14\) Arbitration has become favored over litigation, due mainly to speed, cost, and privacy. Disputes are generally resolved faster in arbitration, resulting in drastically lower costs, and the results are not as publicly accessible as in litigation where court documents are, for the most part, in the public record.

Once arbitration has been chosen, any subsequent disputes that the parties may have must be submitted to arbitration. Should one party try to circumvent this arrangement by seeking relief in court, the court is bound to stay litigation until the dispute is decided in arbitration. After this time, should a party wish, judicial review is possible but cursory. Furthermore, changes in the decision will be made only under limited circumstances, such as if there has been a manifest disregard of the law.\(^15\) Parties usually hire counsel to represent them, and arbitrators may be selected and paid for by one or both parties. Discovery in these proceedings is limited. The final decisions and their reasoning may or may not be written.

Arbitration may take place only when the parties agree to it and only

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

for those disputes contemplated in the agreement. Any matters outside the scope of the arbitration agreement are litigated. Parties may agree to arbitrate before or after a dispute arises.

The arbitration agreement may be the product of the parties’ efforts. The troubling and contentious issue is whether the agreement was a bargained-for exchange, or whether it was given to employees on a “take-it-or-leave-it” basis, and not a product of the parties’ efforts. The interest in arbitration and its consequent application began slowly but has gained momentum as lawsuits and legal costs have increased. Arbitration and other ADR techniques are an attempt, especially by repeat players in disputes, to better manage dispute resolution costs. Arbitration, and ADR in general, are wonderfully effective in most cases. ADR must be supported as it has a vital role in dispute resolution. Arbitration, however, must be done with great care, in an inclusive, knowing, and voluntary manner in which all stakeholders are considered. In the cases that follow, the demand for arbitration was almost entirely management-driven, and little effort was made to ensure that employees’ rights were protected.

B. The Onset of Arbitration

Congress passed the Federal Arbitration Act (“FAA”) in 1925 in order to encourage the use of arbitration as a means of resolving commercial disputes. The Act was intended to reverse hostility to arbitration “at this time when there is so much agitation against the costliness and delays of litigation.” The FAA places arbitration agreements on the same footing as other contracts, and Congress intended the FAA to be generously construed, notwithstanding any contrary state law of arbitration. Courts are, therefore, bound to uphold parties’ agreements and will stay litigation pending resolution by arbitration.


19. Id. at 2.

The Supreme Court has frequently considered arbitration cases, and while it did not support the FAA in earlier cases,\textsuperscript{21} the Court most recently has consistently upheld pre-dispute agreements to arbitrate,\textsuperscript{22} recognizing the supremacy of the federal substantive law of arbitrability.\textsuperscript{23} This has been the case even when disputes have involved arbitration of claims based on state law,\textsuperscript{24} Sherman Act antitrust violations,\textsuperscript{25} the Securities Act,\textsuperscript{26} the Securities and Exchange Act,\textsuperscript{27} civil racketeering under RICO,\textsuperscript{28} international business\textsuperscript{29} and even age discrimination under the ADEA.\textsuperscript{30}

The Court has thus enforced arbitration agreements involving complex issues and statutory claims, even when the statutes provide for jury trials. The Court's rationale, best expressed in \textit{Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.}, is that it is merely enforcing the parties' agreement and that neither party will "forgo the substantive rights afforded by the statute."\textsuperscript{31}

There are limits, though, to the Court's support of arbitration. For example, the Court will hold the parties to their bargain—"unless Congress itself has evinced an intention to preclude a waiver of judicial remedies."\textsuperscript{32} The Court has also cautioned that "the FAA does not confer a right to compel arbitration of any dispute at any time, but rather it confers the right to seek an order compelling arbitration 'in the manner provided for in [the parties'] agreement.'"\textsuperscript{33}

Thus, arbitration has evolved from a disfavored dispute resolution technique into a preferred method through this line of Supreme Court cases. The Court has strongly endorsed arbitration as an alternative to litigation, so much so that it is currently a standard practice in many fields, most notably in the securities industry, which has used arbitration for over

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22. \textit{See infra} notes 23-30 and accompanying text.
28. \textit{See id.} at 238-42.
31. 473 U.S. at 628.
32. \textit{Id.}
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one hundred years as a method of resolving disputes.  

C. Arbitration of Disputes in the Securities Industry—The Supreme Court’s View

Disputes within the securities industry arise most often in two contexts. The first involves financial disputes that occur between brokers and customers regarding the management of customers’ accounts. More often than not, these disputes are triggered by market downturns or general portfolio losses due to mismanagement. The second context encompasses employment disputes that arise between firms and their employees which may have to be resolved by arbitration. For example, the firm may fire a broker for failing to achieve a desired level of production or sales.

In 1953, the Supreme Court decided *Wilko v. Swan*, which involved a “novel federal question affecting both the Securities Act and the United States Arbitration Act.” Finding that the complexity of securities issues necessitated litigation rather than arbitration, the Court concluded that the Securities Act trumped the Arbitration Act. The next challenge to arbitration in the securities industry occurred many years later, and by then, the perception of arbitration had improved dramatically. As in *Wilko*, the claim in *Shearson/American Express, Inc. v. McMahon* arose from a broker-customer dispute, but the plaintiffs in this case brought suit under the Exchange Act, ostensibly hoping for a different result from *Wilko*. In a five-to-four opinion in favor of arbitration, the Supreme Court outlined the background of arbitration, especially noting its *Mitsubishi* decision. It upheld the validity of pre-dispute arbitration agreements, even when the claims involved complex federal securities issues, reasoning that it would do so unless there was a clear contrary directive from Congress.

Two years later, the court took an opportunity to reconsider *Wilko*, and overruled that opinion in *Rodriquez de Quijas v. Shearson/Lehman Brothers, Inc.* Again in a five-to-four opinion by a transitional Court, the Court achieved a “uniform interpretation of similar statutory language” between the Securities and Securities Exchange Acts.

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34. See GAO EMPLOYMENT REPORT, supra note 5, at 3.
36. Id. at 430.
37. See id. at 434-45.
38. See supra notes 23-30 and accompanying text (discussing a line of arbitration cases).
41. See McMahon, 482 U.S. at 242.
42. 490 U.S. 477, 484-86 (1989).
43. Id.
Following these major benchmarks in the law of securities arbitration, there have been few other securities arbitration disputes to reach the Supreme Court. The Court in *Perry v. Thomas*\(^{44}\) considered a statutory wage claim by a former securities employee. Finding that the employee had signed a PDAA, the Court concluded that he was bound to arbitrate this claim.\(^{45}\) In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,\(^{46}\) the Court considered whether state or federal law governs the arbitrability of claims for punitive damages. The investors, who suffered heavy losses, had signed a PDAA purportedly governed by New York law that prohibited arbitral awards of punitive damages.\(^{47}\) Finding ambiguity in the parties’ agreement, the Court construed this in favor of the investors and allowed relief in the form of punitive damages.\(^{48}\) The Supreme Court’s opposition to arbitration of financial securities disputes is long past, and the years 1987 through 1995 will be recognized as a period of unquestioning support for arbitration.

D. Arbitration of Individual Employment Disputes—The Supreme Court’s View

The arbitration of employment disputes is somewhat more problematic, it seems, in comparison to the arbitration of financial disputes. First, there has been a fair amount of litigation over whether employment disputes are exempt from the FAA. In Section 1 of the FAA, it states that "nothing herein... shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."\(^{49}\) It would appear, then, that securities employees are not bound by the FAA. This, however, is not the case. Federal courts have held, and the Supreme Court implicitly agrees, that since the arbitration clause securities employees sign is contained in a registration application (the U-4 form) and is not part of an actual contract of employment, they are not exempt from the FAA.\(^{50}\)

The seminal Supreme Court case considering the arbitration of an

\(^{44}\) 482 U.S. 483 (1987).
\(^{45}\) See id.
\(^{47}\) See id.
\(^{48}\) See generally Reder, *Punitive Damages*, supra note 33.
employment dispute in the securities industry is *Gilmer v. Interstate/Johnson Lane Corp.* Relying on the *Mitsubishi/McMahon/Rodriquez de Quijas* trilogy, the Court held that a securities dealer’s age discrimination claim was subject to compulsory arbitration under New York Stock Exchange “NYSE” rules, as per the registration application that Gilmer signed. The Court reasoned that arbitration agreements should be vigorously enforced even for statutory claims, absent a contrary directive from Congress. The standard that *Gilmer* set, then, is for courts to ask whether the relevant statutory scheme is undermined. The *Gilmer* Court quoted the *Mitsubishi* Court in support of arbitration, stating that: “So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” Courts have been uneven in their application of this analysis to the recent cases discussed in Section B infra.

As with the *Rodriguez de Quijas/Wilko* contrast in outcomes, *Gilmer* stands in contrast with a line of employment arbitration cases beginning with *Alexander v. Gardner-Denver Co.* While this line of cases addresses Title VII claims of union employees bound by collective bargaining agreements (“CBAs”) in contrast to Title VII claims of individual employees, many of the principles are applicable to both classes of employees. In *Gardner-Denver*, the Court held that a discharged employee whose grievance was arbitrated pursuant to the arbitration clause in a CBA could also bring a Title VII claim in court. The Court reasoned that a labor arbitrator had authority to resolve only questions of contractual rights; Title VII allegations, while arising out of the same factual occurrence, were distinctly of a separate nature from those that were arbitrated. The Court found that independent statutory rights are not waived by a union’s agreement because such rights are not susceptible to waiver.

In mandating arbitration of age discrimination claims, the *Gilmer* Court took care not to overrule *Gardner-Denver*, but instead distinguished it, asserting that the statutory rights under the ADEA may be waived as the


52. *See Gilmer*, 500 U.S. at 35.

53. *Id.* at 35 (quoting *Mitsubishi*, 473 U.S. at 637).


55. *See 415 U.S.* at 49-50.

56. *See id.* at 49-50, 53-54.

57. *See id.*
subject of an arbitration agreement.\textsuperscript{58} \textit{Gardner-Denver} is a case that has continuing vitality, and has been very recently cited as support for the view that Title VII claims should not be automatically sent to arbitration.\textsuperscript{59} In \textit{Wright v. Universal Maritime Corp.},\textsuperscript{60} Justice Scalia, writing for a unanimous Court, recognized the tension "between these two lines of cases."\textsuperscript{61} The Court reconciled the case law and stated that "\textit{Gardner-Denver} at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA."\textsuperscript{62} The Court, then, will determine whether the CBA contains a "clear and unmistakable waiver" of the right to a judicial forum before it will deny that right.\textsuperscript{63} This line of cases, allowing access to a judicial forum notwithstanding an arbitration agreement, occurs in the context of union-negotiated agreements. It is interesting to note that individual employees have virtually no negotiating power or bargaining representation, yet under \textit{Gilmer} they are bound to their agreements more so than their union counterparts. Nevertheless, \textit{Gilmer} stands for the proposition that where the employee signed an agreement to submit any employment dispute to binding arbitration, and subsequently brought an age discrimination claim, the Court will enforce this agreement to arbitrate.

II. ARBITRATION OF INDIVIDUAL EMPLOYMENT DISPUTES IN THE SECURITIES INDUSTRY

It becomes clear, then, that arbitration is a relatively new dispute resolution technique, gaining widespread favor only in the past fifteen years. It is particularly desirable to management due to its speed, low cost, and privacy. The Supreme Court first recognized arbitration for employment disputes in 1991 when it compelled arbitration of an age discrimination claim. The \textit{Gilmer} decision has led other courts to embrace and expand the use of employment arbitration for an even wider range of employment discrimination claims, including Title VII actions.\textsuperscript{64} The

\textsuperscript{58} See \textit{Gilmer}, 500 U.S. at 26.
\textsuperscript{59} See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, 995 F. Supp. 190, 194-211 (D. Mass. 1997), aff'd on other grounds, 163 F.3d 53 (1st Cir. 1998); LaChance v. Northeast Publ'g, Inc., 965 F. Supp. 177 (D. Mass. 1997). Although these opinions are both by Judge Gertner, these are by no means aberrations from the most current decisions passing on the arbitration of civil rights claims. See infra Section B.
\textsuperscript{60} 119 S. Ct. 391 (1998).
\textsuperscript{61} Id.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} See, e.g., Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997) (compelling arbitration of sexual harassment charge brought under state law); Keuhner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996) (compelling arbitration of wrongful discharge claim); Armijo v. Prudential Ins. Co., 72 F.3d 793 (10th Cir. 1995) (compelling arbitration
apparent rationale for the courts' expansive readings of *Gilmer* are that the other antidiscrimination statutes are similar to the ADEA in their aims and substantive provisions. Whether this was the intent of Congress or the Supreme Court remains to be seen.

This Part is composed of two sections. Section A discusses the legal and regulatory changes since *Gilmer* that have relevance to whether *Gilmer* has application beyond age discrimination claims. Section B discusses on a circuit-by-circuit basis how courts are deciding whether individuals prospectively relinquish their right to a judicial forum when they sign a securities industry U-4 form.

A. **Legal and Regulatory Changes Since Gilmer**

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

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

1. **Legal Changes—The Civil Rights Act of 1991**

"To restore and reinforce the civil rights of victims of employment discrimination," Congress passed a compromise measure which secured more complete compensation for victims of discrimination and eased plaintiffs' procedural hurdles and burdens of proof. Most notably for this

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65. See Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932, 935 (9th Cir. 1992).


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

Article, though, the 1991 Act contains a section addressing ADR of Title VII claims. Section 118, seen as a "polite bow to the popularity of 'alternative dispute resolution' and perhaps a mild sop to the judiciary," encourages parties to use ADR "[w]here appropriate and to the extent authorized by law." 69 Clearly, the critical language here is the word "encourages." Both zealous advocates and critics of binding arbitration have found grounds for their interpretation of congressional intent in this language. However, a more congruous approach to the entire 1991 amendments and legislative history reveals that "Congress intended arbitration and jury trials to co-exist." 70 Cognizant of Gardner-Denver and its progeny, as well as recent Supreme Court opinions, Congress molded a middle ground. It refused to overrule Gardner-Denver and stated that its encouragement of ADR was intended to supplement, not supplant, rights and remedies found in litigation that would otherwise be available. 71

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

2. Regulatory Changes to Arbitration by the Securities Industry

Since McMahon was decided in 1987, the regulations governing prospective agreements to arbitrate further developed and subsequently evolved. The two agencies charged with supervising employment arbitration in the securities industry are the Securities and Exchange Commission ("SEC") and the Equal Employment Opportunity Commission ("EEOC"). 72

The SEC's oversight responsibility for arbitration programs is tenuous. Its management is largely derivative in that it regulates the self-regulatory organizations ("SROs"). 73 To the extent that oversight exists,

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72. See GAO EMPLOYMENT REPORT, supra note 5, at 3-5.
73. See id. at 4. SROs are organizations such as the NYSE and the National
the SEC focuses its attention on financial disputes—"customer-firm disputes because of its mandates for customer protection." It does not monitor SRO arbitration of employment discrimination cases even though employees' civil rights are at issue.

Despite this situation, the SEC was an ardent supporter of compulsory binding arbitration for employment disputes. In fact, in 1992, the NASD, the SRO perhaps considered the policy leader among them, responded to the litigation regarding the applicability of its policies to employment disputes. It wanted to make clear that employment disputes were to be arbitrated. The SEC approved this proposal, which became effective October 1, 1993. The proposal requires:

arbitration of any dispute, claim or controversy arising out of or in connection with the business of any member of [the NASD] or arising out of the employment or termination of employment of associated person(s) with any member.

Due to the extensive and "vexing issues confronting" this process, the SEC has reconsidered its position. Even though the arbitration

Association of Securities Dealers ("NASD").

74. Id. at 13.

75. See id.


78. NASD Proposed Rule Relating to Enforcement, 58 Fed. Reg. at 39,070. Prior to this proposed rule, the rule in effect did not specifically address employment disputes. It merely provided "for the arbitration of any dispute, claim, or controversy arising out of or in connection with the business of any member of [NASD]." See Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656, 658 (5th Cir. 1995).


mandate passed in 1993 and was reaffirmed in 1995,81 forces coalesced that, by early 1997, caused the SROs to reexamine their support for mandatory employment arbitration.82

By October 1997, the NASD filed a proposed rule change with the SEC that "remove[s] the requirement to arbitrate claims of statutory employment discrimination."83 The SEC approval of the proposal nullifies the present system of mandatory arbitration and allows parties the choice to bring their claims in court or in an alternative forum.84 Moreover, in October 1998, the NYSE published proposed rule changes that would exclude employment discrimination claims from arbitration.85 These rule changes and proposals are discussed in Part III infra and are so recent that no court has considered them.

The other regulatory agency to have oversight of employment arbitrations in the securities industry is the EEOC. This agency is charged with the interpretation and enforcement of U.S. employment discrimination laws. There are a number of antidiscrimination laws which compose a wide "statutory scheme to protect employees in the workplace nationwide."86 Even while recognizing that states have a concurrent

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83. NASD Proposed Rule Relating to Arbitration, 62 Fed. Reg. at 66,166 (discussing congressional and regulatory pressures for changing the mandatory system); ARBITRATION POLICY TASK FORCE (NASD), REPORT ON SECURITIES ARBITRATION REFORM (Jan. 1996) [hereinafter NASD TASK FORCE] (presenting numerous recommendations to improve the process); COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (DUNLOP COMM’N), U.S. DEP’T OF LABOR, U.S. DEP’T OF COMMERCE, REPORT AND RECOMMENDATIONS (Dec. 1994) [hereinafter DUNLOP COMM’N] (stating its belief that not all workplace disputes may be solved through in-house binding arbitration).

84. See id.; see also Exchange Act Release No. 34-40109, supra note 80; cf. DUNLOP COMM’N, supra note 82 (noting that certain claims, such as those involving civil rights allegations, may not be appropriate for consideration by arbitrators whose main focus is on financial arbitration).


enforcement role, Congress emphasized that the federal government has the ultimate enforcement responsibility.\textsuperscript{87} Arbitration of employment disputes does not undermine the EEOC’s role, as the agency may still receive information and has independent authority to investigate claims. It may bring charges in a case\textsuperscript{88} or issue a right to sue letter to the plaintiffs.\textsuperscript{89} EEOC claims may be litigated or resolved through ADR or even settled—all with, or without, the Agency’s help.\textsuperscript{90} Beyond the EEOC’s jurisdictional and legal bases for enforcing these laws, it actually possesses limited power even to order or prohibit binding arbitration of employment disputes. Historically, the SEC always has trumped the EEOC in the making of arbitration agreements in the securities industry. The EEOC has consistently and officially stated that the right to a judicial forum is nonwaivable, and the agency has opposed binding arbitration agreements reasoning that they “are contrary to the fundamental principles evinced in these laws.”\textsuperscript{91} Even though the agency is mindful of\textit{Gilmer}, it gives courts rather than arbitrators “primary responsibility” for the development and interpretation of civil rights law.\textsuperscript{92} Even with all of the EEOC’s opposition to binding arbitration, it has generally not been at the forefront litigating these cases.\textsuperscript{93} In fact, of all the cases discussed and cited in the following section, the EEOC is a named party in just two.

\section*{B. Judicial Decisions on Whether Individuals Have Prospectively Waived Their Right to a Judicial Forum by Signing a Securities Industry U-4 Form}

Notwithstanding\textit{Gilmer}, it is unclear whether employees have waived their statutory rights under civil rights statutes other than the ADEA.\textsuperscript{94} Of the lower courts to have considered this issue, clearly the majority favors

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90. See Cooper, supra note 8, at 209. The reality of the agency’s cameo role in enforcement of these laws is discussed as well. See id.
91. See EEOC Policy Statement, supra note 3.
92. Id.; see also Enforcement Guidance, supra note 3, at N:2329.
93. One need only look at the names in Sections B and C infra to see that the EEOC has not persistently pursued the claims alleged. See also Cooper, supra note 8, at 219-20; cf. EEOC Policy Statement, supra note 3 (discussing that the EEOC has challenged agreements by submitting amicus curiae briefs to courts).
extending *Gilmer* to mandate arbitration of other civil rights in employment claims. This section discusses, circuit-by-circuit, the controlling cases, or should none be on point, the closest relevant discrimination case. Federal district court cases are discussed as well.

1. First Circuit

The First Circuit is among the majority jurisdictions that expand and apply *Gilmer* to compulsory arbitration of Title VII claims. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the court considered whether "Congress intended to prohibit enforcement of pre-dispute arbitration agreements covering employment discrimination claims under Title VII ... as a matter of law in all cases or at least under certain facts said to be present here." After being fired, Rosenberg filed suit alleging age and sex discrimination, and Merrill Lynch moved to enforce the agreement compelling arbitration under NYSE rules.

While the Court of Appeals for the First Circuit upheld the denial of Merrill Lynch's motion based on these particular facts, it held as a matter of law that such agreements may be valid. In construing relevant law, and directly following *Gilmer*, the court first found that the 1991 Act does not automatically preclude pre-dispute arbitration agreements. Second, the court considered whether compulsory arbitration is inconsistent with the framework and purposes of Title VII. After analyzing the NYSE arbitral scheme, the court found, contrary to the finding of the District Court, that there was no conclusive evidence of bias or other structural and systemic shortcomings that undermine the vindicating of Title VII rights. After considering several other of Rosenberg's assertions and rejecting them, the court agreed with one point: that this agreement was unenforceable in that

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95. See infra discussion of cases from the Second, Third, Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits.
97. Id. at *1. See generally Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998) (compelling arbitration of ADA claim since that statute explicitly encourages ADR, and *Gilmer* controls outcome). But see Utley v. Goldman Sachs & Co., 883 F.2d 184, 187 (1st Cir. 1989) (holding that employee who signed a U-4 form could not be compelled to arbitrate Title VII claim due to that statute's "unique nature").
98. See Rosenberg, 1999 WL 80964, at *1.
99. See id. at *9 (relying on language from the 1991 Act encouraging ADR and on language from *Gilmer* promoting arbitration unless there is congressional intent to preclude arbitration, in finding that there is no conflict between Title VII and arbitration).
100. See id. (adopting *Gilmer* and finding no inherent defects in arbitration that render it unsuitable for resolution of statutory claims).
101. See id. at *13 (citing what the circuit court characterizes as numerous misinterpretations by the district court, which found structural and systemic infirmities in the compulsory arbitration system).
Merrill Lynch simply failed to give Rosenberg a copy of the NYSE rules (which detailed the arbitration scheme).\textsuperscript{102}

The court then explicitly adopted \textit{Gilmer} to govern Title VII claims and made short work of the many recent contentions of weaknesses in industry-run compulsory arbitration systems.\textsuperscript{103} Mindful too of \textit{Wright}, the court carefully scrutinized the parties' agreement, finding it incomplete.\textsuperscript{104} So while the First Circuit did not compel arbitration, its decision was essentially limited to these facts.\textsuperscript{105}

2. Second Circuit

As New York is the headquarters for many financial institutions and the home of Wall Street, it, not surprisingly, has the largest volume of all American cities of this litigation. This circuit is presently in a state of flux regarding securities industry employment arbitration. In the 1996 case \textit{Thomas James Associates, Inc. v. Jameson},\textsuperscript{106} the court found "that a registered representative's employment-related claim against an NASD-member employer was arbitrable under the NASD Code."\textsuperscript{107} The court of appeals further stated that employment disputes were required to be arbitrated even before the 1993 NASD Amendment.\textsuperscript{108} While the court was not asked to consider its holding in the context of Title VII discrimination claims, it appears unlikely that this court would distinguish between the two types of claims. Notably absent from this opinion was any discussion of whether employees' rights are effectively protected under the arbitral system. It is important to start with a case like \textit{Jameson} and contrast its outcome with more recent 1998 cases, in which the Second Circuit departs from its former unwavering support of the existing system of employment arbitration.

In \textit{Halligan v. Piper Jaffray, Inc.},\textsuperscript{109} the court found that the arbitrators

\textsuperscript{102} See id. at *20 n.15 (reasoning that Merrill Lynch bears the risk of such incompleteness).

\textsuperscript{103} See id. at *14.

\textsuperscript{104} See id. at *21-22; see also Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998) (unanimous opinion) (declining to compel arbitration where the waiver of a judicial forum clause in a CBA was not clear and unmistakable); cf. LaChance v. Northeast Publ'g, Inc., 965 F. Supp. at 177 (refusing to extend \textit{Gilmer} to ADA and ADEA claims arising out of a CBA).

\textsuperscript{105} See Rosenberg, 1999 WL 80964, at *22.

\textsuperscript{106} 102 F.3d 60 (2d Cir. 1996).

\textsuperscript{107} Id. at 64.

\textsuperscript{108} See id. at 64 n.1; cf. DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818 (2d Cir. 1997), cert. denied, 118 S. Ct. 695 (1998) (confirming an arbitration award for ADEA claims).

\textsuperscript{109} 148 F.3d 197 (2d Cir. 1998).
"manifestly disregarded the law or the evidence or both." \(^{110}\) Courts are increasingly willing to consider procedural and systemic inadequacies as they take note of such cases from other jurisdictions. The Halligan court found "strong evidence that Halligan was fired because of his age" and "that the arbitrators were correctly advised [by both parties] of the applicable legal principles." \(^{111}\) While arbitrators have no obligation to explain their decisions—and they did not in this case—"an[y] explanation . . . would have strained credulity." \(^{112}\) Throughout the opinion, the court noted the greater levels of scrutiny and controversy currently surrounding employment arbitration. \(^{113}\)

Reflecting the Second Circuit's ambivalence in *EEOC v. Kidder, Peabody & Company*, \(^{114}\) the court refused to allow the EEOC independently to seek monetary damages in court for individuals who had all signed PDAAs. \(^{115}\) Judge Feinberg, in a concurrence, agreed with the result but persuasively questioned whether statutory rights "can be vindicated equally well [under the present system of arbitration] as they are in the courts . . . . The area of arbitration of statutory rights in the securities industry may need to be reexamined in order to properly protect employees." \(^{116}\)

Finally, in an interesting twist to a class action settlement between Smith Barney and female employees, the District Court for the Southern District of New York denied final approval of the settlement reasoning that it was not fair, adequate, or reasonable. \(^ {117}\) The judge raised objections *inter alia* to the lack of a guaranteed damages fund, the uncertainty as to the arbitration process, the inadequacy of employer diversity initiatives, and the lack of provision for replacement of the culpable personnel. \(^ {118}\) Clearly, the Second Circuit has reconsidered its previously unquestioned support of securities arbitration.

There are a considerable number of pre-1998 district court cases, all of which compelled arbitration of discrimination claims. In these cases the district courts rejected the argument that there was no knowing waiver of

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110. Id. at 204.
111. Id.
112. Id.
114. 156 F.3d 298 (2d Cir. 1998).
115. See id. at 300-01.
116. Id. at 304 (citations omitted).
118. See id.; see also infra note 265 and accompanying text.
statutory rights119 or other defect in the making of the contract, and they upheld agreements for the spectrum of discrimination claims, including those based on religion, age, race, sex, national origin, and sexual harassment.120

3. Third Circuit

There are, at this time, two major circuit court decisions diametrically opposed: the Third Circuit case, Seus v. John Nuveen and Co.,121 and the Ninth Circuit case, Duffield v. Robertson Stephens & Co.,122 discussed infra. In 1996, Seus filed suit in federal district court against Nuveen alleging Title VII and age discrimination claims.123 Concluding that the Form U-4 that Seus executed was a valid agreement that covered the claims asserted, the court granted Nuveen's motion to dismiss the complaint.124 Interestingly, Seus motioned the court to depose the NASD.125 This request was denied. On review, a three-judge panel in the Third Circuit affirmed both the dismissal of the case and denial of the motion.126

The court first found that there was an agreement to arbitrate after reviewing case law and the language of the FAA, ADEA, OWBPA, Title VII, and the Civil Rights Act of 1991.127 With respect to this last statute, 119. See Schuetz v. CS First Boston Corp., 1997 U.S. Dist. LEXIS 11612 (S.D.N.Y. July 31, 1997).
122. 144 F.3d 1182 (9th Cir. 1998).
123. See Seus, 146 F.3d at 175.
124. See id. at 184.
125. See id. at 178.
126. See id. at 187-88.
127. See id. at 178-83.
the court declared that "§ 118 evinces a clear congressional intent to encourage arbitration of Title VII and ADEA claims," and disagreed with the Duffield court's reading of the section.\textsuperscript{128} In upholding the agreement's validity, the court rejected assertions that it was not made knowingly and voluntarily, and that it was invalid as a contract of adhesion, or even a yellow-dog contract.\textsuperscript{129} The court further held that the agreement covered the claims in question. Even though the Form U-4 was signed in 1982, the Third Circuit joined the majority of courts in finding that employees must comply with the rules as they existed at the time of the dispute.\textsuperscript{130}

Without considering any of the more complex issues at play in this case, the court relied on this relatively narrow two-part construct and then summarily finished the case. The hostility to Seus' claims is palpable in the opinion. Seus supported her motion to depose the NASD with the claim that "current NASD procedures [were] inadequate to protect her statutory and due process rights."\textsuperscript{131} As evidence of this, she referred to the NASD's recent decision to abandon compulsory arbitration.\textsuperscript{132} Seus attempted to determine

the race, sex, age and professional backgrounds of the arbitrators, the procedures for selecting arbitrators, the cost of arbitration, the percentage of arbitration cases involving age and sex employment discrimination claims, the specific results of the arbitration decisions in employment discrimination cases, the location and scheduling of hearings, and the timeliness of decisions.\textsuperscript{133}

The information sought in Seus' motion related to the normally private functions of securities arbitration and is totally relevant to questions of fairness and due process. The motion was unfortunately and, I propose, wrongfully denied.

The Third Circuit in In re Prudential Insurance Company noted that the employees were bound by their U-4 forms, since the NASD intended the 1993 amendments "to be read broadly so that employment disputes that

\textsuperscript{128} Id. at 182.
\textsuperscript{129} See id. at 184 (noting that nothing "short of a showing of fraud, duress, mistake or some other ground recognized by the law as applicable to contracts generally would have excused the district court from enforcing Seus's agreement"). A yellow dog contract refers to an earlier employer practice in which employees had to waive their right to join a union in order to obtain employment. This practice was invalidated by the Norris-LaGuardia Act of 1932, 29 U.S.C. § 103 (1994).
\textsuperscript{130} See Seus, 146 F.3d at 185-87.
\textsuperscript{131} Id. at 187.
\textsuperscript{132} See id. Just a few weeks after this decision was published, an NASD official stated that "[w]e believe statutory-discrimination claims are different from other kinds of business claims." Mark T. Kuiper, NASD Modifies Its Arbitration Rules, BOND BUYER, June 25, 1998, at 37.
\textsuperscript{133} Seus, 146 F.3d at 188 n.6.
also invoked matters ‘involving public policy issues’ would still be arbitrated.” The opinion, of course, includes no discussion of what the EEOC may have intended in trying to enforce the antidiscrimination laws. Further, in *Great Western Mortgage Corp. v. Peacock*, the Third Circuit also agreed to compel arbitration of Title VII claims pursuant to a general business arbitration clause. The court adamantly disagreed with Peacock’s contention that the FAA excludes mandatory arbitration of employment contracts.\(^{135}\)

Moreover, when federal district courts in the Third Circuit considered cases on point previously, they concluded that the plaintiffs were bound to arbitrate all claims including those based upon Title VII, ADEA, and related state law claims.\(^{136}\) The courts found that arbitration procedures adequately protect statutory rights and so expanded upon the holding in *Gilmer*.\(^{137}\)

### 4. Fourth Circuit

Although there is no circuit case on point, the Supreme Court recently decided *Wright v. Universal Maritime Service Corporation*.\(^{139}\) In a unanimous opinion, Justice Scalia wrote that the CBA governing Wright’s employment did not contain a “clear and unmistakable waiver” of his right to a judicial forum for resolution of his ADA claim.\(^{140}\) Acknowledging that “[t]here is obviously some tension between” the *Gilmer* and *Gardner-Denver* line of cases, the Court attempted to read them as harmoniously as possible.\(^{141}\) It construed the latter case to “at least [stand] for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA.”\(^{142}\) Thus, the Court would deny access to a judicial forum only in limited circumstances, finding that covered employees’ statutory claims are “not subject to a presumption of arbitrability.”\(^{143}\)

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136. See id. at 226-27.
140. Id.
141. Id.
142. Id.
Two years earlier, the Fourth Circuit had decided a case involving a CBA as well.\textsuperscript{144} The difference in outcomes mirrors the changes in the Second Circuit, and serves as a reminder that the law is constantly evolving.

In \textit{Austin}, the court ordered arbitration of the plaintiff's Title VII and ADA claims, reasoning that the CBA specifically provided that claims of gender and disability discrimination were to be referred to arbitration.\textsuperscript{145} In a particularly persuasive dissent, Judge Hall reminded the court of \textit{Gardner-Denver} and the rule that a labor union, through a CBA, "may not prospectively waive a member's individual's right to choose a judicial forum for a statutory claim."\textsuperscript{146}

5. Fifth Circuit

This circuit emphatically endorses the majority view. The Fifth Circuit decided \textit{Mouton v. Metropolitan Life Insurance Company}\textsuperscript{147} shortly after \textit{Seus} and \textit{Duffield}, the opposing circuit court decisions. In a matter of first impression, the \textit{Mouton} court considered whether a securities dealer who has agreed to arbitrate any dispute is required to arbitrate his Title VII discrimination claim.\textsuperscript{148} Making quick work of Mouton's assertions, the court joined the majority and compelled him to submit his Title VII claims to arbitration.\textsuperscript{149} Though the court acknowledged the \textit{Duffield} decision, it failed to grapple seriously with the issues and instead took the easy way out. For example, the court strictly adhered to judicial precedent, and the opinion is devoid of any mention of the present controversy surrounding the arbitration system. Moreover, with the exception of \textit{Seus} and \textit{Duffield}, every decision cited for authority on point is outdated and currently of questionable validity.

Previously, the Fifth Circuit decided \textit{Alford v. Dean Witter Reynolds, Inc.} in which the court held that "Title VII claims are properly subject to arbitration under the analysis in \textit{Gilmer}."\textsuperscript{150} In this pre-1993 NASD

\textsuperscript{145} See id.
\textsuperscript{146} Id. at 886-87 (Hall, J., dissenting); cf. Zandford v. Prudential-Bache Sec., Inc., 112 F.3d 723 (4th Cir. 1997) (compelling arbitration of breach of contract and other state law claims); Riley v. Weyerhaeuser Paper Co., 898 F. Supp. 324 (W.D.N.C. 1995) (finding plaintiff's ADA claim could not be waived since the grievance and arbitration provisions of the CBA did not preclude plaintiff from pursuing his judicial remedies).
\textsuperscript{147} 147 F.3d 453 (5th Cir. 1998).
\textsuperscript{148} See id. at 454.
\textsuperscript{150} 975 F.2d 1161, 1164 (5th Cir. 1992). \textit{Alford} has a long history. In light of \textit{Gilmer}, the Supreme Court granted certiorari, then vacated and remanded the circuit's earlier
amendment case, the court found that the Title VII claims were arbitrable and so rejected out of hand the applicability of the *Gardner-Denver* decision upon which its earlier decision had been based.\footnote{151}

An interesting district court opinion, though not directly on point, refused to compel arbitration, reasoning that the company’s “ADR Policy” was “so misleading and against the principles of Title VII . . . that its use violate[d] such law.”\footnote{152} It is just like the second case discussed thus far brought by the EEOC.

Litigation over mandatory arbitration has spawned another class of related lawsuits—arbitrator liability lawsuits. The Fifth Circuit considered a suit against the arbitrators in which the plaintiff alleged that American Arbitration Association (“AAA”) panels were biased.\footnote{153} The plaintiff maintained that the AAA did not disclose that most of the potential arbitrators would be defense attorneys whose clients use AAA services.\footnote{154}

6. Sixth Circuit

This circuit has had the opportunity to consider employment arbitration twice and has found that employment claims under federal civil rights statutes could be the subject of an enforceable arbitration agreement.\footnote{155} While both cases are older and consider arbitration clauses prior to the 1993 NASD Amendment, the court made clear that *Gilmer* is the controlling authority. In *Cosgrove v. Shearson Lehman Bros.*, the decision in *Alford*. \textit{See} 500 U.S. 930 (1991), \textit{vacating and remanding} 905 F.2d 104 (5th Cir. 1990). The next decision reached was 939 F.2d 229 (5th Cir. 1991), which remanded the case to district court, ruling that Title VII claims may be subjected to compulsory arbitration. The district court granted Dean Witter’s motion to compel arbitration. Alford appealed, and the Fifth Circuit affirmed that ruling. \textit{See} 975 F.2d 1161 (5th Cir. 1992). \textit{See generally} *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996) (holding an arbitration clause need not speak directly to employment-related disputes for it to mandate arbitration of Title VII claims).

151. \textit{See id.} at 1162-64. The court hinted that it may consider, in an appropriate future case, whether the parties’ agreement was a contract of adhesion. \textit{See id.} at 1163; \textit{see also} Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656 (5th Cir. 1995) (holding an arbitration agreement in U-4 form enforceable for ADEA and Older Workers Benefit Protection Act claims); \textit{cf.} Folse v. Richard Wolf Med. Instruments Corp., 56 F.3d 603 (5th Cir. 1995), \textit{aff’d}, 136 F.3d 137 (5th Cir. 1998) (ordering compensation dispute back to arbitration as per the parties’ agreement).


154. \textit{See id.}

plaintiff filed suit alleging sexual harassment and retaliation in violation of Title VII as well as state law claims.\footnote{156} The suit was filed in 1992. The Sixth Circuit considered the case in 1997, and stated that it is "well-settled that statutory claims may be the" subject of compulsory arbitration.\footnote{157} The court ruled that parties' agreements will be upheld unless there is evidence of fraud or duress and expressly declined to adopt the Ninth Circuit's "knowing waiver" standard.\footnote{158} Judge Craig Daughtrey stressed in her concurrence that courts should carefully scrutinize whether agreements are truly the result of a "meeting of the minds" and a "bargained-for result of discussions between equally astute business entities."\footnote{159} Judge Daughtrey the court to remand the case "to ensure that employees are not unwittingly stripped" of a judicial forum.\footnote{160}

7. Seventh Circuit

It is unclear whether the Seventh Circuit should be considered a majority jurisdiction, compelling arbitration of security industry employees' civil rights claims. The one case on point is a pre-1993 Amendment case, \textit{Kresock v. Bankers Trust Co.},\footnote{161} which notes that the 1993 U-4 Form language alterations "sweep into the realm of arbitration a whole new class of disputes."\footnote{162} Accordingly, the court seems to indicate that Title VII and other claims may be required to go to arbitration.

The law has evolved, however, and two more recent cases, though not on point, are highly relevant and merit discussion. In these cases involving CBAs, the Seventh Circuit followed the \textit{Gardner-Denver} line of cases allowing plaintiffs to litigate their ADA and Title VII claims in court.\footnote{163} Apparently, the court has moved beyond the \textit{Kresock} analysis. In \textit{Gibson}

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\begin{itemize}
\item \footnote{156} See \textit{id.} at 659.
\item \footnote{157} \textit{Id.}; see also \textit{Willis v. Dean Witter Reynolds, Inc.}, 948 F.2d 305, 307 (6th Cir. 1991).
\item \footnote{158} \textit{See Cosgrove}, 105 F.3d at 659; see \textit{infra} notes 174-194 and accompanying text (discussing the Ninth Circuit rule and in particular, \textit{Prudential Insurance Co. v. Lai}, 42 F.3d 1299 (9th Cir. 1994)). In fact, a federal district court in this circuit criticized the \textit{Lai} decision, considering itself fortunate not to be bound thereby. \textit{See} \textit{Beauchamp v. Great West Life Assurance Co.}, 918 F. Supp. 1091 (E.D. Mich. 1996).
\item \footnote{159} \textit{Cosgrove}, 105 F.3d 659.
\item \footnote{160} \textit{Id.}
\item \footnote{161} 21 F.3d 176 (7th Cir. 1994).
\item \footnote{162} \textit{Id. at} 178-79; cf. \textit{Matthews v. Rollins Hudig Hall Co.}, 72 F.3d 50 (7th Cir. 1995) (compelling arbitration of ADEA claim as per \textit{Gilmer}).
\end{itemize}
v. Neighborhood Health Clinics, Inc., the court instead asked "[w]hether the prerogative of litigating one's Title VII and ADA claims in federal court is the type of important right the relinquishment of which requires a knowing and voluntary waiver." The resonance of the Ninth Circuit's Lai decision is clear in this opinion, which suggests that a court's asking a question is as important as its answer. It seems this circuit court now would not automatically compel arbitration of these claims.

8. Eighth Circuit

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

The federal district courts of this circuit have had the opportunity to consider Title VII claims in the securities industry. Most recently, in Battle v. Prudential Insurance Co., a court compelled arbitration of an employee's age and race discrimination claims. Moreover, it found that the NASD required arbitration of such claims even before the 1993 NASD amendment. The court declined to adopt Lai and pronounced that the law was "clear" on this issue and that such agreements will be "upheld and enforced save upon such grounds as exist at law or in equity for the revocation of any contract." The court noted, however, that it would not

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164. 121 F.3d 1126 (7th Cir. 1997).
165. Id. at 1129 (finding employee's promise to arbitrate unenforceable due to a lack of consideration); cf. Farrand v. Lutheran Bhd., 993 F.2d 1253, 1254-55 (7th Cir. 1993).
166. There are two district court cases on point, however, which resoundingly support the arbitration of employment disputes but may be of questioned vitality due to the aforementioned circuit court cases. In the first of these cases, Kresock, the plaintiff raised a number of outstanding points, none of which were resolved in her favor. Similar points were raised in Rosenberg but with a different outcome. See, e.g., Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 957 F. Supp. 1460 (N.D. Ill. 1997); Nieminski v. John Nuveen & Co., No. 96 C 1960, 1997 U.S. Dist. LEXIS 764 (N.D. Ill. Jan. 6, 1997).
167. 137 F.3d 588 (8th Cir. 1998).
171. Id. at 866 (citation omitted).
compel arbitration of civil rights claims in the collective bargaining context. Another district court upheld the arbitration agreement, but cautioned that it would not have done so if there had existed a "well-founded claim that the arbitration agreement resulted from the exercise of overwhelming economic power."  

9. Ninth Circuit

The most outstanding circuit court case today is the Ninth Circuit case Duffield v. Robertson Stephens & Co. It resembles Rosenberg v. Merrill Lynch and stands in opposition to Seus. In 1995, Duffield brought suit against Robertson in federal district court alleging sexual discrimination and sexual harassment in violation of Title VII, along with state contract and tort claims. Duffield requested a declaratory judgment that securities industry employees cannot be compelled to arbitrate their employment disputes under Form U-4. She contended that the agreement was neither knowing nor voluntary, that it does not protect substantive rights, and that the U-4 form is a contract of adhesion. After reconsidering, the district court certified its orders for immediate appeal. As to Duffield's contentions in her motion for declaratory judgment, the circuit court judges prefaced their analysis with the observation that:

[N]ever [have we] been required to consider the effect of the 1991 Act on the much more difficult question before us today: the enforceability of compulsory arbitration provisions that, as a condition of employment, compel persons to forego their statutory right to judicial relief with respect to future claims of Title VII discrimination, and to submit all such future claims to binding arbitration.

Prior to this case, the court decided the well-known case of Prudential

175. See id. at 1186.
176. See id.
177. See id.
178. Id. at 1189. The Ninth Circuit, though, has decided a fair number of these cases which will be discussed infra. See also Nelson v. Cyprus Bagdad Copper Corp., 119 F.3d 756 (9th Cir. 1997) (applying Lai's knowing waiver analysis to an ADA claim and finding no automatic arbitration); Kuehner v. Dickinson & Co., 84 F.3d 316 (9th Cir. 1996) (concluding that Lai is not applicable to Fair Labor Claims Act and so compelled arbitration); Painewebber, Inc. v. Bahr, 97 F.3d 1460 (9th Cir. 1996) (upholding arbitration order despite claim of fraud); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) (applying Gilmer rather than Gardner-Denver to Title VII claim); Nadeau v. Thomas, No. 96-20383SW, 1997 U.S. Dist. LEXIS 12633 (N.D. Cal. Aug. 21, 1997) (denying petition to compel arbitration).
ruling that claimants who do not "knowingly" agree to arbitrate Title VII claims are not required to submit to arbitration. This was reaffirmed in *Renteria v. Prudential Insurance Co.*\(^{180}\) regarding Title VII and related state law claims.

After considerable analysis of the 1991 Act and section 118, the *Duffield* court concluded that the text is, "at a minimum, ambiguous,"\(^{181}\) that arbitration is "encouraged" "where appropriate," and that the legislative history of section 118 "plainly demonstrate[s] that in allowing arbitration . . . Congress intended to adopt *Gardner-Denver's* firm rule precluding enforcement of compulsory agreements to arbitrate future Title VII claims, not *Gilmer's* possible validation of such agreements."\(^{182}\) Thus, the court concluded that Form U-4 is unenforceable as applied to Title VII claims.\(^{183}\) The court noted that the 1991 Act does not preclude voluntary or post-dispute agreements to arbitrate and recognized the many benefits of arbitration.\(^{184}\) Because the court held that the 1991 Act precludes compulsory arbitration, it did not reach Duffield's more provocative claims that she did not "knowingly" agree to arbitrate her Title VII claims and that the NYSE forum fails adequately to protect her statutory rights.\(^{185}\)

Regarding Duffield's assertions that the Form U-4 imposes an unconstitutional condition of employment, the appeals court found that there was an insufficient level of state action for the government fairly to be said to be encouraging the mandatory arbitration requirement.\(^{186}\) Therefore, Duffield did not forfeit her constitutional rights.\(^{187}\) In response to the *Duffield* decision, JAMS/Endispute, the nation's largest private ADR firm, announced that it will not arbitrate Title VII claims in the Ninth

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179. 42 F.3d 1299 (9th Cir. 1994); cf. Mago, 956 F.2d 932.
180. 113 F.3d 1104 (9th Cir. 1995).
181. 144 F.3d at 1193.
182. Id. at 1195.
183. See id. at 1199. *But see Seus*, 146 F.3d 175 (finding that the 1991 Act requires Title VII claims to be arbitrated under the language of Form U-4).
184. See *Duffield*, 144 F.3d at 1193. This court found that while a compulsory arbitration rule cannot be read into the 1991 Act, voluntary arbitration is within the law. *See id.; cf. Nghiem v. NEC Elec.*, 25 F.3d 1437 (9th Cir. 1994) (concluding that plaintiffs who voluntarily initiate arbitration proceedings are bound thereby); Gail Diane Cox, *Court Strikes Arbitration Clause*,Nat'l L.J., Mar. 8, 1999, at B2 (reporting on a California state appellate opinion in which the judge refused to order arbitration of employment claims reasoning the ADR clause was both substantively and procedurally unconscionable).
185. See *Duffield*, 144 F.3d at 1190. These claims, beyond the question of the meaning of the 1991 Act, are among the more complex, nuanced issues relating to systemic bias and to general structural faults in the industry-sponsored arbitration forum. The question of adequate protections harks back to *Gilmer* and *Mitsubishi*.
186. See id. at 1185.
Circuit. The Ninth Circuit, the nation's largest, includes California, Washington, Arizona, Oregon, Nevada, Idaho, and Montana. Accordingly, Duffield's claims will be bifurcated, with the two discrimination charges being heard in court and the other claims being considered by an arbitrator. After Duffield, and before the Supreme Court's decision in Wright, the Ninth Circuit issued an opinion in Kummetz v. Tech Mold, Inc. With regard to this workplace ADA discrimination claim, the court held the arbitration agreement was unenforceable because it was neither explicitly presented nor accepted. An interesting twist to the law in this area occurred in Imhoff v. Charles Schwab and Co. Imhoff signed the Form U-4, in which both the NASD and NYSE were selected as forums for processing disputes. Imhoff brought suit alleging employment discrimination in violation of Title VII, ADA, ADEA, and state law. Finding itself constrained to apply Lai (which decided a NASD claim) to NASD arbitrations, the plaintiff was not bound to arbitrate under NASD rules. However, the court ordered arbitration under NYSE rules reasoning that the Lai case was not applicable to NYSE claims. Clearly such a dichotomous result is undesirable, and the various exchanges must adopt congruous rules to prevent forum shopping.

10. Tenth Circuit

The Tenth Circuit is clearly a majority jurisdiction. In the leading case from this circuit, Armijo v. Prudential Insurance Co., the plaintiffs claimed that they were terminated because of their race, sex, or national origin. Defendants moved to compel arbitration of claims under the U-4 Form that plaintiffs signed. Finding a presumption of arbitrability under both pre- and post-1993 U-4 provisions that was not rebutted, the court affirmed the decision to compel arbitration.

Most recently, the Tenth Circuit in Schooley v. Merrill Lynch, Pierce,
Fenner & Smith ordered arbitration of claims that included tortious breach of contract, constructive discharge, negligent and intentional infliction of emotional distress, invasion of privacy, and fraudulent contractual interference. The court rejected Schooley’s challenges, reasoning that federal policies favor arbitration and preempt other policies.

11. Eleventh Circuit

This circuit is also a majority jurisdiction. The controlling case in this circuit is Kidd v. Equitable Life Assurance Society. Former securities sales agents brought suit against Equitable alleging race discrimination. Equitable moved to stay the litigation and compel arbitration of the claims. Finding that the former employees “signed the U-4 forms promising to arbitrate any disputes,” the court reversed the district court decision, concluding that the claims were subject to arbitration. The court made quick work of each of the former employees’ points of contention, noting that arbitration of employment disputes at NASD member firms has been required even prior to 1975.

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

198. 107 F.3d 21 (10th Cir. 1997).
199. See id.
200. 32 F.3d 516 (11th Cir.), aff’d, 119 F.3d 11 (11th Cir. 1994), cert. denied, 118 S. Ct. 626 (1997).
201. See id. at 518.
202. See id.
203. Id. at 520.
206. See id. at 1056.
207. See id. at 1058.
208. See id. This is so despite the concurrence urging the court to rule that the arbitration clause includes Title VII claims.
12. District of Columbia Circuit

While this Circuit has not decided a securities industry employment discrimination case, it has produced an influential opinion closely related to this subject. In Cole, after the employee was fired from his job, he filed a complaint alleging, inter alia, discrimination and harassment based on race. The defendant moved to compel arbitration of these claims. The court reluctantly upheld the parties' agreement because "we are constrained by Gilmer... [which requires] the enforcement of arbitration agreements that do not undermine the relevant statutory scheme." This is precisely the question and analysis that Gilmer asks courts to consider, yet not every court has complied. It seems many courts are merely asking whether the agreement is signed and whether the dispute is within the agreement. These courts end the analysis at that point, never questioning the substance or effect of the agreement. The Cole court took efforts to distinguish this individual dispute from a collectively bargained one and made clear that it was cognizant of the reported "inequities and inadequacies of arbitration in individual employment cases." In conclusion, it found "[a]rbitration of public law issues... troubling."

A few conclusions can be drawn at this point regarding the arbitrability of civil rights in employment claims. First, employment arbitration has arguably reached its zenith. The securities industry employment arbitration cases from 1993 to 1996, almost without exception, flatly endorse arbitration and undertake only a cursory analysis of contentions to the contrary. However, in the most recent cases discussed, those decided from 1997-1998, courts are increasingly willing to explore the more complex and nuanced aspects to employment arbitration clauses. There has been a recognition that Gardner-Denver remains vital and that decisions do not have to fall in lock-step with Gilmer, which does not technically apply to cases other than ADEA claims, except by an expansive and not entirely defensible analogy. The extensive and continuing negative coverage

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209. See Brisentine v. Stone & Webster Eng’g Corp., 117 F.3d 519 (11th Cir. 1997).
211. See id. at 1467.
212. See id.
213. Id. at 1467-68.
214. See id. at 1467, 1472-76.
215. Id. at 1467.
highlighting the present system’s inequities has added another dimension hastening this evolution.217

Since the arbitration of financial securities disputes became the law with McMahon, then Rodriguez de Quijas and then with ADEA disputes, federal and state courts have rapidly expanded the law by reading into these decisions a requirement that all employment claims must be arbitrated. Perhaps not ready or capable of handling the complexities involved in this new class of disputes and recognizing that the present system is flawed, there has been a retreat from this expansive view that arbitration covers all statutory employment disputes.

In terms of influence, the Rosenberg, Lai, Cole, and Pryner cases stand out as thoughtful, well-researched, and well-written opinions. The two cases that will share the spotlight as defining decisions, though, are Seus and Duffield. Their clashing values and completely opposite outcomes may presage consideration of the issue by the Supreme Court.218

III. THE CHALLENGES, STRATEGIES, AND RECOMMENDATIONS FOR STABILIZING THE SYSTEM

Compulsory arbitration of employment disputes for NASD-member firms in the securities industry, an uncompromising fixture for many years, has been phased out. One caveat to bear in mind, however, is that this direction has only been taken so far by the NASD. The NYSE, another major player, has such a proposal pending before the SEC, and it remains to be seen what policy other SROs will decide to adopt.219 The NASD, though, is responsible for handling the vast majority of employment arbitrations. Parts I and II of this Article outlined the law, case and statutory, as it is. This Part attempts to flesh out the dynamics of the changes over the past five years, explaining how the tide has turned and why. It is also instructive to note the interplay between courts, agencies, legislatures, plaintiffs, and defendants. Each is a stakeholder in the employment arbitration process, yet each stockholder’s interests and goals are different.

In one sense, the shift in attitude regarding mandatory arbitration may be seen as a stunning rebuke of SEC-approved policies. In other ways, it


218. Although the Court denied certiorari in Duffield, the conflict between the circuit courts remains, and so the Court may in the future consider another similar case.

219. See Peter Truell, Arbitration Rules Relaxed at Brokers, N.Y. TIMES, June 24, 1998, at D11 (reporting that the SEC is “encouraging” other SROs to follow the lead of the NASD).
may be viewed as a recognition that while parties perceive that it is important for ADR to be faster and less expensive than litigation, the cardinal value of systemic fairness has carried the day. The fundamental flaw of this mandatory arbitration system is the perception, real or imagined, that it is biased—a system created and managed by the securities industry, with almost no way out for plaintiffs—the fox guarding the chicken coop, if you will. It has proven unworkable. This Part is divided into four sections, followed by a conclusion. Section A discusses how we arrived at this point and offers some statistics regarding employment arbitration cases. Section B discusses the employment relationship as it has involved arbitration. Section C discusses the dynamics of the arbitration process, from choosing an arbitrator to issues of appealing the decision. Section D discusses agency responsibility for creating this system and agency responsibility for enforcing antidiscrimination laws—goals that have been, to a degree, at cross-purposes. This Section also discusses challenges to the system and legislative intervention.

A. How Many Cases Are Involved and Why There Is So Much Attention Focused on These Cases

While reliable neutral statistics are actually difficult to find and confirm, there are some numbers with which to work. The numbers relate solely to NASD cases, unless another SRO is identified. Four employment discrimination cases were filed in 1991, the year *Gilmer* was decided and the Civil Rights Act of 1991 was enacted. In 1996, 109 discrimination cases were filed. This figure represents just less than two percent of all the arbitration cases filed in 1996, of which there were 5,631, the vast majority representing financial broker-customer disputes.

The following statistics will further challenge readers who may already be wondering why there is such a fervent furor against arbitration when the number of cases is so small. The Securities Industry Association ("SIA"), a trade group representing the interests of over 800 securities firms, submits that arbitration plaintiffs prevail over defendants more often than they would have had their cases been litigated. For example, NYSE

221. See id.
223. See Letter from Stuart J. Kaswell, Senior Vice President and General Counsel, Securities Industry Association to Mary L. Schapiro, President, NASD Regulation, Inc. 3 (Apr. 25, 1997).
arbitration plaintiffs prevailed in forty-one percent of cases. Twenty-six percent of the cases were brought in NASD arbitration, and just nineteen percent of the cases went before the federal trial courts of the Southern District of New York.224

It is a telling statement of just how poorly the present system is operating when panel after panel recommends major changes to the mandatory arbitration system that inspires no confidence in anyone but its creators. In fact, the system of prospective mandatory binding arbitration of employment claims is so seriously malfunctioning that even the SIA is now offering "[s]uggestions for modifying the arbitration process."225

To place these changes in context, I have provided a rough timeline, a brief discussion with dates of relevant events that have led to this full-scale reconsideration of employment arbitration.

1987: *McMahon* is decided, upholding the use of mandatory pre-dispute arbitration of broker-customer Exchange Act Claims.226

1989: *Rodriguez de Quijas* is decided, expanding the *McMahon* rule to Securities Act claims.227

1991: *Gilmer* is decided, further expanding mandatory arbitration agreements to cover age discrimination in employment claims.228

The Civil Rights Act of 1991 is passed by Congress, declining to limit the rule of *Gardner-Denver* yet at the same time encouraging the use of ADR.229

1993: NASD amends its rules, clarifying that even employment disputes are subject to mandatory binding arbitration.230

1994: GAO Report, "How Registered Representatives Fare in Discrimination Disputes," is issued. It was requested by the House Subcommittee on Telecommunications and Finance. Finding many flaws, the Report makes recommendations.231

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224. See id.
230. See supra notes 77-78 and accompanying text (discussing NASD rule change).
231. See GAO EMPLOYMENT REPORT, supra note 5, at 8-17. This report was requested by the Hon. Edward J. Markey, Chairman, Subcommittee on Telecommunications and
NASD forms an Arbitration Policy Task Force, chaired by a former SEC Chair, to study the system and make recommendations.\textsuperscript{232}

*Lai* is decided and is considered an aberration for its holding that the employees were not bound by their agreement because "they did not knowingly contract to forego their statutory remedies."\textsuperscript{233}

Commission on the Future of Worker-Management Relations, known as the Dunlop Commission, sponsored by the Departments of Labor and Commerce, issues a report emphasizing that not all workplace disputes can be resolved through in-house binding arbitration and that such agreements should not be enforceable as a condition of employment.\textsuperscript{234}

1995: Individuals from diverse independent organizations involved in labor and employment law create a Task Force on Alternative Dispute Resolution in Employment and make numerous suggestions to change the present system.\textsuperscript{235}

1996: NASD's Arbitration Policy Task Force issues its report containing more than seventy recommendations, marking the most comprehensive restructuring of the securities industry arbitration system.\textsuperscript{236}

The independent American Arbitration Association releases new rules for the resolution of employment disputes to ensure due process as well as a fair and equitable forum.\textsuperscript{237}

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232. This eight-member task force was appointed in September 1994 by the Board of Governors of the NASD, which handles 85% of the securities arbitration claims each year. See NASD PRESS RELEASE, ARBITRATION TASK FORCE TO ISSUE RECOMMENDATIONS IN LARGEST REVAMPING OF SECURITIES ARBITRATION SINCE ITS START MORE THAN A CENTURY AGO (1996).

233. 42 F.3d 1299, 1304 (9th Cir. 1994).

234. See DUNLOP COMM'N, supra note 82. The Commission, appointed by then Secretary of Commerce Ronald H. Brown and Secretary of Labor Robert B. Reich, asked inter alia, what, if anything, should be done to increase the extent to which workplace problems are resolved privately rather than through recourse to courts. See *id.* The Commission recommended that employers use extreme caution when resorting to non-judicial options in "light of the important social values embodied in . . . employment law." *Id.*


236. See NASD TASK FORCE, supra note 82 and accompanying text (discussing Task Force's mission and results). The 156-page report is a thorough and impressive rendering of the problems involved in industry-sponsored arbitration, and the recommendations are generally very thoughtful. See *id.* The system will most likely be abandoned, however, before many of these recommendations take effect. See *supra* notes 82-83 and infra notes 240-46 (discussing the dismantling of present NASD employment arbitration rules).

237. See American Arbitration Association, American Arbitration Association Releas[es New National Rules for the Resolution of Employment Disputes to Ensure Due Process,
1997: Letter from Representatives Edward J. Markey, Anna G. Eshoo, and Reverend Jesse L. Jackson, Jr. to Arthur Levitt, SEC Chair, questioning whether the NASD’s mandatory arbitration policy is even within the scope of its authority. Mr. Levitt responded one month later acknowledging that sound arguments could be made on both sides of the issue.

Federal legislation is introduced into both the House and the Senate (H.R. 983 and S. 63), known as the Civil Rights Procedures Protection Act of 1997, in an effort to prevent the involuntary application of arbitration to civil rights claims.

NASD Regulation formed an Advisory Committee to assist it in determining the future of employment arbitration in the securities industry. While this Committee conducted hearings, the EEOC issued a Policy Statement reiterating its opposition to unilaterally imposed PDAAs, reasoning that the policy is harmful to both individual civil rights plaintiffs and to the public interest.

One month later, the NASD Advisory Committee recommended amending Rule 10201 of the NASD Code of Arbitration so as to remove the arbitration requirement for such claims and to continue to improve the forum for those who may voluntarily wish to use the industry forum. The NASD accepted the recommendation and requested that it become effective one year from the date of SEC approval.

By the end of 1997, the SEC published in the Federal Register notice of the proposed rule change and solicited comments from interested parties.

1998: Judge Gertner, U.S. District Judge for the District of

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239. See id.
240. See S. 63, 105th Cong. § 2 (1997); H.R. 983, 105th Cong. § 2 (1997) (rendering void any agreements that employees may make regarding the non-judicial resolution of their claims, unless employees “voluntarily enter” into an ADR agreement); see also S. 121, 106th Cong. (1999).
242. See EEOC Policy Statement, supra note 3 (stating that the EEOC believes PDAAs governing employment disputes “are inconsistent with the civil rights laws”).
Massachusetts, issued two opinions in the *Rosenberg* case that negate the effect of mandatory arbitration clauses in favor of judicial resolution of civil rights issues in employment claims.\(^{245}\)

*Duffield* is decided, precluding compulsory arbitration of Title VII claims.\(^{246}\)

*Seus* is decided, upholding compulsory arbitration of Title VII claims.\(^{247}\)

The SEC approves the NASD's proposed rule change, ending compulsory arbitration of employment discrimination claims.\(^{248}\)

The NYSE submits a proposal to the SEC to exclude employment discrimination claims from arbitration unless the parties agreed to arbitrate after the claim arose.\(^{249}\)

It is telling that a rule, which affected less than two percent of securities industry plaintiffs, became such a juggernaut, having the dual effect of coalescing diverse groups and at the same time dividing similar groups. The present system has consequently exposed fault lines in industry-sponsored arbitration largely relating to gender and age, and to a lesser extent issues of forum, who is making the rules, who has to play the game, and whether employees can opt out of the game, or seek a meaningful review of the outcome.

We are at a point where the securities industry is dismantling its arbitration system—precisely because it is a system devised by, and for, the securities industry status quo. In a previous article, I concluded that "public perception" was "crucial to confidence in a system," and that to compel arbitration "as a precondition . . . unfairly curtails Congressionally created and judicially recognized rights."\(^{250}\) There has been a backlash, to borrow from Susan Faludi, against industry-sponsored employment arbitration.\(^{251}\) This handful of cases spoke loudly, and for a variety of reasons. The origin of these issues is discussed throughout the following subsections, with emphasis on the issue of the dynamics of power and control as the main source of the outcome today.

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\(^{246}\) 144 F.3d 1182 (9th Cir.), cert. denied, 119 S. Ct. 465 (1998).

\(^{247}\) 146 F.3d 175 (3d Cir. 1998).


B. The Employment Relationship and Civil Rights in the Workplace

Why securities arbitration has provoked a backlash in the employment context, but not in the financial broker/customer context, is a particularly compelling question. Both systems, financial and employment, were crafted by the same industry, yet reactions to them have been disparate. The employment relationship, as shaped by thirty-five years of civil rights legislation and litigation, bears attributes that set it apart from the broker-customer relationship, in which disputes are wholly contractual in nature and capable of resolution through a straight financial award. Much more, it seems, is at stake in the resolution of employment disputes. This subsection discusses employment in the securities industry and delves into the multiple reasons why employment arbitration has fared so poorly. This is done first from the point of view of employers and then of employees.

1. Employers

It is instructive at the outset to recognize that in employment-at-will/noncontractual relationships, courts are generally reluctant to render void any of the terms or conditions of employment except those that violate the law or are contrary to public policy. Securities industry employers, then, have crafted the terms and conditions of employment and have for the most part been unfettered or burdened by unions or other groups purporting to represent employees. This one-sided, take-it-or-leave-it model of hiring and employment is very common in at-will, non-union work. The appeal of arbitration is hard to resist for employers. Almost every feature, in fact, favors employers who are also the repeat players in the system, and so, it seemed, they had nothing to lose. The following quotation is taken from Duffield v. Robertson Stephens & Co., which held that under the Civil Rights Act of 1991, employers may not compel individuals to waive Title VII rights to a judicial forum. Judge Reinhardt wrote:

Like every individual who wishes to work in the United States as a broker-dealer in the securities industry, Tonyja Duffield was required, as a condition of employment mandated by the national securities exchanges, to waive her right to a judicial forum to resolve all "employment related" disputes and to agree instead to arbitrate any such disputes under the exchanges’ rules. Prospective employees must satisfy this condition by signing the industry’s Uniform Application for Securities Industry Registration or Transfer, commonly known as Form U-4.
Further, the U-4 Form, which requires arbitration, also prospectively binds employees to amendments of rules or constitutions that may be made “from time to time.” These rules plainly do not inure to the benefit of employees. Indeed, the arbitration rules among the self-regulatory organizations bear such similarity that it has been impossible for employees to avoid the industry’s arbitration rules. The securities industry is extremely well-run and cohesive, and it enjoys the services of a powerful professional group, the Securities Industry Association.

Presenting to employees the U-4 Form obligating them to resolve employment disputes through industry-run binding arbitration has been characterized as a violation of public policy. To the extent plaintiffs are not informed, are unable to make a knowing and voluntary choice whether to arbitrate, and do not enjoy rights and remedies coextensive with statutory ones, the standard enunciated in Mitsubishi and reiterated in Gilmer has not been met, as the relevant statutory scheme has been undermined. Courts will not render void an agreement due to mere inequality of bargaining power. Rather, there must be evidence of fraud, lack of agreement, or overwhelming economic power. Moreover, unequal bargaining power does not automatically turn an agreement into a contract of adhesion. A contract of adhesion exists when terms unreasonably favor the other party, when there is a lack of meaningful choice, and when the terms are so one-sided as to be unconscionable. Is this the case here? The Seus court answered in the negative, but I think that the answer is not as clear as that court made it seem. Where are the employees’ choices? Who is dictating the terms? Who runs the arbitration? Could employees have their same job without signing the


255. See Letter from Stuart J. Caswell, Senior Vice President and General Counsel, Securities Industry Association, to Dennis Vacco, Attorney General, State of New York 1 (Jan. 21, 1998) (stating that the “SIA represents the shared interests of its more than 800 member firms... includ[ing] investment banks, broker-dealers, specialists and mutual fund companies. Its members account for approximately 90 percent of the securities business conducted in North America.”).


agreement? Does it get any more unequal than this?

Antitrust issues are raised by employer actions, too. Whether the vast majority of firms agreed to adopt the language such as in the present U-4 Form, either independently or as a group, remains an open question. Antitrust laws condemn the imposition among competitors of fixed terms which are generally unrelated to competence and qualifications. Finally, many wonder whether the SROs even have the power to declare that civil rights legislation may be bypassed in favor of their private industry-run system. Legislators expressed this view to SEC Chair Arthur Levitt, to which he replied that "the scope of SRO authority has no clear answer. Sound arguments can be found on both sides of the issue." A noted scholar wrote that Chairman Levitt's answer that there is "no clear answer" seems accurate; realistically, though, plaintiffs today "face an uphill battle" when advancing this argument.

2. Employees

It is important to identify the plaintiffs in these securities industry employment arbitration cases by more than a last name for readers to understand who has been most impacted by the security industry's singularly uniform rules. One of the most intriguing aspects of these cases is that relative to the securities industry as a whole, an unusually high number of the cases are brought by women and members of other protected classes of workers. The General Accounting Office noted in its 1994 Report that "the two most frequently cited types of alleged discrimination were sex and age."

Indeed, SEC Chair Arthur Levitt noted that "Wall Street serves America, but it doesn't yet look like America, [and that a] commitment to policies of inclusion becomes more important as our population grows


260. Letter from Arthur Levitt, Chair, SEC, to Hon. Edward J. Markey et al., U.S. Representative (Mar. 17, 1997) (replying to Rep. Markey's inquiry). The federal securities laws provide only an equivocal answer. For example section 15A(g)(3)(B) of the 1934 Act permits the NASD to require its members to be registered in accordance with procedures it establishes. Yet, section 15A(b)(6) of the 1934 Act prohibits the NASD from regulating matters that are not related to the administration of the NASD, or to the Act in general. See 15 U.S.C. §§ 78a(a)(1), (b)(1), (b)(8) (1995); 780-3(a)-(b); 785(b)-(c) (1998); 785(g)(1); cf. 17 C.F.R. § 240.15b7-1 (1993).


262. GAO EMPLOYMENT REPORT, supra note 5, at 8.
more diverse."263 It has been reported that more than 500,000 Wall Street workers are covered by arbitration clauses and of this number, approximately eleven are women.264 Yet more than half the plaintiffs in the aforementioned cases are women. Women are underrepresented in the securities industry workforce and unfortunately, overrepresented as plaintiffs in employment discrimination cases. In a recent settlement involving allegations of firm-wide discriminatory practices, a complaint alleges that fewer than five percent of Smith Barney's approximately 11,000 brokers are female.265 At the ten top-grossing securities firms, only five of the top fifty-eight executives are female.266 This situation exists despite decades of civil rights in employment legislation, record educational achievements by women, and employer antidiscrimination policies printed in employee handbooks. Clearly, something is awry.

The recent numbers of complainants, too, is staggering. For example, a recent Merrill Lynch settlement of a sexual discrimination lawsuit allowing suits to proceed to court rather than to binding arbitration affects "a class of between 2,000 and 2,500 women."267 The Smith Barney settlement involving similar charges included twenty-five plaintiffs "and an eye-popping 23,000 potential [female] class members nationwide."268 Before these breakthroughs, a 1995 Wall Street Journal article reported problems with the binding arbitration system and stated: "So grim are the prospects for most women who go through the securities-industry arbitration process that lawyers say they now often advise their clients not to bother with arbitration at all. Instead they urge women to take modest settlements and walk away."269

The backlash that Susan Faludi described in 1991 is a continuing

264. See id.; see also Tom Lowry, Can Wall Street Police Itself? Harassment Case Points up Secrecy, USA TODAY, May 23, 1996, at 5B.
266. See Marks, supra note 263. Moreover, there are only two female CEOs at Fortune 500 companies and just 10% of corporate officers are women. See Ginia Bellafante, Feminism, It's All About ME!, TIME, June 29, 1998, at 54, 58.
phenomenon most often occurring in traditionally male industries. It clearly took bravery, conviction, and patience on the part of plaintiffs to vindicate their rights—especially in industry-sponsored and staffed forums. What makes the sheer numbers of complaints and lack of equal opportunity for women, so stunning is that all of this has happened during a period of seemingly limitless economic growth, perhaps the best the Federal Reserve Chief has seen in nearly fifty years.\footnote{270. See Richard W. Stevenson, \textit{Fed Chief Calls the Economy One of the Best He Has Seen}, \textit{N.Y. Times}, June 11, 1998, at A1. On the same day, the \textit{New York Times} also published an article which focused on the plight of women who reportedly have borne the brunt of the economic disaster in Asia. See Nicholas D. Kristof, \textit{As Asian Economies Shrink, Women Are Squeezed Out}, \textit{N.Y. Times}, June 11, 1998, at A12. They have been the first to be fired from their jobs and have fared far worse than their male counterparts. If the U.S. economy is “as good as it gets,” presumably this is true for American women, yet it is undeniably less good and less true for this subset of the workforce. \textit{See generally} Bellafante, \textit{supra} note 266 (reporting that the average female worker still earns 25\% less than male workers in comparable jobs).}

This diversity gap, most particularly addressed here as a gender gap, is too broad and diffuse throughout the securities industry to render it mere coincidence that plaintiffs are mostly women. This is another example of a traditionally male-dominated industry in which women have struggled, and continue to struggle, for the opportunities to participate and to be rewarded in ways that are coextensive with their equally educated and experienced male counterparts.\footnote{271. See Christine Neylon O’Brien et al., \textit{Employer Fetal Protection Policies at Work: Balancing Reproductive Hazards with Title VII Rights}, 74 MARQ. L. REV. 147 (1991) (discussing how the law has evolved as questions arise over women who have begun to work in higher-paying, benefit-rich jobs traditionally reserved for men); Ann Wozencraft, \textit{Bias at the Bull}, \textit{N.Y. Times}, Feb. 27, 1999, at B1 (detailing subtle obstacles facing women in the securities industry such as distribution of the predominant number of leads to established senior male brokers, and other incidences all of which result in a pattern of economic disparity). \textit{See generally} Steven A. Holmes, \textit{Women Surpass Men in Educational Achievement, Census Reports}, \textit{N.Y. Times}, June 30, 1998, at A18 (reporting that there is now a “cohort of women that is better educated than its male counterparts”); Patricia M. Flynn et al., \textit{The Evolving Gender Mix in Accounting: Implications for the Future of the Profession}, 13 GRADUATE MGMT. ADMISSIONS COUNCIL SELECTIONS 28-39 (1996) (discussing the shift in the gender mix and its associated challenges for an evolving workforce that is increasingly more diversified and specialized); Elliott S. Levy et al., \textit{Customized Work Arrangements in the Accounting Profession: An Uncertain Future}, Report to the Alfred P. Sloan Foundation, May 1998 (detailing the structural and social impediments to women’s full participation in partnerships at public accounting firms).} Of the circuit court securities industry discrimination cases discussed in Part II, thirteen of the lawsuits involved male plaintiffs. They are, in no particular order: Theodore Halligan, Ceasar Wright, Andre Mouton, William Kummetz, Jake Armijo, Ronald Kidd, Arthur Williams, Robert Battle, Raymond DiRussa, Ronald Spyrnal, Thomas Imhoff, John Glennon, and Keith Schooley. Their claims are fairly evenly divided among allegations of discrimination based upon disability, national origin,
race and age. None of their claims were based on sex discrimination.

Twenty-one of these securities industry discrimination cases were brought by female plaintiffs. Of course, it is appropriate to use caution when discussing anecdotal reports. But these numbers, and these plaintiffs, speak volumes about the system as it has been operating. The figures are remarkable not only because the proportion of female plaintiffs in decided cases is wildly disproportionate to their percentage of participation in the field, but also because the women's suits went forward in spite of the overwhelming pressure to leave their jobs, settle their claims, and move on. The women are: Susan Rosenberg, Sheila Warnock Seus, Camille Rojas, Erlinda Hourigan, Kristine Utley, Claudia Cosgrove, Jana Kresock, Linda Willis, Joan Chasen Alford, Tonyja Duffield, Sharon Lockhart, Rachel Renteria, Marybeth Cremin, Justine Lai, Darlene Nieminski, Rosalind Beauchamp, Dano Mago, Linda Bender, Kelli Lyn Metz, and Kay Kuehner. The vast majority of their claims, in contrast to those of the male plaintiffs, were based on sex discrimination, pregnancy discrimination, and sexual harassment. One of these claims alleged discrimination on the basis of race or national origin, and just a handful involved claims of age or disability discrimination. Clearly, men and women, even while working side-by-side in the same industry, are having wholly different experiences.

The employment relationships in the securities industry must be improved to create an environment where all employees are valued, mentored, and rewarded in a way that relies on merit and value added to the firm. To hire women or other minorities yet fail to integrate them fully in every aspect of the firm's official and unofficial culture, both within the firm and outside at general industry functions, has the effect of promoting their failure.

The unfortunate aspect of all the recent attention focused on securities industry ADR is that it is concentrated only on improving the way the disputes are being processed. While this is, of course, deserving of attention, and is the subject of the following sections, the matters raised in this section are of urgent concern, for there would be no disputes to resolve if the employees had not been discriminated against in the first place. The issue of advancing full participation regardless of age, disability, gender, race, ethnicity, sexual orientation, or religion in this workforce, which has been historically white and male, is critical to the overall strength of our economy and social fabric of this country.

C. The Securities Industry Employment Arbitration Process As an Example of Employers Reaching for Too Much, and Going Too Far

The concept of industry-created, industry-run mandatory binding arbitration is so questionable, in terms of procedural or substantive fairness,
that it would be miraculous if it were neutral and well-received by every stakeholder in the process. It is probably a surprise to no one that there was no miracle, and in time there will be a more balanced approach for resolving disputes. Why the securities industry designed a system practically destined for failure is uncertain and speculative at best. It is perhaps irresistible to have nearly free rein to make rules for a dispute resolution system. Because plaintiffs typically avail themselves of the system just once, while defendants repeatedly handle these matters in a relatively private way, it has taken some time to grasp fully the effect of the industry-devised and industry-run system.

While there are a myriad of complex, interrelated issues, this Article focuses on the main points of contention, which are those addressed by the Arbitration Policy Task Force, a diverse group representative of the various constituencies involved.\textsuperscript{272} The question of whether the industry rules are substantively or procedurally fair to all stakeholders is common to each of the points in discussion. It is helpful, then, to disclose the Task Force’s recommendations in summary form, below.

1. The securities industry should be permitted to continue to include predispute arbitration agreements in customer contracts, but disclosure should be improved.

2. The NASD six-year eligibility rule should be suspended for three years during which time recommended procedures for early resolution of statute of limitations issues should be firmly applied.

3. Parties should be prohibited from bringing actions in court raising procedural arbitrability issues before an arbitration award has been entered.

4. Punitive damages should be permitted in all jurisdictions (determined by the investor’s domicile) where available in a judicial forum for the same types of claims, subject to a cap of the lesser of two times compensatory damages or $750,000.

5. The NASD should expand its voluntary mediation program and institute a two-year pilot program in early neutral evaluation.

6. The NASD should continue to offer an arbitration system with three tiers: simplified, standard, and complex, and the ceiling for the simplified procedures should be raised from $10,000 to $30,000.

7. Automatic production of essential documents should be required for all parties, and arbitrators should play a much greater role in directing discovery and resolving discovery disputes.

\textsuperscript{272} There are a number of law review articles that address this question, too. See, e.g., Hoffman, supra note 9; Lewton, supra note 14; Filiault, supra note 20; Ponte, supra note 51; Howard, supra note 68; see also Michael Delikat, Binding Arbitration of Employment Claims: The Shifting Landscape, 22 EMPLOYEE REL. L.J. 25 (1997); Michele L. Giovagnoli, Note, To Be or Not To Be?: Recent Resistance to Mandatory Arbitration Agreements in the Employment Arena, 64 U. MO., KAN. CITY L. REV. 547 (1996).
8. Arbitrator selection, quality, training, and performance should be improved by various means, including adoption of a list selection method, earlier appointment of arbitrators, enhancement of arbitrator training, and increased compensation.

9. Employment disputes, including statutory discrimination claims, should continue to be subject to arbitration, but with the enhancements recommended for customer disputes.

10. NASD pilot rules for injunctions in member-member disputes are beneficial and should be closely monitored.

11. Non-lawyers should be allowed to continue representing parties in arbitration, subject to certification; the NASD should conduct a study to examine whether to continue to permit non-lawyer representation.

12. The staffing and budget of the NASD Arbitration and Mediation Department should be increased.

13. The NASD should provide budgetary and operational autonomy for the arbitration system, which should be administered either as a unit of the newly created NASD regulation subsidiary or as a separate unit reporting directly to the NASD parent holding company.

14. Procedures for monitoring the implementation of the recommendations of this Report should be established by the NASD.273

The Task Force clearly found room for improvement, both in the arbitration process, and in arbitrator quality/training. Most notably, this diverse group recommended that the industry maintain its mandatory binding pre-dispute arbitration system, in spite of the questions it has raised.274

Beyond these important areas of concern, there are a few salient points deserving mention, most of which are related to the Task Force recommendations. There is, first of all, much criticism of securities industry arbitrators having the responsibility of issuing decisions in statutory employment law disputes. Lack of arbitrator quality and competency are among the most frequent complaints of plaintiffs. Most often, arbitrators are current and retired members of the securities industry who have years of experience. This experience, almost without exception, is in securities sales, trading, mergers and acquisitions, futures, commodities, etc. Arbitrators generally do not have much experience handling securities industry employment issues. Their competency to consider and decide claims of such critical importance—claims that reach beyond compensation, affecting careers and livelihoods—is very suspect. Their professional background, no matter how impressive, is not an adequate preparation for deciding employment disputes.

273. See NASD TASK FORCE, supra note 82, at 1-3.

274. It is ironic, perhaps, that these Task Force recommendations will never be implemented due to the suspension of the mandatory employment arbitration system.
A GAO Report found that these same arbitrators are, not surprisingly, mostly white males averaging sixty years of age.\textsuperscript{275} This issue did not receive sufficient coverage in the Task Force report but is highly relevant nonetheless. This is a central problem in the securities industry and in its arbitration program—a disproportionate percentage of the plaintiffs are women who have not been able to continue their careers in this industry. They are made to resolve claims before arbitrators who presumably have flourished and succeeded in the system that these women and others are now challenging.\textsuperscript{276} It is unworkable.

As the arbitrators are chosen for their securities expertise and are not subject to mandatory continuing professional training, they are not necessarily as representative of society as a jury would be. Moreover, the size of arbitrator panels, limited to a few members, cannot match the possibilities for diversity of a jury. Additionally, compensation for arbitrators is recognized as a problem. NASD arbitrators receive an honorarium of $225 per day, as of the time the Task Force Report was published.\textsuperscript{277} This below-market rate limits the numbers of people willing to participate and compromises the quality of members, which "is not as high as it could be."\textsuperscript{278} This generally has gone unnoticed because, unlike judges, arbitrators deciding employment disputes are not publicly chosen or accountable. The decisions are becoming more widely available but disclosure of decisions and decision makers nowhere near approaches the visibility of a litigated or settled case. This relative secrecy has perhaps slowed the development of law in this area and led to missed opportunities for the advancement of novel legal theories and approaches. By way of example, two intriguing theories that are relatively promising for plaintiffs have only just begun to be discussed seriously as cases have begun to be heard in court—first, whether the SEC even has the power to make a mandatory binding arbitration rule depriving plaintiffs of the choice to bring suit for resolution of statutory claims, and second, whether the SROs concerted action of adopting identical rules violates antitrust laws. These challenges go to the core of the system yet were not addressed by it.

The NASD, however, has responded to the Task Force Report. In October 1998, the NASD filed with the SEC a proposed rule change designed to improve the arbitrator selection method.\textsuperscript{279} Additionally, the NASD reports that it is developing a specialized roster of arbitrators to

\begin{footnotesize}
\begin{enumerate}
\item See GAO EMPLOYMENT REPORT, supra note 5, at 2.
\item See id.
\item See NASD Task Force, supra note 82, at 103-04. Of course, the concept of payment is inimical to the Article III judicial system. These types of costs are problematic in terms of the appearance of justice and neutrality, and contribute to the perception of bias.
\item Id. at 109.
\end{enumerate}
\end{footnotesize}
decide employment cases. The NASD further reports that these arbitrators will not be those who in their private capacities primarily represent employers or employees and attempt to coordinate judicial and arbitral claims in order to minimize bifurcation.\textsuperscript{280} These proposals are most certainly well-intended and considered. It remains to be seen, though, whether they will be used now that judicial forums are once again an option.

Beyond arbitrator issues, there are arbitration issues—procedural and substantive challenges to the system itself. These too were addressed by the Task Force, but a few points bear mention here. The first set of issues arises out of the initial signing of the U-4 form by employees. Given the almost complete absence of bargaining power on the part of employees, i.e., please sign this if you wish to have a job; it is surprising that this has been, until recently, a relatively unsuccessful legal theory.\textsuperscript{281}

A historically more effective argument has been that the employees did not knowingly waive their rights to a judicial forum, thus negating the validity of the arbitration clause. For how could employees soundly evaluate the relative merits of the judicial and arbitral systems if they are not fully explained? Based on this claim alone, it is probable that every U-4 form was not signed "knowingly." The Ninth Circuit first recognized this claim in \textit{Prudential Insurance Co. v. Lai}.\textsuperscript{282}

The second set of arbitration issues, arises out of the post-dispute resolution process and relates mainly to procedures and remedies. The following challenges arise most often: time for filing claims, discovery, arbitrator challenges, arbitrator pay, remedies such as back pay, compensatory damages, front pay, reinstatement, interest, punitives, attorney's fees, judicial review, and public disclosure. To the extent that the procedural rules and available remedies are not coextensive with those found in a judicial forum, the system is bound to fail. For example, to cap punitive damages at a level below what plaintiffs could seek in court infringes on congressionally-created rights. As another example, the system for challenges is tightly controlled by the securities industry. Even with one peremptory challenge, and unlimited challenges for cause, there still exists a "fundamental imbalance" in a panel appointed by the SROs.\textsuperscript{283} Judicial review of arbitration decisions is limited as well, and arbitrators


\textsuperscript{281}. \textit{See generally} Duffield \textit{v. Robertson Stephens & Co.}, 144 F.3d 1182 (9th Cir. 1998) (discussing how forcing employees to opt for one of two "choices," sign Form U-4 or seek another profession, is "fundamentally at odds with civil rights legislation").  

\textsuperscript{282}. 42 F.3d 1299 (9th Cir. 1994), \textit{cert. denied}, 516 U.S. 812 (1995).  

are not bound to follow relevant civil rights laws. The procedures and remedies are, at this point in the rules that have been drafted and proposed to the SEC by the Securities Industry Conference on Arbitration (SICA), a group composed primarily of members of the SROs and their trade association, the Securities Industry Association. The form ‘public members’ from outside the securities industry are outnumbered more than two-to-one. Outside ‘regularly invited guests’ include the SEC and the American Arbitration Association, but they cannot vote.284

No matter how debatable one may find the assertions of gender, claim, and age bias in the system, it is incontrovertible that “structural bias” exists within this system “dominated by the securities industry, that is by the employment side, of this dispute.”285 This forum is quite simply inadequate to vindicate employees’ rights. The unique nature of these securities industry employment disputes which sets them apart from broker-customer financial disputes is the unique public function that exists in civil rights litigation. Whereas the arbitral process is relatively confidential and outside of the public forum, employment litigation is public and is continually developing, testing, and redefining the contours of the law. Moreover, to the extent that the results are undesirable, Congress may amend the law, thus providing for a balance of opinion created by a wide consensus, greater than could ever be achieved through private compulsory, industry-sponsored arbitration.286

Public statutory law confers (1) substantive rights and (2) a reasonable right of access to a neutral forum. Civil rights laws exhibit a strong public interest in enforcement and deterrence that do not exist to the same degree in broker-customer financial disputes. This system, which coerces employees to give up rights many do not even yet know they possess, sponsors the forum, creates its own rules, staffs it by industry insiders, and finally takes away the possibility of meaningful judicial review, does not nearly meet the minimum standards to maintain the necessary level of neutrality, competence and trust in the system. This inadequacy has come

284. Id.
285. Id.
286. This has been the case with recent relevant civil rights legislation. When the Civil Rights Procedures Protection Act was first introduced in 1996, there were only 10 co-sponsors, and just one year later there were 35 co-sponsors. See infra notes 305-306 and accompanying text (discussing the Congressional bills); see also Susan Antilla, Wall Street Women’s Sex Harassment Suits, A Year Later, PLAIN DEALER, May 26, 1997, at 3D, available in LEXIS, News Library, Cumws File. Making suits, class actions, settlements, and decisions public has had the effect of making employers and employees more aware of both their rights and responsibilities, which cannot happen with a relatively confidential arbitration system.
under scrutiny of the EEOC and other agencies. Of course, changes are to be made within the year.

D. Current Legislative and Agency Initiatives: What Their Effect Will Be If and When They Are Passed

1. The EEOC

On July 10, 1997, the EEOC Chair Gilbert F. Casellas issued the EEOC's most strongly worded Policy Statement opposing mandatory binding arbitration of employment disputes. It characterized PDAAs as "contrary to the fundamental principles evinced in [U.S. employment discrimination] laws." It should be conceded that part of the EEOC's animosity towards arbitration may be attributed to the fact that the EEOC's regulatory authority over employment cases from this sector is compromised by the industry's use of compulsory arbitration. But beyond any real or imagined turf war, the EEOC presented in its Policy Statement a number of persuasive assertions about why it opposes this system of arbitration.

This document was issued on the heels of two other relevant EEOC documents. In April 1997, the EEOC issued Enforcement Guidance to all of its offices setting forth its position that "an employer may not interfere with the protected right of employees to file a charge . . . under [any] of the laws enforced by the EEOC." Furthermore, between these dates an EEOC Task Force reported to the Chair its development of a National Enforcement Plan to identify priority issues and formulate a plan for their enforcement. One of the first efforts to be made, according to the Task Force, is to "encourage the voluntary resolution of disputes where appropriate and feasible," and only when voluntary efforts fail, is litigation recommended. Recognizing that its "effectiveness as a law enforcement agency had been reduced by the overwhelming increase in its inventory of individual charges of discrimination, [and] by the lack of [commensurate] financial resources," the EEOC is attempting to balance the problems of arbitration with its advantages.

In an effort to reconcile arbitration and litigation, maximizing the positive features of each, the EEOC took the position that arbitration is

287. EEOC Policy Statement, supra note 3, at 1.
290. Id. at 2. (emphasis added).
291. Id. at 1.
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absolutely an appropriate forum in which to vindicate civil rights in employment claims, provided certain conditions are met. The agreement must be voluntary rather than unilateral. The agreement must not be a condition of employment. Arbitration may not be exempt from the federal enforcement of civil rights laws. (This had not been required by the SEC.) Employees must always be able to choose to vindicate their rights in court. The agreement should only be made at the time the dispute arises—known as a post-dispute agreement. Notably, the EEOC endorses binding arbitration and does not mention judicial review of arbitrators’ decisions, which under the current system is insufficient. On balance, the EEOC got it right when it stated that arbitration should be a voluntary, unconditional, mutual choice not made until the dispute arises.

2. The SEC

Just three weeks after release of the EEOC Policy Statement, the NASD proposed to eliminate compulsory arbitration of statutory discrimination claims. Following the requisite notice and comment period, the proposal was considered by the SEC, which has final authority over all rules. The SEC approved the proposal in June 1998, and it becomes effective on January 1, 1999. It applies to those claims brought on or after that date.

The rule change modifies language currently found in the NASD’s Form U-4. Paragraph (a) adds a prefatory phrase indicating that the requirement to arbitrate contains an exception, as found in Paragraph (b). Paragraph (b) states: “[A]ssociated persons are no longer required . . . to arbitrate claims of statutory employment discrimination. Associated persons will still be required to arbitrate other employment-related claims.”

The SEC approval of the NASD’s proposal was concise and pointed. Notably, the SEC declined to discuss two other points in the proposal. First, the NASD had mentioned plans to improve disclosure to employees of the effect of their signing the Form U-4, in ways such as highlighting their rights and the features of arbitration. These plans would greatly enhance disclosure and informed consent on the part of employees. Second, the NASD planned to improve and expand disclosure on the Form

292. See EEOC Policy Statement, supra note 3.
293. See NASD Proposal, supra note 243.
U-4 itself. It seems the NASD is unbowed by recent changes: regarding this last proposal, the NASD stated that it "intends to work with other regulators." It could be that the securities industry may consult with the EEOC, but even so, employee groups are noticeably absent as possible consultants. The NASD has left open the possibility that individual firms could include mandatory provisions in employment agreements.

Finally, the SEC expressly declined to consider other rules concerning employment agreements or to extend the new rule to other causes of action, reasoning that the NASD must consider them in the first instance. Even facing the prospect of bifurcated proceedings, the SEC and SROs remain committed to arbitration of employment disputes as a quicker, less expensive, and more private alternative than litigation.

Another problem, which has received virtually no attention, is the effect the NASD rule change has on other SROs. While it is unclear what other SROs have decided, the NYSE has proposed amending its rules to exclude claims of employment discrimination from arbitration, unless the parties have agreed to arbitrate the claim after it has arisen. This represents an amendment of NYSE Rule 347, and of Rule 600 with a new sub-section (f) providing for post-dispute arbitration. Anticipating the bifurcation issue, amended Rule 347 provides for the entire case to be heard in court in certain circumstances. Should other SROs not modify their rules, there would be a lack of uniformity leading to undesirable results. This issue should be immediately under consideration by the SEC, as this situation already occurred in 1998 in the Imhoff case.

3. Legislation and Other Recommendations

Beyond the two regulatory agencies with jurisdiction, there is a
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legislative effort to modify and clarify existing law in this area. Senate Bill 63, the Civil Rights Procedures Protection Act, proposes to amend all civil rights in employment statutes. The amendment provides that: "plaintiffs may bring suit in federal court and such powers and procedures shall be the exclusive powers and procedures applicable to such claims unless after such claim arises the claimant voluntarily enters into an agreement to resolve such claim through arbitration or another procedure." 305

The Bill also proposes to amend the Federal Arbitration Act to clarify that it does not apply "with respect to a claim of unlawful discrimination in employment if such claim arises from discrimination based on race, color, religion, sex, national origin, age, or disability." 306 Clearly, there is a premium placed on the timing of the making of the arbitration agreement. Every party to have considered this question has supported the proposition that employees should not be required to choose arbitration until after the dispute arises. Also, legislators have emphasized that the process of entering into the agreement must be voluntary. It is interesting that there is no mention of a requirement that this be a knowing and voluntary agreement. It is arguable that an agreement that is entered into voluntarily is also made knowingly, but such is not always the case. 307 Compulsory is not voluntary, and the system must evolve into a consensual one.

Finally, there have been recommendations from organizations that have an interest but no direct stake in this issue. The Dunlop Commission recommends that employees be given a choice whether to litigate or arbitrate. 308 This choice should be made after the dispute has arisen. 309 This Commission makes two additional noteworthy points. It recommends that arbitral systems adopt a standard of judicial review similar to the review of a lower court decision. The Dunlop Commission also raises a novel approach to employment arbitration which involves employees in the process. It states: "In the long run the best way to ensure the acceptability to workers of binding arbitration of their public law claims is to afford employees an independent voice in the design and implementation of such programs." 310

This simple, inexpensive, and brilliant strategy is precisely what the securities industry was lacking when it developed its industry-sponsored system, and is the thesis of Part III.C above. The Dunlop Commission also devoted a portion of its report to due process concerns, another vulnerable

305. S. 63; H.R. 983, 105th Cong. § 2 (1997); see also S. 121, 106th Cong. (1999).
306. Id. at § 9.
307. See id. See generally Media Alert, American Arbitration Association Encourages Use of Voluntary Arbitration to Resolve Employment Disputes, July 9, 1997 (discussing that process is most effective when parties "knowingly and voluntarily agree on the process").
308. See Dunlop Commission, supra note 82, at 7-10.
309. See id.
310. Id. at 11.
feature of industry-sponsored arbitration. It repeatedly called for "fair" policies and methods regarding discovery, access, cost-sharing, representation, remedies, opinions, and judicial review.\(^\text{311}\) The American Arbitration Association issued National Rules for the Resolution of Employment Disputes recognizing that the process must be fair and equitable for all parties.\(^\text{312}\) The rules approach the level of due process afforded litigants in court. For example, arbitrators have the power to order discovery, they must be experienced in the field, and they may grant any remedy deemed just and equitable including those available had the matter been heard in court.\(^\text{313}\)

The initiatives detailed in this section are critical for the legitimacy and success of any dispute resolution system—judicial or arbitral. Had the securities industry not reached so far and instead shared some power and control, the system's fall might not have been so extreme. Each organization, the agencies, legislators, and interest groups have made worthy suggestions for the betterment of employment arbitration. The recommendations they have made, along with those found in the Arbitration Policy Task Force Report, will promote a fair and equitable system. Issues of money and control propelled the securities industry to create a flawed system, parts of which may still be salvaged.

IV. CONCLUSION

Employment arbitration must evolve from a compulsory system to a knowing, consensual one. This consent must not be a condition of employment, but rather be unconditional and made later in the employment relationship when the dispute arises. Employee rights should not be susceptible to prospective waiver. Procedures as well as remedies must be coextensive with those granted by statute, otherwise employees' civil rights will be eviscerated. Although this may cause proceedings to be bifurcated, this complication is outweighed by the value of fairness and equity in the system.

The legacy of the securities industry arbitration system as it existed prior to 1998 rests on two general themes—control, and to a lesser extent, gender. Had the securities industry sought out and included views from employees and such interested parties in an effort to build a consensus, the

\(^{311}\) See id. at 8-12.


\(^{313}\) See National Rules for the Resolution of Employment Disputes, supra note 312.
system would more likely than not have been perceived and realized as a just, fair, and neutral system. The level of power the securities industry asserted and control that it maintained simply is not tenable. This issue will also have the legacy of exposing the continued problems in integrating industries historically closed to others. Women in particular are the ones in the securities industry who have lost their jobs, careers, and income, and who wait for a chance to seek justice. The disproportionate effect on women, older workers, and racial and ethnic minorities is a legacy the securities industry must overcome to ensure that all employees are able to maximize their participation and ultimately their success and advancement.

The reader should not conclude from this Article that arbitration is "bad" or "second-class justice." It is simply that arbitration is variable in that each agreement is different. Each agreement, no matter the industry, should preserve parties' rights, offer a neutral forum, and allow for meaningful judicial review. Arbitration has developed over the years and has great potential to serve justice in an inexpensive and speedy fashion that could never be matched by litigation. Perhaps arbitration should not be as considered 'alternative' anymore, but rather as a starting point for the resolution of parties' disputes.

To start with the process of arbitration, knowing that there is available (if needed), meaningful review of the arbitral decision, is a much less threatening strategy. On balance, arbitration will be most successful when it is a forum agreed upon by both parties in a knowing and voluntary way and when the agreement is the product of all stakeholders, not when it is a condition of employment, entered into after the dispute arises. The arbitration forum should be neutral and follow rules agreed upon in advance. Procedures and remedies should be coextensive with those found in the statute. The arbitrator agreed upon should be a well-trained neutral. The process should even be non-binding. Judicial review should be similar to that found between reviewing and trial courts. These are the hallmarks of a successful program in which the agreement and process is the result of each parties’ efforts and assent.

There is room for both arbitration and litigation, and had arbitration procedures been well-thought out in the first instance, this wholesale retreat might have been avoided. There is no inherent conflict between arbitration and the vindication of statutory employment discrimination claims; it is incumbent, though, to provide all parties with a system that is perceived as fair, accessible, and voluntary, and that such perception is made a reality.