THE FEDERALIST SOCIETY
2003 NATIONAL LAWYERS CONVENTION

ARBITRATION AND THE FREEDOM OF CONTRACT

Friday, November 14, 2003

PANELISTS:

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JUDGE E. GRADY JOLLY, United States Court of Appeals for the Fifth Circuit (moderator)

JUDGE JOLLY: I am E. Grady Jolly. I am particularly pleased to be asked to moderate a panel as distinguished as this in this particular field of arbitration. The program is billed as Arbitration and the Freedom of Contract. Although we may not stick exactly to that particular topic, that is sort of the topic that we will work around.

We will be dealing with such questions as when an arbitration agreement is silent on relevant terms, what are the roles of the court or the arbitrator in deciding class issues? That, of course, is motivated and prompted by the recent Supreme Court decision in Green Tree Financial Corporation v. Bazzle. You will hear a good bit of discussion on that today.

Let me give a very brief introduction of the panel members here. Stephen Ware is a professor at the University of Kansas. He is one of the nation's leading experts on arbitration and arbitration law. He is the author of the treatise Alternative Dispute Resolution, and he has taught in various law schools as visiting professor and as professor. He earned his J.D. degree at the University of Chicago where he was an editor of the Law Review. He served as a law clerk on the United States Court of Appeals for the Second Circuit, and he practiced with Davis Pope for a number of years before he took up his teaching career. At Kansas he teaches not just arbitration

and alternative dispute resolution, but also bankruptcy, contracts and commercial transactions. He will make the first remarks and give us an overview.

Then we will have Richard T. Seymour, a very distinguished lawyer in the field of civil rights. He spent most of his life in the field of civil rights representing plaintiffs in class-actions involving racial and sex discrimination. He has had a long career with the Lawyers' Committee for Civil Rights and the Law, and he indeed is widely recognized to the extent that he helped draft parts of the 1991 Civil Rights Act. He left the Lawyers' Committee not too very long ago, two or three years ago, and he is now a partner in Lieff, Cabraser, Heimann and Bernstein here in Washington. He is also chair of the Employment Rights Section of the Association of Trial Lawyers. He has participated in any number of name cases in his field, many of which, if mentioned by name, would be familiar to those who practice in the field of employment discrimination. He will present the plaintiff's point of view with respect to the arbitration issues that we discuss today.

Then, we will have a presentation by Robert P. Davis, Bob Davis, on the far right over here—I don't know whether that has any significance or not. But he, nevertheless, will make a presentation with respect to the defendant's point of view.

He certainly has a distinguished career. He's widely recognized in his field. He is a former Solicitor of the Department of Labor and worked for Secretary of Labor Elizabeth Dole, having been appointed by the first Bush Administration. There, he supervised some 525 attorneys and administered, or at least gave advice, with respect to more than 140 employment statutes. That clearly indicates that labor law is a specialty within a specialty within a specialty.

He presently represents employers in employment matters, especially including ERISA matters. He is a graduate of Georgetown University Law, magna cum laude, where he was a member of the Law Journal and an editor of the Law Journal. He also got a masters degree from Boston University and Syracuse University in political science and public administration.

Last, we will have the representative of the United States government here to wrap up and tell us where each one of them was wrong and try to bring the entire discussion back to the focus of some degree of truth. This is Eric Dreiband, and Eric is now General Counsel for the Equal Employment Opportunity Commission. He has not been there long enough to think he knows all the answers, I don't think, because he's only been there since August. He will undoubtedly improve his capacity for dogma as time goes on. This is not his first foray into government. He has been with the United States Department of Labor's Wage and Hour Division as Deputy Administrator for Policy. He's presently with Mayer, Brown, and I don't think I mentioned that, as well, for Bob Davis. Everybody wants their firm mentioned. He probably has cards over there in the corner if anybody wants to pick them up. But he is with Mayer, Brown as well. Eric, before becoming the General Counsel, was with Mayer, Brown during part of his career. He went to Princeton and he got on the right

track after Princeton and got a masters of theology studies from Harvard University, but somewhere got back off the right track onto the wrong track and went into law school and became articles editor of the Northwestern University Law Review where he got his degree. He also was a clerk to the United States Court Judge William Bowel on the United States Court of Appeals for the Seventh Circuit.

With that, Professor, if you will lead off, everyone is sitting on their edge of their seats.

PROFESSOR WARE: I have up here, first of all, my email and telephone number, because arbitration law is my specialty. It's what I enjoy talking about, so I welcome any follow up conversation any of you might want to have.

I should start by saying that arbitration law is my specialty. Employment law isn't. There are lots of people in this room who know more employment law than I do. But I have been specializing for a decade in arbitration law and have learned some employment law in the process, especially as it relates to arbitration law. I guess the main thing I've learned is how different the fundamental premises of arbitration law and employment law are.

I'll ask David to put up the next slide over there, and you see basically my point, which is that arbitration law starts from the premise that contracts should be enforced. The Federal Arbitration Act, which governs nearly all arbitration agreements, makes arbitration agreements enforceable unless there is a contract law ground for denying enforcement, grounds such as duress, misrepresentation, unconscionability.

So arbitration law very much embodies freedom of contract. There's no regulatory law of arbitration. There's no statute or regulatory agency, government agency designed to protect employees or consumers or anybody else. The Federal Arbitration Act was enacted in the 1920s. It has not been amended significantly since, so it very much embodies 1920s sorts of values.

By contrast, employment law embodies very different values. The important employment discrimination statutes, as you know, didn't start to be enacted until the 1960s. The fundamental premise of those statues is certainly not freedom of contract. In fact, the basic purpose of employment discrimination statutes is to restrict contract, in particular, the employers' freedom to contract with its employees in a discriminatory manner. So employment law gives employees the right to be free from discrimination.

That in and of itself restricts freedom of contract, but there's a second restriction in employment law on contract that I think is even more important for our purposes here today at this section. That is, not only does employment law give employees the right to be free from discrimination, it also prohibits employees from contracting away that right.

You can try to imagine an employment contract where the employee gives up her right to be free from discrimination in exchange for an extra 50 cents in wages. It's hard to even imagine such a contract, because we can't imagine courts enforcing it. The law doesn't allow employees to sell their employment law rights.

That's what makes employment arbitration agreements so controversial. They can be seen as a sale of employment law rights. It's a little more complicated than that, of course, because an employee bound to arbitrate can, of course, win a claim in arbitration and win a remedy. But critics of arbitration say that arbitration makes it harder for employees to do that. It makes it harder for them to win because, the argument goes, it's harder to attract a lawyer. It's harder to get discovery. It's harder to pursue a class action. It's harder to win large damages awards.

So here we see the tension between these two areas of law. Those of us who come at it from the arbitration side, the freedom of contract side, would like courts to use contract law, apply contract law, in deciding which arbitration agreements to enforce in the employment context, as in other contexts.

By contrast, those who worry that arbitration is weakening employment law protections want it to be harder to enforce employment arbitration agreements. They want to protect employees through regulation of arbitration agreements and through regulation of the arbitration process itself.

I should disclose that my own preference is in the matter of the freedom of contract side. I'm a libertarian, and to me philosophically, there's more justice in the arbitration law contractual approach than in the more regulatory approach of employment law. But instead of elaborating on that philosophical side, I want to talk about the more practical side, the real world affects, if you will, of enforcing employment arbitration agreements. Who wins and who loses from enforcement of these agreements?

Here, Mr. Fortney, I'd ask you for another slide.

I don't know if you can see on this graph. Basically, it shows a number of cases and the dollar amount of the award, with the high award being on the right hand side. You see more litigation cases having a high award than arbitration cases. That's the received wisdom, and it's confirmed by the empirical studies on employment arbitration versus employment litigation.

But you also see, if you can see on the far left there, that sort of vertical line for litigation. A high number of litigation cases, far higher than arbitration cases, that result in a zero dollar recovery by employee claimants. That again, is the received wisdom and confirmed by the empirical studies. It may be because it's easier for employers to win on summary judgment in litigation than in arbitration.

In any event, the received wisdom, the conclusion from the empirical studies, is that arbitration is better for employees with meritorious but lower dollar amount claims, while litigation is better for employees with a claim that would win big in court.

This is what NYU law professor Samuel Estreicher calls Saturns for Rickshaws. What he means is that the employment litigation system, he says, gives a Cadillac to those few lucky employees who win big in court, while giving just a rickshaw—not even a car—to the vast majority of employees who aren't able to get their claim heard at all. By contrast, he says, arbitration gives a Saturn—a modest car—to all the employees. Saturn, by the way, is the kind of car I drive, so I'm attracted to this model of arbitration.

My caution, though, about this empirical side, is that nobody knows for sure if this graph accurately depicts reality. That's because nobody can do an apples-to-apples comparison of the cases going to arbitration and the cases going to litigation. There may be systematic differences between the cases going to arbitration and the cases going to litigation. So these studies comparing the two are comparing apples and oranges.

That said, my hunch is that the graph does basically represent reality. My hunch is that enforcing arbitration agreements in the employment context does reduce the recovery of the employees who would have won big in court, while increasing access to justice for the run of employees, which is the last slide now.

In addition, I accept the economic point that those employers who use arbitration do so because they find that it saves them money. Further, I accept the economic point that these savings are likely to be passed along to employees and to consumers. The short explanation for all that is whether employers save money, those who use arbitration, save money from lower awards paid out, or just lower process costs, lower costs of getting to the award.

Either way, if arbitration saves employers money, the argument goes, then it lowers the cost of labor. That's going to come back to employees in terms of higher wages or passed on to consumers in terms of lower prices, depending on the elasticity of supply and demand and the relevant product and labor markets. I can get into some scholarly literature on that if you'd like. But the point is that under this economic view there are lots of winners to employment arbitration, relatively few losers. So I hope I can persuade, or I hope I have persuaded, many of you, even if you don't share my philosophical commitment to freedom of contract, that this is a good thing, the law of enforcing employment arbitration agreements.

So with that, I will try to stay within our short time limits and sit down. Thank you.

MR. SEYMOUR: My role in this is that of barbarian at the gate, so let me try to fulfill the expectation.

Freedom of contract enters into the field of consumer and employment arbitration much as it would enter into the field of law enforcement if, upon arrest, people were given the opportunity to be relieved from custody, as long as they signed an agreement saying that the arresting officer got to pick the person who would

decide whether they were guilty or innocent. The mother who has no one at home to feed her small children will sign such an agreement. That's the situation that we have here.

Let me start out. There's a clear value in arbitration. There's a clear role for arbitration in employment if it is arbitration that is mutually chooseable by the parties, not a condition of employment; but after the dispute has arisen, the parties agree to arbitrate the claim. The clearest example of utility to both sides that I think we'd all agree on is in the area of sexual harassment claims involving very embarrassing details.

Whether the person accused is accused rightly or wrongly, whether the individual has a good claim or not, no one wants to have the reporter from the local newspaper sitting there in the front row of the courtroom listening to all of these details. I had one woman tell me that she would rather commit suicide than have the details come out. I had to tell her that there was no way that she could present her claim. Even if there were some sort of proceeding that was confidential, it would come out in discovery the next time somebody had a claim.

So there are those situations. There is a world of other situations in which somebody who is knowledgeable can arbitrate a decision quickly. That's not really what we're talking about in terms of the dispute over mandatory arbitration in the employment context.

Why are plaintiffs' lawyers generally opposed to the idea of what we call cram-down arbitration? Well, it began in a way that friends of arbitration would probably agree was very unfortunate: the old securities system of arbitration in which the arbitrators were trained using handbooks saying, "You do not have to follow the law." Now that's fine if you have an agreement saying that rough justice, not the strict rules of law, apply. But when you're arbitrating statutory claims, you're told not to follow the law. You're told to give a one-sentence award that gives no explanation of your reasoning so that no one can say that you failed to follow the law. That raises problems.

Demands for onerous cash: I had a client in a case in which the Supreme Court denied cert who, on making her claim of sexual harassment—she's not a high-level person; she's just a clerical employee—she was given a demand. Pay 1,500 dollars towards your initial share of the arbitration costs within the next five business days or else your claim will be dismissed. So a lot of claims went away at that point.

Horrors. Biased decision makers. I was involved in *Hooters of America v. Philips,* where they sued our client to prevent her making a sexual harassment claim in court. The company's arbitration agreement did not require that the arbitrators be unbiased. They could be the brother and sister of the CEO and that was one of the grounds on which the Fourth Circuit knocked the thing out.

One national provider of arbitration services in the consumer context had to reveal in discovery that there was a 99.4 percent win rate for the companies that

contracted with it to provide arbitration services. There's a problem with legitimacy of these systems. I'll come back to the concept of legitimacy in a second.

Structural problems. There is, in the FAA, no definition of arbitration. There's no minimum set of standards that something has to meet in order to be considered arbitration. Unlike codes of judicial conduct, there is no external code that applies to all arbitrators.

There is one company on Long Island which has imposed an arbitration system which does not involve the hearing of any evidence. You simply send a letter saying what you feel; the company responds; the arbitrator values the claim. Then if you go to court anyhow, which you can, but unless you get your full demand, you have to pay the other side's attorneys' fees. Of course, you waive your own attorneys' fees as soon as you go to court.

Decisions are normally secret. This has a corrosive effect across the field, and I think it hurts employers as much as it hurts employees. Because of public decisions, employees understand that there are limits on certain rights. Any lawyer that they go to will say that if you have got a complaint with a seniority system, you're going to have show that there was intentional discrimination operating here or else you don't have a claim.

So people are advised and they don't bring claims based upon the fact that there is a common understanding of the law. A company may have a particular procedure. If it's been upheld by the courts in a couple of cases, any reputable lawyer will say you don't have a claim here, unless there are some facts that you've got, something that really distinguishes you from the other cases.

If those decisions are secret, as they almost always are, both other employers, the employees of that owned company, have no means of knowing that this is a bad claim. So the employer is doomed to a repetition of the same kind of challenge again and again and again. That also stifles growth in the law.

Differential access to information. Sure, the employee may be able to strike a particular arbitrator, but the employee has no means of knowing, comparable to the employer that uses them, what this person has done in other cases. The conflicts of service providers that AAA, in an investigative series done by the San Francisco Chronicle, turned out to have put a lot of the corporate officials that made it the exclusive provider of arbitration services on its own board. It was paying these officials who had decided to use that.

We talk about the difference between elected and appointed judges in terms of legitimacy of the system and the importance of people's confidence that their cases are really being resolved on the merits. Well what you have here is more like the old justice of the peace system in which part of the compensation was based upon the fines that were levied after a conviction occurred for a petty offense. That violates due process, but we have no system for regulating and for preventing abuses in that.

Two quick points on class actions, and then I'll conclude. Bob, do you want to handle class actions later?

MR. DAVIS: Go ahead.

MR. SEYMOUR: Okay. There is a particular problem with respect to the use of arbitration clauses to defeat class treatment. Most of the clients that I've had in the 30-odd years that I've been representing plaintiffs in civil rights cases would have lost if their cases were simply done on an individual model, like the inferential model on McDonnell-Douglass that we're all familiar with.

Those clients mainly prevailed because they had the advantage of proof of patterns of discrimination, things that were outside of their immediate knowledge. So the difference between winning and losing may depend upon being able to get class treatment.

In one circuit, Judge Jolly's circuit, individuals are not entitled to rely upon evidence of patterns of discrimination outside the context of a class action. That's the Celestine case. In a number of circuits, the Fourth and the Ninth are the ones that I've researched most recently, but I think it's generally true, you cannot get a broad, systemic decree, which is the goal of every civil rights class action, in the absence of a class action. You can only get so much injunctive relief, which makes you as an individual whole, but nothing that changes the system for the future and makes sure that this kind of problem does not arise in the future.

Those kinds of substantive deficits in denial of class treatment seem to me to meet the standards set by the Supreme Court in *EEOC v. Waffle House*—that part of the discussion is going to be in the paper, and I don't want to take time to go through it here.

But the final point is, whether we're consumers of legal services, providers of legal services, judges, lay persons, members of the public of this great country, we have a strong interest in a widely shared perception that legitimate disputes will be resolved in a manner that has legitimacy. Arbitration can, but does not always, meet that standard.

The kinds of examples that I've given are really tarnishing arbitration in the eyes of many. Auto manufacturers are no longer able to impose on their dealers arbitration systems for resolving disputes with the dealers, because the dealers went to Congress, and Congress decided to exempt them. Both parties agree that in the current session of Congress it is likely that the producers of livestock, poultry, and food are going to be exempted from arbitration agreements that are imposed by the large companies, agri-business companies, that take up their produce because of the same kinds of perceptions that we have here.

What you have is a rolling roll-back of the FAA because of problems with the system. I'm not sure what that cure is arbitration—from the kinds of structural

problems I've mentioned. I think that there are going to be statutory changes. I don't see anybody advancing them. But ultimately I don't think that arbitration in the employment context will be available unless those problems are addressed.

Thank you.

MR. DAVIS: I've known Rick for it's got to be 15 years. My problem with him is not that he's the barbarian at the gate, it's that he's such a literate barbarian at the gate.

Over the past couple of years, I've talked with a number of companies about whether they should adopt a program to arbitrate employment disputes. With some apologies to the Hertz Rental Car Company, I'm going to recreate for you in a very quick fashion the debate that I've experienced.

First question, well, arbitration is less expensive, right? Well, using Mr. Hertz, not exactly. How can it be? You don't have to go to court. Yes, but you have to write briefs, and you have to take discovery, and you have to put on argument. You have to examine witnesses. So it's not a lot less expensive.

Yes, but it'll be done quicker, right? Well, yes, I think—and Rick, I'm going to play off you—I think if Rick and I were opposing counsel and we were the one setting the schedule, it could be done more quickly. Unfortunately, arbitrators, particularly good arbitrators, tend to be very busy. I think those of you who have arbitrated have had the experience: well, Mr. Arbitrator, when can we see you next? Well I think we can have our next hearing in about four-and-a-half months from now. Arbitration is not necessarily quicker than, I'll say, federal court practice.

Well the next question, it's less burdensome on us, right? Well, tell me who the arbitrator is, and I'll tell you the answer to that. I mean, are we going to have our corporate people deposed? Yes, some of them anyways. So it's not a lot less burdensome than in-court litigation.

Yes, but we'll get good decisions, because the arbitrators are really skilled in this area. Well, not exactly.

Well, where do these arbitrators come from? Well, under the AAA rules, we're going to get a panel of arbitrators who will be identified from the area, unless we get on to the new super list, which nobody has seen yet—that's another story. Then those of us in law firms, both plaintiffs' side and defense side, will send emails back and forth to each other saying what can you tell me about Joe or Susan. We'll go through the strikes. Does that guarantee quality? Sometimes. Sometimes not.

So wait a minute, the client says, so it's not necessarily less expensive. It's not necessarily quicker. It's not necessarily less burdensome. We're not guaranteed necessarily a good decision in the sense of a well-informed or well-reasoned decision.

Well, how do we get out of it if we don't like the decision or it's just flat wrong? Well, sort of, not exactly. The deal if you get into arbitration is you don't get to go back to Judge Jolly and his brother on anything short, generally, of a manifest disregard of the law standard.

So why is it that people want to do this? Well, there are a couple of reasons. First, arbitration somehow seems less scary. You don't file pleadings that say in the United States District Court for the District of X, or the United States Court of Appeals for the Fifth Circuit. You're filing letter briefs. It seems less scary.

Second, Rick has already picked up on this point, it's a relatively private process. You don't put it in the docket of a district court. You don't have to go through the shenanigans of trying to file under seal. Generally it's private.

Third reason: I think a number of companies have gotten interested in arbitration because it fits what I think is the carry-over notion of the evolution of a progressive discipline system. Let's start with a complain process. Let's go, perhaps, to sort of a mediation step. Then what else can we do that's short of going to court? Well, arbitration, yes, that sounds pretty good.

What's the real reason today? Here's the question that a lot of people are asking. Rick has put it very well, and I'm going to wrap up with this to save time for other speakers. We're going to talk about it. Can we cut off, and I'm being very blunt about the question from the employer's side here, class and collective actions?

That to me becomes the question that employers, employees, their legal representatives, and the courts are going to be struggling with for the next several years. I'm going to come back to the point that Steve made, being sort of a freedom of contract kind of guy, I've got an agreement with you as employee. If I, employer, have a dispute with you, we're going to take it to arbitration. If you, employee, have a dispute with me, we're going to take your dispute to arbitration. We're going to have a good solid debate here in a few minutes about how fair that bargaining process is, but I think that ultimately becomes the tough issue, the cutting-edge issue in terms of how employers decide whether to adopt, modify, or dispense with arbitration programs.

Eric, I think you're up. Thank you.

MR. DREIBAND: I speak on behalf of the Equal Employment Opportunity Commission on the issue of arbitration. I would say, as an initial matter, that while I've been there a short time, as Judge Jolly pointed out, I certainly do not know it all and hope some day to know it all. I usually assign that status to the courts, not to someone like me as a general counsel.

In any case, at the EEOC, we enforce the federal anti-discrimination laws in employment, in particular Title VII of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, sex, color, national origin, or religion; the Equal Pay Act, which prohibits discrimination in wages on the basis of sex; the Age Discrimination and Employment Act, which prohibits discrimination on the basis of age; and the Americans with Disabilities Act, which prohibits disability discrimination.

With regard to arbitration, the EEOC has stated in a 1997 policy statement that mandatory arbitration, that is, arbitration as a condition of employment, is inconsistent with the civil rights laws that the EEOC enforces. That position has been unanimously rejected by every circuit court of appeals in the country to have considered the issue, most recently by the Ninth Circuit Court of Appeals in a decision that issued about six weeks ago.

I think the world of employment mandatory arbitration and the civil rights laws changed in 1991 when the Supreme Court issued the decision of *Gilmore v. Interstate/Johnson Laine Corporation*. In that case, the Court held that an age discrimination claim could be subject to arbitration under the Federal Arbitration Act. That case involved a securities employee who had signed an agreement to arbitrate any claims. The Court said that was fine under the Federal Arbitration Act.

Then in 2001, the Court followed up in a case called Circuit City v. Adams and determined that the exclusion for certain employment contracts under the Federal Arbitration Act applied only in the context of transportation workers, primarily. So that for most employees, according to the Supreme Court, any agreement that employees sign will be subject to arbitration, generally speaking.

The Supreme Court has not opined on whether Title VII or the Americans with Disabilities Act can be the subject of mandatory arbitration. There is legislative history for both of those laws that suggests that in fact mandatory arbitration is inconsistent with the Americans with Disabilities Act and with Title VII. That legislative history formed the basis for the 1997 policy statement that the Commission issued. But as I say, it's now been unanimously rejected by every circuit court of appeals to consider the issue, and it's something around 10 -- I haven't counted them up recently—about 10 of the circuit courts have considered and rejected that concept at this point.

With regard to the federal appellate courts, they are now of the view, unanimously, that mandatory arbitration as a condition of employment is consistent with the civil rights laws that the EEOC enforces.

Two other points that I will make. First, on the matter of the EEOC's authority to bring cases on behalf of persons who have signed arbitration agreements, the Supreme Court has opined in a case called *EEOC v. Waffle House*, that the Commission can bring an action on behalf of someone, or seek relief on behalf of someone, who has signed an arbitration agreement and can even seek victim-specific relief for a particular person, even though that person is bound, themselves, by an arbitration agreement and may even have lost in an arbitration setting.

Secondly, the other issue that arguably, I guess, we are dealing with short of Supreme Court or legislative change involves issues of retaliation. In a decision that the Ninth Circuit decided recently called *EEOC v. Luce*, Ford, Hamilton and Scripps, the Ninth Circuit, en banc, determined as an initial matter than mandatory arbitration is consistent with Title VII and the other laws that the EEOC enforces, but

remanded the case to consider the question of whether or not presenting an employee with an arbitration agreement as a condition of employment may constitute retaliation under the civil rights laws. That issue, the court said, is technically still open. But the Eleventh Circuit has considered and rejected that same theory. The Ninth Circuit, the en banc majority, expressed skepticism about that theory.

In terms of the Commission's policy statement about mandatory arbitration, I understand prior to my arrival that the Commission was looking at whether or not to revise or update its policy statement to make it more consistent with what the Courts of Appeals had been saying about arbitration. I think the Commission has some thinking to do in terms of what the next steps are for the Commission, but has not taken any action, since I've arrived at least, to revise the policy statement or anything else.

But in the interest of opening it up for discussion, that will conclude my remarks. Thanks.

JUDGE JOLLY: As I indicated earlier, we certainly welcome questions from the floor. But to begin the discussion, I turn to Bob to talk about the impact of *Bazzle* on the issues that we're talking about in terms of class actions and arbitration.

MR. DAVIS: Thank you, Judge. Let me kick it off. I think our plan is just to have a give and take among the panelists. By the way, there's a package of materials in the back. I suggest that you pick them up. Steve Ware and I collaborated on a short paper. Rick Seymour has produced a very good paper. There were materials that were distributed as part of CLE stuff, which copies a number of the recent cases, including the *Bazzle* decision.

I know I recognize probably 30 or 40 percent of the people in the room. We've got some pretty experienced practitioners in this room. I'm not going to try to give a detailed recital of what the Supreme Court decided earlier this year in the *Bazzle* case. Let me hit a couple of points and use that as a jumping off point for discussion.

As I recall the facts in Bazzle, various consumers who purchased or entered into a variety of home related financings, signed forms that provided for arbitration of their disputes with the lenders. Ultimately, it comes forward to the Supreme Court of South Carolina on the question, did those forms, which are silent on the question of class proceedings, lead to, as the company argued, the I-agree-to-arbitrate-my-dispute preclusion of class actions? Or did the forms, because they were silent, leave it for somebody else—be it the arbitrator or the court—to decide whether those claims could be tried on a class basis?

Ultimately the Supreme Court of South Carolina decided, I think in part for reasons of judge-made policy, and some reasons of efficiency and economy in resolving disputes, that given the silence in the terms of the agreement, that these matters could be decided on a class basis. So the battle lines were squared.

Everybody who cared deeply about this question—and there are a lot of people out there who do—ran around and filed briefs in the United States Supreme Court on this question. We filed a brief and I had a hand in another one. Rick was the principle author of a brief for a number of groups. That is included in the materials.

I think we all settled back for the United States Supreme Court to answer a very tough question, which is, when the agreement is silent, do you either presume the existence of a right to proceed on a class basis, or does such a right not exist at all? he Supreme Court, in a plurality decision, said, "We're not going to decide that question today."

Now I'm going to wrap this up, and I'm going to kick it to my fellow panelists with a thought, because I think it really is the way to begin to think through what happens with class proceedings. The way that I read the plurality decision, particularly putting it next to the dissent, they're really saying, "All right folks, you're talking about the Federal Arbitration Act. The Federal Arbitration Act is really a statutory embodiment of a contractual dispute resolution process. If that's what you bargained for, you're in the wrong place to get your question answered. You go back and have the party who you bargained for, have that person answer the question. Then we'll see what the Court should do thereafter."

Now, what's happened as a result? Poor arbitrators. They now have to decide case by case what to do.

JUDGE JOLLY: Well, Rick, was the reason of the Supreme Court solid from your point of view?

MR. DAVIS: Your Honor, I always take the ruling of the last Court — (inaudible) — have a case as being solid because that way lies in absence of bolsters and inner peace. Then you have to field, what do you do with it in the future?

JUDGE JOLLY: Very good answer.

MR. SEYMOUR: But it seems to me that the Court did not get into the question that I was addressing, which is whether there is the power to preclude class treatment in the course of the arbitration agreement. Practically speaking, an arbitrator that wants to be chosen again by the employer is going to be reluctant to expose the employer to a large degree of potential liability by having class treatment.

There's an employment issue actually right now. What happened was that the plaintiff resisted arbitration. The federal judge in New Jersey or Delaware, I forget which, ordered arbitration of the claim. The claim had been pleaded as a class claim. The arbitrator was to decide whether or not there was to be class treatment. The employer refused to name an arbitrator because it refused to let anything get out of its hands and start an arbitral process if there was any possibility of arbitration. The

plaintiff is now back again before the district judge saying that the employer has made arbitration impossible.

Put all that aside. What happens when the arbitrator says this agreement, I find, does allow or does not allow for class treatment. Put aside the questions I was raising about the power outside of a common law claim where I think there's clearly power, but where you've got a statutory purpose that's supposed to be served. Put all that aside.

Who reviews that? Under what standard does it get reviewed? There's no requirement that exists right now for any of the reasoning to be there, so you don't know whether there's an adequacy problem. You don't know anything.

Now that can be addressed, perhaps, by agreement saying that the arbitrator has to explain enough of it so the people understand what the decision is.

JUDGE JOLLY: But what happened in this case, though? I mean, the arbitrator in fact did decide the class action issues.

MR. SEYMOUR: Well there were two consolidated cases. In one case a judge actually went ahead and certified the class. The same arbitrator had the second case. That arbitrator then read the arbitration agreement as providing for class treatment, but the judge had already decided that question, so it wasn't really independent of the view of the Supreme Court. So now it goes back for a determination free of any intervention by the state trial judge.

JUDGE JOLLY: But, in those cases, or at least in one of those cases, the arbitrator determined a specific award for the class, did it not? It had to arrive at that figure by applying some class action rules, I suppose.

MR. SEYMOUR: That's right, your Honor. the arbitrator did. The Court held that one of them goes ahead on a class basis. The arbitrator said, "Okay the second goes ahead on a class basis," and did give the award. The award is now vacated, or potentially vacated, and it goes back to the arbitrator for a new decision as to whether class treatment is provided for.

JUDGE JOLLY: The only point that I'm making is whether the kind of problems that you may foresee in an arbitrator handling a class action, are as real as you might think, given the fact that the arbitrator here seemed to successfully work the problem out, at least to the satisfaction, I suppose, of the plaintiffs.

MR. SEYMOUR: Your Honor, yes, except the Supreme Court, and I think they're right, said that once the state courts had already held that the agreement allows for

class treatment and there should be a class, I don't think the arbitrator was a free agent at that point. There's not an untainted decision.

JUDGE JOLLY: It was just merely a matter of his calculating the amount of money that was available, or that was appropriate for the class relief. That is all that was involved at that time.

MR. SEYMOUR: I suspect so. Do you disagree, Bob?

MR. DAVIS: No, I think that's right. I might kick it to Steve as well on this. I am absolutely bedeviled by what the arbitrator does in this circumstance. Let's look at the counterpart in federal practice under Rule 23. Is the arbitrator supposed to look at notions of commonality for dominance to vitality numerosity? Those kinds of questions. What is the arbitrator's power to give class notice? What happens, as is typical, when the arbitration agreement says that any disputes will be resolved confidentially and privately? How can you reconcile notice with that provision? Hey everybody, do you want to opt out of a case that we can't tell you about?"

JUDGE JOLLY: What is going to be the result of this in future negotiations for arbitration clauses? Will employers insist that class action be specifically excluded?

MR. SEYMOUR: Your Honor, there are no negotiations right now. You're simply presented with a document. Often you're not presented with the rules. The document often says that the employer may change the rules.

JUDGE JOLLY: Aside from negotiation, will the employer at this point simply exclude class actions from the agreement that he pushes under the nose of the employee?

MR. SEYMOUR: That's my expectation.

JUDGE JOLLY: Will that hold up then in the unconscionability doctrine?

PROFESSOR WARE: Can I jump on that?

JUDGE JOLLY: Sure.

PROFESSOR WARE: Just to put it into context. There are three possible arbitration agreements, three ways it could be written on the class action issue: prohibiting explicitly class actions; permitting explicitly class actions; and being silent on whether class actions are permitted. This issue from the Bazzle case is really in that third

category, the ambiguous or silent arbitration agreement, where of course we need some kind of background rule to fill the gap in the contract. My expectation would be this will evolve just the way so many form contract, or repeat contract, issues evolve. When there's an issue of ambiguity, then drafters go back and they get explicit and written contracts get longer. Over time courts identify more things that the drafters have to react to.

So there, I suspect, will be more employment arbitration agreements and other kinds of arbitration agreements that explicitly prohibit class actions. Then we'll have an issue that the dissent in the *Bazzle* case got to, and I frankly think got right, which is the Federal Arbitration Act requires enforcement of that term of the agreement unless there's a ground at contract law that defeats enforcement. For example, maybe it's unconscionable in a particular case to deny class-wide relief. We can all imagine a case where we'd hold that to be true.

On the other hand, when you have a contract that explicitly permits class-wide arbitration, then we get into some of the other kind of practical issues my colleagues here have been talking about, which is the public side of class actions. Can arbitration, a private process, handle those?

MR. SEYMOUR: I think it's important to step back for a second and deal with concrete particulars. Most consumer class actions do not involve large amounts of money. If you've got a truth-in-lending claim you're dealing with you may have a hundred thousand persons who are injured. The injury may be 50 dollars a piece. The amount at stake justifies a proceeding if you have it on a class basis. It does not justify any proceeding if it's on an individual basis.

If the company imposing this agreement on its consumers is allowed to preclude class treatment, what the company is actually doing is opting out of legal obligations. Do we as a society want to allow that?

MR. DAVIS: Rick, let me speak to two issues.

JUDGE JOLLY: Why don't you speak to that particular point.

MR. DAVIS: I was going to deal with that and hold the unconscionability point, because that's a very separate issue.

Let me try to give the principle legal response first. I don't want to stretch the analogy to the purchase of consumer goods too far. Basically in the employment context, it's, "Here's the deal. We want to hire you. You want to work for us. Here's the way that we've agreed to resolve our disputes between us."

Now on a simple empirical basis, assuming that there is no other factor that's going to change that evaluation, if you will, by the employee—that you don't have an employee who's going to price it in terms of various alternatives just on that factor—

then the question turns back to the employer to say, "Do I specifically want to, in my view, exclude class disputes or class treatment, if you will?" I think but for the risk of having the entire agreement tossed on unconscionability grounds—we'll get to that later—that the employer nine times out of ten will want that excluded. The only way, Rick, to come back, I think the answer that I can defend that is to say it's the economic transaction. It's not imposed after the fact. It is something that in the most objective way the employee knew or the prospective employee knew when he or she started employment.

Now I know that Eric will say because the 1997 policy statement says—I'm not saying that I'm pledging Eric to what that statement says or not on a continuing basis—the employee or prospective employee is not in a position to evaluate that choice at that time.

JUDGE JOLLY: What is the unconscionability aspect of excluding class actions from an employee-employer contract? If it's perfectly acceptable in every respect except it excludes class actions, why is that unconscionable as between the employer and the employee in resolving their own individual disputes?

MR. SEYMOUR: Your Honor, I think here is the point where we have to bring in Waffle House. Waffle House said that the mistake that the Fourth Circuit had made was forgetting that arbitration agreements cannot limit substantive rights. But the substantive right in Waffle House was not something that I would have thought substantive before the decision. It was the right of having the EEOC bring suit on your behalf to get the identical relief that you could get if you had your own lawyer getting relief. Because of the fee award provision, in theory, there's not a dime's worth of difference, because the cost of legal services is free to you. But having the government go on your behalf, as opposed to your going through arbitration, that was a substantive difference. If that's substantive, then the inability to proceed on a class basis is substantive.

JUDGE JOLLY: But why is it unconscionable? That's the point. Why does it fall within the unconscionability doctrine?

MR. SEYMOUR: If it denies a substantive right—there's both procedural unconscionability and substantive unconscionability, at least in the laws of some states, like California. If it involves the denial of a substantive right --

JUDGE JOLLY: I understand. The difference, of course, between procedure and substance, but to me it's difficult to see how it is a right of substance for me to represent other employees and get money for them or relief for them, as far as resolving the disputes between me and my employer.

MR. SEYMOUR: Well, as I mentioned, for more than three decades, most of my clients have obtained relief only in the context of a class claim in which they were able to rely upon a pattern of discrimination. In all those cases there was a systemic decree that cured the problem for the future.

If I have to proceed on an individual basis, and assuming that the arbitrator is not going to go farther than the courts go, and I think that's a fairly safe assumption, then my clients are going to lose. Even if they were able to win, I would not be able to get the same kind of injunctive relief.

JUDGE JOLLY: So it would be on a case by case basis. In some instances the class action exclusion may be upheld, and in others it may not.

MR. SEYMOUR: At least in the context of FLSA collective actions, that might be a different kettle of fish that I have not thought through, because you don't get injunctions in those cases. You don't rely upon patterns of evidence there.

But for anti-discrimination actions involving hiring, promotion, those kinds of things, I think that in the ordinary case there would be a substantive problem.

JUDGE JOLLY: Well, wouldn't the arbitrator be able to order injunctive relief, then you go to the court and have that arbitration award enforced and effectively have injunctive relief?

MR. SEYMOUR: But, Your Honor, the problem is that if it's not done on a class basis, you cannot get a systemic decree. You can only get a decree saying they can have a sign saying no blacks will be promoted to foreman on the front door, but the remedy for the individual is that the individual black employee gets promoted to foreman. The same system is left in place for the next victim. That's the substantive problem.

JUDGE JOLLY: I am beginning to see it in terms of specifically civil rights, I mean, how I, as a black person, have a substantive right to have other black people considered for employment and to have those barriers down.

Do you have any comment, Bob?

MR. DAVIS: I've got a response, and then Steve, I know, has written on the subject for another perspective. A brief response to that: whenever I read certain opinions on this issue, particularly from the state appellate courts in California and from certain judicial panels in the Ninth Circuit, I can't really tell the difference between substantive unconscionability and "it ain't fair".

I think I can understand, and I really have to credit Rick's compelling argument, that in certain circumstances—this is obviously all off the record—one is

going to be able to make stronger arguments as to substantive unconscionability. But for me, many of the cases, most notably and recently the Engle case—it's part of the materials that we have—Judges Pregerson, Reinhart, et al. have lost the tether to substantive unconscionability and veered into "it ain't fair".

I don't know what legal principle we can educe in terms of advising employers about what's going to pass muster.

Steve, I know you've given this some thought.

PROFESSOR WARE: I think substantive unconscionability boils down to "it ain't fair". It's a legal doctrine with very little doctrine to it, very little structure. For that reason, from judge to judge, there's a lot of variation in terms of what's unconscionable and what isn't. It seems to me that point applies not just to the preclusion of class actions, but to all the other features of arbitration agreements that courts sometimes say, "This is draft or overreaching; this is going too far; we're not going to enforce that."

Whether that has to do with the dollar amount of fees an employee has to pay, whether that has to do with restrictions on discovery or remedies, it seems to me that the bigger legal question for all these issues is, are we going to keep it in the unconscionability realm where courts make case by case decisions with the inevitable diversity of views from judge to judge? Or are we going to have Congress step in and get more specific as to what arbitration agreements are enforceable and what aren't?

I think these are the sorts of the issues that should stay with the courts, despite the challenges that imposes. I just worry that putting Congress or some regulatory agency in this business is going to make things worse rather than better.

JUDGE JOLLY: Let me ask you one question on this, Rick. Looking back to the language of the FAA itself and the language upon which the unconscionability doctrine is based, it is that the agreements are being enforced saved upon such grounds as exist at law or in equity for the revocation of any contract. Given that language and given the fact that it was written many years ago, has that been improperly expanded whenever we begin to talk about the unconscionability relating to class actions and to systemic relief and that sort of thing?

MR. SEYMOUR: Your Honor, I think that the candid response is that courts have tended to err on both sides of the line, more often on the side of the line that fails to recognize general contract rules of unconscionability. For example, the Third Circuit has a case, Peacock, in which part of the arbitration agreement involved the waiver of punitive damages, limitation of compensatory damages, a whole host of owner's restrictions that cut back on it. The Court said the conscionability of the contract on that was for the arbitrator.

That's failing, in my view, to enforce that provision in the FAA. But I think it makes an awful lot of sense. I think the Supreme Court, where the Supreme Court came down, makes a lot of sense. You've got to apply the same rules you apply for all other contracts. You can't have something that is arbitration hostile, that is a rule that applies only there.

There is a question about people even understanding that they have arbitration agreements, because sometimes it's in 8-point type at the end of something that's in much larger type. Again, it's varied, and people may not know. In most of my cases, people have no idea what the rules are, because the rules are not disseminated at the same time as they sign.

In the Hooters case, the company changed the rules after the demand letter was received. I forget whether it was Judge Ludig or Judge Wilkonson who asked at oral argument, "Why did you change the rules of arbitration after you received the demand letter?" A candid response came back. "We wanted to have more of an edge."

JUDGE JOLLY: Eric, let me ask you, in terms of the government's position, is every agreement to arbitrate Title VII cases unconscionable?

MR. DREIBAND: Well, the Commission has taken the position, so far, yes, in a sense, not unconscionable under state law contract principles, but that it is inconsistent with the civil rights laws. As I say, though, that position has been rejected unanimously by every Court of Appeals.

JUDGE JOLLY: Why is that still your position?

MR. DREIBAND: Well, as General Counsel, I'm only the litigation arm of the Commission. The five commissioners have not changed the policy, so it remains today the same policy that it's been since 1997, formally. I think it's in transition candidly.

JUDGE JOLLY: What circuit has not decided the question?

MR. DREIBAND: I don't recall. Not every circuit has opined. It's like almost all of them.

JUDGE JOLLY: Let's just test the amount of brass that you have. If you go before one of those circuits and you have nine circuits ruling the other way, are you going to be able to stand up before that circuit and argue the EEOC's position?

MR. DREIBAND: Well, the Commission did that in the Ninth Circuit.

JUDGE JOLLY: Well, a lot of things happen in the Ninth Circuit.

MR. DREIBAND: I think, yes, I think maybe, I'd have to go back and look. I think there's one or two circuits that have not opined on it. So, I suppose in addition to the fact that I'm, as the litigation branch of the Commission, bound by the Commission's policies, I'm also bound by the rules of professional conduct as a lawyer.

JUDGE JOLLY: What are you saying? That you would send someone else to argue that case?

MR. DREIBAND: I can tell you I'd have no trouble finding people who would be willing to do it at the EEOC.

JUDGE JOLLY: Very good.

MR. DREIBAND: I will say in all seriousness, I think at the level of the Supreme Court it is an open question. The Supreme Court has not opined on either Title VII or the Americans with Disabilities Act. What the Court said in the Gilmore decision was that the courts need to look at the legislative history in addition to the statutory language, to determine whether arbitration is permitted or mandatory arbitration is permitted. The legislative history to the 1991 Civil Rights Act and the Americans with Disabilities Act, I think, fairly clearly, some would say, ambiguously, others would say, says that mandatory arbitration as a condition of employment is not consistent with those statutes.

So I think, were it to be addressed by the Supreme Court, I thin it would be an open question. But short of Supreme Court review, I think the appellate courts have unanimously rejected the legislative history as binding.

JUDGE JOLLY: Let's turn to the audience for a minute. Does anybody have any questions? Back here, right here.

AUDIENCE MEMBER: I can't get over the procedural-substantive issue of the rules of civil procedure are not supposed to be substantive law, at least in my mind. So, by the way I am aligned on both sides, so I'm trying to figure out how to argue this.

A procedural rule about class action and judicial conduct, how can that fly in the arbitration context? I'm just missing it because I think, my gosh, I must have missed this whole line of argument. What am I missing?

JUDGE JOLLY: That's directed to Rick, is it not?

MR. SEYMOUR: I think it's, to me, the difference between substantive and procedural unconscionability doesn't have much to do with the rules of procedure. It

does have to do with something which can be outcome determinative, such as whether you're entitled to rely on a pattern of evidence of discrimination.

It does have to do with the scope of relief that you're able to get. There's a huge difference between, "Put John Smith in this job" and "end the discriminatory system." I mentioned once when I was getting an award from the NAACP Legal Defense and Education Fund that we have to step back sometimes and take a look at the fact that in this nation we made a change in racial relations that could not have occurred peacefully in any other country on earth. We did it because we had public proceedings and largely federal judges like Judge Jolly with the American flag at their right side saying what Americanism involves. It involved decrees that were handed down. Systemic decrees are still the goal, certainly the primary goal, of every class action that I've been involved in. Mind you, I sometimes have clients who instruct me to waive even back pay in order to get more injunctive relief, because they know that it's going to impose a cost on the employer. But if you eliminate the right to a systemic decree, it seems to me that you've eliminated something which is central to the enforcement of the fair employment laws.

On a procedural and conscionability side, a couple of examples of that: there are arbitration agreements that say that you can only get one day of hearings. Suppose you have a complex case. Suppose you can only take one deposition per side. That may not allow a fair opportunity to present a side of the case. To me, that falls on the procedural unconscionability side of things.

So I don't really see it as an elevation of the federal rules of civil procedure. I see it as something that can change the outcome, which can severely constrict the relief on the one side as being substantive, and on the other side, on the procedural side, do you have a fair opportunity to present the case?

JUDGE JOLLY: We have another question right here.

AUDIENCE MEMBER: I'd like to try to bring out points about efficiency or lack thereof in arbitration. Mr. Davis pointed out a lot of inefficiencies of arbitration, some of which get unfavorably reported, such as speed, the ability to compel presence. I'd like Mr. Ware to try to address some of the issues that Mr. Davis raised about the inefficiencies of arbitration in some cases compared to court proceedings, with the observation that I bring that there are employers who are looking at this issue, recognizing the issues that Mr. Davis raises, and for that reason, declining to initiate arbitration programs.

PROFESSOR WARE: Yes, this is a huge practical question for those of you who represent employers. Many employers ask their lawyers to check out arbitration, "Will we be better off requiring our employees to arbitrate or not?"

I certainly don't claim that all employers should conclude we'd be better off requiring our employees to arbitrate. I would expect each employer to weigh the pros and cons. It's going to cut differently, I would think, for some employers than for others. So I certainly don't mean that as an easy job for employers' counsel to answer that question.

What I will say is, to the extent I've seen good data on this, it's still only about 10 percent of employees around the country—here we're talking non-unionized, non-collective bargaining—who are covered by an employment arbitration agreement. So if we can presume, and this is a big if, that employers around the country are accurately assessing whether it's in their own interests to have employment arbitration, the vast majority are concluding it's not in their interest.

MR. DAVIS: Just one brief response to that. In many cases, individual disputes can be resolved quicker, cheaper, and particularly compared to the results in some state courts, probably better. But it's not a panacea, no, it's not a panacea.

JUDGE JOLLY: Any other questions? Right here, in the back.

AUDIENCE MEMBER: I wanted to start with an observation as to something that I think has been overlooked a little bit when we've talked about some of the complications with arbitration, which was a point that both Bob and Rick addressed. That is, one of the good things about arbitration is there's a market out there. A lot of the things that were identified early on are market failures in a sense. It takes so long, arbitrators are so busy. We wish arbitrators were more expert, and other problems that I think do exist to some extent.

But I think the good news there is if indeed employers, and employees as well, want quicker arbitrations, then presumably this market will bring that about. I think that will happen more quickly as courts get clearer about what the rules here are. Similarly as to quality. I think that employers and employees alike have an interest in quality arbitrators, and the market as well should help address that.

I think that a number of the other things that we've talked about today are problems; they're problems in part though because they're new. I think experience in markets that you have through arbitration can be helpful there.

My question is as follows: I'm noticing as I look at these cases two principles that seem to me headed toward conflict. The first is the general bedrock principle under the FAA that arbitration contracts are to be treated the same as all other contracts and put on no worse a footing. That's in the FAA. The Supreme Court has said that emphatically.

On the other hand, we now have an extensive body of state law that is extraordinarily detailed as to arbitration contracts specifically. You have to have these

16 different components so as to be a conscionable agreement. Whereas, for all other contracts in the state, there are no such rules.

There's a very fair rejoinder for the plaintiff's side, which is, these things are essential to fundamental fairness. But having said that, how do you resolve the tension?

You can say in a way that the state courts, which clearly do have a history and are still hostile to arbitration at times, in a sense they are now discriminating against arbitration contracts in a way they do not as to others. I think a little bit is written on this. I don't know how much.

JUDGE JOLLY: Let me ask Steve to address that question.

PROFESSOR WARE: First I would say, Gene, I agree with your observation about how this is a new market, a new industry. The *Gilmore* case was only 12 years ago. Certainly markets take time to develop. I think this one will improve as it grows.

In response to something Rick said earlier, clearly there's a criticism by the plaintiff's bar that this market is going to be warped by employers being repeat players who exert too much leverage over arbitrators, and the employees don't have comparable counterweight. I would suggest that the plaintiff's bar is that comparable counterweight. Plaintiff's lawyers are certainly able to talk amongst themselves about how particular arbitrators have ruled in the past, just like employers are able to talk about that, too.

As to Gene's legal question about Federal Arbitration Act ordering courts to use the same contract law they use generally, Gene, I'll try to summarize fairly. You're suggesting that courts are going too far in making requirements of arbitration agreements to keep them conscionable that they don't do for other kinds of contracts going --

JUDGE JOLLY: Under state law.

AUDIENCE MEMBER: Yes.

PROFESSOR WARE: I guess what I say there is we have a weird situation now where a huge percentage of the overall unconscionability case law is made in the arbitration context. There's just a lot of litigation now about whether arbitration agreements are unconscionable and not a whole lot of other litigation about whether other kinds of contracts are unconscionable.

So you do have sort of the tail wagging the dog there, that the statute requires the tail to mimic the dog. But there's not much dog; there's not much case law out there on other cases.

JUDGE JOLLY: We have another question right back here.

AUDIENCE MEMBER: I wondered if you'd comment on a couple of what I look upon as very fundamental principles. One is the problem of the FAA and federalism. The second one is the right to a jury trial. I was just wondering if anybody had any thoughts where those two principles fit in.

MR. SEYMOUR: Well for starters, I normally get tarred and feathered by plaintiffs' attorney groups before whom I speak when I say some things. This is one of those things. The Seventh Amendment does not mandate trial by jury. You have to specifically demand it, which means that it's waivable. I don't know, I'm very uncomfortable with employment agreements that say I waive the right to trial by jury, which some employers do, even if they don't use an arbitration clause, if the thing is done in advance. But I don't know of any law that's saying that an advance waiver is impermissible. I haven't had to litigate that yet, but that's one part of it.

I should say, the other thing, this is not really right at your question, but it's something that needs to be mentioned, and that is that there are two kinds of arbitration agreements. We've all been talking so far about binding arbitration. But a lot of employers that have decided not to use binding arbitration are using non-binding arbitration. The reasoning is that there are a lot of disputes that are going to wind up in court. They may not have much at stake. They may not have much merit. But they're going to wind up in court. What the person wants is a sense of a fair hearing before someone that the person thinks is fair. If you go through non-binding arbitration and you get the view of someone, and often you will simply reach agreement to pick a practitioner who is local as opposed to somebody from a list, it's just like the early neutral evaluation system that some courts used as an ADR device. Most cases do not proceed further than that. So the advantage in reducing the litigation is there.

And, Judge, if you'll give just 30 seconds worth of leeway here, I want to respond to one of the charts there about it being a good thing that you have a lot of smaller awards in arbitrations. Forget the high dollar awards for this point.

Back when a certain person I will not name was chair of the EEOC, there was a system under which claims of discrimination were resolved in a rapid fashion, not with much regard to the merits, in my view, but with regard to simply a small claims court pay out. You make a charge, you get a thousand dollars. It goes away. It did nothing for justice. I think that's repugnant to the purposes of the law.

I think the people who do not have good claims should not get a cent. In a system which simply averages claims out, giving less than full justice to the persons who needs it, and giving something to people who don't deserve it, is inimical to the rule of law. People who don't have good claims should not think they've got good claims. We don't want a gambler's mentality going on here.

JUDGE JOLLY: Okay, we have Michael Wallace back here from Jackson, Mississippi. I have to show partiality to him.

MR. WALLACE: I'm not an employment lawyer, so everybody else in here may know the answer to this question, but I thought the whole idea of sexual harassment, for instance, is that each employee has a right to work in a non-discriminatory environment. If I got that right, when the arbitrators are giving Mr. Seymour's client the foreman's job, why can't they give him a decree at the same time systemically requiring the employer to be nice to everybody else, too? Isn't that part of his right not to work in a non-discriminatory environment, or maybe I just don't understand the law?

JUDGE JOLLY: And then get it enforced in federal court if need be.

MR. SEYMOUR: The problem is individuals working in a particular area. Do you have a company-wide, do you have a regional-wide, do you have a facility-wide, do you have a department-wide order? Mind you, there are very few class actions for sexual harassment. I happen to have had one. But sexual harassment is generally considered so individual that it's not amenable to class treatment.

We had a case in which there were such systemic problems to the company's policy, that we had an injunctive case that resolved the thing nationally, but that's very, very rare. It's not going to come up that way.

MR. WALLACE: Could an arbitrator do that though in that case?

MR. SEYMOUR: Not absent a class, I don't think.

JUDGE JOLLY: Okay, Jackson, Mississippi is dominating this group today.

AUDIENCE MEMBER: I am a labor lawyer. I hate to, you just don't know how it pains me to agree with the AFL-CIO on anything, but don't they have it basically right, and haven't they had it right for a lot of years, that both the employer and the employee give up procedural niceties in arbitration in exchange for things they want more, which is, for example, most arbitrators in my experience, are juries of one. Doesn't the employer in fact give up 12(b)(6) and the Rule 56 pretrial dismissal motion? Don't we give up getting to drag the employee through lots of hoops over a lot of time in order to get to the day that they have in court? And isn't the employee's interest being in court? And who are we to presume, with less experience than the AFL-CIO, that these are bad things?

JUDGE JOLLY: Rick, I think you're bearing the weight of the questions today.

MR. SEYMOUR: Okay. This is really more of a political than a legal thing. But remember that in a collective bargaining context, the grievance and arbitration procedure was established as a means of obtaining industrial peace for ending huge levels of strikes that occurred before the Wagner Act was enacted.

You have a mechanism. There are some things that don't go to arbitration; they go to the general counsel of the National Labor Relations Board, which does all the enforcement. Nobody does that privately. They bring that enforcement before the Board. We have nothing comparable here.

Now when Sally Smith goes to work for XYZ Company, we know that she cannot be asked to give up certain things in order to get a higher wage rate. For example, she could not be asked to give up her right for protection from sexual harassment in order to get a dollar more per hour. That would be considered unconscionable. That would not be enforced by the court.

Having a system of fair resolution of disputes falls in the category of things that I do not think consistently with the law of conscionability in any state can be waived.

JUDGE JOLLY: We have time for one more question.

MR. ANDERSON: Ed Anderson from Minneapolis. I'd like to bring it back to the legal question. It does seem to me in the unconscionability area, the procedural unconscionability, the whole thing can be avoided by having an opt out.

But on the class action issue, this is particularly directed at Bob and Rick, the plurality in *Bazzle* sent it back and would allow the arbitrator to say that the ambiguous contract prohibited class actions. A three-justice minority would have said outright that it prohibited class actions.

Gilmore argued that his contract was unconscionable because it prohibited class actions, and the Supreme Court said go away. Hasn't the Supreme Court decided this question?

MR. SEYMOUR: Actually what the Supreme Court said with respect to all of the procedural unconscionability arguments made by Gilmore was, "Hey Presto, the New York Stock Exchange has just revised its rules." The guy never responded to that.

My recollection, I could be wrong, and if so, correct me, but I believe that the New York Stock Exchange rules at the time, and the Supreme Court referenced this in Gilmore, did provide for class treatment.

JUDGE JOLLY: Bob, did you want to say --

MR. DAVIS: Yes. While my personal view is that the dissenting group of three got it right, if you step back and say, as I indicated earlier, all right you bargained for the FAA, you're going to live with the FAA. We're going to have the arbitrator decide it.

What concerns me now is even if there are the votes ultimately in the Supreme Court, once you get through that procedural wrinkle of having the arbitrator decide it first, is how does the question come back to the court? Does it come back on judicial review for manifest disregard for the law? I find that to be a very daunting standard to challenge an arbitrator's decision to proceed on a class basis, particularly under the new AAA supplemental rules that came out about a month or two ago where you basically have that served up initially to the Court, the so-called clause construction award, so you have a first bite on a manifest disregard.

I think the short of it is that *Bazzle*'s going to end up being a decision with more difficult lingering effects for employers than it will for plaintiffs.

JUDGE JOLLY: All right, ladies and gentlemen, that concludes the program today. The program that is going to be the address that is going to be right next door is by the Honorable Paula J. Dobriansky, who is Undersecretary for Global Affairs of the United States State Department. It's a less than 30 minute speech, and she would appreciate it if you came there I imagine.