WAFFLING CIRCUITS: WORKPLACE ADR AFTER *CIRCUIT CITY* AND *WAFFLE HOUSE*

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From a legal standpoint, alternate dispute resolution ("ADR") agreements in the workplace have exhilarated HR and employment law. During the last decade, more and more employers have added ADR to their workplace lexicons. Employers of all sizes and descriptions seek alternatives to the high costs of litigation, and many have chosen the ADR approach as their answer.

Two recent United States Supreme Court cases, *Circuit City* and *Waffle House*, may seem, on their faces, to send muddled signals as to whether courts will enforce such agreements. Now that the dust has settled, however, a clear answer is emerging. Yes, courts will enforce mandatory ADR agreements in the workplace, so long as they meet minimum standards of fairness and due process.

This article first defines workplace ADR. Second, the article describes the decisions by which the United States Supreme Court has communicated its overall willingness to enforce mandatory ADR agreements. Third, the article describes minimum standards required for such judicial enforcement. Fourth, the article examines pros and cons of adopting an ADR policy in the employment context, given the current judicial landscape. Finally, the article concludes that, for 2003 and beyond, ADR fits the needs of most organizations. The Circuits are no longer waffling.

I. A Definition of Workplace ADR

Before tackling the legalities and enforceability of ADR choices, one must first grasp the basics. What is workplace ADR, and how does it work? Workplace ADR arises out of contractual agreements whereby prospective and/or current employees agree to resolve specified workplace-related disputes (including disputes arising from the termination of employment) by arbitration, mediation or other non-judicial methods, rather than by litigation. Typically, employers make such agreements a condition of employment for applicants, and many employers also make them apply to current employees.

Not everyone is in love with these agreements. In fact, the Equal Employment Opportunity Commission ("EEOC"), plaintiff trial lawyers and civil rights groups have mobilized in opposing them, thus making ADR not only one of the most important developments of the last ten years but also one of the most controversial. This struggle between proponents and detractors has produced a long and hotly contested series of court battles as to the agreements' legality and enforceability. Although the United States Supreme Court has not yet resolved all issues surrounding ADR in the workplace, proponents appear, at least for now, to have succeeded in their defense of these agreements, provided they do not overplay their hand.

II. Recent Supreme Court and Other Decisions Permitting Workplace ADR

Supreme Court decisions dating back to the 1960's expressed pro-arbitration preferences. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*,[1] for example, the Court held that, under the United States Arbitration Act, arbitrators under an arbitration clause had power to hear even a claim of fraud inducing the contract itself. Also in the early 1960's, the high Court issued its famous trilogy of decisions supporting the arbitrability of workplace disputes.[2] Within the past year, the Supreme Court has shed new light on the subject, even if some have not yet seen that light, or if, having seen it, they have emphasized only the new shadows it casts. Two important decisions have defined the scope of ADR agreements and their enforceability in the workplace.

A. Supreme Court's Decision in *Circuit City (Part I)*

In keeping with the pro-arbitration line of cases, the Supreme Court on March 22, 2001 upheld the enforceability, under the Federal Arbitration Act ("FAA"), of employment agreements requiring arbitration of workplace disputes as a substitute for employment litigation.[3] The *Circuit City I* decision upheld the majority of federal Courts of Appeal that had previously ruled on the issue. In essence, the Court held that both the public policy favoring arbitration and the language of the FAA itself required a narrow construction of the statute's exclusion of employment contracts. In reaching this conclusion, the Court held that the statute's excepting from its scope "contracts of employment of seamen, railroad employees, or any other class of worker engaged in foreign or interstate commerce" excluded from arbitration only those employees actually transporting goods in interstate commerce.[4] Thus, concluded the Court, the statute covered all other employment contracts, and they were therefore enforceable under its provisions.

Members of Congress on both sides of the aisle jockeyed legislatively both in anticipation of and reaction to the holding of *Circuit City I*. On March 1, 2001, for example, three weeks before the decision, Congressman Robert E. Andrews (D—NJ) introduced a bill that would amend 9 U.S.C. to let employees, within 60 days of initiating an employment controversy, reject the use of arbitration, notwithstanding a mandatory ADR agreement.[5] Even earlier, on January 24, 2001, Senators Russ Feingold (D—WI), Patrick Leahy (D—VT), Edward M. Kennedy (D—MA) and Robert G. Torricelli (D—NJ) had introduced a bill that would amend certain federal civil rights statutes to prevent involuntary arbitration of claims arising from unlawful employment discrimination.[6]

Then came *Circuit City I*. Just two weeks later, on April 4, 2001, Congressman Edward J. Markey (D—MA) introduced a House version of the Feingold bill.[7] On September 18, 2001, Congressman Dennis J. Kucinich (D—OH) introduced a bill that would amend 9 U.S.C. to exclude all employment contracts from the arbitration provisions of chapter one of that title.[8] Senators Kennedy and Feingold introduced a Senate version of Kucinich's bill on May 5, 2002.[9] And on October 1, 2002, Senator Jeff Sessions (R—AL) introduced a bill that would amend the first chapter of 9

U.S.C. to provide for greater fairness in the arbitration process.[10]

Despite all this legislative posturing, and although the Court's vote was close (5 to 4), arbitration proponents celebrated victory after *Circuit City I*. Employers saw *Circuit City I* as a green light for making employees sign an ADR agreement as a condition of employment, provided such agreements met minimum standards of fairness and due process.

B. Supreme Court's Decision in *Waffle House*

Proponents of workplace ADR did not savor their victory for long, however, before the Supreme Court issued another major decision addressing ADR agreements. The *Waffle House* decision[11] considered the EEOC's authority to seek relief on behalf of individuals who had previously signed enforceable ADR agreements. On January 15, 2002, the Supreme Court in a 6-3 decision ruled that an arbitration agreement made by a South Carolina restaurant employee and his employer did not prevent the EEOC from pursuing—on the employee's behalf—victim-specific judicial relief based on an Americans with Disabilities Act ("ADA") claim.

Writing for the majority in reversing a decision by the U.S. Court of Appeals for the Fourth Circuit, Justice John Paul Stevens stated that, despite the FAA's preference for arbitration, once a charge is filed with the EEOC the Commission "is in command of the process."[12] Private arbitration agreements to which the EEOC was not a party, he wrote, did not bind it.[13] It was therefore entitled to seek even victim-specific relief—i.e., reinstatement, backpay, injunctive relief and punitive damages.[14]

> In reaching its decision, the Court left open the question of whether a private settlement by the parties or a prior arbitration award would affect the scope of the EEOC's claim or the relief requested. The Court also left open the question of whether it could halt an ongoing arbitration while the EEOC litigated the employee's claim.

Naturally, the *Waffle House* decision received different receptions from ADR's proponents and detractors. Expectedly and understandably, the decision thrilled the EEOC. EEOC Chair Cari M. Dominguez stated that the decision "reaffirms the significance of the EEOC's public enforcement role" and observed that the EEOC, as the agency responsible for enforcing antidiscrimination laws, "is not constrained in any way by a private arbitration agreement to which EEOC is not a party."

ADR proponents, on the other hand, downplayed the decision, observing that it would have little impact because the EEOC initiated litigation only infrequently. Given its budgetary and staff limitations, the EEOC litigates only major cases, involving major employers, novel issues, large class-action matters or charges of systemic discrimination. New York University Professor Samuel Estreicher observed that the decision allowed the EEOC to continue "creating nuisance" when arbitration agreements existed, without providing significant relief for most people who brought charges. Continuing, Professor Estreicher noted that, "The decision injects an element of legal uncertainty for employers using arbitration agreements and could prevent arbitrators from reaching decisions because of concerns EEOC may become involved."

Although, as Professor Estreicher notes, the *Waffle House* decision does inject an element of uncertainty as to the finality of any arbitration proceeding under an ADR agreement or settlements reached as a result thereof, an ADR agreement still remains, in the author's opinion, an attractive alternative to litigation. The small number of EEOC-initiated lawsuits bolsters this assessment. For example, during FY 2000, the EEOC filed a total of only 327 lawsuits, a very small percentage of the charges filed with the Commission. This pattern of prosecutorial restraint will probably continue in 2003 and beyond, as the Bush administration will not likely add to the Commission's limited litigation budget.

The Department of Labor has exercised similar restraint in the wake of *Waffle House*. On August 9, 2002, a directive issued by Solicitor of Labor Eugene Scalia welcomed the case's "affirmation of the government's litigation authority." The directive also, however, acknowledged "a tradition of federal employment agencies deferring to arbitration in appropriate circumstances" and listed factors that agency attorneys must consider when deciding whether to litigate a matter subject to an ADR agreement. These factors included: the dispute's relationship to the Labor Department's mission; the agreement's validity; the arbitration's costs; the arbitrator's qualifications, selection, and procedural and substantive authority; and the arbitration's procedural posture.

In short, the U.S. government seems inclined to leave arbitration agreements, where they exist, as the controlling method for resolving most workplace claims covered by ADR. While employers rightly view the *Waffle House* decision as a step backwards, it appears to be a tiny step backwards and should not deter such agreements in the future.

C. Ninth Circuit's Decision in *Circuit City (Part II)*

On June 3, 2002, in *Circuit City II*, decided on remand from the Supreme Court's *Circuit City I* decision above, the U.S. Court of Appeals for the Ninth Circuit held that a contract of adhesion offered on a take-it-or-leave-it basis is unconscionable under California law.[15] Although *Circuit City I* had overruled the Ninth Circuit's position that the FAA does not apply to employment contracts generally, the Ninth Circuit once again refused to enforce Circuit City's ADR agreement. This time the Ninth Circuit reasoned that the ADR agreement was a contract of adhesion, offered on a take-it-or-leave-it basis between parties of highly unequal bargaining power. State law therefore rendered the agreement both procedurally and substantively unconscionable.

In considering the agreement's procedural unconscionability, the Ninth Circuit focused on the disequilibrium of bargaining power between the parties, the non-negotiability of its terms, and the extent to which the contract did not clearly disclose what rights the employee was relinquishing. The Ninth Circuit ultimately concluded that the company's

pre-employment ADR agreement "function[ed] as a thumb on Circuit City's side of the scale." Additionally, the Court noted that while all of the *employee's* employment-related claims were subject to arbitration, the *employer's* claims were not bound by the same requirements. The court also observed that the agreement limited the available injunctive and other types of statutory relief—thus contrasting with the relief a plaintiff might get in a civil suit for the same causes of action. Finally, the agreement required the employee to split the arbitrator's fees with Circuit City. This fee allocation scheme alone, the court stated, made the agreement unenforceable.

Plaintiffs have frequently raised the contract-of-adhesion defense in other jurisdictions, and, as was the case with the Ninth Circuit's position on the applicability of the FAA, a great majority of courts that have ruled on the issue have rejected it. Nonetheless, this case does underscore the necessity of reviewing the law in the applicable jurisdiction before drafting and adopting an ADR agreement.

D. Other Decisions Finding Mandatory ADR Agreements Enforceable

Since the Supreme Court's decisions in *Circuit City I* and *Waffle House*, other courts, including the Ninth Circuit, have endorsed the enforceability of mandatory ADR agreements between employers and employees.

In *EEOC v. Luce*, from September 2002, the Ninth Circuit Court of Appeals, though divided, finally joined the great majority of the other federal Courts of Appeal, upholding the enforceability of mandatory arbitration of Title VII discrimination claims.[16] Reversing an earlier decision, the *Luce* court held that, in view of *Circuit City I*, a firm previously enjoined from making employees arbitrate Title VII claims could now make employees sign ADR agreements as a condition of employment and could enforce those agreements against current employees. In reaching its decision, the *Luce* court concluded that the Supreme Court's decision in *Circuit City I* "decimated" any inference that Congress intended to preclude compulsory arbitration of Title VII claims. *Luce* is an important decision, because the Ninth Circuit was one of the last federal appellate holdouts in opposing the green light for mandatory arbitration agreements in the workplace. Now, all federal Circuits and many state supreme courts have approved such agreements, with greater or fewer restrictions.

In *Adkins v. Labor Ready, Inc.,* for example, the U.S. Court of Appeals for the Fourth Circuit held that the plaintiff's ADR agreement with a temporary employment-agency barred him from bringing any FLSA suit alleging faulty payroll procedures, because the FLSA did not pre-empt the FAA.[17] In *Tinder v. Pinkerton Security*, the U.S. Court of Appeals for the Seventh Circuit ordered an at-will employee to submit her sex discrimination and retaliation claims to arbitration, because her continued employment and the company's promise to arbitrate constituted valid consideration, even though she began working before the company's ADR plan existed.[18] In *Brown v. Illinois Central Railroad Co.,* the same circuit held that the Railway Labor Act's mandatory ADR provision barred a railroad employee from litigating an ADA claim, because resolving the ADA accommodation issue involved interpreting the seniority provisions of a collective bargaining agreement.[19] In *Weeks v. Harden Manufacturing Corp.,* the U.S. Court of Appeals for the Eleventh Circuit permitted an employer to terminate four employees who refused to sign a mandatory ADR provision covering all Title VII, ADA and ADEA claims, because the employees could not reasonably have believed the provision to be illegal, even if a court were later to find it unenforceable.[20] In *Martindale v. Sandvik Inc.*, a divided New Jersey Supreme Court held that an ADR agreement contained in a job application form did not constitute a contract of adhesion, because the prospective employee was an experienced benefits administrator.[21] In *In re Halliburton Co.*, the Supreme Court of Texas held that, by continuing to work after an employer had sent notice of its new ADR program, an at-will employee accepted the program, for which the employer's promise to arbitrate disputes constituted adequate consideration.[22] And in *Barnica v. Kenai Peninsula Borough School District*, a divided Alaska Supreme Court held that the ADR clause in a collective bargaining agreement covered a former employee's sex discrimination claim under state law, because the discrimination statute's legislative history did not show an intent to prevent an employee from waiving her judicial remedy.[23]

In each instance, courts enforced carefully crafted ADR agreements in the workplace.

III. Minimal Standards Required for Judicial Enforcement

Although various courts have sent mixed signals regarding the enforceability of mandatory ADR agreements, the courts are slowly beginning to establish criteria that, if followed, will ensure legality and enforceability. Indeed, the majority of reviewing courts have enforced workplace ADR agreements and in the process have laid down guidelines for the enforceability of such agreements. These requirements may vary from jurisdiction to jurisdiction, so the language and conditions set forth in ADR agreements must meet the judicial requirements of the applicable jurisdiction(s). Furthermore, the law of workplace ADR continues to evolve, and the U.S. Supreme Court has not finally resolved all possible issues. Nonetheless, at this writing, the courts have consistently examined certain areas to determine whether challenged ADR agreements meet minimal standards of fairness and due process. Some of the most frequently imposed restrictions appear below.

As a general rule, courts enforcing mandatory arbitration agreements have required that such agreements:

A. Be in Writing and Clearly Set Forth the Terms of the Agreement

The New Jersey case of *Garfinkel v. Morristown Obstetrics and Gynecology Associates* illustrates this point.[24] The plaintiff, a physician formerly associated with an obstetrics and gynecology practice, claimed that the practice unlawfully discharged him because he was a male. Before joining the practice, the plaintiff signed a written employment agreement which stated that "any controversy arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration." The plaintiff filed suit in the

New Jersey Superior Court under the New Jersey Law Against Discrimination (LAD). The Court upheld the plaintiff's right to sue in court despite his written agreement to arbitrate. The plaintiff, the Court found, had not clearly and unambiguously waived his rights under the LAD. In reaching its conclusion the Court stated, "The Court will not assume that employees intend to waive those rights unless their agreements so provide in unambiguous terms." The Court further stated that a waiver-of-rights provision "should at least provide that the employee agrees to arbitrate all statutory claims arising out of the employment relationship or its termination. It should also reflect the employee's general understanding of the type of claims included in the waiver, e.g., work place discrimination claims."

Similarly, in *Dumais v. American Golf Corp.*, the U.S. Court of Appeals for the Tenth Circuit found illusory and unenforceable a mandatory ADR agreement with conflicting provisions, because the employee handbook arguably empowered the employer to change the agreement without notice.[25]

B. Provide Employees Same Relief Available In Court

Courts generally require that arbitration agreements provide the arbitrator with the authority to award the employees the same relief that would have been available to them had they gone to court to pursue their claims under various federal, state or local laws. Such relief might include backpay, compensatory and punitive damages, injunctive relief, reinstatement, attorney fees, expert witness fees, etc. In short, the agreement should give the arbitrator authority to fashion any remedy s/he feels appropriate: as one opinion put it, to award "all the types of relief that would otherwise be available."[26]

C. Provide Procedural Fairness By Allowing Pre-hearing Discovery Rights

One safe course would be to authorize what the Revised Uniform Arbitration Act calls "adequate" discovery or discovery "appropriate in the circumstances," which the arbitrator would determine.[27] In *Bailey v. Ameriquest Mortgage Co.,* the U.S. District Court for the District of Minnesota refused to stay a discovery order pending the defendant's appeal of the court's decision not to compel arbitration.[28] Although the plaintiffs had signed a mandatory ADR agreement, the court reasoned, discovery would cause the defendant to suffer little, if any, prejudice.[29] In *Blair v. Scott Specialty Gases*, the U.S. Court of Appeals for the Third Circuit held, first, that the ADR provision in an employee handbook was enforceable, because the company's promise to arbitrate constituted adequate consideration, even though the employer could unilaterally amend the agreement and the employee would have to split arbitration's costs.[30] The *Blair* court also held, however, that the plaintiff was entitled to discovery on costs, because only thus could she test her claim that the fee-splitting provision made the agreement unenforceable.[31]

D. Provide Limited Judicial Review of Arbitrator's Decision

Such a provision ensures that the arbitrator's decision is in accordance with the law and that the arbitrator acted within the scope of his or her authority. Reviewing courts generally will overturn an arbitration decision only where the arbitrator has exceeded the scope of his or her authority, where fraud has occurred, or where the decision itself reveals a "manifest disregard of the law."

E. Do Not Impose Undue Financial Burden On Employee For Pursuing Arbitration Process

Many courts have refused to enforce agreements containing provisions that make employees pay for mandatory arbitration, because such provisions arguably discourage pursuit of genuine disputes. In *Cole v. Burns International Security Service,* for example, the U.S. Court of Appeals for the District of Columbia held that the employer must pay the entire cost of the arbitrator's fee, because had the matter been litigated the employee would not have been required to pay any fees other than minimal court costs.[32] In *Bond v. Twin Cities Carpenters Pension Fund*, a divided U.S. Court of Appeals for the Eighth Circuit ruled that a pension plan's requiring a participant to share the costs of mandatory ADR violated ERISA, because the provision discouraged pursuit of legitimate claims.[33] In *Ferguson v. Countrywide Credit Industries*, the U.S. Court of Appeals for the Ninth Circuit found an ADR agreement procedurally and substantively unconscionable and unenforceable under California law, because the agreement tried to split fees, limit discovery and exclude certain types of claim.[34] In *Gambardella v. Pentec, Inc.,* the U.S. District Court for the District of Connecticut held, first, that a former employee's Title VII claims against fellow employees were subject to arbitration, because these claims arose out of the employer-former employee relationship, even though fellow employees did not sign the employer's-former employee's ADR agreement.[35] Second, the *Gambardella* court held that a clause making each party pay its own legal fees rendered the agreement unenforceable.[36] And in *Perez v. Globe Airport Security Service, Inc.,* the U.S. Court of Appeals for the Eleventh Circuit initially held that the plaintiff did not have to arbitrate her gender-discrimination claim, because the employer's ADR agreement would split fees in all situations, whereas Title VII shifted fees when a plaintiff prevailed.[37] (Nine months later, however, the court vacated its opinion, when the parties moved jointly to dismiss the appeal with prejudice.[38]) All these cases preach a single lesson. To be judicially enforceable, a mandatory ADR agreement must not burden the employee with costs that would make pursuing arbitration financially prohibitive.

In determining what would be a fair cost to impose on the employee, however, other courts have examined the employee's ability to pay. In *Green Tree Financial Corp.-Ala v. Randolph*, for example, the U.S. Supreme Court found that an arbitration agreement's not mentioning arbitration costs and fees did not render it unenforceable per se because it had failed affirmatively to protect a party from potentially steep arbitration costs.[39] Similarly, in *Goodman v. ESPE Am. Inc*., the U.S. District Court for the Eastern District of Pennsylvania held that the "loser pays" provision in a mandatory

ADR agreement was enforceable and did not deny Plaintiff an effective and accessible forum, because the provision by its terms made the plaintiff not liable for *any* costs at *any* time if the plaintiff's claim succeeded.[40]

F. Comply With State Law

On September 30, 2002, California Governor Gray Davis vetoed a bill that would have prohibited an employer's mandatory ADR agreement from requiring an employee to waive rights that the state's fair-employment-and-housing statute guaranteed. Employers must heed such legislative developments to ensure that their ADR agreements meet all statutory requirements under the law governing the transaction.

IV. Evaluating Workplace ADR: Criteria for Employers and Employees Alike

Assuming that one *can* craft an enforceable workplace ADR agreement, *should* one? This author's answer is a qualified "yes, but he concedes that in certain situations his answer may be otherwise. For example, arbitration is probably inappropriate where either party needs or desires a definitive or authoritative resolution of the matter for its precedential value or to maintain established norms and especially important policies. Similarly, if one case significantly affects persons who are not parties to the proceeding, arbitration may not fully resolve the dispute. Sometimes, employers and employees require a full public record of the proceeding.

The following advantages and disadvantages potentially attend workplace ADR, depending on the situation.

A. Advantages

Let us consider first the advantages, because in most instances they are more numerous. A well-conceived and well-executed workplace ADR program ordinarily:

1. Saves money.

Arbitration usually costs far less than litigation, for both employer and employee. This is true even if the employer pays all or substantially all of the costs associated with arbitration. Attorneys' fees for litigating an employment-related lawsuit frequently run into six figures. On the other hand, legal representation at an arbitration proceeding, except in complex and unusual cases, averages between $10,000 and $15,000, sometimes even less. A recent ADR survey of 20 Fortune 500 companies found that the cost of handling cases that went to arbitration was less than one-half the average cost of defending lawsuits that had previously been litigated. This difference occurs, primarily, because the costs associated with pre-trial discovery—depositions, interrogatories, various pre-trial motions, etc.—do not accompany the arbitration process or occur only on a more limited basis.

From an employee's perspective, too, ADR saves money, because it takes less time. Moreover, these reduced expenditures may make it easier for employees to obtain legal representation, and so to pursue their claims, since a plaintiff attorney will not need to commit nearly the amount of time and resources that would be required if the employee/plaintiff had litigated the claim.

2. Resolves disputes more quickly.

Once an arbitrator is selected, a hearing can be quickly scheduled and a decision rendered shortly thereafter. In many cases, a decision can be rendered in three to six months after the parties select the arbitrator to hear the dispute. This compares to a year or more (often much more) to bring employment-related matters to trial. Thus, employees can resolve their claims expeditiously, enabling them to put such cases behind them and get on with their careers, without the aggravations associated with prolonged litigation.

3. Takes away plaintiff lawyers' leverage in negotiations.

Plaintiff lawyers have less power during ADR because defending an arbitrated claim costs much less than defending a litigated one and because the prospect of a runaway financial award lessens with an arbitrator as opposed to a jury.

4. Avoids the uncertainty associated with jury trials.

Many, if not most, of today's employment-related lawsuits qualify for trial by jury. Because of the "sympathy factor" and the uncertainty associated with jury trials, most employers hesitate to have their cases go to a jury. The substantial jury verdicts, with often totally outlandish punitive damage awards, provide a sound basis for this reluctance on the part of employers.

5. Avoids the publicity and media attention that frequently accompany litigation.

The parties can, and frequently do, agree to keep workplace ADR proceedings confidential. This privacy benefits both the employer and the employee, by preventing each from airing the other's "dirty linen" in public. Employers naturally worry about public perception of the company. But employees, too, worry. A terminated employee who has undergone ADR can pursue other career opportunities without the threat that negative publicity, arising from a dispute with a previous employer, will be "aired publicly," thus deterring prospective employers from considering the employee's candidacy.

B. Disadvantages

With workplace ADR's advantages, though, come disadvantages—many of the potential weaknesses being inseparable from ADR's strengths. Even a well-conceived and well-executed workplace ADR program involves risks, though the advantages usually outweigh them. Therefore, both when workplace ADR succeeds and when it fails, it possibly:

1. Increases contested employment-related issues.

By making ADR readily available, an employer can appear to invite employment-related claims. However, most employers who have adopted ADR programs have not experienced an increase in workplace complaints that require third-party resolution.

2. Limits the parties' right to judicial review.

Judicial proceedings and decisions at the trial level are subject to challenge on appeal. Rulings the trial judge makes on discovery issues, admissibility, motions, jury instructions, etc. can be overturned if a higher court deter-

mines that the judge has ruled incorrectly. Arbitration, on the other hand, circumscribes review of an arbitrator's decision-making. On appeal, the question is not whether the arbitrator's decision was right or wrong, but whether the arbitrator had the authority to make the decision rendered.

Note, however, one exception. Most courts will subject an arbitrator's legal interpretation of public laws to limited judicial review. That is, courts will ask whether the award reflects a manifest disregard for the law. If it did not, the arbitrator's decision will stand.

3. Makes employees fear that employers have stolen something from them.

Certain employees may believe that they are forfeiting their statutory right to litigate their claims. This is true. However, it can be creditably argued that the positive aspects of arbitration counterbalance the loss. As indicated above, the process can serve employees' best interests by resolving their claim without the cost, delay, aggravations and publicity attendant litigation.

4. Creates uncertainty over an agreement's enforceability and the possibility of being forced to litigate this issue.

Although the overwhelming number of courts that have ruled on mandatory arbitration agreements have upheld their enforceability, dissenting court decisions exist, particularly in California and the Ninth Circuit. Questions will remain until the U.S. Supreme Court resolves all issues regarding workplace ADR or Congress passes legislation on this subject. Employers may therefore still need to litigate the issue of whether a mandatory ADR agreement is enforceable.

Thus, paradoxically, even if such employers ultimately stay out of court with regard to the substantive employment claim, the effort to stay out of court will itself have dragged them into court over the enforceability issue. In the pre-*Waffle House* case of *Borg-Warner Protective Services Corp. v. EEOC*, for example, the U.S. Court of Appeals for the District of Columbia refused to enjoin the EEOC from issuing policy statements that all arbitration agreements violated Title VII, because the employer, having suffered no legally cognizable injury, lacked standing.[41] Similarly, in the post-*Waffle House* case of *Rivera v. Solomon Smith Barney Inc.*, the U.S. District Court for the Southern District of New York dismissed a former employee's suit for a declaratory judgment on whether the employer's ADR agreement would apply to a hypothetical civil rights claim, because no "actual controversy" existed.[42] In both cases, uncertainty frustrated employers and employees alike, because they could not avoid preliminary litigation aimed at answering merely whether one could litigate a future claim, and even after the initial litigation ended, neither side knew whether future litigation was possible.

Ultimately, neither party can avoid uncertainty about some issues, given the inevitable imprecision of contract language. That is, court cases have sometimes been necessary simply to determine what a given mandatory ADR agreement means, with regard to its own scope. In *International Brotherhood of Electrical Workers v. Balmoral Racing Club, Inc.,* for example, the U.S. Court of Appeals for the Seventh Circuit held that an employer must arbitrate with a union a dispute involving workers employed only briefly, because the union's collective bargaining agreement with the employer made unreviewable the union president's formal determination that the agreement covered those workers.[43] On the other hand, in *Birch v. Pepsi Bottling Group Inc.,* the U.S. District Court for the District of Maryland held that an employee's ADA claim did not fall within the scope of her collectively-bargained-for agreement to arbitrate all employment-related disputes, because the agreement did not clearly and unmistakably refer to the ADA.[44] Again, the mandatory ADR agreement incited litigation, instead of quashing it.

V. Conclusion

On the whole, resolving employment-related claims and other workplace disputes through the arbitration process makes good sense. Those groups opposing mandatory arbitration of employment disputes argue that the system should be an option and not a required condition of employment. Why? So long as the system adopted is fair, impartial, open to judicial review, and able to provide the same relief as would the judicial process, no good reason exists for barring mandatory arbitration and thereby clogging our court system with proliferating workplace claims. The number of discrimination cases filed annually in federal courts between 1990 and 1999 increased from 8,413 to 22,412. However, this trend may be reversing itself, according to the annual report of the Administrative Office of the United States. Perhaps the adoption of ADR agreements by employers is reducing the judicial glut of employment cases, most particularly discrimination cases.

Mandatory arbitration of employment disputes has worked well in the union setting, where almost every collective bargaining agreement includes a grievance provision culminating in arbitration. This process can be equally effective in resolving disputes in the non-union setting, provided the safeguards referred to earlier are in place.

The objective of Title VII and similar civil rights statutes is to eliminate discrimination in the workplace. There is no reason to believe that employers who have mandatory arbitration agreements with their employees are more likely consciously to discriminate against their employees than those employers who do not. Nor is there any reason to believe that, when discrimination does occur, the arbitration process cannot adequately remedy it. Indeed, given the relative speed of arbitration, any remedy that an arbitrator imposes will probably cause a more worthwhile effect than one that the courts provide only after long years of litigation.

In summary, therefore, a legally sufficient ADR agreement benefits all concerned parties: employees, employers and the courts whose dockets will lighten as more companies adopt mandatory mediation/arbitration procedures. The only parties left complaining are plaintiff trial

lawyers, civil rights groups and the EEOC. The first group stands to lose the leverage that a threat of lengthy, expensive litigation gives it in settlement negotiations. The latter groups fear losing the power to portray themselves as exclusive vindicators of employee rights. These fears, however, dwindle in view of the Supreme Court's *Waffle House* decision, whereby the EEOC retains the right to seek individual relief in certain cases and to pursue cutting-edge discrimination law issues.

In short, in most instances, ADR workplace agreements present a win-win situation for employees and employers alike, without depriving the EEOC of its statutory right to seek relief, create new law and protect employee interests in appropriate cases.

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Footnotes

[1] 388 U.S. 395, 404 (1967).

[2] *See United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960) (defining standard that federal court must apply when determining whether to submit grievance to arbitration); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960) (same); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960) (defining standard that court must apply when winning party seeks to enforce arbitral award); *see also Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957) (establishing enforceability of collective bargaining agreement in federal courts).

[3] *See Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001).

[4] *See id.,* 532 U.S. at 119; *interpreting* 9 U.S.C. § 1 (1994).

[5] *See* H.R. 815 (referred on March 9, 2001, to the House Subcommittee on Commercial and Administrative Law).

[6] *See* S. 163, "Civil Rights Procedures Protection Act of 2001" (referred that day to the Senate Committee on Health, Education, Labor and Pensions).

[7] *See* H.R. 1489 (referred that day to the House Committee on Education in the Workforce and the House Committee on the Judiciary).

[8] *See* H.R. 2282, "Preservation of Civil Rights Protections Act of 2002" (referred on September 18, 2001, to the House Subcommittee on Employer-Employee Relations).

[9] *See* S. 2435 (referred that day to the Senate Committee on Health, Education, Labor and Pensions).

[10] *See* S. 3026, "Arbitration Fairness Act of 2002" (referred that day to the Senate Committee on the Judiciary).

[11] *See EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

[12] *Id.,* 534 U.S. at 291.

[13] *See id.,* 534 U.S. 294.

[14] *See* 534 U.S. at 297-98.

[15] *See Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-94 (9th Cir. Feb. 4, 2002), *cert. denied*, 122 S.Ct. 2329 (June 3, 2002).

[16] *See EEOC v. Luce*, 303 F.3d 994, 1004 (9th Cir. Sept. 3, 2002).

[17] *See Adkins v. Labor Ready, Inc.,* 303 F.3d 496, 506 (4th Cir. August 30, 2002).

[18] *See Tinder v. Pinkerton Security*, 305 F.3d 728, 736 (7th Cir. Sept. 17, 2002).

[19] *See Brown v. Illinois Central Railroad Co.,* 254 F.3d 654, 660-61 (7th Cir. June 20, 2001), *cert. denied,* 122 S.Ct. 616 (November 11, 2001).

[20] *See Weeks v. Harden Manufacturing Corp.,* 291 F.3d 1307, 1312-16 (11th Cir. May 22, 2002).

[21] *See Martindale v. Sandvik Inc.*, 800 A.2d 872, 881 (N.J. July 17, 2002).

[22] *See In re Halliburton Co.*, 80 S.W.3d 566, 572-73 (Tex. May 30, 2002).

[23] *See Barnica v. Kenai Peninsula Borough School District*, 46 P.3d 974, 977 (Alaska May 3, 2002).

[24] *See Garfinkel v. Morristown Obstetrics and Gynecology Associates,* 773 A.2d 665, 672 (N.J. June 13, 2001).

[25] *See Dumais v. American Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. Aug. 15, 2002).

[26] *Cole v. Burns Int'l Security Services*, 105 F. 3d. 1465, 1482 (D.C. Cir. 1997).

[27] *See* Revised Uniform Arbitration Act (www.law.upenn.edu/bll/ulc/ul/_frame.htm).

[28] *See Bailey v. Ameriquest Mortgage Co.,* No CIV. 01-545 (JRT/FLN), 2002 WL 1835642 at *1 (D. Minn. Aug. 5, 2002).

[29] *See id.*

[30] *See Blair v. Scott Specialty Gases*, 283 F.3d 595, 603-04 (3d Cir. March 13, 2002).

[31] *See id.,* 283 F.3d at 604-10.

[32] *See Cole v. Burns Int'l Security Services*, 105 F. 3d. 1465, 1482 (D.C. Cir. 1997).

[33] *See Bond v. Twin Cities Carpenters Pension Fund*, 307 F.3d 704, 706 (8th Cir. Oct. 8, 2002).

[34] *See Ferguson v. Countrywide Credit Industries,* 298 F.3d 778, 787 (9th Cir. July 23, 2002).

[35] *See Gambardella v. Pentec, Inc.,* 218 F.Supp.2d 237, 241-42 (D. Conn. July 11, 2002).

[36] *See id.,* 218 F.Supp.2d at 247.

[37] *See Perez v. Globe Airport Security Service, Inc.,* 253 F.3d 1280, 1285-87 (11th Cir. June 12, 2001).

[38] *See id.,* 294 F.3d 1275, 1275 (11th Cir. March 22, 2002).

[39] *See Green Tree Financial Corp.- Ala v. Randolph*, 531 U.S. 79, 92 (Dec. 11, 2000).

[40] *See Goodman v. ESPE Am. Inc*., No. 00-CV-862, 2001 WL 64749 at *4 (E.D. Pa. Jan. 19, 2001).

[41] *See Borg-Warner Protective Services Corp. v. EEOC*, 245 F.3d 831, 836-38 (D.C. Cir. April 17, 2001).

[42] *See Rivera v. Solomon Smith Barney Inc.*, No. 01 Civ. 9282 (RWS), 2002 WL 31106418 at *2 (S.D.N.Y. Sept. 20, 2002).

[43] *See International Brotherhood of Electrical Workers v. Balmoral Racing Club, Inc.,* 293 F.3d 402, 406-08 (7th Cir. June 13, 2002).

[44] *See Birch v. Pepsi Bottling Group Inc.,* 207 F.Supp.2d 376, 383-85 (D. Md. May 2, 2002).