Summer 2001 Newsletter
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THE COLLEGE OF LABOR & EMPLOYMENT LAWYERS

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Reminder:

Applications for the Class of 2002 will be accepted beginning September 1st.

LARGEST CROWD YET GATHERS FOR SIXTH ANNUAL INDUCTION DINNER

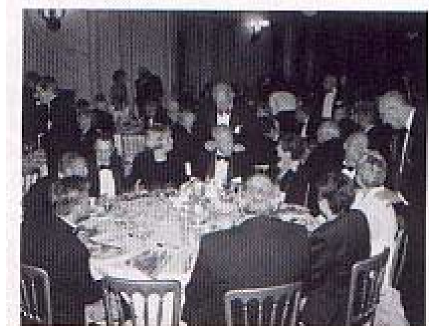
The "Windy City" was never hotter (at least not since Mrs. O'Leary's cow misbehaved) than on Sunday, August 5th. The thousands of lawyers gathered in Chicago to attend the Annual Meeting of the American Bar Association seemed convinced that civilization, as we know it, was about to succumb to global warming. Neither the heat nor the humidity, however, dampened the festive spirits of the College's Sixth Annual Induction Dinner held at the majestic Chicago Culture Center complete with its Italian and Greek Renaissance architecture.

After cocktails, which were held on the ground level of the Cultural Center at The Museum of Broadcast Communication, the over four hundred attendees promenaded up the carrara marble three-story staircase to the Preston Bradley Hall which features a Tiffany stained glass illuminated dome ceiling. There, in the breathtaking historic setting, the College Fellows enjoyed excellent wine and a gourmet feast.

The main reason for the gathering, and the highlight of the evening, was the induction of eighty-nine newly elected Fellows. The honorees were warmly greeted by the crowd, and appropriately welcomed to membership in the College. Truly, our proud organization has come a very long way since the 1996 inaugural induction held at the Bistro de Paris in Walt Disney's Epcot Center with no more than two hundred persons in attendance to witness the induction of the first class of Fellows.

Next year we convene in Washington, DC. Who knows, maybe we'll book the White House for the annual dinner. Catering social affairs could be a cutting-edge privatization experiment for 'W'!

Don Slesnick
Roving Reporter



Mark your calendars. Next year's Annual Induction Dinner will be held in Washington, DC on Sunday, August 11th.

CLASS OF 2001 INDUCTEES

The following list of distinguished lawyers were elected Fellows by the Board of Governors on May 21, 2001.

Steven H. Adelman, Chicago, IL
Richard N. Appel, Washington, DC
Nelson D. Atkin II, Portland, OR
Alice Walker Ballard, Philadelphia, PA
George Barford, Tampa, FL
Robert A. Bloom, Chicago, IL
Kathleen L. Bogas, Detroit, MI
Roger T. Brice, Chicago, IL
Martin D. Buckley, Denver, CO
Paul W. Cane, Jr., San Francisco, CA
Barbara Jean D'Aquila, Minneapolis, MN
H. Lane Dennard, Atlanta, GA
George C. Dunlap, Dallas, TX
Michael W. Dyer, Carson City, NV
Kim F. Ebert, Indianapolis, IN
Karen L.C. Ellis, Nashville, TN
Lawrence F. Feheley, Columbus, OH
Robert J. Finkel, Farmington Hills, MI
Mark R. Flora, El Paso, TX
Patrick M. Flynn, Houston, TX
Howard L. Ganz, New York, NY
Hal K. Gillespie, Dallas, TX
Eugene S. Ginsberg, Garden City, NY
Richard M. Goldberg, Wilkes-Barre, PA
Gerald A. Golden, Chicago, IL
Marc D. Greenbaum, Boston, MA
Hugh E. Hackney, Dallas, TX
W. Michael Hamilton, Nashville, TN
J. Joe Harris, San Antonio, TX
Christopher T. Hexter, St. Louis, MO
William F. Highberger, Los Angeles, CA
Mark A. Jacoby, New York, NY
Thomas W. Jennings, Philadelphia, PA
Weyman T. Johnson, Jr., Atlanta, GA
Phillip R. Jones, Dallas, TX
Jared H. Jossem, Honolulu, HI
Michael J. Keenan, Phoenix, AZ
Judith Droz Keyes, Oakland, CA
Joseph A. Latham, Jr., Los Angeles, CA
Edward A. Lenz, Alexandria, VA
Edward R. Levin, Washington, DC
Wilma B. Liebman, Washington, DC
Jeffrey C. Londa, Houston, TX
Nora L. Macey, Indianapolis, IN
David J. MacKenzie, Los Angeles, CA
Frank T. Mamat, Detroit, MI
Joyce E. Margulies, Memphis, TN
J. Markham Marshall, Seattle, WA
Sandra R. McCandless, San Francisco, CA
Kevin M. McCarthy, Kalamazoo, MI
James P. McElligott, Jr., Richmond, VA
James V. Meath, Richmond, VA
Paul Henry Merry, Boston, MA
Mary L. Mikva, Chicago, IL
Richard E. Molan, Concord, NH
Scott C. Moriearty, Boston, MA
Demitrios M. Moschos, Worcester, MA
James R. Mulroy II, Memphis, TN
Loyd Eugene Owen, Kansas City, MO
Shelton Edward Padgett, San Antonio, TX
Arnold H. Pedowitz, New York, NY
Daniel P. Pelfrey, Louisville, KY
Irving Perlman, Baldwin, NY
S. Richard Pincus, Chicago, IL
Bettina B. Plevan, New York, NY
Adele Rapport, Detroit, MI
John E. Rinehart, Jr., Seattle, WA
Howard Z. Rosen, Los Angeles, CA
Michael T. Roumell, Chicago, IL
Jerome L. Rubin, Seattle, WA
John E. Sands, West Orange, NJ
Bruce W. Sattler, Denver, CO
Tod F. Schleier, Phoenix, AZ
Stephen W. Skrainka, St. Louis, MO
R. Michael Smith, Washington, DC
Lewis T. Smoak, Greenville, SC
J. Hamilton Stewart, III, Greenville, SC
Ilene Robinson Sunshine, Boston, MA
Arthur G. Telegen, Boston, MA
Joseph E. Tilson, Chicago, IL
John M. True, III, Oakland, CA
Robert J. Truhlar, Littleton, CO
Mark F. Vetter, Milwaukee, WI
Daniel R. Wachtler, St. Paul, MN
Jeffrey A. Walker, Jackson, MS
Richard P. Ward, Boston, MA
Vincent A. Wenners, Jr., Manchester, NH
Stanford G. Wilson, Atlanta, GA

UPDATES FROM THE ABA SECTION OF LABOR AND EMPLOYMENT LAW

Section Annual Meeting in Chicago

The Section's Annual Meeting was held August 4-8 at the Fairmont Hotel in Chicago. With over forty substantive programs presented, the more than 800 attending members had plenty to choose from. Program topics included the latest developments in EEO, ERISA and ADR, along with an in-depth presentation from Members of the National Labor Relations Board on recent decisions and current issues before the Board. The Section Reception was a huge success held at the beautiful Museum of Contemporary Art and featured two performances by The Second City Comedy Troupe. On Tuesday, Secretary of Labor Elaine L. Chao spoke to a sold-out luncheon of 240 attendees. She stated that additional complex regulations and new enforcement initiatives would do little to protect the rights of workers, ensure their safety on the job, and guarantee the integrity of their pension funds. Instead, she said the Department of Labor needs to focus on helping employers and employees understand and live by "common sense standards of safety and fairness" -- a strategy she called "compliance assistance." Chao said compliance assistance would be her primary objective as she administers and enforces the nation's labor and employment laws. If you were unable to attend this year's Annual Meeting, but are interested in the program materials, be sure to visit the Section's website at www.abanet.org/labor and click on "Papers and Publications" to view and print the papers that were presented. Also, mark you calendars for the 2002 Annual Meeting, which will be held at the Washington Hilton in Washington, DC August 10-14.

Fall Meeting Forecast – Upcoming CLE Programs

Responding to Mental Health Issues and Violence in the Workplace: Navigating the Rights and Responsibilities Created by the ADA, FMLA, Workers' Compensation Laws, and Other Employment Statutes will be held November 9 and 10 at the Wyndham Atlanta Hotel. This mid- to advanced-level conference will provide attendees with timely approaches and responses to litigation arising from mental disabilities and violence in the workplace.

Equal Employment Opportunity Basic Law and Procedure. This regional institute will be held on October 10 at the Bar Association of Metropolitan St. Louis and October 12 at Stetson University Law School in St. Petersburg, Florida. Registrants of this program will receive a comprehensive introduction to federal and state laws affecting EEO practice as well as the necessary basic information on the administrative and legislative processes that practitioners in the field need to know.

Litigation Skills Training. Held September 28 at Indiana University Law School, Indianapolis, this one-day regional program is designed to teach practitioners the skills necessary to successfully try employment law cases. The program will benefit both new and experienced employment law counsel.

Fair Labor Standards Act and Family Medical Leave Act Basic Law and Procedures. This half-day program, to be held October 18 at the University of Denver Law School, will provide an overview of the structure and enforcement of the federal minimum wage and overtime law. The program will also include an overview of the key provisions of the Family Medical Leave Act of 1993.

For more information on these conferences and a complete listing of the Section's calendar, please visit www.abanet.org/labor and click on Meetings & CLE Events or call the Section office at 312/988-5813.

FELLOW COMMENTARY

In this edition, three distinguished Fellows offer differing perspectives on the all important issue of mandatory arbitration to resolve statutory claims. They do not necessarily represent the views of the College or its Board of Governors. We do hope, however, that this may elicit comments from the readers. If so, such comments, as appropriate, will appear in future editions of this newsletter.

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LESSONS LEARNED: WHAT THE UNION MODEL OF MANDATORY ARBITRATION HAS TO TEACH ABOUT PRIVATE DISPUTE RESOLUTION

By G. Roger King*

The primary concern expressed by opponents of mandatory arbitration is that it favors employers and thereby fails to protect employees' statutory rights.

The Supreme Court's recent decision in *Circuit City Stores, Inc. v. Adams*[1] has inspired considerable debate about the use of mandatory arbitration for resolving employees' statutory claims. The debate is important and timely because the Court will revisit the issue of the effect of arbitration agreements in its next term when it hears an appeal from the Fourth Circuit's decision in *EEOC v. Waffle House Inc.*[2] The issue in *Waffle House* is whether an arbitration agreement bars the Equal Opportunity Commission (EEOC) from prosecuting the individual claims of a worker. Largely absent from the debate that has emerged is any attempt to draw lessons from the unionized workplace context which has extensive experience with the use of mandatory dispute resolution. This commentary seeks to address that gap by discussing how lessons learned from the unionized workplace experience show that there are substantial benefits to a system that promotes the private resolution of workplace conflicts.

The primary concern expressed by opponents of mandatory arbitration is that it favors employers and thereby fails to protect employees' statutory rights. Often this assumption is supported by the reverse logic that employers would not seek mandatory arbitration if it did not benefit them at the expense of employees. The experience of union employees contradicts this assumption because the grievance process provides a guaranteed opportunity to resolve potential claims and creates an incentive for employers to deal with claims quickly and cooperatively.

The standard grievance procedure system in union workplaces ensures access by individual employees to an immediate and efficient system for resolving their claims. Given the limited resources of the EEOC and the crowded and often extremely slow court dockets, employees in a non-unionized setting with claims of relatively minor monetary value are often unable or frustrated from pursuing them. In the union context, employees are guaranteed an opportunity to raise their claims with the employer without the expense and risks involved in bringing a lawsuit. The reduced costs and time involved in arbitration should similarly enhance the ability of employees in non-union workplaces to pursue claims in a more efficient process.[3]

Moreover, a system where litigation is the employee's only recourse often creates an incentive for the employer to refuse to address individual claims because the transaction costs involved in bringing a lawsuit make it likely that a large number of claims will be dropped without any action by or risk to the employer. In contrast, where the employer is contractually obli-

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The relative openness and increased cooperation promoted by a private dispute resolution program permits creative compromise and increases the opportunities and incentives for proactive steps by the employer.

substantially diminish the ability of employees to protect their statutory rights.

For example, the existence of an effective dispute resolution program for employee claims promotes the development of an ongoing dialogue between employer and employees concerning workplace conditions and employee treatment. The relative openness and increased cooperation promoted by a private dispute resolution program permits creative compromise and increases the opportunities and incentives for proactive steps by the employer. Rather then diminishing the protection of employee rights, such a system has the potential to enhance those protections in a systematic and continuous fashion.

Second, the lack of punitive damages does not defeat their intended purpose. Punitive damages are not primarily compensatory in nature; instead they are designed to prevent and deter future misconduct. Even under a system of compulsory arbitration, the EEOC retains the power to seek injunctive and broad-based relief designed to have an effect beyond the individual litigants involved in a particular case. The EEOC's role fulfills the goal of deterring future violations, while the use of arbitration ensures that a broader range of employees have access to a forum for resolving their claims in an efficient manner.

The Fourth Circuit's decision in *Waffle House* illustrates this balance. The court held that the compensatory aspects of an employee's claim remain subject to the arbitration agreement, while the EEOC retains the power to promote the public interest in preventing future violations by pursuing injunctive and broad-based relief notwithstanding any arbitration agreement governing individual claims. This bifurcation of the remedial and regulatory aspects of an individual claim accomplishes the same goals as punitive damages without creating a corresponding disincentive for cooperation on the part of the employer.

A related aspect to the objection that arbitration fails to adequately protect employee rights is the concern that arbitration lacks the full due process protections available in a civil action. In particular, concerns are often raised about the limited discovery available for arbitration. In this respect it is important to emphasize only arbitration agreements that are governed by procedures which guarantee minimal procedural protections should be enforceable. For example, the American Arbitration Association's (AAA) guidelines which permit the arbitrator to subpeona witnesses and documents provides adequate procedural protections with reasonable limitations to ensure that the process remains efficient. In addition to adequate procedural protections governing the arbitration process itself, it is important that employers bear the majority of the costs involved in arbitration in order to remove the obstacle that the fear of high fees presents to employee claims.[4] Removing the prospect of high fees helps create a situation similar to the union setting where employees are guaranteed access to a forum for resolving their claims and thereby enhances the protection of employees' statutory rights.

The current debate over mandatory arbitration will be enhanced by a thorough examination of the extensive experience of the unionized workplace with private dispute resolution mechanisms. Many of the concerns about the use of arbitration appear largely unfounded in light of the success that this system has had in protecting the rights of employees.

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[1] *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2000).

[2] 193 F.3d 805 (4th Cir. 1999).

[3] At least one study examining the cost barriers for employee-plaintiffs under a litigation system has concluded that the reduced costs and time involved in arbitration should significantly increase the willingness of plaintiff's attorneys to take cases headed for arbitration. *See* David Sherwyn, et. al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMPLOY L. 73 (1999).

[4] The D.C. Circuit has emphasized the importance of provisions requiring the employer to pay most or all of the fees associated with arbitration in making an arbitration clause enforceable for employee statutory rights. *See Coles v. Burns International Security Services*, 105 F.3d 1465, 1484 (D.C. Cir. 1997).

At issue before the Supreme Court was the scope of the exclusion in Section 1 of the FAA that otherwise generally compels judicial enforcement of a wide range of written arbitration agreements.

IMPLICATIONS OF CIRCUIT CITY ON ENFORCEABILITY OF MANDATORY ARBITRATION AGREEMENTS

By Evan J. Spelfogel*

In March 2001 the United States Supreme Court ruled 5 to 4 that, under the Federal Arbitration Act ("FAA"), employers may enforce agreements to arbitrate their employees' statutory discrimination claims. (*Circuit City Stores, Inc. v. Adams*,) No. 99-1379, 2001 WL 273205 (Mar. 21, 2001). The Court also held that the FAA pre-empts contrary state law.

The Circuit City v. Adams Decision. When Adams began work at Circuit City in 1995, he signed an employment application a two-page document entitled "Circuit City Dispute Resolution Agreement." This required that employees submit to binding arbitration all disputes arising out of their employment, including claims under federal, state and local anti-discrimination laws. Two years later, Adams filed a state court employment discrimination lawsuit against Circuit City asserting claims under California's Fair Employment and Housing Act, and California tort law.

Circuit City obtained a federal court order enjoining the state court action and compelling arbitration under the FAA. On appeal the Ninth Circuit reversed holding, contrary to decisions in nine other Circuit courts of Appeals, that the FAA did not apply to arbitration agreements contained in employment contracts.

At issue before the Supreme Court was the scope of the exclusion in Section 1 of the FAA that otherwise generally compels judicial enforcement of a wide range of written arbitration agreements. The exclusion covers contracts of employment of seamen, railroad employees, and any other class of workers engaged in foreign or interstate commerce. In reversing the Ninth Circuit, the Supreme Court held that the exemption was narrowly limited to transportation workers similar to seamen and railroad employees. Writing for the majority Justice Kennedy noted (i) the value of nationwide certainty of enforcement of arbitration agreements and of avoiding litigation, (ii) permitting state law to prohibit arbitration of employment claims would call into doubt the efficacy of the dispute resolution procedures already adopted by many employers, and undermine the FAA's pro-arbitration purpose.

The Court distinguished away *Alexander* and its progeny on the ground that those cases involved union-represented employees and arbitration agreements entered into by the unions and not by the individual employees.

Alexander and Its Progeny. In 1974, the Supreme Court unanimously held that union-represented employees could litigate statutory employment discrimination claims in federal court after unsuccessfully arbitrating their claims under a union contract. The Court held that, as a matter of public policy, employees pursuing grievances to final arbitration under the non-discrimination and grievance/arbitration clauses of collective bargaining agreements do not forfeit their right subsequently to bring statutory employment discrimination claims in federal court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

In *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) the Supreme Court extended the *Alexander* rationale to encompass wage and overtime claims brought both under a collective bargaining agreement/grievance procedure and under the Fair Labor Standards Act ("FLSA"). The Supreme Court further extended the rational to include claims under 42 U.S.C. § 1983 in *McDonald v. City of West Branch.* 466 U. S. 284 (1984).

Gilmer. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) the Supreme Court held that Gilmer's Age Discrimination in Employment Act ("ADEA") claim was arbitrable under the mandatory, binding arbitration agreement he had entered into and that Gilmer was precluded from litigating the claim in court. Gilmer, a securities industry employee, had signed an industry agreement providing for mandatory

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The Supreme Court in Circuit City reinforced the Court's endorsement of arbitration of discrimination claims and strengthened the ability of employers to enforce arbitration agreements with their employees

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binding arbitration of any dispute, claim or controversy arising out of his employment or termination of employment. He unsuccessfully argued that under the Supreme Court's 1974 *Alexander* decision and its progeny, his agreement to arbitrate was void as against public policy, and unenforceable.

Over the following eight years, the United States Courts of Appeal extended the holding in *Gilmer* to cover race, sex and all other forms of statutory discrimination, whether the promise to arbitrate was contained in employment agreements, employment applications, personnel manuals or employee handbooks.

The *Gilmer* Backlash. In the mid-1990s, however, a "backlash" began to develop. A number of lower courts rejected some arbitration agreements and allowed court litigation. Their rulings were based on one or more of the following grounds: (i) the agreements were not knowingly and voluntarily entered into by the employee; (ii) the design and internal procedures of the arbitration mechanisms failed to provide to the employee the substantive equivalent to a lawsuit (e.g., absence of formal written opinions or limitations on available remedies); or (iii) the employees were being denied necessary fundamental due process. See, e.g., Andrea Fitz, *The Debate Over Mandatory Arbitration in Employment Disputes*, 514 Disp. Resol. J. 35 (1999); Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 Hofstra Lab. L.J. 247 (1993); and Evan J. Spelfogel, *Pre-dispute ADR Agreements Can Protect Rights of Parties and Reduce Burden on Judicial System*, New York State Bar Journal, Vol. 71, No. 7, p. 16 (September/October 1999).

The Supreme Court in *Circuit City* reinforced the Court's endorsement of arbitration of discrimination claims and strengthened the ability of employers to enforce arbitration agreements with their employees. This result is consistent with *Gilmer* and previous judicial acknowledgement of the strong federal policy favoring arbitration and with the corresponding presumption in favor of the validity of arbitration agreements. The *Steelworkers* Trilogy and *Mitsubishi Motors*: *United Steelworkers of America v.: American Manufacturing Co.*, 363 U.S. 564, 565 n.1 (1960); *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 (1960); *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985).

Circuit City is a significant development in the area of arbitration. Employers who impose pre-dispute mandatory arbitration for their non "transportation" employees as a condition of employment no longer must be concerned whether enforcement of these agreements will be available under the FAA, denied on public policy grounds, or left to the vagaries of multiple and often inhospitable state courts. There remain, however, open issues.

Remaining Issues After Circuit City. First, employers still must ensure that their arbitration agreements meet general requirements for enforceability. Arbitration agreements will not be enforced if they are overreaching, are unfair to the employee, are procedurally defective or lack mutuality. As stated in *Gilmer*, 500 U.S. at 26, "we [recognize] that '[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum'."

Second, the Supreme Court has not yet addressed a split in the Circuits concerning the validity of agreements that require a plaintiff to pay part of an arbitrator's fee. Some courts have held that an employee should not be required to pay more than would be required to file a case in court. Clearly, the argument goes, a plaintiff does not have to pay the salaries of judge or jurors. In *Green Tree Financial Corp. – Alabama v. Randolph*, 121 S. Ct. 513, 522 (2000) (a non-employment case), the Supreme Court stated that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal rights in the arbitral forum."

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The Supreme Court had an opportunity to revisit Alexander in light of Gilmer in Wright v. Universal Maritime Service Corp. 525 U.S. 70 (1998), but declined to do so.

Third, also remaining unresolved is the continuing validity of *Alexander* (arbitration under a union collective bargaining agreement does not foreclose an individual from bringing a claim under federal discrimination statutes). The Supreme Court had an opportunity to revisit *Alexander* in light of *Gilmer* in *Wright v. Universal Maritime Service Corp.* 525 U.S. 70 (1998), but declined to do so. The Court stated that it might reconsider *Alexander* if, unlike in *Wright*, the language in the union collective bargaining agreement arbitration clause expressly covered statutory discrimination claims.

Fourth, the Supreme Court in *Circuit City* did not define "transportation" employees. Did the Court mean all employees working for a transportation business or just those physically providing or carrying goods or services across state lines, excluding the dispatcher or vehicle mechanic back in the shop?

Fifth, questions remain whether (i) an employee covered by a mandatory arbitration agreement may file a discrimination charge with the Equal Employment Opportunity Commission (EEOC), (ii) the EEOC may institute judicial action based on that charge, and (iii) the EEOC may collect damages on behalf of the employee.

The U.S. Court of Appeals for the Fourth Circuit, in *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), and the Second Circuit, in *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) have held that the EEOC may not pursue individual relief such as reinstatement, back pay, compensatory or punitive damages, on behalf of employees who have entered into binding arbitration agreements. The Supreme Court has granted review in *Waffle House*, 121 S.Ct. 1401 (March 26, 2001) to resolve the conflict with the Sixth Circuit's decision on the same issue in *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999), *cert denied*, 525 U.S. 982 (1998). The case is scheduled to be argued during the Court's October 2001 term.

The EEOC, moreover, has held administratively that an employer commits a per se violation of Title VII by conditioning employment on the employee's signing of a pre-dispute arbitration agreement encompassing Title VII rights. There appears to be no court decision upholding the EEOC's position.

Finally, employers must be aware that, contrary to decisions by other Circuits, the Ninth Circuit continues to hold that *Gilmer* does not apply to Title VII claims and, therefore, employees cannot be required to arbitrate such claims in that Circuit (covering the States of Washington, Oregon, California, Montana, Idaho, Nevada and Arizona). In *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998) the Ninth Circuit stated that Congress intended to preclude compulsory arbitration of Title VII claims when it enacted the 1991 amendments shortly after the *Gilmer* decision. The Supreme Court did not grant review in *Duffield*, and *Circuit City* did not address this issue. Notwithstanding, a California federal court has ruled that *Duffield* was voided by *Circuit City*. *Olivares v. Hispanic Broadcasting Corp.*, No. CV- 00-00354-ER, 2001 WL 477171, at *1 (C.D. Cal. April 26, 2001).

In conclusion, *Circuit City* did not resolve all open issues concerning pre-dispute agreements to arbitrate statutory discrimination claims. The decision does not change the kinds of basic contractual issues that may arise, such as whether the parties have made a voluntary, knowing and binding agreement to arbitrate, or the scope of the issues covered by the arbitration clause. In addition, the Court has not resolved whether an arbitration agreement that requires an employee to pay a share of the arbitrator's fee is enforceable under the FAA, whether a contractual limitation on statutory rights or remedies removes a particular statutory claim from the scope of the arbitration clause, or whether provisions in the arbitration agreement that impair the remedial purposes of the statute on which an employee's claim is based invalidate the agreement, all issues that already have been the bases of successful challenges to arbitration of statutory claims in the "backlash" cases.

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Circuit City may lead more employers to consider whether they should require their employees to enter into pre-dispute mandatory arbitration agreements. Employers should weigh carefully, in the specific context of their particular culture and labor relations environment, the potential benefits and drawbacks of arbitration.

If an employer decides that mandatory arbitration is in its interest, it must ensure that such agreements are properly drafted and adopted, to avoid the legal pitfalls that still exist.

ANOTHER PERSPECTIVE ON MANDATORY ARBITRATION

By Joseph Garrison*

An important argument against the litigation system, however, is that it resulted in "Cadillacs for the few and rickshaws for the many."

Before Circuit City, numerous judges and arbitrators strongly felt that civil rights issues were inherently public, and deserved the attention of our courts. Indeed, a strong argument exists that the success of the civil rights laws and the progress that this nation has made under them is due in large part to the enforcement scheme providing that private counsel would have an incentive to bring these cases, under the various fee shifting doctrines. Cases where a company's disregard for an employee's rights was particularly egregious became known publicly through the media, and large jury awards plus unfavorable publicity had a deterrent effect.

An important argument against the litigation system, however, is that it resulted in "Cadillacs for the few and rickshaws for the many." The average, low-damage claimants received no justice because their cases were not significant enough to attract the attention of qualified plaintiff's lawyers. Therefore, a properly designed arbitration system would "do a much better job of delivering accessible justice for average claimants." Estreicher and Waks, "Free To Agree," *Legal Times*, January 8, 2001.

An important argument favoring the litigation system, on the other hand, is that the successful cases do not favor only the individuals directly affected, but often result in systemic changes within companies or, sometimes, depending on the impact of the case, within industries. It is difficult to believe that the progress made by minorities and women in the workplace would have advanced as it has, without the publicity accorded certain jury verdicts and settlements.

It is, ironically, the success of the litigation system which has resulted in the lament of many federal courts that their dockets are overburdened with employment cases. Thus, for some time there have been substantive attempts (requiring pretext-plus for proof of discrimination) and procedural attempts (approving mandatory arbitration as a condition of employment) to relieve these crowded dockets. The procedural attack, given the result in Circuit City, has, without doubt, the most promise for the future, if the goal is simply to reduce federal court caseloads.

Given the perceived need for "therapy for the ailment of the crowded docket," *Securities Industry Association v. Connolly*, 883 F. 2nd 1114, 1116 (1st Cir. 1989), cert. denied, 495 U. S. 956 (1990), it is now an open question whether our federal courts will allow employees to have an equal playing field in arbitration. If clearing the docket is the ultimate goal, will midfield for a company require it to

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Until recently, however, JAMS presumptively allowed one deposition per party, a discovery restriction favoring the employer.

go only thirty yards, while the employee must still go fifty? Even more fundamentally, will federal courts allow employees to step onto a playing field at all, or will they allow the cost of the process to prohibit entry?

We are entering a period where we require great vigilance from our federal courts, to insure that arbitration is, as much as possible, an alternative forum for the enforcement of civil rights. Circuit City determined that the FAA applies to employment contracts, but it did not address the continued exception to arbitration: "save upon such grounds as exist in law or equity for avoidance of contract." The Due Process Protocol has established a strong minimum standard for fairness in arbitration proceedings, and the major arbitration agencies have adopted the Protocol or standards which are similar. But nothing requires a company to use AAA or JAMS to administer their programs, and nothing (but the courts) prevents a company from establishing an arbitration process which falls short of Protocol standards. We have experience with such a company in Connecticut, and it is interesting to use its process as an example of what, in my opinion, changes a playing field from level to one where the employee must run steeply uphill.

1. *Proceedings Are Limited.* Travelers' Group Mandatory Arbitration Policy limits arbitration proceedings to one day, providing that "normally, the hearing shall be completed within one day. In unusual circumstances and for good cause shown, the arbitrator may schedule an additional hearing to be held within five business days." If an arbitrator has no power beyond the "four corners of the contract" then any statutory rights case at Travelers must be completed in two days or less.

2. *Discovery Is Limited.* Perhaps the restrictions on discovery are what will insure that cases under the Travelers' Policy will not take long to present. Interrogatories are "limited to the identification of potential witnesses." Requests for Production of Documents cannot exceed 25, including subparts, without proof to the arbitrator of the "substantial need" for additional production. There is no provision for depositions.

If only these two provisions were enforced in the federal court as consistent with the FAA, I do not seriously believe that arbitration would be an alternative forum to enforce civil rights. Only the most obvious cases could be prosecuted. The lack of discovery and the truncated hearing so clearly favor the company that I would be surprised if reasonable people differed from that conclusion.

Yet there is an ongoing debate about whether the "efficiency" virtue of arbitration should trump the real need that employees have in most cases for complete document discovery and more than one deposition. JAMS has been an administering agency which has, to my observation, tried hard to mandate fairness in its employment policies. Until recently, however, JAMS presumptively allowed one deposition per party, a discovery restriction favoring the employer. To its credit, JAMS is revisiting and probably changing that restriction. What, however, will the federal courts hold if confronted with a case where a company provides for one deposition per party? More to the point, will the courts enforce a policy allowing for such restrictive discovery which also allows for filing of a motion for summary judgment? If so, any clever employer will terminate by committee, putting the plaintiff employee to a guess about which member of the committee might be most qualified to testify. It would be unsurprising to find that most plaintiffs, in that situation, would guess wrong and therefore be unable to present substantial countervailing evidence to oppose the motion for summary judgment.

3. *Company Is Immune From Altering At-Will Status.* Travelers' Policy provides that the arbitrator "shall have no authority to alter or otherwise modify the parties' at-will relationship." In Connecticut, however, representations can, under certain circumstances, change the at will relationship. An arbitrator, bound by the arbitration Policy, cannot enforce Connecticut's common law even if the facts warranted.

4. *Remedies And Reinstatement Are Limited.* The Policy allows punitive damages, attorneys

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fees or injunctive relief only if authorized by statute. Remedies under common law, such as for proof of fraud or other intentional conduct, are not permitted. In addition, a former employee may only be reinstated if money damages are insufficient as a remedy, which reverses the presumption that reinstatement is the "preferred remedy."

5. *Statutes Of Limitations Are Reduced.* The Policy mandates that "any proceeding under this procedure must be brought within one year of the act or omission giving rise to the controversy." Many claims in Connecticut have a two or three-year statute of limitations. This Policy eliminates the additional time for bringing claims under those statutes.

6. *The Policy Is Not Mutual.* Travelers "reserves the right to revise, amend or modify the Policy at anytime in its sole discretion." In addition, Travelers excludes from the Policy's coverage "claims Travelers Group may have regarding unpaid debts to Travelers Group, unauthorized disclosure of trade secrets or confidential information of Travelers Group." If an employee possesses a breach of contract claim against Travelers, the employee must arbitrate; if Travelers claims a breach of contract resulting in an unpaid debt from the employee, Travelers may sue in court.

The Travelers Group Policy has been held enforceable, at least compelling arbitration, by one District Court, in a case now on appeal to the Second Circuit. If it is enforced at that level, will in-house or outside counsel resist the natural tendency of company executives to structure programs which guarantee victory?

At the bottom line, if our federal courts construe docket control as the most pressing item on their agendas, and sweep aside due process as a fundamental right even in arbitrations, victims of discrimination will not only never receive Cadillacs as awards, they will not even receive rickshaws. They will be hoping for their civil rights to be granted as a gratuity, by employers who will voluntarily mandate programs with due process protections. And in those cases, employees will be fortunate to say: "Thank you, Master."

WEBSITE OFFERS INFORMATION AND CONVENIENCE ALL IN ONE!

As anticipated, the College's official website was completed in time for the Annual Induction Dinner. The website, at ***www.laborandemploymentcollege.org***, offers Fellows and interested parties alike the opportunity to obtain important information about the College and its various endeavors. The website is the perfect place to find a variety of information including a brief history of the College, including the Bylaws, information about the Board of Governors, description of standing committees, posting of the quarterly newsletter, a listing of the current membership roster as well as a listing of the most recently elected Fellows, nominations forms, the credentials committee protocol, upcoming events, and links to other relevant websites. Feel free to browse the site yourself or direct potential new Fellows to visit the website for useful information. In addition, in anticipation of the upcoming election of the Class of 2002, you may now view the College's nomination forms on-line and print them for easy access.

The Newsletter Committee continues to strongly encourage all Fellows to submit for publication any honors, accomplishments or other

SPOTLIGHT ON FELLOWS

College Mourns Sudden Passing of Thomas Preston Burke

Thomas Preston Burke passed away suddenly and unexpectedly on June 5, 2001. He was 63. In his personal life, Tom was the quintessential family man, and in his professional life was a widely respected labor and employment attorney, a partner in our Los Angeles office. Recognized as one of the most prominent management labor and employment experts in the country, he was elected as a Fellow to the College of Labor and Employment Lawyers in 1996, served prominent leadership roles within the Council of the American Bar Association's Section of Labor and Employment Law, and served as Co-Chair of the Section's Committee on National Labor Relations Board Practice and Procedure.

Tom earned his J.D. with honors from University of California at Los Angeles School of Law, where he was senior editor of the UCLA Law Review and was a member of Order of the Coif. He began his career as an attorney at Rutan & Tucker in Orange County, and continued it as a partner at the Los Angeles firm of Mitchell, Silberberg and Knupp. From 1976 to 1994, he was a partner at Pettit & Martin, serving repeated terms as that firm's Managing Partner. Tom joined Brobeck Phleger in 1994, and from 1996 to 2000 served as managing partner of the Los Angeles office, after which he became the firmwide chair of the Labor & Employment Group.

While Tom was a tireless and universally respected lawyer who inspired confidence in the clients he represented, his colleagues remember him most as a role model who was a devoted husband, father and good friend. In his career, he not only experienced but shaped many changes in labor relations in the Los Angeles region and at the national level. As a negotiator, he was a formidable but principled opponent, and as a colleague, a dedicated and demanding perfectionist who asked twice as much from himself as he asked from those around him. As justifiably proud as he was of his accomplishments as an attorney, that pride was always dwarfed by the pride he took in his family, especially his children, and their varied achievements.

Tom was much loved and will be much missed by his wife Judith of thirty eight years, his four children and their partners, his two infant grandchildren and many other good friends, family and colleagues. The family requests that in lieu of flowers, donations be made in Tom's name to the Los Angeles Conservancy, 523 West Sixth Street, Suite 1216, Los Angeles, California 90014.

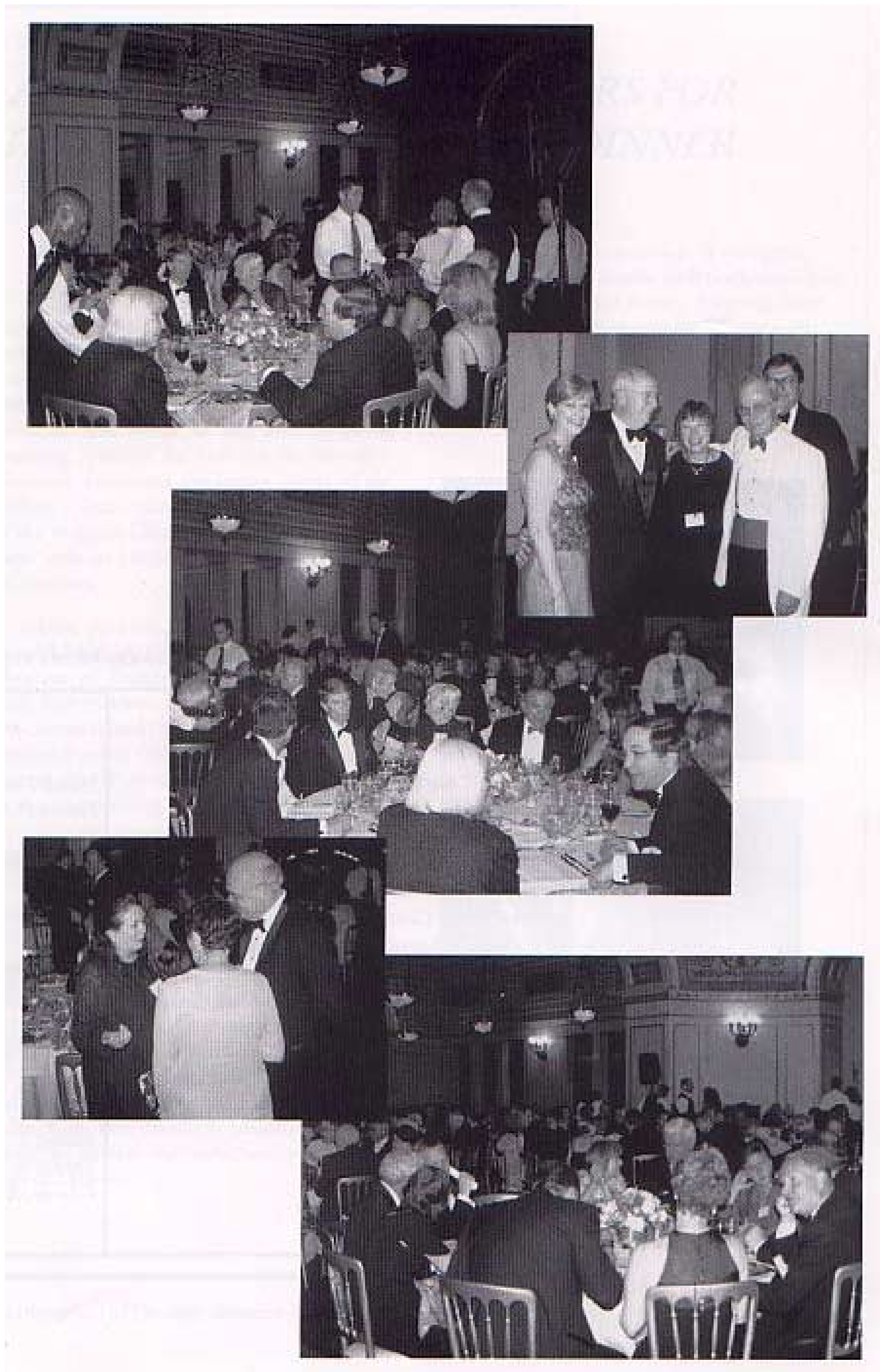
The College also wishes to acknowledge with sadness the passing of the following Fellows Emeritus:

Robert Gilbert – July 22, 2001
Theodore Sachs – March 5, 2001
Sharp Whitmore – July 17, 2001

Fellow Receives Accreditation

Edward E. Shumaker, III, who recently stepped down after service over three years as United States Ambassador to the Republic of Trinidad and Tobago, was recently accredited by the American Arbitration Association, several international bodies, the federal court and the Human Rights Commission as an arbitrator and mediator. Shumaker continues in private practice at Gallagher, Callahan & Gartrell, one of the New Hampshire's largest firms, which he first joined in 1976 and headed as firm president for four years in the

SIXTH ANNUAL INDUCTION DINNER CHICAGO, ILLINOIS



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The views expressed herein are not necessarily those of The College of Labor and Employment Lawyers, Inc.

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