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Enforcing Mandatory Arbitration Clauses in Employment Contracts: A Common Sense Approach to the Federal Arbitration Act's Section 1 Exclusion

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ENFORCING MANDATORY ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS: A COMMON SENSE APPROACH TO THE FEDERAL ARBITRATION ACT'S SECTION 1 EXCLUSION

I. INTRODUCTION

With litigation costs steadily rising, and the number of employment-related lawsuits increasing, employers and the judiciary are continuously seeking to resolve employment disputes in alternative forums. Renewed concern about the adequacy and fairness of arbitration in disputes involving private (nonunion) arbitration agreements in employment contracts has caused some courts and commentators to re-examine the use of the Federal Arbitration Act (FAA) to enforce such agreements.

Chief amongst such concerns and most controversial is the FAA's exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in


4. This comment addresses the use of mandatory arbitration agreements in private, individual employment contracts, such as those contained in contracts entered into and negotiated by one individual nonunion party and his or her employer. An example would be an employment contract between an employee who is a middle management sales director and an employer that is a semiconductor manufacturer and distributor. This is different from a mandatory arbitration agreement contained in a collective bargaining agreement negotiated by a union on behalf of its members, such as an agreement between a garment manufacturer and a textile workers union. That type of agreement is not the subject of this comment.

foreign or interstate commerce."6 Federal courts are split on how to read this exception. If the courts read this exception broadly, all contracts of employment would be exempted from the auspices of the FAA.7 If read extremely narrowly, the courts would limit the exemption to those actually engaged in the transportation industry.8 The United States Supreme Court, in Gilmer v. Interstate/Johnson Lane Corp.,9 held enforceable a predispute agreement to arbitrate contained in a securities registration application,10 but refused to extend its holding to arbitration agreements contained in employment contracts.11 Since that decision, federal courts have remained split on the application of the exception.12

This comment begins by examining the FAA13 and the relevant Supreme Court cases that have developed the policy and general rules that are important to an understanding of the problem.14 Second, this comment addresses the Gilmer decision, which was the major turning point in this area,15 before tracing the two major case lines that have developed with respect to the FAA's exception.16 Finally, this comment decides that a narrow reading of the exception is consistent with the drafters' intent17 and proposes both that the FAA be amended and that a practical solution be utilized in the meantime.18

II. BACKGROUND

A. The Federal Arbitration Act and Its Legislative History

The FAA provides that "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and en-

7. See infra part II.D.2.
8. See infra part II.D.1.
11. Id. at 25 n.2.
12. See infra part II.D.
13. See infra part II.A.
14. See infra part II.B.
15. See infra part II.C.
16. See infra parts II.D.1, II.D.2.
17. See infra part IV.
18. See infra part V.
forceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

The FAA serves a dual purpose. First, it reverses the long-standing judicial hostility to arbitration agreements that existed at English common law and was adopted by U.S. courts. Second, it places arbitration agreements on the same footing as other contracts. Section 2 of the FAA has been viewed as a congressional declaration favoring a liberal federal arbitration policy, notwithstanding any contrary state procedural or substantive law of arbitrability. The effect of the section is to create a body of federal substantive law of arbitrability applicable to any arbitration agreement falling within the parameters of the Act.

Additionally, section 2 has been interpreted as assuring those whose contracts relate to interstate commerce that their expectations will not be undermined by federal judges, state courts, or state legislatures. In creating a substantive rule applicable in state and federal courts, Congress intended to foreclose state legislative attempts to undermine the enforceability of arbitration agreements.

The FAA's scope, however, is limited. Section 1 of the FAA states that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” The legislative history concerning this section of the FAA is sparse. In fact, one of the few references to the section 1 exclusion appears in a report of the Bar Association Committee. It states:

Objections to the bill were urged by Mr. Andrew Furuseth as representing the Seamen's Union, Mr. Furuseth taking

23. Id.
25. Id. at 16.
27. Signal-Stat Corp. v. Local 475, 235 F.2d 298, 302 (2d Cir. 1956).
the position that seamen's wages came within admiralty jurisdiction and should not be subject to an agreement to arbitrate. In order to eliminate this opposition, the committee consented to an amendment to Section 1.29

In addition, at a hearing of the Senate Judiciary Committee, the chairperson of the ABA committee responsible for drafting the bill said:

[This bill] is not intended [to] be an act referring to labor disputes at all. It is purely an act to give the merchants the right or privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it. Now that is all there is in this.30

B. The Pre-Gilmer Supreme Court Case Line: Mitsubishi, McMahon, and Rodriguez de Quijas

The pre-Gilmer Supreme Court case line established as doctrine the Court's overwhelming policy in favor of arbitration. An understanding of this policy and rationale is essential to placing Gilmer and the section 1 case lines in the proper context.

1. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.

In Mitsubishi Motors Corp.,31 the plaintiff automobile manufacturer brought suit against defendant automobile dealer for various breaches of a sales procedure agreement.32 The defendant counter-claimed for violations of various antitrust and unfair competition statutes.33 The specific issue in Mitsubishi was the arbitrability, pursuant to the FAA,34 of claims arising under the Sherman Act35 and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction.36 Defendant Soler

29. Tenney Eng'g v. United Elec. Workers, 207 F.2d 450, 452 (3d Cir. 1953) (quoting 48 A.B.A. REP. 287 (1923)).
32. Id. at 616-22.
33. Id. at 617-20.
36. Mitsubishi, 473 U.S. at 616.
contended that the Court could not construe an arbitration agreement so as to encompass claims arising out of statutes designed to protect Soler's class unless the arbitration clause specifically mentions such statutes.\textsuperscript{37}

The Court rejected this argument, relying in large part on the policy surrounding the FAA.\textsuperscript{38} The Court stated that it found "no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims."\textsuperscript{39} Relying on the liberal federal policy favoring arbitration agreements\textsuperscript{40} shown by section 2 of the FAA,\textsuperscript{41} the Court said that at least this policy guarantees the enforcement of private contractual agreements to arbitrate.\textsuperscript{42} That is, since Congress' main concern in passing the Act was to enforce private arbitration agreements that parties had entered, it is essential that this Court rigorously enforce such agreements.\textsuperscript{43}

The Court said that normal contract principles apply to arbitration agreements.\textsuperscript{44} Therefore, the parties' intentions control, and those intentions are generously construed as to issues of arbitrability.\textsuperscript{45} These principles still apply when the party bound by the arbitration agreement raises claims based on statutory rights.\textsuperscript{46} Mitsubishi is partly based upon the Court's belief that "we are well past the time when judicial suspicion of the desirability of arbitration and of the compe-

\textsuperscript{37} Id. at 624-25.
\textsuperscript{38} Id. at 625.
\textsuperscript{39} Id.
\textsuperscript{41} Specifically, § 2 provides that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . [is] valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (1988).
\textsuperscript{42} Mitsubishi, 473 U.S. at 625.
\textsuperscript{43} Id. at 626 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985)).
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Mitsubishi held that the mere assertion of statutory rights, such as those pertaining to the Sherman Act, Title VII, or the ADEA, does not alter the principles behind enforcing arbitration agreements. Mitsubishi Motors Corp., 473 U.S. at 628. By agreeing to arbitrate statutory rights, the party does not forgo the substantive protection afforded by such statutes. Id. The party merely consents to a different forum for their disposition. Id.
tence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." 47

In keeping with these contract principles, the courts should remain alert to any legitimate claims that the arbitration agreement was induced by the sort of fraud or overwhelming economic power that would provide "grounds . . . for the revocation of any contract." 48 If such grounds are found in relation to the arbitration clause, the clause should be declared void. 49

The Court stressed that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute." 50 The party is merely submitting to the resolution of its claims in an arbitral rather than a judicial forum. 51 If Congress wanted the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from the text or legislative history. 52 "Having made the bargain to arbitrate, the party should be held to it unless Congress itself evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." 53

In his dissent, Justice Stevens opined that the majority's "assumption that arbitral processes are commensurate with judicial processes and that Congress impliedly intended federal courts to defer to arbitral decisions on [antitrust issues]" is unlikely. 54 That is, Justice Stevens expressed doubts regarding the integrity of the arbitral system. 55 Justice Ste-

47. Id. at 626-27.
49. Mitsubishi Motors Corp., 473 U.S. at 627.
50. Id. at 628.
51. Id. What the parties are in effect doing is trading the procedures and opportunity for review of the courtroom for the simplicity, informality, and quickness of arbitration. Id.
52. Id.
53. Id.
54. Mitsubishi Motors Corp., 473 U.S. at 648 (Stevens, J., dissenting) ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII.").
55. "[T]he informal procedures which make arbitration so desirable in the context of contractual disputes are inadequate to develop a record for appellate review of statutory questions. Such review is essential on matters of statutory
vens also said that nothing in the FAA, nor its legislative history, suggests that Congress intended to authorize the arbitration of statutory claims.\textsuperscript{56}

*Mitsubishi* established that federal statutory claims were subject to mandatory arbitration clauses in a commercial context.\textsuperscript{57} In *Shearson/American Express, Inc. v. McMahon*,\textsuperscript{58} the Court addressed the question of whether such claims were subject to arbitration clauses between individuals and securities brokers.\textsuperscript{59}

2. *Shearson/American Express, Inc. v. McMahon*

In *McMahon*,\textsuperscript{60} the Court addressed whether claims brought against a broker by its customers under the Securities Exchange Act of 1934\textsuperscript{61} and the Racketeer Influenced and Corrupt Organization Act (RICO)\textsuperscript{62} must be arbitrated in accordance with the terms of an arbitration agreement.\textsuperscript{63}

Relying on the same analysis of the strong federal policy behind the FAA discussed in *Mitsubishi*,\textsuperscript{64} the *McMahon* Court held that "[t]he Arbitration Act, standing alone . . . mandates enforcement of agreements to arbitrate statutory claims."\textsuperscript{65} *McMahon* also agreed with *Mitsubishi* that a contrary congressional command in a statute may preclude enforcement of an agreement to arbitrate.\textsuperscript{66}

In the securities claim, the Court refused to follow earlier precedent that had held a similar provision unarbitrable.\textsuperscript{67} The Court distinguished *McMahon* from the prior case because the Court denied the enforceability of arbitration on the grounds that arbitration was not an adequate remedy to

\textsuperscript{56} Justice Stevens stated that the FAA should apply exclusively to contractual disputes such as breach of warranty, terms of payment, and time of delivery of goods. *Id.* at 647 & n.11 (Stevens, J., dissenting).

\textsuperscript{57} *Id.* at 640.

\textsuperscript{58} 482 U.S. 220 (1987) [hereinafter *McMahon*].

\textsuperscript{59} *McMahon*, 482 U.S. at 222.

\textsuperscript{60} Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).


\textsuperscript{63} *McMahon*, 482 U.S. at 222.

\textsuperscript{64} See supra text accompanying notes 38-43.

\textsuperscript{65} *McMahon*, 482 U.S. at 226-27.

\textsuperscript{66} *Id.*

protect the substantive rights at issue.\textsuperscript{68} In light of the current view of the adequacy of arbitration as a forum,\textsuperscript{69} the Court held in \textit{McMahon} that the antitrust claims here would not effect a waiver of the protection of the Securities Exchange Act.\textsuperscript{70}

The RICO claim in \textit{McMahon} was held to be arbitrable, again based on the Court's reasoning in \textit{Mitsubishi}.\textsuperscript{71} The plaintiffs contended that the potential complexity of RICO claims meant they were unfit for arbitration.\textsuperscript{72} \textit{Mitsubishi} had said that potential complexity should not suffice to ward off arbitration, reasoning that the "adaptability and access to expertise" characteristic of arbitration rebutted the view "that an arbitral tribunal could not properly handle antitrust matters."\textsuperscript{73} Finally, because there was no inherent conflict between arbitration and the policies underlying RICO,\textsuperscript{74} there was no basis for precluding arbitration.\textsuperscript{75}

\textit{McMahon} thus solidified the Court's current position in favor of the arbitrability of federal statutory claims.\textsuperscript{76} The last vestiges of the Court's doubt concerning arbitration were disposed of in \textit{Rodriguez de Quijas v. Shearson/American Express, Inc.}\textsuperscript{77}

3. \textit{Rodriguez de Quijas v. Shearson/American Express, Inc.}

\textit{Rodriguez de Quijas} involved an agreement between various investors and their broker to settle any controversies re-
lating to their accounts through binding arbitration.\textsuperscript{78} The investors sued the broker after their investments failed, alleging various state and federal claims including claims under the Securities Act of 1933.\textsuperscript{79}

Rodriguez de Quijas held that a predispute agreement to arbitrate claims under the Securities Act of 1933 is enforceable, and resolution of the claims solely in a judicial forum is not required.\textsuperscript{80} This explicitly overruled Wilko v. Swan.\textsuperscript{81} The Court favored arbitration agreements because "they, like the provision for concurrent jurisdiction [that exists in the Securities Act], serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise."\textsuperscript{82} In terms of generalized attacks on arbitration based on "suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," such an attack "has fallen out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."\textsuperscript{83}

The Supreme Court had established its strong support for arbitration as an adequate forum for the disposition of statutory rights, and its recognition of the overwhelming federal policy in favor of arbitration in general.\textsuperscript{84} Against this backdrop, the Court in Gilmer v. Interstate/Johnson Lane Corp.\textsuperscript{85} addressed the question of whether to enforce mandatory arbitration of federal statutory claims in the employment context.\textsuperscript{86}

\textsuperscript{78} Rodríguez de Quijas, 490 U.S. at 478.
\textsuperscript{79} Id. at 478-79.
\textsuperscript{80} Id.
\textsuperscript{81} 346 U.S. 427 (1953). The Rodríguez de Quijas Court stated that Wilko was based on suspicion of arbitration as a method of weakening the protections afforded in the substantive law and thus had fallen out of step with the Court’s current position. Rodríguez de Quijas, 490 U.S. at 481.
\textsuperscript{82} Rodríguez de Quijas, 490 U.S. at 483.
\textsuperscript{83} Id. at 481.
\textsuperscript{84} Id. at 485-86.
\textsuperscript{86} Gilmer, 500 U.S. at 23.
C. Gilmer v. Interstate/Johnson Lane Corp.: Supreme Court Frames the Question

The Court held in *Gilmer*\(^\text{87}\) that disputes between an employee and employer, arising under federal statutes, were subject to an arbitration agreement contained in the employee’s securities registration application.\(^\text{88}\)

The issue in *Gilmer* was whether a claim under the Age Discrimination in Employment Act of 1967 (ADEA)\(^\text{89}\) can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application.\(^\text{90}\) The Court held that it could.\(^\text{91}\)

After revisiting the strong federal policy in favor of enforcing arbitration agreements and the Court’s faith in the arbitration process,\(^\text{92}\) the Court stated that “[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”\(^\text{93}\)

The *Gilmer* Court also addressed the plaintiff’s contention that the ADEA is designed not just to address individual


\(^{88}\) Id. at 23. Gilmer was required to register as a securities representative with the New York Stock Exchange (NYSE). *Id.* The standard NYSE registration form provided that Gilmer “agree[d] to arbitrate any dispute, claim or controversy” arising between himself and Interstate “that is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register.” *Id.* (alteration in original). NYSE Rule 347 requires arbitration of “[a]ny controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.” *Id.* (alteration in original).


\(^{90}\) *Gilmer*, 500 U.S. at 23.

\(^{91}\) *Id.* at 24-26. The Court also noted that a strong federal policy favoring arbitration can be deduced from the FAA language of § 2, which states that arbitration provisions shall be valid and enforceable except upon the same grounds that exist for the revocation of any contract, from § 3 which provides for stays of proceedings in federal district courts when an issue in the proceedings can be referred to arbitration, and in § 4 which provides for orders compelling arbitration when one party has failed to comply with a valid arbitration agreement. *Id.*

grievances, but also to further important social policies. The Court did not find any inherent inconsistency between those policies and enforcement of arbitration agreements. Arbitration is equally able to further broader social policies as is judicial resolution. As earlier cases clearly stated, if Congress intended for the ADEA's substantive protection to include protection from mandatory arbitration, that intention would be deducible from the legislative history or the text. In fact, the ADEA possesses a flexible approach to resolution of claims that suggests arbitration is consistent with its statutory scheme.

The Court also resolved doubts about the adequacy of arbitration as a forum for effective, fair dispute resolution. First, the Court refused to indulge plaintiff's contention that arbitration panels may be partial, stating that the rules applicable to the dispute in this case provide protections against biased panels, and that the FAA itself provides statutory protection. Next, the Court refuted plaintiff's argument concerning the adequacy of discovery in arbitration, stating that the trade-off between procedure and that of efficiency and simplicity does not affect the forum's adequacy. Plaintiff's argument that arbitration will not further the purposes of the ADEA because it does not provide for broad equitable relief was not persuasive, because arbitrators do have the power to fashion equitable relief.

Finally, in response to Gilmer's contention that arbitration agreements related to the ADEA should not be enforced because there will often be unequal bargaining power between the employer and employee, the Court stated that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforce-

95. Id. at 27-28.
96. Id.
98. Gilmer, 500 U.S. at 29.
99. Id.
100. Id. at 30-32.
103. Id. at 32.
able in the employment context.\textsuperscript{104} Such agreements are, pursuant to the very purpose of the FAA, on the same footing as other contracts and are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."\textsuperscript{105}

\textit{Gilmer} declined to directly address the unresolved question of the scope of the FAA's section 1 exclusion because it was not raised in the courts below, it was not among the questions presented in the petition for certiorari, and the arbitration clause being enforced before the Court was not in a contract of employment.\textsuperscript{106}

In his dissent, Justice Stevens opined that the scope of the section 1 exclusion should be addressed.\textsuperscript{107} He stated that arbitration clauses contained in employment agreements are specifically exempt from the coverage of the FAA.\textsuperscript{108} Justice Stevens relied upon the legislative history of the Act, which he viewed as clearly indicating that the FAA was intended to apply solely to commercial arbitration agreements and to mandate a wide-scope interpretation of section 1.\textsuperscript{109} Stevens also stated that the essential purpose of the ADEA was frustrated by compulsory arbitration of employment discrimination claims.\textsuperscript{110}

\textit{Gilmer} held enforceable an agreement to arbitrate federal statutory claims between an employee and an employer pursuant to an arbitration agreement contained in a securities registration application.\textsuperscript{111} Because the Court did not decide whether such an agreement is enforceable pursuant to an arbitration agreement directly between the employee and his or her employer,\textsuperscript{112} a split developed in the federal courts. This split has not been resolved by the Supreme Court.

\begin{flushright}
104. \textit{Id.} at 32-33.
106. \textit{Id.} at 25 n.2. The Court stated that Gilmer's arbitration agreement was not within a contract of employment because it was in a securities registration agreement, which is a contract with a securities exchange and not Interstate. \textit{Id.} However, any disputes between Gilmer and Interstate were subject to this clause. \textit{Id.}
108. \textit{Id.} (Stevens, J., dissenting).
109. \textit{Id.} at 38-41 (Stevens, J., dissenting).
110. \textit{Id.} at 41-42 (Stevens, J., dissenting).
111. \textit{Id.} at 23.
\end{flushright}
D. The Section 1 Exclusion: Two Distinct Case Lines

1. The Majority Advocates a Narrow-Scope Interpretation of the Section 1 Exclusion

Many federal courts that have addressed the issue of the scope of the section 1 exclusion of the FAA have narrowly construed the phrase "any other class of workers engaged in foreign or interstate commerce." As a result, they have held that only arbitration clauses in contracts of employment of those in the transportation industry are exempt from the FAA. In support of this position, various courts have relied on the Act's legislative history, the strong federal policy favoring arbitration, and a belief in the arbitration process as procedurally adequate.

Early decisions relied primarily on the FAA's legislative history. The Court of Appeals for the Third Circuit, in *Tenney Engineering v. United Electrical Workers,* said that to give meaning to the phrase "workers engaged in foreign or interstate commerce" required the court to determine what Congress' intent was in 1925 when it drafted such language. Quoting the statement of Mr. Andrew Furuseth of the Seamen's Union, the court focused on the class of workers in question. Seamen constituted a class of workers for whom "Congress had long provided machinery for arbitration." The other exempted class, railroad employees, also had special procedures for the resolution of disputes. Both of these classes were directly engaged in interstate commerce.

Thus, the intent of the phrase "any other class of workers engaged in foreign or interstate commerce" was, under the rule of "ejusdem generis," to include only those other

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114. Among the federal circuits supporting this view are the first, second, third, and seventh; see Spellman v. Securities, Annuities and Ins. Serv., Inc., 10 Cal. Rptr. 2d 427, 432 (Ct. App. 1992).
115. 207 F.2d 450 (3d Cir. 1963).
117. *Tenney,* 207 F.2d at 452.
118. *See supra* text accompanying note 29.
119. *Tenney,* 207 F.2d at 452 n.7.
120. *Id.* at 452 n.8.
121. *Ejusdem generis* is a generally accepted rule of statutory construction that "where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of
classes of workers who are likewise actually engaged in the movement of interstate or foreign commerce.\textsuperscript{122} "The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers."\textsuperscript{123}

The employees in \textit{Tenney Engineering} were engaged in the production of goods for subsequent sale in interstate commerce. While their activities will "undoubtedly affect interstate commerce they are not acting directly in the channels of commerce itself."\textsuperscript{124} Therefore, they are not a "class of workers engaged in . . . interstate commerce" within the meaning of section 1.\textsuperscript{125} Numerous other courts followed \textit{Tenney Engineering}.\textsuperscript{126}

Another lower court case, \textit{DiCrisci v. Lyndon Guaranty Bank},\textsuperscript{127} expanded on \textit{Tenney}'s reasoning. The \textit{DiCrisci} court

\begin{itemize}
\item the same general kind or class as those specifically mentioned." \textit{BLACK'S LAW DICTIONARY} 517 (6th ed. 1991).
\item See, \textit{e.g.}, Bachashiva v. United States Postal Serv., Inc., 859 F.2d 402 (6th Cir. 1988) (stating that postal workers fall within the scope of the § 1 exclusion. The concern is not whether the individual was personally engaged in interstate commerce, but whether the class of workers to which the individual belonged engaged in interstate commerce.); American Postal Workers Union v. United States Postal Serv., Inc., 823 F.2d 466 (11th Cir. 1987) ("If any workers are actually 'engaged in interstate commerce,' . . . postal workers are."); Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984) (stating that § 1 is limited to workers engaged in the transportation industry); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972) (holding that a professional basketball player is not closely related enough to the actual movement of goods in interstate commerce); Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) (holding that an account executive employed by brokerage firm was not a worker engaged in interstate commerce within the contemplation of § 1 of the FAA); Signal-Stat Corp. v. Local 475, 235 F.2d 298 (2d Cir. 1956) (stating that employees engaged in the manufacture of goods for interstate commerce are not engaged in interstate commerce within the meaning of the exclusionary clause of § 1); Kropfeder v. Snap-On Tools Corp., 859 F. Supp. 962 (D. Md. 1994) ("Plaintiff's relationship with interstate commerce, while quite substantial, is not sufficiently similar to that of seamen and railroad workers so as to bring him within the § 1 exemption."); Hull v. NCR Corp., 826 F. Supp. 303 (E.D. Mo. 1993) ("Because Plaintiff is not a seaman, railroad worker, or an employee actually engaged in the movement of interstate or foreign commerce, she is not a member of the 'class of workers' referred to in the exclusionary clause.").
\end{itemize}
acknowledged that while at first glance it might seem as though Congress would have intended "commerce" to have a uniform meaning throughout the Act, "the reference to 'workers engaged in foreign or interstate commerce' in section 1 would be surplusage if it were simply coextensive with Congress's Commerce Clause power." Therefore, because under Southland Corp. section 2 gives the entire FAA the same reach as Congress' Commerce Clause power, if Congress wanted to exclude all employment contracts it could have just said "employment contracts." That is, "[a]ny workers beyond the reach of the Commerce Clause would not be covered by the Act in the first place." DiCrisci held that the language of section 1 supports this view because the references to "seamen," "railroad employees" and "any other class of workers engaged in . . . interstate commerce" suggest that Congress intended to refer to workers engaged in commerce to the same degree as those groups. DiCrisci also points out that the history behind the addition of the section 1 limitation suggests it may have arisen because of concerns over certain classes of workers and not employment contracts in general.

Generally, courts that rely on the federal policy favoring arbitration invoke the language of Signal-Stat, which stated that "[i]n view of the present, almost universal, approval of arbitration as a means for settling labor disputes . . . we think the courts should interpret the [FAA] so as to further, rather than impede, arbitration in this area." Allegations that arbitration is unfair or procedurally deficient are generally refuted with the support of Rodriguez de Quijas and Mitsubishi Motors Corp.

131. Id.
132. Id. at 953.
133. Id. The § 1 exclusion came about because of the objection of a representative of the Seamen's Union, who claimed that their contracts came under admiralty jurisdiction and should not be subject to the FAA. Id.; see supra note 26 and accompanying text.
134. Signal-Stat Corp. v. Local 475, 235 F.2d 295 (2d Cir. 1956).
2. A Minority of Jurisdictions Advocate a Wide-Scope Interpretation of the Section 1 Exclusion

a. Judicial Interpretation

Some courts have interpreted section 1's phrase "any other class of workers engaged in foreign or interstate commerce" broadly to include all employment contracts. These courts have relied on the legislative history of the FAA, interpretation of the Act's use of the word "commerce," and public policy regarding the perceived inequality in bargaining power between employee and employer.

In Willis v. Dean Witter Reynolds, Inc., the court examined the statement of the chairman of the ABA made during a hearing of the Senate Judiciary Committee concerning the drafting of the FAA that the Act "is not intended to be an act referring to labor disputes at all." The court said that the plain language of section 1, coupled with the description of its meaning by the chairman of the ABA, "suggests an intent to create a mechanism through which businesses might agree to resolve disputes without recourse to the courts." Thus, while the FAA was created to enforce a type of agreement, it limited its scope by creating a category of contracts not subject to the Act's control.

Willis also argued that the commerce power supported an exclusion of all contracts of employment in disputes arising under Title VII and the ADEA. The court reasoned that based upon Congress' determination in Title VII that "any employer with 15 or more employees necessarily implicates interstate commerce," any claims that involve employment contracts with employers subject to Title VII or the ADEA necessarily implicate interstate commerce. Therefore, all employment contracts with employers subject to reg-

138. See supra part II.A.
139. Aquino, supra note 1, at 1.
140. 948 F.2d 305 (6th Cir. 1991).
141. See supra note 30 and accompanying text.
142. Willis, 948 F.2d at 311.
143. Id.
144. Id. Both Title VII and the ADEA were enacted pursuant to Congress' commerce power. Id.
145. Id. at 311.
ulation under a statute enacted pursuant to Congress' commerce power fall within the section 1 exclusion.\textsuperscript{146}

b. "Real Life" Concerns Are Used to Support the Wide-Scope Interpretation of Section 1

Arguments based upon fears that employees will be forced into arbitration clauses because of unequal bargaining power are usually couched in general adhesion contract terms.\textsuperscript{147} It is argued by legal commentators and the plaintiffs' bar that a plaintiff’s Seventh Amendment right to a jury trial, particularly with respect to federal statutory claims, is too important a right to be taken away without the party's full, knowing consent.\textsuperscript{148} Because many employers require their employees to sign arbitration agreements as a condition of employment, there is little for the employee to do if he or she wants to work but to sign the agreement.\textsuperscript{149} Justice Stevens, in his \textit{Gilmer} dissent, vigorously supports this contention, stating that "the exclusion in section 1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment."\textsuperscript{150}

Opponents of mandatory arbitration clauses also argue that full monetary awards will not be available to a prevailing plaintiff.\textsuperscript{151} In particular, arbitrators will rarely award the full punitive damages that a jury would award.\textsuperscript{152} One reason offered for this is that arbitrators will be more favorable to the employer because the employer is generally the party paying the arbitration costs.\textsuperscript{153} Also, since employ-

\begin{footnotes}
\footnotetext{146}{Id.}
\footnotetext{147}{But see supra text accompanying notes 104-05.}
\footnotetext{149}{See Schuyler, supra note 148, at 1.}
\footnotetext{150}{Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 40 (1991) (Stevens, J., dissenting) (emphasis added).}
\footnotetext{151}{See Arbitration Carries Risks for Employees, supra note 148, at PC1; Aquino, supra note 1, at 1.}
\footnotetext{152}{See Arbitration Carries Risks for Employees, supra note 148, at PC1; Aquino, supra note 1, at 1.}
\footnotetext{153}{See Arbitration Carries Risks for Employees, supra note 148, at PC1; Aquino, supra note 1, at 1.}
\end{footnotes}
ers are often repeat users of arbitration services, the arbitrators will not want to "bite the hand that feeds them." That is, if they award a large sum of punitive damages to an employee-claimant, the employer will likely go to another arbitration firm the next time it has a dispute.

c. The Ninth Circuit’s “Knowing Waiver”

Recently, the Ninth Circuit issued a trilogy of cases that limited the ability of employers to enforce mandatory arbitration agreements. In its most pointed decision, Prudential Insurance Co. v. Lai, the Ninth Circuit held that a mandatory arbitration clause contained in the National Association of Securities Dealers’ (NASD) U-4 form is not enforceable unless the party signing it knowingly waived his or her federal statutory rights. The court stated, “Congress intended there to be at least a knowing agreement to arbitrate employment disputes before an employee may be deemed to have waived the comprehensive statutory rights, remedies and procedural protections prescribed in Title VII and related state statutes.” The Lai court noted that the arbitration form the plaintiffs had signed did not specify which types of disputes would be arbitrated, nor did they ever receive a copy of the NASD manual containing the terms of the arbitration agreement. Though not mentioned in the court’s opinion, both plaintiffs in Lai were recent immigrants with limited English skills.

154. See Arbitration Carries Risks for Employees, supra note 148, at PC1; Aquino, supra note 1, at 1.
155. Aquino, supra note 1, at 1.
156. The three cases are: Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994) (holding that employees with limited English ability who signed an agreement containing a vague mandatory arbitration clause had not knowingly waived their federal statutory rights); Tracer Research Corp. v. National Envtl. Serv. Co., 42 F.3d 1292 (9th Cir. 1994) (holding that a misappropriation of trade secrets claim was not arbitrable because the arbitration clause contained vague language); Graham Oil Co. v. ARCO Prod. Co., 43 F.3d 1244 (9th Cir. 1994) (holding that an arbitration clause could not waive a gas franchisee’s rights to recover punitive damages because these rights were guaranteed by statute).
157. 42 F.3d 1299 (9th Cir. 1994).
158. Lai, 42 F.3d at 1305.
159. Id. at 1304.
160. Id. at 1301.
161. Jorge Aquino, Shifting Sands of Arbitration Arena, RECORDER, Mar. 24, 1995, at 1. Shortly after the Lai decision, San Francisco Superior Court held that an English speaking employee of Merrill Lynch, who had been registered with the NASD for 30 years and who had received compensation from his em-
III. IDENTIFICATION OF THE PROBLEM

Litigation costs continue to skyrocket, as do the number of employment-related lawsuits filed each year. For these reasons, it is important for employers to control their litigation expenses. Requiring employees to arbitrate any employment-related disputes is one of the best ways to do this. However, the section 1 exception to the FAA and the resulting split in authority cast doubt on the enforceability of mandatory arbitration agreements contained in employment contracts.

For this reason, it is important to analyze the section 1 exclusion as well as the split authority to establish with some certainty to what extent employers can expect arbitration agreements to be enforced under the FAA.

IV. ANALYSIS

A. The Drafters of the FAA Intended for the Section 1 Exclusion to be Applied Narrowly

1. The Legislative History

A careful examination of the legislative history of the FAA indicates that Congress intended for the section 1 employment contract exclusion to be read narrowly. That is, they intended for it to exclude only those employment contracts of seamen, railroad employees, and those engaged in interstate transportation in a similar fashion.

a. Support for a Narrow Interpretation of the Section 1 Exclusion

When examining congressional motives behind the employment contract exclusion in section 1 of the FAA, the narrow scope of the exclusion becomes clear. The exclusion was placed in the FAA to overcome the objection of a representative of the Seafarers International Union. The representative objected to the bill because admiralty jurisdiction applied to a registered employee who had not knowingly waived his rights in signing a U-4 form, Brown v. Merrill Lynch, No. 957526 (Cal. Super. Ct., Jan. 25, 1995).

See supra notes 1-2.

See supra parts II.A, II.D.

See infra parts IV.A.1.a, IV.A.1.b.

See supra note 29 and accompanying text.
to seaman’s wages and because Congress had long ago provided arbitration machinery for seamen as a class of workers. To overcome the objection, Congress exempted employment contracts of seamen and railroad workers (a class of workers that also had special procedures for dispute resolution). Both classes of workers were directly engaged in the interstate movement of goods. Congress rounded out the exemption by excluding all similar classes of workers, such as those to whom special dispute resolution procedures already existed and those who were directly engaged in the interstate transportation of goods.

Congress did not create a wholesale exclusion from the FAA for employment contracts. Had that been its intent, section 1 would simply read, “nothing herein contained shall apply to contracts of employment.” Instead, a small niche was carved out for certain classes of workers whose employment disputes were already subject to arbitration. It thereby achieved its goal of placing all arbitration agreements upon the same footing as other contracts, while preserving the pre-existing arbitration mechanisms of seamen, railroad employees, and other similar classes of workers. Nothing in this history indicates an intent to exclude all contracts of employment from the FAA.

Many of the cases that follow this narrow interpretation compare the class of workers in question to both seamen and railroad employees in terms of whether they engaged in interstate commerce in a similar fashion.

Thus, workers producing goods that merely affect interstate commerce are not a class of workers “engaged in interstate commerce.”

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167. See Tenney Eng’g v. United Elec. Workers, 207 F.2d 450, 452 n.7 (3rd Cir. 1953).
168. Id. at 452 n.8.
169. Id. at 452.
170. Id. at 452-53.
171. It seems that the exclusion came about not because of some wholesale concern over employment contracts, but because of the particularized concerns of one or two special interest groups. DiCrisci v. Lyndon Guar. Bank, 807 F. Supp. 947, 953 (W.D.N.Y. 1992).
172. See infra notes 173-78 and accompanying text.
173. See Tenney Eng’g v. United Elec. Workers, 207 F.2d 450, 452 n.7 (3rd Cir. 1953).
ers akin to seamen "engaged in interstate commerce,"
174 nor is a professional basketball player,175 nor a brokerage account executive.176 Postal workers, however, are a class of workers engaged in interstate commerce such that the section 1 exclusion applies,177 as are those in the transportation industry.178

b. Minority Misinterpretation

Some courts have misinterpreted the legislative history of the FAA as intending to exclude all arbitration agreements in employment contracts.179

In his dissent in Gilmer,180 Justice Stevens addresses the comments of the chairman of the ABA committee that drafted the Act.181 First, Stevens points out that the ABA committee was instructed to consider and report upon "the further extension of the principle of commercial arbitration."182 In particular, Stevens observes that the committee chairman assured the members of the Senate Judiciary Subcommittee

174. See Miller Brewing Co. v. Brewery Workers Local Union No. 9, 739 F.2d 1159 (7th Cir. 1984) (stating that § 1 is inapplicable because it has been held to be limited to workers engaged in the transportation industries).

175. See Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (2d Cir. 1972) (holding that the § 1 exception is generally limited to employees involved in or closely related to the actual movement of goods in interstate commerce).

176. See Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971) (stating that an account executive employed by a brokerage firm is not a "worker engaged in interstate or foreign commerce" within the contemplation of 9 U.S.C. § 1).

177. See Bachashiva v. United States Postal Serv., 859 F.2d 402 (6th Cir. 1988) ("[If any class of workers is engaged in interstate commerce it is postal workers"); American Postal Workers Union v. United States Postal Serv., 823 F.2d 466 (11th Cir. 1987) ("[Postal workers] are responsible for dozens, if not hundreds of items of mail moving in 'interstate commerce' on a daily basis. Indeed, without them, interstate commerce as we know it today would scarcely be possible."). But see Jeffrey W. Stempel, Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision, 1991 J. Disp. Resol. 259, 265 (1991) ("[M]uch of the letter carrier's work is purely local or intrastate and can hardly be said to have entered the stream of interstate commerce merely because the postal system as a whole is important to commerce.").

178. See Rosen v. Trans-X Ltd., 816 F. Supp. 1364 (D. Minn. 1993) (holding that truck drivers are members of a "class of workers engaged in interstate commerce" even though individual driver's employment with the employer may not have taken him across state lines).

179. See supra part I.D.2.


181. Id. at 38-41 (Stevens, J., dissenting).

182. Id. (Stevens, J., dissenting) (emphasis added).
during hearings on the bill that the bill "is not intended to be an act referring to labor disputes at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it."\textsuperscript{183}

Stevens also cites the statement of Senator Walsh, indicating that employment contracts are generally contracts of adhesion, and thus it is not fair to force the individual to surrender his right to a judicial tribunal.\textsuperscript{184}

From these two sources, Stevens draws the conclusion that the FAA was specifically intended to exclude arbitration agreements between employees and employers.\textsuperscript{185}

While the ABA did instruct its committee to further the principle of commercial arbitration, when this principle is placed alongside section 2 of the FAA\textsuperscript{186} and the general principle that the purpose of the FAA was to make arbitration agreements as valid and enforceable as other contracts,\textsuperscript{187} the ABA's instruction should be properly interpreted as supporting the extension of the principle of commercial arbitration to all arbitration provisions in any contract involving commerce. Therefore, any contract of employment not subject to the narrow section 1 exclusion can contain a valid, enforceable arbitration agreement.

Particularly when one notes that Stevens' main support rests on his belief that arbitration is an inferior forum and on Senator Walsh's classification of employment contracts as contracts of adhesion,\textsuperscript{188} does the weakness of Steven's position surface. For at least the past ten years, the Supreme Court has maintained that "we are well past the time when judicial suspicion of the desirability of arbitration and the

\textsuperscript{183} See supra note 30 and accompanying text.

\textsuperscript{184} Senator Walsh states:

\begin{quote}
The trouble about the matter is that a great many of these contracts that are entered into are really not [voluntary] things at all. . . . A man says "these are our terms. All right, take it or leave it." Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court, and has to have it tried before a tribunal in which he has no confidence at all.
\end{quote}

Hearings on S. 4213 and S. 4214 Before the Subcomm. on the Judiciary, 67th Cong., 4th Sess. 9 (1923).


\textsuperscript{186} See supra notes 19-25 and accompanying text.

\textsuperscript{187} See supra note 21 and accompanying text.

\textsuperscript{188} Gilmer, 500 U.S. at 38-41 (Stevens, J., dissenting).
competence or arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."\textsuperscript{189} The majority in \textit{Gilmer} embraced this position.\textsuperscript{190}

The \textit{Gilmer} majority also dismissed Senator Walsh’s adhesion argument, stating that “mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”\textsuperscript{191}

The FAA itself states that arbitration agreements in general are enforceable except upon grounds for revocation of any contract.\textsuperscript{192} Thus, arguments based on the perceived unfitness of the arbitral forum and on adhesion contract principles have long since dissipated.

Following Senator Walsh and Justice Stevens’ rationale would result in holding that an arbitration agreement in any employment contract or any commercial contract would be inherently void because of unequal bargaining power, regardless of the reality of the situation.\textsuperscript{193} This would seem inconsistent with the FAA’s intent of making arbitration agreements as valid and enforceable as any contract.\textsuperscript{194}

The \textit{Willis} court states that the FAA’s legislative history indicates an intent to enforce a certain type of agreement while excluding another, namely arbitration agreements in contracts of employment.\textsuperscript{195} This conclusion is reached by reading the ABA drafting committee chairman’s statement that the FAA is not intended to refer to labor disputes\textsuperscript{196} in conjunction with the plain language of the FAA’s section 1 exclusion.\textsuperscript{197}

To do so, however, would ignore the rest of the legislative history discussed above, particularly as to why the exclusion was included. Originally, there was no section 1 exclusion in the FAA. It was only after a certain, single special interest group lobbied to be excluded that the section 1 exclusion

\begin{flushright}
\textsuperscript{190} See supra text accompanying notes 100-03.
\textsuperscript{191} Gilmer, 500 U.S. at 32-33.
\textsuperscript{192} See supra note 19 and accompanying text.
\textsuperscript{193} See supra notes 183-85 and accompanying text.
\textsuperscript{194} See supra note 21 and accompanying text.
\textsuperscript{195} Willis v. Dean Witter Reynolds, 948 F.2d 305, 311 (5th Cir. 1991).
\textsuperscript{196} See supra note 30 and accompanying text.
\textsuperscript{197} “[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1 (1988).
\end{flushright}
came about. If the intent was to exclude all employment contracts, as the Willis court believes, then Congress would have so indicated. Instead, they specifically limited the type of employment contracts to which the FAA applies: seamen, railroad employees, and other similar types of workers engaged in interstate commerce in a similar way are exempt. By analogy, if trucking were as popular and efficient a measure of transporting interstate goods in 1923 as ships and trains, it would likely have been enumerated as well.

2. The Use of the Term "Commerce" in the FAA Supports a Narrow-Scope Interpretation

The wording of the section 1 exclusion also indicates an intent of the drafters to exclude only certain classes of workers actually engaged in interstate commerce in an enumerated manner.

Section 2 of the FAA gave the Act the same reach as Congress’ commerce power. Had Congress intended for the word “commerce” to have the same meaning throughout the Act, the wording of section 1 would be redundant if it was simply coextensive with Congress’ powers under the Commerce Clause. Had Congress intended to exclude all contracts of employment, it would simply have said “contracts of employment” in section 1. It did not. Rather, Congress utilized language that indicates they intended to exclude two certain types of employment contracts and those other classes

198. See supra notes 165-70 and accompanying text.
201. To allow the intentionally narrow § 1 exclusion to apply to all employment contracts would be to allow the exception to swallow the rule. The § 1 exclusion was not added to the FAA because Congress intended to exclude all arbitration agreements in employment contracts. It was included simply to appease one specific union.
202. See supra parts II.D.1, IV.A.1.
203. The “involving commerce” requirement in § 2 is not a limitation on the power of the federal courts but a necessary qualification on a statute intended to apply in state and federal courts. As an exercise of the federal Commerce Clause power, the FAA creates a body of federal substantive law applicable in federal and state courts. Southland Corp. v. Keating, 465 U.S. 1, 10-15 (1983).
205. Id.
of workers engaged in interstate commerce in the same way.\footnote{206}

Some courts have argued that all employment contracts with employers subject to regulation under Title VII or the ADEA fall under the section 1 exclusion.\footnote{207} Such courts reason that because Title VII and the ADEA were enacted pursuant to Congress’ commerce power, and because Congress determined in Title VII that any employer with fifteen or more employees necessarily implicates interstate commerce, any claims involving employment contracts with employers subject to regulation under Title VII or the ADEA necessarily implicate interstate commerce.\footnote{208} Thus, all employment contracts with employers subject to regulation under acts of Congress designed to protect employees from unlawful discrimination and enacted pursuant to Congress’ commerce power fall within the exclusion.\footnote{209}

This reasoning, however, fails to take into consideration why Congress decided to strictly limit its language in section 1. Had the original intent been to exclude all employment contracts, Congress would not have singled out certain specific classes of workers, rather than simply using a general statement such as “nothing herein shall apply to contracts of employment.”\footnote{210}

Most importantly, such arguments ignore the fact that Title VII and the ADEA specifically do not disallow arbitration within their text or legislative history.\footnote{211} Were Con-

\footnote{206} Id.
\footnote{207} See Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 311 (6th Cir. 1991).
\footnote{208} Id.
\footnote{209} Id.
\footnote{210} See supra note 200. Southland held that the FAA’s reach was coextensive with Congress’ commerce power. Thus, a simple exclusion of “contracts of employment” would have excluded from the FAA all arbitration agreements in employment contracts that affect interstate commerce. Specifically enumerating a certain class of workers would indicate an intent of Congress to exclude significantly less than all employment contracts from the coverage of the FAA.
\footnote{211} See infra part IV.C. In light of the strong federal policy favoring arbitration, “having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). The party challenging the arbitration agreement has the burden of proving that Congress intended to preclude a waiver of a judicial forum for the statutory claims in question. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 29 (1991).
gress' intent to preclude arbitration under Title VII, such intent would be deducible from the Act itself.\textsuperscript{212} It is not. Section 2 applies the FAA coextensively with the Commerce Clause power.\textsuperscript{213} Thus, any limitation Congress intended to extend to the entire reach of the Act would not need further restrictions such as the section 1 exclusion contains. The section 1 exclusion was therefore meant to apply only to a narrowly defined class of workers and not to employment contracts generally.

B. General Policy Supports the Narrow-Scope Interpretation of the FAA’s Legislative History

There are numerous policy arguments that lend support to an interpretation of Congress’ intent to apply the section 1 exclusion narrowly.

1. The Purpose of the FAA Was to Reverse Judicial Hostility Toward Arbitration

First, the FAA’s recognized purpose was to reverse longstanding judicial hostility to arbitration agreements that existed under English common law.\textsuperscript{214} This is likely the same type of hostility Justice Stevens clings to in his dissent in Gilmer.\textsuperscript{215} While some rely upon this hostility as a basis for their arguments,\textsuperscript{216} they ignore the fact that the whole purpose of the FAA was to overcome the very basis of their arguments.

2. Congress Enacted the FAA to Place Arbitration Agreements on the Same Footing as Other Contracts

The FAA also sought to place arbitration agreements upon the same footing as other contracts.\textsuperscript{217} This position, supported on the very face of section 2 of the FAA,\textsuperscript{218} shows a

\textsuperscript{213} See supra note 203.
\textsuperscript{214} See supra note 20.
\textsuperscript{216} Id. See, e.g., Aquino, supra note 1, at 1; Arbitration Carries Risk for Employees, supra note 148, at PC1.
\textsuperscript{217} Gilmer, 500 U.S. at 24.
\textsuperscript{218} See supra note 19 and accompanying text.
strong faith in arbitration. The message is clear: such agreements are as enforceable as any commercial contract. When Congress' very purpose in enacting the FAA was to place faith and strength in arbitration agreements, it is counterintuitive that some subsequently attempt to say that Congress believed in the value of arbitration agreements in every conceivable commercial situation except one: employment contracts. A more plausible explanation is that Congress intended for all arbitration agreements to be as enforceable as other contracts, with one exception for a narrowly defined class of workers for whom labor arbitration already existed.219

By creating such a broad federal scheme, Congress has been interpreted as intending to create a universal body of federal substantive law of arbitrability applicable to any arbitration agreement within the coverage of the Act.220 Inconsistent state laws could no longer undermine the enforceability of arbitration agreements.221 Thus, the expectations of those whose contracts involve interstate commerce are both protected and predictable.222 Since each state has its own rules regarding the enforceability of arbitration clauses in employment contracts,223 great inconsistency would result, both thwarting Congress' intent and opening the door to forum shopping.

Congress intended, by creating the FAA, to achieve important goals such as reversing judicial hostility,224 creating a substantive federal body of arbitration law,225 preserving expectations,226 and foreclosing state attempts to undermine arbitration agreements.227 To allow some to rely on arguments not supported by generally recognized congressional

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219. See supra part IV.A.1.
222. Id.
224. See supra note 20 and accompanying text.
225. See supra note 23 and accompanying text.
226. See supra note 24 and accompanying text.
227. See supra note 25 and accompanying text.
intent to block important objectives would be inefficient at best and, at worst, unjust.

C. Arbitration is an Adequate Forum for the Disposition of Federal Statutory Claims

The recent discussion over the propriety of compulsory arbitration in employment contracts, particularly with respect to claims based upon statutory rights, has been centered not in the courtroom but in the legal and mainstream press. Arbitration is so accepted by the judiciary that arguments relating to its fitness are no longer accepted by federal courts. Despite the Supreme Court's position, critics continuously resurrect their distrust of arbitration as a vehicle for attacking mandatory arbitration clauses in employment contracts.

As early as 1983, the Supreme Court declared that the FAA manifests a "liberal federal policy favoring arbitration." The federal substantive law that governs arbitration agreements requires "that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration . . . and any doubts concerning the scope of

228. This section does not attempt to fully evaluate the adequacy of arbitration in general. Rather, this section examines the recent criticism leveled at mandatory arbitration clauses in employment contracts by addressing their arguments, particularly in light of the Supreme Court's position in favor of arbitration.


230. See, e.g., Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305, 309-10 (6th Cir. 1991). Relying upon the Supreme Court's rationale in Mitsubishi and Gilmer, the Willis court rejected the plaintiff's argument that arbitration is an inappropriate forum for the disposition of federal statutory discrimination claims. "[S]o long as the prospective litigant 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." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985).

231. Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). With a recent study showing that the 281,740 cases filed in the year ending June 30, 1994 are expected to balloon to over one million cases per year by 2020, the judiciary's preference for arbitration most likely will not change. See Randall Samborn, Judge's Foresee Federal Courts Caseload Crush, NAT'L L.J., Jan. 9, 1995, at 1.
arbitrable issues should be resolved in favor of arbitration."232

Once this federal policy is recognized, and once it is established that employment contracts fall within the scope of the FAA,233 the issue should be entirely resolved. There is no provision in the FAA stipulating that claims based upon federal statutory rights are exempt.234 Nor is this position alluded to by the drafters' intent.235 Should the legislature wish to amend federal statutes to make them exempt from arbitration, the proper federal statutes should be so amended.236

Still, legal commentators and plaintiff attorneys continue to allege that plaintiffs' rights will not be adequately vindicated in arbitration.237 Simply because the party agreed to arbitrate a statutory claim, however, does not mean that party forfeits the substantive rights afforded by the statute; that party only agrees to a resolution in a different forum.238 The plaintiff is not being asked to agree not to bring claims under Title VII. Rather, the party is asked to honor its agreement to trade the procedures and opportunity for review of the courtroom for the simplicity, informality, expedition, and lowered cost of arbitration.239 Thus, the Ninth Circuit's overzealous protection of those plaintiffs required to arbitrate federal statutory claims is both misplaced and out of step with current Supreme Court doctrine.240

233. See supra part IV.A.1.
234. As stated, the only exclusion in the FAA is that for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1988).
235. See supra part IV.A.1.a.
236. In fact, Senator Russell Feingold, D-Wis., introduced the Protection From Coercive Employment Agreements Act in the spring of 1994, that would amend The Civil Rights Act of 1964, the ADEA, the Americans with Disabilities Act of 1990 (ADA), and the Rehabilitation Act of 1973 to make it illegal to make the submission of such claims to mandatory arbitration a condition of hiring, continued employment, or compensation of an individual. S. 2012, 103d Cong., 2d Sess. (1994). No further action was taken and Feingold reintroduced the bill as the Civil Rights Procedures Protection Act of 1995. S. 2271, 104th Cong., 1st Sess. (1995).
237. See sources cited supra note 229.
239. Id.
240. See supra part II.D.2.c.
The federal policy favoring arbitration is so strong that it is assumed that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention would be deducible from text or legislative history. If the party agreed to arbitrate, he or she should be held to that agreement unless Congress has itself expressly manifested an intention to preclude a waiver of judicial remedies for the statutory rights at issue. Courts have found nothing in the text or legislative history of such heavily litigated federal statutes as Title VII, the ADEA, the Securities Act of 1933, the Securities Exchange Act of 1934, RICO, or the Sherman Act that would indicate an intent to preclude arbitration of such claims.

Plaintiff attorneys and legal commentators argue that arbitration will rarely afford the plaintiff the full monetary recovery available in court. Arbitrators, however, often have the power to award punitive damages when the claim is based upon federal law. There is nothing in the FAA that expressly prohibits arbitrators from awarding punitive damages. Therefore, if the federal statute in question allows them, the arbitrator will be permitted to award punitive damages. Generally, arbitrators have the ability to award claimants the same substantive relief as is available in federal court.

247. Id.
249. See sources cited supra note 229.
250. The Supreme Court recently held that punitive damages are recoverable in arbitration proceedings, even when the state law governing the arbitration agreement precluded them. Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995); see, e.g., Stuart H. Bompey & Michael P. Pappas, Compulsory Arbitration of Employment Claims After Gilmer, 19 EMPLOYEE REL. L.J. 197, 208-10 (1993-1994).
It is often argued that arbitration is more favorable to employers in terms of the outcome. Studies are split and inconclusive on this subject. Some support the plaintiff's view that awards favor the employer. Other studies have found that employees actually fare better. We are in an age where the average jury verdict for a prevailing plaintiff in an employment action is reported at $647,000, where a Texas jury recently awarded a wrongfully terminated manager $124 million, and where State Farm Insurance settled a sex discrimination class action for $157 million. In this light, any argument that criticizes arbitration because it awards smaller amounts of money to prevailing plaintiffs in reality seems to expose the fact that the amount of punitive damages presently being awarded is out of control.

Many management-side attorneys concede that the arbitration process may actually favor the plaintiff. First, arbitrators are not bound by the Federal Rules of Evidence, nor are they bound by the formal procedures of the court. Therefore, the plaintiff can submit arguments and evidence in arbitration that would not be allowed in a federal court because they lack legal merit. Arbitrators often are more concerned with issues of basic fairness and are more likely to give the claimant some award even where no violation of the law has occurred. Second, the statute of limitations may be circumvented through the use of arbitration. Third, there is no risk of the plaintiff's claims being dismissed for failure to state a claim or summary judgment. Thus, it is possible for a claimant to prevail in an arbitration when that same case would never make it to trial in federal court.

It is also argued that arbitrators are more likely to be lenient toward employers because employers are the ones

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253. See sources cited supra note 229.
255. Blackman, supra note 229, at 5.
257. Id.
258. Id.
259. Blackman, supra note 229, at 5.
260. Id.
261. Id.
262. Bompey & Pappas, supra note 250, at 211.
263. Blackman, supra note 229, at 5.
264. Id.
paying for the arbitration procedure.\textsuperscript{265} The theory is that
the arbitrator will sympathize with the party who signs its
check.\textsuperscript{266} If the arbitrator awards large punitive damages
against a major client, it is argued that client will most likely
use a different arbitration firm next time.\textsuperscript{267}

The FAA itself protects against this type of occurrence by
allowing courts to overturn arbitration decisions “[w]here
there was evident partiality or corruption in the arbitra-
tors.”\textsuperscript{268} In addition, some forms of arbitration allow for a
panel of three arbitrators, with the third being a neutral
party.\textsuperscript{269} This system cuts down on both real and perceived
bias considerably. Some major commercial arbitration firms
are also revamping their rules to make it easier to disqualify
arbitrators for potential conflicts of interest.\textsuperscript{270}

Finally, another popular criticism of mandatory arbitra-
tion clauses is just that: they are mandatory.\textsuperscript{271} That is, the
employee has no opportunity, generally, to negotiate the
terms of such a clause. The employee signs it and takes the
job or looks elsewhere for employment. It has been contended
that such a clause must be consented to for it to be enforcea-
ble.\textsuperscript{272} If a party signs a contract, that person necessarily
consents to all of its terms under the most basic tenets of con-
tract law. If it was required that all terms in all commercial
agreements be negotiated by both parties and their attorneys
prior to accepting the terms, it is likely business would be
greatly hindered. Adhesion contracts are entered by most
people on a daily basis. There is nothing illicit about these
agreements simply because they are nonconsensual.\textsuperscript{273}

\textsuperscript{265} Private arbitration procedures can cost upwards of $9000, while the av-
average bill to defend a suit in court can exceed $90,000. See Aquino, supra note 1, at 1.
\textsuperscript{266} Id.
\textsuperscript{267} Id.
\textsuperscript{269} Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991). The
New York Stock Exchange arbitration rules require that the parties be in-
formed of the employment histories of the arbitrators and that they be allowed
to further inquire into the arbitrator’s background. Id. Also, each party is al-
lowed one peremptory challenge and unlimited challenges for cause. Id. Fi-
nally, arbitrators are required to divulge any circumstances which might pre-
clude them from rendering an impartial and objective decision. Id.
\textsuperscript{270} Revamping, supra note 229, at 1.
\textsuperscript{271} Davis, supra note 148, at B1.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
The Supreme Court in *Gilmer* stated that mere inequality in bargaining power is not a sufficient reason to hold that arbitration agreements are never enforceable in an employment contract.\(^{274}\) As stated above, the purpose of the FAA was to place arbitration agreements upon the same footing as other contracts,\(^{275}\) and thus arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."\(^{276}\)

Ultimately, opponents of arbitration argue that arbitration clauses in employment contracts should be elevated to a level above normal commercial arbitration clauses, so that they must be specifically consented to and thereby are no longer on the same footing as other contracts. Congress has spoken on the subject. The Supreme Court has spoken on the subject. Until Congress or the Supreme Court decides to change its position, arbitration clauses should be enforced like any other contract. Arbitration clauses in employment contracts are binding on their parties.

V. PROPOSAL

A. *The Federal Arbitration Act Should Be Amended to Remove the Section 1 Exclusion*

As long as section 1 of the FAA contains an exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce,"\(^{277}\) courts and commentators will continue to use it as a tool to misconstrue the intent of Congress in implementing the Act.\(^{278}\) Removing the doubt cast over the use of the FAA to enforce mandatory arbitration clauses in employment contracts will not only protect the expectations of multistate employers, but it will help unstick the logjam of employment-related litigation in the court system.

Due to the constantly increasing caseload overwhelming the federal judiciary,\(^{279}\) particularly with respect to employ-

\(^{275}\) See supra note 20 and accompanying text.
\(^{277}\) See supra note 26 and accompanying text.
\(^{278}\) See discussion supra part IV.A.1.
\(^{279}\) See supra notes 2 and 231.
ment discrimination claims, the need for arbitration of employment-related disputes will continue to grow. In light of this fact, and the Supreme Court's overwhelming support of arbitration, the logical solution is to amend section 1 of the FAA.

Section 1 of the FAA should be amended so as to remove the exclusion for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This exclusion was added to the FAA, as noted above, to overcome the objections of one single union. The exclusion no longer serves the purpose for which it was intended, but rather has created a loophole that the plaintiff bar has attempted to exploit in order to extract larger punitive damages from sympathetic juries. This was not Congress' intent.

Eliminating the section 1 exclusion will serve to effectively close this loophole and achieve Congress' intent of placing all arbitration agreements on the same footing as other contracts.

Should the legislature determine at some point that the objectives of some federal statute will not be effectuated by an arbitral forum, then such federal statute, as the Supreme

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280. There were 20 times more employment discrimination cases filed in 1990 than in 1970. According to the Bureau of National Affairs, almost 88,000 charges of employment discrimination were filed with the EEOC during 1993. This represents a 20% increase over 1992. David R. Barclay & William A. Carmell, Benefits of a Resolution-Centered ADR Program, Corp. Legal Times, Dec. 1994, at 24.

281. See supra parts II.B, II.C.

282. 9 U.S.C. § 1 (1988). As amended, § 1 would read:

§ 1. "Maritime transactions" and "commerce" defined

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia and any State or Territory or foreign nation.

283. See supra notes 165-70 and accompanying text.

284. See supra notes 255-58 and accompanying text.

285. See discussion supra part IV.A.I.

286. See supra note 21 and accompanying text.

287. See supra notes 241-48 and accompanying text.
MANDATORY ARBITRATION CLAUSES

Court indicated, can be amended to exclude the choice of arbitration as a forum.\textsuperscript{288}

B. \textit{Until the FAA Is Amended, Employers Should Continue to Include Mandatory Arbitration Clauses in Employment Contracts}

In light of the fact that the weight of authority, even in such an unsettled area, rests heavily on the side of enforcing mandatory arbitration agreements in employment contracts,\textsuperscript{289} employers should continue to include such clauses in employment contracts offered to their employees.\textsuperscript{290}

To be safe, the employment contract should be drafted so as to more clearly effectuate a knowing waiver of the employee's right to bring his federal statutory claims in court.\textsuperscript{291} This is essential for those employers operating in the Ninth Circuit.\textsuperscript{292} When it is clearly evident that the employee has knowingly agreed to bring his federal statutory claims in an arbitral forum, even opponents of mandatory arbitration are more likely to find it acceptable.\textsuperscript{293}

\begin{itemize}
  \item \textsuperscript{288} A party should be held to its agreement to arbitrate unless Congress has shown an intention to preclude a waiver of judicial remedies for statutory rights at issue. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).
  \item \textsuperscript{289} See discussion supra part IV.
  \item \textsuperscript{290} To illustrate how commonplace such a practice has become, the law firm of Kincaid, Gianunzio, Caudle & Hubert, on the advice of its outside labor counsel, recently told its more than 100 employees that they must sign a mandatory arbitration agreement. Nina Schuyler, \textit{Kincaid, on Outside Advice, Requires Arbitration Form}, \textsc{Daily J.}, Dec. 21, 1994, at 2. For a discussion of various methods of presenting the arbitration agreement, see Todd H. Thomas, \textit{Using Arbitration to Avoid Litigation}, 1993 \textsc{Lab. L.J}., 3, 14-16.
  \item \textsuperscript{291} For example, the arbitration clause may be printed in bold type or set off in a box; it may require the employee to sign his/her initials next to it; and/or it may specifically list any statutory remedies the party is forgoing. \textit{But see} Bell v. Congress Mortgage Co., 30 Cal. Rptr. 2d 205 (Ct. App. 1994), where the California Court of Appeals held that mandatory arbitration clauses in contracts must be highlighted, in bold type, or accompanied by check-off boxes, or they would be unenforceable. However, under pressure from banking and employer groups, the California Supreme Court depublished the case. See also Barbara Steuart, \textit{Court Depublishes Controversial ADR Opinion}, \textsc{Recorder}, July 29, 1994, at 1.
  \item \textsuperscript{292} See supra part II.D.2.c.
  \item \textsuperscript{293} See supra notes 271-73 and accompanying text.
\end{itemize}
VI. CONCLUSION

It is imperative that mandatory arbitration clauses in employment contracts be enforced with the same vigor as any commercial contract. Both the overloaded federal judiciary as well as the high costs of litigation require that such an alternate method of dealing with employment disputes be utilized.

By clearing up the continued confusion over the scope of the section 1 exclusion and the misplaced, antiquated concerns over the adequacy of the arbitral forum, we will be able to open the way for more usage of arbitration.

The FAA was intended to place all arbitration agreements on the same footing as other contracts. The exception in section 1 was included to appease one union, not to exempt all employment contracts. Only by amending the FAA to remove the section 1 exemption can Congress' intent be fully realized.

Criticisms of the adequacy of the arbitral forum are based on sensationalized notions instead of realistic concerns. The judiciary has long since proclaimed its faith in arbitration. It is time that the plaintiff bar accepted this.

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